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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,
Plaintiffs,

v.

STATE OF WASHINGTON and WASHINGTON STATE OFFICE OF
PUBLIC DEFENSE,
Defendants.

ANSWER TO MOTION FOR DISCRETIONARY REVIEW

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TABLE OF CONTENTS

Table of Authorities ii

I. Introduction 1

II. Identity of the Parties 1

III. Decision Below 2

IV. Counterstatement of the Case 2

V. Argument 2

 A. Survey of Relevant Authority Addressing the
 Controlling Question of Law Presented for Review 3

 1. The Right to Assistance of Counsel is a
 Positive Constitutional Right 4

 2. The Superior Court’s Ruling is Supported by
 Persuasive Authority Addressing This Issue in
 Other Jurisdictions 7

 B. The Superior Court’s Ruling Frames the Issue
 Presented 9

VI. Conclusion 12

TABLE OF AUTHORITIES

Cases

Avery v. Alabama,
308 U.S. 444, 60 S. Ct. 321, 84 L. Ed. 377 (1940)..... 5

Braam ex rel. Braam v. State,
150 Wn.2d 689, 81 P.3d 851 (2003)..... 6

Duncan v. State,
284 Mich. App 246, 774 N.W.2d 89 (2009), *vacated*, 486 Mich.
1071, *reinstated*, 488 Mich. 957, *reconsideration denied*, 488
Mich. 1011 (2010) 8

Gideon v. Wainwright,
372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)..... 4

Hurrell-Harring v. State,
15 N.Y.3d 8, 930 N.E.2d 217, 904 N.Y.S.2d 296 (2010)..... 8

McCleary v. State,
173 Wn.2d 477, 269 P.3d 227 (2012)..... 6

Osmunson v. State,
135 Idaho 292, 17 P.3d 236 (2000) 8

Phillips v. California,
Case No. 15CECG02201 (Fresno County, CA Superior Court April
12, 2016) 8

State v. A.N.J.,
168 Wn.2d 91, 225 P.3d 956 (2010)..... 4

State v. A.N.J.,
168 Wn.2d at 98..... 5

Tucker v. State,
162 Idaho 11, 394 P.3d 54, 66 (2017) 7, 8, 9

United States v. Cronic,
466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)..... 5

Statutes

Idaho Code §19-859..... 8

U.S. CONST. amend. VI..... 4

WASH. CONST. ART. I, § 22 4

Other Authorities

Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1137 (1999)..... 6

Jenna MacNaughton, *Positive Rights in Constitutional Law: No Need to Graft, Best Not to Prune*, 3 U. PA. J. CONST. L. 750, 762 (2001) 5

Rules

Rule of Appellate Procedure 2.3(b)(4)..... 1, 2

Rule of Appellate Procedure 4.2(a)(4)..... 2

I. INTRODUCTION

Respondents agree with Petitioner State of Washington and Petitioner Office of Public Defense, as well as the superior court that the proceeding presents “a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.” RAP 2.3(b)(4). This proceeding presents issues of first impression to this Court impacting the constitutional rights of children accused of offenses. As the superior court recognized, the importance of this constitutional issue coupled with the lack of controlling state precedent deserves immediate review so that the superior court may conduct the case under the correct constitutional framework.

Through this Answer, Respondents clarify the issue presented by the superior court’s Order and highlight the persuasive, out-of-state authority that the superior court relied upon in denying the State’s Motion for Summary Judgment and certifying the Order for discretionary review.

II. IDENTITY OF THE PARTIES

Respondents, Plaintiffs below, are a class of children 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. Respondents join the State and Office of Public

Defense's joint motion asking this Court to grant discretionary review of the December 14, 2018 Order of the Thurston County Superior Court.

III. DECISION BELOW

The State moved for discretionary review pursuant to RAP 2.3(b)(4), following the superior court's December 14, 2018 Order (i) denying Defendants' Motion for Summary Judgment; (ii) ruling that the State has a duty to act with regard to a known systemic failure by a county to provide constitutionally adequate indigent defense services; and (iii) certifying the Order for review under RAP 2.3(b)(4). Pet. Ex. A.

IV. COUNTERSTATEMENT OF THE CASE

For the Court's convenience, Respondents incorporate the counterstatement of the case contained in Respondents' Answer to Statement of Grounds for Direct Review at pp. 2-13. The facts set forth there were uncontested, as the State defended Plaintiffs' Motion for Summary Judgment solely by raising legal defenses rejected by the superior court.

V. ARGUMENT

Respondents agree that urgent review by this Court of this question of first impression is warranted under RAP 2.3(b)(4) and 4.2(a)(4). While there is substantial ground for a difference of opinion, the State fails to reference the persuasive, out-of-state authority addressing this question

that the superior court relied upon in its ruling. Based on the superior court's ruling, Respondents would also slightly modify the State's formulation of the issue presented.

A. Survey of Relevant Authority Addressing the Controlling Question of Law Presented for Review

The State's motion obscures the issue actually joined and decided by the superior court in its Order denying the State's Summary Judgment Motion. The State also fails to cite the persuasive authority from other states that clarifies the issue presented and further clarifies the issues which the superior court certified for review.

The superior court recognized that the right to the assistance of counsel is a right that places affirmative duties on the State:

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.

Pet App. B. at 28-29.

The authorities referenced in the superior court’s ruling include authority establishing that the right to assistance of counsel is a positive constitutional right that imposes obligations on the state and persuasive authority from other state courts that have considered the issue presented. Because Petitioners do not brief these authorities in their recitations and issue statement, they are summarized below.

1. The Right to Assistance of Counsel is a Positive Constitutional Right

The right to counsel is guaranteed by both the U.S. Constitution and Washington’s State Constitution. U.S. CONST. amend. VI; WASH. CONST. ART. I, § 22. This right is fundamental and essential to the provision of a fair trial, and the states have a duty to protect it. *Gideon v. Wainwright*, 372 U.S. 335, 342–45, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). “The 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).

Crucially, the right to counsel is not a limitation on what the State can do to its citizens, but rather a demand that the State act to protect its citizens from facing alone the drastic consequences of prosecution. *See Avery v. Alabama*, 308 U.S. 444, 446, 60 S. Ct. 321, 322, 84 L. Ed. 377 (1940) (the “guarantee ... cannot be satisfied by mere formal appointment”); *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984) (the right includes requiring “the prosecution’s case to survive the crucible of meaningful adversarial testing”); *State v. A.N.J.*, 168 Wn.2d at 98 (“not just an appointment of counsel, but also effective assistance of counsel”). Thus the right to counsel is a *positive* constitutional right. Jenna MacNaughton, *Positive Rights in Constitutional Law: No Need to Graft, Best Not to Prune*, 3 U. PA. J. CONST. L. 750, 762 (2001) (positive rights, including the right to counsel, “require some affirmative act by the government to fulfill them”).

A positive constitutional right empowers courts to order the State to take action when the right is being violated. This Court has explained that courts must determine whether the State has abdicated its duty to secure positive constitutional rights:

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. *See* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1137 (1999).

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. The typical inquiry whether the State has overstepped its bounds therefore does little to further the important normative goals expressed in positive rights provisions. ...[I]n a positive rights context we must ask whether the state action achieves or is reasonably likely to achieve “the constitutionally prescribed end.” Hershkoff, *supra*, at 1137.

McCleary v. State, 173 Wn.2d 477, 519, 269 P.3d 227 (2012). *See also Braam ex rel. Braam v. State*, 150 Wn.2d 689, 710, 81 P.3d 851 (2003) (courts have broad powers to require an adequate response from government when dealing with constitutional rights of, in that case, children). As outlined in *McCleary*, in positive rights cases, the judiciary must require the appropriate agencies of the State to act in ways that will adequately implement the right.

Because the right to counsel is a positive constitutional right and the State bears the ultimate responsibility for guaranteeing the right, the question that must be answered in this case before “termination of the litigation” is whether the State has “done enough” to “achieve[]” or is “reasonably likely to achieve” the “constitutionally prescribed end.” Here,

the constitutionally prescribed end is a juvenile public defense system in Grays Harbor County that achieves “meaningful adversarial testing.” As shown in Respondents’ Answer to Statement of Grounds for Direct Review, the evidence at summary judgment establishes that County’s juvenile defense system has systemic, constitutional flaws, the State is fully aware of these flaws and the resultant harms to the County’s children, and that the State falls woefully short of doing “enough” to remedy them.

2. The Superior Court’s Ruling is Supported by Persuasive Authority Addressing This Issue in Other Jurisdictions

Though the superior court recognized that the legal standard governing the State’s responsibility for a systemic violation of the right to counsel is a question of first impression in Washington, it expressly relied on “what appears to be the majority view of other jurisdictions” in its ruling—and the superior court’s prediction that a higher court in this state would do likewise. Pet. App. B. at 29. These decisions from other states are critical to understanding the issue presented in this case.

Several state courts have held that a state may not wholly delegate the positive constitutional duty to governmental subdivisions. *See, e.g., Tucker v. State*, 162 Idaho 11, 394 P.3d 54, 66 (2017) (“[w]hile the provision of public defense has been delegated to Idaho’s forty-four

counties . . . ‘the ultimate responsibility for fulfilling the . . . constitutional duty cannot be delegated’”) (quoting *Osmunson v. State*, 135 Idaho 292, 17 P.3d 236, 240 (2000)); *Hurrell-Harring v. State*, 15 N.Y.3d 8, 26, 930 N.E.2d 217, 904 N.Y.S.2d 296 (2010) (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) (counties 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); *see also Phillips v. California*, Case No. 15CECG02201 (Fresno County, CA Superior Court April 12, 2016) (denying motion to dismiss a claim against the State for deficient public defense services in one county).

Of these decisions, the Supreme Court of Idaho’s opinion in *Tucker v. State* is particularly analogous to the present case. Idaho’s statutory public defense scheme is similar to Washington’s—counties bear substantial responsibility and must themselves provide frontline indigent defense services. *See* Idaho Code §19-859; *Tucker*, 394 P.3d at 66. Yet

Tucker holds that the Fourteenth Amendment left no question that “[t]he State . . . has ultimate responsibility to ensure that the public defense system passes constitutional muster.” *Id* at 64. The Court further held that Idaho’s analogue to Washington’s Office of Public Defense, the Idaho State Public Defense Commission, had authority to implement Idaho’s constitutional duty to provide effective assistance of counsel and remedy deficiencies by requiring the offending “county to explain how the failure will be remedied.” *Id.* at 69.

B. The Superior Court’s Ruling Frames the Issue Presented

Consistent with the persuasive authorities outlined above and the superior court’s well-reasoned ruling, the issue presented for review is:

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

The State contends that it has no further duty if a county has “the means” of providing constitutionally sufficient services. *See* Motion for Discretionary Review at 9-10. Yet this test lacks definition, implies that Grays Harbor County has a greater ability than the record supports, and, most importantly, would improperly restrict the issue to one about taxation authority and funding. The superior court did not base its ruling on cases addressing funding but rather on the cases that address whether criminal

defendants are afforded constitutionally adequate systems of public defense. Pet. App. B at 28-29.

The State's limited framing of the issue does not explain how a court would decide if a county has "the means of providing constitutionally sufficient services," but their briefing to this Court and the superior court equates "means" with the County's ability to levy taxes in support of public defense services. This misses the point 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.

In short, the State's view of its duty is that it has elected to have no duty. This case and the authority cited above proves the failure of this myopic approach. Whether or not Grays Harbor County has "the means," the evidence of record (including OPD's own testimony) establishes that juvenile public defense in Grays Harbor County suffers from systemic, structural problems, which result in a system that provides the children with equivalent of no counsel at all. *See generally* Resp. App. B, C.

The State's assertion that the provision of counsel for the accused is a police power just like other county functions that connect with the criminal justice system, such as police and prosecution, is based on the premise, properly rejected by the superior court, that the State is not a

proper defendant in this declaratory judgment action. This framing ignores that the provision of public defense services is a positive constitutional duty made mandatory on the states—a duty that cannot be abdicated to counties. The State’s proposal implies that a county must reach a crisis point—as the evidence shows is the case in Grays Harbor County—before a lawsuit to provide a remedy may even be filed, because the standard to show a systemic constitutional violation is a high one. In addition to failing to protect Washington’s children, the State’s position is inconsistent with Washington’s constitutional obligations.

Respondents’ complaint seeks a declaratory judgment ruling that the State has a duty to act in the face of its undisputed knowledge of ongoing systemic, constitutional deficiencies. At summary judgment, the superior court overruled the defense the State offered in its motion for summary judgment, instead holding that the State “cannot delegate its ultimate constitutional obligation” and accepted the argument that the constitutional right to the assistance of counsel is a positive constitutional right that places affirmative duties on the State to provide constitutionally adequate public defense services. The issue statement provided above accurately reflects the issue presented in this litigation and permits the State to argue that it has satisfied its constitutional obligation by providing

the counties with “the means” to provide constitutionally adequate public defense.

VI. CONCLUSION

This Court should accept review of this important constitutional issue pursuant to RAP 2.3(b)(4) and 4.2(a)(4).

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

By: /s/ Theresa H. Wang

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CERTIFICATE OF SERVICE

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

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