

No. 25-863

In the Supreme Court of Appeals of  
West Virginia

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*State of West Virginia ex rel. Abraham M. Ashton,*  
*Petitioner,*

v.

*Larry Thompson, Berkeley County Magistrate, Dottie Yost, Berkeley County  
Magistrate, Hon. Debra McLaughlin, Chief Judge of the 27th Judicial Circuit,  
Maxin Sloane Summers, and Kaysee Kirkland III,*  
*Respondents.*

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On Application for Writ of Mandamus and Writ of Prohibition from the  
Twenty-Seventh Judicial Circuit, Berkeley County, West Virginia

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**Motion for Leave to File Brief of *Amicus Curiae* National Association of  
Criminal Defense Lawyers in Support of Petitioner**

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## MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

Pursuant to West Virginia Rule of Appellate Procedure 30, the National Association of Criminal Defense Lawyers (NACDL) respectfully moves for leave to file the accompanying *amicus brief* in support of petitioner. The parties consent to NACDL's filing its *amicus* brief.

NACDL is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes or misconduct. NACDL is dedicated to advancing the proper, efficient, and fair administration of justice. To that end, NACDL files many *amicus* briefs each year in federal and state courts in cases presenting issues important to criminal defense lawyers, those facing criminal charges, and the criminal legal system as a whole.

The attached *amicus* brief would be of assistance to the Court in resolving the important questions presented by the petition. NACDL's deep experience with criminal-defense issues allows it to offer guidance and commentary on indigent-defense issues in states all across the country. And the brief sheds further light on the complex issues of, among other things, statutory construction and constitutional procedure that will drive the result here.

All parties were given notice of NACDL's intention of filing an *amicus* brief more than five days before its filing date, and all parties have consented to the filing of this brief. W. Va. R. App. Proc. 30(a), (b). *Amicus curiae* is filing this brief within

a reasonable time of its knowledge of the filing of the petition. W. Va. R. App. Proc. 30(d).

*Amicus curiae* therefore respectfully requests that this Court grant leave to file this brief, a copy of which is attached as Exhibit A.

Dated: February 13, 2026

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that, on February 13, 2026, a true and correct copy of this motion, along with the accompanying *amicus curiae* brief, was served via File & ServeXpress.

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# **Exhibit A**

No. 25-863

# In the Supreme Court of Appeals of West Virginia

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*State of West Virginia ex rel. Abraham M. Ashton,*  
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v.

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## **Brief of *Amicus Curiae* National Association of Criminal Defense Lawyers in Support of Petitioner**

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## INTEREST OF *AMICUS CURIAE*\*

The National Association of Criminal Defense Lawyers, or NACDL, is a non-profit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes or misconduct. NACDL was founded in 1958 and has more than 10,000 members nationwide, with thousands more who are members of its affiliate organizations. NACDL is dedicated to advancing the proper, efficient, and fair administration of justice. To that end, NACDL files many amicus briefs each year in federal and state courts, seeking to provide assistance in cases presenting issues important to criminal defense lawyers, those facing criminal charges, and the criminal legal system as a whole.

### INTRODUCTION

Respondents have adopted a policy that requires lawyers—including those who lack criminal defense experience, who have never volunteered to take on criminal cases, and who honestly believe that they could not do so competently—to represent defendants facing criminal charges in Berkeley County. This case is about whether that practice complies with West Virginia law. It does not. The practice also raises serious constitutional concerns that should be studiously avoided. This Court should issue a writ prohibiting the practice and vacating the order that instituted it.

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\* No counsel for any party authored this brief in whole or in part or made a monetary contribution intended to fund its preparation or submission. No person other than *amicus curiae*, its members, or its counsel made any monetary contribution to the preparation or submission of this brief. W. Va. R. App. P. 30(e)(5). Prior to the filing of this brief, counsel for *amicus* gave notice to counsel for the parties under Rule 30(b); all parties have consented to the filing of this brief under Rule 30(a).

Abraham Ashton is a real estate lawyer in Martinsburg, West Virginia. Pet. 1, 7-9. His practice is mostly transactional—assisting clients in real estate and contract-related matters—and his courtroom experience is limited to quiet-title petitions, tax sale issues, and special-commissioner appointments. *Id.* Mr. Ashton has relied on this expertise to provide civil pro bono services to those in need in his community. AR57. But Mr. Ashton is not a trial lawyer and, at least before 2025, he had never once represented a criminal defendant in twenty years of practice. *Id.* at 2-4.

But in mid-2025, Berkeley County magistrates began appointing Mr. Ashton to represent criminal defendants. Pet. 8. Mr. Ashton promptly moved to withdraw from the cases on multiple grounds. *E.g.*, AR15-17, 75-80. For one thing, he had never consented to take on criminal representations. *Id.* at 57. For another, he “has no criminal experience,” “does not understand the scope” of criminal matters, is unfamiliar with “the nature of the proceedings,” and cannot anticipate or weigh “potential outcomes” for defendants—all of which lead him to believe he is “not competent” in criminal law. *Id.* at 76-78.

On two occasions, however, Berkeley County magistrates rejected Mr. Ashton’s requests to withdraw. *See* AR4, 83. They did not question the sincerity of Mr. Ashton’s concerns about his competence. But they concluded those concerns were insufficient because the individual defendants were “not in jail” and because the court would “grant a continuance to allow [Mr. Ashton] to prepare.” *Id.* at 4.

Mr. Ashton’s appointments and the denials of his motions to withdraw were purportedly authorized by an administrative order issued in 2024 by the Chief Judge

of what was then the Twenty-Third Judicial Circuit. AR59-63. The order provides that, because “in criminal and post-conviction habeas corpus cases” Berkeley County has “considerably more accused defendants than lawyers who have chosen to practice criminal law,” “as necessary, any attorney licensed to practice law in West Virginia who practices in Berkeley [County] may be appointed to any criminal” case. *Id.* at 60-61. It further states that “[d]eclination of appointments will be considered on a case-by-case basis.” *Id.* at 61. As a result, magistrates in Berkeley County are appointing not only public defenders and panel volunteers to represent eligible defendants, but also unwilling attorneys who have no experience in criminal law and serious concerns about their ability to provide criminal defendants the representation they deserve.

Respondents’ practice—and the administrative order enabling it—violates West Virginia law. Following *Gideon v. Wainwright*, 372 U.S. 335 (1963), West Virginia adopted a statutory attorney-appointment scheme, and today that scheme features a detailed set of provisions designed to ensure that people facing criminal charges carrying the possibility of imprisonment and countless other serious consequences receive adequate and effective representation. W. Va. Code § 29-21-9. That statutory scheme does not authorize the process that respondents have deployed.

Allowing respondents’ practice to continue would raise significant constitutional and ethical issues that this Court should avoid. The practice threatens to deprive defendants of the competent representation that the West Virginia and U.S. Constitutions guarantee—after all, as this Court has previously explained in remarkably prescient terms for this case, the “constitutional right to counsel is not satisfied

by the compelled or random appointment of a specialist in real estate law,” *Jewell v. Maynard*, 181 W.Va. 571, 577, 383 S.E.2d 536, 542 (1989). And for the lawyers implicated, the policy runs up against the Takings Clause and the Rules of Professional Conduct. Concerns about costs or convenience are never viable reasons to threaten constitutional rights in this matter—especially since, as nationwide experience shows, there are many more viable ways to address issues of attorney shortages while simultaneously respecting the right to competent counsel.

These issues are of paramount importance. A criminal defense attorney provides guidance to clients in the most vulnerable moments of their lives. Inexperienced or overburdened lawyers lack the capacity to provide that critical guidance. And lawyers unfamiliar with criminal law are likely to miss issues—because they don’t know, for instance, how to spot unconstitutional searches, challenge substandard forensic analysis, or pursue fruitful avenues of investigation—which in turn will hamstring their ability to develop a robust defensive strategy and litigate (and negotiate) in their clients’ best interests. This leaves the defendants they are appointed to represent vulnerable when faced with life-changing decisions such as whether to enter a cooperation agreement, exercise their right to trial by jury, or testify in their own defense. In the end, forcing inexperienced attorneys to represent criminal defendants exposes clients to unjust plea deals, wrongful conviction, and lengthy incarceration and undermines crucial public confidence in the fairness and accuracy of the criminal legal system.

What’s more, the consequences of criminal conviction revibrate through virtually every aspect of a defendant’s life. Loss of liberty is, of course, among the most

significant. But people also may face loss of professional licensure or employment, ineligibility for public housing and other benefits, disenfranchisement, disqualification from jury service, loss of child custody and visitation rights, firearm bans, and more. Other jurisdictions have undertaken efforts to address attorney shortages that safeguard the right to counsel. But respondents' decision to contravene West Virginia law by appointing unwilling and inexperienced attorneys is not an acceptable solution. This Court should issue writ relief.

## **ARGUMENT**

### **I. Writ relief is warranted under West Virginia law.**

Criminal defendants are guaranteed the right to effective representation of counsel under the West Virginia and U.S. Constitutions. The West Virginia Legislature has codified this right: when an eligible defendant cannot afford counsel, the state must appoint a public defender or voluntary panel attorney to take their case. W. Va. Code § 29-21-1. Nothing in this system permits appointing lawyers, like Mr. Ashton, who disclaim expertise and capacity to represent criminal defendants.

#### **A. The West Virginia and U.S. Constitutions enshrine the right to counsel in criminal cases.**

The right to counsel in criminal proceedings is among the brightest stars in the constitutional constellation. That right was embodied in this State's first constitution, *see* W. Va. Const. art. II, § 8 (1863) ("In all such trials the accused shall . . . have the assistance of counsel for his defense), and maintained its place in the second, *see* W. Va. Const. art. III, § 14 (1872) (same). The U.S. Constitution likewise guarantees that,

“[i]n all criminal prosecutions,” “the accused shall enjoy the right to have the Assistance of Counsel for his defence.” U.S. Const. amend. VI.

This guarantee does not hinge on a defendant’s means. As this Court has recognized, the “noble ideal” that “every defendant stands equal before the law” “cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.” *State ex rel. May v. Boles*, 149 W.Va. 155, 159, 139 S.E.2d 177, 180 (1964) (quoting *Gideon*, 372 U.S. at 344). “[L]awyers in criminal courts are necessities, not luxuries.” *Gideon*, 372 U.S. at 344. Hence, those who face “economic barrier[s]” or are “otherwise unable to afford adequate legal counsel” must have an attorney appointed on their behalf. *Jewell*, 181 W.Va. at 576, 383 S.E.2d at 541; *see Gideon*, 372 U.S. at 344 (“in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him”). This “fundamental and essential” right to counsel ensures defendants are treated fairly and impartially under the law. *Gideon*, 372 U.S. at 344.

It is also not enough for *any* counsel to be seated at counsel table; the Constitution guarantee *competent* representation for criminal defendants. That is because lawyers are “the means through which the other rights of the person on trial are secured.” *United States v. Cronin*, 466 U.S. 648, 653 (1984). The risk that inexperienced or otherwise incapable counsel will make “inexcusable mistake[s] of law” or other predictable errors that jeopardize those fundamental rights is grave. *Hinton v. Alabama*, 571 U.S. 263, 275 (2014). The “special value” of legal representation, then, “is the right to the *effective* assistance of counsel.” *Cronin*, 466 U.S. at 654 (emphasis added).

To ensure that competent attorneys are appointed in criminal cases, courts must consider a lawyer’s expertise, capacity, and interest. “Simply because one has a license to practice law does not make one competent to practice in every area of the law.” *Jewell*, 181 W.Va. at 577, 383 S.E.2d at 542. Someone who is “neither comfortable in court nor knowledgeable about criminal law” lacks the knowledge and skills needed to provide effective representation in criminal cases. *Id.* at 576, 383 S.E.2d at 541. And as this Court has recognized, requiring “*all* practicing lawyers . . . to accept appointments”—however “expedient” that practice might be—runs “contrary to the great weight of authority” in this State. *Id.* at 580, 383 S.E.2d at 545 (emphasis added); *see Cunningham v. Sommerville*, 182 W.Va. 427, 432, 388 S.E.2d 301, 306 (1989).

**B. West Virginia statutes safeguard the right to effective assistance of counsel.**

West Virginia statutes codify this right to counsel. The Legislature recognized that “the state is required to provide high quality legal assistance to indigent persons who would be otherwise unable to afford adequate legal counsel.” W. Va. Code § 29-21-1. And it underscored that “providing legal representation to those who face an economic barrier to adequate legal counsel will serve the . . . rights and privileges guaranteed to all citizens by the Constitution of the United States of America and the Constitution of the State of West Virginia.” *Id.*

Over time, a dual-track system emerged, comprising (1) public defenders and (2) volunteer panel attorneys. W. Va. Code §§ 29-21-8, -13 (establishing a “public defender corporation” in “each judicial circuit,” along with a mechanism to fund them); *id.* § 29-21-9(a) (directing each circuit court to “establish and maintain regional and

local panels of private attorneys-at-law who are available to serve as counsel for eligible clients”). Lawyers in this second category (panel attorneys) volunteer for that role by “informing the court” of their willingness to accept criminal appointments. *Id.* Recognizing that an attorney’s willingness and ability to take on particular matters affects how effective the attorney will be in those matters, the Legislature provided that “[a]n agreement to accept cases generally or certain types of cases particularly may not prevent a panel attorney from declining an appointment in a specific case.” *Id.*

To ensure that only skilled counsel are assigned to represent criminal defendants, the Legislature mandated a detailed “order of preference” for appointments:

- (1) [W]here a public defender office is in operation, the judge shall appoint the public defender office unless an appointment is not appropriate due to a conflict of interest or unless . . . the existing caseload cannot be increased . . . ;
- (2) If the public defender office is not available for appointment, the court shall appoint one or more panel attorneys from the local panel;
- (3) If there is no local panel attorney available, the judge shall appoint one or more panel attorneys from the regional panel;
- (4) If there is no regional panel attorney available, the judge may appoint a public defender office from an adjoining circuit if such public defender office agrees to the appointment;
- (5) If the adjoining public defender office does not accept the appointment, the judge may appoint a panel attorney from an adjoining circuit; or
- (6) If a panel attorney from an adjoining circuit is unavailable, the judge may appoint a panel attorney from any circuit.

W. Va. Code § 29-21-9(b).

Under the statute, judges must prioritize appointing local public defenders and local panel attorneys before going down the list and considering alternatives. *See Terry v. Sencindiver*, 153 W.Va. 651, 657, 171 S.E.2d 480, 483 (1969) (“The Court has

held on numerous occasions that the word ‘shall’ connotes a mandatory duty.”); *State ex rel. Barber v. Cline*, 182 W.Va. 669, 671, 391 S.E.2d 359, 361 (1990) (“Circuit courts ordinarily must follow the attorney-appointment sequence set forth in [the statute].”). The only permitted exception—when “the appointing judge may alter the order in which attorneys are appointed”—is “if the case requires particular knowledge or experience on the part of the attorney to be appointed.” W. Va. Code § 29-21-9(c). Whenever a judge “alters the order of appointment as set forth” in the statute, the court must provide its “reasons” in “the order of appointment.” *Id.* Taken together, these detailed provisions reveal a scheme that is carefully tailored to ensure the expertise, willingness, and competence of appointed attorneys.

Consistent with that design, the statute does not authorize appointing lawyers who are neither public defenders nor on local or regional panels to represent criminal defendants. The Legislature made that crystal clear in 2008. Before then, the statute provided that whenever “there is no public defender, or assistant public defender, local panel attorney or regional panel attorney available,” courts could “appoint one or more qualified private attorneys to provide representation, and such private attorney or attorneys shall be treated as panel attorneys for that specific case.” W. Va. Code § 29-21-9(c) (1990). But in a 2008 amendment, the Legislature removed that language from the law. W. Va. Code § 29-21-9(c) (2008). Today, therefore, attorneys who are not public defenders and who have not volunteered for panels cannot be pressed into representations in criminal cases.

**C. Respondents' practice violates West Virginia law.**

West Virginia's statutory scheme is designed to ensure that only competent, willing attorneys with the necessary expertise in criminal law will be appointed to represent criminal defendants. Forced appointments like Mr. Ashton's violate that scheme in two major ways.

*First*, nothing in the statute allows judges to appoint lawyers who are neither public defenders nor panel attorneys to represent criminal defendants. Respondents have thus violated West Virginia law by appointing Mr. Ashton (and others like him) to represent criminal defendants despite the fact he is not a public defender and has never requested to join a panel. The statute provides that lawyers may become panel attorneys only "by informing the court." W. Va. Code § 29-21-9(a). But Mr. Ashton has done no such thing—indeed, he has expressly disclaimed any interest—and is thus not a panel attorney, either. AR4; *see Jewell*, 181 W.Va. at 580, 383 S.E.2d at 545 (noting that it "runs contrary to the great weight of authority" to force practicing lawyers accept appointments); *Cunningham*, 182 W.Va. at 429, 388 S.E.2d at 303 ("We did not conclude in [previous cases] that each person licensed to practice law in this state is required to accept criminal appointments.").

Indeed, even where attorneys have joined a panel and so agreed "to accept cases generally," courts "*may not* prevent [them] from declining an appointment in a specific case." W. Va. Code § 29-21-9(a) (emphasis added). Attorneys—particularly solo practitioners, as Mr. Ashton is, or members of small firms with fewer resources—face burdens on their time that might prevent them from taking on additional clients and

delivering the competent representation the law requires. Panel attorneys in those situations must be able to decline representation as necessary, since a “lawyer who ‘doesn’t have his heart in it’ can lose a jury trial in a hurry.” *Jewell*, 181 W.Va. at 580, 383 S.E.2d at 545. Respondents’ refusal to allow Mr. Ashton to withdraw from his appointments in such circumstances runs contrary to that dictate, too.

*Second*, the Berkeley County administrative order violates the statutory order of operations. When a public defender in a circuit is unavailable, the circuit judge “shall” appoint, in order, a local panel attorney, regional panel attorney, public defender from an adjoining circuit, panel attorney from an adjoining circuit, or panel attorney from any circuit. W. Va. Code § 29-21-9(b). But under the administrative order, if a local panel attorney is unavailable, “any attorney licensed” in West Virginia “who practices in Berkeley [County]” can then be conscripted. AR61.

The scheme on which the Legislature settled is no trifling matter. It provides a critical guarantee that attorneys appointed to represent criminal defendants possess both the skill and willingness to do so. As a result, this Court has previously awarded writ relief to correct a violation of Section 29-21-9(b)’s appointment sequence. *See Barber*, 182 W.Va. at 673, 391 S.E.2d at 363. The result should be no different here. A writ is necessary to align respondents’ appointment processes with the Legislature’s comprehensive appointment scheme.

**II. Respondents’ practice raises serious constitutional concerns and is unjustified in all events.**

Respondents’ practice of forcing appointments upon unwilling attorneys who lack the experience and knowledge required to handle criminal cases is on a collision

course with the West Virginia and U.S. Constitutions. That provides even greater reason to enforce the limits the Legislature enacted. *See State v. Mullens*, 221 W.Va. 70, 91, 650 S.E.2d 169, 190 (2007). And the justifications respondents have offered for their practice are no license to override constitutional protections.

**A. Respondents’ practice creates an unacceptably high risk of depriving criminal defendants of the right to effective counsel.**

Jeopardizing the right to counsel—among the most cherished guarantees of our constitutional order—is no idle concern. “Society as a whole” “depends upon the role of defense counsel” to counterbalance the prosecution and “secure [our] ordered system of liberty and justice, as ordained by [the] Constitution.” *Mooney v. Frazier*, 225 W.Va. 358, 369, 693 S.E.2d 333, 344 (2010) (quoting *Dziubak v. Mott*, 503 N.W.2d 771, 777 (Minn. 1993)). Even a defendant with “a perfect” defense or alibi could risk conviction simply because he does “not know how to establish his innocence.” *Gideon*, 372 U.S. at 345. Representation of counsel is therefore imperative to “to achieve a fair system of justice.” *Id.* at 344.

As this Court has made “clear,” this right entitles a defendant “to the *effective* assistance of counsel.” *Jewell*, 181 W.Va. at 577, 383 S.E.2d at 542. Capable, zealous lawyers can identify strengths in their client’s case and exploit weaknesses in the State’s case. That in turn serves not only to protect each defendant’s rights, but more broadly to “avoid prosecutorial overreach.” *Id.* But this “constitutional right to counsel is not satisfied by the compelled or random appointment” of an unwilling attorney—one, for instance, who like Mr. Ashton is “a specialist in real estate law.” *Id.*

The “compelled” and “random” appointment of lawyers who specialize in property, contracts, trusts and estates, or divorce law, but who lack the knowledge and expertise required to go toe-to-toe with the State in the context of a criminal prosecution carrying serious consequences, would run roughshod over the constitutional right to counsel. Although counsel might be “available to assist the accused during trial” as a literal matter, the likelihood that he “could provide effective assistance is so small that a presumption of prejudice” may be appropriate. *Cronic*, 466 U.S. at 659; see *Powell v. Alabama*, 287 U.S. 45, 52-53 (1932). Indeed, “representation cannot be coerced in circumstances in which the designated defense counsel cannot serve competently.” *Lofton v. Proconier*, 487 F.2d 434, 436 (9th Cir. 1973).

The right to counsel is no right at all in a system that forces reluctant and unqualified lawyers to represent indigent defendants. A lawyer’s role is to “serve as their clients’ counselor and advocate with courage,” and to “render effective, high-quality legal representation with integrity.” ABA, Criminal Justice Standards for the Defense Function std. 4-1.2(b) (4th ed. 2017), <https://tinyurl.com/3u7kh55v>. But lawyers who lack the experience or conviction to represent a criminal defendant can hardly be expected to provide the zealous representation necessary to safeguard a criminal defendant’s rights.

Take, for example, the plea-bargaining process, through which more than 95% of charges in the federal and state systems are resolved. NACDL, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* 14 (2018), <https://tinyurl.com/4kx7ysfu>; Turner, *Plea Bargaining*, in 3 *Reforming*

Criminal Justice: Trial and Pre-Trial Processes 73 (Luna ed. 2017). Prosecutors have “exclusive access to information and unbridled discretion” in that process, so they wield significant power “to dictate the resolution” of criminal cases. Bright & Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 Yale L.J. 2150, 2158 (2013). Given that inherent imbalance, criminal defendants stand to suffer without defense counsel staunchly committed to effectively representing them—whether that be due to lack of knowledge, capacity, or experience. See Roberts, *Effective Plea Bargaining Counsel*, 122 Yale L.J. 2650, 2653 (2013) (“[I]t is difficult to conceive of a meaningful right to counsel if counsel is not required to function effectively.”).

The consequences of ineffective counsel can be life-altering. Criminal prosecutions threaten the most serious invasion of a person’s liberty: imprisonment. And even beyond imprisonment lies an array of punishments—probation, fines, suspended licenses, loss of employment, disqualification from benefits, loss of firearm rights, immigration consequences, loss of child custody, loss of a home, and more. Plus, because criminal records are widely available, conviction for even petty offenses can carry substantial social stigma. King, *Juries, Democracy, and Petty Crime*, 24 U. Pa. J. Const. L. 817, 836-37 (2022). This is why a defendant is entitled to counsel whenever their “liberty is in jeopardy,” regardless of “the degree of the crime” at issue or “the character of the court” in which they appear. *Bullett v. Staggs*, 162 W.Va. 199, 201, 250 S.E.2d 38, 40 (1978).

Respondents make light of these concerns. They suggest, for example, that “grant[ing] a continuance” would be sufficient to allow an appointed attorney like Mr.

Ashton to “prepare” to take on the representation. AR4. But a defendant ought not be expected to wait, with the weight of pending criminal charges hanging over his head no less, while a real-estate lawyer scrambles to learn criminal law and procedure. Plus, one would imagine that, during that long wait, other capable and willing attorneys well could become available.

Respondents are also wrong to suggest that a client’s pre-trial release moves the needle. AR4. That a person is not imprisoned *now* does not prevent their bail status from changing during the life of the case, nor will it protect them from a jail sentence or other serious consequences upon conviction. Ultimately, if the State believes that a person’s supposed wrongdoing is so minor or the evidence of guilt so attenuated that the courts ought not concern themselves with guaranteeing him qualified and willing counsel, the solution is to refrain from embroiling him in a criminal prosecution that could strip him of his liberty—not, as respondents seem to think, to suppress his constitutional right to competent counsel as insufficiently important.

**B. Respondents’ practice also raises Takings Clause and ethical concerns.**

Respondents’ practice also stands to threaten the rights of still another category of institutional actors: the lawyers themselves.

The Takings Clause guarantees that “private property [shall not] be taken for public use, without just compensation.” U.S. Const. amend. V. As this Court has recognized, the forcible appointment of attorneys can constitute a taking if it impedes the lawyer’s ability to support herself. *See Jewell*, 181 W.Va. at 581, 383 S.E.2d at 546.

Respondents' practice also creates serious tension with the duties a lawyer owes his client under the Rules of Professional Conduct. Under Rule 1.1, for instance, lawyers like Mr. Ashton are duty-bound to "provide competent representation to a client," which "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." W. Va. R. Pro. Conduct 1.1. Whether a lawyer has "requisite knowledge" turns on, among other factors, "the relative complexity and specialized nature of the matter, the lawyer's general experience, [and] the lawyer's training and experience in the field in question." *Id.* at cmt. 1.

These ethical obligations are at their apex when the lawyer's client is facing criminal conviction with all its attendant consequences. "Criminal law is a demanding, rapidly changing and complex specialty" that requires specific training and expertise. *Jewell*, 181 W.Va. at 577, 383 S.E.2d at 542. Trained defense attorneys possess a deep understanding of substantive criminal law and procedure. They can effectively and quickly spot improper searches and seizures, inconsistent testimony, uncounseled confessions, or problematic chains of custody. They can identify evidentiary gaps and find answers through conversations with their clients and specialized fact investigations. And they can wield this expertise in different ways, from convincing a prosecutor to extend a more favorable plea offer, to securing suppression of inadmissible evidence pre-trial, to crafting a winning trial strategy, to preserving and later vindicating rights on appeal.

Even misdemeanor prosecutions, which at first blush might seem straightforward to defend against, often implicate highly technical and complex areas of law

requiring experienced and skilled attorneys. A case involving simple possession of drugs, for example, requires comprehensive knowledge of Fourth Amendment search-and-seizure law; awareness of current and emerging technologies like automated license plate readers, digital device searches, or cell-site simulators, plus the ever-shifting landscape of judicial decisions confronting those technologies; and intimate familiarity with forensic science, including best practices with field test kits and lab analyses. *See, e.g., Defending Modern Drug Cases Seminar*, NACDL, <https://tinyurl.com/4ywxmrv9> (last visited Feb. 12, 2026) (upcoming four-day seminar exploring these sorts of issues). To perform competently and be effective on behalf of their client, attorneys must possess substantial knowledge sufficient to the task. Non-criminal attorneys who lack the time, resources, or interest in developing that expertise will not meet that vital standard.

And when an attorney specifically tells a court that he lacks the competence, time, or willingness to represent a criminal defendant, the court should pay heed—not force the attorney into an ethical bind. Mr. Ashton provides a paradigmatic example. As he sees it, his “lack of competence combined with the limited time and resources” he has to study (as a solo practitioner) “make conditions ripe for malpractice.” AR76. These limitations unquestionably will hinder Mr. Ashton’s ability to provide competent counsel to his clients consistent with his ethical duties.

This would not be the first time this Court has intervened to protect attorneys from coerced criminal representation that could jeopardize their ethical obligations. In *Cunningham*, this Court awarded a writ of prohibition and barred a trial court from

forcing an in-house attorney to represent an indigent criminal defendant on the ground that then-Rule 6.2(b) of the Rules of Professional Conduct forbade in-house counsel from engaging in the separate practice of law. 182 W.Va. at 431, 388 S.E.2d at 305. Here, too, those sorts of ethical concerns firmly counsel against respondents' efforts to evade the West Virginia statutes governing appointment.

**C. Respondents' practice is unjustified, particularly in light of more effective tools to address attorney shortages.**

The administrative order's attempt to justify the forced appointment of unwilling lawyers with no experience in criminal law is unavailing. The order highlights that there are "considerably more accused defendants than lawyers who have chosen to practice criminal law." AR60. But practical concerns are simply no justification to "inter a constitutional right." *Ramos v. Louisiana*, 590 U.S. 83, 110-11 (2020); see also *State v. Citizen*, 898 So.2d 325, 336 (La. 2005) (holding that "budget exigencies cannot serve as an excuse for the oppressive and abusive extension of attorneys' professional responsibilities").

The administrative order's justification does not hold weight even on its own terms. Jurisdictions nationwide are confronting attorney shortages and budgetary shortfalls that jeopardize access to quality representation in criminal cases. But while these struggles are, unfortunately, not unique to Berkeley County, respondents' attempted solution—forcing attorneys who lack the experience, competence, and willingness to represent criminal defendants into such representations—is an outlier.

There are other solutions to respondents' concerns, though, that do *not* pose such a serious risk of violating constitutional rights. Across the country, for example,

jurisdictions are increasing long-stagnant assigned counsel rates to help retain attorneys who might otherwise leave panel lists, encourage already-active attorneys to increase their caseload, or draw attorneys back to the panel who had previously departed.<sup>1</sup> Other states have offered loan forgiveness to attorneys who agree to represent underserved populations.<sup>2</sup> Still others provide free access to research tools and educational trainings.<sup>3</sup> These measures help build the infrastructure needed to sustain public defense services, and in turn safeguard criminal defendants' constitutional rights.

Many states also have chosen to place competence at the forefront of indigent defense. Michigan, for instance, requires that “[d]efense counsel’s ability, training, and experience match the nature and complexity of the case to which he or she is appointed” and that counsel “have attended continuing legal education relevant to counsels’ indigent defense clients.” Mich. Comp. Laws § 80.991(2). In Ohio, lawyers “appointed to represent indigent clients in misdemeanor cases must have . . . completed a minimum of six hours of continuing legal education” within two years prior to appointment, and for felony cases, “a minimum of twelve hours.” Ohio Admin.

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<sup>1</sup> See, e.g., Va. Code § 19.2-163; Wis. Stat. § 977.08(4m)(e); S.D. Unified Jud. Sys., Court-Appointed Attorney Guidelines 8 (2025), <https://tinyurl.com/5n8zkxsu>.

<sup>2</sup> Blake, *Attorney Shortage Leads One State to Offer Student Loan Relief*, Newsweek (Feb. 2, 2024); <https://tinyurl.com/bkweej7t>.

<sup>3</sup> *FAQs for Attorneys*, Me. Comm’n on Pub. Def. Servs., <https://tinyurl.com/449tudch> (last visited Feb. 12, 2026).

Code 120-1-10(B)(1), (D)(1). In Virginia, whenever public defenders and panel attorneys are unavailable to take on representation, “the court may appoint” only attorneys who have demonstrated “an appropriate level of training and experience.” Va. Code Ann. § 19.2-159. Similarly, in Georgia, appointed attorneys “shall have such experience or training in the defense of criminal cases as is necessary in light of the complexity of the case to which he or she is appointed and shall meet such qualifications and standards for the representation of indigent defendants as are established by the council.” Ga. Code Ann. § 17-12-22. Indeed, West Virginia itself has sought to ensure attorney competence by limiting those who can be appointed to represent a criminal defendant to those who would exhibit the requisite experience and capacity. *See supra* at 7-9.

To be sure, if courts are concerned about whether criminal defendants are receiving the representation that the Constitutions guarantee them, they need not stand idly by. This Court has engaged with the Legislature directly on the very topic before. For instance, it “held that the [indigent-defense] system in effect in 1976 was unconstitutional because rates of pay for indigent work were so low and the volume of appointed cases so burdensome that the system took lawyers’ property without just compensation.” *See Jewell*, 181 W.Va. at 573, 383 S.E.2d at 538 (citing *State ex rel. Partain v. Oakley*, 159 W.Va. 805, 814, 227 S.E.2d 314, 322-23 (1976)). The Court chose to “delay[] the entry of the order to permit the legislature to adopt a suitable alternative system.” *See id.* In response, the Legislature replaced the previous, flat-fee funding scheme with hourly rates. *Id.* And within a decade, when the Legislature

recognized that these reforms remained inadequate, it created “Public Legal Services,” which for the first time “authoriz[ed] experiments with new, salaried, public defenders.” *Id.* When necessary to give effect to constitutional rights, the judiciary can and should “point[] that out to the legislature,” *Jewell*, 181 W.Va. 580, 383 S.E.2d at 545, including by granting writ relief.

What courts cannot do, though, is contravene a reticulated legislative scheme like the one here and, in so doing, jeopardize criminal defendants’ constitutional rights. Assigning inexperienced, overburdened attorneys who must learn the relevant area of law from scratch is, in some ways, no better than failing to appoint counsel at all. “When a public defender or appointed counsel is a lawyer in name only, without the time and resources to deliver competent representation, the issue is not effective assistance of counsel; it is nonrepresentation.” Backus & Marcus, *The Right to Counsel in Criminal Cases: Still a National Crisis?*, 86 Geo. Wash. L. Rev. 1564, 1601 (2018). Respondents’ practice produces such a result here.

#### CONCLUSION

This Court should issue a writ of prohibition holding that the forced appointment of attorneys who lack the skill, experience, and interest to represent criminal defendants violates West Virginia law. In issuing writ relief, the Court should vacate the administrative order and grant Mr. Ashton permission to withdraw from all outstanding criminal cases.

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**CERTIFICATE OF SERVICE**

I certify that, on February 13, 2026, a true and correct copy of this Brief for *Amicus Curiae* was served via File & ServeXpress.

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