NO. 96766-1

SUPREME COURT OF THE STATE OF WASHINGTON

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

Respondents,

v.

STATE OF WASHINGTON and WASHINGTON STATE OFFICE OF PUBLIC DEFENSE,

Petitioners.

PETITIONERS' REPLY BRIEF

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I. INTRODUCTION

Respondents Colleen Davison, *et al.*, (collectively Davison) sue the wrong party for the wrong reason. Davison sues the wrong party because, barring proof that the State denies Grays Harbor County the means to provide constitutionally adequate indigent juvenile defense, the claim lies against the county and not the State. Davison concedes that Washington counties are capable of providing "constitutionally adequate—or superior—public defense services" and that some counties provide "stellar" public defense. CP 57-58. Since counties are by Davison's admission capable of meeting the obligations state law assigns to them, the remedy for a county's failure to do so lies against that county.

Davison sues for the wrong reason because their choice of defendants is based on the incorrect notion that state statutes assign the Washington State Office of Public Defense (OPD) the duty of forcing counties to comply with constitutional standards. State law does not compel OPD to do so, as the superior court correctly concluded in dismissing Davison's statutory claim. CP 122-24.

The narrow issue certified for discretionary review poses the question of the State's responsibility for any failing by Grays Harbor County to provide constitutionally adequate indigent juvenile defense services. The lower court has not decided whether indigent juvenile defense

services are, or are not, constitutionally sufficient. CP 548. As such, that question is not properly before this Court. The superior court concluded that even where "the state has delegated operational responsibility for juvenile defense to the counties" a case can nonetheless proceed against the state seeking a remedy for a county's "knowing systemic violation" of constitutional standards. VRP 28:6-17, Dec. 14, 2018 (2018 VRP) (court's oral ruling). That is the question the trial court certified for discretionary review, and this Court should disregard Davison's arguments regarding the adequacy of Grays Harbor County's indigent juvenile defense services

The Court should reverse the decision of the superior court and hold that Davison's remedy lies against Grays Harbor County. It does not lie against the State or OPD.

II. ARGUMENT

A. The State Has a Duty to Act Only if Grays Harbor County is Unable, and not Merely Unwilling, to Provide Constitutionally Adequate Indigent Juvenile Defense

Resolution of this appeal turns on a very narrow question: whether the State's duty to act when a county systemically fails to provide constitutionally adequate juvenile defense arises only upon proof that the county is *incapable* of providing that service (as the State contends), or whether it arises even if the county is merely *unwilling* to fulfill its duty, as Davison contends. The superior court concluded that the State has a duty to

act if it knows of a systemic deficiency in indigent juvenile defense provided by Grays Harbor County, even if the county could correct the deficiency itself and therefore a lawsuit against the county would provide plaintiffs a complete remedy. CP 547.

Davison acknowledges that Washington counties have the capacity to provide constitutionally adequate, "or superior" public defense. CP 57. Davison similarly accepts the State's authority to decide as a matter of policy that indigent juvenile defense be provided at the county level. CP 400.

This posture of the case necessarily narrows the legal question before the Court. Davison's position is, and can only be, that the State bears a duty to remedy a systemic constitutional deficiency in indigent juvenile defense services without regard to the fact that by law the counties are assigned that responsibility. All of Davison's other arguments are mere distractions. The State should prevail on this appeal because the State's duty to act differently than or beyond what it has already provided by statute arises only if the assignment of indigent juvenile defense as a county function is inadequate to satisfy constitutional standards. *See State v. Jorgenson*, 179 Wn.2d 145, 150, 312 P.3d 960 (2013) (state statutes are presumed constitutional).

Davison's argument thus ignores the States statutory assignment of this function to the counties, without bothering to contest that such assignment produces a system that is perfectly capable of satisfying constitutional requirements. *See* Petitioners' Opening Br. at 29-30. But litigants are not free to simply ignore state statutes. The State's system is presumptively valid, unless and until a plaintiff can prove that it is intrinsically incapable of providing constitutionally adequate defense. *See Jorgenson*, 179 Wn.2d at 150. Davison might more productively seek a remedy from Grays Harbor County as the entity that allegedly caused any harm at issue. *See., e.g., Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1132-33 (W.D. Wash. 2013); *see also* Petitioners' Opening Brief at 19-23. Having already conceded that Grays Harbor County is capable of satisfying its obligation, Davison has no remedy from the State. CP 57-58.

Davison makes a strawman argument in lieu of offering a compelling reason why a cause of action should lie against a party that did not cause the alleged harm. Throughout Respondent's Brief, Davison describes the State's position as "abdicating" all responsibility (or similar phrases) for indigent juvenile defense. Davison says this no fewer than a dozen times. Respondents' Br. at 1, 2, 25, 26, 27, 28 (twice, including n 15), 33 (in a section heading), 34, 36 (twice), and 42.

This disingenuous description of the State's position ignores the State's argument both before this Court and below. The State accepts that it has a duty to remedy constitutionally inadequate indigent juvenile defense if, but only if, the system currently in place is incapable of satisfying constitutional requirements. As an argument heading in the State's opening brief explained, "[t]he State does not deny responsibility if it were to fail to provide counties with the means to perform constitutionally mandated functions." Petitioners' Opening Br. at 28. This is not news to Davison on appeal, as the State clearly stated this position in seeking summary judgment below. CP 165. The State described its position below as including the point that, "*at most any State responsibility is secondary and arises only if Grays Harbor County is actually unable to provide constitutionally sufficient juvenile defense services.*" CP 418 (emphasis in original).[1]

The central question this Court is called upon to resolve on discretionary review is narrow: whether the State's role in remedying a known systemic failure by Grays Harbor County in providing

[1] Davison responds to another argument that the State doesn't make, this time with regard to the home rule provision of the state constitution. The State discusses that provision in the context of demonstrating that the State and its various counties are separate legal entities. Petitioners' Opening Br. at 18. Davison claims that the State argues that the home rule doctrine would preclude the State from intervening in local affairs. Respondents' Br. at 39. The State makes no such argument, in part because local home rule powers persist only to the extent that they do not conflict with general laws. Const. art. XI, § 11.

constitutionally adequate indigent juvenile defense services arises only upon proof that Grays Harbor County is incapable of rectifying its own failings or arises any time a plaintiff decides to sue the State instead of the county. If the county is capable of satisfying constitutional standards, the cause of action lies against the county. To rule otherwise would be to simply ignore the statutes that make public defense a local function, without any need to do so. To do so would be to set aside the deference that courts routinely accord the policy choices of the legislative branch. *See Brown v. Owen*, 165 Wn.2d 706, 718, 206 P.3d 310 (2009) (cautioning against infringing on the historic and constitutional rights of the Legislature).

B. The Issue Certified to This Court for Interlocutory Review Is Limited to the State's Responsibility for a Service Assigned by Law to Counties

Davison devotes large swaths to her brief to this Court discussing her argument that indigent juvenile defense services provided by Grays Harbor County are constitutionally inadequate. Respondents' Brief at 3, 6-16, 29-33. But that issue is not before this Court.

The superior court, noting "that the state has delegated operational responsibility for juvenile defense to the counties," concluded simply that a challenge to the sufficiency of that service can nonetheless proceed directly against the State. CP 547. The court concluded this is so even in the absence of evidence that Grays Harbor County in unable to provide constitutionally

adequate service. *Id.* But the trial court went no further. "I don't feel it is at this time appropriate to rule on the underlying facts." CP 548.

The trial court indicated no view as to whether the indigent juvenile defense services provided by Grays Harbor County do, or do not, satisfy constitutional standards. "I find it potentially difficult to believe that," the court explained, "resolving this case on its entirety on a motion for summary judgment would be appropriate." *Id.* The court, rather, envisioned that absent this appeal, "there would be a bench trial." *Id.* Davison's challenge to the sufficiency of indigent juvenile defense in Grays Harbor County therefore abides some future proceeding; it is not currently before this Court.

In any future proceeding to resolve whether Grays Harbor County provides constitutionally adequate juvenile public defense, the County must be present as a party. Otherwise the proceeding will be useless. "In general, even if a judgment purports to affect the rights of third parties, those parties are not bound by the judgment unless their interests were adequately represented by a party to the litigation." *Loveridge v. Fred Meyer, Inc.*, 72 Wn. App. 720, 725, 864 P.2d 417, 419 (1993), aff'd, 125 Wn.2d 759,

887 P.2d 898 (1995). The State offered no defense of Grays Harbor County below, and anticipates offering none in the future.[2]

C. Neither a Positive Rights Analysis nor a Traditional Negative Rights Analysis Supports Davison's Position That the Constitution Compels the State to Take Some Unspecified Action

1. Indigent juvenile defense is not a positive right

Davison grounds much of their argument in the notion that the right of an indigent juvenile is a positive right, akin to the right of Washington children to a basic education. But the right of an indigent person facing charges in juvenile court to have an attorney is unlike the right of all Washington children to a basic education. A positive rights analysis accordingly avails Davison nothing.

The concept of positive rights is based on drawing a distinction between the "vast majority of constitutional provisions," which "are framed as negative restrictions on government action," and other rights that "do not restrain government action [but] require it." *McCleary v. State*, 173 Wn.2d 477, 519, 269 P.3d 227 (2012). That description of positive rights excludes the right to indigent juvenile counsel, which acts to restrain the

[2] Davison notes that the superior court denied the State's preliminary motion to join Grays Harbor County as a necessary and indispensable party. Davison omits that the trial court did so "without prejudice." CP 388. The court explained, "I'm going to exercise my discretion to wait until that is squarely addressed on the merits to this Court."

government's prosecution of offenses rather than to mandate a stand-alone right.

McCleary concerned a provision of the Washington Constitution that makes the provision of a basic education the "paramount duty" of the State. Const. art. IX, § 1. This Court characterized that duty as a "positive right," enforceable judicially to compel the State to meet an obligation set for it in the Constitution. *McCleary*, 173 Wn.2d at 518-19. Article IX, section 1, is thus construed as a mandate; the State could not avoid its stricture, such as by deciding not to provide public schools at all.

The right to counsel is different. It arises only if the government commences criminal or juvenile charges against an individual who desires an attorney but is unable to retain one. *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). The right to counsel is more accurately thought of as a restriction on government: government cannot prosecute an indigent individual for an offense without providing counsel. This is unlike the positive right of a basic education. The right to counsel arises only if the government first charges an indigent individual with an offense, which the Constitution does not require. The right to counsel is not a freestanding right to a benefit or service.

Nor do the out-of-state cases on which Davison relies suggest that the right to counsel is a positive right. Davison makes this claim specifically

about the Idaho decision in *Tucker v. State*, 162 Idaho 11, 394 P.3d 54 (2017). Respondents' Br. at 26 (claiming that the Idaho court concluded "that the right to counsel is a fundamental and positive right under *Gideon*"). But one may search *Tucker* in vain for any reference to "positive rights."

Davison seems to rely on the concept of positive rights in order to shift the burden of persuasion in this case, a role this concept does not serve. Davison's idea seems to be that if the right to counsel is viewed as a positive right, then the duty to provide counsel is more likely to be seen as vested in the State rather than in Grays Harbor County, no matter what the statutes say. *See* Respondents' Br. at 23-25. This makes little sense; whether viewed as a positive right or not, the question remains whether the State has an independent duty to correct a county's failure when the county is capable of doing so.

The test for determining whether the State has satisfied a positive right would be satisfied in this case in any event. As this Court has explained, "in a positive rights context we must ask whether the state action achieves or is reasonably likely to achieve 'the constitutionally prescribed end.' " *McCleary*, 173 Wn.2d at 519 (quoting Helen Herskoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 Harv. L. Rev. 1131, 1137 (1999)). Davison freely admits that Grays Harbor County is capable of providing constitutionally adequate

indigent juvenile defense. CP 57-58; *see also* CP 407 (Davison concedes that Grays Harbor County "likely could but simply is not providing the 'assistance of counsel' for juveniles"). Davison similarly "do[es] not challenge the State's general choice to grant counties authority to implement juvenile public defense services." CP 400. It follows from those points that the State's assignment to counties of indigent juvenile defense "achieves or is reasonably likely to achieve" constitutionally sufficient public defense, if only the remedy is sought from the responsible party.

The right to counsel is thus better characterized as a limitation on governmental authority to prosecute an indigent without providing counsel, and not as a positive right. But even if this case is viewed as relating to a positive right, relief against the State would be unavailable when Grays Harbor County, the entity assigned the public defense function, is by Davison's admission capable of satisfying constitutional standards.

2. A traditional negative rights analysis yields no duty for the State to act unless the statutory system is so inadequate as to be unconstitutional

Davison also fails to establish a constitutional duty on the State, under traditional constitutional analysis, to act when it has provided counties both the authority and the means to provide that service. Davison bears the burden of proving unconstitutional the statutory assignment of indigent juvenile defense as a county function "beyond a reasonable doubt."

Madison v. State, 161 Wn.2d 85, 92, 163 P.3d 757 (2007). Davison cannot do so while conceding that Grays Harbor County is capable of satisfying constitutional standards, a concession that proves the existing statutes constitutionally sufficient.

Davison's argument necessarily depends on the idea that the state cannot merely assign indigent juvenile defense to counties, but must affirmatively act to make sure that all local jurisdictions comply. This entails identifying some constitutional restraint on government action. *See McCleary*, 173 Wn.2d at 519 (contrasting "negative restrictions on government action" from positive rights); *see also Cedar County Committee v. Munro*, 134 Wn.2d 377, 386, 950 P.2d 446 (1998) (noting the need to identify a constitutional limitation on governmental action in order to restrict legislative authority). In other words, before ordering the State to act in a way not contemplated by the statutory system the Legislature has put into place,[3] the Court must find a constitutional restriction that would preclude the Legislature from acting as it has. *See Jorgenson*, 179 Wn.2d at 150.

It is the Legislature's prerogative to determine how to structure the provision of a governmental service. *See Washington State Legislature v.*

[3] *See* Part D, *infra*, and Petitioners' Opening Br. at 11-16.

State, 139 Wn.2d 129, 140, 985 P.2d 353 (1999) (determining the structure of a bill is a legislative prerogative). The respect that each branch of government accords the others in light of the separation of powers precludes the court from invading legislative prerogatives absent a constitutional necessity to do so. *See In re Disciplinary Proceeding Against Petersen*, 180 Wn.2d 768, 781, 329 P.3d 853 (2014) (describing the separation of powers).

Davison asks for a sparse form of declaratory relief, in which this Court would declare that the State has a duty to compel Grays Harbor County to improve its indigent juvenile defense without identifying a legal basis for such a declaration. It is not enough to point airily to the constitution while admitting that Grays Harbor County can perform its assigned role. CP 57-58, CP 407. In order to seek a remedy for a constitutional violation, it is first necessary to establish that the defendant violated a constitutional duty, not that a third party did. *See Quinones v. City of Evanston, Ill.*, 58 F.3d 275, 277 (7th Cir. 1995); *see also* Petitioners' Opening Brief at 19-23.

Davison's failure to identify a specific state action by which the any deficiency on the part of Grays Harbor County could be remedied casts a spotlight on Davison's failure to identify a specific constitutional duty for the State to act. Davison seeks only a general declaration that the State must

do something, without suggesting what. Judicial remedies don't work this way. The declaratory relief sought in this case is akin to a request that Court rejected asking state officers to be ordered "to adhere to the requirements of the Washington State Constitution." *Walker v. Munro*, 124 Wn.2d 402, 407, 879 P.2d 920 1994). The *Walker* court reasoned that "the remedy of mandamus contemplates the necessity of indicating the precise thing to be done." *Id.* Davison's similar failure here to craft a precise judicial remedy demonstrates that Davison cannot suggest a concrete duty to impose on the State. Without being able to identify "the precise things to be done," Davison suggests no specific duty that the State has violated.

D. The Office of Public Defense Lacks Statutory Authority to Direct the Manner in Which Counties Provide Indigent Juvenile Defense

State law has vested public defense services in counties for well over a century. Laws of 1909, ch. 249, § 53; *see generally*, Petitioners' Opening Brief at 11-15. The superior court agreed, first dismissing Davison's statutory cause of action in which she contended that OPD has the authority to direct the provision of trial court public defense. "There is nothing in [RCW 2.70] that gives the Office of Public Defense the authority to do what the plaintiffs have requested, even assuming, as the complaint has alleged, that the defense services in Grays Harbor County violated the constitution and that OPD was aware of that." CP 389. The superior court reiterated that

conclusion in ruling on summary judgment: "It is clear that the state has delegated operational responsibility for juvenile defense to the counties."[4] CP 547.

Nonetheless, Davison continues to claim, against the weight of all authority, that OPD, or the State more generally, has the statutory authority to force Grays Harbor County to improve its indigent juvenile defense. Respondents' Br. at 40-45. The counties, and not the State, are obligated to provide indigent juvenile defense. RCW 36.26.020, RCW 10.101.020, RCW 10.101.030, RCW 43.10.230(3), CrR 3.1(d), Grays Harbor County Superior Court LCrR 3.1(d)(4)(a).[5] *See* Petitioners' Opening Br. at 11-15.

The assignment of public defense as a county function does not leave room for OPD to direct the manner in which counties perform their duties. With regard to trial court public defense, OPD has only the authority provided to it in statute. This includes the role of passing through supplemental state funding to counties and cities through a grant program. RCW 10.101.070 (counties); .080 (cities). OPD also acts as a resource to

[4] The court's sentence continued, "but the state cannot delegate its ultimate constitutional obligation." CP 547. The State agrees, if understood to mean that the state's duty to act arises only if the county is incapable of providing juvenile defense in a constitutionally adequate manner.

[5] On appeal, Davison retreats to the position that state law requires counties to provide "the majority of the day-to-day services." Petitioners' Br. at 5. But counties do not merely provide most trial court public defense services; they provide them all. *See* Petitioners' Opening Br. at 11-15. OPD provides only "oversight and technical support" (RCW 2.70.020(4)) and passes through limited supplemental state funding through a grant program. RCW 10.101.070.

local programs when it provides "oversight and technical assistance to ensure the effective and efficient delivery of services" (RCW 2.70.020(4)) that are authorized by RCW 2.70.020(1)(a) with respect to OPD's grant administration under RCW 10.101. This limited statutory role contrasts sharply with the vastly more expansive role assigned to OPD regarding other services. RCW 2.70.020(1)(b) (appellate indigent defense), .020(1)(c) (representation of parents in dependency and termination actions), .020(1)(f) (representation of respondents in petitions for commitments as sexually violent predators). If the Legislature had intended to grant OPD broader authority in this context, it undoubtedly would have used more explicit language as it did in those other contexts. Hiding broad authority to direct county public defense services in the word "oversight" would be unlikely. The statutory authority for OPD to provide "oversight and technical assistance," (RCW 2.70.020(4)) allows OPD to provide guidance to counties about the grant funding process, but implies no authority to control their actions. It would be natural to expect a clear and definite grant of power if the Legislature intended to grant a state agency the power to control local actions. *See, e.g.,* RCW 29A.04.570 (providing explicit authority for the Secretary of State to review the actions of county auditors administering elections); RCW 29A.04.611 (providing the Secretary of State with authority to adopt rules binding on county auditors).

Davison cites a case brought by the Department of Ecology as an example of how it envisions OPD might enforce constitutional standards against Grays Harbor County. Of course, the question before the Court is not just whether an example exists for State action; the certified question is the State has *a duty* to act when Grays Harbor County is capable of complying with constitutional standards. More importantly, the example *Davison* offers is inapt. Respondents' Br. at 44-45 (citing *Dep't of Ecology v. Wahkiakum County*, 184 Wn. App. 372, 337 P.3d 364 (2014)). But in that case, the Department of Ecology's authority was more than just the did not merely have authority to provide "oversight and technical assistance" to counties, as OPD has under RCW 2.70.020(4). The law under which the Department of Ecology acted in *Wahkiakum* mandated that the department "ensure that 'to the maximum extent possible . . . [biosolids were] reused as a beneficial commodity.' " *Wahkiakum County*, 184 Wn. App. at 383 (quoting RCW 70.95J.005(2)). The department thus acted with an express statutory mandate that OPD lacks in this case.[6]

Davison further suggests that the State must step in to force Grays Harbor County to act even in the absence of a statutory vehicle for doing

[6] In a footnote, Davison also asserts that "[t]he 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." Respondents' Br. at 42 n. 21 (citing CrR 3.1; JuCR 9.2). Davison is mistaken, in that those rules regulate the professional conduct of *lawyers*. They do not regulate counties.

so. This argument necessarily depends on Davison's argument that the State has a constitutional, and not merely statutory, duty to act. *See* Part C above. But this exposes a further problem in Davison's request for relief, a problem that would not arise if it sought relief directly against Grays Harbor County. That is, if the State has a duty to act, but no statutory mechanism for doing so, this Court could not compel the Legislature to create a statutory approach. To do so would be to threaten legislative independence. *See Petersen*, 180 Wn.2d at 781. Certainly the Court could not dictate that the Legislature act in any specific way. "The legislature generally enjoys broad discretion in selecting the means of discharging its duty under" the Constitution. *McCleary*, 173 Wn.2d at 526. Only if the Court were to hold that the existing statutory treatment of indigent juvenile defense is so insufficient as to be unconstitutional could this Court impose a remedy. *See Madison*, 161 Wn.2d at 92 (challenger bears the burden of proving a statute unconstitutional). But even then, any hypothetical future statutory approach would be left to the judgment of the Legislature.

State law thus vests public defense in the counties as a local function. The State and OPD assist the counties by providing grant funding oversight and technical assistance regarding the RCW 10.101 program. State law does not vest OPD, or any agency, with the duty to intervene to

assure that counties provide indigent juvenile defense to constitutional standing.

III. CONCLUSION

This Court should reverse the superior court's ruling and remand with instructions to grant summary judgment in favor of the State and OPD.

RESPECTFULLY SUBMITTED this 29th day of August, 2019.

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