IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO ex rel. BENNETT J. BAUR,
In his capacity as
Chief Public Defender of
The New Mexico Public Defender Department,

Petitioner,

And CHARLES LOPEZ,

Real Party in Interest,

vs. **S-1-SC-36375**

THE HONORABLE WILLIAM G. W. SHOOBRIDGE,
In his capacity as District Court Judge
Lea County, Fifth Judicial District,

Respondent.

Original Proceeding from the
Fifth Judicial District Court, Lea County

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND NEW MEXICO CRIMINAL DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF PETITION OF STATE EX REL. BAUR FOR WRIT OF SUPERINTENDING CONTROL

Respectfully submitted,

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ARGUMENT

Amici curiae National Association of Criminal Defense Lawyers ("NACDL") and New Mexico Criminal Defense Lawyers Association ("NMCDLA") urge this Court to grant the petition of the State of New Mexico ex rel. Baur ("Petitioner") and real party in interest Charles Lopez for a writ of superintending control, and consider the merits of Petitioner's claims.

The Petition asks this Court to address issues that have critically important constitutional and policy ramifications, both nationally and for the citizens of New Mexico. The Chief Justice of this Court stated only two months ago – in words quoted by the lower court in this case – that the New Mexico justice system "is on life support, and its organs are shutting down."[1] Referencing the constitutional guarantees of right to counsel, Chief Justice Daniels stated further that the state's courts "are now faced with the possibility of dismissing criminal cases because of the claimed inability of the public defender to take on any more workload without providing ineffective assistance to the clients they already are serving."

As set forth in greater detail in the Petition, the evidence in the court below unfortunately bears out the Chief Justice's concerns. The record shows that caseload numbers in Lea County significantly exceed the standards set in 1973 by

[1] *See* Charles W. Daniels, *Chief Justice Daniels' 2017 State of the Judiciary Address*, Jan. 20, 2017, located at http://nmpolitics.net/index/2017/01/chief-justice-daniels-2017-state-of-the-judiciary-address/.

the National Advisory Commission on Criminal Justice Standards and Goals – standards that have themselves been the subject of criticism. *See, e.g.,* Norman Lefstein, *Time to Update the "ABA Ten Principles" for the 21st Century,* CHAMPION 42, 46 (March 2016). As a result of these overly high caseloads, the record also establishes that indigent criminal defendants in Lea County are not receiving the effective assistance of counsel to which they are constitutionally entitled. Such defendants are unrepresented at their initial court appearances where bail is set, and may not receive constitutionally mandated effective assistance of counsel at other critical stages of their proceedings because their public defenders often lack time or resources for such basic tasks as conferring with their clients, conducting legal research and filing motions, and preparing adequately for preliminary hearings and trials.

These problems are by no means limited to New Mexico; to the contrary, they are symptomatic of a national crisis in the provision of legal representation to indigent criminal defendants. Abundant research has confirmed that, "[w]ith rare exceptions, existing systems for effectuating the indigent criminal defendant's right to counsel range from disappointing to scandalously inadequate." Stephen J. Schulhofer, *Client Choice for Indigent Criminal Defendants: Theory and Implementation*, 12 OHIO ST. J. CRIM. L. 505, 505 (2015); *see* Laurence A. Benner, *Eliminating Excessive Public Defender Workloads*, CRIMINAL JUSTICE 24, 25

(Summer 2011) ("Caseloads are so excessive that in many jurisdictions defense counsel are unable to perform even core functions, such as conducting an adequate factual investigation into guilt or innocence."); JUSTICE POLICY INSTITUTE, SYSTEM OVERLOAD: THE COSTS OF UNDER-RESOURCING PUBLIC DEFENSE 6 (July 2011) ("many public defenders find it impossible to provide adequate – let alone quality – counsel to their numerous clients due to a fundamental lack of time and resources"); THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 52 (April 2009) ("Our country's failure to provide adequate representation to indigent defendants and juveniles is not just a problem of the past."); AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 38 (Dec. 2004) ("indigent defense in the United States remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction"). One commentator summarized the dire situation as follows: "The persistent failure of indigent criminal defendants to receive adequate legal representation is so well documented that it is no longer news." Tigran W. Eldred, *Prescriptions for Ethical Blindness: Improving Advocacy for Indigent Defendants in Criminal Cases*, 65 RUTGERS L. REV. 333,

334 (2013).[2]

As set forth by the Petitioner and established by the undisputed evidence in the court below, the excessive caseloads imposed on public defenders in Lea County raise problems of constitutional proportions. The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. Accordingly, an indigent defendant who cannot afford a lawyer has a fundamental constitutional right to have a lawyer appointed for him. *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963); *see also Brewer v. Williams*, 430 U.S. 387, 398 (1977) (the right to counsel "is indispensable to the fair administration of our adversary system of criminal justice"). "[T]he right to be represented by counsel is among the most fundamental of rights. . . . [I]t is through counsel that all other rights of the accused are protected." *Penson v. Ohio*, 488 U.S. 75, 84 (1988).

Because of the essential part that lawyers play in the fair administration of justice, the right to counsel attaches as soon as criminal proceedings are initiated

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[2] NACDL has documented the deficiencies in indigent defense systems in a number of states outside New Mexico. *See, e.g.,* ANDREA M. MARSH, STATE OF CRISIS: CHRONIC NEGLECT AND UNDERFUNDING FOR LOUISIANA'S PUBLIC DEFENSE SYSTEM (2017); NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, RUSH TO JUDGMENT: HOW SOUTH CAROLINA'S SUMMARY COURTS FAIL TO PROTECT CONSTITUTIONAL RIGHTS (2017); NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, SUMMARY INJUSTICE: A LOOK AT CONSTITUTIONAL DEFICIENCIES IN SOUTH CAROLINA'S SUMMARY COURTS (2016); SIXTH AMENDMENT CENTER, THE RIGHT TO COUNSEL IN INDIANA: EVALUATION OF TRIAL LEVEL INDIGENT DEFENSE SERVICES (2016), all available at www.nacdl.org/reports.

and applies at any subsequent "critical stage" of the proceedings. *Rothgery v. Gillespie County, Texas*, 554 U.S. 191, 211-12 (2008). The Sixth Amendment may be violated not only where counsel is entirely absent at such a critical stage, but also where counsel is appointed under circumstances that make it impossible for counsel to provide true effective assistance. As the Supreme Court has said:

> [T]he denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. *The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment.*

Avery v. Alabama, 308 U.S. 444, 446 (1940) (emphasis added); *see Strickland v. Washington*, 466 U.S. 668, 685 (1984) ("That a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy the constitutional command."); *United States v. Cronic*, 466 U.S. 648, 654 (1984) ("If no actual 'Assistance' 'for' the accused's 'defense' is provided, then the constitutional guarantee has been violated."); *Powell v. Alabama*, 287 U.S. 45, 57-58 (1932) (Sixth Amendment was violated where there was a *pro forma* appointment of counsel but "the defendants did not have the aid of counsel in any real sense"; "[t]o decide otherwise, would simply be to ignore actualities"). Thus, as the Petitioner has asserted here, excessive workloads may have the direct effect of depriving indigent criminal defendants of their rights under the United States Constitution.

As noted above, New Mexico is by no means the only state facing such a crisis in its treatment of indigent criminal defendants, and other state courts have taken up claims similar to those raised by the Petitioner here. *See, e.g., Kuren v. Luzerne County*, 146 A.3d 715, 718 (Pa. 2016) ("a cause of action exists entitling a class of indigent criminal defendants to allege prospective, systemic violations of the right to counsel due to underfunding"); *Phillips v. State*, No. 15CECG02201, 2016 WL 1573199 (Cal. Sup. Ct. Order, April 11, 2016) (plaintiffs stated claims for violation of right to counsel based on systemic deficiencies in indigent defense system, including excessive caseloads); *State ex rel. Missouri Pub. Def. Comm'n v. Waters*, 370 S.W.3d 592, 597 (Mo. 2012) ("the Sixth Amendment right to counsel is a right to effective and competent counsel, not just a pro forma appointment whereby the defendant has counsel in name only," ordering trial court to vacate appointment of public defender); *Hurrell-Harring v. State*, 930 N.E.2d 217 (N.Y. 2010) (reversing dismissal of complaint alleging that the system of indigent defense in certain counties violated plaintiffs' constitutional right to representation); *Duncan v. State*, 774 N.W.2d 89 (Mich. Ct. App. 2009) (affirming denial of summary judgment on claims that plaintiffs' right to counsel was denied because indigent defense systems in certain counties were underfunded and did not provide defense attorneys with the "necessary tools [and] time" adequately to represent their clients); *see also Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988),

cert. denied, 495 U.S. 957 (1990) (reversing dismissal of complaint alleging "systemic deficiencies" in the provision of assistance of counsel to indigents accused of crimes in Georgia); *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122 (W.D. Wash. 2013) (finding that plaintiffs proved systematic violations of indigent defendants' right to counsel).

NACDL and NMCDLA urge this Court to follow the lead of other state courts and take up the compelling claims raised by this petition. The Petitioner alleges that lack of funding for public defense and overwhelming caseloads have converged to create a constitutional crisis in which the citizens of New Mexico often receive the right to counsel in name only. This Court is fortunate to have the ability to impose administrative remedies that may help to address the problems outlined in the Petition. NACDL and NMCDLA urge this Court to grant the petition and address the merits of these issues, and hope to have the opportunity to address the merits at a later date.

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DATED: April 14, 2017 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on April 14, 2017, I caused a true and correct copy of the foregoing to be hand-delivered to the Attorney General's Box on behalf of Respondent. In addition, I caused true and correct copies to be sent first-class mail, postage prepaid, to the following:

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