

# MAINE COMMISSION ON PUBLIC DEFENSE SERVICES

Jim Billings, Esquire  
Executive Director

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## **Testimony of Jim Billings, Executive Director Maine Commission on Public Defense Services**

### **Before the Joint Standing Committees on Appropriations and Financial Affairs and Judiciary**

**February 11, 2025**

Good afternoon, Senator Rotundo, Representative Gattine, and members of the Joint Standing Committee on Appropriations and Financial Affairs; Senator Carney, Representative Kuhn and members of the Joint Standing Committee on Judiciary. I am Jim Billings, the Executive Director of the Maine Commission on Public Defense Services and I am here today to testify in support of LD 210, and to urge you to support passing a more robust funding package to help get Maine out of its current constitutional crisis.

#### **PDS FY 26-27 Budget Summary**

The Governor's proposed budget creates no new positions for PDS, leaving the state with a half-baked public defender office structure: 5 offices in the northern and western regions of the state, and no public defender offices in the most populous counties. Without immediate intervention, those counties will have an explosion in the number of cases without counsel like we've seen in other areas of the state. The cases without counsel list has been hovering around 1000 cases for many months now. PDS is asking for approval and funding for the remaining three public defender offices to serve York, Cumberland, and the Mid-Coast Counties (Waldo, Lincoln, Knox, and Sagadahoc).

Recruitment of law students and out of state lawyers is the most effective way to increase the system capacity for indigent legal services. We have more law students asking for internships and externships than our current number of public defender offices can accommodate. We have been approved by the Supreme Judicial Court to create a pilot program with the law school to place externs in private assigned counsel law offices. As we indicated in our 2023 annual report, we need a steady progressive increase in public defender positions in order to recruit from law schools and out of state attorneys. We will lose the recruiting momentum we have started if new positions suddenly dry up. Simply put, if we don't have new positions coming online, people will not plan their careers and lives around providing indigent legal services in Maine.

The Governor's budget also fails to include the additional \$12.7 million in "All Other" we need to pay outside counsel for FY 26 (or the \$3.5 additional in "All Other" for FY 27). Our old baseline budget number of \$43 million is obsolete. We're being billed 300,000 hours per year by private assigned counsel at a rate of \$150/hour. That's \$45 million without any other expenses. At our current rate of paying between \$3 and \$4 million per month for outside counsel fees, we'll run out of "All Other" funding in April 2026. This is also disastrous for trying to recruit new members of the bar to do PDS work or to even maintain the meager roster we have. When private attorneys providing indigent legal

services are not paid for services performed (or fear not being paid) they find other work, and even if funding is later restored, many will not come back to do PDS work. We're essentially asking people to take cases now that last a year or two and at the same time saying we won't be able to pay you tomorrow for the cases you take today.

The number of cases without counsel for protective custody cases is also unacceptable, and there are now approximately 100 cases where at least one parent who is entitled to representation at state expense under the state and federal constitutions are waiting for counsel—and there is no one for the court to appoint. We have parents who have lost custody of their children pending a hearing and they have no lawyer to help arrange visits or assist with reunification efforts with DHHS. PDS seeks to increase its ability to provide an employed defender for one parent in 1/3 of the PC cases in FY 26, and to increase that in FY 27 to cover one parent in 1/2 of the cases.

In many areas of the state there is no functioning roster of private assigned counsel for the courts to make appointments. Our modest starting model for the PD offices was to provide capacity to take roughly 1/3 of the adult criminal cases in each region with an office. That assumes that the other 2/3 of cases would be taken by the private bar, and that is not happening statewide. PDS seeks to increase the ability of the PD offices to take approximately 1/2 the adult criminal cases in this biennium. This increases system capacity and as Appendix B to our 2024 annual report demonstrates, saves the state money in the long term.

As indicated in Part II.B of our 2024 annual report, the State of Oregon has recent experience with the unrepresented crisis, and PDS is seeking to try solutions that Oregon has employed to address the crisis here. Through emergency legislation, Oregon authorized paying an increased hourly rate for counsel taking cases off their unrepresented list, and a further augmented rate for taking cases of the list where the defendant was in custody without counsel. Oregon also has 3 full-time staff positions (and they were seeking 2 more) devoted to trying to place cases off the unrepresented list. PDS is seeking three clerical positions to devote to this task and is also seeking \$2.5 million in "All Other" funding for each year of the biennium to pay a stipend to incentivize private assigned counsel taking cases off the unrepresented list.

Maine is in a constitutional crisis, and the court in the ACLU-led *Robbins* litigation has ruled that the constitutional right to counsel is being violated here. PDS respectfully requests your support in implementing its plan to see us out of it.

## **PDS BUDGET INITIATIVES**

- Additional \$12.7 million in All Other for FY 26
- Additional \$3.5 million in All Other for FY 27
- Create three new Public Defender offices (35 positions)
- Increase the Public Defender office capacity from 1/3 to 1/2 of the adult criminal cases (30 positions)
- Expand capacity of the Parents Counsel Division in FY 26 to cover one parent in 1/3 of cases (16 positions)
- Additional expansion of the Parents Counsel Division in FY 27 to cover one parent in 1/2- of cases (13 positions)
- Stipend to stimulate private assigned counsel to take cases from the unrepresented list
- Additional 3 clerical positions at central office devoted to placing cases from the unrepresented list
- Form an Appellate unit (5 positions)
- Form a post-conviction review unit (4 positions)
- Create 10 Intern positions to allow for rotating interns in PD offices
- Expand the Maine Law School Rural Practice Clinic beyond Fort Kent
- Increase central office staff for supervision of assigned counsel bar, immigration law specialist, grant writer/legislative liaison, and support staff (7 positions)

***SFY2026/2027 Biennial Summary***

		010 GF		013 Federal		
PS/AO	Legislative Count	2026 Impact	2027 Impact	2026 Impact	2027 Impact	Reason
AO	-			500	500	Provide allotment to allow agency to spend grant funds
AO	-	12,738,103	3,480,695			All Other appropriation over baseline
PS	13	1,748,329	1,890,824			Cumberland County District Defender Office
AO		252,900	160,950			
PS	12	1,573,965	1,701,707			York County District Defender Office
AO		243,300	156,500			
PS	10	1,267,226	1,369,433			Mid Coast Region Defender Office
AO		242,100	157,600			
AO	-	2,500,000	2,500,000			Stipends for case staffing
PS	16	2,060,315	2,227,622			Additional personnel for Parents Counsel Division
AO		277,080	180,480			
PS	30	4,286,421	4,641,457			Increase personnel to handle 50% criminal cases in every office
AO		238,340	206,640			
PS	3	265,575	286,599			Office Specialist to assist with coordination of counsel assignment
AO		31,029	31,029			
PS	5	748,124	809,907			Creation of an Appeals Unit
AO		120,620	77,770			
PS	4	536,435	579,914			Creation of a Post-Conviction Review Unit
AO		113,640	72,340			
PS	7	910,836	985,505			Central Office Staff
AO		62,391	62,391			
PS	13		1,801,239			Additional personnel for Parents Counsel Division
AO			254,580			
PS	-	170,250	347,600			10 Law student summer internships
AO	-	250,000	1,000,000			Maine Law Rural Practice Clinic
PS	-	117,667	130,615			Increase to AD II salary
<b>113</b>		<b>\$ 31,393,530</b>	<b>\$ 25,501,982</b>	<b>\$ 500</b>	<b>\$ 500</b>	

January 14, 2025

Governor Janet Mills  
Chief Justice Valerie Stanfill, Maine Supreme Judicial Court  
Senator Anne Carney, Senate Chair of the Judiciary Committee  
Representative Amy Kuhn, House Chair of the Judiciary Committee

Delivered via Email

Re: **Annual Report of the Maine Commission on Public Defense Services**

4 MRSA §1804(3)(H)

Governor Mills, Chief Justice Stanfill, Senator Carney, and Representative Kuhn:

The Maine Commission on Public Defense Services<sup>1</sup>, (PDS), by and through its Executive Director, Jim Billings, respectfully presents its annual report pursuant to 4 MRSA § 1804(3)(H):

By January 15th of each year, [the Commission shall] submit to the Legislature, the Chief Justice of the Supreme Judicial Court and the Governor an annual report on the operation, needs and costs of the indigent legal services system. The report must include:

- (1) An evaluation of contracts; services provided by contract counsel and assigned counsel; any contracted professional services; and cost containment measures; and
- (2) An explanation of the relevant law changes to the indigent legal services covered by the commission and the effect of the changes on the quality of representation and costs.

These statutorily required components are near the end of this report. The bulk of the report involves a discussion of the unrepresented crisis facing the state, what is being done about it now, what PDS hopes to be able to do going forward to address the unrepresented crisis, and PDS' continuing efforts at quality assurance.

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<sup>1</sup> In March 2024, the Commission's name was changed from the Maine Commission on Indigent Legal Services to the Maine Commission on Public Defense Services following the passage of LD 653, PL 2023, c. 558, §3.

PDS provides indigent legal services through a hybrid system of private assigned counsel and employed defenders representing indigent people facing a loss of liberty in cases brought by the State of Maine. Simply put, Maine either is failing to meet its constitutional obligations to its people, or it is so close to failing that it's a distinction without any real difference to our constituents. A court order issued January 3, 2025, in *Robbins, et al. v. Billings, Tardy, et al.*, cv-22-054 (Kennebec County Superior Court) (Murphy, J.), granted summary judgment for the plaintiff subclass against the Commissioners and Executive Director of PDS, ruling that the Sixth Amendment rights of the subclass are being violated in Maine.<sup>2</sup> The matter is set for further proceedings in January to determine what remedies the court will order. The subclass is a subset of the larger *Robbins* class action plaintiffs, and consists of people who “currently are, or in the future will be, eligible for appointment of counsel . . . as required by the Sixth Amendment to the United States Constitution or Article I, Section 6 of the Maine Constitution, but who remain unrepresented after arraignment or first appearance on any criminal charge punishable by incarceration or imprisonment.” *Robbins* Order at 1-2. The subclass is basically those who are either on, or who could be placed on, the unrepresented lists discussed below.

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<sup>2</sup> In its order, the court repeatedly referred to positions that PDS took in the litigation regarding various Sixth Amendment issues. Most notably, that PDS' position was that unrepresented defendants were not entitled to counsel except at discrete court events (Order at 15), not during pretrial investigation (Order at 19), not during plea negotiations (Order at 24), and not at bail hearings (Order at 26). Although counsel for PDS, from the Office of the Attorney General, made multiple arguments on behalf of PDS in the litigation, the court recognized that counsel for PDS was working under the premise that the real party in interest in the litigation was the State of Maine (Order at 41). Sixth Amendment law is not well-developed in Maine and has limited, sometimes conflicting caselaw nationwide. These arguments of counsel in the litigation based on a contested record in an area where the law is not fully developed on behalf of the State of Maine do not reflect any policy formally adopted by PDS. For example, PDS has never formally adopted a position that there is no Sixth Amendment right to counsel between initial appearance and dispositional conference. In fact, PDS is actively engaged in compensating lawyers of the day around the state to make the exact *opposite* argument—that the failure of the state to provide counsel to members of the subclass is a constitutional violation deserving of dismissal or, at the very least, release on bail. There is a distinct difference between lawyers arguing and disagreeing about *what the law ought to be* and *what the law is* (or, in this case, *may be*). It is also important to recognize that individual PDS Commissioners likely hold divergent views on both what the Sixth Amendment case law says and what the state's Sixth Amendment obligations ought to be. It is PDS' position that the State, including the courts, needs to do more to discharge its Sixth Amendment obligations, that there ought to be a remedy for when the state falls short of its obligations, and that Maine should not take a cramped view of the Sixth Amendment when putting in place a system of indigent legal services. PDS is dedicated to advancing the defense of indigent constituents in Maine.

## **I. Continuing Constitutional Crisis**

### **A. Background**

As of December 30, 2024, there were 1,150 matters pending without counsel.<sup>3</sup> The breakdown of cases needing counsel is as follows:

- 980 adult criminal
- 12 post-conviction review
- 40 direct appeals to the Maine Supreme Judicial Court
- 6 juvenile
- 112 protective custody (some of which need counsel for both parents)

Three times each week, the Judicial Branch sends PDS an Excel spreadsheet of cases needing counsel, across all case types covered by PDS. PDS in turn emails this spreadsheet to all eligible counsel. We refer to this spreadsheet as the “counsel needed” or “unrepresented” list.

The five trial-level public defender offices established in 2023 and 2024 were funded to handle 30% of the adult criminal caseload in their locations, assuming the remaining 70% of cases would be handled by the private assigned bar. While enrollment in the program of the private bar shows signs of improvement as noted in the Recruitment section below, active participation on rosters (demonstrating an availability to the courts that they will take cases) and volunteering to be assigned to cases on the counsel needed list is simply not at sufficient enough levels to carry 70% of cases where there are public defender offices or to carry 100% of the cases where there are no public defender offices.

Approximately 50% of the cases on the counsel needed list only require eligibility under Chapter 2 of our rules. This means that an attorney fresh out of law school who has completed the on-demand 2-day minimum standards training and a short application form is eligible to take the case. The idea that PDS standards are too high and are driving people away is simply not supported. The more stringent chapter 3 requirements about specialized panels only took effect in March 2024 and this problem preceded that rule change. We’ve seen a decrease in the number of attorneys over a period of years. This is shown on the line graph on page 6. Moreover, following emergency rulemaking in July 2024 to loosen waiver requirements for attorneys seeking specialized panel eligibility, only one attorney applied for a waiver under the emergency rule that they would not have been able to get under the rule adopted in March 2024.

PDS contends 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

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<sup>3</sup> These numbers may include cases where a motion to withdraw has been filed and/or acted upon by the court, but no successor attorney has yet been assigned.

50% public defender-private counsel ratio, and (c) continue with recruitment efforts at the law school level—both in Maine and elsewhere. These efforts are discussed in greater detail in Part II below.

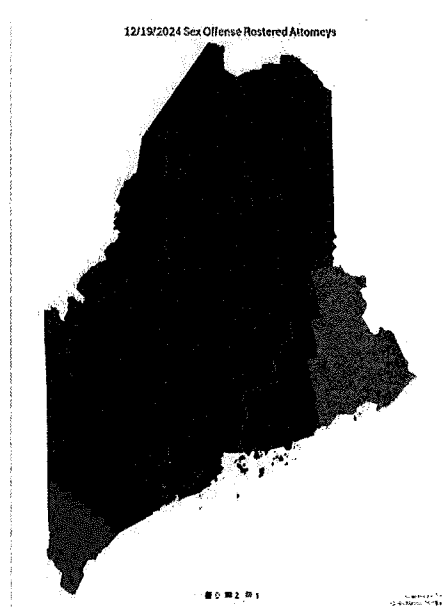
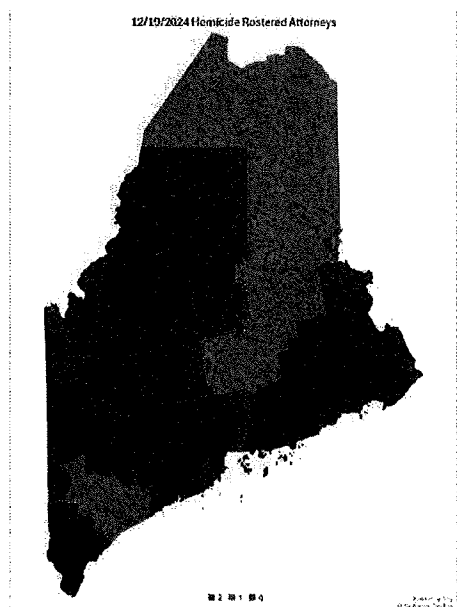
**B. Private Counsel Participation**

As of December 31, 2024, there were 333 eligible attorneys (attorneys who have submitted a renewal form or new application), of which 130 were rostered to accept new case assignments. Of the 130, 83 were on an active roster for trial-level work (excludes lawyer of the day): 29 for adult criminal and 25 for child protection.

Throughout Maine there are currently:

- 8 counties with no attorneys actively rostered to accept homicides cases
- 12 counties with no attorneys actively rostered to accept sex offense cases
- 11 counties with no attorneys actively rostered to accept major felony cases
- 8 counties with no attorneys actively rostered to accept other felony cases
- 12 counties with no attorneys actively rostered to accept domestic violence cases
- 9 counties with no attorneys actively rostered to accept OUI cases
- 7 counties with no attorneys actively rostered to accept other misdemeanor cases
- 3 counties with no attorneys actively rostered to accept protective custody cases

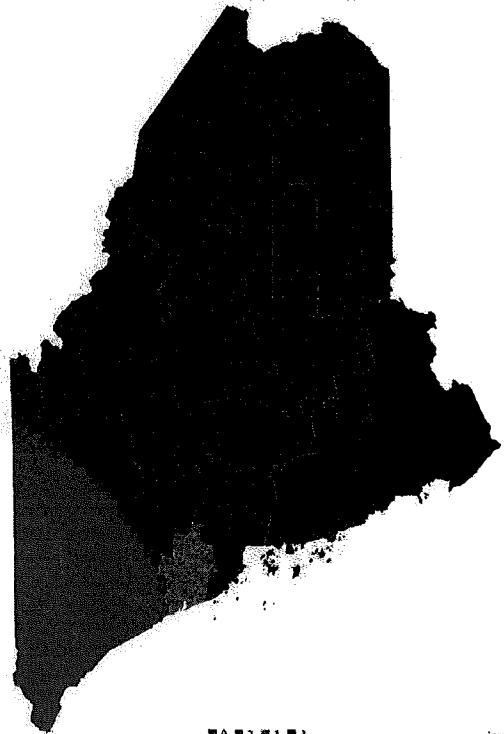
The six colored charts below illustrate the problem with a particular emphasis on the chapter 3 specialized panel case types. Red is a county (counties) with no lawyer on the roster for the specified case in that (those) court(s). But the other colors do not indicate a healthy system. A close look reveals that those courts have a single digit number of attorneys rostered for the specific case type—with 4 attorneys being the highest number of attorneys on a specific subject matter in the geographic areas depicted.



12/19/2024 Other Felony Rostered Attorneys



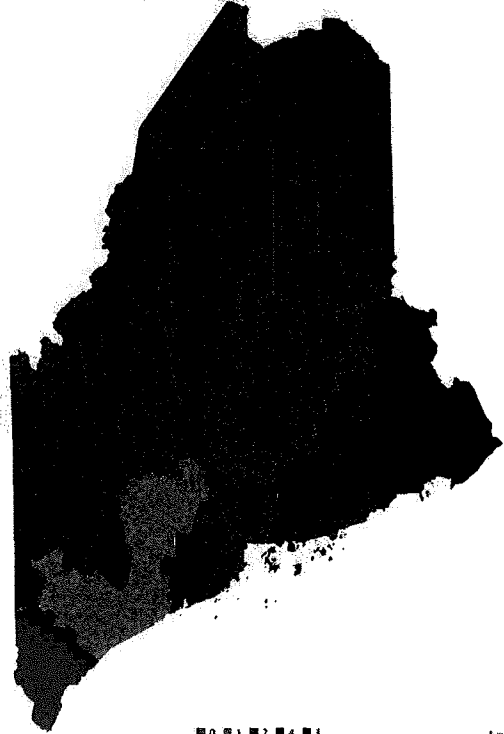
12/19/2024 DV Rostered Attorneys



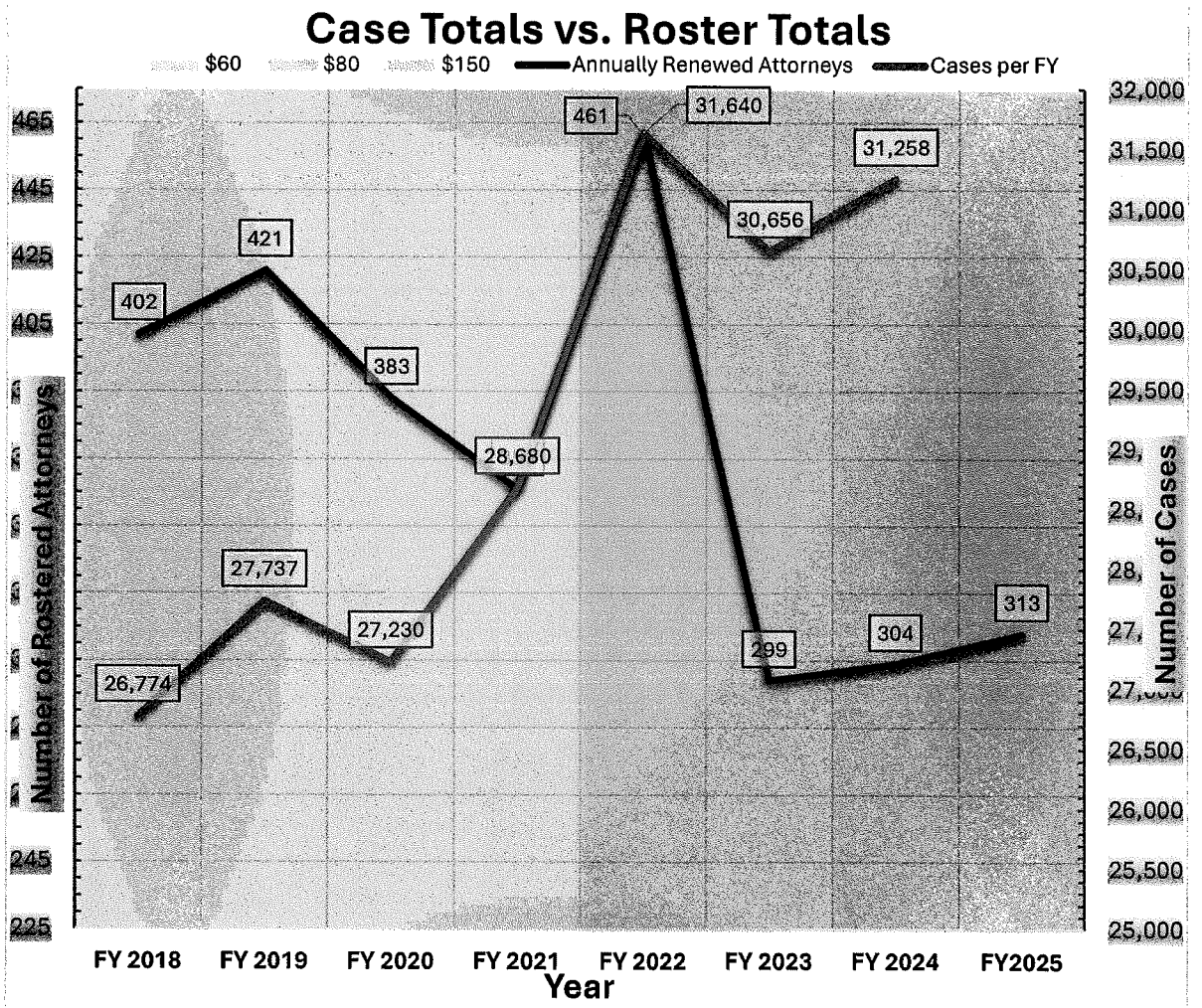
12/19/2024 Major Felony Rostered Attorneys



12/19/2024 OUI Rostered Attorneys



Despite reports that new case filings are down, that's only compared to historic highs. If the tide comes in over your forehead one day while you're stuck in the mud but only comes in up to your eyes the next, it's not really good news and you're still in a heap of trouble if you breathe through your mouth and nose! If we look at the number of new filings from four or five years ago compared to recent years, one can easily see why we continue to struggle to find counsel for every case. See the line graph below for the interplay between case numbers and roster numbers.



In order to gather data on what could be depressing roster participation, PDS staff conducted a market rate survey among members of the bar to gain information on what attorneys are charging retained clients for legal work.

105 responses were submitted and the statewide average rate charged by counsel was:

- \$300.26 per hour for misdemeanor criminal cases
- \$323.29 per hour for felony-level criminal cases
- \$314.72 per hour for other non-PDS case types
- \$113.31 per hour was the average rate charged to clients for paralegal services

The bottom line from the survey suggests that private assigned counsel providing indigent legal services are doing so at a roughly 50% discount from the rate for retained cases. As can be seen in our later discussion about the budget, the state will need to authorize an increase to the rate of \$150 per hour in the FY 28-29 biennial budget cycle. By then, the \$150 per hour rate will be five years old and reduced significantly in real dollars due to inflation. Failing to have a frank discussion about increasing the rate risks further erosion of the roster we have now.

*Attorney Burnout:*

PDS has conducted multiple surveys over the past couple of years to try to get at the causes of the erosion of the roster, and one of the primary causes is clearly attorney burnout. This was set out in in last year's annual report at pages 3-4.

On September 19, 2023, PDS surveyed its assigned counsel bar. 78 attorneys responded to the survey. From those results:

- 74% of attorneys who responded felt overwhelmed with work.
- 76% of attorneys had experienced burnout in the preceding 12 months.
- 62% of attorneys had contemplated a career change in the preceding 12 months.
- 49% of attorneys reported that returning to in-court proceedings contributed to their feelings of burnout.
- 40% of attorneys indicated that burnout had negatively impacted their professional work.
- 69% of attorneys said that burnout had negatively impacted their personal lives.

At our Second Annual Public Defense Conference in October 2024, District Defender Logan Perkins and Resource Counsel Justin Andrus led an interactive ethics presentation. During that presentation, participants were asked to answer questions about attorney burnout anonymously. Below are some important points from the results:

- 73% of attorneys sometimes or often feel emotionally numb.
- 78% of attorneys responded that sometimes, often, or always, their heart starts pounding when they think about their work with clients.
- 50% of attorneys sometimes or often feel as though they are reliving the trauma experienced by their clients.
- 83% of attorneys sometimes, often, or always have difficulty sleeping.
- 75% of attorneys sometimes, often, or always feel discouraged about the future.

- 91% of attorneys sometimes, often, or always think about their work with clients when they do not intend to.
- 78% of attorneys sometimes, often, or always expect something bad to happen.
- When asked to reflect on their own criminal law practice, attorneys used words such as: overwhelmed, isolated, guilty, flustered, stressed, busy, fear, confused, anxious, chaotic, hectic, discouraged, nonstop, scared, and burnout.

As discussed later in this report, PDS is working with the Maine Assistance Program for Lawyers and Judges (MAP) to provide trainings and resources on attorney burnout to try and address it. PDS and MAP co-hosted an attorney wellbeing training series in 2024. As part of that series, we offered eight trainings on attorney wellbeing and are continuing the series in 2025. The impact of attorney burnout on the quality and availability of counsel is significant.

## II. Solutions

### A. Current Efforts

#### 1. Public Defenders

During this past year, PDS experienced rapid expansion in the form of four new brick-and-mortar public defender offices and the establishment of a Parents Counsel Division, bringing the total number of physical offices to five. The Parents Counsel Division was created because of the urgent need for parents' counsel and made possible by phasing out the Rural Defender Unit (RDU) as new physical offices began to open. As RDU members joined public defender offices, those positions were reclassified to parents' counsel positions. There are currently two remaining RDU members who have been embedded in the Aroostook and Highlands Region offices.

The list below gives a snapshot of where we are in the hiring process for all five offices and the Parents Counsel Division. We are over 85% staffed and all five physical offices are on pace to be operational (in leased, furnished office space with internet) by the end of this month. The Parents Counsel Division does not yet have a physical location. If, as requested, the PC Division expands, a standalone office situated in Augusta, Lewiston, and/or Portland will be needed. In the meantime, Parents Counsel attorneys will be able to use space at a public defender office.

The public defender offices were funded to handle 30% of the adult criminal caseload in the geographic areas they cover.

<b>Aroostook (Caribou)</b>	<b>Downeast Region (Ellsworth)</b>	<b>Capital Region (Augusta)</b>
1 District Defender	1 District Defender	1 District Defender
2 Assistant Defender I	1 Assistant Defender I	2 Assistant Defender I
1 Assistant Defender I (RDU)	1 Assistant Defender II	3 Assistant Defender II
1 Assistant Defender II ( <i>vacant</i> )	1 Legal Administrator	1 Legal Administrator
1 Legal Administrator	1 Paralegal ( <i>vacant</i> )	2 Paralegal
1 Paralegal	1 Investigator ( <i>vacant</i> )	1 Investigator
1 Investigator		

**Tri-County (Lewiston)**

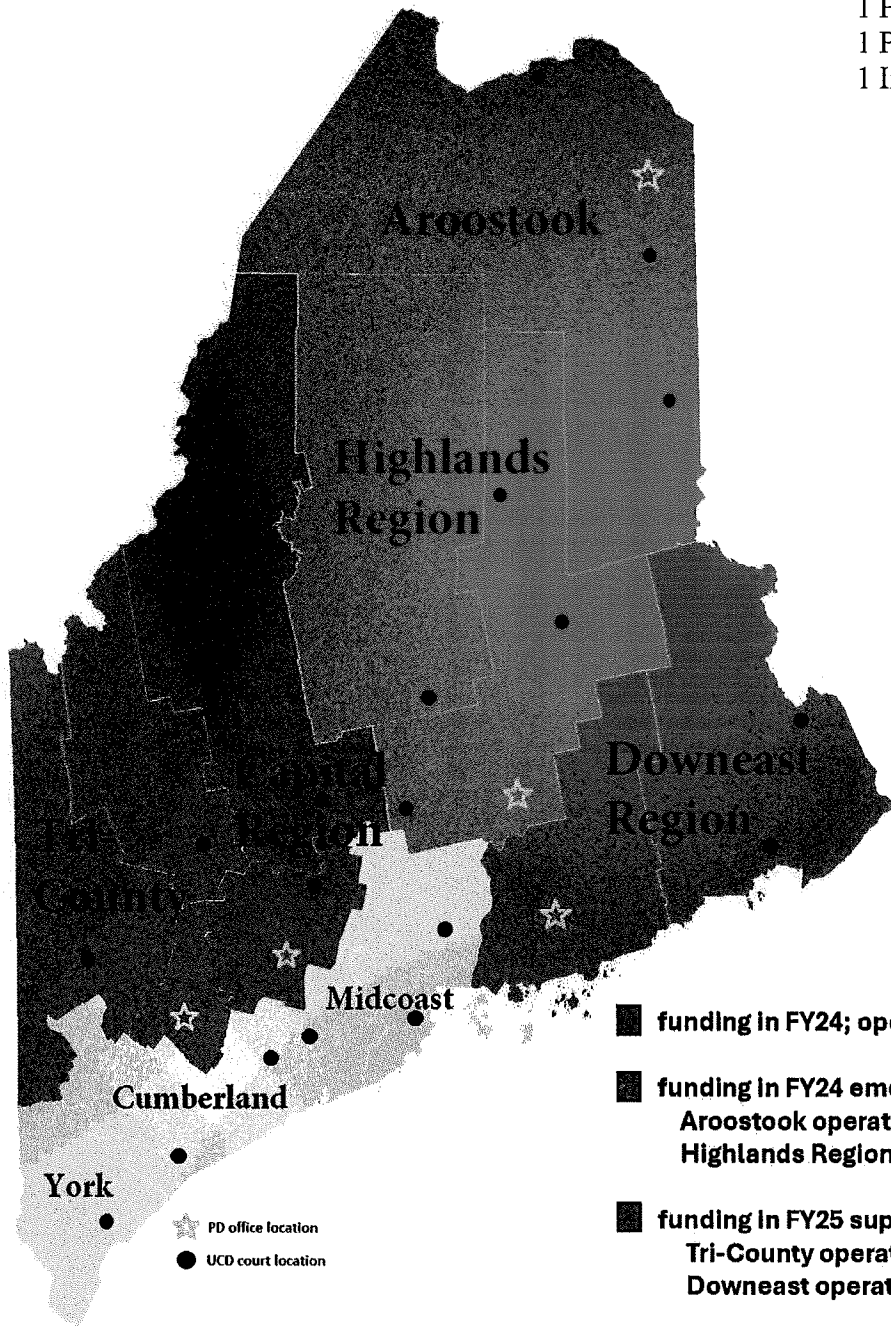
- 1 District Defender
- 4 Assistant Defender I
- 2 Assistant Defender II
- 1 Legal Administrator
- 2 Paralegal
- 1 Investigator (*vacant*)

**Parents Counsel Division**

- 1 Division Chief
- 1 Parents Counsel I (*offer accepted*)
- 1 Parents Counsel I (*vacant*)
- 1 Parents Counsel II (*vacant*)

**Highlands Region (Bangor)**

- 1 District Defender
- 1 Assistant Defender I
- 1 Assistant Defender I (*vacant*)
- 3 Assistant Defender II
- 1 Assistant Defender II (RDU)
- 1 Legal Administrator
- 1 Paralegal
- 1 Paralegal (*offer pending*)
- 1 Investigator



- funding in FY24; operational Nov 2023
- funding in FY24 emergency legislation  
Aroostook operational Nov 2024  
Highlands Region operational Nov 2024
- funding in FY25 supplemental  
Tri-County operational Nov 2024  
Downeast operational late Jan 2025
- funding requested in FY25 emergency supplemental

☆ PD office location  
● UCD court location

operational = furnished leased office space with internet/copier with employed trial attorneys.

The lag time between authorizing new offices/positions and seeing a decrease in the unrepresented lists is also something we need to discuss.<sup>4</sup> We were very fortunate in rolling out the Capital Region Public Defenders office in late 2023. There was office space available that was already set up with a lot of infrastructure—like internet wiring. We had furniture already purchased and available from central office. Most important though, when we opened the CRPD office, there was no long unrepresented list in that region. This allowed that office to focus on a process for accepting new cases in an orderly way that has kept the unrepresented lists to a minimum in Kennebec and Somerset Counties. In addition, the rosters in those two counties were such that the PD office wasn't relied on to do more than it was designed to do.

Unlike the CRPD office, the new offices in Caribou and Bangor opened up into spaces that needed significant build-out or alterations. The office in Lewiston did not need a lot of renovations to open up, but for all four new offices, there was significantly more time involved in getting the physical space set up to be operational than we experienced in Augusta. OIT, for example, had multiple steps and subcontractors involved in setting up internet for each office. Ellsworth took longer than expected to gain possession of leased space because the initial office location fell through. Once in physical possession of built out offices, we learned that the acquisition of furniture through the state procurement process was taking 6-8 weeks. Luckily, we were able to obtain some temporary furniture for some locations to cut down on delay.

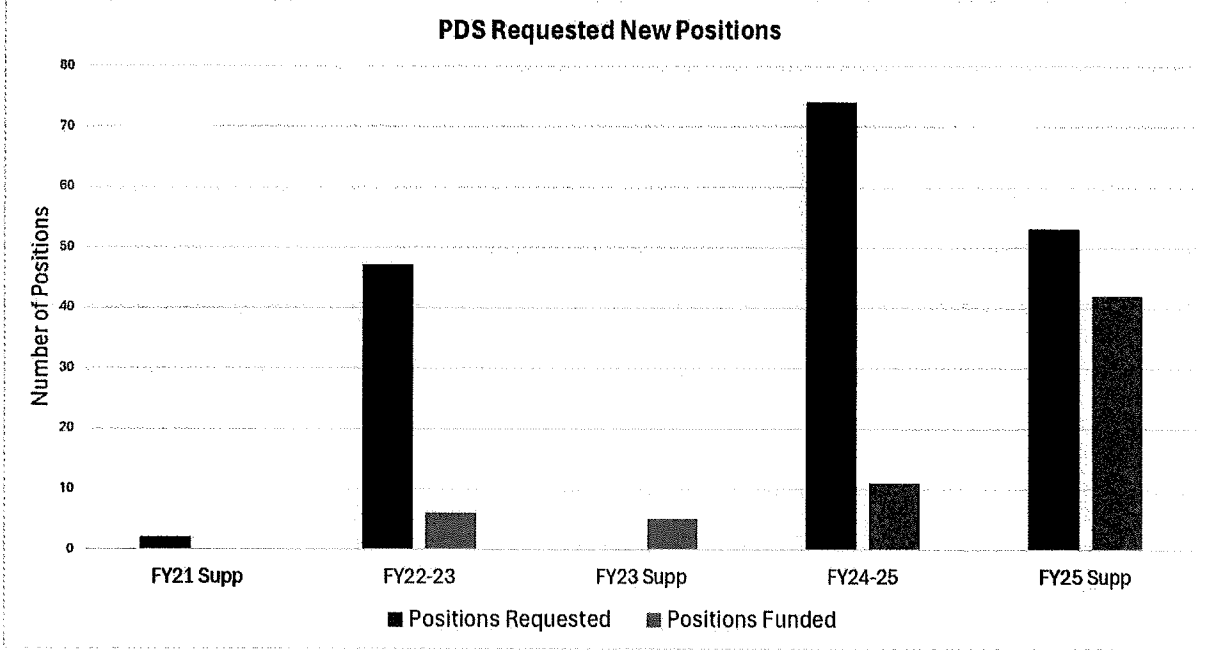
The hiring for Caribou and Bangor also has been prolonged. We've been through several cycles of posting, extending postings, receiving few or no applicants, and reposting again. We still have one attorney vacancy in each of these two offices. The Bangor office just had two attorneys start in December after nearly six months of job postings.

Finally, the Caribou, Bangor, and Lewiston offices walked into a completely different situation than what awaited the Augusta office. As indicated above, there was no long unrepresented list in Kennebec or Somerset when CRPD opened. On the other hand, as each of the offices in Caribou, Bangor, and Lewiston opened and began to be in a position to take on a significant caseload, there were between 100 and 300 cases on the unrepresented list *in each location*. To further exacerbate the situations in Bangor and Lewiston, most categories of cases, especially serious felony matters, simply have nobody on the roster in those courts. That throws the 70/30 private roster/public defender formula out the window. Unfortunately, what this means is that there is a limit to the dent those offices can make in the unrepresented list numbers. We can focus those offices on taking in-custody unrepresented cases off the list, taking the oldest cases off the list, etc., to triage or prioritize cases, but if those offices only take cases off the list, the best they could hope for with a 30% capacity is to “freshen” up the list by getting the oldest cases off to be replaced with some new matter where there is no attorney available to be assigned. Although removing the oldest cases off the unrepresented list is still a good thing, this formula produces no visible reduction in the unrepresented list.

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<sup>4</sup> This is also true for seeing any net reduction in the “all other” billable hours totals. Given the lag time in getting an office operational and the attorneys up to full caseloads, combined with the arrearage billing we see from the private assigned counsel bar (where up to 1/3 are still only submitting a voucher at the end of a case), there is an additional significant delay between the time a PD office is opened in an area and the time it takes to see a reduction in the billable hours in proportion to the carrying capacity of the PD office.

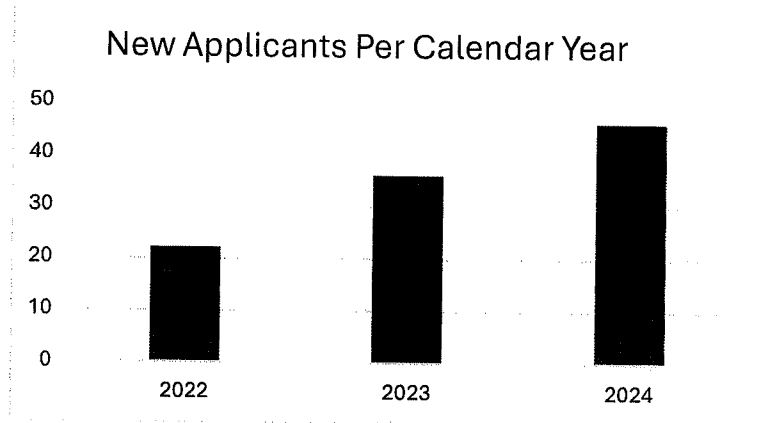
The bar graph below shows what PDS has requested for new employed positions over the past several fiscal years. If we had started the transition to a hybrid model when first requested in FY 22, we might have avoided the long list of people needing counsel that we have today.



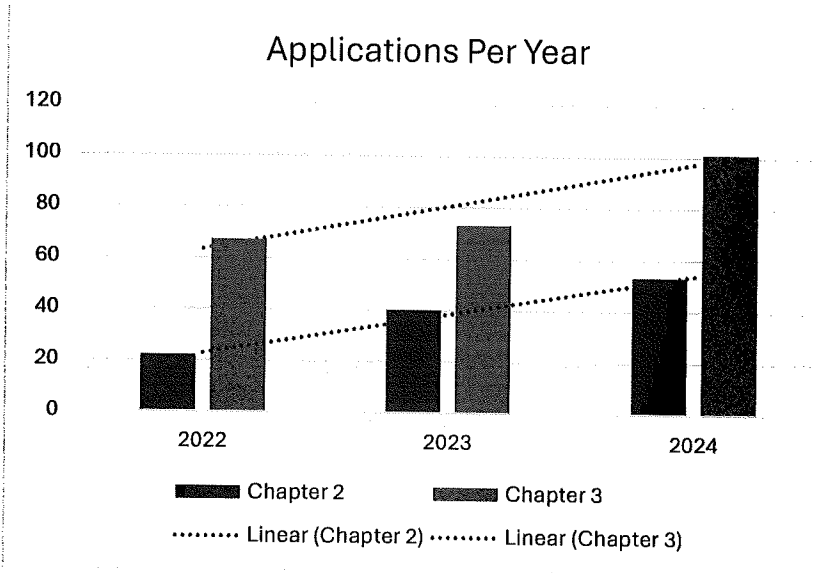
## 2. Recruitment

While the annual renewal cycle for fiscal year 2025 is still open, current renewals of attorneys participating in the PDS program have already slightly exceeded those of FY 24. While case totals for FY 25 cannot yet be finalized we can make a year-end projection to our graph contrasting case totals with renewals, reflecting the slight increase in the number of attorneys participating in the PDS program.

This increase is explained by the overall number of new attorneys who have applied to the PDS program in calendar year 2024 compared to previous years. In calendar year 2024, PDS received applications from 46 new attorneys wanting to participate in the program, 16 of whom indicated they intended to make PDS work 90% or more of their practice.



PDS also continues to see the number of applications for various case types go up year over year with 53 applications to join chapter 2 panels and 101 applications to join chapter 3 specialized panels (typically covering major felonies or other more demanding cases).



While the number of new attorneys joining PDS and the increased chapter 3 specialized panel participation are good news, those gains are offset by the number of people still leaving the program altogether or failing to renew. That is why the totals remain nearly flat, with only a slight uptick. In addition, when someone retires or fails to renew, we're typically losing experienced counsel as opposed to when someone new joins us for the first time.

PDS is trying to get demographic information from the Board of Bar Overseers that would help predict any future drop off in roster numbers related to attorney retirements. PDS is aware that Maine has an aging bar. We're seeking year of birth data for the Maine bar at large so we can cross-reference that age-related data against attorneys in our program. It is important that we see if we have a wave of further retirements coming and if our roster make up is any different than the bar at large. Given the current state of the rosters, we cannot afford any unpleasant surprises.

PDS also saw the first report back on the progress of the Public Service Loan Forgiveness program, as applied to rostered attorneys. Of the ten attorneys willing to discuss receiving discharges (out of a total of 11), those forgiven loan amounts totaled \$1,663,822.86. Two attorneys reported overpayments to the Department of Education that should result in \$40,000 being returned to one and 60 months of overpayments to the other.

On October 12, 2023, PDS received approval from the Law Court for law students working with members of an employed defender office to practice under Rule 56 of the Maine Rules of Criminal Procedure. In the summer of 2024, the Capital Region Defenders office had two student interns from the University of Maine School of Law. Both of those students were rising second year law students and will be returning to that office in the coming year, one as an extern and one as a summer intern. Both students will be fully sworn and able to practice under Rule 56.

Later this past fall, the Law Court expanded the Rule 56 permissions to allow law students to work in private assigned counsel offices providing indigent legal services through PDS. PDS plans to launch a pilot program based on this approval in the summer of 2025.

PDS staff have participated in several recruitment events this year and attended two in-person events in the greater Boston area. One of these was held at Suffolk University Law School and another was at Boston College. Staff also attended an event with the Maine State Bar Association New Lawyers section in Portland.

To facilitate future recruiting efforts, PDS has begun a process to generate new branding materials and development of marketing tools to help reach potential new recruits.

## ***B. The Way Forward***

There are many things that still need to be addressed for Mainers to benefit from the promise of a fully functioning indigent defense system. PDS urges the executive and legislative branches to make indigent defense a top priority this legislative session and fully fund our transition to a robust hybrid system that relies on a combination of a fully deployed array of public defender offices together with our private assigned counsel at a 50-50 ratio.

Thankfully, we have an example to follow in dealing with this crisis. The State of Oregon has been dealing with lists of unrepresented individuals both in and out of custody for longer than Maine. Some may question comparing Oregon's situation to Maine's, but there are some compelling reasons to do so. First, although the states are different in size and population, they are side by side on the U.S. population density statistics charts: Maine is 38<sup>th</sup> and Oregon is 39<sup>th</sup>. Although Oregon's population is about three times Maine's, it is also about three times as large as Maine. Oregon has been dealing with issues with rural access to justice similar to Maine. Also, there has been court involvement in Oregon on this unrepresented issue. There, a federal court has ordered anyone who has been in custody waiting for a lawyer to be assigned for 7 days after initial appearance to be released from custody. PDS will be in court in January in the *Robbins* litigation, and the trial judge will decide on a remedy for Maine's violation of the constitutional right to counsel.

Until recently, Oregon did not have a state employed public defender system. Oregon relied on a mixture of other delivery methods, including non-profits under contract to perform services (40% of cases) and reliance on contracts with for profit private attorneys (60% of cases) to provide services. Finally, Oregon, like Maine, pays an hourly rate for indigent legal defense work that is about 50% of the rates being charged in retained cases.

In July of this year, the Oregon Public Defense Commission issued an in-depth report dealing with their unrepresented crisis. This report can be found [here](#). The Oregon Unrepresented Crisis Plan recounts the varying levels of success Oregon has had in dealing with its unrepresented crisis and details some of the strategies they have used. PDS has proposed adopting some of the Oregon responses in its FY 26-27 budget ask. PDS is seeking to increase the number of public defender offices (Oregon's report echoes the PDS concerns with the inefficiencies of having attorneys travel great distances), PDS is seeking to increase the number of public defender positions statewide, PDS is proposing a tiered compensation system to encourage members of the private bar to take cases off the unrepresented list, and PDS is seeking to directly hire three positions to be devoted full-time to placing cases off the unrepresented list with counsel.

A final note regarding Oregon that is germane to our situation here in Maine. Even with Oregon's earlier start to address the crisis, emergency legislation to allow increased rates for counsel for taking cases off the unrepresented lists, and three full-time employees devoted to placing cases off the unrepresented lists, Oregon's plan predicts it will not have all in-custody unrepresented list cases placed with counsel until March 2025 (eight months after the date of their report), and it will not place all cases off the unrepresented list until March 2026. PDS asks that the Administration, Legislature, and Judicial Branch bear these timetables in mind when setting expectations for Maine and PDS.

a. Budget

Our baseline budget of \$43 million from FY 23-24 is now a thing of the past. The reality is that we are being billed 300,000 annual hours by private assigned counsel, trending upward. This means that "all other" budget line item alone is \$45 million. When we add in the office overhead, chapter 302 expenses for experts and investigators for employed counsel and the private assigned bar, and the personal services for all of PDS, including all the public defender offices, our actual costs for FY 25 are likely to exceed \$57 million.<sup>5</sup> Meeting our obligations for FY 25 is only possible because PDS had approximately \$12.5 million "all other" carry over from FY 23 into FY 24, and approximately \$9.5 million "all other" carry-over from FY 24 into FY 25. Also, we've been able to move unused personal services dollars (due to vacancies) to "all other" through financial orders, totaling approximately \$2.5 million. Currently, even with the FY 23-24 carry-over and unused personal service transfers to date, we are too close for comfort for FY 25 with our remaining available funds. Billable hours have been rising yearly, average voucher amounts are up, and we simply cannot afford to run short of "all other." The impact of not paying the rostered attorneys on further eroding our ability to cover the number of cases we have cannot be overstated. That is why we are seeking to have new budget language added in the emergency supplemental for FY 25 that allows us to tap into an additional \$3 million in unused personal services funds due to vacancies.

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<sup>5</sup> Please see Attachment B for various budget projection scenarios.

Submitted Hours - yearly total	
FY 21	226,687
FY 22	247,454
FY 23	261,556
FY 24	302,875
FY 25	158,090

We're at a critical juncture both as to the (a) need for counsel and (b) future budget impact. PDS recognizes its biennial budget asks for FY 26-27 are a hard pill to swallow. But not taking that medicine now just leads to more pain later, again, in both the number of unrepresented cases and financial impact. For FY 26-27 Maine is essentially paying for two public defender systems: the traditional private assigned counsel billable hours at the \$150 per hour rate, and for the beginning stages of an employed public defender system that has increased the PDS personal services budget from \$1.7 million in FY 23, to \$3.8 million in FY 24, to over \$9 million in FY 25.

PDS has run some basic budget numbers for FY 28-29 to project the following scenarios: our budget carrying on as we are now; our budget if we get the three new offices for Cumberland, York and the Mid-Coast and remaining at 30% capacity for all offices; and our budget if we gain the three new offices and increase personnel to carry 50% of the cases. See Appendix B. It's important to understand how the decisions made in FY 26-27 impact the state down the road. The analysis for FY 28-29 and beyond is based on carrying forward the annual hourly billable hours by private assigned counsel at 300,000 hours (adjusted in the varying scenarios by what impact the PD offices have on that figure).

What we see is that failing to continue to support an increase in the public defender office capacity actually costs the state more money each and every year starting in FY 28. Yes, there is pain in FY 26-27 while we build out more offices, add employed public defenders, and wait for the private assigned counsel billable hours to decline to roughly 50%, but if we act now that pain is temporary. As our preliminary FY 28-29 numbers show, the more we invest in expanding public defenders now, the more stable, predictable and contained the numbers are. In fact, FY 29 shows our overall budget numbers decreasing from current 2025 costs, even after adding all the positions we're seeking.

If we add in a rate increase for private assigned counsel in the FY 28-29 budget cycle, going to either \$175 or \$200 per hour, we see annual cost differences in our proposed plan versus where we are now of \$8 to \$10 million per year. Also, that assumes that the 300,000 hours in annual billing from private assigned counsel remains flat for FY 28-29. Our numbers show a trend of increasing billable hours, such that for FY 28-29, the gap only increases between the system we're asking for (employed public defenders doing 50% of the cases) on the one hand versus continuing to pay the billable hours at the current ratio where we have only about 30 public defenders and employed counsel total statewide.

PDS is also in discussions with DHHS (specifically OCFS) about tapping into federal funds that reimburse states for certain costs incurred in child protective matters. Under the federal Title IV-E program, we think we can increase the federal funding coming to Maine. That program reimburses states for up to 50% of eligible costs. One of the eligible costs is counsel fees for expenses related to protective custody cases—including counsel fees for parents' counsel. PDS had approximately \$9

million in counsel fees for the private assigned bar over the past twelve-month period for child protective cases. In addition, there are formulas to recoup costs attributable to employed counsel. We cannot represent that every task one of the assigned counsel or our employed counsel perform count as eligible costs for full reimbursement, but we are hoping to enter into an MOU with DHHS/OCFS that will allow Maine to increase its receipt of federal money under this program.

### **III. Continuing Quality Assurance**

#### **A. Supervision**

The following is the report of the activities of the Supervision Division for 2024.

##### *Suspensions*

In 2024, the Supervision Division initiated 71 attorney investigations based on constituent or other complaints. Six attorney suspensions were issued in 2024 for five attorneys. Three suspensions were for investigations that had been initiated in 2023 and concluded in 2024, and the remainder were initiated and resolved in 2024.

##### *Appeals*

There were two de novo appeal hearings of PDS suspensions in 2024. One appeal resulted in a decision by the presiding officer to uphold the suspension. This decision was then affirmed by the Commission and the further appeal was dismissed by the court. The second hearing has concluded, and a decision is expected shortly but it is not final yet, pending further Commission action. There are currently two additional suspensions with appeals pending.

In August the Law Court released a decision in *Patrick Gordon v. Maine Commission on Public Defense Services*, 2024 ME 59, upholding an attorney suspension from 2021 and finding that the Commission acted within its authority and the Commission's rules were enforceable.

##### *In-Court Observations*

Supervision staff have been observing via Zoom traditional in-custody LOD sessions throughout the year as well as proceedings pursuant to the Unified Criminal Docket's November 3, 2023, Standing Order on Assignment of Counsel. Supervision staff also conducted one in-person observation of live court proceedings.

##### *Hotline Calls*

In 2024, Supervision staff received and resolved 917 calls or emails from members of the public. Some of these calls are complaints about counsel but many more are simply inquiries into services or requests for procedural information. Staff still receive dozens of calls about services that PDS simply does not provide. Staff is in the process of setting up live answering for constituent calls to better facilitate receiving and distributing information to and from the public.

### *Caseload Analysis*

On January 1, 2024, Chapter 4, which set caseload standards for assigned counsel, became effective. This is the first time in PDS' history that caseload standards have been in place for assigned counsel. Caseload standards are critical to ensuring that attorneys have sufficient time to dedicate to each client's matter and provide high-quality representation.

As of December 19, 2024, there were only 14 rostered attorneys with waivers allowing them to exceed the maximum caseload limit established by Chapter 4; this is down from 19 attorneys with such waivers in March of 2024. There are currently only 28 attorneys carrying over 270 points. This is down from 38 attorneys exceeding that number in March of 2024.

The cumulative maximum point capacity of the attorneys participating in PDS cases is 61,970 points. The assigned counsel bar is currently collectively carrying a total of 41,440 points. The current number of unused or unallocated point capacity among the bar is 20,530 points.<sup>6</sup>

As of December 30, 2024, there were 980 adult criminal cases on the unrepresented list. Even assuming each of those cases were a Class A non-homicide offense, worth 4 points each (which they are not, there is a mix of misdemeanors and felonies), there is enough unused point capacity in the system to staff that list in its entirety more than five times over. Based on case averages, this list also represents approximately \$2 million in as yet unbilled attorney fees.

The consistent number of unallocated points, along with the decrease in attorneys exceeding and seeking to exceed maximum caseload limits, strongly indicate that assigned counsel are self-regulating their caseloads and are not restricted by Chapter 4.

### ***B. Training***

PDS continued to expand its training program in 2024. This past year, PDS hosted 23 in-person trainings totaling 171 hours of new material. We opened attendance at our trainings to students at the University of Maine School of Law, which has proven to be an effective recruitment strategy. By attending PDS trainings, students can learn more about specific areas of law that interest them, and they have an opportunity to network with assigned counsel, public defenders, and PDS staff.

Some of the highlights of the 2024 trainings include:

- *Racial Justice Series*: As discussed in further detail below, PDS was awarded a grant from the Maine Justice Fund to host trainings dedicated to fighting racial injustice in the courtroom. PDS was able to host five racial justice trainings this year.
- *Inaugural Child Protective Defense Conference*: For the first time ever, PDS hosted a conference that was specifically designed for attorneys representing parents in child protective proceedings. This three-day training provided an opportunity for parents' attorneys to learn about a variety of topics and brainstorm ways to improve outcomes for parents in child protective proceedings. This conference also offered an opportunity to expose law students to this important area of law.

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<sup>6</sup> These figures on point capacity do not include the public defender office attorneys—further reinforcing the conclusion that the number of unrepresented persons is not a chapter 4 issue.

- *Pozner on Cross*: Larry Pozner, a nationally recognized expert on cross-examination, came to Portland to give a 6-hour lecture on effective cross-examination. 100 attorneys attended this event.
- *NHTSA's DWI Detection & Standard Field Sobriety Testing Student Course*: This was a three-day interactive workshop in which attorneys learned how to conduct field sobriety testing. This equipped attorneys with the knowledge they need to know whether field sobriety tests are administered accurately in their cases. There was an overwhelming demand for this training, so we will be hosting it again in 2025.
- *Public Defender Onboarding Training*: This was a two-day training provided to all public defender office employees. The training involved lectures, practical exercises, and an opportunity to build community among defenders across the state.
- *PDS' Annual Public Defense Conference*: This was the second annual weeklong conference for criminal defense. This year, the first four days were about criminal defense, and the fifth day was dedicated to youth defense. In addition to local presenters, we were able to bring in national speakers from across the country. 168 attorneys attended some or all of the conference. The conference had 38 hours of instructional time, which included more than enough general, ethics, and H&D CLE credits for attorneys to satisfy their annual Board of Overseers CLE requirements.
- *Bridging the Gap*: For the third consecutive year, PDS presented an all-day training at Bridging the Gap, which is an event new bar admittees are invited to attend. This has been an excellent opportunity for PDS to showcase the multiple areas of law PDS covers and recruit new attorneys to do this work.
- *Attorney Wellbeing Series*: In response to survey results which indicated that a high number of attorneys doing assigned cases were experiencing burnout, PDS partnered with the Maine Assistance Program for Lawyers and Judges (MAP) to host bimonthly trainings about attorney mental health, wellbeing, and burnout prevention. The trainings have been well-received, and PDS and MAP plan to continue jointly delivering this series in 2025.

#### *Talent Learning Management System:*

With all the training content PDS produced this year, it was time to build an online training library. PDS secured a subscription to Talent LMS through the National Association of Public Defense (NAPD). Talent LMS is an online learning management platform where PDS stores its trainings. With the assistance of an intern through the Margaret Chase Smith program, PDS was able to upload its prior recorded trainings and materials to Talent LMS. PDS continues to upload new trainings to Talent LMS. Now attorneys can view free trainings on demand.

Because PDS obtained Talent LMS through NAPD, we have the ability to receive trainings from other jurisdictions. This is significant because, if we are aware that another jurisdiction has done a

training that would benefit our attorneys, we can ask that jurisdiction to share the training with us through Talent LMS so we do not need to reinvent the wheel.

Prior to Talent LMS, attorneys who were interested in accepting PDS case assignments would have to schedule a time to conduct a moderated replay of one or more minimum standards trainings with one of our staff. This approach cost a lot of staff time and did not allow attorneys to view the trainings outside of business hours. Now, attorneys can view the minimum standards trainings at their leisure. Talent LMS monitors their progress and issues a certificate of completion.

*Grants:*

PDS was awarded two grants this year, the Racial Justice Fund grant and the OJJDP FY 24 Enhancing Youth Defense grant.

**Racial Justice Fund Grant**

PDS was awarded a \$10,000 Racial Justice Fund grant provided through the generosity of the Maine Justice Fund. The grant funds were used to host a 5-part training series focused on fighting racial injustice in the courtroom. The trainings were well attended and had an immediate impact. After the first training, attorneys contacted the presenter about applying what they learned to their cases and potentially using experts on racial justice issues. Attorneys must be culturally competent to be effective and racial justice is a fight that is ongoing. Therefore, PDS hopes to continue to offer trainings on this topic in the future. PDS is eligible to reapply for the grant up to two more times, and we intend to do so. PDS thanks the Maine Justice Fund for their generosity.

**OJJDP FY 24 Enhancing Youth Defense Grant**

The second grant was a \$425,142.00 federal grant awarded by the United States Department of Justice Office of Juvenile Justice Delinquency Prevention (US DOJ OJJDP). PDS' proposal, the Youth Access to Counsel Project, is designed to enhance the representation of youth charged with juvenile or criminal offenses by updating the standards of practice for assigned counsel representing youth, working towards the establishment and implementation of Maine's first juvenile public defender office, creating trainings for counsel who represent youth, identifying and working to resolve systemic access to counsel barriers, and reviewing youth commitments to detention centers with a goal of improving the quality and effectiveness of counsel as well as proposing any system-level changes which reduce youth incarceration and reduce the disparate impact of incarceration on African American children. This grant is scheduled to end on September 30, 2027. PDS' goals with this grant are ambitious but achievable. Staff are working hard to begin implementing the project.

**C. *Audit and Cost Containment***

Since this agency increased staff capacity in late 2021, it has sought to improve its ability to provide high-quality legal representation to indigent Maine citizens and increase accountability. Audit staff have encouraged counsel to more accurately describe and better capture the work they are doing and have implemented several rule changes to better achieve that end.

Over the past 12 months, the hours submitted by contract counsel have increased and, consequently, costs have risen. It is believed that this increase is largely a combination of the following factors:

1. Emphasis on Counsel Doing Better Work and Accurately Capturing that Work

With increased supervision capacity, the agency has been able to more closely monitor contract counsels' performance on their cases. Chapter 4 sets the caseload standards that counsel must abide by. The objective is to ensure that attorneys are not overscheduled or overworked and are able to provide effective, high-quality, representation to each client. It is believed that these supervisory factors have contributed to counsels' ability to perform better quality work and, consequently, more work for each client.

Audit staff have worked with counsel to ensure that the time that they put into each case is captured accurately. Counsel have greatly improved their billing practices by employing granular billing. We have also emphasized the need for more timely billing. In other words, we have encouraged and enabled counsel to enter their time into our case management system much closer in time to the actual billing event than they had previously done.

Prior to 2022, with rare exception, counsel could only bill for a case when that case had either finished or when some other triggering event had occurred. Since these cases typically last several months to multiple years, counsel could be submitting a bill that included time entries from the distant past. Audit staff had significant concerns that this billing scheme did not allow the agency to accurately report the amount of work that was being performed by counsel.

In 2022, the concept of interim billing was incorporated into our rules. This change allowed counsel to bill every 90 days per case regardless of whether the case had concluded. In 2024, the rules were amended further to allow counsel to submit a bill once every calendar month per case. It is believed that allowing monthly billing has improved the ability of counsel to better capture all the time that they are working on a case. For the most part, counsel have embraced this change. Audit staff have seen a significant increase in the use of interim billing and monthly billing schemes.

2. Expansion of Training Program and Other Projects

In 2024, the agency's training program expanded. The purpose of this program is to provide counsel with continuing legal education that is specific to the cases that they handle. The hope is that with better training, counsel will employ better case strategies and will take advantage of the resources that the agency provides. Those resources include experts who will assist with documentary and testimonial evidence and includes other resources.

Chapter 301-A establishes the eligibility for payment to attend PDS-sponsored trainings. With certain limitations, including an annual cap of 40 hours, counsel can bill the agency at their hourly

rate (\$150.00) for attending these trainings. This factor alone has increased costs. Additionally, it is believed that counsel have been taking the information they have learned at these trainings and applied that to their cases. As a result, counsel have been exploring a different variety of strategies, working with various experts, and, overall, putting more time into their cases.

Another factor that has been increasing attorney hours is the use of co-counsel. In 2024, PDS began to develop protocols for when it would pay for co-counsel in a case. Rulemaking for the use of co-counsel is underway. PDS determined that co-counsel would be allowed either (a) when a case is of such a magnitude and complexity that additional assistance is necessary, or (b) when a less-experienced attorney is requesting to assist an experienced attorney on a case. In that scenario, one of the goals is to expose the less experienced attorney to cases that they are not presently qualified to handle, with the expectation that they will be qualified to take on those cases in the future. In either scenario, the allowance of co-counsel improves PDS' ability to provide high quality legal representation. Without this program, PDS would be handicapped in preparing new lawyers joining our ranks. However, it does increase the attorney hours that are worked on a case.

### 3. Increased Travel

As the data depicted below indicates, the amount of money PDS has spent on private assigned counsel travel has increased approximately five-fold since the pandemic. It must be noted that the pre-2023 figures are at older, lesser hourly rates. However, even considering the rate change from \$80 to \$150 per hour, there is still a large difference to be accounted for. PDS believes this further increase can largely be explained by the Judicial Branch's transition back to in-person proceedings.

**Travel Hours Comparison - COVID Years to Present**

Year	Hours	Cost
2019	19,977.24	\$1,198,634.40
2020	9,850.71	\$591,042.60
2021	8,062.95	\$586,877.60
2022	9,560.85	\$764,868.00
2023	17,062.97	\$2,428,894.10
2024	17,584.02	\$2,637,603.00
<b>Total</b>	<b>82,098.74</b>	<b>\$8,207,919.70</b>

2021 Total Hours

**252.06K**

2021 Travel Hours

**8.06K**

2021 Travel Hours as a % of the Grand Total

**2.92%**

2023 Total Hours

**276.23K**

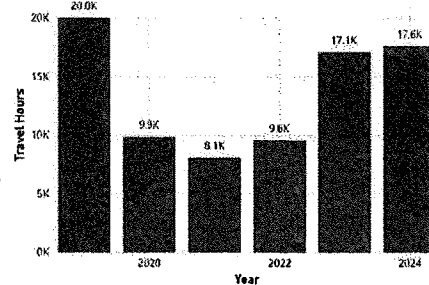
2023 Travel Hours

**17.06K**

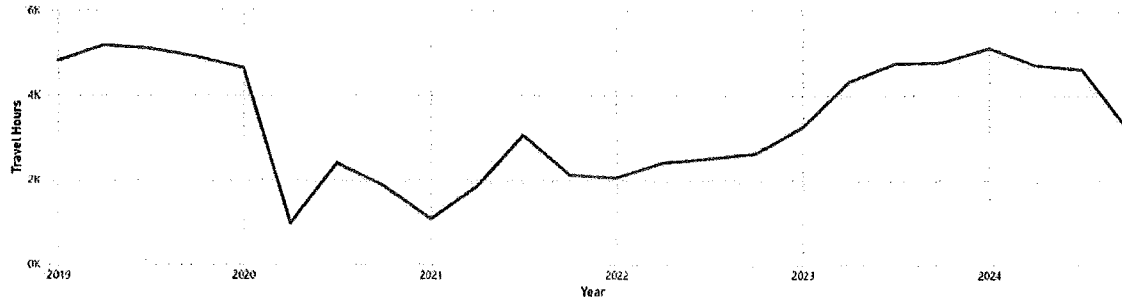
2023 Travel Hours as a % of the Grand Total

**6.18%**

**Travel Hours by Year**



**Travel Hours by Year and Quarter**



#### 4. Acceleration of Payment Obligations

Finally, it should be noted that the attorney hours at issue are taken from bills that have been submitted in 2024. As was detailed above, these bills often contain events that occurred in previous years. However, in 2024, due to the increased use of interim billing, we are paying for attorney work much faster than we had previously. In other words, the dramatic increase in *billed* hours is not necessarily because there is a commensurately dramatic increase in *performed* hours for 2024. For example, for previous billing cycles, we would typically see a significant amount of work performed in the current year show up on bills submitted in the following years. We anticipate that we will see far less of that lag in the future (meaning less work performed in 2024 showing up in post-2024 vouchers).

Based on a survey conducted in 2024, approximately 1/3 of private assigned counsel are billing monthly, about 1/3 are billing approximately every 90 days, and the remaining 1/3 are billing at some other interval with the bulk of this category still billing at the conclusion of a case. We believe this transition to monthly billing helps reduce the unquantifiable unbilled liability the state has for services performed but not yet billed. The accuracy and predictability benefits of this trend are obvious.

#### IV. Statutorily Required Information

##### A. An Evaluation of Contracts; Services Provided by Assigned Counsel; Any Contracted Professional Services

###### 1. Attorney Costs

The following table sets out the case statistics by case type for 2024:

Case Type	New Cases	Vouchers Paid	Approved Paid	Average Amount
Appeal	165	324	\$825,862.36	\$2,548.96
Central Office Resource Counsel	2	35	\$43,617.63	\$1,246.22
Child Protection	2,029	6,904	\$9,126,982.28	\$1,307.39
Drug Court	78	191	\$395,195.58	\$2,069.09
Emancipation	84	78	\$60,791.50	\$779.38
Felony	6,782	11,619	\$16,343,561.04	\$1,406.62
Involuntary Civil Commitment	1,440	1,375	\$751,274.82	\$546.38
Juvenile	1,088	1,632	\$1,774,313.32	\$1,087.20
Lawyer of the Day - Custody	3,350	3,238	\$2,194,195.51	\$677.64
Lawyer of the Day - Juvenile	111	116	\$62,271.75	\$536.83
Lawyer of the Day - Walk-in	1,560	1,553	\$1,046,651.21	\$673.95
PDS Provided Training	803	772	\$891,959.40	\$1,155.39

Misdemeanor	9,445	12,984	\$9,584,880.86	\$738.21
Petition for Modified Release Treatment	22	46	\$60,838.98	\$1,322.59
Petition for Release or Discharge	1	13	\$34,409.27	\$2,646.87
Post-Conviction Review	29	212	\$500,767.77	\$2,362.11
Probate	16	43	\$106,487.27	\$2,476.45
Probation Violation	1,560	1,886	\$1,531,352.60	\$811.96
Represent Witness on Fifth Amendment Issue	32	31	\$33,512.71	\$1,081.06
Resource Counsel Criminal	6	48	\$24,600.00	\$512.50
Resource Counsel Juvenile	1	13	\$2,010.00	\$154.62
Resource Counsel Mental Health	0	8	\$1,470.00	\$183.75
Resource Counsel NCR	0	0		
Resource Counsel Protective Custody	4	33	\$48,563.31	\$1,471.62
Revocation of Administrative Release	6	9	\$8,633.00	\$959.22
Weapons Restrictions Case	310	220	\$122,645.74	\$557.48
<b>Summary</b>	<b>28,924</b>	<b>43,383</b>	<b>\$45,576,847.91</b>	<b>\$1,050.57</b>

The total cost of direct payments to attorneys of \$45,576,847 is an increase from \$32,306,700 in 2023.

## 2. Contracts

Other than services PDS receives from the State directly, there are two outside contracts. The first is a contract with an attorney skilled in immigration law. Immigration counsel is available to confer with PDS counsel on any case in which there may be immigration consequences. Because immigration law is complicated, and changes frequently, this service is essential to PDS operations. The services immigration counsel provides vary from month-to-month, but the effective cost to PDS is much less than it would cost to engage immigration counsel on an *ad hoc* basis at a typical hourly rate.

The second contract is between PDS and Justice Works, an outside vendor that provides the PDS case management and billing system. This contract was the product of competitive bidding in 2016 and is in its final extension. PDS relies on this service for the core of its financial relationship with assigned counsel. After a competitive bidding process, PDS awarded a new multi-year contract to Justice Works to develop a new case management system and billing system to replace the current outdated and limited system. We anticipate the launch of that new system in December 2025. Public defender offices are already using an off-the-shelf version of the new system and will transition to the new PDS custom system when it launches.

**B. An Explanation of the Relevant Law Changes to Indigent Legal Services and the Effect of the Changes on the Quality of Representation and Costs.**

There were four major statutory changes impacting the indigent legal services covered by the Commission:

**4 MRSA §1806** PL 2023 Chapter 638, §17 – allows the executive director or their designee to report potential professional misconduct under the Maine Rules of Professional Conduct to the Board of Overseers of the Bar and provide information and records related to the potential professional misconduct to the Board.

**15 MRSA §§ 3010 & 3308-C** PL 2023 Chapter 638 §§20, 22 – allows PDS staff to have access to juvenile case records and juvenile criminal history information for the purpose of assigning, evaluating or supervising counsel.

**15 MRSA § 3306** PL 2023 Chapter 638 §21 – all juveniles are presumed to be indigent and entitled to counsel.

**22 MRSA §§ 4005-D, 4007, 4008** PL 2023 Chapter 638 §§ 24, 26, 29 – allows the executive director or their designee to attend and observe child protective court proceedings and access child protective records for the purpose of assigning, evaluating or supervising counsel.

**V. Further Legislative Changes Needed**

The proper function of PDS requires several statutory changes that will enhance, and in some instances properly enable, its activities. Those proposed statutory charges are set out in the attached Appendix A.

Broadly, the proposed changes include:

1. Revisions to the PDS enabling statute definitions for indigent legal services, employed counsel, and public defender;
2. Removal of guardianship, adoption, and emancipation from PDS' scope of services;
3. Prohibits direct assignment or appointment by the courts to employed counsel and public defenders;
4. Makes PDS training materials confidential;
5. Addresses continuing issues concerning attorney-client communications in correctional facilities; and
6. Revises language in the confidentiality section of 22 MRSA § 4007 to encompass records under the chapter and not merely the subsection.

In addition, PDS also urges the Legislature to revisit LD 1134 and consider moving to what most states<sup>7</sup> do and not make violating conditions of bail a separate criminal offense. This would free up court, prosecutor, and defense counsel resources in a time when we're all stretched thin.

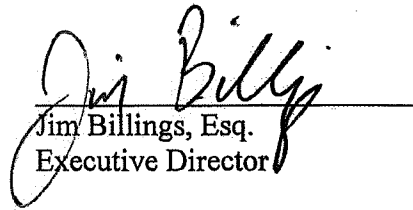
A review of Judicial Branch case data indicates that the top five currently pending charges in the UCD (as of mid-November) are the following:

Violating Condition of Release	13.2%
Theft By Unauthorized Taking or Transfer	5.8%
OUI (Alcohol)	4.5%
Domestic Violence Assault	4.4%
Unlawful Possession of Scheduled Drug	4.3%

Leaving aside domestic violence assault from the above table, the remaining relatively minor misdemeanor charges represent 30% of the cases pending in the courts.

We appreciate your continued support and look forward to a productive legislative session that works to solve the constitutional crisis facing the State of Maine today.

Respectfully submitted,

  
Jim Billings, Esq.  
Executive Director

cc: PDS Commissioners  
PDS Staff  
PDS Eligible Counsel  
PDS Interested Party Distribution List

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<sup>7</sup> “Only a handful of states—including Alaska, Colorado, Connecticut, Delaware, Illinois, Maine, and Wisconsin—also have a separate crime for conditions violations other than nonappearance. Generally, a conditions violation results in sanctions, such as new or increased conditions or increased bail. If the violation of release conditions is commission of a new offense, common penalties include revocation of current release, denial of release for new offense, or upon conviction, enhanced or consecutive sentencing.” <https://www.ncsl.org/civil-and-criminal-justice/pretrial-release-violations-bail-forfeiture>

## APPENDIX A

### *Proposed Statutory Changes for the Frist Regular Session of the 132<sup>nd</sup> Legislature*

1. 4 MRSA §1802, Definitions
2. 4 MRSA §1802-A, Employed counsel and public defender
3. 4 MRSA §1804, Commission responsibilities
4. 4 MRSA §1806, Information not public record
5. 15 MRSA §810, Copy of indictment furnished; assignment of counsel
6. New proposed statute concerning attorney-client communications in correctional facilities
7. 4 MRSA §1804, Commission responsibilities

## Appendix B – FY26-29 Budget Projections

	298,096.32 hours 12/1/23-11/30/24	300,000 hours no new positions	300,000 hrs increase to 50%	240,000 hrs increase to 50%	210,000 hours 30% Statewide	150,000 hours 50% Statewide	300,000 hours Existing 6 Offices Only
<b>ALL OTHER</b>	<b>FY25</b>	<b>FY26</b>	<b>FY26</b>	<b>FY27</b>	<b>FY28/FY29</b>	<b>FY28/FY29</b>	<b>FY28/FY29</b>
Counsel costs at \$150/hr	\$44,714,448	\$45,000,000	\$45,000,000	\$36,000,000	\$31,500,000	\$22,500,000	\$45,000,000
PDS operating expenses		\$1,689,638	\$1,689,638	\$1,932,230	\$2,225,000	\$2,225,000	\$2,225,000
Non-counsel costs via Ch 302	\$2,250,000	\$2,500,000	\$3,000,000	\$3,000,000	\$3,000,000	\$3,000,000	\$3,000,000
New office AO costs			\$1,253,720	\$1,116,750	\$721,083	\$1,172,587	
Projected AO need		\$49,189,638	\$50,943,358	\$42,048,980	\$37,446,083	\$28,897,587	\$47,225,000
<b>PERSONAL SERVICES</b>							
current staffing totals (no new positions)	\$9,103,146	\$9,558,303	\$9,558,303	\$10,036,218	\$10,538,029	\$10,538,029	\$10,538,029
additional positions			\$10,936,256	\$13,632,282	\$7,549,065	\$14,313,896	
Projected PS need			\$20,494,559	\$23,668,500	\$18,087,094	\$24,851,925	
<b>TOTAL PS &amp; AO for offices/outside counsel</b>		<b>\$58,747,941</b>	<b>\$71,437,917</b>	<b>\$65,717,480</b>	<b>\$55,533,177</b>	<b>\$53,749,512</b>	<b>\$57,763,029</b>
<b>ALL OTHER</b>	<b>FY25</b>	<b>FY26</b>	<b>FY26</b>	<b>FY27</b>	<b>FY28/FY29</b>	<b>FY28/FY29</b>	<b>FY28/FY29</b>
Counsel costs at \$175/hr	\$52,166,856	\$52,500,000	\$52,500,000	\$42,000,000	\$36,750,000	\$26,250,000	\$52,500,000
PDS operating expenses			\$1,689,638	\$1,932,230	\$2,225,000	\$2,225,000	\$2,225,000
Non-counsel costs via Ch 302	\$2,250,000	\$2,500,000	\$3,000,000	\$3,000,000	\$3,000,000	\$3,000,000	\$3,000,000
New office AO costs			\$1,253,720	\$1,116,750	\$721,083	\$1,172,587	
Projected AO need			\$58,443,358	\$48,048,980	\$42,696,083	\$32,647,587	\$54,725,000
<b>PERSONAL SERVICES</b>							
current staffing totals (no new positions)	\$9,103,146	\$9,558,303	\$9,558,303	\$10,036,218	\$10,538,029	\$10,538,029	\$10,538,029
additional positions			\$10,936,256	\$13,632,282	\$7,549,065	\$14,313,896	
Projected PS need			\$20,494,559	\$23,668,500	\$18,087,094	\$24,851,925	
<b>TOTAL PS &amp; AO for offices/outside counsel</b>		<b>\$64,558,303</b>	<b>\$78,937,917</b>	<b>\$71,717,480</b>	<b>\$60,783,177</b>	<b>\$57,499,512</b>	<b>\$65,263,029</b>
<b>ALL OTHER</b>	<b>FY25</b>	<b>FY26</b>	<b>FY26</b>	<b>FY27</b>	<b>FY28/FY29</b>	<b>FY28/FY29</b>	<b>FY28/FY29</b>
Counsel costs at \$200/hr	\$49,185,893	\$60,000,000	\$60,000,000	\$48,000,000	\$42,000,000	\$30,000,000	\$60,000,000
PDS operating expenses			\$1,689,638	\$1,932,230	\$2,225,000	\$2,225,000	\$2,225,000
Non-counsel costs via Ch 302	\$2,250,000	\$2,500,000	\$3,000,000	\$3,000,000	\$3,000,000	\$3,000,000	\$3,000,000
New office AO costs			\$1,253,720	\$1,116,750	\$721,083	\$1,172,587	
Projected AO need			\$65,943,358	\$54,048,980	\$47,946,083	\$36,397,587	\$62,225,000
<b>PERSONAL SERVICES</b>							
current staffing totals (no new positions)	\$9,103,146	\$9,558,303	\$9,558,303	\$10,036,218	\$10,538,029	\$10,538,029	\$10,538,029
additional positions			\$10,936,256	\$13,632,282	\$7,549,065	\$14,313,896	
Projected PS need			\$20,494,559	\$23,668,500	\$18,087,094	\$24,851,925	
<b>TOTAL PS &amp; AO for offices/outside counsel</b>		<b>\$72,058,303</b>	<b>\$86,437,917</b>	<b>\$77,717,480</b>	<b>\$66,033,177</b>	<b>\$61,249,512</b>	<b>\$72,763,029</b>

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 Public Defense Services; )  
JOSHUA TARDY, in his official capacity as )  
Chair of the Maine Commission on Public )  
Defense 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 )  
Public Defense Services; and the STATE OF )  
MAINE, )  
)  
Defendants. )  
)

**COMBINED ORDER ON PARTIALLY  
DISPOSITIVE MOTIONS**

Pending before the Court are a number of motions filed by the parties, some of which require resolution before the Phase I trial now scheduled to begin in January of 2025. The Court separated claims originally made by Plaintiffs into two phases in the Court’s Combined Order dated February 27, 2024. Plaintiffs are a Subclass of the original Class certified by the Court on July 13, 2022. The Court amended the definition of the Subclass on September 26, 2024 following briefing.

The Subclass of Plaintiffs in this Phase I trial of the class action brought by the ACLU of Maine in 2022 is now defined as follows:

All individuals who currently are, or in the future will be, eligible for appointment of counsel by the Superior or District Court as required by the Sixth Amendment

to the United States Constitution or Article 1, Section 6 of the Maine Constitution, but who remain unrepresented after arraignment or first appearance on any criminal charge punishable by incarceration or imprisonment.

Order Mot. Amend Class Def., at 10. For purposes of this Combined Order, the Court will use “Plaintiffs” to refer to the individuals who comprise the amended Subclass. The Defendants remaining in this litigation are the Executive Director and Commissioners of the Maine Commission on Public Defense Services (hereinafter MCPDS) and the State of Maine, who is a Party-in-Interest on Count III and a party in Count V.

The Court in this Combined Order addresses the following motions: Plaintiffs’ Motion to Strike Jury Demand as to Count I; Plaintiffs’ Motion for Partial Summary Judgment on liability issues in Counts I, II, III, and V<sup>1</sup>; MCPDS Defendants’ Motion for Summary Judgment on Counts I and II; the State of Maine’s Motion for Summary Judgment on Count V; and the State of Maine’s Motion to Continue Trial.<sup>2</sup>

#### **I. Plaintiffs’ Motion to Strike Jury Demand**

Before the Court considers the parties’ motions for summary judgment, it will address the pending question of whether a jury trial is available to MCPDS Defendants on Count I. The Defendants filed a jury trial demand as to “all claims” on October 1, 2024 but clarified at an October 11, 2024 hearing they are demanding a jury only on Counts I and II. Because the parties agree that the MCPDS Defendants have a statutory right to a jury trial on Count II under the Maine Civil Rights Act, the Plaintiffs’ Motion filed on October 15, 2024 focused solely on Count I. The MCPDS Defendants filed their opposition on November 5, 2024 and the Plaintiffs filed their reply on November 12, 2024.

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<sup>1</sup> The Court dismissed Count IV brought against the agency MCPDS on August 13, 2024.

<sup>2</sup> The Court defers ruling on two motions: Plaintiffs’ Motion in Limine to Exclude Evidence of Prior Convictions, Prior Arrests, Bad Acts, or Pending Criminal Charges; and Motion to Limit the Testimony of Dr. Rachel Casey. These will be discussed at the next conference of counsel now set for January 6, 2025.

**a. Injunctive Relief**

The Plaintiffs argue that because Count I is an equitable claim the MCPDS Defendants are not entitled to a jury trial. The Court agrees.

Under the Maine Constitution, a party has a right to a jury trial in all civil actions “except in cases where it has heretofore been otherwise practiced . . .” Me. Const. art. I, § 20. The Law Court in 1989 held that the right to jury trial exists unless it is “affirmatively shown” that a jury trial was unavailable in such a case when Maine’s Constitution was adopted in 1820. *N. Sch. Congregate Hous. v. Merrithew*, 558 A.2d 1189, 1190 (Me. 1989) (citing *In re Shane T.*, 544 A.2d 1295, 1297 (Me. 1988) (finding no right to a jury trial because suits adjusting the relationship between parent and child were heard in equity without a jury prior to 1820) *and see also City of Portland v. DePaolo*, 531 A.2d 669, 670 (Me. 1987) (finding a right to a jury trial in a civil suit seeking monetary penalties for violations of the City’s anti-pornography ordinance, even though that type of action was unknown in 1820)). The Law Court has also consistently held that the Maine Constitution provides a right to a jury trial for legal claims but not equitable claims. *See, e.g., Town of Falmouth v. Long*, 578 A.2d 1168, 1171–72 (Me. 1990); *DesMarais v. Desjardins*, 664 A.2d 840, 844 (Me. 1995); *DiCentes v. Michaud*, 1998 ME 227, ¶ 7, 719 A.2d 509 (“Because matters in equity were never triable of right to a jury, the right to a jury trial does not exist for claims sounding in equity.”).

The Defendants argue that a jury trial is presumed here because the Plaintiffs cannot prove that a jury trial was unavailable for this cause of action (or a suit of the same general nature) prior to 1820. Defs.’ Opp’n to Pls.’ Mt. to Strike 3–4. However, this argument ignores the core of the Article I, Section 20 analysis which has been consistently used by the Law Court whenever this issue arises—jury trials are provided for legal claims but not equitable claims.

*See, e.g., DaimlerChrysler Corp. v. Exec. Dir., Me. Revenue Servs.*, 2007 ME 62, ¶ 20, 922 A.2d

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The Maine Constitution provides that: ‘In all civil suits, and in all controversies concerning property, the parties shall have a right to a trial by jury, except in cases where it has heretofore been otherwise practiced . . . .’ Actions sounding in equity, ‘cases where it has heretofore been otherwise practiced,’ do not have a right to a jury trial.

(internal citations omitted); *DesMarais*, 664 A.2d at 844

Our ‘practice in analyzing the right to a jury trial is to find there is such a right unless it is affirmatively shown that a jury trial was unavailable in such a case in 1820.’ The Maine Constitution thus provides a jury trial for legal claims, but not equitable ones.

(internal citations omitted); *DiCentes*, 1998 ME 227, ¶ 7, 719 A.2d 509

The right to jury trial in civil matters is found in article 1, section 20 of the Maine Constitution, which provides in pertinent part that ‘[i]n all civil suits, . . . the parties shall have a right to a trial by jury, except in cases where it has heretofore been otherwise practiced.’ Pursuant to M.R. Civ. P. 38, this right ‘shall be preserved to the parties inviolate.’ We have construed article 1, section 20 to provide ‘a broad constitutional guarantee of a right to a jury in all civil cases except where by the common law and Massachusetts statutory law that existed prior to the adoption of the Maine Constitution in 1820 such cases were decided without a jury.’ Because matters in equity were never triable of right to a jury, the right to a jury trial does not exist for claims sounding in equity.

(ellipses in original) (internal citations omitted)). Thus, the question this Court must first answer is whether a claim for injunctive relief is a legal or an equitable claim. If Count I is equitable, there is no need to delve further into pre-statehood common law or Massachusetts law because equitable claims are not tried before a jury.

To distinguish legal claims from equitable ones, the Law Court considers the “basic nature of the issue presented, including the relief sought.” *DesMarais*, 664 A.2d at 844. In a 1993 case, the Law Court specifically held that “[e]ntitlement to a jury trial depends on the type of relief requested by the claim, whether it be in the form of a complaint, a counterclaim[,] or a

cross-claim.” *Morris v. Resol. Tr. Corp.*, 622 A.2d 708, 716 (Me. 1993) (superseded by statute on unrelated grounds in *Wilmington Tr. Co. v. Sullivan-Thorne*, 2013 ME 94, ¶ 11, 81 A.3d 371).

The relief requested here—injunctive relief—is equitable. *See, e.g., Bangor Historic Track, Inc. v. Dep’t of Ag.*, 2003 ME 140, ¶ 11, 837 A.2d 129 (“[I]njunctive relief is an equitable remedy.”). Federal courts conclude the same. *See, e.g., Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982) (“It goes without saying that an injunction is an equitable remedy.”). The fact that Plaintiffs seek an equitable remedy is alone sufficient to render Count I equitable and to eliminate the parties’ jury trial right. *See Morris*, 622 A.2d at 716; *DaimlerChrysler Corp.*, 2007 ME 62, ¶¶ 20, 23–24, 922 A.2d 465; *DesMarais*, 664 A.2d at 844–45. In fact, the Law Court concluded another case was equitable in nature when a plaintiff sought both injunctive relief and, “as a secondary measure,” a civil penalty. *Town of Falmouth*, 578 A.2d at 1172. Even the inclusion of a claim for a civil penalty alongside the requested injunctive relief did not transform that case into one entitling the parties to a jury trial. In Count I, the Plaintiffs do not seek damages, civil penalties, or any kind of legal relief; they seek an injunction requiring the Defendants to comply with the Sixth Amendment.

The Defendants also contend they are entitled to a jury trial because a Section 1983 claim is a “legal claim sounding in tort.” Defs.’ Opp’n to Pls.’ Mt. to Strike 5. The Defendants rely on a Supreme Court case, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), in which the Supreme Court concluded a Section 1983 claim was an action at law entitling parties to a jury trial when plaintiffs sought legal relief in the form of monetary damages. *Id.* at 709–10. It is difficult to see why Defendants find this case persuasive. The Supreme Court noted: “[a party] is *not* entitled to a jury trial on his entitlement to a remedy that sounds not in law but in equity.” *Id.* at 713 (emphasis added). Again, in Count I, Plaintiffs are

not seeking monetary damages. Indeed, *City of Monterey* actually supports the Plaintiffs' argument that a jury trial is not available to the Defendants as a matter of right in Count I.

***b. Declaratory Judgment***

Plaintiffs also seek a declaratory judgment under Count I. The Court understands them to ask the Court to declare that they have a right to continuous representation under the Sixth Amendment, from the time of their initial appearance through the pretrial and plea-bargaining processes and trial. The fact that they seek such a declaration does not change the Court's conclusion that MCPDS Defendants are not entitled to a jury trial on Count I.

Requests for declaratory judgments "are neither legal nor equitable." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 284 (1988). The inclusion of a prayer for declaratory judgment "does not independently generate a right to a jury trial." *See Zani v. Zani*, 2023 ME 42, ¶ 15, 299 A.3d 9. In Maine, when a plaintiff seeks a declaratory judgment, the procedure followed by the court is governed by the "nature of the case." *Socec v. Me. Turnpike Auth.*, 129 A.2d 212, 213 (Me. 1957). That is, the right to a jury trial is "preserved" so long as the right is provided in the Maine Constitution ("under the circumstances and in the manner provided in Rules 38 and 39"). M.R. Civ. P. 57 (referencing Rule 38, providing the civil jury trial of right, and Rule 39, providing the procedure when a party demands a civil jury trial).

As described above, the right to a jury trial is provided for legal claims but not equitable claims. *See supra* pp. 3–5. Thus, if an action including a request for declaratory judgment "is legal in nature, the right to trial by jury is preserved." M.R. Civ. P. 57 reporter's notes; *see Me. Broad. Co. v. E. Tr. & Banking Co.*, 142 Me. 220, 226 (1946) ("The right of jury trial in what is essentially an action at law may not be denied a litigant merely because his adversary has asked that the controversy be determined under the declaratory procedure." (quoting *Aetna Cas. & Sur.*

*Co. v. Quarles*, 92 F.2d 321, 325 (4th Cir. 1937)); see also *Perkins v. Applebee*, No. CV-80-667, 1982 Me. Super. LEXIS 63, at \*3 (Jan. 20, 1982) (“[A] request for a declaratory judgment does not transform a legal action into an equitable one.”). Claims in equity, including equitable claims seeking declaratory judgment, do not carry the right to a jury trial. See *supra* pp. 3–5.

The Court will therefore grant the Plaintiffs’ Motion to Strike Jury Demand on Count I. The Court would note that even if a jury trial were available to Defendants, the course of future proceedings would remain the same. For reasons more fully explained below, the Court will grant Plaintiffs’ Motion for Partial Summary Judgment on the issue of liability on Count I and will grant the MCPDS Defendants’ Motion for Summary Judgment as to Count II. And because there are no material factual issues that require resolution by a factfinder, the remaining legal issues in the case will not be resolved by a jury. The issue of remedy in Count I will be addressed after full briefing and argument on the well-established criteria which must be established before a Court may issue injunctive relief. See *Bangor Historic Track*, 2003 ME 140, 837 A.2d 129; *Ingraham v. Univ. of Me. at Orono*, 441 A.2d 691 (Me. 1982).

## **II. Motions for Summary Judgment**

As stated above, the Plaintiffs have filed a Motion for Partial Summary Judgment as to liability on Counts I, II, III, and V. The MCPDS Defendants have filed a Motion for Summary Judgment on Counts I and II; and the Defendant State of Maine has filed a Motion for Summary Judgment as to Count V.

Under Maine law, “[c]ross motions for summary judgment neither alter the basic Rule 56 standard, nor warrant the grant of summary judgment *per se*.” *Dorsey v. N. Light Health*, 2022 ME 62, ¶ 10, 288 A.3d 386 (quoting *F.R. Carroll, Inc. v. TD Bank, N.A.*, 2010 ME 115, ¶ 8, 8

A.3d 646) (emphasis in original). The summary judgment standard must be applied separately to each motion. *F.R. Carroll, Inc.*, 2010 ME 115, ¶ 8, 8 A.3d 646.

The summary judgment record consists only of the parties' properly supported statements of material fact and the portions of the record referenced therein. *See Dorsey*, 2022 ME 62, ¶ 10, 288 A.3d 386. Summary judgment is appropriate "if the summary judgment record, taken in the light most favorable to the nonmoving party, demonstrates that there is no genuine issue of material fact in dispute and the moving party would be entitled to a judgment as a matter of law at trial." *Chartier v. Farm Fam. Life Ins. Co.*, 2015 ME 29, ¶ 6, 113 A.3d 234; M.R. Civ. P. 56(c). A fact is "material" if it "can affect the outcome of the case," and there is a "genuine issue" when there is "sufficient evidence for a fact-finder to choose between competing versions of the fact." *Toto v. Knowles*, 2021 ME 51, ¶ 8, 261 A.3d 233 (quoting *Stewart-Dore v. Webber Hosp. Ass'n*, 2011 ME 26, ¶ 8, 13 A.3d 773).

Here, the Motion for Summary Judgment filed by the Plaintiffs is only partially dispositive because it addresses the question of liability. The Motion for Summary Judgment filed by Defendants addresses both liability and remedies. Under Rule 56, the Court may render a summary judgment on the issue of liability alone. M.R. Civ. P. 56(c).

#### **A. COUNT I**

The Plaintiffs have filed a Motion for Partial Summary Judgment as to liability on Count I. They allege the Defendants have violated the Subclass members' Sixth Amendment rights under the United States Constitution. The MCPDS Defendants have also filed a Motion for Summary Judgment as to Count I, as to both liability and relief. They argue the Plaintiffs have not been denied counsel at critical stages under federal law.

The legal questions presented in Count I are whether the Sixth Amendment requires continuous representation for the Plaintiffs as they argue, and whether the MCPDS Defendants are correct that the dispositional conference is the earliest and next criminal stage in Maine after a criminal defendant's Sixth Amendment rights attach at the first appearance. The question of whether a particular stage of a criminal proceeding is a critical stage under the Sixth Amendment is a question of law. *See Van v. Jones*, 475 F.3d 292, 314 (6th Cir. 2007) (“[T]he overarching legal question of whether a particular proceeding is a ‘critical stage’ of the trial should focus not only on the specific case before us, but the general question of whether such a stage is ‘critical.’”). After addressing these two issues about the breadth of what the Sixth Amendment requires, the Court must then determine if there are any material issues of fact that require resolution by a factfinder as to whether the MCPDS Defendants are providing representation to the Plaintiffs consistent with these legal standards.

After considering the legal positions of all the parties and reviewing the Summary Judgment record, the Court concludes that Subclass members have been deprived of continuous representation after the right to counsel attaches as required in Maine by the Sixth Amendment; and because counsel is not being provided at critical stages as also required by the Sixth Amendment, the Court grants the Plaintiffs' Motion for Partial Summary Judgment on the liability issues in Count I, and denies the Defendants' Motions for Summary Judgment on Count I. The Court will not address as part of this Combined Order the arguments made by the parties to date regarding remedies, as they will have a full opportunity to be heard on those issues in later proceedings to be held in January of 2025.

The Plaintiffs brought Count I under 42 U.S.C. § 1983, the federal statute originally enacted as part of the Civil Rights Act of 1871. In 1961, the law was expanded by the United

States Supreme Court to become applicable to certain state actors in *Monroe v. Pape*. 365 U.S. 167 (1961). It now permits individuals to sue certain government entities and employees for violations of their civil rights. Section 1983 does not create new substantive rights; it is an avenue for relief from the violation of a federally protected right (i.e., the Sixth Amendment right to counsel). *Baker v. McCollan*, 443 U.S. 137, 144 n. 3 (1979). It reads in part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. State courts have jurisdiction to hear claims brought under Section 1983. *Martinez v. California*, 444 U.S. 277, 283 n.7 (1980).

To prevail on a Section 1983 claim, a plaintiff must prove that: (1) they were deprived of a right secured by the United States Constitution or federal law; and (2) the person (or people) who deprived them of that right acted under color of state law. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). The parties do not dispute that the Defendants in this case were acting under color of state law.

The Maine Legislature enacted a law, still in effect, which explicitly and unambiguously requires the MCPDS Defendants to “provide high-quality, effective and efficient representation and promote due process for persons who receive indigent legal services in parity with the resources of the State *and consistent with federal and state constitutional and statutory obligations.*” 4 M.R.S. § 1801 (emphasis added).

The Sixth Amendment to the United States Constitution reads in part: “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. Const. amend. VI. This obligation is applied to the states through the Fourteenth

Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 341–43 (1963). The right to the assistance of counsel “attaches” when formal judicial proceedings have begun against the accused—“whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.”

*Rothgery v. Gillespie Cnty., Tex.*, 554 U.S. 191, 198 (2008). After the right attaches, a criminal defendant is entitled to have counsel present at all “critical stages” of the process. *Id.* at 211–12.

The complete absence of counsel at a critical stage of a criminal proceeding is a per se Sixth Amendment violation, and no analysis for prejudice or harmless error need be conducted.

*Penson v. Ohio*, 488 U.S. 75, 88–89 (1988); *Van v. Jones*, 475 F.3d 292, 311–12 (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.”)

The Supreme Court has identified some specific events in a criminal proceeding as “critical stages.” The list includes, but is not limited to, custodial interrogations, *see Massiah v. United States*, 377 U.S. 201 (1964) and *Brewer v. Williams*, 430 U.S. 387 (1977), corporeal identifications or “lineups,” *see Moore v. Illinois*, 434 U.S. 220 (1977) and *United States v. Wade*, 388 U.S. 218 (1967), preindictment preliminary hearings at which the “sole purposes . . . are to determine whether there is sufficient evidence against the accused to warrant presenting his case to the grand jury, and, if so, to fix bail if the offense is bailable,” *Coleman v. Alabama*, 399 U.S. 1 (1970), arraignments, *Hamilton v. Alabama*, 368 U.S. 52 (1961), trial, *Gideon*, 372 U.S. 335 (1963), sentencing, *Mempa v. Rhay*, 389 U.S. 128 (1967), appeals, *see Douglas v. California*, 372 U.S. 353 (1963) and *Halbert v. Michigan*, 545 U.S. 605 (2005), and during probation and parole revocation proceedings, *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

The list obviously includes events that occur in a courtroom. However, it is important to recognize it also includes events that occur outside the presence of the court which have nevertheless been found to be “critical” under the Sixth Amendment. *See, e.g., Massiah*, 377 U.S. 201 (1964) (eliciting incriminating statements without the presence of counsel after a criminal proceeding has begun violates the Sixth Amendment); *Brewer*, 430 U.S. 387 (1977) (same); *Moore*, 434 U.S. 220 (1977) (a criminal defendant’s Sixth Amendment right to counsel was violated by a corporeal identification conducted after the initiation of adversary judicial criminal proceedings and in the absence of counsel); *Wade*, 388 U.S. at 237 (the post-indictment lineup is a critical stage of prosecution at which a defendant is “as much” entitled to the assistance of counsel as at the trial itself).

The criminal process in Maine is comprised of consequential events which often occur before a criminal proceeding takes place in a courtroom. The legal requirements for these events in Maine, as in other States, are set out in Maine’s Rules of Unified Criminal Procedure. In our system of federalism, it is the states, not the United States Supreme Court, who are empowered to establish their own criminal procedures. *See Smith v. Robbins*, 528 U.S. 259, 274 (2000) (“[T]he Constitution ‘has never been thought [to] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure.’” (quoting *Spencer v. Texas*, 385 U.S. 554, 564 (1967))). Therefore, courts, including federal courts, look to promulgated state rules to understand a state’s criminal justice process. And importantly, in Maine, these rules have the force of law. *Peterson v. Johnson*, SJC-23-02, at 14 (Jan. 12, 2024) (Douglas, J.).

The Court will therefore look to the Maine rules in considering the parties’ legal arguments on Count I. It will also consider state and federal caselaw in deciding whether or not the representation required in Maine by the Sixth Amendment is “continuous representation.”

And it will also apply the federal definitions of “critical stage” to events and proceedings established in the rules in deciding what the Sixth Amendment demands.<sup>3</sup>

**Continuous representation under Maine law and the Sixth Amendment**

Rule 44 of Maine’s Rules of Unified Criminal Procedure states that a defendant has the right to have counsel “represent the defendant at *every stage of the proceeding*.” M.R.U. Crim. P. 44 (emphasis added). The Plaintiffs argue that this rule requires the State under the Maine Constitution to provide continuous representation. While the Court concludes in this Combined Order that indigent defendants in Maine are entitled to “continuous representation,” it does not agree with Plaintiffs that Rule 44 embodies only the standard required by Article I, Section 6 of the Maine Constitution.

The Court concludes that Maine complies with the demands of the Sixth Amendment under the United States Constitution *through* Rule 44. *See State v. Smith*, 677 A.2d 1058, 1060 (Me. 1996) (holding that Rule 44 “implements the constitutional right to counsel in a criminal proceeding”). In *Smith*, the parties did not—and more importantly, the Law Court does not—ever mention the Maine Constitution. In that case, the defendant appealed a Superior Court’s denial of his request to be declared indigent, asserting violations of his Fourth, Fifth, and Sixth Amendment rights. Defendant Smith simply made no claim under the Maine Constitution, and

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<sup>3</sup> The parties also dispute what it means for the State to provide counsel within a reasonable time of the right to counsel attaching. *See Rothgery*, 554 U.S. at 212 (“[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.”). Plaintiffs construe this obligation as an alternative theory of liability. The Defendants make a number of arguments on the issue. With respect to summary judgment issues, they argue that the length of time without counsel is not material; and they insist that no Plaintiff has been deprived of this right because—eventually—counsel is provided. The Court has concluded that the Plaintiffs’ Sixth Amendment rights require continuous representation, and at critical stages identified in this Combined Order. Given these findings, it is not necessary for the Court at this stage of the proceedings to decide what amount of delay is constitutionally “reasonable” in appointing counsel for the Plaintiffs as part of the liability analysis. The Court has concluded that the issue of “unreasonable” delay should be addressed in later proceedings as part of the remedies analysis when the parties have an opportunity to argue the issue of injunctive relief in Count I, and perhaps as part of the Habeus proceedings in Count III.

the Law Court, in reviewing his Sixth Amendment claim, stated that Rule 44 “implements” the constitutional right to counsel in Maine criminal proceedings.

The Court finds that Justice Douglas of the Maine Supreme Judicial Court’s recent decision in *Peterson v. Johnson*, SJC-23-02 (Jan. 12, 2024) (Douglas, J.), lends some support to this Court’s interpretation of the relationship between Rule 44 and the United States Constitution. He wrote:

Guaranteed by the Sixth Amendment to the United States Constitution and *provided for in Maine law* (emphasis added), 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, 462–63 (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. *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. . . .

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 by Douglas, J.). 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.*” (Emphasis added by Douglas, J.). 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.”

The rules of criminal procedure are “intended to provide for the just determination” of criminal proceedings and are to be “construed to secure simplicity and 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).

*Peterson*, SJC-23-02, at 12–14 (Jan. 12, 2024) (Douglas, J.).

Given Justice Douglas’s decision in *Peterson*, the Law Court’s decision in *Smith*, 677 A.2d 1058 (Me. 1996), and the unambiguous language of Rule 44, the Court concludes that in Maine the Sixth Amendment entitles indigent defendants to continuous representation once the right to counsel attaches at their initial appearance or arraignment.

The MCPDS Defendants argue as a matter of law that unrepresented indigent defendants in Maine—even those who are being held in jails awaiting assignment of counsel—are simply not entitled under the Sixth Amendment to representation except at certain discrete court proceedings which they insist are the only “critical stages” that constitutionally matter. Defendants’ list includes: the probable cause determination (but not the bail hearing) that occurs at the initial appearance or arraignment; the dispositional conference itself; and trial proceedings. Nothing that occurs in preparation for those events is, in the view of the MCPDS Defendants, constitutionally significant enough to require that they provide counsel to the Plaintiffs, even for those who are incarcerated.

The Court rejects the MCPDS Defendants’ very limited view of what they owe indigent defendants in Maine under the Sixth Amendment—particularly those defendants who are held in jails across the State for days, weeks, and sometimes months without *any* Sixth Amendment

protections. The Sixth Amendment demands continuous representation in Maine from the time the right attaches, and at all stages of the criminal process.

**Critical stages in the Maine criminal process**

Even if Rule 44 requires continuous representation only pursuant to Article I, Section 6 of the Maine Constitution, the Court concludes that the MCPDS Defendants' obligations under the Sixth Amendment to provide counsel are not limited to the proceedings they argue are "critical." Their list of "critical stages" may be an accurate description of the status quo, but it is not correct as a matter of law.

MCPDS Defendants argue that Plaintiffs' failure to point to one instance in which a Subclass member has ever been unrepresented at a dispositional conference is fatal to the entirety of their Sixth Amendment claim. The Court disagrees. Their focus on the dispositional conference ignores what federal courts have come to recognize is at stake throughout the criminal process from the time the Sixth Amendment right attaches to the time an indigent defendant must decide if they are going to proceed to trial or instead knowingly and intelligently waive their right to trial. It also seems to be rooted in large part on a misstatement of what Justice Douglas stated in *Peterson* about dispositional conferences in Maine.

"Critical stage" does not have one agreed-upon meaning. *See Van*, 475 F.3d at 312–15 ("[T]he pithy definitions we have do not simply capture the sometimes permissive or inclusive conclusions by the Supreme Court . . . that this or that period, moment, or event in the course of a criminal proceeding is a critical stage."). The Supreme Court has never comprehensively laid out the breadth of the right to counsel at critical stages. *Rothgery*, 554 U.S. at 212 n.15 ("We do not here purport to set out the scope of an individual's postattachment right to the presence of

counsel.”). However, the Supreme Court has articulated the purpose or essence of the “critical stage” in the following cases:

- When the accused’s available defenses may be “irretrievably lost,” *Hamilton*, 368 U.S. at 54, or where the accused’s rights may be “preserved or lost.” *White v. Maryland*, 373 U.S. 59, 60 (1963).
- “[T]he 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.” *Wade*, 388 U.S. at 226.
- “[A]ppointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected.” *Mempa*, 389 U.S. at 134.
- “[T]he test utilized by the Court has called for examination of the event in order to determine whether the accused required aid in coping with legal problems or assistance in meeting his adversary.” *United States v. Ash*, 413 U.S. 300, 313 (1973).
- When there may be “significant consequences for the accused.” *Bell v. Cone*, 535 U.S. 685, 696 (2002).
- “[W]hat makes a stage critical is what shows the need for counsel’s presence.” *Rothgery*, 554 U.S. at 212.
- When the accused “cannot be presumed to make critical decisions without counsel’s advice.” *Lafler v. Cooper*, 566 U.S. 156, 165 (2012).

The right to counsel is a “continuous right.” *Betschart v. Oregon*, 103 F.4th 607, 620 (9th Cir. 2024). It “is not a haphazard jack-in-the-box that occasionally appears when cranked.” *Id.* at 621. The Defendants’ argument that the critical stages are only those stages at which a defendant’s rights *at trial* may be prejudiced by denial of counsel ignores more recent Supreme Court precedent explicitly rejecting this view. *See, e.g., Lafler*, 566 U.S. at 164–65

[P]etitioner and the Solicitor General claim that the sole purpose of the Sixth Amendment is to protect the right to a fair trial. Errors before trial, they argue, are not cognizable under the Sixth Amendment unless they affect the fairness of the trial itself. The Sixth Amendment, however, is not so narrow in its reach. . . . Its protections are not designed simply to protect the trial, even though ‘counsel’s absence in these stages may derogate from the accused’s right to a fair trial.’

*Id.* (citations omitted). The Sixth Amendment guarantees an “ongoing right that persists throughout trial court proceedings.” *Betschart*, 103 F.4th at 621.

- a. From the time when the Sixth Amendment rights attach to the time of the dispositional conference is a critical stage requiring representation in order to protect an indigent defendant's federal constitutional rights and to ensure access to judicial intervention when necessary.*

The United States Supreme Court has declared that “the period from arraignment to trial [is] ‘perhaps the most critical period of the proceedings,’ during which the accused ‘requires the guiding hand of counsel,’ if the guarantee is not to prove an empty right.” *Wade*, 388 U.S. at 225 (internal citations omitted); *see also Powell v. Alabama*, 287 U.S. 45, 57 (1932) (concluding that defendants did not have the assistance of counsel “during perhaps the most critical period of the proceedings . . . , that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important”). Indeed, depriving a person of counsel during the period before trial “may be more damaging than denial of counsel during the trial itself.” *Maine v. Moulton*, 474 U.S. 159, 170 (1985).

The “constitutional command” of the Sixth Amendment requires more than someone “who happens to be a lawyer [to be] present at trial alongside the accused.” *Strickland v. Washington*, 466 U.S. 668, 685 (1984). Defendant’s counsel must not just show up on the day of a court proceeding, “but prepare for it too.” *Betschart*, 103 F.4th at 620. Only with preparation can counsel provide the “meaningful advocacy” the Sixth Amendment demands. *Id.* This is not a new or novel idea. The Supreme Court has long held that “the right to counsel is the right to the *effective assistance of counsel.*” *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970); *see also United States v. Cronin*, 466 U.S. 648, 654–55 (1984) (“The Constitution’s guarantee of assistance of counsel cannot be satisfied by mere formal appointment.”).

The Defendants insist that the pretrial investigation phase is not a critical stage but is instead “something that counsel must undertake in order to be adequately prepared to render constitutionally effective assistance at a critical stage.” Defs.’ Opp’n to Pls.’ Mot. Summ. J. 17. The preparation they refer to is precisely the point. The pretrial period is a critical stage *because* it is when the defendant’s counsel is preparing to try the case. *See Peterson*, SJC-23-02, at 18 (Jan. 12, 2024) (Douglas, J.) (“[p]retrial events and proceedings . . . have the potential to substantially impact a defendant’s defenses to the charges or otherwise adversely affect the outcome at trial.”). It is difficult to square the position of MCPDS Defendants that pretrial events and proceedings are not critical stages when the Supreme Court has actually described it as “the most critical period of the proceedings” and so “vitally important” that to be without counsel during that time is “more damaging than denial of counsel during the trial itself.” *Wade*, 388 U.S. at 225; *Powell*, 287 U.S. at 57; *Moulton*, 474 U.S. at 170.

This position is also difficult to square with the exacting requirements embodied in Maine rules regarding the State’s obligation to provide discovery of all kinds to a defendant before and in preparation for the dispositional conference. *See* M.R.U. Crim. P. 16. The rules categorize the types of discovery, some of which must be provided “automatic[ly],” meaning no request has to be made, while other types of discovery have to be requested. The discovery rules use terminology that an unrepresented person could not be reasonably expected to understand.

The rules lay out a process for how defense counsel may seek redress from the court on their client’s behalf if the State is falling short in meeting its discovery obligations. The Court rejects the suggestion that defendants can do this themselves before the dispositional conference, or that they should simply wait patiently for as long as it takes MCPDS to provide counsel before access to the Court is possible. In addition, the arguments advanced by Defendants fail to note

the realities facing unrepresented criminal defendants, particularly those incarcerated in Maine jails. It is well accepted among Maine criminal practitioners—including those who work at the Office of the Attorney General—that discovery in criminal cases is not provided the way it used to be. It is provided electronically, through “the cloud,” and often arrives piecemeal as it becomes available to prosecutors from law enforcement agencies, or as the State’s investigation of a defendant continues, even after they have been charged and brought before the court.

Substantial federal constitutional rights are also implicated in the early stages of the criminal process. And those rights can be at serious risk if indigent defendants must confront the State alone, without the assistance of counsel. For example, MCPDS Defendants fail to consider the complex Sixth Amendment jurisprudence that requires the State to provide exculpatory evidence to criminal defendants as part of the discovery process. Presumably the Defendants are not suggesting that unrepresented defendants are expected to understand the rights they have to disclosure of exculpatory evidence, much less how to enforce those rights if their access to Maine courts is hobbled by their lack of representation. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) (“[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”) and *Giglio v. United States*, 405 U.S. 150, 154 (1972) (holding that “[w]hen the ‘reliability of a given witness may well be determinative of guilt or innocence,’ nondisclosure of evidence affecting credibility” violates due process).

MCPDS Defendants also fail to note that the Sixth and Fourteenth Amendments have long demanded that no person who is incompetent to stand trial can be compelled to withstand the rigors of any part of the criminal process. *Bishop v. United States*, 350 U.S. 961 (1956); *Pate v. Robinson*, 383 U.S. 375, 378 (1966); *Dusky v. United States*, 362 U.S. 402 (1960). If an

unrepresented indigent defendant's diminished capacities are not recognized by a Lawyer of the Day at the first appearance, waiting weeks or months until a lawyer is finally assigned in order to address the issue at a dispositional conference raises significant Sixth Amendment and due process concerns. Yet the MCPDS Defendants fail to even address the issue of unrepresented defendants awaiting this important advocacy during the pretrial process. Indigent defendants whose mental capacities are so diminished, developmentally or psychiatrically, simply cannot advocate for themselves while waiting indefinitely for MCPDS to provide counsel. *See* 15 M.R.S. § 101-D (setting deadlines for the evaluation of a criminal defendant's competency to stand trial); *see, e.g., Drope v. Missouri*, 420 U.S. 162, 171–72 (1975) (“[T]he prohibition [on trying a mentally incompetent defendant] is fundamental to an adversary system of justice.”); *United States v. Flores-Martinez*, 677 F.3d 699, 705–06 (5th Cir. 2012) (“[T]he criminal defendant has a procedural due process right that guarantees ‘procedures adequate to guard an accused’s right not to stand trial or suffer conviction while incompetent.’” (quoting *Holmes v. King*, 709 F.2d 965, 967 (5th Cir.1983) (citations omitted))); *United States v. DiMartino*, 949 F.3d 67, 71–72 (2d Cir. 2020) (“The court must remain alert to issues of competence *throughout* a criminal proceeding.” (emphasis added)).

Maine rules also require that *at least 7 days before* the date of the dispositional conference (a critical stage, *see Peterson*, SJC-23-02, at 21 (Jan. 12, 2024) (Douglas, J.)), motions to dismiss, discovery-related motions, motions to suppress, and other motions related to the admissibility of evidence must be served upon the opposing party. M.R.U. Crim. P. 12(b)(3)(A). Such motions include potentially dispositive motions brought under the Fourth, Fifth, Sixth, and Fourteenth Amendments. Even if such a motion is successful only in part, preventing the admission of illegal or unconstitutional evidence at trial would seem to be a basic

requirement to ensure a fair trial under the Sixth Amendment. Obviously, the rule contemplates that discovery would have been obtained and reviewed, and that appropriate investigation would have occurred before the need for any such motions could be recognized or drafted. It would be next to impossible for an unrepresented defendant to protect their constitutional rights by filing potentially dispositive motions with the court.

Other rules address important events that are intended to occur before the dispositional conference. Within 14 days of charging a defendant, the prosecution can strengthen its position against a defendant by joining other defendants in the same case. M.R.U. Crim. P. 8(b). Severing a client from joinder must be done by motion, and meeting the legal standard or even understanding it would be difficult for an unrepresented defendant. *See* M.R.U. Crim. P. 8(d); *State v. Pierce*, 2001 ME 14, 770 A.2d 630. In addition, defense counsel can file motions to preserve and transcribe testimony taken before the Grand Jury under certain circumstances. M.R.U. Crim. P. 6(g). If that does not occur before the Grand Jury rises, the defendant may lose forever the potential to use such testimony advantageously at trial or otherwise. Other opportunities to preserve evidence at crime scenes, or in a forensic lab, can also be lost or compromised unless counsel is involved early and continuously. Again, this preservation can only be done by successful motion practice before the court. If evidence is destroyed while a defendant is unrepresented and without an attorney to monitor the discovery process, that defendant then bears the burden of demonstrating bad faith on the part of the police or proving that comparable evidence cannot now be obtained. *See State v. Cote*, 2015 ME 78, ¶ 15, 118 A.3d 805; *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988). An unrepresented defendant is at the mercy of police and prosecutors who may not prioritize or even understand the defendant's need to preserve such evidence.

By the time of the dispositional conference, defense counsel must be “prepared to engage in meaningful discussion regarding *all* aspects of the case with a view toward reaching an appropriate resolution.” M.R.U. Crim. P. 18(b) (emphasis added). Maine law does not just suggest the involvement of defense counsel during the pretrial period—it demands thoughtful and substantive representation. *See Peterson*, SJC-23-02, at 20–21 (Jan. 12, 2024) (Douglas, J.).

All of the above-described events, along with the expectations and deadlines established by the rules, require representation for indigent defendants. Counsel must process discovery, conduct investigation as warranted, and file motions when necessary to protect a defendant’s federal constitutional rights during the period between attachment of that right and the dispositional conference. It would be close to impossible for an unrepresented defendant to understand these processes, much less to productively access a court for redress of important federal constitutional rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments.

As the Supreme Court has said repeatedly: “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 might have.” *Cronic*, 466 U.S. at 654.

***b. The process of plea bargaining with the prosecution has long been recognized as a critical stage under the Sixth Amendment.***

Plaintiffs argue that plea bargaining is a critical stage. The Court agrees. In Maine’s current criminal justice system and throughout the United States, it is beyond dispute that almost all criminal cases are resolved short of trial. As the MCPDS Defendants surely understand, the decision made by a defendant whether to plead guilty is an individual right that cannot be compelled or coerced. And given the enormous pressures faced by trial courts in Maine to resolve cases, it is difficult to overstate the critical role played by counsel in ensuring that any guilty plea is made knowingly and intelligently.

The United States Supreme Court “[has] long recognized 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); *see also Missouri v. Frye*, 566 U.S. 134, 144 (2012) (“[T]he negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.”) *and Lafler*, 566 U.S. 156 (2012) (“Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process.”). This is “an obvious truth,” *Gideon*, 372 U.S. at 343, because plea bargaining “is not some adjunct to the criminal justice system; it *is* the criminal justice system.” *Frye*, 566 U.S. at 144 (emphasis in original).

The Defendants argue that plea bargaining is not a critical stage because “substantive plea negotiations” take place at the dispositional conference, which has already been established as a critical stage. Defs.’ Opp’n to Pls.’ Mot. Summ. J. 19. To the Plaintiffs’ contention that plea bargaining begins well before the dispositional conference, the MCPDS Defendants state that Plaintiffs’ position “would eliminate the well-established ‘critical stage’ analysis. *Id.*”

If what the MCPDS Defendants are referring to as the “well-established critical stage analysis” includes their position that somehow *Peterson* eliminates the possibility that a critical stage could ever occur in Maine between first appearance and the actual dispositional conference, they misstate *Peterson*. As Plaintiffs argue, “*Peterson* said no such thing.” Pls.’ Opp’n to Defs.’ Mot. Summ. J. 4. *Peterson* does not stand for the conclusion that the only other pretrial critical stage is the dispositional conference. Instead, *Peterson* says “[a]t a minimum, . . . 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.” *Peterson*, SJC-23-02, at 21 (Jan. 12, 2024) (Douglas, J.) (emphasis added). Their arguments to the contrary ignore both *Peterson* and substantive federal case law.

In Maine, while plea bargaining may sometimes “culminate” at a dispositional conference, the work that must occur to reach a valid and enforceable plea agreement must begin when the State initiates criminal proceedings against a defendant. *Peterson*, SJC-23-02, at 20 (Jan. 12, 2024) (Douglas, J.). This work includes defendant’s counsel conducting a pretrial investigation and protecting the defendant’s Sixth Amendment rights during the pretrial process as discussed above. It also involves defendant’s counsel communicating with their client regularly. And, importantly, it requires defendant’s counsel to advocate on their client’s behalf to a prosecutor. Plea bargaining cannot be understood as one discrete event. One round of negotiations often leads to others which might or might not “culminate” in resolution by guilty plea at any point before, during, or after the dispositional conference. But regardless of *when* the plea negotiation occurs, the Supreme Court has repeatedly held that criminal defendants require the assistance of counsel to help them negotiate with prosecutors. *See Padilla*, 559 U.S. 356 (2010); *Frye*, 566 U.S. 134 (2012); *Lafler*, 566 U.S. 156 (2012). The MCPDS Defendants’ argument fails to acknowledge these federal precedents.

Criminal defendants must be afforded the assistance of counsel throughout the plea-bargaining processes. It is simply not credible for the MCPDS Defendants to suggest otherwise.

***c. A bail hearing is a critical stage for Sixth Amendment purposes because of the rights at stake.***

Finally, the Court considers Plaintiffs’ argument that a bail hearing is a critical stage, and Defendants’ argument that it is not. The Court concludes that a bail hearing is a critical stage requiring representation.

A defendant is entitled to the assistance of counsel “where [his] substantial rights . . . may be affected.” *Mempa*, 389 U.S. at 134. A defendant’s most basic right—his freedom from incarceration—hangs in the balance at a bail hearing. Even if a defendant is not in custody, arguments about conditions of release constitute a “significant infringement of liberty.” *Lerman*, No. ANDCD-CR-2024-451 Unified Criminal Docket, at 12 (Androscoggin Cnty., June 1, 2024). One of the reasons the Supreme Court in *Coleman* concluded Alabama’s preliminary hearing was a critical stage was because, at that proceeding, the Court decided bail.<sup>4</sup> *Coleman*, 399 U.S. at 8–9 (“[C]ounsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail.”). Other courts have also concluded that a standalone bail hearing is a critical stage. *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). Given this, the Court concludes that a bail hearing is a critical stage.

The MCPDS Defendants’ argument that the bail hearing is not a critical stage is difficult to understand, if for no other reason than that MCPDS, through the Lawyer of the Day (LOD) program, actually does provide counsel at bail proceedings. Supp.’g S.M.F. ¶ 157. And the Law Court has held that representation by an LOD fulfills a defendant’s right to counsel. *State v. Galarneau*, 2011 ME 60, ¶¶ 7–9, 20 A.3d 99. The Court trusts that MCPDS Defendants are not

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<sup>4</sup> The contours of Alabama’s preliminary hearing are analogous to Maine’s initial proceedings. *See* M.R.U. Crim. P. 5 (the court determines probable cause and sets bail, if applicable).

arguing that the LODs could simply make a probable cause argument at initial proceedings and then leave the defendant to their own devices to argue bail. But in this case, Defendants suggest that would be constitutionally permissible.

Finally, the Court is not persuaded by MCPDS Defendants' argument that the bail hearing is not a critical stage because it does not affect a defendant's opportunity for a fair trial. The proper inquiry, under *Coleman*, is "whether potential substantial prejudice to defendant's rights inheres in the confrontation and the ability of counsel to help avoid that prejudice." 399 U.S. at 9. The possibility of pretrial detention, and counsel's ability to advocate to protect the liberty of a defendant who is presumed innocent, makes a bail hearing a critical stage.

***There are no genuine issues of material fact requiring resolution in Count I as to the MCPDS Defendants' obligations to provide continuous representation for Plaintiffs, and at critical stages as found above.***

After reviewing the Summary Judgment record and filings, the Court concludes that, when viewing the record in the light most favorable to the MCPDS Defendants, there is no genuine issue of material fact as to whether Defendants are providing continuous representation and representation at critical stages as required by the Sixth Amendment. Therefore, Plaintiffs are entitled to Partial Summary Judgment as a matter of law. *See* M.R. Civ. P. 56(c). "A material fact is one that can affect the outcome of the case, and there is a 'genuine issue' when there is sufficient evidence for a fact-finder to choose between competing versions of the fact." *Stewart-Dore v. Webber Hosp. Ass'n.*, 2011 ME 26, ¶ 8, 13 A.3d 773; *see also Adeyanju v. Foot & Ankle Assocs. of Me., P.A.*, 2024 ME 64, ¶ 17, 322 A.3d 1201; *Cookson v. Brewer Sch. Dep't*, 2009 ME 57, ¶ 11, 974 A.2d 276.

It would be an understatement to describe the Summary Judgment record filed by the parties as "voluminous." Substantial parts of it, however, do not pertain to Count I. They instead

pertain to Count II’s allegations regarding the emotional and psychological effects on Plaintiffs who remain unrepresented, particularly those in custody. Other sections which do pertain to Count I allege what is at stake for indigent defendants at various pretrial stages, but the Court addressed those issues as a matter of law in its discussion of critical stages. And significant portions of the record propose how to calculate how many eligible defendants have gone without representation after first appearance, and for how long.<sup>5</sup>

With respect to the parts of the record that pertain directly to the two legal issues presented in Count I, Plaintiffs have produced admissible evidence about criminal cases in which eligible criminal defendants have not been appointed counsel by the scheduled date of their dispositional conference. Supp.’g S.M.F. ¶ 124. In some cases, the dispositional conference was postponed, sometimes repeatedly, while the defendant remained unrepresented. *Id.* ¶ 126. In other cases, a criminal defendant’s dispositional conference was held without the defendant having been assigned counsel. *Id.* ¶ 125. Thus, Plaintiffs have generated admissible evidence that criminal defendants are not being provided continuous representation or representation at critical stages of a criminal proceeding.

The MCPDS Defendants have responded to the Plaintiffs’ Statements of Material Facts, but they have not properly controverted them. Defendants responded with “qualified” in response to Plaintiffs’ Paragraphs 124, 125, and 126 and they “object” to the language about what “docket records *indicate.*” Opp. S.M.F. ¶¶ 124–26, 128. They claim that the Court cannot rely upon the docket records and instead must have the underlying case files for each docket record included in the summary judgment record—despite the fact that in a different part of the

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<sup>5</sup> The Court has decided that the length of time Plaintiffs have been unrepresented is material only as to the remedy that might be sought but not as to the legal issue of continuous representation and representation at critical stages of the Maine criminal process. *See supra* note 3, at 13.

MCPDS Defendants' argument they acknowledge that the Court *can* take judicial notice of the docket records and the underlying files. Opp. S.M.F. ¶ 124 n.9. The Court agrees with the Defendants that it can take judicial notice of the docket records and underlying filings, and it will do so.

Next, they argue that the Court cannot, as they say Plaintiffs request, draw inferences from competing, but undisputed facts, and they cite two cases which they claim support their position. However, the summary judgment records at issue in those cases are distinguishable from the record before this Court. The parties in those cases generated competing, uncontested facts that might be "capable of supporting conflicting yet plausible inferences." *Id.* ¶¶ 124–26, 128. Such inferences, which "are capable of leading a rational fact-finder to different outcomes . . . depending on which of them the fact-finder draws . . . is not [a choice] for the court on summary judgment." *Lewis v. Concord Gen. Mut. Ins. Co.*, 2014 ME 34, ¶ 10, 87 A.3d 732 (quoting *Lougee Conservancy v. CitiMortgage, Inc.*, 2012 ME 103, ¶ 11, 48 A.3d 774). In *Lougee*, the Law Court found that "competing inferences" existed, precluding summary judgment on an agency theory, when undisputed facts supported contrary views as to the extent of the party's control over the agent. 2012 ME 103, ¶¶ 13–15, 48 A.3d 774. So while the Defendants correctly cite the legal holdings of both *Lougee* and *Lewis*, they stand for a proposition not at work here, as the MCPDS Defendants have not actually presented to the Court any competing, undisputed facts that might lead a court to improperly choose between inferences. The MCPDS Defendants have not generated any facts that controvert the Statement of Material Facts generated by Plaintiffs referenced above.

The Court will also deem three statements, two by MCPDS Deputy Executive Director Eleanor Maciag and one by MCPDS Commission Chair Joshua Tardy, as not properly

controverted, and therefore admitted for purposes of summary judgment. First, in Paragraph 5 of Plaintiffs' Statement of Material Facts, Deputy Director of MCPDS Maciag, who has been designated an expert for the MCPDS Defendants, stated that MCPDS has not provided a sufficient number of attorneys to populate the rosters, thus making it impossible for Defendants to fulfill their mandate to provide sufficient attorneys. Supp.'g S.M.F. ¶ 5 (citing Maciag Dep. (Oct. 30, 2024), 9:17–21 (“Currently we are not providing -- there are not enough attorneys available to meet the demand for indigent legal services. So in terms of -- for those individuals, we are unable to meet that -- our statutory mandate.”)). Defendants' response was to “qualify” and argue that her entire statement is a legal conclusion. Opp. S.M.F. ¶ 5. It is not necessary for the Court to address the assertion in the qualification that finding sufficient numbers of qualified is not a part of MCPDS's mandate. For purposes of summary judgment, the Court accepts her statement that “there are not enough attorneys available to meet the demand for legal services” as her view of the state of the rosters and finds her statement has not been effectively controverted.

Second, in Paragraph 10, Deputy Executive Director Maciag states under oath, again in her capacity as one of the MCPDS Defendants' experts, that because MCPDS does not have a sufficient pool of attorneys, there is a growing list of people who need, but who do not receive, counsel. Supp.'g S.M.F. ¶ 10 (citing Maciag Dep. (Oct. 30, 2024), 35:14–16 (“Because we don't have a sufficient pool of attorneys, neither employed or rostered, we have this growing list of people needing counsel.”)). Defendants again responded to this by stating “qualified” and arguing that because this statement referenced the “inherently unreliable” Counsel Needed list, the statement is “misleading and unsupported by the cited authority.” Opp. S.M.F. ¶ 10. In the deposition referenced, Deputy Executive Director Maciag was relying upon data generated by Maine courts and shared with her agency. She was testifying as a designated expert for the

MCPDS Defendants. Her understanding of that data has not been controverted. The MCPDS Defendants do not offer any opposing fact of any kind to counter her statements that the number of rostered attorneys is insufficient, and that the number of unrepresented indigent defendants is growing. The Court will accept these statements from Deputy Director Maciag statements as uncontroverted facts.

Third, in Plaintiffs' Paragraph 13, MCPDS Commission Chair Tardy's states under oath, that as of the beginning of 2024, there were around 300 defendants without counsel, and that the number has now "gone far beyond that." Supp.'g S.M.F. ¶ 13 (citing Tardy Dep. 21:9–13 ("I don't know what the number is right now so I just don't know. I just know that it's -- at the beginning of the year, the number was 300. It has gone far beyond that, and there is an ebb and flow, but it's an ebb and flow of unacceptability.")). Defendants again stated "qualified" and use the same argument regarding the unreliability of the Counsel Needed list without offering any opposing fact of any kind. Opp. S.M.F. ¶ 13. Chairman Tardy is a named Defendant. His statement that the number of unrepresented defendants has "gone far beyond" 300 is an uncontroverted admission of a party opponent, and the Court will accept it as such.

The MCPDS Defendants' "qualified" responses do not generate any material fact requiring factfinding at trial. Even when taken in the light most favorable to the Defendants, *see Chartier*, 2015 ME 29, ¶ 6, 113 A.3d 234, the undisputed facts established in the Plaintiffs' Statement of Material Facts establish that no representation is being provided by the MCPDS Defendants from the time of first appearance to the dispositional conference for a number of Plaintiffs. Many criminal defendants still do not have counsel at the time of their scheduled dispositional conference (Supp.'g S.M.F. ¶ 124); some proceeded through their dispositional conference without counsel (*Id.* ¶ 125); and others' cases were postponed indefinitely until

counsel could be appointed (*Id.* ¶ 126). This is certainly not continuous representation, and it is not representation at the critical stages identified by the Court as legally required such that representation must be provided between the first appearance and the dispositional conference.

Plaintiffs are therefore entitled to Partial Summary Judgment on the issue of liability under Count I.

## **B. COUNT II**

The Court has reviewed the parties' motions for summary judgments, their opposition motions, and their replies, along with all supporting documents, including affidavits and statements of material facts. Based on the summary judgment record presented, the Court denies the Plaintiffs' Motion for Summary Judgment as to Count II and grants the Defendants' Motion for Summary Judgment as to Count II.<sup>6</sup>

The Plaintiffs have failed to present evidence to the Court for each essential element of Count II, namely, the element of intent, and the Defendants are thus entitled to summary judgment. *See Johnson v. Carleton*, 2001 ME 12, 765 A.2d 571 (“If the evidence presented by a plaintiff who has the burden of proof on an essential element at trial is insufficient, and the defendant would thus be entitled to judgment as a matter of law on that state of the evidence at a trial, the defendant is entitled to a summary judgment.”).

In Count II, brought under the Maine Civil Rights Act, 5 M.R.S. § 4682, the Plaintiffs allege the Defendants have violated the Subclass members' right to counsel under Article I, Section 6 of the Maine Constitution. When an “aggrieved party” brings a suit under the Maine Civil Rights Act alleging their constitutional rights have been violated, they must prove that

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<sup>6</sup> Rule 56(c) of the Maine Rules of Civil Procedure gives the Court the authority to render summary judgment *against* the moving party. The Court was inclined to do so, as no issue of material fact exists and the Plaintiffs have failed to prove each necessary element of Count II. However, the parties have filed cross-motions for summary judgment and so the Court declines to.

someone “[i]ntentionally interfere[d] or attempt[ed] to intentionally interfere with the exercise or enjoyment . . . of those secured rights.” 5 M.R.S. § 4682(1-A)(B) (emphasis added). This interference can be proven in several ways, including, as Plaintiffs argue, “[e]ngaging in any conduct that would cause a reasonable person to suffer emotional distress or to fear death or bodily injury to that person or to a close relation.” *Id.* § 4682(1-A)(B)(5).

The statute does not define “intentionally.” However, in a 2020 case, the Law Court discussed the similarities in language found in 17 M.R.S. § 2931<sup>7</sup> and language found in the Maine Civil Rights Act, 5 M.R.S. § 4681 (2020),<sup>8</sup> noting: “‘Intentionally,’ as used in this section, means that it was the person’s ‘conscious object to cause’ the result of his or her conduct.” *Anctil v. Cassese*, 2020 ME 59, ¶ 12, 232 A.3d 245. The Court acknowledges that Section 4681 pertains to actions brought by the Attorney General, as opposed to Section 4682, which pertains to actions brought by private, aggrieved persons, but the language in each section as to intentionality is identical. Taking Section 4682’s plain language and the Law Court’s *Anctil*

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<sup>7</sup> Comparing this language:

A person may not, by force or threat of force, intentionally injure, intimidate or interfere with, or intentionally attempt to injure, intimidate or interfere with or intentionally oppress or threaten any other person in the free exercise or enjoyment of any right or privilege, secured to that person by the Constitution of Maine or laws of the State or by the United States Constitution or laws of the United States.

17 M.R.S. § 2931.

<sup>8</sup> To this language:

Whenever any person, whether or not acting under color of law, intentionally interferes or attempts to intentionally interfere by physical force or violence against a person, damage or destruction of property or trespass on property or by the threat of physical force or violence against a person, damage or destruction of property or trespass on property with the exercise or enjoyment by any other person of rights secured by the United States Constitution or the laws of the United States or of rights secured by the Constitution of Maine or laws of the State or violates section 4684-B, the Attorney General may bring a civil action for injunctive or other appropriate equitable relief in order to protect the peaceable exercise or enjoyment of the rights secured.

5 M.R.S. § 4681 (2020).

decision together, the Court reads Section 4682 as requiring the Plaintiffs in this case to establish intentionality as defined in the Maine Criminal Code.<sup>9</sup>

Therefore, to succeed under the Maine Civil Rights Act, the Plaintiffs would need to prove that the Defendants' "conscious object" when engaging in conduct that would cause a reasonable person to suffer emotional distress was to interfere with the Subclass members' right to counsel. *See* 5 M.R.S. § 4682(1-A)(B); *Anctil*, 2020 ME 59, ¶ 12, 232 A.3d 245. It is not enough for the Plaintiffs to demonstrate that the Subclass members have suffered emotional harm. While the Plaintiffs have provided expert testimony regarding the emotional distress likely suffered by those who are incarcerated, and those waiting to be appointed counsel, *see* *Casey Aff.* ¶ 10–48, there is nothing in the Plaintiffs' Statement of Material Facts that suggests, let alone proves, that the Defendants *intentionally* interfered with the Subclass members' right to counsel. The Plaintiffs have failed to make a prima facie case for Count II. The Court denies the Plaintiffs' Motion for Summary Judgment as to Count II and grants the Defendants' Motion for Summary Judgment as to Count II.

It should be noted that the Court's decision on Count II does not address the meaning or breadth of Article I, Section 6 of the Maine Constitution. It is limited to a decision of what is

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<sup>9</sup> The Court considers the statutory language unambiguous. However, if the statute is in fact ambiguous, this Court's interpretation comports with the Maine Legislature's stated intent when the Maine Civil Rights Act was first introduced as a bill in 1989. Senator Gauvreau introduced an amendment to the bill, explicitly intended to "restrict the amounts or numbers of actions which could be brought" under the statute once enacted. 2 Legis. Rec. 1238 (1st Reg. Sess. 1989). The amendment added an "intentionalities standard," meaning that, in Senator Gauvreau's words, "unless a party could prove by the preponderous [sic] of the evidence that a municipal official or any other person working under state law, unless the plaintiff could establish that the conducting [sic] question was intentional, then no such private action could occur." *Id.* Furthermore, when the Maine Legislature amended the Act in 2023 to extend protection to actions that "cause emotional distress or fear of violence," the bill summary declared:

Examples of behavior prohibited under the bill include repeatedly trespassing on another person's property to hang or burn a figure in effigy or to fumigate the other person's residential property with pesticides when such conduct is motivated by reason of race, color, religion, sex, ancestry, national origin, physical or mental disability, sexual orientation or gender identity.

L.D. 868, Summary (131st Leg. 2023). With this history in mind, in the event that the Act *is* ambiguous, the Court nonetheless concludes that the Plaintiffs have failed to demonstrate the kind of intentional conduct the Legislature intended the Act to require.

required for private citizens to bring claims under the Maine Civil Rights Act. The parties will be free to argue about claims and defenses under the Maine Constitution as they argue the merits of other Counts that are left unresolved in whole or in part by this Combined Order.

### **C. COUNT III**

Plaintiffs in Count III have requested Habeus relief from the Court based upon their claims in Counts I and II that their rights under the United States and Maine Constitution have been violated by the MCPDS Defendants and the State of Maine. Although the claims in Count III have been brought against individual County Sheriffs, the Court permitted the State of Maine to remain a Defendant as a Party in Interest, something the State had actually agreed to in the Habeus case heard and decided by Justice Douglas. *See Peterson*, SJC-23-02 (Jan. 12, 2024) (Douglas, J.).

As the Court has found that the liability of the MCPDS Defendants under the Sixth Amendment has been established as a matter of law, the Court will apply the legal findings made on Count I in the bench trial on Count III now scheduled for January of 2025.<sup>10</sup> To that extent, the Plaintiffs' Motion for Summary Judgment is granted in part.

The Court will discuss the course of future proceedings on Count III at the conference now scheduled for January 6, 2025.

### **D. COUNT V**

In its August 13, 2024 Order on Pending Motions to Dismiss, the Court denied the Motion filed by the State of Maine asserting that it was immune from suit under the doctrine of

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<sup>10</sup> As noted, 16 Maine County Sheriffs have been named Defendants on Count III as they are the custodians of a number of Class Members. Counsel for these Defendants have participated in multiple court conferences in this case since Count III was added, but they have not filed any partial or fully dispositive motions on behalf of their clients. The Court has made it clear that the Sheriffs can fully participate in the Habeus trial if they choose to do so, and at the pretrial conference set for January 6, 2025, the Court expects an update on what role, if any, the Sheriffs or their counsel will play in the proceedings on Count III.

sovereign immunity. After full briefing and argument, the Court held that the State of Maine could remain a Defendant in this case for purposes of the declaratory judgment sought in Count V. The Court also deferred its decision as to whether the Court has authority to issue any injunctive relief against the State of Maine as a Defendant on Count V unless Plaintiffs “prevail in establishing liability.” Order on Pending Mot. Dismiss, at 15. That Order rejecting the State’s argument regarding sovereign immunity was appealed to the Law Court and no decision on the merits has been issued. However, after the appeal was docketed, a Single Law Court Justice remanded this case back to the Superior Court on October 24, 2024, stating: “[t]he trial court may take any action on, and may proceed with, its matter in the usual course as though no appeal had been taken.” *Robbins v. Comm’n on Pub. Def. Servs.*, No. Ken-24-450 (Me. Oct. 24, 2024) (Horton, J.). Upon motion of the State, the Single Justice provided clarification on November 4, 2024 that the prior order “does not direct the Superior Court to take any particular action and does not prohibit the Superior Court from taking any particular action.” *Robbins*, No. Ken-24-450 (Me. Nov. 4, 2024) (Horton, J.).

This Court now has pending before it the State of Maine’s Motion to Continue Trial on Count V, along with its Motion for Summary Judgment on Count V. In the latter motion, the State makes a number of arguments, including ones made previously regarding sovereign immunity and as to whether a declaratory judgment is simply a remedy and not a cause of action. In the Motion to Continue, the State asserts the Court has been fundamentally unfair in depriving the State of an opportunity to conduct discovery. The Court addresses this argument first.

### *Motion to Continue*

The State of Maine argues that it is fundamentally unfair for the Court to make any substantive rulings in Count V unless it has had an opportunity to conduct discovery.<sup>11</sup> It suggests that if the Court fails to give the State of Maine this opportunity, the validity of any judgment issued by the Court could be undermined.

The Court would first note that Rule 56(a) by plain language has for a very long time permitted a motion for summary judgment to be filed by a Claimant so long as more than 20 days have passed since the action was filed. M.R. Civ. P. 56(a). For a Defending Party, Rule 56(b) states that it can be brought “at any time, but within such time as not to delay the trial . . . .” M.R. Civ. P. 56(b).

It is also worth noting that what the Court believes Plaintiffs seek in Count V at this stage of the proceedings is a declaration by the Court that the State of Maine is constitutionally responsible for providing counsel for indigent defendants where a risk of jail exists, and that the State of Maine has failed to comply with this obligation.

In addition, when pressed by the Court as to what discovery the State of Maine felt it needed to conduct, it is the Court’s recollection that counsel for the State indicated that it had not finally decided what it intended to do about discovery.

The Court also recognizes that given the failure of the Clerk’s Office to duly docket the appeal filed by the State of Maine, it was not until shortly before the discovery deadline expired that the Law Court, acting through a Single Justice, indicated that the trial court had authority to

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<sup>11</sup> The State has sent mixed messages to the Court regarding its role in this litigation, especially in regard to discovery. It has suggested that sovereign immunity shields the State not just from a judgment, but also from being compelled to participate in the litigation in any respect as that would inflict injury on the State’s sovereignty.

continue trial proceedings “as though no appeal had been taken.” *Robbins*, No. Ken-24-450 (Me. Oct. 24, 2024).

The Court is persuaded that, given this history, it would be fundamentally fair to grant the State’s Motion to Continue Trial in part to permit *limited* discovery on an expedited schedule by way of depositions only. To be clear, however, the Court does not believe it would be fundamentally fair to delay resolution of any Count except Count V, which is the only Count in which the State of Maine is now a party. This is particularly the case as the Court trusts that counsel for the State has had full access to all discovery generated by all parties in this case. Counsel for the State is an Assistant Attorney General (AAG) in the same office as the AAG who has been involved in representing the MCPDS Defendants in this case since its inception.

Finally, the Court wishes to be clear that at no time did it prevent or impose any procedural obstacle on the State of Maine’s ability to file an answer in this case. The Court will not otherwise address this assertion.

**Motion for Summary Judgment**

The Court will therefore defer ruling on the Cross Motions for Summary Judgment pending in Count V and will permit the State of Maine to conduct limited discovery on an expedited schedule. The Court would, however, request that the State of Maine once again reflect upon two things. First, the Plaintiffs in this Phase I proceeding are only seeking a declaration as to what the State of Maine legally and constitutionally is obligated to provide indigent defendants who have been charged with crimes punishable by incarceration but who remain unrepresented. Second, it is the Court’s understanding from previous comments from counsel for the State of Maine that the objection to being included as a named defendant is different from the State of Maine’s intention as to how it *might* proceed in this litigation should

the Court provide a remedy on behalf of the Plaintiffs against the MCPDS Defendants. In any event, the Court invites and awaits clarification on the State of Maine's position.

### CONCLUSION

With respect to Count I, the Court grants partial Summary Judgment for the Plaintiffs on the issue of liability only. And while the Court has done so after striking the Defendants' jury demand on this Count, its analysis would be the same if a jury trial was available to the MCPDS Defendants as they have argued, as there are no disputed issues of material fact as to whether the Defendants have violated the Sixth Amendment rights of the Plaintiffs. The Court denies the MCPDS Defendants' Motion for Summary Judgment on Count I.

The Court declares and concludes that the Sixth Amendment requires the MCPDS Defendants to provide Plaintiffs continuous representation from the time the right attaches at a defendant's first appearance before the Court, throughout pretrial events and proceedings, and throughout the plea-bargaining process and trial process. The Court also declares and concludes that the MCPDS Defendants have deprived the Plaintiffs of their Sixth Amendment right to representation at critical stages between the time the right attaches and the time of the dispositional conference. In light of these findings, prejudice will be presumed.

At the conference with counsel set for January 6, 2025, the Court will establish a procedure for the parties to address the issue of remedy. Plaintiffs have consistently stated that they are seeking only injunctive relief. However, the parties have not been given an opportunity to address the criteria under Maine law for whether Plaintiffs are entitled to injunctive relief. *See, e.g., Burr v. Dep't of Corr.*, 2020 ME 130, 240 A.3d 371; *Bangor Historic Track*, 2003 ME 140, 837 A.2d 129; *Ingraham v. Univ. of Maine at Orono*, 441 A.2d 691 (Me. 1982). Oral argument will be conducted on one of the days now set aside for the bench trial on the Habeas claim in

Count III, January 22–24, 2025. Counsel should attempt to agree on a briefing schedule with those dates in mind. If either party is seeking a testimonial hearing on the issue of remedy, that will be discussed at the January 6, 2025 conference, but parties should expect that the Court is likely to require any such testimony to be taken on January 22–24, 2025.

With respect to Count II, the Court grants Summary Judgment for the Defendants. While neither party addressed the critical element of intentionality in their arguments on summary judgment, the Court has concluded that Plaintiffs have failed to produce or point to any evidence in the summary judgment record that establishes the kind of intentional violation of constitutional rights which must be proven in order to establish liability under the Maine Civil Rights claim alleged in Count II.

As to Count III, the legal findings made in this Combined Order regarding the Sixth Amendment may be used in any determination made by the Court in future proceedings, including those set now set for January 22–24, 2025 on this Court. The Court reserves ruling on any argument the parties might make as to primacy or co-extensiveness between the Sixth Amendment and Article I, Section 6 of the Maine Constitution until later in these proceedings after further hearing and argument.

With respect to Count V, the claim brought against the State of Maine, counsel for the State must now decide whether, in light of its pending appeal of the previous findings of this Court, it intends to pursue *limited* discovery in the form of depositions pursuant to Rule 56(h) as it has suggested in some of the filings on the pending motions. If the State wishes to do so, it must file a discovery plan with opposing counsel and the Court by January 6, 2025. The Court urges the State to begin to schedule any such depositions as soon as possible, and at the January

6, 2025 conference, the Court will discuss with counsel for the parties the deadlines for this discovery and how the parties will finally argue the issues presented in Count V.

Finally, the Court is reminded that, as the Assistant Attorney General who has represented the MCPDS Defendants throughout this litigation stated early on, it is the State of Maine that is “the real party in interest in this matter.” Mot. Dismiss. Tr. 16, 17 (May 26, 2022).

The entry will be:

On Count I, the Plaintiffs’ Motion for Partial Summary Judgment is GRANTED on the issue of liability only. The Court will conduct further proceedings to consider the arguments of the parties on the issue of remedy. The MCPDS Defendants’ Motion for Summary Judgment on Count I is DENIED.

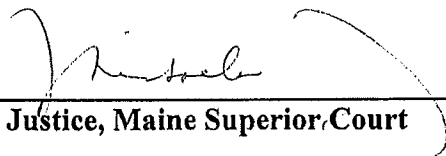
On Count II, the MCPDS Defendants’ Motion for Summary Judgment is GRANTED and the Plaintiffs’ Motion on the issue of liability is DENIED.

On Count III, the Habeas proceeding will proceed before the Court on January 22–24, 2025. The legal findings made in this Order may be applied to any Order issued on Count III after hearing and argument.

On Count V, the Motion for Summary Judgment filed by the State of Maine on the issue of sovereign immunity is DEFERRED and the Motion to Continue Trial on Count V only is granted in part to give the State of Maine a brief period to conduct discovery for reasons stated above.

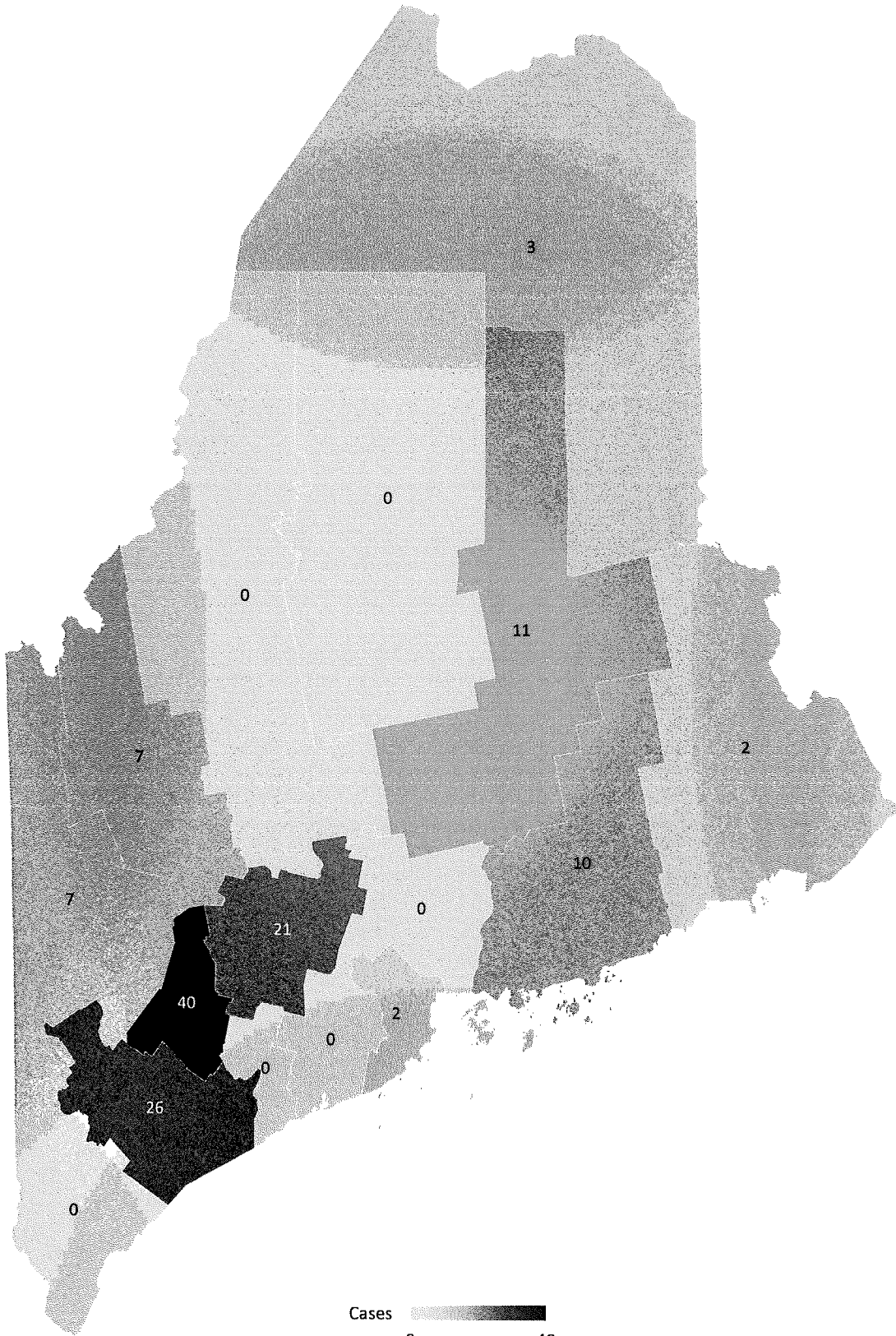
The Clerk shall note this Order on the docket by reference pursuant to Rule 79(a) of the Maine Rules of Civil Procedure.

Dated: January 3, 2025

  
Justice, Maine Superior Court

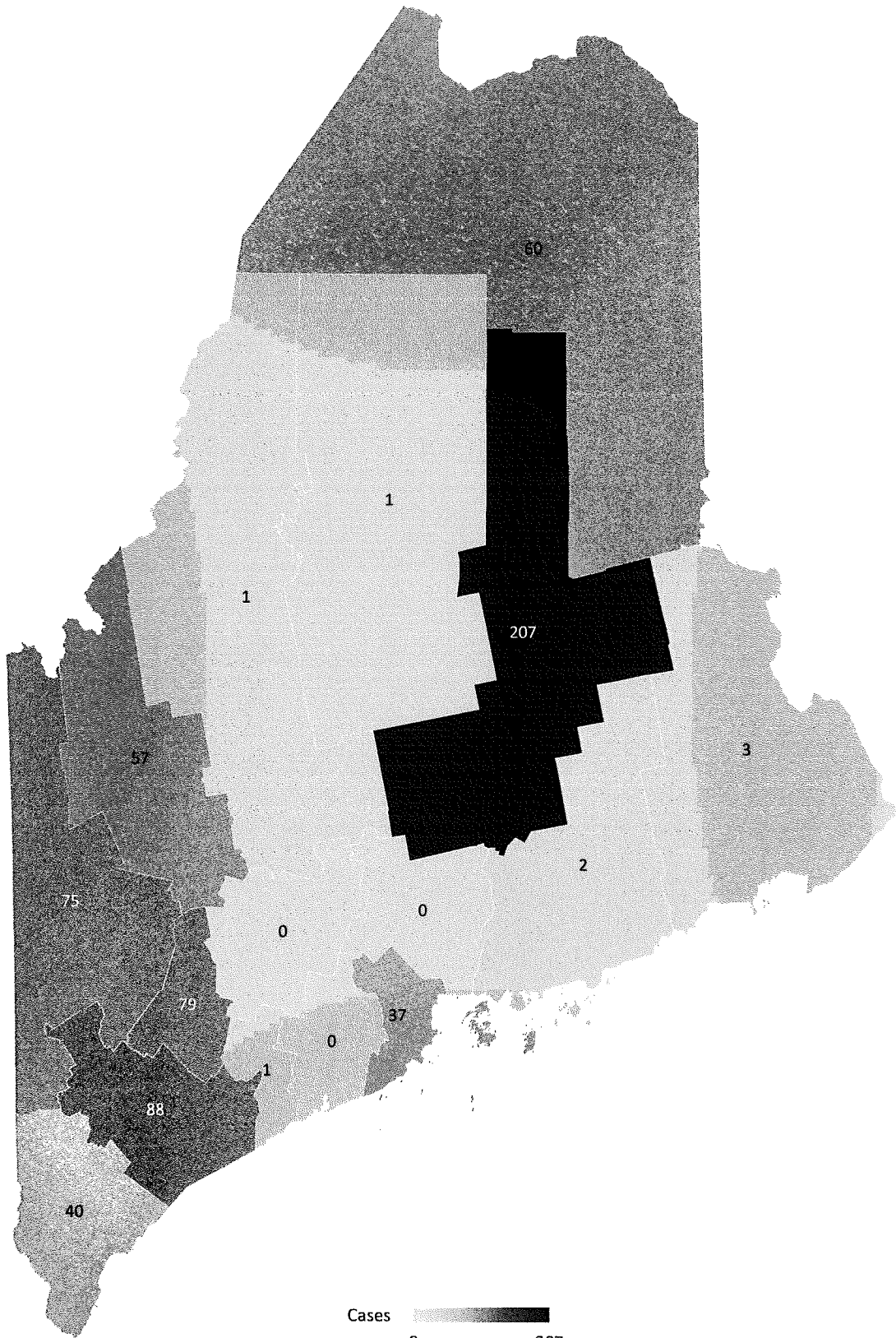
Entered on the Docket: 1/3/2025

# Child Protective Counsel needed By County 2/10/2025



Cases 0 40

# Unstaffed Criminal Cases by County 2/10/2025



Cases 0 207