No. 14-877

In the Supreme Court of the United States

ROBERT BRIGHT,

Petitioner,

v.

GALLIA COUNTY, OHIO; BOARD OF COMMISSIONERS OF GALLIA COUNTY, OHIO; GALLIA COUNTY PUBLIC DEFENDER COMMISSION; AND GALLIA COUNTY CRIMINAL DEFENSE CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND *AMICI CURIAE* BRIEF OF NATIONAL ASSOCIATION FOR PUBLIC DEFENSE, CENTER FOR CONSTITUTIONAL RIGHTS, IDAHO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, KENTUCKY ASSOCIATION OF CRIMINAL DEFENSE ATTORNEYS, OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND OHIO JUSTICE AND POLICY CENTER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE OF *AMICI CURIAE* TO FILE A BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Sup. Ct. R. 37(2)(b), *Amici Curiae* National Association for Public Defense ("NAPD"), Center for Constitutional Rights ("CCR"), Idaho Association of Criminal Defense Lawyers ("IACDL"), the Kentucky Association of Criminal Defense Lawyers ("KACDL"), the Ohio Association of Criminal Defense Lawyers ("OACDL"), and the Ohio Justice and Policy Center ("OJPC") respectfully move the Court for leave to file the following *amicus* brief in support of Petitioner Robert Bright's petition for writ of certiorari. Counsel for Respondents have indicated that they do not consent to the filing of this brief, without further explanation. *Amici* are national and regional criminal defense lawyers' and constitutional law associations committed to the preservation of the role of public defenders in our nation's courtrooms. These organizations play an important role in advocating for defense counsel and the clients they serve and are uniquely situated to speak to the value of public advocacy on behalf of the criminally accused. Given that this case presents important questions about when public defenders' First Amendment rights are protected in the courtroom, the perspective of NAPD, CCR, IACDL, KACDL, OACDL, and OJPC would be of assistance to the Court. More specifically, this brief raises issues not specifically addressed by the parties regarding the role public defenders have played in shaping the Court's criminal jurisprudence and leave should therefore be granted to file it.

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INTEREST OF *AMICI CURIAE*[1]

The National Association for Public Defense is a national organization uniting nearly 7,000 public defense practioners across the 50 states. As public defense experts, NAPD's mission is to ensure strong criminal justice systems, policies and practices ensuring effective indigent defense, system reform that increases fairness for indigent clients, and education and support of public defenders and public defender leaders.

The Center for Constitutional Rights ("CCR") is a national, not-for-profit legal, educational and advocacy organization dedicated to protecting and advancing rights guaranteed by the United States Constitution and international human rights law. Founded in 1966 to represent civil rights activists in the South, CCR has had a significant interest in issues at the intersection of criminal justice and free speech, serving as counsel in this Court in *Humanitarian Law Project v. Holder*, 130 S. Ct. 2705 (2010); *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); and two of the landmark flag-burning cases, *Texas v. Johnson*, 491 U.S. 397 (1989), and *United States v. Eichman*, 496 U.S. 310 (1990). In addition, as the first lawyers to represent petitioners seeking access to habeas corpus while detained without charge in Guantanamo Bay, see *Rasul v. Bush*, 542 U.S. 466 (2004); *Boumediene v.*

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus states that no counsel for a party authored this brief in whole or in part or made a monetary contribution to the costs associated with filing this brief. Counsel of Record for the parties received at least 10 days notice of the intention to file. Counsel for Petitioner consents to this filing. Counsel for Respondent withheld consent.

Bush, 553 U.S. 723 (2008), CCR recognizes the importance of vigorous advocacy - inside and outside the courtroom - to ensuring fair treatment and respect for the rights of politically unpopular clients.

The objective and purpose of the Idaho Association of Criminal Defense Lawyers ("IACDL") is to promote study and research in the field of criminal law and related subjects; to promote the proper administration of justice; to foster, maintain, and encourage the integrity and independence of the judicial system and the expertise of the defense lawyer in criminal cases; and to provide a forum for the exchange of information regarding the administration of criminal justice, and thereby to protect individual rights and improve the criminal law, its practices and procedures. In accordance with this mission, the Idaho Association of Criminal Defense Attorneys has an interest in maintaining nationwide standards that protect robust discourse and vigorous representation on behalf of criminal defendants.

The Kentucky Association of Criminal Defense Lawyers ("KACDL") was formed in 1986 by a group of prominent criminal defense attorneys to address the criminal defense bar's lack of influence in the drafting of Kentucky's Truth-in-Sentencing law. For over twenty-five years, KACDL has effectively and progressively interacted with the General Assembly in the legislative process. KACDL also provides a valuable public voice on criminal justice, speaking on behalf of the criminally accused and providing support for their defenders. KACDL is the only organized, all-inclusive group of criminal defense lawyers in Kentucky. The group remains committed to penal code reform, to

fairness and justice for all citizens accused of crimes in the Commonwealth of Kentucky, and to unwavering service to the criminal defense community through effective and supportive networking, advocacy and education.

The Ohio Association of Criminal Defense Lawyers is an organization of approximately 700 dues-paying attorney members. Its mission is to defend the rights secured bv law of persons accused of the commission of a criminal offense; to foster, maintain and encourage the integrity, independence and expertise of criminal defense lawyers through the presentation of accredited Continuing Legal Education programs; to educate the public as to the role of the criminal defense lawyer in the justice system, as it relates to the protection of the Bill of Rights and individual liberties; and to provide periodic meetings for the exchange of information and research regarding the administration of criminal justice.

Based in Cincinnati, the Ohio Justice & Policy Center ("OJPC") is a non-profit law office that works for productive, statewide reform of the criminal justice system. OJPC operates both the Indigent Defense Reform Project, which improves access to quality public defense services for indigent defendants throughout Ohio, as well as the Indigent Defense Clinic, in which it educates third-year law students in client-centered best practices for representing indigent defendants. Over the past decade, OJPC attorneys have successfully litigated the unconstitutionality of laws restricting the residency of sex offenders,[2] have

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[2] *Hyle v. Porter*, 117 Ohio St.3d 165, 882 N.E.2d 899 (2008).

persuaded the City of Cincinnati to remove its prohibition on employing convicted felons,[3] and have defended hundreds of low-income clients in criminal and collateral cases. In addition, OJPC takes an active role in educating participants in the criminal justice system, including lawyers, judges, and policy-makers, on concepts of redemption and rehabilitation.

INTRODUCTION

Amici The National Association for Public Defense, the Center for Constitutional Rights, the Idaho Association of Criminal Defense Lawyers, the Kentucky Association of Criminal Defense Lawyers, the Ohio Association of Criminal Defense Lawyers, and the Ohio Justice and Policy Center urge the Court to issue a writ of certiorari accepting Petitioner Robert Bright's case for review. The case presents significant questions of constitutional law at the intersection of the Sixth Amendment right to counsel and the First Amendment right to free expression that have not explicitly been, but should be decided by the Court. More specifically, if permitted to stand, the Sixth Circuit's ruling that criminal defense attorneys surrender their First Amendment right to protected speech at the courthouse door threatens to endanger the quality and zealousness of public defense and, by extension, the integrity of the criminal justice system as a whole. *See Bright v. Gallia County, Ohio*, 753 F.3d 639, 654-5 (6th Cir. 2014).

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[3] See http://www.wcpo.com/dpp/news/local_news/ex-felons-can-now-work-for-city-of-cincinnati (last viewed Sept. 25, 2012).

Public defenders serve an important and often unappreciated role in the criminal justice system. *Amici* collectively believe that no public defender should be terminated or precluded from employment solely by virtue of advancing a valid legal argument on behalf of his or her client. For this reason, the Court should accept Mr. Bright's case for review.

ARGUMENT

I. DIVESTING PUBLIC DEFENDERS OF THEIR FIRST AMENDMENT RIGHTS THREATENS INDIGENT DEFENDANTS' PROTECTED SIXTH AMENDMENT RIGHT TO COUNSEL.

It is a bedrock constitutional principle that all persons accused of a crime have the right to be represented by an attorney. *See* U.S. Const. amend. VI; *Gideon v. Wainwright*, 372 U.S. 335 (1963). This was true when the Sixth Amendment was ratified by the founders, and it remains true today. *Id*. at 344. As this Court has observed on numerous occasions, the right to counsel as it has existed historically is not merely perfunctory. To be sure, a criminal defendant's right to an attorney does not merely guarantee a warm body or a person who happens to have a law degree. *Groseclose v. Bell*, 130 F.3d 1161, 1169 (6th Cir. 1997). Rather, the Sixth Amendment envisions a fully adversarial system in which the defendant's attorney vigorously and vociferously protects her client's rights – through the filing of motions, the investigation and presentation of witnesses, the rigorous cross-examination of the state's evidence, and, where warranted, the appeal of trial courts' erroneous and unreasonable decisions. *See, e.g., Strickland v. Washington*, 466 U.S. 668 (1984); *Evitts v. Lucey*, 469

U.S. 387 (1985). Indeed, the core aspect of the Sixth Amendment right to counsel "has historically been, and remains today, 'the opportunity for a defendant to consult with an attorney and to have him investigate the case and prepare a defense for trial." *Kansas v. Ventris*, 556 U.S. 586, 589 (2009) (citing *Michigan v. Harvey*, 494 U.S. 344, 348 (1990)).

The need for vigorous advocacy is heightened in the context of public defense, particularly given the disparity in resources that exists between the government – with its unlimited investigatory capacity and seemingly boundless charging authority – and the paltry ability of the indigent to obtain even rudimentary access to the court system. *See, e.g., Britt v. North Carolina*, 404 U.S. 226, 240 (1971) (characterizing indigent defendant's investigatory resources as "puny" in comparison to the prosecution's). In fact, the right to strong and confrontational indigent defense is so engrained in our collective culture that it has been the subject of award-winning documentaries and heralded novels read by adolescents in nearly every school in America. *See, e.g., Murder on a Sunday Morning*, http://www.imdb.com/title/tt0307197/, http://en.wikipedia.org/wiki/Murder_on_a_Sunday_Morning (documenting the efforts of two public defenders to exonerate a teenager wrongfully accused of a Florida tourist murder, the film was awarded the 2002 Academy Award for Best Documentary Feature); Harper Lee, *To Kill A Mockingbird* (Pulitzer Prize-winning novel chronicling the trial of an African-American defendant accused of rape in the deep South).

Indeed, robust advocacy by public defenders has helped to shape the contours of the Court's criminal

jurisprudence. For example, an assistant public defender from Missouri recently argued before the Court regarding the right to effective counsel in plea bargaining, helping to establish the obligation of defense counsel to present and recommend favorable plea offers to the accused. *See Missouri v. Frye*, 132 S.Ct. 1399 (2012). So too was *Lafler v. Cooper*, the companion case to *Frye* that helped secure the right to counsel in plea bargaining – ironically, the same right that Mr. Bright was protecting when he was terminated from public service - argued and won by a public defender. *See Lafler v. Cooper*, 132 S.Ct. 1376 (2012). In yet another example, a federal public defender published an oft-cited article advocating sentencing reform for child pornography offenders, an idea that gained traction with certain lower courts. *See* Troy K. Stabenow, "A Method for Careful Study: A Proposal for Reforming the Child Pornography Guidelines," Federal Sentencing Reporter, Vol. 24, No. 2, p. 108 (Dec. 2011) (cited in *United States v. Marshall*, 870 F.Supp.2d 489 (N.D. Ohio 2012)). Had these attorneys faced potential adverse employment consequences and retaliation as a result of their representation, they may never have raised these important issues, opting instead to provide a constitutionally-inadequate or short-shrift defense. In other words, in the absence of courageous public defenders who elect to exercise both their own First Amendment rights to zealously advocate for their clients, as well as their clients' rights to due process and to mount a defense, our criminal law would not be as rich, meaningful, and just as it is today. In the words of this Court, "lawyers in criminal courts are necessities, not luxuries." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

The Sixth Circuit's opinion creates a troubling dichotomy in this regard: judicial officials, who gain additional protections by virtue of their governmental positions, are wholly immune from suit for their courtroom speech, while public defenders, who shed their First Amendment rights at the courthouse door, are completely unprotected from personal consequences from their professional conduct. The resulting lack of free speech protection for public advocacy is bound to have a detrimental impact upon the quality and zealousness of the attorneys' representation. Faced with the prospect of bar complaints and job loss each time they challenge a court decision or pursue a novel argument, public defenders may be reticent to provide the zealous representation the Sixth Amendment requires. In other words, the impact of the decision below is a particularly offensive chilling effect: the silencing of speech not only protected, but required by the Constitution. The Ohio Supreme Court observed as much in disciplining Judge Evans for his conduct, noting that his removal of Mr. Bright from all public defender cases caused significant harm to his clients and their constitutional rights. *Ohio State Bar Ass'n v. Evans*, 137 Ohio St.3d 441, 444, 999 N.E.2d 674, 678 (Ohio 2013).

If permitted to stand, the Sixth Circuit's ruling threatens to undermine the quality, vigor, and constitutional adequacy of public defense. The Court should hear Mr. Bright's appeal to ensure that public defenders are protected from harassment, retaliation, and termination for simply fulfilling what the Constitution requires of them. This case presents unique and compelling constitutional questions that are ripe for the Court's review.

CONCLUSION

For the reasons stated above, the National Association for Public Defense, the Center for Constitutional Rights, the Idaho Association of Criminal Defense Lawyers, the Kentucky Association of Criminal Defense Lawyers, the Ohio Association of Criminal Defense Lawyers, and the Ohio Justice and Policy Center respectfully urge the Court to grant Mr. Bright's petition for a writ of certiorari.

Respectfully submitted,

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