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No. 96766-1

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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COLLEEN DAVISON, et al.,

Respondents,

v.

STATE OF WASHINGTON and WASHINGTON STATE OFFICE OF  
PUBLIC DEFENSE,

Appellants.

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**BRIEF OF AMICUS CURIAE**  
**WASHINGTON STATE ASSOCIATION OF COUNTIES**

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## I. INTRODUCTION

“In *Gideon v. Wainwright*, [372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)], the United States Supreme Court held that the Sixth Amendment guarantee of the right to counsel . . . requires that counsel be appointed for an indigent in noncapital as well as capital cases.” *State v. Kanistanaux*, 68 Wn.2d 652, 654, 414 P.2d 784 (1966). The *Kanistanaux* Court recognized that *Gideon*’s holding “is obligatory upon the states by virtue of the Fourteenth Amendment. . . .” *Id.*; *see also* Const. art. I, § 2 (“The Constitution of the United States is the supreme law of the land.”); art. I, § 22 (“Rights of the Accused”). Amicus Curiae Washington Association of Counties’ (“WSAC’s”) member counties perform—and provide the vast majority of the funding for—trial court public defense services in Washington.<sup>1</sup> Because the constitutional duty to provide counsel is “obligatory” upon the State, the State, not the counties, retains ultimate responsibility for providing a constitutionally adequate and uniform system of indigent public defense.

Moreover, this Court’s analysis of positive constitutional rights in the education funding cases demonstrates that the right to counsel is a positive right at least under the State constitution. Thus, the State must act to ensure it “complies with its affirmative constitutional duty” to provide a

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<sup>1</sup> The State provides and funds indigent defense services on the appellate level through a series of contracts with various firms and individuals.

constitutionally adequate public defense in superior court. Accordingly, Davison is entitled to State intervention to remedy the constitutional deficiency claimed.

But the relief Davison requests does not define the scope of the State's obligations to assure compliance with the constitutional requirement to provide defense counsel to indigent defendants. Significantly, Davison does not challenge the adequacy of State funding for indigent defense services or seek additional state funding to remedy the constitutional concern raised. Accordingly, the Court should leave for another day the issue of whether discretionary grant funds and delegated general taxing authority satisfy the State's constitutional public defense obligations under *Gideon* and the State constitution. That issue is not properly before the Court, is the subject of substantial dispute, and should not be decided in the absence of a full record and complete briefing.

## **II. IDENTITY AND INTEREST OF AMICUS CURIAE**

WSAC is a non-profit association that serves all 39 counties throughout the State of Washington. Its members include elected county commissioners, council members, and executives. WSAC also serves as an umbrella organization for affiliate organizations representing county road engineers, local public health officials, county administrators,

emergency managers, county human service administrators, clerks of county boards, and others.

### **III. STATEMENT OF THE CASE**

WSAC adopts the Statement of the Case set forth in the Respondent's Brief filed with this Court on August 2, 2019.

### **IV. ARGUMENT AND AUTHORITY**

#### **A. An Indigent Defendant's Right to Counsel is a Positive Right Requiring Affirmative State Action.**

Neither party to this case disputes that the Sixth Amendment to the United States Constitution guarantees the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538 (1976) ("The right to effective assistance of counsel is a fundamental one, guaranteed by the sixth amendment to the United States Constitution."). Nor is there any dispute that "[a]n accused's right to be represented by counsel is a fundamental component of our criminal justice system." *United States v. Cronin*, 466 U.S. 648, 653, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). Where the parties diverge, however, is in describing the **nature** of the right at issue. Contrary to the State's claims, the right to counsel is a positive right imposing affirmative obligations on the State.

Courts and scholars frequently divide constitutional rights into two broad categories. "Negative rights" constrain the government from

interfering with certain commitments to individual liberty, whereas “positive rights” are “exceptional rights that the constitutional text itself expresses in affirmative form.” Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 330-32 (1985).

While the Sixth Amendment was not initially understood to provide any affirmative guarantee of court-appointed counsel,<sup>2</sup> beginning in the 1930s the U.S. Supreme Court interpreted the right to counsel in positive terms, including an affirmative duty on the part of the government to provide legal assistance if the accused cannot afford it. *See, e.g., Powell v. Alabama*, 287 U.S. 45, 58, 68-73, 53 S. Ct. 55, 77 L. Ed. 158 (1932); *Johnson v. Zerbst*, 304 U.S. 458, 467-68, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). Three decades later, *Gideon* established a categorical federal constitutional right to court-appointed counsel in criminal prosecutions and made that right obligatory upon the states. 372 U.S. at 342-45.

Since *Gideon*, the U.S. Supreme Court repeatedly has confirmed the affirmative nature of indigent defendants’ right to counsel. *See United States v. Bryant*, 136 S. Ct. 1954, 1962, 195 L. Ed. 2d 317 (2016) (Sixth Amendment “requires appointment of counsel for indigent defendants whenever a sentence of imprisonment is imposed”); *Turner v. Rogers*, 564

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<sup>2</sup> *See* Note, “A Prison is a Prison is a Prison”: Mandatory Immigration Detention and the Sixth Amendment Right to Counsel, 129 HARV. L. R. 522, 525 (2015).

U.S. 431, 441, 131 S. Ct. 2507, 180 L. Ed. 2d 452 (2011) (“This Court has long held that the Sixth Amendment grants an indigent defendant the right to state-appointed counsel in a criminal case.”); *O’Dell v. Netherland*, 521 U.S. 151, 167, 117 S. Ct. 1969, 138 L. Ed. 2d 351 (1997) (“the sweeping rule of *Gideon*...established an affirmative right to counsel in all felony cases”). And federal circuit courts have come to the same conclusion. *See, e.g., Burnett v. Kerr*, 835 F.2d 1319, 1321 (10th Cir. 1988) (Sixth Amendment “has been interpreted to mean not only that the government may not prevent a defendant from being represented by counsel, **but also that the government has the affirmative obligation to provide counsel for those criminal defendants who cannot afford such services themselves**” (emphasis added)); *Cooks v. Newland*, 395 F.3d 1077, 1080 (9th Cir. 2005) (“*Gideon* held that the Sixth Amendment requires the state to appoint counsel for indigent criminal defendants.”).<sup>3</sup>

Consistent with the above authorities, numerous scholars have concluded that the Sixth Amendment right to counsel is a “positive right.” *See* Tribe, *supra*, at 331-32 (assistance of counsel is an exceptional right expressed in positive form); Note, *supra*, at 524-25 (Supreme Court has interpreted Sixth Amendment right to counsel in affirmative terms); Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the*

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<sup>3</sup> *See also United States v. Sanders*, 247 F.3d 139, 150 (4th Cir. 2001); *Gaines v. Kelly*, 202 F.3d 598, 604 (2d Cir. 2000); *Anaya v. Baker*, 427 F.2d 73, 74-75 (10th Cir. 1970).

*U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 576 (1992) (Sixth Amendment grants the accused “a veritable panoply of positive rights”); Randolph N. Jonakait, *The Right to Confrontation: Not a Mere Restraint on Government*, 76 MINN. L. REV. 615, 616-17 (1992) (Sixth Amendment is a grant of positive rights to those charged with a crime).

Although this Court has not had occasion directly to rule whether the right to counsel is a positive right, the Court should now recognize that it is. Like the federal cases cited above, this Court has previously acknowledged the affirmative nature of the Sixth Amendment right to counsel. *See State ex rel. Brundage v. Eide*, 83 Wn.2d 676, 679, 521 P.2d 706 (1974) (Sixth Amendment “imposes upon the state the obligation of furnishing counsel to indigent criminal defendants at no cost to the defendant”).

This Court has also laid the groundwork for recognizing the right to counsel as a “positive right.” In *Seattle Sch. Dist. No. 1 of King Cty. v. State*, 90 Wn.2d 476, 585 P.2d 71 (1978), the Court analyzed whether article IX, section 1 of the Washington constitution<sup>4</sup> created a “positive right” to education. In its analysis, the Court specifically mentioned the right to counsel as an example of a “judicially enforceable affirmative

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<sup>4</sup> This section provides that “[i]t is the paramount duty of the state to make ample provision for the education of all children residing within its borders. . . .”

dut[y] of the State.” *Id.* at 502 & n.6. The Court concluded the State constitution’s guarantee to make ample provision for the education of the State’s children was a “true right” created by a “positive constitutional grant” that imposes a judicially enforceable duty on the State. *Id.* at 500-02, 513 n.13. In *McCleary v. State*, 173 Wn.2d 477, 269 P.3d 227 (2012), this Court further explained the “distinction between positive and negative constitutional rights is important because it informs the proper orientation for determining whether the State has complied with its” constitutional duty. *Id.* at 518. The Court noted that “[i]n the typical constitutional analysis, we ask whether the legislature or the executive has overstepped its authority under the constitution.” *Id.* But the Court concluded that 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.” *Id.*

The State cites no authority for its summary claim that the right to counsel is “unlike the positive right of a basic education.” *See* Pet. Reply Br. at 8-10; *see also State v. Hoffman*, 116 Wn.2d 51, 71, 804 P.2d 577 (1991) (“Arguments not supported by relevant citation of authority need not be considered by this court.”). The State’s position conflicts with the

wealth of post-*Gideon* authority discussed above, as well as this Court's acknowledgment of the right's affirmative nature and discussion of positive rights in *Brundage*, *Seattle Sch. Dist. No. 1*, and *McCleary*. Indeed, the nature of the right to counsel is not defined by prosecutorial discretion, as the State contends. The government's decision to prosecute determines, in part, the class of individuals who have a right to counsel. But once the right attaches, the State must take action to meet its duty to provide effective assistance of counsel to those who cannot afford it.

In sum, consistent with the U.S. Supreme Court's post-*Gideon* cases and this Court's analysis holding the State's paramount educational duty a positive right, this Court should hold that the Sixth Amendment to the U.S. Constitution and article I, sections 2 and 22 establish a positive right to counsel that requires state action.<sup>5</sup> *See also* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1138, 1156 (1999) (positive rights impose affirmative obligations on the state and "are not simply structural limits on governmental power; they are also prescriptive duties compelling government to use such power to achieve constitutionally fixed social

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<sup>5</sup> Art. I, § 22 provides at least the same protection as the Sixth Amendment. *State v. Fitzsimmons*, 94 Wn.2d 858, 859, 620 P.2d 999 (1980) ("Reliance on federal precedent and federal constitutional provisions would not preclude us from taking a more expansive view of the right to counsel under state provisions should the United States Supreme Court limit federal guarantees in a manner inconsistent with [Washington Supreme Court precedent].").

ends”); Tribe, *supra*, at 333-34. Such rights “requir[e] the court to take a more active stance in ensuring that the State complies with its affirmative constitutional duty.” *McCleary*, 173 Wn.2d at 519; *see also Seattle Sch. Dist. No. 1*, 90 Wn.2d at 502 (judiciary “has ample power to protect constitutional provisions that look to protection of personal ‘guarantees’”).

Accordingly, this Court’s review in cases involving the right to counsel for indigent defendants should focus not on whether the State has done too much, but on whether the State has done enough. *McCleary*, 173 Wn.2d at 519. Stated another way, in the positive rights context the Court “must ask whether the state action achieves or is reasonably likely to achieve ‘the constitutionally prescribed end.’” *Id.* (quoting Hershkoff, *supra*, at 1137); *see also Sch. Dists.’ All. for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 616, 244 P.3d 1 (2010) (Stephens, J. concurring) (same).

**B. The State Has Ultimate Constitutional Responsibility to Remedy Systemic Violations of the Right to Counsel.**

It is an open question whether and to what extent states may delegate their constitutional obligations under *Gideon* to subunits of government, including counties. That question is not at issue here.<sup>6</sup> But

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<sup>6</sup> While Davison “accept[s] that counties have been assigned responsibility to operate and administer trial-level public defense services and are expected to use county taxing authority to pay for most...public defense functions,” the constitutionality of that arrangement is not before the Court. *See Resp. Br.* at 36.

even assuming the State may delegate public defense functions to counties, it unquestionably cannot wash its hands of its affirmative duty to take action to “achieve the constitutionally prescribed” right to public defense counsel. For the reasons stated below, this Court should definitively so hold.

First, WSAC adopts and incorporates Davison’s argument and analysis on this issue, including the discussion of *Tucker v. State*, 162 Idaho 11, 394 P.3d 54 (2017) and similar cases. See Resp. Br. at 26-28. This Court has time and again recognized (as did the *Tucker* Court) that *Gideon* made the right to counsel obligatory on the **states**. See *Brundage*, 83 Wn.2d at 679 (Sixth Amendment “imposes upon the **state** the obligation of furnishing counsel to indigent criminal defendants” (emphasis added)); *City of Tacoma v. Heater*, 67 Wn.2d 733, 735-36, 409 P.2d 867 (1966) (Sixth Amendment right to counsel is “binding upon the **states**” (emphasis added)); *State v. Fitzsimmons*, 93 Wn.2d 436, 443, 610 P.2d 893 (1980) (*Gideon* “established the indigent’s Sixth Amendment right to counsel **at the expense of the state**” (emphasis added)), *vacated*, 449 U.S. 977, 101 S. Ct. 390, 66 L. Ed. 2d 240 (1980), *affirmed on remand*, 94 Wn.2d 858, 620 P.2d 999 (1980), *overruled in part on other grounds*, *City of Spokane v. Kruger*, 116 Wn.2d 135, 803 P.2d 305 (1991). Although the State has delegated the majority of public defense functions

to counties, the ultimate constitutional duty cannot be delegated. *Tucker*, 162 Idaho at 21.

Second, the affirmative nature of the right (as discussed above) precludes the State from delegating its ultimate constitutional duty to counties. “To have a ‘positive’ right is to have a claim against the state, that is, other citizens, for some good or service. . . . Such rights involve the affirmative obligation of others, enforceable by the state.” Charles M. Freeland, *The Political Process as Final Solution*, 68 IND. L. J. 525, 535-36 (1993). Accordingly, the State is ultimately responsible for correcting any systemic impediment to indigent defendants’ right to counsel.

Again, this Court can and should look to the education context in defining the State’s duty with respect to the positive right to counsel. In states where an affirmative right to education exists, courts have held the state cannot rely on delegation to evade ultimate responsibility for ensuring the provision of education. *See McCleary*, 173 Wn.2d at 528 (rejecting State’s reliance on local funding to support constitutionally required basic education program); *Claremont Sch. Dist. v. Governor*, 142 N.H. 462, 475-76, 703 A.2d 1353 (1997) (“[T]he State cannot use local control as a justification for allowing the existence of educational services below the level of constitutional adequacy.”); *Horton v. Meskill*, 31 Conn. Supp. 377, 386, 332 A.2d 113 (1974) (statutory system that delegated to

municipalities the state's constitutional duty to furnish public education violated state constitution). Here, the State cannot shift its responsibilities to counties to evade its ultimate obligation to ensure provision of the positive right to public defense counsel.

**C. The Adequacy of State Funding Is Not Before the Court and Should Not Be Addressed Here.**

Davison has not alleged or argued deficiencies in the State's indigent defense funding scheme. Nevertheless, the State broadly claims that it has given counties sufficient financial means to provide constitutionally adequate defense services. Under the State's view, discretionary grant funds and delegated taxing authority are sufficient to cover the State's public defense obligations under *Gideon*. Pet. Opening Br. at. 29-30. Not only is this issue not properly before the Court, the State's position is open to substantial disagreement. The State's attempt to persuade this Court to adopt its position without the benefit of a developed record and briefing from opposing viewpoints—including the counties that currently bear the brunt of the responsibility to provide and pay for trial court public defense—should be rejected.

**1. Adequacy of state public defense funding is not at issue in this case.**

As an initial matter, this case presents no basis for the Court to rule on the constitutional adequacy of indigent defense funding in Washington.

Davison has not alleged any state funding deficiencies and has specifically disavowed any request for additional state funding. *See* Resp. Br. at 47-48; *see also* Pet. Opening Br. at 26-27 (acknowledging that the present case does not involve a broad challenge to the system of funding public defense). Nor are any counties—the purported recipients of adequate state funding—parties to this lawsuit. Accordingly, neither the parties here nor counties across the state have had reason or opportunity to brief the issue.<sup>7</sup>

The State’s summary allegations with respect to funding are unsupported by evidence and irrelevant to the limited issues before the Court. Nor do Davison’s unsupported “concessions” regarding Grays Harbor County’s ability to provide adequate defense services establish facts binding on any county. On this record, the adequacy of State funding for trial court public defense is simply outside the scope of this case. Accordingly, the Court should decline to reach (on the merits or in dicta) whether state discretionary funds and delegated taxing authority are sufficient to meet constitutional requirements. *See State v. Wheaton*, 121 Wn.2d 347, 365, 850 P.2d 507 (1993) (declining to review issue where inadequate record and argument precluded reasoned analysis of the issue); *Maehren v. City of Seattle*, 92 Wn.2d 480, 503 n.13, 599 P.2d 1255 (1979) (resolution of issues not before the Court “must await another day”).

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<sup>7</sup> As discussed below, counties have reason to dispute the State’s allegations and will likely do so in the proper case.

**2. Adequacy of state public defense funding is an open and disputed question in Washington.**

Contrary to the State's representations, there remains a genuine dispute in Washington regarding the constitutional adequacy of the State's financial contribution to trial court public defense. WSAC and its member counties are at the forefront of this critically important statewide issue. The concerns discussed below provide key context and further demonstrate the imprudence of ruling on this issue absent a full record and complete briefing on the merits.

In Washington, counties pay over 96 percent of trial court public defense costs; the State contributes less than four percent.<sup>8</sup> Due in large part to implementation of new public defender caseload standards, county public defense expenditures have grown exponentially in recent years and constitute a significant portion of county budgets.

Whatever the situation may be in Grays Harbor County,<sup>9</sup> WSAC is participating as amicus curiae on behalf of many counties that strongly disagree with the State's claim regarding funding adequacy. With the

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<sup>8</sup> See Washington State Association of Counties, 2019 Legislative Session, Increased Funding for Trial Court Public Defense, *available at* [http://wsac.org/wp-content/uploads/2019/07/19LegPri\\_1.23\\_Defense.pdf](http://wsac.org/wp-content/uploads/2019/07/19LegPri_1.23_Defense.pdf) (last visited Sept. 27, 2019). In contrast, 23 states fully fund public defense and another eight states fund more than 50 percent. *Id.* Washington is one of the lowest contributors nationally to public defense. *Id.*

<sup>9</sup> Grays Harbor County is not a party to this lawsuit and has not weighed in on its own ability to provide constitutionally adequate public defense services under existing levels of state funding.

support and cooperation of those counties, WSAC has repeatedly asked the Legislature to fully fund trial court public defense. *See* HB 1086, 66th Leg., Reg. Sess. (Wash. 2019) (requiring state to increase public defense services funding by ten percent every year, with full funding by 2029); SB 5098, 66th Leg., Reg. Sess. (Wash. 2019) (same); HB 2687, 65th Leg., Reg. Sess. (Wash. 2018) (similar); SB 6420, 65th Leg., Reg. Sess. (Wash. 2018) (similar); HB 2031, 65th Leg., Reg. Sess. (Wash. 2017) (requiring state to fully fund public defense services). To date, the Legislature has declined to act, leaving counties to shoulder this financial burden.

To claim (as the State does here) that all counties have adequate means to provide constitutionally sufficient defense services based solely on discretionary grant funds and delegated taxing authority that is not even specific to public defense—without analysis of (among other factors) the numerous other public services counties must perform, the percentages of county budgets dedicated to specific uses, the use of tax revenues, and variation between counties in the provision and funding of public defense and other services, not to mention the constitutionality of the State’s delegation of its duty and its reliance on discretionary local taxes to pay for this State obligation—is unacceptably simplistic. To address each of these factors in detail would far exceed the bounds of a 20-page amicus brief. But even without the benefit of such an analysis, the funding

sources identified by the State do not come close to fully funding trial court public defense.

First, to the extent the State claims it directly funds trial court public defense via grants, it vastly overstates the impact of such funding. On appeal, the State identifies one potential source of such grant funds: the public defense improvement program administered under chapter 10.101 RCW. *See* Pet. Br. at 29-30. But this source not only is entirely discretionary with the State, it does not approach the amount needed to cover basic trial court defense costs. The program is based on “appropriated funds” under RCW 10.101.050, which are consistently low and have not grown in proportion to increases in caseloads and related costs. And any appropriated funds must be used to **improve** the quality of indigent defense in several specified ways. They cannot be used to **supplant** county funds used for public defense services prior to disbursement of funds.<sup>10</sup> Counties thus remain burdened with the vast majority of trial court public defense costs. Finally, the public defense improvement funding scheme creates constitutionally significant

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<sup>10</sup> *See* Washington State Office of Public Defense, County/City Use of State Public Defense Funding, *available at* [http://www.opd.wa.gov/documents/00457-2017\\_Policy-Use-of-State-Funds.pdf](http://www.opd.wa.gov/documents/00457-2017_Policy-Use-of-State-Funds.pdf) (last visited Sept. 27, 2019). The OPD documents and other information located at this link and in the links cited *infra*, footnotes 11-16, constitute public information of which this Court may take judicial notice. *See* ER 201(b), (f); *State ex rel. Helm v. Kramer*, 82 Wn.2d 307, 319-20, 510 P.2d 1110 (1973); *Pudmaroff v. Allen*, 138 Wn.2d 55, 65 n.5, 977 P.2d 574 (1999).

discrepancies between counties. For example, in 2017 Garfield County spent \$36,541 on public defense and received a distribution of \$11,893 via RCW 10.101.050 for use in 2017. In contrast, King County spent \$69,814,122 on public defense but received \$1,311,833 under RCW 10.101.050's grant scheme.<sup>11</sup> Thus, King County's distribution amounted to less than 2 percent of its total spending while Garfield County's distribution amounted to over 32 percent of its total spending.

In the trial court, the State also identified the Extraordinary Criminal Justice Act, RCW 43.330.190 (the "Act"), as a source of additional state funds. The Act establishes a procedure for counties to petition for reimbursement with respect to certain costs incurred in aggravated murder cases and provides that any appropriated funds be distributed based on a prioritized list. *Id.* The Act does not provide for general funding of trial court public defense. And the Legislature may or may not appropriate funds. Several counties requested funds for costs incurred in the years 2015-2018, but no appropriation was made.<sup>12</sup> Even in years where appropriations are made, counties may receive less than

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<sup>11</sup> See Washington State Office of Public Defense, 2018 Status Report on Public Defense in Washington State (May 2019), *available at* [https://www.opd.wa.gov/documents/00732-2019\\_StatusReport.pdf](https://www.opd.wa.gov/documents/00732-2019_StatusReport.pdf) (last visited Sept. 27, 2019); Washington State Office of Public Defense, 2017 Status Report on Public Defense in Washington State (April 2018), *available at* [https://www.opd.wa.gov/documents/00530-2017\\_StatusReport.pdf](https://www.opd.wa.gov/documents/00530-2017_StatusReport.pdf) (last visited Sept. 27, 2019).

<sup>12</sup> See <https://www.opd.wa.gov/program/ex-criminal-justice-costs> (last visited Sept. 27, 2019).

requested or nothing at all. In 2014, Jefferson County (\$246,000), Mason County (\$154,009), and King County (\$2,687,095) appeared on OPD’s prioritized list recommended for funding. But the Legislature appropriated only \$400,000 total—\$246,000 for Jefferson, \$154,000 for Mason, and zero for King.<sup>13</sup> Similar reductions and cuts from the prioritized list occurred in 2010-2013.<sup>14</sup> In fact, since the Act took effect in 1999, the Legislature has never appropriated the full amount of the prioritized list requests.<sup>15</sup>

The State also claims it provides counties with general revenue sources sufficient to cover the cost of providing public defense. But this argument fares no better than the State’s direct funding claim. First, none of the identified revenue sources are specifically dedicated to trial court public defense. *See* RCW 84.52.043(1) (general property tax); RCW 84.52.135 (additional regular property tax for “criminal justice purposes”); RCW 82.14.030 (sales and use tax); RCW 82.14.340 (additional sales and use tax for “criminal justice purposes”); RCW 82.14.350 (sales and use

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<sup>13</sup> *See* [http://www.opd.wa.gov/documents/0326-2014\\_PrioritizedList.pdf](http://www.opd.wa.gov/documents/0326-2014_PrioritizedList.pdf); <http://www.opd.wa.gov/documents/0332-2014-ECJExcerpt.pdf> (last visited Sept. 27, 2019).

<sup>14</sup> For example, ten counties requested Extraordinary Criminal Justice Act funds for the year 2010 in a total amount of over \$6.7 million, yet the Legislature awarded only \$591,000 divided among three of those counties. *See* [https://www.opd.wa.gov/documents/0038-2010\\_PrioritizedList.pdf](https://www.opd.wa.gov/documents/0038-2010_PrioritizedList.pdf); [https://www.opd.wa.gov/documents/0039-2010\\_ECJExcerpt.pdf](https://www.opd.wa.gov/documents/0039-2010_ECJExcerpt.pdf) (last visited Sept. 27, 2019).

<sup>15</sup> *See* <https://www.opd.wa.gov/program/ex-criminal-justice-costs> (last visited Sept. 27, 2019).

tax for juvenile detention facilities and jails); RCW 82.14.450 (sales and use tax one-third of which is limited to “criminal justice purposes, fire protection purposes, or both”); RCW 9.46.110 (gambling excise tax). Without a dedicated revenue source, indigent defense must compete with the many other services counties are required to provide to their residents.

Second, with respect to the general property tax (counties’ major tax revenue source), the Legislature has imposed a 1 percent growth cap. *See* RCW 84.55.005(2); 84.55.010. Property tax collection thus grows at a rate significantly lower than the rate of increase in the cost of providing critical county services, including public defense.<sup>16</sup> This State-imposed limit on county taxing authority directly undercuts the State’s claim that it has provided counties adequate taxing authority to fund public defense.

Third, several of the State’s identified revenue sources require voter approval. *See* RCW 84.52.135(2), (3); RCW 82.14.350(1); RCW 82.14.450(1). This Court in analogous circumstances has found such authority insufficient to fund positive constitutional rights because it leaves funding to the “whim of the electorate” and leads to funding

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<sup>16</sup> For example, while county public defense costs increased by an average of 13.4 percent from 2015 to 2016, property tax collection increased by an average of only 2.37 percent in the same period (1 percent cap plus 1.27 percent from new construction). *See* Washington State Office of Public Defense, 2017 Status Report on Public Defense in Washington State (April 2018), *available at* [https://www.opd.wa.gov/documents/00530-2017\\_StatusReport.pdf](https://www.opd.wa.gov/documents/00530-2017_StatusReport.pdf), and Washington State Office of Public Defense, 2016 Status Report on Public Defense in Washington State (March 2017), *available at* [http://www.opd.wa.gov/documents/00429-2016\\_StatusReport.pdf](http://www.opd.wa.gov/documents/00429-2016_StatusReport.pdf) (last visited Sept. 27, 2019); <https://dor.wa.gov/about/statistics-reports> (last visited Sept. 27, 2019).

discrepancies between counties. *See Seattle Sch. Dist. No. 1*, 90 Wn.2d at 525-26 (State's affirmative duty to make ample provision for education is not fulfilled by merely authorizing school districts to submit special excess levy requests to voters); *see also McCleary*, 173 Wn.2d at 528 (noting inequities in statewide education system resulting from reliance on local-level funding). Here, the constitutionality of the State's reliance upon a system of funding that depends in part on revenue sources requiring voter approval is an open question subject to challenge in the appropriate case.

In sum, this Court should leave for another day the question whether State discretionary funds and delegated taxing authority are sufficient to cover the State's public defense obligations under *Gideon*.

## V. CONCLUSION

WSAC respectfully requests that the Court confirm that (1) the right to counsel under the Sixth Amendment and the Washington constitution is a positive right requiring affirmative state action and (2) the State cannot delegate to counties the ultimate responsibility for compliance with such right. But this Court should decline to rule on issues not properly before the Court in this case—namely, the constitutional adequacy of the current state system of funding trial court public defense. That issue should await resolution in an appropriate case affording all affected parties the opportunity to participate.

RESPECTFULLY SUBMITTED this 27th day of September,  
2019.

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PROOF OF SERVICE

I am and at all times hereinafter mentioned was a citizen of the United States, over the age of 21 years, and not a party to this action. On the 27<sup>TH</sup> day of September, 2019, I caused to be served, via the Washington State Appellate Court's Portal System, a true copy of the foregoing document upon the parties listed below:

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