STATE OF MAINE

SUPREME JUDICIAL COURT
Docket No. SJC-23-2

ANGELINA DUBE PETERSON et al.,

Petitioners

v.

PETER A. JOHNSON, in his capacity as AROOSTOOK COUNTY SHERIFF,

Respondent

and

STATE OF MAINE,

Party in Interest

FINAL DECISION AND ORDER

Timothy D. York and William F. Ofria (Petitioners) assert in their Petition for Writ of Habeas Corpus (Petition) brought pursuant to 14 M.R.S. §§ 5501-5546 (2023) that the State's delay in assigning them an attorney in their pending criminal cases violates their right to counsel as well as their due process rights under Maine law and the United States Constitution. The relief they seek, individually and on behalf of others, is release from incarceration unless counsel is provided within seven days. For the reasons set out below, the Petition is denied.

I. Procedural Background

The Petition was filed on September 20, 2023, by Attorneys Robert Ruffner and Rory McNamara on behalf of Angelina Dube Peterson as well as "[a]n unknown number of persons," all claiming to be incarcerated pending trial and entitled to, but not yet assigned, court-appointed counsel. The Petition named as Respondents numerous public officials.[1] Shortly after the Petition was filed, Peterson was assigned counsel and released from custody.

Pursuant to a September 22, 2023, procedural order, parties were served, and an initial status conference was held on October 16, 2023. Four days after the status conference, an amended petition (Amended Petition) was filed naming eight additional individuals seeking habeas relief in place of Peterson[2] and asserting "next friend" status for Attorneys Ruffner and McNamara on behalf of the named individuals as well as any other persons "imprisoned or restrained" of their liberty. The Amended Petition requested production of data from the Judicial Branch "necessary to identify persons entitled to relief";

[1] The Petition named as Respondents Peter A. Johnson, Aroostook County Sheriff, and William L. King, York County Sheriff, in their official capacities; "[u]nknown Jailers, all in their official capacities"; Hon. Sarah Gilbert and Hon. Carrie Linthicum, Judges of the Maine District Court, in their official capacities; and "[u]nknown Judges and Justices of the Maine Unified Criminal Docket, all in their official capacities." Respondents raised numerous procedural and other defenses to the Petition, which were addressed in part after a second status conference on November 2, 2023. *See infra* note 4.

[2] The eight additional individuals named in the Amended Petition were: Joseph Maile, Tiffany Soucy, Benjamin Stewart, Bruce Hoyt Jr., William Ofria, Randy Lavoie, Christopher Hecker, and Timothy York.

the "release from imprisonment" of "persons subject to relief" if not appointed counsel within seven days; and a declaration pursuant to 14 M.R.S. § 5953 (2023) that "[a]nyone entitled to counsel pursuant to a Maine state-court criminal prosecution pending without conviction, but who has not received the actual assistance of counsel other than so-called 'lawyers for the day,' shall not be subject to imprisonment greater than seven days after such an entitlement has inhered." (Am. Pet. 12.)

By the time a second status conference was held on November 2, 2023, five of the eight newly named individuals[3] in the Amended Petition had been assigned counsel and/or were released from custody. Each of the Respondents moved for dismissal on various grounds. Following the November 2 status conference, an order was issued dismissing certain parties, narrowing the scope of the proceeding, clarifying the status of the parties, and scheduling a final hearing on November 14, 2023.[4] *See* November 6, 2023, Order on Request for Writ of Habeas Corpus (November 6 Order).

[3] Joseph Maile, Tiffany Soucy, Benjamin Stewart, Bruce Hoyt Jr., and Christopher Hecker.

[4] Sheriff King's motion to dismiss was granted because Peterson had been released from custody and none of the remaining individuals seeking relief were being held at the York County Jail. By agreement, Maine District Court Judges Gilbert and Linthicum, as well as all "[u]nknown Judges and Justices of the Maine Unified Criminal Docket," were dismissed. Sheriff Johnson's motion to dismiss was denied because at least some of the named individuals seeking habeas corpus relief were still incarcerated at the Aroostook County Jail. Because it was agreed that the three remaining individuals named in the Amended Petition—Timothy York, William Ofria, and Randy Lavoie—were the real parties in interest, they were deemed the "Petitioners," and Attorneys Ruffner and McNamara were

At the November 14 hearing, testimony was given by Petitioner Timothy York, Petitioner William Ofria, and Michael Fisher, all of whom appeared by video from Aroostook County Jail; Attorney Mackenzie Deveau, an assistant defender with the Rural Defenders Unit; and Attorney Justin Andrus, the former executive director of the Maine Commission on Indigent Legal Services (Commission). A number of exhibits were admitted in evidence by agreement, including transcripts of certain proceedings and docket records pertaining to Petitioners and other individuals currently or formerly incarcerated at the Aroostook County Jail. In addition, judicial notice is taken of the November 3, 2023, Standing Order on Initial Assignment of Counsel (Standing Order) issued by the trial court chiefs during the pendency of this matter.

II. Findings of Fact

A. General Findings

The Maine Legislature established the Commission to "provide efficient, high-quality representation to indigent criminal defendants . . . consistent with federal and state constitutional and statutory obligations." 4 M.R.S. § 1801 (2023). The Commission is charged with, among other things, developing and

appointed as their counsel for purposes of this case. By the time of the hearing on November 14, Randy Lavoie had been assigned counsel and was no longer seeking relief in this matter. The remaining procedural objections were rendered either moot or inapplicable as a result of actions taken by the November 6 Order or are addressed herein.

maintaining a roster of attorneys in private practice eligible for court appointment to represent indigent defendants; prescribing minimum experience, training, and qualification standards for rostered attorneys; and considering "other programs necessary to provide quality and efficient indigent legal services." 4 M.R.S. § 1804(2)-(3) (2023).

Attorneys rostered by the Commission operate as independent contractors. They are free to remove their name from the roster at any time. At all times relevant to this matter, there have been no rostered attorneys available for court appointment in Aroostook County. Some individuals incarcerated and awaiting trial have waited weeks before being assigned a lawyer.[5]

Additionally, in December 2022, the Commission began operating a public defenders program, the Rural Defender Unit, which has approximately five attorneys serving rural areas in Maine. Two assistant defenders are assigned to cover Aroostook County. They carry an average caseload of seventy cases at any one time.

Recognizing that the number of rostered attorneys available for assignment in criminal cases "are frequently inadequate to timely ensure

[5] Angelina Dube Peterson waited over eleven weeks before counsel was assigned to represent her. Within days of counsel's appointment in September, she was released on bail.

court-appointed counsel for indigent defendants at every stage of the proceeding," the trial court chiefs issued an order in early November with statewide applicability during the pendency of this action. Standing Order at 1. The Standing Order provides that defendants in custody who are entitled to but not yet assigned court-appointed counsel be brought before the court (either in person or remotely by video) for hearing on "the next convenient date on which in-custody arraignments are held, but in no event later than seven (7) days after the date of the initial appearance." Standing Order at 1. At the hearing,

> the court shall advise the defendant of the defendant's right to counsel and assign counsel if counsel is available for assignment. If counsel is unavailable for assignment, a lawyer for the day may be designated for the limited purpose of representing the person at that appearance. The court shall proceed to hear motions regarding bail and other matters as necessary and may take such action as the court deems appropriate.

Standing Order at 1-2. These status hearings appear to be conducted weekly until counsel is assigned.

The Commission rosters attorneys who serve as a "lawyer for the day." Courts in Aroostook County, as elsewhere in the state, regularly use lawyers for the day to represent in-custody defendants who are making their initial court appearances or are appearing in other proceedings, including the status hearings held pursuant to the Standing Order. The lawyer for the day represents those defendants who do not already have an attorney. At initial

appearances, a lawyer for the day is responsible for, among other things, reviewing available information to confirm probable cause; advising defendants of their rights, the charges, and the process; discussing the consequences of entering a plea (depending on the nature of the charges); and addressing bail issues.

B. Findings Specific to Petitioners

1. Timothy D. York

In July 2022, an arrest warrant was issued for York based on a complaint charging one count of burglary (Class B) and one count of theft by unauthorized taking (Class C) alleged to have occurred in Mapleton. A grand jury indicted York the following month on the same charges. At the time, York had three misdemeanor charges from February 2020 pending in the Unified Criminal Docket in Aroostook County.[6]

On October 11, 2023, York was arrested and appeared in court by video from the Aroostook County Jail and was represented by the designated lawyer for the day. York was arraigned by the court (*Nelson, J.*) on the misdemeanor charges, to which he entered pleas of guilty and was sentenced to pay fines. He was arraigned on the new felony charges, to which he entered pleas of not

[6] The charges included displaying a fictitious certificate of inspection (Class E), operating after suspension (Class E), and refusing to submit to arrest (Class E).

guilty and was given a dispositional conference date of November 17, 2023. Bail was set at $2,500[7] unsecured bond with special conditions that included a bail contract, with leave to readdress bail if York failed to qualify for a bail contract. The court granted York's motion for court-appointed counsel but did not assign counsel because no rostered attorneys or public defenders were available for assignment.

Since his initial appearance, York has appeared in court twice, both times by video from the jail. On October 31, the court (*Nelson, J.*) readdressed bail, changing the requirement of a $2,500 unsecured bond to $500 cash and dropping the requirement of a bail contract. On November 7, the court (*Linthicum, J.*) held a second bail review and lowered the bail to $350 cash with the same special conditions (and no bail contract).

At the October 31 and November 7 court appearances, York met with the lawyer for the day by video while in a room at the jail with other incarcerated individuals who were also waiting to meet with the lawyer for the day prior to their scheduled court appearances that day. Jail staff was present in the same room. No headphones or other private listening devices were available. Others

[7] According to the transcript of the initial appearance, the State requested a $20,000 unsecured bond, to which York had no objection. The court indicated that "bail was to be set as requested without objection, leave granted to readdress bail if Mr. York [was] not able to secure an acceptable contract." The commitment order shows, however, that the unsecured bond was set at $2,500.

in the room likely could overhear York's conversation with the lawyer for the day. York's meeting with the lawyer for the day was relatively brief, but the record does not otherwise indicate the nature and extent of their contact on that occasion. His meeting with the lawyer for the day at his initial appearance occurred under similar conditions.

As of the November 14 hearing, York remained in custody at the Aroostook County Jail (thirty-four days), had not yet been assigned counsel, and had not been personally provided with the discovery in his case.

2. William F. Ofria

On September 30, 2023, Ofria was arrested for operating under the influence[8] (Class D) and released on $1,000 unsecured bail with a date to appear in the District Court (Caribou) on November 2, 2023. A week later, on October 7, Ofria was involved in a motor vehicle collision that resulted in the death of another individual. He was arrested and charged with manslaughter (Class A) and numerous other offenses.[9]

[8] The State further alleged that Ofria had failed to submit to a test at the request of a law enforcement officer and that he had one previous OUI offense within a ten-year period.

[9] Ofria was also charged with criminal operating under the influence resulting in death (Class B), aggravated driving to endanger (Class C), operating under the influence with one previous OUI offense and failing to submit to a test (Class D), driving to endanger with other enhancement (Class D), and violation of conditions of release (Class E).

On October 10, Ofria appeared in court by video from the Aroostook County Jail and was represented by the designated lawyer for the day. The court (*Langner, J.*) scheduled arraignment on the new charges for February 7, 2024; arraigned Ofria on the September 30 misdemeanor charge, to which he entered a not guilty plea; and scheduled a dispositional conference on that charge for November 28. The court also entered Ofria's denial to the State's motion to revoke bail on the misdemeanor charge and scheduled a hearing on the motion for the same day as the dispositional conference. Ofria was ordered held without bail pending further hearing on the motion to revoke, with bail set on the new charges at $100,000 cash and special conditions. The court granted Ofria's motion for appointment of counsel and signed an appointment order but was unable to assign counsel because no rostered attorney or public defender was available for assignment.

After his October 10 initial appearance, Ofria appeared in court on October 31 and November 7 for bail reviews. He appeared by video from the Aroostook County Jail on both occasions. On October 31, bail was continued as previously set. The record does not indicate the outcome of the November 7 bail review, but presumably bail was again continued as set given the pendency of the motion to revoke bail.

Prior to each court appearance, Ofria met with the lawyer for the day for approximately five minutes while in the same room with jail staff and other defendants scheduled to appear in court that day. Between court appearances, Ofria did not have an opportunity to meet with a lawyer or make private, confidential telephone calls.

As of the date of the hearing on November 14, Ofria remained in custody at the Aroostook County Jail (thirty-eight days), had not yet been assigned permanent counsel, and had not been personally provided with the discovery in his case.

III. Discussion

Petitioners contend that the State's delay in assigning counsel to represent them is a violation of state law and the Sixth Amendment to the United States Constitution.[10] Petitioners further assert that their due process rights have been violated in two respects—by the State's failure to provide them with discovery materials and because the bail reviews they were afforded were constitutionally defective. The principal relief they seek is release from custody

[10] Petitioners also pursue their claims under the Maine Constitution. Petitioners, however, have not presented an independent analysis of the relevant provisions of the state constitution and contend, for purposes of this proceeding, "that § 6 and 6-A guarantee nothing less than the Sixth and Fourteenth Amendments." (Pet. Cl. Arg. 2.) Although there clearly is a right to counsel under the Maine Constitution, it will not be separately analyzed or addressed here. *See State v. Moore*, 2023 ME 18, ¶ 20, 290 A.3d 533.

pursuant to Maine's habeas corpus statute, *see* 14 M.R.S. §§ 5501-5546, both individually and on behalf of others similarly situated.[11]

A. Right to Counsel

Guaranteed by the Sixth Amendment to the United States Constitution and provided for in Maine law, the right to assistance by counsel to defend against a criminal charge is "among the fundamental principles of liberty and justice," *State v. Babb*, 2014 ME 129, ¶ 10, 104 A.3d 878; "safeguards the other rights deemed essential for the fair prosecution of a criminal proceeding," *Maine v. Moulton*, 474 U.S. 159, 169 (1985); and "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty," *Johnson v. Zerbst*, 304 U.S. 458, 462-463 (1938).

If a defendant cannot afford to hire an attorney, the State has an affirmative obligation to assign counsel. *Gideon v. Wainwright*, 372 U.S. 335, 342-43 (1963); *State v. Watson*, 2006 ME 80, ¶ 14, 900 A.2d 702; *see State v. Smith*, 677 A.2d 1058, 1060 (Me. 1996); M.R.U. Crim. P. 44(a)(1). And inherent in the right to counsel is a requirement that an accused is constitutionally entitled to an attorney who provides competent, effective assistance.

[11] As noted previously, the Amended Petition also requests production from the Judicial Branch of information necessary to "identify persons entitled to relief as requested" as well as declaratory relief pursuant to 14 M.R.S. § 5953 (2023). These requests are addressed in Section III(C)(2).

See Kimmelman v. Morrison, 477 U.S. 365, 377 (1986); *Strickland v. Washington*, 466 U.S. 668, 685 (1984); *Laferriere v. State*, 1997 ME 169, ¶ 5, 697 A.2d 1301.

1. State Law

The Maine Rules of Unified Criminal Procedure require appointment of counsel for indigent defendants at initial appearance. Rule 44(a)(1) provides that when an individual charged with a criminal offense involving a risk of jail cannot afford an attorney, "the court shall advise the defendant of the defendant's right to counsel and *assign counsel to represent the defendant at every stage of the proceeding* unless the defendant elects to proceed without counsel." (Emphasis added.) Rule 5(e) provides that "[w]hen a person is entitled to court-appointed counsel, the court *shall assign counsel* to represent the defendant *not later than the time of the initial appearance*, unless the person elects to proceed without counsel." The rules are unambiguous. They require the court to assign counsel to represent an indigent defendant "not later than" the initial appearance to "represent the defendant at every stage of the proceeding."[12]

[12] The importance of assigning counsel at initial appearance was emphasized by the late Justice Harry Glassman in his 1967 treatise on the rules of criminal procedure:

> Many matters may occur during that period which are of significance to the rights of the defendant. He may desire to proceed by way of information rather than awaiting the grand jury proceedings and should be able to consult with counsel concerning the advisability of such procedure. Evidence which may be available to assist in the preparation of the defense may have disappeared or be more difficult to locate if no

The rules of criminal procedure are "intended to provide for the just determination" of criminal proceedings and are to be "construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay." M.R.U. Crim. P. 2. The rules are promulgated by the Maine Supreme Judicial Court; and once effective, "all laws in conflict therewith shall be of no further force or effect." 4 M.R.S. § 9 (2023). Court rules, thus, "have the force of law." *State v. Wells*, 443 A.2d 60, 63-64 (Me. 1982); *Cunningham v. Long*, 125 Me. 494, 496, 135 A. 198, 199 (1926) (holding that "rules have the force of law, and are binding upon the court, as well as upon parties to an action, and cannot be dispensed with to suit the circumstances of any particular case"); *accord State v. Heng*, 539 P.3d 13, 16 (Wash. 2023) ("Our court rules also guarantee the right to counsel."); *State v. Charlton*, 538 P.3d 1289, 1291-92 (Wash. 2023) (same).

In addition to court rules, a state statute specifically addresses assignment of counsel. At the time of Petitioners' initial appearances, 15 M.R.S. § 810 provided:

> steps are taken to secure that evidence between the time of the bind over and the arraignment in the Superior Court.

Glassman, *Maine Practice: Rules of Criminal Procedure Annotated* § 44.2 at 394-95 (1967). While articulated with reference to an earlier procedural framework for processing criminal cases, these principles have equal application to today's unified criminal docket.

> *Before arraignment*, *competent defense counsel shall be assigned* by the Superior Court or District Court, unless waived by the accused after being fully advised of his rights by the court, *in all criminal cases involving a felony*, when it appears to the court that the accused has not sufficient means to employ counsel. The Superior Court or District Court may in any criminal case appoint counsel when it appears to the court that the accused has not sufficient means to employ counsel.

(Emphasis added.) During the pendency of this matter, section 810 was repealed and replaced. *See* P.L. 2023, ch. 485, § 1 (effective Oct. 25, 2023) (codified at 15 M.R.S. § 810).[13] As relevant here, the new section 810 reaffirms

---

[13] Title 15 M.R.S. § 810 now provides:

> **§ 810. Copy of indictment furnished; assignment of counsel**
>
> **1. Copy of indictment furnished.** The clerk shall, without charge, furnish to any person indicted for a crime a copy of the indictment unless the indictment is sealed.
>
> **2. Assignment of counsel before arraignment.** Before arraignment, competent defense counsel must be assigned by the court unless waived by the accused after being fully advised of the accused's rights by the court if the court determines that the accused is indigent and the accused is charged with murder or a Class A, B or C crime, except when the accused has not had an initial appearance on the complaint.
>
> **3. Assignment of counsel at arraignment.** Competent defense counsel must be assigned by the court unless waived by the accused after being fully advised of the accused's rights by the court if the court determines that the accused is indigent and that:
>
> A. There is a risk upon conviction that the accused may be sentenced to a term of imprisonment;
>
> B. The accused has a physical, mental or emotional disability preventing the accused from fairly participating in the criminal proceeding without counsel; or
>
> C. The accused is a noncitizen for whom the criminal proceeding poses a risk of adverse immigration consequences.

Subsections 810(3)(B) and (C) now mandate appointment of counsel to represent two additional classes of indigent defendants *not* facing a risk of jail: those with a disability preventing them from "fairly participating in the criminal proceeding without counsel" and those who are noncitizens facing potential "adverse immigration consequences."

that "competent defense counsel must be assigned" to represent a person accused of a felony offense "[b]efore arraignment."

In this matter, neither Petitioner was assigned counsel at his initial appearance. Even though the presiding judges determined that each Petitioner qualified for court-appointed counsel and granted their motions requesting appointment of counsel, counsel was not—and could not be—assigned as required by the rules because no attorneys deemed "eligible to receive assignments" by the Commission were available for assignment. M.R.U. Crim. P. 44(a)(1). This violated court rules. *See* M.R.U. Crim. P. 5(e), 44(a)(1).

York was arraigned on his felony charges at his initial appearance because an indictment had already been returned. The version of section 810 in effect at the time of his arraignment required assignment of counsel "[b]efore arraignment." Although not assigned counsel before the arraignment/initial appearance, York was represented by a lawyer for the day at that proceeding consistent with the rules. *See* M.R.U. Crim. P. 5(e) ("Counsel may be assigned, or a lawyer for the day may be designated, for the limited purpose of representing the person at the initial appearance."). He has not challenged the effectiveness of the representation provided by the lawyer for the day on that occasion.[14]

[14] Petitioners do not contend that the representation by a lawyer for the day at their initial appearances violated their right to counsel, nor on this record would such a claim be supported. As a general matter, representation by a lawyer for the day at an initial appearance does not violate a

And, he entered not guilty pleas to the charges and therefore suffered no prejudice.

2. Sixth Amendment

The Sixth Amendment, applicable to the states through the Fourteenth Amendment, guarantees a person accused with committing a crime the right "to have the assistance of counsel for his defence," and requires appointment of counsel at state expense for a defendant accused of a crime with the potential for jail if convicted, *Gideon*, 372 U.S. at 339, 342-43. The right to counsel "attaches" when the State initiates "adversarial judicial proceedings" against a defendant—that is at a defendant's first appearance before a judicial officer when the defendant "is told of the formal accusation against him and restrictions are imposed on his liberty." *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 194, 198, 211 (2008). Although the right arises upon a defendant's first appearance, the Sixth Amendment does not require that counsel be assigned at that proceeding. *Id.* at 212. Rather, "counsel 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.* (emphasis added).

---

defendant's Sixth Amendment right to effective legal representation, *State v. Galarneau*, 2011 ME 60, ¶ 8, 20 A.3d 99, and is expressly authorized by rule, M.R.U. Crim. P. 5(e).

The U.S. Supreme Court's Sixth Amendment jurisprudence expressly ties a defendant's entitlement to appointed counsel to a post-attachment "critical stage" of the criminal prosecution. A "critical stage" is generally "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); *Brewer v. Williams*, 430 U.S. 387, 424-25 (1977); *see Aldus v. State*, 2000 ME 47, ¶ 15, 748 A.2d 463 ("[T]he purpose of the constitutional requirement of effective counsel is to ensure a fair trial." (quotation marks omitted)); *see also Rothgery*, 544 U.S. at 216 (Alito, J., concurring) (noting that in interpreting "the right's substantive guarantee" to a criminal defendant of "assistance of counsel for his defence," the Court has held consistently that the Sixth Amendment's reference to "defence" is "defense at trial, not defense in relation to other objectives that may be important to the accused").

Pretrial events and proceedings that have the potential to substantially impact a defendant's defenses to the charges or otherwise adversely affect the outcome at trial also constitute critical stages. *See Moulton*, 474 U.S. at 170 ("[T]o deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself."); *see, e.g.*, *Coleman v. Alabama*, 399 U.S. 1, 9-10 (1970) (adversarial preliminary hearing); *Massiah v.*

United States, 377 U.S. 201, 206 (1964) (post-indictment interrogation); *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961) (arraignment where defenses may be waived if not asserted); *Wade*, 388 U.S. at 237 (post-indictment identification line-ups); *Iowa v. Tovar*, 541 U.S. 77, 87 (2004) (plea hearing).[15]

More recently, the Supreme Court has expanded the objective of constitutionally entitled "assistance" to include representation in plea bargaining, acknowledging that in today's criminal justice system, "the negotiation of a plea bargain, rather than the unfolding trial, is almost always

[15] The Supreme Court has not held that a standalone preconviction bail review is a critical stage, despite some courts citing *Coleman* for that proposition. *Coleman* involved, as noted above, a preliminary evidentiary hearing to determine whether evidence was sufficient to present the case to a grand jury; bail was only an ancillary consideration. *Coleman v. Alabama,* 399 U.S. 1, 9-10 (1970). Other courts are divided on the question. *See United States v. Hooker*, 418 F. Supp. 476, 479 (M.D. Pa. 1976), *aff'd mem.*, 547 F.2d 1165 (3d Cir. 1976), *cert. denied*, 430 U.S. 950 (1977) (stating that "[a] bail reduction hearing is not a 'critical stage' of the proceedings where the defense on the merits would be impaired without the assistance of counsel"); *Padgett v. State*, 590 P.2d 432, 436 (Ala. 1979) ("The setting of bail is . . . not an adversary confrontation wherein 'potential substantial prejudice' to 'the defendant's basic right to a fair trial' inheres, but rather is limited to the issue of interim confinement." (quoting *United States v. Wade*, 388 U.S. 218, 227 (1967))); *Fenner v. State*, 846 A.2d 1020, 1033 (Md. 2004) ("[T]here exists no Sixth Amendment right to provide counsel during a bail review hearing, the only purpose of which is to ascertain the appropriate amount of bail."); *State v. Williams*, 210 S.E.2d 298, 295-96 (S.C. 1974) ("The bail hearing . . . was not a critical stage of the prosecution . . . . There [was] no showing . . . that anything occurred at the bail hearing which in any way affected or prejudiced [the] subsequent trial or that was likely to do so."). *But see Higazy v. Templeton*, 505 F.3d 161, 172 (2d Cir. 2007) (holding that a bail hearing is a critical stage of the criminal process); *Hurrell-Harring v. State*, 930 N.E.2d 217, 223 (N.Y. 2010) (citing *Higazy* with approval); *Caliste v. Cantrell*, 329 F. Supp. 3d 296, 314 (E.D. La. 2018) (holding that a bail hearing is a "critical stage" because "[t]here is no question that the issue of pretrial detention is an issue of significant consequence for the accused"); *Gonzales v. Comm'r of Corr.*, 68 A.3d 624, 631-37 (Conn. 2013) (concluding that a criminal defendant has a right to counsel in proceedings about the setting of bond). Cases considering this issue typically involve situations in which a defendant lacked any representation at a bail review. Here, Petitioners were not left to their own devices but were provided counsel—a lawyer for the day—to represent them. Absent a showing of ineffective assistance counsel, this is sufficient for Sixth Amendment purposes. Petitioners' challenge to the effectiveness of the representation provided in their bail reviews is framed in terms of a violation of due process. *See infra* Section III(B).

the critical point for a defendant." *Missouri v. Frye,* 566 U.S. 134, 144 (2012); *see also Lafler v. Cooper*, 566 U.S. 156, 165 (2012) (holding that the Sixth Amendment's guarantee of assistance of counsel "is not so narrow in its reach" because "its protections are not designed solely to protect the trial" but rather "appl[y] to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice").

Plea bargaining in Maine culminates in the dispositional conference, as mandated by Maine Rule of Unified Criminal Procedure 18. Counsel for the State and defense counsel (or a defendant who has waived the right to counsel) are required to appear and "must be prepared to engage in meaningful discussion regarding all aspects of the case with a view toward reaching an appropriate resolution." *See* M.R.U. Crim. P. 18(a)-(b). If a plea agreement is not reached, "the matter shall be set for jury trial." M.R.U. Crim. P. 18(e).

Other significant pretrial events are timed to the date of the dispositional conference as well. For example, motions affecting substantive rights, such as motions to dismiss, motions for joinder or severance, discovery motions, and motions to suppress "shall be served upon the opposing party . . . at least 7 days before the date set for the dispositional conference." M.R.U. Crim. P. 12(b)(3). Discovery not required to be furnished to a defendant at arraignment on a Class

A, B, or C offense must be provided "no later than 14 days before any dispositional conference that occurs before indictment." M.R.U. Crim. P. 16(b)(3). At a minimum, therefore, the Sixth Amendment requires assignment of counsel sufficiently in advance of a dispositional conference to be able to provide effective representation in connection with the conference as well as related matters.[16]

At their initial appearances Petitioners were each assigned a date for a dispositional conference. York was assigned a dispositional conference date of November 17 with respect to the burglary and theft charges. Ofria was assigned a dispositional conference date of November 28 with respect to the misdemeanor OUI charge. Whether a constitutional violation has occurred in connection with these events is a fact-based determination that must be made on a full record. The Petitioners' dispositional conferences were scheduled to occur after the November 14 hearing in this habeas corpus action. The record has not been supplemented and thus does not disclose what transpired with respect to those events.

This court is not able to make a final assessment as to whether either Petitioners' Sixth Amendment right to counsel has been violated; and,

[16] This is not to suggest that entitlement to court-appointed counsel under current Sixth Amendment jurisprudence is necessarily timed to the scheduling of a dispositional conference. The right could inhere earlier, depending upon the circumstances of each case.

as discussed below in Section III(C)(1), even if there were a violation the remedy is not what Petitioners are seeking through the habeas writ based on the current record. Petitioners may or may not have grounds for seeking relief based on the Sixth Amendment in their underlying cases, depending on how their cases have proceeded and, on the impact, if any, the delay in the assignment of counsel has had on their cases. *See infra* Section III(C)(1).

B. Due Process

Petitioners claim their due process rights under the Fourteenth Amendment to the U.S. Constitution and article I, section 6-A of the Maine Constitution[17] have been violated, "primarily revolv[ing] around two interrelated interests." First, they contend that the State has failed to provide "a fair and reliable determination of probable cause as a condition for any significant restraint of [their] liberty" because they "have not even *seen* the evidence on which they are being charged." Second, they maintain that their statutory and constitutional right to bail has been abridged because the two bail reviews at which they were represented by a lawyer for the day were "meaningless ritual[s]." (Pet. Cl. Arg. 7-8.)

[17] As with their right-to-counsel argument, because Petitioners have not developed or presented an independent analysis with respect to their due process claim under the Maine Constitution, it will not be separately addressed. *See Moore*, 2023 ME 18, ¶ 20, 290 A.3d 533. They also assert in passing but do not develop an equal protection argument. For the same reason, it will not be addressed.

Any restraint of a person's liberty must accord with both substantive and procedural due process. *United States v. Salerno,* 481 U.S. 739, 746 (1987); *see Doe v. Graham,* 2009 ME 88, ¶ 22, 977 A.2d 391. Substantive due process prevents the State from employing practices that "shock[ ] the conscience." *Salerno,* 481 U.S. at 746 (quoting *Rochin v. California,* 342 U.S. 165, 172 (1952)). Procedural due process assures that any government intrusion on liberty or property is done in a procedurally fair manner. *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976).

Petitioners' first argument rests upon their testimony that the State has not provided them with discovery in their cases, and therefore they have "no way of 'testing probable cause for [their] detention.'" If the State has failed to comply with its discovery obligations under the rules, there are remedies for any such violation(s). *See* M.R.U. Crim. P. 16(e). However, the fact that discovery was not furnished directly to Petitioners does not establish their charges were unsupported by probable cause. Neither Petitioner raised a probable cause challenge at his initial appearance, and both were represented by the lawyer for the day. Petitioners do not contend that the lawyer's representation was ineffective, either in general or by failing to challenge probable cause. Nor have they advanced any argument through their counsel in this proceeding that the State lacked probable cause to bring any of the charges in issue. The State's

failure to furnish them personally with the discovery may raise other concerns, but it does not equate to a lack of probable cause. Petitioners have not established sufficient prejudice to support this due process claim. *See State v. Gould*, 2012 ME 60, ¶ 28, 43 A.3d 952; *cf*. *Ingerson v. State,* 491 A.2d 1176, 1182 (Me. 1985) (rejecting defendant's argument that his due process rights were violated because the unavailability of a complete parole hearing transcript had not "caused him any prejudice").

Petitioners' second argument is that inadequate representation by the lawyer for the day at subsequent bail reviews violated their due process rights. They contend that the bail reviews afforded under the Standing Order amount to nothing more than a cursory, "publicly surveilled prehearing discussion with a temporary lawyer" who has "done none of the prehearing legwork necessary to secure the release of his client." (Pet. Cl. Arg. 7.) Again, they are not asserting that the individual lawyer for the day who represented them at their bail reviews provided ineffective representation. Rather, they contend there is a "systemic limitation on the lawyer-of-the-day program" as utilized in the Standing Order bail reviews. (Pet. Cl. Arg. 7-8.)

The record in this case does raise concerns about the way meetings between lawyers for the day and defendants in custody at the Aroostook County Jail are being conducted, at least when the meetings are conducted by video.

The physical layout and other conditions at the Aroostook County Jail do not allow for private meetings between a lawyer for the day and a defendant. A lawyer for the day appearing by video meets with all defendants appearing in court that day. All defendants are in one room. Jail staff is present in the room. The attorney's conversation with each defendant takes place in front of all others in the room. There are no headphones or other devices available to facilitate a private conversation. These conditions may or may not be necessary to accommodate remote appearances at this facility, but neither use of this medium nor other matters of administrative convenience justify compromising the confidentiality of attorney-client communications—and should be rectified forthwith.

And, as Petitioners point out, a lawyer for the day's role is, by definition, more limited than that of assigned counsel. Lawyers for the day are temporary; they do not have an ongoing relationship with a defendant. They typically represent multiple defendants in connection with a scheduled court appearance and meet with the defendants on the day of, and prior to, their appearances. Both the time they are able to devote to an individual client and the scope of their representation is more limited than assigned counsel's.

Despite these limitations, Petitioners have not demonstrated that their bail reviews amounted to a "meaningless ritual" in violation of their due process

rights. There is no indication in the record that the bail reviews offered to Petitioners were fundamentally unfair. And Petitioners have not shown that they were prejudiced, even by the limited scope of the representation provided to them by the lawyer for the day at their reviews. York's bail was adjusted favorably, twice. In Ofria's case, given the pendency of the hearing on the motion to revoke and the nature of the new charges, there would have been little likelihood of obtaining release on bail at either his first or second bail review. Nor is the court persuaded that, as a general matter, the scope of lawyer-for-the-day representation at subsequent bail reviews violates due process.[18] Thus, to the extent their petition for habeas corpus rests on due

[18] In support of this claim, Petitioners offered two examples of other incarcerated defendants who, though eligible for court-appointed counsel, had not yet been assigned attorneys and were represented at their bail reviews by a lawyer for the day. In each instance, it is contended that these individuals were disadvantaged (denied bail) because, due to the limitations of the role, the lawyer for the day was unable to anticipate the need for documentation to support the defendants' proffered reasons for release from custody. Neither example is persuasive. Defendant #1 requested release on post-conviction bail to attend to a medical issue. The presiding judge denied the request, and in passing commented that not having an assigned attorney to get the necessary documentation put the defendant "at a disadvantage." (Pet. Ex. 23.) The record also indicates, however, that the medical issue may not have been urgent and that the defendant was in custody on his fifth motion to revoke probation, which was based on new felony charges. Moreover, the judge praised the lawyer for the day's advocacy stating, "[Y]ou did have an attorney today, [the lawyer for the day], who, again has some familiarity with you, and again, made a solid argument on your behalf." Ultimately, the judge, acknowledging there is no right to post-conviction bail, *see* 15 M.R.S. § 1051(2-A) (2023)—especially with "all of these charges hanging out there"—denied the request for release and held him without bail, but left the door open for future consideration. Defendant #2 requested release on post-conviction bail in order to return to work with a former employer. (Pet. Ex. 21.) This defendant, on probation for a domestic violence conviction, was in custody on a motion to revoke probation based on alleged new criminal conduct (another domestic violence charge). The lawyer for the day advocated for his release so that he could accept the job offer. The judge remarked, "Maybe if [Defendant #2] can generate some documentation . . . about how valuable an employee you were. That might be something that could help you. I don't know." In the end, the bail decision turned on Defendant #2's history of repeated probation violations, the allegations of new criminal conduct, and

process grounds predicated on the inadequacy of the legal assistance they received at subsequent bail reviews, it is denied.

C. Relief Requested

1. Petitioners

The principal remedy Petitioners seek in this action by means of a writ of habeas corpus is a release from pretrial detention if not assigned an attorney within seven days. At common law, and now by statute, an action in habeas corpus is available "to protect and vindicate [a person's] right of personal liberty by freeing [the person] from illegal restraint." *Roussel v. State*, 274 A.2d 909, 913 (Me. 1971); 14 M.R.S. §§ 5501-5546. The court cannot conclude on this record and for the reasons discussed herein that the predicate for the relief Petitioners seek—that their current restraint is unlawful—has been established.

First, Petitioners' specific due process claims, raised for the first time in post-hearing argument, are unpersuasive as discussed above. The record neither supports that the State lacks probable cause in their cases nor that bail was improperly determined in accordance with 15 M.R.S. § 1026 (2023). Petitioners were represented adequately by an attorney, the lawyer for the day,

---

the lack of a right to post-conviction bail—not on the lack of documentation to substantiate his prospective employment. Finally, a review of the transcripts discloses that each defendant received a fundamentally fair hearing, and the representation provided was adequate.

at their initial appearances and in their subsequent bail reviews. As long as the Standing Order is in effect, they and others in custody awaiting assignment of counsel will continue to receive regular court reviews until permanent counsel can be assigned. Because this meets minimum due process standards, their detention is not unlawful.

Second, accepting, as has been determined above, that the failure to assign counsel at initial appearance violated court rules and, in York's case, a state statute, and even assuming that this also constitutes a violation of their Sixth Amendment right to counsel, it does not render their current detention unlawful, and the ultimate remedy they seek is therefore unwarranted. Cases involving a deprivation of the right to counsel, even under the Sixth Amendment, "are subject to the general rule that remedies should be tailored to the injury suffered" and "should not unnecessarily infringe on competing interests." *United States v. Morrison*, 449 U.S. 361, 667-68 (1981) (denying preconviction motion to dismiss with prejudice based on an asserted violation of defendant's Sixth Amendment right to counsel).

In considering a remedy, the "approach has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances" and that "[a]bsent [adverse] impact on the criminal proceeding . . . there is no basis for imposing a remedy in that proceeding, which can go forward with a full

recognition of the defendant's right to counsel and to a fair trial." *Id.* at 668. A delay in assigning counsel could conceivably affect the time and capacity to develop defenses, secure information, arrange for evaluations, etc., or otherwise potentially impact Petitioners' ability to defend against the charges they are facing. If so, remedies may be pursued in the context of each of their underlying cases, on a full record, depending on the particular impact of the delay in assigning counsel and any resulting prejudice.

Of course, pursuing those remedies assumes that one has a lawyer at some point to assist. A protracted, unjustified delay in assigning counsel may alter the equation for fashioning an appropriate remedy for a Sixth Amendment violation and justify granting relief. When a Sixth Amendment critical stage occurs and counsel still has not been assigned, the trial court may consider, either on its own motion or on motion by the lawyer for the day, more immediate remedies that are appropriate in the circumstances of each Petitioner's case. *Cf. United States v. Cronic,* 466 U.S. 648, 659 (1984) (holding that in the post-conviction context courts may presume a defendant suffered unconstitutional prejudice if denied counsel at a critical stage).

In addition, the 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. In the discretion of a reviewing court, given the liberty interests at stake and the statutory presumption of release on personal recognizance or unsecured bond, *see* 15 M.R.S. § 1026(2-A), excessive delay in providing counsel is a consideration to factor into the determination of Petitioners' bail.

Ultimately, for the reasons set out herein, the delay in appointing counsel to these Petitioners on this record does not support the habeas corpus relief requested.

2. Other Relief Requested

The Amended Petition asks for an order requiring the Judicial Branch to produce the information necessary to "identify [other, similarly situated] persons entitled to relief" and that those who are similarly situated (meaning defendants detained pretrial without assigned counsel to which they are entitled) also be granted habeas relief.

One who applies for a writ of habeas corpus on behalf of another is required to make a showing of the other's incapacity. 14 M.R.S. § 5511 (providing that habeas relief is available "on application of any person" on behalf of another "who would be entitled to it on his own application, when from any cause he is incapable of making it"). No such showing has been made here. The fact that one is confined or subject to restraint and lacks counsel does

not satisfy this requirement. *See Kowalski v. Tesmer*, 543 U.S. 125, 132 (2004) (stating that unsophisticated pro se defendants are presumed capable of navigating or pursuing habeas corpus actions).

The relief sought here on behalf of others is more in the nature of a class action. The principal authority cited to support this request, a recent Oregon federal district court case, *Betschart v. Garrett*, No. 3:23-cv-01097-CL, 2023 WL 7220562 (D. Or. Nov. 2, 2023), is distinguishable. *Betschart* involved a petition for habeas corpus joined with a class action brought under the federal rules. This matter was not pleaded as a class action. The rules of civil procedure governing civil actions generally and class actions specifically have limited applicability in habeas proceedings. *See* M.R. Civ. P. 81(b)(1)(A).

For the same reason, their request for data or information "necessary to identify persons entitled to relief" is not a cognizable claim in, and is beyond the scope of, a habeas corpus proceeding. The Amended Petition requests that the court "facilitate discovery of the identities of those unnamed parties entitled to relief," citing, among other authorities, discovery provisions in M.R. Civ. P. 26(a) and 34. As noted, the civil rules have limited applicability in this kind of proceeding. M.R. Civ. P. 81(b)(1)(A); *cf. Harris v. Nelson*, 394 U.S. 286, 293, 295

(1969) (interpreting corresponding provision in federal rules, Fed. R. Civ. P. 81(a)(2), as precluding discovery in federal habeas corpus actions).[19]

Finally, the Amended Petition requests that this court declare pursuant to 14 M.R.S. § 5953 that "[a]nyone entitled to counsel pursuant to a Maine state-court criminal prosecution pending without conviction, but who has not received the actual assistance of counsel other than so-called 'lawyers for the day' shall not be subject to imprisonment greater than seven days after such entitlement inhered." This request is denied.

IV. Conclusion and Order

Although the specific relief requested by Petitioners in this habeas corpus action is not warranted, this does not diminish the severity of Maine's ongoing crisis with respect to providing constitutionally required counsel for indigent criminal defendants, nor does it justify inaction on the part of those in a position to remedy the problem. Rosters of attorneys eligible to take court appointments remain depleted. Courts are unable to meet the requirements of their own rules for assigning counsel. The weekly status hearings required by the Standing Order offer a form of temporary but limited relief for in-custody defendants awaiting permanently assigned counsel; these hearings, however,

[19] Moreover, based on representations made at the hearing in this case, it appears that the data requested by the Amended Petition is available by other means.

are not sustainable and do not address the fundamental need—"to get a lawyer working, whether to attempt to avoid [a] trial or to be ready with a defense when the trial date arrives." *Rothgery*, 554 U.S. at 210. The longer the delay in assigning counsel, the higher the likelihood that defendants entitled to court-appointed counsel—whether in custody or not—may suffer prejudice in preparing for or resolving their cases.

As for the case at hand, in accordance with the foregoing the court must and hereby does ORDER as follows:

1. Petitioners' request pursuant to 14 M.R.S. §§ 5501-5546, individually and on behalf of others, for a release from custody within seven days if not appointed counsel is denied.
2. Petitioners' request for an order compelling production of data from the Judicial Branch is denied.
3. Finally, Petitioners' request for specific declaratory relief pursuant to 14 M.R.S. §§ 5951-5963 is denied.

The clerk may enter this order by reference on the docket pursuant to M.R. Civ. P. 79(a).

Dated: January 12, 2024

/s/ Wayne R. Douglas
Wayne R. Douglas
Associate Justice
Maine Supreme Judicial Court