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CHARLES ROSS
COUNTY AUDITOR

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
COMMISSIONERS; 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)

APPLICATION FOR WRIT OF HABEAS CORPUS
PURSUANT TO RCW 7.36/COMPLAINT PURSUANT
TO RCW 7.24 - 1

AMERICAN CIVIL LIBERTIES UNION OF
WASHINGTON FOUNDATION
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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).

- 1 1.9 Release is an appropriate remedy to end this unlawful restraint. *Id.*
- 2 1.10 The Yakima County Superior Court has acknowledged that *Betschart* applies to the
- 3 issues presented in this petition. *See Exhibit A* at 6.
- 4 1.11 Article I, section 22 and Criminal Rule 3.1 are more protective than the Sixth
- 5 Amendment as they relate to appointment of counsel. *State v. Fitzsimmons*, 94
- 6 Wash.2d 858, 620 P.2d 999 (1980).
- 7
- 8 1.12 Charging an individual and incarcerating them but not appointing counsel violates
- 9 article I, section 22 and article I, section 3 of the Washington Constitution, and
- 10 Criminal Rule 3.1 and constitutes unlawful restraint.
- 11 1.13 We petition this Court to declare this restraint unlawful and deliver Plaintiffs from
- 12 this unlawful restraint.
- 13

14 **B. People Held on Conditions of Release Without Counsel**

- 15 1.14 People charged with crimes who are not in jail wait months for an attorney to be
- 16 assigned to their case with no indication of when an attorney might be assigned.
- 17 1.15 Others who have an attorney withdraw from their case wait months for a new
- 18 attorney to be assigned.
- 19 1.16 Charging an individual and imposing conditions of release but not appointing
- 20 counsel violates article I, section 22 and article I, section 3 of the Washington
- 21 Constitution, and Criminal Rule 3.1 and constitutes unlawful restraint.
- 22
- 23 1.17 We petition this Court to declare this restraint unlawful and deliver Plaintiffs from
- 24 this unlawful restraint.

25 **C. Speedy Trial**

1 1.18 Because counsel is not appointed, many people are reaching and passing their
2 speedy trial deadline, violating the speedy trial rules enshrined in Criminal Rule
3 3.3.

4 1.19 Failure to appoint counsel is not a valid reason to extend the allowable period for
5 trial under Criminal Rule 3.3. Cases continued for this reason were continued in
6 violation of that rule.

7 1.20 Extending speedy trial based on an incorrect application of Criminal Rule 3.3 and
8 continued prosecution of cases that should have been dismissed pursuant to
9 Criminal Rule 3.3 is an unlawful restraint.

10 1.21 Yakima County Superior Court extended the allowable time for trial without notice,
11 an attorney, or an opportunity to be heard for those affected by its order in violation
12 of article 1, section 3 of the Washington Constitution. Because this order was issued
13 without due process, it is invalid and continued prosecution of these cases is an
14 unlawful restraint on Plaintiffs.

15 1.22 We petition this Court to declare these restraints unlawful and deliver Plaintiffs
16 from these unlawful restraints.

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19 **II. NATURE OF ACTION**

20 2.1 Plaintiffs seek a declaration pursuant to the Uniform Declaratory Judgment Act
21 (UDJA)—RCW 7.24 et seq.—that Plaintiffs are unlawfully restrained by
22 Defendants.

23 2.2 Plaintiffs seek a writ of habeas corpus pursuant to RCW 7.36 and for an order
24 delivering them from the unlawful restraints imposed by the Defendants pursuant
25

1 to RCW 7.36.010.

2 **III. JURISDICTION AND VENUE**

3 3.1 This action arises from the Defendants' failure to appoint counsel for existing
4 criminal prosecutions and the resulting continued unlawful restraint of Plaintiffs.

5 3.2 This Court has personal jurisdiction over all parties. RCW 36.01.050.

6 3.3 This Court has jurisdiction to hear the UDJA claims pursuant to RCW 7.24.010.

7 3.4 This Court has jurisdiction to hear statutory writs of habeas corpus pursuant to
8 RCW 7.36.040.

9 3.5 Kittitas County is the proper venue for this action pursuant to RCW 36.01.050 and
10 *Filing Venues for Actions by or Against Counties*. Washington Courts, *Filing*
11 *Venues for Actions by or Against Counties* (2016),
12 https://www.courts.wa.gov/court_dir/?fa=court_dir.filingvenue.

13 **IV. PARTIES**

14 4.1 Plaintiffs are a class of individuals charged with crimes in Yakima County Superior
15 Court who have not had attorneys appointed to their cases.

16 4.2 Class Representatives:

17 4.2.1 **Omar Al-Tharwa** has been in custody since September 3, 2024, without
18 an attorney. He is charged with non-violent property crimes. His
19 arraignment was scheduled for September 17, 2024. He appeared in court
20 but was not provided an attorney. The Court informed him that there were
21 no attorneys available and that the Court hoped he would get an attorney on
22 October 1, 2024. His arraignment was continued to October 16, 2024. He
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1 was not given an opportunity to argue for a reduction in bail and was not
2 asked whether he objected to the continuance. He will spend nearly six
3 weeks in custody before being arraigned or having a chance to argue bail.

4
5 4.2.2 **Orlando Cisneros** has been in custody since September 4, 2024, without
6 an attorney. His arraignment was scheduled for September 19, 2024. He
7 appeared in court but was not provided an attorney. The Court informed him
8 that there were no attorneys available and that the Court hoped he would
9 get an attorney on October 1, 2024. His arraignment was continued to
10 October 17, 2024. He was not given an opportunity to argue for a reduction
11 in bail and was not asked whether he objected to the continuance. He will
12 spend nearly six weeks in custody before being arraigned or having a chance
13 to argue bail.

14
15 4.2.3 **Victor Cuevas** is out of custody. He is charged with taking a motor vehicle
16 without permission in the second degree in Yakima County Superior Court.
17 His case was continued from March 15, 2024 to June 26, 2024 for an
18 attorney status hearing. His attorney withdrew on June 18, 2024. Assuming,
19 without conceding, that the withdrawal of his attorney constitutes a
20 “disqualification” under Criminal Rule 3.3(c)(2)(vii), his speedy trial
21 commencement would have been June 18, 2024, and his allowable time for
22 trial expired September 16, 2024. He has not had an attorney during that
23 time. Judge Bartheld filed an order in his case extending the allowable time
24 for trial. He has appeared once a month since June for attorney status
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1 hearings. His next attorney status hearing is October 17, 2024.

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

18 4.2.5 **Jose Santana-Cervantes** has been in custody since August 31, 2024,
19 without an attorney. His arraignment was scheduled for September 17,
20 2024. He appeared in court but was not provided an attorney. The Court
21 informed him that there were no attorneys available and that the Court
22 hoped he would get an attorney on October 1, 2024. His arraignment was

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

3 4.3 Defendants are Yakima County, its Superior Court, the Presiding Judge of that
4 Court, and several of Yakima's agencies and the heads of those agencies.

5 4.3.1 Yakima County is a county corporation incorporated under the laws of the
6 State of Washington.

7 4.3.2 The Yakima County Department of Corrections, and its Director, Jeremy
8 Welch, operate the Yakima County Jail and have custody of the in-custody
9 group of Plaintiffs.

10 4.3.3 The Yakima County Superior Court is the court of general jurisdiction in
11 Yakima County. Judge Richard Bartheld is the Presiding Judge of that
12 court. The Yakima County Superior Court and its judges imposed the
13 conditions that represent the unlawful restraint on all Plaintiffs. That court
14 is also the primary mechanism enforcing the unlawful restraints on the out-
15 of-custody and speedy trial groups of Plaintiffs. Lastly, the Court issued an
16 order continuing speedy trial for a whole class of people charged with
17 crimes in Yakima County Superior Court without notice to them, an
18 attorney for them, or a right for them to be heard. *See* Exhibit A.

19 4.3.4 The Board of Yakima County Commissioners is the governing board of
20 Yakima County and the organization responsible for funding the public
21 defense system. The Board has failed to take meaningful action to prevent
22 the public defender shortage in Yakima County. Amanda McKinney, Kyle
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1 Curtis, and LaDon Linde are the current Yakima County Commissioners.

2 4.3.5 The Yakima County Department of Assigned Counsel is the organization
3 responsible for employing and assigning public defenders to cases. Paul
4 Kelley is the director of Yakima County Department of Assigned Counsel.
5

6 **V. FACTUAL ALLEGATIONS**

7 **A. Public Defense Shortage in Yakima County**

8 5.1 Yakima County has the sole responsibility for providing indigent people charged
9 with crimes in Yakima County Superior Court with their constitutional right to
10 counsel. *Davison v. State*, 196 Wn.2d 285, 289, 466 P.3d 231, 234 (2020).

11 5.2 Yakima County has a shortage of public defenders, which goes back to at least
12 2022.

13 5.3 In addition to this historical shortage, the Yakima Department of Assigned Counsel
14 (DAC) lost several attorneys in the first half of 2024.

15 5.4 DAC does not have enough attorneys to handle the number of cases filed in Yakima
16 County Superior Court.

17 5.4.1 Each attorney providing representation to indigent defendants is limited in
18 the number of the cases they can take by the Washington State Standards
19 for Indigent Defense (SID). SID 3.3.
20

21 5.4.2 These limits apply on a yearly basis, but it is presumed that cases will be
22 evenly distributed throughout the year. SID 3.3.
23

24 5.4.3 Giving each attorney more cases when they have reached this limit violates
25 the court rules.
26

1 5.5 Because there are not sufficient attorneys to take cases, DAC cannot assign
2 attorneys to cases as they are filed.

3 5.6 Instead, DAC assigns cases at the beginning of each month when the standards
4 allow attorneys to take additional cases.

5 5.7 As a result, anyone booked into the Yakima County Jail are not assigned attorneys
6 until, at least, the month following their arrest.

7 5.8 Because no attorney is assigned to their case, the Court is continuing arraignments
8 and the opportunity to argue for a reduction in bail for people in custody for roughly
9 a month in most cases.

10 5.9 For example, Omar Al-Tharwa was charged on September 3, 2024, and should have
11 been arraigned on September 17, 2024, pursuant to Criminal Rule 4.1. This would
12 have been his first opportunity to enter a plea and argue for release with a prepared
13 attorney. However, no attorney was available, and the Court continued his
14 arraignment until October 16, 2024, a full month after arraignment was required by
15 the rule. Because there was no attorney present for him, he had no opportunity to
16 object or argue for a reduction in bail.

17 5.10 Since April, this cycle has been repeated hundreds of times for the many people
18 charged with crimes in Yakima County Superior Court.

19 5.11 DAC does not currently have capacity to assign each case that was filed in the
20 previous month, or the several months preceding, at the beginning of each month.

21 5.12 People who are held in-custody take priority in assignments.

22 5.13 After assigning attorneys to people who are in custody, DAC has limited capacity
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1 to assign an attorney to anyone who is not held in custody.

2 5.14 As a result, DAC cannot assign attorneys to most people who are out of custody.

3 5.15 Many of these people have waited several months for an attorney to be assigned to
4 their case.

5 5.16 These people are required to repeatedly come to court for attorney status hearings
6 and have had their arraignments repeatedly continued. They are still under the
7 conditions of release set at their first appearance.
8

9 5.17 Other class members had attorneys assigned but those attorneys had to withdraw
10 for various reasons. If these people are out of custody, they wait months to be
11 assigned a new attorney to replace the attorney who withdrew.

12 5.18 While waiting for an attorney to be assigned, these individuals are required to
13 repeatedly come to court for attorney status hearings, frequently waiting hours for
14 a hearing where they are again told that no attorneys are available.
15

16 5.19 All individuals charged with crimes are subject to laws governing individuals
17 charged with crimes and must comply with court orders, including orders to appear
18 in court.

19 5.20 For individuals charged with a crime but not in custody, if the Court wishes to
20 revoke bail pursuant to Criminal Rule 3.2(1)(2) a bail revocation hearing is required.
21 Right now, bail revocation hearings are not held before bail is revoked because no
22 attorney is assigned. People are remanded and incarcerated at the Jail without the
23 protections of a bail revocation hearing and the due process required by Criminal
24 Rule 3.3 or the protections an attorney may provide in such hearings.
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1 **B. Speedy Trial**

2 5.21 Many people will reach the expiration of the allowable time for trial—as calculated
3 under Criminal Rule 3.3—without an attorney assigned to their case.

4 5.22 In July and August of 2024, the Yakima County Prosecutor’s Office moved to
5 continue cases that were reaching the expiration of the allowable time for trial,
6 arguing that continuances are required in the administration of justice or that the
7 time during which counsel is not appointed should be an excluded period.

8 5.23 On August 13, 2024, the Yakima County Superior Court found that several factors,
9 including four attorneys leaving DAC earlier this year and the failure of the
10 Legislature and Supreme Court to help with the public defender shortage,
11 constituted unforeseen circumstances, justifying an excluded period in the
12 allowable time for trial. Exhibit A at 5-7.

13 5.24 This Order purported to apply to all people charged in Yakima County Superior
14 Court who have not been appointed counsel. Exhibit A at 1.

15 5.25 The Court also found that continuances in these cases were required in the
16 administration of justice and continued the trial dates of these cases, with an
17 associated extension of the allowable time for trial. Exhibit A at 7-9.

18 5.26 In making these rulings, the Court noted that “[t]he court must presume the inability
19 to appoint defense counsel may have a prejudicial effect upon the presentation of
20 the defendant’s defense.” Exhibit A at 8.

21 5.27 This ruling was issued as a letter decision without counsel, notice, or an opportunity
22 to be heard for any of the people whose speedy trial rights it purported to alter.
23

1 **VI. CLASS ACTION ALLEGATION**

2 6.1 The Plaintiffs are a class of indigent individuals charged with crimes in Yakima
3 County Superior Court who have not been assigned attorneys.

4 6.2 For the purposes of remedy, there are three sub-classes of people affected by
5 Yakima County's failure to provide counsel:
6

7 6.2.1 The first sub-class is a class of indigent people charged with crimes in
8 Yakima County Superior Court and held in custody in the Yakima County
9 Jail without an attorney assigned to represent them.

10 6.2.2 The second sub-class is a class of indigent people charged with crimes in
11 Yakima County Superior Court who are out of custody but held on
12 conditions of release without an attorney assigned to represent them.

13 6.2.3 The third class is a class of indigent people who reach their speedy trial
14 expiration, as calculated by Criminal Rule 3.3 without an attorney assigned
15 to their case but have the expiration of the allowable time for trial extended
16 through an incorrect application of Criminal Rule 3.3 or an order issued in
17 violation of due process.
18

19 6.3 Each of the people in this class is unlawfully restrained for the purposes of RCW
20 7.36.

21 6.4 The class is so numerous that joinder of all members is impracticable.

22 6.5 Additionally, given the situation, the class is likely to grow as litigation continues,
23 requiring ongoing joinder if a class is not certified.
24

25 6.6 Joinder is not only impractical but impossible where members of the class could
26

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

3 6.7 Each of these classes have common questions of law and fact as they pertain to the
4 issues raised in this case.

5 6.8 Each have been denied counsel.

6 6.9 Each claim that this denial infringes on their rights to counsel, due process, a speedy
7 trial, or all three.

8 6.10 The claims of the representatives are typical of the class and the three remedy-
9 related sub-classes.

10 6.11 The ACLU of Washington Foundation has experience litigating similar issues and
11 can represent the interests of the entire class.

12 6.12 There are no conflicts or competing interests within the class.

13 6.13 Yakima County has failed to appoint attorneys to represent Plaintiffs, making
14 declaratory relief with respect to the class appropriate.

15 6.14 The questions of law or fact common to the members of the class predominate over
16 any questions affecting only individual members because the violation of rights is
17 the same for each member.

18 6.15 A class action is superior to individual adjudications because it allows for the
19 efficient adjudication of the rights of members of the class described above.

20 6.16 In issuing its letter opinion addressing the speedy trial issues, the Yakima County
21 Superior Court, through respondent Presiding Judge Bartheld, treated the legal
22 issues in this case as identical for all members of the class and attempted to issue

1 an order affecting the speedy trial rights of each petitioner.

2 **VII. CLAIMS FOR RELIEF**

3 **FIRST CLAIM**

4 **Violation of Article I, Section 22 Right to Counsel**

5 7.1 Failure to appoint counsel while continuing to restrain Plaintiffs violates Plaintiffs'
6 rights under article I, section 22 of the Washington Constitution.

7 7.2 Article I, section 22 of the Washington Constitution guarantees people charged with
8 crimes the right to "appear and defend...by counsel."

9 7.3 The right to counsel attaches at the time criminal proceedings are initiated.
10 *Betschart*, 103 F.4th at 612.

11 7.4 Investigation and consultation are important aspects of the right to counsel. *State v.*
12 *A.N.J.*, 168 Wn.2d 91, 111-12, 225 P.3d 956, 966 (2010).

13 7.5 The right to counsel is a continuous right to competent and zealous advocacy.
14 *Betschart*, 103 F.4th at 621.

15 7.6 The right to counsel includes confidentiality in communication; investigation of
16 lines of defense; investigation of whether the accused person is competent to stand
17 trial; assistance with preparation and litigation of a bail hearing; guidance through
18 the plea-bargaining process, including communication of formal plea offers and
19 competent advice on how to plead and the right to appeal; assistance with a
20 defendant's attempt to cooperate; advice about issues like deportation; and warning
21 of possible risks in sentencing. *Id.*

22 7.7 Even a delay in providing counsel and all the rights that are tied to the right to
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1 counsel is an unlawful restraint. *Id.*

2 7.8 Lack of counsel interferes with indigent criminal defendants' ability to progress to
3 critical stages. *Id.*

4 7.9 Continuing to prosecute people, hold people in custody, or hold people on
5 conditions of release when they do not have an attorney violates article I, section
6 22 and is an unlawful restraint.
7

8 **SECOND CLAIM**

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

10 7.10 The right to counsel is the most pervasive constitutional due process right because
11 it affects the ability to assert all other rights. *United States v. Cronin*, 466 U.S. 648,
12 654-55, 104 S.Ct. 2039 (1984).
13

14 7.11 The deprivation of counsel in this case has made it impossible for Plaintiffs to assert
15 their other due process rights pursuant to article I, section 3—including addressing
16 legal rights such as speedy trial issues, bail revocations, and Yakima County
17 Superior Court's purported Order waiving such rights.

18 7.12 Continuing to prosecute people, hold people in custody, or hold people on
19 conditions of release when they do not have an attorney violates article I, section 3
20 and constitutes an unlawful restraint.
21

22 **THIRD CLAIM**

23 **Violation of Criminal Rule 3.1 Right to Counsel**

24 7.13 Failure to appoint counsel violates Criminal Rule 3.1.

25 7.14 Criminal Rule 3.1(b)(1) requires that "[t]he right to a lawyer shall accrue as soon
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1 as feasible after the defendant is taken into custody, appears before a committing
2 magistrate, or is formally charged, whichever occurs earliest.”

3 7.15 This rule requires counsel as early as at the time of arrest if the arrest necessarily
4 raises issues of spoliation of evidence. *State v. Fitzsimmons*, 94 Wn.2d 858, 620
5 P.2d 999 (1980).

6
7 7.16 At the latest, this rule requires counsel to be appointed whenever anyone is formally
8 charged with an offense.

9 7.17 Continuing to charge people with crimes, hold people in custody, or hold people on
10 conditions of release when they do not have an attorney violates Criminal Rule 3.1
11 and is an unlawful restraint.

12 **FOURTH CLAIM**

13 **Violation of Criminal Rule 3.3 Right to a Speedy Trial**

14
15 7.18 Someone charged with a crime must be brought to trial within 60 days of
16 arraignment if they are in-custody or within 90 days of arraignment if they are out
17 of custody. CrR 3.3(b) and (c).

18 7.19 Criminal Rule 3.3 requires that “[i]t shall be the responsibility of the court to ensure
19 a trial in accordance with this rule to each person charged with a crime.” CrR
20 3.3(a)(1).

21
22 7.20 “A charge not brought to trial within the time limit determined under this rule shall
23 be dismissed with prejudice.” CrR 3.3(h).

24 7.21 These expiration dates can be extended under limited circumstances described by
25 the rule.

1 7.22 None of the bases for extending the initial expiration date apply to a situation where
2 a county fails to provide an attorney for an accused person.

3 7.23 Continuing to prosecute a person with a crime that should have been dismissed
4 because the speedy trial expiration passed is an unlawful restraint.
5

6 **I. PRAYER FOR RELIEF**

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

8 A. Issue a Declaration that:

- 9 1. Continued prosecution, incarceration, or imposition of pretrial conditions of a
10 person charged with a crime without appointing counsel is a violation of article
11 I, section 22 of the Washington Constitution and constitutes an unlawful
12 restraint.
13
14 2. Continued prosecution, incarceration, or imposition of pretrial conditions
15 without appointing counsel is a violation of article I, section 3 of the
16 Washington Constitution and constitutes an unlawful restraint.
17
18 3. Continued prosecution, incarceration, or imposition of pretrial conditions
19 without appointing counsel is a violation of Criminal Rule 3.1 and constitutes
20 an unlawful restraint.
21
22 4. Extending the allowable time for trial because a person charged with a crime is
23 not appointed counsel violates Criminal Rule 3.3 and the continued prosecution
24 of a case that should have been dismissed because it exceeded its allowable time
25 for trial is an unlawful restraint.
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Exhibit A

APPLICATION FOR WRIT OF HABEAS CORPUS
PURSUANT TO RCW 7.36/COMPLAINT PURSUANT
TO RCW 7.24 - 20

**AMERICAN CIVIL LIBERTIES UNION OF
WASHINGTON FOUNDATION**
P.O. Box 2728
SEATTLE, WA 98111
(206) 624-2184

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-time 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 referred 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 (c)(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 Ninth 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 trial 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 State's 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 CrR 3.3 (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 State's 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

Yakima County Presiding Judge