IN THE COURT OF APPEALS OF THE STATE OF OREGON

Shannon Wilson, Individually and as Executive Director of The Public Defender of Marion County, Inc., and Stacey K. Lowe, Individually and as Director of Southwestern Oregon Public Defender Services, Plaintiff-Appellants Cross-Respondents, v. Oregon Public Defense Commission, Defendant-Respondent Cross-Appellant.	Court of Appeals No. A190765 Marion County Circuit Court No. 25CV53416

AMICUS BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF OREGON, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Appeal from the General Judgment entered on April 17, 2026
By the Honorable Michael C. Wetzel, Clackamas County Circuit Court Judge as Designated *Pro Tem* Judge for Marion County

Justin N. Rosas, OSB 076412
Email: Justin@justinrosas.com
The Law Office of Justin Rosas, LLC
110 West 11th Street
Medford, OR 97501
Telephone: (541) 245-9781
On Behalf of NACDL

Kelly Simon, OSB 154213
Email: Ksimon@aclu-or.org
ACLU Foundation of Oregon, Inc.
PO Box 40585
Portland, OR 97240
Telephone: (503) 849-6793
On Behalf of ACLU and ACLU-OR

Credit as well to:
Donald Falk, CA Bar 150256
Email: dfalk@schaerr-jaffe.com
Schaerr | Jaffe LLP
One Embarcadero Center, Suite 1200

San Francisco, CA 94111
Telephone: (415) 562-4942
NACDL Amicus Committee Co-Chair

Attorneys for Amicus Curiae

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STATEMENT OF INTEREST OF AMICI

This case presents a question of critical importance to the fair administration of justice: What role should the courts play in protecting the right to counsel through ensuring public defense contracts contain reasonable caseload limits that promote ethical, constitutional representation? Resolution of this issue will provide critical guidance to public defense agencies, state and local government leaders, and the communities they all serve.

STATEMENT OF THE CASE

Amici adopts the plaintiff's statement of the case and facts.

INTRODUCTION AND SUMMARY OF ARGUMENT

Our criminal legal system rests on the premise that fair, just, and accurate outcomes are best achieved when both the government and the accused have skilled, dedicated advocates. Each side must be able to marshal evidence, present witnesses, and argue its position within a framework designed to balance individual rights against community interests. As Justice Hugo Black explained, "[t]he right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." *Gideon v. Wainwright*, 372 US 335, 344 (1963). Indeed, the right to counsel is "a core constitutional

right that is essential for the functioning and integrity of our legal system." *State v. Roberts*, 374 Or 821, 835, 584 P3d 1217 (2026).

With more than 80% of people facing criminal charges unable to afford a lawyer,[1] it is the public defense system that gives the right to counsel its meaning. Public defense providers protect constitutional rights, check government overreach and abuses of power, and demonstrate our capacity for compassion, rehabilitation, and community.

Public defense lawyers owe their clients the same duties as every other lawyer—competence, diligence, communication, and loyalty—and must discharge those duties through the same robust advocacy as every other lawyer. The ABA Criminal Justice Standards for the Defense Function and the Oregon Rules of Professional Conduct draw no

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[1] Caroline Wolf Harlow, *Defense Counsel in Criminal Cases* (NCJ 179023, Nov. 2000). In Oregon, based on reported data, there is a similar ratio of persons utilizing public defense services. Available data indicates at least 76% of all those facing criminal charges will rely upon court-appointed counsel (based on the number of total cases and the number of individuals represented by public defense counsel). The true ratio is likely in excess of 80%, as the available data includes individuals who have "no counsel," with many of those "no counsel" cases involving individuals who have requested, but not yet been appointed a lawyer. Data from Letter from Nancy J. Cozine, State Court Administrator, Oregon Judicial Department, to the Joint Interim Committee on Ways and Means, Subcommittee on Public Safety (Nov. 9, 2023), Attachment A ("Criminal Case Filings by Year and Representation Status") https://olis.oregonlegislature.gov/liz/2023I1/Downloads/CommitteeMeetingDocument/277928.

distinction between retained and appointed counsel: every defense lawyer is to serve as the client's counselor and advocate, protect the client's constitutional and legal rights, and provide effective, high-quality representation. American Bar Association (ABA) Criminal Justice Standards for the Defense Function, 4th ed. (2017) (ABA Criminal Defense Standard), Standards 4-1.1

Meeting those obligations requires meaningful, zealous, and effective representation for every client, every time. Excessive caseloads make that impossible. They force defenders to triage—providing constitutional and ethical representation to some clients while others receive far less. Clients and communities bear the cost through rushed pleas, wrongful convictions, excessive sentences, and unchecked government error and abuse.

Courts do more than decide individual cases; they are charged with ensuring that the system lives up to its values. Just as the defense checks the government's power in individual cases, the judiciary checks the other branches when their choices undermine constitutional guarantees. Courts cannot directly fund a public defense system or design its workload model, and *amici* do not ask this Court to do so. But the judiciary's inability to craft a complete, long-term solution to the

problem of excessive caseloads does not relieve it of the duty to refuse to enforce contractual provisions that make meaningful representation impossible.

The contract at the heart of this case threatens to force public defenders to violate their ethical duties. The contract's maximum attorney caseload (MAC) standards are not grounded in any data, studies, or standards associated with the time today's defenders need to properly do their job. They place the need for courts to clear their dockets ahead of the client's right for their attorneys to provide meaningful representation. A contract term that requires lawyers to take on more cases than they can ethically and effectively represent is not a policy choice entitled to deference; it is a structural denial of counsel.

At the same time, court should give substantial deference to defenders' decisions about whether, at any particular point in time, they have reached their ethical limits and cannot accept additional cases. Only defenders and their agencies can see the full extent of the work each case and each client require. Deference to those case-by-case judgments and invalidation of the MAC standard are critical to protecting the constitutional right to counsel: the first protects clients one case at a

time; the second removes the structural pressure that makes case-by-case protection unreliable.

ARGUMENT

I. Excessive caseloads deny defendants the effective assistance of counsel.

When a defender carries more cases than they can handle, some clients get a lawyer in name only. “The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.” *Herring v. New York*, 422 US 853, 862 (1975). That premise does not require every case to go to trial, but it does require that every case be prepared as though it might. The government’s accusations must be zealously tested before an individual loses their liberty. The Constitution is not satisfied when a lawyer provides effective representation to some, or even most, of their clients. The right to counsel “is not a haphazard jack-in-the-box that occasionally appears when cranked.” *Betschart v. Oregon*, 103 F4th 607, 621 (9th Cir 2024) Every person is entitled to an attorney with the time, skill, and ability to provide a robust defense from the start of the case through its conclusion.

A. Public defense lawyers owe their clients the same duties as all other lawyers.

To fulfill the role of defense counsel, an attorney must investigate the facts, scrutinize the evidence, explore legal challenges, and develop mitigation. "An 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 US 668, 685 (1984).[2] As the Oregon Supreme Court has explained, "[t]he mere act of appointment of counsel to represent an indigent accused is obviously not sufficient to provide the protection afforded by" the Constitution. *Krummacher v. Gierloff*, 290 Or 867, 872, 627 P2d 458 (1981) (en banc). Rather, "[c]ounsel must investigate the facts and prepare [themself] on the law to the extent appropriate to the nature and complexity of the case so that [they are] equipped to advise [their] client, exercise professional judgment and represent the defendant in an informed manner." *Id.* at 875.

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[2] ABA Criminal Justice Standards for the Defense Function defines "defense counsel" to include "any attorney – including privately retained, assigned by the court, acting pro bono or serving indigent defendants in a legal aid or public defender's office – who acts as an attorney on behalf of a client being investigated or prosecuted for alleged criminal conduct." ABA Criminal Defense Standard 4-1.1 (a).

Public defense lawyers are bound by the same Rules of Professional Conduct as every other Oregon lawyer. Those rules require every lawyer to:

- Provide competent representation, including the thoroughness and preparation reasonably necessary for the representation (Oregon Rules of Professional Conduct (RPC) 1.1);
- Represent their clients diligently, ensuring they do not neglect a matter entrusted to them (RPC 1.3);
- Keep the client reasonably informed and explain matters to the extent necessary for the client to make informed decisions (RPC 1.4); and
- Abide by the client's decisions about the objectives of the representation (RPC 1.2).

Every lawyer is likewise responsible for keeping their workload at a level that permits timely and effective representation. "Defense counsel should not carry a workload that, by reason of its excessive size or complexity, interferes with providing quality representation, endangers a client's interest in independent, thorough, or speedy representation, or has a significant potential to lead to the breach of professional obligations." ABA Criminal Defense Standard 4-1.8(a). "[T]here is no exception to these obligations for public defense lawyers or public defense cases." Oregon Formal Ethics Opinion 2007-178 (Revised

2026) (quoting ABA Formal Ethics Opinion 06-441 (2006)). A lawyer whose caseload materially limits their ability to represent a client faces a conflict of interest and must decline or withdraw from a representation that will result in a violation of the rules. *Id.,* RPC 1.16 (a).

Defense lawyers serve their clients as confidant, counselor, advisor, negotiator, navigator, and advocate. Clients rely on their lawyer's advice in deciding whether to go to trial or accept a plea, whether to testify or remain silent, and whether to have their case heard by a judge or a jury. That reliance is warranted only if the lawyer has the time to investigate the case, review the evidence, and examine the law; to build the trust needed to learn about the client's background, circumstances, and needs; and to explain the process, the available options, and their consequences so the client can make an informed decision.[3]

"The right of a defendant to be heard by counsel requires at least that counsel advocate the defense with professional skill and judgment." *Krummacher*, 290 Or at 875. But skill and judgment are no substitute for time. A lawyer who cannot meet with the client, conduct an investigation, review the evidence, research the law, and develop mitigation cannot

[3] See e.g. *Reynoso v. Giurbino*, 462 F.3d 1099, 1112 (9th Cir. 2006) ("[C]ounsel cannot be said to have made a tactical decision without first procuring the information necessary to make such a decision.").

provide ethical or constitutionally effective representation, however talented they may be. “It is the defense itself, not the lawyers as such, that animates *Gideon’s* mandate. If the latter cannot provide the former, the promise of the Sixth Amendment is broken.” *Kuren v. Luzerne County*, 146 A.3d 715, 735-36 (2016).

B. Effective representation requires prompt and ongoing engagement.

Time is the single most important resource a defender has. Investigators, experts, and technology help only if the lawyer has time to use them, and voluminous discovery informs the defense only if the lawyer has the capacity to review it. Nor is it enough that a defender will have time for a case at *some point*. The duty to provide counsel “is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.” *Powell v. Alabama*, 287 US 45, 71 (1932).

The right to counsel is as important in the early stages of a criminal case as it is at trial. *See Maine v. Moulton*, 474 US 159, 170 (1985). (“Recognizing that the right to the assistance of counsel is shaped by the need for the assistance of counsel, we have found that the right attaches at earlier, ‘critical’ stages in the criminal justice process ‘where

the results might well settle the accused's fate and reduce the trial itself to a mere formality.'" *Moulton*, 474 US at 170, *quoting United States v. Wade*, 388 US 218, 224 (1967)).

There are "myriad responsibilities that counsel may be required to undertake that must be completed long before trial if the defendant is to benefit meaningfully from his right to counsel." *Lavallee v. Justices in Hampden Superior Court*, 812 NE2d 895, 903–04 (Mass 2004). Delay by counsel is never neutral, "even if the case procedure remains static while the defendant is [waiting for counsel] — the condition of the evidence is not static. Each day's delay . . . accrues to the defendant's detriment." *David v. State*, No. 20AC-CC00093, slip op at 15-16 (Mo Cir Ct Feb 6, 2023) (Opinion available in Appendix 1). *See also* ABA Criminal Defense Standard 4-3.7(a) ("Many important rights of a criminal client can be protected and preserved only by prompt legal action"). When a lawyer has time to act promptly, they can:

- Document bruises and other injuries before they heal, corroborating a claim of self-defense;
- Capture transient conditions, such as a dimmed streetlamp or an overgrown shrub, that undermine an eyewitness identification;
- Locate and interview witnesses before their memories fade;
- Preserve social media posts, text messages, and other digital content before they are deleted;

- Recover surveillance videos from stores and home security systems before retention policies call for its erasure;
- Negotiate a cooperation agreement while the client's assistance can still be useful to the prosecution; and
- Recognize disorganized thinking or delusional beliefs that support a mental health defense and seek treatment before the client deteriorates to the point of requiring lengthy competency restoration.

Lawyers with excessive caseloads frequently cannot give new cases that immediate attention, and once an opportunity passes it cannot be recovered. No lawyer can introduce photographs that were never taken or call witnesses who no longer remember what they saw. Importantly, delay also wears down clients' resolve to contest the charges against them.

A lawyer's obligations do not end once the initial investigation is complete. Effective representation demands sustained attention throughout the life of a case: reviewing discovery as it is produced and following the leads it reveals; consulting with and preparing experts; researching, drafting, and litigating motions; promptly conveying and explaining plea offers; preparing for every hearing, not just trial; monitoring the client's custody status, release conditions, and treatment progress; and developing mitigation and advocating at sentencing. Each

of these tasks competes for the same finite hours. When a caseload exceeds a lawyer's capacity, these ongoing duties—invisible on any docket—are the first to be deferred and, too often, the first to be abandoned. A lawyer stretched this thin becomes little more than window dressing, lending a veneer of legitimacy to a hollowed-out defense.

C. Excessive caseloads force attorneys to triage cases, and everyone pays the price.

"The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronic*, 466 US 648, 656 (1984). Whether that testing occurs is measured against "prevailing professional norms." *Strickland*, 466 U.S. at 688. Those norms have changed dramatically over the decades. The caseload figures that long dominated public defense planning—no more than 150 felonies or 400 misdemeanors per attorney per year—were developed in 1973. National Advisory Commission on Criminal Justice Standards and Goals: The Defense, Standard 13.12 (1973) (NAC Standards). These figures predate body-worn cameras; cell phone extractions, cell site location information, and digital data dumps; the proliferation of forensic science and the

modern understanding of forensic error; and the explosion of collateral consequences, and the increased criminalization of those with mental illness. Moreover, these figures were never grounded in any empirical study of the time cases actually require. Over the past decade increasing efforts have been made to create meaningful, validated workload standards that better account for modern practices. Studies such as the National Public Defense Workload Standards, released in 2023, better reflect those practices. The use of any caseload standard that does not account for the practice of law as it currently exists cannot ensure effective representation.

Today, defenders must combine long-standing duties with the demands of modern practice. Expectations include:

- Reviewing many hours of body-camera footage and large volumes of digital data;
- Keeping abreast of forensic science developments, from the rise of familial DNA testing to growing challenges to once-accepted disciplines such as fingerprint and arson analysis;[4]

[4] Brandon Garrett, *Autopsy of a Crime Lab* (2021); President's Council of Advisors on Science & Technology, Executive Office of the President, Report to the President: Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods 45 (2016).

- Understanding the newest surveillance technologies and the legal challenges to their use, to inform discovery and motions practice; [5]
- Conducting fact investigation that includes searches for relevant social media, digital content, and video recordings;
- Learning the client's personal and family history—including mental illness, substance use, trauma, adverse childhood experiences, brain development, and intellectual and developmental disabilities—to inform defense strategy, mitigation, sentencing, and client communication;
- Exploring and explaining the pros and cons of alternative court programs; and
- Advising clients about collateral consequences, including immigration consequences, in light of their current circumstances and future plans.[6]

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[5] See e.g. *Chatrie v. United States*, No. 25-112, slip op. at 12 (US June 29, 2026) (holding that individuals retain a reasonable expectation of privacy in their digital location data, even though a third party holds that data in the cloud and remanding the case for further proceedings regarding whether the geofence warrant at issue violated the particularity and probable cause requirements of the Fourth Amendment); *United States v. Kyle*, 26-CR-00189-SEH (ND OK, Oct. 1, 2026) (District court grants the defense's motion to suppress based on the government's use of data from a monthlong, multi-state tracking of defendant's vehicle).

[6] For example, a plea in a controlled substances case may cause a family to lose access to public housing assistance (24 CFR § 966.4 (2026)) or SNAP benefits (7 CFR § 273.2 (2026)); or a criminal conviction may prevent an individual from obtaining a construction or HVAC business license (ORS 701.046). See also, *Padilla v. Kentucky*, 559 U.S. 356, 370-374 (2010) (ineffective assistance of counsel occurs when an attorney fails to properly advise a client regarding immigration consequences of a conviction.)

These duties do not disappear because the government's case looks strong, a client says he is guilty, or a plea offer appears fair.[7] Yet an overloaded defender is forced to treat these duties as optional—shortening or forgoing client communication, skimming discovery, skipping review of physical evidence, and bypassing legal research and motions practice. Counsel then becomes "little more than a formality, a stepping stone on the way to a case closure or plea bargain." *Wilbur v. City of Mount Vernon*, 989 F Supp 2d 1122, 1124 (WD Wash 2013). These shortcuts compound: as the defense loses the tools to challenge the State's case and clients lose confidence that their lawyers can do so, pleas become the default rather than a considered choice.

One Wyoming defender admitted as much at a hearing concerning his office's refusal to accept new cases while it was nearly 50% understaffed: "most of the time, especially on misdemeanor cases, I've never read their police report. I've never watched their videos from the police. I've had no time to really investigate their case at all." *Lozano v. Circuit Court of the Sixth Judicial District*, 2020 WY 44, 460 P3d 721, 726 (2020). Some clients will still receive excellent representation, but

[7] ABA Criminal Defense Standard 4-4.1(b).

our system does not promise justice to some of the people, some of the time.

D. Excessive caseloads force attorneys to compromise representation and undermine the integrity of the criminal legal system.

The harms of overloaded counsel extend beyond individual clients and case outcomes to the community and the legal system itself.

Wrongful convictions. Convicting an innocent person is among the gravest harms our legal system can inflict—so grave that our legal tradition holds it better that ten guilty persons go free than that one innocent person suffer.[8] Yet wrongful convictions happen, and not only in the serious cases that draw headlines. The Innocence Project has secured 257 exonerations, including 23 of people sentenced to death. Collectively these individuals served more than 4,100 years in prison for crimes they did not commit.[9]

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[8] Sir William Blackstone, *Commentaries on the Laws of England 358.* See also, *Coffin v. US*, 156 US 432, 453-56 (1895) (detailing the history of the presumption of innocence).

[9] Innocence Project, Our Impact by the Numbers, https://innocenceproject.org/exonerations-data/ (last visited Oct. 14, 2026).

An examination of faulty roadside drug field tests in Harris County, Texas, found 212 people wrongly convicted of drug possession.[10] Ryan Gabrielson & Topher Sanders, *How a $2 Roadside Drug Test Sends Innocent People to Jail*, NY Times Mag, July 7, 2016 Amy Albritton was one of them. She pleaded guilty on the advice of her public defense lawyer, who—despite her claims of innocence—conducted no investigation, did no legal research, and gave her no reason to believe a challenge could succeed. Lab testing later revealed that the substance was not a controlled substance at all. Because her lawyer never learned about her circumstances, she was unprepared for what followed: she lost her job and the accessible housing it provided for her and her disabled son. It took more than four years, and the dogged efforts of a reporter and later an attorney, to have her conviction overturned. *Id.* Even in relatively minor cases, wrongful convictions cost people their homes, their jobs, their families, and their faith in the system.

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[10] Over a ten-year period, there were more than 400 cases in which there was an inconsistent variance between the field test results (and the resulting charges at arrest) and the laboratory's findings. Some were errors of drug type, some involved instances in which there was too little substance to do lab testing, but in 251 cases the laboratory testing revealed there was no controlled substance. Two hundred twelve of those cases were for arrests by the Houston Police Department and were the subject of the reporting.

Whether in capital murder or drug possession cases, documented wrongful convictions usually arise from a confluence of factors, including bad or misapplied forensic science (29%), mistaken eyewitness identification (27%), false confessions (13%), and police and prosecutorial misconduct (61%).[11] (As more than one factor can contribute to a wrongful conviction, these totals exceed 100%). These are precisely the errors overloaded defenders may struggle to catch, as they lack the time to scrutinize lab reports, question confessions, or uncover withheld or fabricated evidence.

Wrongful convictions also endanger the community. When an innocent person is convicted, the true perpetrator remains free. In 89 of the 257 cases in which the Innocence Project has secured exonerations, the true perpetrator was eventually identified. While the innocent person was incarcerated, the true perpetrators went on to commit more than

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[11] Data from the National Registry of Exonerations which examined more than 3800 wrongful convictions. https://exonerationregistry.org/exonerations-contributing-factor (last visited Oct. 13, 2026). Note, the data from the 257 exonerations secured by the Innocence Project identify the same core contributing factors, but at different ratios: mistaken eyewitness identification (62%), faulty forensics (52%), false confessions (29%) and official misconduct (19%). https://innocenceproject.org/exonerations-data/ (last visited Oct. 13, 2026). Variances in these rates are likely attributable to the fact that Innocence Project exonerations rely largely on DNA testing and focus almost exclusively on serious and violent crimes.

100 additional crimes including 56 sexual assaults, 22 murders, and 23 other violent offenses.[12]

Excessive and ill-fitting sentences. When defenders lack the time to learn about a client's needs and develop meaningful alternatives, cases default to one-size-fits-all outcomes. Rather than receiving individualized dispositions that connect them to the resources that best address their circumstances, people are assigned to services based on their charge. That can misdirect scarce treatment resources and leave underlying needs unaddressed, increasing the likelihood of recidivism.

Unchecked government error. Defenders serve as a critical check on government error, overreach, and abuse of power—work that requires digging beneath the surface and challenging the State's assertions. Adequately resourced defenders have, for example:

- Discovered that computer programming errors had excluded many eligible African American jurors from Washington, D.C.'s jury rolls (D.C. Public Defender Service);[13]

[12] Innocence Project, Our Impact by the Numbers, https://innocenceproject.org/exonerations-data/ (last visited Oct. 14, 2026).
[13] *United States v. Powell*, 136 Daily Wash L Rprt 2149, 2150 (DC Superior Court 2008).

- Unraveled a decades-long illegal jailhouse informant program in Orange County, California;[14] and
- Found body-camera footage showing Baltimore police officers planting drugs (Maryland Office of the Public Defender).[15]

Delays. Overburdened lawyers often manage competing demands by seeking continuances. A continuance may buy the lawyer time, but it cannot undo the irreparable harms described above, and it inflicts its own. Continuances disrupt court dockets, impose additional costs on defendants, witnesses, and victims, delay restitution and the return of property, strain pretrial services, and prolong uncertainty for everyone involved.

Burnout and attrition. Unsustainable workloads drive committed public defense lawyers out of the field and deter new lawyers from

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[14] Gustavo Arellano, *O.C. Public Defender Who Exposed Jailhouse Snitch Scandal Is Retiring, but Not Done*, Los Angeles Times, Apr 3, 2025, https://www.latimes.com/california/story/2025-04-03/scott-sanders-oc-public-defender-retiring (accessed Oct 17, 2026).

[15] Bill Chappell, *Baltimore Police Caught Planting Drugs in Body-Cam Footage, Public Defender Says*, NPR, July 20, 2017. https://www.npr.org/sections/thetwo-way/2017/07/20/538279258/baltimore-police-caught-planting-drugs-in-body-cam-footage-public-defender-says (accessed Oct 17, 2026). Jacey Fortin, *Baltimore Police Officer Charged with Fabricating Evidence in Drug Case*, New York Times, Jan 24, 2018. https://www.nytimes.com/2018/01/24/us/baltimore-officer-video-drugs.html (accessed Oct 17, 2026).

entering it, placing even greater strain on those who remain and reinforcing the cycle of workforce instability. States across the country are struggling to recruit and retain enough public defenders and assigned counsel to meet demand.[16] Although crime rates in most cities have remained flat or declined,[17] public defense systems are being stretched to, and often beyond, their breaking point.[18] The Wyoming State Public Defender described the cycle in explaining why her office, with 4.5 attorneys handling the workload of 7.5, would stop accepting new misdemeanor cases: “the attorneys who remain with us have to

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[16] John Gross, *Why Our Public Defense Systems Are Collapsing*, National Association for Public Defense (June 5, 2023), https://thenapd.org/blogs/why-our-public-defense-systems-are-collapsing/ (accessed Oct 17, 2026); *see also* David Montgomery, *With Fewer Public Defenders, Indigent Defendants Pay the Price*, Stateline, Oct 14, 2026, https://stateline.org/2026/10/14/with-fewer-public-defenders-indigent-defendants-pay-the-price/ (accessed Oct 17, 2026).

[17] Ernesto Lopez & Bobby Boxerman, *Crime Trends in U.S. Cities: Year-End 2025 Update* (Council on Criminal Justice Jan 2026), https://councilоncj.org/crime-trends-in-u-s-cities-year-end-2025-update/ (accessed Oct 17, 2026).

[18] *See, e.g.*, *Robbins v. Maine Comm’n on Public Defense Services*, No. KENSC-CV-22-54 (Me Super Ct), *appeal pending*, Nos. KEN-25-137, KEN-24-450 (Me); *State v. Grandberry*, No. 2025AP1507-CR (Wis Ct App) (appeal pending); *Lozano*, 460 P3d 721 (2020). *See also* Matt Hudson, *Judges Say Public Defender Backlog Taking a Toll in Great Falls City Court*, Montana Free Press, Aug 24, 2026, https://montanafreepress.org/2026/08/24/judges-say-public-defender-backlog-taking-a-toll-in-great-falls-city-court/ (accessed Oct 17, 2026); Bryan Polcyn, *Public Defender Delays Persist Despite Pay Increase*, FOX6 News Milwaukee, Jan 10, 2024, https://www.fox6now.com/news/public-defender-delays-persist-pay-increase (accessed Oct 17, 2026).

work the overload and they become burned out and eventually quit. . . . [N]o matter [what] the quality of an attorney is, he cannot do the work of two attorneys." *Lozano*, 460 P3d at 724-25.

Lost public trust. Finally, when public defense lawyers are overloaded, clients and communities alike lose faith in the courts and in government institutions generally. A defender who appears in court with a stack of files, calls out the names of people they have never met, and stands beside them as they plead guilty does not inspire confidence that the system will vindicate the innocent or justly convict and sentence the guilty.

Our criminal legal system is built on core protections: the presumption of innocence; the privilege against self-incrimination; the rights to compel witnesses and present evidence, to a jury of one's peers, and to a speedy and public trial; and the requirement that the State prove its case beyond a reasonable doubt. Of these, the right to counsel is the most critical, because "it is through counsel that all other rights of the accused are protected." *Penson v. Ohio*, 488 US 75, 84 (1988). When we fail in protecting the right to counsel, we fail our entire criminal justice system.

II. Courts must act to ensure the defense can be a meaningful adversary to the government.

In individual cases, courts routinely examine whether an attorney provided constitutionally effective representation, using prevailing professional standards as the measure. See generally *Strickland*, 466 US 668. When counsel's performance is found wanting and that substandard performance prejudices the defendant, courts act—vacating convictions the government secured in the absence of a meaningful adversary. *See, e.g.*, *Wiggins v. Smith*, 539 US 510 (2003)

When asked to examine the system in which those attorneys work, courts must likewise measure it against prevailing professional standards. If a system, by design or in operation, fails to give every client access to a lawyer with the time, resources, and independence to provide effective representation, the court should not wait for the resulting convictions to be challenged in post-conviction proceedings one at a time. It should declare the offending systemic practices unenforceable and bar their continued operation. Here, that means striking the contracts' MAC-based caseload requirements. To do otherwise is to knowingly facilitate injustice.

A. Courts have the authority and the duty to remedy structural denials of counsel.

The duty of ensuring that constitutional rights "are protected and preserved inviolate falls squarely upon the shoulders of the judiciary." *State v. Roberts*, 374 Or 827 (2026) (quoting *State ex rel Ricco v. Biggs*, 198 Or 413, 430, 255 P2d 1055 (1953), *overruled in part on other grounds by State ex rel Maizels v. Juba*, 254 Or 323, 327, 460 P2d 850 (1969)). *See also, Betschart,* 103 F4th at 617 (finding the failure to provide an attorney to those in custody within seven days of their arrest an "unthinkable situation" meriting an immediate release from custody and the intervention of the federal court under the extraordinary circumstances exception to the *Younger* abstention doctrine).

Courts across the country have recognized their authority to address structural failures in public defense systems. While these cases often end in negotiated resolutions after a court's initial findings of constitutional violations,[19] courts have often ordered declaratory and injunctive relief including requiring changes to public defense practices.

[19] See e.g. *Hurrell-Harring v. NY* (Plaintiffs alleged the failure to adequately fund the public defense system created a systematic denial of counsel in the named jurisdictions. Following a favorable ruling on plaintiff's motion for class certification, the parties entered into a

For example, in 2013, the United States District Court for the Western District of Washington found that "municipal policymakers [ ] made deliberate choices regarding the funding, contracting, and monitoring of the public defense system that directly and predictably caused" a systematic deprivation of the right to the effective assistance of counsel. *Wilbur*, 989 F Supp 2d at 1124. The court ordered the municipalities to restructure their public defense contracts so that attorneys could meet constitutional and professional norms, to hire a supervisor to monitor the quality of representation, and to provide data demonstrating compliance. *Wilbur*, 989 F Supp at 1134-1137.

In 2016, the Pennsylvania Supreme Court held that indigent defendants could file a class action suit alleging "prospective, systemic violations of the right to counsel due to underfunding, and to seek and obtain an injunction forcing a county to provide adequate funding to a public defender's office." *Kuren*, 146 A3d at 718.

In 2025, the Kennebec County Superior Court found that Maine was systematically denying eligible defendants continuous representation

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settlement agreement that called for, among other relief, the hiring of sufficient numbers of attorneys and staff to provide constitutionally effective representation.) *Hurrell-Harring v. State of New York*, 15 NY3d 8, 930 NE2d 217 (2010), Settlement Agreement, *Hurrell-Harring v. State*, No. 8866-07 (NY Sup Ct Albany Cnty Oct 21, 2014).

because a shortage of attorneys left individuals without timely access to counsel. *Robbins v. Maine Comm'n on Indigent Legal Services*, No KENSC-CV-22-54 (Me Super Ct, March 7, 2025) (Order After Phase One Trial), *appeal pending*, Nos KEN-25-137, KEN-24-450 (Me).[20] As part of its relief, the court directed that the state public defense commission provide timely representation to all eligible defendants. *Id.* slip op at 45. (Opinion available in Appendix 2).

Courts addressing systemic violations have navigated separation-of-powers concerns to provide effective relief. Those concerns do not relieve the judiciary of its obligation to enforce affirmative constitutional guarantees, even when doing so requires changes to public defense systems. Courts fulfill that obligation by requiring the government to provide a system that allows for, rather than inhibits, constitutionally effective representation. As the *Kuren* court explained:

> "We need not delve into the more complicated questions of whether the requested funding in this case exclusively is a discretionary act or whether compelling a county to provide funding would violate separation of powers. . . . If Appellants ultimately can prove that they are entitled to injunctive relief, the remedy afforded will be the same as if a court issued a writ of mandamus: increased funding." *Kuren*, 146 A3d at 751.

[20] Note: during the pendency of the litigation the Maine Commission on Indigent Legal Services changed its name to the Maine Commission on Public Defense Services. This brief utilizes the agency name as it appeared at the time of the particular pleading referenced.

B. Individual defendants cannot protect themselves from the harms of excessive caseloads.

Post-conviction relief is a poor safeguard against the harms of overloaded counsel. A defendant must show both that counsel's representation fell below an objective standard of reasonableness ***and*** that there is a reasonable probability that, but for counsel's errors, the result would have been different. *Strickland*, 466 US 688. Because courts evaluate those claims with a strong presumption that counsel's performance was within the wide range of reasonable professional assistance, *Strickland,* 466 US at 689, the barrier is inherently high.[21] Excessive caseloads make that burden even more difficult to satisfy. When trial counsel fails to investigate, file motions, or develop mitigating evidence, the record may not contain the material a post-conviction petitioner would need to establish prejudice.

Defendants may also be the people least able to recognize their lawyer's errors as they occur. They have sought counsel precisely because they are unschooled in the law and unfamiliar with the rules that protect them:

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[21] It is estimated less than 3% of appeals are reversed for ineffective assistance of counsel. Nicole L. Waters et al., Bureau of Justice Statistics, US Department of Justice, NCJ 248874, *Criminal Appeals in State Courts* 6 fig 3 (Sept 2015).

> "Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Powell*, 287 US at 69.

Most importantly, defendants have no way of knowing how many clients their lawyer is expected to represent or how many cases they are handling. Unlike the court, defendants cannot see the big picture.

Courts therefore should not wait for a visible collapse before acting. The triage that overloaded attorneys are forced into hides its own damage. Motions not filed, witnesses not found, and rushed, generic pleas in place of considered, individualized outcomes leave no mark on the docket. The thousands of small shortcuts—skipped research, unread reports, skimmed videos, unchallenged assertions by the State—hollow out the right to counsel, leaving a fragile shell over widespread failure that will simply perpetuate if courts merely grant individualized relief.

C. The Legislature's demand that defender organizations meet the MAC quotas undermines defender independence and the fair and effective delivery of justice.

Independence is the cornerstone of an effective public defense system. It is the first of the ABA's Ten Principles: "Public Defense

Providers and their lawyers should be independent of political influence and subject to judicial authority and review only in the same manner and to the same extent as retained counsel and the prosecuting agency and its lawyers." ABA Ten Principles of a Public Defense Delivery System, Principle 1 (Aug 2023). That independence is undermined when public defense leaders and agencies face threats of repercussion to their funding or their jobs for exercising their professional judgment.

For example, in 2020, Montgomery County (Pennsylvania) Chief Public Defender Dean Beer and Deputy Chief Keisha Hudson were fired after their office filed an amicus brief supporting a challenge to cash bail practices pending before the Pennsylvania Supreme Court—a brief that also criticized Montgomery County's own bail practices. The county directed them to withdraw the brief; they did so but were fired anyway.[22]

In 2024, Colorado public defender Travis Weiner was fired after he moved to withdraw from three cases, citing his excessive workload.[23]

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[22] Both sued, and the county reportedly settled their claims for a combined $310,000. *See Beer v. Montgomery County*, No 2:20-cv-01486 (ED Pa filed Mar 17, 2020); *Hudson v. Montgomery County*, No 2:20-cv-01487 (ED Pa filed Mar 17, 2020).

[23] His whistleblower suit remains pending. *Weiner v. Colorado Office of the State Public Defender*, No 2024CV33593 (Colo District Ct, Denver County, filed Nov 20, 2024).

In 2025, Louisiana's State Public Defender, a gubernatorial appointee, declined to renew the contracts of five district defenders who publicly opposed his efforts to expand his authority over the system and reduce chief defenders' pay.[24]

In Oregon, the pressure is not hypothetical; it is documented in the events that gave rise to this case. Before issuing the current contracts, OPDC voted to adopt a modified version of the National Public Defense Workload Standards. (ER 254-255, 1155). The legislature rejected those standards, demanded that OPDC implement the unsupported MAC standards instead, and threatened to withhold funding from any agency that fails to maintain at least 90% of them. (ER 234-245, 306-310, 349-356).

The demand that public defense lawyers meet a caseload quota, coupled with a financial penalty should they fail to do so, puts the interests of rapidly processing cases ahead of providing effective, constitutional representation and forces defenders to choose between

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[24] Four of the five have sued, alleging retaliation and interference by the governor's office; that case is pending. *See* Julie O'Donoghue, *Public Defenders Sue Louisiana over Their "Terminations," Allege Governor's Office Interference*, Louisiana Illuminator (Oct 20, 2025), https://lailluminator.com/2025/10/20/public-defenders-sue-louisiana-over-job-losses-allege-governor-office-interference/ (accessed Oct 18, 2026).

their organization's financial viability and their clients' constitutional right to counsel. Contracts that contain excessive caseload quotas, like the MAC's standards, compel defenders to choose which clients to provide effective representation to and which they withhold that zealous advocacy from. Such contract terms cannot remain.

III. Deference must be given to defender assessments of their current capacity.

While courts must ensure system structures that promote constitutionally effective representation, defender and defender agency judgments that they have reached their ethical limits at any particular point in time deserve substantial deference as only they can see the full extent of the work each case and each client require. Defense providers are in the best position to assess the workloads of their lawyers, because '[o]nly the lawyers themselves know how much must be done to represent their clients and how much time the preparation is likely to take.'" ABA Eight Guidelines of Public Defense Related to Excessive Workloads (ABA Eight Guidelines), Guideline 7 Comment, 13 (Aug

2009) (quoting ABA Standards for Criminal Justice: Providing Defense Services 71 (3d ed 1992)).[25]

The Wyoming Supreme Court recognized as much in *Lozano*, reversing a contempt finding against the State Public Defender for refusing new appointments and holding that the public defender is 'available' for appointment only when able to provide effective assistance consistent with its ethical obligations. *Lozano*, 460 P3d at 733-737. A similar view was applied by the Iowa Supreme Court, finding that "[u]nless the court has reason to believe that the local public defender misrepresented its office's caseload, district courts should be highly deferential to whether a temporary overload has been shown." *State Public Defender v. Iowa District Court for Scott County*, 31 NW3d 45, 51 (Iowa 2026).

The trial court in the current case rightly protected defenders' exercise of that judgment and enjoined OPDC from retaliating against those who exercise it. Order ¶¶ 4–5 (ER 1201). But case-by-case refusals cannot carry the full weight of protecting the right to counsel.

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[25] Note, OPDC's contract requires providers to adhere to the ABA Eight Guidelines (ER 692), placing this provision at odds with the demand that they maintain a caseload of at least 90% of the MAC.

They depend on each lawyer and agency's willingness to turn away cases under a contract that measures performance by the MAC standard and a funding scheme that penalizes any agency falling below 90% of it. They place the burden of protecting clients on those least able to bear it: defenders who must risk their offices' funding and their colleagues' jobs, and clients who cannot see their lawyer's caseload at all. So long as the MAC standard remains, defense lawyers and agencies are caught between a rock and a hard place—if they reject the contract, their offices close and their staff lose their jobs; if they accept it, they guarantee that at least some of their clients will receive ineffective assistance. Clients' constitutional rights should not turn on how individual lawyers resolve that dilemma.

Protecting the right to counsel requires more than appointing a lawyer. The Oregon Constitution guarantees the right "'not just to a lawyer in name only, but to a lawyer who provides adequate assistance.'" *Jackson v. Franke*, 369 Or 422, 426, 507 P3d 222 (2022) (quoting *Montez v. Czerniak*, 355 Or 1, 6, 322 P3d 487, *adh'd to as modified on recons*, 355 Or 598, 330 P3d 595 (2014)). That guarantee cannot be met if defenders must operate under contracts that demand caseloads permitting little more than the processing of pleas. "Of all the rights that an accused person has, the right to be represented by

counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." *Cronic*, 466 US at 654 (*quoting* Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 Harv L Rev 1, 8 (1956)).

Just as defense lawyers must be zealous guardians of their clients' rights, courts must be zealous guardians of the fundamental fairness of the proceedings in their courtrooms. When confronted with a public defense structure that makes effective, ethical representation of every client impossible, the court must act.

CONCLUSION

If the prosecution is the people's sword, public defense is their shield. Defending one person's rights is how the system protects everyone's rights against government overreach, unjust and wrongful convictions, and excessive punishments. The continued application of the MAC provisions in public defender contracts in Oregon sends the message that equal justice and fair trials are reserved only for those can pay for them. If courts uphold contracts that impose caseloads that defenders cannot ethically carry, courts become complicit in the machinery of injustice.

RESPECTFULLY SUBMITTED this 22nd day of October, 2026.

JUSTIN N. ROSAS

/s/ Justin N. Rosas
Justin N. Rosas, OSB 076412
Email: Justin@justinrosas.com
The Law Office of Justin Rosas, LLC
110 West 11th Street
Medford, OR 97501
Telephone: (541) 245-9781
On Behalf of NACDL

Kelly Simon, OSB 154213
Email: Ksimon@aclu-or.org
ACLU Foundation of Oregon, Inc.
PO Box 40585
Portland, OR 97240
Telephone: (503) 849-6793
On Behalf of ACLU and ACLU-OR

CERTIFICATE OF COMPLIANCE

Brief length

I certify that (1) this Brief complies with the word count limitation in ORAP 5.05(1)(b)(ii) and (2) the word count of this brief (as described in ORAP 5.05(1)(a)) is 7,108 words.

Type size

I certified that the size of the type in this brief is not smaller than 14- point for both the text of the brief and footnotes as required by ORAP 5.05(3)(b)(ii).

/s/ Justin N. Rosas
Justin Rosas, OSB 076412
Justin@justinrosas.com

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing **AMICUS BRIEF** by causing it to be electronically filed with the Appellate Court Administrator on October 22, 2026, through the appellate e-filing system.

I further certify that on the same date, I served a true and correct copy of the same on the following individuals, who are registered eFilers, using the electronic service function of the appellate eFiling system, pursuant to ORAP 16.45:

Adam Holbrook, OSB No. 145494
Assistant Attorney General
Email: adam.holbrook@doj.oregon.gov

Paul L. Smith, OSB No. 001870
Solicitor General

Dan Rayfield, OSB No. 064790
Attorney General
OREGON DEPARTMENT OF JUSTICE
1162 Court Street NE
Salem, OR 97301-4096

Dated: October 22, 2026

/s/ Justin N. Rosas
Justin Rosas, OSB 076412
Justin@justinrosas.com

Appendix 1

David v. State, No. 20AC-CC00093(Mo Cir Ct Feb 6, 2023)

IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

JENNIFER L. DAVID, et al.,	)	
Petitioners,	)	
	)	
vs.	)	
	)	**Case No. 20AC-CC00093**
STATE OF MISSOURI, et al.,	)	
Respondents.	)	
	)	
	)	

JUDGMENT

Petitioners filed their Petition against Respondents in this cause seeking remedies for alleged violations of the Missouri Constitution arising out of the failure by the State to timely furnish legal counsel to Petitioners and others similarly situated by placing them on Missouri Office of State Public Defender waiting lists. On July 14, 2020, a class was certified, defined as all indigent persons who have been charged with a crime and are currently on a Missouri State Public Defender waiting list for legal representation, or who will be charged with a crime and placed on a Missouri State Public Defender waiting list for legal representation during the pendency of this litigation. A bench trial was held on November 17 and 18, 2020.

Thereafter, on February 8, 2021 Respondents filed a Motion to Stay Proceedings or Defer Ruling, asserting that the issues raised in the lawsuit may become moot in the near future based on hoped-for legislative action. The Court

on February 18, 2021 entered its order indicating that Petitioners were likely to succeed in their claim under Count I that the failure to timely furnish counsel violates the right to counsel afforded under Article I, Section 18(a) of the Missouri Constitution. The order nevertheless granted the Motion to Stay based on principles of comity and ordered that Respondents provide periodic updates concerning the status of legislative and executive branch actions relevant to the permanent elimination of public defender waiting lists. In the following twenty-one months, several such status updates were filed and two evidentiary hearings were held, on January 7, 2022 and November 29, 2022.

This matter is ready for final judgment and disposition. The Court will first address the findings and conclusions relevant to the issues raised at the bench trial. Second, the Court will address Defendants' Motion to Stay Proceedings or Defer Ruling based on mootness.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Procedural Background and Findings of Fact.

Petitioners filed this lawsuit against Respondents State of Missouri, the Missouri Public Defender Commission, and Mary Fox in her official capacity as Director of the Missouri Office of State Public Defender.[1] Their Petition alleges that since the fall of 2017, the Missouri Office of the State Public Defender (MSPD), in cooperation with courts, have been placing or authorizing the

[1] The petition also named as Respondents seven judges, but by agreement of all parties the judges were dismissed.

placement of many indigent defendants charged with an offense in state court on waiting lists for legal representation. Count I claims that the MSPD waiting list statute, § 600.063.3(5), RSMo Supp. 2013 violates the right to counsel guarantee afforded under Article I, Section 18(a) of the Missouri Constitution to the extent that it allows courts to authorize the placement of indigent defendants on waiting lists for legal representation. Count II claims that § 600.063.3(5) violates the right to due process afforded under Article 1, Section 10 of the Missouri Constitution. Count III claims that § 600.063.3(5) violates the equal rights and opportunity clause afforded under Article 1, Section 2 of the Missouri Constitution. Count IV claims that Respondents have independently violated Article 1 Section 10 due process clause of the Missouri Constitution by engaging in the allegedly unconstitutional practice of placing defendants on waiting lists.

Section 600.063[2] allows any MSPD district defender, under certain

[2] The full text of section 600.063, RSMo Supp. 2013 is as follows:

1. Upon approval by the director or the commission, any district defender may file a motion to request a conference to discuss caseload issues involving any individual public defender or defenders, but not the entire office, with the presiding judge of any circuit court served by the district office. The motion shall state the reasons why the individual public defender or public defenders will be

Section 600.063 (continued)

unable to provide effective assistance of counsel due to caseload concerns. When a motion to request a conference has been filed, the clerk of the court shall immediately provide a copy of the motion to the prosecuting or circuit attorney who serves the circuit court.

2. If the presiding judge approves the motion, a date for the conference shall be set within thirty days of the filing of the motion. The court shall provide notice of the conference date and time to the district defender and the prosecuting or circuit attorney.

3. Within thirty days of the conference, the presiding judge shall issue an order either granting or denying relief. If relief is granted, it shall be based upon a finding that the individual public defender or defenders will be unable to provide effective assistance of counsel due to

conditions, to request a conference to discuss caseload issues involving any individual public defender or defenders with the presiding judge of the circuit. If the presiding judge finds that the individual public defender or defenders will be unable to provide effective assistance of counsel due to caseload issues, the judge is authorized to grant one or more forms of relief, including the following option per section 600.063.3 (5): "Place cases on a waiting list for defender services,

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caseload issues. The judge may order one or more of the following types of relief in any appropriate combination:

(1) Appoint private counsel to represent any eligible defendant pursuant to the provisions of section 600.064;

(2) Investigate the financial status of any defendant determined to be eligible for public defender representation under section 600.086 and make findings regarding the eligibility of such defendants;

(3) Determine, with the express concurrence of the prosecuting or circuit attorney, whether any cases can be disposed of without the imposition of a jail or prison sentence and allow such cases to proceed without the provision of counsel to the defendant;

(4) Modify the conditions of release ordered in any case in which the defendant is being represented by a public defender, including, but not limited to, reducing the amount of any bond required for release;

(5) Place cases on a waiting list for defender services, taking into account the seriousness of the case, the incarceration status of the defendant, and such other special circumstances as may be brought to the attention of the court by the prosecuting or circuit attorney, the district defender, or other interested parties; and

(6) Grant continuances.

4. Upon receiving the order, the prosecuting or circuit attorney and the district defender shall have ten days to file an application for review to the appropriate appellate court. Such appeal shall be expedited by the court in every manner practicable.

5. Nothing in this section shall deny any party the right to seek any relief authorized by law nor shall any provisions of this section be construed as providing a basis for a claim for post-conviction relief by a defendant.

6. The commission and the supreme court may make such rules and regulations to implement this section. Any rule or portion of a rule, as that term is defined in section 536.010, that is created by the commission under the authority delegated in this section shall become effective only if it complies with and is subject to all of the provisions of chapter 536 and, if applicable, section 536.028. This section and chapter 536 are nonseverable and if any of the powers vested with the general assembly pursuant to chapter 536 to review, to delay the effective date, or to disapprove and annul a rule are subsequently held unconstitutional, then the grant of rulemaking authority and any rule proposed or adopted after August 28, 2013, shall be invalid and void.

taking into account the seriousness of the case, the incarceration status of the defendant, and such other special circumstances as may be brought to the attention of the court by the prosecuting or circuit attorney, the district defender, or other interested parties."

At the November, 2020 bench trial, evidence was adduced that, starting in 2017, multiple MSPD district defenders sought caseload relief, resulting in the creation of MSPD waiting lists in parts of the state. Some waiting lists were created informally by agreement with the presiding judge of the judicial circuit without a formal hearing or written order, and other waiting lists were by written order of the presiding judge after hearing. Tr. 171-175. Once the waiting lists began, the number of defendants placed on the lists grew substantially. In November, 2019, there were more than 5,800 cases on MSPD waiting lists, involving 16 different MSPD district defender offices. The waiting lists were in existence for cases pending in 29 counties: Jasper, Newton, Boone, Cooper, Callaway, Audrain, Cass, Henry, Bates, Jefferson, Miller, Moniteau, Cole, Jackson, Camden, Stone, Barry, Lawrence, Crawford, Pettis, Greene, Christian, Taney, St. Charles, Buchanan, Franklin, Howell, Shannon, and Oregon. Pet. Ex. 2.

As of November, 2019, nearly 600 persons on the waiting lists had been waiting for counsel for over one year from the initial determination of indigency. Approximately 1,546 had been waiting for at least six months, 1,916 for at least five months, and 2,273 were waiting for at least four months. Pet. Ex. 2.

An indigent defendant who has been placed on a waiting list does not have access to an MSPD attorney until the defendant has been removed from the waiting list and assigned MSPD counsel. This is so regardless of whether the defendant is in custody or out of custody. While an indigent defendant is on a waiting list awaiting counsel, no MSPD attorney talks to the defendant, investigates the case, reviews evidence, gives advice, or assists the defendant in any way.

As of November 15, 2020, two days before trial, there were approximately 2,500 persons on waiting lists statewide. Tr. 87, 90-91, Pet. Ex. 102. 233 had been waiting for over a year; 665 for over six months; 734 for over five months; 922 for over four months. The ten oldest cases on the Boone County waiting list had an average waiting time of eighteen months. Tr. 102, 108, 188.

Conclusions of Law.

Count I. Right to Counsel. The Sixth Amendment of the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." Article 1, Section 18(a) of the Missouri Constitution, provides, "That in criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel; . . ." As the federal and state constitutional provisions confer the similar right to counsel, the construction of the federal constitution is persuasive in construing the state counterpart. *See State ex rel. Mo. Pub. Defender Comm'n v. Waters*, 370 S.W. 3d 592, 605 (Mo. banc 2012) ("Of particular relevance here is the Sixth

Amendment. It provides in pertinent part, 'In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.' . . . To that end, Missouri's Constitution similarly provides, 'in criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel.' Mo. Const. art. I, § 18(a)." *See also Doe v. Phillips,* 194 S.W.3d 833, 841 (Mo. banc 2006) ("While provisions of our state constitution may be construed to provide more expansive protections than comparable federal constitutional provisions, . . . analysis of a section of the federal constitution is strongly persuasive in construing the like section of our state constitution." (internal quotation marks and citation omitted).

In *State v. Green*, 470 S.W. 2d 571, 572 (Mo. banc 1971), the Missouri Supreme Court stated:

> In 1963, in *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L. Ed.2d 799, the United States Supreme Court held that the United States Constitution requires the State of Missouri, and other States, to furnish counsel to an indigent accused of crime. This means, in practical effect, that an indigent accused of crime cannot be prosecuted, convicted, and incarcerated in Missouri unless he is furnished counsel.

The Sixth Amendment right to counsel (and, by extension, the right to counsel under the Missouri Constitution, embodied in Art. 1 Sec. 18(a)), attaches "at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty." *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 194 (2008). "[A] criminal defendant's initial appearance before a judicial officer, where he learns the charge against

him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel." *Id.* at 213. Attachment occurs at first appearance because that marks "the point at which 'the government has committed itself to prosecute,' 'the adverse positions of government and defendant have solidified,' and the accused 'finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'" *Id.* at 198 (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)).

"[C]ounsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself." *Id.* at 212. "Once attachment occurs, the accused at least is entitled to the presence of appointed counsel during any 'critical stage' of the postattachment proceedings." *Id.* "[A] defendant subject to accusation after initial appearance is headed for trial and needs to get a lawyer working, whether to attempt to avoid that trial or to be ready with a defense when the trial date arrives." *Id.* at 209-210.

"The cases have defined critical stages as proceedings between an individual and agents of the State (whether formal or informal, in court or out), that amount to trial-like confrontations, at which counsel would help the accused in coping with legal problems or meeting his adversary." *Id.* at 212 f.n. 16 (internal quotations and citations omitted). "[O]ur cases have construed the Sixth Amendment guarantee to apply to 'critical' stages of the proceedings . . .

The plain wording of this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful 'defence.'" *United States v. Wade*, 388 U.S. 218, 224, 225 (1967). "[I]n addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." *Id.* at 226. Thus, in *Hamilton v. Alabama,* 368 U. S. 52 (1961), arraignment was considered a critical stage of the prosecution because the accused at arraignment requires the guiding hand of counsel, and in addition "[w]hat happens there may affect the whole trial." *Id.* at 54. Moreover, a critical stage existed at arraignment because of the possible loss of available defenses if not preserved at that stage. *Id.*

Within days after a defendant's attachment of right to counsel at first appearance, the defendant typically encounters critical stages requiring the presence of counsel. First, if a defendant is in custody, one or more hearings are held where the judge decides whether to release the defendant from custody, and if so, the conditions imposed. The release hearing must be held within seven days after defendant's first appearance per Missouri Supreme Court Rule 33.05. Though not entirely free from doubt, it appears that such a release hearing is a critical stage for which a defendant has the right to counsel. *Booth v. Galveston County*, 352 F. Supp. 3d 718, 738-739 (S.D. Tex. 2019) states:

> There can really be no question that an initial bail hearing should be considered a critical stage of trial. See *Higazy v. Templeton*, 505 F.3d 161, 172 (2d Cir. 2007) ("a bail hearing is a critical stage of the State's

criminal process") (internal quotation marks and citation omitted); *Caliste*, 329 F. Supp. 3d at 314 ("the issue of pretrial detention is an issue of significant consequence for the accused"). As a District Court in the Eastern District of Louisiana recently noted:

> [W]ithout representative counsel the risk of erroneous pretrial detention is high. Preliminary hearings can be complex and difficult to navigate for lay individuals and many, following arrest, lack access to other resources that would allow them to present their best case. Considering the already established vital importance of pretrial liberty, assistance of counsel is of the utmost value at a bail hearing.

Caliste, 329 F. Supp. 3d at 314. The importance of providing counsel at the initial detention hearing is underscored by empirical research which indicates that case outcomes for pretrial detainees are much worse — in terms of an increased likelihood of conviction and harsher sentences — than for those who are released pending trial. *See, e.g.*, 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 (2002). Given this research, it is imperative from a constitutional standpoint that individuals facing a pretrial detention hearing be afforded counsel to help guide them through the complicated and overwhelming process.

. . . Because bail was not contested in *Rothgery*, the high court never addressed whether an initial bail hearing is a critical stage of trial. Even so, this Court is confident that, based on longstanding precedent, the Supreme Court would undoubtedly conclude that a pretrial detention hearing is a "critical stage" for Sixth Amendment purposes. See *Coleman*, 399 U.S. at 9-10, 90 S.Ct. 1999 (holding that Sixth Amendment required the presence of counsel at preliminary hearing because, in part, counsel could make effective arguments about necessity of bail); *Smith v. Lockhart*, 923 F. 2d 1314, 1319 (8th Cir. 1991) (holding that hearing on bail reduction motion was a critical stage of proceeding requiring representation by counsel).

Accord: Gonzalez v. Commissioner of Correction, 68 A.3d 624, 643 (Conn. Sup. 2013) (Palmer, J., concurring) (bail hearing is a critical stage of a criminal prosecution in light of the significant consequences, including that "a defendant

who is released from confinement pending trial may be better able to assist counsel in preparing for that trial, or to maintain employment so as to afford counsel of choice, or both"); *State v. Charlton,* 515 P.3d 537, 540, 546 (Wash. Ct. App. 2022) (bail hearing after the defendant has been formally charged is a critical stage); *Hurrell-Harring v. State*, 15 N.Y. 3d 8, 20, 930 N.E. 2d 217, 904 N.Y.S. 2d 296 (2010) (following *Higazy* and concluding that "[t]here is no question that a bail hearing is a critical stage of the [s]tate's criminal process." *Contra: People v. Collins*, 298 Mich. App. 458, 828 N.W. 2d 392 (2012) (bond revocation hearing not a critical stage); *United States v. Hooker,* 418 F. Supp. 476, 479 (M.D. Penn. 1976) (bond hearing not a critical stage).

The named petitioners in this case provide examples of issues faced by defendants at bond hearings, and the mention of two will suffice. Petitioner Travis Herbert was on the MSPD waiting list for 147 days while incarcerated and charged with three felonies. While on the waiting list he attended seven bond hearings without counsel. A prosecutor appeared each time, and all bond reductions were denied until the sixth hearing, when he was released on his own recognizance. Petitioner Dakota Wilcox was on the MSPD waiting list for over five months while in custody charged with several felonies. At the end of the waiting period, an attorney through MSPD entered, and within two days obtained Mr. Wilcox' release.

The confrontation at a bond hearing is a proceeding between an individual and agents of the State that amounts to a trial-like confrontation "at which

counsel would help the accused in coping with legal problems or meeting his adversary, " *Rothgery, supra,* 554 U.S. at 212, f.n. 16. Further, "[w]hat happens there may affect the whole trial." *Hamilton v. Alabama, supra*, 368 U. S. at 54. It follows that the bond hearing is likely a critical stage, obligating the State to furnish the defendant with counsel at the hearing.

Second, a defendant is faced early in the litigation process with the decisions of whether to request a change of judge or change of venue. As MSPD Director Mary Fox testified, the choice of judge and venue are choices that can affect the trial itself. Tr. 128. The right to a timely change of judge has been described as "virtually unfettered" and "highly prized." *State v. Cella*, 976 SW 2d 543, 550 (Mo. App. E.D. 1998); *State ex rel. Amoco Oil Co. v. Ely*, 992. S.W. 2d 915, 918 (Mo. App. W.D. 1999). Generally a change of judge and, in counties with a population of 75,000 or less, change of venue must be requested within the first ten days after entry of the initial plea pursuant to Missouri Supreme Court Rules 32.07 and 32.03. The choices of venue and judge are likely a critical stage, as the defendant requires the "guiding hand of counsel," and the choices "may affect the whole trial." *Hamilton v. Alabama, supra,* 368 U. S. at 54. Hence the State must furnish a defendant with counsel in time to guide the defendant in making these decisions. While a judge having jurisdiction can delay the arraignment proceedings in order to avoid triggering the ten day deadline for change of judge and venue, the defendant is then placed in the untenable position of being charged with a crime and *not even being allowed to plead not guilty to the charge*

because of the unwillingness of the State to provide counsel. "The purpose of arraignment in Missouri is to ascertain whether defendant is personally before the court . . . and to give him the opportunity to plead." *State v. Donnell,* 430 S.W. 2d 297, 300 (Mo. 1968).

But it is not enough for the State to furnish counsel at all critical stages. In addition, the State is required to furnish counsel "within a reasonable time after attachment to *allow for adequate representation at any critical stage before trial, as well as at trial itself*." *Rothgery, supra,* 554 U.S. at 212. Again, a "defendant subject to accusation after initial appearance is headed for trial and needs to get a lawyer working, whether to attempt to avoid that trial or to be ready with a defense when the trial date arrives." *Id*. at 209-210. To provide "adequate representation" at trial, the lawyer must investigate the facts, and must do so while the facts are still available. Investigating facts and communicating with the defendant in the days after the defendant's first court appearance provide the foundation upon which the defense of a case is built. The value of timely attorney-client communication, discovery review, and case investigation is obvious and beyond dispute. Our system of justice depends largely on the memory of witnesses, and memory rapidly dissipates over time. If evidence is not discovered and preserved when it is available, it affects the whole trial, and a belated appointment after the dissipation of evidence does not allow for "adequate representation" at trial. This is so regardless of the advocate's zeal once finally appointed.

Neither the United States Supreme Court nor Missouri courts have addressed what constitutes a "reasonable" amount of time following attachment, but other courts applying *Rothgery* have suggested that a "reasonable" amount of time is to be measured in days or weeks—not months or years. *See, e.g.*, *Lavallee v. Justices in Hampden Sup. Ct.*, 442 Mass. 228 , 237-238 (Mass. 2004) (finding that waiting weeks to receive an attorney was unreasonable under *Rothgery* and explaining that such a delay will impair an attorney's ability to perform the kind of investigation and counseling necessary to ultimately have a fair criminal proceeding and holding, ultimately, that indigent defendants could not be held in custody without counsel for longer than seven days and if someone was facing a felony or misdemeanor with jail time sought their case must be dismissed if they are held for more than 45 days); *see also, e.g.*, *Farrow v. Lipetzky,* 637 Fed. App'x 986, 987 (9th Cir. January 8, 2016) (unpublished op.) (reversing the dismissal of a Sixth Amendment claim under *Rothgery* and remanding for determination of whether delay in appointing counsel five to thirteen days after attachment complies with the *Rothgery* requirement that counsel be appointed within a reasonable time after attachment). Moreover, statements made by the United States Supreme Court make clear that appointment of counsel is expected promptly after the first appearance or arraignment. *See e.g. Michigan v. Jackson*, 475 U.S. 625, 630, f.n. 3 (1986) (["T]he most critical period of the proceedings against these defendants was *from the time of their arraignment* until the beginning of their trial") (quoting *Powell v. Alabama*, 287 U. S. 45, 57

(1932) (emphasis in original) (internal quotation marks omitted); *Rothgery, supra,* 554 U.S. at 203-205 (Justice Souter, writing for the majority, recites that the American Bar Association has taken the position for the past 40 years that counsel should be appointed "no later than the accused's initial appearance before a judicial officer" and that the Federal Government and 43 States take the first step toward appointing counsel "before, at, or just after initial appearance," and then states, "The only question is whether there may be some arguable justification for the minority practice [of 'denying appointed counsel on the *heels of the first appearance*']. Neither the Court of Appeals in its opinion, nor the County in its briefing to us, has offered an acceptable one.") (emphasis added).

A judge having jurisdiction in a criminal case without defense counsel due to MSPD waiting lists is in an unenviable position. The judge can release a defendant from custody in order to avoid the critical stage of a bond hearing, but concerns for community or victim safety sometimes preclude that option. The judge can stay action in the case to avoid the uncounseled lapse of the rights of change of venue and change of judge, but that results in icing the defendant in a state of unchallengeable indictment where the defendant is charged with a crime and is forbidden to come into court and deny the charge at arraignment because the State does not see fit to furnish defendant with a lawyer. Even if the judge releases the defendant from custody and stays all action in the case — that is, even if the case *procedure* remains static while the defendant is on the waiting list — the *condition of the evidence* is not static. Each day's delay in investigating

for the defendant and preserving evidence accrues to the defendant's detriment, and thus a delay of weeks, much less of months or years, violates the obligation of the State to furnish counsel to "allow for adequate representation" at critical stages and at trial. In the alternative, in order to avoid this constitutional harm to the defendant, the judge can appoint private counsel without pay to immediately represent the defendant. However, given the size of the waiting lists,[3] to institute a system for appointing private counsel to waiting list cases is to conscript the services without pay of most or all of the local attorneys in the geographical area of the MSPD shortage to represent the indigent defendants. Moreover, appointing scores of private counsel without pay to represent the thousands on the waiting lists at the time this lawsuit began forces private citizens to satisfy an obligation that is owed by the State.

It is no defense to assert, as does the State, that we don't know with respect to a given defendant whether the delay in appointing counsel is hurting that specific defendant's case. The right to counsel is a *prospective* right and that right is broader than the right to set aside a conviction for ineffective assistance of counsel. In *State ex rel. Mo. Pub. Defender Comm'n v. Waters*, *supra*, 370 S.W. 3d 592 at 607, our Supreme Court explained:

> No case suggests that a court analyze whether the Sixth Amendment right to counsel has been preserved at all critical stages only by retrospectively determining that the lack of such counsel deprived a defendant of a fair trial. To the contrary, . . . the United States Supreme Court has explained that "[i]t is well settled" that the Sixth Amendment

[3] Michael Barrett, MSPD director from 2014 through 2019, described the number of people on the MSPD waiting list in late 2019 as "staggering, really high" in certain jurisdictions.

> right to counsel is broader than the question of whether a court must retrospectively set aside a judgment due to ineffective assistance of counsel. The constitutional right to effective counsel applies to all critical stages of the proceeding; it is a prospective right to have counsel's advice during the proceeding and is not merely a retrospective right to have a verdict or plea set aside if one can prove that the absence of competent counsel affected the proceeding.

Further, no prejudice need be shown where counsel was absent at a critical stage of a criminal proceeding. *United States v. Cronic*, 466 U.S. 648, f.n. 25, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) ("The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding."); *see also Van v. Jones*, 475 F.3d 292, 312 (6th Cir. 2007) ("It is settled that a complete absence of counsel at a critical stage of a criminal proceeding is a *per se* Sixth Amendment violation warranting reversal of a conviction, a sentence, or both, as applicable, without analysis for prejudice or harmless error.")

In its defense of waiting lists, the State points out that the concept of a public defender waiting list was envisioned by the Missouri Supreme Court in *Waters,* where the Court stated that "a trial court can use its inherent authority over its docket to 'triage' cases so that those alleging the most serious offenses . . . are given priority in appointing the public defender and scheduling trials. . ." *Id.* at 611. However, this overlooks a sentence from the previous paragraph of the opinion: "[T]rial courts have both the authority and the responsibility to manage their dockets in a way that both moves their cases and *respects the constitutional*,

statutory and ethical *rights* and obligations *of the defendant*, the prosecutor, the public defender and the public." *Id.* at 610-611 (emphasis added). Thus *Waters* is unlikely authority for the months-long denial of counsel to an indigent defendant the State seeks to incarcerate when that very opinion specifies that the constitutional rights of the defendant be respected.

As to Count I, the Court finds and concludes that section 600.063.3(5) violates the right to counsel afforded by Article I, section 18(a) of the Missouri Constitution only to the extent that it is applied to allow the State to charge a defendant with a crime or probation violation wherein the State seeks defendant's incarceration, and then fail to furnish the defendant with counsel within two weeks after the defendant has been found indigent and otherwise entitled to appointment of counsel. The use of a waiting list is not itself a deprivation of a defendant's right to counsel, as the constitutional right to counsel does not specify counsel through the Missouri Office of State Public Defender. Rather, the State fails in its obligation to provide counsel when it fails to provide counsel through MSPD and and further fails to provide counsel by any other mechanism within such two week period, as such a failure falls below the minimal obligation placed upon the State to appoint counsel within a reasonable time after attachment.[4] A defendant, having had an initial appearance with a judge and having been subject to accusation, "is headed for trial and needs to get

[4] The window for appointment of counsel would necessarily be shortened if counsel's presence is necessary to adequately represent a defendant at an earlier critical stage, such as consulting with the defendant within the deadline for requesting a change of judge or change of venue after a *pro se* arraignment, or appearing at a release hearing.

a lawyer working, whether to attempt to avoid that trial or to be ready with a defense when the trial date arrives." *Rothgery*, 554 U.S. at 209-210.

Counts II, III, and IV. Count II claims that § 600.063.3(5) violates the right to due process afforded under Article 1, Section 10 of the Missouri Constitution, which states, "That no person shall be deprived of life, liberty or property without due process of law." Count III claims that § 600.063.3(5) violates the equal rights and opportunity clause afforded under Article 1, Section 2 of the Missouri Constitution, which states, "that all persons are created equal and are entitled to equal rights and opportunity under the law." Count IV claims that Respondents have independently violated Article 1 Section 10 due process clause of the Missouri Constitution by engaging in the allegedly unconstitutional practice of placing defendants on waiting lists. Unlike the numerous cases analyzing the denial or delay of appointing counsel for an indigent defendant as a violation of the constitutional right to counsel, no party in this case cites any case concluding that such a denial or delay constitutes a violation of the constitutional provisions cited in Counts II, III, and IV. The Court finds insufficient authority to conclude that § 600.063.3(5) as applied violates any of the constitutional provisions cited under these Counts.

II. MOTION TO STAY PROCEEDINGS OR TO DEFER RULING

On February 8, 2021 Respondents filed a Motion to Stay Proceedings or Defer Ruling, asserting that the issues raised in the lawsuit may become moot in the near future based on hoped-for legislative action. The Court on February 18,

2021 entered its order indicating that Petitioners were likely to succeed in their claim under Count I. The order nevertheless granted the Motion to Stay based on principles of comity and ordered that Respondents provide periodic updates concerning the status of legislative and executive branch actions relevant to the permanent elimination of MSPD waiting lists.

At a hearing held January 7, 2022, Respondents asserted that the case was then moot and should be dismissed. MSPD Director Mary Fox testified that at the time she assumed her duties as Director of MSPD in January, 2020, approximately 4,600 persons were on MSPD waiting lists, including approximately 600 persons who remained in pretrial detention. On June 30, 2021 Governor Parson approved the FY 2022 Budget passed by both houses of the General Assembly appropriating an additional $3.6 Million for MSPD to eliminate the use of waiting lists. The increase allowed for the creation of an additional 53 attorney full-time equivalent positions in MSPD trial offices. MSPD was successful in filling many but not all of the new positions, and utilized some of the funds to retain outside contract attorneys, thereby eliminating the waiting list. As of the date of the January, 2022 hearing, there were zero cases on the MSPD waiting list, the waiting list having been reduced to zero as of November 30, 2021. Ms. Fox opined that it was doubtful that a waiting list, without a corresponding way to provide an indigent defendant with counsel, was likely to recur. Hrg. Tr. 57. However, she declined to predict whether waiting lists would be "off the table" or unlikely to occur for future use. Hrg. Tr. 27. This

Court by order dated March 4, 2022 held that the claims are reviewable under the public interest exception to the mootness doctrine, but nevertheless extended the stay.

At the final hearing held in this cause on November 29, 2022, evidence was adduced that the waiting list remained at zero based on sufficient funding having been provided by annual appropriations by the Missouri legislature. Respondents declined to rule out the future use of waiting lists resulting in the delay in the provision by the State of counsel to indigent defendants.

The Missouri Supreme Court in the case of *State ex rel. Reed v. Reardon*, 41 S.W. 3d 470, 473 (Mo. banc 2001) explains the doctrine of mootness:

> In terms of justiciability, "`[a] cause of action is moot when the question presented for decision seeks a judgment upon some matter which, if the judgment was rendered, would not have any practical effect upon any then existing controversy.' " *Shelton v. Farr*, 996 S.W.2d 541, 543 (Mo.App. 1999) (quoting *Bank of Washington v. McAuliffe*, 676 S.W.2d 483, 487 (Mo. banc 1984)). "`The existence of an actual and vital controversy susceptible of some relief is essential to appellate jurisdiction.'" *Armstrong*, 990 S.W.2d at 64 (quoting *State ex rel. Wilson v. Murray*, 955 S.W.2d 811, 812-13 (Mo.App.1997) (citation omitted)). "When an event occurs that makes a court's decision unnecessary or makes granting effectual relief by the court impossible, the case is moot and generally should be dismissed." *Id.*; *In re C.A.D.*, 995 S.W.2d 21, 28 (Mo.App.1999). "`Even a case vital at inception of the appeal may be mooted by an intervenient event which so alters the position of the parties that any judgment rendered [merely becomes] a hypothetical opinion.'" *Armstrong*, 990 S.W.2d at 64 (quoting *Gilroy-Sims and Assocs. v. City of St. Louis*, 697 S.W.2d 567, 569 (Mo.App.1985)). In deciding whether a case is moot, an appellate court is allowed to consider matters outside the record. *Bratton v. Mitchell*, 979 S.W.2d 232, 236 (Mo.App.1998); Wilson, 955 S.W.2d at 812.

Given the above standard, it would appear that the causes of action in the instant case are moot, as a judgment would not have a "practical effect upon any then existing controversy." *Id.* As noted in *Reed*, even a case vital in the beginning may be mooted by a subsequent event "which so alters the position of the parties that any judgment rendered [merely becomes] a hypothetical opinion." *Id.*

The instant case was vital at the inception of the case and at trial. Evidence at the November, 2020 trial established that as of November, 2019, three months before Plaintiff's petition was filed, there were more than 5,800 cases on MSPD waiting lists, involving 16 different MSPD district defender offices. Nearly 600 persons on the waiting lists had been waiting for counsel for over one year from the initial determination of indigency. Approximately 1,546 had been waiting for at least six months, 1,916 for at least five months, and 2,273 were waiting for at least four months. Pet. Ex. 2. An indigent defendant on a waiting list did not have access to an MSPD attorney until the defendant had been removed from the waiting list and assigned MSPD counsel, regardless of whether the defendant was in custody. While the indigent defendant was on the waiting list, no MSPD attorney talked to the defendant, investigated the case, reviewed evidence, gave advice, or assisted the defendant in any way. As of November 15, 2020, two days before trial, approximately 2,500 persons remained on waiting lists. Trial Tr. 87, 90-91, Pet. Ex. 102. 233 had been waiting for over a year; 665 for over six months; 734 for over five months; 922 for over four

months. The ten oldest cases on the Boone County waiting list had an average waiting time of eighteen months. Tr. 102, 108, 188.

A judgment entered after the initial trial would have had a practical effect on a "then existing controversy." *Reed, supra,* 41 S.W. 3d at 470. At that time, thousands of indigent defendants charged with felonies were waiting for the State of Missouri to provide them with counsel, some for over one year. However, this Court elected, as a matter of comity and deference to the legislative and executive branches, to defer ruling in order to give time for those branches to act. To their credit, both did so by appropriating sufficient funding to eliminate the waiting list and promptly provide all indigent defendants charged with a crime with counsel through MSPD. The actions of both branches of government are commendable. As no one is currently on the waiting list as of this writing, the positions of the parties would appear to be altered such that "any judgment rendered merely becomes a hypothetical opinion." *Id.* (brackets omitted). Hence, the instant case appears moot.

Ordinarily a case which is moot should be dismissed. *Reed, supra*, 41 S.W. 3d at 470. However, "[g]enerally speaking, there are two exceptions to the mootness doctrine. First, when a case becomes moot after submission of the case in the appellate court and second, when the issue raised has general public interest and importance and is likely to recur but otherwise evade review." *In the Interest of PDW*, 606 S.W. 3d 232, 235 (Mo. App. W.D. 2020) (internal citations omitted). The first exception does not apply, as the case has become moot before,

rather than after, submission of the case in the appellate court. The second exception, however, is applicable. That is, the issues raised have general public interest and importance, are likely to recur, and are likely to otherwise evade review.

First, the issues raised have general public interest and importance. Petitioners claim in their petition that since 2017, the Missouri Office of the State Public Defender (MSPD), in cooperation with courts, have been placing or authorizing the placement of thousands of indigent defendants charged with an offense in state court on waiting lists for legal representation. Count I claims that the MSPD waiting list statute, § 600.063.3(5), RSMo Supp. 2013 violates the right to counsel guarantee afforded under Article I, Section 18(a) of the Missouri Constitution to the extent that it allows courts to authorize the placement of indigent defendants on waiting lists for legal representation. The issue raised in this claim is of general public interest and importance.

Second, the issue of delaying appointment of counsel for an indigent defendant by placing the defendant on a waiting list is virtually certain to occur in the future. The waiting list is at zero, not because Respondents have renounced its use, but because the State is currently providing sufficient funding to avoid resorting to it. The General Assembly appropriates funds on a one-year basis. *V.S. DiCarlo Construction Co., Inc. v. State*, 485 S.W.2d 52, 54, 57 (Mo. 1972). The history of providing defense counsel for indigent defendants in Missouri is replete with claims of inadequate resources for providing effective

representation. *See generally IN RE AREA 16 PUBLIC DEFENDER OFFICE III,* 609 SW 3d 743 (Mo. App. W.D. 2020); *In re Hinkebein*, No. SC96089 (Mo. banc 2017); *Barrett v. Greitens*, 542 SW 3d 370 (Mo. App. W.D. 2017); *State ex rel. Mo. Public Defender Comm'n v. Waters*, *supra,* 370 S.W.3d 592 (Mo. banc 2012); *State ex rel. Missouri Pub. Defender Comm'n v. Pratte*, 298 S.W.3d 870 (Mo. banc 2009); *State ex rel. Public Defender Comm'n v. Williamson*, 971 S.W.2d 835 (Mo.App.W.D. 1998); *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64 (Mo. banc 1981); *State v. Green*, 470 S.W.2d 571 (Mo. banc 1971). Section 600.063.3 (5), RSMo Supp. 2013, the statute relied upon by Respondents to maintain the waiting list, remains unamended, available to be utilized at the next MSPD funding shortfall to delay appointment of counsel for defendants charged by the State with a crime. Meanwhile, Respondents continue to assert that the practice of using the waiting list – even when it allows the State to delay for months or years furnishing an indigent person charged by the State with a crime – does not violate an indigent defendant's right to counsel.[5] The issues raised in the instant case involving the use of a waiting list are likely to recur.

Finally, it is likely that future issues regarding use of a waiting list for unrepresented indigent defendants will continue to evade review. In *Nichols v. McCarthy*, 609 S.W. 3d 483 (Mo. App. E.D. 2020), the public interest exception to

[5]For example, Plaintiff's Petition, paragraph 78, alleges that Respondents have violated Article 1, Section 18(a) of the Missouri Constitution by placing, or authorizing the placement of, indigent defendants on waiting lists, without access to counsel. Respondents' Amended Answer denies the allegations. *See Dennig v. Graham,* 227 Mo. App. 717, 722, 59 S.W.2d 699 (Mo. App. Spr.D. 1933) (A party's pleading, by which the party is bound, is evidence of the party's future intentions. Additionally, past actions of a party are relevant as tending to show the party's present intentions: "[T]he court may judge the future by the past actions of defendant.")

mootness was held to apply to issues involving the setting of a bond for a defendant charged with a crime. The court held that "the issue will continue to evade appellate review because defendants will generally have issues regarding their bond resolved in some manner before they can obtain a declaration of rights in the circuit court followed by appellate review." *Id.* at 491. Likewise, in the instant case issues regarding appointment of counsel will usually be resolved before a defendant can obtain a declaration of rights, thus evading appellate review.

Respondents cite *Sauer v. Nixon*, 474 S.W.3d 624, 630 (Mo. App. W.D. 2015) for the proposition that action by the legislature to solve a problem initially sought to be solved through litigation may render the litigation moot, even after considering the public interest exception. In *Sauer*, the Court of Appeals dismissed as moot an appeal of a judgment forbidding certain State agency actions arising out of the State's membership in the "Smarter Balanced Assessment Consortium" based upon intervening legislation that forbade the State from membership in the consortium. As the action of the General Assembly effectively granted the relief sought by petitioners, it was unlikely that the issue would recur. Unlike the intervening action in *Sauer*, the waiting list statute which is the subject of the instant litigation, section 600.063.3 (5), RSMo Supp. 2013, remains intact.

For the above reasons, the claims raised in the instant case are reviewable under the public interest exception to the mootness doctrine.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

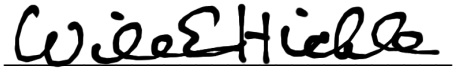
1. As to Count I, the Court declares that section 600.063.3(5), RSMo Supp. 2013 is unconstitutional only to the extent that it is applied to allow the State to charge a defendant with a crime or probation violation wherein the State seeks defendant's incarceration, and then fail, after defendant has been found indigent and otherwise entitled to appointment of counsel, to furnish the defendant with counsel within the earlier of either (a) two weeks, or (b) in time to assist with an earlier critical stage, such as a bail or bond hearing or a decision of whether to request a change of judge or venue. Such a failure by the State to timely furnish counsel by application of the waiting list statute violates the right to counsel afforded by Article I, section 18(a) of the Missouri Constitution.

2. As to Counts II, III, and IV, the Court finds insufficient authority to conclude that § 600.063.3(5) as applied violates any of the constitutional provisions cited under these Counts.

3. All other relief requested by any party not otherwise addressed by this Judgment is denied.

SO ORDERED.

Date: February 6, 2023



William E. Hickle, Judge

Appendix 2

Robbins v. Maine Comm'n on Indigent Legal Services,
No KENSC-CV-22-54 (Me Super Ct, March 7, 2025)
Order After Phase One Trial

STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-22-054

ANDREW ROBBINS, et al.,

Plaintiffs,

v.

JAMES BILLINGS, in his official capacity as Executive Director of the Maine Commission on Indigent Legal Services; JOSHUA TARDY, in his official capacity as Chair of the Maine Commission on Indigent Legal Services; DONALD ALEXANDER, RANDALL BATES, MICHAEL CAREY, ROGER KATZ, KIMBERLY MONAGHAN, and DAVID SOUCY, in their official capacities as Commissioners of the Maine Commission on Indigent Legal Services; and the STATE OF MAINE,

Defendants.

ORDER AFTER PHASE ONE TRIAL (COUNTS I, III, AND V)

On January 22–24, 2025, the Court held a bench trial on the issues remaining for resolution in Counts I, III and V in this Phase I litigation. The trial was conducted pursuant to the Court's January 3, 2025 Combined Order on Partially Dispositive Motions. In that Order, the Court granted partial summary judgment on the issue of liability in favor of the Plaintiff Subclass members on Count I; granted full summary judgment in favor of the MCPDS Defendants on Count II; granted partial summary judgment on the issue of liability under the Sixth Amendment in favor of Plaintiff Subclass members on Count III; and deferred ruling on the State of Maine's Motion for Summary Judgment on Count V.[1]

[1] On February 21, 2025, the Court ruled on two pending motions brought by MCPDS Defendants. The Court granted in part and denied in part a Motion to Alter or Amend Combined Order on Partially Dispositive Motions and denied a Motion for Partial Summary Judgment on Relief Demanded in Counts I and II.

The Court has reviewed the extensive post-trial filings by the parties on these Counts, the last of which was received by the Court on February 28, 2025. The Court begins by making findings of fact upon which it will in part rely when considering the remedy issues for the Section 1983 claim in Count I, as well as for the claim for habeas corpus relief in Count III.[2]

FACTUAL FINDINGS

The scope of the problem at the close of the evidence

As of January 9, 2025, there were approximately 739 pending criminal cases in Maine where no counsel had ever been provided by the MCPDS Defendants. O'Brien Testimony, Jan. 23, 2025, at 64–72.[3] This was the credible conclusion of the Plaintiffs' expert, Dr. Liam O'Brien, a highly qualified Professor of Statistics at Colby College. Of those cases, about one half of them remained without assigned counsel for more than 66 days. *Id.* at 67. Professor O'Brien conducted this analysis using data provided to Plaintiffs by the MCPDS Defendants for three points in time: September of 2024, November of 2024, and January of 2025. *Id.* at 44. He concluded that the median time that cases are going without counsel has increased from September 2024 to January 2025. *Id.* at 76–77.[4]

In this same time frame, Professor O'Brien identified an additional distinct group of 252 cases in which counsel had been assigned but later withdrew, and no new attorney had been

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[2] The Court overrules the State of Maine's standing objection to the Court considering any facts developed in the three-day bench trial in its decision on the habeas claim in Count III. The Court is unpersuaded that factual findings play no meaningful role in the Court's consideration of the scope of the remedy available in habeas claims, in addition to determinations of liability in such claims. *See, e.g.*, *Peterson v. Johnson,* SJC-23-02, at 4–11 (Jan. 12, 2024) (Douglas, J.) (Findings of Fact).

[3] Please note: both the Court and the parties produced transcripts of the audio recording of the January 22–24, 2025 trial. The two transcriptions were paginated differently, and thus citations to the record using one transcript do not line up with the other transcript. When citing to the record in this Order, the Court is referring to the Court's official transcription, not the transcription ordered privately by the parties.

[4] Professor O'Brien calculated the median number of days these 739 cases have gone without counsel in two different ways. When calculated from the date the motion for appointment of counsel was granted, the median number was 66 days. *Id.* at 57. However, if calculated from the date the case was filed, the median number for cases for which counsel was not assigned rose to 111 days for that same group of 739 cases. *Id.* at 71.

assigned. *Id.* at 63. This brings the number of cases without counsel to 991 as of January 9, 2025. *Id.* at 73. And just as with the other group of 739 cases, the trend for this distinct group of 252 cases is that "the median is increasing throughout time. So at each time point, it's getting larger." *Id.* at 77.

Professor O'Brien also noted that, in a number of these cases, the defendant has been without counsel for more than a year. As of January 9, 2025: (1) of the cases in which a defendant's motion for counsel was granted or appointment was ordered by a court, but no counsel has been appointed, and in cases where a defendant has requested counsel but a court has not yet ruled on that motion, there are a total of 51 cases in which a defendant has been without counsel for more than a year, *id.* at 64–67; (2) of the cases in which a defendant previously had counsel but that counsel withdrew and no new attorney has been assigned, there are a total of 79 cases in which a defendant has been without counsel for more than a year. *Id.* at 74–75.

MCPDS Defendants' response to the crisis

Against this background, the MCPDS Defendants attribute the crisis to forces outside their control. They argue that the number of private attorneys participating in their programs is insufficient to carry 70 percent of adult criminal cases. Pls.' Ex. 7, Annual Report of Commission (Jan. 14, 2025), at 3. That percentage was selected by MCPDS as part of its goal to create a "hybrid" indigent defense system. Under this model, public defender offices are expected to staff the remaining 30 percent of the criminal cases requiring assignment of counsel for adult indigent defendants. *Id.*

In its Report, MCPDS adamantly defends its caseload standards (often referred to as the "Chapter 4" standards or regulations)—the points-based limits MCPDS puts on how many cases a rostered attorney can take in a single year. It asserts that "[t]he idea that PDS standards are too

high and are driving people away is simply not supported." *Id.* They note that the trend of declining participation has been ongoing for "a period of years," with the exception of an uptick in 2024. *Id.* Earlier in the crisis, in a March 8, 2024 memo from Executive Director Billings to the Commissioners, he made essentially the same claim. MCPDS Defs.' Ex. 13, Memorandum Regarding Unassigned Cases and System Capacity (Mar. 8, 2024). Executive Director Billings stated that, as of that date, there were over 20,000 unallocated "points" in the system, *id.* at 1, and that "for all attorneys not already over their caseload limit, the average carried caseload was 85 points less than their caseload limit." *Id.* He drew the following conclusion from the data:

> It has been suggested that the implementation of Chapter 4 was the precursor to the rise in the number of cases needing counsel. However, looking at the number of cases without counsel over time reveals that the number of unstaffed cases has been steadily increasing since November of 2023. That rate held steady in January of 2024 after the implementation of the Chapter 4 caseload standards. The current accelerated rate of increase did not begin until mid to late February of 2024. The temporal delay and availability of system capacity indicate that the rise in cases without counsel cannot be ascribed to the implementation of Chapter 4.

Id. at 2. He explained that since the Chapter 4 regulations were implemented, "26 attorneys have been granted caseload limit waivers. 19 attorneys have been granted waivers that would allow them to exceed the standard caseload limit of 270 points." *Id.* at 1. He ended the memo by stating that MCPDS staff concluded that "counsel appear to be self-regulating their caseloads and intentionally maintaining lower caseloads than the maximums permitted by Chapter 4." *Id.* at 3. In other words, he believes the caseload standards are working to the benefit of the system as it motivates private attorneys to stay on the rosters if they can control their caseloads.

He indicated at trial, however, that since the Court's finding of liability on Count I, that he had been "freely granting" waivers. Billings Testimony, Jan. 23, 2025, at 220–21.[5]

[5] In its most recent Annual Report, MCPDS Executive Director Billings wrote that MCPDS undertook emergency rulemaking in July 2024. Pls.' Ex. 7, Annual Report of Commission (Jan. 14, 2025), at 3. These rules made it possible for attorneys to seek waivers for "specialized panels." *Id.* Executive Director Billings noted that only one

The MCPDS Report concludes that the caseload standards should be maintained, and that "the best way forward to address this crisis is to: (a) continue the buildout of the public defender offices to geographically cover the remainder of the state, (b) increase to at least a 50% public defender-private counsel ratio, and (c) continue with recruitment efforts at the law school level—both in Maine and elsewhere." Pls.' Ex. 7, Annual Report of Commission (Jan. 14, 2025), at 3–4.

There is unrebutted testimony in the record, however, that the approach taken to date by MCPDS for how to use the expertise and experience *within* the public defender offices (the District Defenders) has fallen short in addressing the crisis in four of the five regions where offices now exist, with one notable exception in Region IV, where the Capital Region Public Defender opened in late 2023. In response to questions from the Court, it was established that some of the District Defenders in the other four regions are not actually assigning cases to themselves but are instead supervising Assistant Defenders in cases selected for them by the District Defenders.

District Defenders were presumably hired because they are experienced and highly competent attorneys qualified to handle any case type. And it is well understood that one major benefit of a public defender system is that public defenders are not typically given the option to pick and choose their cases. But that is what appears to be happening now. The Court understands that four of the five public defender offices open now are relatively new. And in ordinary circumstances, the decision to roll out the offices while permitting District Defenders to personally handle very few or, in some cases, no, adult criminal matters might be completely defensible. But current circumstances are far from ordinary.

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attorney applied for a waiver, and he cites this fact as further evidence that the standards should not be changed or adjusted during this crisis. *Id.* The waivers are intended to permit attorneys to exceed the number of points MCPDS permits attorneys to accrue before they must notify courts and MCPDS that they are no longer eligible to be assigned to represent defendants for certain case types. Billings Testimony, Jan. 23, 2025, at 219–20.

Executive Director Billings testified that he is hearing from his District Defenders that

> a lot of the cases on the unrepresented list are there because nobody wants them, and the evidence is in disarray, the discovery is incomplete, there's an ongoing battle for discovery, and that it takes a long time to get caught up because you feel like you are behind in those case. And so there's a limit to how quickly they can take cases off the list and still provide high-quality services.

Billings Testimony, Jan. 23, 2025, at 240.

Cases that are in disarray are exactly what might be expected when cases linger without representation by a skilled practitioner who could resolve or ameliorate what the District Defenders describe. And it would seem obvious that these cases are *exactly* the sorts of cases that the District Defenders should personally be taking on—particularly for defendants in custody.

Here are the numbers of cases that have been selected by four out of the five District Defenders (DDs) for assignment to their Assistant Defenders (ADs), and to themselves:

1) The Aroostook County DD personally handles no adult criminal cases of his own. Instead, he handles "a few juvenile cases" and acts as "Lawyer of the Day" (LOD) in Fort Kent and sometimes in Madawaska. He supervises two ADs who each have 70–75 cases. Billings Testimony, Jan. 24, 2025, at 8–11;

2) In the Highlands Region of Penobscot and Piscataquis Counties, the DD personally handles no adult criminal cases of her own. Instead, she supervises one AD who has 11 cases, and one AD who has 20 cases. *id.* at 7–8;

3) In the Downeast Region of Hancock and Washington Counties, the DD has 14 cases of his own, two of which are on deferred dispositions. As of the close of the evidence, he had no ADs to supervise. *id.* at 8;

4) In the Tri-County Region of Androscoggin, Franklin, and Oxford Counties, the DD personally handles 13 adult criminal cases. He supervises one AD who, as of January 24, 2025, had 2 cases (but who he hoped would be able to take 12 to 15 more cases in the near future); one AD who has 12 cases; one AD who has 24 cases; and one AD who has 40 cases. He also supervises one AD who, as of the close of the evidence, did not have any cases assigned to him. Tarpinian Testimony, Jan. 24, 2025, at 74–77.

MCPDS is understandably concerned with the Assistant Defenders being "overwhelmed" if they have to take too many cases while they are still being trained. However, no MCPDS representative has articulated a credible reason why the District Defenders themselves cannot take "off the spreadsheet" the most difficult cases, meaning either that the case or defendant may be particularly challenging—especially when those defendants are in custody. To put it in simple, mathematical terms, if each District Defender personally handled approximately ten unrepresented defendants who are now in custody, the "in custody" column on the spreadsheet would be cut in half.

The testimony at trial also establishes that no one from MCPDS' central office is maintaining an internal list of the unrepresented, incarcerated defendants or where they are located—much less attempting to actually visit them in the jails. Instead, they wait to receive the data from the Judicial Branch, and then forward that data three times per week to "all eligible counsel." Maciag Testimony, Jan. 23, 2025, at 183–85. Deputy Director Maciag and Executive Director Billings explained that MCPDS does not have the staff to make calls or otherwise reach out to private counsel to take adult criminal cases and often rely upon court clerks to make such calls. Billings Testimony, Jan. 23, 2025, at 198–99. He did note, however, that MCPDS recently conducted a pilot program to recruit private attorneys to represent parents in child protective cases. *Id.* at 254. A private attorney was hired to work with the Lewiston District Court clerks to make calls to find counsel willing to be assigned. *Id.* He stated that her success rate was approximately sixty percent. *Id.* He did not indicate if MCPDS was considering using this model to try and similarly convince private attorneys to take criminal cases off the unrepresented list.

In his oral closing argument, Counsel for MCPDS suggested to the Court that their proposal for a remedy to the ongoing Sixth Amendment violations found in Count I was

essentially the budget they had proposed be included in the Governor's budget for the next biennium, MCPDS Defendants' Closing Argument, Jan. 24, 2025, at 116, which means that MCPDS is addressing the current crisis by focusing on obtaining additional resources.

Executive Director Billings testified about the budget MCPDS submitted for consideration by the Governor. Billings Testimony, Jan. 23, 2025, at 249–59. Because an insufficient number of private attorneys are willing to take cases, the proposed budget would permit MCPDS to roll out three more public defender offices: one in the Midcoast, and two in the most populated counties in Maine, Cumberland and York. Billings Testimony, Jan. 23, 2025, at 251; Pls.' Ex. 7, Annual Report of Commission (Jan. 14, 2025), at 9, 15. Their goal is for public defender offices statewide to take on 50 percent of adult criminal cases, as opposed to the 30 percent of adult criminal cases they are supposed to be handling now. Billings Testimony, Jan. 23, 2025, at 255; Pls.' Ex. 7, Annual Report of Commission (Jan. 14, 2025), at 15. Their budget included financial incentives for private attorneys to take more cases, along with the creation of three new positions tasked specifically with soliciting private attorneys to take cases "off" the unrepresented list. Billings Testimony, Jan. 23, 2025, at 251–52. The proposal was modeled after the State of Oregon, which has faced similar problems to Maine in providing counsel for indigent defendants. *Id.* at 244–45.

Unfortunately, to date, MCPDS has been unable to persuade other State actors in the Legislative or Executive Branches to go along with this proposal. According to Executive Director Billings, "[t]he next word we saw was in the release of the Governor's budget, where we had no new positions and we do not have the $12 million that we need to pay the rostered attorneys." *Id.* at 257.

The parties are aware that the Court has no authority to order the Legislature to appropriate the funds requested by MCPDS. And the Court would emphasize that it has no intention of ordering any particular District Defender to take a particular case. Nor does it have authority at this stage of the litigation to order MCPDS to consider suspending caseload standards or to implement a pilot program such as the one that was so successful in finding attorneys for parents in child protective cases. The Court's purpose in asking about capacity was not part of an agenda to micromanage MCPDS. The Court's questions were designed to determine if there was as a factual matter some reserve capacity in the system. It appears to the Court that there is.

The factual findings about these issues are manifest from the trial record, and some of them they will play a part in the legal analysis conducted by the Court on the Counts remaining in this litigation.

COUNT I

The Phase I Subclass of unrepresented Plaintiffs (hereinafter, "the Plaintiffs") prevailed on the issue of liability under Count I, the Section 1983 claim. The Court found that the Sixth Amendment requires MCPDS Defendants to provide Plaintiffs with continuous representation from the time the right attaches at a defendant's first appearance or arraignment, throughout pretrial events and proceedings, and throughout the plea-bargaining and trial processes.

Plaintiffs now seek a declaratory judgment consistent with those conclusions, and a permanent injunction requiring the MCPDS Defendants to provide continuous representation.

In order to obtain permanent injunctive relief, Plaintiffs must succeed on the merits; and they must establish that 1) they would suffer irreparable harm if the injunction is not issued; 2) the harm to the Plaintiffs outweighs any potential harm to the Defendants; and 3) there are public

interests beyond the private interests of the Plaintiffs that would be served by issuance of the injunction. *Ingraham v. Univ. of Me. at Orono,* 441 A.2d 691, 693 (Me. 1982); *Fitzpatrick v. Town of Falmouth,* 2005 ME 97, ¶ 18, 879 A.2d 21. "Failure to demonstrate that any one of three criteria are met requires that injunctive relief be denied." *All. for Retired Ams. v. Sec'y of State,* 2020 ME 123, ¶ 11, 240 A.3d 45. The most critical factor independent of success on the merits is the demonstration of irreparable harm. *Nken v. Holder*, 556 U.S. 418, 434 (2009).

Before addressing whether Plaintiffs have established these three criteria, the Court must address a legal issue, raised for the first time by the MCPDS Defendants almost two years after this litigation commenced—that the MCPDS Defendants are entitled to "quasi-judicial immunity" and that therefore Plaintiffs are not entitled to any injunctive relief, as a matter of law.

In support of their argument, the MCPDS Defendants rely upon cases primarily from jurisdictions that take markedly different approaches than Maine as to how separate branches of government manage the authority and responsibility allocated to them to run indigent defense systems. Remarkably, after many months of asserting that the Judicial Branch has no authority over how MCPDS operates, in part because only MCPDS can determine what attorneys are qualified or eligible to be appointed, MCPDS now asserts they are protected from being subjected to injunctive relief by judicial or quasi-judicial immunity because all they do is "facilitate" the work of the courts. In order to make that argument, the MCPDS Defendants must now characterize their role differently. They now describe their obligation to provide counsel to indigent defendants as working under the courts, and as essentially ministerial. The Court rejects this argument for a number of reasons.

As noted, the MCPDS Defendants have repeatedly claimed that jurists in Maine have no authority to determine whether an attorney is qualified or eligible to be appointed. They cite to

the "Clifford Commission," which in 1999 "recommend[ed] that Maine implement an indigent legal services system that is independent from the judiciary, and that provides the training and oversight necessary to ensure quality representation to Maine's citizens." MCPDS Defs.' Ex. 9, Clifford Commission Report, at 10. The Report was admitted into evidence as a Defense Exhibit, and it is also posted on the MCPDS website. *See* Maciag Testimony, Jan. 23, 2025, at 132–36; *see also* Report of the Indigent Legal Services Commission, at 10 (Feb. 2009), https://www.maine.gov/pds/sites/maine.gov.mcils/files/documents/Clifford-Commission-Report.pdf.

The Clifford Commission specifically recommended that the Maine Legislature create a new state agency, outside of the Judicial Branch and with its own budget, and that it be given the exclusive authority to set its own standards for "the selection, training, and performance review of appointed counsel." MCPDS Defs.' Ex. 9, Clifford Commission Report, at 11.

In 1999, in response to this Report, the Maine Legislature did just that. It specifically removed from the Judicial Branch the authority to make determinations as to which attorneys were qualified or eligible to represent indigent defendants. Maine jurists still retained the authority and obligation to determine indigency, M.R.U. Crim. P. 44A, and to appoint counsel, M.R.U. Crim. P. 44, but only from rosters populated by attorneys MCPDS deemed qualified. 4 M.R.S. § 1804(2)–(3) (It is explicitly the "duty" of MCPDS to "determin[e] . . . whether an attorney meets the minimum eligibility requirements to receive assignments or to receive assignments in specialized case types," to "ensure an adequate pool of qualified attorneys," and to "ensure the delivery of high-quality, effective and efficient indigent legal services."). When read in tandem with Rule 44 of the Maine Rules of Criminal Procedure, this is abundantly clear. "Assigned counsel *must be designated by [MCPDS] as eligible to receive assignments for the type of case to which counsel is assigned.*" M.R. Crim. P. 44(a)(1) (emphasis added). And

notably, under certain circumstances, the Commission has authority, pursuant to procedures they established, to "accept the initial assignment made by the court or substitute other counsel for counsel assigned by the court." *Id.*

The Law Court recently had occasion to review an administrative appeal brought by an attorney who claimed he was aggrieved by action taken by MCPDS. In *Gordon v. Maine Commission on Public Defense Services*, the Law Court explained the process in Maine for attorneys who challenge MCPDS decisions as to their ability to remain on rosters. 2024 ME 59, ¶ 3–7, 320 A.3d 449. Attorney Gordon requested an intra-agency appeal before a hearing officer, who denied his appeal. *Id.* ¶ 8. MCPDS then ratified the decision of the hearing officer. *Id.* Attorney Gordon's only recourse was to seek review in the Superior Court, which was of course required to show great deference to MCPDS's decision about his eligibility. *Id.* ¶ 11. That deference resulted in Attorney Gordon having to appeal to the Law Court, which also described its authority to overturn MCPDS's decision as "deferential and limited." *Id.* The Law Court stated: "[W]e do not substitute our judgment for that of the agency on questions of fact." *Id.* The question of fact the Law Court was referring to was Attorney Gordon's eligibility to stay on the rosters maintained by MCPDS. This decision refutes the MCPDS Defendants' new position that all they do is "facilitate" the court assignment process.

The Court has nevertheless reviewed the cases cited by the MCPDS Defendants and finds them inapplicable. There is simply no comparison between the defendants sued in those cases to the MCPDS Defendants. The defendants in the cases cited were actually working directly with and under the supervision of jurists who determined whether an attorney was eligible to be

assigned to represent an indigent defendant. The MCPDS Defendants' reliance upon the Penobscot Superior Court's *Carey* case is also completely misplaced.[6]

Irreparable harm

Plaintiffs called a number of witnesses to testify about the harm they claim is irreparable for persons who are charged with crimes punishable by jail or incarceration, but who must wait an indeterminate amount of time before counsel is finally appointed. MCPDS Defendants claim that the factual record at the most created "speculative harms" because Plaintiffs failed to call any witness or produce evidence that any Plaintiff's "right to a fair trial has been irredeemably lost." Instead, MCPDS Defendants suggest that hundreds of individual Plaintiffs, who are

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[6] The MCPDS Defendants cite to three federal cases in support of their immunity argument. None of them are analogous to Maine's system of administering public defense services.

The first is *Roth v. King*, concerning the "Family Court Panels Committee," which was established to work *in consultation with* the presiding and deputy presiding judges of the District of Columbia Family Court to recommend panels of designated and approved attorneys to represent indigent parties in juvenile delinquency matters. 449 F.3d 1272, 1277 (D.C. Cir. 2006). The defendants in the suit, a group of judges and public defense employees, were judicially immune from injunctive relief—the judges because they were acting in a "judicial capacity" when selecting attorneys for inclusion on the panels and the public defense employees because, by statute, they were tasked with coordinating with and assisting judges during the panel process. *Id.* at 1286–87.

Second is *Durrance v. McFarling*, in which a practicing attorney sued two judges for removing him from a "felony defendant appointment list." No. 4:08-cv-289, 2009 WL 1577995 (E.D. Tex. June 4, 2009). Under Texas law, a panel of judges in each county created and maintained a list of attorneys eligible for felony appointments. *Id.* at *1. The defendant-judges had judicial immunity from suit because the steps they took to assist in removing the plaintiff-attorney from the felony appointments list related to the "general function[s] normally performed" by a judge in that jurisdiction. *Id.* at *4.

Third, in *Ashford v. Bowie*, a practicing attorney's application to be placed on a list of attorneys eligible to receive court appointments in murder cases was denied by a panel of judges and attorneys. No. 8:15CV8, 2016 WL 4186952 (D. Neb. Aug. 8, 2016) (*vacated and remanded on unrelated grounds by Ashford v. Douglas Cnty.*, 880 F.3d 990 (8th Cir. 2018)). The attorney sued the panel members, alleging their decision was racially motivated. *Id.* at *1. The Nebraska legislature expressly tasks judges with the appointment responsibility in cases with indigent defendants. NEB. REV. STAT. §§ 29-3902 to -3906. The judges in this particular county had created a panel of four judges, two private practice attorneys experienced in criminal defense, and the County Public Defender to consider applications to the appointment list. *Ashford*, 2016 WL 4186952, at *2. The defendant-judges had judicial immunity from suit, and the defendant-public defender had quasi-judicial immunity from suit, because they were engaged in a *judicial act*, rather than an administrative or executive act, under Nebraska law. *Id.* at *3.

The MCPDS Defendants' reliance on a Maine Superior Court case and its progeny at the Law Court is similarly misplaced. In the *Carey* case, three of the named defendants were entitled to quasi-judicial immunity from suit because they were all Judicial Branch employees (court clerks) engaged in the "seemingly" judicial act of appointing counsel. *Carey v. Me. Bd. of Overseers of the Bar*, No. CV-17-17, 2017 WL 6513581, at *17 (Me. Super. Ct. Oct. 25, 2017). On appeal, the Law Court concluded defendant MCILS (today, MCPDS) and Judicial Branch employees were immune from suit under the Maine Tort Claims Act. *Carey v. Bd. of Overseers of Bar*, 2018 ME 119, ¶ 25, 192 A.3d 589. The defendants in the *Carey* case were being sued *for damages*. *Id.* ¶¶ 21, 30 n.5.

represented for one day only by "Lawyers of the Day," should try and convince trial judges at seven-day review hearings that their individual cases should be dismissed for lack of a fair trial—even though those Plaintiffs have not come remotely close to having a trial at all because the MCPDS Defendants have failed to provide them with representation. Essentially, they argue that the Court should say the current situation is "good enough"—that the hundreds of Plaintiffs should wait patiently in jails or in the community while on bail until a lawyer is finally provided who might then file motions to dismiss their cases at some undetermined point in time. In some respects, they are reiterating arguments already rejected as to whether this case should have been brought as a class action, as well as their arguments regarding whether any Plaintiff has actually gone without counsel at a "critical stage." The Court stands by its previous rulings on both those issues.

MCPDS Defendants also argue that Plaintiffs overstate federal case law when they assert that deprivation of any constitutional right constitutes irreparable harm. The Court agrees with the Defendants that, for purposes of obtaining injunctive relief, Plaintiffs must establish actual harm.[7] However, after reviewing the factual record in the form of testimony and exhibits, the Court concludes that Plaintiffs have established actual harm, and that it is irreparable.

Plaintiffs called a number of highly experienced defense attorneys, who testified at length about what is lost if counsel is not promptly assigned to provide continuous representation throughout the criminal process. Attorney Amber Tucker, Attorney Walt McKee, Professor Eve Primus, and Professor Rachel Casey all testified credibly about the harms experienced by

[7] The Massachusetts Supreme Judicial Court has found that actual denial of the right to counsel entitles a criminal defendant to relief even without a specific showing of harm due to the absence of counsel. Because unrepresented defendants "could not be expected by themselves to assess and to demonstrate the seriousness of any harm to them," "it is enough that they have shown a violation of that right that *may likely* result in irremediable harm if not corrected." *Lavallee v. Justs. in the Hampden Superior Ct.*, 812 N.E.2d 895, 905 (Mass. 2004) (emphasis added); *Carrasquillo v. Hampden Cnty. Dist. Cts.*, 142 N.E.3d 28, 44 (Mass. 2020) (emphasis added).

unrepresented defendants when they are not able to conduct initial investigations;[8] when they are not able to participate in timely bail hearings;[9] when they are not able to meaningfully engage in plea bargaining;[10] about the harm to the attorney-client relationship;[11] along with a myriad of significant personal costs,[12] including lost housing, employment, and familial relationships.

A number of the MCPDS Defendants' own experts corroborated important aspects of Plaintiffs' witness testimony, including Commissioner David Soucy, Commission Chair Joshua Tardy, District Defender Frayla Tarpinian, Deputy Director Eleanor Maciag, and Executive Director Jim Billings.

Commissioner Soucy testified that "[e]vidence is lost when there are delays[,] [m]emories fade, tapes are destroyed, opportunities are lost because of the timelines imposed by the court." Soucy Testimony, Jan. 22, 2025, at 214. He also testified about the importance of appointing counsel promptly so that discovery issues can be addressed. *Id.* at 212–13. He corroborated Professor Casey's testimony when he stated that the prompt appointment of counsel is a reasonable expectation of the client in establishing the attorney-client relationship, as a client "needs some reassurance that their case is being addressed." *Id.* at 214–15.

Commission Chair Tardy confirmed it is important for people to have counsel at bail hearings because of the substantive rights at stake in those hearings. Tardy Testimony, Jan. 22, 2025, at 204.

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[8] Tucker Testimony, Jan. 23, 2025, at 13–16, 19; McKee Testimony, Jan. 22. 2025, at 29, 30–32, 35–36; Primus Testimony, Jan. 22, 2025, at 106–08.
[9] McKee Testimony, Jan. 22, 2025, at 44, 46–47, 62, 64; Primus Testimony, Jan. 22, 2025, at 110–11.
[10] Tucker Testimony, Jan. 23, 2025, at 16 –17, 18; McKee Testimony, Jan. 22, 2025, at 37, 39–40; Primus Testimony, Jan. 22, 2025, at 108–112, 114–15.
[11] Primus Testimony, Jan. 22, 2025, at 104–05, 106.
[12] Casey Testimony, Jan. 22, 2025, at 77, 79, 80–87; Tucker Testimony, Jan. 23, 2025, at 18–19, 20; McKee Testimony, Jan. 22, 2025, at 49.

District Defender Tarpinian (Region IV) reiterated the barriers facing an unrepresented defendant who tries to conduct their own investigation or receive or interpret the discovery in their case. Tarpinian Testimony, Jan. 24, 2025, at 88–90. And she testified about the importance of having an attorney to address any discovery issues early in a case, *id.* at 49–52, particularly when considering the difficulties often encountered with the automatic discovery system. *Id.* at 45–47. She also testified about the challenges facing an unrepresented defendant in drug cases specifically—defendants may be unfamiliar with drug lab testing delays and the implications of those delays on their case. *Id.* at 46–47; 89–90.

Deputy Director Maciag testified that delays in appointment result in delays in necessary witness interviews being conducted. Maciag Testimony, Jan. 23, 2025, at 38.

And Executive Director Billings did not disagree with Plaintiffs' position that unrepresented criminal defendants are unable to meaningfully participate in plea negotiations without the assistance of counsel. Billings Testimony, Jan. 23, 2025, at 98. He further testified that there are unrepresented defendants who feel "trapped in a coercive system" and plead guilty just to get out of jail. *Id.* at 98.

While it is true that Attorneys McKee and Tucker and District Defender Tarpinian testified that the kind and extent of harm could vary case to case, these concessions did not undercut the Plaintiffs' central premise that gaps in representation throughout the criminal process cause harms that cannot be repaired or remedied.

The Court finds that Plaintiffs have produced credible and compelling evidence of irreparable harm caused by the MCPDS Defendants' failure to provide continuous representation at all critical stages of the criminal process. While the MCPDS Defendants are correct that the presumption of prejudice, *see Penson v. Ohio*, 488 U.S. 75, 88–89 (1988); *Van v. Jones*, 475 F.3d

292, 311–12 (6th Cir. 2007), does not relieve Plaintiffs of their obligation to establish real harm to be eligible for injunctive relief, the Court concludes that Plaintiffs have amply established real, irreparable harm through the testimony of their experts, and as corroborated by a number of Defense witnesses.

Balancing of harms and the public interest

Plaintiffs must also establish that the harm to them outweighs potential harm to the MCPDS Defendants, and that the issuance of an injunction is in the public interest. The parties correctly recognize that when the respondent is a state government or the federal government, the balancing of equities and the public interest merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

Plaintiffs claim that no harm will befall the State if the Court issues injunctive relief for the Plaintiffs, as the MCPDS Defendants would simply be required to follow their statutory and constitutional obligations. Plaintiffs also claim that if counsel is provided to in-custody defendants within seven days of their initial appearance, the criminal justice system in Maine will "guarantee efficiency, make criminal proceedings less burdensome on all involved, and will prevent cases from being needlessly delayed." Pls.' Post-Trial Br. 15. Defendants assert that injunctive relief will harm their interests and the interest of the public by impeding their efforts to increase capacity to provide defense counsel for indigent defendants. And the Defendants question the "last-minute focus on Maine's emerging public defenders' offices as somehow the problem" as an "unfortunate and unproductive detour."

The Court understands that its ability to issue injunctive relief is limited to the leeway granted to the Judicial Branch in *Burr v. Department of Corrections*, 2020 ME 130, ¶¶ 18–28, 240 A.3d 371. The Defendants properly focus on the controlling language. The Law Court in *Burr* made clear that when a plaintiff has prevailed on the merits of a Section 1983 claim against

a state agency, meaning that a court has ruled a constitutional violation has occurred, the court may grant injunctive relief requiring agency actors to comply with the Constitution without violating separation of powers principles. *Id.* ¶¶ 23, 27. Put a different way, agency actors are not "harmed" if they make decisions about compliance which might result in them doing things differently than they did before a constitutional violation was found, so long as it is the agency who decides which changes to make which would enable it to fulfill its constitutional obligations. For MCPDS that means providing counsel consistent with the requirements of the Sixth Amendment. *See* 4 M.R.S. § 1801 (establishing MCPDS, "whose purpose is to provide high-quality, effective and efficient representation . . . consistent with federal and state constitutional and statutory obligations.") *and id.* § 1804(3)(D) (including among MCPDS's duties to "ensure an adequate pool of qualified attorneys.").

The Court has concluded that the balance of harms weighs significantly in favor of Plaintiffs, and they have therefore established the third criteria for obtaining injunctive relief.

Finally, the public interests in providing the relief requested are significant. They would include the public interest in a fair, functional, and stable criminal justice system; the public interest in the protection of the liberty interests for all the citizens of Maine who are charged with crimes punishable by incarceration; and the public interest in ensuring that the presumption of innocence is meaningfully protected against the power of the State through the effective assistance of counsel.

INJUNCTION ON COUNT I

Before issuing the injunction, the Court will set out its analysis on how to provide a meaningful remedy for Plaintiffs while adhering to the standard set out in *Burr*. 2020 ME 130,

¶ 27, 240 A.3d 371 ("To . . . enjoin specific conduct that the court found unconstitutional [is] a power that rests with the judiciary.").

The Court will order the MCPDS Defendants to provide continuous representation as required by the Sixth Amendment. The Court understands that the Defendants are constrained by the resources that the Executive and Legislative Branches have provided. There is nothing in the trial record, however, that gives the Court any confidence that those branches will soon be providing the resources that the Defendants state they need. The Court also understands that advocates for improvements in Maine's indigent defense system have always had their work cut out for them. After decades of neglect by State actors, they have had to fight every step of the way to create a system that is independent from the judiciary, free from political interference, and adequately resourced.

What follows is the Ninth Circuit's description of where things stand in Oregon for indigent defendants who are presumed to be innocent but remain incarcerated for indeterminate amounts of time without the benefit of counsel:

> The state arrests a citizen and incarcerates him pending trial. Days, weeks, and months pass without any legal representation. He seeks relief from the authorities—surely a lawyer should help him? In response, he gets a shoulder shrug, a promise that they are "working on it," and nothing more. He remains in jail, without legal counsel or any relief in sight. You might think this passage comes from a 1970s State Department Report on some autocratic regime in the Soviet Bloc. Unfortunately, we do not need to go back in time or across an ocean to witness this Kafkaesque scene. This is the State of Oregon in 2024. . . . Yet, due to an "ongoing public defense crisis" of its own creation, Oregon does not provide indigent criminal defendants their fundamental right to counsel despite *Gideon*'s clear command.

Betschart v. Oregon, 103 F.4th 607, 612 (9th Cir. 2024).

Lest anyone believe that the Ninth Circuit was being overdramatic about what Oregon is facing, or how their problems compare to present circumstances in Maine, some perspective is in

order. Oregon has approximately three times the population of Maine. In *Betschart,* the federal District Court and later the Ninth Circuit were contending at separate points in time with approximately 100 unrepresented indigent defendants who remained in jail pending trial. 103 F.4th at 613. In Maine, while the numbers of unrepresented indigent defendants fluctuate week to week, the number of incarcerated unrepresented defendants fluctuates between 50 to 100. *See* Pls.' Washer Dep. Ex. 5. Given this, it is fair to say that the situation in Maine is two or three times worse than the situation in Oregon for incarcerated unrepresented defendants. There can be no serious dispute that unrepresented defendants who are incarcerated confront the most significant harms and impediments to obtaining their Sixth Amendment rights. *See supra* pp. 5–8 (loss of physical liberty, housing, and employment, to name a few). Therefore, the Court believes the focus of the injunction must be to require the MCPDS Defendants to provide representation for the incarcerated Plaintiffs.

The injunction requiring MCPDS Defendants to provide representation for plaintiffs and to prioritize incarcerated plaintiffs does not violate the doctrine of separation of powers

The parties have spent a lot of their efforts over the last two years arguing about who or what is responsible for the current crisis. Clearly, the MCPDS Defendants have, along with the courts, struggled to respond to their day-to-day obligations while at the same time trying to figure out how to best address the growing problem. But if all the parties or system participants do—including the courts—is assign blame to others, nothing will change. And the result will be the normalization of egregious, ongoing violation of fundamental rights. It will then become acceptable in the State of Maine to arrest indigent defendants, hold them in custody for indeterminate periods of time, and deny them access to their State and federal constitutional rights simply because they are poor.

The Court is keenly aware that the MCPDS Defendants did not think it appropriate for the Court to elicit at trial information about the efforts made by its central office to address the problem, along with the capacity of its District Defenders to provide representation. The Defendants misapprehend why the inquiry was important. Again, it was not part of a plan by the Court to take over the agency or to micromanage it. The Court is also aware that the MCPDS Defendants have argued strenuously since the earliest days of this litigation that they have absolutely no ability to comply with any Court order as they are understaffed and under-resourced. And they insist that requiring them to do anything at all would violate the separation of powers doctrine.

The Court is not ordering the MCPDS to violate any of its own regulations or standards. However, it was important for the Court to know how MCPDS has approached the crisis it confronts before the Court decides if it should impose the extraordinary remedies that Plaintiffs—and indeed, sometimes the Defendants—are asking the Court to impose.[13]

The remedy that must be tried first is representation for incarcerated Plaintiffs. That is the primary goal of the injunction the Court has concluded it must issue on Count I. Prioritizing incarcerated Plaintiffs is integral to the relief required in this case, in recognition of the undeniable fact that the incarcerated Plaintiffs experience the most direct and significant harms in terms of loss of liberty, harms caused by the Defendants' failure to provide counsel for them.[14]

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[13] *See, e.g.*, Tarpinian Testimony, Jan. 24, 2025, at 86–87 (Question by Attorney Kevin Martin for Plaintiffs: "If sheriffs were ordered to release persons who had been held for seven days without counsel, would that interfere with the operations of your public defender's office?" Answer by District Defender Tarpinian: "It would not." Question by Attorney Kevin Martin for Plaintiffs: "And if charges were dismissed against persons who – who had gone without counsel for 45 days, would that interfere with the operations of your public defender's office?" Answer by District Defender Tarpinian: "No. It would help.").

[14] The Court would emphasize that the MCPDS Defendants are not being ordered to comply with any *Lavallee*-type protocol as a remedy in Count I. *See* infra pp. 35–39. The statutory framework that resulted in the "*Lavallee* protocol," discussed further under Count III and used by Massachusetts to solve their indigent defense crisis, is obviously different from a Section 1983 claim. The *Lavallee* and *Carrasquillo* cases are important, however, in part because Massachusetts was able to implement guardrails to ensure that the courts would not encroach on the

There is some existing capacity in the system which would enable MCPDS to presently comply with their obligation to provide continuous representation under the Sixth Amendment for at least some of the incarcerated, unrepresented indigent defendants

The Court's factual findings from trial establish that there is some capacity within the system which would give MCPDS Defendants the ability to comply with their obligations to provide continuous representation for Plaintiffs, particularly for unrepresented indigent defendants who are incarcerated for an indeterminate amount of time. Steps they could consider include retaining counsel, as they did in child protective cases, to make calls to find counsel willing to take cases "off the spreadsheet." They could also escalate their efforts, as Executive Director Billings indicated in his testimony, to offer waivers to private counsel.[15] According to him, there are clearly excess unused "points" in the system.

The Defendants could also immediately require District Defenders to take cases off the in-custody, unrepresented spreadsheet, even if that means that they take the cases "nobody wants." Clearly some of the District Defenders are handling just a few of their own cases, if any. As the Court noted in its Findings, if the District Defenders each took 10 cases off the in-custody unrepresented spreadsheet, the spreadsheet would essentially be cut in half.

All of the above could occur almost immediately. But as *Burr* held, the Court has no authority to micromanage or set policies for the agency. And so the Court feels compelled to emphasize *it is not ordering MCPDS to take any of those steps.* It is completely up to them to

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independence of the agency charged in the Commonwealth to run its indigent defense system, while at the same time ensuring that a meaningful remedy was provided for unrepresented indigent defendants.

In both *Lavallee* and *Carrasquillo*, the Massachusetts Supreme Judicial Court began by recognizing the limits of its authority under its own separation of powers doctrine, and it approved the imposition of extraordinary remedies only as a last resort. The process required under *Lavallee* was for the trial court to establish as a factual matter that the agency had been given the opportunity to provide counsel consistent with its obligations and standards, and then to establish that capacity within the system to provide representation had been exhausted before any other remedies would be imposed. *Lavallee*, 812 N.E.2d at 911–12; *Carrasquillo*, 142 N.E.3d at 50 –52.

[15] Other efforts would obviously require changes in rulemaking but could be considered, including temporarily suspending or modifying caseload standards or requiring LODs to remain on a case until trial counsel is available, thus providing continuous representation.

decide how they intend to come into compliance with the Sixth Amendment, but the options described do exist. *Burr*, 2020 ME 130, ¶ 27, 240 A.3d 371.

The Court agrees with the Plaintiffs that Defendants should be given a reasonable amount of time to decide how to comply, and they will be given a deadline to provide their plan to opposing counsel and to the Court.

The time frame for providing representation for incarcerated Plaintiffs will also be the timeframe under which the MCPDS Defendants are required to prepare a plan for how to come into compliance with their other ongoing obligations to provide counsel for unrepresented indigent defendants in Maine.

The Court cannot and does not expect miracles. The Defendants can only do what is possible. But it is clear that the Defendants have not been prioritizing finding or providing counsel for the incarcerated Plaintiffs "on the spreadsheet" who are waiting for MCPDS to do just that. Each and every one of these individuals has been found indigent by a court. Each one of them appears to be a Subclass member. The Defendants must prioritize finding counsel for them, and the Court believes the Defendants can do so using existing resources. How they choose to do that is up to the MCPDS Defendants, and the Court is confident that MCPDS can find a way to provide counsel for some, if not all of the incarcerated Plaintiffs.

After MCPDS has an opportunity to provide counsel for the unrepresented Plaintiffs, it will likely be necessary for the Court to provide Plaintiffs with other forms of relief not available to them in Count I. The Court will address those proposed remedies further in Count III; but again, to be clear, they are not a part of the remedies being provided in Count I.

On Count I, the Court issues the following Order:

(1) The Court declares that the MCPDS Defendants are required to provide continuous representation for all Subclass Members as previously defined by the Court, and further

declares that they have failed to do so in violation of the Sixth Amendment to the United States Constitution.

(2) The MCPDS Defendants are ordered to create and file with the Court a written plan on how they intend to remedy the ongoing violations of the Sixth Amendment for all Subclass members, whether they are in-custody or in the community subject to bail conditions, and to do so by April 3, 2025.

(3) The MCPDS Defendants are further ordered to prioritize and to make good faith efforts to actually provide counsel for the unrepresented, incarcerated defendants who, as of this same date, are listed on the so-called "without counsel" spreadsheet, and to do so by April 3, 2025. They must also by that date advise the Court as to how successful they have been in these efforts.

COUNT III

In its January 3, 2025 Order, the Court granted Plaintiffs' Motion for Summary Judgment on the issue of liability only for Count III based on their successful arguments regarding violations of the Sixth Amendment on Count I. The Court reserved ruling "on any arguments the parties might make as to primacy or co-extensiveness between the Sixth Amendment and Article I, Section 6 of the Maine Constitution." Jan. 3rd Order, at 40.

At the January 6, 2025 Pretrial Conference and again before trial commenced on January 22, 2025, counsel for Plaintiffs and for Party-in-Interest State of Maine stipulated that Article I, Section 6 of the Maine Constitution conveyed at least the same, if not more, constitutional protections to Maine citizens as they enjoy under the Sixth Amendment.

Consequently, the Court will now find that Plaintiffs are entitled to habeas relief under both the Sixth Amendment and Article I, Section 6 of the Maine Constitution for failing to provide continuous representation to indigent defendants at all stages of the criminal process.

Habeas remedies and the parties' Count III arguments

Article I, Section 10 of the Maine Constitution states that "the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." Me. Const. art. I, § 10. The Law Court has found that the writ of habeas corpus is broadly available to secure the right of personal liberty to anyone who has been illegally deprived of his freedom. *Stewart v. Smith,* 101 Me. 397, 64 A. 663, 664 (1906). It has been held to apply not only to persons accused of a crime, but also to persons who have been held against their will as mentally ill if their detention violates their constitutional rights. *A.S. v. LincolnHealth,* 2021 ME 6, ¶ 11, 246 A.3d 157.

In Maine, "[e]very person unlawfully deprived of his personal liberty by the act of another . . . shall of right have a writ of habeas corpus according to the provisions herein contained." 14 M.R.S. § 5501. The Plaintiffs argue that in Maine, habeas remedies are available to persons subject to physical custody in jail or prison, but also to persons whose liberty is restrained by the imposition of bail conditions and personal recognizance, if the deprivations they endure are unlawful.

The United States Supreme Court has held that the "Great Writ" is not just available to individuals held in "actual, physical custody in prison or jail." *Jones v. Cunningham*, 371 U.S. 236, 238 (1963). Instead, the Court looked to the use of habeas in common law England, concluding that "there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient . . . to support the issuance of habeas corpus." *Id.* at 240. These other restraints, the Court concluded, included parole, which "significantly restrain[s] [an individual's] liberty to do those things which in this country free men are entitled to do" and thus was "enough to invoke the help of the Great Writ." *Id.* at 243. The habeas

remedy "is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Id.* at 242–43.

The language in Maine's habeas statute does not dampen or limit the scope of the "Great Writ" under common law. Maine's habeas law embraces the spirit of the remedy by explicitly affording relief beyond only release from physical detainment—repeatedly using the language "imprisonment or restraint" when referring to the unlawful deprivation of an individual's personal liberty by the action of another. *See, e.g.*, 14 M.R.S. §§ 5510, 5511, 5515, 5518, 5521–23. Basic statutory interpretation tells the Court that "restraint" refers to something distinct from "imprisonment." When considered in concert with the history of the "Great Writ," the Court concludes that the "unlawfully depriv[ation] of . . . personal liberty," *id.* § 5501, can include more than physical custody in a Maine jail or prison.

Plaintiffs clarify that what they are seeking is a conditional writ, which they describe as the "most common and least intrusive form of relief: a conditional order of release from the unlawful restraints on their liberty." Pls.' Post-Trial Br. 26 (citing *Wilkinson v. Dotson,* 544 U.S. 74, 89 (2005)). With a conditional writ, "the state is given a window of time to cure the infirmity within which it might cure the error." *Satterlee v. Wolfenbarger,* 453 F.3d 362, 369 (6th Cir. 2006). If the state fails to comply with the stated conditions, the conditional writ of habeas corpus "requires" release. *Id.*

While not exactly conceding liability in Count III, Counsel for Party-in-Interest State of Maine (hereinafter "State")[16] agreed that the issues regarding what remedy, if any, should be

[16] Maine's 16 county sheriffs were named as necessary Respondents as they are the custodians of approximate 100 Plaintiffs who are incarcerated in Maine county jails. They were remotely present for all trial proceedings and were given the opportunity to call witnesses, examine witnesses, and make argument. None of them called or examined witnesses, but the Court has reviewed their written submissions and will grant their requests to provide names of

provided in Count III was at this stage more of a legal than factual matter. And it does not challenge the concept that release is required if an individual's detention is illegal. At the same time, the State makes the argument that the Court must conduct an individualized, fact-specific inquiry into what remedy is appropriate for an individual, now that the Court has found that their rights to counsel under the Sixth Amendment and Article I, Section 6 have been violated by the MCPDS Defendants.

The State relies in large part on *United States v. Morrison*, 449 U.S. 361 (1981), for its oft-cited language that as a general rule in cases involving violations of the Sixth Amendment, "remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *Id.* at 364.

In *Morrison,* which was not a habeas case, the Supreme Court reversed a Third Circuit decision dismissing with prejudice an indictment where DEA agents had intentionally contacted the defendant, who they knew was under indictment and had retained counsel. *Id.* at 362–63. The agents made disparaging statements to her about her attorney and essentially told her that if she did not cooperate with them, she would face a harsh sentence. *Id.* at 362. She declined to cooperate with them, but they tried again. *Id.* She informed her attorney, who was able to convince the Circuit Court that the federal agents' conduct merited dismissal of the indictment with prejudice. *Id.* at 363. The Supreme Court reversed, saying there was no evidence their conduct had prejudiced the quality of her representation or had adversely affected her legal position. *Id.* at 366–67.

Class Members who are in jail, which jail they are currently held, and what is expected of any sheriff as far as transporting that individual to any proceedings, and obviously providing as much advance notice as possible to the sheriffs and their attorneys before any in-court proceedings occur.

It is somewhat mystifying why the State believes *Morrison* controls how the Court should respond to the constitutional violations found under Count III given the facts of Ms. Morrison's case. Ms. Morrison actually had an attorney, an effective one to boot. The *Morrison* Court explicitly distinguishes its decision from the facts of *Gideon v. Wainwright*, because, of course, Mr. Gideon had no attorney. *Id.* at 364 ("In *Gideon v. Wainwright*, the defendant was totally denied the assistance of counsel.") (internal citations omitted).

To the extent the State suggests that *Morrison* requires Sixth Amendment remedies be provided in proportion to the harm caused, the Court agrees with that general principle. But to the extent the State suggests *Morrison* stands for the proposition that a dismissal can never be an appropriate remedy for a Sixth Amendment violation, the Court disagrees. There is simply no language in *Morrison* to support the State's position. The Circuit Court dismissed her indictment *with prejudice* even though she had an attorney, and, understandably, the Supreme Court found the Circuit Court had gone too far. In this case, Plaintiffs do not seek that kind of relief. The dismissals they seek are dismissals *without prejudice*, meaning that if their cases are dismissed, they could and should expect that they will be charged again by the State. By contrast, Ms. Morrison walked free until the Supreme Court held otherwise.

The Court is aware that some trial courts in Maine have been using a form that cites *Morrison* at the so-called seven-day review hearings that were established by the Trial Chiefs of the Superior and District Courts in November of 2023. Pls.' Ex. 1, Order on Delay in Appointment of Counsel at an Appearance Pursuant to the Standing Order on Initial Assignment of Counsel (dated Mar. 22, 2024). The so-called Standing Order required that any indigent person who was being held in jail for more than seven days without counsel be brought before a judge to "review" their status. It appears that many jurists routinely find violations of the Sixth

Amendment at these hearings, and those that use the form order check a box that cites to *Morrison.* The form states in pre-printed language that the defendant is not subject to release as the defendant's right to counsel "does not outweigh the competing interests including society's interest in the administration of criminal justice." *Id.* It is not clear if the meaning of that phrase is ever explained to the defendant who is simply returned to custody and their cases remain on the court's docket.

To be clear, this is not a Judicial Branch form, despite its appearance to the contrary. More concerning is that it blithely cites to language in *Morrison* about the "State's competing interest including society's interest in the administration of criminal justice" as a reason to deny any remedy at all to a criminal defendant who has been held in jail without counsel, which was hardly Ms. Morrison's situation. The Court concludes that *Morrison* does not control its decision in Count III.

Dismissal without prejudice as a pre-conviction remedy

Counsel for the State argues that dismissal without prejudice is not an appropriate habeas remedy in the pre-conviction context. The Court has concluded otherwise.

Plaintiffs are being denied the right to counsel at critical stages—during bail hearings, the investigatory phase, and plea bargaining. The Plaintiffs who are not in-custody but are instead in the community on conditions of release are nevertheless being deprived of their personal liberty by these conditions. The restraints on liberty are numerous, and any practitioner of criminal law could list them from memory: conditions of release restrict a defendant's freedom of movement; freedom of association; where they may live and with whom; where they may be employed; what they may own or possess; whether they may access the Internet, etc. *See* 15 M.R.S. § 1026(3)(A)(1)–(19); see attached JB Conditions of Release form and Bail Bond form. Violation

of any condition imposed is itself a crime. *id.* § 1092. The State can also move to revoke a defendant's bail and obtain a warrant for the defendant's arrest. *Id.* § 1095–96. Upon the State's motion, the court can then order the defendant be held without bail pending trial. *Id.* § 1097.

It is the ongoing violations of the Plaintiffs' right to counsel under the Sixth Amendment and Article I, Section 6 that make these restraints unlawful. They may live in the community, but significant liberties have been taken away from them. And while being deprived of their liberty by the State, it is the State that has failed to provide them with an attorney.

The State's argument fails to appreciate that Plaintiffs cannot be free of these restrictions unless and until the charges against them have been resolved; only then does a court declare that they are "released" from bail and bail conditions. Their argument fails to grasp that the Plaintiffs do not have access to the court to resolve their case because the Maine courts cannot constitutionally require them to stand trial—or even attend a dispositional conference—until an attorney is provided by the State. The Court has concluded that the circumstances of these Plaintiffs constitute "unlawful depriv[ation] of . . . personal liberty" entitling them to a writ of habeas corpus. *See* 14 M.R.S. § 5501.

In addition, habeas in Maine is not just a post-conviction remedy. Indeed, Maine law explicitly recognizes that an individual's liberty can be unlawfully restrained before conviction. *See, e.g.*, 14 M.R.S. § 5511 ("any party alleged to be imprisoned or restrained of his liberty *but not convicted and sentenced*" (emphasis added)). The fact that they have not been convicted does not foreclose redress. The Plaintiffs' right to counsel under the Maine and United States Constitutions is being denied, and while waiting for the State to provide counsel they must live with significant loss of liberties. And "every right, when withheld, must have a remedy, and every injury its proper redress." *Marbury v. Madison*, 1 Cranch, 5 U.S. 137, 147 (1803).

The role of public safety in habeas claims

The State also objects to releasing any Plaintiff who may present public safety concerns and has repeatedly taken to reminding this Court of what happened when a trial court judge lowered bail for one defendant following a review hearing. After being released, the defendant assaulted his former partner and killed another person.

No Judge or Justice in either the District or Superior Court needs to be reminded about the consequences of decisions that they make every single day in Maine courtrooms. Public safety is always top of mind for many decisions Maine jurists make in criminal cases. It is important, however, to remember that given the conditions under which most jurists work when making bail decisions, they are often expected in a matter of minutes to apply the bail code to an unpredictable number of individuals, and to do so in reliance upon information supplied by others in the criminal justice system who may also be working under difficult conditions. Jurists in Maine are not permitted to conduct their own investigations of the facts of a case or the personal characteristics of a criminal defendant. If the information conveyed is inadequate, or if a judge makes a decision based on information from others, or, as often happens, an agreement is reached by prosecutors and defense counsel that bail should be lowered or a defendant released, judges have come to understand that they will likely be the person blamed or berated for whatever dangerous act a criminal defendant might decide to commit after their release.

It is sometimes the case, however, that the Maine and United States Constitutions actually *require* that someone be released from custody or restraint. For example, when a jury finds that the State has not proven a defendant's guilt beyond a reasonable doubt, they are instructed that they *must* follow the Constitution and return a verdict of not guilty. Unless the defendant is held on other charges, that means they are released into the community, even if they are dangerous.

The jury is not permitted to consider public safety; they must follow the law and the Constitution. When the Law Court reverses a criminal conviction due to prosecutorial misconduct, or because a defendant's Fourth, Fifth, or Sixth Amendment rights have been violated by State actors, the person released may have actually committed a violent act, or they may go on to commit a violent act upon their release. Recently, in *State v. Akers*, 2021 ME 43, 259 A.3d 127, the Law Court reviewed a jury's conviction of a defendant for intentional or knowing murder after the defendant killed his neighbor with a machete. The Law Court vacated the defendant's conviction for violations of his Fourth, Fifth, and Fourteenth Amendment rights stemming from two illegal, warrantless searches and involuntary inculpatory statements by the defendant. Public records confirm that upon remand to the Superior Court, the State was compelled to dismiss the charges against the defendant because it lacked the evidence required to sustain a conviction. In the Law Court's *Akers* decision, it never weighed the violence that the defendant committed and was convicted of against the potential risk to public safety in determining that the defendant's rights had been violated. Instead, the Law Court was compelled by the law and the Constitution to find that his conviction "must be vacated." *Id.* ¶ 50.

Just like a Maine jury, jurists on the Law Court, the Superior Court, and the District Court must all follow the law and the Constitution. Every Maine jury and every Maine jurist takes an oath to do so. So when these difficult decisions are made, it would be extreme unlikely that it occurred because a jury or a jurist did something they simply felt like doing. It would be because a jury or a jurist took an oath to uphold constitutional standards and to follow the law. And in a habeas claim, release from custody or from restraint is *required* if the restraint is illegal.

The Plaintiffs in this case have not been convicted of the crimes for which they are charged. Each of them is still presumed to be innocent under the Maine and United States

Constitutions. And yet many of them remain in custody, without counsel. Their only access to due process is to be brought before a judge every seven days, represented by counsel who are permitted by the MCPDS rules to represent them for all of one day. They are brought before judges, most of whom are essentially doing bail hearings—not habeas hearings. The Maine Bail Code does not permit a judge to dismiss a case, and it was never designed or intended to provide remedies for the constitutional violations at issue here. As Justice Douglas stated in *Peterson v. Johnson*, the Review Hearings were never intended to be the solution to this crisis. SJC-23-02, at 29–30 (Jan. 12, 2024) (Douglas, J.) ("[T]he regular status hearings held pursuant to the Standing Order are intended as a limited, short-term response to an on-going crisis, and do not justify indefinite delay by the State in assigning counsel to in-custody defendants entitled to a court-appointed attorney.").

The Court fully intends to factor in the legitimate concerns about public safety expressed by the State in their argument regarding habeas relief, just as the Ninth Circuit did in *Betschart.* And while *Morrison* stands for the proposition that judicial relief provided for violations of the Sixth Amendment must be proportional to how grievous the violation was and what harm has been caused, it is not a habeas case, and it never mentions the phrase "public safety" anywhere. More importantly, *Morrison* should not be read as a reason for Maine courts to do nothing when significant systemic failures have resulted in the complete lack of counsel for a significant number of indigent defendants.

Reducing backlogs or MCPDS caseloads by dismissing cases

It has also been suggested at various times that dismissing cases through this lawsuit could work as a curative case management tool to reduce trial court backlogs or somehow help MCPDS address its ongoing challenges. The suggestion has come from both sides and at various

stages of this litigation. The Court categorically rejects these as improper considerations, and they will not play any part in this Order.

It may become necessary for the Court to dismiss cases, but if that happens the Court understands it is unlikely that other systemic problems will be solved. Prosecutors will likely continue to file more cases than the court system can handle, and no court can stop them from filing anything they choose to. MCPDS will in all likelihood continue to struggle with being under-resourced, which in the current budget before the Legislature means that they will be unable to roll out more public defender offices and that they could run out of funds in the next year or so to pay the private attorneys who are currently willing to take cases. Those are problems no court in Maine has any authority to remedy.

HABEAS RELIEF ON COUNT III

After considering the arguments of counsel and reviewing pertinent case law, the Court has concluded that Plaintiffs are entitled to habeas relief. The nature of the remedies available to a Plaintiff under a Section 1983 claim and a habeas claim are quite different. However, the Court will attempt to structure the relief provided for each Count to be as consistent as possible. Therefore, the timelines established in Count I are intended to give the MCPDS Defendants (who are not named Defendants in Count III) the time and opportunity to comply with the initial requirement of the Court's injunction that they provide counsel for the incarcerated Plaintiffs. The starting date for carrying out the habeas relief will be delayed briefly to see how many Plaintiffs remain in custody after the MCPDS Defendants decide how to comply with the Court's injunction and provide counsel for them. To be clear, however, the Court does not intend to wait indefinitely to provide relief under Count III while MCPDS decides what to do in Count I.

Three cases from other jurisdictions provide the framework for how habeas relief will be provided. These cases, *Betschart*, *Lavallee*, and *Carrasquillo*, are really the only cases this Court, or any court, has to go on. And that is because only a few states—Oregon, Massachusetts, and now Maine—have found themselves in this position facing similar crises.

The Court will rely upon the aforementioned cases: *Betschart,* which was a class action habeas case, 103 F.4th 607 (9th Cir. 2024); and two cases from Massachusetts which predate *Betschart* but were not habeas cases, *Lavallee*, 812 N.E.2d 895 (Mass. 2004), *and Carrasquillo*, 142 N.E.3d 28 (Mass. 2020). What they have in common is that all three provided meaningful remedies for Plaintiffs identically situated to the Plaintiffs in Maine. In the Court's view, they all offer sound approaches for providing relief that is proportionate to the gravity of the violation and harms caused, while at the same time ensuring consideration of other important public concerns, including public safety.

In *Betschart,* the Ninth Circuit on May 31, 2024 affirmed the granting of habeas relief issued by the United States District Court in Oregon. 103 F.4th at 613. The case was filed as a class action brought by federal public defenders on behalf of state indigent defendants who were eligible for appointment of counsel but who remained unrepresented for indeterminate periods of time in local jails. *Id.* at 611, 613.

The District Court granted a temporary restraining order, and applied essentially the same standards that this Court did for Count I. *Id.* at 614. The District Court declared that the State of Oregon was violating the Sixth Amendment, and it ordered that the sheriffs who had custody of the class members release them unless the State of Oregon provided representation within seven days of the defendant's initial appearance, or within seven days of the withdrawal of previously appointed counsel. *Id.* Each released class member was brought before a state court judge to set

reasonable bail conditions to address the State's concerns regarding public safety. *Id.* at 613; *Betschart v. Garrett*, 700 F.Supp.3d 965, 988 (D. Or. 2023). The District Court denied relief to persons who were charged with certain offenses if the Oregon Constitution prohibited pretrial release. *Betschart*, 103 F.4th at 614. And it made clear that relief would not be available for defendants who repeatedly "fired" their attorneys in order to be released. *Betschart v. Garrett*, No. 3:23-CV-01097-CL, 2023 WL 7621969, at *1 (D. Or. Nov. 14, 2023).

The Maine Superior Court is clearly not the Ninth Circuit. But closer to home and Maine's jurisprudential traditions, the Commonwealth of Massachusetts in 2004 and again in 2020 confronted the same problem that exists in Oregon, and now in Maine. The approach taken by the Massachusetts Supreme Judicial Court in both begins with an explicit recognition that courts in the Commonwealth are constrained by the doctrine of separation of powers but could nonetheless provide a meaningful remedy for unrepresented defendants.

First, in *Lavallee*, a group of indigent criminal defendants being held pretrial without attorneys sought relief in the form of a writ by the Massachusetts Supreme Judicial Court pursuant to Mass. G.L. ch. 211 § 3. *Lavallee v. Justs. in the Hampden Superior Ct.*, 812 N.E.2d 895, 899–900 (Mass. 2004). Petitioners alleged that Massachusetts's "chronic underfunding" of its assigned counsel system led to an insufficient number of attorneys willing to accept indigent defense cases. *Id.* at 900. The Massachusetts Supreme Judicial Court ruled that the petitioners were being denied the right to counsel under its state constitution. *Id.* at 901. To address the petitioners' complete denial of the right to counsel, the court fashioned a remedy recognizing that

> [t]he harm involved here, the absence of counsel, cannot be remedied in the normal course of trial and appeal because an essential component of the "normal course," the assistance of counsel, is precisely what is missing here. The course of the proceedings in these cases is per se not normal.

Id. at 907. The court established what is now known as the "*Lavallee* protocol"—every week, the clerk of the county courts would be required to prepare a list of the unrepresented criminal defendants to forward to the district attorney, the attorney general, the chief counsel for the public defenders, and the judges tasked with administrative and scheduling decisions. *Id.* at 911–12. Using this list, the administrative judge would schedule a status hearing as to each defendant who had either been held in custody for more than seven days or whose case has been pending for more than forty-five days. *Id.* at 912. At the hearing, the judge would determine whether the public defense committee has made a "good faith effort" to secure representation for each defendant. *Id.* If, despite a good faith effort, there was no counsel available to represent a defendant, the judge was required to, if the defendant had been held in custody for seven days or more, order the defendant be released from custody, subject to conditions; or, if the defendant's case had been pending for forty-five days or more, order the defendant's charges be dismissed without prejudice until counsel could be made available to the defendant. *Id.* at 912–13. This solution, the court reasoned, acknowledged that "[t]he duty to provide . . . counsel falls squarely on government, and the burden of a systemic lapse is not to be borne by defendants." *Id.* at 911.

In 2020, the indigent defense attorney shortage recurred. In *Carrasquillo v. Hampden County District Courts*, 142 N.E.3d 28 (Mass. 2020), a shortage of defense attorneys available on arraignment days led a judge to order a public defense office to provide counsel "who shall accept appointment in all cases as ordered by the Court." *Id.* at 41. The overseeing public defense committee filed an emergency petition for a writ, seeking to vacate the judge's order. *Id.* at 42. The Massachusetts Supreme Judicial Court ruled that the judge's order was invalid because it infringed on the committee's statutory authority to control caseload limits, but it reaffirmed the

Lavallee protocol as an appropriate method for remedying constitutional violations for deprivation of counsel. *Id.* at 35, 44, 47, 49–51.

Notably, the condition of indigent defense in Massachusetts has improved since the *Carrasquillo* decision. After the Supreme Judicial Court's opinion in March of 2020, a single justice of the high court required the parties to regularly provide the court with information so that they could periodically assess whether the *Lavallee* protocol was still required in the county courts. *Carrasquillo v. Hampden Cnty. Dist. Courts*, 2021 WL 5441084, at *1 (Mass. Oct. 21, 2021) (Wendlandt, J.). After months of "deteriorating" circumstances in which the number of indigent criminal defendants without counsel increased, with a dispute as to whether the public defense committee actually lacked the capacity to represent indigent defendants, the single justice assigned a retired associate justice to the case. *Id.* The retired justice was ordered to prepare a report for the court discussing the causes of the indigent defense counsel shortage and possible solutions based on the parties' joint recommendations. *Id.*

The retired justice submitted his report to the court in March of 2022, and in June of 2022, the single justice lifted the *Lavallee* protocol. *Carrasquillo v. Hampden Cnty.*, 2022 WL 2902767, at *1 (Mass. June 30, 2022). The "crisis ha[d] abated"; there were just two unrepresented indigent defendants in Hampden County, each having been on the list for less than four days. *Id.* The justice attributed the change in circumstances "largely, if not entirely, to the extraordinary efforts of the parties to address the problems and find solutions." *Id.* The public defense committee had successfully opened a second office of twelve attorneys in the county, had increased rates for private attorneys, and waived the cap on the number of hours a private attorney could bill for the year. *Id.* The justice noted that these changes, while perhaps brought to bear by the "awareness of the urgency" required by the *Lavallee* protocol, would continue to be

effective even without the protocol in place. *Id.* The county courts would continue to circulate weekly lists of unrepresented defendants, and the public defense committee would continue to provide the court with periodic six month updates, including (1) the number of unrepresented defendants and specifically the number in custody; (2) the length of time each has gone without counsel and the charges pending against them; (3) the current caseloads of public defenders and private contracted attorney; and (4) the committee's efforts to increase the availability of counsel for unrepresented defendants, including the status of any ongoing efforts to petition the Legislature for continued additional funding. *Id.* The county courts and the district attorney would be invited to file a response to each update. *Id.*

In *Lavallee* and *Carrasquillo,* the Massachusetts Supreme Judicial Court ordered the same relief as *Betschart* and more. It ordered both release from custody after seven days and dismissal without prejudice after forty-five days without counsel.

Importantly, however, the Massachusetts Supreme Judicial Court also added one critical requirement to the findings made at individual hearings where eligibility for relief would be confirmed and provided. In part in recognition of the separation of powers and the authority delegated to the agency in the Commonwealth to staff and administer indigent defense, it required the Court to hear from those state actors about their ability and capacity to provide counsel, and to establish as a factual matter that, despite "good faith efforts," the agency was unable to do so. *See Lavallee*, 812 N.E.2d at 912. Only if capacity was truly exhausted in an individual case would the court step in.

The Court would emphasize what it stated as to Count I. The most appropriate remedy it can provide to Plaintiffs is representation. Release or dismissal without prejudice pursuant to this Order may be necessary, but only as a last resort. However, if representation has become

available at the time the Court issues relief for individual Plaintiffs, the constitutional violation has been remedied.

While neither the Maine Constitution nor Maine's habeas statute, 14 M.R.S. §§ 5501–46, provides for the very limited factual inquiry the Court will require, Plaintiffs do not object to the Court requiring this "check" to ensure that the appropriate remedy is being provided. Plaintiffs here seek a "conditional remedy" and the Court believes it has the authority to add another condition to that remedy by requiring that a representative from MCPDS—who the Court understands is not a party to Count III—advise the Court it has had an opportunity to find counsel, and whether it has made a good faith effort to do so before the Court acts. That factual determination is required by the separation of powers, and the Court trusts that MCPDS will cooperate in providing this information when requested by the Court.

The Court therefore concludes that Plaintiffs are entitled to habeas corpus relief for violations of their Sixth Amendment and Article I, Section 6 rights to continuous representation. Relief will be provided as follows:

1) On April 7, 2025 at 10:00 a.m., counsel for the parties in this matter, including counsel for the Maine county sheriffs, shall attend a hearing at the Capital Judicial Center to set the course of future habeas proceedings. By that date, the Court should have received information from MCPDS regarding their efforts to provide counsel for incarcerated Plaintiffs. The first round of hearings will prioritize any Plaintiffs who remain incarcerated, and relief will be provided to them consistent with this Order. Any attorney for the sheriffs may appear remotely.

2) Counsel for the parties shall have by that date agreed to and prepared a list of all Plaintiffs who are incarcerated awaiting appointment of counsel in any Maine jail or correctional facility. The list shall include the name and physical location of any Plaintiff, and shall be shared with all Maine sheriffs, all District Attorneys, the Office of the Attorney General, and the Executive Director of MCPDS. The list shall be based upon the Counsel Needed spreadsheets provided to MCPDS by the Judicial Branch. The list shall also include the docket numbers for any pending charges for the Plaintiffs.

3) The Court will conduct several court sessions at several locations in northern, central, and southern Maine during the month of April 2025. The court locations and dates of each session will be provided no later than April 7, 2025. The locations will be determined with the goal of assisting the sheriffs in arranging transport for any Plaintiffs in their custody.

4) Only Plaintiffs held in physical custody shall receive notices to appear at the first round of hearings conducted in April of 2025. Other hearings for Plaintiffs who are out on bail will be the subject of habeas relief hearings beginning in May of 2025 on a schedule to be discussed and set by the Court at the conference on April 7, 2025. Ongoing hearings are expected to be necessary for Plaintiffs in and out of custody.

5) MCPDS will provide counsel for these Plaintiffs at every hearing conducted.

6) The Court will rely upon the physical court files which it will have in its possession at each hearing in determining whether the individual is a Class member, and as to any pertinent dates for when the individual first appeared before the court, when bail was set and in what amount, and how long they have been held. The Court will be assisted by a clerk who will have access to MEJIS during any court proceeding.

7) The sheriffs do not need to personally appear at these hearings, but they shall designate a representative to appear who can verify how long the person has been held, and on what charges.

8) At the hearings for incarcerated Plaintiffs, the Court will determine if MCPDS has made a good faith effort to secure representation. This determination for the hearings conducted in April of 2025 shall be made in person by an MCPDS employee designated by the agency. After the first round of hearings, the Court is willing to accept written affidavits submitted by the MCPDS Defendants so long as the information is individually tailored to each individual Plaintiff.

9) At the hearings for incarcerated Plaintiffs, the Court will hear from counsel for the individual, from the prosecuting attorney, and from the MCPDS representatives. The Court will also hear from Class Counsel and from any attorney from the Office of the Attorney General who has been involved in this litigation if they wish to be heard.

10) After hearing from the parties, the Court will make the following determinations:
    a. Whether the individual Plaintiff is a Subclass member as defined by the Court;
    b. Whether MCPDS has made good faith efforts to secure representation for the individual; and

c. Whether there is still no attorney available to represent the individual.

If the Court determines that, despite the good faith efforts of MCPDS and any efforts by others to find representation for the individual, there is still no counsel willing and available to represent the individual, the Court shall order as follows:

> For any Subclass member who has been detained and remains without counsel for more than 14 days after their initial appearance or arraignment, or more than 14 days after leave for withdrawal of counsel has been granted, this Court will order release of the individual from detention unless within 7 additional days after the habeas hearing, counsel is provided. However, the Court will impose conditions of release related to ensuring the presence of the individual at the next court appearance, and to ensure the safety of the community. These conditions can include any condition authorized under the Maine Bail Code sufficient to protect public safety and ensure the integrity of the judicial process; and the Court may do so without the consent of the individual. This Court must advise the individual of the consequences of violation of any condition of release, and the consequence of committing new criminal conduct while they are out on bail.
>
> This relief shall not be available for any individual who is being held without bail after his or her right to bail has been extinguished because they are charged with a formerly capital offense. *See* 15 M.R.S. § 1027(3).
>
> With respect to Subclass members who have remained without counsel for more than 60 days after their initial appearance or arraignment or more than 60 days after counsel has been granted leave to withdraw, the Court shall order that the charges against the Subclass member be dismissed *without prejudice* until such time as counsel is available to provide representation of the individual, unless within 7 additional days after the habeas hearing, counsel is provided. This order applies both to Plaintiffs who are incarcerated and those living in the community subject to bail conditions.
>
> No relief set out above for incarcerated Plaintiffs or Plaintiffs residing in the community on bail shall be available if the individual persists in "firing" appointed counsel for less than good cause, and/or in order to obtain relief.
>
> For current members of the Subclass, the 60-day deadline shall begin running on the date this Order is signed and docketed by the Court.

COUNT V

The Defendant State of Maine has again raised the sovereign immunity defense as to both the request for declaratory judgment and for injunctive relief under Count V.

As to the declaratory judgment, the Court stands by its August 13, 2024 Order on Pending Motions to Dismiss, in which it relied on *Welch v. State*, 2004 ME 884, 852 A.2d 214, to conclude the State was not immune from Plaintiffs' request for declaratory judgment against the State. Aug. 13, 2024 Order, at 12–15. Judge Duddy's Footnote 15 in *NECEC* reinforces the Court's decision to do so. When the *NECEC* case was before the Business and Consumer Court, Judge Duddy did not formally address the sovereign immunity defense raised by the defendants, having denied plaintiff-energy company's motion for preliminary injunction for failure to meet their burden. *NECEC Transmission LLC v. Bureau of Parks & Land*, No. BCD-CIV-2021-00058, 2021 WL 6125325, at *8 n.15 (Me. B.C.D. Dec. 16, 2021). Nonetheless, the court stated it was "inclined to agree" with the line of cases across several other states which hold that, in an action seeking a declaratory judgment regarding constitutionality, sovereign immunity is not an available defense. *Id.* "[T]he availability of judicial review here appears to be integral to the constitutional framework," Judge Duddy wrote. *Id.* Granting the state immunity from constitutional claims "would undermine and destroy the principle of judicial review." *Id.* (quoting *Jones v. Bd. of Trs. of Ky. Retirement Sys.*, 910 S.W.2d 710, 713 (Ky. 1995)).

As to the issue of injunctive relief under the Declaratory Judgments Act, the Court did not reach any conclusion its August 13, 2024 Order. At that time, the Court stated that the issue "may be explored and argued after trial, should Plaintiffs prevail in establishing liability." Aug. 13, 2024 Order, at 15. Plaintiffs have now prevailed in establishing liability, and the Court believes that *Avangrid Networks, Inc. v. Sec'y of State*, 2020 ME 109, 237 A.3d 882 offers a sound alternative for the parties and the Court. The case involved the dispute over the citizen ballot initiative against the Central Maine Power transmission line from Quebec to Lewiston, Maine. In that case, the Law Court "saw no need to" order injunctive relief enjoining the Secretary of State

from including the initiative on the ballot because the Secretary of State had represented to the Law Court that, if the Court were to conclude that the ballot initiative was unconstitutional, he would not include the initiative on the ballot. *Id.* ¶ 39. The Law Court was "confident that he '[would] comply with the law once it is declared' and prevent the invalid initiative from being placed on the ballot," and thus declined to order the injunctive relief requested by plaintiffs. *Id.* (quoting *Great N. Paper, Inc. v. Penobscot Nation*, 2001 ME 68, ¶ 64 n.21, 770 A.2d 574).[17]

Counsel for the State has represented to this Court on multiple occasions that the State would step into the shoes of MCPDS for any violations found by this Court. Now that the Court has found liability against the MCPDS Defendants, and after review of the *Avangrid* decision, the Court thinks it appropriate for the State to advise the Court as to whether the State will indeed step up and support the agency in providing a remedy for the violations found.

Counsel for the State has ten days to respond to the Court's inquiry. If the State stands by its Counsel's previous statements to the Court, it will become "unnecessary" for this Court to consider or resolve the complex issues of first impression as to the injunctive relief requested by Plaintiffs. *See Avangrid*, 2020 ME 109, ¶ 39, 237 A.3d 882; *see also Gideon v. Wainwright*, 372

[17] The Law Court's discussion of this issue reads in full:

> As we have noted, in the trial court and indeed during much of his oral argument on this appeal, the Secretary of State has opposed the issuance of injunctive relief that would enjoin him from including the initiative on the ballot. Ultimately, however, counsel for the Secretary stated that if we were to conclude that the initiative is unconstitutional and cannot be submitted to the electors for popular vote—which is precisely our clear holding today—on his own accord, he will not include the initiative on the ballot. Based on the Secretary of State's clarification of his position, we are confident that he "will comply with the law once it is declared" and prevent the invalid initiative from being placed on the ballot. *Great N. Paper, Inc. v. Penobscot Nation*, 2001 ME 68, ¶ 64 n.21, 770 A.2d 574. Thus, we see no need for the issuance of injunctive relief. *See Littlefield v. Town of Lyman*, 447 A.2d 1231, 1235 (Me. 1982) (holding that injunctive relief against a municipal planning board was "unnecessary" when we remanded for the trial court to enter a declaratory judgment that a specific version of an ordinance applied and there was "no evidence suggesting an unwillingness on the part of the Board to accept a judicial determination of that question").

Avangrid, 2020 ME 109, ¶ 39, 237 A.3d 882.

U.S. 335, 343 (1963) ("[O]ne charged with crime, who is unable to obtain counsel, must be furnished counsel *by the state*." (emphasis added)).

The Court will wait for Counsel's response before issuing any further order on Count V.

The entry will be:

On Count I, the Court orders a permanent injunction requiring MCPDS Defendants to provide continuous representation for Plaintiffs. The Court further orders them to provide a plan to the Court explaining how they will comply with the injunction. The deadlines for providing representation and for filing the plan with the Court are set forth on pp. 23–24 and are incorporated herein.

On Count III, the Court will provide Habeas Corpus relief for Plaintiffs as set forth in detail on pp. 34–40. The deadlines and procedures established on pp. 40–42 are incorporated herein.

Counsel of record for Counts I, III, and V, along with Counsel for Maine county sheriffs in Count III, shall attend a hearing on April 7, 2025 at 10:00 a.m. at the Capital Judicial Center. Any attorney for the sheriffs may appear remotely.

On Count V, the Court defers ruling on pending motion for summary judgment brought by the State of Maine until the Court receives the State's response to the inquiry made by the Court on pp. 44 of this Order.

The Clerk shall note this Order on the docket by reference pursuant to Rule 79(a) of the Maine Rules of Civil Procedure.

Dated: March 7, 2025

Justice, Maine Superior Court

MAINE JUDICIAL BRANCH

☐ **COMMITMENT ORDER with CONDITIONS OF RELEASE** ☐ **CONDITIONS OF RELEASE**

☐ UNIFIED CRIMINAL ☐ DISTRICT ☐ SUPERIOR COURT located at _____

Docket No. _____

STATE OF MAINE v. _____, Defendant

OFFENSE(S): _____

OFFENSE DATE (*mm/dd/yyyy*): _____ **LOCATION OF OFFENSE:** _____

AGENCY: _____

SEQUENCE NUMBER: _____ **ATN/CTN:** _____

Defendant shall be held at the ☐ _____ County Jail ☐ Department of Corrections ☐ without bail ☐ as indicated on attached Bail Bond form ☐ until bail is posted as follows:

☐ **PERSONAL RECOGNIZANCE.**

☐ **UNSECURED.** Defendant is not required to post any security to be released, but if defendant fails to appear as the Bail Bond requires defendant shall owe the State of Maine $_____

☐ **SECURED.** Defendant shall be released from custody only after the following security is posted.

☐ Cash in the amount of $_____ or ☐ No Third Party Bail Allowed

☐ Real estate (or _____) with a net value (total value less encumbrances) of $_____.

☐ Bail Lien. ☐ Within 1 working day after today. ☐ Before defendant may be released, a lien on the real estate described must be recorded in the Registry of Deeds in the country where the real estate is located, and proof of such recording must be filed with the court listed above. (Note: The Registry of Deeds and the clerk's office are different offices and may be in different counties.)

☐ **SUPERVISED RELEASE: Check One Box Only** ☐ AND ☐ OR in the alternative, defendant is released to the custody of a supervised bail contract pursuant to terms and conditions provided in the contract. The contract must be signed by the Defendant, the Court, and the supervising agency.

☐ **CONCURRENT.** This bail is concurrent to the bail previously set/posted in (*list court and docket number*): _____

Additional conditions to which the defendant agrees to obey, if checked. The defendant will not:

☐ use ☐ possess **OR** ☐ excessively use or possess ☐ alcohol; and

☐ use ☐ possess **OR** ☐ excessively use or possess ☐ marijuana or marijuana products; and

☐ use or possess ☐ any illegal drugs or their derivatives; and

☐ use or possess ☐ any dangerous weapons or ☐ firearms.

☐ In order to determine if s/he has violated any prohibitions of this bond regarding alcohol, illegal drugs or their derivatives, marijuana or marijuana products, she/he will submit to searches of her/his person, vehicle, and residence and, if applicable, to chemical tests upon articulable suspicion.

☐ As a condition of her/his participation in a specialty court docket, or as a condition of her/his deferred disposition, she/he will submit to random searches of her/his person, vehicle, and residence and, if applicable, to chemical tests for possession or use of alcohol, illegal drugs or their derivatives, or marijuana or marijuana products.

☐ In order to determine if s/he has violated any prohibitions of this bond regarding firearms or dangerous weapons, s/he will submit to searches of her/his person, vehicle, and residence ☐ at any time without articulable suspicion or probable cause. ☐ upon articulable suspicion.

ADA Notice: The Maine Judicial Branch complies with the Americans with Disabilities Act (ADA). If you need a reasonable accommodation contact the Court Access Coordinator, accessibility@courts.maine.gov, or a court clerk.
Language Services: For language assistance and interpreters, contact a court clerk or interpreters@courts.maine.gov.

☐ have no direct or indirect contact with (*name and DOB (mm/dd/yyyy)*) _____

_____

except as is necessary ☐ for counseling; ☐ to pay child support; ☐ for child contact; ☐ for court appearances; ☐ by telephone (☐ from _____ ☐ am ☐ pm to _____ ☐ am ☐ pm); ☐ by text; ☐ by email; ☐ _____

☐ and not enter any ☐ residence ☐ place of employment ☐ place of education of any such person(s); ☐ except for a single time, while accompanied by a police officer, for the purpose of retrieving defendant's personal effects.

☐ maintain or actively seek employment; ☐ maintain or commence an education program.

☐ participate in regular substance abuse counseling and provide proof of such counseling upon request.

☐ undergo ☐ medical ☐ mental health ☐ evaluation ☐ counseling/treatment & provide proof of such counseling/treatment upon request.

☐ complete certified Domestic Violence Intervention Program ☐ undergo other counseling/treatment _____ and provide proof of such counseling/treatment upon request.

☐ abide by the following restrictions on personal associations, place of abode, or travel: _____

_____

☐ report ☐ daily ☐ weekly ☐ _____, ☐ in person ☐ by phone, to ☐ probation officer ☐ _____

☐ comply with the following curfew: _____

_____

☐ participate in ☐ outpatient ☐ voluntary inpatient treatment; at or with _____

_____

☐ take medications as prescribed. ☐ participate in an electronic monitoring program.

☐ not operate any motor vehicle under any circumstances ☐ unless lawfully licensed to do so.

☐ _____

_____

_____

If the defendant makes bail, the defendant is required to appear at the Unified Criminal Court on: (*mm/dd/yyyy*) _____ at _____ ☐ am ☐ pm and on any other date and time and at the court the justice, judge, or clerk tells me to appear.

(This Conditions of Release form must be attached to defendant's Bail Bond.)

Date (*mm/dd/yyyy*)	▶ ☐ Justice ☐ Judge ☐ Clerk ☐ Bail Commissioner	Printed Name of Bail Commissioner

ADA Notice: The Maine Judicial Branch complies with the Americans with Disabilities Act (ADA). If you need a reasonable accommodation contact the Court Access Coordinator, accessibility@courts.maine.gov, or a court clerk.
Language Services: For language assistance and interpreters, contact a court clerk or interpreters@courts.maine.gov.

The Conditions of Release remain in effect. The defendant is required to appear on:
(*mm/dd/yyyy*) _____ at _____ ☐ am ☐ pm at ☐ District ☐ Superior Court.

Date (*mm/dd/yyyy*): _____ ▶ _____
☐ Justice ☐ Judge

The Conditions of Release remain in effect. The defendant is required to appear on:
(*mm/dd/yyyy*) _____ at _____ ☐ am ☐ pm at ☐ District ☐ Superior Court.

Date (*mm/dd/yyyy*): _____ ▶ _____
☐ Justice ☐ Judge

The Conditions of Release remain in effect. The defendant is required to appear on:
(*mm/dd/yyyy*) _____ at _____ ☐ am ☐ pm at ☐ District ☐ Superior Court.

Date (*mm/dd/yyyy*): _____ ▶ _____
☐ Justice ☐ Judge

The Conditions of Release remain in effect. The defendant is required to appear on:
(*mm/dd/yyyy*) _____ at _____ ☐ am ☐ pm at ☐ District ☐ Superior Court.

Date (*mm/dd/yyyy*): _____ ▶ _____
☐ Justice ☐ Judge

The Conditions of Release remain in effect. The defendant is required to appear on:
(*mm/dd/yyyy*) _____ at _____ ☐ am ☐ pm at ☐ District ☐ Superior Court.

Date (*mm/dd/yyyy*): _____ ▶ _____
☐ Justice ☐ Judge

The Conditions of Release remain in effect. The defendant is required to appear on:
(*mm/dd/yyyy*) _____ at _____ ☐ am ☐ pm at ☐ District ☐ Superior Court.

Date (*mm/dd/yyyy*): _____ ▶ _____
☐ Justice ☐ Judge

SSC 578

MAINE JUDICIAL BRANCH
BAIL BOND ☐ AMENDED

☐ UNIFIED CRIMINAL ☐ DISTRICT ☐ SUPERIOR COURT located at _____ Docket No. _____
STATE OF MAINE v. _____, Defendant
Defendant's mailing address: _____
Defendant's residence address (if different): _____
Defendant's email address: _____
Date of Birth (*mm/dd/yyyy*): _____ **SS Number Disclosure Required on separate form**
Hair Color _____ Eye Color _____ Height _____ Weight _____ Gender _____ Race _____
Home phone # _____ Work phone # _____ Cell phone # _____
For Title 29-A violations, driver's license number required _____ State _____
Date of Offense(s) (*mm/dd/yyyy*) _____ Location of Offense(s) _____
Offense(s), Class of offense, Seq #, Title & Section, ATN/CTN of each offense:

_____

_____

Law enforcement officer and agency: _____

The following apply if checked:

☐ **PERSONAL RECOGNIZANCE.** ☐ **UNSECURED.** If I fail to appear as this Bail Bond requires I will owe the State of Maine $_____

☐ **SECURED.** To be released from custody the following property is being posted. The property is:

☐ Cash in the amount of $_____ (see reverse for designation of third-party ownership) **OR**

☐ Real estate (or _____) with a net value of $_____.

☐ Bail Lien. ☐ Within 1 working day after today. ☐ Before I may be released, a lien on the real estate described must be recorded in the Registry of Deeds in the county where the real estate is located, and proof of such recording must be filed with the court listed above. (Note: The Registry of Deeds and the clerk's office are different offices and may be in different counties.)

☐ **CONCURRENT.** This bail is concurrent to the bail previously set/posted in (*list court and docket number*): _____

I agree to obey the following conditions of my release so long as this bail bond remains in effect. I understand that it is a crime for me to violate any of these conditions, and that if I violate these conditions I will be subject to arrest, jail and/or a fine.

1. I will appear at the Unified Criminal Docket located at _____, in _____ (City/Town), _____ (County) Maine, Tel # (207) _____, on (*mm/dd/yyyy*) _____ at _____ ☐ a.m. ☐ p.m. and on any other date and time and at the court the justice, judge, or clerk tells me to appear.
2. I will commit no criminal act and will not violate any protection from abuse orders.
3. I will immediately give written notice of any change in my address or telephone number to the court named above.
4. I waive extradition to the State of Maine from any other State of the United States, from the District of Columbia, from any territory of the United States, and from any other jurisdiction whatsoever, for prosecution on the charge(s) listed above.

Additional conditions which I agree to obey, if checked. I will not: ☐ use ☐ possess **OR** ☐ excessively use or possess ☐ alcohol; and ☐ use ☐ possess **OR** ☐ excessively use or possess ☐ marijuana or marijuana products; and ☐ use or possess ☐ any illegal drugs or their derivatives; and ☐ use or possess ☐ any dangerous weapons or ☐ firearms.

☐ In order to determine if I have violated any prohibitions of this bond regarding alcohol, illegal drugs or their derivatives, marijuana or marijuana products, I will submit to searches of my person, vehicle and residence and, if applicable, to chemical tests upon articulable suspicion.

☐ As a condition of my participation in a specialty court docket, or as a condition of my deferred disposition, I will submit to random searches of my person, vehicle, residence and, if applicable, to chemical tests for use or possession of alcohol, illegal drugs or their derivatives, or marijuana or marijuana products.

☐ In order to determine if I have violated any prohibitions of this bond regarding firearms or dangerous weapons, I will submit to searches of my person, vehicle, and residence ☐ at any time without articulable suspicion or probable cause. ☐ upon articulable suspicion.

☐ have no direct or indirect contact with (*name and DOB mm/dd/yyyy*) _____ except as is necessary

☐ for counseling; ☐ to pay child support; ☐ for child contact; ☐ for court appearances; ☐ by telephone (☐ from _____ ☐ a.m. ☐ p.m. to _____ ☐ a.m. ☐ p.m.) ☐ by text ☐ by email ☐ _____

☐ and not enter any ☐ residence ☐ place of employment ☐ place of education of any such person(s)

☐ except for a single time, while accompanied by a police officer, for the purpose of retrieving defendant's personal effects.

☐ not operate any motor vehicle under any circumstances ☐ unless lawfully licensed to do so. ☐ Participate in electronic monitoring.

☐ **Defendant cannot be released unless a supervised bail contract is executed and approved by the Court. Def. must abide by contract conditions.**

☐ _____

☐ As a condition of my release, I shall comply with any condition(s) set forth on the Conditions of Release form.

☐ **THE CASH BAIL HAS BEEN POSTED BY A THIRD PARTY**

WARNING: Your cash or surety bail may be ordered forfeited if you fail to appear or if you violate any of the conditions of release in this case. Cash or surety bail has been ordered to ensure your appearance at all court proceedings as required, ensure you refrain from new criminal conduct, ensure the integrity of the judicial process, and ensure the safety of others in the community. Forfeiture of this bail may occur if you fail to appear as ordered, violate any of the conditions of release on this bond or others, or fail to abide by court orders.

I have read and I understand all my obligations under this bond. Defendant: ▶ _____

I have explained the defendant's (and if applicable, the surety's/third party's) obligations under this bond on this date and will give a copy of this form to the defendant and surety/third party immediately after signing it.

Dated (*mm/dd/yyyy*): _____ at _____ ☐ am ☐ pm ▶ _____

at _____, Maine ☐ Justice ☐ Judge ☐ Clerk ☐ Bail Commissioner

_____
Printed Name of Bail Commissioner

COURT