

No. 102374-0

IN THE SUPREME COURT OF  
THE STATE OF WASHINGTON

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STATE OF WASHINGTON,  
Plaintiff / Respondent,

v.

JOSE MANUEL FLORES-RAMIREZ,  
Defendant / Appellant.

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ON REVIEW FROM THE SUPERIOR COURT OF  
THE STATE OF WASHINGTON,  
FRANKLIN COUNTY

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*APPELLANT'S STATEMENT OF  
GROUNDS FOR DIRECT REVIEW*

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A. *IDENTITY OF PARTY AND DECISION BELOW*

Mr. Jose Flores-Ramirez, Appellant and Movant, was the respondent below in a criminal case brought in both district and superior courts which ultimately led to a plea and sentence imposed on August 15, 2023, in Franklin County superior court. *See* Plea Agreement (attached as Appendix A); Judgment and Sentence (App. B).

Pursuant to RAP 4.2(a)(4), because this case presents fundamental and urgent issues of broad public import which require prompt and ultimate determination by this Court, Mr. Flores-Ramirez respectfully asks the Court to take direct review.

B. *NATURE OF THE CASE AND DECISION BELOW*

Mr. Jose M. Flores-Ramirez seeks direct review from a plea and sentence entered in Franklin county superior court on August 15, 2023. *See* Clerk's Minutes, 8/15/2023 (App. C); *see also* App. A, B.

He entered that plea only after being promised and deprived of appointed counsel for months despite his indigency, while speedy trial time came and went, and while being brought to court several times in chains without any

proof of the necessity. See Order (2/28/2023) (App. D); Clerk's Minutes 5/26/2023 (App. E); Clerk's Minutes, 5/30/2023 (App. F); Clerk's Minutes, 6/13/23 (App. G); Clerk's Minutes, 7/11/23 (App. H); Clerk's Minutes, 8/01/23 (App. I)<sup>1</sup>; Clerk's Minutes, 8/08/23 (App. J); App. C; see also, OPD notice (App. K) (announcing that "indigent defense services" were unavailable).<sup>2</sup>

The charge of second-degree assault was originally brought in 2021 against Mr. Flores-Ramirez in Franklin County district court. District Court Complaint (App. L). The prosecutor's office also filed a competing charge for the same incident, but dismissed that without prejudice for the case to proceed in district court. 21 Information (App. M); 21 Order of Dismissal (App. N). A First Amended Complaint in district court reduced the charge to third-degree assault, after which a deferred prosecution did not succeed. See District Court docket (App. O); District Court Order (App. P). The Franklin County Prosecutor's Office refiled the third-degree assault

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<sup>1</sup>The Clerk's Minute incorrectly states that Ms. Astley was standing in for Mr. Stovern "to represent defense" but Mr. Stovern is a prosecutor and the context indicates this was a typographical error.

<sup>2</sup>An index to appendices is contained at the end of this pleading.

charges in superior court, dismissing the district court matter. See 23 Information (App. Q). For some unknown reason, they filed it not under the original 21 cause number but instead as a new case with a 23 cause number, the number associated with this appeal. *Id.*

On May 26, 2023, when bail was set, the person standing in just for that day made no complaints on Mr. Flores-Ramirez' behalf. See App. E. This included Mr. Flores-Ramirez appearing in chains. *Id.* CrR 3.2 was apparently never discussed. *Id.*

Appointed counsel was not provided for the actual case that day or the next. *Id.* Instead, it would take months. During that time, the State would bring Mr. Flores-Ramirez to court, where a judge say through the interpreter that he was entitled to counsel - they just did not have anyone to represent Mr. Flores-Ramirez yet. See App. F, G, H, I. He asked for release and bail reduction. See App. F. With no lawyer there for Mr. Flores-Ramirez, the prosecutor's arguments were unmet and, not surprisingly, the trial court denied the requests. *Id.*; see App. H.

Several of the delays were recorded as having been



sought by the defense. See App. G, H, I.

Finally, on August 1, Mr. Flores-Ramirez asked to be allowed to plead in order to get released, rather than wait any longer. App. I.<sup>3</sup> He expressed distrust at promises of an attorney in the future and just wanted to get out. App. I. Within a week, an attorney was found - only to help with the plea. App. C. The newly appointed counsel did not object to his client being shackled. App. C, J. He did not move for any relief based on violation of any of his client's rights, or raise speedy trial concerns. App. C, J. Instead of conferring with his client first in confidence, he spoke to him on the record, in open court. *Id.*

Bob Burochowitz, Director of The Defender Initiative at the Fred T. Korematsu Center for Law and Equality at Seattle University of Law, reviewed court tapes from the case. Letter, Aug. 26, 2023 (App. R). He described newly appointed counsel saying on August 8 that he had only taken the case because it was understood the client wanted to "rush a plea," and if not he would need time to actually read the file and meet Mr.

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<sup>3</sup>The Clerk's Minute incorrectly states that Ms. Astley was standing in for Mr. Stovern "to represent defense" but Mr. Stovern is a prosecutor.

Flores-Ramirez. *Id.*<sup>4</sup>

Newly appointed counsel was Timothy E. Dickerson. *See* App. J. His previous job was as a Deputy Prosecuting Attorney at the Franklin County Prosecutor's Office. *See* App. L, M, O. In that capacity, he had filed the charges in this same case and pursued them in both district and superior courts. App. L, M, O.

During his entire representation of Mr. Flores-Ramirez from August 8 to entry of the plea and sentencing on August 15, it appears Mr. Dickerson, the court and the current prosecutor did not mention this apparent conflict of interest. *See* App. C; J.

Mr. Flores-Ramirez was sentenced to one month - time served - with community supervision to follow, and a lengthy "no contact" order. App. B at 4-5. With counsel *pro bono*, he appealed, seeking direct review. *See* Notice of Appeal and Request for Direct Review (App. S). This pleading follows.

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<sup>4</sup>A Statement of Arrangements is being prepared.

C. *ISSUES PRESENTED FOR REVIEW*

**Is a plea constitutionally invalid where it was the result of repeated, extensive violations of fundamental constitutional and rule-based rights of the accused?**

Were Appellant's pretrial rights under this Court's rules, the Sixth and 14<sup>th</sup> Amendment, Article 1, section 22, and due process violated when he was criminally accused, financially indigent, and

- a) given temporary counsel at the bail hearing who made no arguments on Mr. Flores-Ramirez' behalf and instead "reserved" on every issue, even the unconstitutional apparently routine physical shackling of his client without the required individualized finding?
- b) deprived of appointed counsel for not days or weeks but months after charging due to financial problems and staffing issues of the charging county?
- c) not given counsel until after his speedy trial rights had been violated and the time for trial had passed - with the trial court indicating, incorrectly, that the delay was either at "defense" behest or for "good cause?"
- d) denied counsel pretrial until he had served more time in jail than the presumptive standard range for the charged offense, before the State had met its due process burden of proving guilt beyond a reasonable doubt?
- e) was provided counsel only once he asked to be able to plead instead of having to wait further and was given counsel only for that

purpose?

- f) given appointed counsel who not only made no motions or arguments on his client's behalf despite unconstitutional shackling and the history of the case but also apparently committed ineffective assistance in multiple ways including the potential immigration consequences for his client in entering the plea?
- g) given appointed counsel laboring under an actual conflict of interest as he was the prosecutor who had charged and prosecuted Mr. Flores-Ramirez for the very same case in district and superior court?

D. *GROUNDS FOR DIRECT REVIEW*

REVIEW SHOULD BE GRANTED UNDER RAP 4.2(4), BECAUSE THE CASE INVOLVES FUNDAMENTAL, URGENT AND INTERLOCKING ISSUES OF BROAD PUBLIC IMPORT WHICH REQUIRE THIS COURT'S PROMPT AND ULTIMATE DETERMINATION

In a criminal case, our state guarantees the constitutional right to appeal. Article 1, § 22; *see State v. Tomal*, 133 Wn.2d 985, 989, 948 P.2d 833 (1997). Although most such review is done in the lower appellate courts, this Court will take direct review of a superior court decision in certain situations. RAP 4.2. One of those is when the case involves "a fundamental and urgent issue of broad public import which requires prompt and ultimate determination[.]"

RAP 4.2(a)(4).

This is just such a case. The issues presented involve the wholesale, systemic violation of the constitutional and rule-based pretrial rights of not just Mr. Flores-Ramirez but all the financially indigent criminally accused in Franklin county -and, apparently, in other counties as well.

Further, the people most affected are those like Mr. Flores-Ramirez, with little or no criminal history or charged with minor crimes. Like Mr. Flores-Ramirez, they are and will continue spending more time in jail pretrial without being given access to counsel -*before* the State has met its due process burden of proving guilt - than the Legislature has authorized a court to impose after conviction. Many are not just financially indigent but also members of other traditionally marginalized groups, like Mr. Flores-Ramirez, who is Hispanic and speaks only Spanish.<sup>5</sup>

This Court's prompt and ultimate determination of these issues will guide lower courts on their duties to the indigent criminally accused. It will clarify the role of those courts and

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<sup>5</sup>It is unclear based on the available record whether he also faced immigration concerns; the full record is being ordered.

others when a county's budgetary or staffing woes lead to violations of constitutional and rule-based pretrial rights.

Direct review is also essential because the systemic failures which caused the repeated violations of Mr. Flores-Ramirez' constitutional and rule-based rights still exist, are likely to recur, and appear to be happening across the state. Others like Mr. Flores-Ramirez are feeling the same systemically caused undue and improper coercion to plead just to get released.

This Court's prompt and ultimate determination is needed to clearly and firmly set guardrails around the pretrial rights of the financially indigent criminally accused. Otherwise, each county will continue to engage in piecemeal, inconsistent resolution of these issues, and people like Mr. Flores-Ramirez will continue to be deprived of their constitutional and rule-based rights in courts across the state.

- a. *The issues presented involve pretrial criminal procedures which this Court has recognized invoke significant public concern and have great impact across the state*

First, the issues presented are of urgent and broad public import and require the Court's prompt and ultimate

determination, because they all involve pretrial criminal procedures. This Court has recognized that such issues usually present significant public concern. *See, e.g., State v. Barton*, 181 Wn.2d 148, 152, 331 P.3d 50 (2014); *Westerman v. Cary*, 125 Wn.2d 277, 286, 892 P.2d 1067 (1994).

Indeed, the Court has addressed such issues even when technically moot because of their broad public impact, as well as the risk they would recur but escape review. *Westerman*, 125 Wn.2d at 286; *see also, Blomstrom v. Tripp*, 189 Wn.2d 379, 402 P.2d 831 (2017) (granting statutory writs of review regarding constitutionality of pretrial release condition).

The Court also recognized the importance of similar issues when it granted transfer review from the lower appellate court on the issue of whether Snohomish County courts were violating the state constitution in their pretrial “bail” procedures. *See Barton*, 181 Wn.2d at 149. It similarly took review to address whether Asotin county was violating the rights of the criminally accused by providing “counsel” who was not admitted to the bar. *See In re Personal Restraint of Lewis*, 200 Wn.2d 848, 523 P.3d 760 (2023).

More recently, this Court granted review in two cases

where, as here, the accused was deprived of counsel pretrial. *See, State v. Charlton*, 23 Wn. App. 2d 150, 515 P.3d 537 (2022), *review granted*, 200 Wn.2d 1025, 523 P.3d 1182 (2023); *State v. Heng*, 22 Wn. App. 2d 717, 512 P.3d 942 (2022), *review granted*, 200 Wn.2d 1025, 523 P.3d 1175 (2023). *Charlton* and *Heng* involve the related issues of whether a pretrial release hearing where bail is set is a “critical stage” of the criminal proceedings, and whether the failure to provide counsel at that stage is structural constitutional error or subject to some version of “constitutional harmless error” review. *See Charlton, supra; Heng, supra.*

While brought in different ways, each of these cases illustrates this Court’s recognition of the significant public importance of pretrial criminal court procedures. In each, the Court took review in order to perform a necessary oversight role to review such issues so as to uniformly define and protect the rights of the criminally accused.

This Court has also showed the importance of such procedures and their fairness by its active role in trying to improve them. For example, when research showed that CrR 3.2, the pretrial release rule, was being applied unfairly against



certain minorities and those in poverty, this Court rewrote it. *See, e.g., In the Matter of the Adoption of the Amendments to CrR 3.2, CrR 3.2.1., CrRLJ 3.2, and CrRLJ 3.2.1., Order No. 25700-A-721 (WSR 02-01-025) (Dec. 6, 2021).*<sup>6</sup>

Thus, this Court has repeatedly recognized the public importance of issues such as those presented here. Further, the Court has taken an active role in ensuring the pretrial constitutional and rule-based rights of the accused, by granting review in cases involving similar issues.

- b. *The issues presented involve apparently systemic, ongoing violation of the constitutional and rule-based rights of the financially indigent criminally accused including those like Mr. Flores-Ramirez from marginalized groups*

The issues here also are fundamental and urgent requiring this Court's "prompt and ultimate determination" under RAP 4.2(a)(4), because they involve repeated, apparently systemic and ongoing violations of the fundamental pretrial rights of the accused with a significant impact on the

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<sup>6</sup>Available at:

<http://apps.leg.wa.gov/documents/laws/wsr/2002/02/02-01-025.htm>  
Only after all other possible release conditions are explored may a court consider a financial condition ("bail), and then only after a trial court considers the actual finances of the accused. CrR 3.2(b)(4); CrR 3.2(d)(6); *see State v. Huckins*, 5 Wn. App. 2d 457, 468-69, 426 P.3d 797 (2018).

marginalized, like Mr. Flores-Ramirez - starting with the fundamental right to counsel.

The right to counsel under the Sixth Amendment and Article 1, § 22 has been described as the most important fundamental right, because it is through counsel that all other rights are ensured. *See Gideon v. Wainwright*, 372 U.S. 335, 344-45, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); *City of Seattle v. Ratliff*, 100 Wn.2d 212, 220, 667 P.2d 630 (1983). Indeed, appointed counsel is a necessary pillar of our “adversary” system without whose vigorous advocacy the system will fall. *See Penson v. Ohio*, 488 U.S. 75, 87-88, 109 S. Ct. 346, 102 L. Ed. 2d 300 (1988).

Even before the U.S. Supreme Court applied the Sixth Amendment right to counsel to the states in *Gideon*, it had already found a right to counsel grounded in the due process mandate of “fundamental fairness” for criminal proceedings. *See Powell v. Alabama*, 287 U.S. 45, 57, 53 S. Ct. 33, 77 L. Ed. 158 (1932). Deprivation of counsel to the criminally accused violates due process because it offends the “fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.” 287 U.S. at 57, *quoting, Hebert v.*

*State of Louisiana*, 272 U.S. 312, 316, 47 S. Ct. 103, 71 L. Ed. 270 (1926).

For this reason, the failure to provide appointed counsel at a critical stage of criminal proceedings is one of the very few “structural” constitutional errors which compel automatic reversal. *See Rose v. Clark*, 478 U.S. 570, 577-78, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986); *United States v. Cronin*, 466 U.S. 648, 657, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). This Court recently heard arguments in two cases expected to address whether that analysis retains currency or some version of constitutional “harmless error” should apply. *See Charlton, supra; Heng, supra*.

*Charlton* and *Heng*, however, will not resolve the issues here. In those cases, there was no counsel at the pretrial release hearing where bail was set; counsel was provided about two weeks later after which trial and conviction occurred. *See Charlton*, 23 Wn. App. 2d at 152; *Heng*, 22 Wn. App. 2d at 724. Those cases ask whether bail setting is a “critical stage” of the criminal proceedings for which counsel must be provided and whether failure to do so remains “structural” constitutional error or some form of “harmless error” can apply. *See Charlton*,

23 Wn. App. 2d at 155-70; *Heng*, 22 Wn. App. 2d at 724, 738-46.

Here, the case presents related issues regarding deprivation of counsel but the questions are different. Here, the delay in providing appointed counsel was not a few days or weeks - it was for months. So much time passed with so many broken promises that Mr. Flores-Ramirez asked to plead rather than have to wait for counsel any longer. Unlike in *Charlton* and *Heng*, the question of whether prejudice has to be shown to have occurred at a later trial and the currency of “structural” constitutional error is not dispositive here. There is a direct link between the deprivation of not just the right to counsel but other constitutional and rule-based rights and the entry of the constitutionally invalid plea.

Notably, *Charlton* and *Heng* support granting direct review here - and not only by demonstrating this Court’s concerns about providing guidance on pretrial criminal issues. This case involves Franklin county. *Charlton* is from Grays Harbor county. *See Charlton*, 23 Wn. App. 2d at 150. *Heng* occurred in Clark county. *Heng*, 22 Wn. App. 2d at 717.

Failure to provide counsel pretrial is thus neither new nor limited to Franklin county alone. *See also* Cameron Probert,

*Legal crisis: Tri-Cities officials race to fix lawyer shortage before criminal cases are dropped*, Tri-City Herald (May 7, 2023) (App. T) (Franklin county no attorneys as of March of 2023, waiting list by April was 80 felony cases); Cameron Probert, *Nonprofit threatens to sue Franklin County after dozens of suspects don't get attorneys*, Tri-City Herald (Aug. 27, 2023) (App. U); *see also*, Donald W. Meyers, *Attorney shortage affecting some charging decisions in Yakima County, prosecuting attorney says*, Yakima Herald-Republic (Feb. 27, 2023) (App. V) (Yakima county); Denver Pratt, *'Very troubling': Dozens in Whatcom County waiting for a public defender to be named*, Bellingham Herald (May 15, 2023) (App. W) (43 people without attorneys as of that date, at least two waiting more than a month).

As a result, prompt and ultimate determination by this Court will provide sorely needed guidance to more than just Franklin county about how to handle these challenging issues.

This case also involves the crucial question of whether the obligation to provide appointed counsel is satisfied by providing "counsel" who provides no argument and simply waives everything for a single appearance, as occurred (and is apparent practice) here. *See, e.g. State v. Anderson*, 19 Wn.

App. 2d 550, 562, 497 P.3d 880 (2021), *review denied*, 199 Wn.2d 1004 (2022) (the right to counsel “demands more than just access to a warm body with a bar card”). The county’s struggles around appointment of counsel have apparently led to hiring counsel with direct conflicts such as the former prosecutor here. At the least this shows that any conflict screening being done is inadequate; the record, while incomplete at this point, shows neither the court nor the current prosecutor raising any concern.

The violations and coercions below also included unsupported use of extreme physical “shackling.” Shackles have a long, shameful history of use to control and oppress people from marginalized communities. *See State v. Jackson*, 195 Wn.2d 841, 851, 467 P.3d 97 (2020). Any decision to use restraint in court even absent a jury must be based on an individualized inquiry involving the risks of the particular accused - an analysis required every time. *See State v. Clark*, 143 Wn.2d 731, 775, 24 P.3d 1006, *cert. denied*, 534 U.S. 1000 (2001); *Jackson*, 195 Wn.2d at 854-55.

Important to this case, shackling can exacerbate hidden or implicit bias against people from marginalized communities

like Mr. Flores-Ramirez, causing even greater prejudice to the accused. *Jackson*, 195 Wn.2d at 856-57. Yet the appointed “counsel” provided for the May 26 hearing and the former prosecutor appointed for the plea and sentencing saw the government restraining their client in chains and just “reserved.” App. C; App. E.

The deprivation of counsel for months after charging also violates due process notions of fundamental fairness as well as rules of this Court. This Court explicitly crafted rules providing for counsel pretrial (CrR 3.2.1), including during arraignment. *See*, CrR 4.1(d). Those rules are supposed to ensure a speedy trial. *See* CrR 3.3(b). In Franklin county, people like Mr. Flores-Ramirez are spending so long without being provided counsel that “speedy trial” is past.

Even with counsel, there are hardships associated with pretrial detentions and bail in general; being hampered in preparing a defense, loss of job, financial instability, stress on relationships, parenting concerns,<sup>7</sup> and suffering the stigma of incarceration before conviction. *See State v. Perrett*, 86 Wn. App. 312, 318, 936 P.2d 526, *review denied*, 133 Wn.2d 1019

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<sup>7</sup>Mr. Flores-Ramiez has several children. *See* App. R.

(1997).

Here, those hardships were being suffered by Mr. Flores-Ramirez without counsel for so long that speedy trial and the standard range had run. Through it all, he was provided with an interpreter (usually by video) - but the difficulties of navigating the legal system in a language you do not speak could only have exacerbated his stress.

Further, although Franklin was the first county in Washington state to have a majority Hispanic population, racism against non-whites has a long history there and Hispanics have suffered its effects. *See* Ajsa Suljic, *Franklin County Profile*, Washington State Department of Employment Security (2022) (App. X); Eric Rosani, 'A very long shadow.' *Thousands in Tri-Cities still live in homes with racist covenants*, Tri-City Herald (Feb. 24, 2023) (App. Y); *see also*, *Portugal v. Franklin County*, 1 Wn.3d 629, 643, 530 P.3d 994 (2023) (noting the historical use of "literacy" and other racist voting barriers used to discriminate against Hispanic voters in Franklin county). It is especially important that this Court grant direct review to provide needed oversight where, as here, the systemic errors impact people from marginalized communities



like Mr. Flores-Ramirez.

Notably, given their relative lack of resources and power, many will be unwilling to draw attention to their plight. Many may also face immigration consequences about which they are unaware. It is unclear whether that includes Mr. Flores-Ramirez; the record will further tell.

There is no question that there is administrative burden in ensuring that the constitutional and rule-based rights of the accused are honored. But the cost of protecting a right cannot justify its total denial. See *Bounds v. Smith*, 430 U.S. 817, 825, 52 L. Ed. 2d 72, 97 S. Ct. 1491 (1977); *Whitney v. Buckner*, 107 Wn.2d 861, 734 P.2d 485 (1987).

People accused of crimes are suffering the most flagrant deprivations of their fundamental and rule-based rights as a result of broken criminal justice systems. This Court should grant direct review under RAP 4.2(a)(4).

E. *CONCLUSION*

Mr. Flores-Ramirez was deprived of his constitutional and rule-based rights until he entered a coerced plea just to be set free. He was punished before the State ever met its due process burden of establishing guilt. Unfortunately, he is not alone.

This Court should grant direct review under RAP 4.2(a)(4). The prompt and determinative resolution of the urgent and significant public issues presented will vindicate the rights of Mr. Flores-Ramirez but also is needed to ensure the rights of others like him across the state, and to give guidance to the many lower courts struggling with similar concerns.

DATED this 27th day of September, 2023.

ESTIMATED WORD COUNT: 3,976.

Respectfully submitted,



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