□ Expedite
□ No Hearing Set
X Hearing Set
Date: August 25, 2017
Time: 9:00 a.m.
Judge: Honorable Christopher Lanese

SUPERIOR COURT OF THE STATE 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, Plaintiff, v. STATE OF WASHINGTON and WASHINGTON STATE OFFICE OF PUBLIC DEFENSE, Defendant.	Case No. 17-2-01968-34 PLAINTIFFS' REPLY ON MOTION FOR CLASS CERTIFICATION

Defendants' Opposition is based on faulty premises about the State's responsibility for public defense and a fundamental misunderstanding of this case and public defense class actions. Plaintiffs meet all of the criteria for class certification.

A. Whether The State Is Responsible For Constitutionally Adequate Public Defense Is A Crucial Issue in This Case.

The State tries to suggest at pages 2-3 that it is not responsible for constitutionally adequate public defense services. This section of the State's submission is labelled "Factual Background," but it is instead a legal argument about an issue

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central to this case: Whether the State is ultimately responsible for enforcing the constitutional right to adequate counsel. In its argument on this crucial issue, the State tellingly neglects to cite or engage with a single public defense reform related case; the Sixth Amendment or its state counterpart; or RCW 2.70.005, which places responsibility squarely on the Office of Public Defense ("OPD"):

> In order to **implement the constitutional and statutory guarantees of counsel** and to ensure effective and efficient delivery of indigent defense services funded by the state of Washington, an office of public defense is established as an independent agency of the judicial branch. (Emphasis added.)

Defendants are not the first to seek to shirk their constitutional duties, but courts across the country—including most recently the Idaho Supreme Court—have repeatedly found that states are ultimately responsible for ensuring the adequate provision of public defense services and cannot abdicate that responsibility to other governmental entities. *Tucker v. State*, 162 Idaho 11, 394 P.3d 54, 64 (2017).[1] The ultimate issue of responsibility cannot be resolved on the current issue of class certification, but it is far from a "fact" that the State and OPD—both of which are defendants—can shirk responsibility for the Grays Harbor juvenile public defense system.

Most importantly, the position Defendants adopt—that they are not legally responsible for what is happening in Grays Harbor County to children constitutionally entitled to public defense services—is precisely the common "course of conduct" that supports class certification.

[1] *See also*, the United States' Department of Justice *amicus* brief filed in the *Tucker* case, available at https://www.justice.gov/opa/file/850831/download, at 15, 18 ("A State does not satisfy its obligation under *Gideon* simply by appointing lawyers to indigent defendants. . . . Rather, those lawyers must be appointed under circumstances that permit them to do their jobs. …If systemic, structural conditions are such that appointed counsel functions as counsel in name only, the State has not provided the "assistance" of counsel that *Gideon* and the Sixth Amendment require.").

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King v. Riveland, 125 Wn.2d 500, 519-520, 886 P.2d 160 (1994). Whether the State must legally do more to require constitutional juvenile public defense in Grays Harbor affects all juveniles in the proposed class equally and is thus a common issue.

B. Cases Challenging Public Defense Systems Are Routinely Certified As Class Actions; Individual Determinations of Unconstitutionality Are Not Required.

In its effort to avoid class certification, the State does not cite a single case challenging public defense systems in which a class was not certified. In all of the cases challenging a system that Plaintiffs are aware of, class certification has been granted. *See, e.g., Wilbur v. City of Mt. Vernon*, 989 F. Supp. 2d 1122 (W.D. Wash. 2013); *Hurrell-Harring v State of New York*, 930 N.E.2d 217, 15 N.Y.3d 8, 904 N.Y.S.2d 296 (N.Y. May 6, 2010); *Kuren v. Luzerne Cnty.*, 146 A.3d 715 (Pa. 2016).

The State correctly says the court needs to understand the elements and issues in a case in order to certify a class, but then misses exactly those points by arguing that Plaintiffs have not shown "commonality" or "predominance." Opposition at 9-10. As is clear from our motion and the Complaint, Plaintiffs propose class certification for declaratory relief under *CR 23(b)(2)*, which allows certification if "The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Whether individual issues "predominate" is not implicated in "(b)(2)" classes, but rather only when a party is seeking class certification under *CR 23(b)(3)*. Plaintiffs do not seek a (b)(3) class, so "predominance" is not an issue.

And as the cases cited above demonstrate, the State's argument on the "commonality" requirement that does apply in 23(b)(2) cases also reflects a fundamental misunderstanding of

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the standard for determining whether a public defense *system* is unconstitutional. The standard to be applied is not the *individual* "ineffective assistance" standard of *Strickland v. Washington,* 466 U.S. 668; 104 S. Ct. 2052; 80 L. Ed. 2d 674 (1984) but, as stated in the Complaint, paragraph 5, whether the system is capable of requiring the prosecution's case to survive the "crucible" of "meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656, 659, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). This distinction between claims about the system as it affects defendants' pretrial and throughout the process and individual claims that focus only on one case's outcome is the basis for the kind of systemic declaratory relief Plaintiffs seek here. *See, e.g., Hurrell-Harring*, *supra*, 930 N.E.2d 220-228.

The cases cited above properly address the issues not from the standpoint of what has happened in each individual criminal case, but whether the system as a whole fails to provide adequate adversarial testing for the class—thus placing plaintiffs at imminent risk of irreparable harm, as the public defense systemic cases say. Plaintiffs explicitly seek only prospective declaratory relief; although individual criminal cases are relevant to whether the system as a whole is unconstitutional under the proper standard, Plaintiffs do not seek to re-litigate each case to provide people with relief from their convictions or sentences.

Because a single system is involved and individual outcomes are not the issue, commonality is present. *Wal-Mart Stores, Inc., v. Dukes,* 564 U.S. 338, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011) and its progeny do not counsel otherwise. As quoted by the State, *Wal-Mart* states that class certification is appropriate when "one stroke" will resolve an issue that is "central to the validity" of a claim. 564 U.S. at 350. The responsibility of the State for constitutional public defense is precisely such an issue. As the State makes clear in its arguments here, it claims only narrow responsibilities for public defense in Grays Harbor. Whether that

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"course of conduct" is constitutional can be decided for all in the class in one stroke. Similarly, under the proper standard in this systemic case, the class will also be equally affected by adjudication of the question whether the juvenile system in Grays Harbor is providing constitutionally adequate defense services.

C. The Class Is Large Enough To Be Certified.

The State seems to suggest that plaintiffs have failed to show why joinder of individual claims would not suffice in this case. Opposition at 6. But joinder is not possible because the proposed class (Complaint paragraph 29) includes juveniles who will come into the system in the future:

> All indigent persons 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.

The proposed class thus describes the group of people who are and will be subjected to a system that the Complaint shows causes great harm. The Complaint seeks only prospective declaratory relief from this system. As in the other public defense cases and nearly all other criminal justice cases challenging a system, the only realistic and efficient way to decide the issues in this case is through class treatment. It is a paradigmatic class action.

The State does not seem to challenge that sufficient numbers of juveniles are subjected to the system under scrutiny. As stated Plaintiffs' opening brief at 9-10, the "numerosity" requirement has been met.

D. Additional Facts Are Not Needed, But Even If They Were, Counsel Have Been Prevented From Accessing Those Facts.

Given the nature of the actual claims in this case, Plaintiffs have shown more than

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enough for this court to certify the class. Nevertheless, the State insists that Plaintiffs need more. But as is apparent from Plaintiffs' Motion For Access that is also before the court, and as the State well knows, Plaintiffs' counsel have been prevented from getting more information from incarcerated juveniles who are members of the proposed class. In its filings, the State claims Plaintiffs have alleged an insufficient factual basis for class certification and simultaneously that this court can do nothing to provide Plaintiffs counsel with the very access to the facts the State claims are lacking. Defendants cannot have it both ways. Should this court determine that more information or discovery is necessary before class certification can be considered, such a ruling would only underscore the need for an order requiring access to the incarcerated juveniles.

E. Plaintiffs Have A Class Representative Who Has Standing And Is An Adequate Representative.

The State makes various arguments in the opposition to class certification about K.B., her guardian who brought suit on her behalf, and the taxpayer plaintiff. Most of these arguments are irrelevant and none are well taken.

To the extent the State is trying to suggest that K.B. is not a proper or adequate class representative, the State is incorrect. The proposed class is juveniles in pretrial status. When the complaint was filed, K.B. was in pretrial status, so she clearly has standing to represent the class—under well-settled law, her standing relates back to the time of the filing of the motion for class certification because her situation is capable of repetition but evading review. *County of Riverside v. McLaughlin*, 500 U.S. 44, 50-52, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991). As these cases demonstrate—and as the wealth of other classes certified under nearly identical circumstances confirm—it would be nearly impossible to find named plaintiffs for a civil suit challenging the adequacy of public defense services if courts required that the plaintiffs maintain

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a pretrial status for the life of the case. In fact, part of the issue often challenged in this type of litigation is sub-standard representation that typically forces indigent defendants to plead guilty instead of going to trial.

K.B. is also a more than adequate representative to raise both the profound deficiencies in the system that she was subjected to, *e.g.*, Complaint at paragraphs 9, 22-25, and to raise the question of the State's responsibility for the deficiencies in the system. As the Complaint alleges, the deficient representation she endured was emblematic of the deficient representation provided generally to juveniles in Grays Harbor. K.B.'s claims are typical and she is certainly an adequate class representative.[2] Neither is it a problem that K.B. is the only named plaintiff. As the plain language of CR 23 makes clear, "*One or more* members of a class may sue . . . as representative parties on behalf of all." CR 23(a) (emphasis added).

The State irrelevantly makes arguments about differences between K.B. and her guardian Colleen Davison, while also correctly stating that juvenile K.B. and Ms. Davison are in effect one party. Whether couched as Ms. Davison on behalf of K.B. or K.B. on her own, we are talking about only one party, the proposed class representative.

There is nothing in the complaint suggesting that taxpayer plaintiff Gary Murrell is seeking to represent a class. Nevertheless, the State in its Opposition on this class certification motion tries to argue that Mr. Murrell is not a proper taxpayer plaintiff. This has nothing to do with class certification and Plaintiffs will not respond to the State's taxpayer argument in this reply.

Conclusion

[2] There is no need to have more than one class representative, but again if for some reason there were a need to get more information to support class certification, Plaintiffs' counsel is currently blocked from access to incarcerated juveniles, the very people we would have to see to obtain additional representatives.

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For the foregoing reasons, and those previously given, the proposed class should be certified.

DATED this 24th day of August, 2017.

Respectfully submitted,

By:

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Plaintiff,

v.

STATE OF WASHINGTON and WASHINGTON STATE OFFICE OF PUBLIC DEFENSE,

Defendant.

Case No. 17-2-01968-34

CERTIFICATE OF SERVICE

I, Kaya McRuer, am a legal assistant for the American Civil Liberties Union of Washington Foundation, 901 Fifth Avenue, Suite 630, Seattle, WA 98164. I hereby certify that on the date indicated below, I caused to be served via email to the following pursuant to e-service agreement and electronically filed with the Clerk of the Court using the Thurston County e-filing system true and correct copies of the ***Plaintiffs' Reply on Motion for Class Certification*** and this ***Certificate of Service*** on the following:

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

DATED this 24th day of August, 2017 at Seattle, Washington.

KAYA MCRUER

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