

**IN THE SECOND JUDICIAL DISTRICT COURT
BERNALILLO COUNTY
STATE OF NEW MEXICO**

CASE NO: D-202-CV-2017-06462

**DAIRON ROMERO and
DUSTIN JESSAMINE, and
other named and unnamed
members of the same class,**

PETITIONERS,

V.

**THE HON. CHRISTINE RODRIGUEZ,
THE HON. LINDA ROGERS,
THE HON. EDWARD BENAVIDEZ, and
other named and unnamed judges of the
Bernalillo County Metropolitan Court,**

RESPONDENTS.

**VERIFIED PETITION FOR WRIT OF
MANDAMUS AND SUPERVISORY CONTROL**

Petitioners Dairon Romero and Dustin Jessamine, through counsel, petition the Second Judicial District Court for the issuance of a *Writ of Mandamus and Supervisory Control* directed at the Honorable Christine Rodriguez, the Honorable Linda Rogers, and the Honorable Edward Benavidez, Bernalillo County Metropolitan Court Judges, concerning the following: with respect to persons accused of felony criminal offenses with cases pending in the Metropolitan Court, the systemic and systematic violation of the Rule 7-202(A)(3) NMRA ministerial mandate to dismiss cases and discharge defendants at the ten-day jurisdictional limitation or the sixty-day jurisdictional limitation, respectively, prescribed by Rule 7-202(A)(1) NMRA, which also violates U.S. Const. amends. V and XIV and N.M. Const. art. II, section 18. Specifically, the Petitioners show this Court:

BASIS FOR JURISDICTION, VENUE, AND STANDING

1. This Petition is brought under article VI, Section 13 of the New Mexico Constitution and under the Rules of Civil Procedure for the District Courts, Rule 1-065 NMRA.
2. Article VI, Section 13 of the New Mexico Constitution provides, in relevant part,

The district court shall have . . . supervisory control over [all cases originating in inferior courts]. The district courts, or any judge thereof, shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, prohibition *and all other writs, remedial or otherwise* in the exercise of their jurisdiction; provided, that no such writs shall issue directed to judges or courts of equal or superior jurisdiction.

Id. (emphasis added).
3. The Respondents are judges of the Bernalillo County Metropolitan Court, an inferior court in the Second Judicial District in which the cases at issue in this Petition originated.
4. The Petitioners are aggrieved by unlawful incarceration caused by Respondents' failures, individually and collectively, to take mandatory, non-discretionary action: Respondents, by failing to effect the ministerial mandate of Rule 7-202(A), have caused the unlawful incarceration of Petitioners and of countless similarly situated others.
5. A writ of mandamus will issue to compel the performance of a ministerial act or duty that is clear and indisputable, as long as there is not a plain, speedy and adequate remedy in the ordinary course of law. *Hand et al. v. Hofacket*, 2017 – NMSC – 005, ¶ 7 (internal quotation marks and citation omitted).

- a. As set forth below, Respondents were and are subject to a clear and indisputable ministerial duty.
 - b. There is no plain, speedy, and adequate remedy to restore the liberty lost by Petitioners and countless others or to prevent the repetition of the injuries to others situated similarly if Respondents are allowed to continue to fail to perform their ministerial duty.
6. District Courts have concurrent original jurisdiction with the Supreme Court over mandamus and other extraordinary writs. N.M. Const. art. VI, sections 3 and 13; *State ex rel. Owen v. Van Stone*, 1912-NMSC-003, ¶ 14, 17 N.M. 41.

II. REAL PARTIES IN INTEREST

The Respondents are public officers who purport to act in the discharge of official duties; the real parties in interest are the Petitioners, represented by undersigned counsel, similarly situated others, and the State of New Mexico, represented by the Second Judicial District Attorney.

III. GROUNDS, FACTS, AND SUBSTANTIVE LAW

III. A. SUBSTANTIVE LAW

7. With respect to defendants charged with a felony when the case is initiated in the Metropolitan Court, Rule 7-202(A)(1) states, “A preliminary examination shall be held within a reasonable time but in any event not later than ten (10) days after the first appearance if the defendant is in custody and no later than sixty (60) days after the first appearance if the defendant is not in custody. “

8. Rule 7-202(A)(3) states, “If a preliminary examination is not held within the time limits in this rule, the court shall dismiss the case without prejudice and discharge the defendant.”
9. Committee Commentary to Rule 7-202 states, in relevant part, “[T]o discharge a defendant the court must release the defendant from custody [and] relieve the defendant of all conditions of release”
10. Article II, section 18 of the New Mexico Constitution states, in relevant part, “No person shall be deprived of life, liberty or property without due process of law.”

III. B. RESPONDENT HON. CHRISTINE RODRIGUEZ

11. In cause number T-4-FR-2017-004132, a felony case originating in the Metropolitan Court, Petitioner Dairon Romero came before the Metropolitan Court for first appearance on July 22, 2017.
12. Petitioner was incarcerated in the Bernalillo County Metropolitan Detention Center on the date and at the time of this first appearance and remained continuously incarcerated in T-4-FR-2017-004132 from that first appearance through August 29, 2017.
13. Based upon a first appearance date of July 22, 2017 and Defendant’s continuous incarceration, pursuant to Rule 7-202(A)(1) and –(3), if no preliminary examination is held within ten days (10) days – *i.e., by August 4, 2017* – “the [Metropolitan Court] *shall* dismiss the case without prejudice and discharge the [Respondent].” Rule 7-202(A)(3) (emphasis added).
14. This Respondent at no time took action to dismiss cause number T-4-FR-2017-004132 or discharge Petitioner.

15. Late in the afternoon of August 29, 2017, the Second Judicial District Attorney's Office – i.e., not this Respondent – dismissed T-4-2017-004132¹.
16. Undersigned counsel is unaware of any matter in which this Respondent has taken it upon herself to comply with the ministerial mandate of Rule 7-202(A)(3); if it has happened, it is a rare exception and far from the norm.
17. At the present time, undersigned counsel is aware of three other current or all-but-current matters under this Respondent's jurisdiction in which defendants have suffered unlawful incarceration as a consequence of this Respondent's failure to execute the ministerial mandate of Rule 7-202(A)(3):
 - a. In felony cause number T-4-FR-2017-004557, State v. Jesus Torrez aka Jesus J. Torres:
 - i. There has been neither a preliminary examination nor a grand jury hearing;
 - ii. Defendant Torrez has been incarcerated since his first appearance on August 12, 2017;
 - iii. The ten day limit of Rule 7-202(A)(1) expired on August 28, 2017;
 - iv. Respondent has neither dismissed T-4-FR-2017-004557 nor discharged defendant Torrez.
 - v. On September 8, 2017, the Hon. Charles Brown, Presiding Criminal Division Judge of the Second Judicial District, in light of this Respondent's failure to comply with Rule 7-202, granted a

¹ Public Defender Department paralegals spent Monday, August 28, 2017, and Tuesday, August 29, 2017, repeatedly asking the District Attorney's Office to take action to secure Petitioner's release; from long experience, the Albuquerque Felony Division of the Law Offices of the Public Defender has almost completely given up asking this Respondent – or any other Metropolitan Court judge, for that matter – to execute the judicial function at issue in this Petition.

petition to dismiss T-4-FR-2017-004557 and discharge defendant
Torrez.

- b. In felony cause number T-4-FR-2017-000703, State v. Anna Torrez:
 - i. There has been neither a preliminary examination nor a grand jury hearing;
 - ii. Defendant Torres was incarcerated beginning before her first appearance on August 14, 2017;
 - iii. The ten day limit of Rule 7-202(A)(1) expired on August 28, 2017;
 - iv. Respondent neither dismissed T-4-FR-2017-000703 nor discharged defendant Torres.
 - v. Defendant Torres remained unlawfully incarcerated in T-4-FR-2017-000703 until September 2, 2017, when she posted a surety bond.
- c. In felony cause number T-4-FR-2017-002896, State v. Sally Gonzalez:
 - i. There has been neither a preliminary examination nor a grand jury hearing;
 - ii. Defendant's first appearance was on May 23, 2017;
 - iii. Because defendant Gonzalez was released from custody, the sixty day time limit of Rule 7-202(A)(1) was reached on July 24, 2017;
 - iv. This Respondent did not dismiss T-4-FR-2017-002896 after the time limit was exceeded;

- v. Instead, this Respondent left T-4-FR-2017-002896 in pending status, leaving in effect a warrant this Respondent had issued on June 16, 2017;
- vi. After the warrant was executed on defendant Gonzalez on August 25, 2017 (*over a month after the expiration of the sixty-day limit*), the incarcerated defendant Gonzalez was brought before this Respondent on August 26, 2017;
- vii. Instead of dismissing T-4-FR-2017-002896 and discharging defendant Gonzalez when defendant Gonzalez came before her, this Respondent left defendant Gonzalez in custody and set a hearing for August 29, 2017;
- viii. On August 29, 2017, the Second Judicial District Attorney's Office – i.e., *not this Respondent* – dismissed T-4-FR-2017-002896, freeing defendant Gonzalez from unlawful incarceration.

18. This Respondent has exhibited a pattern and practice of failure to fulfill the ministerial duty set forth in the ministerial mandate of Rule 7-202(A)(1) and –(3).

III. C. RESPONDENT HON. LINDA ROGERS

- 19. In cause number T-4-FR-2017-001448, a felony case originating in the Metropolitan Court, Petitioner Dustin Jessamine came before the Metropolitan Court for first appearance on July 27, 2017.
- 20. Petitioner was incarcerated in the Bernalillo County Metropolitan Detention Center on the date and at the time of this first appearance and remained

continuously incarcerated in T-4-FR-2017-001448 from that first appearance through August 28, 2017.

21. Based upon a first appearance date of July 27, 2017 and Defendant's continuous incarceration and pursuant to Rule 7-202(A)(1) and -(3), if no preliminary examination is held within ten days (10) days – *i.e., by August 10, 2017* – “the [Metropolitan Court] *shall* dismiss the case without prejudice and discharge the [Respondent].” Rule 7-202(A)(3) (emphasis added).
22. The Committee Commentary to Rule 7-202 states, in relevant part, “[T]o discharge a defendant the court must release the defendant from custody”
23. This Respondent neither dismissed cause number T-4-FR-2017-001448 nor discharged Petitioner Jessamine.
24. On August 28, 2017, the Second Judicial District Attorney's Office – *i.e., not this Respondent* – dismissed T-4-2017-001448².
25. Undersigned counsel is unaware of any matter in which this Respondent has taken it upon herself to fulfill the ministerial duty set forth in the ministerial mandate of Rule 7-202(A)(3); if it has happened, it is a rare exception and far from the norm.

III. D. RESPONDENT HON. EDWARD BENAVIDEZ

26. This Respondent is the Chief Judge of the Bernalillo County Metropolitan Court.
27. Earlier this year (2017), this Respondent accepted responsibility for dismissing cases and discharging defendants for which the Rule 7-202(A)(1) time limits had been exceeded.

² Petitioner Jessamine's attorney asked the District Attorney's Office to take action to secure Petitioner's release; as noted in the previous footnote, from long experience, the Albuquerque Felony Division of the Law Offices of the Public Defender has given up asking Respondent – or any other Metropolitan Court judge, for that matter – to execute the judicial function at issue in this Petition.

28. Because Metropolitan Court had no system for identifying these cases, undersigned counsel agreed to submit daily lists of cases as they came upon the ten-day and sixty-day time limits of Rule 7-202(A)(1); in return, Respondent agreed to dismiss the cases and discharge the defendants per the ministerial mandate of Rule 7-202(A)(3).
29. This arrangement was to continue until the Metropolitan Court worked out its own system for identifying cases as they came up to and exceeded the Rule 7-202(A)(1) time limits.
30. This arrangement partially worked for a few weeks:
 - a. This Respondent for those few weeks dismissed cases which had gone beyond the ten-day time limit.
 - b. However, this Respondent did not dismiss cases which had gone beyond the sixty-day time limit.
31. After a few weeks, this Respondent stopped dismissing any cases.
32. In this process, this Respondent demonstrated his jurisdiction over all felony criminal cases pending in the Metropolitan Court.
33. Despite this jurisdictional power, this Respondent — other than for the few weeks cited above — has failed to exercise his jurisdiction to fulfill the ministerial duty set forth in Rule 7-202(A).
34. Upon information and belief, this Respondent has never developed a system for identifying cases as they come up to and exceed the Rule 7-202(A)(1) time limits.

III. E. OTHER JUDGES OF THE METROPOLITAN COURT

III. E. i. HON. COURTNEY WEAKS

35. On Wednesday, September 6, 2017, Public Defender Attorney Cherylinn Gunning went to the Metropolitan Court clerk's window to file an emergency petition seeking dismissal and discharge on defendant Richard Hammon in Metropolitan Court felony cause number T-4-FR-2017-003768 because defendant Hammon was incarcerated in that matter beyond the end of the sixty-day time limit.
36. Because it was an emergency petition, the clerk's staff directed Attorney Gunning directly to the chambers of Metropolitan Court Judge Courtney Weeks.
37. Judge Weeks's assistant indicated that *Judge Weeks would call the matter for review the next day.*
38. Attorney Gunning protested that defendant Hammon was already unlawfully incarcerated and delay would mean another night in jail.
39. Judge Weeks's assistant took Attorney Gunning's cell phone number and said she would do what she could.
40. Five minutes later, Judge Weeks's assistant called Attorney Gunning and said that it had been determined that it was the District Attorney's responsibility to dismiss the matter.
41. *Judge Weeks never called the matter for review.*
42. According to what Defendant Hammon told Attorney Gunning, one of defendant Hammon's relatives had attempted to post a cash bond with the court, and the Metropolitan Court Clerk refused to accept the money -- the clerk said (incorrectly) that Defendant Hammon had been ordered to be released from jail.

43. Defendant Hammon was thus caught in a trap set by Judge Weeks's abdication of her ministerial duty and the Metropolitan Court Clerk's incorrect reading of defendant Hammon's status.
44. Defendant Hammon escaped from the trap only because the Hon. Charles Brown, Presiding Criminal Division Judge of the Second Judicial District, granted a petition to dismiss Metropolitan Court cause number T-4-FR-2017-003768 and discharge defendant Hammon.

III. E. ii. HON. SHARON WALTON

45. Attorneys in the Metropolitan Court Division of the Law Offices of the Public Defender have reported to undersigned counsel that in the context of denying motions to dismiss and discharge pursuant to the ministerial mandate of Rule 7-202(A)(3), the Hon. Sharon Walton has stated her belief that the Metropolitan Court does not have the authority to dismiss felony case initiated in and pending in the Metropolitan Court.
46. During the a hearing in which Judge Walton actually did dismiss a felony case and discharge a defendant pursuant to Rule 7-202, undersigned counsel heard Judge Walton say that she does not believe she has the authority to dismiss a felony case initiated in and pending in the Metropolitan Court.

III. E. iii. HON. VIDALIA CHAVEZ

47. Second Judicial District Defender Richard Pugh has informed undersigned counsel the Hon. Vidalia Chavez, Presiding Criminal Judge of the Metropolitan Court, stated to District Defender Pugh that Metropolitan Court judges do not

have jurisdiction to dismiss felony cases initiated in and pending in the Metropolitan Court nor to discharge defendants in those cases.

III. F. IMPLICATIONS FOR METROPOLITAN COURT JUDGES

48. Except during the brief time period where Respondent Hon. Edward Benavidez as Chief Judge exercised his jurisdiction over all Metropolitan Court cases, judges of the Metropolitan Court currently divide up responsibility for and jurisdiction over felony criminal cases in the Metropolitan Court according to which judge presided over felony first appearance.
49. However, the practice of the judges of the Metropolitan Court described in the preceding paragraph has varied over time:
 - a. Sometimes, questions of custody and release are taken up by judges who rotate week-by-week presiding over custody matters.
 - b. Sometimes, as now, matters of custody and release are dealt with by the judge who first deals with a defendant.
 - c. Upon information and belief, the policy and practice changes from time to time according to the desires of the Bernalillo County Metropolitan Court judges as a group.
 - d. Since jurisdiction over individual cases is a matter of choice and not rule or statute, all judges of the Metropolitan Court are in effect responsible for applying all time limits in all felony cases in the Metropolitan Court, and this Petition could legitimately be directed at all judges of the Metropolitan Court.

III. G. APPLICATION OF LAW TO FACTS

50. At the time of the felony first appearance in Metropolitan Court, the court determines whether probable cause exists to hold a defendant upon the alleged charges. Rule 7-203(A) NMRA.
51. This probable cause determination is “non-adversarial and may be held in the absence of the defendant and of counsel.” Rule 7-203(B) NMRA.
52. Therefore, when a defendant is either incarcerated or released with liberty restrictions after a Rule 7-203 probable cause determination, the infringement on the defendant’s liberty interest has been effected *without due process*.
53. Both incarcerated and unincarcerated defendants suffer real harm when the time limits of Rule 7-202(A)(1) expire and the court does not fulfill the ministerial mandate of Rule 7-202(A)(3):
 - a. The infringement on an incarcerated defendant’s liberty interest after the ten-day limitation on incarceration has expired is obvious and need not be elaborated.
 - b. The infringement on an unincarcerated defendant’s liberty interest after the sixty-day limitation has expired may be less obvious, but it is just as real:
 - i. There is always a danger of unlawful and wrongful incarceration – as occurred in the case of Sally Gonzalez recounted above.
 - ii. Employers, landlords, licensing authorities, lenders, government benefits providers, and others regularly check court records before making decisions; a pending felony criminal case – even a

wrongfully pending felony criminal case -- can and does result in wrongful denial of employment, housing, licensure, financial assistance, government benefits, and more.

54. Nothing in the mandatory dismissal and discharge called for by Rule 7-202(A)(3) infringes upon or in any way impacts the ability of the State of New Mexico to re-initiate the criminal charges, whether by re-filing in the Metropolitan Court, by filing an Information and holding a preliminary examination in the District Court pursuant to Rule 5-302 NMRA, or by taking the matter to a grand jury, pursuant to NMSA 1978 Sections 31-6-1 through 31-6-15 and Rule 5-302A NMRA.

IV. MOOTNESS

55. Because the District Attorney has dismissed both T-4-FR-2017-004132 and T-4-FR-2017-001448, Petitioners' specific cases are moot.
56. However, mootness -- the expiration of controversy -- is not necessarily fatal to jurisdiction:

When no actual controversy exists for which a ruling by the court will grant relief, an appeal is moot and ordinarily should be dismissed. In New Mexico, however, courts recognize two exceptions to the prohibition on deciding moot cases: cases which present issues of substantial public interest, and cases which are capable of repetition yet evade review. A case presents an issue of substantial public interest if it involves a constitutional question or affects a fundamental right such as voting. An issue is capable of repetition yet evading review if the issue is likely to arise in a future lawsuit, regardless of the identity of the parties. The Court's review of moot cases that either raise an issue of substantial public interest or are capable of repetition yet evading review is discretionary.

Snow v. Warren Power & Mach. Inc., 2015-NMSC-026, ¶ 11 (internal quotation marks and citation omitted).

57. This Petition involves a substantial public interest because it involves a constitutional question concerning Article II, Section 18 of the New Mexico Constitution -- violation of the liberty interest of people accused of felony criminal offenses who have never been afforded the due process of an adversarial probable cause determination at which they have a right to notice, to testify, to present evidence -- in other words, to defend themselves with and through legal counsel.

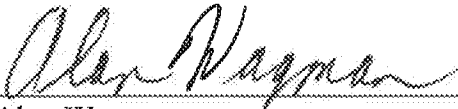
a. The issue raised in this appeal is capable of repetition because it is capable of arising every time any time any Metropolitan Court judge takes jurisdiction over a felony matter filed in the Metropolitan Court; it will evade review, because as soon as the Law Offices of the Public Defender (LOPD) becomes aware of unlawful incarceration, LOPD goes to work to secure release, either via a *nolle prosequi* (dismissal without prejudice) from the District Attorney's office or via petition to the Presiding Criminal Division Judge of the Second Judicial District Court. For obvious reasons this takes precedence over keeping someone in jail in order to preserve jurisdiction.

58. This Court can and should retain jurisdiction and take action on this important constitutional issue.

V. THE NATURE OF THE RELIEF SOUGHT

Petitioner requests that this Court issue its Writ of Supervisory Control directed to all named Respondents and to all of the judges of the Bernalillo County Metropolitan Court, directing them to immediately and to henceforward follow the ministerial mandate of Rule 7-202(A)(3).

I state under oath that I have read the foregoing
Petition and that the statements contained in the
Petition are true and correct to the best of my
knowledge, information and belief.

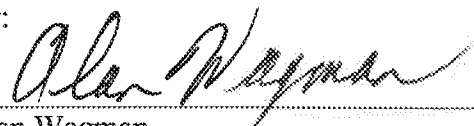


Alan Wagman
Assistant Public Defender
Counsel for Petitioners

Respectfully submitted,

BENNETT BAUR
Chief Public Defender

By:



Alan Wagman
Assistant Public Defender
505 Marquette NW, Suite 120
Albuquerque, NM 87102
Phone: (505) 219-2867

CERTIFICATE OF SERVICE

Copies were served on all of the following individuals by personal delivery, email, facsimile, or mailing copies to them with sufficient first-class postage on September 11, 2017.

Hon. Christine Rodriguez
Bernalillo County Metropolitan Court
401 Lomas Blvd, NW
Albuquerque, NM 87103

Hon. Linda Rogers
Bernalillo County Metropolitan Court
401 Lomas Blvd, NW
Albuquerque, NM 87103

Hon. Edward Benavidez
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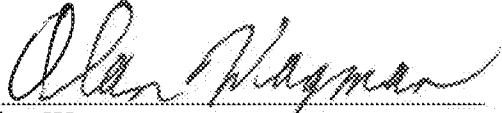
Hon. Courtney Weaks
Bernalillo County Metropolitan Court
401 Lomas Blvd, NW
Albuquerque, NM 87103

Hon. Sharon Walton
Bernalillo County Metropolitan Court
401 Lomas Blvd, NW
Albuquerque, NM 87103

Hon. Vidalia Chavez
Bernalillo County Metropolitan Court
401 Lomas Blvd, NW
Albuquerque, NM 87103

Raul Torrez
Counsel for Real Party in Interest, State of New Mexico
Second Judicial District Attorney's Office
520 Lomas Blvd, NW
Albuquerque, NM 87102

Office of the Attorney General
Counsel for Respondents
P.O. Box 1508
Santa Fe, NM 87504-1508

A handwritten signature in cursive script, appearing to read "Alan Wagman", written over a horizontal dotted line.

Alan Wagman
Assistant Public Defender
Counsel for Petitioners

STATE OF NEW MEXICO
SECOND JUDICIAL DISTRICT COURT
BERNALILLO COUNTY

DAIRON ROMERO, DUSTIN JESSAMINE,
and other named and unnamed members of the
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No. _____

Judge assigned: _____

STATE OF NEW MEXICO
WRIT OF MANDAMUS AND SUPERVISORY CONTROL

TO: Raul Torrez, Second Judicial District Attorney, Counsel for State of New Mexico, Real
Party in Interest

ADDRESS: 520 Lomas Blvd. NW, Albuquerque, NM 87102

GREETINGS: THIS IS A COURT ISSUED WRIT.

A LAWSUIT HAS BEEN FILED AGAINST YOU. A copy of the Verified Petition for Writ
of Error and Superintending Control is attached. The Verified Petition seeks an order from the
District Court that the Hon. Courtney Weaks shall not impose incarceration sentences beyond
Metropolitan Court authority under Rule 7-202(A) NMRA and shall abide by the mandate of
Rule 7-202(A) with respect to dismissing cases and discharging defendants when this Rule's
time limits are exceeded.

YOU ARE REQUIRED TO FILE A WRITTEN RESPONSE TO THE COMPLAINT
WITHIN _____ DAYS AFTER THE WRIT HAS BEEN SERVED ON YOU. You must
file (in person or by mail) your written response with the court. When you file your response,
you must give or mail a copy to the person who signed the Verified Petition for Writ of Error and
Superintending Control.

**THE SECOND JUDICIAL DISTRICT COURT WILL HOLD A HEARING ON THIS
MATTER ON** _____ *(date – no earlier than seven business days following
issuance of the Writ)* **AT** _____ *(time)* **IN COURTROOM** _____ **OF THE**
BERNALILLO COUNTY DISTRICT COURTHOUSE, 400 LOMAS BLVD. NW,
ALBUQUERQUE, NM 87102.

If you need an interpreter, you must ask the court for one in writing.

Your answer must be filed with the court which is located at 400 Lomas Blvd. NW,
Albuquerque, NM 87102

A copy of your answer or responsive pleading must be mailed to:

Name: Alan Wagman, Attorney for Petitioner

Address: 505 Marquette Ave. NW, Suite 120, Albuquerque, NM 87102

District Court Judge

Clerk

**IN THE SECOND JUDICIAL DISTRICT COURT
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APPENDIX TO WRIT

BASIS FOR JURISDICTION, VENUE, AND STANDING

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2. Article VI, Section 13 of the New Mexico Constitution provides, in relevant part,

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Id. (emphasis added).
3. The Respondents are judges of the Bernalillo County Metropolitan Court, an inferior court in the Second Judicial District in which the cases at issue in this Petition originated.
4. The Petitioners are aggrieved by unlawful incarceration caused by Respondents' failures, individually and collectively, to take mandatory, non-discretionary action: Respondents, by failing to effect the ministerial mandate of Rule 7-202(A), have caused the unlawful incarceration of Petitioners and of countless similarly situated others.
5. A writ of mandamus will issue to compel the performance of a ministerial act or duty that is clear and indisputable, as long as there is not a plain, speedy and adequate remedy in the ordinary course of law. *Hand et al. v. Hofacket*, 2017 – NMSC – 005, ¶ 7 (internal quotation marks and citation omitted).

- a. As set forth below, Respondents were and are subject to a clear and indisputable ministerial duty.
 - b. There is no plain, speedy, and adequate remedy to restore the liberty lost by Petitioners and countless others or to prevent the repetition of the injuries to others situated similarly if Respondents are allowed to continue to fail to perform their ministerial duty.
6. District Courts have concurrent original jurisdiction with the Supreme Court over mandamus and other extraordinary writs. N.M. Const. art. VI, sections 3 and 13; *State ex rel. Owen v. Van Stone*, 1912-NMSC-003, ¶ 14, 17 N.M. 41.

II. REAL PARTIES IN INTEREST

The Respondents are public officers who purport to act in the discharge of official duties; the real parties in interest are the Petitioners, represented by undersigned counsel, similarly situated others, and the State of New Mexico, represented by the Second Judicial District Attorney.

III. GROUNDS, FACTS, AND SUBSTANTIVE LAW

III. A. SUBSTANTIVE LAW

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14. This Respondent at no time took action to dismiss cause number T-4-FR-2017-004132 or discharge Petitioner.

15. Late in the afternoon of August 29, 2017, the Second Judicial District Attorney's Office -- i.e., not this Respondent -- dismissed T-4-2017-004132¹.
16. Undersigned counsel is unaware of any matter in which this Respondent has taken it upon herself to comply with the ministerial mandate of Rule 7-202(A)(3); if it has happened, it is a rare exception and far from the norm.
17. At the present time, undersigned counsel is aware of three other current or all-but-current matters under this Respondent's jurisdiction in which defendants have suffered unlawful incarceration as a consequence of this Respondent's failure to execute the ministerial mandate of Rule 7-202(A)(3):
 - a. In felony cause number T-4-FR-2017-004557, State v. Jesus Torrez aka Jesus J. Torres:
 - i. There has been neither a preliminary examination nor a grand jury hearing;
 - ii. Defendant Torrez has been incarcerated since his first appearance on August 12, 2017;
 - iii. The ten day limit of Rule 7-202(A)(1) expired on August 28, 2017;
 - iv. Respondent has neither dismissed T-4-FR-2017-004557 nor discharged defendant Torrez.
 - v. On September 8, 2017, the Hon. Charles Brown, Presiding Criminal Division Judge of the Second Judicial District, in light of this Respondent's failure to comply with Rule 7-202, granted a

¹ Public Defender Department paralegals spent Monday, August 28, 2017, and Tuesday, August 29, 2017, repeatedly asking the District Attorney's Office to take action to secure Petitioner's release; from long experience, the Albuquerque Felony Division of the Law Offices of the Public Defender has almost completely given up asking this Respondent -- or any other Metropolitan Court judge, for that matter -- to execute the judicial function at issue in this Petition.

petition to dismiss T-4-FR-2017-004557 and discharge defendant Torrez.

b. In felony cause number T-4-FR-2017-000703, State v. Anna Torrez:

- i. There has been neither a preliminary examination nor a grand jury hearing;
- ii. Defendant Torres was incarcerated beginning before her first appearance on August 14, 2017;
- iii. The ten day limit of Rule 7-202(A)(1) expired on August 28, 2017;
- iv. Respondent neither dismissed T-4-FR-2017-000703 nor discharged defendant Torres.
- v. Defendant Torres remained unlawfully incarcerated in T-4-FR-2017-000703 until September 2, 2017, when she posted a surety bond.

c. In felony cause number T-4-FR-2017-002896, State v. Sally Gonzalez:

- i. There has been neither a preliminary examination nor a grand jury hearing;
- ii. Defendant's first appearance was on May 23, 2017;
- iii. Because defendant Gonzalez was released from custody, the sixty day time limit of Rule 7-202(A)(1) was reached on July 24, 2017;
- iv. This Respondent did not dismiss T-4-FR-2017-002896 after the time limit was exceeded;

- v. Instead, this Respondent left T-4-FR-2017-002896 in pending status, leaving in effect a warrant this Respondent had issued on June 16, 2017;
- vi. After the warrant was executed on defendant Gonzalez on August 25, 2017 (*over a month after the expiration of the sixty-day limit*), the incarcerated defendant Gonzalez was brought before this Respondent on August 26, 2017;
- vii. Instead of dismissing T-4-FR-2017-002896 and discharging defendant Gonzalez when defendant Gonzalez came before her, this Respondent left defendant Gonzalez in custody and set a hearing for August 29, 2017;
- viii. On August 29, 2017, the Second Judicial District Attorney's Office – i.e., *not this Respondent* – dismissed T-4-FR-2017-002896, freeing defendant Gonzalez from unlawful incarceration.

18. This Respondent has exhibited a pattern and practice of failure to fulfill the ministerial duty set forth in the ministerial mandate of Rule 7-202(A)(1) and –(3).

III. C. RESPONDENT HON. LINDA ROGERS

- 19. In cause number T-4-FR-2017-001448, a felony case originating in the Metropolitan Court, Petitioner Dustin Jessamine came before the Metropolitan Court for first appearance on July 27, 2017.
- 20. Petitioner was incarcerated in the Bernalillo County Metropolitan Detention Center on the date and at the time of this first appearance and remained

continuously incarcerated in T-4-FR-2017-001448 from that first appearance through August 28, 2017.

21. Based upon a first appearance date of July 27, 2017 and Defendant's continuous incarceration and pursuant to Rule 7-202(A)(1) and -(3), if no preliminary examination is held within ten days (10) days – *i.e., by August 10, 2017* – “the [Metropolitan Court] *shall* dismiss the case without prejudice and discharge the [Respondent].” Rule 7-202(A)(3) (emphasis added).
22. The Committee Commentary to Rule 7-202 states, in relevant part, “[T]o discharge a defendant the court must release the defendant from custody”
23. This Respondent neither dismissed cause number T-4-FR-2017-001448 nor discharged Petitioner Jessamine.
24. On August 28, 2017, the Second Judicial District Attorney's Office – *i.e., not this Respondent* – dismissed T-4-2017-001448².
25. Undersigned counsel is unaware of any matter in which this Respondent has taken it upon herself to fulfill the ministerial duty set forth in the ministerial mandate of Rule 7-202(A)(3); if it has happened, it is a rare exception and far from the norm.

III. D. RESPONDENT HON. EDWARD BENAVIDEZ

26. This Respondent is the Chief Judge of the Bernalillo County Metropolitan Court.
27. Earlier this year (2017), this Respondent accepted responsibility for dismissing cases and discharging defendants for which the Rule 7-202(A)(1) time limits had been exceeded.

² Petitioner Jessamine's attorney asked the District Attorney's Office to take action to secure Petitioner's release; as noted in the previous footnote, from long experience, the Albuquerque Felony Division of the Law Offices of the Public Defender has given up asking Respondent – or any other Metropolitan Court judge, for that matter – to execute the judicial function at issue in this Petition.

28. Because Metropolitan Court had no system for identifying these cases, undersigned counsel agreed to submit daily lists of cases as they came upon the ten-day and sixty-day time limits of Rule 7-202(A)(1); in return, Respondent agreed to dismiss the cases and discharge the defendants per the ministerial mandate of Rule 7-202(A)(3).
29. This arrangement was to continue until the Metropolitan Court worked out its own system for identifying cases as they came up to and exceeded the Rule 7-202(A)(1) time limits.
30. This arrangement partially worked for a few weeks:
 - a. This Respondent for those few weeks dismissed cases which had gone beyond the ten-day time limit.
 - b. However, this Respondent did not dismiss cases which had gone beyond the sixty-day time limit.
31. After a few weeks, this Respondent stopped dismissing any cases.
32. In this process, this Respondent demonstrated his jurisdiction over all felony criminal cases pending in the Metropolitan Court.
33. Despite this jurisdictional power, this Respondent – other than for the few weeks cited above – has failed to exercise his jurisdiction to fulfill the ministerial duty set forth in Rule 7-202(A).
34. Upon information and belief, this Respondent has never developed a system for identifying cases as they come up to and exceed the Rule 7-202(A)(1) time limits.

III. E. OTHER JUDGES OF THE METROPOLITAN COURT

III. E. i. HON. COURTNEY WEAKS

35. On Wednesday, September 6, 2017, Public Defender Attorney Cherylinn Gunning went to the Metropolitan Court clerk's window to file an emergency petition seeking dismissal and discharge on defendant Richard Hammon in Metropolitan Court felony cause number T-4-FR-2017-003768 because defendant Hammon was incarcerated in that matter beyond the end of the sixty-day time limit.
36. Because it was an emergency petition, the clerk's staff directed Attorney Gunning directly to the chambers of Metropolitan Court Judge Courtney Weaks.
37. Judge Weaks's assistant indicated that *Judge Weaks would call the matter for review the next day.*
38. Attorney Gunning protested that defendant Hammon was already unlawfully incarcerated and delay would mean another night in jail.
39. Judge Weaks's assistant took Attorney Gunning's cell phone number and said she would do what she could.
40. Five minutes later, Judge Weaks's assistant called Attorney Gunning and said that it had been determined that it was the District Attorney's responsibility to dismiss the matter.
41. *Judge Weaks never called the matter for review.*
42. According to what Defendant Hammon told Attorney Gunning, one of defendant Hammon's relatives had attempted to post a cash bond with the court, and the Metropolitan Court Clerk refused to accept the money – the clerk said (incorrectly) that Defendant Hammon had been ordered to be released from jail.

43. Defendant Hammon was thus caught in a trap set by Judge Weeks's abdication of her ministerial duty and the Metropolitan Court Clerk's incorrect reading of defendant Hammon's status.
44. Defendant Hammon escaped from the trap only because the Hon. Charles Brown, Presiding Criminal Division Judge of the Second Judicial District, granted a petition to dismiss Metropolitan Court cause number T-4-FR-2017-003768 and discharge defendant Hammon.

III. E. ii. HON. SHARON WALTON

45. Attorneys in the Metropolitan Court Division of the Law Offices of the Public Defender have reported to undersigned counsel that in the context of denying motions to dismiss and discharge pursuant to the ministerial mandate of Rule 7-202(A)(3), the Hon. Sharon Walton has stated her belief that the Metropolitan Court does not have the authority to dismiss felony case initiated in and pending in the Metropolitan Court.
46. During the a hearing in which Judge Walton actually did dismiss a felony case and discharge a defendant pursuant to Rule 7-202, undersigned counsel heard Judge Walton say that she does not believe she has the authority to dismiss a felony case initiated in and pending in the Metropolitan Court.

III. E. iii. HON. VIDALIA CHAVEZ

47. Second Judicial District Defender Richard Pugh has informed undersigned counsel the Hon. Vidalia Chavez, Presiding Criminal Judge of the Metropolitan Court, stated to District Defender Pugh that Metropolitan Court judges do not

have jurisdiction to dismiss felony cases initiated in and pending in the Metropolitan Court nor to discharge defendants in those cases.

III. F. IMPLICATIONS FOR METROPOLITAN COURT JUDGES

48. Except during the brief time period where Respondent Hon. Edward Benavidez as Chief Judge exercised his jurisdiction over all Metropolitan Court cases, judges of the Metropolitan Court currently divide up responsibility for and jurisdiction over felony criminal cases in the Metropolitan Court according to which judge presided over felony first appearance.
49. However, the practice of the judges of the Metropolitan Court described in the preceding paragraph has varied over time:
 - a. Sometimes, questions of custody and release are taken up by judges who rotate week-by-week presiding over custody matters.
 - b. Sometimes, as now, matters of custody and release are dealt with by the judge who first deals with a defendant.
 - c. Upon information and belief, the policy and practice changes from time to time according to the desires of the Bernalillo County Metropolitan Court judges as a group.
 - d. Since jurisdiction over individual cases is a matter of choice and not rule or statute, all judges of the Metropolitan Court are in effect responsible for applying all time limits in all felony cases in the Metropolitan Court, and this Petition could legitimately be directed at all judges of the Metropolitan Court.

III. G. APPLICATION OF LAW TO FACTS

50. At the time of the felony first appearance in Metropolitan Court, the court determines whether probable cause exists to hold a defendant upon the alleged charges. Rule 7-203(A) NMRA.
51. This probable cause determination is “non-adversarial and may be held in the absence of the defendant and of counsel.” Rule 7-203(B) NMRA.
52. Therefore, when a defendant is either incarcerated or released with liberty restrictions after a Rule 7-203 probable cause determination, the infringement on the defendant’s liberty interest has been effected *without due process*.
53. Both incarcerated and unincarcerated defendants suffer real harm when the time limits of Rule 7-202(A)(1) expire and the court does not fulfill the ministerial mandate of Rule 7-202(A)(3):
 - a. The infringement on an incarcerated defendant’s liberty interest after the ten-day limitation on incarceration has expired is obvious and need not be elaborated.
 - b. The infringement on an unincarcerated defendant’s liberty interest after the sixty-day limitation has expired may be less obvious, but it is just as real:
 - i. There is always a danger of unlawful and wrongful incarceration -- as occurred in the case of Sally Gonzalez recounted above.
 - ii. Employers, landlords, licensing authorities, lenders, government benefits providers, and others regularly check court records before making decisions; a pending felony criminal case -- even a

wrongfully pending felony criminal case – can and does result in wrongful denial of employment, housing, licensure, financial assistance, government benefits, and more.

54. Nothing in the mandatory dismissal and discharge called for by Rule 7-202(A)(3) infringes upon or in any way impacts the ability of the State of New Mexico to re-initiate the criminal charges, whether by re-filing in the Metropolitan Court, by filing an Information and holding a preliminary examination in the District Court pursuant to Rule 5-302 NMRA, or by taking the matter to a grand jury, pursuant to NMSA 1978 Sections 31-6-1 through 31-6-15 and Rule 5-302A NMRA.

IV. MOOTNESS

55. Because the District Attorney has dismissed both T-4-FR-2017-004132 and T-4-FR-2017-001448, Petitioners' specific cases are moot.
56. However, mootness – the expiration of controversy – is not necessarily fatal to jurisdiction:

When no actual controversy exists for which a ruling by the court will grant relief, an appeal is moot and ordinarily should be dismissed. In New Mexico, however, courts recognize two exceptions to the prohibition on deciding moot cases: cases which present issues of substantial public interest, and cases which are capable of repetition yet evade review. A case presents an issue of substantial public interest if it involves a constitutional question or affects a fundamental right such as voting. An issue is capable of repetition yet evading review if the issue is likely to arise in a future lawsuit, regardless of the identity of the parties. The Court's review of moot cases that either raise an issue of substantial public interest or are capable of repetition yet evading review is discretionary.

Snow v. Warren Power & Mach. Inc., 2015-NMSC-026, ¶ 11 (internal quotation marks and citation omitted).

57. This Petition involves a substantial public interest because it involves a constitutional question concerning Article II, Section 18 of the New Mexico Constitution – violation of the liberty interest of people accused of felony criminal offenses who have never been afforded the due process of an adversarial probable cause determination at which they have a right to notice, to testify, to present evidence – in other words, to defend themselves with and through legal counsel.

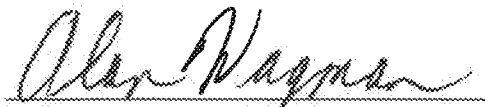
a. The issue raised in this appeal is capable of repetition because it is capable of arising every time any time any Metropolitan Court judge takes jurisdiction over a felony matter filed in the Metropolitan Court; it will evade review, because as soon as the Law Offices of the Public Defender (LOPD) becomes aware of unlawful incarceration, LOPD goes to work to secure release, either via a *nolle prosequi* (dismissal without prejudice) from the District Attorney's office or via petition to the Presiding Criminal Division Judge of the Second Judicial District Court. For obvious reasons this takes precedence over keeping someone in jail in order to preserve jurisdiction.

58. This Court can and should retain jurisdiction and take action on this important constitutional issue.

V. THE NATURE OF THE RELIEF SOUGHT

Petitioner requests that this Court issue its Writ of Supervisory Control directed to all named Respondents and to all of the judges of the Bernalillo County Metropolitan Court, directing them to immediately and to henceforward follow the ministerial mandate of Rule 7-202(A)(3).

I state under oath that I have read the foregoing
Petition and that the statements contained in the
Petition are true and correct to the best of my
knowledge, information and belief.



Alan Wagman
Assistant Public Defender
Counsel for Petitioners

Respectfully submitted,

BENNETT BAUR
Chief Public Defender

By:



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CERTIFICATE OF SERVICE

Copies were served on all of the following individuals by personal delivery, email, facsimile, or mailing copies to them with sufficient first-class postage on September 11, 2017.

Hon. Christine Rodriguez
Bernalillo County Metropolitan Court
401 Lomas Blvd, NW
Albuquerque, NM 87103

Hon. Linda Rogers
Bernalillo County Metropolitan Court
401 Lomas Blvd, NW
Albuquerque, NM 87103

Hon. Edward Benavidez
Bernalillo County Metropolitan Court
401 Lomas Blvd, NW
Albuquerque, NM 87103

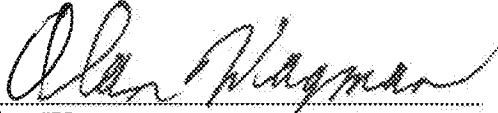
Hon. Courtney Weaks
Bernalillo County Metropolitan Court
401 Lomas Blvd, NW
Albuquerque, NM 87103

Hon. Sharon Walton
Bernalillo County Metropolitan Court
401 Lomas Blvd, NW
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Hon. Vidalia Chavez
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A handwritten signature in cursive script, appearing to read "Alan Wagman", written over a horizontal dotted line.

Alan Wagman
Assistant Public Defender
Counsel for Petitioners