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**SUPREME COURT OF THE STATE OF WASHINGTON**

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

Respondents,

v.

STATE OF WASHINGTON and WASHINGTON STATE OFFICE OF  
PUBLIC DEFENSE,

Petitioners.

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**STATE'S REPLY TO AMICI**

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## I. INTRODUCTION

The Legislature has made a longstanding policy decision to delegate both the authority to bring charges in juvenile proceedings and the responsibility to provide indigent defense to Washington counties. Amici object to that approach, arguing that the State should have to step in and fund juvenile defense in a county even if the county is fully capable of paying for constitutionally adequate juvenile defense itself. Nothing in the state or federal constitution requires that approach, and this Court should not overturn the Legislature's considered judgment absent evidence that counties are *unable* (rather than simply *unwilling*) to fund juvenile defense adequately.

Amici Juvenile Law Center and National Legal Aid and Defender Association, in one brief, and Amicus National Juvenile Defender Center, in a separate brief (collectively Juvenile Centers) address several points regarding the importance of indigent juvenile defense. The State agrees that juvenile public defense is important, but that does not answer the question here. The Legislature's decisions about how to allocate duties are presumptively constitutional. *See Lenander v. Dep't of Ret. Sys*, 186 Wn.2d 393, 403, 377 P.3d 199 (2016) (statutes are presumed constitutional). And there are many important constitutional rights, especially in the criminal justice system—from the right against self-incrimination to the right to

exculpatory evidence—that local governments implement. The importance of these rights and the risk of local violation does not mean that the State must handle the entire criminal justice process itself.

Amicus Washington State Association of Counties (WSAC) agrees with the State on a crucial point: that Plaintiffs in this case have presented no evidence or argument that either Grays Harbor County or counties generally are unable to fund constitutionally adequate juvenile defense. WSAC Brief at 12-13. But WSAC argues that even if counties *could* provide constitutionally adequate juvenile defense, they should not have to do so because the right to counsel is a “positive right.” WSAC Brief at 3-9. WSAC ignores that the right to counsel kicks in only when *a county* decides to prosecute someone for an offense. WSAC wants counties to retain control over criminal prosecution, but force the State to bear the resulting costs of indigent defense. There is no constitutional basis to impose that rule.

## II. ARGUMENT

### A. **The Issue Certified to This Court for Interlocutory Review is Limited to the State’s Responsibility for Indigent Juvenile Defense When Counties are Capable of Providing that Service**

The sole issue before this Court is:

May the State of Washington be held responsible for violating the constitutional rights of indigent juvenile defendants in one county where the State has statutorily assigned the responsibility of providing indigent defense to

counties and has given counties the authorities necessary to perform that function in a constitutional manner?

Petitioners' Opening Br. at 2. The superior court's ruling at issue here was simply that a plaintiff can seek relief directly from the *state* for constitutionally-deficient indigent juvenile defense provided by a *county* even in the absence of evidence that the county is unable to meet constitutionally minimum standards. CP at 547.

Amici's failure to focus on the narrow issue actually presented in this case renders many of Amici's arguments beside the point. This is an interlocutory appeal, raising a single issue of law; focus on that issue remains essential. *See* Petitioners' Reply Br. at 6-8. *See Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 303 n.4, 103 P.3d 753 (2004) (courts need not consider arguments raised only by amici).

**B. Reply to Brief of Amicus Curiae Washington State Association of Counties**

**1. The Remedy for Constitutionally Insufficient Indigent Juvenile Defense Lies Against the Counties Unless the State Deprives the Counties of the Means of Satisfying Constitutional Requirements**

WSAC's argument regarding the role of the State fails to acknowledge the Legislature's prerogative to determine the manner in which the State satisfies constitutional obligations. *See Wash. State Farm Bur. Fed'n v. Gregoire*, 162 Wn.2d 284, 300-01, 174 P.3d 1142 (2007). The

Legislature has assigned both criminal prosecution and indigent public defense to counties, ensuring that counties bear the cost of the criminal justice policies they adopt. The Legislature's statutory system in this instance would fail to satisfy the Constitution if, but only if, the Legislature failed to provide counties ways to provide constitutionally sufficient indigent juvenile defense. WSAC agrees that counties' capability of providing service is not at issue on this appeal. WSAC Amicus Br. at 12.

WSAC's suggestion that this Court look to education cases for guidance on the State's role regarding indigent juvenile defense is unfruitful. The Washington Constitution makes basic education the State's "paramount duty." Const. art. IX, § 1. Every child has a right to a constitutionally adequate basic education, regardless of circumstance. *Id.* In contrast, and without minimizing the important of juvenile public defense, an indigent juvenile's right to counsel arises only upon the county's commencement of charges. RCW 13.40.140(2) (right to counsel applies at "all critical states of proceedings"). Unlike the right to a basic education, there is no "positive right" to counsel unless a county first charges a juvenile with an offense. And providing a defense is just one element of a proceeding that in other respects is pursued by and through county officers at the county level. Where the county is capable of providing constitutionally adequate indigent juvenile defense, the State's statutory system for providing that

service locally is not constitutionally infirm. A litigant's remedy thus lies against the county, not the State.

The parties do not dispute that a right to counsel arises when an indigent juvenile is charged or prosecuted for an offense. WSAC errs by equating the existence of a right with the proposition that a remedy lies against the State when the function of providing counsel is assigned to counties. Nevertheless, the State's existing statutory system assigning that function to counties survives constitutional muster whether indigent juvenile defense is viewed as a positive or negative right. *See* Petitioners' Reply Br. at 8-14.

**2. WSAC Asks the Court to Impose New Obligations on the State Even if Counties Can Provide Constitutionally Sufficient Indigent Juvenile Defense**

WSAC correctly states that the adequacy of county resources to provide indigent juvenile defense is not properly at issue on this appeal. WSAC Amicus Br. at 12-13. The State made the same point in this case. Petitioner's Reply Br. at 6-8. WSAC also correctly states that the sufficiency of Grays Harbor County's indigent juvenile defense services cannot be determined on the current posture of this case. Davison, for her part, admits that Grays Harbor County is capable of providing constitutionally adequate indigent juvenile defense. CP 57-58; CP 407

(“Plaintiffs claim that [Grays Harbor] County likely could but simply is not” providing constitutionally adequate counsel).

These facts about the posture of this case and the record have important implications for this appeal: For purposes of this appeal, the ability of Grays Harbor County to provide constitutionally sufficient indigent juvenile defense is uncontested. Grays Harbor County is not bound by that point (because it is not a party), but it is a premise of the narrow question posed to this Court. *See Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 728, 818 P.2d 1062 (1991) (uncontested facts are verities on appeal). Thus, the question before the Court is whether plaintiffs can proceed directly against the State without first establishing that the County is incapable of performing the duties assigned to it by statute.

WSAC’s argument has potentially far-reaching implications. Acceptance of the notion that the State becomes responsible even if the county *could* fund adequate indigent defense but has simply chosen not to would effectively undermine the Legislature’s authority to make the policy decision as to what level of government should provide a service. This would be so even if the state has delegated both the authority to provide that service and the ability to raise the resources necessary to provide the service. That makes no sense. A county should not be able to impose on the State

costs that it could cover but chooses not to because it would rather spend money on other things, even if they aren't constitutionally required.

**C. Reply to Briefs of Amici Curiae National Juvenile Defender Center, Juvenile Law Center, and National Legal Aid and Defender Association**

The Juvenile Centers offer valuable insight on the importance of indigent juvenile defense and the way in which it contrasts with adult criminal defense. Legal defense for juveniles presents unique challenges because of the developmental stage of juveniles.

The State agrees that the legal services provided to indigent juveniles must satisfy constitutional standards. But the question before the Court does not address what services do, or do not, satisfy constitutional standards. The information offered by the Juvenile Center amici could be valuable in a future proceeding, but the question now is simply whether a plaintiff alleging a county's systemic failure to provide constitutionally adequate indigent juvenile defense can seek a remedy against the State without first establishing that the county statutorily assigned to provide that defense is incapable of meeting constitutional minimums. The issue is not what services satisfy constitutional standards, but when a remedy may lie against the State.

### III. CONCLUSION

For these reasons, and for the reasons the State set forth in prior briefing, the Court should reverse the superior court's ruling and remand with instructions to grant summary judgment in favor of the State and Office of Public Defense.

RESPECTFULLY SUBMITTED this 28th day of October, 2019.

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