STATE OF MAINE

SUPREME JUDICIAL COURT
Docket No. SJC-23-2

ANGELINA DUBE PETERSON ET AL.

Petitioners,

v.

PETER A. JOHNSON, Aroostook County Sheriff, *in his official capacity*

Respondent,

and

STATE OF MAINE,

Party in Interest.

Petitioners' Closing Argument

Petitioners respectfully present this Closing Argument:

I. The State of Maine has violated the law.

Actually, the State has violated *several* laws, and this Court might grant relief for any one such violation. The first few are the plainest, thanks to precise language: (a) Maine has violated M.R.U. Crim. P. 44(a)(1) (providing that the court "shall … assign counsel to represent the defendant at every stage of the proceeding"); *see also* M.R.U. Crim. P. 5(e) ("shall"); and (b) it has violated 15 M.R.S. § 810 (State "must" provide counsel before an arraignment following an initial appearance). Before proceeding to discussion of the State's constitutional violations, Petitioners pause here to underscore what the foregoing illegalities mean by themselves: Without needing to undertake any constitutional analysis whatsoever, this Court can already hold that the State is in breach of a handful of laws. At this early

moment, in other words, the Court can skip to Section II on Page 8 of this filing to consider the remedy for the State's infractions.

Only for the sake of argument, then, do Petitioners press on with a discussion of the relatively more esoteric questions of constitutional law. Petitioners do not today present independent state-constitutional analyses; instead, they assume that §§ 6 and 6-A guarantee nothing less than the Sixth and Fourteenth Amendments. *Cf. State v. Galaraneau*, 2011 ME 60, ¶¶ 5-8, 20 A.3d 99. A discussion of federal law therefore lights the way.

A. The State has violated Petitioners' constitutional right to counsel.

There is no question that Petitioners' constitutional right to counsel has "attached." *See Rothgery v. Gillespie County*, 554 U.S. 191, 199 (2008) (Sixth Amendment right "attaches at the initial appearance before a judicial officer"); *Kirby v Illinois*, 406 U.S. 682, 688 (1972) ("[A] person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him."). "Once attachment occur[red]," Petitioners became "entitled to the presence of appointed counsel during any 'critical stage' of the postattachment proceedings." *Rothgery*, 554 U.S. at 212. The decisive question for constitutional right-to-counsel purposes, then, is whether Petitioners have been denied counsel at a "critical stage."

"[W]hat makes a stage critical is what shows the need for counsel's presence." *Ibid*. But it is not just the critical stage itself for which counsel must be provided; counsel must be timely appointed to give sufficient lead-

time "to allow for adequate representation at any critical stage before trial, as well as the trial itself." *Ibid.* The bottom line: Counsel must be provided early enough for counsel to make a difference at any "critical" pretrial stage.

More finely, a "critical stage" is "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." *United States v. Wade*, 388 U.S. 218, 226 (1967). But the constitutional right to counsel is not limited to trial; given the "changing patterns of criminal procedure and investigation that have tended to generate pretrial events that might appropriately be considered to be parts of the trial itself," the Court long ago recognized that the right applies at pretrial stages, too. *United States v. Ash*, 413 U.S. 300, 310 (1973); *ibid.* (Right to counsel exists at any "pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality."). Put another way, a "critical stage" is any at which "the accused require[s] aid in coping with the legal problems or assistance in meeting his adversary." *Id.* at 313.

Among the many "critical stages" previously identified by the Court are: "making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail." *Coleman v. Alabama*, 399 U.S. 1, 9 (1970); *cf. Higazy v. Templeton*, 505 F.3d 161, 172 (2d Cir 2007) ("a bail hearing is a critical stage") (quotation marks omitted). Petitioners again pause and suggest that the Court may now proceed to Section Two of this filing on Page 8; *Coleman* alone establishes that Petitioners' constitutional right to counsel has been violated. On the facts,

the record in Michael Fisher's case establishes that, had he been provided counsel early enough "to allow for adequate representation at," *Rothgery*, 554 U.S. at 212, his "seven-day-bail-review" hearing (*i.e.*, had counsel been able to call McDonald's or Pat's Pizza), he likely would have been granted bail. *See* PX 21 at 7-11.

It is black-letter law that "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010). Yet, Petitioners and others in their situation are unable to propose plea deals with the assistance of an attorney. As Attorney Deveau testified regarding Joseph Maile, defense lawyers often resolve cases well before scheduled dispositional conferences, particularly for those facing charges amenable to relatively short carceral sentences. With Attorney Deveau, Mr. Maile was able to reach a reasonable resolution of his case mere days after her appointment, leading to his discharge from custody, his time already served. *See* PX 22 at 2 (Maile's docket sheet). Those without counsel do not have such ability unless they submit to dealing with experienced prosecutors *pro se* – a surrender to the compulsion of incarceration without representation. *See* 15 M.R.S. § 815; *cf*. PXs 24a & 24b (Olivia Martin so surrendered).

Here is another violation: None of the imprisoned men in Aroostook County have received their discovery; apparently the District Attorney refuses[1] to provide it to defendants without counsel. Yet each of these

[1] Contra the mandatory language of M.R.U. Crim.P. 16(a) & (b) – a situation that has been calling out for judicial intervention for months.

individuals has a constitutional right to have his lawyer "effectively discover the case the State has against his client." *Coleman*, 399 U.S. at 9. Weeks, now *months*, into their cases, none of them knows whether the State's case is made up of lies or otherwise rests precariously on a hill of "*Brady*" or "*Giglio*" material. That's literally Kafkaesque. Franz Kafka, *The Trial* (1925) (protagonist Josef K. is arrested and prosecuted without being advised of the evidence against him).

Coleman also makes clear that early involvement by counsel in order to "make possible the preparation of a proper defense" is a critical stage. 399 U.S. at 9. Courts have found the right to *effective* assistance of counsel – a subsidiary of the right to counsel but nonetheless, apropos to our case, one existing only during "critical stages" – to be violated by poor investigation and discovery-practice. *Cf. Kimmelman v. Morrison*, 477 U.S. 365, 384-87 (1986) (ineffective assistance when attorney performed lacking investigation). The time from arraignment until the beginning of trial is not just any "critical stage;" it is "*the most* critical period of the proceedings." *Powell v. Ala.*, 287 U.S. 45, 57 (1932) (emphasis added). It's quite likely that defendants charged with burglary and OUI would want to preserve video-evidence and forensic evidence; for Petitioners, it is increasingly likely with each passing day that the opportunity to do so has come and gone.

Certainly, the opportunity to have a "speedy" trial – a constitutional right of Petitioners – is obviated by the State's failure to provide a lawyer who might invoke that right or assure Petitioners that invocation is wise. *See Winchester v. State*, 2023 ME 23, ¶ 59, 291 A.3d 707 (defense counsel's

failure to assert speedy-trial right is potentially violative of right to counsel – meaning, by necessity, that timely assertion of the right constitutes a critical stage). How, exactly, are those without counsel able to demand a speedy trial when they do not have lawyers to represent them at that trial? *Cf. State v. Norris*, 2023 ME 16, ¶ 16, 302 A.3d 1 (faulting the defendant for not demanding speedy trial at his initial appearance). If this Court were to refrain from finding that the State has violated defendant's right to counsel, it will have simultaneously provided an avenue by which Maine prosecutors may nullify the right to a speedy trial: just withhold counsel so that there can be no trial (or even a demand for a speedy one) until the State is ready.

Petitioners need not pile on. They have established that they have been denied counsel at a critical stage – and under multiple theories. That is all they need to do. As the Supreme Court has clarified, "[C]ourts may presume that a defendant has suffered unconstitutional prejudice if he 'is denied counsel at a critical stage.'" *Woods v. Donald*, 575 U.S. 312, 315 (2015) (*per curiam*) (quoting *Cronic*, 466 U.S. at 659); *Mickens v. Taylor*, 535 U.S. 162, 166 (2002); *Perry v. Leeke*, 488 U.S. 272, 278-80 (1989); *Holloway v. Arkansas*, 435 U.S. 475, 489 (1978); *Geders v. United States*, 425 U.S. 80, 91-92 (1976); *Herring v. New York*, 422 U.S. 853, 865 (1975); *Hamilton v. Alabama*, 368 U.S. 52, 54-55 (1961); *White v. Maryland*, 373 U.S. 59, 60 (1963) (*per curiam*); *Glasser v. United States*, 315 U.S. 60, 76 (1942); *see also United States v. Gonzalez-Lopez,* 548 U.S. 140, 150 (2006). That rule of law applies here: Petitioners, it is presumed as a matter of law, have suffered unconstitutional prejudice.

B. The State has violated Petitioners' right to due process and equal protection.

In addition to the Sixth Amendment, Petitioners have also proceeded under the Fourteenth Amendment and § 6-A of Article I. *See* Amended Petition at ¶¶ 2, 9a, 19. The substantive and procedural components of due process, in our context, primarily revolve around two interrelated interests.

First, the State "must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty...." *Gerstein v. Pugh*, 420 U.S. 103, 124-25 (1975). To repeat, Petitioners have not even *seen* the evidence on which they are being charged; it follows they have no way of "testing probable cause for detention." *Id*. at 124. This sort of thing is commonplace in authoritarian states, not the United States.

Second, notwithstanding probable cause sufficient to detain, there exists a statutory and constitutional right to bail, providing the prerequisites can be established. 15 M.R.S. § 1021 *et seq*.; ME. CONST. Art. I, § 10; *see United States v. Salerno*, 481 U.S. 739, 750 (1987) (recognizing "the individual's strong interest in liberty"). Yet, as the prisoners from Aroostook County testified, the State has afforded nothing more than 2-3 minutes of publicly surveilled prehearing discussion with a temporary lawyer who does nothing more than address the court, having done none of the prehearing legwork necessary to secure the release of his client. *See*, *again*, PX 21 at 7-11 (counsel at bail hearing hadn't bothered to contact Fisher's employer). As Attorney Andrus testified, this is a systemic limitation on the lawyer-of-the-

day program for other than initial appearances, not just an individual attorney's failure.

Surely – to name a well-heeled, recent defendant – Eliot Cutler did not have to depend on an unprepared lawyer of the day to secure his preconviction release. Numerous poor Mainers, including Petitioners, though, have had to participate in such a "meaningless ritual." *Cf. Douglas v. California*, 372 U.S. 353, 358 (1963). "[W]here the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot," equal protection is denied. *Cf. id.* at 357.

As Judge McShane wrote in Oregon:

> [N]o reliable process guaranteed by the Fourteenth Amendment is present when an indigent defendant is required to proceed against the power of the state without counsel while incarcerated. They are unable to adequately argue for conditional release, secure witnesses, review discovery, challenge the charging instrument, intervene in the grand jury process, negotiate with the prosecution in an arms-length fashion, request the preservation of evidence, or challenge the length of their confinement through speedy trial statutes. For some, an uncounseled guilty plea is the only avenue out of custody. Because the Fourteenth Amendment guarantees minimum protections when individuals face that [sic] most severe forms of liberty restrictions, it bars indefinite detention without counsel.

Betschart v. Garrett, 2023 U.S. Dist. LEXIS 197438 ** 35-36, 2023 WL 7220562 * 11 (D. Or. Nov. 2023). The reasoning applies in Maine, too.

II. Release from custody is the remedy.

Petitioners have easily established multiple violations at every level of authority – rule-based, statutory and constitutional. Now this Court should fashion an appropriate remedy. There are only two available to it.

Release is the sole remedy Petitioners seek under the habeas corpus statute.[2] *See* 14 M.R.S. § 5523. As the State appropriately conceded at the argument before the Court on November 14, this Court may grant the writ so long as Petitioners are unlawfully detained. *See* 14 M.R.S. §§ 5515 ("lawfully imprisoned or restrained of his liberty"); 5523 ("if no legal cause is shown for such imprisonment or restraint"). Petitioners certainly qualify.

This brings us to the second remedy available to this Court, which it should also grant. Pursuant 14 M.R.S. § 5953, Petitioners may obtain declaratory relief. *See* Amended Petition for Writ of Habeas Corpus, PRAYER FOR RELIEF ¶ 5 (seeking such relief); *Higgins v. Robbins*, 265 A.2d 90, 91-92 (Me. 1970) (declaratory judgments may be issued attendant to proceedings for writs pursuant to Chapter 609 of Title 14). Specifically, it may declare, in "either affirmative or negative … form," the "rights, status and other legal relations" of those imprisoned pending trial in Maine. 14 M.R.S. § 5953.

Such relief is necessary. Maine's governor, legislators and, it seems, trial judges must be made to understand that the current state of affairs is unlawful and, therefore, untenable. A declaration to that effect, one would hope, would encourage a more diligent response to the deepening crisis in our courts. Maine's inaction on this front threatens not just the rights of those accused of crimes but the State's very ability to lawfully prosecute crimes. Many of the convictions it has obtained in recent months have been

[2] Though, in a separate proceeding, they might be able to obtain relief in the form of discharge from conditions of release, Petitioners do not press such a claim in this matter.

uncounseled in the meaning of the constitutions of this country and state. They are stippled with structural error.[3] Thus, ours is hardly a case in which declaratory relief would serve no "'useful purpose.'" *Cf. LeGrand v. York Cnty. Judge of Probate*, 2017 ME 167, ¶ 40, 168 A.3d (quoting *Capodilupo v. Town of Bristol*, 1999 ME 96, ¶ 3, 730 A.2d 1257); *see* 14 M.R.S. § 5958. To the contrary, a superior court judge presiding over the lawsuit against the State for failing to provision suitable indigent-defense services has held up a settlement agreement expressly because of the uncertainty about what the settlement would do to persons held without lawyers. *See Robbins et al. v. MCILS et al.*, KENSC-CV-22-54 *Order on Joint Motion for Preliminary Settlement Approval* ** 19-20 (Murphy, J., Sept. 13, 2023).

An appropriate declaration, given the illegalities, mirrors that from Oregon: If counsel – which does *not* include a lawyer-for-the-day – is not secured within seven days of initial appearance for any defendant currently in physical custody, or if counsel is not appointed within seven days of the withdrawal of previously appointed counsel, the sheriff of that county is ordered to release the defendant. *Cf. Betschart*, 2023 U.S. Dist. LEXIS 197438 *47, 2023 WL 7220562 *15.

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[3] The question whether the prosecutions against Petitioners can lawfully continue or whether they are irretrievable lame-ducks, stricken by either structural or prejudicial error (or both), is not before the Court. Once counsel are appointed in their criminal matters, Petitioners will be suited to perhaps seek such relief with the assistance of counsel during the critical stage that is a motion to dismiss. Delay – caused by the lack of counsel – of their opportunity to do so is itself further prejudice at a critical stage. *Cf. State v. Allen*, 522 P.3d 355 (Kan. Ct. App. 2022) ("[A] hearing on a motion to dismiss is a critical stage of a criminal proceeding.").

Respectfully submitted this 21st Day of November 2023,

By the Petitioners,

/s/ Robert J. Ruffner

Robert J. Ruffner, *Esq*. #8855
MAINE INDIGENT DEFENSE CENTER
148 Middle Street, Suite 1D
Portland, ME 04101
(207) 236-0020
rjr@mainecriminaldefense.com

/s/ Rory A. McNamara

Rory A. McNamara, *Esq*. #5609
DRAKE LAW LLC
P.O. Box 143
York, ME 03909
(207) 475-7810
rory@drakelawllc.com

CERTIFICATE OF FILING AND SERVICE

I hereby certify that:

- I filed a copy of this Closing Argument with the Maine Supreme Judicial Court by email. *See* Procedural Order of 9/22/2023 (Douglas, J.,) at ¶ 4.
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- I have caused to be delivered a copy of this Closing Argument to: MLichtenstein@wheelerlegal.com; and Sean.D.Magenis@maine.gov.

/s/ Rory A. McNamara

Rory A. McNamara, *Esq*. #5609
DRAKE LAW LLC
P.O. Box 143
York, ME 03909
(207) 475-7810
rory@drakelawllc.com