IN THE SUPREME COURT OF NEW MEXICO

No. 36,375

STATE OF NEW MEXICO, *ex rel.*, BENNETT J. BAUR,
in his capacity as Chief Public Defender
of the New Mexico Public Defender Department,
Petitioner,

v.

HON. H. WILLIAM G. W. SHOOBRIDGE,
in his capacity as District Court Judge,
Lea County, Fifth Judicial District,
Respondent,

and

CHARLES LOPEZ,
Real Party in Interest.

Original Proceeding from the Fifth Judicial District Court, Lea County

Brief of *Amicus Curiae* National Association for Public Defense in Support of Petitioner

GLOVER WRIGHT
Pro hac vice
201 Poplar Ave., Ste. 2-01
Memphis, TN 38103
(901) 222-2847
(901) 222-2801 *fax*
glover.wright@shelbycountytn.gov

JERRY TODD WERTHEIM
Jones, Snead, Wertheim
& Clifford, P.A.
P.O. Box 2228
Santa Fe, NM 87501
(505) 982-0011
todd@thejonesfirm.com

Counsel for Amicus Curiae

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CERTIFICATIONS

Undersigned counsel certifies that, pursuant to Rule 12-320(D)(1) NMRA, all parties have received timely notice of the intention of *amicus curiae* to file this brief, and that, pursuant to Rule 12-318(G) NMRA, the body of this brief, which was prepared using a proportionally-spaced typeface, contains 6,343 words. This word count was obtained from Microsoft Word 2010, the word-processing program used to prepare this brief. All parties received timely notice of NAPD's intent to file this brief by this Court's order. This Court granted leave for the filing of this brief by order of May 15, 2017, and this brief is timely if filed on or before June 5, 2017.

INTEREST OF *AMICUS CURIAE*

The National Association of Public Defense (NAPD)[1] is an association of more than 14,000 professionals who deliver the right to counsel throughout all U.S. states and territories, including New Mexico. NAPD members include attorneys, investigators, social workers, administrators, and other support staff who are responsible for executing the constitutional right to effective assistance of counsel. NAPD's members are advocates in jails, courtrooms, and communities. They are

[1] Pursuant to Rule 12-320(C) NMRA, this brief was not authored by counsel for a party, and neither counsel for a party nor a party made a monetary contribution intended to fund the preparation or submission of this brief.

experts in not only theoretical best practices, but also in the practical, day-to-day delivery of indigent defense services. Their collective expertise represents state, county, and local systems through full-time, contract, and assigned counsel delivery mechanisms; through dedicated juvenile, misdemeanor, felony, capital, and appellate offices; and through a diversity of traditional and holistic practice models. NAPD and its members actively engage in data-driven analysis of metrics required for evaluating whether public defense delivery systems satisfy best-practice standards in public defense.

NAPD believes that, for far too long, public defenders have accepted crushing workloads that rob clients of their constitutional right to counsel and erode the morale of lawyers who cannot possibly meet the demands placed on them. Public defenders can no longer operate in a system without meaningful workload standards. This Court has final responsibility for ensuring that such standards exist and are enforced in New Mexico, and should do so by exercising its supervisory authority in this case.

INTRODUCTION

This case is about more than one defendant in Lea County. The Petition in this case notes that the New Mexico Public Defender Department, otherwise known as the Law Offices of the Public Defender (LOPD), decided to decline additional cases in Lea County "because the situation there was the worst of any Office in the

State." **Pet. at 17.** But excessive public defender caseloads in New Mexico are by no means limited to Lea County. LOPD is preparing similar litigation in Lincoln County and is contemplating litigation elsewhere. *Id.* The issues decided by this Court in this case will therefore have statewide significance.

An indigent defendant is entitled to the assistance of counsel in criminal proceedings. U.S. Const. amends. VI, XIV; N.M. Const. art. II, § 14; *Gideon v. Wainwright*, 372 U.S. 335 (1963). The right to counsel "cannot be satisfied by mere formal appointment," *Avery v. Alabama,* 308 U.S. 444, 446 (1940), and is not simply a right to "counsel in name only." *State ex rel. Missouri Pub. Def. Comm'n v. Waters*, 370 S.W.3d 592, 597 (Mo. 2012). Rather, "[a]n accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland v. Washington,* 466 U.S. 668, 685 (1984). The right to counsel means the right to effective and meaningful assistance of counsel. *See Kimmelman v. Morrison,* 477 U.S. 365, 377 (1986); *United States v. Cronic*, 466 U.S. 648, 569 (1984). The right to counsel applies no less in misdemeanor cases carrying a possible sentence of imprisonment than it does in capital murder cases, *see* NMSA 1978 § 31-15-12 (1993), and no less at an initial appearance – the latest time in New Mexico at which public defender representation shall begin – than it does during trial. *See* NMSA 1978, § 31-15-10(C) (2001).

Public defenders across the country daily violate their constitutional and ethical obligations to their clients in the face of excessive caseloads. Peter A. Joy, *Ensuring the Ethical Representation of Clients in the Face of Excessive Caseloads*, 75 MO. L. REV. 771, 786 n. 1 (2010). Public defenders with excessive caseloads and insufficient support may be "so overburdened as to be effectively unqualified" and therefore ineffective under the Sixth Amendment. *State v. Peart*, 621 So. 2d 780, 789-90 (La. 1993). Excessive caseloads create situations where "[p]ublic defenders are not able to spend adequate time interviewing their clients, counselling their clients, or even explaining the basic information to their clients about the upcoming court proceedings." *Rivera v. Rowland*, 18 Conn. L. Rptr. 117 (Super. Ct. Oct. 23, 1996). They "prevent public defenders from spending adequate time reviewing each client's file, conducting necessary legal research, conducting necessary fact investigation and witness preparation, pursuing motions for speedy trials, preparing for trial, filing certain pretrial motions and exploring pretrial alternatives to incarceration as well as sentencing options." *Id.* They cause "high stress, low staff morale, and burnout." *Id.* They rob indigent defendants of their right to counsel.

Public defenders in Lea County exceed recommended national caseload standards and fail to meet performance standards. They are moreover ethically conflicted and render ineffective assistance of counsel to their clients by virtue of

their excessive caseloads. New Mexico law requires that LOPD attorneys be automatically disqualified from representing clients when they have an actual conflict based on excessive caseloads. Because LOPD, in the face of excessive caseloads, has no ability to provide conflict-free representation to new indigent defendants regardless of whether they are represented by in-house or contract counsel, New Mexico law also requires that courts appoint conflict-free counsel with the ability to render effective assistance to indigent defendants. A writ of superintending control, as requested by petitioner, is the appropriate mechanism for considering such relief. This Court should also consider the benefits of an empirically grounded, jurisdiction-specific workload study in deciding this case as well as related matters.

ARGUMENT

A. Public defenders in Lea County exceed recommended national caseload maximums and fail to meet American Bar Association (ABA) guidelines on excessive workloads, as well as New Mexico Public Defender Commission (NMPDC) and ABA performance standards.

The District Court, while finding in the face of uncontroverted testimony that Lea County public defenders exceed recommended caseload limits and fail to meet performance standards —**2-13-17 ORD FOF 3**[2] — nevertheless refused to

[2] The Petition on page 5 refers to the District Court's written order of February 7, 2017. A copy of the District Court's Finding of Facts, Conclusions of Law, and

acknowledge that their clients receive ineffective assistance of counsel. But the systemic constitutional inadequacies facing Lea County public defenders caused by excessive caseloads *are* made visible by their failure to meet even the most basic of recommended caseload maximums — like those published by the National Advisory Commission on Criminal Justice Standards and Goals (NAC) — as well as performance standards set by the NMPDC and the ABA.

NAC Standards

In 1973, the NAC published "national caseload standards" recommending that public defender officers should not exceed, per attorney per year, more than 150 felonies; more than 400 misdemeanors; or more than 200 juvenile court cases. National Advisory Commission on Criminal Justice Standards and Goals, The Defense (1973), *available at* http://www.nlada.org/defender-standards/national-advisory-commission.

The undisputed evidence before the District Court was that Lea County public defenders had already exceeded these recommended maximum caseloads by midway through fiscal 2017. **Pet. at 12**. But the NAC standards are only one metric for assessing excessive caseloads and, in many ways, the most basic.

ABA Eight Guidelines

Order Denying Motion to Reconsider Order Allowing the Law Office of the Public Defender to Withdraw submitted by Petitioner as an exhibit is date-stamped February 13, 2017. This brief, in citing to the record and pleadings in accordance with the appendix to Rule 23-112 NMRA, uses the latter date.

A treatise published by the ABA Standing Committee on Legal Aid and Indigent Defendants in 2011 suggests that public defender agencies should not rely solely upon the NAC standards to assess attorney caseloads, but should "recognize that caseloads of lawyers must be assessed on an individual basis." Norman Lefstein, *Securing Reasonable Caseloads: Ethics and Law in Public Defense*, Executive Summary and Recommendations, at 34 (2011). In particular, caseloads should be evaluated consistent with the ABA Eight Guidelines of Public Defense Related to Excessive Workloads, a set of principles adopted by the ABA in 2009. *See* ABA Eight Guidelines of Public Defense Related to Excessive Workloads, *available at* https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_eight_guidelines_of_public_defense.authcheckdam.pdf.

Those guidelines direct that public defender agencies should avoid excessive workloads and their adverse impact on providing quality legal representation by considering attorneys' performance obligations, including devoting sufficient time to interviewing and counseling clients; seeking pretrial release of incarcerated clients; conducting investigations; pursuing formal and informal discovery; undertaking sufficient legal research; and preparing sufficiently for hearings and trials. *Id.* The undisputed evidence before the District Court reflects a systemic

failure by Lea County public defenders to undertake such tasks, rendering them ineffective.[3]

NMPDC Performance Standards and ABA Defense Function Standards

Excessive caseloads likewise render Lea County public defenders ineffective under performance standards governing the representation of indigent defendants promulgated by the NMPDC[4] and by the ABA.

In 2014, the NMPDC adopted performance standards for attorneys. *See* Performance Standards for Criminal Defense Representation, *available at* http://www.lopdnm.us/pdf/2016PerfStand.pdf. These standards, revised in 2016, reflect "the steps that *shall be taken in every client's case* in order to achieve constitutionally mandated representation." *Id.* at 1. (emphasis added). The ABA

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[3] The ABA Eight Guidelines also direct that "lawyers file motions asking a court to stop the assignment of new cases and to withdraw from current cases, as may be appropriate, when workloads are excessive"; that when such motions are filed, "lawyers resist judicial directions regarding the management of Public Defense Programs that improperly interfere with their professional and ethical duties in representing their clients"; and that "lawyers appeal a court's refusal to stop the assignment of new cases or a court's rejection of a motion to withdraw from cases of current clients." LOPD followed each of these guidelines in this case.

[4] LOPD is an independent state agency overseen independently by the NMPDC, as established under article VI, § 39 of the New Mexico Constitution. The NMPDC is tasked with "provid[ing] guidance to the chief public defender in the administration of the department and the representation of indigent persons," *id.*, and has been further mandated by the Legislature to "set representation standards for the department. NMSA 1978 § 31-15-2.4 (2014).

similarly promulgates Criminal Justice Standards for the Defense Function. *See* ABA Standards for Criminal Justice, The Defense Function (4th ed. 2015), *available at* https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition.html, which the United States Supreme Court has cited as reflecting "prevailing norms of practice." *Padilla v. Kentucky*, 559 U.S. 356, 366-67 (2010) (citations and quotation marks omitted).

The New Mexico standards are based in part on the ABA Defense Function Standards and are explicitly "minimal standards rather than aspirational guidelines." NMPDC Performance Standards at 1. They are not best practices; they are *required* practices *in every case*. They include no caveats regarding whether they may serve as the basis for professional discipline.

The New Mexico standards mandate that counsel shall, among other requirements:

- maintain familiarity with substantive and procedural criminal law, including staying abreast of changes and developments in the law (Standard 1.1);
- maintain personal, private contact with clients (Standard 2.2(c));
- attend initial appearances (Standard 3.1);
- sufficiently prepare for preliminary hearings (Standard 3.2);
- conduct promptly an independent case review (Standard 4.1), including:
- reviewing the law and charging documents;

- interviewing the client;
- interviewing (and recording) potential witnesses;
- securing, through formal and informal discovery procedures, all relevant information possessed by the prosecution or law enforcement (*see also* Standard 4.2);
- requesting and reviewing preliminary hearing tapes/transcripts and Grand Jury tapes;
- viewing physical evidence;
- viewing the scene of the alleged offense;
- where necessary, securing expert assistance;
- prepare, timely file, and argue — after thorough investigation — motions as cases require (Standards 5.1-5.3);
- where applicable, negotiate with the prosecution while moving forward with case preparation (Standards 6.1-6.2);
- sufficiently prepare for trial (Standards 7.1-7.7);
- sufficiently prepare for sentencing, including, where appropriate, preparing and presenting to the court a defense sentencing memorandum (Standards 8.3-8.7).

NMPDC Chairman Michael Stout gave "undisputed testimony" before the District Court that excessive caseloads render Lea County public defenders

"routinely unable to comply" with these mandatory *minimal* standards. **Pet. at 7-8.** The District Court credited that testimony when it found that LOPD's caseloads do not allow it to meet these standards. *See* **2-13-17 ORD FOF 3**. Routine noncompliance with these mandatory standards is *prima facie* evidence that Lea County public defenders are providing ineffective assistance of counsel to clients relying on them to provide ethical and zealous representation.

B. Excessive caseloads in Lea County create actual conflicts of interest requiring the automatic disqualification of LOPD in new cases.

Public defenders with LOPD have an actual conflict of interest where, in cases like this one, excessive caseloads compel them to triage their representation, choosing among the interests of various clients to each of whom they owe competing duties of competent, diligent, and conflict-free zealous advocacy. While public defenders have an ethical duty to withdraw from representing a new client where that representation creates a conflict, New Mexico law, as surveyed below, provides that this actual conflict requires the automatic disqualification of LOPD without the need for a case-specific inquiry and that, in evaluating claims of ineffective assistance of counsel based on this actual conflict, prejudice shall be presumed.

An inevitable conflict of interest is created when a public defender's excessive caseload compels her to choose between the rights of her various clients. *In re*

Edward S., 92 Cal. Rptr. 3d 725, 746-47 (Ct. App. 2009); *see also In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Pub. Def.*, 561 So. 2d 1130, 1135 (Fla. 1990). This conflict arises because "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client." Rule 16-107(A)(2) NMRA, Model Rules of Prof'l Conduct R. 1.7(a)(2).

A public defender therefore has an ethical obligation not to accept a new client if representation of the new client would prevent the attorney from providing competent and diligent representation to her existing clients. ABA Formal Ethics Opinion 06-441 ("Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation"), *available at* http://publicdefender.mt.gov/forms/pdf/ABA_Ethics_Opinion.pdf. A public defender's acceptance of a new case creates a conflict when it compromises her ability to continue providing effective assistance to her other clients. *Waters*, 370 S.W.3d at 607-08. A public defender in such a situation, like any lawyer — and like counsel in this case — "should move to withdraw so that the court can appoint substitute counsel." *People v. Roberts*, 321 P.3d 581, 589 (Colo. App. 2013).

A conflict of interest involving the competing interests of current clients is *actual*, not potential. *Churchman v. Dorsey*, 1996-NMSC-033, ¶ 13, 122 N.M. 11

("An actual conflict exists if a defendant's counsel *actively* represented conflicting interests." [citations and quotation marks omitted]); *see also, e.g., Bottoms v. Stapleton*, 706 N.W.2d 411, 417 (Iowa 2005) (citing 1 *The Law of Lawyering* § 10.4, at 10-13); *Matter of Pirtle*, 965 P.2d 593, 599 (Wash. 1998); *Clark v. State*, 340 P.3d 757, 761 (Or. Ct. App. 2014); *EOR Domestic, LLC v. Shroff*, 300 P.3d 759, 764 (Okla. Civ. App. 2013).

Actual conflicts of interests not waived by individual clients automatically disqualify LOPD from representation. *Morales v. Bridgforth*, 2004-NMSC-034, ¶ 3, 136 N.M. 511.[5] Moreover, this Court presumes prejudice in evaluating a claim of ineffective assistance of counsel involving "an actual, active conflict." *State v. Joanna V.*, 2004-NMSC-024, ¶ 5, 136 N.M. 40 (citing *Strickland,* 466 U.S. at 692).

Because excessive caseloads, by creating actual conflicts, render unethical and ineffective the representation of new clients by Lea County public defender, this Court must craft a remedy providing the effective assistance of counsel to indigent defendants whom LOPD cannot represent.

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[5] *Morales* clarifies that this Court's earlier holding in *Richards v. Clow,* 1985-NMSC-059, 103 N.M. 14 — that conflicts of interest within LOPD should be evaluated on a case-by-case basis — applies **only** to potential and not to actual conflicts. The District Court relied solely on *Richards* in ruling that LOPD "has no conflict of interest based simply on caseload numbers." **2-13-17 ORD FOF 8.**

C. LOPD has no ability to provide conflict-free representation by staff attorneys outside of Lea County or by contract counsel to indigent defendants whose representation excessive caseloads render unethical.

The District Court suggests that, should any conflict arise in the course of LOPD representation, "LOPD and the Chief Public Defender have the ability to provide a staff attorney or contract attorney from another county or district to represent the defendant herein and other similarly situated indigent defendants." **2-13-17 ORD FOF 9.**

But the Lea County LOPD office, the District Court found, is "chronically underfunded, understaffed," and has caseloads exceeding recommended national standards as well as mandatory standards set by the NMPDC. **2-13-17 ORD FOF 3**. A justice of this Court has similarly found that LOPD has over time "had to fulfill its duties with extremely limited resources." *Kerr v. Parsons*, 2016-NMSC-028, ¶ 36, 378 P.3d 1 (Vigil, J., concurring). Notwithstanding this reality, the chief public defender and the NMPDC are tasked by law with determining how best to allocate resources within LOPD "in a manner most beneficial to the overall needs of the Department." *Id.* ¶ 39.

Nothing in the hearing below or in the District Court's findings suggests that either the chief public defender or the NMPDC are allocating resources with

anything other than maximum efficiency.[6] Because LOPD's resources are already stretched so thinly, using them to provide indigent defendants with counsel outside of LOPD would only create more conflicts by taking resources away from clients currently relying on them.

To be sure, New Mexico courts have "the inherent authority to guarantee the enforcement of constitutional civil liberty protections in criminal prosecutions," and, accordingly, "the inherent power to appoint counsel for indigent defendants in safeguarding the state and federal constitutional right to counsel." *State ex rel. Quintana v. Schnedar*, 1993-NMSC-033, ¶ 3, 115 N.M. 573. Therefore this Court held in *Richards v. Clow,* 1985-NMSC-059, ¶ 13, 103 N.M. 14 (citing *State v. Rascon,* 1976-NMSC-016, 89 N.M. 254), that "[w]here a conflict or other disqualification arises rendering continued representation by the Public Defender Department or by contract counsel unethical, improper or illegal ... the court, under its inherent power, shall appoint counsel to represent the indigent."

The District Court failed to take into account this Court's conclusion in *Richards* that in some instances, as in this case, LOPD may be completely unable

[6] The District Court's assertion that LOPD does not adequately screen for indigence — **2-13-17 ORD FOF 7** — runs contrary to this Court's holding that under NMSA 1978 §§ 31-15-1 to -12 and 31-16-1 to -6, LOPD's standards for determining indigence are generally authoritative, and that courts should therefore ordinarily defer to LOPD's evaluation of whether a defendant is "needy." *State ex rel. Quintana v. Schnedar*, 1993-NMSC-033, ¶ 11, 115 N.M. 573.

to represent indigent defendants and that this inability may "extend statewide so that no public defender could be available to represent a particular indigent." *Id.*

D. A writ of superintending control is the appropriate mechanism for relief in this case because this Court has a duty to ensure that indigent defendants prejudiced by actual conflicts and ineffective assistance of counsel receive constitutionally meaningful representation.

A writ of superintending control is the appropriate mechanism for resolving New Mexico's systemic failure to provide resources necessary to ensure that defendants receive effective assistance of counsel. New Mexico courts have not only the authority but the duty to ensure that indigent defendants receive constitutionally adequate assistance of counsel by virtue of their "inherent power to exercise authority essential to their function and management of their caseloads." *State v. Young*, 2007-NMSC-058, ¶ 19, 143 N.M. 1 (citing *State v. Gonzales,* 2002–NMCA–071, ¶¶ 21–22, 132 N.M. 420). They serve as "the ultimate guardians of an indigent defendant's constitutional rights" and "must enforce the rights guaranteed by the constitution and further the intent of its provisions." *Id.* (citations omitted).

The power of superintending control allows this Court to control the course of ordinary litigation in inferior courts if remedy by appeal seems inadequate and to correct any *specie* of error, and where the public interest calls for the question involved to be settled at the earliest moment. *See* N. M. Const. art. VI, § 3; *Kerr v.*

Parsons, 2016-NMSC-028, ¶ 16, 378 P.3d 1. Notably, the District Court cited *Kerr*, but only in its conclusions that "the district public defender shall represent every person without counsel who if financially unable to obtain counsel and who is in charge in any Court in the district with any crime that carries a possible sentence of imprisonment," and that "[i]f the district public defender is unable to represent someone, the Chief Public Defender is required to provide representation by other means. **2-13-17 ORD COL 5-6**. The District Court failed to acknowledge that in *Kerr*, when this Court previously faced prospective claims of ineffective assistance of counsel related to structural deficiencies in public defense services, it relied on *United States v. Cronic*, 466 U.S. 648 (1984), in considering whether to grant a writ of superintending control. *Kerr*, 2016-NMSC-028, ¶¶ 19-24.

Some circumstances, *Cronic* held, "are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." 466 U.S. at 658; *see also State v. Grogan*, 2007–NMSC–039, ¶¶ 12-13, 142 N.M. 107 (noting circumstances where courts may presume prejudice). Moreover, in certain cases, "the likelihood that any lawyer … could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Cronic*, 466 U.S. at 659–60 (citation omitted).[7] A case where

[7] Deciding ineffective assistance claims before trial where the record contains sufficient evidence furthers the interest of judicial economy, protects the constitutional rights of defendants, and preserves the integrity of the trial process.

"counsel entirely fails to subject the prosecution's case to meaningful adversarial testing" is one such case. *Id.* at 659.

Thus, this Court has not hesitated to exercise its authority to enforce constitutional rights in the public defense context. Among other actions, this Court has ordered the provision of expert witness fees to indigent defendants, *State v. Brown,* 2006-NMSC-023, 139 N.M. 466; required appointment of an expert witness at state expense to an indigent parent in an abuse and neglect proceeding, *State ex rel. CYFD v. Kathleen D.C.,* 2007-NMSC-018, 141 N.M. 535; and stayed prosecution of the death penalty where compensation for an indigent defendant's appointed counsel was inadequate and therefore violated his Sixth Amendment right to effective assistance of counsel. *State v. Young*, 2007-NMSC-058, 143 N.M. 1. Proactive steps like those above — and like the relief requested by petitioner — are required when serious concerns are raised about whether a defendant "will ultimately receive the effective assistance of trial counsel." *Young*, 2007-NMSC-

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State v. Peart, 621 So. 2d 780, 787 (La. 1993). Moreover, rights that do not affect the outcome of a trial are still protected under the Sixth Amendment. "Whether an accused has been prejudiced by the denial of a right is an issue that relates to relief — whether the defendant is entitled to have his or her conviction overturned — rather than to the question of whether such a right exists and can be protected prospectively." *Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir. 1988). "The right to counsel is more than just the right to an outcome." Rodger Citron, *(Un) Luckey v. Miller: The Case for A Structural Injunction to Improve Indigent Def. Servs.*, 101 YALE L.J. 481, 494 (1991).

058, ¶ 21 (citing *Lavallee v. Justices in Hampden Superior Court*, 812 N.E.2d 895 (Mass. 2004); *State ex rel. Partain v. Oakley,* 227 S.E.2d 314, 323 (W. Va. 1976)).

For similar reasons, courts across the country have recognized that prospective relief may be granted where systemic inadequacies in public defender systems result in the denial of counsel. In 2016, in *Kuren v. Luzerne Cty.*, 146 A.3d 715, 751, the Pennsylvania Supreme Court recognized a prospective cause of action where a public defender's office funding level left it "incapable of complying with *Gideon*, creating the likelihood of a systematic, widespread constructive denial of counsel in contravention of the Sixth Amendment to the United States Constitution." In *Kuren*, the court found that public defenders:

- were "so constrained in time and resources that they cannot provide the basic services that sustain and foster the attorney client relationship, and cannot devote the effort necessary to investigate and defend against the prosecution's case";
- were prevented by mounting caseloads from appearing at arraignments, resulting in higher bail than necessary being set and causing delays that unnecessarily extended pretrial incarceration;
- were "so taxed by their caseload ... that, even when the attorneys were available, they were often unprepared and unable to provide meaningful advice";

- were precluded by time constraints "from investigating the facts and defenses of each case, and rendered ... incapable of advising clients regarding constitutional rights and the effects that flow from decisions such as whether to plead guilty or whether to testify at trial";
- insisted due to time constraints "upon plea bargains that were unfavorable to the defendant or unsupported by law or fact";
- lacked time or resources to maintain meaningful communication with clients, often filing pleadings "without first completing a full review of the case materials and conducting a meaningful interview with the client"; and
- conducted trial preparation — if at all — "at the last minute, too late to uncover and investigate potentially meritorious defenses." *Id.* at 746-748.

More recently, in April of this year, in *Tucker v. State*, --- P.3d ----, No. 43922, 2017 WL 1533651, at *4 (Apr. 28, 2017), the Idaho Supreme Court held that "[a]lleging systemic inadequacies in a public defense system results in actual or constructive denials of counsel at critical stages of the prosecution suffices to show an injury in fact to establish standing in a suit for deprivation of constitutional rights." The *Tucker* court found that "[a] criminal defendant who is entitled to counsel but goes unrepresented at [her initial appearance] suffers an actual denial of counsel and is entitled to a presumption of prejudice. *Id.* at *5 (citing *Cronic*,

466 U.S. at 658-60). The court also suggested that there may be constructive denial of counsel in a number of situations, including:

- where a defendant, although represented at her initial appearance, has no opportunity to speak with her attorney;
- where an attorney's caseload is so large and her resources so few that she is unable to review a client's comments on police reports or to investigate physical evidence before its destruction;
- where a client cannot "communicate effectively or consistently with her attorney, and is concerned that her attorney is pressuring her to plead guilty because [she] does not have the time or resources to prepare sufficiently for trial";
- where an attorney's demanding schedule prevents her "from conducting any meaningful investigation into [her client's] case, reviewing and explaining to [her client] relevant discovery materials, or discussing trial strategy";
- where a client is "unable to communicate effectively" or consistently with her attorney about her case and is thereby unable "to participate meaningfully" in her defense; and
- where an attorney is unable to file substantive motions on behalf of her client. *Id.*

Similarly, in *Hurrell-Hurring v. New York*, 930 N.E.2d 217 (2010), the New York Court of Appeals held that indigent criminal defendants stated a cognizable claim for constructive denial of their right to counsel where they were nominally represented by public defenders but often appeared without counsel at arraignments and lacked the benefit of attorneys advocating for a bail reduction after arraignment. Noting that "[a]ctual representation assumes a certain basic representational relationship," the *Hurrell-Hurring* court found that where an attorney is appointed but "uncommunicative" and makes "virtually no efforts on [her] nominal clients' behalf during the very critical period subsequent to arraignment," her client may as well be unrepresented. *Id.* at 224.

Based on the evidence in this case, indigent defendants today in Lea County — and, perhaps, in other jurisdictions in New Mexico — suffer prejudice from the same kinds of deprivations of their Sixth Amendment right to effective assistance of counsel as those found in *Kuren*, *Tucker*, and *Hurrell-Hurring*. Intervention by this Court is therefore required because LOPD is suffering from "a lack of resources necessary for providing the effective representation required under [the New Mexico] Constitution and statutes … ." *Kerr*, 2016-NMSC-028, ¶ 39 (Vigil, J., concurring). This Court should act prospectively by granting a writ of superintending control and acting swiftly to return to indigent defendants their rights that excessive caseloads rendered illusory.

E. This Court should consider the benefits of an empirically grounded, jurisdiction-specific workload study in deciding this case as well as related matters.

Public defense providers, with rare exceptions, have been historically unsuccessful in maintaining reasonable workloads. *See* NAPD Statement on the Necessity of Meaningful Workload Standards for Public Defense Delivery Systems, *available at* http://www.publicdefenders.us/files/NAPD_workload_statement.pdf. NAPD therefore recommends that, in crafting relief, this Court consider the benefits of a local, empirically based workload study that relies on best-practice standards for data-driven reform. This step is warranted in part because the only workload assessment study that has been conducted for LOPD, a 2007 study produced by the National Center for State Courts and National District Attorneys Association, relied on the NAC standards in order to determine staffing needs. *See Workload Assessment Study for the New Mexico Judiciary, New Mexico District Attorneys' Offices, and the New Mexico Public Defender Department*, *available at* https://nmsc.unm.edu/reports/2007/b.%20NMSC%20200607%20Workload%20Final%20Report.pdf.

The NAC standards, while useful, were based neither on any empirical research nor on any independent research conducted by the NAC, and they were never intended to be used as a nationwide measure of how many cases an individual lawyer is able to represent every year. Lefstein, *supra*, at 34. They were, however,

broadly adopted in 2007 by the American Council of Chief Defenders (ACCD), which noted at the time that the standards "reflect the maximum caseloads for fulltime defense attorneys, practicing with adequate support staff, who are providing representation in cases of average complexity in each case type specified." ACCD Statement on Caseloads and Workloads, *available at* https://pdc.idaho.gov/wp-content/uploads/sites/11/2016/08/ACCD-Statement-on-Caseloads.pdf.

Indeed, the ACCD adopted the NAC standards with the caveat that, in light of the increased complexity of public defense practice since 1973, maximum caseload levels in many jurisdictions should be *lower* than those suggested by the NAC. This greater complexity stems from, among other things:

- developments in forensic evidence;
- increasingly severe sentencing schemes;
- more comprehensive prosecutions of people charged with sex offenses;
- increasingly complicated practices requiring a significant degree of specialized knowledge and often expert assistance, particularly with respect to cases carrying the possibility of life in prison and also with respect to the representation of children; and
- expanded collateral consequences of convictions, especially with regard to cases where a conviction may affect a client's driving privileges, federal

student loan eligibility, public housing eligibility, SSI benefits eligibility, or immigration status, or place her on a sex offender registry (which did not exist in any state in 1973). *Id.*

In adopting the NAC standards, therefore, the ACCD urged "thorough assessment in each jurisdiction to determine the impact of local practices and laws on those levels … ." *Id.* Because the NAC standards are neither empirically based nor jurisdiction-specific, the ABA Standing Committee on Legal Aid and Indigent Defendants has undertaken two statewide studies on public defender workloads — in Louisiana[8] and in Missouri[9] — in order to develop reliable, empirically based annual caseload numbers to supplement the NAC standards, and the Public Policy Research Institute of Texas A & M University, relying on the ABA's work, has

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[8] Postlethwaite & Netterville and the ABA Standing Committee on Legal Aid and Indigent Defense, *The Louisiana Project: A Study of the Louisiana Defender System and Attorney Workload Standards* (2014), *available at* https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_louisiana_project_report.authcheckdam.pdf

[9] RubinBrown and the ABA Standing Committee on Legal Aid and Indigent Defendants, *The Missouri Project: A Study of the Missouri Public Defender System and Attorney Workload Standards* (2017), *available at* https://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/ls_sclaid_5c_the_missouri_project_report.authcheckdam.pdf.

conducted a similar statewide public defense workload study mandated by the Texas legislature.[10]

The Louisiana, Missouri, and Texas studies drew on consensus time expectations for effectively handling specific types of cases — under prevailing norms and standards — of a group of private practice and public defender experts from across each state to establish the average number of hours required to effectively handle specific types of cases. Those consensus time expectations were then used to determine maximum caseloads per attorney per year based on the average time required to handle specific types of cases and the number of annual work hours available to attorneys, whether full- or part-time.

Data-driven, jurisdiction-specific workload studies like those conducted in Louisiana, Missouri, and Texas produce caseload limits that closely align with public defenders' ethical and constitutional duties. *See* Geoffrey T. Burkhart, *How to Leverage Public Defense Workload Studies*, 14 OHIO ST. J. CRIM. L. 403, 416 (2017). Those limits by their case- and time-specific nature can in turn be flexibly implemented by public defender providers to ensure that clients receive effective, meaningful, conflict-free assistance of counsel.

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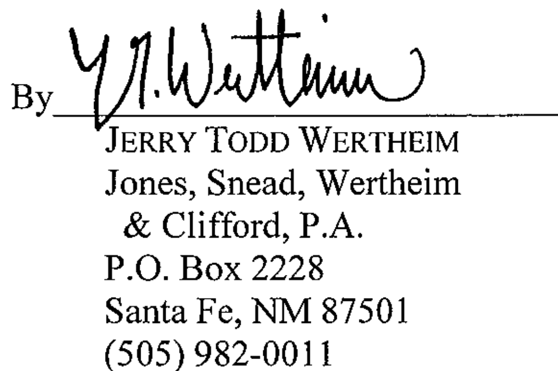
[10] Public Policy Research Institute, *Guidelines for Indigent Defense Caseloads: A Report to the Texas Indigent Defense Commission* (2015), *available at* http://tidc.texas.gov/media/31818/150115_weightedcl-final.pdf.

NAPD endorses such empirically grounded studies and believes that while the NAC standards remain useful, they must be considered the absolute maximums of acceptable public defense workload standards, and that any jurisdiction currently using the NAC standards should also have, or implement, an evidence-based method of assessing whether they remain a reliable measure. *See* NAPD Statement. This court should consider the benefits of a public defender workload study like those conducted in Louisiana, Missouri, and Texas, in addressing the systemic inadequacies of the public defense system in New Mexico.

CONCLUSION

The Court should issue a writ of superintending control, stay proceedings below, and, upon full consideration, craft a remedy providing indigent defendants in Lea County and elsewhere in New Mexico with the effective, meaningful, conflict-free assistance of counsel required by the United States and New Mexico constitutions.

Respectfully submitted,



By____________________

JERRY TODD WERTHEIM
Jones, Snead, Wertheim
& Clifford, P.A.
P.O. Box 2228
Santa Fe, NM 87501
(505) 982-0011

GLOVER WRIGHT
Pro hac vice
201 Poplar Ave., Ste. 2-01
Memphis, TN 38103
(901) 222-2847
Glover.wright@shelbycountytn.gov

Certificate of Service

I hereby certify I caused true and correct copies of this pleading to be sent, first-class mail, postage prepaid, on this 5th day of June, 2017 to the following:

Honorable William G.W. Shoobridge
Fifth Judicial District Court
Lea County
100 N. Main, Box 6-C
Lovington, New Mexico 88260
Respondent

Ms. Diana Luce,
Fifth Judicial District Attorney
102 N. Canal, Ste. 200
Carlsbad, New Mexico 88220-5750
Trial counsel of record for the State of New Mexico

Mr. Freeman C. Faust
1601 N. Turner, Suite 300
Hobbs, New Mexico 88241
Counsel for Real Party in Interest Charles Lopez

Ms. Regina Ryanczak,
Office of the
New Mexico Attorney General
Post Office Drawer 1508
Santa Fe, New Mexico 87504-1508
Counsel for Respondent

Ms. Theresa M. Duncan,
Ms. Gia L. Cinconi
Mr. Norman R. Meuller
c/o Law Office of Theresa M. Duncan
515 Granite NW
Albuquerque, New Mexico 87102

JERRY TODD WERTHEIM