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Date: <u>December 14, 2018</u>	
Time: <u>1:30 PM</u>	
Judge/Calendar: <u>The Honorable Christopher Lanese</u>	

IN THE SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

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

Plaintiffs,

v.

STATE OF WASHINGTON and
WASHINGTON STATE OFFICE OF PUBLIC
DEFENSE,

Defendants.

Case No.: 17-2-01968-34

PLAINTIFFS' RESPONSE TO
11/1/18 ORDER REQUESTING
SUPPLEMENTAL BRIEFING

The Court's November 1, 2018 Order requested supplemental briefing on four questions.
Plaintiffs submit the following points and authorities in response.

QUESTION NO. 1: *Whether the fact that this case concerns juvenile defense rather than adult criminal defense is of any relevance under the law, given that nearly all of the cited authorities concern adult criminal defense.*

Answer: In *State v. A.N.J.*, 168 Wn.2d 91, 225 P.3d 956 (2010), the Washington Supreme Court made clear that accused juveniles have at least the same constitutional right to

1 effective assistance of counsel as adults, and *A.N.J.* and other authorities show that, if anything,
2 status as a juvenile heightens the need for adequate advocacy by counsel.

3 **Analysis:**

4 **A. Accused juveniles have at least the same constitutional right to counsel as adults.**

5 It is well established that *all* accused persons, including juveniles, are guaranteed the
6 fundamental right to counsel afforded by the federal and state constitutions. *A.N.J.*, 168 Wn.2d at
7 96; *In re Gault*, 387 U.S. 1, 41, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967); U.S. Const. amends. VI
8 and XIV; Wash. Const. Art. I, §22. The Washington and U.S. Supreme Courts have recognized
9 that the Constitution guarantees “not just an appointment of counsel, but also effective assistance
10 of counsel.” *A.N.J.*, 168 Wn.2d at 98. The *A.N.J.* court analyzed a juvenile defendant’s
11 constitutional right to counsel by applying case law involving both juveniles and adults. *Id.* at
12 97-98. The court held that “[t]he right of effective counsel ... [is] fundamental to, and implicit in,
13 any meaningful modern concept of ordered liberty,” and that this right extends to children. *Id.* at
14 96-97. As the *Gault* court said, and as the Washington Supreme Court agreed in *A.N.J.*, “neither
15 the Fourteenth Amendment nor the Bill of Rights is for adults alone.” 387 U.S. at 13.

16 Thus juveniles are entitled to the “meaningful adversarial testing” required as part of the
17 constitutional right to counsel, as detailed in Plaintiffs’ Opening Brief in Support of Motion for
18 Summary Judgment at 16-18 (citing *United States v. Cronin*, 466 U.S. 648, 654–56, 104 S. Ct.
19 2039, 80 L. Ed. 2d 657 (1984) (holding “the adversarial process protected by the Sixth
20 Amendment requires that the accused have ‘counsel acting in the role of an advocate.’ The right
21 to the effective assistance of counsel is thus the right of the accused to require the prosecution’s
22 case to survive the crucible of meaningful adversarial testing”) (citations omitted)). *See also In*
23 *re R.K.S.*, 905 A.2d 201, 216 (D.C. 2006) (applying “meaningful adversarial testing” principles
24 in a juvenile case).

1 The *A.N.J.* court affirmed these established legal standards in reviewing a lawyer’s
2 performance regarding a 12-year-old boy’s guilty plea. 168 Wn.2d at 96. The court recognized
3 the various tasks essential to compliance with the constitutional right to counsel for both adults
4 and juveniles – tasks recognized as essential to constitutional compliance by Defendant OPD and
5 tasks which the undisputed evidence shows is lacking in the Grays Harbor County juvenile
6 public defense system: “investigation, testing of evidence, research, and trial preparation.”
7 168 Wn.2d at 98. Plaintiffs’ prior briefing also describes how juvenile class members receive the
8 equivalent of no counsel, and the *A.N.J.* court quoted *Gideon v. Wainwright* recognizing that this
9 “noble ideal [of the constitutional right to counsel] cannot be realized if the poor man charged
10 with crime has to face his accusers without a lawyer to assist him.” 372 U.S. 335, 344, 83 S. Ct.
11 792, 9 L. Ed. 2d 799 (1963) .

12 Applying the same standard for determining violations of the constitutional right to
13 counsel that applies to adults, the *A.N.J.* court ruled that the deficient representation of a juvenile
14 amounted to a violation of the Sixth Amendment because the essential tasks required by the right
15 to counsel were not performed. 168 Wn.2d at 109. Furthermore, although *A.N.J.*, like many
16 members of the Plaintiff class in the present case, made statements allegedly indicating
17 willingness to admit guilt, the Washington Supreme Court firmly noted that this was “not enough
18 to excuse some investigation. False confessions (especially by children), mistaken eyewitness
19 identifications, and the fallibility of child testimony are well documented.” *Id.* at 111. In other
20 words, the court noted the underlying duty to investigate applied equally to a 12 year old, but if
21 anything, was all the more important considering the unique attributes of juveniles.

22 Other Washington cases also use the same test for determining a violation of the
23 constitutional right to counsel in juvenile and adult cases. *See, e.g., State v. Maynard*, 183 Wn.2d
24

1 253, 259-61, 351 P.3d 159 (2015); *State v. Boyer*, 200 Wn. App. 7, 14-17, 401 P.3d 396 (2017);
2 *State v. B.J.S.*, 140 Wn. App. 91, 100-102, 169 P.3d 34 (2007). Other states agree as well. *See*,
3 *e.g.*, *In re M.B.*, 2018-Ohio-4334, 2018 WL 5305034 at * 10 (Ohio App. Oct. 25, 2018); *In re*
4 *K.J.O.*, 27 S.W.3d 340, 342-44 (Texas App. 2000).

5 **B. Juvenile status is relevant in considering violation of the constitutional right to**
6 **counsel because of juveniles’ greater immaturity and vulnerability.**

7 Juvenile status is recognized as relevant in application of the fundamental right to the
8 assistance of counsel. Juveniles may need additional protections due to their immature cognition
9 and judgment, and the consequences of incarceration and conviction that can have a significant
10 impact on a child’s development and life. If anything, a constitutionally-compliant juvenile
11 public defense system must feature more actual advocacy to provide “assistance” and “counsel.”
12 In addition to recognizing the constitutional relevance of professional standards, the *A.N.J.* court
13 also recognized that the attributes of youth – less maturity, more impulsiveness, and greater
14 susceptibility to peer and adult pressure – make representation by constitutionally-adequate
15 counsel even more important for youth, and more harmful when a system fails to provide such
16 representation. Similarly, the U.S. Supreme Court recognizes that juveniles are less mature than
17 adults, noting that the differences between children and adults are “self-evident to anyone who
18 was a child once himself.” *J.D.B. v. N.C.*, 564 U.S. 261, 272, 131 S. Ct. 2394, 180 L. Ed. 2d 310
19 (2011). To this end, the *J.D.B.* court also found that age is a fact that “generates commonsense
20 conclusions about behavior and perception,” and as such “our history is replete with laws and
21 judicial recognition that children cannot be viewed simply as miniature adults.” *Id.* (internal
22 quotes and citations omitted). Furthermore, the court recognized that “[t]he law has historically
23 reflected the same assumption that children characteristically lack the capacity to exercise mature
24

1 judgment and possess only an incomplete ability to understand the world around them.” *Id.* at
2 273.

3 Even before *J.D.B.*, the *Gault* court explained how these attributes of juveniles
4 demonstrate their greater need for counsel’s “guiding hand.” *Gault* explained:

5 The juvenile needs the assistance of counsel to cope with problems of law, to
6 make skilled inquiry into the facts, to insist upon regularity of the proceedings,
7 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.’

8 387 U.S. at 36 (citations omitted). The necessary guiding hand for juveniles must be at least as
9 diligent as for an adult, and likely more so.

10 **C. Professional Organizations and Experts Also Recognize Juveniles’ Right to
11 Constitutionally-Sufficient Representation**

12 The Washington Supreme Court in *A.N.J.* ruled that professional standards are legally
13 relevant to determining whether a violation of the constitutional right to counsel has occurred.
14 168 Wn.2d at 110. A brief survey of such standards is warranted in response to the Court’s
15 question.

16 For example, the attributes of youth described above are recognized in the Washington
17 State Bar Association Guidelines for Juvenile Offense Representation, with which the Supreme
18 Court has required juvenile defenders to be familiar. JuCR 9.2 section 14.1.D. (attached as Ex.
19 45 to Plaintiffs’ Summary Judgment Motion and discussed therein at 18-19). Furthermore,
20 practice standards issued by “a number of national organizations, including the American Bar
21 Association, the Institute for Judicial Administration, and the National Juvenile Defender
22 Center” have “firmly identif[ied] the role of juvenile counsel as a zealous, loyal advocate who
23 abides by the client’s stated interests,” the same as they would for adults. Kristin Henning,
24 “Race, Paternalism, and the Right to Counsel,” 54 Am. Crim. L. Rev. 649, 660 (2017). A 2013

1 assessment of Washington’s juvenile defense by these organizations provides more detail about
2 the importance of counsel’s role in juvenile defense:

3 The role of counsel for a child is a unique one for an attorney. When defending a young
4 person against the accusation of a crime, there is no question that the lawyer’s role is first
5 that of criminal defense attorney. The attorney must know criminal law and procedure,
6 and must follow the rules of professional conduct. But representing a young person
7 stretches the role of the attorney. These clients are less able to defend themselves than the
8 typical adult client. Their stage of development may not include effective tools for
9 decision making. They are more likely than the general population to have learning
10 disabilities and mental health problems, and are more likely to be the victims of neglect
11 and abuse. They are, in a word, vulnerable.

12 Am. Bar Ass’n Juvenile Justice Center, *et al.*, “An Assessment of Access to Counsel and Quality
13 of Representation in Juvenile Offender Matters” at 1 (2013), available at: [http://njdc.info/wp-](http://njdc.info/wp-content/uploads/2013/11/Final-Washington-State-Assessment-Report.pdf)
14 [content/uploads/2013/11/Final-Washington-State-Assessment-Report.pdf](http://njdc.info/wp-content/uploads/2013/11/Final-Washington-State-Assessment-Report.pdf).

15 Experts in the field of juvenile criminal law similarly recognize that the protections
16 needed to ensure juveniles’ constitutional right to counsel are the same as, if not greater than,
17 those required for adult defendants. *See* Henning, *supra*, 54 Am. Crim. L. Rev. at 651; *see also*
18 Kristin Henning, “Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of
19 Child’s Counsel in Delinquency Cases,” 81 Notre Dame L. Rev. 245, 256 (2005) (“the weight of
20 academic opinion now firmly supports the traditional expressed-interest, adversary model of
21 advocacy in delinquency cases.”).

22 Defendant OPD is not only aware of both the constitutional and professional standards
23 applicable to the right to counsel for adults and juveniles, it trains attorneys around the state
24 about this. *See* “Public Defense Improvement Program - Resources for Public Defense
Representation in Juvenile Offender Cases” *available at*:
<https://opd.wa.gov/index.php/program/trial-defense/12-pd/184-juvenile-offender-cases>.

Defendant OPD’s home page for its “Public Defense Improvement Program” recognizes the life-

1 altering consequences at stake in juvenile public defense: “Juvenile court involvement
2 substantially impacts the life of youth and their families – beyond direct consequences such as
3 detention, probation, and restitution. Having a juvenile court record can impact youths’
4 opportunities in areas such as housing, education, employment, and healthcare.”). *Id.* OPD’s
5 website also urges juvenile public defenders to consider the NJDC and NLADA TEN CORE
6 PRINCIPLES For Providing Quality Delinquency Representation Through Public Defense
7 Delivery Systems, *Id.* (linking to [http://njdc.info/wp-content/uploads/2013/11/10-Core-](http://njdc.info/wp-content/uploads/2013/11/10-Core-Principles.pdf)
8 [Principles.pdf](http://njdc.info/wp-content/uploads/2013/11/10-Core-Principles.pdf)), every one of which is violated by the Grays Harbor County juvenile public
9 defense system, as demonstrated by the uncontested evidence submitted on summary judgment.

10 In summary, there is ample authority establishing the relevance of adult right to counsel
11 cases to Plaintiffs’ case involving juveniles. In addition, Plaintiffs’ juvenile status is legally
12 relevant both to application of the constitutional standard, and to an understanding of the
13 increased harm inflicted by violation of the right to counsel.

14 **QUESTION NO. 2:** *The identity of the precise statutory language that delegates*
15 *juvenile defense responsibilities to counties, given that RCW 36.26.020 is permissive and not*
mandatory.

16 **Answer:** No relevant statute exclusively delegates to the counties the constitutional duty
17 to comply with the right to counsel.

18 **Analysis:** Plaintiffs could find no specific direction by the Legislature in any statute that
19 assigns public defense exclusively to counties. Defendants’ suggestions that a full delegation
20 exists are not supported.

21 Defendants claim that “State law requires counties to provide public defense,” and in
22 support of this proposition they cite RCW 36.26.020, .060, .090 and RCW 10.101.030.
23 Defendants’ Summary Judgment Reply at 2-3, 7. But these statutory references do not support a
24 claim that the Legislature has attempted to defer all responsibility for public defense to the

1 counties. As the Court’s question recognizes, RCW 36.26.020 simply *allows* single or multiple
2 counties and cities to create a “public defense district” and to appoint a public defender to head
3 such an office. RCW 10.101.030 does require counties to adopt standards for public defense, but
4 there is nothing in this statute providing that only counties are responsible for upholding public
5 defense standards.

6 No other statute that Defendants cite, or that Plaintiffs could find, supports Defendants’
7 claim. It is true that counties do in general provide public defense services (supplemented by
8 OPD). It is also true that counties are legislatively empowered to, and do, levy taxes to support
9 most (but not all) of public defense. But there is nothing in state law assigning public defense
10 exclusively to counties. And there is certainly no statute that purports to absolve the State of its
11 constitutional duty to provide the assistance of counsel for people unable to afford it.

12 Defendants try to bolster their claim that counties alone are responsible for public defense
13 by positing limitations on OPD that do not exist. For example, Defendants claim that “State law
14 explicitly prohibits OPD from providing public defense services itself. RCW 2.70.020.”
15 Defendants’ Motion for Summary Judgment at 3. This reference is to the last sentence of
16 RCW 2.70.020, which provides only that “The office of public defense shall not *provide direct*
17 *representation of clients*” (emphasis added). This is a narrow prohibition on OPD acting directly
18 as the lawyer for an accused person. Defendants are incorrect in claiming that this provision
19 prohibits the far more general “providing public defense services,” nor could it be such a
20 prohibition given that OPD exists precisely to provide many such services.

21 In their vain attempt to avoid State responsibility for public defense, Defendants read
22 OPD’s explicit and implied powers much more narrowly than the statutes themselves permit.
23 *See, e.g.*, Plaintiffs’ Reply Brief at 8-10. As shown, the Legislature could not constitutionally
24

1 abdicate the ultimate constitutional duty to the counties, but in any case the Legislature has not
2 even attempted to do so. Indeed, as has been extensively discussed in previous briefing, the
3 Legislature has specifically created OPD to, among other things, “implement the constitutional
4 and statutory guarantees of counsel.” RCW 2.70.005. The statutes do not support Defendants’
5 claims of exclusive county autonomy on public defense.

6 **QUESTION NO. 3:** *Whether there is authority on other areas of constitutional law*
7 *regarding whether states may delegate to counties or other local jurisdictions (a) execution*
8 *and (b) ultimate legal responsibility of constitutional obligations.*

9 **Answer:** Where positive constitutional rights are at issue, states retain the ultimate legal
10 responsibility for implementation and may not fully delegate these constitutional duties.

11 **Analysis:** Generally, courts that have considered whether states may delegate ultimate
12 legal responsibility for positive constitutional rights have answered in the negative. Apart from
13 cases cited by Plaintiffs involving public defense functions, Plaintiffs have discovered only cases
14 where such examinations occur with regard to (1) state constitutional rights to public education,
15 and (2) enforcement of the Fourteenth Amendment in school desegregation cases. Otherwise,
16 Plaintiffs have not located other scenarios where courts have reviewed a state’s delegation and/or
17 abdication of its own constitutional responsibilities to local government.

18 **A. Courts Have Held States Responsible for Providing Constitutionally-Adequate**
19 **Public Education**

20 State courts have held that constitutional rights to education must be enforced at the state
21 level, including in Washington State. The Washington State Supreme Court has recognized that
22 the right to education constitutes a “positive right,” requiring an inquiry into whether state action
23 “achieves or is reasonably likely to achieve ‘the constitutionally prescribed end.’” *McCleary v.*
24 *State*, 173 Wn.2d 477, 519, 269 P.2d 227 (2012) (citation omitted).

1 Plaintiffs have already discussed the holding in *Tucker v. State*, 162 Idaho 11, 394 P.3d
2 54 (2017), but *Tucker* sheds unique light on the Court’s question. There, the Idaho Supreme
3 Court compared the state’s duty to ensure constitutionally-sufficient public defense services to
4 the state’s responsibility for the constitutional right to education. *Id.* at 21. Specifically, the court
5 looked to *Osmunson v. State*, a case where the Idaho Supreme Court found that “[o]f course, the
6 ultimate responsibility for fulfilling the state’s [Constitutionally Based Educational Claims Act]
7 cannot be delegated” to local school districts. 135 Idaho 292, 296-97, 17 P.3d 236 (2000).

8 Many other states to consider these issues are in accord. For example, in *Claremont*
9 *School District v. Governor*, the New Hampshire Supreme Court examined whether the state was
10 responsible for upholding the adequacy of public education throughout the state. 142 N.H. 462,
11 475-76, 703 A.2d 1353 (1997). There, the court held:

12 We recognize that local control plays a valuable role in public education;
13 however, the State cannot use local control as a justification for allowing the
14 existence of educational services below the level of constitutional adequacy. The
15 responsibility for ensuring the provision of an adequate public education and an
16 adequate level of resources for all students in New Hampshire lies with the State.

17 *Id.* at 475. *See also McDuffy v. Secretary of Exec. Office of Educ.*, 415 Mass. 545, 621, 615
18 N.E.2d 516 (1993) (“while local governments may be required, in part, to support public schools,
19 it is the responsibility of the Commonwealth to take such steps as may be required in each
20 instance effectively to devise a plan and sources of funds sufficient to meet the constitutional
21 mandate”); *William Penn Sch. Dist. v. Pa. Dep’t of Educ.*, 170 A.3d 414, 451-3 (Penn. 2017)
22 (discussing cases where courts review state rights to education and the scope of the state’s duty).

23 **B. States Are Ultimately Responsible for Desegregation of Schools**

24 Courts have also determined that states cannot abdicate their responsibilities under the
Equal Protection Clause of the federal Constitution in cases addressing school desegregation.
Applying this principle to the right to counsel, in *Phillips v. California* the court found “[t]he

1 State cannot disclaim its constitutional responsibilities merely because it has delegated such
2 responsibilities to its municipalities.” Fresno County, CA Superior Court 2016 at 3.¹ For
3 comparison, the court pointed out that in a school desegregation case, the Fourth Circuit held that
4 “because the Fourteenth Amendment imposes direct responsibility on a *state* to ensure due
5 process . . . a state’s delegation to a political subdivision of the power necessary to remedy the
6 constitutional violation does not absolve the state of its responsibility to ensure that the violation
7 is remedied.” *Id.* at 3-4 (quoting *Stanley v. Darlington County Sch. Dist.*, 84 F.3d 707, 713 (4th
8 Cir. 1996)). *Stanley* held that even if the state delegated responsibility, the state remained
9 ultimately responsible for “failure to take steps to dismantle a [segregated] educational system
10 that it created.” As such, the plaintiffs could have brought suit against both the local school
11 district and the state for desegregation relief. *Id.* at 713.²

12 Consistent with these principles, other courts have held states responsible for racial
13 disparities the state itself perpetuated. For example, in *Bradley v. School Board of City of*
14 *Richmond, Virginia*, the court noted:

15 [t]hat a state’s form of government may delegate the powers of daily
16 administration over public schools to officials with less than statewide jurisdiction
17 does not dispel the obligation of those who have broader control to use the
18 authority they have consistently with the Constitution. In a state where the law
19 formerly compelled racial segregation, this duty includes that of taking
20 affirmative steps to dismantle the dual system. In such instances the constitutional
21 obligation toward the individual school children is a shared one.

21 ¹ This case was previously provided to the Court as Exhibit A to Plaintiffs’ Reply in Support of Plaintiffs’ Motion
for Summary Judgment.

22 ² In *Stanley*, however, the plaintiffs chose to sue the local school district only. *Stanley*, 84 F.3d at 713. Plaintiffs
23 prevailed at trial, after which the school district moved to join the state, and cross-claimed for contribution. *Id.* at
24 710. The district court granted the motion and ordered the state to share in the costs of desegregation of the school
district. *Id.* at 710-11. On appeal, the Fourth Circuit held that though the state could have been a defendant,
plaintiffs did not sue the state and therefore it could not be liable for contribution and ordered to pay for
desegregation costs. *Id.* at 717.

1 51 F.R.D. 139, 142 (E.D. Va. 1970) (internal citations omitted). *See also Godwin v. Johnston*
2 *County Bd. of Educ.*, 301 F. Supp. 1339, 1341 (E.D.N.C. 1969) (holding desegregation of
3 schools “falls not only upon the local school boards, but also upon the State Board of Education
4 and the State Superintendent of Public Instruction”); *Lee v. Macon County Bd. of Educ.*, 267 F.
5 Supp. 458, 478 (M.D. Ala. 1967) (finding the state “under an affirmative constitutional duty to
6 take whatever corrective action is necessary to disestablish [segregated schools]... It cannot be
7 seriously contended that the defendants do not have the authority and control necessary to
8 accomplish this result.”), *aff’d sub nom. Wallace v. U.S.*, 389 U.S. 215 (1967).

9 The dire violations of the constitutional right to counsel in the Grays Harbor County
10 juvenile public defense system have persisted as a result of the State’s failure to act. As was the
11 case with the positive constitutional right to public education and the duty to remedy segregated
12 schools, states may delegate some responsibility to local governments but they may not disclaim
13 all further responsibility. Instead, the ultimate responsibility for complying with constitutional
14 standards lies with the state, and it cannot abdicate this duty.

15 **QUESTION NO. 4: *Whether a separate analysis of the right to counsel is required for***
16 ***the United States and Washington state constitution is necessary under State v. Gunwall 106***
Wn.2d 54, 720 P.2d 808 (1986).

17 **Answer:** A separate analysis of the state and federal constitutional right to counsel is not
18 necessary in this case, but if one is undertaken it would underscore the state’s authority to act to
19 remedy the violation of the right to counsel being inflicted on children in Grays Harbor County.

20 **Analysis:** Washington courts have a duty “where feasible” to resolve constitutional
21 questions first under the state constitution. *State v. Gregory*, — Wn.2d —, 427 P.3d 621, 631
22 (2018). This duty arises in order to honor the “double security” of the protections afforded by
23 both state and federal constitutions, because state constitutions can be interpreted to be more
24 protective of citizens’ rights. *Id.* In this case, it is not necessary for the Court to engage in a

1 separate state constitutional analysis, but if a *Gunwall* analysis is performed, it would make the
2 State’s authority and duty even more clear.

3 The Washington State Supreme Court has not ruled on whether the Washington
4 Constitution provides greater protections in this arena. The court has, however, stated that
5 “[r]eliance on federal precedent and federal constitutional provisions would not preclude us from
6 taking a more expansive view of the right to counsel under state provisions should the U.S.
7 Supreme Court limit federal guaranties in a manner inconsistent with [state decisions].” *State v.*
8 *Fitzsimmons*, 94 Wn.2d 858, 859, 620 P.2d 999 (1980). Some Court of Appeals decisions state
9 explicitly that there is no basis for finding any differences between the state and federal
10 constitutional right to counsel, citing *State v. Medlock*, 86 Wn. App. 89, 99, 935 P.2d 693, *review*
11 *denied*, 133 Wn.2d 1012 (1997). The court in *Medlock* undertook a *Gunwall* analysis but
12 concluded that there were not sufficient reasons to find that the Washington provision provided
13 greater protection.

14 As detailed above in answer to the Court’s Question 1, the Washington Supreme Court
15 has analyzed the state and federal protections as if they provide the same protections to juveniles
16 as to adults. *State v. A.N.J.*, *supra*. The authorities cited in *A.N.J.* and Plaintiffs’ prior briefs
17 provide a more than adequate basis for Plaintiffs to invoke the state’s constitutional duty to
18 address violations of the right to the assistance of counsel. However, we provide a *Gunwall*
19 analysis below to show that if such an analysis is appropriate, the Washington Constitution
20 would provide even greater protection.

21 In *Gunwall*, the court laid out six neutral criteria to consider when “determining whether,
22 in a given situation, the constitution of the State of Washington should be considered as
23 extending broader rights to its citizens than does the United States Constitution.” 106 Wn.2d at
24

1 61. Those criteria are (1) textual language of the State Constitution, (2) differences in the texts of
2 parallel provisions, (3) state constitutional and common law history, (4) pre-existing state law,
3 (5) structural differences between the two constitutions, and (6) matters of particular state or
4 local concern. *Id.* at 61-62. When applied to the right to counsel, a *Gunwall* analysis leads to the
5 conclusion that the Washington State Constitution guarantees at least as much protection for this
6 right as does the Sixth Amendment to the United States Constitution. And, depending on how the
7 federal constitution is interpreted in the future, it may provide even more.

8 Factors 1 and 2 (text): Article I, § 22 of the Washington State Constitution states, “In
9 criminal prosecutions the accused shall have the right to appear and defend in person, or by
10 counsel” The United States Constitutional equivalent, the Sixth Amendment, states, “In all
11 criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence
12 [sic].” While the wording of these texts differ, they are similar in that both guarantee defendants
13 in criminal prosecutions the right to counsel. The second *Gunwall* factor, likewise, does not
14 reveal much difference between the texts. Both provisions guarantee the right to “counsel” for
15 “the accused” in “criminal prosecutions.”

16 Factors 3 and 4 (history and preexisting state law): To date, Washington state courts have
17 treated the state and federal constitutional rights to counsel the same. No case law appears to
18 have interpreted the state provision in a manner inconsistent with the federal, but the Washington
19 Supreme Court’s statement in *Fitzsimmons, supra*, makes clear it would not hesitate to find the
20 state protection broader than the federal if necessary. And as demonstrated by *State v. A.N.J.*, the
21 two provisions have been interpreted to be identical for purposes of enforcing the constitutional
22 right to counsel for juveniles. Should federal law become more restrictive, the question of more
23 protection under the state constitution would arise.

1 Factor 5 (structure of constitution): The right to counsel appears at the beginning of
2 Article I, § 22 of the Washington State Constitution. Conversely, the right to the assistance of
3 counsel appears at the end of the Sixth Amendment. This factor virtually always counsels in
4 favor of independent interpretation because of the Washington Constitution’s fundamental
5 structure to protect individuals. *State v. Foster*, 135 Wn.2d 441, 458-459, 957 P.2d 712 (1998).
6 This factor thus supports a conclusion that the drafters of the state constitution were at least, if
7 not more, concerned about guaranteeing the right to counsel for the accused than the federal
8 drafters.

9 Factor 6 (special state or local concern): This factor strongly supports a conclusion that
10 the state constitution may well be more protective of accused children’s right to counsel.
11 Certainly, juveniles are of great concern to the state, and the welfare of children is
12 quintessentially a state rather than a federal matter. The federal constitution delineates a floor for
13 the rights of children accused of criminal behavior, but there is no need for national uniformity
14 on this matter. Washington does provide greater protections for juveniles in court settings than
15 many other states. *See*, for example, JuCR 1.6 (severe limits on use of restraints in court);
16 JuCR 6.2-6.3 (right to a lawyer in alternative residential cases). Thus this factor does weigh in
17 favor of independent interpretation.

18 Thus, although the state and federal constitutional provisions covering right to counsel
19 likely provide identical protections in this case, Washington’s Constitution would provide more
20 protection in some circumstances.

1 DATED this 16th day of November, 2018.

2 STOKES LAWRENCE, P.S.

3
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19 Attorneys for the Plaintiffs

1 **DECLARATION OF SERVICE**

2 I hereby declare that on this 16th day of November, 2018, I caused a copy of the
3 foregoing to be:

4 electronically filed with the Clerk of the Court using the Thurston County E-Filing
5 system.

6 e-mailed pursuant to e-Service Agreement, to the following:

7 Counsel for Defendants State of Washington and
8 Washington State Office of Public Defense:

9 Eric A. Mentzer, Senior Counsel
10 *EricM@atg.wa.gov*

11 Jeff Even, Deputy Solicitor General
12 *JeffE@atg.wa.gov*

13 Jennah Williams, Paralegal
14 *JennahW@atg.wa.gov*

15 Ali Hollenbeck, Legal Assistant
16 *AliB@atg.wa.gov*

17 Electronic Mailing Inbox
18 *TorOlyEF@atg.wa.gov*

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

21 EXECUTED at Seattle, Washington this 16th day of November, 2018.

22 /s/ Alicia Cason

23 Alicia Cason, Practice Assistant