

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

JOSEPH A. DENBOW et al.,

Petitioners,

v.

MAINE DEPARTMENT OF
CORRECTIONS et al.,

Respondents.

Docket No. 1:20-cv-00175-JAW

**RESPONDENTS' MOTION TO
DISMISS AND INCORPORATED
MEMORANDUM OF LAW**

Motion to Dismiss

Under Rule 5 of the Rules Governing § 2254 Cases (the “Habeas Rules”),¹ Respondents Maine Department of Corrections and Commissioner Randall Liberty (together, “MDOC”) move to dismiss the petition for the writ of habeas corpus filed by state inmates Joseph Denbow and Sean Ragsdale (“Petitioners”) on behalf of the putative classes, on the basis that Petitioners failed to exhaust administrative remedies as required by 28 U.S.C. § 2254(b) and (c).

Introduction

Section 2254 provides “a simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court.” *Rhines v. Weber*, 544 U.S. 267, 276-77 (2005) (quoting *Rose v. Lundy*, 455 U.S. 509, 520 (1982)). Ignoring this instruction is “fatal to the prosecution of a habeas petition.” *Jackson v. Coalter*, 337 F.3d 74, 85-86 (1st Cir. 2003) (cleaned up); *Martens v. Shannon*, 836 F.2d 715, 717 (1st Cir. 1988).

¹ Should the Court conclude that the Habeas Rules are inapplicable, Respondents alternatively move under Fed. R. Civ. P. 12(b)(6).

There is no question that the two named petitioners here have not yet exhausted state-court remedies. Section 2254(c) provides that petitioners “shall not be deemed to have exhausted . . . if [they have] the right under the law of the State to raise, by any available procedure, the question presented.” Here, both men could bring a state court petition for post-conviction review (“PCR”), and in fact, Mr. Denbow has. That action is proceeding expeditiously, with a bail hearing set for June 24, 2020. Other state-court remedies are potentially available too: Petitioners could have filed a petition for a state-law writ of habeas corpus under 14 M.R.S. § 5501, a request for judicial review of a final agency action under 5 M.R.S. § 11001 and M.R. Civ. P. 80C, or a motion to correct their sentences under M.R.U. Crim. P. 35. These “available procedures” mean that Petitioners have not exhausted their claims. 28 U.S.C. § 2254(c).

Nor can Petitioners meet their heavy burden of establishing either of the two statutory exceptions to exhaustion: that “there is an absence of available State corrective process” or that “circumstances exist that render such process ineffective to protect the rights of the applicant.” 28 U.S.C. § 2254(b)(1)(B)(i) & (ii). Instead, the evidence shows that the Superior Court in Petitioner Denbow’s case is moving forward, that the state courts have been available throughout the pandemic to expeditiously hear emergency cases and are increasingly back to normal operations, and that no state inmates besides Denbow have even tried to present COVID-19-related claims in state PCR proceedings. Petitioners thus cannot show that exhaustion is excused because state processes are “absent” or “ineffective.”

Because Petitioners cannot meet their burden of showing that these state court procedures are unavailable, this Court should dismiss the petition under § 2254(b) and (c). In addition, given that the Superior Court is presently adjudicating Mr. Denbow’s nearly identical petition for post-

conviction review, this Court should abstain from hearing his case under *Younger v. Harris*, 401 U.S. 37, 45 (1971), and should dismiss Petitioner Denbow from the suit.

Facts

I. Background.

Petitioners Denbow and Ragsdale brought a putative class habeas petition on May 15, 2020, on behalf of a class of “medically vulnerable” inmates and three subclasses. (Pet. ¶¶ 63, 67 (ECF No. 1).) Petitioners moved for a TRO or preliminary injunction on May 18, 2020. (ECF No. 5.) Mr. Denbow is serving a sentence for two counts of operating after habitual offender revocation and aggravated forgery,² and he is due to be released at the end of his sentence on August 28, 2020.³ (State’s Resp. to Pet. 1 p. 1 (Ex. A); Prisoner/Probationer Search for Mr. Denbow, <https://www1.maine.gov/cgi-bin/online/mdoc/search-and-deposit/detail.pl?mdocnumber1=33030> (last viewed June 20, 2020).) Mr. Ragsdale is serving a sentence for two counts of aggravated trafficking of scheduled drugs, and is due to be released at the end of his sentence on July 13, 2020. (Prisoner/Probationer Search for Mr. Ragsdale, https://www1.maine.gov/cgi-bin/online/mdoc/search-and-deposit/detail.pl?mdoc_number1=126457 (last viewed June 20, 2020).)

² The petition claims that Mr. Denbow is in prison for aggravated forgery because he “initially g[ave] the traffic officer his brother’s name instead of his own” during a traffic stop. (Pet. ¶ 14.) But this description of his offense not consistent with a conviction for aggravated forgery, which requires falsely making, completing, endorsing, or altering one of several kinds of “written instrument[,],” including records “to be filed in or with a public office[.]” 17-A M.R.S. § 702(1).

³ These dates are the earliest possible release dates, due to those inmates’ monthly good time credits, which they may or may not earn for the time remaining on their sentence, based on disciplinary actions and other factors.

II. The Superior Court Is Adjudicating Petitioner Denbow's Petition for Post-Conviction Review.

On April 13, 2020, Petitioner Denbow, through the same counsel representing him in this case (ACLU of Maine), filed an Emergency Petition for Post-Conviction Review ("PCR") by e-mailing it to the Oxford County Clerks' Office under PMO-SJC-3. (Ex. B, Pet.) Petitioner Denbow also filed by e-mail a supporting memorandum of law, as well as an Emergency Motion for Release on Bail and Leave to File an Unsworn Petition. (Ex. C, *Joseph Denbow v. State of Maine*, Docket Record, OXFCD-CR-2020-00226; Ex. D, Mem. of Law; Ex. E, Mot. for Release on Bail.)⁴ In his state court petition, Denbow makes the same claims he is making in this action, but under both the U.S. and Maine Constitutions. (Ex. B at 3; Ex D. at 2-8.) He asserts that his criminal sentence is unconstitutionally disproportionate to his offense and that his continued incarceration constitutes cruel and unusual punishment due to the threat of COVID-19. (*Id.*) In an order dated April 23, 2020, Justice William Anderson of the Maine Superior Court ordered the State to file a response to the petition. (Ex. F.) Also on April 23, Petitioner Denbow filed an Emergency Motion for Hearing on Post-Conviction Bail (for which briefing was complete on April 29). (Ex. G, H, and I.) Chief Justice Mullen assigned the petition to Justice Cole on April 24, 2020. (Ex. J.) The parties received these orders on May 18, due to a clerical error. (Ex. K, emails from Oxford County Superior Court Clerk Michelle Racine.)⁵ On May 19, Chief Justice Mullen assigned Justice McKeon to handle the proceedings. (Ex. L.)

⁴ In contrast with Fed. R. Civ. P. 12(b)(6), the Habeas Rules do not prevent the Court from considering evidence extrinsic to the complaint in deciding a motion to dismiss for failure to exhaust. In any event, even in the Rule 12(b)(6) context, a court may properly consider court filings of undisputed authenticity, as well as other matters subject to judicial notice. *See Squeri v. Mount Ida Coll.*, 954 F.3d 56, 61 (1st Cir. 2020) (matter subject to judicial notice); *Lipin v. Ellis*, No. 07-92-P-S, 2007 WL 2198876, at *3 (D. Me. July 26, 2007) (court orders, judgments, and other "matters of public record").

⁵ The clerical error may have related to the fact, as admitted by Petitioner Denbow, that "some of [Petitioner Denbow's] motions may have been filed in the docket numbers for Mr. Denbow's underlying

On June 5, 2020, the State filed a response to Denbow's petition (electronically and by overnight mail) and simultaneously moved to dismiss the petition for failure to exhaust administrative remedies within MDOC, as required by 15 M.R.S. § 2126. (Ex. A.)⁶ Petitioner Denbow's counsel opposed the motion to dismiss on June 15. (Ex. M.)

On June 17, the court held a telephonic conference under M.R.U. Crim. P. 72A(a). During that phone conference on June 17, Justice McKeon ordered the State to file a reply in support of the motion to dismiss by June 26. Petitioner Denbow requested a deadline of July 10 to move to amend his petition to assert class allegations. Justice McKeon indicated he would likely set a deadline for moving to amend sooner than July 10. Justice McKeon also ordered Petitioner Denbow to file a request for an evidentiary hearing, if Denbow believes a hearing is necessary, which Justice McKeon anticipated would likely occur in September 2020. Following the conference, the court scheduled a bail hearing for Mr. Denbow for June 24, 2020.

Respondents' investigation indicates that no state inmates other than Mr. Denbow have attempted to avail themselves of the state-court PCR process to address COVID-19-related conditions of confinement. The Office of the Attorney General (OAG), which sometimes represents the State in such proceedings, is handling no such cases. (Decl. of Lisa Marchese, dated June 22, 2020, ¶ 12.) Moreover, the OAG polled the various District Attorneys—whose offices handle the remainder of such cases—and learned of only one additional COVID-19-related case,

criminal dockets, OXFCD-CR-2018-00300, and OXFCD-CR-2018-00600." (Renewed Mot. for Bail and Opp. to Mot. to Dismiss State Pet. (Ex. M) at 2 n. 2.)

⁶ At the State's request, the Superior Court impounded Exhibit A to that response (Mr. Denbow's criminal history) and certain lines in the supporting affidavits filed by the State, to protect Petitioner Denbow's privacy. Respondents are filing with this Court the redacted versions of the affidavits, but are not filing the criminal history, because it is not necessary for deciding the motion to dismiss. (See Ex. A.)

which involves a probationer in the community who filed a case on June 4. (Marchese Decl. ¶¶ 5, 7-11.)

III. State Court Procedures Are Available to MDOC Inmates.

As evidenced by the progress of Mr. Denbow's state-court case, the state courts remain open and available to litigants. Beginning in March 2020, the Maine Supreme Judicial Court issued emergency Pandemic Management Orders ("PMOs") to respond to COVID-19, which have been periodically updated. Those orders limited the case types that would be routinely scheduled and heard, with later orders incrementally increasing the number of case types that would be scheduled. (Ex. N, PMO-SJC-1; Ex. O, State of Maine Judicial Branch, COVID-19 Phased Management Plan ("PMP") at 1.) From the start of the pandemic, the Supreme Judicial Court's emergency order allowed the hearing of motions for review of bail for defendants held in custody and criminal matters "related to the incarceration of a defendant." (Ex. N, PMO-SJC-1.) The orders also provided that a case of a type not being routinely heard could still be scheduled and heard upon a showing of "urgent and compelling reasons." *Id.*

By May 2020, virtually all case types and proceedings could be heard without the need to show urgent and compelling reasons. *See* Ex. P, May 6, 2020 Press Release ("Effective immediately, and continuing through May 30, 2020, the courts may schedule and hear virtually all case types and proceedings so long as all hearings, conferences, and other court events take place only by video or audio conference."); *see also* Ex. O, PMP (noting that recent PMOs provide for hearing of almost all case types provided that the case can be addressed by video or telephone and that judicial resources will be directed to priority case types first).

On May 27, 2020, the Maine Judicial Branch issued a detailed five-phase approach for the resumption of all functions of the Maine state courts by September 7. (Ex. O, PMP.) This plan makes clear that state courts will continue to schedule and hear matters relating to persons held in

custody. (*Id.* at 4.) Under the plan, state courts may “schedule and hear all other case types and proceedings so long as all hearings, conferences, and other court events take place only by video or audio conference.” (*Id.* at 5.) A party may still request that a matter be heard or scheduled by the Superior Court. (*Id.* at 6.) The plan envisions a return to all activities by September 2020. (*Id.* at 11.) Effective Monday, June 1, 2020, Maine courthouses were open from 8 a.m. to 4 p.m., Monday through Friday, with visitor restrictions for entrants. (*Id.* at 3, 14-15.)

Although there appear to be no other state-court inmate cases like Mr. Denbow’s, Maine courts have moved quickly in other types of cases since the start of the pandemic. For example, a case challenging the Secretary of State’s ratification of a direct initiative petition followed a breakneck schedule in which the Superior Court adjudicated a challenge to an April 1 administrative decision by April 13, with the Law Court deciding the resulting appeal by May 7, 2020. *See Reed v. Sec’y of State*, 2020 ME 57, ¶¶ 8-11 & n.6, ___ A.3d ___. Similarly, in an action to enjoin a citizen initiative, *Avangrid Network, Inc. v. Secretary of State*, CV-20-206, Justice Warren, on May 22, 2020, set a schedule that contemplated a merits resolution by June 29, 2020. (Ex. Q, Scheduling Order.) And, a challenge to a people’s veto petition, *Payne v. Secretary of State*, Docket No. KEN-20-169, is currently proceeding in the Law Court on an expedited basis.⁷

Within MDOC facilities, prison mail (including legal mail) has proceeded normally. (Decl. of Dr. R. Thornell in Supp. of Mot. to Dismiss, ¶ 5.) The only change in prison mail during the COVID-19 pandemic has been for inmates on quarantine status, whose mail is held until after the two-week quarantine due to the potential for transmitting COVID-19. (*Id.*) Moreover, MDOC

⁷ The Order establishing the expedited course of appeal is posted at https://www.courts.maine.gov/news_reference/high_profile/rankedchoice2020/order_course_of_appeal.pdf (last visited June 21, 2020).

facilities have taken steps to ensure prisoners can continue to access to legal materials. (*Id.* ¶¶ 8-10.)

Legal Standard

Habeas relief to an inmate in state custody “shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State.” 28 U.S.C. § 2254(b)(1)(A). Subsection (c) of § 2254 states that “[a]n applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.” This strict exhaustion requirement is grounded in principles of federal-state comity, which counsel that federal courts “will interfere with the administration of justice in the state courts only ‘in rare cases where exceptional circumstances of peculiar urgency are shown to exist.’” *Rose*, 455 U.S. at 515-16 (quoting *Ex parte Hawk*, 321 U.S. 114, 117 (1944)). Moreover, because § 2254’s exhaustion requirement is codified in statute, federal courts have no “judicial discretion” to excuse exhaustion except as the statute specifically allows. *See Ross v. Blake*, 136 S. Ct. 1850, 1857 (2016) (addressing exhaustion under Prison Litigation Reform Act).

Federal courts enforce the exhaustion requirement “consistently and rigorously,” with few exceptions. *Adelson v. DiPaola*, 131 F.3d 259, 262 (1st Cir. 1997). The First Circuit has “made no bones about the fact that a failure to exhaust ordinarily is ‘fatal’ to the prosecution of a habeas petition.” *Jackson v. Coalter*, 337 F.3d 74, 85-86 (1st Cir. 2003) (quoting *Martens v. Shannon*, 836 F.2d 715, 717 (1st Cir. 1988)).

There are two “escape hatches” from § 2254’s exhaustion requirement. (Order on Mot. for TRO (ECF No. 25) at 40.) State exhaustion is not required if the federal petitioner has demonstrated that “there is an absence of available State corrective process” or if “circumstances

exist that render such process ineffective to protect the rights of the applicant.” (*Id.* (citing 28 U.S.C. § 2254(B)(1)(i-ii)).) The latter situation requires a showing that the relevant state-court process is “so clearly deficient as to render futile any effort to obtain relief.” *Gagne v. Fair*, 835 F.2d 6, 9 (1st Cir. 1987) (quoting *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (per curiam)).

The burden is on petitioner to demonstrate exhaustion or an exception. *Barresi v. Maloney*, 296 F.3d 48, 51 (1st Cir. 2002); *accord Buchanan v. O’Brien*, 181 F.2d 601, 605 (1st Cir. 1950) (holding that the burden was on petitioner to show exhaustion under § 2254 “[b]efore a federal court may exercise the delicate jurisdiction of interfering with state criminal processes”). And it is a “heavy burden,” requiring petitioner to establish that he “fairly and recognizably presented to the state courts the factual and legal bases of this federal claim.” *Adelson*, 131 F.3d at 262; *accord Coningford v. Rhode Island*, 640 F.3d 478, 482 (1st Cir. 2011); *Barresi*, 296 F.3d at 51.

Argument

I. The Petition is Barred for Failure to Exhaust.

As discussed in the Court’s order denying Petitioners a TRO, the First Circuit follows the majority view that § 2254 governs all habeas petitions by inmates in custody pursuant to a state court judgment, including those styled as petitions under 28 U.S.C. § 2241. (Order on Mot. for TRO at 38); *see Gonzalez-Fuentes v. Molina*, 607 F.3d 864, 875 n.9 (1st Cir. 2010); *Brennan v. Wall*, 100 Fed. App’x 4 (1st Cir. 2004). Thus, it is settled law in the First Circuit that § 2254’s rigorous statutory exhaustion requirement—and not the flexible judge-made exhaustion requirement of § 2241 preferred by Petitioners—applies in this case. *Gonzalez-Fuentes*, 607 F.3d at 875 n.9; *see Elleby v. Smith*, No. 20 CIV. 2935, 2020 WL 2611921, at *4 n.3 (S.D.N.Y. May 22, 2020) (contrasting § 2254 statutory exhaustion requirement, which barred COVID-19-related petition, with “judge-made” § 2241 exhaustion requirement).

Petitioner Denbow has a pending petition for post-conviction review in the Superior Court on the same claims he brings before this Court and thus very much “has the right to raise” the “question presented” in “the courts of the state” and is thus barred by § 2254(c). (Ex. B.) In contrast to Petitioner Denbow, Petitioner Ragsdale has not even attempted to invoke state judicial processes to challenge his confinement. (Marchese Decl. ¶¶ 7-12; *see also* Ragsdale Decl. (ECF No. 1-3); Pet. (ECF No. 1) at 43.) “[I]t is rather incongruous to call an otherwise available process unnecessarily time-consuming or futile when one has made no effort to initiate it.” *Mays v. Dart*, No. 20-C-2134, 2020 WL 1812381, at *6 (N.D. Ill. April 9, 2020); *see also Wilson v. Wells*, No. 3:17-CV-40, 2017 WL 6667515, at *2 (D. Conn. Sept. 6, 2017) (declining to convert complaint into § 2254 petition where petitioner failed to allege any efforts to exhaust state-court remedies). In short, there can be no dispute that neither petitioner has exhausted his state-law remedies under § 2254(b) and (c). Thus, the only way for Petitioners to overcome the exhaustion requirement is to demonstrate that one of § 2254’s two exceptions to exhaustion applies to their claims. They will be unable to carry their “heavy burden” to do so. *Barresi*, 296 F.3d at 51.

A. State Court Remedies Are Available and By No Means Futile.

1. *Mr. Denbow’s State Court Proceeding Is Not Futile.*

Petitioners previously took the position that § 2254’s exhaustion exception applies here because Mr. Denbow’s PCR petition allegedly “languished” for “over five weeks” in the Superior Court. (Mot. for P.I. (ECF No. 5) at 10.) It has since become clear, however, that this assertion was incorrect. As counsel for both parties belatedly (due to a clerical error) learned, Mr. Denbow’s petition was specially assigned to a justice on April 24, 2020, shortly after it was filed, and the State had been ordered to respond to the petition within 21 days of receipt of the order. Although the clerical error delayed the State’s response deadline by a few weeks, the State did respond on June 5, 2020, and the case is now moving forward expeditiously.

A clerical error, unlikely to be repeated, that delayed the state-court proceeding by a few weeks does not come close to showing that the state court processes are “so clearly deficient” as to be “futile.” *Gagne*, 835 F.2d at 9. Mere passage of time is not sufficient to establish futility except the most egregious circumstances. *See Mercer v. Warden*, No. 98-315-P-H, 1999 WL 33117092, at *3 (D. Me. Feb. 4, 1999) (declining to excuse exhaustion despite “troublesome” three-year delay in state-court proceedings), *report and recommendation aff’d* (Feb. 24, 1999); *St. George v. Dist. Attorney of Cty. of Philadelphia*, 529 F. App’x 226, 228 (3d Cir. 2013) (“regrettable delay” in state court proceeding did not excuse exhaustion where delay “has not rendered the state remedy ineffective”); *Malloy v. Dist. Attorney of Montgomery Cty.*, No. CV 20-1804-JMY, 2020 WL 2571170, at *3 (E.D. Pa. May 21, 2020) (two-month COVID-19-related delay in state-court proceedings insufficient to excuse exhaustion); *cf. Story v. Kindt*, 26 F.3d 402, 406 (3d Cir. 1994) (excusing exhaustion after eleven-year delay in state-court proceeding caused by state court’s “inability to manage its own docket”).

Here, after a brief delay, the state court proceeding is moving forward swiftly. The Superior Court is holding a bail hearing on June 24, 2020, and will be adjudicating the State’s motion to dismiss the petition after a reply is filed on June 27, 2020. An evidentiary hearing, if Petitioner Denbow seeks one, would likely occur in September 2020. Particularly in light of MDOC’s exemplary track record in keeping COVID-19 almost entirely out of MDOC facilities,⁸ the state court’s scheduling decisions are entirely consistent with the urgency of Mr. Denbow’s claims.

Given these facts, the state court proceeding cannot be shown to be “futile.” *Gagne*, 835 F.2d at 9. The Court should thus “defer action on a cause properly within its jurisdiction until the

⁸ See ECF No. 20, Thornell Declaration, dated May 27, 2020, ¶ 55 (stating that MDOC has had only four positive inmate cases, in a single facility, since the start of the pandemic).

courts of another sovereign with concurrent powers, already cognizant of the litigation, have had an opportunity to pass upon the matter.” *Scarpa v. Dubois*, 38 F.3d 1, 6 (1st Cir. 1994) (citing *Rose*, 455 U.S. at 518). Because Petitioners have not given the state court a chance to rule on Mr. Denbow’s claims, this Court should dismiss the petition without prejudice.

2. *Petitioners Cannot Show that Maine Courts Generally Are Incapable of Adjudicating COVID-19-Related Claims Brought by Class Members.*

Petitioners also claim that “exhaustion is futile for proposed Class Members, because requiring each class member to individually petition the state court would burden the limited judicial resources during this emergency and cause further delay.” (Pet. (ECF No. 1) ¶ 95.) But the state courts would clearly not be overburdened by petitions by the two named class members. Whether state courts would be overburdened if every single putative class member filed a state-court action is not the relevant question and in any event is purely speculative. Respondents’ investigation shows that it appears no other inmate in MDOC custody has even tried to file a petition for post-conviction review based on COVID-19. (Marchese Decl. ¶¶ 7-12.) There is simply no reason to think that dismissal of this action would result in a flood of state-court actions by MDOC inmates or that state courts could not handle such a flood.

As another district court recently explained, although COVID-19 “has had an undeniable impact on all aspects of society, including delaying many court proceedings,” such generalized facts are not sufficient to excuse exhaustion absent some specific showing by a petitioner that he “cannot obtain relief” in state court. *Pittman v. Cook*, No. 3:20cv626, 2020 WL 2840256, at * 7 (D. Conn. June 1, 2020) (declining to excuse exhaustion where petitioner never attempted to file an emergency motion in his state case). In addition to *Pittman*, a growing number of federal courts have rejected claims by inmates that actual or theorized COVID-19 related roadblocks to a state

court proceeding are sufficient to defeat § 2254's exhaustion requirement.⁹ This caselaw is particularly apt where, as described above, Maine courts are well along in the process of returning to normal operations and where state courts have been hearing cases regarding in-custody individuals and other time-sensitive cases.

3. *Other State Remedies Besides PCR Are Potentially Available.*

Finally, even if PCR proceedings were found to be "ineffective" for some reason, class members have other potential options to present their claims in state court.¹⁰

State inmates could file a petition for writ of habeas corpus under 14 M.R.S. § 5501, which states, "Every person unlawfully deprived of his personal liberty by the act of another, except in the cases mentioned, shall of right have a writ of habeas corpus" and that this petition "shall be made to any Justice of the Supreme Judicial Court or Superior Court, *regardless whether or not the Supreme Judicial Court or Superior Court is in session.*" 14 M.R.S. § 5513 (emphasis added). The Justice may then "hear evidence produced on either side, and if no legal cause is shown for

⁹ See *Resch v. Rewerts*, No. 1:20-CV-515, 2020 WL 3396625, at *3 (W.D. Mich. June 19, 2020) (exhaustion not excused where petitioner failed to allege circumstances rendering state court remedies ineffective); *Brooks v. Wolcott*, No. 20-CV-0516, 2020 WL 3103795, at *4 (W.D.N.Y. June 11, 2020) ("various state and national orders" allegedly impacting availability of courts did not excuse exhaustion); *Bussinger v. Gramp*, No. CV 20-5600, 2020 WL 2989080, at *2 (D.N.J. June 3, 2020) (exhaustion not excused where petitioner could have sought emergency review of claims in state court); *Griffin v. Cook*, No. 3:20-CV-589, 2020 WL 2735886, at *2 (D. Conn. May 26, 2020) (exhaustion not excused where state courts had previously acted upon another COVID-19-related habeas matter); *Elleby v. Smith*, No. 20 CIV. 2935, 2020 WL 2611921, at *4 (S.D.N.Y. May 22, 2020) (exhaustion not excused where inmates could bring post-conviction proceedings in New York courts and those courts were acting on such requests); *Malloy v. Dist. Attorney of Montgomery Cty.*, No. CV 20-1804, 2020 WL 2571170, at *3 (E.D. Pa. May 21, 2020) (two-month COVID-19-related delay in state-court proceedings did not excuse exhaustion); *Gansert v. Barnes*, No. 820CV00781, 2020 WL 1975387, at *2 (C.D. Cal. Apr. 24, 2020) (order to show cause why exhaustion did not bar claim where prisoner's pending state-court proceeding was filed "a few weeks ago"); *Money v. Pritzker*, No. 20-CV-2093, 2020 WL 1820660, at *21 (N.D. Ill. Apr. 10, 2020) (exhaustion not excused where relevant state court remained open for emergency matters).

¹⁰ In pointing out these potential avenues for state-court relief, Respondents do not suggest that a class member's right to such relief would go uncontested by the State in any such proceeding, nor do they waive (or, for that matter, have any authority to waive) any arguments that the State might have against such relief.

such imprisonment or restraint, the court or justice shall discharge” the individual. 14 M.R.S. §§ 5513, 5516. If the writ is denied, an appeal can be taken to the Law Court. *Id.* § 5513; *see Lamay v. State*, 276 A.2d 603, 605 (Me. 1971) (considering an appeal of the Superior Court’s denial of a petition for habeas corpus and holding that a hearing is mandatory “when there are relevant allegations of fact in a petition which, if satisfactorily proved, would entitle the Petitioner to the writ[.]”). Thus, the writ of habeas corpus remains a viable state court remedy for “[e]very person unlawfully deprived of his personal liberty by the act of another.” 14 M.R.S. § 5501. A detained juvenile recently used § 5501 to obtain review of his detention in the MDOC juvenile facility in *A.I. v. State of Maine*, Dkt. No. SJC-19-02 (Me. Sup. Jud. Ct. 2019) (opinion attached as Ex. R), which Justice Gorman ruled on, and A.I. appealed. Petitioners could have brought a petition under § 5501, but they have not tried.

In addition to a § 5501 petition, Petitioners could have challenged the denial of their applications for Supervised Community Confinement (or any other final COVID-related action by MDOC) under the Maine Administrative Procedure Act (MAPA), 5 M.R.S. § 11001. In the petition for PCR, Petitioner Denbow recognized the potential for review by a state court under this provision, stating, “To the extent the Court determines that this action challenges administrative action not included in the definition of post-sentencing proceeding, . . . Petitioner respectfully requests that the Court exercise its equitable authority to convert the action into an emergency complaint under [MAPA].” (Mem. of Law in Supp. Emergency Pet. for PCR at 9 n.17 (Ex. D).) That Petitioners could have sought judicial review of a final agency action reflects another available state procedure that Petitioners could have employed.

Finally, Under Criminal Procedure Rule 35, a convicted individual may move to “correct an illegal sentence or a sentence imposed in an illegal manner.”¹¹ Because Petitioners’ habeas claims purport to challenge the legality of their criminal sentences, those claims may be cognizable through a Rule 35 motion to correct a sentence. *See State v. Gilman*, 2010 ME 35, ¶ 15, 993 A.2d 14 (vacating a criminal sentence for operating after revocation on appeal of the denial of the State’s motion to correct an illegal sentence, and rejecting defendant’s arguments that the minimum sentencing provision was unconstitutionally disproportionate and violated his equal protection and due process rights). One inmate at Mountain View has brought a motion to reduce his sentence under Rule 35(c), based on the threat of COVID-19. (Marchese Decl. ¶ 10.)

In short, because class members have multiple state avenues available to them, federal habeas relief is barred by 28 U.S.C. § 2254(c).

B. That State Law Regarding Class-Wide Habeas Relief Is Untested Does Not Excuse the Failure to Exhaust.

Petitioners also argue that, because the state criminal procedure rules do not authorize class treatment, they are not subject to the exhaustion requirement. (Mot. for P.I. (ECF No. 5) at 10.) The Court should reject this proposition as a matter of law. Respondents are aware of no case in any jurisdiction supporting the extraordinary proposition that merely including class allegations in a habeas petition could defeat exhaustion, thus creating a huge, easily exploited loophole in an exhaustion requirement that is supposed to be applied “consistently and rigorously.” *Adelson*, 131 F.3d at 262. To the contrary, federal courts considering exhaustion in the context of habeas class-

¹¹ While a Rule 35(a) motion must be “made within a year after a sentence is imposed,” and is thus arguably only available for a portion of the purported class, Petitioners could presumably argue that the one-year bar should not apply when the factors that make the “sentence imposed in an illegal manner” have only recently arisen. M.R.U. Crim. P. 35(a). As discussed more fully below, that the contours of a state remedy are unclear or untested does not show that they are “unavailable” under § 2254.

actions have required the Petitioners to satisfy exhaustion requirements, including in the COVID-19 context. *Mays*, 2020 WL 1812381, at *6 (dismissing class-action habeas petition over COVID-19 response where named petitioners failed to exhaust); *Pace v. Chino Inst. for Men*, No. EDCV 09–00841, 2009 WL 2189885, at *2 (C.D. Cal. July 21, 2009) (finding “no need to consider” whether a § 2254 petition may be brought as a class action where named petitioners failed to exhaust); *Robinson v. Leahy*, 401 F. Supp. 1027, 1032 (N.D. Ill. 1975) (dismissing class action for failure to exhaust under § 2254).

Indeed, Plaintiffs’ proposed class-action exception is inconsistent with the very language of § 2254. To excuse exhaustion, subsection (b)(1)(B)(ii) requires the applicant to show that “State corrective process” is “ineffective to protect the rights of the applicant.” Even assuming that the “applicant” here includes each putative class member and not just the two named petitioners, the fact that state law might require a particular individual class member to seek state-court relief actively through an individual habeas or PCR action rather than passively as a member of a class in no way makes the State’s corrective processes “ineffective” to protect that particular class member’s rights. 28 U.S.C. § 2254(b)(1)(B)(ii). Moreover, in a telling indication of congressional intent, § 2254 specifically provides that a petitioner must use “*any* available procedure” to present his claims to the state court in order to exhaust. 28 U.S.C. § 2254(c) (emphasis added). This language strongly suggests that Congress did not intend for federal courts to excuse exhaustion merely because state-court rules did not include the applicant’s preferred procedural mechanism for presenting his claims.

Finally, even assuming *arguendo* that the lack of a class-action mechanism in the state courts might excuse § 2254 exhaustion, Petitioners cannot meet their heavy burden to establish that the unavailability of a class-action remedy in state court is so certain that it would be “futile”

for Petitioners to even attempt to seek it. *Gagne*, 835 F.2d at 9; *see also Roman v. DiGuglielmo*, 675 F.3d 204, 209 (3d Cir. 2012) (exhaustion under § 2254 is futile only if a remedy is “so clearly foreclosed by state law” that the federal habeas court can “conclude with certainty” that the remedy is unavailable).

Here, Petitioners have not tried to bring a class petition in state court, or a common law class petition under 14 M.R.S. § 5501. At a telephonic hearing on June 17, 2020, in Mr. Denbow’s state post-conviction review proceeding, Justice McKeon stated that he will permit Petitioner Denbow to move to amend his petition to include class claims and will decide on briefs whether to allow amendment.¹² Petitioners undoubtedly have the opportunity to make the case for a class petition before Justice McKeon; they simply have not tried.

As described in Part I.A.3 above, Petitioners and other class members also have other state court processes by which they could attempt to challenge their confinement, including a common law habeas petition under 14 M.R.S. § 5501 or an administrative appeal of an adverse SCCP decision under 5 M.R.S. § 11001 and M.R. Civ. P. 80C. In either type of proceeding, Petitioners could attempt to assert class-action claims, even if it turned out they were unavailable in PCR proceedings.

While it is true that Maine Supreme Judicial Court appears to have never held that a class mechanism is available in any of the proceedings potentially available to Petitioners in state court, it also appears to have never rejected the applicability of a class mechanism to those proceedings.¹³

¹² MDOC will likely oppose class treatment of this putative class action, including on the same grounds MDOC will oppose class certification in the federal case, but the opposition of one party does not establish that the remedy is unavailable.

¹³ Indeed, even in the federal habeas context, uncertainty remains as to whether a class action is permissible. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 858 n.7 (2018) (Thomas, J., concurring in part) (“This Court has never addressed whether habeas relief can be pursued in a class action.”).

The reality is that no one knows whether Maine courts would allow such class claims. But Respondents do not have to establish that such a remedy is permitted; Petitioners must establish—to a “certainty”—that such a remedy is *not* permitted. *Roman*, 675 F.3d at 209. Thus, even if lack of a class mechanism could be said to make state processes “ineffective,” Petitioners still cannot be excused from exhaustion, since the most they can establish is uncertainty as to the availability of such a remedy in the state courts.

II. *Younger* Abstention Bars Denbow’s Claims.

Finally, Petitioner Denbow cannot obtain relief in this action or serve as class representative because his claims are barred by *Younger* abstention. *Younger* abstention is premised on the “strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances” and “a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.” *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S. 423, 431 (1982) (internal citations and quotation marks omitted).

As the Supreme Court has recently clarified, *Younger* abstention is potentially applicable to three specific types of “exceptional” state-court actions: “(i) criminal prosecutions, (ii) civil proceedings that are akin to criminal prosecutions, and (iii) proceedings that implicate a State’s interest in enforcing the orders and judgments of its courts.” *Sirva Relocation, LLC v. Richie*, 794 F.3d 185, 192 (1st Cir. 2015). If the state court proceeding falls within one of these categories, *Younger* further requires that the requested federal relief interfere (i) with an ongoing state judicial proceeding; (ii) that implicates an important state interest; and (iii) that provides an adequate opportunity for the federal plaintiff to advance his federal constitutional challenge. *Id.*

Here, all the requirements for *Younger* abstention are met. A state PCR proceeding in

which the petitioner seeks relief from a criminal sentence ordered by a state court “implicate[s] a State’s interest in enforcing the orders and judgments of its courts,” *id.*, and is thus one of the “exceptional” proceedings to which *Younger* applies. *See Willis v. Dembe*, No. CV 15-3821, 2016 WL 3612000, at *3 (E.D. Pa. July 6, 2016) (citing cases to show that “courts have interpreted [*Younger*] test to include pending state habeas actions”); *see also Heck v. Humphrey*, 512 U.S. 477, 487 n.8 (1994) (observing in dicta the abstention may be appropriate if a federal civil-rights action is brought during the pendency of a state habeas proceeding); *Morrow v. Holland*, No. 18-2412, 2019 WL 2720213, at *4 (W.D. Tenn. June 27, 2019) (applying *Younger* to postconviction proceeding); *Canales-Robles v. Peters*, 270 F. Supp. 3d 1230, 1241 (D. Or. 2017) (same).

Moreover, the three additional *Younger* factors are met: Denbow’s PCR proceeding is ongoing. (Ex. C.) An order from this Court releasing Denbow from custody would interfere with that state proceeding by effectively terminating it. *Bowell v. Paramo*, No. CV1709313, 2018 WL 4735721, at *4 (C.D. Cal. Aug. 6, 2018), *report and rec. adopted*, 2018 WL 4698250 (C.D. Cal. Sept. 28, 2018) (holding that federal action seeking release from custody “would entail interference [with state habeas proceedings] because the ongoing state proceeding effectively would be terminated”). Moreover, state habeas and post-conviction proceedings implicate a state’s “enforcement of criminal laws and the administration of its judicial system,” which are “vital state interests.” *Ridge v. Campbell*, 984 F. Supp. 2d 364, 375 (M.D. Pa. 2013); *see also Wiltse v. Smith*, No. 17-CV-01022, 2018 WL 1517176, at *2 (D.N.M. Mar. 27, 2018) (“the state has an important interest in reviewing the constitutionality of Petitioner’s criminal conviction and sentence”); *Shove v. Martel*, 510 F. App’x 503, 503 (9th Cir. 2013) (habeas proceeding “implicates important state interests”). Indeed, the State’s interest in postconviction review proceedings is precisely the same as its interest in the original criminal proceeding, which *Younger* itself recognizes as an interest

meriting abstention. And, finally, as already shown in Part I, Denbow has a full opportunity to advance his federal constitutional challenge in those state proceedings. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 17 (1987) (holding that an “unusual fact situation, never before addressed by the [state] courts” did not defeat abstention where plaintiff failed to show that state court procedures were “so deficient” that courts could not adjudicate constitutional claims); *Carbajal v. Hotsenpiller*, 524 F. App’x 425, 428 (10th Cir. 2013) (delay in state-court post-conviction proceeding did not establish state court provided an inadequate forum for *Younger* purposes). Because Denbow’s state petition provides an adequate remedy for Denbow to advance his constitutional challenges, and because a federal-court decision ordering the release of Denbow would interfere with that proceeding, this Court should abstain and dismiss Denbow’s petition.

Conclusion

The petition for habeas corpus is barred by 28 U.S.C. § 2254(b) and (c) and should be dismissed without prejudice.

Dated: June 22, 2020

AARON M. FREY
Attorney General

/s/ Jonathan R. Bolton

Jonathan R. Bolton

jonathan.bolton@maine.gov

Jillian R. O’Brien

jill.obrien@maine.gov

Alisa Ross

alisa.ross@maine.gov

Assistant Attorneys General

Office of the Attorney General

6 State House Station

Augusta, ME 04333-0006

Tel. (207) 626-8800

STATE OF MAINE
OXFORD, ss.

SUPERIOR COURT
UNIFIED CRIMINAL DOCKET
DOCKET NO. CR-2020-226
(*Post Conviction Review*)

JOSEPH DENBOW,

Petitioner

v.

STATE OF MAINE,

Respondent

**STATE OF MAINE’S RESPONSE AND
REQUEST FOR DISMISSAL OF
PETITION FOR POST-CONVICTION
REVIEW**

NOW Comes Respondent the State of Maine and hereby responds to the petition¹ by Joseph Denbow for post-conviction review and further requests that the Court dismiss the petition for failure to exhaust administrative remedies, as required by 15 M.R.S. § 2126.

PROCEDURAL HISTORY

Mr. Denbow is incarcerated at Mountain View Correctional Facility and is serving a sentence for aggravated forgery (Class B) and operating after habitual offender revocation (with a prior) (Class C), to which he pled guilty on May 8, 2019. (Denbow Criminal History, attached to this Response as Exhibit A.) He received a sentence of 10 years of incarceration, all but 2 years suspended, and 2 years of probation for the aggravated forgery and 2 years of incarceration and 2 years of probation for the operating after habitual offender revocation. (*Id.*) His estimated release date is currently August 28, 2020. (Affidavit of Hollie Brewer, filed concurrently, ¶ 9.) His criminal history also reflects prior convictions for assault, burglaries, thefts, operating under the influence, operating after habitual offender revocation, failing to report, failure to submit to arrest,

¹ Petitioner submitted not only a petition for post-conviction review but also a “Memorandum of Law in Support of Emergency Petition for Post-Conviction Review.” The Court’s Order directing the State to respond attached the petition, but not the “Memorandum of Law.” The State reserves the right to respond further to the legal and factual claims made in the “Memorandum of Law,” after the Court determines if the petition must be dismissed for failure to exhaust under 15 M.R.S. § 2126.

probation violations and revocations, and forgery. (Denbow Criminal History (attached as Ex. A); Affidavit of Benjamin Beal, filed concurrently, ¶ 13; Brewer Aff. ¶ 13.)

Mr. Denbow was incarcerated at Mountain View Correctional Facility on a prior conviction in 2013, and he applied to participate in the Supervised Community Confinement Program (SCCP)² run by the Maine Department of Corrections (“MDOC”). (Brewer Aff. ¶ 4; Beal Aff. ¶ 2.) After a thorough investigation of Mr. Denbow’s proposed residence and upon Mr. Denbow’s agreement to a list of conditions for his participation, MDOC granted him supervised community confinement in 2013.³ (Brewer Aff. ¶ 4, 7; Beal Aff. ¶¶ 3-4.) The SCCP Program allowed Mr. Denbow to live in the community (supervised by probation) and to attend welding classes at Beal College. (Brewer Aff. ¶ 6.) Mr. Denbow’s caseworker, Hollie Brewer, assisted him in applying to college and for financial aid. (*Id.* ¶ 3.) The Warden of Mountain View himself drove Mr. Denbow to the Beal College orientation. (*Id.* ¶ 5.). However, after being released to the community on SCCP, Mr. Denbow violated the terms of the program, and was shortly thereafter returned to Mountain View. (*Id.* ¶ 8.)

Mr. Denbow sought to participate in the SCCP program again in 2020, during his current term of incarceration. (Brewer Aff. ¶¶ 11-12.) Mr. Denbow wrote on a re-entry questionnaire, dated January 3, 2020, that he was not sure where he would be living upon release and would “need help with apt., house, etc.” and would need to apply for housing programs such as the

² The Supervised Community Confinement Program (SCCP) is governed by 34-A M.R.S. § 3036-A and allows the Commissioner of MDOC to consider inmates for release to approved residences in the community with supervision by probation. The statute limits which inmates qualify for SCCP and sets strict requirements. For example, inmates are not eligible for SCCP unless they are classified at a security level of minimum custody or better, or until they have served a certain portion of their sentence, and their proposed residence must be approved by MDOC. 34-A M.R.S. § 3036-A(2)(B)-(D), (3)(B).

³ The State has records reflecting Mr. Denbow’s SCCP participation and application to SCCP in 2013 and 2020, but the State believes that certain information contained in these records is protected by state and federal law and cannot be disclosed without a Court order. *See, e.g.*, 34-A M.R.S. § 1216. If the Court wishes to view the records, the State will immediately provide the documentation upon a Court order. The State has already provided Mr. Denbow’s counsel, Emma Bond, copies of these records.

Bridging Rental Assistance Program (BRAP) (for which an inmate must have “no subsequent identified residence” to be eligible), as well as MaineCare, food stamps, and possibly general assistance. (Brewer Aff. ¶ 10.) Mr. Denbow also indicated that he would need two weeks of medication upon release. (*Id.*) Although Mr. Denbow takes prescribed medication daily, he performs his own activities of daily living. For example, he is able to walk across the Mountain View campus, climb stairs, and walk to the “smoke shack” where Mr. Denbow and other inmates at Mountain View are permitted to go to smoke cigarettes.⁴ (Brewer Aff. ¶¶ 19, 21.)

In March of 2020, the “unit team”⁵ in Mr. Denbow’s unit at Mountain View Correctional Facility evaluated Mr. Denbow for participation in SCCP and determined he was not an appropriate candidate, based on his lack of housing, prior SCCP failure in 2013, and criminal history. (*Id.* ¶¶ 13-14.) There is a procedure by which inmates can appeal these SCCP determinations within MDOC, and Mr. Denbow did not pursue any appeal. (Beal Aff. ¶¶ 10-12; Brewer Aff. ¶ 18.)

On April 13, 2020, Mr. Denbow filed this petition for post-conviction review. Mr. Denbow’s petition does not challenge his plea or the criminal conviction itself; instead, Mr. Denbow argues that his remaining in prison through August (when his sentence will expire) is “cruel and unusual punishment” and “disproportionate” because Mr. Denbow claims to be “at high risk of serious illness and death from COVID-19” by virtue of being in prison. (Petition p. 3.) However, MDOC has taken innumerable steps to try to prevent COVID-19 from entering and spreading in Maine’s prisons, and as of today, there have only been four confirmed cases of COVID-19 in the prisons, at a single facility in Windham, despite testing and re-testing that

⁴ Inmates at Mountain View can obtain smoking cessation aids through the Maine Tobacco Helpline, which provides inmates with free lozenges, gum, and patches through the inmate’s caseworker. (Brewer Aff. ¶ 22.)

⁵ The “unit team” is a group that meets to discuss inmates’ community program applications and other decisions regarding inmate housing and classification issues. (Brewer Aff. ¶ 12.)

facility's entire population. (*See* Affidavits of Dr. Ryan Thornell (¶¶ 26, 31-33, 43-44, 49-50, 54-55, 57) and Dr. John Newby (¶¶ 10, 14, 17-21, 23, 30-32, 39, 42, 44), attached to this Response as Exhibits B and C, and which were filed in federal court⁶ on May 27, 2020, detailing the steps MDOC has taken to reduce the risk of COVID-19 in prison; *see also* Brewer Aff. ¶¶ 24-31, outlining steps taken at Mountain View specifically in light of COVID-19.) Because MDOC took early and aggressive action to reduce the risk of COVID-19 to inmates, and because those actions have been effective, Mr. Denbow's sentence is not unconstitutional.

Mr. Denbow's petition is also barred by 15 M.R.S. § 2126, because he failed to exhaust administrative remedies. Mr. Denbow's petition claims that he sought administrative remedies by "request[ing] release from the Department of Corrections through the Supervised Community Confinement program" (Petition p. 6), but Mr. Denbow omits the fact that he failed to appeal the determination by his unit team that he was not suitable for the program. (Brewer Aff. ¶¶ 16-18; Beal Aff. ¶¶ 9-11.) Because the regulations governing SCCP provide a mechanism to appeal that determination further within MDOC, which Mr. Denbow did not do, Mr. Denbow has failed to exhaust administrative remedies and cannot bring this petition for post-conviction review. (Beal Aff. ¶¶ 9-11.)

For these reasons, the State requests that the Court dismiss the petition on the ground that he did not exhaust administrative remedies as required by 15 M.R.S. § 2126. Pursuant to the

⁶ While this petition for post-conviction review was pending, Mr. Denbow also filed a habeas petition in federal court, through his counsel, purporting to bring a class action, and moved for a temporary restraining order against MDOC, seeking the release of hundreds of inmates, among other broad relief. (*See Denbow v. MDOC*, Case No. 1:20cv175-JAW, filed May 15, 2020.) However, as MDOC raised in the federal action, the federal habeas statute (28 U.S.C. § 2254(b), (c)) requires that Mr. Denbow exhaust his state remedies, which he has not done, given the instant proceedings in Superior Court. MDOC has also alerted the federal court to the status of these proceedings.

Court's order of April 24, 2020,⁷ the State also responds to the grounds asserted in the petition under Rules 71 and 71A.

REQUEST TO DISMISS PETITION

Respondent State of Maine seeks dismissal of the petition under Maine Rule of Criminal Procedure 71A and 15 M.R.S. § 2126, because Mr. Denbow failed to exhaust administrative remedies available to him within MDOC. Mr. Denbow failed to show that he exhausted administrative remedies, and he cannot make that showing, because he failed to appeal the denial of his request to participate in the Supervised Community Confinement Program. (Beal Aff. ¶¶ 9-12; Brewer Aff. ¶¶ 16-18.) 15 M.R.S. § 2126 requires that a petitioner for post-conviction review “must also demonstrate that the person has previously exhausted remedies incidental to proceedings in the trial court, on appeal *or administrative remedies*.” (Emphasis added.) Because Mr. Denbow did not exhaust available administrative remedies, his petition should be denied.

RESPONSE TO PETITION

The State denies the allegations in the petition for post-conviction review, and states as follows:

1. The State denies Petitioner's claim in “Ground One.”

First, as discussed above, both grounds of Mr. Denbow's petition should be dismissed for failure to exhaust administrative remedies under 15 M.R.S. § 2126.

As a substantive matter, Mr. Denbow's incarceration does not pose a “high risk of serious illness or death from COVID-19” that would render three more months of incarceration (the rest of his Court-ordered sentence) “unconstitutionally disproportionate to his offense,” as Mr. Denbow

⁷ The Court ordered the State to respond to the petition under M.R. Crim. P. 71 within 21 days of the date the order assigning the petition “is received.” Due to a clerical error, counsel for Petitioner and the Office of the Attorney General did not receive this Order until May 18, 2020, although the Court signed the Order on April 24, 2020. As a result, this response to the petition is timely filed within 21 days of receipt of the petition.

claims in Ground 1. MDOC and Mountain View have taken innumerable steps to address the risk of COVID-19 facing inmates and staff in MDOC facilities. In light of the risks of COVID-19, Mountain View has implemented social distancing to the greatest extent possible, including in Dorm 3, where Mr. Denbow lives. (Brewer Aff. ¶¶ 23-24.) For example, each floor of Mr. Denbow's dormitory (approximately 25 people) is going to the chow hall every other day. (*Id.*) On the days in between, the inmates eat in their housing units. (*Id.* ¶ 24.) Due to COVID-19, Mountain View also instituted increased cleaning practices. (*Id.* ¶ 26.) In addition, inmates at Mountain View, including Mr. Denbow, have access to a disinfecting agent and rags to clean their cells and any other surfaces they wish to clean. (*Id.* ¶ 25.) Inmates at Mountain View also have access to alcohol-based hand sanitizer. (*Id.* ¶ 27.) This hand sanitizer is kept in an officer-only area for distribution to inmates because of its 70% alcohol content and potential for abuse. (*Id.*)

Additionally, inmates at Mountain View have been provided with two cloth masks and are required to wear them when they are outside of their room or dorm floor, if they are not able to stay six feet from other people. (*Id.* ¶ 28.) Exceptions to this rule are limited to situations in which mask wearing is not practical, such as while inmates are eating in the chow hall. (*Id.*) If Mr. Denbow leaves his dorm to go to another part of the facility, he and other inmates are required to wear masks if they cannot socially distance. (*Id.*) Staff at Mountain View are also required to wear masks when interacting with inmates. (*Id.* ¶¶ 29-30.)

As discussed by MDOC in opposition to the request by Petitioner and others for a temporary restraining order from the federal court regarding these same claims about the conditions of confinement, MDOC and its contracted medical provider (Wellpath) provided extensive evidence of the early and aggressive steps MDOC took and is still taking to combat the spread of COVID-19. (Thornell Aff. ¶¶ 26, 31-33, 43-44, 49-50, 54-55, 57; Newby Aff. ¶¶ 10, 14,

17-21, 23, 30-32, 39, 42, 44.) In March, MDOC took action to limit movement into prisons of nearly everyone except staff and implemented strict staff screening requirements. (Thornell Aff. ¶¶ 26, 31, 32, 50.) MDOC has worked extremely closely with the Maine Center for Disease Control & Prevention to develop a three-phased plan to prevent the spread of COVID-19 in prisons. (*Id.* ¶¶ 7, 22, 57.) MDOC responded aggressively to the first confirmed inmate case in prison (which did not occur until May 19, 2020), and tested and re-tested all inmates at that prison, only finding four total inmates with positive tests. (*Id.* ¶¶ 55, 57.) Those inmates are being cared for by Wellpath staff, have not required hospitalization, and are isolated from other inmates. (*Id.* ¶¶ 55.) MDOC also worked to identify any inmates who had recently transferred out of that prison and tested them, to prevent the spread of the virus. (*Id.* ¶¶ 53-54.) Given these efforts, Mr. Denbow remaining in prison⁸ until the end of August does not constitute an unconstitutionally “disproportionate” sentence for the crimes to which he pled guilty. Thus, the State of Maine denies Ground One of the petition.

2. The State denies Petitioner’s claim in “Ground Two.”

First, as discussed above, both grounds of Mr. Denbow’s petition should be dismissed for failure to exhaust administrative remedies under 15 M.R.S. § 2126.

As a substantive matter, Mr. Denbow’s incarceration does not violate the U.S. or Maine Constitution’s prohibition on “cruel and unusual punishment,” as claimed in the petition. As discussed above, MDOC has taken innumerable steps to try to prevent COVID-19 from entering

⁸ With only four cases of COVID-19 confirmed in Maine’s prisons, prison is arguably safer than the community, where thousands of cases have been reported. As of June 4, 2020, there have been 2,446 confirmed cases of COVID-19 in Maine. Penobscot County, where Mr. Denbow is incarcerated, has had 100 confirmed cases. Cumberland County, where the Maine Correctional Center is located, has had 1,244 confirmed cases. Knox County, where Maine State Prison is located, has had 21 confirmed cases. See Maine Center for Disease Control, “Novel Coronavirus 2019 (COVID-19),” <https://www.maine.gov/dhhs/mecdc/infectious-disease/epi/airborne/coronavirus.shtml> (last viewed June 5, 2020).

the prisons and stopping its spread. These efforts do not constitute cruel or unusual punishment. Prison officials cannot be found to have violated the Cruel and Unusual Punishment Clause of the Eighth Amendment “for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety[.]” *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). The state of mind required for an Eighth Amendment violation is “akin to criminal recklessness.” *Farmer*, 511 U.S. at 837-38. A reasonable response to a known risk negates an Eighth Amendment claim based on conditions of confinement, even if harm is not averted,⁹ and even a negligent response to a known risk “that was colorable and taken in good faith might still be enough to negate deliberate indifference.” *Burrell v. Hampshire County*, 307 F.3d 1, 8 (1st Cir. 2002) (citing *Farmer*, 511 U.S. at 844).

Mr. Denbow claims in the petition that “[t]he Legislature has not made Mr. Denbow’s [crimes] punishable by death” and that “[g]iven the impossibility of physical distancing in prison, Mr. Denbow’s remaining prison sentence [through August 2020] exposes Mr. Denbow to an unsafe, life threatening condition” and constitutes cruel and unusual punishment. (Petition p. 3.) But keeping Mr. Denbow in prison at Mountain View, where there have been no confirmed cases of COVID-19 (*see* Thornell Aff. ¶¶ 53, 55), for the remainder of his sentence (three more months), does not constitute cruel and unusual punishment. The community in Maine has had thousands of positive COVID-19 tests, while MDOC’s prisons have only found four confirmed positives, despite testing over 900 inmates.¹⁰ (Thornell Aff. ¶¶ 35, 55; MDOC Daily COVID-19 Dashboard,

⁹Here, harm has thus far been largely averted, as Mr. Denbow has not contracted COVID-19, and the four inmates at MCC who have tested positive have not required hospitalization. (Thornell Aff. ¶ 55.)

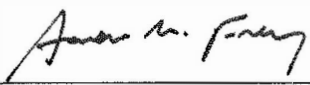
¹⁰ MDOC has been remarkably transparent regarding COVID-19. MDOC publishes data every weekday regarding the inmate population and COVID-19 on the MDOC Daily COVID-19 Dashboard, <https://www.maine.gov/corrections> (last visited June 5, 2020). On June 5, 2020, the dashboard indicated that 954 inmate tests for COVID-19 had been run, and only 4 tests had come back positive. In addition, every time an inmate has tested positive for COVID-19, MDOC has issued a press release within a matter of hours to inform the public of the result and MDOC’s efforts in response to those test results. (Thornell Aff. ¶¶ 59-60.)

<https://www.maine.gov/corrections> (last visited June 5, 2020).) Given MDOC's actions, the fact that Mr. Denbow remains incarcerated to complete the sentence imposed by the Court for the crimes to which he pled guilty does not constitute cruel and unusual punishment. Thus, the State of Maine denies Ground Two of the petition.

CONCLUSION

For the above reasons, the State respectfully requests that this Court dismiss the petition for post-conviction review.

Date: June 5, 2020

 O.B.O. Bar # 4325

Jillian R. O'Brien, Bar No. 6225
Assistant Attorney General
Office of the Attorney General
6 State House Station
Augusta, ME 04333-0006
(207) 626-8800
jill.obrien@maine.gov

STATE OF MAINE
OXFORD, ss.

SUPERIOR COURT
UNIFIED CRIMINAL DOCKET
DOCKET NO. CR-19-1755

JOSEPH DENBOW,

Petitioner

v.

STATE OF MAINE,

Respondent

AFFIDAVIT OF BENJAMIN BEAL

Benjamin Beal, duly sworn, states that the following is true and correct and based on his personal knowledge:

1. I have personal knowledge of the facts contained in this affidavit. In preparing this affidavit, I also reviewed records regularly kept by the Maine Department of Corrections (“MDOC” or “the Department”) that are available to me and that I rely on in my official duties.

2. I am the Director of Classification for MDOC and have served in this role for approximately fourteen months. I have worked for MDOC for over 19 years. In this position, I manage the Supervised Community Confinement Program (SCCP), governed by 34-A M.R.S. § 3036-A, and the applicable regulations 03-201 C.M.R. ch. 10, which are laid out in the Department’s SCCP Policy, a true and correct copy of which is attached to this affidavit.

3. The SCCP Policy provides that to participate in SCCP, the inmate must have a proposed residence that is approved by the Regional Correctional Administrator, or his or her designee. The approved residence requirement is also in the statute (34-A M.R.S. § 3036-A(3)(B)). The SCCP Policy also states that the residence must not also house others who are potential crime victims, offenders, former offenders, or MDOC staff. (Procedure C, attached).

4. The SCCP Policy also lays out the multiple steps involved in the SCCP application process (Procedure D, attached), including investigating the proposed residence, conducting a records check for outstanding warrants or detainers, review of the application by the unit management team (“unit team”), and a community investigation that includes a site review, investigation of community sentiment, input from law enforcement, and victim impact statements (if applicable). *See* Procedure D, attached.

5. Mr. Denbow is currently in the custody of MDOC and housed at the Mountain View Correctional Facility.

6. Mr. Denbow participated in the SCCP program in 2013. As dictated by statute, before release to SCCP, Mr. Denbow signed a list of conditions of his release to SCCP and agreed to abide by those terms. He was terminated from the program in 2013 for failing to abide by those terms.

7. It is my understanding that Mr. Denbow applied for the SCCP program, and that on March 31, 2020, Mr. Denbow’s unit team thoroughly discussed his SCCP application and determined it was not appropriate for Mr. Denbow.

8. The unit team reviewed documentation regarding Mr. Denbow from the Department’s offender management database (“CORIS”), including his return to prison from SCCP in 2013, for violating the terms of the program, as well as the fact that Mr. Denbow does not have a residence in the community to be released to.

9. Mr. Denbow did not appeal the Unit Team’s determination that SCCP participation is not appropriate for Mr. Denbow. Under the SCCP Policy (Procedure K), he would have had to appeal the unit team’s decision to me.

10. Procedure K of the SCCP Policy (attached) states that an inmate “wishing to appeal denial . . . of approval for his or her transfer to the supervised community confinement program may submit the appeal to the Department’s Director of Classification [me] within five (5) working days of receiving the decision. The Department’s Director of Classification is the final authority for this appeal (no further appeals are allowed).”

11. Mr. Denbow did not appeal the unit team’s March 31, 2020 decision that SCCP participation was inappropriate.

12. Even though Mr. Denbow’s appeal of the decision needed to be directed to me, under the SCCP policy, it is possible that Mr. Denbow could have misunderstood and appealed the decision to the Warden of Mountain View. I have been informed by Warden Jeff Morin of Mountainview and by Mr. Denbow’s current caseworker, Hollie Brewer, that Mr. Denbow did not appeal the Unit Team’s determination that SCCP participation is not appropriate for Mr. Denbow.

13. I have personally reviewed Mr. Denbow’s records and his potential for SCCP release, as part of a review the Classification Department conducted of those inmates who have medical conditions placing them at a greater risk from COVID-19. I noted that Mr. Denbow has a lengthy criminal history, including convictions for burglaries, thefts, assault, operating under the influence, operating after habitual offender revocation, failing to report, failure to submit to arrest, probation violations and revocations, and forgery, [REDACTED]

[REDACTED] His criminal record spans more than 35 years. I also noted that Mr. Denbow would be homeless if released to the community, which was one of the reasons that his unit team denied his SCCP application in March 2020. Due to his lack of housing, Mr.

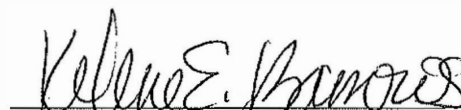
Denbow is not eligible for SCCP, and even if Mr. Denbow could find housing, these other factors make him a poor candidate for SCCP.

DATED: 6-4-20

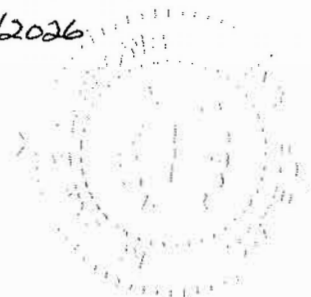

BENJAMIN BEAL

STATE OF MAINE
KENNEBEC, ss.

Personally appeared before me this 4 day of June 2020, the above named Benjamin Beal and made an oath that the foregoing is true and correct and based on his personal knowledge.


NOTARY PUBLIC

Print Name: Kelene E. Barrows
My notary commission
Expires: 10/25/2026



STATE OF MAINE
OXFORD, ss.

SUPERIOR COURT
UNIFIED CRIMINAL DOCKET
DOCKET NO. CR-19-1755

JOSEPH DENBOW,

Petitioner

v.

STATE OF MAINE,

Respondent

AFFIDAVIT OF HOLLIE BREWER

Hollie Brewer, duly sworn, states that the following is true and correct and based on her personal knowledge:

1. I am a Correctional Caseworker for the Maine Department of Corrections (MDOC or “the Department”), and I work at Mountain View Correctional Facility. I have been a Caseworker at Mountain View for nearly eight years. I have personal knowledge of the facts contained in this affidavit. In preparing this affidavit, I also reviewed records regularly kept by MDOC that are available to me and that I rely on in my official duties.

2. Petitioner Joseph Denbow is currently in the custody of MDOC and is housed at the Mountain View Correctional Facility. Mr. Denbow is an inmate who is currently assigned to my caseload. This means that I meet with Mr. Denbow periodically (and more often, if he requests it) to discuss his plans for post-release, programs that he participates in while incarcerated, and other issues.

3. Mr. Denbow was also assigned to my caseload in 2013, when he was serving a different term of incarceration. At that time, I helped him apply for financial aid to attend Beal College and to complete the Beal College application.

4. In 2013, Mr. Denbow applied for and was approved to participate in the Supervised Community Confinement Program (SCCP, governed by 34-A M.R.S. § 3036-A), where he lived in the community and attended a welding program at Beal College. Inmates on SCCP are supervised by the MDOC probation department (Community Corrections).

5. The Warden of Mountain View Correctional Facility (Jeff Morin) personally drove Mr. Denbow to the orientation program for Beal College, before his release to the SCCP program in 2013. I personally took Mr. Denbow to Beal College before his release on SCCP to register for classes.

6. When Mr. Denbow began SCCP, he was released from Mountain View Correctional Facility to the community to attend the welding program at Beal College.

7. As dictated by statute, before release to SCCP, Mr. Denbow signed a list of conditions of his release to SCCP and agreed to abide by those terms.

8. While in the community, Mr. Denbow violated the terms of the SCCP program by dropping out of school and having unapproved visitors at his home. As a result, he was required to return to Mountain View to finish his sentence.

9. After finishing his earlier sentence and being released to the community, Mr. Denbow returned to the Department's custody and currently resides at Mountain View. His current projected release date is August 28, 2020.

10. As his caseworker, I meet with Mr. Denbow to discuss his plans upon release, among other issues. Mr. Denbow submitted a re-entry questionnaire to me on January 3, 2020.¹

¹ I have a copy of this form and other relevant materials, but they contain information that is potentially confidential under state and federal law and cannot be disclosed with a Court order. Thus, I am reciting the relevant, non-confidential information from these materials. I have been informed by counsel for MDOC that Mr. Denbow's attorney Emma Bond has a copy of these materials.

On this form, Mr. Denbow wrote that he was “not sure” where he would be living following release and that he would “need help with apt., house, etc.” He also indicated he would need to apply for housing programs such as Bridging Rental Assistance Program (BRAP)²/Shelter care, disability and MaineCare, food stamps, and possibly general assistance. He also stated he would need two weeks of medication upon release.

11. On March 22, 2020, Mr. Denbow completed the “Community Custody or Program Application” for the SCCP program and submitted it to the unit management team (“unit team”). The unit team is a group that meets to discuss inmates’ community program applications and other decisions regarding inmate housing and classification issues.

12. On March 31, 2020, Mr. Denbow’s unit management team (“unit team”) discussed his application. I was part of that March 31 unit team meeting, as were Unit Manager Suzan Ackerman, Unit Clerk Dyana White, Correctional Care and Treatment Worker June Allen, and Community Program Coordinator Thomas Kirlin. Inmates are not generally present during the part of unit team meetings where SCCP participation and eligibility are discussed, because the unit team may discuss victim statements and the inmate’s risk assessment. Mr. Denbow was not present at the March 31 meeting, and he did not make any request to be present at that meeting.

13. On March 31, the unit team reviewed documentation regarding Mr. Denbow from the Department’s offender management database (“CORIS”), including his return to prison from SCCP in 2013 for violating the terms of the program. CORIS also reflected that while on SCCP in 2013, he was allegedly drinking and had begun a romantic relationship without informing his probation officer. The unit team also discussed Mr. Denbow’s [REDACTED]

² To be eligible for BRAP, an inmate must have “no subsequent identified residence” (meaning the inmate is homeless).

[REDACTED]

[REDACTED] The unit team discussed all of these factors on March 31, 2020.

14. On March 31, 2020, the unit team also discussed Mr. Denbow's re-entry questionnaire and the fact that he had no home to go to for supervised community confinement, and that Mr. Denbow's fiancé also does not have her own housing.

15. On March 31, 2020, Unit Clerk Dyana White documented the unit team's decision to deny Mr. Denbow's SCCP application on the Program Application. She checked the box for "denied," and noted the date of the review (3/31/20). She also wrote, "Previous SCCP failure." The 2013 program failure is one of the reasons the unit team denied his application; Mr. Denbow's lack of appropriate housing is another reason.

16. Under the SCCP Policy, Mr. Denbow would have had to appeal the unit team's decision to the Director of Classification.

17. Even though, under the SCCP policy, Mr. Denbow's appeal of the decision would need to have been directed to the Director of Classification, it is possible that Mr. Denbow could have misunderstood the appeal process and thought that he needed to appeal the decision to the Warden of Mountain View, as he would other unit team decisions.

18. Mr. Denbow did not inform me that he planned to appeal the decision, and Warden Jeff Morin of Mountain View informed me that Mr. Denbow did not appeal the decision to the Warden's Office.

19. Mr. Denbow is assigned as a grounds maintenance worker at Mountain View. Over the last three months, I have interacted with Mr. Denbow approximately five times, and

every time I have met with him, he has been able to walk across campus and up the stairs to my office without assistance.

20. Smoking is permitted at the Mountain View Correctional Facility in an outside area known as the “smoke shack.” The number of inmates permitted at the smoke shack at one time is currently reduced, to allow the inmates to socially distance.

21. I am sensitive to the smell of cigarette smoke, and I have smelled cigarette smoke on Mr. Denbow’s clothing. When I have called his dorm, staff there have reported that they have seen him smoking at the smoke shack. I have reviewed records from the Mountain View commissary indicating that Mr. Denbow regularly purchases 10-15 packages of cigarettes per week. Inmates are not permitted to give away or sell cigarettes or other items to other inmates.

22. Inmates at Mountain View can obtain smoking cessation aids by asking their caseworker to set up a call to the Maine Tobacco Helpline, which then sends free lozenges, gum, and patches to inmates through their caseworker.

23. Mr. Denbow lives in Dorm 3, where I am informed that he currently has three roommates. His dorm houses approximately 50 inmates. Dorm 3 has two floors; each floor is comprised of approximately 25 people. Each floor has a communal bathroom and shower.

24. In light of the risks of COVID-19, Mountain View has implemented social distancing to the furthest extent possible. For example, each floor of Mr. Denbow’s dormitory is going to the chow hall every other day. On the days in between, the inmates on that floor eat in their housing units.

25. Inmates at Mountain View have access to a disinfecting agent and rags to clean their cells and any other surfaces they wish to clean.

26. Due to COVID-19, Mountain View instituted increased cleaning. Inmate cleaning crews clean communal areas three to four times per day.

27. Inmates at Mountain View have access to alcohol-based hand sanitizer. This hand sanitizer is kept in an officer-only area for distribution to inmates because of its 70% alcohol content and potential for abuse. Warden Morin sent a memo to staff and inmates about its intended use and distribution in April 2020, and the memo is posted and visible to inmates.

28. Inmates at Mountain View have been provided with two cloth masks and are required to wear them when they are outside of their room or dorm floor, if they are not able to stay six feet from other people. Exceptions to this rule are limited to situations in which mask wearing is not practical, such as while inmates are eating in the chow hall.. In Mr. Denbow's case, he only attends the chow hall with other inmates from his floor, as discussed above. If Mr. Denbow leaves his dorm to go to another part of the facility, he and other inmates are required to wear masks if they cannot socially distance.

29. Staff at Mountain View are also required to wear masks when interacting with inmates. Staff are not required to wear a mask if they are alone in their office, behind a closed door.

30. I have worn a cloth mask every time I interacted with Mr. Denbow since mid-April 2020.

31. Inmates at Mountain View have been informed that they can be disciplined for not wearing masks where required.

DATED: 6-4-2020

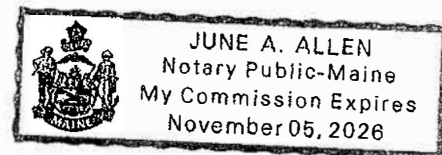
Hollie Brewer
HOLLIE BREWER

STATE OF MAINE
PENOBSCOT, ss.

Personally appeared before me this 4th day of June 2020, the above named Hollie Brewer and made an oath that the foregoing is true and correct and based on his personal knowledge.

June A. Allen
NOTARY PUBLIC

Print Name: June A. Allen



STATE OF MAINE

SUPERIOR COURT, ss.
COUNTY OF Oxford, ss.

DOCKET NO.: _____

Joseph Denbow,
Petitioner (*Print full name as it appears on Criminal Judgment*)
Date of Birth: 10/4/1965

**PETITION FOR
POST-CONVICTION REVIEW**

v.

STATE OF MAINE

I seek a review of the following Criminal Judgment(s) or court proceeding(s) that occurred after I was sentenced in my case.

A. TRIAL COURT INFORMATION

- My case was filed in the following court:
☒ Superior Court/Unified Criminal Docket in Oxford (County)
☐ District Court in _____ (Town or City)
- The Docket Number of my case is: OXECD-CR-2018-00300, OXFCD-CR-2018-00600
- The date of the Criminal Judgment in my case is: 5/8/2019
- The presiding Judge or Justice in my case was: _____
- This is a list of the crime(s) for which I was charged in my case and my plea to each charge:
(For example: Charge = Theft; and Plea = Not Guilty):

Charge(s)	Plea(s)
<u>Aggravated forgery (B)</u>	<u>Guilty</u>
<u>Operate after habitual offender revocation, prior (C)</u>	<u>Guilty</u>
<u>Operate after habitual offender revocation, 2 prior (C)</u>	<u>Guilty</u>

- I was convicted of the following charges and given the following sentence(s) in my case:

Charge(s)	Sentence(s)
<i>(For example: Charge = Theft; and Sentence = 6 years; all but 18 months suspended; 2 years probation):</i>	
<u>Aggravated forgery</u>	<u>10 years, all but 2 years suspended and 2 years probation</u>
<u>Operate after habitual offender revocation</u>	<u>2 years</u>
<u>Operate after habitual offender revocation</u>	<u>2 years</u>

- I was convicted of these charge(s) following:
☒ My plea(s) of Guilty
☐ A Jury Trial
☐ A Non-Jury (Bench) Trial
- [Answer the following only if you had a Jury Trial or a Bench Trial]*
☐ I testified at the trial
☐ I did not testify at the trial

9. At the time of the trial or plea(s) in my case:

- ☒ I was represented by Attorney Attorney Maurice Porter, Esq.
☐ I was not represented by an attorney.

10. Are you asking the court to assign an attorney to represent you in this Post-Conviction Review?

- ☐ Yes
☒ No

(If you answered "Yes" to question 10, then (a) you must fill out a Motion for Determination of Indigency and Assignment of Counsel [Form No. CR-031]; (b) if you are in jail/prison you must also obtain a certificate from that jail/prison as to the amount of money or securities on deposit to your credit in any account in that institution; and (c) file both documents with this petition)

B. RESTRAINT OR IMPEDIMENT (15 M.R.S. § 2124)

"Restraint or Impediment" refers to how the Criminal Judgment you are challenging presently affects your life or will affect your life in the future.

Check only the box(es) that apply to you.

- ☒ 1. The Criminal Judgment I am challenging is causing me a **PRESENT DIRECT RESTRAINT OR OTHER IMPEDIMENT** because:
- ☒ I am incarcerated at (name of jail/prison) Mountain View Facility in Charleston, Maine
 - ☐ I am on probation, parole, or other conditional release
 - ☐ I was sentenced to an unconditional discharge
 - ☐ The jail/prison sentence that I received was completely satisfied at the time the sentence was imposed by the court because of credit for time that I had already earned
 - ☐ My sentence to jail/prison, probation, parole or other conditional release must be served in the future because I am presently on bail while my appeal of this Criminal Judgment is pending
 - ☐ My sentence to jail/prison, probation, parole or other conditional release must be served in the future because I must serve another sentence first
 - ☐ I was Ordered to pay a fine or restitution in my case, but I have not fully paid that fine or restitution
 - ☐ The Criminal Judgment is a juvenile disposition, which restrains or impedes me in the following way: _____
 - ☐ I am committed to the Maine Department of Health and Human Services because I was found not criminally responsible by reason of insanity. **I understand that I cannot use this petition for post-conviction review to ask to be released or discharged from an institutional inpatient residence and be allowed to live in a permanent residence in the community**
- ☐ 2. The Criminal Judgment is causing me a **FUTURE RESTRAINT OR OTHER IMPEDIMENT** because I am presently serving a jail/prison sentence resulting from another case and, after that, I will be committed to the Maine Department of Health and Human Services as a result of being found not criminally responsible by reason of insanity in the Criminal Judgment that I am challenging. **I understand that I cannot use this petition for post-conviction review to ask to be released or discharged from an institutional inpatient residence and be allowed to live in a permanent residence in the community.**

☐ 3. The Criminal Judgment is causing me a **PRESENT INDIRECT RESTRAINT OR OTHER IMPEDIMENT** because:

- ☐ After I was convicted of the crime(s) in the Criminal Judgment that I am challenging, I was convicted of a new crime and sentenced to jail/prison; **AND** I received a longer sentence for the new crime than what I otherwise would have received because of the Criminal Judgment I am challenging, **AND** Both the crime(s) in the Criminal Judgment I am challenging and the new crime are punishable by a sentence of a year or more in prison (*Class A, B or C crimes*)
- ☐ After I was convicted of the crime(s) in the Criminal Judgment that I am challenging, I was convicted of a new crime and sentenced to jail/prison; **AND** By law, the new crime for which I am serving a sentence required proof that I was convicted of the crime(s) in the Criminal Judgment that I am challenging, **AND** The crime(s) in the Criminal Judgment that I am challenging is punishable by one year or more in prison (*Class A, B or C crime*), and the new crime for which I have been convicted is either
- ☐ Punishable by one year or more in prison (*Class A, B or C crime*), or
- ☐ Was committed in another state or federal jurisdiction and is categorized as a felony or an infamous crime
- ☐ The Criminal Judgment I am challenging is based on my plea of guilty or nolo contendere, which was accepted by the trial court on or after March 31, 2010; **AND** I was represented by an attorney at the time of my plea in that case; **AND** I was not a citizen of the United States; **AND** As a result of my plea, I am subject to the following pending deportation proceeding under federal immigration law
- ☐ Place of deportation proceeding _____
- ☐ Date of deportation proceeding _____

C. GROUNDS FOR RELIEF (15 M.R.S. § 2125). The Criminal Judgment I am challenging or the sentence I received is unlawful or unlawfully imposed, or the impediment to me that resulted from the court proceeding after I was sentenced is unlawful, as a result of the following error(s) or ground(s) for relief in my case. [**CAUTION: If you fail to set forth any grounds for relief in your Petition, you may be prevented from presenting them at a later date**]

1. Ground One: Violation of Maine Constitution, Article I, section 9, the proportionality guarantee, requiring that "punishments shall be proportioned to the offense."
Supporting FACTS: Mr. Denbow's high risk of death from COVID-19 renders his prison sentence unconstitutionally excessive punishment for his non-violent offenses. At 54, Mr. Denbow is in remission from cancer and suffers from chronic asthma and COPD--placing him at high risk of serious illness and death from COVID-19 if and when he becomes infected in prison. When comparing the "gravity" of Mr. Denbow's offense to his high risk of death in prison before he is released in August 2020, this sentence is unconstitutionally disproportionate to his offense.
2. Ground Two: Violation of U.S. Constitution Amend. 8, Maine Constitution, Article 1, section 9, prohibiting "cruel and unusual punishment"
Supporting FACTS: The legislature has not made Mr. Denbow's non-violent offenses punishable by death or serious physical harm, nor could the Court have predicted the unprecedented mortal threat of the COVID-19 epidemic at the time it sentenced Mr. Denbow. Given the impossibility of physical distancing in prison, Mr. Denbow's remaining prison sentence exposes Mr. Denbow to an unsafe, life threatening condition in violation of the prohibition against cruel and unusual punishment.

3. Ground Three: _____

Supporting FACTS: _____

4. Ground Four: _____

Supporting FACTS: _____

D. WAIVER OF GROUNDS FOR RELIEF (15 M.R.S. § 2128)

Please answer the following questions:

1. Did you appeal the Criminal Judgment or the post-judgment proceedings you are challenging in this Petition to the Maine Supreme Judicial Court or any other court?

☐ Yes

☒ No

2. If you answered "Yes" to question 1, did you raise the same errors or grounds for relief in your appeal that you are now raising in this Petition?

☐ Yes

☐ No

3. If you answered "No" to question 2, please explain why you did not raise the same errors or grounds for relief in your appeal? At the time Mr. Denbow had the opportunity to appeal his sentence, he could not have predicted that the sentence would place him at elevated risk of contracting a deadly virus in an unprecedented pandemic.

4. Have you previously filed a petition for post-conviction review regarding the Criminal Judgment or post-sentencing proceedings that you are challenging in this Petition?

☐ Yes

☒ No

5. If you answered "Yes" to question 4, did you raise any of the same errors or grounds for relief in your previous petition that you have raised in this Petition?

☐ Yes

☐ No

6. If you answered "No" to question 5, please explain why you could not have raised those same errors or grounds for relief in your earlier petition? _____

E. EXHAUSTION OF REMEDIES (15 M.R.S. § 2126)

Please answer the following questions:

1. Did you file any motions in the trial court challenging the Criminal Judgment or the post-judgment proceedings you are challenging in this Petition? *(For example: motion for acquittal; motion for a new trial; etc.)*
☐ Yes
☒ No
2. If you answered “Yes” to question 1, what were the motions; what was the result of each motion; and what was the date of each result? _____

3. Did you appeal the Criminal Judgment or the post-judgment proceedings you are challenging in this Petition to the Maine Supreme Judicial Court or any other court?
☐ Yes
☒ No
4. If you answered “Yes” to question 3, what was the decision of the appellate court and the date of that decision? _____

5. Did you apply to the Maine Supreme Judicial Court for permission to appeal your sentence in the Criminal Judgment you are challenging in this Petition?
☐ Yes
☒ No
6. If you answered “Yes” to question 5, what was the decision of the Maine Supreme Judicial Court and the date of that decision? _____

7. Did you file a petition for clemency (pardon) to the Governor of Maine related to the Maine the Criminal Judgment you are challenging in this Petition?
☐ Yes
☒ No
8. If you answered “Yes” to question 7, what was the Governor’s decision and the date of that decision? _____

9. Did you file a petition for a Writ of Habeas Corpus in the United States District Court related to the Criminal Judgment you are challenging in this Petition?
☐ Yes
☒ No

10. If you answered "Yes" to question 9, answer each of the following questions:
- Date your petition for a Writ of Habeas Corpus was filed: _____
 - The U.S. District Court's decision: _____
 - Date of U.S. District Court's decision: _____
 - U.S. District Court's Docket Number: _____
 - If you appealed the decision of the U.S. District Court to the First Circuit Court of Appeals, what was the decision and date of the decision of that appellate court: _____

11. Did you seek any administrative remedies regarding the Criminal Judgment you are challenging in this Petition?
- ☒ Yes
- ☐ No
12. If you answered "Yes" to question 11, what was the name of the administrative agency, what was the agency's decision and the date of that decision? Mr. Denbow requested release from the Department of Corrections through the Supervised Community Confinement Program.

13. What other remedies did you seek related to the Criminal Judgment you are challenging in this Petition? N/A

F. TIME FOR FILING (15 M.R.S. § 2128-B).

Please provide any dates for the following that apply regarding, the Criminal Judgment or post-sentencing proceeding that you are challenging in this Petition.

- Please check and complete all the following that apply:
 - ☒ Date of the Criminal Judgment or post-sentencing proceeding: May 8, 2019 (sentencing)
 - ☐ Date your appeal was decided: _____
 - ☐ Date that a new law supporting one or more of your grounds for relief went into effect: _____
 - ☒ Date that you learned about new facts supporting one or more of your grounds for relief: March 15, 2020, the date that Governor Mills declared a state of emergency because of COVID-19
 - ☐ Date of any final administrative action: _____
- If you checked any of the boxes in 1, is this petition being brought more that one year after the most recent date listed by you?
 - ☐ Yes
 - ☒ No
- If you answered "Yes" to question 2, please state why your petition was not brought within the required one-year period: _____

4. If you are subject to a pending deportation proceeding under federal immigration law, please check and complete the following:

(a) Date that you discovered that deportation proceedings have been started against you:

(b) Was your petition for post-conviction review brought more that 60-days after this date?

☐ Yes

☐ No

(c) If you answered "Yes" to 4(b), please state why your petition was not brought within the required 60-day period: _____

G. CONCLUSION

Wherefore, I pray that the court grant me the following relief:

Declare that Mr. Denbow's remaining sentence of imprisonment until August 28, 2020 is
unconstitutional and order immediate release so Mr. Denbow can safely quarantine
at home and protect himself from exposure to the deadly COVID-19 virus.

Date: 4/13/2020

Signature /s/ Emma E. Bond on behalf of Petitioner Joseph Denbow
Print name Emma Bond, Maine Bar No. 05211
Address P.O. Box 7860
Portland, Maine 04112

H. OATH OR AFFIRMATION

See attached Emergency Motion for Bail and Leave to File
Unsworn Petition

The Petitioner, _____, being first duly sworn, deposes (affirms) and says that he/she is the Petitioner named in the foregoing Petition; that he/she has read the same; that all matters set forth are true, except such matters as are alleged on information and belief; and, as to those matters, he/she believes them to be true.

Date: _____

Signature _____
Print name _____

Subscribed and sworn to (affirmed) before me this _____ day of _____.

(Month)

(Year)

(Notary Public) (Attorney)

STATEMENT OF SHARON MCDONNELL, MD MPH

I am a physician with board certification in Public Health and Epidemiology and I am moved to offer my expertise and concern about the risks posed by prisons and jails in the COVID-19 pandemic. By now we have become all too familiar with the deadly threat posed by COVID-19. One month ago on February 28, 2020 there were 20 cases of COVID-19 in the United States, and on March 27, at 4pm, there were 97,000 with 1,475 deaths. The United States has more confirmed cases than any other country. Although the outbreak is in earlier stages here in Maine we are still seeing rapid increases in cases over the past week, with 155 confirmed cases on March 26, compared with only 23 cases the week before.¹ The landscape will change just as dramatically in the next week as our doubling time is around 2-3 days and our testing is limited.

The way to protect our community from this highly infectious and deadly disease—which has no vaccine or known cure—is through hand washing and physical distancing. Physical distancing—maintaining 6 feet between people at all times—is impossible in jails and prisons at this time. The single biggest risk to the spread of COVID-19 is crowding, and in prisons and jails COVID-19 can spread like wildfire, endangering prisoners, staff, and the community alike. As a terrible example, the rate of infection of Rikers Island Jail in New York City is *seven times higher* than the city-wide rate, according to the Legal Aid Society.² And once such an infection infiltrates a prison or jail, the CDC warns that “[o]ptions for medical

¹ *Maine reports 155 coronavirus cases, ‘community transmission’ in York County*, Portland Press Herald (Mar. 26, 2020); *March 17 live blog: The latest on coronavirus and Maine*, Bangor Daily News (March 17, 2020).

² *Coronavirus Update: Rikers Island Rate of Infection 7 Times Higher than Citywide Rate, Legal Aid Says*, CBS New York (Mar. 26, 2020), available at <https://newyork.cbslocal.com/2020/03/26/coronavirus-rikers-island/>.

isolation of COVID-19 cases are limited.”³ The care of ill prisoners and staff would place a significant additional burden on the health care system.

In such an epidemic, a jail or prison sentence or order for pretrial detention could become a death sentence, especially for individuals over 50 or with chronic health conditions.⁴ Prisons and jails are not equipped to treat the vast numbers of prisoners who could be affected, leading to reliance on what will soon be overburdened regional hospitals.⁵ These dire risks also extend to the officers who oversee prisoners, the medical providers who treat them, and the broader community—all of whom will be relying on the same hospital beds, respirators, and other health resources.

In light of these concerns, facilities across the country and the world have been releasing inmates who are at high risk of infection or low risk to the community—enabling those individuals to physically distance in the community and reducing the threat to other inmates and facility staff. It is crucial that we take all possible steps to do so. Our immediate handling of risk in our most marginalized communities will dictate the success for the community as a whole.

I lived for two years in Monrovia Liberia working to mitigate and control the ebola epidemic there. Please take this moment, early in the epidemic, to act. Every case in a prison will necessitate the need to quarantine nearly 10-100 people including staff. It will not be possible to keep the virus out. Instead we need to manage space and staff to make a safe-as-possible environment. The public safety

³ Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities, Centers for Disease Control and Prevention, (last updated Mar. 23, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>.

⁴ Coronavirus Disease 2019 (COVID-19) People Who are at Higher Risk, Centers for Disease Control and Prevention, (updated Mar. 26, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/people-at-higher-risk.html>.

⁵ See CDC Interim Guidance, *supra* n.3.

mission of the prison system is paramount as we move forward in these difficult times.

Thank you for your consideration and please feel free to contact me if you think I can help.

Sincerely,

Sharon McDonnell BSN MD MPH

Consulting Epidemiologist Maine Medical Center, Portland ME and

Adjunct Faculty Public Health Program, University of New Hampshire

[REDACTED]

[REDACTED]

STATEMENT OF LANI GRAHAM, MD MPH

As a physician and expert in public health, I write to ask the Court to give serious consideration to taking immediate action to address the challenges posed by jails and prison as Maine struggles to control the COVID-19 virus. We cannot protect our community unless we protect *all* members and look closely at all settings. At times like this with so many challenges before us, it is all too easy to turn our backs on those who are incarcerated and “hope for the best”. This would be a serious mistake and can only result in more misery. We health professionals must depend on you to develop solutions that take into account what we already know about the dangers posed by correctional facilities and how that spills over into Maine communities. As you weigh these options, I ask you to consider the following medical facts:

- COVID-19 has already shown us in multiple settings that prisons and jails are where the worst outbreaks occur—South Korea, our model of a good public health approach, had its worst outbreak in a prison hospital (107 infected and 7 died). And many states are seeing how impossible it is to contain this virus in a prison setting—New York and Massachusetts.
- Large numbers of inmates in all United States prisons, including Maine, are ill with mental health problems or substance use disorders. Must they be kept from treatment *and* infected with a lethal virus?

- Inmates, of course, present a high risk to those caring for them—the staff, both medical and non-medical. These folks go in and out of facilities, perhaps taking the virus home to vulnerable family and their community at large. I understand that in some places in Maine where the virus has a foothold, significant percentages of staff are already ill.
- We must protect health professionals who are working the front lines in this conflict. They do not need an influx of ill inmates to add to their burden.

It is crucial to reduce as much as possible the number of inmates in Maine jails and prisons, enabling people to perform social distancing and to access healthcare resources in the community. In this our 200th year, let's lead the nation in good sense and creativity as we face together this terrible pandemic.

Thank you for your consideration and please feel free to contact me if you think I can help.

Sincerely,

Lani Graham, MD MPH

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

JOSEPH DENBOW
v.
STATE OF MAINE

CRIMINAL DOCKET
OXFORD, ss.
Docket No OXFCD-CR-2020-00226

DOCKET RECORD

PL. DOB: 10/04/1965
PL. ATTY: EMMA BOND
AMERICAN CIVIL LIBERTIES UNION OF MAINE
121 MIDDLE STREET SUITE 200
PORTLAND ME 04101
RETAINED 04/13/2020

State's Attorney: RICHARD BEAUCHESNE
State's Attorney: JILLIAN O'BRIEN

Filing Document: PETITION
Filing Date: 04/13/2020

Major Case Type: POST CONVICTION REVIEW

Charge(s)

Docket Events:

04/21/2020 FILING DOCUMENT - PETITION FILED ON 04/13/2020

04/21/2020 Party(s): JOSEPH DENBOW
ATTORNEY - RETAINED ENTERED ON 04/13/2020

Attorney: EMMA BOND

05/20/2020 Party(s): STATE OF MAINE
ATTORNEY - RETAINED ENTERED ON 04/22/2020

Attorney: JILLIAN O'BRIEN

05/20/2020 POST CONVIC. REVIEW - REVIEW SENT FOR REVIEW ON 04/21/2020

05/20/2020 POST CONVIC. REVIEW - REVIEW REVIEW BY JUSTICE ON 04/23/2020
WILLIAM R ANDERSON , JUSTICE

05/20/2020 ORDER - COURT ORDER ENTERED ON 04/23/2020
WILLIAM R ANDERSON , JUSTICE

ORDER ASSIGNING PETITION FOR PCR

05/20/2020 POST CONVIC. REVIEW - ASSIGNMENT ASSIGNED TO DOCKET ON 04/23/2020
WILLIAM R ANDERSON , JUSTICE

05/20/2020 ORDER - COURT ORDER ENTERED ON 04/24/2020
ROBERT E MULLEN , JUSTICE

CASE ASSIGNED TO HON ROLAND COLE

05/20/2020 POST CONVIC. REVIEW - ASSIGNMENT ASSIGNED TO JUSTICE ON 04/24/2020

05/20/2020 NOTE - OTHER CASE NOTE ENTERED ON 05/20/2020

DUE TO CLERICAL ERROR, ORDER ASSIGNING PETITION AND SPECIAL ASSIGNMENT NOT DOCKETED UNTIL
TODAY

A TRUE COPY

ATTEST: _____

Clerk

STATE OF MAINE
OXFORD, ss.

UNIFIED CRIMINAL DOCKET
LOCATION: South Paris
Docket No.: _____

JOSEPH DENBOW,

Petitioner,

v.

STATE OF MAINE,

Respondent.

)
)
)
)
)
)
)
)
)
)
)

**MEMORANDUM OF LAW IN SUPPORT
OF EMERGENCY PETITION FOR POST-
CONVICTION REVIEW**

Petitioner, Joseph Denbow, brings this petition for post-conviction review challenging a prison sentence that, in the COVID-19 pandemic, risks becoming a death sentence. At 54, Mr. Denbow suffers from chronic disease that places him at high risk of death or serious injury if and when he is exposed to the COVID-19 virus in the closed congregate setting of prison. Mr. Denbow respectfully requests that the Court declare his sentence to be unconstitutionally disproportionate to his nonviolent offenses and to order his release on probation to safely quarantine in the community.

FACTUAL BACKGROUND

I. Dangers of COVID-19 In the Prison Setting

COVID-19 is a highly infectious and deadly virus that has sickened hundreds of thousands of people worldwide. Although COVID-19 can be deadly in any demographic, those with chronic underlying health conditions face particularly high risk of death. According to the CDC, high-risk conditions include: asthma and chronic lung disease, serious heart conditions, conditions that cause a person to be immunocompromised (including cancer treatment) and prolonged use of corticosteroids, severe obesity, diabetes, chronic kidney disease, and liver

disease.¹ Even for the general population, COVID-19 is about ten times more deadly than the seasonal flu.² High-risk groups with underlying chronic conditions face an even greater risk of death. Early reports estimate that the mortality rate for those with cardiovascular disease was 13.2%, 9.2% for diabetes, 8.4% for hypertension, 8.0% for chronic respiratory disease, and 7.6% for cancer.³ Those who survive may face permanent harm such as difficulties with walking or brain functioning, or permanent reduction of lung function.⁴

Without any known cure or vaccine for this highly infectious disease, prevention is crucial—through frequent handwashing and physical distancing. According to the Director for the Maine CDC, “[p]hysical distancing is the best vaccine that we have.”⁵ Indeed, across the state, the country, and the world, people are being ordered to stay at home and, when they must leave for essential reasons, to remain six feet apart from others. The CDC warns that, for people at high risk of death from COVID-19, social distancing is even more important.⁶

Yet physical distancing is currently impossible in Maine Department of Corrections facilities, in which prisoners eat their meals cheek to jowl, share bathrooms with dozens of other

¹ At Risk for Severe Illness, U.S. Centers for Disease Control and Prevention (last accessed Apr. 5, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html>.

² Betsy McKay, *Coronavirus vs. Flu Which Virus is Deadlier*, WALL ST. J. (Mar. 10, 2020, 12:49 PM), <https://cutt.ly/itEmi8j>.

³ *Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19)*, World Health Organization (Feb. 28, 2020), at 12 <https://cutt.ly/KtD3ALr> (finding fatality rates for patients with COVID-19 and comorbid conditions to be: “13.2% for those with cardiovascular disease, 9.2% for diabetes, 8.4% for hypertension, 8.0% for chronic respiratory disease, and 7.6% for cancer”).

⁴ Adrianna Rodriguez, Some severe cases of coronavirus could result in brain damage, inability to walk, USA TODAY (Mar. 19, 2020), <https://www.usatoday.com/story/news/health/2020/03/19/coronavirus-what-acute-respiratory-distress-syndrome-ards/5066412002/> (quoting Dr. Nuala Meyer, associate professor at the University of Pennsylvania Perelman School of Medicine); Tian-Yuan Xiong et al., *Coronaviruses and the Cardiovascular System: Acute and Long-Term Implications*, EURO. HEART J. ehaa231 (2020).

⁵ <https://www.youtube.com/watch?v=nX4ljxGU4VI>.

⁶ Social Distancing, U.S. Centers for Disease Control and Prevention (last accessed Apr. 6, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html>.

inmates, sleep two or four to a room, and have close contact with prison staff who are not equipped with masks, gloves, or personal protective equipment. Under similar conditions, a seasonal flu epidemic sickened a large number of inmates and staff in 2011, even killing one prisoner.⁷ The difference is that once COVID-19 infiltrates the prisons, it will be far more deadly. As one epidemiologist explained: “In such an epidemic, a jail or prison sentence . . . could become a death sentence, especially for individuals over 50 or with chronic health conditions.”⁸

II. BACKGROUND SPECIFIC TO PETITIONER

Mr. Denbow’s sentence places him in mortal danger. At 54, Mr. Denbow is immune-compromised from a prior bout with cancer and also suffers from chronic obstructive pulmonary disease and asthma. Mr. Denbow is prescribed multiple different medications for his asthma and he relies on his albuterol inhaler several times a day. People with asthma are at particularly high risk of developing ARDS (acute respiratory distress syndrome), which can lead to fluid build-up in the lungs, inability to process oxygen, and, ultimately, organ failure and death.⁹ Accordingly, due to his constellation of conditions, Mr. Denbow is at extremely high risk of both contracting the virus and experiencing serious complications and even death.

⁷ Influenza Outbreaks at Two Correctional Facilities – Maine, March 2011, Centers for Disease Control and Prevention (Apr. 6, 2012), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6113a3.htm>.

⁸ See statements of Dr. Sharon McDonnell and Dr. Lani Graham, accompanying a March 30, 2020 letter filed by the Maine Association of Criminal Defense Lawyers and the ACLU of Maine Foundation to the Chiefs of the Maine Supreme Judicial Court, the Superior Court, and the District Court. Dr. McDonnell’s and Dr. Graham’s statements are attached to this filing.

⁹ Adrianna Rodriguez, Some severe cases of coronavirus could result in brain damage, inability to walk, USA TODAY (Mar. 19, 2020), <https://www.usatoday.com/story/news/health/2020/03/19/coronavirus-what-acute-respiratory-distress-syndrome-ards/5066412002/> (quoting Dr. Nuala Meyer, associate professor at the University of Pennsylvania Perelman School of Medicine); Tian-Yuan Xiong et al., *Coronaviruses and the Cardiovascular System: Acute and Long-Term Implications*, EURO. HEART J, ehaa231 (2020).

Mr. Denbow is currently incarcerated in at the Mountain View Correctional Facility in Charleston, Maine. He is incarcerated for nonviolent and nondangerous offenses and set to be released in August of this year. After accounting for good time, Mr. Denbow has already served most of his sentence. Before the Department of Corrections shut down the program because of COVID-19, Mr. Denbow traveled to the community multiple times a week to work.

Yet it is impossible for Mr. Denbow to protect himself from infection in prison. Although he keeps to himself as much as possible, he cannot avoid close contact with other prisoners and staff. He shares a dorm with more than 50 other man, eats meals inches away from other prisoners, and shares bathroom stalls, showers, and sinks with dozens of others who could be infected. Even at night, he sleeps in a small room with three other people. In similar settings across the country and the world, COVID-19 has spread like wildfire once it enters the facility, sickening and killing prisoners and staff alike.¹⁰ The Mountain View facility is in Penobscot County, which is 98% likely to experience an epidemic from COVID 19.¹¹

DISCUSSION

In these extraordinary times, the mortal danger to Mr. Denbow renders his sentence unconstitutional as disproportionate under the Maine Constitution and cruel and unusual punishment under both the Federal and Maine Constitutions. The post-conviction review process is an appropriate vehicle to challenge this disproportionate sentence and to seek release.

¹⁰ See, e.g., Zak Cheney-Rice, Rikers Reports Its First COVID-Related Prisoner Death, New York Magazine (Apr. 6, 2020), <https://nymag.com/intelligencer/2020/04/rikers-island-reports-its-first-covid-related-prisoner-death.html>, A Rikers inmates has died of complications from the virus, New York Times, (Apr. 5, 2020), <https://www.nytimes.com/2020/04/05/nyregion/coronavirus-new-york-update.html#link-3236f5ee>; A jail in Chicago is now the largest-known source of U.S. infections, New York Times, (Apr. 8, 2020), available at <https://www.nytimes.com/2020/04/08/us/coronavirus-live-updates.html#link-7634e187> (noting at least 387 cases can be linked to Cook County jail in Chicago, more than other high-profile outbreaks in closed congregate settings).

¹¹ Erin Rhoda, *The Maine counties most likely to see sustained spread of the coronavirus*, Bangor Daily News (Apr. 10, 2020), https://bangordailynews.com/2020/04/10/mainefocus/the-maine-counties-most-likely-to-see-sustained-spread-of-the-coronavirus/?mc_cid=6c31853839&mc_eid=9579286a44.

Accordingly, we respectfully request that the court immediately order Mr. Denbow to be safely released to shelter in place at home. Each of these issues is discussed in further detail below.

I. Mr. Denbow’s Sentence Is Unconstitutional

A. COVID-19 Has Transformed Mr. Denbow’s Sentence to One Imposing a High Risk of Death, which Is Unconstitutionally Disproportionate to his Offense

In normal times, a sentence that is within the range dictated by the legislature is likely to fall within the proportionality guarantee in the Maine Constitution. Me. Const. Art. I, § 9. In this extraordinary pandemic, however, judicial intervention is necessary to prevent Mr. Denbow from being punished by risk of death for a nonviolent offense.

Article I, section 9 requires that “penalties and punishments shall be proportioned to the offense.” Me. Const. Art. I, § 9. Under this proportionality guarantee, the Maine constitution provides for “a broader proportionality review” than the federal constitution. *State v. Stanislaw*, 2013 ME 43, ¶¶ 26, 65 A.3d 1242 (citing *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991)). The Court has traditionally applied a two-part test to determine whether a sentence is excessive. First, it compares “the gravity of the offense” with “the severity of the sentence.” *Stanislaw*, 2013 ME 43, ¶ 29 (citations omitted). Second, if that comparison suggests gross disproportionality, the Court compares “the defendant’s sentence with the sentences received by other offenders in the same jurisdiction.” *Id.* (citations omitted).

Applying this analysis, a sentence imposing a high risk of death is grossly disproportionate to the “gravity” of Mr Denbow’s nonviolent offenses. He is currently serving two years of imprisonment for aggravated forgery and operating a motor vehicle after habitual offender revocation. The “aggravated forgery” arose from Mr. Denbow’s poor judgment, in the moment, to give his brother’s name to the officer who pulled him over for driving on a revoked license. Mr. Denbow promptly corrected this misrepresentation, and, in any event, has already

served the majority of his sentence in prison for these offenses. While in prison, Mr. Denbow has earned good time for, among other things, working in the community. Forcing Mr. Denbow to remain incarcerated until August 28, 2020, his current earliest projected release date,¹² would expose him to an unacceptably high risk of exposure to the virus and resulting risk of death.¹³ A sentence imposing a high risk of death is grossly disproportionate to Mr. Denbow's offenses.

Under the second prong of the proportionality analysis, moreover, imposing death or serious risk of death is not a sentence imposed on others for forgery or driving on a revoked license. *Stanislaw*, 2013 ME 43, ¶ 29 (citations omitted). Accordingly, both factors militate in favor of holding that Mr. Denbow's sentence, in the time of COVID-19, is grossly disproportionate in violation of the Constitution. *See* Me. Const. Art. I, § 9.

Mr. Denbow's sentence also includes two years of probation, which is not disproportionate and would allow Mr. Denbow to safely protect himself by socially distancing at home.

B. A Sentence that Prohibits Mr. Denbow from Physical Distancing Is Cruel and Unusual Punishment

Mr. Denbow's sentence also imposes an unsafe, life-threatening sentence in violation of the Federal and State Constitutions. *See* U.S. Const. Amend. 8; Me. Const. Art. I, § 9.¹⁴ "The

¹² Joseph Denbow, Maine Inmate Search, available at https://www1.maine.gov/cgi-bin/online/mdoc/search-and-deposit/detail.pl?mdoc_number1=33030 (last visited Apr. 13, 2020).

¹³ It is the sentence of imprisonment that imposes this punishment. As another court has recognized, precautionary measures relating to hygiene "are inadequate to sufficiently decrease the substantial likelihood that Petitioner will contract COVID-19." *See Malam v. Adducci*, No. 20-10829, 2020 WL 1672662, at *8 (E.D. Mich. Apr. 5, 2020), *as amended* (Apr. 6, 2020). Indeed, "even the most stringent precautionary measures—short of limiting the detained population itself—simply cannot protect detainees from the extremely high risk of contracting this unique and deadly disease." *Id.* In such cases, the prison sentence itself—which mandates living in a closed congregate setting with dozens of other prisoners and staff—imposes a high risk of death.

¹⁴ Under the Eighth Amendment, "excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted.*" U.S. Const. Amend. 8. The Maine Constitution provides the same. Me. Const. Art. I, § 9.

Eighth Amendment does not mention disproportionate punishments explicitly, but rather incorporates the principle that a grossly disproportionate punishment is cruel and unusual.” *State v. Ward*, 2011 ME 74, ¶ 16, 21 A.3d 1033, 1037 (citing *Graham v. Florida*, 560 U.S. 48 (2010)) “The concept of proportionality is central to the Eighth Amendment.” *Graham*, 560 U.S. at 59. “To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to “ ‘the evolving standards of decency that mark the progress of a maturing society.’” *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

In this deadly pandemic, a sentence of imprisonment for medically vulnerable prisoners implicates the Eighth Amendment’s prohibition against cruel and unusual punishment. It is “cruel and unusual punishment to hold convicted criminals in unsafe conditions,” *Youngberg v. Romeo*, 457 U.S. 307, 315–316 (1982). Even when a “possible infection might not affect all those exposed,” the risk alone can be “unsafe” or “life-threatening.” *Helling v. McKinney*, 509 U.S. 25, 33 (1993). Knowingly exposing prisoners to such infectious disease violates the prohibition against cruel and unusual punishment. *See, e.g., Hutto v. Finney*, 437 U.S. 678, 682–685 (1978) (recognizing the need for a remedy where prisoners were crowded into cells and some had infectious diseases). For Mr. Denbow, imprisonment is synonymous with the inability to physically distance, and, consequently, with a high risk of death from COVID-19. Although the prison has taken steps to increase sanitation and hygiene, the prison setting makes it impossible for Mr. Denbow to protect against infectious but asymptomatic carriers of COVID-19, who may be eating meals or sharing a dorm with him, unbeknownst to Mr. Denbow or the prison staff.¹⁵ Mr. Denbow’s sentence of imprisonment exposes him to a high risk of infection

¹⁵ *See Malam*, 2020 WL 1672662, at *8.

and correspondingly high risk of death— an “unsafe, life-threatening condition” in violation of the Eighth Amendment. *Helling v. McKinney*, 509 U.S. 25, 33 (1993).

II. Post-Conviction Review Is an Appropriate Method to Seek Release from Unconstitutional Incarceration

“The statutory remedy of post-conviction review, 15 M.R.S. §§ 2121-2132, was intended to fully replace and implement the constitutional right of post-conviction habeas corpus as it pertains to a post-sentencing proceeding that occurs during the course of an offender’s sentence.” *Petgrave v. State*, 2019 ME 72, ¶ 11, 208 A.3d 371, 374 (citing *James v. State*, 2008 ME 122, ¶ 12, 953 A.2d 1152). Under the Maine Constitution, “the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.” Me. Const. Art. I, § 10. “The writ of habeas corpus traditionally has been accepted as the specific instrument to obtain release from unlawful confinement, or to deliver someone from unlawful custody.” 39 Am. Jur. 2d Habeas Corpus § 1 (citations omitted).

The purpose of post-conviction review statutes is “to require that the attack, which might have been made in some other court through resort to habeas corpus, be made by motion in the sentencing court, unless it appears that the remedy by motion is inadequate or ineffective to test the legality of the prisoner's detention.” 39 Am. Jur. 2d Habeas Corpus § 9 (emphasis added). In cases where the statutory relief is inadequate, the underlying constitutional guarantee of the great writ remains available. *See id.*; *see also Kimball v. State*, 490 A.2d 653 (Me. 1985), *abrogated on other grounds by Manly v. State*, 2015 ME 117, 123 A.3d 219. For example, when a claim “would have been recognized in a petition for a writ of habeas corpus at common law,” the Maine Supreme Judicial Court held there was jurisdiction under the post-conviction review statute to adjudicate it. *Id.*

In this case, post-conviction review is an appropriate vehicle for Mr. Denbow to seek release from his unconstitutional sentence. As detailed in the petition, Mr. Denbow satisfies each of the requirements for post-conviction relief, including **(1)** restraint or impediment under 15 M.R.S. § 2124, **(2)** prior exhaustion of any available remedies under 15 M.R.S. § 2126,¹⁶ **(3)** absence of waiver under 15 M.R.S. § 2128, **(4)** timely filing of petition under 15 M.R.S. § 2128-B, and **(5)** stating of a ground upon which post-conviction relief can be granted under 15 M.R.S. § 2125. *See* M.R. Crim. P. 66. On the last prong specifically, Mr. Denbow’s “challenged criminal . . . sentence is unlawful” in violation of the Maine and Federal Constitutions.¹⁷ *See* 15 M.R.S. § 2125. Accordingly, post-conviction relief is not only appropriate, but required, in this case.

Finally, because of imminent dangers faced by Petitioner, any response and hearing on this petition should be expedited as quickly as possible. Under Rule 70(a), Petitioner respectfully requests at the court “promptly examine” the petition and grant expedited relief as detailed in the attached motion for release on bail.

¹⁶ Mr. Denbow could not have predicted the COVID-19 pandemic last May, when he had the opportunity to file a direct appeal of his sentence. Additionally, Mr. Denbow has applied for release under the community supervision process, but was denied due to cancellation of a prior community release for a non-safety-related reason; specifically, Mr. Denbow’s cancer diagnosis and treatment had prevented him from satisfying the mandatory work requirements. The imminent risks from this fast-paced pandemic mean that no other avenues for relief are available to Denbow, necessitating review from this Court.

¹⁷ In the alternative, this petition challenges an unlawful post-sentencing proceeding. *See* 15 M.R.S. § 2125. Although the definition of “post-sentencing proceeding” excludes cancellation of furlough or community release, 15 M.R.S. § 2121(2), that is not what happened here; Mr. Denbow simply was not awarded relief in the first place. To the extent the Court determines that this action challenges an administrative action not included in the definition of “post-sentencing proceeding,” moreover, Petitioner respectfully requests that the Court exercise its equitable authority to convert the action to an emergency complaint under Title 5, chapter 375, subchapter 7. *See* 15 M.R.S. § 2123-A. This Court’s general jurisdiction over petitions sounding in habeas relief. 14 M.R.S. §§ 5301, 5501, provides an additional basis for the exercise of jurisdiction and the provision of relief.

CONCLUSION

For these reasons and the reasons stated in the petition for post-conviction review, Mr. Denbow respectfully requests expedited review of his petition and entry of an order declaring his sentence of imprisonment to be unconstitutional and ordering release on probation.

Respectfully submitted, this 13th day of April, 2020,

/s/ Emma E. Bond

Emma E. Bond (Bar No. 5211)
Zachary L. Heiden (Bar No. 9476)
American Civil Liberties Union of Maine
Foundation
P.O. Box 7860
Portland, Maine 04112
(207) 619-8687
(207) 619-6224
ebond@aclumaine.org
zheiden@aclumaine.org

Counsel for Petitioner

I certify that there are good grounds to support this pleading, that it complies with PMO-SJC-3, and that it is not being filed to cause any delay.

/s/ Emma E. Bond

Emma E. Bond (Bar No. 5211)
P.O. Box 7860
Portland, Maine 04112
(207) 619-8687
ebond@aclumaine.org

CERTIFICATE OF SERVICE

I, Emma E. Bond, hereby certify that on April 13, 2020, the above MEMORANDUM OF LAW IN SUPPORT OF EMERGENCY PETITION FOR POST-CONVICTION REVIEW was sent to the following:

District Attorney Andrew Robinson
55 Lisbon Street, 2nd Floor
Lewiston, ME 04240
Andrew.robinson@maineprosecutors.com

/s/ Emma E. Bond
Emma E. Bond (Bar No. 5211)
American Civil Liberties Union of Maine
Foundation
P.O. Box 7860
Portland, Maine 04112
(207) 619-8687
ebond@aclumaine.org

Counsel for Plaintiff

crime and the nature of the ultimate relief contemplated by the court if the petitioner were to prevail,” and (3) “the standards and conditions governing bail contained in 15 M.R.S. § 1051(2) and (3) are satisfied.” M. R. Civ. P. 74(b).

Each of these standards is satisfied here. *First*, Mr. Denbow is likely to prevail on the merits of his petition. As described in the memorandum of law filed with this motion, the COVID-19 pandemic has transformed Mr. Denbow’s sentence to one imposing a high risk of death. Such a sentence is grossly disproportionate to Mr. Denbow’s nonviolent offenses and in violation of the Maine and United States Constitutions. *Second*, release on bail is appropriate given the nonviolent nature of Mr. Denbow’s driving and forgery offenses, and is consistent with the petition’s request to enable Mr. Denbow to physically distance in the community during the COVID-19 pandemic. *Third*, as discussed below, the standards listed in 15 M.R.S. § 1051(2) and (3) are satisfied in this case.

Specifically, section 1051(2) provides that post-conviction bail may only be provided if the judge or justice has “probable cause” to believe that:

- A. There is no substantial risk that the defendant will fail to appear as required and will not otherwise pose a substantial risk to the integrity of the judicial process;
- B. There is no substantial risk that the defendant will pose a danger to another or to the community; and
- C. There is no substantial risk that the defendant will commit new criminal conduct.

15 M.R.S. § 1051(2). Each of these factors supports release. There is no substantial risk that Mr. Denbow would fail to appear for future court dates because, upon release, Mr. Denbow would live with his fiancé in the community where he can safely perform physical distancing while remaining in proximity to the court. Release is particularly consistent with the “integrity of the judicial process” given that Mr. Denbow has already served the majority of his sentence and is

set to be released in August 2020. Nor is there any substantial risk that releasing Mr. Denbow would pose any risk to the community. To the contrary, forcing Mr. Denbow to remain in prison—where he is likely to be exposed to the virus, spread it to others, and require a hospital bed and other scarce medical resources—is where the true danger to the community lies.¹ Finally, there is no substantial risk that Mr. Denbow will commit new criminal conduct. Rather, he simply wishes to remain safe at home with his fiancé during this state of emergency.²

Furthermore, aside from the bail conditions that are mandatory for post-conviction bail, no additional conditions or money bail are required.³ See, e.g., 15 M.R.S. § 1051(3). When a judge decides to set bail in the post-conviction context, the factors set forth in section 1026 provide the general framework. See 15 M.R.S. § 1051(2) (referring to section 1026 and stating that “[i]f the judge or justice decides to set post-conviction bail for a defendant, the judge or

¹ People with asthma are more likely to require hospitalization and a ventilator than people without a chronic health condition. Indeed, of those hospitalized for COVID-19, 89% had some underlying health condition and 17% had chronic lung disease specifically. Shikha Garg, M.D, *et al.*, *Hospitalization Rates and Characteristics of Patients Hospitalized with Laboratory-Confirmed Coronavirus Disease 2019 – COVID-NET, 14 states, March 1-30, 2020*, Centers for Disease Control and Prevention (Apr. 8, 2020), available at <https://www.cdc.gov/mmwr/volumes/69/wr/mm6915e3.htm>.

² The remaining factors for consideration under section 1051(2) likewise support release. These factors include:

factors relevant to preconviction bail listed in section 1026, as well as the facts proved at trial, the length of the term of imprisonment imposed and any previous unexcused failure to appear as required before any court or the defendant’s prior failure to obey an order or judgment of any court, including, but not limited to, violating a protection from abuse order pursuant to Title 19, section 769 or Title 19-A, section 4011.

15 M.R.S. § 1051(2).

³ “Every order for post-conviction release of a defendant must include a waiver of extradition by the defendant as well as a condition of bail that the defendant refrain from new criminal conduct and not violate any pending protection from abuse order pursuant to Title 19, section 769, or Title 19-A, section 4011.” 15 M.R.S. § 1051(1).

justice shall apply the same factors in setting the kind and amount of that bail”). Under section 1026, release must be “on personal recognizance or upon execution of an unsecured appearance bond,” without any conditions, unless doing so would undermine the purposes of the Bail Code. *See* 15 M.R.S. § 1026(2), (3). Payment of money bail or additional conditions of release are required only upon a showing of need. *See id.* In this case, there is no reason to require cash bail or additional conditions of release. Not only does release of Mr. Denbow pose minimal risk, but his indigent status and imminent risk of death in prison require speedy release uninhibited by unnecessary conditions.

Petitioner respectfully requests the Court’s expedited consideration of this motion for bail. Although no positive tests for COVID-19 have been publicly reported at the Mountain View facility, the prevalence of asymptomatic carriers and the dearth of testing mean that COVID-19 may be spreading in the facility at this very moment. Immediate relief is required to protect Mr. Denbow from unnecessary risk of death.

Finally, Petitioner respectfully request leave to file an unsworn petition for post-conviction review, signed by his attorney. Given the expedited nature of this request and COVID-19-related restrictions on visitation, there was no time or opportunity for an in-person meeting for Mr. Denbow to physically sign the petition before filing. By electronically signing the petition, Mr. Denbow’s attorney represents that, to the best of her knowledge, information, and belief there is good ground to support it.

CONCLUSION

For these reasons, Petitioner respectfully requests that the Court provide expedited consideration of this motion within 48 hours, grant release on PR bail, and permit filing of the unsworn petition.

Respectfully submitted, this 13th day of April, 2020,

/s/ Emma E. Bond

Emma E. Bond (Bar No. 5211)

Zachary L. Heiden (Bar No. 9476)

American Civil Liberties Union of Maine
Foundation

P.O. Box 7860

Portland, Maine 04112

(207) 619-8687

(207) 619-6224

ebond@aclumaine.org

zheiden@aclumaine.org

Counsel for Petitioner

I certify that there are good grounds to support this pleading, that it complies with PMO-SJC-3, and that it is not being filed to cause any delay.

/s/ Emma E. Bond

Emma E. Bond (Bar No. 5211)

P.O. Box 7860

Portland, Maine 04112

(207) 619-8687

ebond@aclumaine.org

CERTIFICATE OF SERVICE

I, Emma E. Bond, hereby certify that on April 13, 2020, the above EMERGENCY MOTION FOR RELEASE ON BAIL AND LEAVE TO FILE UNSWORN PETITION was sent to the following:

District Attorney Andrew Robinson
55 Lisbon Street, 2nd Floor
Lewiston, ME 04240
Andrew.robinson@maineprosecutors.com

/s/ Emma E. Bond
Emma E. Bond (Bar No. 5211)
American Civil Liberties Union of Maine
Foundation
P.O. Box 7860
Portland, Maine 04112
(207) 619-8687
ebond@aclumaine.org

Counsel for Plaintiff

STATE OF MAINE
OXFORD, ss.

UNIFIED CRIMINAL DOCKET
DKT. NO. OXFCD-CR-2020-00226

JOSEPH DENBOW,

Petitioner,

v.

STATE OF MAINE,

Respondent.

**ORDER ASSIGNING PETITION
FOR POST-CONVICTION REVIEW**

On April 13, 2020, Petitioner Joseph Denbow filed a petition for post-conviction review pursuant to 15 M.R.S. §§ 2121-2132 (2018). His challenge stems from the criminal judgments entered against him in the Unified Criminal Docket (Oxford County, *Cole, C.J.*) on May 8, 2019. (OXFCD-CR-2016-00600; OXFCD-CR-2018-00300.) Petitioner pleaded guilty to aggravated forgery (Class B), 17-A M.R.S. § 702(1)(D) (2018); operating after habitual offender revocation with priors (Class C), 29-A M.R.S. § 2557-A(2)(B) (2018); and operating after habitual offender revocation with 2 priors (Class C), 29-A M.R.S. § 2557-A(2)(C) (2018). The court sentenced him to ten years in prison on the aggravated forgery count with all but two years of the sentence suspended. He was sentenced to two-year terms of imprisonment on each operating after habitual offender revocation count, each to be served concurrently with the aggravated forgery sentence. Petitioner will be subject to a term of probation of two years. The petition was filed by counsel.

ANALYSIS

To warrant assignment, Petitioner must file his petition within the statutory filing period, be under a present or future impediment, and state at least one cognizable ground for post-conviction review that has not been waived.

1. Time

A one-year filing deadline applies to actions for post-conviction review. *Id.* § 2128-B. The

SOPSC/DC/OXFCD
PR 28 '20 AM 11:54

one-year period for post-sentencing proceedings “runs from the later of . . . [t]he date of filing of the final judgment in the court proceeding occurring during the course of and pursuant to the operation of the underlying sentence that results in incarceration or increased incarceration; or . . . [t]he date of the final administrative action occurring during the course of and pursuant to the operation of the underlying sentence that results in incarceration or increased incarceration.” *Id.* § 2128-B(2)(A), (B). Petitioner filed this less than a year after the date of the criminal judgment, therefore it is timely.

2. Impediment

A petition for post-conviction review is cognizable only when the Petitioner is under a restraint or impediment within the meaning of the statute because of the underlying criminal judgment. *Id.* § 2124. Petitioner is currently incarcerated as a result of the criminal judgment, which qualifies. *Id.* § 2124(1)(A).

3. Alleged Grounds

A petition for post-conviction review must state at least one cognizable ground for relief that has not been waived. *Id.* § 2125. Petitioner contends his sentence is unlawful on both state and federal constitutional grounds. *See* U.S. Const. amend. VIII; Me. Const. art. I, § 9; 15 M.R.S. § 2125. These appear to qualify as cognizable grounds for relief. Due to the unique nature of the petition in the face of Petitioner’s chronic health issues and the COVID-19 pandemic, the petition will be assigned.

It is hereby ORDERED:¹

1. The petition is assigned to the regular criminal docket.
2. Within **21 days** of the date the order assigning the petition is received, the State shall file a response pursuant to Rule 71. M.R.U. Crim. P. 70(c)(1).
3. Following the filing of a response by the State a petition may be further amended only by leave of the court for good cause shown. If the court

¹ Due to the apparent time-sensitive nature of the petition, the assigned court undoubtedly has the discretion to modify the timelines prescribed by the Maine Rules of Unified Criminal Procedure governing petitions for post-conviction review.

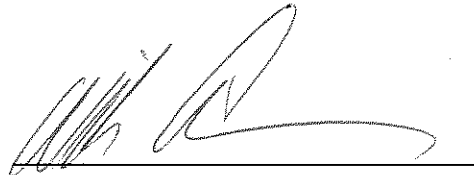
allows a petition to be amended after the filing of a response, the State may, except as the court might otherwise provide pursuant to Rule 72A(b)(3), file an additional response within **14 days** of receipt of the amended petition. M.R.U. Crim. P. 70(c)(3).

4. Following the filing of the pleadings, the clerk of the Unified Criminal Docket shall as soon as possible schedule a conference and give notice to the parties thereof. The court may dispense with a conference. M.R.U. Crim. P. 72A(a).
5. The clerk shall make the following docket entry:

Post-Conviction Assignment Order filed and incorporated herein by reference; case assigned to the regular criminal docket; time limits established.

Dated: _____

4/23/20



Hon. William R. Anderson
Justice, Maine Superior Court

STATE OF MAINE
OXFORD, ss.

UNIFIED CRIMINAL DOCKET
LOCATION: South Paris
Docket No.: CR-2020-226

JOSEPH DENBOW,

Petitioner,

v.

STATE OF MAINE,

Respondent.

)
)
)
)
)
)
)
)
)
)
)

**EMERGENCY MOTION FOR
HEARING ON POST-CONVICTION
BAIL**

Petitioner, Joseph Denbow, respectfully requests an emergency hearing on his motion for post-conviction bail. In adjudicating such motions, the assigned “judge or justice *shall* hold a hearing on the record on the bail application and shall state in writing or on the record the reasons for denying or granting bail.” 15 M.R.S. § 1051(1) (emphasis added) (applying to cases “pending ... execution of sentence or entry of judgment or appeal”); *see also* 15 M.R.S. § 2129(4); M.R. Crim. P. 74 (referring to the standards under 15 M.R.S. § 1051). We have consulted with the opposing counsel, Assistant Attorney General Jill O'Brien, who has represented that the Respondent, State of Maine, does not consent to the relief requested in this motion. For the reasons below, Mr. Denbow respectfully requests that the Court immediately provide an emergency hearing and decision on the pending motion for bail.

The risk of a COVID-19 outbreak in the Mountain View Correctional Facility represents an immediate threat to Mr. Denbow and necessitates an emergency hearing on his motion. That risk existed on April 13, 2020, when Mr. Denbow filed the emergency motion for bail, and has only increased in the intervening days. News broke three days ago that a prison in Ohio now represents the largest hotspot of COVID-19 cases in the country, with 73% of prisoners testing

positive for the virus, and accounting for 20% of the total cases in the state.¹ Although the Maine DOC has not yet reported any positive tests for prisoners, the well-known risk of asymptomatic infection means that the virus could nonetheless be spreading right now through the Mountain View facility. *See, e.g., Wilson v. Williams*, 4:20-CV-00794, 2020 WL 1940882, at *1 (N.D. Ohio Apr. 22, 2020) (discussing the risks of asymptomatic transmission). Indeed, Mountain View is located in Penobscot County, which has been experienced “community transmission” of COVID-19 for some time.² Prison staff risk becoming vectors of disease as they travel between the prison and the greater community every day. The low rate of testing—only 17 out of 2,000 inmates—makes that risk of unknown (yet rapid) transmission even greater.³ As another court recently explained, “[w]ith the shockingly limited available testing and the inability to distance inmates, COVID-19 is going to continue to spread, not only among the inmate population, but also among the staff.” *Wilson*, 2020 WL 1940882 at *1.

Mr. Denbow faces the immediate threat that an asymptomatic carrier with whom he shares sleeping quarters, a bathroom, or a meal hall could transmit the virus. And unlike some others who experience no symptoms from COVID-19, the virus could be deadly for Mr. Denbow, who is in remission from cancer and suffers from chronic lung disease. As another court explained, COVID-19 can lead to pneumonia and “diminishing oxygen absorption, with resulting organ failure leading to death.” *Wilson*, 2020 WL 1940882, at *2. The emergency exists now and we ask the Court to provide a hearing before it is too late.

¹ Bill Chappell, *73% of Inmates at Ohio Prison Test Positive for Coronavirus*, (Apr. 20, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/20/838943211/73-of-inmates-at-an-ohio-prison-test-positive-for-coronavirus>

² Charles Eichacker, *Coronavirus is spreading in Penobscot County through community transmission*, (Mar. 23, 2020), <https://bangordailynews.com/2020/04/10/news/penobscot/coronavirus-is-spreading-in-penobscot-county-through-community-transmission/>.

³ *See* DASHBOARD, COVID-19 Related Information, Maine Dep’t of Corrections (Apr. 23, 2020), <https://www.maine.gov/corrections/home/MDOC%20COVID19%20Web%20Dashboard%204-23-2020.pdf> (showing 17 out of 2,000 prisoners have been tested).

CONCLUSION

For these reasons, Petitioner respectfully requests an emergency hearing on his pending motion for post-conviction bail.

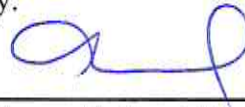
Respectfully submitted, this 23rd day of April, 2020,



Emma E. Bond (Bar No. 5211)
Zachary L. Heiden (Bar No. 9476)
American Civil Liberties Union of Maine
Foundation
P.O. Box 7860
Portland, Maine 04112
(207) 619-8687
(207) 619-6224
ebond@aclumaine.org
zheiden@aclumaine.org

Counsel for Petitioner

I certify that there are good grounds to support this pleading, that it complies with PMO-SJC-3, and that it is not being filed to cause any delay.



Emma E. Bond (Bar No. 5211)
P.O. Box 7860
Portland, Maine 04112
(207) 619-8687
ebond@aclumaine.org

CERTIFICATE OF SERVICE

I, Emma E. Bond, hereby certify that on April 23, 2020, the above EMERGENCY
MOTION FOR HEARING ON POST-CONVICTION BAIL was sent to the following:

Jill O'Brien
Office of the Maine Attorney General
6 State House Station
Augusta, ME 04333
Jill.obrien@maine.gov

Assistant District Attorney Richard Beauchesne
26 Western Avenue
South Paris, ME
Lewiston, ME 04281
Richard.beauchesne@maineprosecutors.com



Emma E. Bond (Bar No. 5211)
American Civil Liberties Union of Maine
Foundation
P.O. Box 7860
Portland, Maine 04112
(207) 619-8687
ebond@aclumaine.org

Counsel for Plaintiff

not also potentially be entitled to bail.¹ A petition for post-conviction review is not the proper vehicle to challenge MDOC's response to COVID-19, and neither Petitioner nor the other 1,989 inmates in prison are entitled to immediately move into the community while MDOC and the State determine how to best manage this global crisis.

As discussed in the State's opposition to the motion for bail, the Court cannot make an informed determination regarding Petitioner's likelihood of success on the merits at this early stage of the post-conviction review, as required for determining whether bail is appropriate under M.R. Crim. P. 74(b)(1). (Opp'n to Bail Mot. 2.) The Court may consider the issue of bail "on the basis of all pleadings" or "the pleadings supplemented by any evidence received at a hearing pursuant to Rule 73." (*Id.*) Respondent the State of Maine has not yet had an opportunity to respond to the petition, and the petition and memorandum Petitioner filed do not show a likelihood of success on the merits. Petitioner admits that he is only 54 years old and that he was recently healthy enough to work multiple days per week before the prison system stopped his work program to prevent the spread of COVID-19. (Mem. in Support of Petition pp. 1, 4.) Petitioner further admits that there have been no confirmed cases of COVID-19 among Maine prison inmates. (Mem. in Support of Petition p. 2; *see also* MDOC's Daily COVID-19 Dashboard, available at <https://maine.gov/corrections/> (last visited Apr. 24, 2020).) Despite these facts, Petitioner claims that his health is so poor and his preexisting conditions are so serious that he should not be required to serve his prison sentence (through approximately August 2020) for the forgery and other crimes to which he pled guilty in 2019. (Mem. in Support of Petition p. 3.)

¹ MDOC provides a public, online daily report on the number of inmates in its custody, the number of inmates tested for COVID-19, the number of inmates being monitored for the virus, and the number of inmates being transferred to the community under the Supervised Community Confinement Program (SCCP). *See* MDOC's Daily COVID-19 Dashboard, available at <https://maine.gov/corrections/> (last visited Apr. 24, 2020).

Petitioner also states that he tried to exhaust administrative remedies by unsuccessfully applying to the Supervised Community Confinement Program (“SCCP”), through which the Commissioner of MDOC allows inmates who meet certain criteria to serve the remainder of their sentence in the community. (Petition p. 6.) But Petitioner omits the fact that he did not appeal the denial of his application to this program within MDOC, which will be demonstrated in the course of proceedings if the petition proceeds further. Thus, Petitioner failed to exhaust administrative remedies and has no likelihood of success on the merits. 15 M.R.S. § 2126 (2020). For all of these reasons, Petitioner’s emergency motion for a hearing on bail should be denied.

Releasing Petitioner on bail would also expose him to the same dangers of contracting COVID-19 that members of the public face. This risk is not insubstantial. He alleges that he requires multiple prescription medications (Mem. in Support of Petition p. 3), which are presently provided to him in prison by the prison’s private medical contractor, but in the community, he would have to find access to medications through a doctor’s office or pharmacy. As discussed above, there are no confirmed cases of COVID-19 among Maine’s prison inmates. The same cannot be said for the community. Confirmed cases of COVID-19 have been found in all counties in Maine. *See* Maine Center for Disease Control & Prevention COVID-19 Update and Information, available at <https://www.maine.gov/dhhs/mecdc/infectious-disease/epi/airborne/coronavirus.shtml#situation> (last visited Apr. 24, 2020). Petitioner further requests that he be “allowed to shelter in place at home,” but it is unclear at this time whether Petitioner even has a place to reside if he is released from prison. Thus, the State requests that the Court deny the emergency motion for a hearing on bail.

Under M.R. Crim. P. 74, the Court may decide to release an inmate on bail pending final determination of a petition for post-conviction review, if the conditions of 15 M.R.S. §§ 1051(2)

and (3) are satisfied. Section 1051(2), in turn, requires that there be no substantial risk that the Petitioner will fail to appear and will not otherwise pose a substantial risk to the integrity of the judicial process; that there is no substantial risk he will pose a danger to another or the community; and no substantial risk that he will commit new criminal conduct. 15 M.R.S. § 1051(2) (2020). Even without considering any of Petitioner's criminal history, the nature of the crimes to which he pled guilty and is currently serving a sentence on (forgery and operating after habitual offender revocation) show that Petitioner is unable to show that there is no substantial risk that he will commit new criminal conduct. Petitioner refers to the multiple felony crimes that he committed as "nondangerous" (Mem. in Support of Petition p. 4), but this unreasonably downplays the potential danger inherent in these offenses and ignores his criminal history, which includes being convicted of operating under the influence, multiple operating after habitual offender revocations, multiple burglaries and thefts, assault, and failing to report.

Because Petitioner's request for bail is premature and because Petitioner has no likelihood of success on the merits, the request for an emergency bail hearing should be denied.

Respectfully submitted this 27th day of April, 2020.

I certify that there are good grounds to support this pleading, that it complies with PMO-SJC-3, and that it is not being filed to cause any delay.

/s/ Jillian R. O'Brien
Jillian R. O'Brien, Bar No. 6225
Assistant Attorney General
Office of the Attorney General
6 State House Station
Augusta, ME 04333-0006
(207) 626-8800
jill.obrien@maine.gov

asymptomatic transmission and the absence of widespread testing, “confirmed” cases are a poor indicator of risk.¹ In highlighting a recent study on asymptomatic transmission of COVID-19, Director of the Maine Center for Disease Control and Prevention (CDC), Dr. Nirav Shah, warned against a “symptom-based approach to [COVID-19] control[.]”² Yet that is the approach taken by the Maine Department of Corrections (DOC), which has tested only *one percent* of adult inmates, and has no way to know whether the remaining ninety-nine percent of asymptomatic inmates are infected with the coronavirus.³ Nor has DOC publicly released information on staff testing, even though at least one staff member has tested positive for the virus.⁴ Time is of the essence now, to protect vulnerable prisoners before a known outbreak.

Nor is the State on any stronger footing in suggesting that Mr. Denbow could somehow be at greater risk if he is released on bail. State Opp. at 3. Without widespread testing, the only measures to protect against asymptomatic transmission are frequent hand-washing and physical

¹ See, e.g., *Presymptomatic Transmission of SARS-CoV-2 – Singapore, January 23–March 16, 2020*, U.S. Centers for Disease Control and Prevention (Apr. 10, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6914e1.htm>.

² Twitter, @nirav_maineCDC (Apr. 27, 2020), https://twitter.com/nirav_maineCDC?lang=en (citing Melissa Arons, et al., *Presymptomatic SARS-CoV-2 Infections and Transmission in a Skilled Nursing Facility*, *The New England Journal of Medicine* (Apr. 24, 2020), available at https://www.nejm.org/doi/full/10.1056/NEJMoa2008457?query=featured_coronavirus).

³ Daily Dashboard, Maine Dep’t of Corr. (Apr. 27, 2020), available at <https://www.maine.gov/corrections/home/MDOC%20COVID19%20Web%20Dashboard%204-27-2020.pdf>.

⁴ Statement from DOC Comm’r, Maine Dep’t of Corr. (Mar. 31, 2020), <https://www.maine.gov/corrections/home/3.31.20%20Statement%20from%20Commissioner%20Liberty.pdf> (reporting on the positive test of a staff member at the Bolduc Correctional Facility in Warren, Maine).

distancing.⁵ Yet physical distancing is impossible in prison⁶ and the State does not even attempt to argue otherwise, instead offering the excuse that 1989 other prisoners may be in the same boat. *See* State Resp. at 1-2. Release on bail would enable Mr. Denbow to follow the statewide stay-at-home order and comply with CDC guidance on physical distancing.⁷

The State's further suggestion that Mr. Denbow's medically vulnerable status—and resulting need for medication—supports keeping him in prison, is also fundamentally wrong. *See* State Opp. at 3. Exposing medically vulnerable people to the risk of infection in prison—where they may die “after agonizing days under intensive care, most probably with ventilators”—is not only inhumane to the inmate, but also endangers prison staff and wastes state resources that would be better spent on widespread testing or facilitating the release of inmates who are at low-risk to the community. *See Wilson v. Williams*, No. 4:20-CV-00794, 2020 WL 1940882, at *10 (N.D. Ohio Apr. 22, 2020) (noting that the prison “absorbs the high cost of this treatment—costs that are likely multiples of what it would have cost to test each [prison] inmate and guard”).

The claim that Mr. Denbow's motion for hearing is premature is also unpersuasive. *See* State Resp. at 2. Contrary to the State's argument, the criminal rule on bail in post-conviction reviews does not delay a bail hearing until submission of “all” the pleadings. *See id.* (citing State Opp. to Bail Mot. and M.R. Crim. P. 74). To the contrary, Rule 74 allows for evaluation of likelihood of success on post-conviction review bail “on the basis of the pleadings,” which

⁵ Guidance for Community-Related Exposures, U.S. Centers for Disease Control and Prevention, (last visited Apr. 28, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/php/public-health-recommendations.html>.

⁶ Hawks L, Woolhandler S, McCormick D., *COVID-19 in Prisons and Jails in the United States*. *JAMA Intern Med*. Published online April 28, 2020. doi:10.1001/jamainternmed.2020.1856

⁷ Governor Mills Executive Order 28 FY 19/20 (Mar. 31, 2020), <https://bit.ly/2Yeo8F1>.

provides a broad and flexible rule for granting necessary relief. M.R. Crim. P. 74(b)(1). This criminal rule provides standards (not procedures) governing post-conviction review bail, and does not contradict the statutory requirement for a hearing. *Compare* M.R. Crim. P. 74 *with* 15 M.R.S. § 1051 (requiring a hearing on a motion for post-conviction bail).

Next, in an argument that appears nowhere in its opposition to the bail motion (and which the State has, thus, arguably procedurally defaulted in the bail context), the State argues that Mr. Denbow has failed to exhaust his administrative remedies. State Opp. at 3 (citing 15 M.R.S. § 2126). But failure to exhaust is “an affirmative defense rather than a jurisdictional issue.” *Belskis v. Somerset Cty.*, No. 1:15-CV-00091-JAW, 2017 WL 835163, at *7 (D. Me. Mar. 2, 2017), *aff’d*, No. 1:15-CV-00091-JAW, 2017 WL 4082679 (D. Me. Sept. 15, 2017) (citing *Jones v. Bock*, 549 U.S. 199, 216 (2007)). Where, as here, Mr. Denbow has adequately pled exhaustion, M.R. Crim. P. 70(b), the burden falls to the State to present evidence “that there was an available administrative remedy, and that the prisoner did not exhaust that available remedy.” *Belskis*, 2017 WL 835163 at *7 (quoting *Albino v. Baca*, 747 F.3d 1162, 1172 (9th Cir.) (en banc)); *accord* M.R. Crim. P. 71(c). And, the proper time for the State to make such a showing is at the hearing that Mr. Denbow has sought and the State has opposed. They will, in any case, be unsuccessful. The State cannot show that any additional administrative procedures were “available” to resolve Mr. Denbow’s claim for emergency relief, because any potential appeal could have languished for thirty days, in a time when COVID-19 outbreaks can explode in a matter of days. *See* MDOC Policy 27.02(VI)(K)(3). Nor were remedies “available” in this prison setting (in which a prisoner’s access to materials is wholly controlled by the prison) when neither the application nor the denial letter made any mention of the requirement to file an appeal within five days. Rules requiring administrative exhaustion do not require prisoner clairvoyance. In any

event, the State makes no argument that Mr. Denbow has failed to exhaust available administrative remedies related to his claim that his sentence has become clearly disproportionate in violation of the Maine Constitution, Article I, Section 9.

Finally, the State argues (again, for the first time) that post-conviction relief is not “proper” and that prisoners should defer to MDOC’s handling of the crisis. State Resp. at 1-2. But when there is a constitutional violation—such as a clearly disproportionate sentence or deliberately indifferent exposure to infection—a prisoner’s plight becomes an issue for the Court. *See* Me. Const. Art. I, § 9; U.S. Const. Amend. 8; *see also, e.g., Wilson*, 2020 WL 1940882, at *10 (granting relief to prisoners in a federal habeas petition).

CONCLUSION

For these reasons, Petitioner respectfully requests an emergency hearing on his pending motion for post-conviction bail.

I certify that there are good grounds to support this pleading, that it complies with PMO-SJC-3, and that it is not being filed to cause any delay.

Respectfully submitted, this 29th day of April, 2020,



Emma E. Bond (Bar No. 5211)
Zachary L. Heiden (Bar No. 9476)
American Civil Liberties Union of Maine
Foundation
P.O. Box 7860
Portland, Maine 04112
(207) 619-8687
(207) 619-6224
ebond@aclumaine.org
zheiden@aclumaine.org

Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Emma E. Bond, hereby certify that on April 29, 2020, the above EMERGENCY MOTION FOR HEARING ON POST-CONVICTION BAIL was sent to the following:

Jill O'Brien
Office of the Maine Attorney General
6 State House Station
Augusta, ME 04333
Jill.obrien@maine.gov



Emma E. Bond (Bar No. 5211)
American Civil Liberties Union of Maine
Foundation
P.O. Box 7860
Portland, Maine 04112
(207) 619-8687
ebond@aclumaine.org

Counsel for Plaintiff

STATE OF MAINE
OXFORD, SS.

SUPERIOR COURT
UNIFIED CRIMINAL DOCKET
DOCKET NO.: OXFCD-CR-2020-226

JOSEPH DENBOW,

Petitioner

v.

STATE OF MAINE,

Respondent

SPECIAL ASSIGNMENT ORDER

To the Honorable **Roland A. Cole** Justice, Maine Superior Court:

WHEREAS the above referenced case is now pending in the **Oxford** County Superior Court Unified Criminal Docket, and

WHEREAS it appears advisable that a single justice hear this case and any matters in connection therewith to a final conclusion of same;

NOW, THEREFORE, IT IS HEREBY ORDERED that Justice Roland A. Cole is hereby assigned to hear and dispose of all matters that may arise in connection with this case, including hearing the case on the merits, to the exclusion of all other justices, hearings to be set at such times and places as Justice Roland A. Cole may at his sound discretion decide, with the least interference with his schedule of other assignments, and notwithstanding that some other separate session of the Superior Court may be in progress at the same time.

The Clerk is directed to incorporate this Order into the docket by reference pursuant to M.R. Civ. P. 79(a).

DATED: 4-24-2020



Robert E. Mullen
Chief Justice
Maine Superior Court

OPSC/DC/OXFCD
MAY 5 '20 AM 8:20

O'Brien, Jill

From: Michelle Racine <michelle.racine@courts.maine.gov>
Sent: Monday, May 18, 2020 4:28 PM
To: Emma Bond; O'Brien, Jill
Subject: Fwd: Denbow PCR
Attachments: 20200518162452088.pdf

Good afternoon - we received a call this afternoon indicating the AG's office did not receive a copy of the PCR petition. It appears that it was sent to the Oxford DA's office only. I'm forwarding along copies of the petition, order assigning petition and special assignment order. I apologize for the error. Please let me know if you have any questions. Thank you

----- Forwarded message -----

From: <donotreply_scanner@courts.maine.gov>
Date: Mon, May 18, 2020 at 4:24 PM
Subject: Denbow PCR
To: michelle <michelle.racine@courts.maine.gov>

This E-mail was sent from "SopCC-Multi1" (MP 3054).

Scan Date: 05.18.2020 16:24:51 (-0400)
Queries to: donotreply_scanner@courts.maine.gov

--

Michelle Racine, Clerk
Oxford County Superior & District Courts

Confidentiality Notice: This e-mail message, including any attachments, is for the sole use of the intended recipient(s) and may contain confidential and privileged information. Any unauthorized review, use, disclosure, or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply e-mail and destroy/delete all copies of the original message.

O'Brien, Jill

From: Michelle Racine <michelle.racine@courts.maine.gov>
Sent: Wednesday, May 20, 2020 10:17 AM
To: Emma Bond
Cc: O'Brien, Jill
Subject: Re: Denbow PCR
Attachments: Denbow docket sheet.pdf

Attached please find the docket sheet for the Joseph Denbow PCR. Due to the current situation and limited staffing, both orders were docketed today and noted on the docket sheet. Thank you for your patience.

On Mon, May 18, 2020 at 9:31 PM Emma Bond <ebond@aclumaine.org> wrote:

Clerk Racine,

Thank you for sending this! This is the first that I have seen the special assignment order, or any order in this case, and I just wanted to confirm that you have the correct address for me: P.O. Box 7860, Portland, Maine 04112.

Additionally, would it be possible to request a copy of the full docket? I would be happy to pay for any records as necessary. Thanks again for your time!

Take care,
Emma

Emma Bond

pronouns: she/her/hers

Staff Attorney

American Civil Liberties Union of Maine

PO Box 7860, Portland, ME 04112

■ 207-619-8687

■ ebond@aclumaine.org

www.aclumaine.org

From: Michelle Racine <michelle.racine@courts.maine.gov>
Sent: Monday, May 18, 2020 4:27 PM
To: Emma Bond <ebond@aclumaine.org>; O'Brien, Jill <Jill.O'Brien@maine.gov>
Subject: Fwd: Denbow PCR

Good afternoon - we received a call this afternoon indicating the AG's office did not receive a copy of the PCR petition. It appears that it was sent to the Oxford DA's office only. I'm forwarding along copies of the petition, order assigning petition and special assignment order. I apologize for the error. Please let me know if you have any questions. Thank you

----- Forwarded message -----

From: <donotreply_scanner@courts.maine.gov>
Date: Mon, May 18, 2020 at 4:24 PM

Subject: Denbow PCR

To: michelle <michelle.racine@courts.maine.gov>

This E-mail was sent from "SopCC-Multi1" (MP 3054).

Scan Date: 05.18.2020 16:24:51 (-0400)

Queries to: donotreply_scanner@courts.maine.gov

--

Michelle Racine, Clerk
Oxford County Superior & District Courts

Confidentiality Notice: This e-mail message, including any attachments, is for the sole use of the intended recipient(s) and may contain confidential and privileged information. Any unauthorized review, use, disclosure, or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply e-mail and destroy/delete all copies of the original message.

--

Michelle Racine, Clerk
Oxford County Superior & District Courts

Confidentiality Notice: This e-mail message, including any attachments, is for the sole use of the intended recipient(s) and may contain confidential and privileged information. Any unauthorized review, use, disclosure, or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply e-mail and destroy/delete all copies of the original message.

STATE OF MAINE
OXFORD, SS.

SUPERIOR COURT
UNIFIED CRIMINAL DOCKET
DOCKET NO.: OXFCD-CR-20-226

JOSEPH DENBOW,

Petitioner

v.

STATE OF MAINE,

Respondent

**AMENDED
SPECIAL ASSIGNMENT ORDER**

The Administrative Order dated April 24, 2020, designating the Honorable Roland A. Cole as the justice assigned, is hereby **vacated**. This case will be assigned to the Honorable Thomas McKeon, Justice, Maine Superior Court.

To the Honorable Thomas McKeon, Justice, Maine Superior Court:

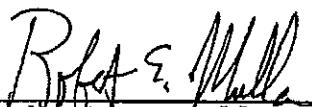
WHEREAS the above referenced case is now pending in the Unified Criminal Docket of Superior Court in and for the County of Oxford, and

WHEREAS it appears advisable that a single justice hear this case and any matters in connection therewith to a final conclusion of same;

NOW, THEREFORE, IT IS HEREBY ORDERED that Justice Thomas McKeon is hereby assigned to hear and dispose of all matters that may arise in connection with this case, including hearing the case on the merits, to the exclusion of all other justices, hearings to be set at such times and places as Justice Thomas McKeon may at his sound discretion decide, with the least interference with his schedule of other assignments, and notwithstanding that some other separate session of the Superior Court may be in progress at the same time.

The Clerk is directed to incorporate this Order into the docket by reference pursuant to M.R. Civ. P. 79(a).

DATED: MAY 19 2020



Robert E. Mullen
Chief Justice, Maine Superior Court

STATE OF MAINE
OXFORD, ss.

UNIFIED CRIMINAL DOCKET
LOCATION: South Paris
Docket No.: CR-2020-226

JOSEPH DENBOW,	)	
	)	
Petitioner,	)	PETITIONER'S RENEWED MOTION
	)	FOR HEARING ON BAIL AND
v.	)	OPPOSITION TO STATE'S MOTION
	)	TO DISMISS
STATE OF MAINE,	)	
	)	
Respondent.	)	

There have been numerous procedural developments since April 13, 2020, when Petitioner, Mr. Denbow, filed the underlying petition for post-conviction review and an accompanying emergency motion for post-conviction bail. But two things have not changed:

(1) Mr. Denbow's petition is not barred by any failure to exhaust administrative remedies, and
(2) Mr. Denbow's petition raises substantial challenges to the constitutionality of his continued incarceration in light of the risks of infection with COVID-19, making him eligible for post-conviction bail. Accordingly, Mr. Denbow opposes the State's motion to dismiss and respectfully requests a hearing on post-conviction bail as soon as possible. Mr. Denbow also requests the opportunity to discuss additional case management issues at the upcoming status conference on June 17, including the option of amending the petition consistent with recent representations by the State.

I. There Have Been Several Important Developments Since Filing the PCR Petition

More than a month after Mr. Denbow filed his PCR petition in this Court, he and another prisoner filed a class petition for emergency relief in federal court, on their own behalf and on behalf of more than 900 other prisoners who are medically vulnerable to serious illness or death from COVID-19. *See* Ex. C at 1-6 (Docket in *Denbow v. Me. Dep't of Corrections*, 20-cv-00175-

JAW). They pursued class relief in federal court in light of the large number of people needing emergency relief, the apparent unavailability of class habeas procedures in state court, and the limited scheduling and availability of the State courts in light of COVID-19 precautions.

Specifically, when Mr. Denbow filed this PCR petition on April 13, 2020, the Maine Judicial Branch was operating with reduced court hours,¹ and had cancelled or delayed all “criminal matters (except as related to the incarceration of a defendant).” *See* PMO-SJC-1 (Apr. 14, 2020). State courts were allowed to “schedule and hear only the following” criminal proceedings: “[a]rraignments and first appearances of defendants held in custody,” and “[m]otions for review of bail of defendants held in custody.” *Id.* Additionally, although Mr. Denbow filed a motion for bail on April 13, and another motion requesting an emergency hearing on bail on April 23, the State opposed allowing even a hearing on Mr. Denbow’s emergency request for bail, *see* Ex. A at 38-42,² and, to date, no hearing has been held.

By May 15, 2020, neither side had received an order from the Court regarding Mr. Denbow’s case.³ At the same time, Mr. Denbow was not the only medically vulnerable prisoner affected by DOC’s COVID-19 response; more than 900 prisoners had been identified as

¹ Public Information Office, Maine Supreme Judicial Court (Mar. 22, 2020), <https://www.courts.maine.gov/covid19/reduction-court-hours-march23.pdf>.

² Petitioner understands that some of his motions may have been filed in the docket numbers for Mr. Denbow’s underlying criminal dockets, OXFCD-CR-2018-00300, and OXFCD-CR-2018-00600. For the Court’s convenience, all filings predating the State’s June 5, 2020 response are reproduced in an appendix attached to this filing. *See* Ex. A (Appendix of State Court Filings).

³ When filing the federal class petition, counsel were not aware that this Court had ordered a response to Mr. Denbow’s petition for post-conviction review. On May 18, 2020, counsel received an email from the Oxford County Clerk attaching a judicial assignment order and an order requiring the State to respond within twenty-one days. *See* Ex. B (email communications with the Oxford County Clerk). On May 20, 2020, the Clerk explained that “[d]ue to the current situation and limited staffing, both orders were docketed today and noted on the docket sheet.” *See id.*

medically vulnerable by DOC. *See* Ex. C at 22 (Sideris Decl. Att. B (May 4, 2020 email from the DOC Director of Classification identifying “924 other clients who also have underlying medical conditions”)). The absence of meaningful testing and the risk of rapid asymptomatic transmission left Mr. Denbow and other prisoners afraid of an undetected outbreak in the prison facilities—an outbreak that could be deadly. *See* Ex. C at 26-77 (declarations of Dr. Parrish and Dr. Goldenson); *see also id.* at 36-39 (Dr. Parrish discussing asymptomatic transmission in closed congregate settings); *id.* at 58 (Dr. Goldenson describing COVID-19’s mortality rate for medically vulnerable people). Because they believed that emergency class habeas proceedings were unavailable in state court, *see infra* at p. 8, Mr. Denbow and another prisoner filed a class petition for habeas corpus in federal court requesting immediate emergency relief, as well as a motion for temporary restraining order (TRO), on behalf of themselves and more than 900 similarly situated prisoners.

The federal court recently dismissed without prejudice the motion for TRO, *Denbow et al. v. Me. Dep’t of Corrections*, No. 1:20-CV-00175-JAW, 2020 WL 3052220 (D. Me. June 8, 2020), and has ordered the parties to propose next steps to proceed to an evidentiary hearing on the motion for preliminary injunction. Minute Entry, ECF No. 27 (June 11, 2020).

II. There Is No Procedural Bar to Mr. Denbow’s Claims

The State wrongly contends that Mr. Denbow’s petition should be dismissed for failure to exhaust administrative remedies regarding his application for home confinement. *See* Resp. at 5. To the contrary, Mr. Denbow pursued all known remedies within DOC, *see* Ex. D at ¶¶ 12-13

(Denbow declaration), and the State has had ample opportunity to consider and act upon the serious constitutional claims raised in his petition.⁴

By statute, a person seeking post-conviction review must have “previously exhausted remedies incidental to proceedings in the trial court, on appeal or administrative remedies.” 15 M.R.S. § 2126. But nothing requires prisoners to exhaust remedies that are not “available” in practice. *See* M.R. Crim. P. 71A(a) (allowing stay or dismissal only when a person has failed to exhaust “available” remedies). In this case, the five-day appeal to the Classification Director was not “available” to Mr. Denbow. *See* Ex. D ¶¶ 12-13 (Denbow Decl.). Mr. Denbow is a prisoner whose access to information is controlled by the prison, and DOC failed to provide him with notice of the five-day appeal procedures. *Id.* at ¶ 12. In denying Mr. Denbow’s request for home confinement, DOC never mentioned any appeal, and it certainly did not mention the requirement to file within five days. *Id.* The five-day window for appeal is already extraordinarily short, and even the State’s witnesses acknowledge that Mr. Denbow may not have known all the intricacies of the rule. Brewer Decl. ¶ 17 (acknowledging that Mr. Denbow “could have misunderstood” the appeal rule); Beal Decl. ¶ 12 (same). Indeed, Mr. Denbow attempted to seek reconsideration from the DOC Unit Manager by writing her a note several days after the denial of home confinement. Denbow Decl. ¶ 13. She never followed up to inform him about the correct procedure. *Id.* And in light of the six-month bar on reapplying for home confinement, Mr. Denbow cannot simply reapply with the assistance of counsel. *See* Denbow Decl. ¶ 12. Under such circumstances, dismissing Mr. Denbow’s weighty constitutional claims is not required by

⁴ Counsel submits Mr. Denbow’s declaration as an amendment to the pleadings and as a preview of Mr. Denbow’s testimony at a hearing before the Court. Because of precautions associated with COVID-19 and other logistical challenges, Mr. Denbow’s declaration has not been notarized as required by this Court’s rules, but Mr. Denbow has reviewed and provided authorization to use his electronic signature.

statute and would carry serious due process concerns. *See In re Robert S.*, 2009 ME 18 n.1, 966 A.2d 894, 899 (discussing the due process requirement that “notice of the hearing [be] given in a manner calculated to give actual notice”).

Additionally, the State’s argument ignores the key purpose of the exhaustion rule because the relevant decision maker already considered and rejected Mr. Denbow’s eligibility for home confinement. Exhaustion of administrative remedies is required “primarily ‘to allow administrative agencies to correct their own errors, clarify their policies, and reconcile conflicts before resorting to judicial relief.’” *Bryant v. Town of Camden*, 2016 ME 27, ¶ 10, 132 A.3d 1183, 1187 (quoting *Ne. Occupational Exch., Inc. v. Bureau of Rehab.*, 473 A.2d 406, 409 (Me. 1984)). Yet here, the person who resolves appeals—Classification Director Benjamin Beal—has already considered and rejected Mr. Denbow for home confinement. Beal Decl. at ¶ 13. Indeed, in his declaration to this Court, Mr. Beal stated that “I have personally reviewed” Mr. Denbow’s records and rejected home confinement. *Id.* Accordingly, the primary purpose of exhaustion has been satisfied and any additional appeal would have been futile. *See Stanton v. Trs. of St. Joseph’s Coll.*, 233 A.2d 718, 724 (Me. 1967) (acknowledging that “special circumstances” may require “a relaxation of” the requirement for exhaustion when the process would be “futile”).

Additionally, because DOC has categorically refused to use “the medical furlough to release clients during the COVID19 pandemic,” Ex. C at 24, it would have been “futile” for Mr. Denbow to pursue additional review for release on this basis. *See Stanton*, 233 A.2d at 724.

A final “special circumstance” applies when there are “persuasive grounds for relief which are beyond the jurisdiction of the administrative agency to determine.” *Stanton*, 233 A.2d at 724. That is the case here. Mr. Denbow’s petition alleges serious claims under the State and

Federal Constitutions. The Department of Corrections does not have the jurisdiction to resolve such constitutional claims. For this reason as well, the State's argument on exhaustion must be rejected.

III. Mr. Denbow Requests an Immediate Hearing on Post-Conviction Bail

Now that the State has responded to his petition, Mr. Denbow respectfully renews his motion for post-conviction bail and requests a hearing as soon as possible. Release on post-conviction bail remains appropriate for all the reasons listed in the original motion and request for hearing. *See* Ex. A at 19-24 (Emergency Motion for Post-Conviction Bail); *id.* at 33-37 (Emergency Motion for Hearing). The additional factual development since April 13, 2020, provides additional support that (1) Mr. Denbow has a "reasonable likelihood of prevailing on the petition," (2) "release on bail is appropriate given the crime and the nature of the ultimate relief," and (3) the typical standards and conditions governing bail support the requested relief. *See* M.R. Crim. P. 74(b); *see generally* Ex. C (containing select filings from federal court, including expert declarations and testimony of additional prisoners regarding DOC's response to COVID-19); Ex. D (declaration of Mr. Denbow); Ex. E (declaration of Laura Crawford, Mr. Denbow's fiancé).

The federal court, for example, acknowledged that Petitioners raised weighty constitutional claims, and that, depending on further factual development, they may be able to establish a violation of the Eighth Amendment. *Denbow*, 2020 WL 3052220, at *20. The federal court explained that "assuming Petitioners' assertions about on-the-ground life at MDOC facilities are true—they are not able to socially distance; masks, hand sanitizer, and cleaning of shared spaces are limited or unavailable on a practical level; inmates are scared to report symptoms of COVID-19; and the MDOC is considering preexisting medical conditions as a

negative in making [home confinement] decisions—they may well have made out an Eighth Amendment claim.” *Id.* Although the presence of factual disputes prevented the federal court from granting a TRO on a “likelihood of success on the merits” standard, *id.* at 19, the standard for post-conviction bail merely requires a “reasonable” likelihood of success—a standard that has been satisfied here. *See* M.R. Crim. P. 74(b). Additionally, the Maine Constitution provides for even “broader proportionality review” than the Eighth Amendment to the U.S. Constitution. *State v. Stanislaw*, 2013 ME 43, ¶¶ 26, 65 A.3d 1242 (citing *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991)). As such, Mr. Denbow’s claim that the dangerous conditions in DOC facilities have rendered his sentence “disproportionate” in violation of the Maine Constitution also satisfy the “reasonable likelihood of success” standard. *See* Me. Const. Art. I, § 9.

Mr. Denbow’s fiancé also provides more details about the offenses for which Mr. Denbow is currently incarcerated, further supporting release on bail. *See* Ex. E at ¶ 6 (Crawford Declaration). Specifically, Mr. Denbow’s offense is limited to driving without a license, with no underlying accident or other harm, and giving an officer his brother’s name, before quickly correcting the record. *Id.* Granting bail to protect him against the risk of serious illness or death from COVID-19 is entirely appropriate given the nature of these crimes, plus the fact that he has completed almost all of his sentence, with an earliest release date of August 28, 2020.

Finally, the State suggests that Mr. Denbow should not receive home confinement or other release because he did not include a known address in his application several months ago. *Resp.* at 2; *Beal Decl.* ¶ 13. But both Mr. Denbow and Ms. Crawford, his fiancé, receive Social Security Income because of their disabilities, and could arrange for a safe apartment if they knew it would be used. *See, e.g., Crawford Decl.* ¶ 8. Rather than closing off the option of bail, the

answer is to impose a condition of release requiring that Mr. Denbow obtain an apartment and notify the Court and probation officers of his address.

Finally, at the very least, Mr. Denbow is entitled to a hearing “on the bail application,” *see* 15 M.R.S. § 1051(1), and requests such a hearing as soon as possible.

IV. Mr. Denbow Requests a Scheduling Order Allowing for Amendments to the Underlying Petition, In Light of the State’s Position that Class Action Habeas Petitions May Proceed in State Court

At the upcoming status conference on June 17, 2020, Mr. Denbow respectfully requests the opportunity to discuss additional case management issues, including a deadline for the opportunity to amend the petition. Mr. Denbow participated as a class representative in the federal case based in part on the understanding that class procedures are unavailable in state post-conviction reviews. Indeed, petitions for post-conviction review “may attack only a single proceeding,” M.R. Crim. P. 67(b), and state petitions for post-conviction review are governed by the criminal rules, not by the rules of civil procedure, such as Rule 23 allowing class actions. *See* M.R. Crim. P. 65 Committee Advisory Notes (stating “the present approach does not contemplate that the Maine Rules of Civil Procedure govern any aspect of the proceeding”). Nonetheless, at oral argument, the State represented “that class actions are available in Maine under a common law habeas corpus petition.” *Denbow*, 2020 WL 3052220, at *17 & n.7. At the TRO stage, the federal court accepted the State’s “representation that the Petitioners could bring a common law class action in Maine courts.” *Id.* at *17 n.7. Mr. Denbow respectfully requests a case management order that would allow him the opportunity to amend the petition in light of this representation by the State.

Finally, although Mr. Denbow does not oppose the State’s motion to impound, he does oppose the wholesale submission of decades-old convictions that are not admissible pursuant to

the Maine Rules of Evidence. *See* M.R. Evid. 609(b). By opposing relief based upon these aged offenses, the State disregards the current offense for which Mr. Denbow is incarcerated and his imminent release date of August 28. The question for the bail inquiry is whether Mr. Denbow should be safely released now, when he does not have COVID-19, or whether he must remain unable to physically distance in the closed congregate prison setting for the next two and a half months, exposing himself and others to the risk of infection.

CONCLUSION

For these reasons, Mr. Denbow respectfully requests a hearing on his motion for bail as quickly as possible, and further requests a scheduling order allowing further proceedings on his petition for post-conviction review, to be addressed in the upcoming telephonic conference on June 17, 2020.

Respectfully submitted, this 15th day of June, 2020,



Emma E. Bond (Bar No. 5211)
Zachary L. Heiden (Bar No. 9476)
American Civil Liberties Union of Maine
Foundation
P.O. Box 7860
Portland, Maine 04112
(207) 619-8687
(207) 619-6224
ebond@aclumaine.org
zheiden@aclumaine.org

Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Emma E. Bond, hereby certify that on June 15, 2020, the above PETITIONER'S
RENEWED MOTION FOR HEARING ON BAIL AND OPPOSITION TO STATE'S MOTION
TO DISMISS was sent to the following:

Jill O'Brien
Office of the Maine Attorney General
6 State House Station
Augusta, ME 04333
Jill.obrien@maine.gov



Emma E. Bond (Bar No. 5211)
American Civil Liberties Union of Maine
Foundation
P.O. Box 7860
Portland, Maine 04112
(207) 619-8687
ebond@aclumaine.org

Counsel for Plaintiff

PMO-SJC-1

**STATE OF MAINE JUDICIAL BRANCH
PANDEMIC MANAGEMENT ORDER**

Order Issued March 30, 2020

Revised Emergency Order and Notice from the Maine Supreme Judicial Court

In light of public health concerns arising from the novel coronavirus (COVID-19), Maine's Judicial Branch is taking steps to adhere to the guidance provided by the Maine and United States Centers for Disease Control and Prevention.

IDENTIFYING CURRENTLY EFFECTIVE ORDERS

As the Judicial Branch continues its response to the novel coronavirus pandemic, this and other Orders will be revised from time to time. This Order augments and supersedes the prior Revised Emergency Order and Notice.

This and other Orders of the Supreme Judicial Court will be numbered to reflect the Pandemic Management Order as follows: **PMO-SJC-1**.

Orders issued by the Trial Courts will be similarly numbered to reflect the Pandemic Management Order of the Trial Chiefs: **PMO-TC-1**

COURTHOUSE SCHEDULES

Courthouse schedules can be found here:

<https://www.courts.maine.gov/covid19/court-hours.html>

Most courthouses remain open to the public. **You should go to a courthouse only if you are required to be there, or if you are seeking protection from abuse or harassment.** If you have questions about whether you should go to a courthouse, please call 207-753-2999.

Persons identified as being infected by COVID-19, having had contact with those infected by COVID-19, or having visited areas identified as problematic due to the prevalence of COVID-19 should not come to Maine's courthouses. If that happens, call the courthouse where you were required to attend. Courthouse phone numbers can be found using the following link:

https://www.courts.maine.gov/maine_courts/index.shtml

CASE TYPES CANCELLATIONS AND POSTPONEMENTS

Effective immediately, and continuing through May 1, 2020, unless otherwise ordered by the court, the following case types and proceedings will **NOT** be scheduled or heard:

- FED (Eviction, landlord/tenant)
- Disclosures
- Foreclosures
- Small Claims
- Medical Malpractice proceedings including Panel Hearings
- Family matters
- Adoptions
- Juvenile matters (unless the juvenile is being detained)
- Criminal matters (except as related to the incarceration of a defendant)
- All other nonjury civil matters including civil violations
- All actions to recover personal property
- All Violations Bureau hearings (traffic tickets)

All previously scheduled cases are postponed. An extension of these limitations beyond May 1, 2020 is likely but has not yet been ordered.

The courts **WILL** schedule and hear only the following:

- Arraignments and first appearances of defendants held in custody
- Motions for review of bail of defendants held in custody
- Juvenile detention hearings
- Protection from Abuse requests and hearings
- Protection from Harassment requests and hearings
- Child Protection petitions and hearings
 - Hearings are limited to Summary Preliminary Hearings and Jeopardy Hearings.
- Mental health requests and hearings
- Emergency guardianships

EXCEPTIONS IN EXTRAORDINARY AND URGENT CIRCUMSTANCES

In those matters that are not being scheduled or heard during this phase of the pandemic management, an exception to that prohibition may be made in individual cases upon an order of the court in the following circumstances.

1. If a party or the party's attorney contends that there are urgent and compelling reasons that the court should hold the party's criminal, civil, or family trial or hearing, the party or counsel shall immediately file a written motion.
2. That motion, explaining why this particular case must be heard before May 1, must be served on the other party or parties. If any party objects to the motion, it must file its written opposition within three days after the motion is filed. The court will rule on the motion expeditiously.
3. Hearings may be held if the court has determined that:
 - The nature of the matter for which a hearing or other court action has been requested is urgent and compelling;
 - The hearing can be held without requiring the presence of additional court staff;
 - The proceeding can be undertaken without requiring the in-person participation of any parties, witnesses, or attorneys; and
 - The proceeding can be undertaken without requiring the physical proximity of any participants or placing undue stress on those necessary to the proceeding.

JURORS AND JURY TRIALS

All jury matters, civil and criminal, including grand jury proceedings, are postponed to a date after May 29, 2020.

LITIGANTS: If your jury trial is now scheduled between March 16 and May 29, 2020, your trial will be rescheduled, and you will receive notice of the new trial date.

Availability of jury trials will be reviewed on an ongoing basis with notice provided to all parties.

BOARDS, COMMITTEES, AND CLE

Effective immediately and until further order of the Court, all boards and committees established by the Maine Supreme Judicial Court are hereby authorized to conduct any and all meetings, conferences, and other activities by means of an electronic medium without in-person participation.

In addition, effective immediately and until further order, any in-person participation requirements for continuing legal education, including but not limited to the requirement in M. Bar. R. 5(c)(3), are hereby suspended and participation may be by an electronic medium.

ORAL ARGUMENTS IN THE SUPREME JUDICIAL COURT

All oral arguments scheduled before the Supreme Judicial Court, sitting as the Law Court, are hereby cancelled until further notice. All appeals scheduled to be argued in April 2020 will be decided on the briefs. No oral arguments will be held in May 2020.

The Court will be monitoring events and providing updates with respect to the status of its calendar as to oral argument after May 2020 and thereafter.

OTHER PANDEMIC MANAGEMENT ORDERS

This Order is not intended to be comprehensive. Other pandemic management orders of the Supreme Judicial Court and the Trial Court Chiefs can be found at this site: <https://www.courts.maine.gov/covid19.shtml>.

Dated: March 30, 2020

For the Court:

_____/s/
Leigh I. Saufley
Chief Justice



STATE OF MAINE JUDICIAL BRANCH

COVID-19 Phased Management Plan

Version 1: Issued May 27, 2020

History

In March 2020, the emergence of the COVID-19 pandemic compelled the Maine Judicial Branch to significantly curtail court proceedings in the interest of public safety and the health and safety of Judicial Branch Employees. The initial orders issued by the Maine Supreme Judicial Court limited court proceedings to those matters in which persons faced dangers of injury or death and matters involving constitutional liberty interests.

In the weeks that followed, the Court issued Pandemic Management Orders (PMOs) that incrementally increased the number of case types to be scheduled and heard in accordance with safety concerns. The Court's most recent PMOs provide for scheduling and hearing of almost all case types, on two conditions: (1) the case must be one that can be addressed by video or telephone conference and (2) judicial resources will be directed to priority case types first.

In each instance, the Court's decisions have been founded upon scientific data and have represented the Court's best judgment in the difficult task of balancing the need to protect the health and safety of the public and the Court's employees with the need to provide a forum for the adjudication of legal matters.

Creation of COVID-19 Phased Management Plan

Consistent with the gradual reopening of State functions in the wake of the COVID-19 pandemic, the Court now establishes this COVID-19 phased management plan to set forth the anticipated incremental resumption of all Court activities. In establishing this plan—and in making any revisions to it that may be necessitated by the unavailability of resources, the progression of the

pandemic, or other relevant subsequent events—the Court is and will continue to be guided by the most recent scientific data available from the Maine Center for Disease Control and Prevention, as well as internal data and recommendations from the Chiefs of the Superior and District Courts; the Maine Executive and Legislative branches of government; County Commissioners; jail personnel; other State, county, and municipal offices; and other interested stakeholders. We are particularly guided by the State of Maine’s COVID-19 Prevention Checklists for [General Guidance](#) and for [Industry Guidance on Public and Community Buildings](#).

Guiding Principles

The following principles will continue to guide the Court’s decision-making as it establishes and revises its long-term plans in the wake of the COVID-19 pandemic:

- **Evidence-Based, Collaborative Decision-Making.** In making decisions about court capabilities during the COVID-19 pandemic, the Court will continue to obtain and rely on scientific information from the Maine Center for Disease Control and Prevention as well as the input of diverse stakeholders in determining how to ensure the health of the public while upholding the fundamental rights of litigants in the court system.
- **Protecting Courthouse Staff and Visitors.** It is essential to the public welfare that courthouse staff and visitors alike, including those who are the most vulnerable, are protected and safe so that the work of the courts may continue to be carried out without causing harm.
- **Attention to Local Conditions.** The specific anticipated dates for each phase set forth below may be attainable in some courthouses and not in others. By virtue of the conditions necessary for execution of each phase, some court functions in some locations may be subject to additional delays.
- **Availability of Necessary Resources.** Reopening of the courts may be accomplished only when all necessary resources—including sufficient staffing, security, and technological capabilities—are available to both adequately protect all court staff and visitors and support the resumption of court functions.

- **Satisfaction of Required Conditions.** At each phase of the anticipated reopening plan, the execution of the plan is dependent on the satisfaction of a list of preconditions related to each of the above principles. The inability of any court location to meet any one or more of the required preconditions may necessitate
 - Adjustments to the phase attributes in that location,
 - A halt to phase progression, and/or
 - A return to the safeguards of an earlier phase.

Anticipated Phases

Consistent with the guiding principles, a five-phase plan for the resumption of all functions of the Maine state courts is established. Any resurgence of COVID-19 may, however, necessitate

- Adjustments to the phase attributes,
- A halt to phase progression, and/or
- A return to the safeguards of an earlier phase.

These changes may be implemented on a statewide basis if necessary or may be implemented only in specific court locations if the incidence of the disease varies across the state.

PHASE 1 Anticipated for June 1 – June 12 (two weeks)

Required Conditions for Phase 1

- Entry screening to enforce the Judicial Branch Visitor Restrictions set forth in the Judicial Branch Notice dated April 8, 2020, must be available at the courthouse at all times that the courthouse is open to the public. See Appendix A.
- Any person entering the courthouse must wear a face shield, mask, or cloth face covering that covers the nose and mouth at all times while in the courthouse pursuant to PMO-SJC-1. Hand sanitizer will be available at entrances and exits and must be used upon entering and exiting the building, and upon reentering the building after exiting.

- Social distancing measures employed in each courthouse must be observed. No more than 10 people, including court personnel, shall be present in a courtroom at any one time. No more than 50 people per courthouse floor may be present in common areas at any one time. These numbers may be reduced depending on the need for social distancing at a specific courthouse or on a specific floor of a courthouse. To the extent possible, court events will be scheduled at staggered times to prevent large numbers of people from entering and exiting a courthouse at any given time.
- Adequate staff and technology resources, and adequate personal protective equipment must be available at the courthouse.

Attributes of Phase 1 when Required Conditions are Satisfied

- Courts will be open to the public from 8:00 a.m. to 4:00 p.m.
- The following case types and proceedings will NOT be scheduled or heard:
 - FED (eviction, landlord/tenant) except requests for writs of possession as provided by the Governor's Executive Order Number 40, dated April 16, 2020
 - Disclosures
 - Foreclosures
 - Small claims
 - Violations Bureau
- No jury trials will be scheduled or held.
- No grand jury proceedings will be scheduled or held.
- The courts WILL continue to schedule and hear the following proceedings in the same manner that they have been conducted since the implementation of the Pandemic Management Orders:
 - Arraignments and first appearances of defendants held in custody
 - Motions for review of bail of defendants held in custody
 - Juvenile detention hearings
 - Protection from abuse requests and hearings

- Protection from harassment requests and hearings
 - Child protection petitions and proceedings
 - Hearings are limited to summary preliminary hearings, jeopardy hearings, and judicial reviews¹
 - Mental health requests and hearings
 - Emergency guardianships
- The courts MAY schedule and hear all other case types and proceedings so long as all hearings, conferences, and other court events take place only by video or audio conference. In scheduling hearings, conferences, and other court events, the courts will continue to allocate judicial resources in such a manner that the following cases receive priority for scheduling and hearings:
 - Arraignments and first appearances of defendants held in custody
 - Motions for review of bail of defendants held in custody
 - UCD plea agreements for defendants in custody
 - UCD probation revocation hearings for defendants in custody
 - UCD dispositional conferences for defendants in custody
 - Juvenile detention hearings
 - Uncontested gestational carrier hearings
 - Uncontested divorce and judicial separation hearings
 - Uncontested parental rights and responsibilities hearings
 - Uncontested parentage hearings
 - Telephonic case management, status conference, and Rule 26(g) discovery conferences in family matters
 - Protection from abuse requests and hearings
 - Protection from harassment requests and hearings
 - Child protection petitions and proceedings
 - Summary preliminary hearings, jeopardy hearings, judicial reviews, case management conferences, uncontested hearings on termination of parental rights, and uncontested hearings on orders of parental rights and responsibilities
 - Uncontested child support, child support modification, and child support enforcement actions
 - Mental health requests and hearings
 - Emergency guardianships

¹ Case management conferences and docket calls, if held, will be conducted telephonically.

- Uncontested adoptions
- Petitions for Review concerning Control of Notifiable Diseases (22 M.R.S. § 820)
- In any matter that is not being scheduled or heard during this phase of the pandemic management, a request can be made for the scheduling of the matter as set forth in PMO-SJC-1.
- All oral arguments scheduled before the Supreme Judicial Court, sitting as the Law Court, will be conducted either by video conferencing or addressed by the court without oral arguments.

PHASE 2 Anticipated for June 15 – July 2 (three weeks)

Required Conditions for Phase 2

- Entry screening to enforce the Judicial Branch Visitor Restrictions set forth in the Judicial Branch Notice dated April 8, 2020, must be available at the courthouse at all times that the courthouse is open to the public. See Appendix A.
- Any person entering the courthouse must wear a face shield, mask, or cloth face covering that covers the nose and mouth at all times while in the courthouse pursuant to PMO-SJC-1. Hand sanitizer will be available at entrances and exits and must be used upon entering and exiting the building, and upon reentering the building after exiting.
- Social distancing measures employed in each courthouse must be observed. No more than 10 people, including court personnel, shall be present in a courtroom at any one time. No more than 50 people per courthouse floor may be present in common areas at any one time. These numbers may be reduced depending on the need for social distancing at a specific courthouse or on a specific floor of a courthouse. To the extent possible, court events will be scheduled at staggered times to prevent large numbers of people from entering and exiting a courthouse at any given time.
- Adequate staff and technology resources, and adequate personal protective equipment must be available at the courthouse.

- No person in custody will be permitted to enter the courthouse except in compliance with standard entry screening limitations and express prior arrangements or memorandum of understanding with the custodial facility that will adequately protect the public, courthouse staff, and the incarcerated person from infection.
- New conditions did not arise during the two weeks of Phase 1 that require additional restrictions.

Attributes of Phase 2 when Required Conditions are Satisfied

- The following case types and proceedings will NOT be scheduled or heard:
 - FED (eviction, landlord/tenant) except requests for writs of possession as provided by the Governor's Executive Order Number 40, dated April 16, 2020
 - Disclosures
 - Foreclosures
 - Small claims
 - Violations Bureau
- No jury trials or grand jury proceedings will be scheduled or held.
- Video and telephone conferences are the strongly preferred medium for all proceedings. However, the courts MAY schedule and hear the following proceedings as in-person hearings, subject to the availability of judicial resources and the need to address priority cases:
 - Arraignments and first appearances of defendants held in custody
 - Motions for review of bail of defendants held in custody
 - Juvenile detention hearings
 - Protection from abuse requests and hearings
 - Protection from harassment requests and hearings
 - Child protection petitions and proceedings
 - Mental health requests and hearings
 - Emergency guardianships
 - UCD plea agreements for defendants in custody
 - UCD probation revocation hearings for defendants in custody
 - UCD dispositional conferences for defendants in custody

- Criminal cases involving summonses awaiting first appearances
 - Uncontested gestational carrier hearings
 - Uncontested divorce and judicial separation hearings
 - Uncontested parental rights and responsibilities hearings
 - Uncontested parentage hearings
 - Telephonic case management, status conference, and Rule 26(g) discovery conferences in family matters
 - Uncontested child support, child support modification, and child support enforcement actions
 - Uncontested adoptions
 - Petitions for Review concerning Control of Notifiable Diseases (22 M.R.S. § 820)
- In any matter that is not being scheduled or heard during this phase of the pandemic management, a request can be made for the scheduling of the matter as set forth in PMO-SJC-1.
 - All oral arguments scheduled before the Supreme Judicial Court, sitting as the Law Court, will be conducted either by video conferencing or addressed by the court without oral arguments.

PHASE 3 Anticipated for July 6 – July 31 (four weeks)
--

Required Conditions for Phase 3

- Entry screening to enforce the Judicial Branch Visitor Restrictions set forth in the Judicial Branch Notice dated April 8, 2020, must be available at the courthouse at all times that the courthouse is open to the public. See Appendix A.
- Any person entering the courthouse must wear a face shield, mask, or cloth face covering that covers the nose and mouth at all times while in the courthouse pursuant to PMO-SJC-1. Hand sanitizer will be available at entrances and exits and must be used upon entering and exiting the building, and upon reentering the building after exiting.
- Social distancing measures employed in each courthouse must be observed. No more than 10 people, including court personnel, shall be

present in a courtroom at any one time. No more than 50 people per courthouse floor may be present in common areas at any one time. These numbers may be reduced depending on the need for social distancing at a specific courthouse or on a specific floor of a courthouse. To the extent possible, court events will be scheduled at staggered times to prevent large numbers of people from entering and exiting a courthouse at any given time.

- Adequate staff and technology resources, and adequate personal protective equipment must be available at the courthouse.
- No person in custody will be permitted to enter the courthouse except in compliance with standard entry screening limitations and express prior arrangements or memorandum of understanding with the custodial facility that will adequately protect the public, courthouse staff, and the incarcerated person from infection.
- New conditions did not arise during the three weeks of Phase 2 that require additional restrictions.

Attributes of Phase 3 when Required Conditions are Satisfied

- The following case types and proceedings will NOT be scheduled or heard:
 - FED (eviction, landlord/tenant) except requests for writs of possession as provided by the Governor's Executive Order Number 40, dated April 16, 2020
 - Disclosures
 - Foreclosures
 - Small claims
 - Violations Bureau
- Video and telephone conferences are the strongly preferred medium for all proceedings. However, the courts MAY schedule and conduct in-person hearings in all case types not listed above, subject to the availability of judicial resources and the need to address priority cases.
- No jury trials will be scheduled or held.

- Grand jury proceedings may be scheduled and held in person at courthouses. Capacity controls will be adjusted to accommodate the special requirements for grand jury proceedings.
- All oral arguments scheduled before the Supreme Judicial Court, sitting as the Law Court, will be conducted either by video conferencing or addressed by the court without oral arguments.

PHASE 4 Anticipated for August 3 – September 4 (five weeks)
--

Required Conditions for Phase 4

- Entry screening to enforce the Judicial Branch Visitor Restrictions set forth in the Judicial Branch Notice dated April 8, 2020, must be available at the courthouse at all times that the courthouse is open to the public. See Appendix A.
- Any person entering the courthouse must wear a face shield, mask, or cloth face covering that covers the nose and mouth at all times while in the courthouse pursuant to PMO-SJC-1. Hand sanitizer will be available at entrances and exits and must be used upon entering and exiting the building, and upon reentering the building after exiting.
- Social distancing measures employed in each courthouse must be observed. No more than 10 people, including court personnel, shall be present in a courtroom at any one time. No more than 50 people per courthouse floor may be present in common areas at any one time. These numbers may be reduced depending on the need for social distancing at a specific courthouse or on a specific floor of a courthouse. To the extent possible, court events will be scheduled at staggered times to prevent large numbers of people from entering and exiting a courthouse at any given time.
- Adequate staff and technology resources, and adequate personal protective equipment must be available at the courthouse.
- No person in custody will be permitted to enter the courthouse except in compliance with standard entry screening limitations and express prior

arrangements or memorandum of understanding with the custodial facility that will adequately protect the public, courthouse staff, and the incarcerated person from infection.

- New conditions did not arise during the four weeks of Phase 3 that require additional restrictions.

Attributes of Phase 4 when Required Conditions are Satisfied

- No jury trials will be scheduled or held.
- Grand jury proceedings may be scheduled and held in person at courthouses. Capacity controls will be adjusted to accommodate the special requirements for grand jury proceedings.
- Video and telephone conferences are the strongly preferred medium for all proceedings. However, the courts MAY schedule and conduct in-person hearings in all case types, subject to the availability of judicial resources and the need to address priority cases.
- All oral arguments scheduled before the Supreme Judicial Court, sitting as the Law Court, will be conducted either by video conferencing or addressed by the Court without oral arguments.

PHASE 5 Anticipated for September 7 onward

Required Conditions for Phase 5 (and until further notice)

- Entry screening to enforce the Judicial Branch Visitor Restrictions set forth in the Judicial Branch Notice dated April 8, 2020, must be available at the courthouse at all times that the courthouse is open to the public. See Appendix A.
- Any person entering the courthouse must wear a face shield, mask, or cloth face covering that covers the nose and mouth at all times while in the courthouse pursuant to PMO-SJC-1. Hand sanitizer will be available at entrances and exits and must be used upon entering and exiting the building, and upon reentering the building after exiting.

- Social distancing measures employed in each courthouse must be observed. No more than 10 people, including court personnel, shall be present in a courtroom at any one time. No more than 50 people per courthouse floor may be present in common areas at any one time. These numbers may be reduced depending on the need for social distancing at a specific courthouse or on a specific floor of a courthouse. To the extent possible, court events will be scheduled at staggered times to prevent large numbers of people from entering and exiting a courthouse at any given time.
- Adequate staff and technology resources, and adequate personal protective equipment must be available at the courthouse.
- No person in custody will be permitted to enter the courthouse except in compliance with standard entry screening limitations and express prior arrangements or memorandum of understanding with the custodial facility that will adequately protect the public, courthouse staff, and the incarcerated person from infection.
- New conditions did not arise during the five weeks of Phase 4 that require additional restrictions.

Attributes of Phase 5 when Required Conditions are Satisfied

- Courts will be open to the public from 8:00 a.m. to 4:30 p.m.
- Jury trials may be scheduled and held. Capacity controls will be adjusted to accommodate the special requirements for jury trials.
- Grand jury proceedings may be scheduled and held in person at courthouses. Capacity controls will be adjusted to accommodate the special requirements for grand jury proceedings.
- Video and telephone conferences are the strongly preferred medium for all proceedings. However, the courts MAY schedule and conduct in-person hearings in all case types, subject to the availability of judicial resources and the need to address priority cases.

- All oral arguments scheduled before the Supreme Judicial Court, sitting as the Law Court, may be conducted in person or by video conferencing as determined by the Court in consultation with counsel.

APPENDIX A: State of Maine Judicial Branch Public Notice Regarding Visitor Restrictions (issued April 8, 2020; revised May 27, 2020)

STATE OF MAINE JUDICIAL BRANCH

PUBLIC NOTICE

Issued April 8, 2020
(revised May 27, 2020)

Visitor Restrictions

The State of Maine Judicial Branch announces visitor restrictions that apply to all State courthouses. These restrictions are imposed in light of the health concerns caused by the COVID-19 (coronavirus) pandemic.

The United States Centers for Disease Control and Prevention (CDC) has advised people to take precautions in light of the pandemic. The CDC advises that the best way to avoid illness is to avoid being exposed to the virus.

For purposes of these restrictions, “close contact” with a person with confirmed COVID-19 means having spent 30 minutes or more within 6 feet of the person within the past 14 days without the use of full personal protective equipment (PPE).

Therefore, effective immediately, the following persons shall not enter any State courthouse in Maine:

- Persons who have, within the last fourteen days, travelled to any country for which the CDC has issued Level Two or Level Three travel health notices (this list will be updated weekly);
- Persons who have, within the last fourteen days, travelled to any area of the United States for which the CDC has issued a Domestic Travel Advisory (this list will be updated weekly);
- Persons who reside or have had close contact with someone who has travelled to any of those countries or areas of the United States within the last fourteen days;
- Persons who have been asked to self-quarantine by any doctor, nurse practitioner, hospital, or health agency; and
- Persons who have been diagnosed with COVID-19 within the preceding 30 days or who have had close contact within the preceding 30 days with anyone who has been diagnosed with COVID-19.

When you arrive at a courthouse, you will be asked the following questions:

1. In the last seven days, have you experienced any of the following symptoms:

- | | |
|--|-------------------------------|
| ○ Fever or chills, | ○ Headache, |
| ○ Cough, | ○ New loss of taste or smell, |
| ○ Shortness of breath or difficulty breathing, | ○ Sore throat, |
| ○ Fatigue, | ○ Congestion or runny nose, |
| ○ Muscle or body aches, | ○ Nausea or vomiting, or |
| | ○ Diarrhea? |

2. Do you live with, or have you been in close (less than 6 feet) prolonged contact, (more than 30 minutes) with someone who has or had a diagnosis of COVID-19?

3. Do you live with, or have you been in close (less than 6 feet) prolonged contact, (more than 30 minutes) with someone who has or had fever, cough, shortness of breath, or flu-like symptoms?
4. Within the last 14 days, have you traveled outside of Maine or have you had close contact with someone who has traveled outside of Maine?
5. Have you been diagnosed with COVID-19 or been asked to self-quarantine by any hospital, health agency, nurse practitioner, physician's assistant, or doctor?

If you answer YES to any of these questions, you may be asked some follow-up questions and, depending on the answers to those questions, you will either be allowed to enter or you will be refused entrance and provided with a contact number so that you may be assisted. You may be asked to sign a written attestation confirming that you do not have any of the symptoms noted above.

If you refuse to participate in the screening process, you will be refused entrance and provided with a contact number so that you may be assisted.

In order to comply with CDC recommendations and to protect the public and court staff, anyone attempting to enter in violation of these protocols will be denied entry by a Judicial Marshal.

If you have a scheduled court hearing or are otherwise required to appear at one of the courthouses in Maine, and you cannot enter the courthouse as a result of these protocols, you should proceed as follows:

- If you are represented by an attorney, please contact your attorney;
- If you are not represented by an attorney, please call **207-753-2999** to speak to a clerk about your case;
- If you are seeking protection from abuse or protection from harassment, call **207-753-2999** and a clerk will assist you;
- If you are an attorney and you are scheduled to appear in court, please call **207-753-2999** to speak to a clerk about your case.

These restrictions will remain in place temporarily, until it is determined safe to remove them. All persons who believe they have been exposed to the coronavirus should immediately contact their healthcare providers.

May 27, 2020

_____/s/_____
Hon. Andrew M. Mead
Acting Chief Justice, Maine Supreme Judicial Court



MAINE JUDICIAL BRANCH
ADMINISTRATIVE OFFICE OF THE COURTS

PORTLAND OFFICE
P.O. Box 4820
Portland, ME 04112-4820
Phone: 207-822-0792
Fax: 207-776-6096

FOR IMMEDIATE RELEASE

Contact: Amy Quinlan, Esq., Director of Court Communications
Phone: (207) 822-0716
Email: amy.quinlan@courts.maine.gov

Maine Judicial Branch Announces Revisions to Pandemic Management Orders

Portland, ME – The Maine Judicial Branch issued revisions to the Pandemic Management Orders (PMOs) today updating the measures being taken in response to the COVID-19 pandemic emergency and include:

- [PMO-SJC-1](#)
- [PMO-SJC-3](#)
- [PMO-TC-1](#)

The new PMOs extend many of the emergency deadlines, expand the list of cases and proceedings that may be scheduled and heard, and implement additional safety precautions for those entering courthouse facilities consistent with the Governor's Executive Orders. The Supreme Judicial Court also announced the creation of a new stakeholders advisory group to provide information and assistance to the Judicial Branch as it continues to formulate plans to address the COVID-19 pandemic and its effects on court operations.

USE OF MASKS IN COURTHOUSE FACILITIES. Effective May 5, 2020, all members of the public who enter any courthouse facility will be required to wear a mask or cloth face covering that covers the nose and mouth at all times. See [PMO-SJC-1](#).

HEARINGS

Effective immediately, and continuing through May 30, 2020, the courts may schedule and hear virtually all case types and proceedings so long as all hearings, conferences, and other court events take place only by video or audio conference. In scheduling hearings, conferences, and other court events, the courts will continue to allocate judicial resources in such a manner that priority cases receive precedence. See [PMO-SJC-1](#).

FILING OF DOCUMENTS IN PRIORITY CASES

The Maine Judicial Branch has provided for the email filing, Mondays through Friday, between 8 a.m. and 3 p.m., of certain court documents in priority cases and has expanded the list to include complaints for protection from abuse orders. See [PMO-SJC-3](#) for guidance on how to file documents by email.

DEFERRED JURY TRIALS

Deferrals for all jury trials have been extended by [PMO-SJC-1](#) as follows:

- All civil and criminal jury trials are deferred until after June 30, 2020 at the earliest.
- Grand jury sessions will not be held until after June 30, 2020.





MAINE JUDICIAL BRANCH
ADMINISTRATIVE OFFICE OF THE COURTS

PORTLAND OFFICE
P.O. Box 4820
Portland, ME 04112-4820
Phone: 207-822-0792
Fax: 207-776-6096

ORAL ARGUMENTS IN THE SUPREME JUDICIAL COURT

Oral Arguments before the Supreme Judicial Court will proceed either by video conference or be addressed by the court upon briefs submitted by the parties. See [PMO-SJC-1](#).

STAKEHOLDERS ADVISORY GROUP

The Judicial Branch announces the creation of a new stakeholders advisory group to provide information and assistance to the Judicial Branch as the Branch continues to formulate plans to address the COVID-19 pandemic and its effects on court operations. The group is comprised of a wide variety of organizations and groups whose members regularly appear in Maine court proceedings. Video conference meetings of the group will occur on May 14 at 9:30 a.m. and on May 21 at 9:30 a.m. Any party or group beyond those listed in PMO-SJC-1 wishing to be included should send a request to: chiefjustice@courts.maine.gov, no later than noon on May 7, 2020.

TRAFFIC INFRACTIONS

All deadlines established pursuant to M.R. Civ. P. 80F (traffic infractions), and set to expire on or before May 31, 2020, have been extended to June 1, 2020. See [PMO-TC-1](#).

FINES, FEES, RESTITUTION, AND ATTORNEY FEE REIMBURSEMENTS

Fines and fees can be paid online, eliminating the need to come to a courthouse. Here is the site for online payments. <https://www5.informe.org/online/courts/fines/>

For those unable to pay their fines and fees at this time, the deadline for fine payments is extended through June 1, 2020. See [PMO-TC-1](#).

COURT HOURS

Court hours in every region continue to be adjusted. The current schedule can be found here https://www.courts.maine.gov/maine_courts/schedules/closings.shtml.

Do not come to court without checking courthouse schedules. Because changes in court hours may occur daily, any person intending to go to a Maine courthouse should check the website here: https://www.courts.maine.gov/maine_courts/schedules/closings.shtml before traveling to the court or call 207-753-2999 and be aware that you must wear a mask or cloth face covering while inside courthouses.

Do not go to any courthouse if you are sick, if you have the virus, or if you know that you have been exposed to the virus. If have questions about whether you should go to a courthouse, please call 207-753-2999. For general inquiries concerning the Judicial Branch's response to the COVID-19 outbreak, contact info@courts.maine.gov.

Please visit the Judicial Branch's webpage at: <https://www.courts.maine.gov/covid19.shtml> **for the latest information about the Judicial Branch's response to COVID-19 and related court orders.**



mev

STATE OF MAINE
CUMBERLAND, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO CV-20-206

AVANGRID NETWORKS INC.,
et al.,

Plaintiffs

v.

ORDER

SECRETARY OF STATE, et al.,

Defendants

REC'D CIVIL CLERK'S OFFICE
MAY 25 '20 PM 12:35

At a telephone conference with counsel on May 22 the following schedule was set:

1. All parties agree that this case presents solely issues of law. Accordingly, on or before May 29, 2020 the parties shall attempt to agree upon the material facts and the questions to be considered for a report to the Law Court under M.R.App.P. 24(a).
2. The clerk's office shall schedule a telephone conference on May 29, 2020 so that the court can be informed of the status of a Rule 24(a) report.
3. In the absence of an agreed Rule 24(a) report, the court shall grant Avangrid's motion to be allowed to proceed to a hearing despite the current pandemic emergency order, shall excuse any ADR requirement, and sets the following schedule:
4. All parties agree that the plaintiffs' motion for a preliminary injunction can be consolidated with plaintiffs' request for a permanent injunction under M.R.Civ.P. 65(a)(2) and that no evidentiary hearing shall be necessary.

5. The Secretary of State and any other parties opposing the plaintiffs' request for relief shall serve by email and file opposition papers to the plaintiffs' motion on or before June 15, 2020.¹

5. Reply memoranda shall be served by email and filed on or before June 22, 2020 and oral argument shall be set – on Google Meet or Zoom – on June 24, 2020. The court will undertake to issue a decision by June 29 if at all possible to allow for an expedited appeal to the Law Court before the date on which the court understands it will be too late to make any changes on the ballots.

The entry shall be:

Procedural order entered. The clerk shall incorporate this order in the docket by reference pursuant to Rule 79(a).

Dated: May 26, 2020



Thomas D. Warren
Justice, Superior Court

Entered on the Docket: 05/26/20

¹ Opposition and reply papers may be filed with the court by sending them during business hours by email addressed to thomas.d.warren@courts.maine.gov. Paper copies shall be simultaneously mailed to the clerk's office.

STATE OF MAINE

SUPREME JUDICIAL COURT
Docket No. SJC-19-02

A.I.

v.

**ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS**

STATE OF MAINE

Pending before the Court is a petition for a writ of habeas corpus filed by A.I., a thirteen-year-old child, who is seeking release from the Long Creek Youth Development Center. A hearing was conducted in this matter on June 6, 2019. Present at the hearing were A.I., represented by Sarah Branch, Esq.; A.I.'s mother, Sadiya Ali, represented by Lisa Chmelecki, Esq.; Assistant District Attorney Christine Thibeault, on behalf of the State of Maine; Assistant Attorneys General Donald Macomber, Alisa Ross, and Jason Anton, on behalf of the Department of Corrections; Assistant Attorney General Michael Kearney, on behalf of the Department of Health and Human Services; and Andrew Bloom, Esq., the juvenile's guardian ad litem.

At the hearing, the parties presented a set of stipulated facts, as well as testimony from Colin O'Neill, Associate Commissioner, Maine Department of Corrections; Todd Landry, Ph.D., Director, Office of Child and Family Services; and James Harrison, Ph.D. Dr. Harrison completed a neuropsychological

evaluation of A.I. in the fall of 2018. To the extent this order contains any factual findings, they reflect the stipulated facts or my evaluation of the testimony presented by these witnesses.

On December 28, 2018, the Juvenile Court ordered A.I. to be detained at Long Creek pending an adjudication on a variety of juvenile criminal charges brought against him. *See* 15 M.R.S. § 3203-A (2018). No appeal was taken from the detainment order.

After a contested testimonial hearing, by order dated April 23, 2019, the Juvenile Court (*Powers, J.*) found that A.I. was not competent to proceed with an adjudication on the charges, and it suspended the proceedings. *See* 15 M.R.S. § 3318-A (2018). Because the court also found a “substantial probability that [A.I.] will be competent to stand trial in the foreseeable future,” the court referred A.I. to the Department of Health and Human Services “for evaluation and treatment of the mental health and behavioral needs identified in the reports of Dr. Harrison and Dr. Donnelly,” who completed A.I.’s neuropsychological evaluation and forensic evaluation, respectively. *See* 15 M.R.S. § 3318-B(1) (2018). No appeal was taken from the competency order.

A.I. has remained at Long Creek since the competency order was entered. On May 14, 2019, A.I. filed with the Supreme Judicial Court a petition for a writ

of habeas corpus, asserting that the Department of Health and Human Services was “failing to provide treatment for [him]” and seeking release from Long Creek. *See* 14 M.R.S. § 5513 (2018).

“Every person unlawfully deprived of his personal liberty by the act of another, except in the cases mentioned, shall of right have a writ of habeas corpus according to the provisions herein contained.” 14 M.R.S. § 5501 (2018). A writ of habeas corpus—“the great writ of liberty”—“is not only to secure the right of personal liberty to one who has been illegally deprived thereof, but also to insure a speedy hearing and determination of the questions involved and as to the right of the petitioner to be released from imprisonment.” *Stuart v. Smith*, 101 Me. 397, 401, 64 A. 663 (1906) (quotation marks omitted). It is an “extraordinary remedy,” however, *Pike v. State*, 152 Me. 78, 82, 123 A.2d 774 (1956) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938)), and one that is available only when the petitioner lacks any other means of redress, *Haynes v. Robbins*, 158 Me. 17, 24, 177 A.2d 352 (1962) (“Habeas corpus is not a substitute for a motion to quash, writ of error, nor can it be used instead of an appeal process.”).

I deny A.I.’s petition for two reasons. First, A.I. had and has multiple other remedies available—thus precluding the employment of the extraordinary remedy of habeas corpus. It is the detention order, not the determination of

incompetence, that has resulted in A.I.'s placement at Long Creek; A.I. could have appealed the detention order to the Supreme Judicial Court. *See* 15 M.R.S. § 3402(1)(D) (2018). Despite having failed to file such an appeal, however, he may seek release pursuant to 15 M.R.S. § 3203-A(11) and, should he not prevail, he may file an appeal from that order, *see* 15 M.R.S. § 3402(1)(D). Additionally, A.I. may seek a different outcome at the follow-up hearings that are statutorily mandated within 60 days, 180 days, and one year after the court's referral of an incompetent child to the Department of Health and Human Services for evaluation and treatment, *see* 15 M.R.S. § 3318-B(1)(A).¹

Second, I cannot conclude that A.I.'s detention at Long Creek is unlawful. Again, A.I. is held at Long Creek not because he lacks competence to stand trial, but pursuant to the detention order issued on December 28, 2018. No challenge to that detention order has ever been mounted, however, and I have no basis to conclude that the original detention order was in any way unlawful. *See* 15 M.R.S. § 3203-A(4-A), (5)(C) (authorizing the pretrial detention of a juvenile when there is probable cause to believe the juvenile has committed a juvenile

¹ It is not clear from the statute whether A.I. could have sought an appeal from any portion of the court's competency order—the portion finding him incompetent to stand trial or the portion finding that there was a substantial probability that he will be competent in the foreseeable future. Title 15 M.R.S. § 3402 (2018) does not specifically list orders issued pursuant to 15 M.R.S. § 3318-B (2018) as among those that may be appealed to the Supreme Judicial Court, and section 3318-B makes no mention of appellate rights.

crime); *United States v. Salerno*, 481 U.S. 739, 746-48 (1987) (holding that pretrial detention is a constitutional exercise of regulatory power).

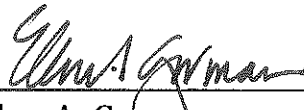
I also have no basis to conclude that A.I.'s *continued* detention at Long Creek is unlawful. By operation of statute, the suspension of A.I.'s juvenile criminal proceedings because of his lack of competence "does not affect the Juvenile Court's ability to detain" him. 15 M.R.S. § 3318-A(5); *see* 15 M.R.S. § 3203-A(5). Further, on the record presented, there is no evidence that the evaluation and treatment services that A.I. is receiving at Long Creek—when compared to what is required by the competency order—are so grossly insufficient as to render A.I.'s continued detention at Long Creek a violation of his right of due process.² *See* U.S. Const. amend. XIV; *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (authorizing, for a "reasonable period of time," the pretrial detention of a person charged with a criminal offense who is not competent to stand trial); *see also State v. Dedekian*, 680 A.2d 441, 443-44 (Me. 1996) (concluding that one year is a reasonable period of time to detain a criminal defendant to determine whether that defendant will become competent).

I do not disagree with counsel for A.I. that A.I.'s placement at Long Creek is far from ideal; A.I. needs residential treatment, and he needs it right away. It

² I make no pronouncement, however, regarding whether the Department of Health and Human Services has satisfied the obligations imposed on it by the court's competency order based on any grounds other than due process.

is also clear that the State has gone to extraordinary efforts to find a placement for A.I. These efforts have been stymied by the systemic lack of adequate resources within the State of Maine for juveniles with mental illness and cognitive challenges, and by the roadblocks created by A.I.'s mother's understandable reluctance to allow her child to be treated in a facility far from his home and community. Nevertheless, these realities provide no ground for habeas corpus relief.³

The petition for a writ of habeas corpus is DENIED.



Ellen A. Gorman,
Associate Justice

RECEIVED

JUN 10 2019

Clerk's Office
Maine Supreme Judicial Court

³ "The court is not a provider of social services, and judges' options for the disposition of cases are limited to existing programs and services. Resources for intervention that have been established by the Legislature, communities, and public and private entities are simply too few and far apart to provide judges with creative alternatives." *State v. J.R.*, 2018 ME 117, ¶ 27, 191 A.3d 1157.