

Fidel Cassino-DuCloux
Federal Public Defender
Stephen R. Sady
Chief Deputy Federal Public Defender
Julie Vandiver, Jessica Snyder,
Robert Hamilton, Michael Benson,
Peyton E. Lee, and Megha Desai
Assistant Federal Public Defenders
101 SW Main Street, Suite 1700
Portland, OR 97204
Tel: (503) 326-2123
Fax: (503) 326-5524
Emails: Fidel_Cassino-DuCloux@fd.org
Steve_Sady@fd.org
Julie_Vandiver@fd.org
Jessica_Snyder@fd.org
Robert_Hamilton@fd.org
Michael_Benson@fd.org
Peyton_Lee@fd.org
Megha_Desai@fd.org

Attorneys for Petitioners

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

**CALEB AIONA, JOSHUA SHANE
BARTLETT, WALTER BETSCHART,
TYRIK DAWKINS, JOSHUA JAMES-
RICHARDS, TANIELA KINI KIN
LATU, RICHARD OWENS, LEON
MICHAEL POLASKI, ALEX SARAT
XOTOY, AND TIMOTHY WILSON,
on their behalf, and on behalf of all
others similarly situated**

Case No. 3:23-cv-01097-CL

**MOTION AND SUPPORTING
MEMORANDUM FOR ORDER TO
SHOW CAUSE WHY RELIEF
SHOULD NOT BE GRANTED
PURSUANT TO 28 U.S.C. § 2243**

Petitioners,

v.

**PATRICK GARRETT,
WASHINGTON COUNTY SHERIFF,
in his official capacity.**

Respondent.

The petitioners, on their behalf and on the behalf of all others similarly situated, through counsel, move this Court to issue an order requiring the respondent within three days to show cause why relief should not be granted as provided in 28 U.S.C. § 2243. Because the petition has not yet been screened by the Court and served on the respondent in accordance with Rule 4 of the Rules Governing Section 2254 cases, the petitioners have not sought the position of the respondent on this motion. *See* Local Rule 7-1. In support of this Motion, counsel states as follows:

Introduction

The petitioners filed a habeas petition pursuant to 28 U.S.C. § 2241 asserting that they are held in violation of their constitutional rights under the Sixth, Eighth, and Fourteenth Amendments because they are being prosecuted by Washington County but have not been provided attorneys and their liberty is restrained without an advocate to challenge those restraints. ECF 1. The Court should grant the motion for an order to show cause because, to be effective, the habeas remedy must be swift. Further, the constitutional violations are plain, serious, and not subject to serious dispute. Each passing day compounds the injury and extends the unconstitutional restraint. *United States v. Cronin*, 466 U.S. 648, 654 (1984) (The Sixth Amendment right to “counsel is by far the most pervasive” of all constitutional rights because it affects a defendant’s “ability to assert any other rights he may have”); *Boumediene v. Bush*, 553 U.S. 723, 739 (2008) (“The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty”). Speedy disposition is necessary to prevent the petitioners from suffering further irreparable injury.

A. Pretrial Habeas Relief “Must Be Speedy If It Is To Be Effective.”¹

Habeas corpus is a “speedy remedy, entitled by statute to special, preferential consideration to insure expeditious hearing and determination.” *Van Buskirk v. Wilkinson*, 216 F.2d 735, 737-738

¹ *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (initial capitals added).

(9th Cir. 1954). The statute, 28 U.S.C. § 2243, provides for an accelerated process so that the petitioner may have a “swift, flexible, and summary determination of his claim.” *Preiser v. Rodriguez*, 411 U.S. 475, 495 (1973). The timelines in the statute call for the Court to “forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted.” 28 U.S.C. § 2243. The writ or the order then “shall be returned within three days.” *Id.* Only on a showing of good cause is additional time permitted, “not exceeding twenty days.” *Id.* A hearing is to follow five days after return of the order. Finally, the statute permits the court to summarily hear and determine the facts and dispose of the matter as law and justice require. *See also Browder v. Director*, 434 U.S. 257, 266 n.10 (1978) (“The [Supreme] Court stated in *Walker v. Johnston* that there could be situations where ‘on the facts admitted, it may appear that, as a matter of law, the prisoner is entitled to the writ and to a discharge,’” and “a federal district court [is empowered] to discharge a habeas corpus petitioner from state custody without conducting an evidentiary hearing, when the facts are undisputed and established a denial of petitioner’s constitutional rights.”) (quoting *Walker v. Johnston*, 312 U.S. 275, 284 (1941)).

B. The Facts Alleged Are Not Subject To Serious Dispute.

The petition alleges that each petitioner is in custody in violation of his federal constitutional rights. The respondent cannot dispute that each has been charged criminally in Washington County, has their liberty restricted, and has not been afforded counsel, as reflected in Washington County jail records and the Oregon Judicial Case Information Network. The plain and simple facts are that today—right now—the petitioners are in custody based on criminal charges without the attorney required by *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Rothgery v. Gillespie County*, 554 U.S. 191, 194 (2008). The respondent should be ordered to show cause why the writ should not issue.

It is widely accepted and openly discussed that scores of criminal defendants in Washington County suffer an ongoing deprivation of their constitutional rights. The Washington County Circuit Court recognized in writing the longstanding and vast scope of the violations of federal constitutional rights:

Since about February 2022, criminal defendants in Washington County, Oregon have waited longer to receive court appointed counsel than in previous months, and possibly years. Currently there are approximately seventy-nine defendants in custody waiting for attorneys in Washington County. Of those, two have been waiting for an attorney for over 100 days and they are faced with Measure 11 charges.²

In a similar case earlier this year, the Washington County prosecutor wrote recognizing the “insanity” of failing to prevent violations of constitutional rights:

At every turn OPDS insists on a framework which gives it sole control over violating the constitution [sic] rights of defendants and others by failing to provide legal representation. It disallows this Court’s ability to step in despite this Court observing ongoing violations of constitutional rights under its own roof. The Presiding Judge is being told to step aside and not interfere when constitutional rights of criminal defendants and victims are being violated on an ongoing basis. This is insanity. It cannot be allowed to continue.³

In another pleading, the prosecutor, moving the state court to appoint defense counsel, described the violation of the right to an attorney:

Together, the State and the defendants face an analogous situation in the instant cases. The defendants have a constitutional right to an attorney, but the PDSC and OPDS are exercising statutory authority in a manner that effectively deprives them

² Order Re: State’s Motion to Identify Counsel Without Delay and Increase Defense Attorney Compensation As Needed at 2, *Oregon v. Applegate*, 23CR16895 (Washington County July 10, 2023).

³ State’s Memorandum in Response to OPDS Pleading and Argument at 7, *State v. Boyd, Smith, Applegate*, C130935CR; C053243CR; 23CR16895 (Washington County Circuit Court June 30, 2023).

of that representation. Due Process requires this court to place the defendant's constitutional rights above the statutory authority of OPDS.⁴

In petitioner Sarat Xotoy's case, the prosecutor filed a motion for identification of counsel, recognizing that his fundamental rights were being violated:

It is a fundamental principal of our American justice system that criminal defendants are entitled to legal representation in court. Oregon courts are obligated and empowered to ensure criminal defendants are properly represented by counsel as required by both the Oregon and United States Constitution. *See State v Langley*, 351 Or 652, 663 (2012) ("A defendant in a criminal case has a constitutional right to adequate assistance of counsel under both Article I, section 11, of the Oregon Constitution and the Sixth Amendment to the United States Constitution."⁵

This statement was made in Mr. Sarat Xotoy's case in December 2022, and he is still without counsel. Other petitioners also continue to languish in custody without counsel. The relevant facts are not subject to reasonable dispute.

C. Fundamental Constitutional Rights Are At Stake.

From the commencement of adversarial proceedings, the petitioners have been in custody in violation of their Sixth Amendment rights. *United States v. Wade*, 388 U.S. 218, 237 (1967) ("the postindictment lineup was a critical stage of the prosecution at which he was 'as much entitled to such aid (of counsel) . . . as at the trial itself.'") (quoting *Powell v. Alabama*, 287 U.S. 45, 57 (1932)). "In deciding what qualifies as a critical stage, courts have recognized that the period from arraignment to trial is 'perhaps the most critical period of the proceedings.'" *United States v. Hamilton*, 391 F.3d 1066, 1070 (9th Cir. 2004) (simplified) (quoting *Wade*, 388 U.S. at 225). Arraignments are "[a]mong the stages of a prosecution deemed 'critical' for Sixth Amendment

⁴ Motion to Identify Defense Counsel Without Delay and Increase Defense Attorney Compensation as Needed at 6-7, *State v. Boyd, Smith, Applegate*, C130935CR; C053243CR; 23CR16895 (Washington County Circuit Court June 12, 2023).

⁵ Motion to Require the Identification of Defense Counsel Without Delay at 2, *Oregon v. Sarat Xotoy*, 22CR58185 (Washington County December 13, 2022).

purposes[.]” *Id.* (citing *Hamilton v. Alabama*, 368 U.S. 52, 53-55 (1961)). Preliminary hearings and bail hearings are also critical stages, *Coleman v. Alabama*, 399 U.S. 1, 9-10 (1970), as is “the process of plea bargaining and period of defendant’s potential cooperation with the government.” *Id.* (citing *United States v. Leonti*, 326 F.3d 1111, 1117 (9th Cir. 2003)).

The Sixth Amendment right to “counsel is by far the most pervasive” of all constitutional rights because it affects a defendant’s “ability to assert any other rights he may have.” *United States v. Cronin*, 466 U.S. 648, 654 (1984) (internal quotation omitted). But the other rights at issue are also fundamental.

In addition to the Sixth Amendment right to counsel, the pretrial custody without counsel violates rights selectively incorporated and directly binding on the States through the Fourteenth Amendment:⁶

- The pretrial custody of the petitioners without counsel violates the **Eighth Amendment**: “In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” *United States v. Salerno*, 481 U.S. 739, 755 (1987). The carefully limited exception forecloses detention unless, “after an adversary hearing,” certain factual determinations are made. *Id.* To comply with due process and the Eighth Amendment, “[d]etainees have a right to counsel at the detention hearing.” *Id.* at 751 (citing the Bail Reform Act).
- The pretrial custody of the petitioners without counsel results in violation of the **liberty protected by the Due Process Clause**. “The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty[.]” *Boumediene*, 553 U.S. at 739. “Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)).
- The pretrial custody of the petitioners without counsel violates the **procedural due process** guaranteed by the Fifth and Fourteenth Amendments. The balance of interests establishes that, where liberty is at issue and the State is represented by counsel, requiring the indigent

⁶ The Supreme Court recognizes that “custody” for the purposes of federal habeas corpus includes restraints in the community. *Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973) (release on recognizance prior to service of sentence constitutes “custody”); see *Dow v. Circuit Court of the First Circuit*, 995 F.2d 922, 923 (9th Cir. 1993) (mandatory presence at a particular place for class attendance constituted “custody”).

defendant who has not waived counsel to proceed without counsel is unconstitutional. *Salerno*, 481 U.S. at 746 (citing *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976)). The failure to provide counsel to the petitioners during their criminal proceedings has deprived them of important procedural protections. By conducting proceedings with the petitioners in the absence of counsel and without a voluntary waiver in compliance with *Faretta v. California*, 422 U.S. 806 (1975), they have been required to either make uncounseled statements and interact directly with the court hearing their case and the prosecutor charging them, or alternatively have no opportunity to be heard. *See Simmons v. United States*, 390 U.S. 377, 394 (1968) (“[W]e find it intolerable that one constitutional right should have to be surrendered in order to assert another”).

- The pretrial custody of the petitioners without counsel violates the **equal protection and due process protections against discrimination based on wealth**. *Bearden v. Georgia*, 461 U.S. 660, 665 (1983) (where discrimination is based on indigency, “[d]ue process and equal protection principles converge in the Court’s analysis[.]”). If the petitioners were wealthy enough to retain private counsel, none of the crippling deficits in constitutional procedures would be occurring: no delay, experts and investigators at work, pretrial conditions minimized, trial preparation and negotiations underway. Only those without sufficient resources are subjected to the constitutional deprivations that wealth would solve.

The constitutional interests at issue are fundamental and in no way equivocal. These undisputable constitutional violations deserve a remedy, and the respondent must answer why the writ should not be granted.

D. The Petitioners Have Been And Continue To Be Irreparably Harmed By The Violation Of Their Federal Constitutional Rights.

The federal court must step in to avoid further irreparable harm to the petitioners and those similarly situated. In proceedings regarding other habeas petitioners, the Washington County Circuit Court admitted that it seemed like the crisis of the unrepresented has been going on for what “seems like forever, but at least for a year and several months at this point.”⁷ The Washington County Circuit Court expressed confusion at the continued crisis: “I don’t understand a person being in custody for 90-plus days without an attorney.”⁸ The Washington County prosecutor

⁷ Exhibit A at 6.

⁸ Exhibit A at 33.

acknowledged that persons in pretrial custody were suffering irreparable harm: “It is imperative that the court address this issue or risk *further irreparable harm to the defendants* and the victims of these crimes.”⁹

Moreover, the state’s ability and willingness to protect federal rights is not improving, as the Washington County Circuit Court wrote: “The unrepresented defendant crisis has not diminished, to the contrary our unrepresented cases have continued to increase.”¹⁰ There is wide agreement that there is intolerable, ongoing violations of the constitutional rights of criminal defendants. The violations of rights have devastating effects in the real world. For example, the petitioners and those similarly situated experience:

- The inability to propose and advocate for alternatives to pretrial detention in jail or to ameliorate restrictive conditions in the community resulting in family separation, jobs and residences lost, and interruption of continuity of medical and other treatment in the community.
- With no counsel, necessary and time sensitive investigation and preservation of evidence cannot occur, as witnesses vanish, memories fade, exculpatory surveillance tape are recorded over, and experts are delayed in assessing contemporaneous psychological conditions.
- The opportunity to negotiate for early resolution is lost, including time-served offers, time-limited plea offers, to mitigate through cooperation, or to show the prosecution why the case should be dismissed based on innocence.
- Having no one to explain the nature of the charges, conduct discovery, and provide advice regarding potential outcomes.
- Being repeatedly brought to hearings where the opposing party is represented by the prosecutor while no one is representing the person charged.

⁹ Motion to Identify Defense Counsel Without Delay and Increase Defense Attorney Compensation as Needed at 7, *Oregon v. Boyd, Smith, Applegate*, C130935CR; C053243CR; 23CR16895 (Washington County Circuit Court June 12, 2023) (emphasis added).

¹⁰ Corrected Presiding Judge Order 331 Directing the Priority Appointments of Defense Attorneys in Washington County at 2 (Washington County Circuit Court July 13, 2023).

Although the ongoing harm involves myriad facts, the suffering of the class members, in all its forms, arises from the single issue before the Court: whether the pretrial custody violates federal constitutional rights.

E. This Court Should Grant This Motion Under The Habeas Corpus Statute Forthwith.

Habeas is a “prompt and efficacious remedy for whatever society deems to be intolerable restraints.” *Fay v. Noia*, 372 U.S. 391, 401-402 (1963). “[I]f the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release.” *Id.* at 402. The habeas corpus statute, using the mandatory “shall,” directs that the order to show cause should issue “forthwith.” 28 U.S.C. § 2243. The Supreme Court has stated that the term “forthwith” is defined

as indicating that as soon as by reasonable exertion, confined to the object, it may be accomplished. This is the import of the term; it varies, of course, with every particular case. In matters of practice and pleading it is usually construed, and sometimes defined by rule of court, as within twenty-four hours. . . . [I]t has a relative meaning, and will imply a longer or shorter period, according to the nature of the thing to be done.

Dickerman v. Northern Trust Co., 176 U.S. 181, 193 (1900); *see* Black’s Law Dictionary (11th ed. 2019) (“1. Immediately, without delay. 2. Directly; promptly; within a reasonable time under the circumstances; with all convenient dispatch.”).

Given the foregoing and as pleaded in the petition, there is “a plain, direct, and adequate remedy by petition for writ of habeas corpus.” *Van Buskirk*, 216 F.2d at 737. The habeas statute requires “special, preferential consideration to insure expeditious hearing and determination.” *Id.* at 737-38. The continuing irreparable harm warrants the requested expedited habeas corpus proceedings, as does the absence of other effective class-wide remedies for the serious violations of federal constitutional rights.

Wherefore, this motion should be granted, and the following relief should be ordered on behalf of the petitioners and all others similarly situated:

1. Forthwith screen the habeas petition pursuant to Rule 4 and order the respondent served with the petition and this motion;
2. Issue an order requiring the respondent to show cause, within three days, why the writ should not issue as to the petitioners and all others similarly situated;
3. Hold a hearing within five days after the return of the order to show cause;
4. Summarily hear and determine the facts and dispose of the matter as law and justice require.

Respectfully submitted, this 1st day of August, 2023.

/s/ Fidel Cassino-DuCloux
Fidel Cassino-DuCloux

/s/ Stephen R. Sady
Stephen R. Sady

/s/ Robert Hamilton
Robert Hamilton

/s/ Julie Vandiver
Julie Vandiver

/s/ Peyton E. Lee
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/s/ Jessica Snyder
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/s/ Megha Desai
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/s/ Michael Benson
Michael Benson

Attorneys for Petitioners