NO. 96766-1

IN THE SUPREME COURT
FOR 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.

RESPONDENT'S BRIEF

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I. INTRODUCTION

This case is about whether the Washington State Office of Public Defense ("OPD") and the State of Washington (together, the "State") have a duty to ensure constitutionally adequate defense for indigent children accused of offenses when they have undisputed knowledge of Grays Harbor County's failure to provide those children with constitutional representation and have nevertheless refused to act.

Respondents 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. They have or will suffer serious injury as a direct result of the State's failure to act, despite its knowledge of the unconstitutional juvenile public defense system in the County and the resulting harm to children.

The State of Washington claims that it can (indeed, must) shirk its constitutional duty to provide for adequate public defense of juveniles. The State maintains that it can and must do nothing once it has authorized taxing authority, no matter how deficient and unconstitutional the public defense system in a given county becomes. But that is not the law. And the State's misapprehension of its duties has broken a solemn constitutional promise to Washington's children, that they have a right to the guiding hand of counsel when they stand accused of offenses and face the full power of a justice system that they are developmentally unable to navigate − let alone comprehend − on their own.

The Constitution enshrines the right to counsel as a fundamental right and requires meaningful adversarial testing of the charges against children. Unlike many other rights, the right to counsel is a positive constitutional right, that the State must act affirmatively to implement. Although the State may delegate implementation to a county, the State may not fully abdicate its ultimate responsibility for its constitutional obligation, nor turn its back when conditions in a given county become abjectly and systemically unconstitutional.

In light of the gravity of the harm, Respondents seek a declaratory judgment that the State is ultimately responsible for the provision of constitutionally adequate representation in the County. A declaratory judgment is necessary and appropriate here, as the Court is faced with a dispute that is far from theoretical or abstract. The uncontroverted record at the close of discovery shows the glaring deficiencies in the County Juvenile Defense system, and crucially, also reveals the State's specific knowledge of those deficiencies. Yet the State forthrightly insists that it must continue to shirk its constitutional duty. On these facts, the Respondents properly sued the State for a declaratory judgment determining the State's duty. That judgment should be granted.

II. STATEMENT OF THE ISSUE

Does the State have a constitutional duty to act when a county's public defense system fails to provide constitutionally adequate defense to juveniles charged with offenses?

III. STATEMENT OF THE CASE

A. Statement of Undisputed Facts[1]

The undisputed evidence presented at summary judgment shows that the County's juvenile public defense systematically fails to provide the constitutionally-required minimum and that Defendant OPD has known of these deficiencies and its harmful impact on juveniles for years, but has taken no action. The voluminous and unrebutted evidence came through document requests and depositions of OPD staff, OPD itself, the County, the lawyer holding the County's juvenile public defense contract, as well as Plaintiffs' expert, who observed juvenile court and reviewed dozens of court records and files of the juvenile defense contractor. *See* CP 575-1214. The evidence shows OPD's specific knowledge of the systemic defects in the County's juvenile defense, the reality of that system as it impacts and harms the children caught up in it, and OPD's failure to take any action to remedy the constitutional defects it knows about in that system.[2]

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[1] The State's argument that the facts of this case are "irrelevant," State's Br. at 4 n.2, should not be countenanced. As is shown below in Argument Sec. F, courts in a declaratory judgment action may not rule on an abstract proposition divorced from any factual context, and the trial court did not do so. The trial court referenced the facts in its order, *see* CP 547 (agreeing with cases from other jurisdictions that are "sufficiently similar to the facts at bar"), and the court's written order denying the State's motion for summary judgment, i.e., the order under review, CP 518, explicitly states that the court considered this factual material.

[2] The factual record submitted by Plaintiffs is uncontroverted for purposes of this review. Though the hearing on cross-motions for complete

1. Defendant OPD's Knowledge of Deficiencies in the County's Juvenile Public Defense System.

a. The Legislature Created OPD to Implement and Ensure the Right to Counsel

Washington law permits counties to provide public defense services and requires that the counties adopt standards for the delivery of public defense services. RCW 36.26.020; RCW 10.101.030. However, in 1996, the Legislature created a state agency − 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. OPD's enumerated 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." RCW 10.101.060(1), (2). OPD is specifically empowered to take action, including removing state funding from counties, if counties fail to comply with RCW 10.101 requirements.[3] In

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summary judgment occurred days before the close of discovery (with only limited discovery left to complete), the State introduced no evidence to create a material issue of fact on any factual assertion submitted by Plaintiffs, and did not move under CR 56(f) for leave to submit additional evidence.

[3] RCW 10.101.060(2) provides: "The office of public defense *shall* determine eligibility of counties and cities to receive state funds under this chapter. If a determination is made that a county or city receiving state funds under this chapter did not substantially comply with this section, the office of public defense *shall* notify the county or city of the failure to comply and unless the county or city contacts the office of public defense and substantially corrects the deficiencies within ninety days after the date of notice, or some other mutually agreed period of time, the county's or

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, technical assistance, and enforcement of many statutory requirements and standards.[4] Counties are directed to these state standards in creating their own standards for the provision of public defense services. RCW 10.101.030.

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city's eligibility to continue receiving funds under this chapter is terminated. If an applying county or city disagrees with the determination of the office of public defense as to the county's or city's eligibility, the county or city may file an appeal with the advisory committee of the office of public defense within thirty days of the eligibility determination. The decision of the advisory committee is final." (Emphasis added.)

[4] The State does not cite, and Plaintiffs are not aware, of any current express statutory delegation of public defense services and responsibility from the State to the counties. *See* State's Br. at 11-15. 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. *See* Argument section D, below.

b. OPD Has Actual and Direct Knowledge Regarding the Deficiencies in the County's Juvenile Defense System

OPD has for many years known of serious problems in juvenile defense in the County. In depositions, three OPD staff—including two experts in public defense who evaluate defense programs statewide and the Director of OPD in a CR 30(b)(6) deposition—testified about the County's system and the standards that should be applied. CP 608-610; 642; 649-653; 701; 705-707.

OPD witness Katrin Johnson was asked at her deposition what, in her experience as a public defender and as staff at OPD, is "meaningful adversarial testing."[5] She testified:

> Well, certainly it would include defense counsel doing an analysis on the discovery provided by the state, and consulting with their clients about the discovery so the clients are aware of what's available. Using investigative services for questioning witnesses, questioning police officers, questioning other witnesses, getting information, records, any information that could be helpful to the case. But, you know, not just passively taking the police report and relying on that as the official story of what occurred. Then of course litigating it, bringing motions or going to trial or using information found within negotiations, but again taking more of an active approach rather than a passive approach of here's the police report, here's the offer.

CP 708-709. The two other OPD deponents gave similar answers, identifying as necessary for a functioning adversarial system: adequate

[5] A systemic lack of "meaningful adversarial testing" is a constitutional violation. *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122 (W.D. Wash. 2013).

independent investigation of a case and regular, meaningful communication with juvenile defendants due to their age and vulnerability. CP 618-619; 657-659. Ms. Johnson agreed adequate client communication is required by WSBA standards for indigent defense services and the WSBA performance guidelines for criminal defense attorneys. CP 720-721. OPD's Mr. Yeannakis discussed the necessity of juvenile defense being informed by the evidence that "children are different" as they are "less culpable, more amenable to treatment" and less likely to understand and make a knowing waiver of rights. CP 654-656. He agreed that failing to properly educate a juvenile client to ensure they understand their rights, and why they should or should not waive rights likely amounts to ineffective assistance of counsel. *Id*.

OPD gained knowledge that the County's juvenile defense falls short of these basic requirements. OPD obtained this information about juvenile defense in the County through: (1) OPD "site visits" to the County starting in 2014; (2) multiple courtroom observations; (3) the County's applications for state defense funding under RCW 10.101; and (4) complaints about what was happening to specific juveniles caught up in the County's system.

At least two specific juvenile cases from the County came to OPD's attention:

M.D.: In April 2016, OPD learned that this 16-year old boy had been held in solitary confinement for several days while he was serving 120 days for probation violations in the County's juvenile detention

center. CP 627-628; 690-695. The sentence was illegal, as it was four times the length permitted by law. *See* 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.* Eventually, the *prosecutor* filed a motion conceding that the sentence violated Washington law and requesting M.D.'s release. CP 789-794.

K.B.: In early 2017, 11-year-old K.B. was incarcerated in juvenile detention for felony assault, with bail set at $10,000. CP 848-849. Because K.B. was 11 years old, she was presumed incapable of 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 the public defender did not challenge bail or otherwise attempt to get KB out of detention (CP 678), despite receiving reports that mental health professionals had been called in numerous times due to K.B.'s suicidal threats or attempts (CP 853-860). K.B. was not released until April 20, 2017—79 days after her arrest—after a crisis center worker complained to Child Protective Services about her treatment. CP 879.

In early March 2017, K.B.'s grandmother, Plaintiff Colleen Davison, mailed OPD a detailed letter. CP 806-827. The letter explained how K.B., who had no prior criminal history, had been incarcerated since January 31 and was continuing to be harmed by the public defense system in the County. 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 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. It was not until after this letter was received by OPD and after OPD staff contacted the contract defender that the defender moved to dismiss based on the lack of capacity hearing. CP 844-846. On the same day that the motion to dismiss was finally filed, the prosecutor filed new charges based on incidents that occurred in the detention center, prolonging K.B.'s incarceration to 79 days. CP 851.

OPD staff observed similar issues in the courtroom. One OPD witness testified that during a courtroom visit it was "hard to tell who was the prosecutor and who was the defender." CP 673-674. This witness also observed the contract attorney apparently having failed to investigate the facts of K.B.'s case and failing to speak on behalf of K.B., leaving K.B. to answer substantive questions from the judge who would decide her case without any objection. CP 684-687. The witness also testified that a public defender's failure to investigate clients' cases constitutes a lack of an adversarial system and risks clients being falsely convicted. CP 658. He observed a lack of "ardent" advocacy in two contract attorneys who held successive juvenile public defense contracts for the County, including the contract attorney who represented most juvenile clients during the discovery period. CP 684.

OPD public defense expert Mr. Yeannakis confirmed that juveniles who are detained while their case is ongoing have a statistically higher

chance of being jailed at the end of their case than those who are not in custody, and expressed concern that children in custody are easily preyed upon by detention staff and other kids, partially due to the wide range of ages that are mixed together in a close environment in this county's detention facility. CP 678-679. He also noted the harm children suffer in being removed from school and deprived of parental interaction while detained. *Id*. He agreed these forms of harm caused by detention demonstrate why it is important for juvenile public defenders to challenge bail and advocate for the release of their clients. *Id.*[6]

Mr. Yeannakis confirmed that he is aware that County juveniles regularly must serve the maximum punishment allowed by statute of 30 days for probation violations, without individualization. He agreed that the bail amounts he has seen in the County juvenile court have been high, and have gone unchallenged by the juvenile public defender. He confirmed that the juvenile detention rate in the County is greater than almost any other in the state. He agreed there is a persistent problem in the County of

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[6]Regarding the harm of juvenile detention, *see, e.g.,* Elisabeth S. Barnert, et. al, *How does Incarcerating Young People Affect Their Adult Health Outcomes?,* PEDIATRICS, Volume 139, No. 2 (February 2017), available at http://pediatrics.aappublications.org/content/pediatrics/139/2/e20162624.full.pdf; David S. Kirk and Robert J. Sampson, *Juvenile Arrest and Collateral Educational Damage in the Transition to Adulthood.* SOCIOLOGY OF EDUCATION Vol. 86(1), 36-62 (2013), available at http://www.asanet.org/sites/default/files/savvy/journals/soe/Jan13SOEFeature.pdf; Anna Aizer and Joseph J. Doyle, *Juvenile Incarceration, Human Capital, and Future Crime: Evidence from Randomly Assigned Judges*, THE QUARTERLY JOURNAL OF ECONOMICS 130:2, 759-803 (2015), abstract at http://www.nber.org/papers/w19102.

juveniles being detained for longer periods than necessary to accomplish any real goal of rehabilitation, and agreed judges uniformly give most or possibly all juveniles 30 days detention at any probation violation hearing. CP 676-680.

OPD's Director testified that "evaluations and monitoring [of public defenders] are a central part of quality representation." CP 612-613. She admitted that the County resolution adopting public defense standards (as required by RCW 10.101.030) omits mention of evaluation, supervision, and monitoring of the county's public defense system, though the statute specifically requires standards on this topic. CP 626; 1066-1069 (County resolution). The County told OPD in a 2016 meeting that the only oversight of juvenile public defense is the judge's observation of the proceedings before him in his own courtroom. CP 623-624; 1061-1064. Mr. Yeannakis agreed this constitutes a systemic problem. CP 668-669.[7]

OPD knows that in order to determine whether juvenile defenders meet caseload standards under court rules, the County uses a so-called "Case Weighting Policy." The OPD Director testified that this policy does not comply with established standards because it is not based on a time study. CP 616-617; 626-627.[8]

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[7] RCW 10.101.060 requires OPD to determine whether counties "substantially comply" with the statutory requirements, yet OPD has never formally raised an issue of substantial compliance with any County, including Grays Harbor. CP 611.

[8] For example, the policy (CP 1028) states that juvenile offense cases should take six hours or less and that juveniles typically admit probation

As OPD knows, the County resolution adopting public defense standards states that public defense contractors shall be selected "solely" by the judges. CP 1066. All OPD witnesses testified that a system where judges select the public defenders and oversee that process may lead to an environment where the public defender makes decisions to keep themselves in favor with the judge, rather than to vigorously advocate for their clients' rights; such a system creates a dangerous conflict of interest. CP 614-615; 668-669; 683-684; 716-717.

Two OPD witnesses agree this lack of attorney independence is a systemic issue in the County. CP 668-669; 683-684; 716-717. According to OPD juvenile expert Mr. Yeannakis, juvenile defenders in the County are under pressure from judges, as well as prosecutors, not to advocate for their clients. CP 683-684; 688-689.[9]

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violations early in the proceedings and thus should take a total of 54 minutes or less.

[9] In its CR 30(b)(6) deposition in this case, the County admitted that it has no system of evaluation or monitoring of juvenile defenders outside the courtroom and does not request any information about case outcomes. CP 731-732; 752-753. Although the County swears under oath in its applications for state public defense funding that its defenders keep and submit time sheets (CP 1021), and the juvenile defender's contract states that she must keep time records (CP 801), the County admitted it does not require time records (CP 748-749). The County testified that the "case point" system developed by one judge − without a time study − is the only method used to determine compliance with caseload standards, but also that the County *does not know* whether the contract attorney had contracts in addition to the County's juvenile public defense. CP 743; 750-751. (In fact, she did have other contracts that she stated took about a third of her time. CP 767-768; 777.) The County does not audit the "case point" reports that the contract attorney provides. CP 741-743. The County did

2. Juvenile Defense Expert Confirms That the County's Juvenile Defense System Falls Below Any Minimum Standard and is Unconstitutional.

Plaintiffs' expert Simmie Ann Baer, through her courtroom visits and extensive review of court documents and over 50 of the juvenile public defense contract attorney's files, applicable standards and other materials, found pervasive failures to provide the basic tasks of defense counsel. CP 575-587. Her findings included, but are not limited to:

- "[The lawyer's] files are void of research, documented witness interviews, theory development, motions, school records, mental health records, time sheets or any documentation of an individualized case plan for any child client." CP 577.

- "[T]here is no evidence that she has done an independent investigation of the clients' lives, needs, assets and deficits. There is no evidence she has conducted investigation of the charges detailed in the police report or other materials provided by the prosecution. I have seen no indications that the juvenile public defender procures school records, psychological evaluations, IEPs or any records that could assist her in advocating for her client. I never heard her make an argument for release, lower bail, or suppression based on this type of information obtained from the client or through other means." CP 582.

- "I observed no evidence of pretrial motions of any kind. There are none in her files or filed in the court file." CP 582.

- "One of the most concerning aspects of my review of files in this case is the complete failure to file motions to suppress confessions. I read all of the police reports in the client files I

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not even notice that the contract attorney did not file monthly reports required by her contract for eight months in 2017 until a third-party public records request asked the County for the reports, and the County had earlier forgotten to request certifications required by court rule for 2016 and 2017. CP 737-739; 1049-1051; 1053.

reviewed. In all but two there are confessions obtained without Miranda warnings being provided." CP 582.[10]

- "I observed many children brought before the court on probation violations. [The lawyer] does not make individualized fact based arguments for her clients in these hearings. Routinely, youth are given the maximum punishment of 30 days in detention. Counsel does not challenge the allegations or evidence presented by the probation officer." CP 584.

- "It appears that [the contract attorney] adopts the police narrative as her narrative and leaves it up to the child to figure the defense out. She has only brief notations in her client files on the court docket sheet about what has occurred in court. She also testified that she doesn't usually file anything for sentencing. She doesn't use the brain science information, except sometimes when she talks with the prosecutor." CP 581-582 (citing contract attorney's deposition).

Ms. Baer describes her observations of the experiences of several juveniles as examples of these patterns and how the County's system affected them. One was J.C., a 13-year-old who had been charged with Unlawful Inhalation of Toxic Fumes (CP 885), and was "charged" with a probation violation of "not following school rules" (CP 882). Ms. Baer was present at a pretrial hearing, held more than three weeks after a public defender was appointed. In her report, Ms. Baer described what happened:

[10] The County's contract attorney was unable to articulate the holding in *J.D.B. v. North Carolina,* 564 U.S. 261, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011), the leading United States Supreme Court case involving challenges to juvenile statements to the police. CP 779-780. Yet she testified that in "the majority" of her cases, her child clients had spoken with police officers in various settings, including at school, home, or "just in the street." *Id.*

> This child was charged with Unlawful Inhalants. This charge should have indicated to defense counsel that perhaps a neuro-psych evaluation should be considered. This child was small; he did not even reach the top of the judge's bench. The probation officer brought him in for violating his release conditions by acting out at school. Defense counsel was not with him at the bench. The judge was telling the child not to talk out of turn while the probation officer was reciting all the violations. The child tried to tell the judge he had started taking meds. Defense counsel did not provide any meaningful information about the child's school or IEP. There could be a question of whether he even understood the release conditions given his charge and obvious agitation. The probation officer requested detention. The judge ordered him into detention until he changed his behavior. His mother said he was very sick. The child was sobbing and saying he was trying. $2500 bail was imposed. As he was taken into custody he was sobbing and screaming, "I need a hug." The detention guards took him away; I could hear him in the back screaming, "I need a hug." Defense counsel continued the pretrial hearing for a week to talk with him, while he remained in detention; she had not talked to him earlier.

CP 584. After J.C. was detained for acting out at school, the contract attorney finally met with J.C. on December 6, nearly a month following appointment and after J.C. had been incarcerated for nearly a week. CP 905. The following day, J.C. pled guilty to the probation violation and was sentenced to 21 days in detention, with credit for time served. CP 907-915.

Ms. Baer concluded that the County's juvenile public defense system overall "does not act as counsel" for children being prosecuted and fails to provide even minimally effective representation at every critical stage. She stated in her conclusion, "In Grays Harbor County Juvenile Court, no real testing of the prosecutor's case occurs; there appears to be

no adversarial activity by the public defender." CP 585 (quoting and concluding that the conclusions of the *Wilbur* case, 989 F. Supp. 2d at 1131-32, apply in the County: "[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.").

3. OPD Has Done Nothing to Point Out to the County, Let Alone to Remedy, the Systemic Defects In the County's Juvenile Defense System.

OPD has never taken action to change systemic defects in juvenile defense in the County, either before or (to our knowledge) since the filing of this lawsuit. It has never even suggested that the County make any changes in juvenile defense. As the OPD Director testified:

> Q. … Has OPD sent any writing to Grays Harbor County suggesting that they should remedy problems that you're aware of?
>
> A. No, we haven't.
>
> Q. Have you called Grays Harbor County to talk about any problems that you're aware of there?
>
> A. No, we haven't.

CP 632; *see also* CP 626-627.[11]

[11] OPD has intervened with defenders in the two specific cases from the County that came to OPD's attention and took some action to enhance

B. Procedural History

K.B.'s grandmother, Ms. Davison, who had asked OPD to intervene in K.B.'s case, and taxpayer Plaintiff Gary Murrell, filed the complaint in this case on April 3, 2017. The complaint sought class action status and the case was certified as a class action comprised of: All indigent persons who have or will have juvenile offender cases pending in pretrial status in Grays Harbor County Juvenile Court, and who have the constitutional right to appointment of counsel. CP 557-59. The Complaint sought declaratory relief requiring the State and OPD to act under both constitutional and statutory duties. CP 59-60.

At the pleading stage, the State filed a Motion for Partial Judgment on the Pleadings, seeking to dismiss Plaintiffs' claims for relief under RCW 2.70 *et seq.* and RCW 10.101 *et seq.*, and moving the trial court to join the County as a necessary party. CP 78-90. The trial court granted the State's motion in part, dismissing Plaintiffs' statutory claims but preserving Plaintiffs' constitutional claims. CP 122-24.

The trial court also ruled that the County was not a necessary party as a matter of law, and denied the State's motion to join the County. *Id.*

On the eve of the discovery cutoff, after more than 15 months of discovery, the parties filed competing motions for summary judgment (and, in response to questions from the trial court, supplemental briefing). Following this extensive briefing and oral argument, the trial court denied

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training for defenders, but has not made any suggestion to the County to change anything, and training has been ineffective. CP 675.

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 the 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 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.

CP at 547-48.

Though it rejected the defenses in the State's Motion for Summary Judgment, the trial court did not rule on Plaintiffs' Motion for Summary Judgment, instead holding it in abeyance and certifying for immediate review the issue that is the subject of this appeal. CP 546-49.

IV. ARGUMENT

A. Standard of Review

This Court reviews questions of law, such as constitutional issues, the existence and scope of a legal duty, and questions of statutory interpretation, de novo. *State v. Gresham*, 173 Wn.2d 405, 419, 269 P.3d 207 (2012). Courts of appeal review "an order of summary judgment in a declaratory judgment action de novo." *Lakewood Racquet Club, Inc. v. Jensen*, 156 Wn. App. 215, 222, 232 P.3d 1147 (2010). "When reviewing a grant of summary judgment, [courts] consider solely the issues and evidence the parties called to the trial court's attention on motion for summary judgment." *Schreiner Farms, Inc. v. Am. Tower, Inc.*, 173 Wn. App. 154, 158, 293 P.3d 407 (2013) (citing RAP 9.12) (regarding an appeal of a trial court's summary dismissal of a declaratory judgment action).

B. The Constitutional Guarantee of "Assistance of Counsel" is a Fundamental and Positive Right and the Duty to Protect It Belongs to the State

1. Ample Precedent Recognizes the Right to Counsel is a Fundamental Right Requiring a System that Provides Adversarial Testing, Particularly for Juveniles

Both the U.S. Constitution and Washington's State Constitution guarantee criminal defendants the right to counsel. U.S. Const. amend. VI; Wash. Const. art. I, § 22. This right is so fundamental and essential to the provision of a fair trial that its protection has been made obligatory on 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). The language of the Fourteenth Amendment makes clear that if a right like the right to counsel applies to the states, there is a corresponding duty imposed on the State to protect that right.[12] As this Court has also recognized, "[t]he right of effective counsel . . . [is] fundamental to, and implicit in, any meaningful modern concept of ordered liberty." *State v. A.N.J.*, 168 Wn.2d 91, 96, 225 P.3d 956 (2010) (a juvenile offense case); *see also In re Gault,* 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967) (constitutional right to counsel extends to juveniles accused of criminal offenses, particularly in light of juveniles' need for counsel's assistance and advocacy and in light of the severe potential consequences of the proceeding).

This constitutional right to counsel requires more than provision of counsel for the accused who is unable to pay. The government must do much more than check a box indicating that a defendant "has a lawyer." An essential feature of a public defense system that complies with the constitutional right to counsel is "meaningful adversarial testing":

> The text of the Sixth Amendment itself . . . requires not merely the provision of counsel to the accused, but "Assistance," which is to be "for his defence." . . . If no actual "Assistance" "for" the accused's "defence" is provided, then the constitutional guarantee has been violated. . . ." The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment."

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[12] "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

> *Avery v. Alabama*, 308 U.S. 444, 446, 60 S. Ct. 321, 322, 84 L. Ed. 377 (1940) (footnote omitted).
>
> Thus, the adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing.

U.S. v. Cronic, 466 U.S. 648, 654–56, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984) (citations and footnotes omitted); *see also A.N.J.*, 168 Wn.2d at 98 (constitution guarantees "not just an appointment of counsel, but also effective assistance of counsel").

Moreover, a constitutionally compliant public defense system for juveniles requires *more* to provide "assistance" and "counsel" (and "meaningful" adversarial testing) to juveniles, who are a vulnerable and immature population. The U.S. Supreme Court has described what actual "assistance" of counsel means for juveniles facing accusations of criminal behavior and loss of liberty:

> [a] proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. 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 and submit it. The child "requires the guiding hand of counsel at every step in the proceedings against him."

In re Gault, 387 U.S. at 36 (footnotes and citations omitted). And this Court has long recognized children's lesser understanding of adult legal concepts. *See Bauman ex rel. Chapman v. Crawford*, 104 Wn.2d 241,

244–45, 704 P.2d 1181 (1985) ("the child's standard of care allows for the normal incapacities and indiscretions of youth."). More recently, this Court has repeatedly recognized that the Constitution demands recognition of children as different:

> More recent Supreme Court cases have clearly reaffirmed that there are measurable and material differences between juveniles and adults that have constitutional implications. … The Supreme Court's case law clearly shows that treating juveniles and adults the same way in all respects is not only unwise but sometimes unconstitutional.

State v. S.J.C., 183 Wn.2d 408, 428, 352 P.3d 749 (2015) (surveying cases and harmful consequences of juvenile offender records); *see also, State v. Scott*, 190 Wn.2d 586, 604, 416 P.3d 1182 (2018) ("[t]he Eighth Amendment … compels us to recognize that children are different").[13]

[13] This practical reality of juveniles' greater need for "assistance of counsel" is recognized by the State of Washington in the need for juvenile defenders to undergo special training on juvenile brain development, special care that juveniles understand the consequences of pleading guilty, and other steps required to provide actual representation. *See* CP 1123 (WSBA Juvenile Offense Representation Guideline 2.2). This need for special care in defending juveniles is especially acute given the very serious consequences of both prosecuting and incarcerating children and youth, even for brief periods. The proven harms to children include harm to their future health, significant disruption of educational opportunities, and increased likelihood of adult incarceration. Any meaningful assistance of counsel to juveniles must be informed by these grave lifetime consequences. OPD fully acknowledges these harms and consequences. CP 618-619; 657-659. The right to counsel for children should be interpreted in light of these clear mandates regarding the status, capacity and development of children.

2. The Right to Counsel is a Positive Right, Further Supporting that the Duty Belongs to the State and is Not Subject to Being Entirely Delegated to the Counties

Unlike the majority of fundamental rights, which serve as limitations on the State's authority, the right to counsel places affirmative obligations on the State to protect its citizens from facing alone the drastic consequences of prosecution. *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"); *Cronic, supra* (requirement of "meaningful adversarial testing").

This Court recognizes that positive constitutional rights are rare and distinct from most constitutional provisions, and require a separate analysis:

> The vast majority of constitutional provisions, particularly those set forth in the federal constitution's bill of rights and our constitution's declaration of rights, are framed as negative restrictions on government action. With respect to those rights, the role of the court is to police the outer limits of government power, relying on the constitutional enumeration of negative rights to set the boundaries.
>
> This approach ultimately provides the wrong lens for analyzing positive constitutional rights, where the court is concerned not with whether the State has done too much, but with whether the State has done enough. Positive constitutional rights do not restrain government action; they require it.

McCleary v. State, 173 Wn.2d 477, 519, 269 P.3d 227 (2012) (internal quotations and citations omitted); *see also Braam ex rel. Braam v. State*, 150 Wn.2d 689, 710, 81 P.3d 851 (2003) (holding courts have broad

powers to require an adequate response from government when dealing with constitutional rights of, in that case, children).

Because the right to counsel places an affirmative obligation on the State to secure the right, the right to counsel is a "positive constitutional right" rather than a restraint on government action. *See* 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").

Case law has specifically discussed the constitutional right at issue here − the right to counsel − as a positive right. *Archie v. City of Racine*, 847 F.2d 1211, 1220-22 (7th Cir. 1988). Additional commentators also discuss the Sixth Amendment's guarantee of assistance of counsel as an affirmative constitutional right. One such commentator has observed that "Some constitutional provisions clearly mandate affirmative governmental conduct. For example, the sixth amendment requires government to provide an accused a speedy public trial, compulsory process, assistance of counsel, and the opportunity to be informed of the nature of the accusation and confronted with the witnesses against him." Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2276 (1990). "The trial-related rights, for example, reflect a recognition that unless a trial is accompanied by certain affirmative guarantees, such as the right to counsel and compulsory process, the core sixth amendment

promise of a fair (speedy, public, impartial) trial becomes a nullity." *Id*. at 2271.[14]

The State has a positive constitutional duty to act to ensure compliance with the right to counsel under the Sixth Amendment and Article I, section 22 of the Washington Constitution. The question in this case is whether, in the words of this Court in *McCleary,* the State has "done enough" to secure that right in the County.

3. The Majority of State Courts to Consider the Issue Recognize that the State Cannot Abdicate Its Duty to Ensure that Counties Comply with the Right to Counsel

Applying the legal analysis discussed above, and as the trial court recognized below (CP 547-48), a majority of other state appellate courts have agreed that the State has an actionable duty to ensure compliance with a juvenile defendant's right to counsel. *Cf. Centurion Props. III, LLC v. Chicago Title Ins. Co.*, 186 Wn.2d 58, 75-79, 375 P.3d 651 (2016) (analyzing other jurisdictions' holdings in evaluating question of first impression on the existence of a legal duty). Given the fundamental nature of this positive constitutional right, it is not surprising that courts of other jurisdictions have held, on analogous facts, that the State cannot wholly abdicate its duty in favor of counties.

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[14] *See also* David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1280 (2002) (categorizing the right to counsel as both a fundamental right and a "quasi-affirmative" one); Jorge M. Farinacci-Fernós, *Looking Beyond the Negative-Positive Rights Distinction: Analyzing Constitutional Rights According to Their Nature, Effect, and Reach*, 41 HASTINGS INT'L & COMP. L. REV. 31, 43 (2018) (classifying the right to counsel as positive constitutional right).

The Idaho Supreme Court has explained how the duty to comply with the constitutional right to counsel rests with the State. Similar to the State's arguments here, the State of Idaho tried to claim that it had delegated public defense to counties and so could not be sued for constitutional deficiencies in county systems. The Idaho Supreme Court rejected the State's attempt to so abdicate, reasoning that the right to counsel is a fundamental and positive right under *Gideon*:

> Concerning the State, Appellants satisfy the causation standard. The right to counsel is "made obligatory upon the *States* by the Fourteenth Amendment." *Gideon*, 372 U.S. at 342, 83 S. Ct. at 795, 9 L. Ed. 2d at 803–04 (emphasis added); *see also* [*State v.*]*Montroy*, 37 Idaho [684, 690, 217 P. 611, 614 (1923)]. The State, therefore, has ultimate responsibility to ensure that the public defense system passes constitutional muster. While the provision of public defense has been delegated to Idaho's forty-four counties under Idaho Code section 19-859, "the ultimate responsibility for fulfilling the ... constitutional duty cannot be delegated." *See Osmunson v. State*, 135 Idaho 292, 296, 17 P.3d 236, 240 (2000) (explaining that the Legislature could delegate provision of public education to school districts, although it could not delegate the ultimate responsibility of fulfilling constitutional duties). Moreover, it cannot be said that the counties are third parties acting independently of the State with respect to public defense. Instead, the counties are political subdivisions of the State. *See, e.g.*, Idaho Const. art. XVIII, § 1; *State v. Peterson*, 61 Idaho 50, 54, 97 P.2d 603, 605 (1939). Because Appellants' alleged injuries are fairly traceable to the State, we hold that causation as to the State is met.

Tucker v. State, 162 Idaho 11, 394 P.3d 54, 64 (2017).

Other courts agree that while a state may delegate public defense tasks and even funding to counties, states cannot escape ultimate

responsibility for the constitutional duty. *Hurrell-Harring v. State*, 15 N.Y.3d 8, 26, 930 N.E.2d 217, 904 N.Y.S.2d 296 (2010) (finding there is no constitutional or statutory mandate better established than the State's duty to provide legal representation to indigent criminal defendants at all critical stages of proceedings); *Duncan v. State*, 284 Mich. App 246, 267-68, 288, 340-41, 774 N.W.2d 89 (2009) (providing counties are required to operate and fund courts and public defense, but this "does not relieve" the state of "constitutional duties under *Gideon*" and counties do not need to be parties to suit), *vacated*, 486 Mich. 1071, *reinstated*, 488 Mich. 957, *reconsideration denied*, 488 Mich. 1011 (2010) (permitting case against state to proceed in Michigan); *Phillips v. California*, Case No. 15CECG02201 (Fresno County, CA Superior Court April 12, 2016) (attached as CP 441-62) (denying motion to dismiss a claim against the State for deficient public defense services in one county and emphasizing that *Gideon* placed the responsibility on "the State" and that the "State cannot disclaim its constitutional responsibilities merely because it has delegated such responsibilities to its municipalities").

Of these decisions, the Supreme Court of Idaho's opinion in *Tucker v. State* is most analogous to the present case. Idaho's statutory public defense scheme is similar to Washington's—counties have primary responsibility for operating trial-level indigent defense services. *See* Idaho Code §19-859; *Tucker*, 162 Idaho at 23. As the quotation above shows, *Tucker* convincingly holds that the Fourteenth Amendment left no

question that the state bears the ultimate responsibility.[15] Moreover, the reasoning of the other courts should apply equally to Washington State. The State may require counties to perform some public defense functions, but in so doing the State cannot abdicate its ultimate duty to ensure assistance of counsel for children accused of crimes.

The other-jurisdiction cases the State cites, State's Br. at 24, either support Plaintiffs' position, or rest on flawed analysis. The State cites *Remick v. Utah*, 2018 WL 1472484 (D. Utah Mar. 23, 2018), for the proposition that it may abdicate public defense duties to counties, but the *Remick* court merely acknowledged a state's authority to delegate to subordinate state agencies (such as counties) while acknowledging that there are circumstances where a state "may very well" have a duty to intervene in public defense primarily provided by counties. *Id*. at 17. Even under the reasoning in *Remick*, this is such a case.

The State's main argument for the lack of any state duty is based on a flawed theory advanced by just one state court, *Quitman County v.*

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[15] The State's claims about *Tucker* are in at least one respect very misleading in stating that *Tucker* suggested some sort of exhaustion of local remedies. State's Br. at 25. The *Tucker* court quoted *Osmusson v. State*, 135 Idaho 292, 17 P.3d 236 (2000), for the proposition that a positive constitutional duty can never be delegated by the state. *Osmusson* dealt with school funding and does discuss how in that context local exhaustion is required, but makes that statement involving a specific statutory scheme requiring those steps before a court must implead the state. *Tucker* quotes *Osmusson* not on this statutory exhaustion question that has no relevance here, but rather for the general principle, noted later in *Osmusson*'s discussion, that the state cannot abdicate responsibility for positive rights.

State, 910 So. 2d 1032 (Miss. 2005). State's Br. at 27. The Mississippi court held that the state is required to step in only when it is impossible for a county to provide adequate counsel. *Id*. at 1047; *compare* CP 547 (trial court order below rejecting Mississippi's position). The Mississippi court's holding is at odds with all of the other cases that were decided later as it fails to ensure that the right is protected. It does not, for example, account for a situation in which a county simply refused to provide counsel for people clearly entitled to it. This Court should reject the Mississippi court's 18-year-old holding as not persuasive authority on the issue and adopt the majority—and far better reasoned—view that the State cannot abdicate the constitutional duty.

C. The State's Duty to Act is Triggered Here, Where the State Has Knowledge of the Ongoing and Systemic Failure of a County to Provide Constitutional Defense

The above statement of undisputed facts overwhelmingly shows that the County's juvenile public defense system is constitutionally deficient and that the State and OPD know it, confirming the necessity for declaratory relief that the State has the authority to act. OPD has not even mildly suggested to the County that its system of juvenile defense is deficient. CP 632. OPD has also admitted that it provides no oversight and that it would likely continue to extend funding even if a county was abjectly failing to meet its requirements. CP 660-61 (Yeannakis Dep.) at 74:21-75:15, CP 662-64 at 76:22-78:5, CP 665-66 at 87:23-88:12, CP 675 at 124:5-24, CP 682 at 148:7-15; CP 611 (Moore OPD 30(b)(6) Dep.) at 13:10-23, CP 632 at 100:7-13, CP 636-37 at 108:15-110:23; CP 712-15

(Johnson Dep.) at 58:2-61:24, CP 722-23 at 107:24-108:6; CP 710-11 at 50:11-51:23.

Despite the benefit of full discovery, on cross-motions for complete summary judgment, the State failed to identify facts challenging Respondents' evidence and its expert's conclusions that (i) juveniles charged with offenses in the County are systemically deprived of the assistance of counsel, (ii) the County's juvenile public defense system provides the equivalent of no counsel at all, and (iii) the State was aware of the systemic violation. The County's juvenile defense system is thus very like the system described in *Wilbur v. City of Mount Vernon:*

> The 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.

989 F. Supp. 2d 1122, 1128, 1131-32 (W.D. Wash. 2013) (finding systemic failure to provide adversarial testing under *Cronic* lacking where "shockingly low" number of defense files showed there had been investigation, research, or cases set for trial); *see also Childress v. Johnson,* 103 F.3d 1221, 1224, 1231 (5th Cir. 1997) (concluding that counsel was of "little or no[] assistance. . ." and that "appointed counsel in [the county] routinely failed to discuss strategy with their clients, research the law, investigate the facts, or otherwise go to bat for the accused"; in violation of *Cronic,* counsel "was not the advocate for the defense whose

assistance is contemplated by the Sixth Amendment"); *Gardiner v. U.S.*, 679 F. Supp. 1143 (D. Me. 1988) (holding that failure to speak on defendant's behalf at sentencing constituted constructive denial of assistance of counsel altogether); *Kuren v. Luzerne County*, 637 Pa. 33, 79-80, 146 A.3d 715 (2016) (recognizing that a class of indigent defendants may seek relief under *Cronic* in the event of a systematic denial of counsel).

The lack of adversarial testing is not the problem of one attorney or evidenced by a single case. Defense counsel utterly fail to investigate cases or advocate for their child clients, and this is a result of systemic failures that the State asserts it is powerless to redress. The County's lack of any monitoring or evaluation system violates RCW 10.101.030, the American Bar Association's *Ten Principles Of A Public Defense Delivery System*, and the WSBA Standards for Indigent Defense Services, Standards 10 and 11. CP 1155 (ABA Principle 10); CP 1172-73 (WSBA Standards 10, 11). And the continued lack of independence of the system and pressure to conform to a culture of non-advocacy is contrary to the very first ABA principle. CP 1154 (ABA Principle 1). The result is more than the violation of all reasonable standards, however. The result is a complete failure of the adversarial testing the Constitution requires.

There is also no dispute that OPD (and therefore the State) has known about these deficiencies—both systemic and in the courtroom—of the County juvenile defense system ***for years.*** As shown in the undisputed facts, OPD admits its direct knowledge of the non-advocacy for children

and its knowledge of a system set up to support and encourage a lack of advocacy. It is well aware of the lack of monitoring or evaluation and systemic pressures against providing real advocacy for clients. But neither OPD nor the State have taken any action to cure these defects.

If the federal and state constitutions mandate a juvenile public defense system in the County that achieves "meaningful adversarial testing" and the question presented in this case is whether the State has "done enough" to "achieve[]" or is "reasonably likely to achieve" that constitutionally prescribed end, the record evidence in this case is unambiguous: The State falls woefully short of fulfilling its duty.

Plaintiffs propose a simple standard: Where there is an ongoing, systemic violation of the right to counsel, the State must act to protect that right. The case is not a close one. This record dramatically demonstrates the need for State intervention to protect the class's constitutional rights. As other courts have recognized in public defense cases,

> the lack of an actual representational relationship and/or adversarial testing injures both the indigent defendant and the criminal justice system as a whole. The exact impacts of the constitutional deprivation are widespread but difficult to measure on a case by case basis, making legal remedies ineffective.

Wilbur, 989 F. Supp. 2d at 1133. The same holds true here. A systemic remedy is required, and the State must provide it.

Respondents are aware of no action OPD (or any state official) has taken to even try to inform the County of its juvenile public defense system deficiencies, let alone requiring the County to remedy this

situation. The State failed to submit any such evidence on summary judgment. Instead, OPD has claimed it can do nothing.[16] Constitutional demands and the relevant Washington statutes do not allow—and they certainly do not require—the State to be passive in the face of these obvious systemic constitutional violations.

D. There is no Authority Supporting the State's Claim that it Can Entirely Abdicate to the Counties Responsibility for Systemic Violations of the Right to Counsel

The State insists that it has no authority to protect the constitutional right to counsel, that it has entirely delegated that duty to the counties, and that it has no obligation to the children of the County when their right to counsel is being systematically violated. Instead, the State asserts that is has satisfied any constitutional duty by delegating it to the counties and providing them with the ability to raise funds in support of that mandate. State's Br. at 1. The State further asserts that the right to counsel is just like other parts of the criminal justice system, an ordinary function under the counties' general police powers, and that allowing

[16] CP 660-61 (Yeannakis Dep.) at 74:21-75:15 (not aware of any specific remedy OPD could do in the face of a constitutional violation), CP 662-64 at 76:22-78:5, CP 665-66 at 87:23-88:12 (OPD does not monitor and purports to lack authority to require constitutional compliance), CP 675 at 124:5-24 (can only offer training, but that has not resulted in improvement in the County), CP 682 at 148:7-15 (OPD aware of deficient complaint system in the County but lacks power to force change); CP 636-38 (Moore 30(b)(6) Dep.) at 108:15-110:18; CP 712-15 (Katrin Johnson Dep.) at 58:2-61:24 ("the state is not ensuring that the constitutional right to counsel is being met"), CP 722-23 at 107:24-108:6, CP 710-11 at 50:11-51:23 (OPD provides no oversight of public defense services).

counties to make unfettered localized political choices on how best to effectuate the right suffices to comply with the constitution. *Id*. at 12-14.

These arguments categorically fail. The fundamental, positive Sixth Amendment right to counsel does not deal with a standard "police power" that can be wholly delegated to counties. The right to counsel, under *Gideon* and the other authority discussed above, is not a mere function of government the Legislature may divide among the State and localities; it is a constitutional duty obligating the State to act in the County.

1. The Duty Cannot be Fully Assigned

The State contends that it has fully discharged its constitutional duty because the Legislature has "assigned the duty" to the counties, State's Br. at 19, such that it has no further obligation. But the State presents no authority for the proposition that it may simply delegate a constitutional duty and, having done so, ignore ongoing constitutional violations. The ongoing situation in the County is an example of "Justice by Geography" where defendants have constitutional rights protected if they are charged in certain of Washington's 39 counties, but not others; it is not evidence that the State is protecting this fundamental right. CP 1187-1210. As shown above, the State can appoint a locality to perform services, but cannot offload the ultimate constitutional duty.

2. Providing the Means for Counties to Provide Public Defense Funding Does Not Fulfill the State's Duty

The State contends that it has no further duty if a county has "the means" of providing constitutionally sufficient services. The State asserts that, once it delegates this constitutional responsibility, "[i]t therefore follows… 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." State's Br. at 9. The State's conclusion does not logically "follow" from the assertion that it has granted to counties the means of fulfilling its duty. Moreover, the State's test lacks definition. The State's briefing (i) confirms that it is equating "means" with "taxing authority," (ii) represents that the County has adequate taxing authority, and (iii) contends that the delegation is constitutional if it merely permits a county to raise necessary revenues. These assertions improperly restrict the issue to one about taxation authority and funding and miss the point of this case entirely.

The bare ability to raise funds for public defense may be necessary to the provision of indigent defense services, but it is not sufficient to ensure constitutional public defense services. Nor is the State's underlying contention accurate (or even relevant) that, through its delegation and grant of taxing authority, "[t]he State thus ensures that county officials are fully accountable for the costs of the criminal justice policies they pursue." State's Br. at 1. There is no evidence anywhere in the record that a 1% cap on taxes "ensures" anything relevant to this litigation. And the State's

purported policy of "local accountability" does not address, much less supersede, the overarching constitutional duty to provide adequate representation.

The State's claim that counties possessing taxing authority for public defense suffices to comply with the Constitution is not supported by any case discussing the Sixth Amendment. Plaintiffs accept that counties have been assigned responsibility to operate and administer trial-level public defense services and are expected to use county taxing authority to pay for most (but not all) public defense functions. But this by itself provides no authority for allowing the State to abdicate its constitutional duties.

3. The State's Policy Choice to Delegate to Counties Does Not Diminish its Own Constitutional Duty

The State also argues without citation that having counties solely responsible for trial court public defense makes sense from a practical and policy perspective, and is therefore presumed valid. No authority is cited to support either of these propositions in this constitutional context, and in any event the Legislature has not made counties solely responsible[17] and could not abdicate the ultimate constitutional responsibility that state officials themselves have acknowledged. As the State admits, all legislative action is limited by constitutional requirements. State's Br. at 9. Even if the Legislature had tried to completely delegate public defense to

[17] See Statement of Undisputed Facts and Argument Sec. E, below.

the counties and absolve the State of all responsibility, the Constitution requires ultimate State responsibility.

Whatever providing counties with taxing authority may do, it emphatically has not provided children accused of offenses in the County with meaningful representation and the protections of adversarial testing required by the Constitution. Further, the contention that the scope of the state's duty is so limited is not supported by logic, common sense, justice, policy, or precedent as applied to the facts of this case—the traditional factors in assessing the scope of a duty. The Legislature has chosen the counties as a front-line mechanism to deliver constitutionally-required public defense services. But that political choice does not move the ultimate constitutional duty away from the State.

Contrary to the State's insinuation, State's. Br. at 17, the State is not being asked to take over trial court public defense. The State is being asked to abate a clear constitutional violation that it knows about in an arena in which it bears ultimate responsibility.

4. The State's Constitutional Duty is Not Altered by Home Rule Nor the State's Choice to Appoint its Political Subdivisions as its Agents to Fulfill the Duty

To the extent that some responsibility to provide public defense services has been delegated to the counties, Washington's counties are fulfilling that function not as independent entities but as state agents. The Washington Constitution recognizes that counties exist as both "legal subdivisions" that are local agents of the state and as municipal corporations with the legal authority to exercise general police regulatory

powers. Wash. Const. art. XI, §§ 1, 11. "[C]ounties [are] political subdivisions of the State [when] exercising involuntary or mandatory duties, as distinguished from voluntary duties that municipal corporations may exercise at their option." Steve Lundin, *The Closest Governments to the People*, Washington State University and self-published, at 83-84 (quoting *State ex rel. Summerfield v. Tyler*, 14 Wash. 495, 499, 45 P. 31 (1896)), available at http://mrsc.org/getmedia/1c25ae05-968c-4edd-8039-af0cf958baa7/Closest-Governments-To-The-People.pdf.aspx?ext=.pdf.; *See also Tucker*, 394 P.3d at 64. The provision of public defense is a constitutionally-mandated state duty. Therefore, to the extent that the State of Washington has directed counties to implement the requirements of the right to counsel, the counties are acting as agents of the State for this purpose. Thus the State's authorities addressing counties' optional services or discretionary political decisions are inapposite. (The State is essentially making opposite of a respondeat superior argument, that it should be held harmless for the acts of its own agent when that agent is acting within the scope of its agency.)

The Washington cases cited by the State do not lead to a finding that public defense is purely a county function. State's Br. at 18-19. One says merely that "generally" counties can be seen as separate entities, but also cites several cases saying that counties are an arm or agency of the state in certain contexts. *Mochizuki v. King Co.*, 15 Wn. App. 296, 297-298, 548 P.2d 578 (1976) (attempt to offset county tax bill by making a wage claim against the state; entities were separate for these purposes).

Another cited decision states that sometimes local entities are arms of the state and at other times not. *Columbia Irr. Dist. v. Benton County*, 149 Wash. 234, 235, 270 P. 813 (1928).[18] None of the other cases cited are at all relevant to the constitutional issues raised here.[19] All are answered by the reality that the State has a duty to ensure constitutional systems of public defense.

The State's argument that the home rule doctrine should prohibit the State's interference in counties' local affairs is particularly inapplicable to the situation in the County. To Plaintiffs' knowledge, Grays Harbor County is not a charter county and has not opted for "home rule." Even if the home rule doctrine were applicable to the County, its protections are not absolute: counties may conduct local affairs without supervision by the state ***only*** "so long as they abide[] by the provisions of the constitution and [do] not run counter to considerations of public policy

[18] As to the State's argument that the County is the real party in interest, the trial superior court expressly rejected that argument when it denied the State's Motion for Necessary Joinder. CP 122-24. The State did not appeal this ruling and it is not before this Court on direct review.

[19] The State suggests that *Whatcom County v. Hirst*, 186 Wn.2d 648, 381 P.3d 1 (2016), involved a conflict between Department of Ecology "rules" and county duties, but the DOE statute involved, RCW 90.54.130, explicitly says that DOE may make only "advisory recommendations," not rules, so there was nothing the state could make the county adhere to. *Mun. of Metro. Seattle v. O'Brien*, 86 Wn.2d 339, 544 P.2d 729 (1976), discusses local taxation issues that the State doesn't control, but says nothing relevant to the constitutional analysis at issue here. *In re Kittitas County for a Declaratory Order*, 8 Wn. App. 2d 585, 438 P.3d 1199 (2019), simply holds that the state Liquor and Cannabis Board may make decisions for licensing cannabis outlets without enforcing local zoning ordinances; in other words, the two arenas are completely separate.

of broad concern, expressed in general laws." *Carlson v. San Juan Cty.*, 183 Wn. App. 354, 368, 333 P.3d 511 (2014) (citation omitted, emphasis added). The ongoing and systemic constitutional violations in the County make home rule inapplicable here.

There is ample authority that the U.S. and Washington constitutions place an affirmative duty on the State to ensure counties' compliance with the right to counsel. This Court should hold that the State retains the ultimate responsibility for discharging its constitutional duty.

E. The State Must Act, Either Through the Office of Public Defense or Otherwise.

As the above demonstrates, the State has a duty to act to remedy the blatantly unconstitutional and harmful situation in the County's juvenile courts, a duty the State cannot avoid. The Office of Public Defense can undertake necessary means to fulfill this duty, but even if OPD did not exist, the State would nevertheless be required to act.

1. The Constitution and Statutes Empower OPD to Act

When the Legislature created OPD, it specifically referenced the Constitution. RCW 2.70.005 gives OPD the express duty "to implement the constitutional and statutory guarantees of counsel and to ensure the effective and efficient delivery of indigent defense services funded by the state of Washington." The Legislature further confirmed the fundamental nature of the right and its constitutional status, which distinguishes it from the other county police powers referenced by the State:

> The legislature finds that effective legal representation must be provided for indigent persons and persons who are

> indigent and able to contribute, consistent with the constitutional requirements of fairness, equal protection, and due process in all cases where the right to counsel attaches.

RCW 10.101.005.

The Legislature has steadily increased OPD's powers, in 2008 adding that OPD must conduct "oversight and technical assistance to ensure the effective and efficient delivery of services in the office's program areas." RCW 2.70.005; .020(4). Laws of 2008, ch. 313 §4.[20] This amendment is significant — it increases OPD's authority and empowers it to promote compliance with Washington's public defense standards. It expands OPD's previously-existing authority to require "substantial compliance" with a variety of "use requirements" (including the adoption of standards) with which counties must "substantially comply" in order to receive state public defense funds. RCW 10.101.060.

This Court interprets statutes to "ascertain and carry out the Legislature's intent." *State Dep't of Ecology v. Campbell & Gwinn, LLC*,

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[20] These amendments followed a 2008 Joint Legislative Audit and Review Committee (JLARCO) report on the Office of Public Defense, available at http://leg.wa.gov/jlarc/AuditAndStudyReports/Documents/08-2.pdf. This report was written as a response to a "sunset" provision that would have eliminated OPD if the Legislature did not act. *Id.* However, the report recommended retaining OPD, partly because the State acknowledged that it cannot constitutionally write itself out of public defense: the State recognized that it would continue to have an obligation for the Constitutional guarantee of counsel, even if the Office of Public Defense were terminated. JLARCO Report at 2. Thus even State officials realize that either OPD must implement the right to counsel or some other agency must.

146 Wn.2d 1, 9, 43 P.3d 4 (2002). "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Id*. at 9-10. "Plain language analysis also looks to amendments to the statute's language over time." *Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 421, 440, 395 P.3d 1031 (2017). As noted above, OPD's authority was expanded in 2008 to add to its powers "oversight" of trial-court-level public defense. And recognizing OPD's authority to act is also consistent with a practical interpretation of the statute, *id.* at 444, since it enables the State to carry out its duties in enforcing the constitutional right to counsel. It also interprets the statute in a way which promotes a constitutional outcome. *See State ex rel. Evans v. Bhd. of Friends*, 41 Wn.2d 133, 143, 247 P.2d 787 (1952).

These provisions confirm both that the State retains the constitutional duty to ensure county compliance with the right to counsel, and that OPD is constitutionally and statutorily empowered and obligated to move to require change in the County. The Legislature cannot fully delegate ultimate responsibility for public defense to counties and it plainly has not attempted to do so. The clear tenor of legislative enactments over time is to allow State-level actors to positively intervene to remedy constitutional violations.[21] Under these statutory commands,

[21] The State is further involved in public defense under this Court's comprehensive rules that govern trial level public defense caseloads and lawyer qualifications, which place state limits on what counties can do. CrR 3.1; JuCR 9.2.

OPD may not "passively observe" the known system breakdown in the County, especially given the active verbs the Legislature chose in describing OPD's duties. "To implement," "to ensure," and "to provide oversight and technical assistance" all encompass the authority to intervene in the delivery of indigent public defense services. These active verbs express a clear intent—the OPD has the authority and responsibility and must act.[22]

2. Even if OPD Were Not Empowered to Act, the State Must Nevertheless Act

The Constitution requires the State to shoulder ultimate responsibility for acting to staunch the horrible and unconscionable juvenile public defense system in the County. The State may argue, as it did below, that the OPD statutes do not provide OPD the authority to take any substantive action to change county public defense systems.[23]

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[22] Chapter 2.70 RCW does not define "implement," "ensure," "oversight," and "assistance." Dictionary definitions of "implement," "ensure," "oversight," and "assistance" support the conclusion that OPD has the authority and discretion to take appropriate action in order to implement and protect the guaranteed constitutional rights. "Implement" means to "carry out, accomplish" and "to give practical effect to and ensure of actual fulfillment by concrete measures." LANGENSCHEIDT'S NEW COLLEGE MERRIAM-WEBSTER DICTIONARY 583 (1996). To "ensure" means to "make sure, certain, or safe" and to "guarantee." *Id.* at 386. "Oversight" means "regulatory supervision." *Id.* at 830.

[23] In response to a motion made by the State, the trial court ruled that the statutes did not of their own force require or empower OPD to remedy the situation in the County. CP 123. This ruling left open the question whether the Constitution might allow or require OPD to act. After discovery, Plaintiffs argued on summary judgment that the statutes, in light of the

Although this is incorrect, as shown above, even if OPD were not so empowered (or didn't exist), the constitutional principles are clear: the State must act to change that system.

In the OPD Rule 30(b)(6) deposition, OPD Director Moore was asked what OPD would do if she felt there was systemic ineffective assistance in a county. She ultimately stated, they would find "other attorneys who are able to file litigation…." apparently referring to private or nonprofit counsel. CP 636-37 (Moore 30(b)(6) Dep.) at 108:15–109:8. In the present case, Plaintiffs have shown that the County's juvenile defense system is unconstitutional and, most importantly, the State knows it. The State could take any number of actions at the behest of OPD or on its own, for example filing suit against the County itself.

This is what the Department of Ecology (DOE) did. DOE successfully sued a county for enacting an ordinance banning certain biosolids products that was contrary to state law endorsing the use of these materials, and thus violated the constitution. *State Dept. of Ecology v. Wahkiakum County,* 184 Wn. App. 372, 337 P.3d 364 (2014), *review denied,* 182 Wn.2d 1023 (2015). DOE determined that a county had done something unconstitutional and directed its lawyers to sue to stop it. OPD or some other state actor, knowing what it does about the awful situation

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constitutional command, do empower OPD. The trial court, in the ruling under review here, held that the State has the duty to remedy known systemic constitutional violations in a political subdivision, but did not yet opine on whether the Constitution would empower OPD to provide the remedy. For the reasons stated above, OPD does have the power to act.

in the County, could do the same thing, especially given that vulnerable child defendants and not mere biosolids policy is involved here.

There are no doubt other options as well, with no need for additional funding or constant State oversight. Whatever the means, and whether through OPD or otherwise, the State must act to abate the stark and harmful constitutional violations in the County's juvenile court system.

F. The Declaratory Judgment Sought by Plaintiffs is Essential to Remedying the Systemic Constitutional Violation in the County

This case is a declaratory judgment action seeking a ruling on the State's duty regarding the right to counsel under the facts of this case.[24] Since the only question asked here is the nature of the State's duty, the State and OPD are the proper defendants.

The State's insistence that it will not (and purportedly cannot) act to protect the children in the County gives rise to Plaintiffs' claim for declaratory relief. For purposes of declaratory relief, a justiciable controversy is

> (1) ... an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2)

[24] Plaintiffs seek declarations that: the State has an affirmative constitutional duty and ultimate responsibility for ensuring public defense; where there is an ongoing, systemic violation of the right to counsel and the State knows about it, the State must act to protect those defendants' rights; the State has the legal authority to act and OPD has the competence, expertise, and authority to decide how to redress the County's ongoing, systemic violations. CP 59-60.

> between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

Washington State Coalition for the Homeless v. Dep't of Soc. & Health Servs., 133 Wn.2d 894, 917, 949 P.2d 1291 (1997), quoting *Nollette v. Christianson*, 115 Wn.2d 594, 599, 800 P.2d 359 (1990) (other citations omitted).[25]

The present case amply meets all of these requirements. The dispute here is far from hypothetical (criterion 1). The voluminous facts Plaintiffs have brought forth demonstrate their direct and substantial interests in constitutionally adequate public defense in the County; the State strongly asserts its interests as avoiding having to intervene in the County (criteria 2 and 3). This Court is being asked for a final decision on the State's duty (criterion 4). There is more than enough here for the Plaintiffs to respectfully insist on a declaration of the State's duty.

The State is correct that Respondents could file a complaint for injunctive relief against the County, but that is irrelevant to the instant action. Plaintiffs' dispute is with the State and the facts of the case show

[25] *See also Wash. State Housing Fin. Comm'n v. Nat'l Homebuyers Fund, Inc.*, 2019 WL 3331356 (Wash. July 25, 2019) (two part test for standing in declaratory judgment action, which "is not intended to be a particularly high bar": whether the interest sought to be protected is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question; and, whether the challenged action has caused injury in fact).

that this is far from a theoretical or abstract dispute. Children are being harmed while the State denies its duty.

This proper request for declaratory judgment disposes of all of the State's arguments about "standing" or who should be sued. State's Br. at 8-11. The State insists that the entity causing harm must be sued, but this ignores the existence of the State's duty and the harm flowing from the State's violation of its own duty. The Court granted review on the question of the State's duty. The State has the constitutional duty to abate the conflagration in the County juvenile defense. Plaintiffs are not suing the maker of a rule for some other entity's violation of that rule. *Cf.* State's Br. at 23. Instead, Plaintiffs are suing the responsible entity for clear failure to do its duty. *See also* CP 123, 104-08 (trial court's order that the County is not an indispensable party and related briefing below).

A declaration would affirm that the State of Washington has the ultimate constitutional duty in this area, even when it has delegated aspects of public defense to be performed by counties. Armed with a clarifying declaration, the State, through its agency OPD and through the office of the attorney general, can speak with authority to the counties who it has entrusted as its agents to fulfill its duty.

The record shows that this straightforward request that the State be tasked to do its duty is necessary because the State vehemently denies any responsibility or authority to abate the harms occurring in the County. The requested relief does not mandate any particular action by the State, but leaves it to those who have the duty and to their experts. This is expressly

not a case where Plaintiffs are seeking additional funding or revenue for the counties. They are seeking a declaration of the State's authority and responsibility to intervene to remedy systemic violations of the fundamental and positive right to the assistance of counsel.

V. CONCLUSION

This Court should affirm the trial court and enter the declaratory judgment Plaintiffs have requested, that the State has an actionable duty to enforce compliance with the constitutional right to counsel.

DATED: August 2, 2019

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 2nd day of August, 2019, I caused a true and correct copy of the foregoing document, "RESPONDENT'S BRIEF to be delivered via electronic notification to the following counsel of record:

Counsel for Defendants:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED at Seattle, Washington this 2nd day of August, 2019.

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Appendix of Statutes

RCW 2.70

2.70.005 Office of public defense established.
In order to implement the constitutional and statutory guarantees of counsel and to ensure effective and efficient delivery of indigent defense services funded by the state of Washington, an office of public defense is established as an independent agency of the judicial branch.

2.70.010 Director—Appointment—Qualifications—Salary.
The supreme court shall appoint the director of the office of public defense from a list of three names submitted by the advisory committee created under RCW 2.70.030. Qualifications shall include admission to the practice of law in this state for at least five years, experience in providing indigent defense services, and proven managerial or supervisory experience. The director shall serve at the pleasure of the supreme court and receive a salary to be fixed by the advisory committee.

2.70.020 Director—Duties—Limitations.
The director shall:
(1) Administer all state-funded services in the following program areas:
(a) Trial court criminal indigent defense, as provided in chapter 10.101 RCW;
(b) Appellate indigent defense, as provided in this chapter;
(c) Representation of indigent parents qualified for appointed counsel in dependency and termination cases, as provided in RCW 13.34.090 and 13.34.092;
(d) Extraordinary criminal justice cost petitions, as provided in RCW 43.330.190;
(e) Compilation of copies of DNA test requests by persons convicted of felonies, as provided in RCW 10.73.170;
(f) Representation of indigent respondents qualified for appointed counsel in sexually violent predator civil commitment cases, as provided in chapter 71.09 RCW;
(2) Submit a biennial budget for all costs related to the office's program areas;
(3) Establish administrative procedures, standards, and

guidelines for the office's program areas, including cost-efficient systems that provide for authorized recovery of costs;
(4) Provide oversight and technical assistance to ensure the effective and efficient delivery of services in the office's program areas;
(5) Recommend criteria and standards for determining and verifying indigency. In recommending criteria for determining indigency, the director shall compile and review the indigency standards used by other state agencies and shall periodically submit the compilation and report to the legislature on the appropriateness and consistency of such standards;
(6) Collect information regarding indigent defense services funded by the state and report annually to the advisory committee, the legislature, and the supreme court;
(7) Coordinate with the supreme court and the judges of each division of the court of appeals to determine how appellate attorney services should be provided.
The office of public defense shall not provide direct representation of clients.

2.70.025 Director—Indigent defense services—Civil commitment of sexually violent predators.
In providing indigent defense services for sexually violent predator civil commitment cases under chapter 71.09 RCW, the director shall:
(1) In accordance with state contracting laws, contract with persons admitted to practice law in this state and organizations employing persons admitted to practice law in this state for the provision of legal services to indigent persons;
(2) Establish annual contract fees for defense legal services within amounts appropriated based on court rules and court orders;
(3) Ensure an indigent person qualified for appointed counsel has one contracted counsel appointed to assist him or her. Upon a showing of good cause, the court may order additional counsel;
(4) Consistent with court rules and court orders, establish procedures for the reimbursement of expert witness and

other professional and investigative costs;
(5) Review and analyze existing caseload standards and make recommendations for updating caseload standards as appropriate;
(6) Annually, with the first report due December 1, 2013, submit a report to the chief justice of the supreme court, the governor, and the legislature, with all pertinent data on the operation of indigent defense services for commitment proceedings under this section, including:
(a) Recommended levels of appropriation to maintain adequate indigent defense services to the extent constitutionally required;
(b) The time to trial for all commitment trial proceedings including a list of the number of continuances granted, the party that requested the continuance, the county where the proceeding is being heard, and, if available, the reason the continuance was granted;
(c) Recommendations for policy changes, including changes in statutes and changes in court rules, which may be appropriate for the improvement of sexually violent predator civil commitment proceedings.

2.70.030 Advisory committee—Membership—Duties—Travel and other expenses.
(1) There is created an advisory committee consisting of the following members:
(a) Three persons appointed by the chief justice of the supreme court, who shall also appoint the chair of the committee;
(b) Two nonattorneys appointed by the governor;
(c) Two senators, one from each of the two largest caucuses, appointed by the president of the senate; and two members of the house of representatives, one from each of the two largest caucuses, appointed by the speaker of the house of representatives;
(d) One person appointed by the court of appeals executive committee;
(e) One person appointed by the Washington state bar association;
(f) One person appointed by the Washington state association of counties; and

(g) One person appointed by the association of Washington cities.
(2) During the term of his or her appointment, no appointee may: (a) Provide indigent defense services funded by a city, a county, or the state, except on a pro bono basis; (b) serve as a judge except on a pro tem basis or as a court employee; or (c) serve as a prosecutor or prosecutor employee.
(3) Members of the advisory committee shall receive no compensation for their services as members of the committee, but may be reimbursed for travel and other expenses in accordance with state law.
(4) The advisory committee shall:
(a) Meet at least quarterly;
(b) Review at least biennially the performance of the director, and submit each review to the chief justice of the supreme court;
(c) Receive reports from the director;
(d) Make policy recommendations, as appropriate, to the legislature and the supreme court;
(e) Approve the office's budget requests;
(f) Advise the director regarding administration and oversight of the office's program areas; and
(g) Carry out other duties as authorized or required by law.

2.70.040 Employees—Civil service exemption.

All employees of the office of public defense shall be exempt from state civil service under chapter 41.06 RCW.

2.70.050 Transfer to office of appellate indigent defense powers, duties, functions, information, property, appropriations, employees, rules, and pending business—Apportionment—Effect on collective bargaining.

(1) All powers, duties, and functions of the supreme court and the administrative office of the courts pertaining to appellate indigent defense are transferred to the office of public defense.
(2)(a) All reports, documents, surveys, books, records, files, papers, or written material in the possession of the supreme court or the administrative office of the courts pertaining to the powers, functions, and duties transferred

shall be delivered to the custody of the office of public defense. All cabinets, furniture, office equipment, motor vehicles, and other tangible property employed by the supreme court or the administrative office of the courts in carrying out the powers, functions, and duties transferred shall be made available to the office of public defense. All funds, credits, or other assets held in connection with the powers, functions, and duties transferred shall be assigned to the office of public defense.

(b) Any appropriations made to the supreme court or the administrative office of the courts for carrying out the powers, functions, and duties transferred shall, on June 6, 1996, be transferred and credited to the office of public defense.

(c) Whenever any question arises as to the transfer of any personnel, funds, books, documents, records, papers, files, equipment, or other tangible property used or held in the exercise of the powers and the performance of the duties and functions transferred, the director of financial management shall make a determination as to the proper allocation and certify the same to the state agencies concerned.

(3) All employees of the supreme court or the administrative office of the courts engaged in performing the powers, functions, and duties transferred are transferred to the jurisdiction of the office of public defense. All employees classified under chapter 41.06 RCW, the state civil service law, are assigned to the office of public defense to perform their usual duties upon the same terms as formerly, without any loss of rights, subject to any action that may be appropriate thereafter in accordance with the laws and rules governing state civil service.

(4) All rules and all pending business before the supreme court or the administrative office of the courts pertaining to the powers, functions, and duties transferred shall be continued and acted upon by the office of public defense. All existing contracts and obligations shall remain in full force and shall be performed by the office of public defense.

(5) The transfer of the powers, duties, functions, and

personnel of the supreme court or the administrative office of the courts shall not affect the validity of any act performed before June 6, 1996.
(6) If apportionments of budgeted funds are required because of the transfers directed by this section, the director of financial management shall certify the apportionments to the agencies affected, the state auditor, and the state treasurer. Each of these shall make the appropriate transfer and adjustments in funds and appropriation accounts and equipment records in accordance with the certification.
(7) Nothing contained in this section may be construed to alter any existing collective bargaining unit or the provisions of any existing collective bargaining agreement until the agreement has expired or until the bargaining unit has been modified by action of the personnel board as provided by law.

2.70.060 Parents for parents program—"Child welfare parent mentor" defined.
For the purposes of RCW 2.70.070 through 2.70.100, "child welfare parent mentor" means a parent who has successfully resolved the issues that led the parent's child into the care of the juvenile dependency court system, resulting in family reunification or another permanency outcome, and who has an interest in working collaboratively to improve the lives of children and families.

2.70.070 Parents for parents program—Goal—Structured peer mentoring.
(1) The goal of the parents for parents program is to increase the permanency and well-being of children in foster care through peer mentoring that increases parental engagement and contributes to family reunification.
(2) The parents for parents program may provide structured peer mentoring for families entering the dependency court system, administered by child welfare parent mentors.

2.70.080 Parents for parents program—Components of program.
Subject to the availability of amounts appropriated for this

specific purpose, components of the parents for parents program, provided by child welfare parent mentors, may include:
(1) Outreach and support to parents at dependency-related hearings, beginning with the shelter care hearing;
(2) A class that educates parents about the dependency system they must navigate in order to have their children returned, empowers them with tools and resources they need to be successful with their case plan, and provides information that helps them understand and support the needs of their children;
(3) Ongoing individual peer support to help parents involved with the child welfare system;
(4) Structured, curriculum-based peer support groups.

2.70.090 Parents for parents program—Funding, administration—Program advisors.

(1) Subject to the availability of amounts appropriated for this specific purpose, the parents for parents program shall be funded through the office of public defense and centrally administered through a pass-through to a Washington state nonprofit-lead organization that has extensive experience supporting child welfare parent mentors.
(2) Through the contract with the lead organization, each local program must be locally administered by the county superior court or a nonprofit organization that shall serve as the host organization.
(3) Local stakeholders representing key child welfare systems shall serve as parents for parents program advisors. Examples of local stakeholders include the department of children, youth, and families, the superior court, attorneys for the parents, assistant attorneys general, and court-appointed special advocates or guardians ad litem.
(4) A child welfare parent mentor lead shall provide program coordination and maintain local program information.
(5) The lead organization shall provide ongoing training to the host organizations, statewide program oversight and coordination, and maintain statewide program information.

2.70.100 Parents for parents program—Evaluation—Reports to the legislature.

(1) Subject to the availability of amounts appropriated for this specific purpose, a research entity with experience in child welfare research shall conduct an evaluation of the parents for parents program. The evaluation design must meet the standards necessary to determine whether parents for parents can be considered a research-based program.

(2) A preliminary report to the legislature must be provided by December 1, 2016. At a minimum, the preliminary report must include statistics showing rates of attendance at court hearings and compliance with court-ordered services and visitation. The report must also address whether participation in the program affected participants' overall understanding of the dependency court process.

(3) A subsequent report must be delivered to the legislature by December 1, 2019. In addition to the information required under subsection (2) of this section, this report must include statistics demonstrating the effect of the program on reunification rates and lengths of time families were engaged in the dependency court system before achieving permanency.

2.70.900 Transfer of certain powers, duties, and functions of the department of social and health services.

(1) All powers, duties, and functions of the department of social and health services and the special commitment center pertaining to indigent defense under chapter 71.09 RCW are transferred to the office of public defense.

(2)(a) The office of public defense may request any written materials in the possession of the department of social and health services and the special commitment center pertaining to the powers, functions, and duties transferred, which shall be delivered to the custody of the office of public defense. Materials may be transferred electronically and/or in hard copy, as agreed by the agencies. All funds, credits, or other assets held in connection with the powers, functions, and duties transferred shall be assigned to the office of public defense.

(b) Any appropriations made to the department of social and health services for carrying out the powers, functions, and duties transferred shall, on July 1, 2012, be transferred and credited to the office of public defense.
(3) Notwithstanding July 1, 2012, if implementation of office of public defense contracts would result in the substitution of counsel within one hundred eighty days of a scheduled trial date, the director of the office of public defense may continue defense services with existing counsel to facilitate continuity of effective representation and avoid further continuance of a trial. When existing counsel is maintained, payment to complete the trial shall be prorated based on standard contract fees established by the office of public defense under RCW 2.70.025 and, at the director's discretion, may include extraordinary compensation based on attorney documentation.

RCW 10.101

10.101.005 Legislative finding.

The legislature finds that effective legal representation must be provided for indigent persons and persons who are indigent and able to contribute, consistent with the constitutional requirements of fairness, equal protection, and due process in all cases where the right to counsel attaches.

10.101.010 Definitions.

The following definitions shall be applied in connection with this chapter:

(1) "Anticipated cost of counsel" means the cost of retaining private counsel for representation on the matter before the court.

(2) "Available funds" means liquid assets and disposable net monthly income calculated after provision is made for bail obligations. For the purpose of determining available funds, the following definitions shall apply:

(a) "Liquid assets" means cash, savings accounts, bank accounts, stocks, bonds, certificates of deposit, equity in real estate, and equity in motor vehicles. A motor vehicle necessary to maintain employment and having a market value not greater than three thousand dollars shall not be considered a liquid asset.

(b) "Income" means salary, wages, interest, dividends, and other earnings which are reportable for federal income tax purposes, and cash payments such as reimbursements received from pensions, annuities, social security, and public assistance programs. It includes any contribution received from any family member or other person who is domiciled in the same residence as the defendant and who is helping to defray the defendant's basic living costs.

(c) "Disposable net monthly income" means the income remaining each month after deducting federal, state, or local income taxes, social security taxes, contributory retirement, union dues, and basic living costs.

(d) "Basic living costs" means the average monthly

amount spent by the defendant for reasonable payments toward living costs, such as shelter, food, utilities, health care, transportation, clothing, loan payments, support payments, and court-imposed obligations.
(3) "Indigent" means a person who, at any stage of a court proceeding, is:
(a) Receiving one of the following types of public assistance: Temporary assistance for needy families, aged, blind, or disabled assistance benefits, medical care services under RCW 74.09.035, pregnant women assistance benefits, poverty-related veterans' benefits, food stamps or food stamp benefits transferred electronically, refugee resettlement benefits, medicaid, or supplemental security income; or
(b) Involuntarily committed to a public mental health facility; or
(c) Receiving an annual income, after taxes, of one hundred twenty-five percent or less of the current federally established poverty level; or
(d) Unable to pay the anticipated cost of counsel for the matter before the court because his or her available funds are insufficient to pay any amount for the retention of counsel.
(4) "Indigent and able to contribute" means a person who, at any stage of a court proceeding, is unable to pay the anticipated cost of counsel for the matter before the court because his or her available funds are less than the anticipated cost of counsel but sufficient for the person to pay a portion of that cost.

10.101.020 Determination of indigency—Provisional appointment—Promissory note.
(1) A determination of indigency shall be made for all persons wishing the appointment of counsel in criminal, juvenile, involuntary commitment, and dependency cases, and any other case where the right to counsel attaches. The court or its designee shall determine whether the person is indigent pursuant to the standards set forth in this chapter.
(2) In making the determination of indigency, the court shall also consider the anticipated length and complexity

of the proceedings and the usual and customary charges of an attorney in the community for rendering services, and any other circumstances presented to the court which are relevant to the issue of indigency. The appointment of counsel shall not be denied to the person because the person's friends or relatives, other than a spouse who was not the victim of any offense or offenses allegedly committed by the person, have resources adequate to retain counsel, or because the person has posted or is capable of posting bond.

(3) The determination of indigency shall be made upon the defendant's initial contact with the court or at the earliest time circumstances permit. The court or its designee shall keep a written record of the determination of indigency. Any information given by the accused under this section or sections shall be confidential and shall not be available for use by the prosecution in the pending case.

(4) If a determination of eligibility cannot be made before the time when the first services are to be rendered, the court shall appoint an attorney on a provisional basis. If the court subsequently determines that the person receiving the services is ineligible, the court shall notify the person of the termination of services, subject to court-ordered reinstatement.

(5) All persons determined to be indigent and able to contribute, shall be required to execute a promissory note at the time counsel is appointed. The

person shall be informed whether payment shall be made in the form of a lump sum payment or periodic payments. The payment and payment schedule must be set forth in writing. The person receiving the appointment of counsel shall also sign an affidavit swearing under penalty of perjury that all income and assets reported are complete and accurate. In addition, the person must swear in the affidavit to immediately report any change in financial status to the court.

(6) The office or individual charged by the court to make the determination of indigency shall provide a written report and opinion as to indigency on a form prescribed by the office of public defense, based on information

obtained from the defendant and subject to verification. The form shall include information necessary to provide a basis for making a determination with respect to indigency as provided by this chapter.

10.101.030 Standards.

Each county or city under this chapter shall adopt standards for the delivery of public defense services, whether those services are provided by contract, assigned counsel, or a public defender office. Standards shall include the following: Compensation of counsel, duties and responsibilities of counsel, case load limits and types of cases, responsibility for expert witness fees and other costs associated with representation, administrative expenses, support services, reports of attorney activity and vouchers, training, supervision, monitoring and evaluation of attorneys, substitution of attorneys or assignment of contracts, limitations on private practice of contract attorneys, qualifications of attorneys, disposition of client complaints, cause for termination of contract or removal of attorney, and nondiscrimination. The standards endorsed by the Washington state bar association for the provision of public defense services should serve as guidelines to local legislative authorities in adopting standards.

10.101.040 Selection of defense attorneys.

City attorneys, county prosecutors, and law enforcement officers shall not select the attorneys who will provide indigent defense services.

10.101.050 Appropriated funds—Application, reports.

The Washington state office of public defense shall disburse appropriated funds to counties and cities for the purpose of improving the quality of public defense services. Counties may apply for up to their pro rata share as set forth in RCW 10.101.060 provided that counties conform to application procedures established by the office of public defense and improve the quality of services for both juveniles and adults. Cities may apply for moneys pursuant to the grant program set forth in

RCW 10.101.080. In order to receive funds, each applying county or city must require that attorneys providing public defense services attend training approved by the office of public defense at least once per calendar year. Each applying county or city shall report the expenditure for all public defense services in the previous calendar year, as well as case statistics for that year, including per attorney caseloads, and shall provide a copy of each current public defense contract to the office of public defense with its application. Each individual or organization that contracts to perform public defense services for a county or city shall report to the county or city hours billed for nonpublic defense legal services in the previous calendar year, including number and types of private cases.

10.101.060 Appropriated funds—Use requirements.

(1)(a) Subject to the availability of funds appropriated for this purpose, the office of public defense shall disburse to applying counties that meet the requirements of RCW 10.101.050 designated funds under this chapter on a pro rata basis pursuant to the formula set forth in RCW 10.101.070 and shall disburse to eligible cities, funds pursuant to RCW 10.101.080. Each fiscal year for which it receives state funds under this chapter, a county or city must document to the office of public defense that it is meeting the standards for provision of indigent defense services as endorsed by the Washington state bar association or that the funds received under this chapter have been used to make appreciable demonstrable improvements in the delivery of public defense services, including the following:

(i) Adoption by ordinance of a legal representation plan that addresses the factors in RCW 10.101.030. The plan must apply to any contract or agency providing indigent defense services for the county or city;

(ii) Requiring attorneys who provide public defense services to attend training under RCW 10.101.050;

(iii) Requiring attorneys who handle the most serious cases to meet specified qualifications as set forth in the

Washington state bar association endorsed standards for public defense services or participate in at least one case consultation per case with office of public defense resource attorneys who are so qualified. The most serious cases include all cases of murder in the first or second degree, persistent offender cases, and class A felonies. This subsection (1)(a)(iii) does not apply to cities receiving funds under RCW 10.101.050 through 10.101.080;

(iv) Requiring contracts to address the subject of compensation for extraordinary cases;

(v) Identifying funding specifically for the purpose of paying experts (A) for which public defense attorneys may file ex parte motions, or (B) which should be specifically designated within a public defender agency budget;

(vi) Identifying funding specifically for the purpose of paying investigators (A) for which public defense attorneys may file ex parte motions, and (B) which should be specifically designated within a public defender agency budget.

(b) The cost of providing counsel in cases where there is a conflict of interest shall not be borne by the attorney or agency who has the conflict.

(2) The office of public defense shall determine eligibility of counties and cities to receive state funds under this chapter. If a determination is made that a county or city receiving state funds under this chapter did not substantially comply with this section, the office of public defense shall notify the county or city of the failure to comply and unless the county or city contacts the office of public defense and substantially corrects the deficiencies within ninety days after the date of notice, or some other mutually agreed period of time, the county's or city's eligibility to continue receiving funds under this chapter is terminated. If an applying county or city disagrees with the determination of the office of public defense as to the county's or city's eligibility, the county or city may file an appeal with the advisory committee of the office of public defense within thirty days of the eligibility determination. The decision of the advisory committee is final.

10.101.070 County moneys.

The moneys shall be distributed to each county determined to be eligible to receive moneys by the office of public defense as determined under this section. Ninety percent of the funding appropriated shall be designated as "county moneys" and shall be distributed as follows:

(1) Six percent of the county moneys appropriated shall be distributed as a base allocation among the eligible counties. A county's base allocation shall be equal to this six percent divided by the total number of eligible counties.

(2) Ninety-four percent of the county moneys appropriated shall be distributed among the eligible counties as follows:

(a) Fifty percent of this amount shall be distributed on a pro rata basis to each eligible county based upon the population of the county as a percentage of the total population of all eligible counties; and

(b) Fifty percent of this amount shall be distributed on a pro rata basis to each eligible county based upon the annual number of criminal cases filed in the county superior court as a percentage of the total annual number of criminal cases filed in the superior courts of all eligible counties.

(3) Under this section:

(a) The population of the county is the most recent number determined by the office of financial management;

(b) The annual number of criminal cases filed in the county superior court is determined by the most recent annual report of the courts of Washington, as published by the office of the administrator for the courts;

(c) Distributions and eligibility for distributions in the 2005-2007 biennium shall be based on 2004 figures for the annual number of criminal cases that are filed as described under (b) of this subsection. Future distributions shall be based on the most recent figures for the annual number of criminal cases that are filed as described under (b) of this subsection.

10.101.080 City moneys.

The moneys under RCW 10.101.050 shall be distributed to each city determined to be eligible under this section by the office of public defense. Ten percent of the funding appropriated shall be designated as "city moneys" and distributed as follows:

(1) The office of public defense shall administer a grant program to select the cities eligible to receive city moneys. Incorporated cities may apply for grants. Applying cities must conform to the requirements of RCW 10.101.050 and 10.101.060.

(2) City moneys shall be distributed in a timely manner to accomplish the goals of the grants.

(3) Criteria for award of grants shall be established by the office of public defense after soliciting input from the association of Washington cities. Award of the grants shall be determined by the office of public defense.

10.101.900 Construction—Chapter applicable to state registered domestic partnerships—2009 c 521.

For the purposes of this chapter, the terms spouse, marriage, marital, husband, wife, widow, widower, next of kin, and family shall be interpreted as applying equally to state registered domestic partnerships or individuals in state registered domestic partnerships as well as to marital relationships and married persons, and references to dissolution of marriage shall apply equally to state registered domestic partnerships that have been terminated, dissolved, or invalidated, to the extent that such interpretation does not conflict with federal law. Where necessary to implement chapter 521, Laws of 2009, gender-specific terms such as husband and wife used in any statute, rule, or other law shall be construed to be gender neutral, and applicable to individuals in state registered domestic partnerships.

RCW 36.26

36.26.020 Public defender district—Creation—Office of public defender.

The board of county commissioners of any single county or of any two or more territorially contiguous counties or acting in cooperation with the governing authority of any city located within the county or counties may, by resolution or by ordinance, or by concurrent resolutions or concurrent ordinances, constitute such county or counties or counties and cities as a public defender district, and may establish an office of public defender for such district.

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STOKES LAWRENCE, P.S.

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