SUPREME COURT No. 1020619
Court of Appeals No. 75416-I

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Respondent,

vs.

STEPHEN DOWDNEY, JR.,

Petitioner.

AMICUS CURIE MEMORANDUM OF SNOHOMISH COUNTY PUBLIC DEFENDER ASSOCIATION

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A. IDENTITY AND INTEREST OF AMICI

The identity and interest of the amici are set forth in the Motion for Leave to File, submitted contemporaneously with this brief.

B. INTRODUCTION

Criminal procedures must provide due process and equal protection to achieve fairness and justice, not conveniences to ease the State's burdens or stubborn adherence to status quo. The treatment of defendants must "comport with prevailing notions of due process and fundamental fairness." *California v. Trombetta*, 476 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984). The public has a significant interest in the way our State carries out its criminal prosecutions and the way in which criminal defendants are treated. *See e.g., State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005). Accordingly, when there is a system where the stated intent is significantly out of

alignment with the actual impacts, a review of that system is an absolute necessity.

At issue in this case is the Everett District Court-Felony (EDC-F) process.[1] A review of the EDC-F process shows it is an unacceptable system. In this system, defendants are provided notice of the criminal complaint delivered by a Corrections Officer often sliding a paper under the door of the cage they are confined in. The defendant does not appear before a court to defend against a criminal complaint. Defendants, especially those who are indigent, are routinely held for two weeks or more without access to discovery or access to procedural safeguards, such as motions to dismiss. This massively upends the lives of our clients, many of whom are extremely vulnerable and historically disadvantaged. People detained on EDC-F holds face the loss of their housing, employment, access to services and financial support while they

[1] The Everett Division is the division of the district court in Snohomish County that processes felony complaints.

wait, without adequate or fair remedies, to see if the State will file charges.

The Snohomish County Public Defender Association (SCPDA) joins Mr. Dowdney concerns of due process and equal protection. He is not the only defendant negatively impacted by the EDC-F process. SCPDA aims to provide a broader picture of the unconstitutional imbroglio that is EDC-F and why its existence is a substantial public interest. RAP 13.4(b)(4).

C. ARGUMENT

1. The EDC-F System undermines the State and Federal Constitutions' Guarantee of Due Process and Fundamental Fairness – the Public is Assuredly Interested in Whether Government Activity is Fundamentally Unfair.

The EDC-F's affronts to a defendant's due process rights are plentiful and work synergistically to set them up for failure. They are not minor defects in an otherwise workable system. Rather, the system, as currently constructed,

irrevocably harms our clients while significantly limiting their ability to redress their confinement.

a. A defendant held in the EDC-F system lacks access to critical information harming their ability to seek release and damaging their relationship with counsel.

While in custody on an EDC-F complaint, a defendant is constrained from accessing a plethora of critical information that they can use for preparation in their defense, motions for release, and to build rapport and understanding with their counsel. Denial of this information results in harm to several key constitutional protections. *See e.g.*, *State v. Lopez*, 190 Wn.2d 104, 123–25, 410 P.3d 1117 (2018) (recognizing how a counsel's ineffective performance affected the defendant's right to prepare a defense); *In re Addleman*, 139 Wn.2d 751, 754, 991 P.2d 1123 (2000) (noting those held in custody maintain the right to petition the governmnent to redress grievances); *Nordstrom v. Ryan*, 856 F.3d 1265, 1271 (2017) (recognizing

candid communication between the client and attorney are firmly within Sixth Amendment protections).

1. The lack of access to critical information harms our EDC-F clients' ability to prepare for their defense.

While our clients are able to fully prepare and assist in their defense when charges are formally filed in Superior Court, the people charged with EDC-F complaints do not appear in front a judicial officer after they are charged. Nor is there a discovery process while detained on an EDC-F hold. This prejudices their capacity to prepare and assist. Without sufficient information about what conduct was criminal or the State's evidence against them, it is exceedingly difficult for a person held on an EDC-F case and their counsel to meaningfully investigate and plan a defense in the period immediately after their arrest. This early stage is incredibly important as evidence can be lost and witnesses' memories fade. Whether it is security footage that gets routinely erased or potential witnesses become impossible to track down, losing

approximately two weeks of focused investigation and preparation directly after the allegedly criminal conduct can substantially increase the difficulty in defending oneself against the State. In short, while EDC-F clients sit in jail, they are afforded less information and affronted with the ills that come from that lack of information, than if they were formally charged immediately. This situation results in enduring prejudice to our EDC-F clients and offends their constitutional rights.

ii. The lack of access to critical information harms our EDC-F clients' ability to redress their confinement.

EDC-F clients are held by a court of limited jurisdiction, not a court with the authority to adjudicate the charge. They must be presumed innocent and ensured their full protections under the state and federal constitutions. *See Reanier v. Smith*, 83 Wn.2d 342, 349, 517 P.2d 949 (1974) ("An unconvicted accused who is not allowed or cannot raise bail is deprived of his liberty."). For EDC-F clients, the legal

protections of their rights are effectively narrowed to a CrRLJ 3.2 analysis: conditions of confinement and release.

If our in-custody clients appeared in a court authorized to review a felony allegation, there would be a plethora of options to address their custody status, including motions to suppress or dismiss, plea bargains, and, of course, taking the case to trial. None of these options are available to EDC-F clients. They are stuck with a limited pool of choices, specifically the posting of bail, a preliminary hearing, or a bail review motion. However, because of the EDC-F system and the societal conditions people who tend to be charged in this system face, those options are difficult, if not impossible to utilize.

Our EDC-F clients can post bond to get released. Yet, this avenue is, for the vast majority of them, only a hypothetical. It is exceedingly difficult for EDC-F clients to post bond as they are the most economically disadvantaged individuals in our county. They often, at the best of times, live

paycheck to paycheck if they have regular employment at all. Only a small fraction own homes or other property that they can use as collateral. Many others do not have family support that can be relied on for bond assistance. And while there are some groups that provide bail assistance to our clients, those organizations are few in number and often cap the amount they can provide. Simply put, a large majority of EDC-F clients have absolutely no hope of posting bond.

For those who do post bond, it is often not only a burden to the person charged, but to their family members, who post the funds and suffer the loss of household funds needed to meet basic needs.

Moreover, SCPDA has represented clients who had to post twice for the same criminal allegation: first in a court of limited jurisdiction and again in Superior Court. There is often considerable delay in charging if the person posts bail and is released from the EDC-F. Yet, the prosecutor cites to the prior order setting bail as justification for setting bail when the case

is filed in Superior Court. This practice compounds the already high bar to get released by posting bond. Posting bond is already difficult enough, if not outright impossible, for our clients. Some attorneys counsel clients not to post bail at the EDC-F stage so that funds are conserved for a hearing two or more weeks later if the charge is filed in Superior Court. This advice is based on the experience of other clients who have been unable to post bail twice and faced long-term confinement while awaiting trial.

The actual impacts of these systems are relevant to a review of fundamental fairness. Some people accused of crimes are regularly required to post bail twice or face pre-trial detention. Some people wait two weeks to post bail due to the lesser of two evils calculation. The stated intent to provide for considered charging decisions appears in practice very much less intentional and quite arbitrary. A case will be charged within two weeks if the person is in custody and it will be

charged sometime within the statute of limitations if the person posts bail.

The second option for EDC-F clients is a preliminary hearing. However, this is not actually an option. SCPDA has been unable to set a single preliminary hearing while our clients are held on an EDC-F hold. The only time Snohomish County District Court has ever granted our clients' request for a preliminary hearing it did so after the EDC-F hold would end, rendering the preliminary moot. Accordingly, our clients cannot utilize this option to get released.

Our clients' last route to challenge their EDC-F custody is a bail review motion. Yet again, the nature of the EDC-F system undercuts their ability to successfully raise these motions.

EDC-F holds occur after the imposition of bail following a CrRLJ 3.2 hearing. At the hearing, our attorneys provide as much information as possible to the Court to justify release, including their financial situation, family support, and

other reasons for release. This information may not meaningfully change during the EDC-F period. The prevalence of a CrRLJ 3.2 finding of a likelihood of failure to appear as the sole basis to set bail is common, despite the lack of any future hearing set under that cause number. An effective means to demonstrate the client's commitment to show up for future court hearings is for defense counsel to present to the court the hearings needed to defend the case and the client's interest in accomplishing those court hearings. There are no substantive court hearings for EDC-F cases in courts of limited jurisdiction and the uncertainty of where the case is headed does not weigh in the accused's favor. Accordingly, our clients must present some additional information relevant under CrRLJ 3.2 to justify a motion for release or a reduction in bail. CrRLJ 3.2(j). However, EDC-F clients' ability to present such additional information is severely impaired by the EDC-F system's lack of disclosure.

Our clients are not provided full discovery as would be required under CrR 4.7 when a charge is formally initiated. Rather, the only information indicating the potential charges and alleged criminal conduct the defendant receives is a probable cause affidavit. This document is often only a few pages and does not include written witness statements. The accused does not receive *Brady* material or a witness list. *See* CrR 4.7(a)(3) (noting exculpatory information must be disclosed if it negates the defendant's guilt for the offense charged.)

Without access to this information, EDC-F clients face an uphill battle in their motions for release. With only the probable cause affidavit, judges are often presented with the worst possible version of events for our clients. Having access to the full police report, witness statements, and potentially exculpatory information is necessary to reframing the strength of the State's case against the defendant.

With this information, EDC-F clients can argue that the nature of the offense is not one that justifies the imposition of bail. It is particularly important for alleged first-time offenders where their lack of criminal history means the nature of the offense can be the only basis to find they are likely to commit a future violent offense. This information can also be helpful to our clients of color as the full panoply of information can show how law enforcement or the witnesses' interpretation of events was influenced by bias, prejudice, and stereotyping. It is an anathema to this Court and our Constitution that a person be held in custody pending the filing of a charge based on biased and prejudiced interpretations of actions and events when the information necessary to correct and call out such racism is denied. *See* Letter from Wash. State Sup. Ct. to Members of Judiciary and Legal Cmty. (June 4, 2020) ("As lawyers and members of the bar, we must recognize the harms that are caused when meritorious claims go unaddressed due to

systemic inequities or the lack of financial, personal, or systemic support.").

Our clients have a right to redress their EDC-F confinement. However, the ability to effectuate that right is unacceptably and unconstitutionally constrained by how the EDC-F system is utilized. The only option that is truly accessible to every EDC-F client is often hopelessly drained of effectiveness because the lack of a formal filing prevents access to critical information that can be used to justify the elimination, or at least lowering, of bond. Our clients, by virtue of their presumed innocence, are entitled to seek their release from custody pending the State's decision whether to file formal charges. Yet, the system in place for the State to make that decision also enervates that very entitlement. This is a constitutional malady that cannot be abided.

iii. The lack of access to critical information harms the attorney-client relationship between our EDC-F clients and their counsel.

With respect to guarding the attorney-client relationship, the Sixth Amendment does not just ensure confidential communication between client and attorney, but also secures the ability for candid communication. *Nordstrom*, 856 F.3d at 1271. In other words, there is a Sixth Amendment protection against interfering with the defendant and attorney's ability to have frank, honest, and straightforward discussions as that is necessary to ensure the defendant can make informed decisions, but also to secure the space for the client and attorney to build a trusting relationship. However, in yet another ill of the EDC-F system, these discussions are affected by the asymmetrical access to information.

Discovery is a defining principle of our legal system. The public, whether it be from legal television shows, high profile trials, or some other source, are aware of the concept and have some notion that they should have access to the information against them. This is particularly true for criminal defendants who have previously gone through the process. It is

against this backdrop of defendant expectations where EDC-F's informational deprivation causes a breakdown in candid communication.

The attorney, without the substantive information or the procedural protections in the Superior Court rules, is fundamentally hamstrung in their ability to communicate and advise their client. Answers to basic questions from the client, like "What am a looking at?" or "What do they have on me?" are often forced to be non-specific and understandably include hedging language. This EDC-F imposed information restraint significantly hampers an attorney's ability to be straightforward and frank with their client. Moreover, the damage is magnified for several reasons. First, the relationship is in its infancy. It is incredibly important to build trust early on between attorney and client. WSBA, *Not Rules, Relationships!*, 12-13 (2012). This lack of early candor can poison the relationship. Mr. Dowdney, who decided to represent himself in district and superior court, may have experienced this. Additionally, the

client being held in custody furthers threatens the attorney-client relationship. The client is understandably frustrated and concerned by their confinement. Yet, when they wish to engage in their case to rectify their station, they can be met with an attorney who is doing their level best to advise them but simply cannot fully answer their questions because the EDC-F system prevents their access to information.

Our EDC-F clients are often stuck in custody and feeling the full weight of the State marshalling its forces against them. This is a lonely place. They often, especially early on in a case, have a singular entity in their corner, a sole source of reliance: their counsel. Yet, because of the information imbalance baked into the EDC-F system, there is a significant risk of clients becoming immediately skeptical of their attorney, threatening a breakdown of the relationship and otherwise portending potentially worse outcomes. This harm is solely attributable to the construction of the EDC-F system and is incongruent with the Sixth Amendment.

EDC-F directly threatens multiple constitutional protections of our clients. These affronts individually, but especially in combination, work to place our clients in a position where they may face a demonstrably worse outcome than if they were charged with an offense or actually allowed a preliminary hearing. When the State operates in such a way it cannot be viewed as fundamentally fair and is in fact an outrage to constitutional due process protections. *Matter of Troupe*, 4 Wn. App. 2d 715, 730, 423 P.3d 878 (2018) ("Due process requires the fundamental fairness of governmental activity."). The inability to meaningfully engage in their defense, the suffocation of their avenues for redressing their confinement, and the potential damage to the relationship with their attorney demonstrates how the EDC-F system is fundamentally unfair to our clients. It is absolutely in the public's interest to examine the EDC-F system.

2. The Structural Infirmities with EDC-F Magnify the Concerns Identified in Mr. Dowdney's Petition for Review.

The due process and equal protection concerns raised in Mr. Dowdney's petition for review are buttressed and sharpened by the several additional constitutional problems detailed above. Mr. Dowdney's petition focused on how the disparate treatment of EDC-F defendants, compared to those where a complaint is filed in Superior Court, violates due process and equal protection because the former has their time for trial clock delayed while the latter does not. These unequal positions result in EDC-F defendants facing, if there are not continuances, up to 90 days in custody, instead of the normal 60. CrRLJ 3.2.1(g)(2);CrR 3.3(b)(1)(i). This two-week difference is already a major problem as it relates to the constitutional right to a speedy trial. But this harm is brought into focus when considering the other constitutional ills.

Not only does the defendant have to sit in custody with their time for trial delayed, but they are stuck with limited and weakened options to get out, unable to meaningfully begin

preparation of their defense, all while potentially faced with the debilitation of the relationship with their attorney.

EDC-F is a mélange of constitutional violations which the public certainly has a substantial interest in rectifying. But it is not just the violations themselves that should cause alarm. It is the very real way those violations result in the destruction of our clients' lives and our community. Our clients are held in custody for up to thirty days with minimal ability to fight for release or otherwise force the State's hand on the case. If our client had a job upon confinement, it is almost assuredly gone. If they had housing, they very likely can no longer afford rent. If they were enrolled in substance use disorder or mental health treatment, they may be very well ejected from their program. In fact, our clients with substance use disorder face a non-insignificant risk of major bodily harm or death because of their EDC-F confinement. *See* Paul J. Joudrey et al., *A conceptual model for understanding post-release opioid-related overdose risk*, 14 ADDICTION SCI. & CLINICAL PRACTICE 1, 10 (2019).

Moreover, our clients of color are far are more likely to experience these effects, and do so with a serious increase in severity, as the harms are amplified by the litany of already existing racial discriminations. *See* Monica L. Ricci and Carolyn Barry, *Challenges of reentering society for incarcerated African-American men*, 17 MODERN PSYCH. STUDIES 13, 18 (2011) (finding that the barriers facing black men reentering society after confinement are exacerbated by the existing discriminatory structures and attitudes).

D. CONCLUSION

EDC-F is a maelstrom of constitutional violations and real-world destruction where the wreckage is the lives of our clients. By the mere fact they are processed through this system rather than a formal filing process or even through the preliminary hearing process, our EDC-F clients are positioned to experience more constitutional affronts and worse outcomes. The due process and equal protection guarantees of our State and Federal Constitution cannot allow this transgression. U.S.

Const. Amend XIV; Const. art. I, §§ 3, 12. The public should be, and in fact is, monumentally interested in the State respecting the constitutional protections of its residents and ensuring that any violations and the harm flowing from them are identified and resolved. SCPDA, operating at the frontlines of this crisis, request this Court examine this immeasurably cruel system and grant Mr. Dowdney's petition for review.

As required by RAP 18.17(b), the undersigned attorney certifies the word court for the briefing is 3,448.

DATED this 31st day of July, 2023.

Respectfully submitted,

/s/ Colin Patrick

Colin Patrick WSBA#55533
Snohomish County Public Defender Association

IN THE WASHINGTON SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	No. 1020619
vs.	CERTIFICATE OF SERVICE
STEPHEN PALMER DOWDNEY JR.	

I certify that I initiated electronic service of the following document(s) sent via electronic mail, true and correct copies of the following documents on the parties below. Service was initiated on 7/31/2023.

Documents:

1. Amicus Curie Memorandum of Snohomish County Public Defender Association.
2. Motion For leave to File Amicus Curie Memoranda for Snohomish County Public Defender Association.

Parties:

1. Prosecuting Attorney, Bradley Bartlett, Bradley.bartlett@co.snohomish.wa.us
2. Dianne Kremenich, diane.kremenich@co.snohomish.wa.us
3. Attorney, Richard Lechich richard@washapp.org

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

DATED this 31st day of July, 2023.

/s/ Andrea Durst

Andrea Durst – Legal Assistant

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SNOHOMISH COUNTY PUBLIC DEFENDER ASSOCIATION

July 31, 2023 - 9:15 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	102,061-9
Appellate Court Case Title:	State of Washington v. Stephen Palmer Dowdney Jr.
Superior Court Case Number:	16-1-00712-5

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- matthew.pittman@co.snohomish.wa.us
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Comments:

Documents attached: 1. Amicus Curie Memorandum of Snohomish County Public Defender Association 2. Motion For Leave to File Amicus Curie Memoranda for Snohomish County Public Defender Association.

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