LOUISIANA SUPREME COURT

NO. 2021-C-00502

JOSEPH ALLEN, STEVEN AYRES, ASHLEY HURLBURT, RORY KEVIN GATES, JAMES HOWARD, DEMARCUS MORROW, RODNEY WALLER, KEITH ARCEMENT, FREDERICK BELL, GENARO CRUZ GOMEZ, SAM YBARRA, MICHAEL CARTER, AND JAMES PARK, ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED

VERSUS

JOHN BEL EDWARDS IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF LOUISIANA, ZITA JACKSON ANDRUS, CHRIS L. BOWMAN, FLOZELL DANIELS, JR., THOMAS D. DAVENPORT, JR., PATRICK J. FANNING, W. ROSS FOOTE, KATHERINE E. GILMER, MICHAEL C. GINART, JR., FRANK HOLTHAUS, DONALD W. NORTH, AND MOSES JUNIOR WILLIAMS, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF LOUISIANA PUBLIC DEFENDER BOARD; AND JAMES T. DIXON, JR., IN HIS OFFICIAL CAPACITY AS THE LOUISIANA STATE PUBLIC DEFENDER

ON APPLICATION FOR SUPERVISORY OR REMEDIAL WRITS OF CERTIORARI OR REVIEW TO THE LOUISIANA FIRST CIRCUIT COURT OF APPEAL DOCKET NO. 2019 CA0125 (WHIPPLE, C.J., GUIDRY, THERIOR, CHUTZ, AND WOLFE, JJ.) AND TO THE NINETEENTH JUDICIAL DISTRICT COURT FOR THE PARISH OF EAST BATON ROUGE, NO. C655079, DIVISION A, SECTION 27

BRIEF OF THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

Christine M. Calogero, 36818
BARRASSO USDIN KUPPERMAN FREEMAN & SARVER, L.L.C.
909 Poydras Street, Suite 2350
New Orleans, Louisiana 70112
Telephone: (504) 589-9700
Facsimile: (504) 589-9701
ccalogero@barrassousdin.com

Counsel for Amicus Curiae the Brennan Center for Justice at NYU School of Law

Ames C. Grawert
THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
120 Broadway, Suite 1750
New York, NY 10271
Telephone: (646) 292-8354
grawerta@brennan.law.nyu.edu

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION AND STATEMENT OF INTEREST

The Brennan Center for Justice at NYU School of Law ("the Brennan Center") is a non-profit, nonpartisan public policy and law institute that seeks to secure our nation's promise of "equal justice for all." The Brennan Center's Justice Program seeks to build a rational, effective, and fair criminal justice system, and advocates for reshaping public policies that undermine this vision. The Brennan Center's recent research explores the connection between poverty and mass incarceration and identifies solutions that can break that link while advancing racial and economic justice. One such solution is early access to effective counsel, which has been proven to help prevent unnecessary incarceration and reduce the risk of excessive sentences, helping to avert cycles of incarceration and poverty that devastate families, communities, and the social order. This case implicates both that fundamental right and the courts' ability to address unconstitutional policies and practices that systematically undermine access to effective counsel.

ARGUMENT

Nearly thirty years ago this Court took proactive steps to vindicate the Sixth Amendment rights of people who would have otherwise been forced to rely upon an underfunded, constitutionally ineffective public defense system. It is past time to revisit and build on that initiative, as the evidence presented by the plaintiffs in this case clearly demonstrates. But the First Circuit concluded otherwise, relying on an overly technical reading of this Court's case law to narrow its inquiry so far as to blind the judiciary to the continuing crisis in the state's indigent defense system, and its social and economic consequences for Louisiana. Because the First Circuit's decision unreasonably limits this Court's jurisprudence on the right to counsel, and implicates vital state interests, we urge this Court to exercise its supervisory jurisdiction.

I. The First Circuit's decision unreasonably narrows this Court's Sixth Amendment jurisprudence.

Since its seminal decision in *State v. Peart*, 621 So. 2d 780 (La. 1993), this Court has sought to balance a preference for resolving right-to-counsel claims on a case-by-case basis against the reality of systemic flaws in the state's provision of indigent defense services. The First Circuit's decision in this case mistakenly abandoned any pretense at balance, shutting the door to right-to-counsel claims brought either (1) prospectively or (2) on behalf of a group of similarly-

situated people. The former limitation lacks any foundation in case law; the latter ignores vital social interests that the *Peart* Court rightly sought to uphold. Taken together, these errors would unnecessarily constrain this Court's ability to redress systemic right-to-counsel issues and merits reversal accordingly.

A. Contrary to the First Circuit's unsupported conclusion, Sixth Amendment violations can—and in this case must—be addressed prospectively.

The First Circuit erred by holding that this Court's prior decisions require that any Sixth Amendment claims related to "systemic 'structural barriers'" be limited to "an individualized analysis *reserved for the post-conviction relief procedure*." *Allen v. Edwards*, 2019-0125, p. 15 (La. App. 1 Cir. 3/12/21), --- So. 3d ---, 2021 WL 941773, at *7 (emphasis added). This holding, left undisturbed, would relegate an entire class of Sixth Amendment claims to the more uncertain postconviction litigation phase and deprive trial courts of the chance to anticipate and prevent error in the first instance.

Critically, this limitation on Sixth Amendment claims exists nowhere in the Court's prior jurisprudence. Indeed, *Peart* itself held that "treating ineffective assistance claims before trial where possible will further the interests of judicial economy" and "protect defendants' constitutional rights, and preserve the integrity of the trial process." *See* 621 So. 2d at 787 (internal citation omitted). This Court's recent decision in *Covington*—which considered a public defender's wholesale withdrawal application, not a freestanding right-to-counsel claim—is not to the contrary. *See State v. Covington*, 2020-00447, pp. 7–9 (La. 12/11/20), 2020 WL 7301278, at *3–4 (finding that, unlike in *Peart*, no "case-specific facts" concerning the attorney's representation had been developed). Far from a "reaffirm[ation]" of *Peart*,[1] the First Circuit's bar on prospective relief represents a startling departure from both *Peart* and *Covington*.

The First Circuit's rule would also undermine the criminal justice system's preference for addressing error before it irrevocably taints a criminal case. In other criminal procedure cases, this Court has correctly recognized that some bells cannot be un-rung, and that, in many cases, criminal defendants whose rights are violated cannot be restored to the status quo ex ante. That is the very foundation of the exclusionary rule, which provides that evidence obtained in violation of a

---

[1] *See Allen*, 2019-0125, p. 14, 2021 WL 941773, at *7.

defendant's Fourth Amendment right should be pruned from the record before trial, rather than allowed to derail the proceedings once they have begun. *See State v. Lipscomb*, 2000-2836, p. 3 (La. 1/25/02), 807 So. 2d 218, 220 (explaining that pretrial adjudication of search and seizure issues "avoids unwarranted delay and jury confusion"); *see also* La. Code Crim. Proc. art. 703 (detailing pre-trial motion to suppress procedure). Louisiana courts also safeguard other Sixth Amendment guarantees prospectively, including the right to an attorney free of conflicts of interest. *See, e.g.*, *State v. Cisco*, 2001-2732, pp. 15–17 (La. 12/3/03), 861 So. 2d 118, 129–30 (discussing pretrial resolution of conflict-of-interest claims).

There is no reason to treat the Sixth Amendment claims raised here any differently. The evidence supporting plaintiffs' allegations of systemic failures is robust, *see Allen*, 2019-0125, pp. 17–18, 2021 WL 941773, at *16–18 (Guidry, J., dissenting), and can readily be applied by judges seeking to evaluate the impact of those failures on ongoing cases or groups of cases before them. *Peart* itself provides a perfect illustration. There, this Court created a presumption of ineffective assistance of counsel to be applied, "prospectively only," to a certain subset of cases. *See Peart*, 621 So. 2d at 791 & n.12.

Lastly, the First Circuit's holding would create absurd and unjust results. Under the First Circuit's decision, which erases any potential for prospective claims related to the right to counsel, an indigent defendant who believes their attorney cannot competently represent them would effectively be obligated to endure a sham trial, or plead guilty, before asserting their constitutional rights. Simply put, the First Circuit's requirement that indigent defendants prejudice themselves before asserting their constitutional rights is unsupported, in direct contravention of this Court's previous holdings, and would significantly limit the reach of the Sixth Amendment.

B. In *Peart*, this Court acknowledged that indigent defendants share common interests capable of systemic resolution.

Separately, the First Circuit relies heavily on *Peart*'s statement that any claim of ineffective assistance of counsel requires an individualized determination of counsel's performance. That principle, the First Circuit concluded, dooms any attempt to resolve systemic Sixth Amendment issues through a class action. *See Allen*, 2019-0125, p. 13, 2021 WL 941773, at *6 (citing *Covington*, 2020-00447, 2020 WL 7301278, at *6; *Peart*, 621 So. 2d at 787–88). But the First

Circuit's reading of *Peart* oversimplifies a complex decision.[2] While *Peart* did emphasize the general need for "case-by-case" resolution of Sixth Amendment claims, it also acknowledged that indigent defendants in Louisiana trial courts faced shared hardships, and that those shared hardships could be assessed jointly. *See* 621 So. 2d at 788–90. Furthermore, *Peart* openly contemplated the need for more creative, direct judicial solutions for continuing Sixth Amendment violations. *Id.* at 791. Accordingly, and especially in cases like this one, resting on a strong evidentiary record, *Peart* should not be read as a categorical bar to joint resolution of Sixth Amendment claims, through a class action or otherwise.

Even as it warned that Sixth Amendment claims should generally be handled on an individual basis, the Court took seriously the considerable evidence of systemic failures in indigent defense and responded with a creative remedy. *See id.* at 788–91. Specifically, the Court entered "global findings about the state of indigent defense" in a particular corner of the state judiciary, found that indigent defendants represented there were "generally not provided with the effective assistance of counsel the constitution requires," and created a "rebuttable presumption" that these defendants were "receiving assistance of counsel not sufficiently effective to meet constitutionally required standards." *Id.* The Court further ordered that "all indigent defendants" in the court at issue represented by public defenders would be entitled to that presumption for "so long as there are no changes in the workload and other conditions under which [public defenders] provide legal services." *Id.* at 791.

By relying on "global findings" to fashion a remedy for a broad group of people, the Court acknowledged that indigent defendants facing an underfunded public defense system have common concerns that can be addressed in a single suit. Admittedly the remedial framework the Court settled on required that the presumption be applied to individual cases. *See id.* at 791–92. But to the extent the First Circuit read *Peart* to create a clear-cut rule precluding joint relief of any sort, and blinding the judiciary to commonalities between similarly-situated indigent defendants,

---

[2] It also applies the wrong legal framework, as plaintiffs make clear in their writ application. *See* Pls.' Appl. for Supervisory or Remedial Writs 6–8, 16–17 (arguing that the fact-intensive inquiry required by *Strickland v. Washington*, 466 U.S. 668 (1984) is inapplicable in a case seeking prospective relief). However, and in the interest of brevity, the Brennan Center sees no need to further restate plaintiffs' argument.

it both misread and unreasonably narrowed the case and the scope of Sixth Amendment litigation in general.

Significantly, the Court also acknowledged that the remedial framework it created in *Peart* might not be enough to protect the Sixth Amendment rights of indigent defendants:

> If legislative action is not forthcoming and indigent defense reform does not take place, this Court, in the exercise of its constitutional and inherent power and supervisory jurisdiction, may find it necessary to employ the more intrusive and specific measures it has thus far avoided to ensure that indigent defendants receive reasonably effective assistance of counsel.

Id. at 791. This warning was neither isolated nor idly issued. Twelve years later, this Court again noted its "supervisory jurisdiction" and "duty to ensure that the criminal justice system is functioning in a constitutional manner," in holding that a trial court can, in some cases, "halt the prosecution" of a criminal case if it determines that there is not enough funding to fully compensate appointed counsel. *See State v. Citizen*, 2004-1841, pp. 16–17 (La. 4/1/05), 898 So. 2d 325, 338–39; *see also State v. Kyle*, 2013-0647, pp. 1–3 (La. 6/14/13), 117 So. 3d 498, 498–99 (considering this framework in noncapital cases). And in both *Peart* and *Citizen*, this Court cited approvingly to strings of cases in which other state supreme courts intervened directly in the operation of indigent defense systems. *See Peart*, 621 So. 2d at 791;[3] *Citizen*, 2004-1841, p. 15–16; 898 So. 2d at 337 & n.12 ("We are very much cognizant of the lengths to which other state courts have gone to ensure that the indigents' constitutional rights are protected, in spite of legislative inaction.").

The policy and legal issues that prompted these warnings persist to this day. In the intervening decades, evidence of the effect of under-funded indigent defense systems on people and institutions has only mounted, both nationally and in Louisiana. *See, e.g.*, Bryan Furst, Brennan Center for Justice, *A Fair Fight* 3–4, 6–7 (2019), *available at* https://www.brennancenter.org/our-work/research-reports/fair-fight (surveying research and

---

[3] The *Peart* Court focused specifically on cases invalidating methods for compensating appointed counsel. 621 So. 2d at 791. Notably, at least two of the cited cases—*Arnold v. Kemp*, 813 S.W.2d 770 (Ark. 1991) and *State ex rel. Stephan v. Smith*, 747 P.2d 816 (Kan. 1987)—ultimately led to broader legislative change. *See State v. Crittenden County*, 896 S.W.2d 881, 884 (Ark. 1995) (noting that, in Arkansas, the state supreme court's decision in *Arnold v. Kemp* precipitated wholesale reform of the state's indigent defense system); *Sharp v. State*, 827 P.2d 12, 13–14 (Kan. 1992) (noting judicially-prompted reforms after the decision in *Smith*).

noting the impact of under-funding on the culture and quality of representation provided by public defenders as well as Louisiana's unique situation); *see also* section II, *infra*. Considering this historical context, and the Court's "duty to ensure that the criminal justice system is functioning in a constitutional manner," *Citizen*, 2004-1841, p. 16, 898 So. 2d at 338, it would be odd indeed to construe *Peart* to categorically exclude any specific mechanism for addressing an ongoing Sixth Amendment violation—including a class action. *See Peart*, 621 So. 2d at 790 (noting the Court's "inherent powers 'to do all things reasonably necessary for the exercise of its functions'" (quoting *Konrad v. Jefferson Parish Council*, 520 So. 2d 393, 397 (La. 1988)). Indeed, not only did *Peart* fashion a broad systemic remedy affecting numerous similarly-situated people, it expressly left the door open for an even broader and more invasive comprehensive remedy if it ultimately proved necessary to address continuing, systemic deprivations of the right to counsel. 621 So. 2d at 791.

The First Circuit would have the courts close that door, without considering whether this case—and the significant evidentiary record developed at the class certification hearing, see *Allen*, 2019-0125, pp. 17–18, 2021 WL 941773, at *16–18 (Guidry, J., dissenting) (canvasing evidence presented in support of class certification)—finally presents the right opportunity to extend *Peart*. *See Covington*, 2020-00447, p. 3, 2020 WL 7301278, at *6 (Weimer, J., concurring) (observing that "it may be time to re-visit *Peart*," but concluding that *Covington* did not present such an opportunity).[4] That failure would abdicate the responsibilities this Court outlined in *Peart* and *Citizen* and merits correction.

II. Right-to-counsel litigation must be understood in the context of mass incarceration and its collateral consequences, including poverty and inequality.

The First Circuit's holding effectively removes systemic indigent defense issues from this Court's supervisory jurisdiction, with dire consequences for individual defendants and for the socioeconomic wellbeing of the state as a whole. This case arises from Louisiana's well-documented, continuing failure to provide meaningful representation to people who cannot afford their own attorney. It also arises in the context of the state's high imprisonment rate and new

---

[4] Significantly, the court concluded that *Covington* was not such a case due to its relatively smaller factual record. *See* 2020-00447, p. 7; 2020 WL 7301278, at *3. But the present case rests on a much more substantial record, and is brought, like *Peart*, by the vulnerable people most intimately in need of the court's protection. *See Allen*, 2019-0125, pp. 16–19; 2021 WL 941773, at *17–18 (Guidry, J., dissenting) (canvasing evidence presented in support of class certification).

research demonstrating the collateral consequences of incarceration on such a scale. As the Court weighs whether to intervene in this matter, we ask that it consider the relationship between these factors and the public's interest in a functioning criminal justice system. *See* La. Sup. Ct. Rule X, § 1(a) (providing for the grant of a writ where constitutional error "will cause material injustice or significantly affect the public interest").

Even in an era of reform, Louisiana continues to imprison more of its citizens per capita than any other state. E. Ann. Carson, Bureau of Justice Statistics, *Prisoners In 2019* 11 tbl.7 (2020), *available at* https://www.bjs.gov/index.cfm?ty=pbdetail&iid=7106 (identifying the state's imprisonment rate as 680 "sentenced prisoners" per 100,000 residents). The state's pretrial incarceration rate is also "3.4 times greater than the national average," according to a pre-pandemic survey of Louisiana jails. A'Niya Robinson, ACLU of Louisiana, *Justice Can't Wait* 15–16, 39 tbl.1. (2020), *available at* https://www.laaclu.org/en/publications/justice-cant-wait-indictment-louisianas-pretrial-system.[5] To be fair, Louisiana has made progress; rates of crime and incarceration declined in tandem between 2007 and 2017, as they did in most other states. *See* Cameron Kimble & Ames Grawert, Brennan Center for Justice, *Between 2007 and 2017, 34 States Reduced Crime and Incarceration in Tandem*, (Aug. 6, 2019), *available at* https://www.brennancenter.org/our-work/analysis-opinion/between-2007-and-2017-34-states-reduced-crime-and-incarceration-tandem. Unfortunately, the pace of reform remains slow.

Incarceration on such a scale creates a serious drain on the state's resources. In FY 2018–19, the state's correctional apparatus cost taxpayers nearly $750 million. *See* Louisiana Department of Public Safety & Corrections, Fiscal Year 2019/2020 Annual Report 6 (2021), *available at* https://s32082.pcdn.co/wp-content/uploads/2021/03/DPSC-FY-2020-Annual-Report-Final-3.4.21.pdf. But this significant cost understates the actual impact it has on Louisiana's economic wellbeing. According to Brennan Center research, conviction and imprisonment profoundly alter a person's life course, contributing to long-term poverty and racial and economic inequality. Building on decades of scholarship demonstrating the economic impact

---

[5] Data on state jail populations are released irregularly, making the ACLU of Louisiana's survey-based analysis the most recent, rigorous, and reliable estimate of the Louisiana jail population. *See Robinson, supra*, at 34–37 (describing methodology).

of imprisonment, the Brennan Center's research shows that time in prison can reduce someone's annual earnings by roughly 50 percent, and their lifetime earnings by roughly $480,000. Terry-Ann Craigie *et al.*, Brennan Center for Justice, *Conviction, Imprisonment, and Lost Earnings: How Involvement with the Criminal Justice System Deepens Inequality* 14, 17–19, 25–26 (2020), *available at* https://www.brennancenter.org/our-work/research-reports/conviction-imprisonment-and-lost-earnings-how-involvement-criminal (presenting findings and reviewing previous research on the effects of imprisonment). Of course, people in prisons tend to have faced other forms of socioeconomic disadvantage even before their incarceration. *See* Bernadette Rabuy & Daniel Kopf, Prison Policy Initiative, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned* (2015), *available at* https://www.prisonpolicy.org/reports/income.html. The Center's research shows that the experience of prison compounds those disadvantages and may trap people in poverty. *See* Craigie, *supra*, at 18–19.

Devastating at the personal level, these losses are also significant at the community and macroeconomic levels. Reduced earnings related to a history of imprisonment cost the American economy an estimated $55 billion annually. *Id.* at 15–16. In New York alone—which admittedly operates a prison system that is currently larger than Louisiana's—economic losses related to previous imprisonment reach nearly $2 billion annually. Ames Grawert *et al.*, Brennan Center For Justice, *Poverty And Mass Incarceration In New York: An Agenda For Change* 8–9 (2021), *available at* https://www.brennancenter.org/our-work/policy-solutions/poverty-and-mass-incarceration-new-york-agenda-change. And research also shows that high rates of incarceration can make communities less safe, self-sufficient, and prosperous. *See* Todd R. Clear, *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse* 82–83 (2007) (arguing that over-incarceration causes "the remaining social networks [within a community to] lose their capacity to function as ordinary social controls," such that "[c]ommunity life as a force for social order deteriorates").

Louisiana's high incarceration rates, and the related collateral consequences, did not emerge in a vacuum. They are the product of a myriad of policy choices made over the last half-century, as well as social factors unique to the state itself. No single factor explains the rise of

incarceration in the United States and Louisiana since the 1960s or the relationship between poverty and criminal justice involvement. *See*, e.g., Craigie, *supra*, at 13. That said, social science research suggests that the state's underfunded public defense system likely plays a part, by contributing to the state's high jail and prison populations. Like anything else, a defense attorney's performance depends on economic realities. *See* Michael A. Roach, *Indigent Defense Counsel, Attorney Quality, and Defendant Outcomes*, 16 Am. L. & Econ. Rev. 577, 607–08 (2014) (showing that the availability of competing, higher-paying work affects the quality of attorneys available to take indigent defense appointments and, by extension, case outcomes); Benjamin Schwall, *More Bang for Your Buck: How to Improve the Incentive Structure for Indigent Defense Counsel*, 14 Ohio St. J. of Crim. L. 553, 568–69 (2017) (demonstrating that attorneys spend fewer hours per case in a flat-fee structure). Decades of research on the effectiveness of public defenders relative to court-appointed and private counsel also suggest a related and unsurprising through line: Well-resourced, experienced defense attorneys tend to provide a better defense. *See* Radha Iyengar, *An Analysis of the Performance of Federal Indigent Defense Counsel* 20–26 (Nat'l Bureau of Econ. Research, Working Paper No. 13187, 2007) (studying professional federal defenders); *see also* Maggie Bailey, UNC School of Government Criminal Justice Innovation Lab, *Empirical Research on the Effectiveness of Indigent Defense Delivery Systems* 8 (2021) *available at* https://cjil.sog.unc.edu/wp-content/uploads/sites/19452/2021/02/Research-on-Indigent-Defense-2.19.20.pdf (summarizing existing literature by observing that court-appointed attorneys tend to underperform professional public defenders and retained counsel; David S. Abrams & Albert H. Yoon, *The Luck of the Draw: Using Random Case Assignment to Investigate Attorney Ability*, 74 U. Chicago L. Rev. 1145, 1173 (2007) (noting the value of experience).

The trend emerges with clarity in studies of single jurisdictions. *See, e.g.,* Amanda Agan *et al.*, *Is Your Lawyer a Lemon? Incentives and Selection in the Public Provision of Criminal Defense*, 103 Rev. of Econ. & Stat. 294, 300, 304–07 (2021) (observing changes in the same attorneys' behavior depending on compensation structure, in Bexar County, Texas). In a study of murder cases in Philadelphia, the services provided by a professional public defender's office reduced conviction rates by nearly 20 percent, and overall time served in prison by 24 percent, relative to appointed counsel. James M. Anderson & Paul Heaton, *How Much Difference Does*

the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes, 122 Yale L. J. 154, 159 (2012). Notably, every homicide case handled by the Philadelphia public defender's office was "staffed with teams of two lawyers and one or more investigations and mitigation specialists . . . as needed"—a significant commitment of resources. *Id.* at 161–62. Similarly, though research on the subject is more limited, sudden "funding injections" into a jurisdiction's indigent defense system appear to lead to higher-quality defense work and case outcomes more favorable to defendants. See Andrew L. B. Davies *et al.*, *Unique New York? Theorizing the Impact of Resources on the Quality of Defense Representation in a Deviant State*, 31 Crim. Just. Pol'y Rev. 962, 968–69 (2020).

In other words, the economic realities of legal practice directly influence the amount of time and effort an attorney can spend on each client, and thus ultimately bear on the question of who will be convicted of a crime and how long their prison sentence will be. Perhaps unsurprisingly, a similar dynamic also plays out in the pretrial context. There, access to counsel appears to decrease the amount of time people spend in jail while waiting for trial. *See* Alissa Pollitz Worden *et al.*, National Institute of Justice, *Early Intervention by Counsel: A Multi-Site Evaluation of the Presence of Counsel at Defendants' First Appearances in Court* 20–21 (2020), *available at* https://www.ojp.gov/pdffiles1/nij/grants/254620.pdf (concluding that early access to counsel in rural New York was associated with fewer days in pretrial detention, among other things); Douglas L. Colbert *et al.*, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 Cardozo L. Rev. 1719, 1720, 1755–56 (2002), *available at* https://digitalcommons.law.umaryland.edu/fac_pubs/291/ (early access to counsel in Baltimore was associated with a 250 percent increase in pretrial release). Such detention carries its own risks, including job loss and future unemployment. *See* Will Dobbie & Crystal Yang, *The Economic Costs of Pretrial Detention* 2–3, 8 (BPEA Conference Draft, March 25, 2021), *available at* https://www.brookings.edu/bpea-articles/the-economic-costs-of-pretrial-detention/.

Woven together, then, research suggests that an under-resourced indigent defense system contributes to both high jail and prison populations, and to the socioeconomic consequences that result from over-incarceration. Of course, effective representation is but one of many policy "levers" affecting an incredibly complex system. So while it would be wrong to conclude from

this research that a better-funded indigent defense system would singlehandedly or significantly reduce Louisiana's jail and prison populations, it would also be short-sighted to conclude that public defense funding has no impact beyond its immediate cost.

The Court should consider these broader effects and the underlying social concerns they implicate while determining whether to grant writs in this case. The above research only bolsters the evidence that was presented in this case and compels the conclusion that the relationship between effective representation, conviction, and poverty creates common issues of fact capable of resolution through a class action. *See Peart*, 621 So. 2d at 788–90 (drawing on evidence presented by amici and others of "the systemic inadequacies in the Louisiana indigent defender system" to enter "global findings about the state of indigent defense" in a particular courtroom).

CONCLUSION

The First Circuit's erroneous ruling conflicts with this Court's caselaw and severely limits the ability of the judiciary to uphold indigent defendants' constitutional right to effective assistance of counsel, contributing to mass incarceration and socioeconomic hardship at the personal and state level. This Court should exercise its supervisory jurisdiction accordingly.

Respectfully submitted,

Christine M. Calogero, 36818
BARRASSO USDIN KUPPERMAN
FREEMAN & SARVER, L.L.C.
909 Poydras Street, Suite 2350
New Orleans, Louisiana 70112
Telephone: (504) 589-9700
Facsimile: (504) 589-9701
ccalogero@barrassousdin.com

Counsel for Amicus Curiae the Brennan Center for Justice at NYU School of Law

Ames C. Grawert
THE BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
120 Broadway, Suite 1750
New York, NY 10271
Telephone: (646) 292-8354
grawerta@brennan.law.nyu.edu

CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief has been served on counsel of record listed below by electronic mail or United States mail this 16th day of June, 2021.

Counsel for Defendants

Mr. Thomas P. Owen, Jr.
Ms. Kathryn W. Munson
Mr. John P. D'Avello
Stanley, Reuter, Ross,
Thornton & Alford, L.L.C.
909 Poydras Street, Suite 2500
New Orleans, Louisiana 70112

Counsel for Plaintiffs

Mark A. Cunningham, 24063
Peter J. Kee, 34860
Jason Culotta, 35731
Jones Walker LLP
201 St. Charles Avenue, 50th Floor
New Orleans, Louisiana 70170

Liyah Brown
Cameron Clark
Conor Gaffney
Southern Poverty Law Center
201 St. Charles Avenue, Suite 2000
New Orleans, Louisiana 70170

Jon Greenbaum
Tianna Mays
Lawyers' Committee for Civil
Rights Under Law
1401 New York Avenue, NW, Suite 400
Washington, DC 20005

Daniel F. Kolb
Lara Samet Buchwald
Rebecca Martin
Michelle C. Musielewicz
Chase McReynolds
Davis Polk & Wardwell LLP
450 Lexington Avenue
New York, NY 10017