FILED August 18, 2023 05:27 PM
Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

THE PUBLIC DEFENDER OF MARION COUNTY, INC.,

Relator,

and

STATE OF OREGON,

Plaintiff-Adverse Party

v.

IZELL GUAJARDO-MCCLINTON,

Defendant.

Marion County Circuit Court
23CR16472

S070205

Original proceeding in mandamus.

BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION OF OREGON, THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER THE LAW AND THE CRIMINAL JUSTICE REFORM CLINIC AT LEWIS & CLARK LAW SCHOOL IN SUPPORT OF RELATOR THE PUBLIC DEFENDER OF MARION COUNTY, INC.

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I. INTERESTS OF AMICUS CURIAE

Amici Curiae are the American Civil Liberties Union of Oregon, (ACLU of Oregon), the American Civil Liberties Union Foundation (ACLU), Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee), and the Criminal Justice Reform Clinic at Lewis & Clark Law School (CJRC).[1]

ACLU of Oregon is a statewide non-profit and non-partisan organization with over 28,000 members. As a state affiliate of the national ACLU organization, ACLU of Oregon is dedicated to defending and advancing civil rights and civil liberties for Oregonians, including the fundamental rights protected in the Oregon Constitution and the United States Constitution. That includes defending the suite of rights in Article I, section 11, of the Oregon Constitution and the Sixth Amendment of the U.S. Constitution that ensure that the State of Oregon treats people fairly in its criminal legal system.

The ACLU is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to the principles of liberty and equality embodied in our nation's Constitution and civil rights laws. The ACLU's Criminal Law Reform Project (ACLU-CLRP) engages in litigation and advocacy throughout the country to protect the constitutional and civil rights of criminal defendants and to end excessively harsh crime policies that

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[1] *Amici* would like to thank Katie Welsh for assisting with the preparation of this brief.

result in mass incarceration and overcriminalization. In addition, ACLU-CLRP has a long, extensive history of advocating for effective representation of criminal defendants, ensuring that public defense systems effectively implement the right to counsel, and supporting those whose constitutional rights have been violated within the criminal system.

Lawyers' Committee is a national nonpartisan, nonprofit organization formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination and the resulting inequality of opportunity—work that continues to be vital today. Much of the Lawyers' Committee's work involves combatting racial inequities in the criminal justice system through litigation, public policy advocacy, and serving as amicus curiae. The Lawyers' Committee has a deep understanding of, interest in, and experience working on issues related to public defense.

The CJRC is a legal clinic dedicated to students receiving hands-on legal experience while engaging in a critical examination of and participation in important issues in Oregon's criminal justice system. Under the supervision of Lewis & Clark Law School faculty, CJRC students work on a variety of cases and issues, including representing clients that are currently or formerly incarcerated. In addition to direct client casework, CJRC also works in collaboration with attorneys and organizations in Oregon on various research reports, data driven projects, and legal briefs, all designed to understand and

improve Oregon's criminal justice system. Finally, and relevant to this case, the majority of the CJRC's students go on to become public defenders after they graduate from law school.

II. INTRODUCTION

Five months ago, on March 18, 2023, the nation commemorated the 60th anniversary of *Gideon v. Wainwright*, 372 US 335 (1963), the foundation of our modern public defender system. Gideon recognized the "noble ideal" that our nation has "fair trials before impartial tribunals in which every defendant stands equal before the law." *Id.* at 344. But that ideal "cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him." *Id.* Such a power imbalance in a system with severe consequences destroys the nobility of the freedom and fairness our Constitution seeks to establish.

Today, six decades after *Gideon*, that ideal remains unrealized. The country is experiencing a crisis where public defenders are underfunded, under resourced, and carry too many cases to effectively represent all their clients. Moreover, this national crisis disproportionately harms people of color who are overrepresented in the criminal legal system due to systemic and longstanding discrimination.

Oregon is no exception. In fact, there is growing and extensive evidence that Oregon's public defense system is failing. The State legislature and this

Court know very well that Oregon's public defender system is in crisis and has been for too long. In the last four years, the American Bar Association Standing Committee on Legal Aid and Indigent Defense and the Sixth Amendment Center published reports that expose and document the scope of this statewide crisis. And in Marion County, Relator Shannon Wilson, Executive Director of the Public Defender of Marion County, Inc. (PDMC), knows the crisis first-hand. In Marion County, PDMC's 18 public defenders are doing the work of 29 lawyers. The result is that these public defenders are failing to represent all of their individual clients consistent with constitutional standards. Public defenders are forced to choose between which clients' cases to work on and which ones to pay less attention to—an unconstitutional conflict of interest. And when public defenders represent indigenous people originally from Latin America—which is common in Marion County—the challenge to provide effective representation is even greater due to a dearth of interpreter services for these clients. There are only two interpreters in Oregon who speak the Mayan languages Mam and K'iche. Thus, Marion County is experiencing a public defender crisis that disproportionately affects people of color.

Since the Spring of 2023, Director Wilson has attempted to address this crisis by objecting to the Marion County circuit court appointing additional criminal cases to already overloaded PDMC attorneys. In this case specifically, over Director Wilson's objection, the circuit court appointed PDMC to

represent Izell Guajardo-McClinton. Director Wilson presented ample and compelling evidence to the circuit court that PDMC attorneys are carrying workloads that far exceed their capacities, resulting in the attorneys' inability to effectively represent their clients. Director Wilson presented further evidence that this crisis crosses county lines and harms public defenders and their clients across the State. The circuit court's persistent appointment of criminal cases to PDMC attorneys, over objection—including in this case—has exacerbated the county-wide crisis.

Through this case, the Court has an opportunity to ease the immediate and dire crisis that public defenders and their clients across Oregon are currently facing. This Court's earlier order did not resolve the case, as the circuit court did not follow this Court's order. Now, Director Wilson is once again before this Court and a comprehensive remedy is needed to ensure adequate relief and resolution of the issues raised here.

Amici now urge the Court to rule in Director Wilson's favor. And *Amici* urge the Court to be specific and directive in its order. In addition to granting Director Wilson's requested relief, the Court should (1) hold that it is unethical and unconstitutional for a public defender's workload to exceed the maximum caseloads established in the American Bar Association Standing Committee on

Legal Aid's 2022 "Oregon Project" report[2]; (2) fashion an order that permits PDMC attorneys and all public defenders across Oregon to decline new appointments and withdraw from existing appointments upon a showing that their workload is excessive; (3) require that the accused people in those declined cases be timely provided with alternative effective assistance of counsel; and (4) if timely effective assistance of counsel is not available, require that those cases be dismissed. If the Court provides this relief, Oregon will move towards fulfilling the Constitutional mandate that all people facing criminal charges, regardless of their financial status, be represented ethically by effective and zealous counsel.

III. ARGUMENT

A. The Public Defense Crisis in Oregon Has Resulted in Defendants Going Unrepresented and Public Defenders Carrying More Cases Than They Can Competently Handle

1. The Crisis is Statewide

Oregon's public defender system is in dire need of long-term *and* immediate attention. Twenty years ago, the crisis was evident to this Court. *See State ex rel. Metro. Pub. Def. Servs., Inc. v. Courtney*, 335 Or 236, 242, 64 P3d 1138, 1141 (2003) (observing that the judiciary had reduced the indigent defense budget so deeply that the judiciary would be unable to appoint or

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[2] Caseloads that do not exceed those maximums may also be unethical and unconstitutional, depending on a public defender's total workload—including but not limited to management responsibilities and other non-case tasks.

compensate indigent defense counsel in trial-level cases). Today, the Court continues to deal with the same emergency. In *Jackson v. Franke*, 369 Or 422, 507 P3d 222 (2022), for example, the Court denied summary judgment on an ineffective assistance of counsel claim. Justice Garrett, who did not think the trial court erred in its grant of summary judgment, wrote and acknowledged the ongoing crisis: "Our state's crisis in funding indigent criminal defense is now well documented. Oregon is said to be 1,296 public defenders short of what it needs to adequately vindicate the constitutional right to counsel." *Id.* at 369 Or at 459 n1 (J. Garrett, dissenting) (citing with approval the American Bar Association Standing Committee on Legal Aid and Indigent Defense Oregon Project analysis).

Federal courts in Oregon are also aware of the public defender crisis. Two days ago, in *Betschart et al. v. Garrett et al.*, 3:23-cv-01097, United States District Court Judge McShane granted a temporary restraining order to a class of unrepresented in custody defendants requiring their release after 10 days if competent counsel is unavailable. See generally *id.*, Opinion and Order, dkt # 25 (August 17, 2023). McShane observed from the bench that Oregon's high volume of languishing cases without counsel was "an embarrassment" and that, compared with other states, "Oregon is an outlier here … Literally, we have

suspended the Constitution when it comes to this group [of unrepresented indigent people facing criminal charges]."[3]

The State legislature has also recognized the enduring emergency, finding two months ago that "[t]he current unrepresented defendant crisis represents a threat to the constitutional rights of Oregonians and must be resolved." Senate Bill 337, Section 103(2) (July 12, 2023) (SB 337). Notwithstanding its recognition of the public defender emergency, SB 337 does not provide immediate solutions to the crisis. Senate Bill 337 provides significant funding for public defense services and takes steps to restructure the delivery of public defense services, but funding increases were granted for two years starting in July 2023, with no guarantee of renewal and the restructuring does not *start* until January 1, 2025. *Id*. at Sections 92, 116-121. The only urgent solution that SB 337 contemplates is related to people who have not been appointed counsel, requiring Oregon courts to "immediately develop and implement a coordinated public safety unrepresented defendant crisis plan." *Id.* at Section 104. These crisis plans must prioritize first the resolution of cases where the defendant is in custody without representation, but SB 337 does not specify what those plans should contain and therefore how those cases are to be

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[3] Noelle Crombie, "National 'embarrassment': Oregon judge sets 10-day deadline to release people held in jail without lawyer," The Chronicle (August 16, 2023), https://www.chronline.com/stories/national-embarrassment-oregon-judge-sets-10-day-deadline-to-release-people-held-in-jail,323809

resolved. *Id.* Moreover, SB 337 does not contemplate any plan on how to handle the immediate crisis that Director Wilson is faced with and that this Court is addressing in this case.

After Governor Kotek signed SB 337 on July 13, 2023, it became clear that all three branches of Oregon's government know the system is in crisis. And the problem of unrepresented defendants—let alone under resourced public defenders—is worsening with time. The Oregon Judicial Department (OJD) dashboard of data shows that the number of unrepresented individuals in the State is increasing.[4] As of August 18, 2023, there were 2,358 pretrial unrepresented individuals in the State, 133 of whom were in custody.[5] One year ago, there were 700 pre-trial unrepresented individuals in the State, 56 of whom were in custody.[6] So today, there are 3.4 times more unrepresented people pre-trial in Oregon than there were one year ago, and almost 7% of them are incarcerated waiting for a lawyer to be appointed to represent them.

In addition to accused people going unrepresented, there is substantial evidence that the people who do have counsel are being represented by public

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[4] Oregon Judicial Department's (OJD's) Unrepresented Individuals Data Dashboard, *available at* https://app.powerbigov.us/view?r=eyJrIjoiNDQ2NmMwYWMtNzhiZi00MWJhLWE3MjgtMjg2ZTRhNmNmMjdmIiwidCI6IjYxMzNlYzg5LWU1MWItNGExYy04YjY4LTE1ZTg2ZGU3MWY4ZiJ9.

[5] *Id. Amici* note that these numbers are only of pre-trial defendants and do not include all unrepresented individuals.

[6] *Id*.

defenders who have more cases than any lawyer can reasonably handle. In January 2022, the American Bar Association Standing Committee on Legal Aid and Indigent Defense (ABA SCLAID) and Moss Adams LLP published its "Oregon Project" report on attorney workloads in the Oregon public defense system. The conclusion of the report is clear and dire: the State's public defense system is simply unable to adequately represent all individuals in adult criminal and juvenile cases given current caseloads. To provide effective assistance of counsel, all 592 full- and part-time contract public defense attorneys in Oregon would need to spend an average of 6,632 hours per year working on case specific public defense work, amounting to an impossible 26.6 hours per working day for each attorney during the entire year.[7] Furthermore, all 592 contract public defense attorneys in Oregon would need to handle 156 cases per year, regardless of whether those cases are low-level misdemeanor cases or serious felony cases, equating to only 13 hours per case, be that case dependency, burglary, or homicide.[8] Put differently, the public defender system has only 31% of the full-time attorneys that it needs to provide its adult and juvenile clients effective assistance of counsel.[9] According to this study,

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[7] ABA Standing Committee on Legal Aid and Indigent Defense & Moss Adams LLP, *The Oregon Project: An Analysis of the Oregon Public Defense System and Attorney Workload Standards* 5 (January 2022), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls-sclaid-or-proj-rept.pdf
[8] *Id*.
[9] *Id*. at 26.

Oregon needs an additional 1,296 full-time public defenders to meet the standard of reasonably effective assistance of counsel guaranteed by the Sixth Amendment.[10]

The 2022 Oregon Project report followed on the heels of the 2019 Sixth Amendment Center study, [11] and both show that the State's public defense crisis is severe. The Sixth Amendment Center highlighted an especially extreme example: one public defender at the Metropolitan Public Defender Services—the largest public defense provider in Oregon, covering Multnomah and Washington Counties—handled 1,265 misdemeanors in 2017.[12] The same lawyer also handled 111 dependencies, 166 probation violations, 110 specialty court proceedings, and two terminations of parental rights cases.[13]

With a growing number of accused people awaiting legal representation and public defenders who are already overburdened, the constitutional right to counsel in Oregon is collapsing.

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[10] *Id*. at 35.

[11] Sixth Amendment Center, *The Right to Counsel in Oregon: Evaluation of Trial Level Public Defense Representation Provided Through the Office of Public Defense Services* 4 (January 2019), https://sixthamendment.org/6AC/6AC_Oregon_report_2019.pdf

[12] *Id.* at IV.

[13] *Id.* at IV.

2. Marion County Exemplifies the Statewide Crisis

In Marion County, the public defense crisis is severe. As of August 18, 2023, there were 140 unrepresented people pre-trial in Marion County.[14] A year prior there were 33 unrepresented people in Marion pre-trial, meaning that there are 4.2 times as many unrepresented people in Marion County today than there were one year ago.[15] Experts in this case concluded that PDMC has a 37% deficiency in full-time attorney staff. Hanlon Decl. para 99 (ER-102).

B. Oregon's Public Defense Crisis Disproportionately Harms People of Color

The failing public defense system in Oregon has an especially acute effect on people of color who are disproportionately represented in the criminal legal system and experience disproportionate rates of poverty.

Racial disparities are pervasive in Oregon's criminal legal system. Black people are 3.7 times more likely to be imprisoned than white people.[16] Moreover, "Latino Oregonians are nearly twice as likely as white residents to be charged with minor cocaine-related offenses, 2.6 times as likely as whites to

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[14] Oregon Judicial Department's (OJD's) Unrepresented Individuals Data Dashboard, *available at* https://app.powerbigov.us/view?r=eyJrIjoiNDQ2NmMwYWMtNzhiZi00MWJhLWE3MjgtMjg2ZTRhNmNmMjdmIiwidCI6IjYxMzNlYzg5LWU1MWItNGExYy04YjY4LTE1ZTg2ZGU3MWY4ZiJ9.

[15] *Id*.

[16] Latisha Jensen, "Black Oregonians Are Imprisoned at a Rate Almost Four Times That of White People," Willamette Week (May 5, 2021), https://www.wweek.com/news/2021/05/05/black-oregonians-are-imprisoned-at-a-rate-almost-four-times-that-of-white-people/.

be charged with prostitution-related offenses, and 6.5 times as likely to be charged with offenses involving a driver's license."[17] In Multnomah County, Black people "are about four times as likely as white residents to be charged with prostitution-related offenses, nearly six times as likely as whites to be ticketed for offenses involving police and eight times as likely to be charged with robbery."[18] Finally, "Latino and [B]lack Oregonians pay higher median fines than whites. In Multnomah County alone, the gap between the fines for African-Americans and whites comes to as much as $2 million a year."[19] This disproportionate representation is apparent at all levels of the criminal justice process throughout the country. Racial disparities begin with arrest rates, as Black people across the country are arrested at a rate 2.8 times higher than white people.[20] From there, people of color in the United States, particularly Black and Latino people, are more likely to be detained pretrial compared to white people.[21] This trend continues in incarceration rates, with Black men

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[17] John Schrag, *Justice Disparate By Race In Oregon*, InvestigateWest (February 2, 2017), https://www.invw.org/2017/02/02/justice-disparate-by-race-in-oregon/.

[18] *Id*.

[19] *Id*.

[20] Bechtold, J., Monahan, K., Wakefield, S., & Cauffman, E. (2015). The role of race in probation monitoring and responses to probation violations among juvenile offenders in two jurisdictions. *Psychology, Public Policy, and Law,21*, 323–33

[21]Prison Policy Initiative, *How Race Impacts Who Is Detained Pretrial* https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/#:~:text=Overall%2C%20the%20available%20research%20suggests,have%20to%20pay%20money%20bail. (October 9, 2019)

comprising 13% of the national male population, but about 35% of those incarcerated nationally.[22] This is paralleled in Latino populations across the country, where one in six Latino men can expect to be incarcerated in their lifetime in comparison to one in seventeen white men.[23] National racial and ethnic incarceration disparities are also significant among women of color.[24]

Coupled with disproportionate representation in the criminal legal system, people of color in Oregon experience poverty at higher rates than white Oregonians. *See, e.g.,* Task Force on Homelessness and Racial Disparities in Oregon, Report to the Oregon State Legislature, pp. 15-16. (January 2022), *available at https://www.oregon.gov/ohcs/get-involved/Documents/01-21-2022-Findings-and-Recommendation.pdf.* The task force found that in addition to racial disparities for American Indian/Alaska Native and Hispanic/Latino Oregonians, Black or African American Oregonians made up 4% of people in

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[22] Elizabeth Hinton, LeShae Henderson & Cindy Reed, AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM VERA.ORG (2018), https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf; *see also* Ashley Nellis, "The Color of Justice: Racial and Ethnic Disparity in State Prisons," The Sentencing Project, December 16, 2022, https://www.sentencingproject.org/reports/the-color-of-justice-racial-and-ethnic-disparity-in-state-prisons-the-sentencing-project/.

[23] The Sentencing Project, *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System – The Sentencing Project* (2018)

[24] Elizabeth Hinton, LeShae Henderson & Cindy Reed, AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM VERA.ORG (2018), https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf

poverty and 6% of those experiencing homelessness despite being on 2% of the total population. This combination of disparities—in the criminal legal system and in poverty—means that the public defense crisis in Oregon is imposing disproportionate harm on the State's communities of color.[25] For example, in May 2022, 23% of people in Oregon who were waiting for an attorney were Black, despite the fact that Black people only make up 3% of Oregon's population.[26] In addition, there are not enough Mayan language interpreters. In recent years, requests for indigenous languages have increased by 42% in Oregon; languages like Mam and K'iche now receive hundreds of requests annually, but only one interpreter for each respective language lives within the

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[25] *See e.g.,* Erika Bolstad, "Public Defenders Were Scarce before COVID. It's Much Worse Now.," (reporting that Black defendants rely on court-appointed attorneys at a higher rate than their white counterparts) Stateline, June 6, 2023, https://stateline.org/2022/06/21/public-defenders-were-scarce-before-covid-its-much-worse-now/; *see also* Matt Keyser, *In America's Courtrooms, the Need for High-Quality Public Defense is Vital*, (reporting that Black people in the United States are 4.7 times more likely than white people to have a public defender and Latino people are 2.1 times more likely to have a public defender than white people.) Arnold Ventures (Sept. 29, 2021), https://www.arnoldventures.org/stories/in-americas-courtrooms-the-need-for-high-quality-public-defense-is-vital#:~:text=The%20study%2C%20Created%20Equal%3A%20Racial,rely%20on%20a%20public%20defender

[26] Gillian Flaccus, "Oregon Sued over Failure to Provide Public Defenders," Spokesman.com, May 17, 2022, https://www.spokesman.com/stories/2022/may/16/oregon-sued-over-failure-to-provide-public-defende/.

State.[27] This makes it even more difficult for overloaded public defenders to provide adequate representation to their indigenous Latin American clients.

Marion County mirrors these trends. Within the county, people of color are simultaneously overrepresented in the criminal justice system and require the services of public defenders at a higher rate when compared to white people.[28] The disparities are characterized by higher arrest and conviction rates for Black and Latino people, at both the juvenile and adult levels.[29] In addition, more than 25% of the Marion County population speaks a language other than English in the home.[30] The public defender crisis already hampers access to quality legal representation: when coupled with a lack of interpreters for indigenous languages, services for people who speak these languages inevitably suffer even greater disadvantages in our adversarial system.

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[27] The Associated Press, "In Oregon, Requests for Indigenous Language Translators Up," oregonlive, September 28, 2018, https://www.oregonlive.com/politics/2018/09/in_oregon_requests_for_indigen.html.

[28] Noelle Crombie - The Oregonian/OregonLive, "Marion County DA Drops Reckless-Driving Case after a Prosecutor Calls Defendant 'Drunk Hispanic Guy,'" Salem Reporter, May 25, 2023, https://www.salemreporter.com/2023/05/24/marion-county-da-drops-reckless-driving-case-after-a-prosecutor-calls-defendant-drunk-hispanic-guy/.

[29] JJIS Steering Committee, "Racial and Ethnic Disparities Data & Evaluation Report 2018 Marion County," Juvenile Justice Information System, 2018, Juvenile Justice Information System; CampaignZero, "Nationwide Police Scorecard: Marion, OR," Nationwide Police Scorecard, 2023, https://policescorecard.org/or/sheriff/marion-county.

[30] U.S. Census Bureau, "U.S. Census Bureau Quickfacts Sheet: Marion County, Oregon," (2017-2020) https://www.census.gov/quickfacts/marioncountyoregon.

C. The Basic Foundation of Our Justice System is Undermined When Public Defenders Have Too Many Cases

The harm that occurs when an accused person goes unrepresented requires little explanation. Significant harm—to clients and to the system at large—also occurs when people are represented by public defenders who have excessive workloads. The adversarial nature of the American criminal legal system is its most fundamental feature, envisioned by the framers as the way to achieve just outcomes. *Herring v. New York*, 422 US 853, 862 (1975) ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."); *see also Gideon v. Wainwright,* 372 US 335, 343-44 (1963) ("in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."). The system gives enormous power to prosecutors, which requires resourced defense lawyers on the other side to provide a counterweight and ensure that the proceedings are not one-sided. A "severe imbalance in the adversary process" would turn courts into "breeding grounds for unreliable judgments." *Hurrell-Harring v. State,* 15 NY3d 8, 27 (2010). *See also U.S. v. Nixon,* 418 US 683, 709 (1974) (explaining that "[t]he ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts.").

The role of the criminal defense lawyer—guaranteed for all by the Sixth and Fourteenth Amendments—is to ensure that this adversarial system works as intended. *U.S. v. Cronic*, 466 US 648, 656–57 (1984) ("the adversarial process protected by the Sixth Amendment requires that the accused have counsel acting in the role of an advocate…. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.") (internal quotations and citations omitted). Indeed, criminal defense lawyers are essential guardians of every other right that the Constitution provides to people accused of crimes. Without a meaningful right to counsel, every other constitutional right is jeopardized at best, and more likely lost entirely. The rights an accused person stands to lose without meaningful representation include the Fourth Amendment right against unreasonable searches and seizures; the Eighth Amendment rights against excessive bail and cruel and unusual punishment; the Sixth Amendment rights to confront one's accusers, to a speedy and public trial, to an impartial jury; the due process rights to have prosecutors disclose exculpatory evidence before trial and prove allegations beyond a reasonable doubt; and the First Amendment right not to be criminalized for pure speech.

If criminal defense lawyers have too many cases for too many clients, they will inevitably "fail[] to subject the prosecution's case to meaningful adversarial testing," thereby failing to protect their clients' rights. *Wilbur v. City*

of Mount Vernon, 989 F Supp 2d 1122, 1131 (WD Wash 2013); *see also Stano v. Dugger*, 921 F2d 1125, 1170-71 (11th Cir 1991) (The absence of meaningful representation "undermines not only the defendant's individual rights, but also the accuracy of the truth-seeking process and thus the integrity of the criminal justice system itself."). For this reason, American Bar Association's (ABA) Model Rules of Professional Conduct recognize that the workload of all lawyers—whether handling civil or criminal cases—"must be controlled so that each matter can be handled competently."[31] The ABA also instructs in its Ten Principles of a Public Defense Delivery System, that in a properly functioning public defense system "Defense counsel's workload is controlled to permit the rendering of quality representation."[32] In its Eight Guidelines of Public Defense Workloads, the ABA further explains that "if workloads are excessive, neither

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[31] American Bar Association, *Model Rules of Professional Conduct, Rule 1.3 Diligence, Comment 2.* Available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_3_diligence/comment_on_rule_1_3/; *see also* Oregon State Bar, *Report of the Task Force on Standards of Representation in Criminal and Juvenile Delinquency Cases* (April 25, 2014) ("In abiding by the Oregon Rules of Professional Conduct, a lawyer should ensure that each client receives competent, conflict-free representation in which the lawyer keeps the client informed about the representation and promptly responds to reasonable requests for information.") available at https://www.osbar.org/surveys_research/performancestandard/index.html

[32] ABA, Ten Principles of Public Defense Delivery System, Principle 5, available at https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf

competent nor quality representation is possible."[33] Compliance with these standards, the Supreme Court has explained, is a crucial measure of whether representation is constitutionally adequate. *Strickland v. Washington*, 466 US 668, 688-689 (1984) (the "Sixth Amendment … relies [ ] on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions.").

Despite these clear standards, public defense systems often fail to control their attorneys' workloads, resulting in high caseloads that stand in the way of "the kind of individualized client representation that every indigent criminal defendant deserves and on which our adversarial system of criminal justice depends." *Wilbur,* 989 F Supp 2d at 1128. In Oregon, to adequately represent all of their clients, public defenders need time to communicate with each client, provide support services, obtain and review discovery, conduct an independent investigation, interview potential witnesses, consult with experts, conduct legal research, engage in motions practice, negotiate with the prosecutor, prepare for

[33] ABA, Eight Guidelines of Public Defense Workloads, Guideline 1 Comment, available at https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_eight_guidelines_of_public_defense.pdf

court appearances, attend court appearances, advocate for mitigation at sentencing, and engage in post-judgment advocacy.[34]

Without enough time, lawyers must make impermissible choices about which clients to give adequate representation to and which clients to shortchange. Excessive cases "make it highly unlikely that any lawyer, no matter how competent, would be able to provide effective assistance;" when this happens, "the appointment of counsel may be little more than a sham." *Wilbur,* 989 F Supp 2d at 1131; see also *In re Edward S*., 173 Cal App 4th 387, 414 (Cal Ap 2009) ("[A] conflict of interest is inevitably created when [a lawyer's excessive workload forces the lawyer] to choose between the rights of the various [clients] he or she is defending."); *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*, 561 So 2d 1130, 1135 (Fla 1990) (a conflict of interest is inevitably created when a public defender's excessive workload compels the lawyer to choose between the rights of various clients).

Thus, an overloaded public defense system jeopardizes the rights of every client and undermines the system for all. "The very integrity of our system—its fairness, its accuracy as a truth-seeking process, and thus its ability

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[34] The Oregon Report, ABA, p. 21 available at https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls-sclaid-or-proj-rept.pdf

to accord justice—depends upon effective assistance of counsel." *Stano*, 921 F2d at 1170-71. And this integrity is more than a lofty or theoretical goal, it is a tool for achieving public safety: indeed numerous studies have shown that perceived unfairness in the criminal legal system can actually *increase* crime. *See e.g.,* Donald Braman, *Punishment and Accountability: Understanding and Reforming Criminal Sanctions in America*, 53 UCLA L REV 1143, 1165 (2006) (explaining that "prominent legal theorists" and "a broad array of recent empirical studies" support the notion that "[w]hen citizens perceive the state to be furthering injustice . . . they are less likely to obey the law, assist law enforcement, or enforce the law themselves"); Janice Nadler, *Flouting the Law*, 83 TEX L REV 1399, 1399 (2005) (reviewing the literature and reporting new experimental evidence that "the perceived legitimacy of one law or legal outcome can influence one's willingness to comply with unrelated laws").''

D. This Court Has the Authority to Abate Oregon's Public Defense Crisis and Strengthen the Constitutional Right to Counsel

In this case, Director Wilson has presented the Court with the precise remedy that it should adopt to address the public defender crisis in Marion County. The Court should require the circuit court to permit Director Wilson's withdrawal from Izell Guarjardo-McClinton's case. In fact, the circuit court should have heeded Director Wilson's objection to appointment in the first instance. Furthermore, because Director Wilson has presented compelling evidence that Izell Guajardo-McClinton cannot receive effective assistance of

counsel from another source, this Court should require the circuit court to dismiss the case if it cannot timely appoint effective counsel.

The Court should provide a remedy in this case that can vindicate the right to counsel for all indigent defendants in Marion County and for all indigent defendants in Oregon—and vindicate the ethical obligations of Director Wilson, their assistant public defenders, and all public defenders in Oregon. The Oregon Supreme Court has broad inherent authority to prescribe processes to manage court resources in a way that ensures uniformity from circuit to circuit. See *Couey*, 357 Or 460 (2015); accord *State v. McCarthy*, 305 Or App 658, 64 (2020)("[I]t is well-established that the Chief Justice has wide-ranging administrative authority over Oregon courts."); *Smith v. Washington County*, 180 Or App 505, 521 rev den 334 Or 491 (2002) (concluding that "administrative authority and supervision" as used in ORS 1.002 are "broad in their scope"). The Court's power to offer these remedies is bolstered by its inherent authority to consider issues of public interest. *Couey v. Atkins*, 357 Or 460, 515-16 (2015) (en banc). *Amici* agree with the federal district court in Oregon:

> "Generally, public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution." *Id*. at 996 (quoting *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005)). And while the release of certain pretrial defendants into the community may cause some concern about community safety, that theoretical fear does not mean that we should suspend the Constitution as our response. The public's interest in the rule of law and the protection of our fundamental rights is at the heart of our democracy.

Betschart et al. v. Garrett, 3:23-cv-01097, Opinion and Order at p. 13. Thus, the Court can and should fashion a broadly applicable remedy here to avoid an enormous wave of duplicative litigation and to ensure a consistent statewide approach to a statewide problem. It has all the litigants it needs before it.

The Court can broadly permit public defenders with excessive workloads to decline new cases and withdraw from existing cases, and require courts to dismiss charges if adequate alternative counsel cannot be timely provided. Declination, withdrawal and dismissal are tools that ensure the criminal legal system is not distorted by extreme imbalances. The Legislature agrees. See e.g., ORS 135.755 (permitting the court to dismiss a charge on its own motion and in furtherance of justice); see also ORS 9.380 (providing generally that in "any action or proceeding" the attorney client relationship may be terminated upon application of the attorney and "for good and sufficient cause"). Civil rights and community-based organizations, like *amici*, agree. See also, *Hannah et al. v. Oregon et al*, Case No. 22CV36357 (Mult Co 10/21/2022) (filed by attorneys at the Oregon Justice Resource Center and NYU's Center on Race, Inequality, and the Law and advocating for dismissal of cases for which an attorney cannot be timely provided). Court appointed lawyers like Director Wilson agree. *See also* PDSC and OPDS, "Unrepresented Crisis Plan Guidance," p. 6 (July 14, 2023) (naming dismissal among a list of "best practices for courts"), available at https://www.oregon.gov/opds/SiteAssets/Lists/General%20Accordions/AllItem

s/Plan%20Guidance%207.14.2023.pdf. However, as is evident by this case, not all judges and prosecutors recognize declination, withdrawal, and dismissal as legitimate ways to address public defenders' excessive workloads, let alone ethically and constitutionally-mandated ones.

Senate Bill 377 does not affect the Court's authority to provide a broad remedy in this case and it does not obviate the need for such a remedy. The fact that the legislature has taken some action that may mitigate the unrepresented defendant crisis and address excessive public defender workloads at some point in the future does not lessen this Court's authority to provide relief upholding the constitutional right to counsel now. Legislative processes cannot limit the Court's inherent authority and do not do so here. Neither the strictures of the mandamus process, nor the silence of SB 337 crisis plan provisions limit the Court's ability to fashion a remedy here. Indeed, SB 337 is entirely silent on public defender declination of and withdrawal from cases, as well as silent on trial courts' dismissals of cases. The Court therefore retains its "plenary" authority to direct circuit courts in any criminal case to permit declination, withdrawal, and dismissal to protect defendants' constitutional rights and public defenders' related ethical obligations.

"Judicial power" as contemplated in Article VII of the Oregon Supreme Court is "[not] an empty vessel to be filled as it pleases the legislature." *Couey v. Atkins*, 357 Or 460, 515-16 (2015) (en banc). In *Couey*, the Court relied on

principles of separation of powers to conclude that the legislature can only act insofar as it does not invade the judicial function. *Id.* at 520-21. That is, it cannot grant the judiciary more authority or take away any inherent authority. See *id.* (citing *In Re Ballot Title*, 247 Or 488 (1967)). And while the *Couey* court did not define the bounds of the judicial function entirely, it did recognize "centuries of historical practice and the sound prudential exercise of judicial power, at least as to public action cases or cases involving matters of public interest." 357 Or at 521. Regardless of legislative action, this Court retains its own authority to make judicial determinations that uphold the Constitution. Thus, the passage of SB 377 does not affect this Court's authority to issue broad relief in this case. In fact, SB 377 makes the issuance of such broad relief needed even more.

Among other things, SB 337 mandates that the presiding judge of each judicial district develop a crisis management plan to address the urgent need for relief for accused people who are currently unrepresented. Section 104(1)(a). The plan "must first prioritize the resolution of the cases of unrepresented defendants who are in custody." Section 104(1)(b). The legislature did not specifically provide that dismissal—where adequate counsel cannot be timely assigned—is a proper tool that should be utilized in these crisis management plans. *Amici* urge this Court to provide that relief in this case and make clear to presiding judges that dismissal can indeed be a proper – and constitutionally

mandated – form of relief in crisis management plans. Related, *Amici* urge that plans must avoid appointments that force public defense attorneys to carry excessive caseloads.

IV. CONCLUSION

The Constitution should not be controversial or aspirational. *Amici* urge the Court to make real the right to counsel in Oregon by providing clear remedies to people charged with crimes and the public servants who represent them.

For the reasons stated above, *Amici* request that this Court:

1) Order the Marion County circuit court to grant Relator Director Shannon Wilson's request to withdraw;
2) Order the Marion County circuit court to dismiss the charges against Izell Guajardo-McClinton if adequate counsel cannot be timely appointed;
3) Hold that it is unethical and unconstitutional for a public defender's workload to exceed the maximum caseloads established in the American Bar Association Standing Committee on Legal Aid's 2022 "Oregon Project" report[35];
4) Fashion an order:

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[35] Caseloads that do not exceed those maximums may also be unethical and unconstitutional, depending on a public defender's total workload—including but not limited to management responsibilities and other non-case tasks.

a. Permitting PDMC attorneys and all public defenders across Oregon to decline new appointments and withdraw from existing appointments upon a showing that their workload is excessive;

b. Requiring that in declined and withdrawn cases, accused people be timely provided with alternative effective assistance of counsel; and

c. If timely effective assistance of counsel is not available, requiring that those cases be dismissed.

DATED this 18th day of August, 2023.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the word-count limitation in ORAP 5.05(1)(b)(ii)(B) because the word count on this brief (as described in ORAP 5.05(1)(d)(i)) is 6,307 words.

I certify that the size of the type in this brief is not smaller than fourteen points for both the text of the brief and footnotes, as required under ORAP 5.05(3)(b)(ii).

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on August 18, 2023, I directed the original **BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION OF OREGON, THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER THE LAW AND THE CRIMINAL JUSTICE REFORM CLINIC AT LEWIS & CLARK LAW SCHOOL IN SUPPORT OF RELATOR THE PUBLIC DEFENDER OF MARION COUNTY, INC.** to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon all parties to this action using the court's electronic filing system.

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