STATE OF MAINE

SUPREME JUDICIAL COURT
Docket No. SJC-23-2

STATE OF MAINE, *ex rel.* PETERSON *et al.*,

Petitioners,

v.

Amended Petition for Writ of Habeas Corpus

PETER A. JOHNSON, *et al.*,

Respondents.

INTRODUCTION

1. Petitioners hereby respectfully amend their initial petition, incorporating none of their prior allegations or arguments unless specifically noted herein. In sum and substance, Petitioners withdraw the petition as to their claim that named and unnamed judges and justices of the Unified Criminal Docket have unlawfully restricted the liberty of persons entitled to relief. Respondents Judges should be dismissed from the action. *See infra* PRAYER FOR RELIEF ¶ 1.

2. An unknown number of persons are currently in jail while their criminal cases pend in Maine state courts, despite the fact that, though they are entitled to it, these individuals have not been provided counsel to represent them. Because of the failure of the State of Maine to appoint counsel entitled by M.R.U.Crim.P. 44(a), 15 M.R.S. § 810, 17-A M.R.S. § 1811(4), the Maine Constitution, Art. I. §§ 6 & 6-A; and the Sixth and Fourteenth Amendments to the United States Constitution;

the persons on whose behalf this petition is brought are "unlawfully deprived of [their] personal liberty" by known and unknown jailers and are, therefore, entitled to relief from such deprivation. *See* 14 M.R.S. § 5501 *et seq.*

JURISDICTION

3. This Court has original jurisdiction in this proceeding pursuant to 14 M.R.S. § 5301, 14 M.R.S. § 5513, 14 M.R.S. § 5526, and 4 M.R.S. § 7. The latter – "jurisdiction according to the common law not inconsistent with the Constitution or any statute" – is shaped by ME. CONST. Art. I, § 10, the Suspension Clause ("[T]he 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.").

4. This Court has personal jurisdiction pursuant to the foregoing and 14 M.R.S. § 704-A(2).

JUSTICIABILITY

5. Petitioners have standing by virtue of 14 M.R.S. § 5511 (authorizing "any person" to seek writ of habeas corpus on behalf of "any party alleged to be imprisoned or restrained of his liberty but not convicted and sentenced"). Additionally, at common law, *see* 4 M.R.S. § 7, Petitioners would have had standing sufficient to bring this action. "The common law permitted next-friend suits for prisoners as far back as the seventeenth century... . In theory, next friends do not assert third-party standing because they are not parties at all[.]" Curtis A. Bradley *et al.*, *Unpacking Third-Party Standing*, 131 YALE L.J. 1, 63

(Oct. 2021). "A 'next friend' does not himself become a party to the habeas corpus action in which he participates, but simply pursues the cause on behalf of the detained person, who remains the real party in interest." *Whitmore v. Arkansas*, 495 U.S. 149, 163 (1990); *see also* William S. Church, *A Treatise on the Writ of Habeas Corpus*, § 89 (2d 1893) (noting viability of such actions).

6. There is a live controversy – several, in fact. Those persons identified by name are incarcerated without counsel. In addition, pursuant to 14 M.R.S. § 5528, Petitioners seek relief on behalf of unknown or uncertain persons, now and in the future. Even were there not ongoing controverses, of course, there is an undeniable likelihood that, in the days and months to come, the State of Maine will be unable to procure counsel for imprisoned pretrial defendants who are entitled to such counsel. *Cf. A.S. v. Lincolnhealth*, 2021 ME 6, ¶¶ 8-9, 246 A.3d 157 (applying capable-of-repetition and great-public-concern exceptions to mootness on appeal of denial of petition for writ of habeas corpus). This Court should reach the merits now to avoid piecemeal, repetitious litigation that would prevent counsel, including Undersigned Petitioners (who often represent indigent defendants in criminal matters), from undertaking more of that work.

PARTIES

7. Undersigned Petitioners, who are attorneys licensed to practice in the State of Maine appearing *pro bono*, bring this petition on behalf of

persons, both named and unnamed, who would be entitled to relief on their own application. *See* 14 M.R.S. § 5511; *see also* M.R.Civ.P. 17(a).

8. The named individuals on whose behalf relief is sought include:

   a. Joseph Maile, AROCD-CR-2023-40672 (in custody 35 days as of filing), *see* PX 1;

   b. Tiffany Soucy, AROCD-CR-2019-20125 (32 days), *see* PX 2;

   c. Benjamin Stewart, AROCD-CR-2023-30475 (22 days), *see* PX3;

   d. Bruce Hoyt, Jr., AROCD-CR-2023-40359, AROCD-CR-2023-40360, AROCD-CR-2023-40688 (15 days), *see* PX4-PX6;

   e. William Ofria, AROCD-CR-2023-00456, AROCD-CR-2023-40729 (10 days), *see* PX7-PX8;

   f. Randy Lavoie, AROCD-CR-2023-20348 (15 days), *see* PX9;

   g. Christopher Hecker, AROCD-CR-2023-40567, AROCD-Cro2023-40730 (9 days), *see* PX10-PX11;

   h. Timothy York, AROCD-CR-2022-40426 (8 days), *see* PX12.

9. Unnamed persons subject to relief, *see* 14 M.R.S. § 5528, include all those:

   a. entitled to counsel pursuant to U.S. CONST. amends. VI & XIV; ME. CONST. Art., §§ 6, 6-A & 19; 15 M.R.S. § 810; 17-A M.R.S. § 1811(4); M.R.U.Crim.P. 44(a)(1) in relation to a pending state-court criminal proceeding; and

   b. who are currently, or will be in the future, "imprisoned ... but not convicted and sentenced ... ." 14 M.R.S. § 5511.

10. The undersigned endeavored to identify by name the unknown and uncertain individuals who fit these criteria. However, by email dated September 15, 2023, representatives of the Judicial Branch declined to provide this information, citing Administrative Order JB-05-20 (A. 4-21), *Public Information and Confidentiality*. Further, a Maine superior court judge has suggested that "no one" really knows how many individuals fit these criteria. *See* Order on Joint Motion for Preliminary Settlement Approval, *Robbins v. MCILS, et al.*, KENSC-CV-22-54 ** 15-16 (Murphy, J., Sept. 13, 2023). Nonetheless, Petitioners have sufficiently "ma[d]e known who is intended" to benefit from this petition, by virtue of their specified criteria. *See* 14 M.R.S. § 5528. This Court holds the key to unlocking their identities.[1]

11. In Maine, a county "sheriff has the custody and charge of the county jail and of all prisoners in that jail and shall keep it in person, or by a deputy as jailer, master or keeper." 30-A M.R.S. § 1501; *see also* 30-A M.R.S. § 454 (requiring each county – whose law enforcement responsibilities fall to sheriffs – to provide for detention facilities). Such individuals may be "described by an assumed name" such as "Jailers" and "Jailer-Respondents." *See* 14 M.R.S. § 5527.

12. Respondent Peter A. Johnson is the Aroostook County Sheriff.

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[1] Petitioners disagree that § 5528 is meant only to unlock names rather than statuses. Indeed, the point of habeas corpus is to determine, as Petitioners seek to do via this action, whether an individual is lawfully detained. It would be counter to the ancient purposes of the Great Writ to effectively block from its purview those detainees whom jailers are particularly successful at shielding from society's view.

13. Respondent William L. King is the York County Sheriff.

CLAIMS FOR RELIEF

14. First, this Court should facilitate discovery of the identities of those unnamed parties entitled to relief. *See* A.O. JB-05-20 (A. 4-21) at III.A.6 (permitting judges to order disclosure of data sought by the Petitioners); *see* M.R.Civ.P. 26(a), 34 (providing for discovery of "documents or things," and "other data compilations"); *see also* Brandon L. Garrett, *Habeas Corpus and Due Process*, 98 CORNELL L. REV. 47, 66 (Nov. 2012) (noting availability of discovery in common law habeas proceedings). Petitioners and the public enjoy a common-law right to access judicial information necessary to unlock the identities of those individuals entitled to relief. *See Nixon v. Warner Communications*, 435 U.S. 589, 597 (1978) (common-law right to access encompasses a "citizen's desire to keep a watchful eye on the workings of public agencies"). Anyway, this Court, attendant to its statutory authority "examine" and "hear evidence," *see* 14 M.R.S. § 5523, certainly retains authority to order the production of data in its own databases. It can do as much as a matter of judicial notice, too. *Guardianship of Jewel M.*, 2010 ME 80, ¶ 24, 2 A.3d 301 (Maine courts may take judicial notice of "court records in other cases including pleadings and docket entries.").

15. Second, "without delay," this Court "shall proceed to examine the causes of imprisonment or restraint... ." 14 M.R.S. § 5521. If

necessary, this Court might hear evidence to determine whether the continued liberty restraints are lawful. 14 M.R.S. § 5523.

16. Section 5501 guarantees the writ "of right" to everyone unlawfully restricted. Section 5512(1) proposes a limitation: Those "committed or confined in prison or jail on suspicion of ... felony... " "shall not **of right** have such a writ." 14 M.R.S. § 5512(1) (emphasis added). First, Petitioners contend that this limitation merely purports to make the statutory *right* to habeas corpus instead one of a judge's *discretion* as to suspected felons. This interpretation is supported by the Law Court's decision in *Welch v. Sheriff of Franklin Cnty.*, 95 Me. 451, 50 A. 88 (1901). There, the Court held that suspected felons, though "not entitled to the writ of habeas corpus as a matter of right," 95 Me. at 452-453, 50 A. at 88, might nonetheless receive the writ in "the discretion of the court." 95 Me. at 454, 50 A. at 89. This is why, notwithstanding § 5512(1), courts have not infrequently granted felons habeas corpus relief. *Cf. Wade v. Warden of State Prison*, 145 Me. 120, 73 A.2d 128 (1950) (Court grants writ to individual convicted of manslaughter); *Ex parte Bollman*, 8 U.S. 75 (1807) (Court grants writ to individuals accused of treason). Back in 1821, that courts retained discretion to grant the writ as to felons was more explicit in the statute that it now is: "Nothing" in the felony-limitation "shall be construed to hinder or restrain the said Supreme Judicial Court ... or any one or more Judges thereof ... from bailing any person wherever and for whatever offense committed at their discretion, whenever the

circumstances of the case shall appear to require it... ." P.L. 1821, c. 604, § 1.[2] Second and relatedly, any per se felony-level[3] restriction on the ancient writ would violate ME. CONST. Art. I, § 10's Suspension Clause. An unconstitutional suspension occurs whenever the legislature purports to foreclose an avenue to the writ that was available at common law, absent the requisite "rebellion or invasion." *Cf. Kimball v. State*, 490 A.2d 653, 658-59 (Me. 1985); *cf. Fredette at* 402 (Me. 1981); *see also* 4 M.R.S § 7. Because the writ was available to alleged "felons" at common law, its availability remains constitutionally mandated today. *Cf.* Judith Farbey *et al., The Law of Habeas Corpus* 148 (3d ed. 2011) ("From the seventeenth century to

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[2] Notably, § 10 of Article I's treatment of the right to bail mirrors the "of right" v. discretionary paradigm. *See Harnish v. State*, 531 A.2d 1264, 1269 (Me. 1987) (while those suspected of formerly capital offenses do not retain constitutional right to bail, "the discretionary power of the court to admit any defendant to bail" remains "intact.").

[3] Petitioners do not concede that any of the above-specified persons on whose behalf relief is sought would have qualified as felons at common law. *See Jerome v. United States*, 318 U.S. 101, 108 n. 6 (1943) (Common law felonies include "murder, manslaughter, arson, burglary, robbery, rape, sodomy, mayhem, and larceny.") (citing Wharton, *Criminal Law* (12th ed.) § 26).

For example, Petitioners disagree that drug possession or trafficking, *see* PX2-PX3, or driving offenses, *see* PX3, PX8, or domestic-violence assaults/threatening, *see* PX1, PX10, are common-law "felonies" even contemplated by § 5512. *See State v. Sitton*, 2015 Wash. App. LEXIS 27, ¶ 18, (Wash. App. Div. 20150 ("[D]rug possession was never a common law crime."); *Benitez v. Dunevant*, 7 P.3d 99, 103 (Ariz. 2000) (Drunk-driving has "no common-law antecedent"); *United States v. Ryno*, 2023 U.S. Dist. LEXIS 94159 **9-10 (D. Alaska May 30, 2023) ("American legal history and tradition indicates that lawmakers, both at the time of ratification and well into the 20th century, simply did not recognize domestic violence as a societal problem meriting criminal liability.").

the nineteenth century, habeas corpus ... was the accepted method by which a person committed by the local justices could appeal to the general power of the King's Bench to grant bail, and it generally provided a method of review over pretrial hearings. It was, and still is, thought to provide a measure of protection against arrest and detention unauthorized by the ordinary criminal process.").

17. The right to counsel enshrined by the Maine Constitution derives from both § 6 and § 6-A. *See State v. Sklar*, 317 A.2d 160, 165-67 (Me. 1974). "For those who cannot afford counsel, the constitutional right imposes an affirmative obligation on the State to provide court-appointed counsel if the defendant faces incarceration whether because of a plea of guilty or no contest, or after trial." *State v. Watson*, 2006 ME 80, ¶ 14, 900 A.2d 702.

18. The federal constitutional right to counsel inheres no later than the "first appearance before a judicial officer at which the defendant is told of the formal accusation against him and restrictions are placed on his liberty." *Rothgery v. Gillespie County*, 554 U.S. 191, 194 (2008). This means, in Maine state courts, the federal right to counsel applies no later than the initiation of any "proceeding" in the criminal matter. *See* M.R.U.Crim. P. 44(a). Indeed, this initial period – "'that is to say, from the time of [defendants'] arraignment until the beginning of their trial'" – represents perhaps "'the most critical'" stage at which counsel must be provided. *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (quoting *Powell v. Alabama*, 287 U.S. 45, 57 (1932)). But the right to

counsel, whether rule-based, statutory or constitutional, does not depend on only in-court hearings or trials. *Cf. Powell v. Alabama*, 287 U.S. 45, 59 (1932) (right to counsel guarantees "sufficient time to advise with counsel and prepare his defense."). Rather, the deprivation of counsel is often characterized by the lack of hearings, motions, and investigation – prejudices this petition is meant to avoid. *Cf. State v. Wai Chan*, 2020 ME 91, ¶ 7 n. 3, 236 A.3d 471 (potentially exculpatory evidence is destroyed before counsel, who had just been appointed, is able to preserve it).

19. Fundamentally, the authority attendant to a criminal prosecution to detain a defendant is contingent upon the State's provision of "procedural safeguards" such as appointment of competent counsel. *See United States v. Salerno*, 481 U.S. 739, 755 (1987). A recent decision from the United States District Court for the District of Oregon is illustrative. *Betschart et al. v. Garrett et al.*, 2023 U.S. Dist. LEXIS 144139, 2023 WL 5288098, Case No.: 3:23-cv-01097-CL (D. Or. Aug. 17, 2023) (McShane, J.) (page numbers refer to slip opinion). After the county failed to provide counsel for defendants restrained attendant to criminal prosecutions in Oregon state courts, the petitioners pressed for habeas corpus in federal court. *Id.* at * 2. The federal court ordered the jailers to release the petitioners for whom no

counsel could be appointed within ten days.[4] *Id.* at * 13. The court reasoned:

> No reliable process guaranteed by the Fourteenth Amendment is present when an indigent defendant is required to proceed against the power of the state without counsel. They are unable to adequately argue for conditional release, secure witnesses, review discovery, challenge the charging instrument, intervene in the Grand Jury process, negotiate with the prosecution in an arms-length fashion, request the preservation of evidence, or challenge the length of their confinement through speedy trial statutes. For some, an uncounseled guilty plea is the only avenue out of custody.

Id. at ** 11-12. The same reasoning applies in Maine, and this Court should accept the solemn duty of ordering the release of similarly situated Mainers rather than require them to resort to federal court to obtain that relief. Of particular concern, given this state's robust privilege against self-incrimination, *see, e.g.*, *State v. Collins*, 297 A.2d 620, 626 (Me. 1972), is the specter of defendants being coerced to plead guilty, imprisoned without access to counsel or the relief counsel might help them obtain.

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[4] At the status hearing on October 16, this Court wondered whether the Oregon case was meaningfully distinguished from ours because, in Oregon, some or all of the petitioners had proceeded without counsel at multiple hearings. However, the relief Judge McShane ordered in Oregon – release of any future class member within 10 days – does *not* require that defendants first run the gauntlet of such hearings without the assistance of counsel. Indeed, relief *prior* to such a spectacle and coercion is appropriate. *See Betschart*, 2023 U.S. Dist. LEXIS 144139 at * 19.

PRAYER FOR RELIEF

1. This Court should dismiss Respondents Hon. Sarah Gilbert and Hon. Carrie Linthicum and Unknown Judges and Justices of the Maine Unified Criminal Docket from this proceeding. Dismissal should be without prejudice.[5]
2. This Court should expeditiously order discovery of the data necessary to identify persons entitled to relief, as requested above. *Supra* ¶ 14.
3. This Court should expeditiously convene any evidentiary hearing necessary to decide this petition on its merits.
4. This Court should expeditiously order that, within seven days, Respondents release from imprisonment those persons subject to relief.
5. This Court should issue a declaratory judgment, pursuant to 14 M.R.S. § 5953, declaring: Anyone entitled to counsel pursuant to a Maine state-court criminal prosecution pending without conviction, but who has not received the actual assistance of counsel other than so-called

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[5] Petitioners agree with the argument of counsel for Respondents Judges at the October 16, 2023 status hearing: Petitioners have not at this time made sufficiently specific allegations to support a claim for relief. *See* 14 M.R.S. § 5515 (calling for Court to make determination whether alleged restraint is "lawful[]"). However, to preserve the rights of those who might later present such allegations, dismissal here should be without prejudice. *Cf. Lemay v. State*, 244 A.2d 556, 557 (Me. 1968) (because petition for writ of habeas corpus was uncounseled, no claim not advanced in it is barred in future petition). Certainly, as there have been no named individuals subject to bail conditions, no such individual could be seen to have waived any potential claim for relief.

"lawyers for the day," shall not be subject to imprisonment greater than seven days after such an entitlement has inhered. *See Higgins v. Robbins*, 265 A.2d 90, 91-92 (Me. 1970) (declaratory judgments may be issued in proceedings for writs pursuant to Chapter 609).

Respectfully submitted this 20th Day of October 2023,

By the Petitioners,

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that:

- I filed a copy of this Amended Petition with the Maine Supreme Judicial Court by hand-delivery and email. *See* M.R.U.Crim. P. 46(d) & 49(d) & Advisory Committee Note [1998];
- I have caused to be delivered, or have attempted to cause to be delivered, a copy of this Amended Petition to: MLichtenstein@wheelerlegal.com; tsmith@lokllc.com; and Sean.D.Magenis@maine.gov.

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OATH AND AFFIRMATION

I, Robert J. Ruffner, do swear and affirm, under penalty of perjury, that the foregoing and attached exhibits are correct and accurate as to my information and belief.

RJR 8855 Dated: 10/20/2023

State of Maine
County of Cumberland

Sworn to and subscribed before me, Leslie W, this 20th day of October 2023.

Leslie W 010318

Attorney/~~Notary Public~~

[If Notary Public] My Commission Expires: N/A