Supreme Court No. 1054424

Yakima County Superior Court No. 25-2-00718-39

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

VICTOR CUEVAS, ORLANDO CISNEROS, JESUS GUZMAN, ON THEIR BEHALF AND ON BEHALF OF OTHER SIMILARLY SITUATED INDIVIDUALS,

Petitioners,

v.

YAKIMA COUNTY; YAKIMA COUNTY DEPARTMENT OF CORRECTIONS; JEREMY WELCH, DIRECTOR OF THE YAKIMA COUNTY DEPARTMENT OF CORRECTIONS, IN HIS OFFICIAL CAPACITY; YAKIMA COUNTY SUPERIOR COURT; BOARD OF YAKIMA COUNTY COMMISIONERS; AMANDA MCKINNEY, YAKIMA COUNTY COMMISSIONER, IN HER OFFICIAL CAPACITY; KYLE CURTIS, YAKIMA COUNTY COMMISSIONER, IN HIS OFFICIAL CAPACITY; LADON LINDE, YAKIMA COUNTY COMMISSIONER, IN HIS OFFICIAL CAPACITY; YAKIMA COUNTY DEPARTMENT OF ASSIGNED COUNSEL; PAUL KELLEY, DIRECTOR OF YAKIMA COUNTY DEPARTMENT OF ASSIGNED COUNSEL, IN HIS OFFICIAL CAPACITY,

Respondents.

STATEMENT OF GROUNDS FOR DIRECT REVIEW AND MOTION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

Because of decades of neglect of Washington's public defense system, counties across our state struggle to meet their constitutional obligation to provide public defenders to indigent people charged in their courts. *Washington State Ass'n of Ctys. v. State*, 34 Wn. App. 2d 879, 906, 572 P.3d 1225 (2025). Confusion about what process should be used when counties cannot provide public defenders has led to a patchwork of responses to the problem, resulting in justice by geography. Depending on where a person is charged, they may have counsel, their case may be dismissed because counsel is unavailable, or they may be held in jail indefinitely until counsel can be provided. This is unfair and creates significant harm to many people charged with crimes across our state.

This case arises from an especially acute failure to provide counsel in Yakima County. From November of 2022 to July of 2025, Respondents, referred to herein collectively as "Yakima County," failed to provide public defenders to hundreds of people who were charged with crimes in Yakima County

Superior Court and determined to be indigent. *Infra*. § II. Nonetheless, Yakima County continued to charge people, hold many people in custody, and subjected others to conditions of release, for weeks or months until counsel could be provided. *Id*.

Yakima County was not the only county in Washington experiencing shortages of public defenders. *Infra*. § VI(B)(1). In 2024, Benton and King counties faced similar issues, and Spokane, Clark, Franklin, and Mason counties are either currently facing shortages that prevent timely appointment of counsel or are concerned they soon will. *Id*. A patchwork of responses has resulted, ranging from dismissing cases because an attorney cannot be appointed, to holding people in jail indefinitely, as Yakima County did, until an attorney can be appointed. *Id*.

Petitioners brought this case to challenge Yakima's failure to abide by constitutional and statutory protections and moved for summary judgment on Uniform Declaratory Judgment Act claims related to the right to counsel, due process and speedy trial. Appendix to Motion for Direct Review (App) 15 *et. seq.* In

ruling on Plaintiffs' summary judgment motion, the trial court confirmed the lack of clarity on what procedure should be used when a county cannot provide a public defender by certifying several questions related to constitutional and legal requirements for addressing public defense shortages under RAP 2.3(b)(4). App 8-9.

These questions represent "fundamental and urgent issue[s] of broad public import which require[] prompt and ultimate determination." RAP 4.2(a)(4). Clarity is necessary to ensure fairness and uniformity as multiple public defense shortages arise across our state. For this reason, the Court should grant direct, discretionary review of this case to provide guidance to trial courts when an attorney cannot be provided to indigent people charged with crimes.

II. NATURE OF THE CASE

From November of 2022 to July of 2025, Yakima County was unable to provide counsel to hundreds of people who were charged with crimes in Yakima County Superior Court and screened eligible for a public defender, for weeks or months after

their initial scheduled arraignment. App 19, 21-22, 64.[1] Between May and September 2024, many people waited in custody for over a month for an attorney. App 21, 64. People who were not held in jail waited months for an attorney to be appointed, eventually reaching their speedy trial expiration dates. App 22, 27, 64.

At each turn, Yakima County circumvented the court rules and constitutional protections meant to protect people charged with crimes. Despite the requirements of Criminal Rule (CrR) 3.1 and article I, section 22 of the Washington Constitution, Yakima County continued to charge people, hold them in custody, and subject them to conditions of release without providing an attorney. App 24, 63-65. Ignoring the requirements of CrR 4.1, Yakima County continued arraignment for people when it could not provide attorneys, even if those people were in custody. App 23, 62, 64. As 213 people reached their speedy trial expiration, the Yakima County Prosecuting Attorney's Office

[1] There is no material dispute about these facts. Petitioners provide parallel citations to these facts in Petitioners' trial court briefing and Respondents' trial court briefing.

moved to extend their speedy trial deadline. App 28, 65-66, 144. The court granted these motions and issued the same generic written opinion in each of the 213 cases, issuing the opinion in perfunctory hearings wherein people were not represented, were not given notice that the motion would be made prior to the hearings, and were not allowed to address the motion. App 28, 65-66.

Petitioners brought an action under the Uniform Declaratory Judgment Act (UDJA) and a *habeas corpus* petition pursuant to RCW 7.36 *et. seq.* on behalf of a class of people who had been impacted by Respondents' failure to provide counsel. App 147 *et. seq*. Among other things, Petitioners asked the court to declare that the failure to appoint counsel violated article I, section 22 of the Washington Constitution and CrR 3.1, and that the speedy trial extensions described above violated article I, section 3 of the Washington Constitution and CrR 3.3. App 15 *et. seq.*

III. TRIAL COURT DECISION

The trial court certified a class of indigent criminal

defendants who had not been appointed counsel by arraignment or within 10 days of withdrawal of their previous attorney. App 11. Plaintiffs moved for Summary Judgment on their UDJA claims, requesting three declarations:

> 1) Failure to provide counsel to indigent defendants by the first hearing after filing or the first hearing after an attorney withdraws violates article I, section 22 of the Washington Constitution, and CrR 3.1;
>
> 2) Extending the allowable time for trial without the presence of defense counsel and without notice or the opportunity to be heard violates article I, section 3 of the Washington Constitution; and
>
> 3) Extending the allowable time for trial because of a failure to provide an attorney to indigent defendants violates CrR 3.3.

After extensive briefing and argument, App 14 *et. seq.*, the court made findings of fact and conclusions of law, including finding that article I, section 22 of the Washington Constitution provides greater protection than the Sixth Amendment of the United States Constitution in this context. App 2-6. The trial court did not, however, adopt Plaintiffs' requested declarations, instead declaring that:

1) Between November 2022 and July of 2025, Yakima County indigent defendants were entitled to have counsel appointed within a reasonable time to allow for adequate representation at every critical stage;[2]

2) Between August of 2024 and January of 2025, the then presiding Judge of Yakima County Superior Court could not extend the allowable time for trial pursuant to his Letter Decision without notice and an opportunity to be present and heard;[3] and

3) The circumstances affecting Yakima DAC between August of 2024 and January of 2025, as detailed in the then presiding Judge's Letter Decision were unavoidable and unforeseen consistent with CrR 3.3(e)(8).

App 6.

While announcing its rulings, the court noted that these issues were novel, and that appellate guidance was likely needed to fully answer the questions presented. App 5 (posing but not answering the question, "Each *Gunwall* factor supports finding

[2] This reflects the Sixth Amendment standard for violations of the right to counsel based on failure to appoint counsel. *See Betschart v. Garrett,* 700 F. Supp. 3d 965, 981 (D. Or. 2023).

[3] There was no material dispute that Judge Bartheld denied every defendant an opportunity to be heard on these motions. App 30, 65-66. Defendants provided examples of Judge Bartheld telling people not to address the issue but provided no examples of people being given the opportunity to address the issue. App 66.

that article I, section 22 of the Washington Constitution provides broader protection [but] what is 'broader protection'…?"). The court also found that "issues raised in this matter are of substantial public importance." App 3. Eventually, the court certified three questions as representing "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" as outlined below as the issues presented for review. App 8-9; *infra*. § V.

IV. IDENTITY OF PETITIONERS

Petitioners are a class of individuals who were charged with crimes in Yakima County Superior Court, screened eligible for public defenders, but not timely appointed counsel.

V. ISSUES PRESENTED

As certified in the trial court's order of certification under RAP 2.3(b)(4), App 8-9, the issues presented are:

1. Does failure to appoint counsel by the first hearing after a case is filed or an attorney withdraws violate article I, section 22 of the Washington Constitution? If not, at what point

does failure to appoint counsel violate article I, section 22? What remedy should follow a finding of a violation of the right to counsel in these circumstances?

2. What procedure must a trial court follow to comply with due process when the court is determining whether speedy trial should be extended because they cannot appoint counsel? Did the procedure used by Yakima County comply with due process?

3. Can speedy trial be extended under CrR 3.3(e)(3) or (e)(8) because due to staffing shortages the government is unable to appoint counsel?

VI. ARGUMENT

"A party may seek review in the Supreme Court of a decision of a superior court which is subject to review as provided in Title 2" and involves "a fundamental and urgent issue of broad public import." RAP 4.2(a), (a)(4).

As shown below, this case is subject to review as provided in Title 2. Because the trial court certified the questions outlined above, discretionary review is appropriate under RAP 2.3(b)(4).

Moreover, the trial court's declarations are subject to review under RAP 2.3(b)(1) because they represent "an obvious error which would render further proceedings useless."

This case also presents "fundamental and urgent issue[s} of broad public import," satisfying the second requirement of RAP 4.2(a). Because of long term neglect of the public defense system in Washington, counties across the state have faced attorney shortages which prevent timely appointment of counsel. A patchwork approach to dealing with this situation has led to wildly disparate outcomes for people in different counties. The answers to the questions certified by the trial court would provide much needed guidance on these important issues to counties in Washington.

This Court should grant direct, discretionary review to provide the needed guidance and uniformity in addressing these critical statewide issues and to protect people charged with crimes in Washington.

A. The Decision of the Superior Court in this Case Is Subject to Discretionary Review Under RAP 2.3(a)(1) and (a)(4).

Discretionary review of a superior court order under RAP 2.3 may only occur under the four circumstances outlined in that rule. RAP 2.3(b). The two circumstances that are relevant here allow discretionary review if:

> The superior court has certified…that the order involves 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) or "[t]he superior court has committed an obvious error which would render further proceedings useless[.]" RAP 2.3(b)(1).

The superior court certified the three questions articulated above as required by RAP 2.3(b)(4), justifying discretionary review in this case. This certification is justified and should lead to discretionary review. Consistent with the trial court's finding that there is "substantial ground for a difference of opinion" about how to address public defender shortages, courts across our state have taken wildly different approaches to these questions.

Infra. § (B)(1). Addressing these questions will certainly advance the ultimate termination of litigation in this case, as fashioning remedies based on uncertain rights would undoubtedly lead to wasted effort.[4] Of equal importance, resolution of these issues will also provide crucial and timely clarification for courts around the state.

Moreover, the trial court committed obvious errors on each declaration. RAP 2.3(b)(1). While acknowledging that the Washington Constitution is likely to provide greater protection for the right to counsel, the trial court nonetheless simply articulated the Sixth Amendment standard, forbidding unreasonable delay in appointing counsel. App 5-6; *see Betschart,* 700 F. Supp. 3d 981 (holding that unreasonable delay in appointment of counsel violates right to counsel). The trial court found in the abstract that failure to allow defendants to be heard during hearings on significant legal issues violated due

[4] Yakima County has argued that no remedies are available to Petitioners beyond declaratory relief (*see e.g.* App 77), but that question has not been litigated. Moreover, absent clear answers on the questions certified by the trial court, any such determination would likely result in significant wasted effort.

process but failed to acknowledge the undisputed evidence that the Yakima court provided no opportunity to be heard when extending class members' speedy trial expiration. App 6. The trial court did not even acknowledge the argument that failure to provide counsel during such hearings violates due process. App 6. Finally, the trial court found that CrR 3.3 allowed an extension of speedy trial solely because of Yakima County's failure to provide counsel. App 6. Each of these represents an error which would prevent Petitioners from getting full relief in this case.

For these reasons, discretionary review is justified under RAP 2.3(b).

B. The Court Should Grant Direct Review.

Once the Court has determined review is appropriate under Title 2 of the Rules of Appellate Procedure, the Court may accept direct review when a case involves "a fundamental and urgent issue of broad public import which requires prompt and ultimate determination." RAP 4.2(a)(4). Here, the questions certified by the trial court meet this standard. First, public defense shortages exist across the state, and a patchwork of

approaches to addressing this issue have arisen, creating vastly different outcomes for people charged in different jurisdictions. This Court must provide guidance on how counties must address public defense shortages when they arise to put an end to this patchwork approach. Second, failure to appoint public defenders creates significant harm to people charged with crimes. It is imperative that the Court clarify what protections apply in this situation to avoid these harms.

1. *Virtually every county in Washington is facing a public defense shortage, leading to a patchwork of responses. The Court must provide guidance to create a uniform approach.*

Forty-five years of systemic underfunding in Washington's public defense system has led to high caseloads and low pay for public defenders in Washington.[5] These factors, combined with increasingly complex and time-consuming cases,

[5] Washington State Association of Counties, *The Public Defense Crisis in Washington State* at 18 (2026), https://wsac.org/wp-content/uploads/2026/02/2026_WSAC_Public-Defense-Crisis-in-Washington-State_v02.pdf; TVW, *Tipping Point—The Public Defense Crisis* at 8:10, TVW (2026), https://tvw.org/documentaries/tipping-point-the-public-defense-crisis/.

have made practicing public defense in Washington unsustainable, forcing people out of the profession.[6]

The resulting exodus[7] created a public defense shortage across the state, including acute shortages in criminal courts in Yakima and Benton County in 2024.[8] In 2024, the King County Department of Public Defense also lacked attorney capacity to appoint attorneys to people who were involuntarily detained. *Matter of Det. of M.E.*, __Wn.3d__, 586, P.3d 580, 586 (2026).

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[6] TVW, *ibid*. fn. 5 at 7:01; 10:20; 11:35; ACLU-WA *Letter re: Proposed Standards for Indigent Defense* at 2 (2024), https://www.courts.wa.gov/court_Rules/proposed/2024Jun/1568%20CrR%203.1%20STDS%20CrRLJ%203.1%20STDS%20JuCR%209.2%20STDS/ACLU-WA%20-%20CrR%203.1,%20CrRLJ%203.1,%20JuCR%209.2%20STDS.pdf.

[7] Amy Sundberg, *King County Grapples with Public Defender Crisis*, The Urbanist (2024), https://www.theurbanist.org/king-county-grapples-with-public-defender-crisis/.

[8] Daniel Beekman, *WA's public defender system is breaking down, communities reeling*, The Seattle Times (2024), https://www.seattletimes.com/seattle-news/politics/was-public-defender-system-is-breaking-down-communities-reeling/.

Spokane[9] and Clark[10] counties faced similar shortages in 2026. Franklin,[11] Mason,[12] and King[13] counties all face significant shortages of public defenders, which have led to serious concerns that they would not be able to assign counsel. Because of a lack of qualified attorneys, Asotin County hired an attorney who was not barred in the State of Washington to handle their public defense cases. *Matter of Lewis*, 200 Wn.2d 848, 854, 523 P.3d 760 (2023). These are just examples of a systemic problem that impacts every county in Washington. *Washington State Ass'n of Ctys*, 34 Wn. App. 2d at 906-907.

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[9] Emry Dinman, *Spokane public defenders are at a 'critical moment' as homelessness crackdown stresses courts and caseloads*, The Spokesman-Review (2026), https://www.spokesman.com/stories/2026/mar/30/spokane-public-defenders-are-at-a-critical-moment-/.

[10] Tyler Brown, *Clark County judge dismisses 24 misdemeanor cases over lack of attorneys for defendants*, The Columbian (2026), https://www.columbian.com/news/2026/feb/27/clark-county-judge-dismisses-24-misdemeanor-cases-over-lack-of-attorneys-for-defendants/.

[11] Donald Meyers, *WA grapples with a public defender shortage*, The Seattle Times (2023), https://www.seattletimes.com/seattle-news/wa-grapples-with-a-public-defender-shortage/.

[12] TVW, *ibid*. fn. 5 at 2:10 (explaining that Mason County is down two attorneys and a chief public defender, which has crippled their already small office).

[13] Sundberg, *ibid*. fn. 7.

A patchwork of responses has resulted. Benton County released people when they could not provide attorneys, following the Ninth Circuit Court of Appeals' decision in *Betschart v. Oregon*, 103 F.4th 607 (9th Cir. 2024).[14] Benton County subsequently dismissed cases that reached speedy trial expiration without an attorney being appointed.[15] In February of 2026, Clark County District Court also dismissed cases when counsel could not be appointed.[16]

Yakima took a different approach. When Yakima County could not appoint counsel to people charged in their court who were in custody, they held them until they could appoint counsel. App 22-23. If Yakima could not appoint counsel by their scheduled arraignment, they continued arraignment until counsel could be appointed. App 23. People were not given notice of the

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[14] Cameron Probert, *No end in sight for Benton County defense attorney shortage. 6 suspects already freed*, Tri-City Herald (2024), https://www.tri-cityherald.com/news/local/crime/article289156234.html.

[15] Nathalie Graham, *Washington State Has a Public Defense Crisis*, The Stranger (2026), https://www.thestranger.com/news/washington-state-has-a-public-defense-crisis/.

[16] Brown, *ibid*. fn. 10.

issues that would be decided at hearings to continue their arraignment or an opportunity to be heard on the continuance of their arraignment, and, of course, were not represented during the hearing. App 23. Some people, including two of the named Petitioners, waited for more than six weeks in custody for their arraignment. App 23, 156-157. People who were out of custody waited months for an attorney to be appointed, attending repeated hearings while their cases and lives stagnated. App 22-23. As the people who were waiting out of custody, including two of the named Petitioners, approached their speedy trial expiration, the court extended their speedy trial expiration, using a generic order applied to every case. App 28, 156-157. This generic order did not consider any facts or circumstances related to individual defendants and was created before some of the criminal cases were even filed. App 28, 156-157. To implement the order, the court held perfunctory hearings. The people whose speedy trial expirations were approaching were unrepresented and were not given notice of the motion that would be made until they were sitting in the courtroom. *Id*. Not only were they not given an

opportunity to be heard on the motion, they were explicitly forbidden from addressing it. *Id*.

Yakima's drastic approach to their public defense shortage presents the issues in a particularly stark form. It is the unfortunate outcome of the current patchwork approach to this issue. The patchwork of approaches to addressing public defense shortages will continue absent a ruling from this Court clarifying the procedure which must be followed if a court cannot appoint counsel. Because this is an ongoing issue, affecting people around our state every day, prompt and ultimate determination is necessary.

Moreover, providing concrete guidance on procedures to be used in the case of public defense shortages will provide policy makers with certainty about how to address the problems of the public defense system. Balancing competing policy priorities can be difficult when the result of system failures is uncertain. The Court can provide this certainty.

While statewide guidance is important, guidance is especially crucial for Yakima County. Yakima County never

repudiated its approach to this situation, and, in fact, spent significant time in its briefing praising itself for the way the situation was handled. App 57 *et. seq.* Yakima County even goes as far as to argue that there are no due process rights at stake when a court extends speedy trial expiration. App 93.

Finally, the record in this case has been sufficiently developed—as demonstrated by the parties' motions, depositions of all relevant parties, and other extensive discovery, App 14 *et seq.*—so that this Court can make definitive rulings on the important issues presented and provide clarity to the counties throughout the state.

Now when a shortage occurs, each county must decide how to address this complicated issue without guidance. Clarity in the law and in the procedure which must be followed when a local government cannot provide counsel represents a quintessential "fundamental and urgent issue of broad public import which requires prompt and ultimate determination." RAP 4.2(a)(4). Therefore, the Court should accept direct review.

2. *The failure to provide counsel creates significant harm to people charged with crimes. This Court must create protections to minimize this harm.*

"Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." *United States v. Cronic*, 466 U.S. 648, 654 (1984); *see also State v. A.N.J.*, 168 Wn.2d 91, 97, 225 P.3d 956 (2010) ("Without an attorney, these fundamental rights are often just words on paper."). The continuous right to counsel includes, but is not limited to, a right to confidential communication; investigation of lines of defense; investigation of competency; assistance with bail hearings; assistance in negotiations; and advice about potential consequences of a plea. *Betschart*, 103 F.4th at 620. The trial court acknowledged these crucial components of the right. App 4. Without counsel, none of this is possible. The record in this case reveals the many significant harms that followed in Yakima County. App 24-26. Avoiding such harm is why constitutional and procedural protections in criminal cases are so important.

But as Yakima County encountered the protections that might avoid such harm, they circumvented them or, in some instances, simply ignored them. For example, the judge who presided over the worst of the crisis (and who drafted the blanket order extending speedy trial), knew that the U.S. District Court in Oregon ruled that holding people in custody for longer than seven days without counsel was a violation of the Sixth Amendment right to counsel and that this ruling had been affirmed by the Ninth Circuit. App 27. He discussed this with other Yakima officials but took the position that the court would deal with it "once a motion was filed." App 21, 27. Unsurprisingly, since no attorneys were appointed, no such motion was filed. App 27. In other words, the court would not recognize the clear violation of the right to counsel, or implement the required remedy, absent a motion no unrepresented defendant could make. In contrast, judges in Benton County took their duty to protect criminal defendants seriously and released defendants based on the ruling in *Betschart*. *Supra.* at 16. This disparity in treatment should not be allowed to occur.

Ensuring that criminal defendants are treated fairly in every county in our state when jurisdictions cannot provide the baseline protection that the right to counsel provides is imperative and represents "a fundamental and urgent issue of broad public import which requires prompt and ultimate determination." RAP 4.2(a)(4). For this reason, this Court should accept direct review.

C. Other State Courts Have Provided Such Guidance.

Washington is not the only state to face these issues. Other states have established comprehensive schemes to address the failure to provide counsel to indigent defendants. For example, in Massachusetts, facing persistent shortages of counsel for indigent defendants in one county, the Supreme Judicial Court of Massachusetts established a protocol to be followed if counsel cannot be appointed. *Lavallee v. Justices In Hampden Superior Court,* 442 Mass. 228, 246, 812 N.E. 2d 895 (2004). The court noted that "[t]he duty to provide such counsel falls squarely on government, and the burden of a systemic lapse is not to be borne by defendants." *Id*. As a result, the clerk-magistrate of each trial

court is required to compile a list of any unrepresented criminal defendants each week and note how long they had been waiting for an attorney, and the superior court must then schedule a hearing to address remedies for violation of the right to counsel. *Id*. at 246-47. Anyone who is in custody for more than seven days must be released. *Id*. at 246. If a person is not provided counsel within 45 days, the charge is dismissed without prejudice until counsel can be provided. *Id*.

A Maine superior court just adopted a similar procedure to address similar problems there. *Robbins v. Billings*, CV-22-054 (Kennebec Superior Court 2026) (holding that people must be released after seven days if counsel is not appointed and the case dismissed without prejudice after 60 days if counsel is still not appointed).[17] Through decisions by both state and federal courts in Oregon, a similar protocol has been established there. *Betschart*, 103 F.4th at 607; *State v. Roberts*, 374 Or. 821, 859,

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17 https://www.aclumaine.org/app/uploads/drupal/sites/default/files/field_documents/7_march_2025_robbins_order_after_phase_one_trial_0.pdf.

584 P.3d 1217 (2026).

This Court should accept direct review and establish a similar protocol to create uniformity in response to this serious statewide problem. Only through such a uniform approach can the fundamental right to counsel, and the just operation of the criminal legal system, be protected.

VII. CONCLUSION

For the reasons stated above, Petitioners request that this Court grant direct, discretionary review pursuant to RAP 4.2.

Pursuant to RAP 18.17(c)(11), this document contains 4,268 words, excluding the parts of the document exempted from the word count by RAP 18.17(c).

DATED this 16th day of June, 2026.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 16th day of June, 2026, I caused a true and correct copy of this document to be served on all parties by electronically filing this document through the Washington State Appellate Courts Secure Portal.

Signed this 16th day of June, 2026 at Seattle, WA.

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Appendix A

(Findings of Fact and Conclusions of Law on Plaintiffs' Motion for Summary Judgment)

5

IN THE SUPERIOR COURT OF WASHINGTON
FOR YAKIMA COUNTY

VICTOR CUEVAS, et. al., on their behalf and on behalf of other similarly situated individuals,

Plaintiffs,

v.

YAKIMA COUNTY, et. al.,

Defendants.

Case Number 25-2-00718-39

ORDER ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

THIS MATTER came before the Court on Plaintiffs' Motion for Summary Judgment. The Court has considered the all the pleadings filed to date, oral argument presented by both parties, and the record in this case and therefore deems itself fully advised. Based on the foregoing:

I. Preliminary Issues

1. **Applicability of the Uniform Declaratory Judgment Act RCW 7.24?**
   RCW 7.24.010 provides that the court has authority to issue a declaration of rights, status and other legal relations whether or not further relief is or could be claimed. Therefore, the UDJA applies to this matter, regardless of possible remedies.
2. **Is this matter moot?**
   a. There is an actual present dispute in this case. There is currently a statewide movement to systematically reform public defense services in the state of Washington. With the reduction of case load limits this statewide crisis will continue to grow. It

doesn't specifically apply to any of the current class members, but it applies to their circumstances that give rise to this action.

b. Issues suffered by the current plaintiff will continue to be ongoing. While the defendants have made efforts to and have corrected the problem that gave rise to this matter, the changes to CrR 3.1, specifically to the caseload limits effective in 2026 and predictably will continue to go down in future years. This is evident that this is an ongoing concern.

c. The issues raised in this matter are of substantial public importance. The public defender shortage is a matter of substantial public interest. Failure to adequately staff the indigent defense system, either by financial incentive, recruitment, management, or reducing caseloads is a matter of substantial public importance that will never dissipate.

Therefor, this matter is not moot.

II. Findings of Fact

1. At all times, relevant to this matter, every individual who appeared with Yakima County Superior Court had a preliminary assigned counsel to provided legal advice for the particular preliminary docket. That Attorney was able to discuss and argue probable cause, bail and other conditions of release. Every individual also had access to an on-call counsel to receive legal advice.
2. Between November 2022 and July 2025 the defendants, as a collective, failed to provide specific "permanently" appointed public defenders for individuals that qualified for public defenders. In some cases they failed to provide a public defender for a short period to several weeks for defendants who were in custody and up to five months for defendants who were out of custody.
3. At times relevant to this matter, Yakima Department of Assigned Council suffered a catastrophic reduction in attorney resources for various reasons.
4. At this time, all individuals affected by the deprivation of their right to council have received council and most have resolved their cases.
5. On August 13, 2024, then Presiding Yakima County Superior Court Judge Richard Barthel issued a Letter Decision that was used in approximately 213 cases. Said Letter Decision acknowledged the probable delays in the assignment of counsel and found good cause to

extend the defendant's time for trial based upon unforeseen and unavoidable circumstances and reserved on the prejudicial effect on the defendant. This Court cannot determine if all the defendants had notice and an opportunity to be present and heard on the subject.

6. Based upon the pleadings to date and argument of council, the court specifically finds that the defendants, as a collective, have made every reasonable effort to increase staffing at the Department of Assigned Council, and have currently eliminated the issues raised in this matter.

III. Findings of Law

1. **Does failing to appoint council by the first hearing after filing or the first hearing after an attorney withdraw violate Article 1, Section 22 of the Washington Constitution and CrR 3.1?**

    a. The Sixth Amendment to the United States Constitution provides "of all the rights that an accused person has, the right to be represented by council is by far the most pervasive for it affects his ability to assert any other rights he may have." *United States v. Cronic*, 466 U.S. 648, 654 (1984). This right includes "a continuous right to have confident and zealous advocacy outside of the courtroom." *Betschart v. Garrett*, 700 Supp.3d 965, 981 (D. Or. 2023) *affirmed by Betschart v. Oregon*, 103 F.4th 607, 620 (9th Cir. 2024). This continuous right to counsel necessarily must include, but is not limited to, a right to confidential communication, investigation of lines of defense, investigation of competency; assistance with bail hearings, assistance in negotiations, and the advice about potential consequences of a pleas. An unreasonable delay in appointing counsel can violate the right to counsel under the Sixth Amendment to the United States Constitution. *Betschart.* Counsel must be appointed within a reasonable time to allow for adequate representation at any critical stage before trial, as well as at trial itself. *Betschart.*

Therefore, The Sixth Amendment to the United States Constitution does not necessarily require appointment of counsel by the first hearing after filing or the first hearing after an attorney withdraw.

    b. Does Article I, Section 22 of the Washington Constitution provides more protection than the Sixth Amendment and specifically provides a right to appear

through counsel, by the first hearing after the filing of a criminal case or after an attorney withdraws?

Each *Gunwall* factor supports the finding that article I, section 22 of the Washington Constitution provides broader protection than the Sixth Amendment to the Federal Constitution. Even with the *Gunwall* analysis, what is "broader protection" than to have a counsel appointed within a reasonable time to allow for adequate representation at any critical stage? It is unreasonable to appoint "permanent" counsel before a person appears and requests counsel. All individuals are represented by "preliminary" assigned counsel to receive advice to make an informed decision as to whether they want permanent counsel. As soon as a person requests counsel or assigned counsel withdraws, the court should appoint DAC. DAC, in turn, should assign permanent counsel.

2. Did then Presiding Yakima County Superior Court Judge Richard Barthel's Letter Decision extending the allowable time for trial violate of Article I, Section 3 of the Washington Constitution?

Would it be a violation of a defendant's due process rights for their time for trial to be automatically extended without notice and the opportunity to be present and heard on the subject. Of course. At a minimum, Article I, Section 3 of the Washington Constitution requires notice and an opportunity for a hearing. Just because the analysis is written out in advance does not mean it violates due process. As long as the defendant is given notice and the opportunity to be present and heard with an individual assessment of the facts as they pertain to that particular defendant, due process is not offended. The court cannot rule that a particular defendant will not be prejudiced if the defendant does not have notice and opportunity to be present and heard. This Court will note that suggesting that a defendant not speak to the facts of their particular case without the assistance of counsel is reasonable.

To determine if a particular defendant's due process rights were violated there must be an individual inquiry into that particular defendant's notice and opportunity to be present and heard and assessment of the prejudicial effect on the particular defendant.

3. Does extending the allowable time for trial because of a failure to provide an attorney to indigent defendants violate CrR 3.3?

Did Judge Bartheld's Letter Decision violate the defendants' right to a speedy trial under CrR 3.3 when they extended speedy trial pursuant to CrR 3.3(e)(8)? Judge Bartheld's Letter Decision found that unavoidable or unforeseeable circumstances affected the defendants' time for trial. Resource limitations alone cannot justify a continuance under this provision. A shortage of DAC staff can be foreseen, and recruitment should always be on DAC's mind. That being said, the Letter Decision details extra-ordinary, catastrophic and uncontrollable circumstances that in Yakima County DAC's circumstances were unavoidable and unforeseen consistent with CrR 3.3(e)(8).

IV. Order

BASED ON THE FOREGORING IT IS ORDERED, Plaintiffs' motion is granted in part and denied in part, and the Court declares:

(1) Between November 2022 and July of 2025, Yakima County indigent defendants were entitled to have counsel appointed within a reasonable time to allow for adequate representation at every critical stage;

(2) Between August of 2024 and January of 2025, the then presiding Judge of Yakima County Superior Court could not extend the allowable time for trial pursuant to his Letter Decision without notice and an opportunity to be present and heard; and

(3) The circumstances affecting Yakima DAC between August of 2024 and January of 2025, as detailed in the then presiding Judge's Letter Decision were unavoidable and unforeseen consistent with CrR 3.3(e)(8).

IT IS SO ORDERED this 7 day of May, 2026

The Honorable David L. Petersen

Appendix B

(Order on Motion for Certification Pursuant to RAP 2.3(b)(4))

2

FILED
BILLIE A. MAEGARD, CLERK
2026 MAY 28 A 11:23
SUPERIOR COURT
YAKIMA CO WA

IN THE SUPERIOR COURT OF WASHINGTON
FOR YAKIMA COUNTY

VICTOR CUEVAS, et. al., on their behalf and on behalf of other similarly situated individuals,

Plaintiffs,

v.

YAKIMA COUNTY, et. al.,

Defendants.

Case Number 25-2-00718-39

ORDER ON MOTION FOR CERTIFICATION PURSUANT TO RAP 2.3(b)(4)

THIS MATTER came before the Court on Plaintiffs' Motion for Certification Pursuant to RAP 2.3(b)(4). The Court has considered the pleadings filed and the record in this case and therefore deems itself fully advised. Based on the foregoing:

IT IS ORDERED, Plaintiffs' motion is granted:

a. This Court certifies that the order on Plaintiffs' Motion for Summary Judgment involves 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.

b. Controlling questions of law implicated by the order include:

i. Does failure to appoint counsel by the first hearing after a case is filed or an attorney withdraws violate article I, section 22 of the Washington Constitution? If not, at what point does failure to appoint counsel violate article I, section 22? What remedy should follow a finding of a violation of the right to counsel in these circumstances?

ii. What procedure must a trial court follow to comply with due process when the court is determining whether speedy trial should be extended because they cannot appoint counsel? Did the procedure used by Yakima County comply with due process?

iii. Can speedy trial be extended under CrR 3.3(e)(3) or (e)(8) because the government is unable to appoint counsel?

IT IS SO ORDERED this 28 day of May, 2026

The Honorable David L. Peterson

Appendix C
(Order on Class Certification)

3

FILED
BILLIE A. MAGGARD, CLERK

25 MAY 30 A9:00

SUPERIOR COURT
YAKIMA CO. WA

IN THE SUPERIOR COURT OF WASHINGTON
FOR YAKIMA COUNTY

OMAR AL-THARWA, et. al., on their behalf and on behalf of other similarly situated individuals, Plaintiffs, v. YAKIMA COUNTY, et. al., Respondents.	Case Number 25-2-00718-39 [PROPOSED] ORDER ON CLASS CERTIFICATION

THIS MATTER came before the Court on Plaintiffs' Motion for Class Certification. The Court has considered the pleadings filed and the record in this case and therefore deems itself fully advised. Based on the foregoing:

IT IS ORDERED, Plaintiffs' motion is granted subject to further review, and a class is hereby certified of individuals who are:

> (1) qualify for an attorney at public expense, (2) have faced criminal charges in Yakima County Superior Court since April of 2024, and have not resolved their case, or will face charges in Yakima County Superior Court in the future, as long as their case is pending, with the exception of the class representatives, and (3) have not had an attorney appointed to represent them at their arraignment; or have had an attorney appointed to their case who subsequently withdrew and no substitute counsel has been appointed within 10 days of their withdrawal.

THE COURT HEARBY FINDS that:

(1) The class as alleged in this case currently meets the requirements of Civil Rule 23(a) and Civil Rule 23(b)(2):

a. The class allegedly meets the numerosity requirement of Civil Rule 23(a)(1). There are hundreds of individuals included in the proposed class. Moreover, people are being added to the class each month, making the joinder of all class members not just impractical but impossible. *Zimmer v. City of Seattle*, 19 Wn. App. 864, 868, 578 P.2d 548, 550 (1978).

b. The class described above meets the commonality requirement of Civil Rule 23(a)(2) because the central legal question in this litigation for each class member is whether continuing to prosecute and detain people without providing counsel constitutes an unlawful restraint. *See Betschart v. Garrett*, 700 F. Supp. 3d 965, 978 (D. Or. 2023).

c. The proposed class representatives, Omar Al-Tharwa, Orlando Cisneros, Jesus Guzman, Jose Santana-Cervantes, and Victor Cuevas are typical of the class as required by Civil Rule 23(a)(4) because each was charged with a crime for weeks or even months in Yakima County Superior Court without counsel. The class representatives shall meaningfully

d. participate in the prosecution of this matter, including but not limited complying with the discovery process.

e. The ACLU of Washington has experience litigating this type of case. *See, e.g., Wilbur v. City of Mount* Vernon, 298 F.R.D. 665 (W.D. Wash. 2012). Class counsel also has sufficient experience to adequately represent the class.

f. Plaintiffs allege that Yakima County has not appointed counsel to the class within the time required by Criminal Rule 3.1 and article I, section 22 of the Washington Constitution, appropriately seeking class declaratory relief in this case. CR 23(b)(2).

g. For these reasons, the proposed class currently meets the requirements for certification

under Civil Rule 23(b)(2).

IT IS SO ORDERED this 28 day of May, 2025

The Honorable David L. Petersen

Appendix D

(Plaintiffs' Motion for Summary Judgment)

EFILED
Clerk Billie Maggard
1/29/2026 8:30 AM
Superior Court Yakima County, WA

IN THE SUPERIOR COURT OF WASHINGTON
FOR YAKIMA COUNTY

VICTOR CUEVAS, et al., on their behalf and on behalf of other similarly situated individuals,

Plaintiff,

v.

YAKIMA COUNTY, et al.,

Defendant.

No. 25-2-00718-39

MOTION FOR SUMMARY JUDGMENT

Plaintiffs move this Court for summary judgment on plaintiffs Uniform Declaratory Judge Act claims, asking this Court to declare that 1) Failure to provide counsel to indigent defendants by the first hearing after filing or the first hearing after an attorney withdraws violates article I, section 22 of the Washington Constitution, and Criminal Rule (CrR) 3.1; 2) Extending the allowable time for trial without the presence of defense counsel and without notice or the opportunity to be heard violates article I, section 3 of the Washington Constitution; and 3) Extending the allowable time for trial because of a failure to provide an attorney to indigent defendants violates CrR 3.3.

This motion is based on the concurrently filed Memorandum in Support of Motion for Summary Judgment and Statement of Undisputed Material Facts in Support of Motion for Summary Judgment, as well as declarations and exhibits to those declarations as cited in those documents and filed concurrently.

DATED this 28th day of January, 2026.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION

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Attorneys for Plaintiffs

Appendix E

(Plaintiffs' Statement of Undisputed Material Facts in Support of Summary Judgment)

EFILED
Clerk Billie Maggard
1/29/2026 10:01 AM
Superior Court Yakima County, WA

IN THE SUPERIOR COURT OF WASHINGTON
FOR YAKIMA COUNTY

VICTOR CUEVAS, et al., on their behalf and on behalf of other similarly situated individuals,

Plaintiff,

v.

YAKIMA COUNTY, et al.,

Defendant.

No. 25-2-00718-39

STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiffs submit this statement of undisputed material facts in support of their Motion for Summary Judgment:

A. Due to an Attorney Shortage, Yakima County Failed to Timely Provide Public Defenders to Indigent Defendants Charged with Crimes in Yakima County Superior Court.

1. Since at least 2019, Yakima County has had an attorney shortage which affected Yakima County Department of Assigned Counsel (DAC) and the Yakima County Prosecuting

Attorney's Office (PAO). *Declaration of David Montes* (*D.M. Dec.*) Ex. A[1] at 17, 58-59; Ex. A.1[2] at 1; Ex. C[3] at 19-20.

2. Because of this shortage, DAC has suffered a shortage of public defenders. *D.M. Dec*. Ex. Q[4] ¶¶ 1.1, 5.2, 5.4.
3. As a result, from November of 2022 to July of 2025, Yakima did not provide attorneys to hundreds of people who were charged with crimes, and eligible for public defenders, until after their first scheduled arraignment. *D.M. Dec*. Ex. A at 29; Ex. C at 26-28, 34-35, 42-43, 45-46, 49-50.
4. On July 27, 2022, DAC's director, Paul Kelley, sent a letter informing the Yakima County Prosecutor, Joseph Brusic, and Judge Richard Bartheld, that his office only had capacity to staff 160 case filings per month. *D.M. Dec.* Ex. D.1[5] at ¶ 14 and exhibit referred to and attached therein.
5. The PAO continued to file more cases than DAC could handle. *D.M. Dec*. Ex. B[6] at 20-21; Ex. C at 26; Ex. D[7] at 108.
6. As a result, as of November of 2022, DAC was unable to assign counsel to many people who were screened eligible for a public defender until after their initial scheduled arraignment. *D.M. Dec*. Ex. C at 26-28; Ex. D at 94.

[1] Excerpts from *30(b)(6) Dep. of Joseph Brusic*.
[2] Exhibit 5 of the *30(b)(6) Dep. of Joseph Brusic.* This exhibit does not have page numbers. The numbers cited herein refer to the page immediately after the Yakima County Superior Court cover page as page 1 and each subsequent page as they would normally be ordered if they did have page numbers.
[3] Excerpts from *30(b)(6) Dep. of Paul Kelley*.
[4] Defendants' Answer.
[5] Exhibit 2 of the *Dep. of Paul Kelley.* Exhibit D.1 includes the exhibit referred to in paragraph 14 of that document.
[6] Excerpts from *Dep. of Joseph Brusic.*
[7] Excerpts from *Dep. of Paul Kelley.*

7. In the absence of an attorney shortage, DAC's goal is to have counsel assigned by the rule-based arraignment or, in the case of attorney withdrawals, the hearing immediately following withdrawal. *D.M. Dec*. Ex. C at 7-8; Ex. D at 79-80. As of September 2025, CrR 4.1 requires arraignments within 3 days of filing for in-custody defendants. *Id.* Ex. D at 81. DAC indicated that appointing counsel within this period is feasible, *Id.*, and has since been able to assign counsel by arraignment when attorneys are available. *Id.* Ex. C at 16. Other counties assign attorneys even faster. *See Id.* at Ex. H; Ex. I.

8. The length of delays grew through 2023. *D.M. Dec*. Ex. D at 107-108; Ex. E[8] at 21-22. In December, DAC ran out of attorney capacity on the seventh day of the month. *Id.* Ex. D.1 ¶ 21. Therefore, everyone, whether in or out of custody, had to wait until at least the beginning of the following month for an attorney to be assigned. *Id.*

9. In the first half of 2024 DAC lost an additional four attorneys.[9] *D.M. Dec*. Ex. K at No. 4; Ex. Q ¶ 5.3.

10. In addition to further reducing DAC's capacity to accept cases, the attorneys who left had to withdraw from cases, leaving hundreds of people who were previously represented without attorneys. *D.M. Dec*. Ex. A at 27; Ex. D at 113-114. These cases had to be reassigned to new attorneys. *Id.* Ex. A at 27; Ex. D at 113-114; Ex. D.1 at ¶ 27.

11. Despite this further reduction in capacity, the PAO continued to file more cases each month than DAC had capacity to accept. *D.M. Dec*. Ex. Q ¶ 5.4.

12. On April 17, 2024, DAC began to prioritize people waiting in-custody for assignment.

[8] Excerpts from *Dep. of Diane Hehir.*

[9] One of DAC's contract attorneys left a contract with DAC to join the PAO after seeking but receiving no request to apply from DAC. *D.M. Dec*. Ex. E at 12.

D.M. Dec. Ex. J at No. 13; Ex. D at 116-117.

13. Part of the reason DAC decided to prioritize in-custody assignments was the Federal District Court of Oregon and Ninth Circuit's decisions in *Betschart v. Oregon*, which required that anyone that was in custody in Oregon and not assigned an attorney within seven days was to be released. *D.M. Dec* Ex. D at 135-138; Ex. D.2[10] at 6. Yakima County Superior Court did not adopt a similar remedy for people held in custody without an attorney in Yakima County, despite discussing the decision among stakeholders and believing the decision applied to Yakima County. *Id*.
14. Despite taking priority, people still waited in-custody for an attorney for weeks, and in many cases over a month. *D.M. Dec*. Ex. Q ¶ 1.7.
15. Between May and September of 2024, DAC was unable to assign an attorney to every person waiting in custody even when DAC's attorney capacity renewed at the beginning of the month following their arrest, resulting in wait times for an attorney of *at least* a month for people who they could not assign. *D.M. Dec.* Ex. A at 36; Ex. D.1 at ¶ 28.
16. As a result, hundreds of people waited in custody past their initial arraignment date without an attorney. For example, people arrested and incarcerated between mid-April of 2024 and the end of May of 2024 did not have attorneys until June 1, 2024. *D.M. Dec.* at ¶ 2. There were more than 50 people waiting for an attorney in Yakima County Jail at the end of every month between May and December of 2024 except November. *Id.* Ex. K at No. 13. Seven days before the end of June 2024, there were already 75 people waiting in jail for an

[10] Exhibit 18 of the *Dep. of Paul Kelley.* This exhibit does not have page numbers. The numbers cited herein refer to the first page as page 1 and each subsequent page as they would normally be ordered if they did have page numbers.
[10] Excerpts from *30(b)(6) Dep. of Paul Kelley*.

attorney. *Id.* Ex. D.3[11] at Ex. 7. At the end of July 2024, there were 96 people in custody in the Yakima County Jail without attorneys. *Id*. at Ex. 9. Roughly half of these people would have waited at least two weeks by the time an attorney was assigned and in many cases over a month. *D.M. Dec* Ex. D at 138; *D.M. Dec.* Ex. Q ¶ 1.7.

17. People who were out of custody and did not have attorneys waited much longer, in many cases for months. *D.M. Dec.* Ex. C at 40; *D.M. Dec.* Ex. Q ¶¶ 1.14, 1.15, 5.15. Between May and September 2024, *no* out-of-custody defendants were assigned attorneys. *D.M. Dec*. Ex. D.1 at ¶¶ 28, 35. As a result, most people waited over three months for counsel to be assigned. *Declaration of Marley Forest* (*M.F. Dec.*) Ex. A.

18. As a result, there were nearly 250 people waiting for an attorney out of custody on July 30, 2024, and the list grew through August. *D.M. Dec.* Ex. D.3 at Ex. 8, Ex. 10. Again, most ended up waiting at least 100 days and, in many cases, almost five months. *Id.* Ex. C at 40; *M.F. Dec.* Ex. A. Even though DAC was able to assign some out-of-custody defendants counsel in September and October, there were still more than 250 people waiting in October. *D.M. Dec.* Ex. D.3 at Ex. 14, p. 3-9[12]. The County remained limited in its ability to assign attorneys to people who were out of custody in December of 2024. *D.M. Dec.* Ex. Q ¶ 5.14.

B. Because Counsel Was Not Assigned, Many People Appeared at Hearings Without Attorneys

[11] Exhibit 6-17 of the *Dep. of Paul Kelley.* Exhibits 6-17 of Paul Kelley's deposition were originally disclosed as Public Records Act responses. *D.M. Dec.* Ex. D at 119-123, 125-131.They are accurate lists of people who were charged with crimes, screened eligible for public defender services, and waiting for an attorney to be assigned as of the date noted at the top of each exhibit. *Id.*

[12] This exhibit does not have page numbers. The numbers cited herein are consistent with treating the page with the Exhibit 14 sticker as page 1 and each subsequent page as they would numbered if they had page numbers.

[12] Excerpts from *30(b)(6) Dep. of Paul Kelley*.

19. In the absence of counsel, an arraignment was scheduled pursuant to Criminal Rule 4.1, "but it was mostly understood as a placeholder because [the Court and PAO] weren't going to conduct the arraignments unless [people appearing before the Court] had an attorney." *D.M. Dec.* Ex. F[13] at 33. These initial arraignment dates would be continued because people did not have attorneys. *D.M. Dec*. Ex. A at 29-30, 40; Ex. D at 95-96; 140; Ex. E at 25; Ex. L[14] at 29.

20. Because in some cases arraignments for people who were held in custody were continued for two weeks or more, some people waited six weeks or more for an arraignment after their booking. *See e.g. D.M. Dec.* Ex. Q ¶¶ 4.2.1, 4.2.2, 4.2.4, 4.2.5. Many people who were out of custody waited for months for an arraignment. *M.F. Dec.* Ex. A; *D.M. Dec.* Ex. Q ¶ 5.15; *D.M. Dec.* Ex. F at 40-41; *Declaration of Jesus Guzman* (*J.G. Dec*) ¶ 4.

21. As the Court was continuing arraignments, the Court would explain that the case was being continued because there was no attorney appointed. *D.M. Dec.* Ex. A at 51-52; Ex. E at 25; Ex. F at 30. People would not be informed ahead of these hearings that the Court was going to continue their arraignment. *D.M. Dec.* Ex. A at 62-63. The person would get only an order resetting their hearing. *D.M. Dec.* Ex. E at 25.

22. At these hearings, Judge Bartheld would not consider legal arguments, including bail arguments, and discouraged people from such arguments. *D.M. Dec.* Ex. A at 42-43.

23. Yakima County has admitted the dates that the Court initially scheduled arraignment constituted constructive arraignment, the PAO treated them as constructive arraignment

[13] Excerpts from *Dep. of Richard Petersen.*
[14] Excerpts from *Dep. of Judge Richard Bartheld (ret.).*

dates, and the Court was indicating to people that this hearing would constitute constructive arraignment. *D.M. Dec.* Ex. A at 54; Ex. E at 52; Ex. L at 30.

24. Similarly, people who had attorneys withdraw from their cases would come to repeated status hearings for months, only to have their cases continued until an attorney was appointed. ¶ *D.M. Dec.* Ex. Q ¶ 5.18; *D.M. Dec.* Ex. D at 141; Ex. E at 32-33; Ex. F at 40-41; *Declaration of Victor Cuevas* (*V.C. Dec.*) ¶ 6. At these hearings, people were simply given an order that their hearing would be continued with no prior notice or opportunity to object to the continuance. *D.M. Dec.* Ex. E at 32-33. Failure to appear at any of these status hearings resulted in an arrest warrant. *Id.* Ex. B at 21; Ex. E at 30.

C. Because Counsel Was Not Assigned, Defendants Could Not Advance Their Cases

25. Line prosecutors noted that "the most fundamental effect [of delays in appointing counsel in Yakima County] was just the cases grounded to a halt…" *D.M. Dec.* Ex. F at 79-80. People "didn't have an attorney so nothing happened." *Id.* Ex. G[15] at 49-50.

26. Without an attorney, there could be no meaningful progress in criminal cases. *Declaration of Professor Robert Boruchowitz* (*R.B. Dec*.) ¶ 36. A criminal case cannot move forward until a defense attorney consults with their client, explains the nature and consequences of the charges, and determines goals for the litigation. *Id.* ¶ 51-55

27. Then, the attorney must investigate lines of defense and otherwise pursue the client's goals. *R.B. Dec.* ¶ 43; *D.M. Dec.* Ex. D at 31-33. Sometimes that goal would be to negotiate a resolution but lack of counsel also "absolutely" and "necessarily" delays negotiations since

[15] Excerpts from *Dep. of Joseph Brown.*

there is "no attorney to negotiate with…" and it would be unethical for prosecutors to negotiate with an unrepresented defendant. *D.M. Dec.* Ex. E at 79-80; Ex. F at 80. Early negotiated resolutions may result in a credit for time served resolution, so delay in appointing counsel could result in delayed release. *R.B. Dec.* ¶ 49.

28. During an initial consultation, a client may tell their attorney about important, exculpatory evidence that may be lost if not gathered immediately, if so, an attorney must act expeditiously to gather the evidence. *R.B. Dec.* ¶¶ 43, 49. As a result, delays in appointing counsel may result in significant loss of evidence, such as videos, witness information, and pictures of injuries, that could be permanently lost if it is not gathered soon after someone is arrested. *Declaration of Hector Rivera* ¶¶ 4-13; *R.B. Dec.* ¶¶ 43, 48, 49. Even where exculpatory evidence can be found later, delay in finding evidence that proves a person is innocent delays the release of an innocent person.[16] *R.B. Dec* ¶ 49.
29. Practitioners regularly see how video that might be erased exonerates clients. *R.B. Dec* ¶ 43(a). Functionally there is no remedy once this evidence is lost.
30. An attorney must also act to mitigate the effects of a criminal charge while a case is pending. Incarceration or repeated mandatory court hearings can lead to the loss of a job, loss of housing, even loss of custody of children. *R.B. Dec*. at 15, ¶ 37; *Declaration of Kyle Wadkins* (*K.W. Dec.*) ¶¶ 6-8. Even if people had been given an opportunity to argue bond, without counsel, in-custody defendants cannot make meaningful bond arguments, since organizing family, friends, and employers to come to court, organizing treatment, or getting

[16] Washington cases include instances where defense counsel was able to procure evidence exonerating a defendant before trial. *See e.g. State v. Matthews*, 92 Wn. App. 1048 (1998).

proof of housing and other community connections, is virtually impossible for people who are in custody. *R.B. Dec*. ¶¶ 56-62.

31. Similarly, conditions of release often interfere with out-of-custody defendants' work, housing, medical care, or other important aspects of their life. *See e.g. V.C. Dec.* ¶ 7; *K.W. Dec.* ¶ 7. Without an attorney, people generally do not know how to ask for changes in their conditions of release without an attorney. *V.C. Dec.* ¶ 7; *R.B. Dec*. at 15-16, ¶¶ 35-37; ¶ 51.

32. Jail can be dangerous, especially for vulnerable people such as people struggling with mental health issues, and an attorney may be the only person who is able and willing to advocate for crucial treatment or improvements in jail conditions. *R.B. Dec*. at 17 ¶¶ 37, 42, 46. This may be a matter of life and death, with six people dying in the Yakima County Jail in 2023 and 2024. *Id.* ¶ 42.

33. An attorney is also necessary to protect the rights of people during hearings. Important rights may be waived without counsel, such as the right to object to a timely arraignment or the right to plead guilty at arraignment, or an objection may be meaningless by the time counsel is appointed. *R.B. Dec.* ¶¶ 51-54.

34. An attorney is also integral to competency proceedings. RCW 10.77.103(a); *R.B. Dec*. ¶ 45. In Yakima, delays in appointing counsel subjected people who had never talked to an attorney—or anyone else in the Court system—to invasive competency evaluations as the Court would order such evaluations in the absence of an attorney. *D.M. Dec.* Ex. E at 29-30; Ex. G at 52-54; Ex. L at 32. Additionally, some people who ultimately needed

evaluations were delayed in that process because no competency evaluation was ordered until counsel was appointed. *Id.* Ex. G at 54

35. Perhaps most telling, uncounseled defendants could not meaningfully advocate for an end to Yakima's failure to provide attorneys. The worst of the crisis occurred after the federal courts ruled that people in Oregon could not be held in custody more than 7 days if they were not appointed an attorney. *D.M. Dec.* Ex. D at 135-138. Judge Bartheld was aware of this ruling but noted that he would deal with it "once a motion was filed." *Id.* Ex. L at 58. Because there were no attorneys and DAC did not represent these individuals, there was no one to file such a motion. *Id.* Ex. D at 137-138. Without an attorney, most uncounseled defendants cannot take affirmative steps or make objections that are crucial to protecting their rights. *R.B. Dec.* ¶¶ 51-52. In Yakima, most uncounseled people did not make objections, *D.M. Dec.* Ex. A at 42, and the few who tried, were not able to articulate successful legal theories. *Id.* Ex. D 141-142.

36. The inherent harm of failure to appoint an attorney was not mitigated even when an attorney was appointed within the speedy trial period as the Court treated new assignments as a new commencement date under CrR 3.3. *D.M. Dec.* Ex. F at 81-83.

D. Mass Extension of Speedy Trial Deadlines Without Process

37. As wait times for an attorney approached 90 days for some attorneys the PAO was "getting concerned about speedy trial rights and the fact that individuals were not getting arraigned..." *D.M. Dec.* Ex. A at 54. In response, the PAO made motions to extend those deadlines. *Id.* at 54-55.

38. On August 13, 2024, Judge Bartheld issued an order (referred to herein as "Letter Decision") that purported to resolve speedy trial issues for all of the people without counsel, even in cases where no motion had been made and for cases that had yet to be filed. *D.M. Dec.* Ex. A.1 at 1. The "Letter Decision" described the Judge's intention "to address the various motions filed by the State … with the intent that its ruling will have application in the other cases where similar motions have been filed but have not been noted for argument together with cases with similar issues where motions have not been filed..." *Id.* Ex. A.1 at 1; Ex. L at 40.
39. The Letter Decision held that speedy trial would be extended on a mass basis *because the defendant was without counsel* on two theories: 1) it was unforeseeable that attorneys would leave DAC, that pay raises would not bring in more attorneys, and that the Washington legislature and Washington Supreme Court would not help Yakima County meet its obligation to provide counsel to indigent defendants; and 2) that continuances were required in the administration of justice. *D.M. Dec.* Ex. A.1 at 5-9.
40. The Court had never requested the Washington State Supreme Court take any action such as changing court rules to extend the time to appoint counsel or extend arraignment timelines. *D.M. Dec.* Ex. L at 55.
41. Yakima County took several actions, including lobbying the legislature and eventually suing the state to try to get the legislature to assist with public defense funding going back to at least 2013. *D.M. Dec.* Ex. B at 41-43. The State has largely refused to assist. *Id.*
42. The Court did find that "[t]he court must presume the inability to appoint defense counsel may have a prejudicial effect upon the presentation of the defendant's defense" but

reserved findings on prejudice until after the people affected by the order were appointed attorneys. *D.M. Dec.* Ex. A.1 at 8 (indicated by arrow).

43. The Court filed the Letter Decision in hundreds of cases. *See M.F. Dec.* Ex. A. Judge Bartheld had a set procedure for filing these motions:

> After the decision was issued, there were a number of cases that the appointment of counsel was going to occur at or after the expiration of the 90 days from the effective date of arraignment.
>
> The process at that point in time was the State would file their motion to continue and I would issue an order basically adopting the findings, conclusions, and order that I had made in the memorandum decision.

D.M. Dec. Ex. L at 40-41; see also Id. Ex. F 30-31.

44. When he issued the Letter Decision "[o]n August 13, 2024, Judge Bartheld expressed an instruction to the deputy prosecuting attorney to have the order available for filing and available to provide to the defendant so they knew what his ruling was." *D.M. Dec.* Ex. E at 76. Thereafter, the PAO kept a pre-printed stack of the Letter Decision in Court. *Id.* Ex. F at 62. When a case was approaching its speedy trial deadline, the prosecutor would fill in the name and case number of the defendant on the preprinted motion and letter decision and hand it forward to the Court. *D.M. Dec.* Ex. E at 71-72; Ex. F at 63; Ex. G at 35. The Court would sign and file the decision, the defendant would be given a copy, and the Court would explain that their speedy trial had been extended. *Id.* Ex. G at 35-36.

45. Neither the prosecutor nor the judge would fill in any facts related to the case because the motions were "…based upon the legalities as opposed to the specifics. The specific is that person didn't have indigent counsel specifically appointed. Everything else legally flowed from that." *D.M. Dec.* Ex. B at 27; *see also D.M. Dec.* Ex. F at 62-63; Ex. L at 46.

46. This procedure was used when people had not been assigned an attorney; therefore, people were never represented during these motions. *D.M. Dec.* Ex. L at 43. The unrepresented defendants were not informed the state was going to make this motion ahead of time. *Id.* Ex. A at 62-63; E. G at 46-47; Ex. E at 68; Ex. F at 66. In court, on the record, Judge Bartheld told unrepresented people not to make legal arguments on their own behalf, sometimes refusing to hear such arguments and telling people they could raise the issue once they were appointed attorneys. *Id.* Ex. F at 31, 41, 65-66; Ex. L at 41-42.

47. However, DAC only filed motions raising the issue in three cases, one of which was not litigated before the case was resolved. [17] In some cases, DAC refused to raise the issue even when asked to do so by their clients. *D.M. Dec.* Ex. M. DAC never filed an appeal of the decision. *Id.* Ex. B at 44.

DATED this 28th day of January, 2026.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION

By: s/David Montes
David Montes
La Rond Baker
John Midgley
ACLU of Washington Foundation

[17] DAC had no policy or directive to challenge the Letter decision once appointed, leaving the choice of whether to file such a motion to individual attorneys. *D.M. Dec.* Ex. D at 151. Prosecutors did not deal with or hear about these motions. *Id.* Ex. F at 71-72. In response to a discovery request for all motions filed challenging the Letter Decision, Defendants, including DAC, were only able to produce three written motions that had been filed challenging the Letter Decision. *Id.* Ex. N. They produced five other motions challenging speedy trial but none of those challenged the Letter Decision. *Id.* In one of the three cases in which the Letter Decision was challenge, the motion was never litigated. *Id.* Ex. O.

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Appendix F

(Memorandum in Support of Plaintiffs' Motion for Summary Judgment)

EFILED
Clerk Billie Maggard
1/29/2026 8:30 AM
Superior Court Yakima County, WA

IN THE SUPERIOR COURT OF WASHINGTON
FOR YAKIMA COUNTY

VICTOR CUEVAS, et al., on their behalf and on behalf of other similarly situated individuals,

Plaintiff,

v.

YAKIMA COUNTY, et al.,

Defendant.

No. 25-2-00718-39

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

The state arrests a citizen and incarcerates him pending trial. Days, weeks, and months pass without any legal representation. He seeks relief from the authorities—surely a lawyer should help him? In response, he gets a shoulder shrug, a promise that they are "working on it," and nothing more. He remains in jail, without legal counsel or any relief in sight.

You might think this passage comes from a 1970s State Department Report on some autocratic regime in the Soviet Bloc. Unfortunately, we do not need to go back in time or across an ocean to witness this Kafkaesque scene.

- Judge John Owens, *Betschart v. Oregon*, 103 F.4th 607, 612 (9th Cir. 2024).

The right to counsel for indigent defendants has been guaranteed in Washington for at least 160 years. Nonetheless, between 2022 and 2025, Yakima County failed to provide counsel to hundreds of indigent people charged in their court. There is no genuine issue of material fact that people in Yakima were charged with crimes but waited weeks or months, both in custody and out of custody, for a public defender. Nor is there a genuine issue of material fact that Defendants extended the speedy trial deadline of hundreds of defendants without notice or an opportunity to be heard, because Yakima County was unable to provide counsel. Accordingly, this motion presents a pure question of law, whether Yakima violated the Washington Constitution and court rules by failing to provide attorneys to indigent people charged with crimes in their court and extending the allowable time for trial because of that failure. They did. For this reason and the reasons given below, Plaintiffs ask this Court to grant summary judgment on Plaintiffs' Uniform Declaratory Judgment (UDJA) Claims, declaring that: 1) Failure to provide counsel to indigent defendants by the first hearing after filing or the first hearing after an attorney withdraws violates article I, section 22 of the Washington Constitution, and Criminal Rule (CrR) 3.1; 2) Extending the allowable time for trial without the presence of defense counsel and without notice or the opportunity to be heard violates article I, section 3 of the Washington Constitution; and 3) Extending the allowable time for trial because of a failure to provide an attorney to indigent defendants violates CrR 3.3.

II. FACTS

Concurrent with this memorandum, Plaintiffs file a Statement of Undisputed Material Facts, which is incorporated herein by reference and referred to throughout as "SUMF."

III. LEGAL STANDARD

Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). While all facts must be taken in the light most favorable to the non-moving party, the non-moving party may not defeat summary judgment with bare assertions:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of a pleading, but a response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

CR 56(e). Uncontroverted, relevant facts offered in support of summary judgment are deemed established. *Central Washington Bank v. Mendelson-Zeller, Inc.*, 113 Wn.2d 346, 354 (1989). Summary judgment is proper if reasonable minds could reach only one conclusion from the evidence presented. *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 708 (2007).

IV. ARGUMENT

The UDJA provides that "[c]ourts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed." RCW 7.24.010. Summary judgment is appropriate in UDJA claims where there is no issue of material fact. CR 56(a) and (c).

Here, there are no genuine issues of material fact, and Plaintiffs are entitled to a declaratory judgment that 1) Failure to provide counsel to indigent defendants by the first hearing after filing or the first hearing after an attorney withdraws violates article I, section 22 of the Washington Constitution, and CrR 3.1; 2) Extending the allowable time for trial without the presence of defense

counsel and without notice or the opportunity to be heard violates article I, section 3 of the Washington Constitution; and 3) Extending the allowable time for trial because of a failure to provide an attorney to indigent defendants violates CrR 3.3.

A. Failing to Appoint Counsel By the First Hearing After Filing or the First Hearing After an Attorney Withdraws Violates Article I, Section 22 of the Washington Constitution and CrR 3.1.

"Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." *United States v. Cronic*, 466 U.S. 648, 654 (1984); *see also State v. A.N.J.*, 168 Wn.2d 91, 97 (2010) ("Without an attorney, [] fundamental rights are often just words on paper."). The right to counsel goes beyond the right to have an attorney appear at certain hearings; it includes "a continuous right to competent and zealous advocacy outside of the courtroom." *Betschart v. Oregon*, 103 F.4th 607, 620 (9th Cir. 2024). This continuous right to counsel includes, but is not limited to, a right to confidential communication; investigation of lines of defense; investigation of competency; assistance with bail hearings; assistance in negotiations; and advice about potential consequences of a plea. *Id.* at 620-621; *see also generally Declaration of Robert Boruchowitz*.

Because of the continuous nature of the right to counsel, unreasonable delay in appointing counsel can violate the right to counsel under the Sixth Amendment[1] to the United States Constitution. *Betschart v. Garrett,* 700 F. Supp. 3d 965, 981 (D. Or. 2023). Such an unreasonable delay does not require proof of individualized prejudice before a violation of the right to counsel

[1] Although the Washington Constitution is frequently more protective than its federal counterpart, including in this context, the federal constitution always represents minimum constitutional protection. *See e.g. Matter of Williams*, 198 Wn.2d 342 (2021). As such, it is important to understand these baseline protections when analyzing independent state protections.

is established. *Betschart*, 103 F.4th at 621 (rejecting the argument that any Sixth Amendment violation that occurs before a verdict is collateral and therefore not remediable). Instead, such a delay violates the right to counsel because: 1) the lack of counsel prevents people charged with crimes from preparing for or progressing to critical stages and 2) the lack of counsel prevents people from having meaningful bail hearings. *Id.* at 619.

While the Sixth Amendment represents minimum protection for the right to counsel in Washington, article I, section 22 of the Washington Constitution provides a right not provided by the Sixth Amendment: the right to appear through counsel. Wash. Const. art. I, § 22 ("the accused shall have the right to appear and defend in person, or by counsel..."); *cf.* U.S. Const. Amend. 6 ("the accused shall … have the Assistance of Counsel for his defence."). Washington courts have never considered the import of article I, section 22's right to appear through counsel.[2] However, the plain language of this provision supports an explicit right to an attorney at every hearing, which is not contained in the Sixth Amendment. Moreover, the history of the right to counsel in Washington, pre-existing state law, and the importance of access to justice to the structure of the Washington Constitution all support a robust right to appear through counsel, requiring counsel to be appointed before any hearing in a criminal case.

1. An Independent Reading of Article I, Section 22 is Appropriate and Supports a Robust Right to Appear Through Counsel.

[2] Washington courts consider each state constitutional context separately, requiring a new analysis even when a provision has been considered in other contexts. *Williams,* 198 Wn.2d at 353-54. While Washington Courts have considered whether article I, section 22 is more protective than the Federal Constitution in other contexts, *see e.g. State v. Shafer*, 156 Wash.2d 381, 391 (2006) (finding article I, section 22 to be more protective of the right to confrontation); *State v. Medlock*, 86 Wn. App. 89, 98 (1997) (finding article I, section 22's right to counsel during interrogation is coextensive with the Sixth Amendment), they have never considered this context. As such, an analysis to determine whether an independent reading should be given to the right to appear through counsel under article I, section 22 is required.

When considering whether a provision of the Washington Constitution is more protective than the federal constitution, courts consider the six non-exclusive *Gunwall* factors: 1) the textual language of the state provision, 2) significant differences in the text of parallel federal provisions, 3) state constitutional and common law, 4) pre-existing state law, 5) differences in structure in the two constitutions, and 6) matters of particular state or local concern. *State v. Gunwall*, 106 Wn.2d 54, 61–62 (1986). Each of these factors weigh in favor of finding Washington's article I, section 22 is more protective, providing a robust right to appear through counsel.

Textual Differences (Factors 1 and 2): Factors 1 and 2—concerning textual differences between the state and federal provision—are frequently considered together. *See e.g. State v. Foster,* 135 Wn.2d 441, 459 (1998). The Washington Supreme Court has held that article I, section 22 and the Sixth Amendment have significant textual difference and that article I, section 22 provides additional rights. *State v. Martin*, 171 Wn.2d 521, 529 (2011). Because the federal provision existed at the time of adoption of article I, section 22, courts presume these textual differences were a conscious choice. *Id.* at 530.

Article I, section 22 requires: "the accused shall have the right to appear and defend in person, or by counsel..." Article I, section 22 also provides that "[i]n no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed." The Sixth Amendment to the federal constitution by contrast requires only that "the accused shall … have the Assistance of Counsel for his defence." As such, article I, section 22 includes a whole category of protection that the Sixth Amendment does not: the right to *appear* through counsel. *Gensburg v. Smith*, 35 Wn.2d 849, 856 (1950) ("The right of accused persons to appear and defend by counsel is expressly guaranteed by Art. I, § 22, of the state constitution…").

The plain language of this provision guarantees the right to counsel at every appearance. Therefore, the right is violated whenever counsel is not appointed by the first hearing after a case is filed, generally arraignment, or after counsel withdraws, because that is the only way to ensure no hearing will occur without counsel.

Moreover, since 1889, article I, section 22 has required that "[i]n no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed." If counsel is not provided by arraignment, this additional right is violated because the only way to take advantage of the right to counsel, the right to arraignment under CrR 4.1, or the many other rights guaranteed by article I, section 22, is to pay for an attorney. The only way to avoid such a situation is to find a violation of the right to counsel whenever counsel is not appointed by the first hearing after filing or after an attorney withdraws.

Factors 1 and 2 strongly support an independent reading of article I, section 22, providing a robust right to appear through counsel.

History (Factor 3): The history of appointed counsel in Washington indicates stronger protection for the right to appointed counsel under article I, section 22. Before statehood, the right to counsel at no cost was a normal part of criminal trials. The first attorney admitted to practice in Washington territory immediately "turned to the defense of numerous persons then charged with various misdemeanors." Donald McDonald, *The Courts and Early Bar of the Washington Territory*, 17.2 Wash. L. Rev. 57, 62 (1942). During the first recorded criminal trial in the territory—the trial of six Native men accused of killing Europeans who were colonizing the area—counsel was appointed "[f]or the purpose of affording a fair, impartial, and properly conducted

trial."[3] *Id.* at 60. The territory also enacted a statute requiring counsel at no cost for indigent defendants over 100 years before such a right was recognized under the federal constitution and over 30 years before statehood. Washington Courts, *Statement on 50th Anniversary of Gideon v. Wainwright* (2013) https://www.courts.wa.gov/newsinfo/content/pdf/GideonJuryComment.pdf.

Once Washington became a state, there was a continued emphasis on the right to counsel. As noted, article I, section 22 guaranteed the right to counsel at no cost as soon as ratification. As early as 1905, the right to the advice and representation of counsel at arraignment was recognized. S*tate v. Allen*, 41 Wn. 63, 65 (1905) (requiring trial court to allow withdrawal of defendants' guilty plea because he was not advised of his right to counsel at arraignment). Article I, section 22's right to appear through counsel also supported the right to counsel for plea and sentencing thirteen years before *Gideon* was decided. *Gensburg*, 35 Wn.2d at 856. Similarly, the right to effective assistance of counsel was recognized in Washington thirty years before the federal constitution was determined to contain this right in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Buckingham v. Cranor*, 45 Wn.2d 116, 117 (1954). More recently, the Washington Supreme Court affirmed the right to counsel is not simply concerned with in-court advocacy but guarantees the right to counsel for investigation and consultation in the early stages of litigation. *A.N.J*, 168 Wn.2d at 114-116. From the earliest part of our state's history, and consistently throughout, the right to counsel was guaranteed during every part of criminal proceedings.

This history—recognizing a right to appear through counsel at arraignment 60 years before *Gideon*—supports a robust right to appear through counsel provided by article I, section 22.

[3] This is telling because the two people who were convicted were put to death two days after their arrest. McDonald, at 60. Even in a context where due process protections were extremely minimal, counsel was provided.

Washington courts' emphasis on the importance of investigation and consultation further supports a reading of the state constitution that goes beyond the federal constitutional floor and includes the right to counsel who can prepare the case and consult with the client, not just an attorney that appears to help at individual hearings. Such a right to counsel is violated whenever counsel is not appointed by the first hearing after filing or after an attorney withdraws.

Pre-existing State Law (Factor 4): Pre-existing state law supports a robust right to appear through counsel under article I, section 22. *See e.g.* CrR 3.1(b)(1) ("The right to a lawyer shall accrue as soon as feasible after the defendant is taken into custody, appears before a committing magistrate, or is formally charged, whichever occurs earliest."); RCW 10.77.103(a) (guaranteeing the right to counsel throughout competency proceedings).Washington's rule based right to counsel, CrR 3.1,[4] is significantly more protective than the right to counsel under the Federal Constitution. For example, in *State v. Fitzsimmons*, the Washington Supreme Court held that the right to an attorney attaches when people are detained for a DUI because the evidence of that offense is fleeting and the opportunity to collect independent evidence will be lost without immediate access to an attorney. 94 Wn.2d 858, 858 (1980). The State appealed that decision to the U.S. Supreme Court. *Id.* That Court remanded the case to determine whether the ruling was based on independent state grounds or the Sixth Amendment. *Id.* Our Court clarified that its decision was grounded in state law. *Id.* at 859. In relying on independent state grounds, the Court emphasized that "[r]eliance on federal precedent and federal constitutional provisions would not preclude [Washington courts] from taking a more expansive view of the right to counsel under state provisions…" *Id.*

[4] Washington courts have used court rules to inform their constitutional analysis when doing so is necessary to protect important constitutional rights. *See e.g. State v. Zamora*, 199 Wn.2d 698 (2022); *State v. Berhe*, 193 Wn.2d 647 (2019) (using standards from General Rule 37 to inform analysis of the defendant's right to a fair trial).

Pre-existing state law also highlights the failure of Washington law to fully protect the right to counsel it guarantees, supporting and highlighting the need for an independent interpretation of article I, section 22. In *State v. Heng*, the trial court held Mr. Heng's first appearance without an attorney, violating his right to counsel under CrR 3.1 and the Washington Constitution. 2 Wn.3d 384, 389 (2023). The Washington Supreme Court started its analysis of this violation by noting: "Violation of [the right to counsel] is, at least, constitutional error. A violation of that right at a critical stage of criminal proceedings is structural error." *Id.* at 387. The Court found that this was a clear constitutional error but not a structural error, meaning proof of prejudice, which was not present, was required before reversal. *Id.* at 397. This pre-existing law supports a robust right to appear through counsel at every hearing in Washington, even where such a right cannot afford a remedy.

This ruling also highlights the need for broader protection for the right to counsel. Every justice ruled that the right to counsel was violated but there was no remedy available. Justice Yu concurred with the result in *Heng*, writing separately to emphasize the injustice of a right without a remedy and the need for an enforcement mechanism:

> [T]his case illustrates the need for us to develop a more robust protection of the right to counsel for the accused… [T]he violation of Heng's right to counsel was both clear and apparently unnecessary. Yet, Heng has no recourse on appeal…[T]he lack of counsel undermines the integrity of criminal investigations because even a brief private conversation between a defendant and their counsel can be crucial to their defense. Yet, disentangling the possible effects of pretrial detention from the many other conditions that could influence outcomes is difficult. As a result, it is nearly impossible for a defendant to show that the absence of counsel at a preliminary appearance in their particular case demonstrably affected the outcome… *No hearing before a judicial officer in a criminal prosecution should occur without the presence of defense counsel…* [a]nd… we should enact an enforcement mechanism that has significant consequences.

Id. at 398-400 (emphasis added). The violation of the right to counsel in Yakima is significantly more severe and widespread, with hundreds of people appearing at a wide variety of hearings without counsel, and further highlights the need for an enforcement mechanism. A robust right to appear through counsel under article I, section 22 provides this mechanism.

These pre-existing state laws support a finding that the Washington Constitution goes beyond the Sixth Amendment's protection against "unreasonable delay" and indicate the strong necessity of such additional protection. As such, this pre-existing state law strongly supports reading article I, section 22 to provide a robust right to appear through counsel, which is violated whenever counsel is not appointed by the first hearing after filing or after an attorney withdraws.

Differences in structure (Factor 5): The Washington Supreme Court has "previously concluded that an analysis of the differences in structure (factor 5 of the Gunwall criteria) supports an independent state constitutional analysis in every case." *State v. Foster*, 135 Wn.2d 441, 458 (1998). Nonetheless, as it relates to the right to counsel, there is further support for an independent analysis. Our constitution puts a strong emphasis on access to justice, enshrining the right to access to justice in article I, section 10. Debra Stephens, *The Once and Future Promise of Access to Justice in Washington's Article I, Section 10*, 91 Wash. Law. Rev.41, 42-48 (2016). Because access to justice in criminal cases is only possible through counsel, the Washington Constitution's emphasis on access to justice supports a robust right to appear through counsel in article I, section 22.

Matter of Particularly Local Concern (Factor 6): The criminal legal system is a matter of particularly local concern. *See e.g. State v. Silva*, 107 Wn.App. 605, 620-21 (2001) (*Gunwall* analysis regarding right to self-representation). Public defense is funded entirely by state or local

governments. *Davison v. State*, 196 Wn.2d 285, 289 (2020). Federal courts refuse to intervene in state criminal proceedings absent extreme circumstances because those proceedings are deemed to be the almost exclusive province of states. *Younger v. Harris*, 401 U.S. 37, 46 (1971). Moreover, public defense has been of particular concern for courts around the state of Washington. *See* Washington Supreme Court, *Washington Supreme Court Issues Interim Order on Public Defense Standards*, Washington Courts: News and Information (June 9, 2025) https://www.courts.wa.gov/newsinfo/?fa=newsinfo.internetdetail&newsid=52746. There is no doubt that conduct of the criminal legal system is of intense local concern.

Conclusion: All six *Gunwall* factors support a robust right to appear through counsel under article I, section 22. This right goes beyond the Sixth Amendment's right to counsel without unreasonable delay. Reasonableness is a flexible standard, whereas the right to appear through counsel presents a concrete right and a clear standard against which an alleged violation can be measured. Under this standard, a court must ask whether an alleged deprivation of counsel results in the defendant being deprived of his right to appear through counsel at any hearing, regardless of reasonableness.

This is a common dichotomy in the context of the Washington and Federal constitutions. For example, in the search and seizure context "[t]he Fourth Amendment protects only against 'unreasonable searches' by the State, leaving individuals subject to any manner of warrantless, but reasonable searches [while] article I, section 7 is unconcerned with the reasonableness of the search, but instead requires a warrant before any search, reasonable or not." *State v. Eisfeldt*, 163 Wn.2d 628, 634 (2008). Article I, section 22 is similarly not concerned with reasonableness but instead guarantees the right to appear through counsel.

Given this clear right to appear through counsel and the other continuous rights that accompany the right to counsel, this court should declare that this right is violated whenever counsel is not appointed by the first hearing after filing or after an attorney withdraws.

2. Yakima's Failure to Provide Counsel Before the First Hearing After Filing or the First Hearing After an Attorney Withdrew Was a Violation of Article I, Section 22.

There is no material dispute that many people appeared in Yakima County Superior Court for various hearings, including continuances of arraignment dates, extensions of speedy trial, issuances of warrants, and attorney status hearings, without counsel. *Statement of Undisputed Material Facts in Support of Motion for Summary Judgment* (SUMF) ¶¶ 18-23. This is a clear violation of the right to appear through counsel. The inability of in custody defendants to assert their rights at these hearings, despite clear precedent that their detention was unlawful, highlights the importance of this right and its violation here. Judge Bartheld knew that the federal courts in Oregon ruled that holding people in custody for longer than seven days without counsel was a violation of the right to counsel. *Id.* ¶ 34. He discussed this ruling with other stakeholders but took the position that the Court would deal with it "once a motion was filed." *Id.* ¶¶ 12, 34. Unsurprisingly, since no attorneys were appointed, no such motion was filed. *Id.* ¶ 34. Only an attorney would have the knowledge and wherewithal to do so, and the defendants involved were all without counsel. In other words, the Court would not recognize the clear violation of the right to counsel represented by the failure to appoint counsel, absent counsel making such a motion.

While there may be extenuating circumstances, which excuse short continuances of hearing to accommodate emergencies, such as illness of an attorney, those extenuating circumstances cannot be resource limitations, as they were in Yakima. Article I, section 22 has no exception to

the right of counsel if there is an attorney shortage: "Administrative convenience, lack of funds, or shortage of defense counsel are not adequate reasons to deprive a person accused of a crime of counsel." *Heng*, 2 Wn.3d at 391.

For all these reasons, the Court should declare that article I, section 22 is violated when counsel is not appointed by the first hearing in a case or after an attorney withdraws.

3. Failing to Provide Counsel Before Arraignment is a Violation of CrR 3.1.

As noted above, CrR 3.1 requires counsel by the first appearance before a magistrate and at every hearing thereafter. As such, the Court should declare that failing to appoint counsel by the first hearing after filing or after an attorney withdraws is also a violation of CrR 3.1.

B. Extending the Allowable Time for Trial Without the Presence of Defense Counsel and Without Notice or the Opportunity to be Heard Violates Article I, Section 3 of the Washington Constitution.

Once it became apparent that defense counsel was unavailable, Yakima County further violated the due process rights of people accused of crimes by holding hearings at which the court made substantive legal decisions, including extending speedy trial deadlines. These extensions violated due process. At a minimum, article I, section 3 of the Washington Constitution requires that "deprivation of life, liberty or property by adjudication be *preceded* by notice and opportunity for hearing appropriate to the nature of the case." *Guardianship Estate of Keffeler ex rel. Pierce v. State*, 151 Wn.2d 331, 342 (2004) (emphasis added).

There is no material dispute that these basic requirements were not met here. While the Court held individual hearings, the outcome of hearings was predetermined, as evidenced by the pre-printed motions and letter decision. SUMF ¶¶ 43, 44. Moreover, people who came before the court were denied notice or the opportunity to speak, SUMF ¶ 45, let alone receive a decision

based on the specific facts of their case. Without counsel, the hearings became a mere pantomime of a legal process. This is precisely what due process protections are meant to prevent. This Court should declare that extending speedy trial in this fashion violates due process.

To determine the process due in any given situation, courts consider the *Mathews* factors: "(1) the private interest affected, (2) the risk of erroneous deprivation of that interest through existing procedures…, and (3) the governmental interest, including costs and administrative burdens of additional procedures." *In re Det. of Stout*, 159 Wn.2d 357, 370 (2007).

Starting with Factor 1, people accused of a crime have several important liberty interests protected by the constitution, including an interest in being free from incarceration, *Born v. Thompson*, 154 Wn.2d 749, 755 (2005), and an interest in a speedy and fair trial. Wash. Const. Art. 1, § 22. Among other things, speedy trial rules are vital in protecting these rights because they are "important safeguard[s] to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself." *U.S. v. Ewell*, 383 U.S. 116, 120 (1966). In other words, speedy trial is a time bound right meant to protect the most important liberty interests in the criminal legal system. The whole purpose of the rule is to ensure there is an efficient end to proceedings; extending those proceedings is the very harm to be prevented. As such, there is an important liberty interest at stake when speedy trial rights are adjudicated.

In addition to these important interests, promulgation of mandatory state law or court rule can create a due process liberty interest. *See Matter of Cashaw*, 123 Wn.2d 138, 144 (1994); *Heng*, 2 Wn.2d at 389; *In re McCarthy*, 161 Wn.2d 234, 240 (2007); *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974). CrR 3.3, Washington's speedy trial rule, protects the important interests noted above

by creating such a mandatory right. *See State v. Kenyon,* 167 Wn.2d 130, 136 (2009). CrR 3.3's first mandate is that "[i]t shall be the responsibility of the court to ensure a trial in accordance with this rule to each person charged with a crime." CrR 3.3(a)(1). Moreover, it requires that "[a] charge not brought to trial within the time limit determined under this rule shall be dismissed with prejudice." CrR 3.3(h). CrR 3.3 is not discretionary; if the rule is violated, dismissal with prejudice is both required and automatic, the court simply loses jurisdiction over the case. *State ex rel. Moore v. Houser*, 91 Wn.2d 269, 273-74 (1978); *State v. Denton*, 23 Wn.App.2d 437, 459 (2022). In short, the individual interest in speedy trial is both important and protected by a mandatory court rule, which itself creates a liberty interest.

Turning to Factor 2, the risk of erroneous deprivation of the speedy trial right, given the procedure used here, is extremely high. Without an attorney to argue, there is no consideration of any factor relating to individual defendants other than the absence of counsel. In fact, in this case, the Court discouraged defendants from arguing a decision that had been made before the hearing, in some cases months before, creating a situation where deprivation was all but ensured. Even if people had been given the opportunity to argue and the motion had not been predetermined, they were given no notice that the motion would be made. An experienced attorney would have trouble arguing such a motion under these circumstances, much less a person with no legal training. The procedure here not only created a risk of erroneous deprivation but ensured it.

Turning to Factor 3, the private interests align with the governmental interest here. Speedy trial is a rule meant to preserve the constitutional rights of the defendant and therefore, both the government and the defendant have a strong interest in its enforcement. *Kenyon,* 167 Wn.2d at

136. Moreover, because this right implicates the "integrity of the judicial process…," *Id.*, the government has a stronger interest still in ensuring appropriate process.

All three factors indicate that significant due process protections should accompany a hearing to determine whether speedy trial expiration is extended, but the Yakima court provided none. There is no material dispute about what happened here: Once Judge Bartheld's order was issued on August 13, 2024, it was filed in hundreds of cases. SUMF ¶ 42. The Letter Decision was meant to address future cases where this issue arose, even those where no motion had been filed. SUMF ¶37. Neither the Court nor the prosecutors individualized the orders in any way since the ruling flowed from the singular fact that the person reached their speedy trial deadline without being appointed counsel. SUMF ¶ 42. The court held individualized "hearings" with a predetermined outcome and provided no notice and not only did not provide an opportunity for people to be heard but actively discouraged people from making any argument. SUMF ¶ 42-46.

The process provided in this case falls far below the requirement of the due process clause, given the importance of these rights. Even in the prison context, where courts regularly hold due process rights are restricted, due process requires that people be given written notice of the nature of alleged violation of prison rules 24 hours before a hearing, the right to present and challenge the evidence presented, and the right to give their perspective on whether a violation occurred. *Wolff*, 418 U.S. at 557. Here, where people are presumed innocent and retain much broader due process rights, this would be the bare minimum requirement. The Court did not provide it.

Judge Bartheld's reservation on the issue of prejudice does not save this process.[5] In the criminal context, process is required *before* a right is taken: "It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment..." *Powell v. State of Ala.,* 287 U.S. 45, 68 (1932). Moreover, this reservation did not provide any process as a practical matter, since the order was challenged in only two cases, neither of which was appealed, and DAC[6] attorneys refused to challenge it in other cases, even when asked to do so by their clients. SUMF ¶ 46.

As such, the process used by the Court here did not comply with due process and this Court should declare that extensions of speedy trial made without an attorney for the defendant, without notice, and without the opportunity to be heard violate article I, section 3.

C. Extending the Allowable Time for Trial Because of a Failure to Provide an Attorney to Indigent Defendants Violates CrR 3.3.

In addition to violating due process, Judge Bartheld's order extending speedy trial because no attorney was available violated CrR 3.3. As noted above, CrR 3.3 requires that a judge dismiss any case which is not brought to trial consistent with the rule, regardless of prejudice. CrR 3.3(h). After the speedy trial period runs, courts simply lose jurisdiction over such a case. *Houser*, 91 Wn.2d at 273-74; *Denton*, 23 Wn.App.2d at 459. CrR 3.3 requires that a person detained in jail be brought to trial within 60 days of their "commencement date" and a person who is not detained in jail be brought to trial within 90 days of their "commencement date." CrR 3.3(b). The

[5] Even if such a reservation could prevent a due process violation, it was fundamentally ineffective here since it affected only part of the court's ruling. The Court's ruling that unforeseeable circumstances justified an extension of speedy trial is unaffected by the reservation of prejudice.

[6] It is worth noting that DAC, a defendant in this case, has also defended this lawsuit with the same counsel, taking the same position on these issues as Yakima County Superior Court and Yakima County, since at least December of 2024, making true adversity on these issues unlikely.

commencement date is set pursuant to CrR 3.3(c), which initially sets commencement on the initial arraignment date based on CrR 4.1. CrR 3.3(c)(1).

A court may exclude time from the calculation of a speedy trial date under the rule, essentially pausing the speedy trial clock. CrR 3.3(e). Reasons for an excluded period include unavoidable or unforeseen circumstances or continuances that are required in the administration of justice. CrR 3.3(e)(3) (referring to CrR 3.3(f)(2)) and (8). These were the reasons cited by Judge Bartheld in his Letter Decision. However, these provisions do not allow an excluded period for a whole class of defendants because a County fails to provide constitutionally required attorneys. Moreover, even if such an explanation could justify an excluded period, the factual circumstances here would not support one. As a result, these speedy trial extensions violated CrR 3.3.

1. Yakima's Failure to Provide Public Defenders Cannot Justify an Extension of the Time for Trial.

A staffing shortage at a government agency cannot justify an excluded period in the speedy trial calculation. *See e.g. Denton*, 23 Wn.App.2d at 450. Judge Bartheld was aware of this when he made his ruling. In *State v. Denton*, Judge Bartheld himself granted a continuance to accommodate a nine-month turnaround for getting DNA results from the Washington State Crime Lab because of understaffing at the lab, holding that the extension was required in the administration of justice, and describing the speedy trial rules as "aspirational." *Id.* The Court of Appeals found that extending speedy trial to accommodate delays in the crime lab was an abuse of discretion, noting that unlike cases where brief congestion allowed for such a delay, "the State and the trial court characterized the crime lab delays as expected and routine…" *Id.* at 458. This type of ongoing staffing shortage cannot excuse such a delay because "if congestion excuses the

long delays, there is lacking sufficient inducement for the state to remedy congestion." *Id.* at 450. *See also State v. Salgado-Mendoza*, 189 Wn.2d 420, 428 (2017) ("If the State wishes to pursue prosecution, it must allocate sufficient resources to its departments so that they may operate in a way that is consistent with a defendant's right to a fair trial.").

Nor can a staffing shortfall constitute an unforeseeable or unavoidable circumstance under CrR 3.3(e)(8). For example, in *State v. Kenyon*, the Washington Supreme Court found that the unavailability of judges was not unforeseeable or unavoidable under CrR 3.3(e)(8). 167 Wn.2d at 134. Kenyon was charged in a county with only two judges, one of which was presiding over a separate trial and the other of which was on vacation. *Id.* at 138. The Court excluded 17 days from speedy trial because no judge was available. *Id.* The Court emphasized that "[e]ven though trial preparation and scheduling conflicts may be valid reasons for continuances beyond the time for trial period," judicial unavailability was not. *Id.* at 137.

These cases are unequivocal and controlling: a staffing shortfall cannot be an unforeseen circumstance or allow an excluded period in the administration of justice. Therefore, a consistent, long-standing shortage of public defenders resulted in routine delays in many criminal cases, which cannot justify an excluded period. Nor does any other provision of the rule justify an extension of speedy trial. The drafters of CrR 3.3 were aware that issues with counsel could affect speedy trial. CrR 3.3(c)(2)(vii) allows courts to reset the commencement date if a new attorney is appointed to a defendant's case. However, the rule resets the commencement date on the day that counsel is disqualified, not the new commencement date. The rule makes no provision for resetting speedy on initial appointment of counsel, strongly indicating delay in that process cannot justify an extension in speedy trial.

Moreover, allowing such an extension would present defendants with an unlawful Hobson's choice. The government cannot force defendants to choose between their right to counsel and their right to speedy trial under CrR 3.3. For example, in *State v. Michielli*, the State made a late amendment which "forced Mr. Michielli either to go to trial unprepared or give up his speedy trial right." 132 Wn.2d 229, 245 (1997). The Court upheld the trial court's dismissal under CrR 8.3, because Michielli was "forced to choose between his right to a speedy trial and his right to effective assistance of counsel...." *Id.* at 244. Although the court did not analyze how CrR 3.3 applied to the situation, the case still answers this question. Were such a continuance required under these circumstances, there would be no tension; Michielli's right to counsel could be preserved by a continuance to allow his counsel to prepare. Just as in *Michielli*, people charged with crimes in Yakima had an unlawful Hobson's choice. However, they did not have the—by contrast good—option of unprepared counsel; to move forward within speedy, they would have to waive counsel altogether. Such a Hobson's choice is unlawful.

As such, this court should declare that extending the allowable time for trial because counsel was unavailable violated CrR 3.3.

2. Even if Yakima's Failure to Provide Counsel Could Justify a Continuance Pursuant to CrR 3.3, the Factual Circumstances Here Do Not Justify Such a Continuance.

In addition to not providing a legal basis for continuances under CrR 3.3, the two justifications for continuing cases in the Letter Decision are not supported by the factual record. First, finding that no prejudice will follow a continuance is required *before* a court can grant a continuance in the administration of justice under CrR 3.3(f)(2). *Silva*, 107 Wn. App. at 611. Here, the Letter decision acknowledged that the court could *not* make such a finding and, in fact,

presumed prejudice could result: "The court must presume the inability to appoint defense counsel may have a prejudicial effect upon the presentation of the defendant's defense…" SUMF ¶ 41. This part of the Letter decision is correct but also precludes a continuance under CrR 3.3(f)(2).

Further, these circumstances were not unforeseeable, precluding the Court's finding under CrR 3.3(e)(8). There was a staffing shortage in Yakima County for over two years when the letter decision was issued. SUMF ¶ 3-4, 37. Yakima sought help from the state for over a decade, and the state repeatedly refused. SUMF ¶ 40. In other words, these were not unforeseen circumstances that arose in April of 2024, but the status quo in Yakima for years or even a decade. Moreover, the Court never sought a rule change from the Washington Supreme Court. SUMF ¶ 39. It is not unforeseeable that a Court will not grant relief which is not sought.

For these reasons, there is no factual basis for Judge Bartheld's decision and this Court must declare that extensions of speedy trial because counsel was not available violated CrR 3.3.

V. CONCLUSION

For the foregoing reasons, Plaintiffs ask this Court to grant summary judgment on the UDJA claims outlined above. Once that issue is resolved, we will ask the Court to convene a summary proceeding pursuant to RCW 7.36 to determine the extent to which class members continue to be unlawfully restrained and the appropriate remedy to release that restraint.

DATED this 28th day of January, 2026.

Respectfully submitted,

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Appendix G

(Response to Plaintiffs' Motion for Summary Judgment)

HONORABLE DAVID L. PETERSEN
Hearing Date: March 2, 2026
Hearing Time: 9:00 a.m.
With Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

OMAR AL-THARWA, et al., on their behalf and on behalf of other similarly situated individuals, Plaintiffs, v. YAKIMA COUNTY, *et al.*, Defendants.	No. 25-2-00718-39 RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Every indigent defendant to pass through Yakima County Superior Court for over eight months has had an attorney timely appointed to their case at or before their first scheduled arraignment date. Decl. of P. Kelley ISO Response to M. Summary J. (SJ) ¶¶ 3-4, Decl. of D. Montes, Ex. C at 16. Plaintiffs' suggestion that Yakima County is experiencing an indigent defense crisis equivalent to the complete, ongoing breakdown of Oregon's statewide defense system, and akin to a Soviet regime, is belied by the facts. Unlike in the primary case Plaintiffs cite, *Betschart v. Oregon*, 103 F.4th 607 (9th Cir. 2024), where at the time of adjudication defendants sat in custody for months with no lawyer and no estimate when they would have one, DAC has been

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timely assigning attorneys to all indigent defendants. Decl. of P. Kelley (SJ) ¶¶ 2-4. As this court defined the class last year, there has not been a class member added since July 2025. *Id*.

At the time of certification, there were still some indigent defendants in Yakima County whose arraignments were being continued because they did not yet have appointed counsel. But today, there is no ongoing failure to provide attorneys before arraignment dates in Yakima County, and there has not been since shortly after the class was certified. Although Plaintiffs continue to ask the Court for the kind of extraordinary relief that is sometimes justified when individuals do not have attorneys who can advocate for them, every class member has had an attorney assigned for over eight months (and most for much longer). Tellingly, Plaintiffs offer no evidence of *any* alleged harms suffered because of delayed appointment of counsel in *any* class member's criminal case more recently than January 2025—over a year ago. To the extent discovery following this Court's order to compel yielded some elaboration of any prejudice claimed even by the named plaintiffs, the issues raised did not relate to any delay in appointment of counsel.

Because no class member is awaiting appointment of counsel, and any class member by definition must still have an open criminal case and an appointed lawyer, to the extent any class member is entitled to retroactive relief based on the individual circumstances of their criminal case, they may vindicate those rights through counsel in that proceeding. Any requested declaration regarding the time to appointment of counsel in this case is moot and would amount to an advisory opinion. This is likewise true of Plaintiffs' requested due process and time-for-trial declarations. To the extent those requests are even within the scope of what the Court certified,[1]

[1] The Court certified a class of individuals who:

> (1) qualify for an attorney at public expense, (2) have faced criminal charges in Yakima County Superior Court since April of 2024, and have not resolved their case, or will face charges in Yakima County Superior Court in the future, as long as their case is pending, with the exception of the class representatives, and (3) have

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Judge Bartheld, who issued the orders on time for trial Plaintiffs ask this Court to reverse, retired in January 2025. Not only, therefore, are those claims at least 14 months stale, each class member who had that order entered has also continued their case multiple times with counsel since then.[2]

Finally, established law precludes entry of the declarations Plaintiffs request, even if the Court considers each of them on the merits. First, they ask this Court to create a new constitutional mandate under article I, section 22 of the Washington Constitution, which is not supported by any authority and conflicts with existing law (which Plaintiffs fail to cite). Second, they ask this Court for declaratory judgments on two other issues—due process and time for trial—which are not amenable to class-wide determination. As to any assertion of past violations of individual speedy trial rights, there is no authority for the requested relief, and controlling authority precluding it (which, again, Plaintiffs do not cite).

This Court should therefore deny Plaintiffs' motion because, as a matter of law, Plaintiffs are not entitled to the declaratory judgments sought.

II. STATEMENT OF THE CASE[3]

A. Yakima's public defense system addressed the acute shortage of public defenders that manifested in 2024.

While Yakima County previously experienced a shortage of public defense attorneys, it has acted aggressively to mitigate this shortage and to ensure that it is able to provide indigent defendants with counsel promptly after charges are filed.

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not had an attorney appointed to represent them at their arraignment; or have had an attorney appointed to their case who subsequently withdrew and no substitute counsel has been appointed within 10 days of their withdrawal.

Order on Mot. for Class Certification (May 28, 2025).

[2] Or had time for trial extended for another authorized reason, such as a warrant or competency proceedings. *See, e.g.*, CrR 3.3(c)(2)(ii) (failure to appear), CrR 3.3(e)(1) (competency).

[3] For unspecified reasons, Plaintiffs filed with their motion for summary judgment a separate document entitled Plaintiffs' Statement of Undisputed Material Facts. While some courts use a

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In 2024, Yakima County had a shortage of public defense attorneys, some aspects of which dated back to 2022.[4] Decl. of D. Montes, Ex. Q ¶ 5.2.[5] Paul Kelley, the Director of Yakima County's Department of Assigned Counsel (DAC), circulated a memo in July 2022 to the Prosecuting Attorney, Joseph Brusic, and then-Presiding Judge of the Superior Court, Richard Bartheld, explaining that DAC would only take 160 case credits each month—equivalent to the cumulative monthly ethical capacity of the then-current attorney resources. Decl. of P. Kelly ISO Response to Mot. for Class Cert. (Class Cert), Ex. A at 1. At that point, DAC was down four attorney resources out of a budgeted 16.8 full-time attorney resources. *Id*. at 2. Mr. Kelley's memo then laid out a response aimed at ensuring that indigent defense attorneys would not take cases beyond those they could handle while meeting their ethical duties to clients, *id.* ¶ 14, or would not, alternatively, be overworked to the point of burnout and leaving the practice of indigent defense. *Id*.

procedure where the parties exchange such statements akin to a form of pleading, Defendants are aware of no such procedure in Yakima County. Defendants have provided a single memorandum addressing all aspects of Plaintiffs' motion in accordance with YCLCR 56(e).

[4] Plaintiffs' statements of "uncontested" facts on this point paint the misleading picture that "[s]ince at least 2019, Yakima County has had an attorney shortage which affected [DAC] and the Yakima County Prosecuting Attorney's Office (PAO)," Statement of Undisputed Material Facts (SOF) ¶ 1, due to which "DAC has suffered a shortage of public defenders," *Id*. ¶ 2. What the citations actually say is that the PAO and DAC noticed as early as 2019 that they were getting fewer applicants for open positions, and that a shortage of public defenders began manifesting in late 2022 following the Pandemic. Decl. of D. Montes, Ex. A at 17 (30(b)(6) deposition testimony of Prosecuting Attorney Joseph Brusic: "I noticed over the course of my tenure as Yakima County Prosecutor that we were receiving less and less applicants over the course of time, and it was starting to really kind of come to more of a head after COVID had hit."); *id.* Ex. A.1 at 7 ("A shortage of qualified indigent defense counsel has been problematic in this county since November 2022."); *id*. Ex. C at 19-20 (30(b)(6) testimony of DAC Director Paul Kelley, explaining a "lack of interest in taking on professional positions at all levels of county government" around 2019).

[5] Plaintiffs cite Defendants' Answer in SOF ¶ 2 but omits the relevant information about timing included in the Answer as noted above.

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DAC and other County stakeholders also contemporaneously implemented new policies and expanded existing ones, attempting to shore up the pipeline of criminal defense practitioners in the County. For instance, DAC added additional attorneys to DAC's District Court unit, allowing more attorneys at any given time to be working toward the qualifications required to handle felony cases. Decl. of P. Kelley (Class Cert) ¶ 17. Mr. Kelley and Mr. Brusic advocated for pay increases to attract additional applicants and to retain existing attorneys. *Id.*¶ 18, Decl. of C. Riva, Ex. A at 17-19.[6] The Board of County Commissioners accordingly increased wages for DAC attorneys and contracting attorneys beginning in July 2022, Decl. of P. Kelley (Class Cert) ¶ 18, Ex. B at 4, and again in October 2022. *Id*. at 8-9. This brought the pay of, for instance, an entry level attorney in Yakima County to $80,100 in 2022. *Id*. at 10. By comparison, the 2022 salary for an entry level attorney in the King County Department of Public Defense was $73,991.[7]

In February 2023, the Board of County Commissioners authorized additional $12,000 signing bonuses for newly hired attorneys and $10,000 retention bonuses for existing employees. Decl. of P. Kelley (Class Cert) Exs. C, D. Likewise, in 2022, Mr. Kelley obtained external funding to start a paid internship program at DAC, which hired its first two interns for the Summer of 2023, to increase the pipeline to DAC from local law schools and to provide support for full-time attorneys.[8] *Id*. ¶ 13. Those two interns are now full-time employees at DAC. Decl. of P. Kelley (SJ) ¶ 9. DAC was also able to secure funding to add an additional full-time equivalent (FTE)

[6] Yakima County CR 30(b)(6) deposition testimony of designee Joseph Brusic.
[7] SEIU 925, Coalition Labor Agreement between King County and Service Employees International Union, Local 925 Department of Public Defense, Addendum A (January 1, 2021, through December 31, 2024), www.seiu925.org/wp-content/uploads/2022/09/SEIU-925-KingCo-DPD-2021-2024.pdf.
[8] The successful internship program continues, and it has expanded to 4 interns each summer. *Id*.

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attorney equivalent resource to its budget, raising its budgeted staffing for Superior Court to 17.8 FTE. *See* Decl. of P. Kelley (Class Cert).

System stakeholders in Yakima County also undertook several efforts to obtain additional public defense funding from the State, including lobbying efforts and a lawsuit. Decl. of D. Montes, Ex. B at 41-43.[9] In 2023 and 2024, the PAO reduced its total filings by hundreds of cases year over year. Decl. of J. Brusic (SJ). ¶ 8, Ex. A.

Despite these efforts and investments across multiple fronts, however, the lack of qualified attorneys available for indigent defense work did not meaningfully improve through 2023. Decl. of P. Kelley (Class Cert) ¶ 20. DAC continued to operate with very little leeway to absorb otherwise normal fluctuations in case assignments from month to month. *Id*. ¶ 21. In those cases in which DAC was concerned it would not be able to appoint an attorney by the initial arraignment date, it would file a "Notice of Unavailability." Decl. of C. Riva, Ex. B at 49.[10] In other words, not all cases in which a Notice of Unavailability was filed had a delay in appointing a specific attorney, but it is believed every case that had a delay in appointing a specific attorney also had a Notice of Unavailability filed. *See id.*[11]

Then in the first half of 2024, a series of sudden departures of several experienced indigent defense attorneys from the Yakima County system created a new problem. First, in February 2024, an experienced full-time equivalent (FTE) contractor for DAC terminated her contract and

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[9] These efforts remain ongoing, and the lawsuit continues following a recent successful appeal regarding standing. *See generally Wash. State Ass'n of Cntys. v. State*, 34 Wn. App. 2d 879, 572 P.3d 1225 (2025). Yakima County is a named plaintiff in the suit. *Id.* at 883.

[10] Yakima County 30(b)(6) deposition testimony of designee Paul Kelley.

[11] It is impossible to make any statements with complete certainty as to every criminal case in Yakima County Superior Court over multiple years, which number in the thousands, as there may sometimes be anomalies. This statement is true to the best of Defendants' knowledge and is consistent with DAC's approach to this issue. *See* Decl. of P. Kelley (SJ) ¶ 17; Decl. of J. Brusic (SJ) ¶ 11.

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withdrew from her cases. Decl. of P. Kelley (Class Cert) ¶ 23. This had the effect of both reducing DAC's caseload capacity and adding her pending cases to the number of cases needing assigned attorneys. *Id*. DAC was largely able to absorb those cases at the time, but the strain essentially limited any margin to respond to the subsequent departures. Decl. of P. Kelley (SJ) ¶ 13. In April 2024, two other felony-qualified FTE attorneys for DAC who had announced they would leave the office at the end of June were cut off from taking new cases, Decl. of P. Kelley (Class Cert) ¶ 24, and a third FTE attorney left the office in June 2024 to lead the Public Defense agency in a different county. *Id*. ¶ 27. Thus, in the span of approximately six weeks from late February to early April, 2024, DAC's unfilled attorney capacity doubled, leaving DAC with the attorney capacity for only 8.8 FTE caseloads, out of a fully staffed capacity of 17.8. *Id*. ¶ 25. And in June, the departing attorneys' unresolved cases would be added to the rapidly growing backlog of cases needing assignment of attorneys. *Id*. ¶ 27. This created the crisis at the heart of this case: a backlog of criminal cases awaiting assignment of public defense attorneys, without attorneys available to take them, which peaked in May, June, July and August 2024. Decl. of P. Kelley (Class Cert) ¶ 28. *See also* Expert Decl. of G. Scott ¶ 9 ("I observed that in Yakima County in Spring-Summer 2024, several attorneys suddenly left the Department of Assigned Counsel in relatively quick succession. This resulted in a lack of available attorneys qualified to take on felony defense cases.")

Accordingly, effective May 1, 2025, DAC changed its assignment practices to prioritize assigning attorneys to cases in which the defendant remained in-custody awaiting their attorney. Decl. of P. Kelley (Class Cert), Ex. E.[12] It did so in recognition of the fact that "[t]he liberty interests of those in jail are easily definable and cannot be equated with those indigent persons

[12] Plaintiffs' statement that this prioritization began April 17, 2024, is incorrect. SOF ¶ 12. That is the date of a memo Mr. Kelley wrote to Mr. Brusic and Judge Bartheld explaining that the change would occur effective May 1, 2024. Decl. of P. Kelley (Class Cert), Ex. E.

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who have been released while their cases are pending in Superior Court." *Id*. The distinction between these liberty interests was validated by the Ninth Circuit's subsequent decision upholding a preliminary injunction as to indigent defendants in Oregon who were waiting indefinitely in custody for appointment of counsel. *Betschart*, 103 F.4th at 607.

This change to assignment protocols shielded in-custody defendants from the worst of the crisis, although some still, at that time, experienced delays in appointment of counsel. The indigent defendants who waited the longest in-custody for assignment of an attorney waited about a month beyond their initial arraignment date. Decl. of P. Kelley (SJ) ¶ 14. None, therefore, even approached their rule-based time for trial without an assigned attorney.[13] That, however, left less attorney capacity each month to assign the cases of out-of-custody defendants, and the backlog of those cases grew through the peak period.[14] *See* Decl. of P. Kelley (Class Cert) ¶ 28. In July and August, 2024, DAC was unable to assign attorneys to out-of-custody cases.[15] Some out-of-custody defendants therefore waited multiple months for an attorney to be appointed to their case, Decl. of D. Montes Ex. C at 40, and some of them approached their initial rule-based time for trial without

[13] Criminal Rule 3.3 sets the initial time for trial for in-custody defendants at 60 days from arraignment, not including any excluded periods. CrR 3.3(b)(1), (c)(1). At the time, CrR 4.1 set the time for arraignment for in-custody defendants at 14 days from filing. Supreme Court of Washington, Ord. No. 25700-A-1653 (July 2, 2025) at 3 (adopting amendment to CrR 4.1 time for arraignment for in-custody defendants to three days from filing, effective 9/1/25).

[14] Plaintiffs' SOF ¶ 15 claims that from May-September 2024, DAC was unable to appoint an attorney for all in-custody defendants at the beginning of each month and people who were not immediately appointed counsel therefore waited *at least* a month for attorneys. That is not accurate. The sources Plaintiffs cite explain that a month is an "estimate" of the "worst" wait some in-custody defendants experienced around August 2024, Decl. of D. Montes Ex. A at 36, and that "some people" waited over a month in that timeframe. *Id*. Ex. D.1 ¶ 28.

[15] The source Plaintiffs cite for their claim that this was true of May-September 2024, SOF ¶ 17, explicitly states that in July and August, 2024 (i.e., not May-September), DAC was not able to assign attorneys to any out-of-custody cases. Decl. of D. Montes Ex. D.1 ¶ 28.

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an attorney assigned. *See* CrR 4.1(b)(2), (c)(1) (setting time for trial for out-of-custody defendants at 90 days from arraignment, not including any excluded periods).

As some of these out-of-custody cases approached their initial expiration dates in August 2024, Deputy Prosecuting Attorneys (DPAs) began filing various motions in certain individual cases, including motions to compel DAC to assign attorneys, to assign attorneys other than DAC attorneys, to exclude time, and to continue. Decl. of C. Riva, Ex. A at 54-55. On August 13, 2024, then-Presiding Judge Richard Bartheld issued a "Letter Decision," addressing four motions raised in individual hearings to that date. Decl. of D. Montes, Ex. A.1 at 2. Judge Bartheld's decision declined to compel DAC or the Court to appoint attorneys to cases awaiting assignment, and found that the circumstances justified continuing the time for trial or excluding the period without an attorney from the time for trial calculation. Decl. of D. Montes, Ex. A.1 at 10. Relief was granted without prejudice, and specifically directed the individual defendants whom it affected to return with their attorney, once assigned. *Id*; *see also* Decl. of C. Riva Ex. A at 61.

The process on subsequent Motions to Continue on the same grounds after Judge Bartheld first issued the August 13, 2024 Letter Decision was as follows: DPAs would make motions to continue in individual cases as necessary. Decl. of C. Riva, Ex. A at 59-60. They would give the defendant a copy of that Motion and the Letter Decision, which served as a proposed form of order for the relief sought in new cases. *Id*. Judge Bartheld would explain and give the defendant an opportunity to review the Motion. Decl. of C. Riva, Ex. C at 41-42.[16] He would then, typically, enter an order attaching the Letter Decision in that individual's case, and would continue the case based on the findings and conclusions laid out in the Letter Decision. *Id*. He would generally advise the person on the record not to address the issue to the Court without a lawyer, and explained that

[16] Deposition testimony of the Honorable Richard Bartheld at 41-42.

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once they were appointed counsel, they should specifically discuss those issues with their attorney, and if there was an issue they felt was appropriate, bring it back before the Court with representation. *Id*. The individual would get a copy of the State's Motion and the Court's Decision. *Id*. *See also, e.g.*, Decl. of C. Riva ¶ 6, Ex. D (Judge Bartheld explaining to a defendant "the State will be giving you a copy of their written Motion to Continue and a copy of my written decision. You're certainly welcome to review that, it's important though that you talk to your court-appointed attorney about that once that attorney is appointed, ok? Any questions?") ("I have issued a written opinion in this case authorizing a continuance but preserving the argument by defense that the continuance prejudiced the presentation of your defense. You can't argue that, you're not in a position to do that, it preserves that for your attorney in the future."), *id*. ¶ 8, Ex. E.

The Letter Decision, therefore, was a form of order, but did not "resolve speedy trial issues for all of the people without counsel, even in cases where no motion had been made and for cases that had yet to be filed," or extend speedy trial on a "mass basis." SOF ¶¶ 38-39. Indeed, the typical procedure outlined above demonstrates that the Letter Decision was implemented case by case by an associated Order continuing the time for trial in individual hearings with the defendant present, was filed only in cases in which the State made an appropriate motion, and only by Judge Bartheld when he ruled on a request to continue. Plaintiffs have presented no evidence that any class member's time for trial was extended except pursuant to court order after a relevant motion, no evidence that the Letter Decision represented the opinion of the Court as a body or of any judge beyond Judge Bartheld, and no evidence that any judge other than Judge Bartheld ever entered or otherwise relied upon the Letter Decision to continue a defendant's time for trial.[17]

[17] Indeed, the discovery in this case has repeatedly shown the opposite. *See, e.g.*, Decl. of C. Riva, Ex. F (Response to Plaintiffs' interrogatory explaining "individual judicial officers in Yakima County Superior Court have been deciding issues related to provision of public defense

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Shortly after the Letter Decision was first entered in mid-August, 2024, Mr. Kelley circulated several documents to DAC program felony attorneys that they "may find helpful in assessing CrR 3.3 and CrR 8.3 motions on behalf of impacted clients," including the Court's decision and a template brief on speedy trial and right to counsel. Decl. of P. Kelley Ex. A (September 3, 2024 email). In early November, Mr. Kelley again circulated those materials—along with Plaintiffs' Complaint in this case, which had been filed in the intervening months—to DAC felony attorneys, which group had grown. He noted the materials could be helpful framing the issue for clients in the event they "consider[ed] filing objections to trial dates and motions to dismiss for CrR 3.3 violations," and suggested that any attorneys who had already briefed the issue share their briefing with the group. *Id*., Ex. B (November 1, 2024 email). *Accord* Expert Decl. of G. Scott ¶¶ 17-24 (because of defense attorneys' ethical obligations to each individual client, it is "dangerous to require specific actions by the Defense be taken in every criminal case").

In some impacted cases, DAC attorneys ultimately assigned made oral objections to the time of arraignment; in some cases, they made motions to dismiss on speedy trial grounds or otherwise challenging time for trial generally; and in some cases where the Letter Decision had been entered, they made motions to dismiss challenging the entry of the associated Order. Decl. of C. Riva Ex. H (noting oral motions to time for arraignment); Decl. of D. Montes Ex. N (examples of motions).

services as those issues are raised in cases before a given individual judge"), *id*. Ex. A at 62 (DPAs would file motions to continue while in Court with the defendant present, and Judge Bartheld would clearly explain it on the record to the individual defendant), *id*. Ex. G at 147-8 (deposition testimony of Paul Kelley) (the Letter Decision was filed in "cases where there were motions filed….at the hearing at the morning" docket and "Judge Bartheld, because it was his ruling, would then take that motion and then supply a copy of the Letter Decision.").

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Judge Bartheld retired from the Court as of January 10, 2025. *See* Order and Stipulation Dismissing Former Presiding Judge Richard Bartheld (June 9, 2025). Plaintiffs have not offered any instances of the Letter Decision being filed in any case since then. *See generally* SOF. After Judge Bartheld retired, the subsequent Criminal Presiding Judge, the Honorable Shane Silverthorn, in early 2025 occasionally entered different forms of orders continuing cases on different grounds. Decl. of C. Riva, Ex. F at 9.[18]

In the meantime, County stakeholders made additional efforts to address the case backlog. In February 2024, the Board of County Commissioners had authorized additional $10,000 retention bonuses for existing DAC attorneys, and authorized continued $12,000 signing bonuses for newly hired attorneys. Decl. of P. Kelley (Class Cert) Ex. F, G. In July 2024, the Board authorized significant new increases to the attorney pay scale above those implemented the year prior, bringing the salaries of Yakima County public defense and contract attorneys up even further beyond the relatively high levels the 2022 raises had set. *Id.* Ex. H. For example, the 2024 salary for an entry-level public defense attorney in Yakima County increased to $100,000, and an experienced non-supervisory attorney could make up to $175,389. *Id.* By comparison, the 2024 salary for an entry-level public defense attorney in King County was $80,028, and an experienced non-supervisory attorney could make up to $155,091.[19]

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[18] Defense's supplemental response to Plaintiffs' Interrogatory No. 8 ("Judge Silverthorn has issued a substantive reasoned decision addressing time for trial under CrR 3.3 when a public defender has not yet been appointed in a case, among other issues, in approximately a dozen cases since he began his current position as a criminal presiding judge…. He has not utilized a uniform order in each instance, but has issued different forms of orders depending on the case and motion…").

[19] SEIU 925, Coalition Labor Agreement between King County and Service Employees International Union, Local 925 Department of Public Defense, Addendum A (January 1, 2021, through December 31, 2024), www.seiu925.org/wp-content/uploads/2022/09/SEIU-925-KingCo-DPD-2021-2024.pdf.

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DAC continued its attempts to alleviate the existing strain and build the pipeline of public defense attorneys, and the PAO continued to decline to file cases at lower rates. Decl. of J. Brusic (SJ) Ex. A; Decl. of P. Kelley (Class Cert) ¶ 29. And at the peak of the crisis of attorney unavailability in late Summer and early Fall 2024, those years of effort and investments then began paying off, as DAC increased its attorney capacity and the crisis receded. *Id.* ¶ 34. *See also* Expert Decl. of G. Scott ¶ 10 ("Since that time, I have seen an increase in the number of practitioners joining the indigent defense practice in Yakima County. That includes both new law school graduates and experienced lawyers from other Counties.") DAC chipped away at the backlog and the wait times for an attorney shortened through late 2024 and early 2025. Decl. of P. Kelley (Class Cert) ¶¶ 38. By January 2025, the wait for in-custody defendants who had to wait for an attorney was down to two weeks after their initial time for arraignment. Decl. of P. Kelley (SJ) ¶ 15. By June 17, 2025, the backlog of in-custody cases was completely resolved, i.e., every in-custody defendant first appearing in on or since that date had an attorney appointed by their initial arraignment date. *Id.* ¶ 3. [20] By July 1, 2025, that was true for out-of-custody defendants as well. *Id*. ¶ 4. The resolution of the issue has proved durable; DAC has not filed any Notices of Unavailability in any cases, in or out of custody, since July 2025. Decl. of P. Kelley ¶ 2.

Throughout the entire period from 2022 through today, DAC continued its practice of providing counsel to all defendants at preliminary hearings, when the Superior Court first imposes conditions of release. Decl. of P. Kelley (Class Cert) ¶ 9. The DAC preliminary appearance attorneys review the statements of probable cause for cases on the calendar, meet with the defendant, and make any necessary arguments for relief. They also assist clients in less common

[20] At the time, the Criminal Rules set the time for arraignment for in-custody defendants as within 14 days of filing, and for out-of-custody defendants as within 14 days of the first appearance in Court following filing. *See* CrR 4.1; *supra* n.13.

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situations as necessary, such as by having an investigator assist with immediate needs or by requesting a competency evaluation if necessary. *Id*. ¶ 10. In Yakima County, the Superior Court Judges who hear criminal cases typically handle both preliminary appearances and arraignments, so the conditions of release imposed at the preliminary appearance are most often maintained at the subsequent arraignment. Expert Decl. of G. Scott ¶ 11.

B. Procedural History

Plaintiffs filed an Application for Writ of Habeas Corpus and Complaint on behalf of a putative class on September 30, 2024, but did so in Kittitas County. Compl. at 1. The parties stipulated to a change of venue to Yakima County in January 2025.[21] Decl. of M. Segal (Class Cert), Ex. F. The case file arrived in Yakima County in March 2025, and Defense filed a request for a status conference to set a case schedule. Req. for Status Conference, March 28, 2025. A visiting judge accepted the case in April 2025. *Id*. Ex. Q.

Plaintiffs filed a Motion for Class Certification and set a hearing for late May 2025. *Id*. Ex. D. Defense subsequently entered into an agreed briefing schedule to accommodate that hearing request. *Id*. The Court certified a class of individuals with active criminal cases in Yakima County who had not been appointed counsel by their initial rule-based arraignment, or within 10 days after counsel withdrew. Order on Mot. for Class Certification (May 28, 2025). Specifically, the Court certified the class for requested declaratory relief as to whether Yakima County has "appointed counsel to the class within the time required by Criminal Rule 3.1 and article I, section 22 of the Washington Constitution," based on the "central legal question in this litigation… whether continuing to prosecute and detain people without providing counsel constitutes an unlawful

[21] Plaintiffs' Complaint requested habeas relief and named individual Yakima County officials, both of which require venue in the county in which the allegedly unlawful actions occurred. RCW 2.08.010; RCW 4.12.020; *Johnson v. Inslee*, 198 Wn.2d 492, 497, 496 P.3d 1191 (2021).

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restraint." *Id*. (1)(f), (b). The Court further specified the "class *as alleged* in this case *currently* meets the requirements of [CR 23(a) and CR 23(b)(2)]," *Id.* (1) (emphasis added), and explained at the hearing that "'currently' means we get to review it." Decl. of C. Riva, Ex. I at 60.[22]

The parties subsequently agreed in principle to a tentative case schedule that accounted for discovery and expert disclosures, mandatory mediation, and dispositive briefing. Decl. of C. Riva, ¶ 14. But the schedule was never finalized, because throughout the Spring and Summer, Defendants' attempts to convince Plaintiffs' counsel to comply with discovery requirements were unsuccessful, and Defense ultimately was required to file a Motion to Compel on a range of issues, set for hearing in August by agreement of the parties. *See generally* Mot. to Compel. The Court struck the August hearing due to a scheduling conflict, and the Court and parties were unable to reschedule the hearing immediately, so the parties agreed that the Court should decide the Motion on the papers. Stipulation on Discovery Mot, Aug. 26, 2025. The Court issued an Order granting Defense's Motion on October 14, 2025. Order on Mot. to Compel. Over the month following the Court's order, Defense completed the newly authorized depositions of in-custody Plaintiffs. Decl. of C. Riva Ex. K[23], J.[24] Plaintiffs supplemented their discovery responses as required across October, November, and December 2025. Decl. of C. Riva, Ex. M, O, P.

In January, 2026, Plaintiffs set a hearing on this Motion for Summary Judgment, again before consulting with Defense on the requested hearing date; Defense agreed to a briefing schedule to accommodate the date set. Stip. on Briefing Schedule (Jan. 28, 2026).

III. ARGUMENT

This Court should deny Plaintiffs' Motion for Summary Judgment.

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[22] Transcript of hearing on Motion for Class Certification.
[23] Transcript of November 6, 2025 deposition testimony of Orlando Cisneros.
[24] Transcript of November 17, 2025 deposition testimony of Jesus Guzman.

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First, the Court certified the present class under CR 23(b)(2). It did so on the premise the case could be resolved class-wide by a single declaration about the timeline for appointment of counsel when class members were not being appointed counsel by their initial arraignment date. Yet Plaintiffs' motion presents the court with an entirely different case, seeking three declaratory judgments, now encompassing due process and speedy trial, without even identifying what if any remedies could flow class-wide from such declarations.

Second, this case, especially as certified, is moot. All class representatives had counsel appointed in 2024, and all class members have had counsel since at least early August, 2025. The question of whether any alleged past delay in the appointment of counsel caused harm to the cases of individual class members must be answered based on the facts of their specific case. The additional due process and time-for-trial declarations Plaintiffs request are also moot; there are no ongoing alleged violations of time for trial without counsel, and the Letter Decision that forms the basis of Plaintiffs' due process claims has not been entered for 14 months. There is no occasion for this Court to issue prospective relief on these points, since there are no future class members. And even more than as to the timing of appointment of counsel, as to the issues of speedy trial, the Court must consider the individualized timeline and circumstances of each case, precluding retrospective class-wide relief that would affect class members' ongoing criminal cases.

No exception to mootness applies because the case was mooted before an adjudication of the merits, and because the Department of Assigned Counsel (DAC) and the County acted aggressively to bolster the public defense system in ways that have proved to be lasting and effective.

Third, even if this Court did reach the merits of Plaintiffs' claims, there is no legal basis for the declaratory judgments Plaintiffs now seek. Plaintiffs' article I, section 22 claims and

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Gunwall[25] analysis is foreclosed by existing law. Plaintiffs' proposed *Mathews*[26] due process analysis does not apply in criminal cases, and even if it did, it requires individualized determinations under the relevant balancing test. *See infra* III(D). Judge Bartheld's process when he entered the Letter Decision in class members' cases and the associated procedural safeguards also at least facially provided due process; individual circumstances that may impact certain cases, if there are any, would need to be assessed and litigated in those cases. *See id*. As to Plaintiffs' rule-based time for trial claim, that was required to be raised at the time trial was set with counsel present, and this Court should not allow Plaintiffs to create an end-run around this requirement. Moreover, Judge Bartheld correctly and adequately analyzed the rule, and Plaintiffs ask this Court to overrule his analysis.

In sum, to the extent any class members are entitled to relief due to circumstances or past events in their individual criminal case, ready remedies exist to raise those concerns. Plaintiffs' requests for generic and overbroad declaratory relief in this civil case based on entirely novel legal theories, however, should be denied.

A. The Court cannot grant class-wide relief on Plaintiffs' claims.

As an initial matter, the Court certified a class in this case under CR 23(b)(2). Certification was based on Plaintiffs' request for a finding that failure to appoint counsel within a certain set time period violates an indigent defendant's article I, section 22 right to counsel, on the premise it would resolve *every* class member's claims. Decl. of C. Riva, Ex. I at 54; *see also* Mot. for Class Cert. at 2 ("[T]he primary legal issue in the case is common to all class members: has Yakima unlawfully restrained the class members by continuing to prosecute and detain them despite its

[25] *State v. Gunwall*, 106 Wn.2d 54, 61, 720 P.2d 808 (1986).
[26] *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976); *see* Mot. at 15.

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failure to provide counsel?") Importantly, CR 23(b)(2) "does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011); *see also, e.g.*, *Dolan v. King County*, 13 Wn. App. 2d 1054, 2020 WL 2395167 at *11 (May 12, 2020) (unpublished) (citing *Dukes* for the standard that "subsection (b)(2) was intended for relief that impacts the entire class and can be remedied by a class-wide injunction").

Plaintiffs now ask the Court to issue three separate declaratory judgments, without showing that such relief would, as required under CR 23(b)(2), resolve every class member's claims. Indeed, none of the rules Plaintiffs currently seek would result in relief for all class members. First, some class members were represented by counsel at their first hearing after filing, so Plaintiffs' rule would not grant them relief. *See, e.g.*, Decl. of C. Riva Ex. R (Filing on September 12, 2024, with Preliminary Appearance with attorney on September 17, 2024), *id*. Ex. S (Filing on May 31, 2024, with Preliminary Appearance with Attorney on November 4, 2024).[27] Second, Plaintiffs' due process and speedy trial arguments (if before the Court) would apply only to class members who were out-of-custody while awaiting counsel, and then only to a subset of those. Mot. at 14-17; *see also* Decl. of P. Kelley ¶ 14. (the longest wait suffered by in-custody defendants was a month after initial arraignment date). Plaintiffs acknowledge they would need to follow any declaratory judgment with "a proceeding pursuant to RCW 7.36 to determine the extent to which class members continue to be unlawfully restrained and the appropriate remedy to release that

[27] The first hearing after filing in these cases was a preliminary appearance, at which DAC provides counsel to all defendants. Decl. of P. Kelley (Class Cert) ¶¶ 9-10. Plaintiffs and their experts sprinkle their filings in this case with implications that such a calendar system of representation is not constitutionally sufficient representation, but the Washington Supreme Court recently confirmed that it is. *State v. Heng*, 2 Wn.3d 384, 391, 539 P.3d 13 (2023) ("[D]efendants must have counsel present, at least virtually, at their first preliminary appearance before a judge unless it is simply not feasible for some extraordinary reason.").

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restraint."[28] "That the plaintiffs have superficially structured their case around a claim for class-wide… declaratory relief does not satisfy Rule 23(b)(2) if as a substantive matter the relief sought would merely initiate a process through which highly individualized determinations of liability and remedy are made; this kind of relief would be class-wide in name only, and it would certainly not be final." *Jamie S. v. Milwaukee Pub. Schs*., 668 F.3d 481, 499 (7th Cir. 2012). Plaintiffs therefore improperly seek declaratory relief to initiate a process for individualized determinations of remedy. *See also* Decision and Order, Dkt. 265, *Thomas v. Evers*, Case no. 22CV1027 (Wis. Cir. Ct. January 13, 2026), Decl. of C. Riva, Ex. T (January 2026 decision denying renewed motion for class certification in a right to counsel case where plaintiffs could not identify a remedy that would address every class member's injury even after discovery).

The current facts belie Plaintiffs' asserted need for class-wide declarations. In their motion for class certification, Plaintiffs asserted that the class will "continue to grow indefinitely until Yakima County can provide attorneys when new cases are filed or attorneys withdraw." Mot. for Class Cert. at 2. But no person is currently being prosecuted, much less detained, without counsel. To that end, the size of the class is shrinking, not "growing indefinitely": no new class members have been added since before July 2025, Decl. of P. Kelley ¶ 2-4, (As of July 1, 2025, both in- and out-of-custody defendants have been assigned attorneys within their rule-based time for arraignment) and existing class members fall out of the class as they resolve their criminal cases. *See* Order on Class Certification, *supra* n.1 (limiting class to defendants with active criminal cases).

[28] It is not clear what, if any remedy would be available to Plaintiffs pursuant to RCW 7.36. *See infra* at 22.

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To the extent Plaintiffs address this point at all, they obfuscate by stating that DAC has, since the amended CrR 4.1 shortened the period for arraignment, "been able to assign counsel by arraignment *when attorneys are available*." Plaintiffs' Statement of Undisputed Material Facts (SOF) ¶ 7 (emphasis added). As their cited source shows, Plaintiffs added this embellishment with no basis in the record. Decl. of D. Montes, Ex. C at 16 (30(b)(6) deposition of Paul Kelley) ("Q: [A]s a practice in Yakima County regarding the assignments to indigent defendants from the time of arrest to the time of assignment, are you complying with CR [sic] 4.1? A: Yes. Q: As it is currently written? A: Yes.")

In stark contrast with the ongoing emergencies that have sometimes justified courts' intervention in active criminal cases, Plaintiffs offer *no evidence* of any injury allegedly suffered as a result of alleged deprivations after January 2025—14 months before the hearing on this motion. *See generally* SOF. The record is comprised substantially of the same declarations submitted at class certification and other evidence focused primarily on events before 2025.[29]

At the hearing on class certification, the Court explained that its decision on class certification was subject to change depending on how the facts developed. Decl. of C. Riva, Ex. I at 60. At the time, DAC was still unable to assign counsel to some indigent defendants before their initial arraignment date. This Court was faced with the question: *could* the delay in counsel violate current indigent defendants' rights, in the absence of attorneys to advocate for them? But now every class member has long had an attorney; the question is not whether class members *could* suffer harms this Court can remedy, but whether they *did*. Plaintiffs have offered no evidence supporting such a finding, and regardless, a single declaration cannot resolve that issue.

[29] A Motion to Strike certain of this limited evidence as also inadmissible is filed contemporaneously with this Response.

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B. Plaintiffs are not entitled to the relief they seek because every class member now has counsel, rendering the case moot.

This case is moot because the Court "can no longer provide effective relief." *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 602, 229 P.3d 774 (2010).

Notwithstanding that every class member now has counsel, and as of July 2025, no new individuals have been added to the class,[30] Plaintiffs ask the Court to establish three bright-line rules: (1) that article I, section 22, of the Washington Constitution and CrR 3.1 requires counsel to be appointed by the first hearing in a criminal case (or first hearing after an attorney withdraws); and (2-3) that article I, section 3, of the Washington Constitution (regarding due process) and CrR 3.3, respectively, prohibit continuing the allowable time for trial because a criminal defendant has not yet been appointed counsel, even if counsel may object after being appointed. Yet, no class member is reaching their first hearing without a lawyer or facing an extension of the allowable time for trial because they have not been appointed counsel.

Plaintiffs' focus on *Betschart* further exemplifies why there is no basis for class-wide declaratory relief in this case. As in *Betschart*, Plaintiffs filed suit in 2024 on behalf of people with active criminal cases who did not have appointed counsel to press their claims. But unlike in *Betschart*, every class member in this case has long had a lawyer who can press those issues in their active cases, and Yakima County's bolstered indigent defense system has proved stable even as rule changes have reduced caseloads and the time for appointment before arraignment. In other words, here there is no person — much less a group of people — that requires the Court to vitiate defendants' rights in the absence of counsel doing so through the normal means. *Cf. Betschart*, 103 F.4th at 607 (affirming preliminary injunction "when faced with a complete collapse" of the

[30] Decl. of P. Kelley (SJ) ¶¶ 3-4.

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indigent defense system); *State v. Roberts*, 374 Or. 821, 825–26 & n.3, 2026 WL 308139 (Or. Feb. 5, 2026) (granting dismissal without prejudice when petitioner had not been appointed counsel in over 9 months amidst "systemic, statewide public defense crisis", and setting 90-day timeline for the "2000 out-of-custody-defendants [who remain] without counsel"). Under Washington's established criteria, Plaintiffs also have no basis for an injunction, and do not seek one.[31]

Instead of establishing any linkage between the requested declarations and relief to the class members, Plaintiffs request an undefined additional proceeding to determine the extent to which each class member may be harmed and the appropriate remedy for the alleged harm. Mot. at 22. To the extent such a proceeding would invoke statutory habeas corpus claims under RCW 7.36, and setting aside the extraordinary nature of a dismissal remedy for past continuances where no specific harm is identified, habeas claims are not a means to dismiss criminal charges. *Weiss v. Thompson*, 120 Wn. App. 402, 407, 85 P.3d 944 (2004) ("[I]ssuance of a writ of habeas corpus cannot result in . . . dismissal of the criminal charges.").

Nor can Plaintiffs invoke the Uniform Declaratory Judgment Act (UDJA), RCW 7.24, to obtain an advisory opinion. To seek a declaratory judgment under the UDJA, a plaintiff must have a justiciable controversy. *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 814–15, 514 P.2d 137 (1973). A justiciable controversy is:

> (1) "an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement"; (2) "between parties having genuine and opposing interests"; (3) "which involves interests that must be direct and substantial, rather than

[31] "It is an established rule in this jurisdiction that one who seeks relief by temporary or permanent injunction must show (1) that he has a clear legal or equitable right, (2) that he has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to him." *Tyler Pipe Indus., Inc. v. State, Dep't of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982).

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> potential, theoretical, abstract or academic"; and (4) "a judicial determination of which will be final and conclusive."

Id. at 815.[32]

While some class members, for example, may have had their arraignment continued pending appointment of counsel in 2024, this merely means that these class members *may* have a live controversy as to the prejudicial effect, if any, on their *individual cases*, which they can now resolve with the assistance of counsel. *See infra* Section III(C) (deprivation of counsel requires analysis of the content of affected hearings). It does not mean that they have an actual and present dispute, with direct and substantial interests, as to whether Washington's Constitution and Criminal Rules require appointment of counsel prospectively on a fixed timeline regardless of the circumstances, or prohibit continuances to provide a defendant a lawyer. Nor would a judicial determination of that issue be final or conclusive. Because this case is moot, deciding it would violate "the long-standing rule that this court is not authorized under the declaratory judgments act to render advisory opinions." *Walker v. Munro*, 124 Wn.2d 402, 418, 879 P.2d 920 (1994).

Plaintiffs may attempt to invoke exceptions to mootness that allow: (1) a class action to proceed even though a class representative's claims are moot; or (2) an appellate court to review moot claims when the claims are of substantial public interest *and* the merits of the claims were adjudicated before the claims were moot. But those exceptions do not apply here.

[32] "While the assertion of constitutional rights is important, by itself, it does not qualify a case as one presenting 'issues of broad overriding public import' warranting exception from the justiciable requirement." *Stevens Cnty. v. Stevens Cnty. Sheriff's Dep't*, 20 Wn. App. 2d 34, 46–47, 499 P.3d 917 (2021) (quoting *Diversified*, 82 Wn.2d at 814); *see also, e.g.*, *Civ. Survival Project v. State*, 24 Wn. App. 2d 564, 584–85, 520 P.3d 1066 (2022).

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1. The class representative exception does not apply.

At the class certification stage, the parties addressed the issue of mootness in a different context than it applies today: at the time, the question was whether the class representatives could adequately represent the class when their own claims were moot because they had been assigned attorneys or resolved their criminal cases. The Court explained that even though the class representatives' claims were moot, the class action could proceed for those with active cases because there was "an ongoing potential issue" as to the class. Decl. of C. Riva Ex. I at 55 (transcript of Court's ruling on Motion for Class Certification); *see Burman v. State*, 50 Wn. App. 433, 439, 749 P.2d 708 (1988) ("[M]ootness as to the representative in a class action does not necessarily mean that the case itself is moot as to the class.") But this exception is no longer applicable, because now *every* class member has a lawyer.

A similar situation arose in *Heckman v. Williamson Cnty.*, 369 S.W.3d 137 (Tex. 2012). The four plaintiffs in *Heckman* brought claims alleging denial of right to counsel against a county. *Id.* at 144. Because three of the plaintiffs had been appointed counsel, the defendants moved to dismiss for lack of jurisdiction, which the trial court denied. *Id.* at 144–45. The defendants sought interlocutory appeal and notified the intermediate appellate court that the plaintiffs had been appointed counsel and that the claims of the putative class members were moot because the county revised its policies for appointing legal counsel to indigent defendants and hired additional staff to provide lawyers. *Id.* at 145. The Supreme Court of Texas remanded the case to the trial court to determine whether the actions that the county had taken to address access to counsel had mooted every class member's claims. *Id.* at 167–68.

This case is now far more like *Heckman* than *Betschart*. *Betschart* was not moot since it involved a "fluctuating class of defendants . . . who face[d] ongoing constitutional violations."

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Betschart v. Garrett, 700 F. Supp. 3d 965, 978 (D. Or. 2023), *amended*, 2023 WL 7621969 (D. Or. Nov. 14, 2023); *see also Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975) (a class action is not moot when "the constant existence of a class of persons suffering the deprivation is certain."). Here, by contrast, the class representative exception to mootness does not apply because no class member—representative or not—faces an ongoing delay in the appointment of counsel.

2. The appellate exception does not apply.

Appellate courts may also sometimes consider moot claims when (a) there is a continuing matter of substantial public interest involved, and (b) the merits had already been adjudicated *before* the case was mooted. *Westerman v. Cary*, 125 Wn.2d 277, 286–87, 892 P.2d 1067 (1994) (citing *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972)). This exception may be justified when "[a]fter a hearing on the merits, it [would be] a waste of judicial resources to dismiss an appeal on an issue of public importance which is likely to recur in the future." *Orwick v. Seattle*, 103 Wn.2d 249, 253–54, 692 P.2d 793 (1984). When the merits have been decided, there is less risk of "allowing [the parties] to litigate a claim in which they no longer have an existing interest." *Id*. at 254.[33]

This Court is not an appellate court considering facts that were live when they were adjudicated, and for that reason alone, the appellate exception does not apply. But this doctrine

[33] The Washington Supreme Court has not adopted the U.S. Supreme Court's "capable of repetition, yet evading review" exception to mootness. *Hart v. Dep't of Soc. & Health Servs.*, 111 Wn.2d 445, 451–52, 759 P.2d 1206 (1988). It has effectively incorporated it into the *appellate* review exception. *See Westerman*, 125 Wn.2d at 286–87; *Munoz v. Washington State Health Care Authority*, 34 Wn. App. 2d 1097, 2025 WL 1879581 at *6 (July 8, 2025) (unpublished). Even then, this factor applies only where (1) "the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration"; and (2) there is a "reasonable expectation" or a "demonstrated probability" the action will recur. *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)).

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also demonstrates the wisdom of considering the merits of a moot issue only if the merits are adjudicated *before* the issue is moot. Here, after every class member's claim was mooted, relevant operative legal authority changed in at least two relevant ways. First, effective September 1, 2025, CrR 4.1 was amended to reduce the time for arraignment for in-custody defendants from 14 days after filing to 3 days after filing. This creates a framework that did not apply at the time of certification or to any of the class members, *supra* n.1, since no class member has been added since well before September 1. Second, and similarly, effective January 1, 2026, CrR 3.1 required public defenders to reduce their maximum caseloads by 10%, changing the standards for the ethical provision of public defense services. DAC's bolstered assignment capabilities have proven to be sustainable even in light of these changes requiring faster provision of increased public defense resources. Nevertheless, the changes create a complete mismatch between the past record and the declaratory relief sought in this case.

Moreover, because there is no continuing deprivation—and there has not been since shortly after the class was certified—there is no recurring issue that warrants this Court's ruling to guide Yakima County. Yakima County and DAC acted aggressively to ensure it can provide criminal defendants with counsel. Yakima County and DAC never sought to deny counsel to any indigent defendant, and have long since provided every class member with a lawyer. They have also undertaken extensive measures to ensure that future indigent defendants will have access to counsel. These significant efforts led to lasting changes (e.g., a high attorney pay scale with built-in yearly increases) that have proven durable (e.g., appointing counsel to all defendants by arraignment for the past eight months, six of which were under a significantly faster arraignment

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requirement).[34] The speculative possibility that Yakima County might, despite the lasting policy changes it implemented to fix the problem, unintentionally experience delays in the appointment of counsel "at some indeterminate time in the future" does not create a live controversy. *De Cano v. State*, 7 Wn.2d 613, 617, 110 P.2d 627 (1941); *see also To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 415–16, 27 P.3d 1149 (collecting cases).

By contrast, for example, in *Roberts*—which, unlike here, involved a statutory exception to mootness that applies to "any action," ORS 14.175—the Oregon Supreme Court concluded that the failure to appoint counsel was likely to recur because Oregon has, for several years, "experienced a systemic, statewide public defense crisis." 374 Or. at 826, 833. That crisis, despite the preliminary injunction affirmed in *Betschart*, 103 F.4th 607, is ongoing, with over 2,000 defendants awaiting appointment of counsel and an individual petitioner who sought dismissal of their case after nine months without a lawyer—a timeframe far beyond even the worst, past delays in Yakima.[35] *Roberts*, 374 Or. at 826 n.3. The situation in Yakima County is not like the statewide crisis in Oregon, where, for example, newly implemented policies exacerbated the unavailability of lawyers. *See Betschart*, 103 F.4th at 613. [36]

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[34] In some cases involving claims for injunctive relief, Washington courts have applied the U.S. Supreme Court's exception for mootness in cases where a defendant voluntarily ceases the challenged conduct and there is a reasonable expectation that, once the case is dismissed, the defendant will resume the same conduct. *See e.g.*, *Fam. of Butts v. Constantine*, 198 Wn.2d 27, 41, 491 P.3d 132 (2021). Even if that exception applied here, there is no evidence that all the changes to the public defense system over many years were the result of "gamesmanship" rather than an earnest desire to address the problem. *Id.; see also, e.g.*, Decl. of P. Kelley ¶¶ 6-10.

[35] Even when determining a bright-line timeframe for appointment of counsel to provide guidance amidst that ongoing emergency, the Oregon Supreme Court decided felony cases must ordinarily be dismissed without prejudice if an attorney is not assigned within 90 consecutive days after arraignment (not filing). *Roberts*, 374 Or. at 859.

[36] The Oregon situation is also different because the Oregon Supreme Court decided an issue affecting the entire state on an ongoing basis, where public defense services are provided on a state-wide basis through a single state agency. This Court considers only Yakima County's county-specific provision of public defense through DAC.

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Overall, this case is moot, and no exceptions to mootness apply. The Court should deny the requested declarations on this basis alone. But Plaintiffs' class-wide claims are also settled by existing law and individual class members all have attorneys who are able to advocate for any remedy that may be appropriate, if any, in individual cases. The requested declarations, therefore, also fail on the merits.

C. Neither the Constitution nor Washington cases required that counsel be appointed by the first hearing after filing or the first hearing after an attorney withdraws.

In the context of the attachment of the right to counsel, "[t]he right to counsel under article I, section 22 (amendment 10) of the Washington Constitution does not provide more protection than the Sixth Amendment." *State v. Corn*, 95 Wn. App. 41, 62, 975 P.2d 520 (1999) (citing *State v. Earls*, 116 Wn.2d 346, 374 n.5, 805 P.2d 211 (1991)). It is a well-established point of both Washington and federal law that a reversible "constitutional violation occurs only if a defendant is deprived of counsel at a 'critical stage' in the criminal proceedings." *State v. Charlton*, 23 Wn. App. 2d 150, 159, 515 P.3d 537 (2022) (citing *In re Sanchez*, 197 Wn. App. 686, 698, 391 P.3d 517 (2017)), *aff'd*, 2 Wn.3d 421, 538 P.3d 1289 (2023); *State v. Heddrick*, 166 Wn.2d 898, 909–10, 215 P.3d 201 (2009) ("Under both the Washington and United States Constitutions, a criminal defendant is entitled to the assistance of counsel *at critical stages in the litigation*.") (emphasis added). The timing of appointment of counsel is based on a rule of reason under the circumstances: "[C]ounsel must be appointed *within a reasonable time after attachment* to allow for adequate representation at any critical stage before trial." *Charlton*, 23 Wn. App. 2d at 159 (quoting *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 212 (2008)).

Thus, even if an individual does not have counsel at a specific hearing, the Court must analyze what actually occurred at that hearing for that person to determine whether it was a "critical

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stage" and whether that deprivation constituted "structural error requiring automatic reversal" or merely a constitutional harmless error. *Heng*, 2 Wn.3d at 392–95. Determining whether a hearing at which counsel was not present amounted to a critical stage requires an inquiry into the "hearing's 'substance and not merely [its] form,'" *id*. (quoting *State v. Jackson*, 66 Wn.2d 24, 28, 400 P.2d 774 (1965)). The same analysis applies in assessing the right to counsel under CrR 3.1, which directs that "[t]he right to a lawyer shall accrue as soon as feasible after the defendant is taken into custody, appears before a committing magistrate, or is formally charged…" CrR 3.1(b)(1). *See Heng*, 2 Wn.3d at 388–95. Accordingly, "the language of CrR 3.1(b)(1) does not trigger the right to counsel at the earliest possible moment." *Corn*, 95 Wn. App. at 63.

Without reference to this established framework for evaluating the right to counsel, Plaintiffs ask this Court for an advisory opinion creating a new, bright-line rule that in *every* case in which a defendant does not have counsel during the first hearing after filing (or the first hearing after an attorney withdraws), whether it is a critical stage or not, and continuously thereafter, their rights to counsel under article I, section 22 of the Washington Constitution and CrR 3.1 are violated. What happens when their rights are allegedly violated under this new rule? As noted above, Plaintiffs provide no answer. In tacit recognition that existing law provides no path to that result, Plaintiffs ask this Court to adopt a new interpretation of the scope of the protections offered in article I, section 22 of the Washington Constitution.

Contrary to precedent, Plaintiffs' proposed rule focuses on form—the first hearing—rather than substance. It does not matter what that hearing is, or whether the lack of counsel at that hearing may have had no effect on the resolution of a class member's case. Consider these class members' cases:

- Jerry Tovar was scheduled for an out-of-custody arraignment on charges on May 9, 2025. His arraignment was continued for four weeks until June 5, 2025,

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due to lack of defense counsel. Once Tovar was appointed counsel, his lawyer sought or agreed to continuances on August 1, 2025, October 10, 2025, and on January 16, 2026. Decl. of C. Riva, Ex. U (certified case documents).

- Robert Engelhart's arraignment was continued from May 28, 2024, to June 13, 2024, due to lack of counsel. He failed to appear at that hearing, and was arrested on the warrant, and appeared in to address the warrant on July 2, 2024. He was arraigned on July 8, 2024. His attorney subsequently sought or agreed to continuances on August 16, 2024, November 8, 2024, March 31, 2025, May 9, 2025, July 11 and 18, 2025, and September 26, 2025. Decl. of C. Riva, Ex. V (certified case documents).

Under Plaintiffs' proposed rule, no individualized inquiry is necessary to determine whether these delays in appointment of counsel—delays that are shorter than delays class members consented to or contributed to (by failing to appear) in their individual cases were reasonable or rise to violations of the right to counsel.

Plaintiffs' proposal is foreclosed by existing authority, which they do not cite to the Court, and should be rejected on this ground. But even were the Court to accept Plaintiffs' invitation to conduct a *Gunwall* analysis without regard to existing authority, the conclusion should be the same. The *Gunwall* factors do not support Plaintiffs' requested declaration any more than existing case law does.[37]

[37] Not only does this sweeping declaration not apply to every class member, see *supra* III(A), but it functionally would raise more questions rather than answers. If an indigent defendant wanted to try to hire appointed counsel, has the County violated his rights if he has not done so by his next hearing? If a public defender discovers and withdraws from a case the day before a pretrial hearing, are the defendant's rights violated if a new attorney is not able to be appointed before the next day? Is the right violated where the State at an arraignment amends charges to ones which the previously assigned public defender is not qualified to handle? These are just some situations where Plaintiffs' proposed rule creates problems that the existing rule allows courts to assess based on the circumstances.

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1. Even if this Court did undertake a *Gunwall* analysis, it would not support Plaintiffs' conclusion.

Courts consider six factors to determine whether a provision of the Washington Constitution may offer greater protection than the Federal Constitution: "(1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern." *Gunwall*, 106 Wn.2d at 58. These factors weigh in favor of reaffirming that the Sixth Amendment and article I, section 22 are co-extensive as to appointment of counsel.

a. Textual Differences (Factors 1 and 2)

There is no "substantial difference" between article I, section 22, and the Sixth Amendment regarding the right to counsel. *State v. Medlock*, 86 Wn. App. 89, 98, 935 P.2d 693 (1997); *see also State v. Kolocotronis*, 73 Wn.2d 92, 97–98, 436 P.2d 774 (1968). While Washington courts have held that some parts of article I, section 22 are different than the Sixth Amendment, "just because a state constitutional provision has been subject to independent interpretation and found to be more protective in a particular context, it does not follow that greater protection is provided in all contexts." *State v. Gwin,* 31 Wn. App. 2d 295, 301, 548 P.3d 970, 974 (2024) (quoting *Murphy v. State*, 115 Wn. App. 297, 311, 62 P.3d 533 (2003); *see also State v. Rivers*, 1 Wn.3d 834, 858–59, 533 P.3d 410 (2023) (because "[n]ot all claims encompassed within a particular constitutional provision are the same," the analysis must center on a plaintiff's "specific claim"). Several courts have held that article I, section 22, is co-extensive with the Sixth Amendment in the context of appointment of counsel. *See, e.g.*, *Earls*, 116 Wn.2d at 373 n.5; *Medlock*, 86 Wn. App. at 99 (in context of waiver of right to counsel, "there is no basis to conclude that Const. art. I, § 22 (amend. 10) should be interpreted so as to provide more protection than the Sixth Amendment"). Plaintiffs offer no analysis of the caselaw or text that indicates otherwise.

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Article I, section 22, provides, "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel." At the constitutional convention, the framers deliberately chose to use "or" rather than "and." Robert F. Utter & Hugh D. Spitzer, *The Washington State Constitution* 48 (2d. ed. 2013); *see also Journal of the Washington State Constitutional Constitution 1889*, Beverly Paulik Rosenow Ed. 1999, at 511–12.[38] Plaintiffs deemphasize "and defend in person, or" to create what they call "the right to *appear* through counsel." Mot. at 6 (emphasis added). But when read in context, the word "appear" supports a defendant's right "to be present at trial" or "to represent himself." *State v. Silva*, 107 Wn. App. 605, 617–18, 27 P.3d 663 (2001).[39] A plain reading of the text, supported by interpreting caselaw, shows that the Washington Constitution confers a right to appear at one's criminal proceedings and a right to counsel—not the "right to appear through counsel" and necessarily to have counsel at every hearing.

b. Constitutional History (Factor 3)

Plaintiffs' historical account is similarly misleading. The fact that Washington has rightfully, and generally, recognized the importance of a right to counsel does not mean the right should be deemed violated whenever a defendant attends any hearing without counsel. Plaintiffs rely on historical sources that merely confirm that the Washington Constitution, like the Sixth Amendment, recognizes the right to counsel "not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Matter of Lewis*, 200 Wn.2d 848, 860, 523 P.3d 760 (2023) (quoting *United States v. Cronic*, 466 U.S. 648, 658 (1984)); *see also id.* at 858 n.4

[38] The journal is available online through the University of Washington at: https://digitalcommons.law.uw.edu/selbks/4/.

[39] This is further apparent in looking at the references to the delegates edits in the Journal, at 511.

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("The petitioners agree that the state and federal constitutions provide the *equivalent right* to appointed counsel.") (citation omitted).

Plaintiffs contend that the decision in *State v. Allen*, 41 Wash. 63, 82 P. 1036 (1905), was an early recognition of an absolute "right to the advice and representation of counsel at arraignment." Mot. at 8. But the defendant in *Allen* was actually arraigned and, at that arraignment, pleaded guilty without a lawyer. *Id.* at 64. The court, in determining that the individual's right to counsel was violated because he may have acted differently had he had advice of counsel at that stage, applied the same analysis that applies under the Sixth Amendment and was reaffirmed in *Heng*: it looked to the substance of the hearing to determine whether the right to counsel was violated. *Id.* at 65; *see In re Sanchez*, 197 Wn. App. at 701–02 ("[W]e must examine the nature of [an] arraignment before we can determine whether it was a critical stage."); *Heng*, 2 Wn.3d at 392. *Allen* further suggests that article I, section 22 and the Sixth Amendment are co-extensive on this point.[40]

c. Preexisting State Law (Factor 4)

As discussed above, the preexisting state law is settled: "[u]nder both the Washington and United States Constitutions, a criminal defendant is entitled to the assistance of counsel at critical stages in the litigation." *Heddrick*, 166 Wn.2d at 909; *Medlock*, 86 Wn. App. at 99 ("Prior state law does not indicate that Washington's right to counsel was more protective than its federal counterpart."). Plaintiffs do not point to any caselaw that suggests that defendants have a right to counsel at every hearing and instead rely on Justice Yu's solo concurrence in *Heng*, 2 Wn.3d at

[40] Plaintiffs' contentions regarding the right to effective assistance of counsel are irrelevant because Plaintiffs allege only actual denial of counsel, not ineffective assistance of counsel. *State v. A.N.J.*, 168 Wn.2d 91, 114–16, 225 P.3d 956 (2010), which does not speak to when counsel must be appointed, is inapposite.

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397, which notably reflects a view on what the law could be and not on what it currently is. They also misread *State v. Fitzsimmons*, 94 Wn.2d 858, 858–59, 620 P.2d 999 (1980), which did not hold that a rule-based right to counsel is more expansive than the right to counsel under the Washington and Federal Constitutions. In clarifying that the ruling rested on the rule-based right to counsel, the Washington Supreme Court explained that the discussion of constitutional law "demonstrate[s] the application and effect of the court rules." *Id.*; *see also Heng*, 2 Wn.3d at 389–95 (applying the same analysis to the right to counsel under CrR 3.1 and the right to counsel under the Washington and Federal Constitutions).

d. Differences in Structure (Factor 5)

Although Plaintiffs "parrot the observation that [the structural differences between the Washington and U.S. constitutions] always cut[] in favor of an independent analysis," they overstate that there is a "common dichotomy" between the Washington Constitution, which supposedly favors bright-line rules, and the Federal Constitution, which purportedly relies on reasonableness standards. *State v. Martin*, 151 Wn. App. 98, 115, 210 P.3d 345 (2009); Mot. at 11–12. Plaintiffs provide a single example: article I, section 7. But there is an obvious textual difference between that and the Fourth Amendment.[41] Washington's Supreme Court has also rejected Plaintiffs' contention that article I, section 10's open courts provision bears on access to publicly funded legal representation. *King v. King*, 162 Wn.2d 378, 391, 174 P.3d 659 (2007).

[41] Whereas article I, section 7, provides, "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law," the Fourth Amendment prohibits "unreasonable searches and seizures." There is no such difference between article I, section 22, and the Sixth Amendment. "Unlike article I, section 7's language expressly protecting one's 'private affairs,' . . . there is nothing in the language of article I, section 22 to suggest that the defendant's rights, as set forth therein, are any different from those protected by the Sixth Amendment." *Martin*, 151 Wn. App. at 110–11.

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e. Matter of Particular Local Concern (Factor 6)

The sixth factor requires considering whether the issue is of local, as opposed to federal, concern. This factor can overlap with the fourth factor. *See Gunwall*, 106 Wn.2d at 67. Although criminal legal systems are traditionally a state concern, the fourth factor, as discussed above, demonstrates that no local issue has prompted Washington to adopt a statewide right to counsel different from that under the Sixth Amendment. Nor could it, because the right is sensitive to local concerns: it requires looking at the circumstances of each individual case. *Supra* III(C).

In sum, considering factors as a whole, Plaintiffs' *Gunwall* analysis does not support the conclusion that article I, section 22, confers a right to counsel beyond critical stages of a case, much less compel the rejection of existing appellate authority related to this issue.

2. Even if Plaintiffs' *Gunwall* analysis favored a broader application of art. I, sec. 22, there is no support for their proposed blanket declaration.

Finally, even if article I, section 22 was interpreted more broadly than the Sixth Amendment as to appointment of counsel, Plaintiffs offer no support for their requested rule—that indigent defendants must, constitutionally, always be appointed counsel within days of filing.[42]

Even if a bright-line rule was appropriate outside the emergency injunction setting of cases such as *Betschart* —and it is not— under emergency circumstances no courts have awarded temporary relief on the timeline Plaintiffs suggest. *See, e.g.*, *Roberts*, 374 Or. at 859 (dismissal without prejudice when no counsel appointed for 90 days after arraignment, for felonies); *Betschart*, 103 F.4th at 613 (released on conditions of release after 7 days without counsel for in-custody defendants; no line for out-of-custody); *Robbins*, *et al., v. State of Maine*, *et al.*, Case no.

[42] The first hearing after filing for in-custody defendants, under the current CrR 4.1, generally occurs three days after filing; for out-of-custody defendants, that may be within 14 days or, when filed by warrant or summons, the preliminary appearance.

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CV-22-054 (Kennebec Sup. Ct. March 7, 2025) at 3, Decl. of C. Riva Ex. W (In Maine, cases dismissed without prejudice where unrepresented defendants are not assigned counsel within 60 days, where 900+ defendants had still never been appointed counsel and median time without counsel was growing at the close of evidence). And *Betschart* itself made it clear that it was only affirming a unique grant of emergency injunctive relief under the ongoing circumstances of that case,[43] and not changing the general rule of time for appointment of counsel, which remains reasonableness with regard to critical stages. *Charlton*, 23 Wn. App. 2d at 159.

In addition, Plaintiffs' insistence that they must have "continuous" representation starting from the first hearing after filing flies in the face of caselaw and standards permitting the use of calendar attorneys for arraignments and appointment of counsel only after arraignment occurs. *See Heng,* 2 W.3d at 390 ("At oral argument, counsel for the State acknowledged that providing counsel at preliminary hearings would place no extra burden on the State because 'following COVID, we've utilized video proceedings to always have indigent defense counsel present via video so that if other attorneys who are actually appointed to the case are not available to be present to represent their client at these preliminary appearances, the ... *on duty indigent defense attorney who's appearing via video can step in just for that proceeding.*'") (emphasis added).

In sum, Plaintiffs' proposal is foreclosed by existing law. Even if emergent circumstances justified this Court's intervention—and they do not—Plaintiffs' proposed rule goes well beyond the relief courts have granted in more dire, ongoing failures to appoint counsel.

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[43] "The dissent's insistence that today we establish a 'brightline rule that the Sixth Amendment right to counsel is violated by a seven-day gap' is a gross mischaracterization that demonstrates the dissent's confusion over our standard of review. We merely hold that it was not an abuse of discretion for the district court to conclude, when faced with a complete collapse of Oregon's indigent defense attorney network, that *Gideon* guarantees pretrial counsel to those incarcerated and awaiting trial." *Betschart*, 103 F.4th at 624–25.

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D. Plaintiffs cannot show a violation of their due process rights.

Plaintiffs' argument that Judge Bartheld's use of a form of order to continue cases violated due process in every case it was filed also fails. For one, speedy trial rights cannot be separately assessed under the Due Process clause. Even if they could be, Plaintiffs fail to show that the process afforded in these cases was inadequate based on the test they erroneously apply, or that the same process would be warranted in every case.

"The Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order." *Medina v. California*, 505 U.S. 437, 443 (1992).[44] Plaintiffs invoke the procedural due process balancing test from *Mathews*, 424 U.S. at 319, but "the *Mathews* balancing is not appropriate in criminal cases." *Heddrick*, 166 Wn.2d at 904 n.3. Plaintiffs fail to cite this authority and provide no authority supporting their proposed application of the *Mathews* test to this case.

Even if the *Mathews* test did apply, it could not establish a class-wide deprivation of due process. The test is inherently based on balancing, and "there are no 'hard and fast' rules for determining the requisite timing and adequacy of pre- and post-deprivation procedures." *Yagman v. Garcetti*, 852 F.3d 859, 864 (9th Cir. 2017) (quoting *Brewster v. Board of Educ. of Lynwood Unified School Dist.*, 149 F.3d 971, 984 (9th Cir. 1998)). "The result of combining the *Mathews* test's ambiguity with its ubiquity is unsurprising: '[O]ne cannot accurately predict how any

[44] Although Plaintiffs rely on article I, section 3 as the basis of their Due Process claim, "Washington's due process clause does not afford a broader due process protection than the Fourteenth Amendment." *In re Pers. Restraint of Dyer,* 143 Wn.2d 384, 394, 20 P.3d 907 (2001).

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specific case will be decided.'" *Brewster*, 149 F.3d at 984 (quoting Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* § 17.8, at 663 (2d ed.1992)).

For example, Plaintiffs concede that *Mathews* requires consideration of the private interest affected. Mot. at 15. But those interests are not the same across the class. The process required for an out-of-custody defendant under minimal conditions of release for a property offense will be different from the process required for an in-custody defendant held on a violent felony. *See, e.g.*, *Betschart*, 700 F. Supp. 3d at 987–88 (out-of-custody defendants' liberty interest is "minimal compared [to]" that of detained individuals). Moreover, under *Mathews*, a combination of pre- and post-deprivation process is often sufficient. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547–48 (1985). Here, Judge Bartheld typically would explain, at a hearing, his ruling to defendants as he entered it and would advise them that they could return to argue at another hearing, with their attorney if, once assigned, the attorney and client wished to do so. *See supra* at 9-10. Some individuals did so.[45] Additional procedural safeguards also existed including support from pretrial services and referrals to DAC for limited representation on legal issues that arose for unrepresented individuals while pending appointment of counsel. Decl. of J. Wilcox ¶ 6-8[46]; *see also, e.g.*, Decl.

[45] Plaintiffs' implication that it was problematic for DAC not to require its attorneys to make motions on this point misunderstands the ethical obligations of public defenders, which requires a case-by-case strategy dependent on individual case circumstances, the client's priorities, and the most strategic way to achieve those priorities. Expert Decl. of G. Scott, ¶ 12, 17-18, 22-24 Plaintiffs further misrepresent that DAC only made motions on this point in three cases, Decl. of C. Riva, Ex. H (discovery response specifically noting the motions provided were not exhaustive examples), and their contention that a Plaintiff demanded that meritorious motions be made and his attorney refused, SOF ¶ 47, is likewise incorrect. Decl. of P. Kelley (SJ) ¶ 16; *see also id.* Ex. A, B.

[46] It is not accurate that "failure to appear at any of these status hearings resulted in an arrest warrant." SOF ¶ 24. Plaintiffs cite Mr. Brusic's statement as to how a situation generally could be handled by prosecutors, Decl. of D. Montes, Ex. B at 21, and a statement by a DPA about the different kinds of things that could happen at attorney status hearings, *id.* Ex. E at 30. But DPAs were empowered to make decisions about what to do in each individual case, Decl. of J. Brusic ¶ 9, and individual class members' cases show Plaintiffs' statement is false. *See, e.g.*, Decl. of C.

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of C. Riva Ex. Ex. Y at 2, 6 (case summary showing Motion to Increase Bail addressed before permanent assignment of counsel, and attorney representing defendant for that hearing signed associated order); *id*. Ex. Z (certified copy of Case Summary and Motion for modification of conditions of release made by DAC attorney despite pending appointment of permanent counsel). As another example, because DAC provided attorneys at all preliminary appearances, defense attorneys could raise competency if it appeared to be an issue. *See, e.g.*, Ex. AA (order scheduling competency return signed by defense attorney). These procedural safeguards provided additional process. *See, e.g.*, *In re Stout*, 159 Wn.2d 357, 370, 150 P.3d 86 (2007). Plaintiffs simply assert that the process provided was not sufficient because class members did not necessarily know of the Motions to Continue before the hearing. *See* Mot. at 18. Plaintiffs provide no authority for the proposition that lack of pre-hearing notice of a motion to continue per se violates due process, even when the defendant is invited by the court to return when counsel is appointed and raise objections then.[47]

Plaintiffs seemingly invoke due process because constitutional speedy trial claims are "fact-specific and 'necessarily dependent upon the peculiar circumstances of the case.'" *State v. Ollivier*, 178 Wn.2d 813, 827, 312 P.3d 1, 10 (2013) (citing *State v. Iniguez,* 167 Wn.2d 273, 288,

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Riva Ex. X at 2 (certified case summary showing a failure to appear at such hearing without a bench warrant).

[47] Plaintiffs' citation to *Powell v. Alabama*, 287 U.S. 45 (1932), is not on point. The relevant portion of that opinion addressed whether criminal trials violated due process when: nine young Black men were charged with raping two white women in the Jim Crow South; they were tried in three groups and all three trials occurred in the course of a single day and only six days after indictment; the court refused to appoint a specific attorney but appointed "all members of the bar" if all (any) members of the bar would "help" the defendants if no counsel appeared; the attorney who assisted them at trial told the judge he had not prepared the case, was not familiar with local procedure, and was not planning to appear as counsel, but proceeded when the judge said he would be counsel with the "help" of a local practitioner who happened to be present; all nine defendants were convicted and sentenced to death. *Id.* at 55–56.

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292, 217 P.3d 768 (2009) (quoting *Barker v. Wingo,* 407 U.S. 514, 530–31 (1972)). "[T]he conduct of both the prosecution and the defendant are weighed." *Barker,* 407 U.S. at 530. Among the nonexclusive factors to be considered are the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* at 530. None of these factors is sufficient or necessary to a violation. *Iniguez,* 167 Wn.2d at 283, 217 P.3d 768 (citing *Barker,* 407 U.S. at 533). But as shown above, a due process analysis, even if applicable, raises the same individualized issues. Either analysis would need to account for the various reasons for delay in a case, and in nearly every instance involving a class member who was subject to Judge Bartheld's order, the delay attributed to the class member is longer than the delay attributable to the order. *See, e.g.*, Decl. of C. Riva, Ex. E (Case Summary showing 13 agreed continuances with counsel over five years *before* subsequent withdrawal and entry of the Letter Decision); Ex. D (Case Summary showing five agreed continuances and a bench warrant over 13 months *after* the entry of the Letter Decision delayed initial arraignment).

For all of the above reasons, the Court should not enter a generic declaration on due process.

E. Plaintiffs' CrR 3.3 claims are barred, and would require individual analysis.

Finally, the Court should also decline to enter a generic declaration under the speedy trial rule.

The foremost issue is that Criminal Rule 3.3 requires any "party who objects to the [trial] date set upon the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice is mailed or otherwise given, move that the court set a trial within those time limits." CrR 3.3(d)(3). "A party who fails, for any reason, to make such a motion shall lose the right to object." *Id.*; *see also, e.g., State v. Walker*, 199 Wn.2d 796, 801, 513 P.3d 111 (2022) ("The

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CrR 3.3(d)(3) objection must be brought as a motion to the trial court to set the trial within the time-for-trial limit…. within 10 days of notice of the trial date."). Any extensions of time for trial granted by Judge Bartheld were granted without prejudice, so the individuals could return to argue those points with the assistance of their lawyer, once assigned. Decl. of D. Montes, Ex. A.1. Nonetheless, class members whose time for trial was extended pursuant to CrR 3.3 while an attorney was not yet assigned have not put forth any evidence that they filed a written objection to the trial date set at their arraignments (when they were represented) within ten days after appearing with counsel. While some class members may have preserved this argument, others did not. *See, e.g.*, Decl. of D. Montes Ex. N (motions to dismiss on time-for-trial grounds); Ex. D (case summary showing oral objection to arraignment date but no motion to dismiss or objection to arraignment date). This alone would preclude class-wide relief under CrR 3.3.

Moreover, Plaintiffs' cited cases about court congestion do not support their conclusion that there was no valid basis to extend the time for trial. *See State v. Nelson*, No. 84411-3-I, 2024 WL 2271620, at *5 (unpublished) (finding that continuances due to the COVID-19 pandemic were justifiable). For instance, in *State v. Kenyon,* 167 Wn.2d 130, 136, 216 P.3d 1024 (2009), which Plaintiffs cite, the court found that the defendant's speedy trial rights were violated because the trial court failed to document the availability of pro tempore judges and unoccupied courtrooms--not simply because judges were unavailable. *See also State v. Flinn,* 154 Wn.2d 193, 200, 110 P.3d 748 (2005) ("[w]hen the primary reason for the continuance is court congestion, the court must record details of the congestion, such as how many courtrooms were actually in use at the time of the continuance and the availability of visiting judges to hear criminal cases in unoccupied courtrooms."). Here, no such deficiency in the record exists. The Letter Decision documented in detail the acute and immediate public defense crisis in 2024, including how many FTE's the

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department lost between February and July of 2024, and the number of defendants who were awaiting the appointment of counsel when the Letter Decision was entered. *See* Decl. of D. Montes, Ex. A.1 at 1-3. This was "unprecedented and unavoidable," *id*. at 7, and meets the standard under CrR 3.3(e)(8).

The validity of any excluded period may also require assessment of delays not attributable to the Letter Decision. *See, e.g.*, *id*. Moreover, Plaintiffs have not made any showings as to any prejudice any class member suffered in their criminal case because of the extension; instead, the harms they identify occurred at stages where they had attorneys, such as preliminary appearances, or are standard complaints about attorney performance unrelated to the timing of appointment. *See, e.g.*, Decl. of C. Riva, Ex. K at 46-7, (Plaintiff Cisneros is "pretty sure" his bail assessment was due to prior failures to appear); *id.* Ex. N at 20-21 (Plaintiff Guzman raising alleged issues with assistance of counsel after appointment).[48] But in order for this Court to grant relief on a rule-based claim, class members would have to show that it would be reasonably likely the outcome of their case would have been affected. *See State v. Templeton*, 148 Wn.2d 193, 220, 59 P.3d 632 (2002).

In essence, Plaintiffs' requested CrR 3.3 declaration asks this Court to second guess and reverse every continuance Judge Bartheld entered without any consideration of the circumstances of those cases. The proper avenue to contest the decision of a co-equal Superior Court Judge in an active criminal case is not in concurrent civil litigation, however. *See, e.g.*, *McGrath v. Gibbons*, 25 Wn. App. 2d 1054, 2023 WL 2366672 at *4 (2023) (unpublished) ("[T]he plain language of the UDJA undermines [Plaintiff's] claim that a litigant, dissatisfied with court rulings in a pending lawsuit, can challenge those rulings collaterally by filing a new, separate lawsuit framed as a

[48] Deposition testimony of Orlando Cisneros.

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request for "declaratory relief" under the UDJA."); *accord Bresolin v. Morris*, 86 Wn.2d 241, 245, 543 P.2d 325 (1975). There are instead any number of actions still available to class members in their criminal cases, including but not limited to: an appeal after judgment including of the Letter Decision (if it was entered); a Motion to Dismiss pursuant to CrR 3.3, if not waived; a Motion to Dismiss pursuant to CrR 8.3; or a Motion to Reconsider any decision extending a defendant's time for trial, where timely. Accordingly, this Court should not grant summary Plaintiffs' request for a class-wide declaration on this point.

IV. CONCLUSION

For the above reasons, this Court should deny Plaintiffs' Motion for Summary Judgment.

DATED this 23rd day of February, 2026.

PACIFICA LAW GROUP LLP

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CERTIFICATE OF SERVICE

I am and at all times hereinafter mentioned was a citizen of the United States, a resident of the State of Washington, over the age of 21 years and not a party to this action. On the 23rd day of February, 2026, I caused to be served a true copy of the foregoing document upon:

David Montes
La Rond Baker
John Midgley
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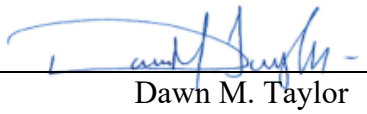
☐ via facsimile
☐ via overnight courier
☐ via first-class U.S. mail
☒ via email service agreement
☐ via electronic court filing
☐ via hand delivery

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

DATED this 23rd day of February, 2026.



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Appendix H

(Reply in Support of Summary Judgment)

EFILED
Clerk Billie Maggard
2/25/2026 2:22 PM
Superior Court Yakima County, WA

IN THE SUPERIOR COURT OF WASHINGTON
FOR YAKIMA COUNTY

VICTOR CUEVAS, et al., on their behalf and on behalf of other similarly situated individuals,

Plaintiff,

v.

YAKIMA COUNTY, et al.,

Defendant.

No. 25-2-00718-39

REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Defendants' primary argument in response to Plaintiffs' Motion for Summary Judgment is that the shortage of public defenders in Yakima was resolved as of July 2025, so Plaintiffs' declaratory judgment claims are moot. This is incorrect and inconsistent with Yakima's own public statements on the issue. In sharp contrast to their position in this case, Yakima County has been vocal that the public defense shortage looms as a constant threat and cannot be resolved absent systemic reform. That reform has not occurred. As such, their contrary position in this case—that there is no longer a public defense shortage and no likelihood of a crisis recurring—is

unexplainable and cannot be relied on or credited. Moreover, the failure of Yakima County to provide counsel for long periods harmed Plaintiffs and continues to do so. Finally, the substantial public importance of the issues raised by Plaintiffs provides an independent basis to address the issues in this case even if those issues were technically moot.

Yakima County's few other substantive arguments are equally unavailing. This Court should grant Plaintiffs' Motion for Summary Judgment and enter appropriate declarations.

II. FACTS

Plaintiffs rely on the previously filed Statement of Undisputed Material Facts (herein "SUMF"). Notably, Defendants do not dispute these facts and in some instances offer further support for Plaintiffs' factual assertions, and as such, these facts are deemed admitted. *Central Washington Bank v. Mendelson-Zeller, Inc.*, 113 Wn.2d 346, 354 (1989). Defendants nowhere suggest that there is any dispute regarding material facts. Only legal issues remain.

III. ARGUMENT

A. Plaintiffs' Claims Are Not Moot and the Justiciability Requirements of the UDJA Are Met Here

"Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed."[1] RCW 7.24.010. Contrary to Defendants suggestion, "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." CR 57. Such claims

[1] Defendants raise several issues regarding further proceedings under RCW 7.36.120. The Defendants primary complaint is that the procedure seems ill-defined to them. However, the summary proceedings required by RCW 7.36.120 are well defined and distinct from this motion for summary judgment, i.e. this is not the issue before the Court at this point and has no bearing on the current motion, which is for declaratory relief.

are appropriate where they present

> (1) … an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

To-Ro Trade Shows v. Collins, 144 Wn.2d 403, 411 (2001). The UDJA is to be "liberally construed and administered." RCW 7.24.120. Thus, justiciability requirements are "not intended to be a particularly high bar." *Washington State Hous. Fin. Comm'n v. Nat'l Homebuyers Fund, Inc.*, 193 Wn.2d 704, 712 (2019). Moreover, courts still must resolve cases even if they are technically not justiciable if the case presents a matter of substantial public concern. *Washington State Ass'n of Ctys. v. State*, 34 Wn.App.2d 879, 887–88 (2025). Under these standards, the Plaintiffs have met the prerequisites for declaratory relief.

Defendants argue that this case is moot because Yakima County resolved its attorney shortage in July of 2025. This argument fails for several reasons. First, the premise of this argument is false. Yakima County, by their own account, has not resolved its public defender shortage. In fact, over the last six months and as recently as January of 2026, they have argued in front of Division II of the Court of Appeals, the Washington Supreme Court, and the Washington State Legislature that no such resolution of the public defense shortage is possible absent systemic reform. *See infra* § (A)(1). This is unsurprising given that, according to the declarations filed in support of their response to Plaintiffs' motion for summary judgment, Yakima still faces public defense staffing shortages. *Id*. This Court should not credit their new position that these issues are resolved. Moreover, Yakima's failure to provide counsel was not harmless and class

representatives have a right to redress these harms. Finally, even if the claims were technically moot—they are not—the Court should still address the public defense shortage issue, since this is a matter of significant public concern.

1. There Is an Actual and Present Dispute in this Case

Because defendants frequently attempt to moot claims to avoid review, courts must beware of efforts to defeat relief by protestations of reform. *Braam ex rel. Braam v. State*, 150 Wn.2d 689, 709 (2003). Such arguments should not be accepted unless it is "absolutely clear that behavior will not reoccur." *Id.*; *State v. City of Sunnyside*, 3 Wn.3d 279, 314 (2024). Defendants' posture in this case shows this standard is not met here. Here, Defendants defend their actions, strongly suggesting they would repeat the same actions if they were unable to provide counsel in the future.

Moreover, Yakima County has not, despite its suggestions here, resolved the attorney shortage that led to this issue. Recently, Yakima County argued that it had standing to challenge Washington State's public defense funding scheme because the public defense shortage *could not* be resolved absent a change in the state's model for funding public defense. *Washington State Ass'n of Ctys. v. State*, 34 Wn.App.2d 879, 887–88, 906 (2025). The Court of Appeals accepted this argument: "As the landscape is presented in the Counties' complaint, any improvement is unlikely without some sort of change." *Id.* at 906. Yakima County reaffirmed this position when the State appealed that decision to the Washington Supreme Court in September of 2025.[2] As recently as January 13, 2026, LaDon Linde, a named defendant in this case, appeared in front of

[2] *Respondents' Answer to Petition for Review in Washington State Ass'n of Ctys.*, No. 1044861 at 32 https://www.courts.wa.gov/content/petitions/1044861%20Answer%20to%20Petition%20for%20Review.pdf.

the Senate Law and Justice Committee to support a bill that would create a statewide task force to address systemic reform of public defense in Washington to address what he framed as one of the biggest issues facing Yakima County: "We are facing a critical shortage of qualified public defenders." TVW, *Public Hearing on SB 5912* at 42:00, https://tvw.org/video/senate-law-justice-2026011148/?eventID=2026011148; *see also* Board of Yakima County Commissioners, *Comment In Opposition to Caseload Standards*[3] ("There is currently a shortage of public service attorneys throughout Washington State").

Notably, Yakima County relies on the opinion of an attorney who practices in Yakima County to support their position that staffing has improved. *Declaration of G Scott* ¶ 8. This attorney has no role in administering public defense in Yakima County. *Id.* at ¶¶ 1-3. Paul Kelley, who is the Director of DAC, has a starkly different perspective regarding the reliability of current public defense staffing. In his declaration, signed this month, he reveals that Yakima County was down two attorneys at the end of 2025. *Dec. of Paul Kelley* ¶ 5. Moreover, in his 30(b)(6) deposition in October of 2025, he was clear about the ongoing nature of the problem: "Staffing has always been an issue… staffing is always an issue. And when you're on, you're always on the margin, I -- I was -- I don't remember whenever we were fully staffed. I just don't." *David Montes Dec*. *ISO MSJ* (*D.M. Dec.*), Ex. C at 19, lines 3-8. Defendants present no declaration from any representative of Yakima County suggesting this issue is actually resolved and their statements in several other forums indicate exactly the opposite.

[3]https://www.courts.wa.gov/court_Rules/proposed/2024Jun/1568%20CrR%203.1%20STDS%20CrRLJ%203.1%20STDS%20JuCR%209.2%20STDS/Board%20of%20Yakima%20County%20Commissioners%20-%20CrR%203.1,%20CrRLJ%203.1,%20JuCR%209.2%20STDS.pdf

This all makes clear that attorney shortages in Yakima County could easily recur at any time. In fact, the issue recurred during the pendency of this case. In May of 2025, the same month Yakima County last tried to convince the Court that these issues were resolved, an attorney providing defense services passed away, which Defendants did not mention to the Court during their effort to convince the Court the issue had resolved, despite the fact that the attorney's unexpected death set back efforts to timely appoint counsel by three months. *Def. Res. on Class Cert.* (filed May 26, 2025) at 12; *D.M. Dec*., Ex. C at 48-50.

With the notable exception of this case, Yakima County has consistently argued that the public defender shortage in Washington cannot be addressed absent systemic reform to Washington's means of delivering public defense services. They should not be allowed to adopt a contrary position in this case to evade review. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538 (2007) ("Judicial estoppel… precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position."); *Bartley-Williams v. Kendall*, 134 Wn.App. 95, 98 (2006) (holding that Plaintiff was forbidden from taking one position in a bankruptcy proceeding and an inconsistent position during a subsequent civil suit). Moreover, the positions they take in this lawsuit strongly suggest that if Yakima County was unable to provide counsel again, they would address the situation in the same way, meaning there is a live dispute for the purposes of the UDJA.

2. Plaintiffs Have Ongoing Injuries, Which Allow Them to Challenge the Procedures Used in Yakima County Under the UDJA

Even if this shortage were somehow resolved, the Defendants cannot plausibly argue that the due process and speedy trial issues are moot, because the named Plaintiffs and many others are

still directly affected by Yakima's actions extending speedy trial, as their cases should have been dismissed. Victor Cuevas and Jesus Guzman[4] were convicted of crimes that should have been dismissed on speedy trial grounds but for Judge Bartheld's unlawful order. These issues are far from hypothetical or speculative: Defendants do not dispute their failures in providing counsel, many Plaintiffs suffer present effects from the procedures used to address the crisis, and Defendants posit little to nothing to prevent all of it from happening again. Whether any other remedy is available or sought, the resulting unlawful convictions still burden Plaintiffs, and they have the right to seek a ruling through the UDJA. RCW 7.24.010.

3. The Issues Raised in This Case Are of Substantial Public Importance

In addition to properly presenting live controversies under the UDJA, the issues here are clearly of ongoing and substantial public interest and therefore should be addressed. Indeed, Yakima County itself recently convinced Division II of the Court of Appeals that public defender shortages are a matter of substantial public importance in the case described above. *Washington State Ass'n of Ctys.*, 34 Wn.App.2d at 896. In finding Yakima County had standing, the Court held "[t]he public importance of adequate funding for indigent criminal defense is self-evident… As highlighted by the complaint, the legislature and the public have been made aware for over 30 years that the current indigent defense system does not meet minimum constitutional requirements." *Id.* at 906. This "has often led to the systematic deprivation of effective assistance of counsel." *Id.* As such, the Court found that the issues raised were of substantial public importance. *Id.*

[4] The Court defined the class to include only people with pending cases but exempted Mr. Cuevas and Guzman from this requirement as class representatives. *Def. Resp.* fn. 1.

As the Court of Appeals found, attorney shortages are clearly a matter of substantial and statewide public importance.[5] The Court of Appeals' ruling—that Defendants advocated for—directly contradicts Defendants' claim that a matter can only be of substantial public importance if there has already been a ruling on the merits. *Def. Resp.* at 25. Yakima County's case against the State was dismissed at the trial court because of lack of standing on a CR 12(b)(6) Motion before any ruling on the merits. *Washington State Ass'n of Ctys.*, 34 Wn.App.2d at 889. Division II found that this was an abuse of discretion, in part because it was an issue of ongoing public concern. *Id.* at 906. In other words, Defendants and Defendants' counsel ask this Court to take the very position that they argued was an abuse of discretion in front of Division II within the last six months.

As the Court is aware, the public defense shortage has been an ongoing issue of public concern throughout Washington and all courts throughout the state would benefit from clear answers regarding the rights of people charged with crimes and appropriate procedures to protect those rights when public defense shortages arise. As such, even if Plaintiffs did not have a justiciable claim on the right to counsel issue—which they do—it would still be appropriate to address that issue here.

B. Article I, Section 22 Supports a Separate Right to Appear Through Counsel

[5] Donald Meyers, *WA grapples with a public defender shortage* (December 31, 2023) https://www.seattletimes.com/seattle-news/wa-grapples-with-a-public-defender-shortage/; Daniel Beekman, *WA's public defender system is breaking down, communities reeling* (February 25, 2024) https://www.seattletimes.com/seattle-news/politics/was-public-defender-system-is-breaking-down-communities-reeling/.

Defendants make several arguments suggesting that article I, section 22 does not support a separate right to appear through counsel. As a preliminary matter, Defendants argue that this issue has already been decided, but cite only cases decided in other contexts, i.e., those concerning prefiling right to counsel during interrogation and a pre-*Gunwall* case concerning the right to self-representation. *Def. Resp.* at 29-30. However, as Defendants acknowledge, *Id.* at 31, *Gunwall* requires a new analysis in each new context. *Matter of Williams*, 198 Wn.2d 342, 353-54 (2021). It is perhaps not surprising that cases concerning the right to counsel during interrogation and the right to self-representation did not find an independent right to appear in court through counsel. Defendants cite no cases that have previously decided the issue before the Court. As such, a new *Gunwall* analysis is necessary.

Next, Defendants argue that the language of article I, section 22 "the right to appear and defend in person, or by counsel" does not support a right to "appear through counsel." They argue that the phrase "or by counsel" only modifies the preceding phrase, "defend in person." *Def. Resp.* at 32. This ignores the prior antecedent rule of construction and its corollaries. The prior antecedent rule dictates that, absent other context clues, a modifier applies only to the last item in a preceding list. *City of Spokane v. Cnty. of Spokane*, 158 Wn.2d 661, 673–74 (2006). But the applicable corollary here holds that "the presence of a comma before the qualifying phrase is evidence the qualifier is intended to apply to all antecedents instead of only the immediately preceding one." *Id.* Article I, section 22 clearly follows this latter pattern. Because "or by counsel" appears after a comma, it applies to the entire list preceding the comma, in contrast to Defendants' arguments.

Thus, there is a right to appear through counsel in Article I, Section 22.[6]

C. The Process Used When Filing Judge Bartheld's Letter Decision Does Not Comply with Due Process

Defendants argue that the process used to issue Judge Bartheld's order extending speedy trial deadlines for hundreds of defendants—simply informing defendants that the decision to extend had already been decided before they showed up—complied with Due Process. Their argument misunderstands the nature of due process in criminal cases. As a preliminary matter, Defendants argue that the *Mathews* factors do not apply to criminal cases, citing *State v. Heddrick,* 166 Wn.2d 898 (2009). *Def. Resp.* at 37. But *Heddrick* held that the *Mathews* test did not apply because it was not sufficiently protective in situations where a criminal statute dictates a particular procedure. 166 Wn.2d at 904 n. 3 ("…the procedures in chapter 10.77 RCW must be followed... No additional balancing of the interests is necessary."). In such a situation, Defendants are correct that *Mathews* does not apply because weighing of relative interests is not allowed, strict compliance with statute is required to comply with due process. *Id.* This holding only serves to emphasize the much more stringent due process protections in criminal cases. Nonetheless, when no statutory process is prescribed, the *Mathews* balancing test is appropriate in criminal cases to determine the process and requires heavy weighting of the private interests. *Born v. Thompson*, 154 Wn.2d 749, 763 (2005) (applying the *Mathews* balancing test to determine the standard of proof in determining whether an offense is a violent offense under RCW 10.77).

In one sense Defendants' citation to *Heddrick* is correct. There are clear statutory and

[6] And even if the Washington Constitution did not provide more robust protection for the right to counsel, the long periods during which Plaintiffs were deprived of counsel would violate the federal constitutional standard. *Betschart v. Oregon,* 103 F.4th 607 (2024).

constitutional provisions that dictate a procedure for protecting the interests of people charged with crimes when a legal issue arises: providing counsel. That is the explicit, mandatory, and minimum process. Defendants did not provide this protection and thus did not comply with due process. It is also true that the criminal rules do not outline how legal motions should be handled in the absence of counsel because this represents a massive deviation from normal due process protections and is, as such, uncharted territory. *Betschart v. Oregon*, 103 F.4th 607, 622 (9th Cir. 2024). If the Court does not find, as it might, that the mere absence of counsel when determining legal issues is a due process violation, *Mathews* applies.

The Defendants next argue that *Mathews* cannot support class wide relief because it requires a weighing of a private interest. This fundamentally misunderstands the private interest inquiry, which focuses on the nature of the relevant liberty interest, not the particularized harm to the individual. For example, in the context of license suspensions, the private interest inquiry focuses on the general liberty interest in a driver's license, not an individual's need to drive or the consequences to the individual of losing their license. *City of Redmond v. Moore*, 151 Wn.2d 664, 671 (2004). Thus, the process due in such a situation can be determined for multiple people at the same time, with no consideration of their particular interest in a driver's license. *Id.* Here, the private interest is the interest in mandatory speedy trial rights, and as such the process that is due to protect these important rights can be determined not just for class members but for everyone charged with a crime. [7]

[7] As acknowledged by Defendants, the people affected by Judge Bartheld's order were all out of custody, *Def. Resp.* at 17, so even under the Defendants' incorrect formulation would have similar liberty interests.

The process due far exceeds what was provided by Yakima County. Defendants argue that a post-adjudication opportunity to object absolves Yakima County of pre-adjudication due process requirements. This argument fails. First, the post-adjudication process concerned only a narrow portion of the order, which would have left speedy trial extensions intact even if defendants raised the issue. The harm was done when speedy trial was unlawfully extended in the first place. Second, even in the prison context, where due process protections are at their lowest, due process requires *pre-adjudication* notice and opportunity to be heard. *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974); *see also Moore*, 151 Wn.2d at 671 (requiring pre-adjudication hearings before license suspensions). The greater protections in the criminal context confirm that pre-adjudication process is the bare minimum required: "It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment[.]" *Powell v. State of Ala.*, 287 U.S. 45, 68 (1932). Yakima County failed to provide this minimal process before extending hundreds of speedy trial deadlines. This lies well outside of anything that could be described as Due Process.

D. CrR 3.3 Requires Objection Within 10 Days Entry of the Extension of Speedy Trial, Not When Counsel Is Appointed

Defendants attempt to avoid the speedy trial issues presented by Judge Bartheld's order by arguing that defendants who failed to object once counsel[8] was appointed waived the issue. *Def. Resp.* at 44. However, Defendants' argument is misleading as the rule requires a much earlier objection, one that unrepresented defendants could not timely make. Defendants add the word "[trial]" into the relevant section of the rule to suggest that the objection requirement of CrR

[8] This argument ignores the fact that Defendants include the very counsel who failed to object.

3.3(d)(3) is triggered when trial is set. *Id.* However, despite using the term "trial" date many times in the section, the drafters left "trial" out of this portion of the rule: "…a party who objects to the date set upon the ground that it is not within the time limits" must formally object within 10 days. CrR 3.3(d)(3). The plain language of this provision requires a person to object to *any* date outside of the speedy trial deadline within 10 days. Judge Bartheld's decision set these dates when people were unrepresented and he forbade them from objecting. The time to object passed in these cases before counsel was appointed and as such, failure to object later is irrelevant.

E. The Court Can Decide the Issues Presented in Plaintiffs' Motion for Summary Judgment on a Class Wide Basis

1. Individual Prejudice Is Not Required for the Court to Find a Violation of the Right to Counsel

Defendants argue that a finding of individualized prejudice is required before this Court can find a violation of the right to counsel. This is plainly incorrect. In *Betschart v. Oregon*, the Ninth Circuit held that a Plaintiff class, presenting no evidence of individualized prejudice, was likely to succeed in their argument that holding someone in custody for seven days without an attorney violates the right to counsel. 103 F.4th at 621. Ignoring this holding, Defendants turn to appellate criminal cases to claim that the right to counsel is only violated if individualized prejudice is shown. *Def. Resp.* at 29. However, individualized prejudice relates to relief and is only required where a court is asked to overturn a conviction because of a violation of the right to counsel, something Plaintiffs do not ask with respect to the right to counsel claim in this case. *State v. Heng* clarifies this distinction. There, the trial court held Mr. Heng's first appearance without an attorney. 2 Wn.3d 384, 389 (2023). Defendants' assertion that only Justice Yu found a violation of the right to counsel is simply incorrect. The majority opinion found that this was a clear violation

of Mr. Heng's constitutional right to counsel. *Id.* at 387. However, because no prejudice was shown, the Court would not overturn his conviction. *Id.* at 397. In other words, even in the context that best supports Defendants' argument, courts do not require individualized prejudice to find a violation of the constitutional right to counsel. Therefore, this Court can make a class-wide declaration that the right to counsel was violated.

2. Because Judge Bartheld Used the Same Procedure and Order to Continue the Cases of Hundreds of People, The Legality of this Procedure Can Be Considered on a Class Wide Basis

Plaintiffs have presented overwhelming evidence that Judge Bartheld used the same procedure to continue hundreds of cases[9] pursuant to his Letter Decision. SUMF ¶¶ 37-44. Defendants admit these allegations and make no suggestion that there is an issue of material dispute. *Def. Resp.* at 25. In effect, Judge Bartheld created a class—without considering the requirements of CR 23 or appointing class counsel—by using one order to address speedy trial in hundreds of cases.[10] But now the Defendants oddly try to deny there can be a class fix to the effects of an order applied uniformly to a class. Because the Court used the same procedure and order to address these cases, the Court's decision can be reviewed on a class-wide basis.

3. Defendants Should Not be Allowed to Relitigate Issues Decided During the Class Certification Motion

Defendants attempt to relitigate class certification issues here, arguing that because of class issues, class wide relief is not possible. First, Defendants claim that Plaintiffs argued, and the Court

[9] Although Defendants move to strike the declaration supporting this assertion in a separate motion, they do not dispute the assertion itself, as such, it is deemed admitted. *Mendelson-Zeller, Inc.*, 113 Wn.2d at 354.

[10] Defendants argue that some people had their speedy trial continued for other reasons. This is true but does not defeat these claims. The court's declaration would simply have no relevance to these individuals.

certified a class based on only right to counsel claims, not due process and speedy trial claims, and now "Plaintiffs' motion presents the court with an entirely different case[.]" *Def. Resp.* at 17. This is plainly untrue. The Plaintiffs' complaint, *Complaint* at 16-19,[11] the Plaintiffs' Motion for Class Certification's discussion of commonality, *Pl. Mot. for Class Cert.* at 22, and the Court's ruling on commonality, *Riva Dec.*, Ex. I at 54-55,[12] all specifically discussed the letter decision and that it was part of the common issues to be determined in the case.

Next, Defendants revert to their overstatement of the holdings of federal authority and ignore binding state law authority. The Defendants repeat the incorrect assertion that under Washington's CR 23, unless every class member can obtain identical remedies, class wide relief is impossible. This is simply not the case. *Chavez v. Our Lady of Lourdes Hosp. at Pasco*, 190 Wn.2d 507 (2018). The Court did not accept this argument during class certification and should not accept it now.

It is true, as Defendants suggest, that the people who were subject to Judge Bartheld's order were all out-of-custody, and charged with less serious offenses. *Def. Resp.* at 17 and 38. But this does not somehow defeat a ruling under the UDJA for this subset of the class, all of whom suffered the same harm. It just means that this ruling would not apply to other class members.

[11] Plaintiffs complaint is explicit that Plaintiffs were seeking a declaration on these issues from the start of the case.

[12] "When we talk about Judge Bartheld's letter, the pleadings that the Court find to be credible are that he made a ruling based upon circumstances that at the time may not apply forward but did apply to some individuals at that time… And so the -- what -- the ultimate merits of that, whether or not those -- that that was an unconstitutional order and who all it applied to, that goes to the ultimate merits."

IV. CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' Motion for Summary Judgment and issue a declaratory judgment as requested in that motion.

DATED this 25th day of February,

Respectfully submitted,

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Appendix I

(Plaintiffs' Supplemental Brief in Support of Motion for Summary Judgment)

EFILED
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3/16/2026 3:32 PM
Superior Court Yakima County, WA

IN THE SUPERIOR COURT OF WASHINGTON
FOR YAKIMA COUNTY

VICTOR CUEVAS, et al., on their behalf and on behalf of other similarly situated individuals,

Plaintiff,

v.

YAKIMA COUNTY, et al.,

Defendant.

No. 25-2-00718-39

SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Though Washington's public defense crisis is a pressing issue facing our state, Plaintiffs do not request that the Court address these statewide issues. Instead, Plaintiffs' Motion for Summary Judgment asks the Court to make three declarations pursuant to the Uniform Declaratory Judgment Act (UDJA), addressing whether Yakima County violated Plaintiffs' rights:

1. Defendants violated Plaintiffs' right to counsel under article I, section 22 of the Washington Constitution when they failed to appoint counsel by the first hearing after a case was filed or after an attorney withdrew.

2. Defendants violated Plaintiffs' right to due process under article I, section 3 of the Washington Constitution when they extended speedy trial pursuant to Judge

Bartheld's Letter Decision in hearings with no counsel, no notice, and no opportunity to be heard.

3. Defendants violated Plaintiffs' right to a speedy trial under Criminal Rule (CrR) 3.3 when they extended speedy trial pursuant to Judge Bartheld's Letter Decision.

Defendants argue that the Court cannot make these declarations because Yakima County has not violated the rights of more people in the last eight months. This is incorrect. The UDJA grants this Court broad authority to declare the rights and legal relations of parties where there is an ongoing dispute. Here there is an ongoing dispute: Plaintiffs claim that their rights were violated, and Defendants respond that Plaintiffs cannot prove a violation. Moreover, this issue represents a matter of substantial public concern and must be adjudicated. Finally, the motion for summary judgment on Plaintiffs' UDJA claims can be determined without addressing any issues regarding the scope of the class.

II. FACTS

There is no dispute about the material facts in this case: Between November of 2022 and July of 2025 Yakima County was unable to provide public defenders to hundreds of people who were screened eligible until after their scheduled arraignment or until weeks or months after an attorney withdrawal. *Pl. Stat. of Undisputed Material Facts* (*SUMF*) ¶¶ 3, 6-18; *Def. Resp. to Pl. Mot. for Summ. Judg.* (*Def. Resp.*) at 6-9. As a result, people appeared at their scheduled arraignment without counsel, and the Court continued their arraignments for weeks or months. *SUMF* ¶¶ 19-24; *Def. Resp.* at 6-9. As people who were out of custody approached their speedy trial deadline, and remained without counsel, the Prosecutor's Office made motions to extend speedy trial. *SUMF* ¶¶ 37-47; *Def. Resp.* at 9-10. In response to these motions, with no input from

any defendant or defense attorney, Judge Bartheld ruled on August 13, 2024, that failure to provide counsel justified an extension of speedy trial, memorializing that ruling in a document which will be referred to herein as the "Letter Decision." *Id.* The Letter Decision gave two explanations for extending speedy trial: 1) the attorney shortage was unforeseen under CrR 3.3(e)(8); and 2) speedy trial extensions were required in the administration of justice under CrR 3.3(f)(2). *SUMF* ¶¶ 39; *Def. Resp.* at 9-10. Judge Bartheld used the same procedure in hundreds of cases: the Letter Decision would be filed, unrepresented defendants would be handed a copy, and Judge Bartheld would tell them not to address the legal issues raised by the decision and that they could do so when they were appointed counsel. *SUMF* ¶¶ 43; *Def. Resp.* at 41-42.

Because there are no disputed facts, the Court can determine the questions outlined above as a matter of law.

III. ARGUMENT

Plaintiffs' request declarations that the Defendants' failure to provide counsel and extensions of speedy trial for hundreds of defendants was unlawful. Plaintiffs, who had this happen to them, now request a declaratory judgment that failure to appoint counsel by arraignment or by the first hearing after an attorney withdraws violates the right to appear through counsel in article I, section 22 of the Washington Constitution. *See Pl. Mem. in Sup. of Summ. Judg.* at 4-14 (outlining Plaintiffs' *Gunwall* analysis).[1] Plaintiffs also request a declaratory judgment that extending their speedy trial deadline in hearings with no counsel, no opportunity to be heard, and no notice violates due process under article I, section 3 of the Washington Constitution, *see id.* at

[1] *See also Plaintiffs' Reply in Support of Summary Judgment* (*Reply*) at 8-9.

14-18,[2] and that extending speedy trial because the government is unable to provide counsel violates CrR 3.3. *See id.* at 18-22.[3] These claims are not moot, present issues of substantial public importance, and can be determined without further analysis of class issues.

A. Plaintiffs' Claims Are Not Moot

The UDJA gives courts jurisdiction "to declare rights, status and other legal relations whether or not further relief is or could be claimed." RCW 7.24.010. Accordingly, unlike in cases brought pursuant to other causes of action, mootness in a UDJA action does not turn on the availability of relief beyond a declaration.

A UDJA case is not moot, even if government has ceased the challenged action, so long as the declaration will settle an ongoing legal dispute. For example, in *West v. Walla Walla City Council*, the plaintiff sued for injunctive and declaratory relief for alleged violations of the Open Public Meetings Act (OPMA) by the Walla Walla City Council. 34 Wn. App. 2d 195, 200-202 (2025). Before the case was filed, members of the City Council acknowledged a potential violation and directed staff to create an OPMA training course to avoid similar issues in the future. *Id.* at 200-201. The trial court dismissed the case as moot and denied plaintiff's motion for summary judgment. *Id.* at 202. The Court of Appeals found that even though the request for injunctive relief was moot, given the cessation of the action that led to the dispute, the UDJA claim was not moot. *Id.* at 208-9. The court found that the UDJA action was live because it asked the court to declare whether an event that happened in the past violated the OPMA. *Id.* Because there was an ongoing dispute regarding whether that event violated the OPMA, the plaintiff was entitled to a ruling. *Id.*

[2] *See also Reply* at 10-12.
[3] *See also Reply* at 12-13.

Plaintiffs have, if anything, more concrete claims than were present in *West*. Yakima County did not provide them with counsel and continued their speedy trial deadline. Yakima County argues that Plaintiffs have not proven a violation that Plaintiffs' rights were violated. Moreover, Yakima County—unlike Walla Walla in *West*—has implemented no policies suggesting they would handle this situation differently if it arose again. That Yakima County has not violated the rights of more people in the last eight months has no bearing on this question. There is a clear, ongoing dispute, which must be resolved by the Court.

Defendants argue that this case is moot because the Court "can no longer provide effective relief." *Def. Resp.* at 21 (citing *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593 (2010)). However, the holding of *SEIU* does not support Defendants' position because it arose under mandamus and not the UDJA and therefore applied a different standard for mootness. *Id.* at 603. In *SEIU*, the Plaintiffs sought an order compelling the legislature to adopt a certain budget, but by the time the Court heard the issue, a budget had already passed, and the legislature was incapable of complying with such an order if issued. *Id.* The case was moot because mandamus actions necessarily seek only prospective relief, which was no longer available—this is much like the injunction in *West*. *See also Pimentel v. Judges of King Cnty. Superior Court*, 197 Wn.2d 365, 371 (2021) (finding a mandamus action moot because no prospective relief was available). This is in sharp contrast to the UDJA claims here, which seek a retrospective declaration regarding the legality of what Yakima County did. That relief is clearly still available.

Moreover, because the central purpose of the UDJA is to provide relief from uncertainty, courts find UDJA claims justiciable when a resolution provides clarity about the rights of parties in the future. *See Benton Cnty. v. Zink*, 191 Wn. App. 269, 279 (2015) (allowing a UDJA action to

proceed to spare the county uncertainty, among other things). Here, Yakima County, by its own account, has no control over whether the attorney shortage will recur since it stems from systemic issues with the administration of public defense in Washington. *See Reply* at 4-6. Therefore, absent a declaration of rights, Defendants could adopt the same approach challenged here the next time a public defender shortage occurs. Accordingly, Plaintiffs are entitled to declaratory relief not only to determine whether their rights were violated in the past, but also to relieve uncertainty about the scope of important constitutional rights for future cases.

Because the UDJA is to be liberally construed, and because there is an ongoing conflict about the legality of what Defendants did to Plaintiffs, the UDJA claims are not moot.

B. The Declarations Sought Present Issues of Substantial Public Importance

Even where a UDJA claim does not present a justiciable controversy, it must still be heard if the case presents a matter of substantial public importance. *Kitsap Cnty. v. Smith*, 143 Wn. App. 893, 908 (2008). In determining whether an issue is an issue of substantial public concern, courts consider:

> (1) Whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur. A fourth factor may also play a role: the level of genuine adverseness and the quality of advocacy of the issues. Lastly, the court may consider the likelihood that the issue will escape review because the facts of the controversy are short-lived.

Satomi Owners Ass'n v. Satomi, *LLC*, 167 Wn.2d 781, 796 (2009) (quotation marks omitted).

Each of the three main factors justify a finding that these UDJA claims present issues of substantial public concern. The issue is plainly of a public nature involving a government's approach to the rights of defendants, and future guidance to Yakima County in dealing with the

right to counsel and speedy trial issues is obviously necessary, given the dispute here. Moreover, there is a strong likelihood of recurrence given that the Defendants here – unlike *West* – have not argued they have changed any policies or procedures and would apparently take the same actions again if an attorney shortage recurs. *Reply* at 4-6.

Defendants attempt to narrow this exception, citing non-UDJA cases, like *Westerman v. Carey*, 125 Wn.2d 277, 286 (1994). *Def. Resp.* at 25. However, the standard for the mootness exception in *Westerman* does not apply to this case. *Westerman* was not a UDJA case but an appeal from a writ of review of a district court order. *Westerman*, 125 Wn.2d at 286. In sharp contrast, the justiciability exception for UDJA claims applies at the trial court and applies whether the merits have been determined or not. For example, in *Eyman v. Ferguson*, the plaintiff filed a UDJA action, which was dismissed at the trial court before the merits were heard. 7 Wn. App. 2d 312, 318 (2019). The issue became moot in the interim. *Id.* Nonetheless, the Court of Appeals decided the issue because it was a matter of substantial public interest. *Id.* at 323. Similarly, Division II of the Court of Appeals recently found that the trial court in Yakima County's case against Washington State erred in not finding public defense was an issue of substantial public concern. *Washington State Ass'n of Ctys. v. State*, 34 Wn. App. 2d 879, 887–88 (2025).

Because this is a matter of substantial public interest, the Court must reach the merits of the UDJA claims presented by this summary judgment motion.

C. The Request for Declaratory Judgment Does Not Require the Court to Reconsider Certification

The Court certified a class on May 28, 2025. There is no motion before the Court to reconsider its ruling. The class as currently constituted is entitled to declarations as to whether

Yakima County violated various constitutional and statutory provisions regarding actions Yakima took toward them. And in any event, the named Plaintiffs are independently entitled to the requested declaratory judgment. The UDJA does not require a class to issue a declaration regarding legal rights, so even if the Court had not previously certified a class, class representatives have the right to pursue the above declarations. *West*, 34 Wn. App. 2d at 202.

IV. CONCLUSION

For the foregoing reasons and the reasons outlined in Plaintiffs Motion for Summary Judgment and Reply, Plaintiffs ask this Court to grant summary judgment on their UDJA claims.

DATED this 16th day of March, 2026.

Respectfully submitted,

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Appendix J

(Defendants' Supplemental Brief in Opposition to Summary Judgment)

HONORABLE DAVID L. PETERSEN
Hearing Date: April 29, 2026
Hearing Time: 9:00 a.m.
With Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

OMAR AL-THARWA, et al., on their behalf and on behalf of other similarly situated individuals,

Plaintiffs,

v.

YAKIMA COUNTY, *et al.*,

Defendants.

No. 25-2-00718-39

DEFENDANTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Plaintiffs have not disputed that every class member now has counsel, there have been no delays (even incremental) in the appointment of counsel since July 1, 2025, and nobody has been added to the class since that time. Decl. of P. Kelley (SJ) ¶¶ 2-4. Yet, Plaintiffs attempt to use this case to convert the type of limited relief courts have afforded in ongoing emergencies to a mechanism seemingly to dismiss cases retroactively. There is no legal or factual basis for what Plaintiffs seek, and Defendants respectfully request the Court deny the motion for summary judgment.

Plaintiffs request three generic declarations of law. Plaintiffs' claims for declaratory relief should be denied as moot or on the merits. This case is now moot because the requested declarations cannot lead to any effective class wide relief, and the claims fail on the merits because none of the declarations sought are consistent with existing authority or the record.

Importantly, denying Plaintiffs' motion does not foreclose class members from relief. As the Court correctly observed at the hearing, the individual circumstances of remaining class members' criminal cases are essential to evaluate. Plaintiffs have counsel in those cases, and they are best positioned to litigate any individual remedy to which an individual may be entitled.

II. SUPPLEMENTAL RESPONSE TO STATEMENT OF FACTS

The Court referenced the question of disputed facts at the hearing. At the outset, this is Plaintiffs' motion for summary judgment. The Court may not resolve any disputed facts, and Defendants, as the non-moving party, are entitled to have the court draw all inferences in their favor. *Boyd v. Sunflower Props., LLC*, 197 Wn. App. 137, 142, 389 P.3d 626 (2016). For instance, Defendants in their Response emphasized disputes with Plaintiffs' Statement of Facts paragraphs 1-2, 7, 12, 15, 17, 24, 38-39, and 47, in addition to detailing additional facts that undermine

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Plaintiffs' characterization of the circumstances in Yakima County.[1] Finally, the Court has now stricken some of the record upon which Plaintiffs relied.

There are, however, several *undisputed* facts relevant to the Court's question regarding class members' representation at their first hearing. Yakima County's Department of Assigned Counsel (DAC) provides counsel for every defendant in Yakima County Superior Court at their preliminary hearing. Decl. of P. Kelley (Class Cert.) ¶ 9. *See also* Response to Mot. for Summary Judgment at 13-14 (detailing role of preliminary appearance attorneys). Plaintiffs likewise do not contend that any class member was arraigned without counsel. *See generally* Response at 33. Plaintiffs also do not contest the fact that some class members had counsel at their first hearing after filing (i.e., the bright-line rule Plaintiffs ask this Court to draw as to a per se constitutional violation). *See* Response at 18. In other words, as to the assignment of counsel at the earliest stages of cases, even at the peak of Yakima County's attorney capacity crisis, it is undisputed that (a) every class member was represented at their preliminary appearance including bond setting; (b) no class member was arraigned without counsel; and (c) some class members had counsel within Plaintiffs' proposed rule, i.e., the requested declaration would not provide them relief.

III. SUPPLEMENTAL ARGUMENT

A. Plaintiffs' Claims are Moot.

First, at the hearing, the Court queried whether this motion could address only liability and defer the issue of remedies. In this case, the answer is no.

A case is moot when a court "can no longer provide effective relief." *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 602, 229 P.3d 774 (2010). Plaintiffs cannot defer determination of remedies on summary judgment because mootness "is a jurisdictional concern."

[1] *See* Response at 4, 7, 8, 10, 20, 38.

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State v. Beaver, 184 Wn.2d 321, 330, 358 P.3d 385 (2015). As the Court of Appeals recently confirmed, when significant developments after the claims at issue mean there is no remedy that can now provide effective relief in a UDJA action, the Court lacks jurisdiction over the moot case. *Rimmer v. Edmonds,* No. 87644-9-I at 5 (March 16, 2026) (unpublished). And for a court to grant a declaratory judgment, there must be "an actual, present and existing dispute . . . a judicial determination of which will be *final and conclusive*." *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973) (emphasis added). Plaintiffs themselves recognize the declaratory relief they seek will be neither final nor conclusive, seeking a later "proceeding pursuant to RCW 7.36 to determine the extent to which class members continue to be unlawfully restrained and the appropriate remedy to release that restraint." Mot. at 22. Courts need not grant declaratory relief if it "would not terminate the uncertainty or controversy giving rise to the proceeding". RCW 7.24.060; *Bloome v. Haverly*, 154 Wn. App. 129, 147, 225 P.3d 330 (2010).

Second, Plaintiffs identify no other relief that can be granted. The Court asked about damages. There are no damages claims in this case, nor could there be; damages are not a remedy under the Washington Constitution. *See Blinka v. Washington State Bar Ass'n*, 109 Wn. App. 575, 591, 36 P.3d 1094 (2001).

Plaintiffs do not seek an injunction, nor could they given there is no pending threat of any invasion of rights. In other indigent defense cases where class members were suffering significant and ongoing deprivations of counsel, courts ordered injunctive relief requiring appointment of counsel within a certain number of days. For example, in *Robbins v. Billings*, No. CV-22-054 at 2 (Me.Super. Mar. 7, 2025), the court noted that at the time of trial, "there were approximately 739 pending criminal cases in Maine where no counsel had ever been provided . . . . Of those cases, about one half of them remained without assigned counsel for more than 66 days." Decl. of C.

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Riva Ex. W. The Court issued declaratory and injunctive relief requiring, *inter alia*, the Maine public defense system to assign counsel within 60 days or to dismiss charges without prejudice after a habeas hearing (unless counsel could be appointed within 7 additional days). For plaintiffs appointed counsel, there was no further relief.[2]

Here, there is no ongoing deprivation because every class member has counsel and no new individuals have been added to the class since June 2025. Response at 14. DAC undertook a number of steps, including increasing attorney salaries to alleviate the existing strain and build the pipeline of public defense attorneys, and the PAO continued to decline to file cases at lower rates. The salary increase was not the result of one-time funding, but is part of Yakima County's commitment to ensuring the timely appointment of counsel. At a *minimum*, there are disputed material facts as to this issue precluding summary judgment.

Moreover, as the Washington Court of Appeals just reiterated, "[i]ssuance of a writ of habeas corpus cannot result in dismissal of the charges." *Williams v. Skagit Cnty.*, No. 88521-9-I, 2026 WL 579343, at *2 (Wash. Ct. App. Mar. 2, 2026) (unpublished) (citing *Weiss v. Thompson*, 120 Wn. App. 402, 407, 85 P.3d 944 (2004)).[3] Thus, habeas corpus is not a basis to retroactively dismiss charges based on any of Plaintiffs' allegations.

Plaintiffs ask this Court to declare that "Judge Bartheld's order extending speedy trial because no attorney was available violated CrR 3.3." Motion at 18. But the UDJA "does not allow

[2] Similarly, in *State v. Roberts*, 374 Or. 821, 833 (2026), the Court noted that "Because of the public defense crisis, trial courts across the state are frequently unable to appoint counsel to eligible defendants." The Court then ordered dismissal of felony cases, *without prejudice*, where criminal defendants did not have counsel and had been waiting *more than 90 days*. *Betschart v. Garrett*, 700 F. Supp. 3d 965, 972 (D. Or. 2023), *amended,* No. 3:23-CV-01097-CL, 2023 WL 7621969 (D. Or. Nov. 14, 2023)*, and aff'd sub nom. Betschart v. Oregon,* 103 F.4th 607 (9th Cir. 2024)("The parties agree that the State is facing a crisis in its constitutional mandate to provide qualified attorneys to those charged with crimes.").

[3] Defendants cited *Weiss* in their response brief. Response at 22. Plaintiffs did not address it.

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a party to seek a court order invalidating an order issued by a different court." *McGrath v. Gibbons*, 2023 WL 2366672, at *4, 25 Wash. App. 2d 1054 (2023) (unpublished); *see also Glitsch, Inc. v. Koch Eng'g Co.*, 216 F.3d 1382, 1384 (Fed. Cir. 2000) ("When a court enters an order that a party does not like, the party's recourse is to seek relief on appeal; it is not appropriate for the party to contest the court's order by filing a new action seeking a declaratory judgment challenging the court's ruling in the first case."); *Williams*, 2026 WL 579343, at *2 (Wash. Ct. App. Mar. 2, 2026) ("habeas corpus is an original action wherein the petitioner does not seek review of another court's decision") (cleaned up).

Even if this Court could essentially review all of Judge Bartheld's orders in a declaratory or habeas action, appellate courts do not disturb such rulings unless there is an abuse of discretion, which requires a "clear showing" that the decision was "manifestly unreasonable." *Id.* at 449–50. Plaintiffs seek to avoid this deferential standard by impermissibly using the UDJA to seek de novo appeal of Judge Bartheld's orders before this Court.

Plaintiffs' real argument is that in some instances Judge Bartheld's orders allegedly violated due process or the right to counsel. Even if that were so, "the pending charge shall not be dismissed unless the defendant's constitutional right to a speedy trial was violated." CrR 3.3(a)(4)*; see also State v. George*, 160 Wn.2d 727, 737, 158 P.3d 1169 (2007) ("Criminal cases should be dismissed under the time-for trial rules only if one of the rules' express provisions have been violated; other time-for-trial issues should be analyzed under the speedy trial provisions of the state and federal constitutions."). Plaintiffs do not allege any class member's constitutional speedy trial right was violated. In sum, there is no appropriate class wide relief regarding time to trial via declaratory judgment or habeas corpus.

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Third, as the Court also inquired, this case is not about statewide indigent defense funding. The Washington State Association of Counties (WSAC), and individual counties including Yakima, have brought a separate case against the State. *Wash. State Ass'n of Cntys. v. State (WSAC)*, 34 Wn. App. 2d 879, 572 P.3d 1225 (2025). The issue in *WSAC* relates to the constitutionality of state statues governing the apportionment of funding for public defense. *Id.* at 885–86, 904–05. Plaintiffs' discussion of the case in their reply brief was inaccurate and misleading in several key respects, including their uniform characterization of the case, the parties' positions, and the Court's statements as being about "the public defense shortage," thereby skewing the characterized quotations to seem contrary to the County's positions in this case. *See, e.g.*, Reply at 4, 6-8. But again, the primary concern in *WSAC* is who should pay for indigent defense. Specifically, it is about whether counties—which currently pay for "over 96 percent of the cost of trial court indigent defense"—must continue to divert funds from "other critical services for their residents" to ensure access to counsel, or if the State has a constitutional duty to pitch in. 34 Wn. App. 2d at 887, 893. The asserted injury is the strain on local budgets, not a specific county's ability to adequately support indigent defense.

The issue of public importance the *WSAC* court describes as unlikely to change without additional State resources is not Yakima County's "public defender shortage," Reply at 4, but the difficulty facing counties choosing between adequately funding their public defense services at the expense of other government expenditures, versus allowing under-resourced public defense systems. *WSAC*, 34 Wn. App.2d at 906. Yakima County has continued its path, set before the filing of this case, to devote significant resources to adequately funding its public defense system, making it unlikely that the acute staffing shortage of early 2024 will recur. *See* Response at 26-7. But as the *WSAC* court acknowledged, that does not come for free.

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Plaintiffs' treatment of this case is misleading in other ways. For example, to the extent anything specific to Yakima County could be drawn from the counties' pleadings in *WSAC*, Plaintiffs fail to mention that the factual filings in that case were in late 2023. 34 Wn. App.2d at 887. Regardless, factual statements regarding the *WSAC* case are best understood as descriptions of the difficult resourcing dilemmas facing counties across the State and the disparate effects on less well-resourced counties. *Id*. at 883. This is also true for testimony of a Yakima County Commissioner advocating for funding, which Plaintiffs cite without the context that the Commissioner was discussing the challenges retaining qualified defense attorneys "across eastern Washington" and went on to discuss Yakima County's efforts to attract and retain attorneys and advocate for passing task force bill that includes requirements to consider the unique fiscal and geographic challenges faced by communities east of the Cascades.[4] Reply at 4-5. WSAC's (and Yakima County's claims) in *WSAC* are consistent with the fact that this case is moot, and the continued advocacy for funding in multiple fora underscores, rather than undermines, Yakima County's commitment to maintaining its indigent defense services.[5]

B. No Exception to Mootness Applies.

Plaintiffs do not show that any exception to mootness applies. The only case that Plaintiffs rely on to assert an exception to mootness is *WSAC*, 34 Wn. App. 2d 879. They attempt to invoke *WSAC* in response to Defendants' contention regarding the established proposition that trial courts

[4] https://tvw.org/video/senate-law-justice-2026011148/?eventID=2026011148

[5] Plaintiffs attempt to use Paul Kelley's statement that staffing is always an ongoing struggle to argue that delays are likely to recur. Reply at 5. Mr. Kelley's quote proves just the opposite—absent the unexpected overlapping circumstances that came to a head in early 2024, DAC is able to fulfill its duties even in the common instance across governmental agencies of having a few open positions. *See also* Decl. of P. Kelley (Class Cert) ¶ 6 ("[W]hen operating normally, DAC is typically able to fulfill its duties in assigning counsel to indigent defendants in Yakima County, even at times when the office is understaffed by a few attorneys.")

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cannot decide moot cases. Reply at 7–8; Response at 25–26. But the *WSAC* court considered whether there was a substantial public interest as an alternative basis for *standing*, not mootness. 34 Wn. App. 2d at 906–07. Standing is not at issue here, and nothing in *WSAC* even touches on deciding moot cases. The fact that a statewide issue regarding the apportionment of indigent defense funding is a matter of substantial public importance affording standing to a statewide association of counties does not bear on the issues presented here: whether the Court should issue three bright-line constitutional rules regarding the right to counsel and time to trial for individual defendants in one county where the parties agree there is no ongoing emergency.

Because no exception to mootness applies, the Court should not issue the requested declarations. Granting a declaratory judgment with "unclear consequences[ ] would not enhance the public interest but [would] instead further complicate an already complicated problem." *Civ. Survival Project v. State*, 24 Wn. App. 2d 564, 584–85, 520 P.3d 1066 (2022). This is especially so here, where the operative regulatory authority has changed in at least two ways since all Plaintiffs' claims have been moot. The period for arraignment (and therefore what attorneys have time to do in the period before arraignment) has shortened significantly, and counties have passed the first milestone for phasing in significantly lower public defense caseloads. *See* Wash. Supreme Ct. Orders No. 25700-A-1653 (July 2, 2025), No. 25700-A-1681 (December 15, 2025). This creates a framework for the provision of indigent defense that is significantly different than that which applied at the time of class certification or at the time any class member had a live claim. Class members' cases—even the harms they could allege—would therefore be different if any alleged deprivations occurred at some time in the future, years removed from the apex of the 2024

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appointment delays. The facts before the Court therefore do not shed light on how any change in the law would apply in the current framework.[6]

Although summary judgment should not be granted in this case, class members entitled to individual relief are not without recourse. Each class member has a lawyer and an ongoing criminal case that allows for the individualized claims, remedies, and appeals Plaintiffs cannot address for the whole class. This Court therefore need not step in to redress potential individual relief, particularly where those motions are most appropriately brought before other judges.

C. Even if Plaintiffs' Claims Were Justiciable, They Fail on the Merits.

1. Plaintiffs' article I, section 22 claim depends on this Court ignoring precedent and creating new law.

The guise of *Gunwall* does not eliminate binding precedent. Plaintiffs' Reply again fails to engage with binding authority holding that at least the first four of the *Gunwall* factors have already been interpreted by Washington Courts that have determined, repeatedly, that article I, section 22 and the Sixth Amendment are coextensive. For example, as to the first two *Gunwall* factors, Plaintiffs insist that article I, section 22, which provides that "the accused shall have the right to appear and defend in person, or by counsel..." is broader than the federal guarantee that "the accused shall … have the Assistance of Counsel for his defense." Mot. at 6-7. But it is established that "There does not appear to be a substantial difference between the two clauses." *State v. Medlock*, 86 Wn. App. 89, 98, 935 P.2d 693 (1997); *see also State v. Kolocotronis*, 73 Wn.2d 92,

[6] Unlike the states in *Roberts* (Oregon) and *Robbins* (Maine), which provide public defense services through a state-wide agency, Washington provides indigent defense through discrete county-specific structures. This Court is therefore in a different position than the appellate courts that set state-wide rules in those cases, in which facts about the ongoing crises were broadly applicable. Plaintiffs nevertheless explicitly ask this Court to use Yakima County's facts to justify a state-wide systemic change, asking this Court to make a decision to provide answers to "all courts throughout the state[.]" Reply at 8.

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97–98, 436 P.2d 774, 779 (1968) (analyzing the same text and finding "the language used in the constitutional provision is plain, direct, unqualified, unambiguous, and unequivocal. But, it is no more so than language contained in the… United States Constitution.").

Plaintiffs also fail to engage with case law holding that neither prior state law nor the history of the constitutional provision support a broader right to counsel under art. 1, section 22. *See Matter of Lewis*, 200 Wn.2d 848, 860, 523 P.3d 760 (2023) (history of both provisions indicates right exists to protect the ability to receive a fair trial); *Medlock*, 86 Wn. App. at 99 (prior state law does not indicate a broader Washington right).

This Court should decline Plaintiffs' invitation to ignore the established legal framework to evaluate right to counsel claims in Washington. *State v. Heng*, 2 Wn.3d 384, 388, 539 P.3d 13, 16 (2023) (treating the state and federal rights to counsel as equivalent). Neither article I, section 22 nor the Sixth Amendment support issuance of the declaratory judgments Plaintiffs seek.

2. Plaintiffs' time-for-trial claims fail by law.

Plaintiffs' argument that "Judge Bartheld created a class . . . by using one order to address speedy trial in hundreds of cases," Reply at 14, misunderstands the time-for-trial analysis. In each criminal case, the impact of the form of order and the length of delay was different. Whether any order violated time-for-trial for any specific class member turns on the facts of the case.[7] As Plaintiffs themselves recognize, declaratory relief as to their speedy trial claims will "have no relevance to [some] individuals" in the class. Reply at 14 n.10.

Allowing Plaintiffs to use the UDJA to collaterally attack Judge Bartheld's orders also contravenes CrR 3.3. Plaintiffs erroneously insist that "[t]he plain language of [CrR 3.3(c)]

[7] Plaintiffs insist that "Defendants Should Not be Allowed to Relitigate Issues Decided During the Class Certification Motion." Reply at 15. But, as the Court recognized, whether there could be class-wide relief on their claims "will go to the ultimate merits." Decl. of C. Riva, Ex. I at 54-5.

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requires a person to object to *any* date outside of the speedy trial deadline within 10 days," Reply at 13, and because Plaintiffs lacked counsel to object, the procedural requirements should be waived. Yet, "CrR 3.3(d) is not ambiguous. CrR 3.3(d) expressly provides that a party must object within 10 days after notice of the *trial* date, and '[a] party who fails, for any reason, to make such a motion shall lose the right to object.'"[8] All class members had counsel when they were arraigned and trial was set—and that trial counsel was fully capable of objecting, as required by the rule. In some cases they did; in others they did not. Response at 41.

Where a defendant had "the ability to timely comply with the requirements of CrR 3.3(d)(3)," *State v. Walker*, 199 Wn.2d 796, 804, 513 P.3d 111 (2022), they must do so. *Id.* ("We hold that Walker lost the right to object to the untimely trial date under CrR 3.3(d)(3) because the trial date was set before the time-for-trial period expired but she failed to raise an objection until after the time-for-trial deadline expired."); *Farnsworth*, 133 Wn. App. at 13 ("[E]ven if the trial date is not within the time-frame prescribed in CrR 3.3, absent a timely objection, the trial date set by the trial court becomes the last allowable trial date.").

Appellate courts have also held that exclusion of time from time-for-trial calculations is appropriate where, as in Judge Bartheld's orders, there is "a detailed showing of the nature of the congestion or backlog, the steps the prosecution has taken to get around the congestion or backlog, and a reasonable time frame within which the case can be brought to trial," *State v. Denton*, 23 Wn. App. 2d 437, 450, 516 P.3d 422 (2022).[9]

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[8] *State v. Farnsworth*, 133 Wn. App. 1, 12–13, 130 P.3d 389 (2006), as amended (June 14, 2006), *as amended* (Mar. 13, 2007), *review granted, cause remanded*, 159 Wn.2d 1004, 151 P.3d 976 (2007) (quoting CrR 3.3(d)(3)) (emphasis added).

[9] Where appellate courts have found trial courts inappropriately excluded time, it is because the record was inadequate. *See, e.g.*, *State v. Kenyon*, 167 Wn.2d 130, 137, 216 P.3d 1024 (2009), *as amended* (Oct. 19, 2009) ("When the primary reason for the continuance is court congestion, the court must record details of the congestion, such as how many courtrooms were actually in use at

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Again, Plaintiffs' real argument is that their time-for-trial rights were violated on constitutional grounds. But any remedy there lies within constitutional speedy trial, not due process. *See Medina v. California*, 505 U.S. 437, 443 (1992) ("The Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order."). Plaintiffs attempt to distinguish *State v. Heddrick*, 166 Wn.2d 898 n.3, 215 P.3d 201 (2009), which follows *Medina*, but neither case mentions the distinction they claim.[10] Because constitutional speedy trial is "necessarily relative," *State v. Iniguez*, 167 Wn.2d 273, 282, 217 P.3d 768 (2009), whether it was violated "must be determined ad hoc on a case-by-case basis." *Wallace v. Kern*, 499 F.2d 1345, 1351 (2d Cir. 1974).

IV. CONCLUSION

This case is moot because the Court cannot grant class wide relief, and no other form of relief is available to Plaintiffs in this proceeding. Even if this case were justiciable, Plaintiffs' requested declarations are contrary to law. The Court should deny Plaintiffs' motion and allow class members to seek relief in their individual criminal proceedings.

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the time of the continuance and the availability of visiting judges to hear criminal cases in unoccupied courtrooms."); *State v. Kokot*, 42 Wn. App. 733, 713 P.2d 1121 (1986).

[10] "The Court of Appeals erroneously engaged in a balancing analysis under *Mathews v. Eldridge,* 424 U.S. 319, 335 1976), to determine that Heddrick received adequate due process. *Heddrick,* 140 Wash.App. 1019, 2007 WL 2411354, at *3. However, the Mathews balancing is not appropriate in criminal cases. *Medina*[], 505 U.S. 437, 443 [] (1992) ("the *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules")." The case Plaintiffs rely on to argue *Mathews* applies in criminal proceedings was a civil commitment proceeding on habeas review (i.e., not criminal). *Born v. Thompson*, 154 Wn.2d 749, 752-3, 117 P.3d 1098 (2005).

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DATED this 16th day of March, 2026.

PACIFICA LAW GROUP LLP

By: */s/ Matthew J. Segal*
Matthew J. Segal, WSBA #29797
Clare Riva, WSBA #57013
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Attorneys for Defendants

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CERTIFICATE OF SERVICE

I am and at all times hereinafter mentioned was a citizen of the United States, a resident of the State of Washington, over the age of 21 years and not a party to this action. On the 16th day of March, 2026, I caused to be served a true copy of the foregoing document upon:

David Montes
La Rond Baker
John Midgley
ACLU of Washington Foundation
P.O. Box 2728
Seattle, WA 98111
dmontes@aclu-wa.org
baker@aclu-wa.org
jmidgley@aclu-wa.org
twells@aclu-wa.org (paralegal)

☐ via facsimile
☐ via overnight courier
☐ via first-class U.S. mail
☒ via email service agreement
☐ via electronic court filing
☐ via hand delivery

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

DATED this 16th day of March, 2026.

Dawn M. Taylor

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Appendix K

(Stipulation Regarding Exhibit A.1 To Declaration of David Montes)

EFILED
Clerk Billie Maggard
4/1/2026 10:19 AM
Superior Court Yakima County, WA

IN THE SUPERIOR COURT OF WASHINGTON
FOR YAKIMA COUNTY

VICTOR CUEVAS, et. al., on their behalf and on behalf of other similarly situated individuals, Plaintiffs, v. YAKIMA COUNTY, et. al., Respondents.	Case Number 25-2-00718-39 STIPULATION REGARDING EXHIBIT A.1 TO DECLARATION OF DAVID MONTES

I. STIPULATION

The parties agree and stipulate as follows:

1. Exhibit A.1 to the Declaration of David Montes in Support of Plaintiffs' Motion for Summary Judgment was filed in substantially the same form from August 13, 2024 through January, 2025 in the cases of approximately 213 people charged with crimes in Yakima County Superior Court.

STIPULATED TO this 1st day of April, 2026.

PACIFICA LAW GROUP LLP

By *s/ Matthew Segal*
Matthew Segal, WSBA # 29797

By *s/ Clare Riva*
Clare Riva, WSBA # 57013

Attorneys for County Defendants

ACLU OF WASHINGTON

By s/ David Montes
David Montes, WSBA # 45205
La Rond Baker, WSBA # 43610
John Midgley, WSBA # 6511

Attorneys for Plaintiffs

Appendix L

(Complaint and Application for Writ of Habeus Corpus)

IN THE SUPERIOR COURT OF WASHINGTON
FOR KITTITAS COUNTY

OMAR AL-THARWA, ORLANDO CISNEROS, VICTOR CUEVAS, JESUS GUZMAN, JOSE SANTANA-CERVANTES, on their behalf and on behalf of other similarly situated individuals,

Plaintiff,

v.

YAKIMA COUNTY; YAKIMA COUNTY DEPARTMENT OF CORRECTIONS; JEREMY WELCH, Director of the Yakima County Department of Corrections, in his official capacity; YAKIMA COUNTY SUPERIOR COURT; JUDGE RICHARD BARTHELD, Presiding Judge of the Yakima County Superior Court, in his official capacity; BOARD OF YAKIMA COUNTY COMMISIONERS; AMANDA MCKINNEY, Yakima County Commissioner, in her official capacity; KYLE CURTIS, Yakima County Commissioner, in his official capacity; LADON LINDE, Yakima County Commissioner, in his official capacity; YAKIMA COUNTY DEPARTMENT OF ASSIGNED COUNSEL; PAUL KELLEY, Director of Yakima County Department of Assigned Counsel, in his official capacity,

Defendant.

No. 24 2 0033119

APPLICATION FOR WRIT OF HABEAS CORPUS PURSUANT TO RCW 7.36/COMPLAINT PURSUANT TO RCW 7.24

(CLASS ACTION)

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I. INTRODUCTION

1.1 Yakima County has a public defender shortage.

1.2 The burden of Yakima County's public defender shortage is borne by indigent people charged with crimes, who wait for weeks or months for an attorney to help with their case.

1.3 Despite a lack of attorneys to help with their cases, Plaintiffs continue to face prosecution, incarceration, onerous conditions of release, and repeated court hearings—where they are forced to face the court without counsel—that do not move their case forward.

1.4 Yakima County's failure to appoint counsel violates the right to counsel guaranteed in article I, section 22 and article I, section 3 of the Washington Constitution, and Criminal Rule 3.1.

1.5 As a result, the continued prosecution of these cases without counsel is a restraint on the people being prosecuted.

1.6 We petition this Court to declare this restraint unlawful and deliver Plaintiffs from this unlawful restraint.

A. People Incarcerated Without Counsel

1.7 Some people wait in the Yakima County Department of Corrections for over a month before they are appointed an attorney.

1.8 Incarceration without appointment of an attorney violates the Sixth Amendment right to counsel and constitutes unlawful restraint. *Betschart v. Oregon*, 103 F.4th 607, 614 (9th Cir. 2024).

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1.9 Release is an appropriate remedy to end this unlawful restraint. *Id.*

1.10 The Yakima County Superior Court has acknowledged that *Betschart* applies to the issues presented in this petition. *See* Exhibit A at 6.

1.11 Article I, section 22 and Criminal Rule 3.1 are more protective than the Sixth Amendment as they relate to appointment of counsel. *State v. Fitzsimmons*, 94 Wash.2d 858, 620 P.2d 999 (1980).

1.12 Charging an individual and incarcerating them but not appointing counsel violates article I, section 22 and article I, section 3 of the Washington Constitution, and Criminal Rule 3.1 and constitutes unlawful restraint.

1.13 We petition this Court to declare this restraint unlawful and deliver Plaintiffs from this unlawful restraint.

B. People Held on Conditions of Release Without Counsel

1.14 People charged with crimes who are not in jail wait months for an attorney to be assigned to their case with no indication of when an attorney might be assigned.

1.15 Others who have an attorney withdraw from their case wait months for a new attorney to be assigned.

1.16 Charging an individual and imposing conditions of release but not appointing counsel violates article I, section 22 and article I, section 3 of the Washington Constitution, and Criminal Rule 3.1 and constitutes unlawful restraint.

1.17 We petition this Court to declare this restraint unlawful and deliver Plaintiffs from this unlawful restraint.

C. Speedy Trial

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1.18 Because counsel is not appointed, many people are reaching and passing their speedy trial deadline, violating the speedy trial rules enshrined in Criminal Rule 3.3.

1.19 Failure to appoint counsel is not a valid reason to extend the allowable period for trial under Criminal Rule 3.3. Cases continued for this reason were continued in violation of that rule.

1.20 Extending speedy trial based on an incorrect application of Criminal Rule 3.3 and continued prosecution of cases that should have been dismissed pursuant to Criminal Rule 3.3 is an unlawful restraint.

1.21 Yakima County Superior Court extended the allowable time for trial without notice, an attorney, or an opportunity to be heard for those affected by its order in violation of article 1, section 3 of the Washington Constitution. Because this order was issued without due process, it is invalid and continued prosecution of these cases is an unlawful restraint on Plaintiffs.

1.22 We petition this Court to declare these restraints unlawful and deliver Plaintiffs from these unlawful restraints.

II. NATURE OF ACTION

2.1 Plaintiffs seek a declaration pursuant to the Uniform Declaratory Judgment Act (UDJA)—RCW 7.24 et seq.—that Plaintiffs are unlawfully restrained by Defendants.

2.2 Plaintiffs seek a writ of habeas corpus pursuant to RCW 7.36 and for an order delivering them from the unlawful restraints imposed by the Defendants pursuant

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to RCW 7.36.010.

III. JURISDICTION AND VENUE

3.1 This action arises from the Defendants' failure to appoint counsel for existing criminal prosecutions and the resulting continued unlawful restraint of Plaintiffs.

3.2 This Court has personal jurisdiction over all parties. RCW 36.01.050.

3.3 This Court has jurisdiction to hear the UDJA claims pursuant to RCW 7.24.010.

3.4 This Court has jurisdiction to hear statutory writs of habeas corpus pursuant to RCW 7.36.040.

3.5 Kittitas County is the proper venue for this action pursuant to RCW 36.01.050 and *Filing Venues for Actions by or Against Counties*. Washington Courts, *Filing Venues for Actions by or Against Counties* (2016), https://www.courts.wa.gov/court_dir/?fa=court_dir.filingvenue.

IV. PARTIES

4.1 Plaintiffs are a class of individuals charged with crimes in Yakima County Superior Court who have not had attorneys appointed to their cases.

4.2 Class Representatives:

4.2.1 **Omar Al-Tharwa** has been in custody since September 3, 2024, without an attorney. He is charged with non-violent property crimes. His arraignment was scheduled for September 17, 2024. He appeared in court but was not provided an attorney. The Court informed him that there were no attorneys available and that the Court hoped he would get an attorney on October 1, 2024. His arraignment was continued to October 16, 2024. He

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was not given an opportunity to argue for a reduction in bail and was not asked whether he objected to the continuance. He will spend nearly six weeks in custody before being arraigned or having a chance to argue bail.

4.2.2 **Orlando Cisneros** has been in custody since September 4, 2024, without an attorney. His arraignment was scheduled for September 19, 2024. He appeared in court but was not provided an attorney. The Court informed him that there were no attorneys available and that the Court hoped he would get an attorney on October 1, 2024. His arraignment was continued to October 17, 2024. He was not given an opportunity to argue for a reduction in bail and was not asked whether he objected to the continuance. He will spend nearly six weeks in custody before being arraigned or having a chance to argue bail.

4.2.3 **Victor Cuevas** is out of custody. He is charged with taking a motor vehicle without permission in the second degree in Yakima County Superior Court. His case was continued from March 15, 2024 to June 26, 2024 for an attorney status hearing. His attorney withdrew on June 18, 2024. Assuming, without conceding, that the withdrawal of his attorney constitutes a "disqualification" under Criminal Rule 3.3(c)(2)(vii), his speedy trial commencement would have been June 18, 2024, and his allowable time for trial expired September 16, 2024. He has not had an attorney during that time. Judge Bartheld filed an order in his case extending the allowable time for trial. He has appeared once a month since June for attorney status

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hearings. His next attorney status hearing is October 17, 2024.

4.2.4 **Jesus Guzman** is currently unrepresented on two cases in Yakima County Superior Court. The first was charged in July of 2024 and a second offense was charged on August 28, 2024. He bailed out twice but was remanded both times. Criminal Rule 3.2(l)(2) allows for revocation of bail but not without a hearing at which a violation of conditions is proven by clear and convincing evidence. No such hearing was held, and no counsel was appointed to represent him at such a hearing. He has been in custody since September 2, 2024, without an attorney on these cases. He has yet to be arraigned on either case. He appeared for a scheduled arraignment on September 17, 2024, but was not provided an attorney. The Court informed him that there were no attorneys available, and that the Court hoped he would get an attorney on October 1, 2024. His arraignment was continued to October 15, 2024. He was not given an opportunity to argue for bail and was not asked whether he objected to the continuance. He will spend nearly six weeks in custody before being arraigned or having a chance to argue bail.

4.2.5 **Jose Santana-Cervantes** has been in custody since August 31, 2024, without an attorney. His arraignment was scheduled for September 17, 2024. He appeared in court but was not provided an attorney. The Court informed him that there were no attorneys available and that the Court hoped he would get an attorney on October 1, 2024. His arraignment was

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continued to October 15, 2024. He was not given an opportunity to argue for bail and was not asked whether he objected to the continuance.

4.3 Defendants are Yakima County, its Superior Court, the Presiding Judge of that Court, and several of Yakima's agencies and the heads of those agencies.

4.3.1 Yakima County is a county corporation incorporated under the laws of the State of Washington.

4.3.2 The Yakima County Department of Corrections, and its Director, Jeremy Welch, operate the Yakima County Jail and have custody of the in-custody group of Plaintiffs.

4.3.3 The Yakima County Superior Court is the court of general jurisdiction in Yakima County. Judge Richard Bartheld is the Presiding Judge of that court. The Yakima County Superior Court and its judges imposed the conditions that represent the unlawful restraint on all Plaintiffs. That court is also the primary mechanism enforcing the unlawful restraints on the out-of-custody and speedy trial groups of Plaintiffs. Lastly, the Court issued an order continuing speedy trial for a whole class of people charged with crimes in Yakima County Superior Court without notice to them, an attorney for them, or a right for them to be heard. *See* Exhibit A.

4.3.4 The Board of Yakima County Commissioners is the governing board of Yakima County and the organization responsible for funding the public defense system. The Board has failed to take meaningful action to prevent the public defender shortage in Yakima County. Amanda McKinney, Kyle

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Curtis, and LaDon Linde are the current Yakima County Commissioners.

4.3.5 The Yakima County Department of Assigned Counsel is the organization responsible for employing and assigning public defenders to cases. Paul Kelley is the director of Yakima County Department of Assigned Counsel.

V. FACTUAL ALLEGATIONS

A. Public Defense Shortage in Yakima County

5.1 Yakima County has the sole responsibility for providing indigent people charged with crimes in Yakima County Superior Court with their constitutional right to counsel. *Davison v. State*, 196 Wn.2d 285, 289, 466 P.3d 231, 234 (2020).

5.2 Yakima County has a shortage of public defenders, which goes back to at least 2022.

5.3 In addition to this historical shortage, the Yakima Department of Assigned Counsel (DAC) lost several attorneys in the first half of 2024.

5.4 DAC does not have enough attorneys to handle the number of cases filed in Yakima County Superior Court.

5.4.1 Each attorney providing representation to indigent defendants is limited in the number of the cases they can take by the Washington State Standards for Indigent Defense (SID). SID 3.3.

5.4.2 These limits apply on a yearly basis, but it is presumed that cases will be evenly distributed throughout the year. SID 3.3.

5.4.3 Giving each attorney more cases when they have reached this limit violates the court rules.

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5.5 Because there are not sufficient attorneys to take cases, DAC cannot assign attorneys to cases as they are filed.

5.6 Instead, DAC assigns cases at the beginning of each month when the standards allow attorneys to take additional cases.

5.7 As a result, anyone booked into the Yakima County Jail are not assigned attorneys until, at least, the month following their arrest.

5.8 Because no attorney is assigned to their case, the Court is continuing arraignments and the opportunity to argue for a reduction in bail for people in custody for roughly a month in most cases.

5.9 For example, Omar Al-Tharwa was charged on September 3, 2024, and should have been arraigned on September 17, 2024, pursuant to Criminal Rule 4.1. This would have been his first opportunity to enter a plea and argue for release with a prepared attorney. However, no attorney was available, and the Court continued his arraignment until October 16, 2024, a full month after arraignment was required by the rule. Because there was no attorney present for him, he had no opportunity to object or argue for a reduction in bail.

5.10 Since April, this cycle has been repeated hundreds of times for the many people charged with crimes in Yakima County Superior Court.

5.11 DAC does not currently have capacity to assign each case that was filed in the previous month, or the several months preceding, at the beginning of each month.

5.12 People who are held in-custody take priority in assignments.

5.13 After assigning attorneys to people who are in custody, DAC has limited capacity

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to assign an attorney to anyone who is not held in custody.

5.14 As a result, DAC cannot assign attorneys to most people who are out of custody.

5.15 Many of these people have waited several months for an attorney to be assigned to their case.

5.16 These people are required to repeatedly come to court for attorney status hearings and have had their arraignments repeatedly continued. They are still under the conditions of release set at their first appearance.

5.17 Other class members had attorneys assigned but those attorneys had to withdraw for various reasons. If these people are out of custody, they wait months to be assigned a new attorney to replace the attorney who withdrew.

5.18 While waiting for an attorney to be assigned, these individuals are required to repeatedly come to court for attorney status hearings, frequently waiting hours for a hearing where they are again told that no attorneys are available.

5.19 All individuals charged with crimes are subject to laws governing individuals charged with crimes and must comply with court orders, including orders to appear in court.

5.20 For individuals charged with a crime but not in custody, if the Court wishes to revoke bail pursuant to Criminal Rule 3.2(l)(2) a bail revocation hearing is required. Right now, bail revocation hearings are not held before bail is revoked because no attorney is assigned. People are remanded and incarcerated at the Jail without the protections of a bail revocation hearing and the due process required by Criminal Rule 3.3 or the protections an attorney may provide in such hearings.

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B. Speedy Trial

5.21 Many people will reach the expiration of the allowable time for trial—as calculated under Criminal Rule 3.3—without an attorney assigned to their case.

5.22 In July and August of 2024, the Yakima County Prosecutor's Office moved to continue cases that were reaching the expiration of the allowable time for trial, arguing that continuances are required in the administration of justice or that the time during which counsel is not appointed should be an excluded period.

5.23 On August 13, 2024, the Yakima County Superior Court found that several factors, including four attorneys leaving DAC earlier this year and the failure of the Legislature and Supreme Court to help with the public defender shortage, constituted unforeseen circumstances, justifying an excluded period in the allowable time for trial. Exhibit A at 5-7.

5.24 This Order purported to apply to all people charged in Yakima County Superior Court who have not been appointed counsel. Exhibit A at 1.

5.25 The Court also found that continuances in these cases were required in the administration of justice and continued the trial dates of these cases, with an associated extension of the allowable time for trial. Exhibit A at 7-9.

5.26 In making these rulings, the Court noted that "[t]he court must presume the inability to appoint defense counsel may have a prejudicial effect upon the presentation of the defendant's defense." Exhibit A at 8.

5.27 This ruling was issued as a letter decision without counsel, notice, or an opportunity to be heard for any of the people whose speedy trial rights it purported to alter.

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VI. CLASS ACTION ALLEGATION

6.1 The Plaintiffs are a class of indigent individuals charged with crimes in Yakima County Superior Court who have not been assigned attorneys.

6.2 For the purposes of remedy, there are three sub-classes of people affected by Yakima County's failure to provide counsel:

6.2.1 The first sub-class is a class of indigent people charged with crimes in Yakima County Superior Court and held in custody in the Yakima County Jail without an attorney assigned to represent them.

6.2.2 The second sub-class is a class of indigent people charged with crimes in Yakima County Superior Court who are out of custody but held on conditions of release without an attorney assigned to represent them.

6.2.3 The third class is a class of indigent people who reach their speedy trial expiration, as calculated by Criminal Rule 3.3 without an attorney assigned to their case but have the expiration of the allowable time for trial extended through an incorrect application of Criminal Rule 3.3 or an order issued in violation of due process.

6.3 Each of the people in this class is unlawfully restrained for the purposes of RCW 7.36.

6.4 The class is so numerous that joinder of all members is impracticable.

6.5 Additionally, given the situation, the class is likely to grow as litigation continues, requiring ongoing joinder if a class is not certified.

6.6 Joinder is not only impractical but impossible where members of the class could

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not be identified since they are not yet members of the class. *Zimmer v. City of Seattle*, 19 Wn. App. 864, 868, 578 P.2d 548, 550 (1978).

6.7 Each of these classes have common questions of law and fact as they pertain to the issues raised in this case.

6.8 Each have been denied counsel.

6.9 Each claim that this denial infringes on their rights to counsel, due process, a speedy trial, or all three.

6.10 The claims of the representatives are typical of the class and the three remedy-related sub-classes.

6.11 The ACLU of Washington Foundation has experience litigating similar issues and can represent the interests of the entire class.

6.12 There are no conflicts or competing interests within the class.

6.13 Yakima County has failed to appoint attorneys to represent Plaintiffs, making declaratory relief with respect to the class appropriate.

6.14 The questions of law or fact common to the members of the class predominate over any questions affecting only individual members because the violation of rights is the same for each member.

6.15 A class action is superior to individual adjudications because it allows for the efficient adjudication of the rights of members of the class described above.

6.16 In issuing its letter opinion addressing the speedy trial issues, the Yakima County Superior Court, through respondent Presiding Judge Bartheld, treated the legal issues in this case as identical for all members of the class and attempted to issue

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an order affecting the speedy trial rights of each petitioner.

VII. CLAIMS FOR RELIEF

FIRST CLAIM

Violation of Article I, Section 22 Right to Counsel

7.1 Failure to appoint counsel while continuing to restrain Plaintiffs violates Plaintiffs' rights under article I, section 22 of the Washington Constitution.

7.2 Article I, section 22 of the Washington Constitution guarantees people charged with crimes the right to "appear and defend…by counsel."

7.3 The right to counsel attaches at the time criminal proceedings are initiated. *Betschart*, 103 F.4th at 612.

7.4 Investigation and consultation are important aspects of the right to counsel. *State v. A.N.J.*, 168 Wn.2d 91, 111–12, 225 P.3d 956, 966 (2010).

7.5 The right to counsel is a continuous right to competent and zealous advocacy. *Betschart*, 103 F.4th at 621.

7.6 The right to counsel includes confidentiality in communication; investigation of lines of defense; investigation of whether the accused person is competent to stand trial; assistance with preparation and litigation of a bail hearing; guidance through the plea-bargaining process, including communication of formal plea offers and competent advice on how to plead and the right to appeal; assistance with a defendant's attempt to cooperate; advice about issues like deportation; and warning of possible risks in sentencing. *Id.*

7.7 Even a delay in providing counsel and all the rights that are tied to the right to

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counsel is an unlawful restraint. *Id.*

7.8 Lack of counsel interferes with indigent criminal defendants' ability to progress to critical stages. *Id.*

7.9 Continuing to prosecute people, hold people in custody, or hold people on conditions of release when they do not have an attorney violates article I, section 22 and is an unlawful restraint.

SECOND CLAIM

Violation of Article I, Section 3 Due Process Right to Counsel

7.10 The right to counsel is the most pervasive constitutional due process right because it affects the ability to assert all other rights. *United States v. Cronic*, 466 U.S. 648, 654-55, 104 S.Ct. 2039 (1984).

7.11 The deprivation of counsel in this case has made it impossible for Plaintiffs to assert their other due process rights pursuant to article I, section 3—including addressing legal rights such as speedy trial issues, bail revocations, and Yakima County Superior Court's purported Order waiving such rights.

7.12 Continuing to prosecute people, hold people in custody, or hold people on conditions of release when they do not have an attorney violates article I, section 3 and constitutes an unlawful restraint.

THIRD CLAIM

Violation of Criminal Rule 3.1 Right to Counsel

7.13 Failure to appoint counsel violates Criminal Rule 3.1.

7.14 Criminal Rule 3.1(b)(1) requires that "[t]he right to a lawyer shall accrue as soon

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as feasible after the defendant is taken into custody, appears before a committing magistrate, or is formally charged, whichever occurs earliest."

7.15 This rule requires counsel as early as at the time of arrest if the arrest necessarily raises issues of spoliation of evidence. *State v. Fitzsimmons*, 94 Wn.2d 858, 620 P.2d 999 (1980).

7.16 At the latest, this rule requires counsel to be appointed whenever anyone is formally charged with an offense.

7.17 Continuing to charge people with crimes, hold people in custody, or hold people on conditions of release when they do not have an attorney violates Criminal Rule 3.1 and is an unlawful restraint.

FOURTH CLAIM

Violation of Criminal Rule 3.3 Right to a Speedy Trial

7.18 Someone charged with a crime must be brought to trial within 60 days of arraignment if they are in-custody or within 90 days of arraignment if they are out of custody. CrR 3.3(b) and (c).

7.19 Criminal Rule 3.3 requires that "[i]t shall be the responsibility of the court to ensure a trial in accordance with this rule to each person charged with a crime." CrR 3.3(a)(1).

7.20 "A charge not brought to trial within the time limit determined under this rule shall be dismissed with prejudice." CrR 3.3(h).

7.21 These expiration dates can be extended under limited circumstances described by the rule.

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7.22 None of the bases for extending the initial expiration date apply to a situation where a county fails to provide an attorney for an accused person.

7.23 Continuing to prosecute a person with a crime that should have been dismissed because the speedy trial expiration passed is an unlawful restraint.

I. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court grant relief as follows:

A. Issue a Declaration that:

1. Continued prosecution, incarceration, or imposition of pretrial conditions of a person charged with a crime without appointing counsel is a violation of article I, section 22 of the Washington Constitution and constitutes an unlawful restraint.
2. Continued prosecution, incarceration, or imposition of pretrial conditions without appointing counsel is a violation of article I, section 3 of the Washington Constitution and constitutes an unlawful restraint.
3. Continued prosecution, incarceration, or imposition of pretrial conditions without appointing counsel is a violation of Criminal Rule 3.1 and constitutes an unlawful restraint.
4. Extending the allowable time for trial because a person charged with a crime is not appointed counsel violates Criminal Rule 3.3 and the continued prosecution of a case that should have been dismissed because it exceeded its allowable time for trial is an unlawful restraint.

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5. Extending the allowable time for trial based on an order issued without giving those affected by the order notice, an attorney, or an opportunity to be heard violates article I, section 3 of the Washington Constitution is an unlawful restraint.

B. Deliver Plaintiffs from these unlawful restraints pursuant to RCW 7.36.010.

DATED this 30th day of September,

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION

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Exhibit A

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COURTS LETTER DECISION RELATING TO TIME FOR TRIAL ISSUES FOR OUT OF CUSTODY DEFENDANTS AWAITING APPOINTMENT OF COUNSEL

The Yakima County Superior Court has a criminal defense counsel shortage that has reached a crisis level. Presently, more than 250 defendants are awaiting the appointment of counsel. The court has directed the Yakima Department of Assigned Counsel (hereinafter "DAC") to appoint counsel for these defendants. The DAC has been unable to appoint counsel because of the lack of qualified attorneys to provide indigent defense. This inability arises out of a variety of factors, discuss later in this opinion.

Defendants without counsel are out of custody. They fall into two principal categories. Several had counsel that later withdrew and are awaiting appointment of counsel. The remaining defendants are out of custody awaiting the appointment of counsel since their preliminary appearance before the court. Many are approaching ninety days from the "effective date" of their arraignment. See CrR 4.1(a)(2). For the most part, defendants in custody have been appointed counsel, although appointments in some cases are delayed. Presently, defendants in custody and appointed counsel on or after August 1, 2024 will not have attorneys appointed until September 3, 2024.

The state has filed a variety of motions in several criminal cases seeking to avoid dismissal of criminal cases because of the inability to locate and appoint counsel for these criminal defendants. These motions advance four different theories to avoid dismissal. For instance, in *State v. Dario Navarro*, Cause numbers 19-1-2139-39, 20-1-00712-39, and 20-1-00716-39, the State seeks an order to compel the appointment of counsel prior to the expiration of speedy trial. They also seek a continuance pursuant to CrR3.3 (f) (2), arguing a continuance is in the best interest of justice. In *State v Patricia Jackson*, 23-1-01934-39, the State seeks an order requiring the court to appoint counsel other than the public defender, and compelling funding for that expense pursuant to RCW 36.26.090 In *State v Henley*, Cause No. 24-1-00659-39, the State seeks to exclude from the time for trial timeline, the period from the effective date of arraignment to the date counsel is appointed pursuant to CrR3.3 (e)(8). In the past week, the State has filed a number of these motions in dozens of cases to avoid dismissal pursuant to CrR 3.3 (h). This court intends to address the various motions filed by the State in this decision with the intent that its ruling will have application in the other cases where similar motions have been filed but have not been noted for argument together with cases with similar issues where motions have not been filed but the court must rule upon.

FACTS

The shortage of qualified defense counsel in rural Washington counties is not unforeseen. In Yakima County, the Director of DAC has monthly notified the court, prosecutor and others of the attorney shortage and their limited ability to appoint counsel between a defendant's preliminary

appearance and arraignment. The office was able to appoint counsel generally within 30 days of the effective date of arraignment, even though they were down 4-5 attorneys. They were also able to appoint counsel in pending cases where attorneys were allowed to withdraw.

In an effort to attract more attorneys, Yakima County increased wages by 15% in November 2022 for attorneys in the prosecuting attorney's office and DAC and authorized signing bonuses of $12,000.00 to attract attorney applicants. The county also awarded $10,000.00 retention bonuses for existing deputy prosecutors and defense counsel. Despite this, few applied or were hired for open positions in either office. The retention bonus did not have the desired effect.

DAC has attorneys that work in its office and are employees for the County of Yakima. The office provides attorneys for District Court, ITA hearings, Juvenile offenders, Therapeutic Courts and for civil contempt hearings where imprisonment is sought. The Director of Assigned Counsel, Mr. Paul Kelley, also carries a felony caseload in addition to his administrative duties.

DAC also hires contract attorneys to handle cases where conflicts of interest arise, or the number of cases exceed the cases that may be assigned to its employees. An attorney with a 100% contract can accept the same number of cases equivalent to a full-time DAC defense attorney. Some of the contract attorneys have less than a full-time contract to allow them to accept cases from private paying clients or to accept appointments from other jurisdictions. For example, Mr. Christopher Swaby had a 50% contract with Yakima County and accepted many of the Class A complicated criminal cases. Mr. Wes Gano has a 95% contract which allows him to accept cases from other jurisdictions. DAC also has contracts with private defense counsel to provide indigent defense when the number of appointments exceed indigent defense standards. See SID 3.4 and 3.5. The private defense counsel also is required to meet caseload standards and certify they can comply with standards required by CrR 3.1.

In March 2024, DAC lost one of its contract attorneys to the Prosecutor's office. This created an immediate conflict of interest with her clients and necessitated her withdrawal. DAC was responsible to appoint defense counsel to her existing cases. These appointments were drawn from remaining counsel available to DAC, depleting the number of attorneys available for assignment in new cases. Presently, there remains two cases that a defense counsel has not been assigned caused by her withdrawal.

Also in March, two full-tome attorneys in DAC announced their intentions to quit in 60 days. DAC avoided assignment of new defendants to these attorneys insisting they focus on resolving their existing cases. This resulted in further blows to DAC and their ability to assign counsel to indigent defendants. Despite their best efforts, the two full-time attorneys with DAC were not able to resolve all of their existing cases. Their departure in late June, 2024 left DAC with the responsibility to appoint replacement counsel, thus depleting the number of attorneys available for assignment in new cases. DAC was able to reappoint counsel for their clients in custody, however, as of August 7,2024, there remains 48 cases requiring counsel appointment for Mr. David McAleer's cases and 64 cases for Mr. John Chambers. These cases waiting appointment of counsel represent 44.8% of the 250 cases awaiting appointment of counsel.

Effective July 1, 2024, Mr. Christopher Swaby started as the Director of Assigned Counsel for Clark County. He stopped accepting appointments in June 2024 and has withdrawn as counsel in several existing cases. He has also agreed to remain as counsel in a few complex criminal cases. The loss of his contract services has depleted the number of attorneys available for DAC appointment in new cases as well.

Faced with the continuing loss of attorneys and inability to hire counsel to fill existing positions and contracts, Yakima County responded by increasing salaries for deputy prosecutors and defense counsel an additional 22.4%. They also increased signing bonuses to $15,000.00. The increase was effective July 1, 2024. This also applies to contract attorneys. Full-time contract compensation was raised to ranges between $177,979 to $189,950 per year for felony qualified attorneys. Despite this increase, the number of applicants for defense counsel has not materially increased. It is hoped the substantial increases in earnings approved in the past 9 months will help increase the number of defense counsel in Yakima County.

The referral of criminal cases by law enforcement for felony charges in Yakima County since the Fall of 2022 has not materially changed. Because of the attorney shortage, the number of defendants charged with felony offenses has decreased. Prosecutors are more selective in the felony cases charged and refer more cases to courts of limited jurisdiction for resolution. Other cases are refereed back to law enforcement for additional investigation. While this reduces the number of cases and defendants requiring the appointment of counsel, it has an adverse effect on community safety and the prosecuting attorney's relationship with law enforcement. Nobody wins with the lack of qualified defense counsel.

The lack of defense counsel and inability of Yakima County to attract attorneys to fill these positions is unprecedented. Forty years ago, several attorneys applied for a single job opportunity. Today, few apply for several positions available. The county's inability to fill these positions reflect a problem much larger than Yakima County can resolve alone. This problem is not unique to Yakima. Benton and Franklin Counties suffer from the same issues along with other rural counties in the state. The State of Washington shifts the cost of criminal justice to the 39 counties that make up the state, with limited exceptions. By contrast, the State provides funding for attorneys to represent tenants involved in Landlord/tenant cases.

STATE'S MOTIONS

I. MOTION TO COMPELL DAC DIRECTOR PAUL KELLEY TO APPOINT COUNSEL

This motion implies that the court has not directed DAC to appoint counsel for indigent defendants. If fact, the court directed DAC to appoint counsel in the Order on Preliminary Appearance when the defendant first appeared before the court following arrest or appearance by Summons. In realty, the State seeks a personal order directing a specific individual to appoint counsel with the expectation of later proceedings to hold the individual in contempt of court.

The folly of this approach is the lack of any evidence that DAC had the ability to appoint counsel and refused to do so. Further, finding an individual failed to follow a court order does nothing to rectify the attorney shortage and may result in one more attorney unable to provide indigent attorney services. The State's motion is DENIED

II. MOTION FOR COURT TO APPOINT COUNSEL OTHER THAN PUBLIC DEFENDER

The Court has the obligation to appoint counsel for indigent defendants. CrR 3.1 (b)(2)(A). Because the DAC has been unable to fulfill this obligation, the State asks the court to assume this responsibility. RCW 36.26.090, revised (1984) provides:

> For good cause shown, or in any case involving a crime of widespread notoriety, the court may, upon its own motion or upon application of either the public defender or of the indigent accused, appoint an attorney other than the public defender to represent the accused at any stage of the proceedings or on appeal: PROVIDED, That the public defender may represent an accused, not an indigent, in any case of public notoriety where the court may find that adequate retained counsel is not available. The court shall award, and the county in which the offense is alleged to have been committed shall pay, such attorney reasonable compensation and reimbursement for any expenses reasonably and necessarily incurred in the presentation of the accused's defense or appeal, in accordance with RCW 4.88.330.

By contrast, the Washington Supreme Court adopted GR 42, effective January 1, 2023. GR 42 (a) states:

> "The purpose of this rule is to safeguard the independence of public defense services from judicial influence or control. Consistent with the right to counsel as provided in article I, sections 3 and 22 of the Washington State Constitution and in Washington statutes, it is the policy of the judiciary to develop rules that further the fair and efficient administration of justice. **In promulgating this rule, the Washington Supreme Court seeks to prevent conflicts of interest that may arise if judges control the selection of public defense administrators or the attorneys who provide public defense services, the management and oversight of public defense services, and the assignment of attorneys in individual cases.**" (Emphasis added)

The State argues the court retains the ability to appoint defense counsel pursuant to RCW 36.26.090 if the public defense administrator is unable to make an appointment relying upon language in GR 42 (e)(2) which states, "if no qualified attorney on the list is available, a judicial officer shall appoint an attorney who meets the qualifications in the Supreme Court Standards for Indigent Defense." The State's reliance on this provision is misplaced. Reading the paragraph (e)(1) with paragraph (e)(2), the court's obligation to appoint counsel only arises when there is no

public defense agency or administrator available to make the appointment. Yakima County has a Department of Assigned Counsel, and its director is Mr. Paul Kelly. He is charged with making appointments for indigent defendants. Further, the administrator's inability to appoint counsel because of the lack of attorneys does not grant the court authority to select attorneys from the community. The very purpose of the Rule is to "prevent conflicts that may arise if judges control… the assignment of attorneys in individual cases." The State's request to have judges appoint counsel from the community directly violates the provisions of GR 42. Even assuming the Court has the authority, the State has not offered a single attorney they believe would meet the Standards for Indigent Defense or any evidence that Director Kelley has not reached out to those individuals. Assuming further there existed qualified attorneys in Yakima County, the attorneys would still be vetted by the Director and subject to his approval. For these reasons, the State's motion is DENIED.

III. MOTION TO CONTINUE PURSUANT TO CrR 3.3 (e)(8)

The right to a speedy trial begins on the date of arraignment. CrR3.3 (c)(1). For defendants out of custody, the arraignment must occur no "later than 14 days after that appearance which next follows the filing of the information…" CrR4.1 (a)(2). Defendant's right to trial commences on the date of arraignment and shall occur within 90 days of arraignment. CrR 3.3 (c) and 3.3 (b)(2)(i). Should the State fail to arraign the defendant in 14 days, "[a]ny delay in bringing the defendant before the court shall not affect the allowable time for arraignment, regardless of the reason for that delay." CrR 4.1 (a)(2).

The effective date of the defendant's arraignment is the date upon which the arraignment should have taken place under CrR 4.1. The effective date of arraignment is the commencement of the 90-day period within which to bring the defendant to trial. CrR 3.3 (b)(2)(i).

Certain periods in calculating the time for trial are excluded. CrR 3.3 (e) provides:

> **(e) Excluded Periods.** The following periods shall be excluded in computing the time for trial:
>
> (8) *Unavoidable or Unforeseen Circumstances.* Unavoidable or unforeseen circumstances affecting the time for trial beyond the control of the court or of the parties. This exclusion also applies to the cure period of section (g).

For reasons set forth above, the court is facing a multitude of criminal felony cases where unrepresented defendants are approaching the end of the 90-day period to bring them to trial. The delay in arraignment is not caused by the State. Rather, it is caused by a variety of factors

outside the control of the parties and court, some of which were foreseeable and others unavoidable and unforeseen. A shortage of qualified indigent defense counsel has been problematic in this county since November 2022. This resulted in a delay appointing counsel for all defendants, whether in custody or out of custody. However, arraignments occurred, and trial dates were set.

The system collapse started in March 2024 when one of DAC's full time contract attorneys announced her intent to terminate her contract and join the Yakima County Prosecutor's office. Not only did this stop monthly assignment of felony cases to her, but it also required the DAC to reassign her existing cases to the remaining DAC attorneys or contract attorneys. In essence, it added dozens of existing cases to the remaining attorneys, directly impacting defendants awaiting appointment of counsel.

Also, in late March, two felony qualified attorneys employed by DAC gave notice of their intent to leave employment in sixty days. DAC substantially reduced the appointment of counsel for these two persons, requesting they resolve the dozens of open cases each were assigned. This also had a direct impact upon the number of defense counsel available for future assignments. Unfortunately, the two attorneys leaving employment did not resolve all their existing cases. DAC was able to reappoint counsel for defendants in custody but has been unable to reappoint counsel for those out of custody, totaling 112 cases as of August 7,2024. Many are approaching the expiration of time for trial requirements of CrR 3.3.

The loss of qualified felony defense counsel suffered another blow with the loss of Mr. Christopher Swaby who took the position as the Director of the new public defender office on Clark County Washington. Mr. Swaby attempted to minimize the impact of his withdrawal by retaining some of his cases. However, this effort still reduces the number of attorneys available for assignment and it required reappointment of counsel for some in custody. His former clients out of custody still await appointment of new counsel.

The loss of four attorneys between March and June 2024 directly caused the critical shortage of attorneys for assignment to all current felony criminal defendants. The loss of these attorneys was unforeseeable, and the consequences are unavoidable. However, this is not the end of the analysis.

On May 31, 2024, the Nineth Circuit of the Court of Appeals filed its decision in *Betschart v Oregon, 103 F.4th 607 (2024),* upholding a preliminary injunction issued by the federal district court requiring the release of certain defendants held in jail awaiting appointment of counsel. The District Court injunction required release of criminal defendants held more than 7 days awaiting counsel, except "those charged with murder and aggravated murder." 103 F 4th 627,

While the public defender system in Oregon is substantially different in Oregon, the impact of the decision does apply in the State of Washington. DAC changed its appointment of counsel procedure from first-in/first-out to a system where those in custody are appointed counsel first.

If there are any remaining assignments, then it is first-in/first-out for those out of custody. The *Betschart* decision was on the courts radar, but the timing of the decision added to the DAC's inability to appoint counsel for those out of custody.

As noted above, Yakima County addressed the attorney shortage by increasing wages 15% in November of 2023 in hopes attorneys would apply for open positions. Signing bonuses of $12,000.00 were also included. The applicants did not materialize. The county has recently increase wages another 22.4% and increased the signing bonus to $15,000.00, effective July 1, 2024. The increase also includes contract attorneys. It applies to all contracts from 100% contracts to lesser percentages. Whether the increase will attract more applicants is yet to be determined. Was it foreseeable that substantial increases in earnings and signing bonuses would fail to attract qualified applicants? The court concludes it was unforeseeable.

This court also concludes that it was unforeseeable that the Washington Supreme Court has offered no guidance to address these pressing issues faced by trial courts in rural Washington counties. Further, the Supreme Court has not exercised its emergency rulemaking authority to address or modify or suspend the present court rules. This court also concludes that it was unforeseeable that the Executive and Legislative branches of Washington government have failed to adequately address these issues that arise in multiple rural Washington counties. For example, a bill submitted this last legislative session designed to attract attorneys to apply for public service employment with the promise of student loan forgiveness died in committee. Trial courts must rely upon laws, court decisions and court rules to properly administer justice. When relief is not offered through executive or legislative action and the Supreme Court fails to address these issues in its rulemaking authority, it produces problems for trial courts that are unprecedented and unavoidable.

For the above stated reasons, the court finds the time period between the effective date of arraignment and time for trial is excluded for the time for trial provisions of CrR 3.3 pursuant to subsection (e)(8). For those defendants awaiting reappointment of counsel, CrR 3.3 (e)(8) excludes from the time for trial the time period between the order of withdrawal to the time counsel is reappointed. It remains the Court's responsibility to ensure best efforts are made to appoint counsel for all defendants awaiting appointment. For this reason, the court orders a status hearing in sixty days to review the efforts made to appoint counsel for all defendants, out of custody and awaiting appointment.

IV. MOTION TO CONTINUE PURSUANT TO CrR 3.3 (f)(2)

The State moves to continue pending cases awaiting the appointment of counsel pursuant to CrR 3.3 (f)(2) which provides:

(2) *Motion by Court or a Party*. On motion of the court or a party, the court may continue the trail date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time has expired. The court must state on the record or in writing the reasons for the continuance. The bringing of such motion by or on behalf of any party waives that party's objection to the requested delay.

Although this court has determined the time between the effective date of arraignment and appointment of counsel should be excluded from the time for trial provisions in CrR 3.3, the court addresses the State's motion as an alternative basis for relief.

Trial courts are routinely asked to continue cases for a variety of reasons. The court analyses the stated need for the continuance, the length requested, if a continuance is required in the interests of justice and determines if the continuance will have a substantial impact upon the presentation of the defendant's defense.

Addressing the States motion, the first inquiry is whether this rule applies to the present scenario where a trial date has not been set. Trial dates have not been set because an arraignment has not occurred because of the inability to appoint counsel. However, the time within which to set trial continues to run from the effective date of arraignment in CrR 4.1. See analysis above. The practical effect is allowing the time for trial to expire before a trial date can be set for defendants awaiting appointment of counsel following their preliminary appearance. This court finds the lack of a present trial date should not impact the State's ability to seek continuance of the time for trial period pursuant to CrR3.3 (f)(2) The time for trial runs despite the lack of a trial date. The reasons for a continuance apply equally to the present scenario. The court finds no material difference between a request for continuance of an existing trial date from the situation when a trial date should be set. The rule should have equal application. This analysis does not apply to those defendants that await reappointment of counsel because trial dates have been set.

The court finds the reason for the continuance is required by the interests of justice. Defendants are charged with felony offenses and need appointed counsel. The State has not engaged in activities of misconduct that results in the present inability to appoint counsel. Community safety is at issue. The inability to hire, retain or contract with qualified counsel has intensified because of unavoidable and unforeseeable circumstances. See above.

The court must presume the inability to appoint defense counsel may have a prejudicial effect upon the presentation of the defendant's defense. The degree of the prejudice is not presently measurable. Does the prejudice rise to the level of substantial prejudice? This issue should be addressed by the court after counsel is appointed. Accordingly, the prejudicial effect of continuing the time for trial is reserved for future determination. At the present time. The Court GRANTS the States request for continuance of the trial date to be set beyond the appointment of

counsel and formal arraignment. A status date should be set in sixty days to review the efforts to appoint counsel.

CONCLUSION

For the reasons set forth above, the court denies the State's motion to compel the director to appoint counsel for out of custody indigent defendants. The court denies the State's motion to ignore the provisions of GR 42 and reach out to licensed attorneys in Yakima County to represent defendants charged with felony offenses and circumvent the duties of the director of the Department of Assigned Counsel. The court finds the loss of four defense counsel between March 2024 and July 1, 2024 was unforeseeable and unavoidable. Further the court finds substantial increase in wages and signing bonuses failed to attract qualified applicants for public defender position. This was unforeseeable. Lastly, the lack of any guidance from the Supreme Court or positive acts by the Executive and Legislative branches of government to address the situation in the past nineteen months was unforeseeable. Based on these conclusions, the court finds the time period between the effective date of arraignment and appointment of counsel should be excluded from the time for trial requirements of CrR 3.3. Further, the time period between the Order of Withdrawal and reappointment of counsel is excluded from the time for trial calculation. Finally, in the alternative, the Court finds a continuance is in the best interest of justice and the prejudicial effect of a continuance is reserved for future determination following appointment of counsel and upon proper notice and opportunity to be heard.

Dated this 13th day of August 2024

Richard H Bartheld

Richard H. Bartheld

Yakima County Presiding Judge