

NO. 387984

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

JACOB SWIGER and AMANDA SWIGER,

Respondents,

v.

AMY KISENMACHER MORALES,

Appellant.

**AMICUS CURIAE BRIEF OF THE WASHINGTON
STATE OFFICE OF CIVIL LEGAL AID (OCLA)**

ROBERT W. FERGUSON
Attorney General

ANDREA BRENNEKE, WSBA No. 22027
VIRAK ANTHONY THACH, WSBA No.
50004
ALEXIA DIORIO, WSBA No. 27280
Assistant Attorneys General
Wing Luke Civil Rights Division
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 233-3384
andrea.brenneke@atg.wa.gov
anthony.thach@atg.wa.gov
alexia.diorio@atg.wa.gov
Attorneys for Amicus Curiae OCLA

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	IDENTITY AND INTEREST OF AMICUS CURIAE	1
III.	ISSUES ADDRESSED BY AMICUS.....	2
IV.	STATEMENT OF THE CASE.....	3
	A. The Washington Legislature Enacted a Universal Right to Appointed Counsel to Protect the Due Process and Property Rights of Indigent Tenants.....	3
	B. OCLA’s Design and Implementation of the Appointed Counsel Program Was Actively Coordinated With Judicial-Branch Stakeholders to Ensure Uniform Procedures and the Effective Assistance of Counsel for Indigent Tenants	4
	1. The Eviction Defense Screening Line.....	7
	2. The process for appointment of counsel is governed by standing orders, administrative directives or memoranda of understanding in every judicial district	8
	3. OCLA-contracted programs, not the courts, screen tenants for eligibility for appointed counsel representation	11
V.	ARGUMENT	12
	A. The Right to Counsel Is Mandatory; No Proceedings or Action May Occur Until Counsel is Appointed	12

1. Notice must be provided of the right to court-appointed counsel for all indigent tenants.....	15
2. To be properly effectuated, once a tenant asserts their right to appointed counsel, all proceedings must stop	16
3. Permitting substantive proceedings after a tenant invokes their right to counsel, but before appointment, effectively constitutes a forced waiver prohibited by law in similar contexts.....	18
B. Representation of Indigent Tenants Protects Against Often Devastating Impacts Resulting From the Loss of Their Rights to Rental Housing....	21
C. OCLA’s Appointed Counsel Program Has Decreased Evictions and Improved Housing Stability for Indigent Tenants; Legislative Intent Requires Consistent Access to the Right Across All Counties	28
VI. CONCLUSION	31

TABLE OF AUTHORITIES

Cases

<i>City of Bellevue v. Acrey</i> , 103 Wn.2d 203, 691 P.2d 957 (1984).....	19
<i>City of Seattle v. Ratliff</i> , 100 Wn.2d 212, 667 P.2d 630 (1983).....	18
<i>City of Tacoma v. Bishop</i> , 82 Wn. App. 850, 920 P.2d 214 (1996).....	20
<i>City of Wenatchee v. Owens</i> , 145 Wn. App. 196, 185 P.3d 1218 (2008).....	13
<i>Erection Co. v. Dep't of Lab. & Indus. of State of Wash.</i> 121 Wn. 2d 513, 852 P.2d 288, 291 (1993).....	14
<i>Gideon v. Wainwright</i> , 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)	5
<i>In re Det. of T.A.H.-L.</i> , 123 Wn. App. 172, 97 P.3d 767 (2004).....	19
<i>In re Det. of W.</i> , 70 Wash. App. 279, 852 P.2d 1134, 1137 (1993)	31
<i>In re V.R.R.</i> , 134 Wn. App. 573, 141 P.3d 85 (2006).....	19
<i>In re Welfare of G.E.</i> , 116 Wn. App. 326, 65 P.3d 1219 (2003).....	19
<i>Leda v. Whisnand</i> , 150 Wn. App. 69, 207 P.3d 468 (2009).....	22

<i>Miranda v. Sims</i> , 98 Wn. App. 898, 991 P.2d 681 (2000).....	20
<i>State v. A.N.J.</i> , 168 Wn.2d 91, 225 P.3d 956 (2010)	18
<i>State v. Blazina</i> , 182 Wn. 2d 827, 344 P.3d 680, 685 (2015).....	13
<i>State v. Curry</i> , 191 Wn.2d 475, 423 P.3d 179 (2018).....	19
<i>State v. DeWeese</i> , 117 Wn.2d 369, 816 P.2d 1 (1991).....	19
<i>State v. Dodd</i> 120 Wn.2d 1, 838 P.2d 86 (1992).....	13

Statutes

RCW 2.53.005	20
RCW 2.53.020(1)	1
RCW 2.53.050	2
RCW 2.53.050(2)	4
RCW 59.12	1, 4, 13
RCW 59.12.030	22
RCW 59.18	1
RCW 59.18.057	15
RCW 59.18.365	15

RCW 59.18.620.....	4
RCW 59.18.640.....	passim
RCW 59.18.640(1)	1, 2, 4, 5
RCW 59.18.640(2)	11
RCW 59.18.650(2)	15, 22
RCW 59.18.650(6)	22
RCW 59.20	1, 4, 13

Other Authorities

Allison Bovell-Amman, <i>The Hidden Health Crisis of Eviction</i> , B.U. SCH. PUB. HEALTH (Oct. 5, 2018), https://www.bu.edu/sph/news/articles/2018/the-hidden-health-crisis-of-eviction/	27
David A. Dana, <i>An Early Intervention Approach to Reducing Evictions and Improving Child Welfare</i> , 42 Child. Legal Rts. J. 79, 88 (2022).....	27
E2SSB 5160, 2021 Leg., 67 th Sess. § 8 (Wa. 2021).....	3
Ericka Petersen, <i>Bldg. A House for Gideon: The Right to Counsel in Evictions</i> , 16 Stan. J. Civ. Rts. & Civ. Liberties 63 (2020).....	5, 26
Eviction Resolution Pilot Program and Right to Counsel for Evictions Standing Order (October 6, 2021), https://www.stevenscountywa.gov/files/documents/EvictionResolutionPilotProgramRighttoCounselforEvictionsStandingOrder-	

Effective090121through0623231373072249100721PM. pdf.	passim
H.B. 18, 2021 Leg., Reg. Sess. (Md. 2021)	15
John Pollock, <i>Test. in Supp. of E2SSB 5160</i> (January 20, 20221), https://ocla.wa.gov/wp- content/uploads/2022/11/5160-Submitted-Testimony- 1.pdf at 65	24, 25
Maria Roumiantseva, <i>A Nationwide Movement: The Right to Counsel for Tenants Facing Eviction Proceedings</i> , 52 Seton Hall L. Rev. 1351 (2022).....	passim
Nat’l Coal. for a Civ. Right to Counsel., <i>Eviction Representation Statistics for Landlords and Tenants Absent Special Intervention</i> , http://civilrighttocounsel.org/uploaded_files/280/Landlor d_and_tenant_eviction_rep_stats_NCCRC_.pdf	23
OCLA <i>Report to the Legislature — Implementation of Tenant Right to Counsel</i> (OCLA Report) (July 28, 2022) at 2, 3; https://ocla.wa.gov/reports/	passim
OCLA, <i>Implementation Plan—Right to Counsel for Indigent Tenants</i> (Implementation Plan) (2021), https://ocla.wa.gov/reports/	6, 7, 8, 14
OCLA, <i>Income Calculation for the Right to Counsel Program: RTC Providers</i> , https://ocla.wa.gov/wp- content/uploads/2022/10/Eviction-Defense-Screening- Line-Income-Calculation-Procedure.pdf	12
OCLA, <i>OCLA Right to Counsel Dashboard</i> , https://ocla.wa.gov/wp-content/uploads/2022/10/Right- to-Counsel-Dashboard-10-17-22.xlsx	29

OCLA, <i>Unlawful Detainer Bench Card</i> , UD Bench Card PDF: (wa.gov).....	10, 11, 16, 17
Seattle Women’s Commission & King County Bar Association, <i>Losing Home: The Human Cost of Eviction in Seattle</i> (2018), https://www.kcba.org/Portals/0/pbs/pdf/HJP_LosingHome_%202018.pdf).....	26, 28
Stout Risius Ross, LLC, <i>Economic Return on Investment of Providing Counsel in Philadelphia Eviction Cases for Low-Income Tenants</i> (2018), https://philadelphiabar.org/?pg=News&blAction=showEntry&blogEntry=72215#:~:text=2018%2C%20the%20Association%E2%80%99s-,study%2C,-conducted%20by%20Stout	25
Vamsi A. Damerla, <i>The Right to Counsel in Eviction Proceedings: A Fundamental Rights Approach</i> , 6 Colum. Hum. Rts. L. Rev. Online 355, 359 (2022).....	5

Rules

GR 15.....	12
GR 34.....	12
SPR 98.24W(1)(d).....	17, 21

Treatises

17 William B. Stoebuck & John Weaver, Wash. Prac.: Real Estate: Propoerty Law § 6.5 (2d ed. 1995).....	22
---	----

I. INTRODUCTION

In 2021, the Washington state Legislature established a right to appointed counsel for indigent tenants in unlawful detainer proceedings filed under chapters 59.12, 59.18, and 59.20 RCW. RCW 59.18.640(1). That right is mandatory, held by the indigent tenant, with the obligation of appointment imposed on the court. As soon as the right is invoked by a tenant, all action in the case must be stayed until the tenant is screened and, if found eligible, appointed counsel. This is necessary to effectuate the will of the Legislature and must be afforded to *all* indigent tenants equally and consistently across every county in the state. In resolving this appeal, the Court should confirm these important requirements.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus Curiae is the Washington State Office of Civil Legal Aid (OCLA). OCLA is an independent agency of the judicial branch. RCW 2.53.020(1).

The Legislature assigned responsibility to implement the appointed counsel program in unlawful detainer proceedings across the state to OCLA. RCW 59.18.640(1); RCW 2.53.050.

As the agency administering the appointed counsel program, OCLA has a statutory duty and interest to ensure that courts in every superior court judicial district in Washington follow consistent practices to ensure compliance in all unlawful detainer proceedings involving indigent tenants. OCLA also has an interest in ensuring that the right of indigent tenants to appointed counsel is effective and held inviolate, such that once a tenant invokes the right, all proceedings are immediately stayed pending screening and appointment of counsel, and that no action affecting an indigent tenant's substantive or procedural rights or defenses is taken without assistance of counsel.

III. ISSUES ADDRESSED BY AMICUS

Whether RCW 59.18.640(1) requires that, after an indigent tenant asserts their right to court appointed counsel in unlawful detainer actions, any and all further legal proceedings

must be continued to enable screening, appointment, and meaningful preparation of defenses by counsel.

IV. STATEMENT OF THE CASE

OCLA adopts the portion of Appellant's Statement of the Case regarding her invocation of the right to appointed counsel and the subsequent trial court proceedings. In addition, OCLA offers the following additional factual background to describe the development and structure of Washington's appointed counsel program.

A. The Washington Legislature Enacted a Universal Right to Appointed Counsel to Protect the Due Process and Property Rights of Indigent Tenants

On April 22, 2021, the Legislature enacted Engrossed Second Substitute Senate Bill (E2SSB) 5160, which established a universal right to court appointed counsel for all indigent tenants in unlawful detainer proceedings. E2SSB 5160, 2021 Leg., 67th Sess. § 8 (Wa. 2021). Now codified in the Residential Landlord-Tenant Act (RLTA) at RCW 59.18.640, the law requires court appointment of attorneys for indigent

tenants in all unlawful detainer proceedings that have been commenced: “the court *must* appoint an attorney for an indigent tenant in an unlawful detainer proceeding under this chapter and chapters 59.12 and 59.20 RCW.” RCW 59.18.640(1) (emphasis added). The Legislature plainly stated its intent to “provide legal representation for qualifying tenants in eviction cases.” *Id.* (citing RCW 59.18.620 Legislative intent).

B. OCLA’s Design and Implementation of the Appointed Counsel Program Was Actively Coordinated With Judicial-Branch Stakeholders to Ensure Uniform Procedures and the Effective Assistance of Counsel for Indigent Tenants

RCW 59.18.640(1) provides that OCLA is responsible for implementing the statewide program for court-appointed counsel for indigent tenants in unlawful detainer cases. RCW 59.18.640(1). The Legislature directed OCLA to have the program operational within a year of April 22, 2021. RCW 2.53.050(2).

OCLA’s appointed counsel program recognizes that the fundamental and universal right to appointed counsel for

indigent tenants in unlawful detainer actions, established in Washington by statute, is akin to a “civil *Gideon*.” *See generally Gideon v. Wainwright*, 372 U.S. 335, 344-45, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (indigent defendants facing criminal proceedings in state courts have the right to publicly appointed defense counsel); Vamsi A. Damerla, *The Right to Counsel in Eviction Proceedings: A Fundamental Rights Approach*, 6 Colum. Hum. Rts. L. Rev. Online 355, 359 (2022) (asserting the need for a right to counsel in eviction proceedings and a substantive due process approach). *See also* Ericka Petersen, *Bldg. A House for Gideon: The Right to Counsel in Evictions*, 16 Stan. J. C. R. & C. L. 63 (2020) (*Gideon in Evictions*).

To meaningfully effectuate its intent that indigent tenants receive effective assistance of counsel in all unlawful detainer proceedings, RCW 59.18.640(1) establishes: (a) an unqualified duty of the court to timely inform unrepresented tenants in unlawful detainer cases of their potential right to publicly funded defense counsel and where/how to be screened for eligibility; (b)

an unqualified duty of the court to appoint OCLA-contracted attorneys for every tenant determined to be indigent; and (c) a corresponding right of every indigent tenant to the effective assistance of appointed counsel. *See* RCW 59.18.640. In establishing the program, OCLA took pains to ensure indigent tenants' right to counsel is meaningful, effective, and uniformly implemented across the state.

In accordance with its legislative directive, OCLA developed a comprehensive Implementation Plan. *See* OCLA, *Implementation Plan—Right to Counsel for Indigent Tenants* (Implementation Plan) (2021), [Right to Counsel for Indigent Tenants PDF: \(wa.gov\)](#) (last visited November 14, 2022) The Implementation Plan established three “Conditions of Certification” that had to be met before it would certify the availability of indigent tenant representational services in a given judicial district: 1) hiring a sufficient number of attorneys to represent indigent tenants; 2) training them; and, 3) requiring that courts in each judicial district enter orders or administrative

directives outlining protocols for screening and appointment of attorneys for eligible tenants in all unlawful detainer proceedings. Implementation Plan at 15.

OCLA certified the three conditions had been met and the indigent tenant representation program was operational in all superior court judicial districts as of January 18, 2022. *See OCLA Report to the Legislature — Implementation of Tenant Right to Counsel* (OCLA Report) (July 28, 2022) at 2, 3, [OCLA Report to the Legislature PDF: \(wa.gov\)](#) (last visited November 14, 2022).

1. The Eviction Defense Screening Line

To ensure uniformity of tenant access to counsel, income eligibility screening, and assignment to an OCLA-contracted attorney, OCLA contracted with the Northwest Justice Project to establish and operate a statewide Eviction Defense Screening Line. OCLA Report at 4. Northwest Justice Project designed, staffs, and operates the Eviction Defense Screening Line, where non-attorneys receive telephonic and online requests from

tenants as well as referrals from courts and others. Implementation Plan at 12; OCLA Report at 4. *See also* <https://nwjustice.org/eviction-help>. The call center's technology is supported by a case management system shared by all contracted attorneys to facilitate timely and accurate screening and referral while ensuring the capture and retention of necessary eligibility data for quality-control and accountability purposes. OCLA Report at 5-6; Implementation Plan at 12.

2. The process for appointment of counsel is governed by standing orders, administrative directives or memoranda of understanding in every judicial district

For judicial officers who appoint the attorneys for indigent tenants in eviction proceedings, OCLA took steps to ensure statewide effectiveness, uniformity, and consistency in the appointment and screening process for both filed and unfiled unlawful detainer actions. OCLA Report at 3.

To “ensure courts adhere to the requirements of RCW 59.18.640,” certification of the availability of court-

appointed counsel was conditioned “on court adoption of a standing order or administrative assignment in each of the 37 judicial districts outlining the process for appointment of counsel for indigent tenants in unlawful detainer cases in the jurisdiction.” *Id.*

For the combined Superior Courts of Ferry/Stevens/Pend Oreille County, the requisite right to counsel standing order was entered by Presiding Judge Jessica Reeves on October 6, 2021. *See* Eviction Resolution Pilot Program and Right to Counsel for Evictions Standing Order (Stevens Order); <https://www.stevenscountywa.gov/files/documents/EvictionResolutionPilotProgramRighttoCounselforEvictionsStandingOrder-Effective090121through0623231373072249100721PM.pdf>.

The Stevens Order contains “The Process for Appointment [of counsel] in Unfiled Proceedings.” *Id.* at 2.D. It also contains the required “Initial Hearing Procedures for Unlawful Detainer Cases.” *Id.* at 2.E.

As an added support to the courts, OCLA worked collaboratively with the Superior Court Judges Association and housing stakeholders to create an “Unlawful Detainer Bench Card.” OCLA Report at 3-4. It was distributed to superior court judicial officers throughout the state to educate the bench on substantive changes in the RLTA, including the appointed counsel process and need for continuances to enable tenants to be screened for eligibility and obtain counsel. *See* OCLA, *Unlawful Detainer Bench Card* (UD Bench Card) (2021), [UD Bench Card PDF: \(wa.gov\)](#) (last visited Nov. 14, 2022).

Under the standing orders incorporating local court-adopted protocols, and as reiterated by the UD Bench Card, “judicial officers must advise every unrepresented tenant defendant of their possible right to appointed counsel; provide them with information . . . to be screened for eligibility . . .; and continue the hearing for time necessary . . . for the tenant to be screened, . . . appointment of an attorney, . . . and prepar[ation]

of] defenses.” OCLA Report at 3-4. *See also* Stevens Order at 2.E(1) (requiring these same steps); UD Bench Card at 4.

3. OCLA-contracted programs, not the courts, screen tenants for eligibility for appointed counsel representation

OCLA-contracted legal providers screen for indigent tenant income eligibility. The financial criteria to establish indigency is set forth in RCW 59.18.640(2), which reads: “[I]ndigent’ means any person who, at any stage of a court proceeding, is: (a) Receiving one of the following types of public assistance [delineated in the statute]; or (b) Receiving an annual income, after taxes, of 200 percent or less of the current federally established poverty level.” RCW 59.18.640(2). OCLA’s approved income verification process implements the statute. OCLA, *Income Calculation for the Right to Counsel Program: RTC Providers*, <https://ocla.wa.gov/wp-content/uploads/2022/10/Eviction-Defense-Screening-Line-Income-Calculation-Procedure.pdf>

Tenant eligibility screening is conducted by the Northwest Justice Project, through the Eviction Defense Screening Line or on line, <https://nwjustice.org/eviction-help>, or by contracted civil legal aid providers in each county. As in other contexts,¹ upon application and attorney certification of tenant income eligibility, the Superior Court appoints counsel ex parte. *See, e.g.*, Stevens Order at 2.D, Appendix (Request for Administrative Appointment of Counsel in Unfiled Unlawful Detainer Case).

V. ARGUMENT

A. The Right to Counsel Is Mandatory; No Proceedings or Action May Occur Until Counsel is Appointed

The Legislature saw fit to make the right to appointed

¹ Courts entrust legal aid attorneys, as Court officers, to certify tenants' income eligibility for representation. *See* GR 34 (application for waiver of civil filing fees based on indigent status made by "declaration of counsel stating that the individual was screened and found eligible by the [qualified legal services provider]"). This prevents tenants from having to disclose private financial information publicly in order to avail themselves of their rights and promotes judicial efficiency, making it unnecessary for courts to screen tenant income or seal information used in the process. *Cf.* GR 15.

counsel mandatory: “the court *must* appoint an attorney for an indigent tenant in an unlawful detainer proceeding under this chapter and chapters 59.12 and 59.20 RCW.” RCW 59.18.640 (emphasis added).

Washington courts consistently have held that the words “must” and “shall” are synonymous and both impose mandatory duties. *State v. Dodd*, 120 Wn.2d 1, 14, 838 P.2d 86 (1992); *City of Wenatchee v. Owens*, 145 Wn. App. 196, 204, 185 P.3d 1218 (2008). “As a general rule, we treat the word ‘shall’ as presumptively imperative—we presume it creates a duty rather than confers discretion.” *State v. Blazina*, 182 Wn. 2d 827, 838, 344 P.3d 680, 685 (2015) (citing *State v. Bartholomew*, 104 Wn.2d 844, 848, 710 P.2d 196 (1985)). “The word ‘shall’ in a statute thus imposes a mandatory requirement unless a contrary legislative intent is apparent.” *Erection Co. v. Dep’t of Lab. & Indus. of State of Wash.*, 121 Wn. 2d 513, 518, 852 P.2d 288, 291 (1993) (citations omitted).

Indeed, Washington was the first state in the country to implement a so-called “right to counsel” program for tenants, and the only jurisdiction (local or state) with a court-appointed model. Maria Roumiantseva, *A Nationwide Movement: The Right to Counsel for Tenants Facing Eviction Proceedings*, 52 Seton Hall L. Rev. 1351, 1390 (2022) (*Nationwide Movement*).

The Legislature’s court appointment directive ensures that the tenant’s right to the effective assistance of counsel is mandatory and sacrosanct, and not dependent on attorney availability or “counsel of the day” housing justice models.² Cf. Implementation Plan at 9 (describing Housing Justice Projects and previous tenant advocacy); H.B. 18, 2021 Leg., Reg. Sess. (Md. 2021) (establishing “Access to Counsel” instead of “Right to Counsel” in Maryland).

² Right to Counsel is subject only to appropriations. “The Legislature appropriated \$24.1M for OCLA to implement and operate the program during the FY 22-23 biennium.” OCLA Report at 1.

In order for effective assistance of counsel to exist, an indigent tenant must have notice of the right to a court appointed attorney and then, if asserted, be afforded the time for screening, appointment, and preparation by counsel. Courts must continue all proceedings to enable this to happen.

1. Notice must be provided of the right to court-appointed counsel for all indigent tenants

Consistent with the mandatory nature of RCW 59.18.640, tenants must be notified in writing of their potential right to counsel.³ In addition, courts affirmatively must notify tenants of their right to counsel orally at the first unlawful detainer hearing. *See, e.g.*, Stevens Order at 2(E)(i) (“At the first hearing, the Court

³ In a nonpayment of rent case, landlords are required to “substantially” follow the form of a Fourteen-Day Notice to Pay Rent or Vacate by notifying tenants in writing that a court may be able to appoint them a lawyer at no cost if they are a qualifying low-income renter. RCW 59.18.057. For those matters, as well as other enumerated causes for eviction under RCW 59.18.650(2)—including a 90-day notice of intent to sell—landlords also must issue a Summons to the tenant that notifies them of the Eviction Defense Screening Line and their right to counsel. RCW 59.18.365.

will advise the tenant of their right to appointed counsel if indigent and inquire whether they wish to assert that right. If so, the Court shall refer the tenant to the . . . Eviction Defense Hotline or legal aid program . . . , unless counsel has previously been appointed for the tenant prior to filing of the case with the Court.”). And the UD Bench Card provides a sample script for judges to use in order to refer tenants to the hotline. *See* UD Bench Card at 4.

2. To be properly effectuated, once a tenant asserts their right to appointed counsel, all proceedings must stop

Once an unrepresented tenant asserts their right to counsel, all substantive eviction proceedings must be stayed by the judicial officer and continued to a later date. Guidance on this matter is clear and should be followed in an exacting manner to ensure that tenants receive effective assistance and guidance of counsel at all stages of the proceeding and in relation to all procedural and substantive decisions—including the question at

issue in the case below of whether to accept and waive defenses to service of process.

In Stevens County, the Standing Order provides that “[i]f a tenant is referred for appointment of counsel, the Court *will* continue the initial hearing as appropriate to allow the litigant to receive assistance from assigned counsel within appropriate timeframes as allowed by law and/or Court rule.” Stevens Order at 2(E)(i) (emphasis added). The UD Bench Card also provides a sample script for such continuances. UD Bench Card at 4 (“I will continue the eviction hearing for ____ days to allow you to complete the screening process. If you are eligible, this will give you time to meet with an attorney about this case”). The Washington State Supreme Court recently published a proposed rule entitled “Unlawful Detainers—Appointment of Attorneys” that would require a continuance “for at least 14 days.” SPR 98.24W(1)(d); https://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=600
[4](#).

Thus, once the right to appointed counsel is invoked by a tenant in an unlawful detainer proceeding, the matter must be continued, and no further legal proceedings *whatsoever* held, until the tenant is represented by counsel who can protect the tenant's legal interests, including any affirmative defenses.

3. Permitting substantive proceedings after a tenant invokes their right to counsel, but before appointment, effectively constitutes a forced waiver prohibited by law in similar contexts

“[I]n Washington, as in other jurisdictions, the right to counsel is of paramount importance to all persons appearing in our courts and must be jealously guarded.” *City of Seattle v. Ratliff*, 100 Wn.2d 212, 218, 667 P.2d 630 (1983). “The right of effective counsel and the right of review are fundamental to, and implicit in, any meaningful modern concept of ordered liberty.” *State v. A.N.J.*, 168 Wn.2d 91, 96, 225 P.3d 956 (2010). Without access to an attorney, fundamental rights “are often just words on paper.” *Id.* at 97. “The due process protection of the right to counsel . . . is meaningless unless it is read as the right to *effective*

counsel.” *In re Det. of T.A.H.-L.*, 123 Wn. App. 172, 179, 97 P.3d 767 (2004) (emphasis in original).

When an individual has the right to counsel, it cannot be taken away except in limited circumstances. In civil contexts, an individual can lose that right only by (1) waiver, (2) waiver by conduct, or (3) forfeiture. *In re V.R.R.*, 134 Wn. App. 573, 582, 141 P.3d 85 (2006). Waiver is not accomplished easily—it must be a “knowing and voluntary relinquishment and is typically ‘indicated by an affirmative, verbal request.’” *Id.*

The requirement of a clear waiver of the right to counsel in criminal proceedings is similar. *See, e.g., City of Bellevue v. Acrey*, 103 Wn.2d 203, 691 P.2d 957 (1984); *In re Welfare of G.E.*, 116 Wn. App. 326, 333-34, 65 P.3d 1219 (2003). For a criminal defendant, the request to proceed pro se must be “unequivocal.” *State v. DeWeese*, 117 Wn.2d 369, 376, 816 P.2d 1 (1991); *see also State v. Curry*, 191 Wn.2d 475, 482-83, 423 P.3d 179 (2018). “[T]he trial court must advise a defendant at the time of arraignment or when counsel is appointed of his right to

an attorney and the consequences of proceeding pro se if he should choose to do so.” *City of Tacoma v. Bishop*, 82 Wn. App. 850, 861, 920 P.2d 214 (1996).

These standards serve to protect the right to appointed counsel, which is foundational to justice. “[M]eaningful access [to the courts] requires representation. Where rights and responsibilities are adjudicated in the absence of representation, the results are often unjust. If representation is absent because of a litigant’s poverty, then likely so is justice, and for the same reason.” *Miranda v. Sims*, 98 Wn. App. 898, 909, 991 P.2d 681 (2000) (Ellington, J., concurring). *See also* RCW 2.53.005 (“The provision of civil legal aid services to indigent persons is an important component of the state’s responsibility to provide for the proper and effective administration of civil and criminal justice.”).

These principles apply to the unlawful detainer context, where the right of indigent tenants to the effective assistance of court-appointed counsel likewise is fundamental. And, to be

meaningful, courts must stay/continue all proceedings once the right has been invoked. The continuance must be immediate and must put a stop to all substantive proceedings for a minimum of 14 days. *See* SPR 98.24W(1)(d). Further, any tenant waiver of their fundamental right to appointed counsel must be “knowing and voluntary.” *Cf. In re V.R.R.*, 134 Wn. App. at 582.

In resolving this appeal, the Court should clearly prescribe these principles. It should affirm the requirements of RCW 59.18.640, that courts provide notice of the right of indigent tenants to the appointment and effective assistance of counsel, and, if the right is invoked, to immediately stay all proceedings to provide opportunity for counsel to be appointed and prepare a defense to the request for writ of restitution.

B. Representation of Indigent Tenants Protects Against Often Devastating Impacts Resulting From the Loss of Their Rights to Rental Housing

The policy objectives of providing representation to indigent tenants includes protection against the devastating impacts associated with the sudden loss of tenant rights to rental

housing. Washington law recognizes that tenants, as renters, have a property interest in their rental housing. “[A] leasehold is one of the estates in land, because the tenant has the right of possession.” 17 William B. Stoebuck & John Weaver, Wash. Prac.: Real Estate: Propoerty Law § 6.5 (2d ed. 1995) (*Nature of Parties’ Property Interests*). Both the federal and state constitutions require “a meaningful opportunity to be heard” before a court may order them stripped of “possession of the property.” *Leda v. Whisnand*, 150 Wn. App. 69, 83, 207 P.3d 468 (2009) (citation omitted). To that end, the RLTA provides many substantive and procedural protections of tenants’ property interest in their homes. *See, e.g.*, RCW 59.18.650(2) (limiting evictions for “just cause”); RCW 59.12.030 (requiring notice as a prerequisite to an unlawful detainer action); RCW 59.18.650(6) (requiring that notices identify “facts and circumstances” with “enough specificity” to enable tenant defense).

Yet, enforcement of those rights and access to justice for tenants facing unlawful detainer proceedings historically has

been elusive because landlords routinely are represented by attorneys while tenants are not. In the absence of a right to court-appointed counsel, only three percent of tenants on average are represented in eviction proceedings, as compared to 82% percent of landlords. *See Nat'l Coal. for a Civ. Right to Counsel., Eviction Representation Statistics for Landlords and Tenants Absent Special Intervention,* http://civilrighttocounsel.org/uploaded_files/280/Landlord_and_tenant_eviction_rep_stats_NCCRC_.pdf (last modified July 2022).

“The right to counsel for tenants facing eviction is a demonstrably effective intervention that, among other benefits, helps more tenants either remain in their homes or move with more time and money to do so.” Roumiantseva, *Nationwide Movement* at 1352. “The right to counsel can interrupt the predictability and trajectory of a typical eviction proceeding, permitting the tenant additional opportunities and choices within the constraints of the existing system.” *Id.* at 1358–59.

In its hearings on E2SSB 5160, and through written submission, the Legislature received testimony from John Pollock, the Executive Director of the National Coalition on Civil Right to Counsel, emphasizing the importance and effectiveness of right to counsel for tenants facing eviction proceedings. *See* John Pollock, *Test. in Supp. of E2SSB 5160* (January 20, 2021) (NCCRA Testimony), <https://ocla.wa.gov/wp-content/uploads/2022/11/5160-Submitted-Testimony-1.pdf> at 65.

New York City, the first city to provide such a right, “has seen 86% of tenants remaining in their homes while the eviction filing rate has dropped by 30% . . . And New York City housing court judges testified that the right to counsel had made their courts more efficient and just.” *Id.* Similarly, “San Francisco saw a 10% filing rate drop in just one year, and two-thirds of all represented tenants are staying housed.” *Id.*

Further, Mr. Pollock testified that Stout [Risius Ross, LLC], an independent financial analysis company, evaluated

right to counsel programs in many cities and found that providing tenants legal representation “leads to more than 90% of tenants avoiding disruptive displacement” and “saves millions more than it costs up front. For instance, in Philadelphia, Stout found that a \$3.5 million investment in right to counsel would yield \$45 million in savings.” *Id.* See also, Stout Risius Ross, LLC, *Economic Return on Investment of Providing Counsel in Philadelphia Eviction Cases for Low-Income Tenants* (2018), <https://philadelphiabar.org/?pg=News&blAction=showEntry&blogEntry=72215#:~:text=2018%2C%20the%20Association%E2%80%99s-,study%2C,-conducted%20by%20Stout> (last visited Nov. 14, 2022).

Local studies pre-dating enactment of RCW 59.18.640 reached similar conclusions. In King County, “[t]enants with legal counsel were about twice as likely to remain in their homes as those who did not.” Roumiantseva, *Nationwide Movement at 1380* (citing Seattle Women’s Commission & King County Bar Association, *Losing Home: The Human Cost of Eviction in*

Seattle (2018) (Losing Home) at 20-21), https://www.kcba.org/Portals/0/pbs/pdf/HJP_LosingHome_%202018.pdf).

The Legislature’s decision to establish a state-wide right to court-appointed counsel thereby helps prevent housing disruption and instability, the effects of which are devastating. “The consequences of a forced move or inadequate housing can be devastating. The data repeatedly show that expanding access to counsel can help keep people housed.” Petersen, *Gideon in Evictions* at 98.

“Evictions are not a threat to mere shelter; they are a threat to home. Evictions are a threat to everything contained within the four walls of a home, including privacy, well-being, and security.” Roumiantseva, *Nationwide Movement* at 1356. Eviction “often leads to residential instability, moving into poor quality housing, overcrowding, and homelessness, all of which is associated with negative health among adults and children.” David A. Dana, *An Early Intervention Approach to Reducing*

Evictions and Improving Child Welfare, 42 Child. Legal Rts. J. 79, 88 (2022) (*Early Intervention*) (citing Allison Bovell-Amman, *The Hidden Health Crisis of Eviction*, B.U. SCH. PUB. HEALTH (Oct. 5, 2018), <https://www.bu.edu/sph/news/articles/2018/the-hidden-health-crisis-of-eviction/>). “Housing instability impacts the welfare of individuals and families by disrupting public education, increasing food insecurity, and making the lives of low-income people more stressful, more perilous, and less fulfilling in general.” Dana, *Early Intervention* at 79.

“Most harmfully, evictions disproportionately impact, disrupt, and devastate the lives of people of color, particularly Black women.” Roumiantseva, *Nationwide Movement* at 1356. “Over 50 percent of the tenants facing eviction in Seattle in 2017 were people of color, despite comprising a little over 35 percent of the rental population. Women of color comprised over 57 percent of all women facing eviction in Seattle in 2017. *Id.* at 1358 (citing *Losing Home* at 23-24).

The potentially devastating effects of eviction on tenants, including the most vulnerable, particularly when unrepresented, highlight the public interest import of the Legislature’s decision to establish a permanent right held by indigent tenants and enforced by courts to appointment and effective assistance of counsel in unlawful detainer proceedings in Washington.

C. OCLA’s Appointed Counsel Program Has Decreased Evictions and Improved Housing Stability for Indigent Tenants; Legislative Intent Requires Consistent Access to the Right Across All Counties

The initial results of the right to appointed counsel program in Washington demonstrate that it is working to preserve tenancies and promote housing stability for indigent tenants who seek representation. “Since commencing operations in October 2021, attorneys have been appointed for all tenants screened and found eligible for appointed counsel in every case in every judicial district in the state.” OCLA Report at 6. Indigent tenant representation was provided in 4,465 cases from January 1, 2022, through October 21, 2022. OCLA, *OCLA Right to*

Counsel Dashboard, <https://ocla.wa.gov/wp-content/uploads/2022/10/Right-to-Counsel-Dashboard-10-17-22.xlsx> (last visited Nov. 14, 2022).

OCLA’s analysis of the first five months of the program found that “court-appointed attorneys represented tenants in close to 3000 Unlawful Detainer proceedings between January 1 and May 31, 2022.” OCLA Report at 8. During this period, attorneys helped tenants “remain in their homes in more than 50% of closed cases where the outcome is known,” and in others they negotiated for more time to move, entered orders to limit dissemination, achieved dismissals, and helped tenants improve their long-term ability to find alternative rental housing. *Id.*

The right to appointed counsel “is clearly a game-changer.” *Id.* at 10. “[T]here can be no doubt about the program’s beneficial impact – from reducing the number of unnecessary U[nlawful] D[etainer] filings through achieving results that protect tenant residential housing rights from wrongful summary dispossession.” *Id.* at 10. In this way,

Washington has levelled the playing field in unlawful detainers and limited housing instability and the harm arising from evictions. “The balance of power between landlords with attorneys and tenants predominately without attorneys in unlawful detainer cases substantially shifted, ensuring a greater chance of just results consistent with applicable law in these cases that involve some of the greatest stakes – the right to live in one’s home.” *Id.*

That said, Washington’s court-appointed counsel program is successful only if all superior courts implement the mandatory requirements consistently and in an exacting manner. *See, e.g., In re Det. of W.*, 70 Wash. App. 279, 284, 852 P.2d 1134, 1137 (1993) (where a court requirement is mandatory, “to disregard the statutory language is inconsistent with the entire statutory scheme and renders the statute incapable of reasonable and consistent enforcement.”).

Judicial review of the courts’ implementation of the right to appointed counsel for *all* indigent tenants established in

RCW 59.18.640 is essential to ensure uniform implementation and consistent enforcement across all courts and in all counties.

VI. CONCLUSION

The Legislature established a universal right to the appointment and effective assistance of counsel at public expense for all indigent tenants in unlawful detainer cases. That right is mandatory. To fully effectuate the will of the Legislature to ensure due process for all indigent tenants, a strict and uniform approach to its implementation is required. Specifically here, once the right to appointment of counsel is invoked, courts must immediately and completely stay the proceedings to allow for screening, appointment and preparation of counsel. Until such time, courts must refrain from taking any action affecting the tenant's substantive or procedural rights.

RESPECTFULLY SUBMITTED this 14th day of November 2022.

This document contains 4,819 words, excluding the parts of the document exempted from the word count by RAP 18.17.

ROBERT W. FERGUSON

Attorney General



ANDREA BRENNEKE, WSBA No.
22027

VIRAK ANTHONY THACH, WSBA No.
50004

ALEXIA DIORIO, WSBA No. 27280

Assistant Attorneys General

Wing Luke Civil Rights Division

Office of the Attorney General

800 Fifth Avenue, Suite 2000

Seattle, WA 98104

(206) 233-3384

andrea.brenneke@atg.wa.gov

anthony.thach@atg.wa.gov

alexia.diorio@atg.wa.gov

Attorneys for Amicus Curiae OCLA

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed with the Washington State Court of Appeals, Division III. I further certify that I caused to be served a true and correct copy of the foregoing document via the Washington State Appellate Courts' Portal and via electronic mail as follows:

Scott Crain, WSBA No. 37224
Alicia Kingston, WSBA No. 9890032
Joanna Otero, WSBA No. 26033
401 Second Avenue S., Suite 407
Seattle, WA 98104
scottc@njwustice.org
alicia.kingston@nwjustice.org
joanno@nwjustice.org

Attorneys for Appellant

Jeffrey M. Carr, WSBA No. 56282
The Carr Law Group, P.C.
1275 W. Collage Avenue, #337
Spokane, WA 99201
jeffrey@olympialegal.com

Attorney for Respondents

DATED this 14th day of November 2022, at Seattle,
Washington.



Tiffany Jennings
Legal Assistant