SUPREME JUDICIAL COURT OF THE STATE OF MAINE
SITTING AS THE LAW COURT

Law Court Docket No. 25-137

ANDREW ROBBINS, *et al.*

Plaintiffs-Appellees,

v.

STATE OF MAINE, *et al.*

Defendants-Appellants.

On Appeal from the
Superior Court, Kennebec County,
Superior Ct. No. KENSC-CV-22-54

BRIEF OF APPELLEES IN RESPONSE TO BRIEF OF APPELLANT MCPDS

Carol J. Garvan
Zachary L. Heiden
Anahita D. Sotoohi
ACLU OF MAINE FOUNDATION
PO Box 7860
Portland, Maine 04112

Kevin P. Martin*
Jordan Bock*
Samantha Jandl*
Andrea Goodman*
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, Massachusetts 02210

Matt Warner
Alex Harriman
PRETI, FLAHERTY, BELIVEAU & PACHIOS, LLP
1 City Center
Portland, Maine 04101

**Motion for pro hac vice admission pending*

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If you cannot afford a lawyer, the state will provide one for you. *See Gideon v. Wainwright*, 372 U.S. 335, 340-41 (1963). This bedrock guarantee is "fundamental and essential" to our criminal justice system. *Id.* at 344. Maine has entrusted its affirmative obligation to provide counsel to the Maine Commission on Public Defense Services ("MCPDS" or "the Commission").[1] By statute MCPDS must provide effective representation through qualified and competent counsel consistent with the federal and state constitutions. 4 M.R.S. § 1801. MCPDS's failure to satisfy this charge—first by providing inadequately-supervised lawyers, and later by not providing lawyers at all—led to this litigation.

After more than two years of negotiations and discovery, summary judgment briefing on liability, and an evidentiary trial on remedy, the trial court concluded that the Commissioners and Executive Director of MCDPS (collectively, the "MCPDS Defendants" or "Defendants") failed to provide counsel to those constitutionally eligible for it. As the trial court recognized, the Sixth Amendment guarantees the provision of counsel pre-trial, including during pre-trial investigations, plea negotiations, bail hearing, and dispositional conferences—and demands appointment of counsel sufficiently in advance of those stages to guarantee counsel's preparation as well as presence. Undisputed evidence, including extensive testimony

[1] When this case was filed, MCPDS was known as the Maine Commission on Indigent Legal Services ("MCILS"). Plaintiffs use MCPDS as shorthand for both.

from Defendants' own witnesses, proved beyond cavil that the MCDPS Defendants failed to fulfill this guarantee. And under well-established Supreme Court precedent, this complete denial of counsel is itself prejudicial, with no need for a further showing of prejudice in any individual case. *United States v. Cronic*, 466 U.S. 648, 654-55 (1984).

Defendants filed this interlocutory appeal challenging the trial court's determination. They argue that the Sixth Amendment did not require them to provide counsel until the dispositional conference, and therefore ask this Court to reverse. Defendants' position is directly contrary to controlling precedent from the U.S. Supreme Court, which repeatedly has recognized that earlier stages in a criminal case are critical and demand the assistance of counsel. Defendants wrongly assume that the Sixth Amendment is "a haphazard jack-in-the-box that occasionally appears when cranked," rather than "an ongoing right that persists throughout trial court proceedings." *See Betschart v. Oregon*, 103 F.4th 607, 621 (9th Cir. 2024). Even accepting Defendants' cramped constitutional perspective, the undisputed evidence establishes that many Subclass members *did* appear at dispositional conferences without the assistance of any counsel. Others were appointed counsel just before their dispositional conference, and still others had their dispositional conferences postponed precisely because they lacked counsel. These Subclass members all suffered Sixth Amendment violations, even under Defendants' erroneous

interpretation. Remarkably, Defendants make no appellate argument to the contrary, instead incorporating by reference the entirety of their summary judgment brief below. That is a waiver of the issue.

While the issues presented by this appeal could not be more important, their resolution is straightforward. Firmly established caselaw requires the appointment of counsel during the pre-trial stages of a criminal case, well in advance of the dispositional conference. The State failed to provide that here. The trial court's decision should be affirmed.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Maine was—until recently—the only state in the country without public defenders; indigent defense fell entirely to private attorneys willing to take court-appointed cases. While the state now has a few public defender offices, there is not a sufficient pool of attorneys to meet the needs of indigent defendants charged with crimes in most of the State. J.A.170.

Responsibility for operating this system falls to MCPDS, "an independent commission whose purpose is to provide high-quality, effective and efficient representation and promote due process for persons who receive indigent legal service … consistent with federal and state constitutional and statutory obligations." 4 M.R.S. § 1801. Specifically, the Commission is tasked with "ensur[ing] the delivery of indigent legal services by qualified and component counsel in a manner

that is fair and consistent throughout the State," and further "ensur[ing] adequate funding of a statewide system of indigent legal services." *Id.* Defendants in this action are the nine MPCDS Commissioners (including the Chair of the Commission) and the Commission's Executive Director. The Executive Director is responsible for ensuring "that the provision of indigent legal services complies with all constitutional, statutory, and ethical standards," 4 M.R.S. § 1805(1), and administering and coordinating "delivery of indigent legal services and supervise compliance with commission standards," *id.* § 1805(3).

Plaintiffs filed a putative class action in March of 2022 against the MCPDS Defendants challenging the constitutional adequacy of Maine's indigent-defense system. *See* J.A.276-79. As Plaintiffs explained in their initial complaint, "MCILS has failed to develop and implement an effective system for the appointment of counsel for indigent defendants." J.A.277-78. Thus, this case initially focused on whether MCPDS-rostered attorneys were providing constitutionally adequate representation due to, among other issues, high caseloads and inadequate training and supervision. The trial court denied Defendants' motion to dismiss in relevant part and certified a class of individuals eligible for appointment of counsel. Order on Mot. for Class Cert. at 5 (July 13, 2022); Order on Mot. to Dismiss, 2022 WL 17348139 (Me. Super. Ct. June 2, 2022).

While the parties engaged in discovery and undertook settlement negotiations, the situation on the ground deteriorated: as of early 2024, hundreds of indigent defendants were not being provided counsel *at all*. J.A.170-71; Combined Order 4 (Feb. 27, 2024) (attaching Counsel Needed spreadsheets) ("Feb. 2024 Order"). The problem thus shifted from a risk of deprivation of effective counsel to a lack of any counsel. While the parties reached a settlement to resolve the original claims in the case, the trial court denied preliminary approval, explaining that the agreement "fails to address or provide enforceable relief for the ever-increasing number of unrepresented indigent defendants." Feb. 2024 Order at 14. The court then (1) "create[d] a Subclass consisting of Class Members who remain unrepresented after initial appearance or arraignment, unless the right to counsel has been waived by an individual class member"; and (2) subdivided the case into two phases:

> In Phase 1, the Court will adjudicate the federal and state claims and defenses regarding non-representation as they relate to the subclass above. In Phase 2, claims which allege that systemic conditions or practices exist which may pose an "unconstitutional risk" of deprivation of counsel will then be adjudicated.

Id. at 16. MCPDS filed an interlocutory appeal of the trial court's Feb. 27 Order, which this Court dismissed. Order Dismissing Appeal (May 1, 2024).

Plaintiffs then filed an amended complaint, expanding their allegations and claims to more directly address the urgent crisis of non-representation. Among other claims, the amended complaint sought declaratory and injunctive relief against the

MCPDS Defendants for their failure to provide any counsel in violation of the Sixth Amendment of the United States Constitution (Count I). The amended complaint separately sought habeas relief against the sheriffs for each of the Maine counties and party-in-interest State of Maine for Subclass members unlawfully detained without counsel (Count III), as well as declaratory and injunctive relief against the State of Maine for failure to provide counsel (Count V). J.A.235-46.

Following extensive discovery and briefing, on January 3, 2025, the trial court granted summary judgment to Plaintiffs on liability for Count I (their Phase I claims for non-representation), concluding that MCPDS had violated the Subclass members' Sixth Amendment right to counsel by failing to provide continuous representation from the time of initial appearance or arraignment and at all critical stages of their proceedings. J.A.156.[2] In so holding, the trial court rejected the MCPDS Defendants' argument that a Sixth Amendment violation does not occur until the dispositional conference. *Id.* As the trial court explained, Defendants' position "ignores what federal courts have come to recognize is at stake throughout the criminal process from the time the Sixth Amendment right attaches to the time an indigent defendant must decide if they are going to proceed to trial or instead knowingly and intelligently waive the right to trial." *Id.* And it "ignores more recent

[2] The Court granted summary judgment to Defendants on Count II, Plaintiffs' claim for denial of counsel under the Maine Civil Rights Act.

Supreme Court precedent explicitly rejecting" the view that a violation of the Sixth Amendment occurs only if "a defendant's rights *at trial* may be prejudiced by denial of counsel." J.A.157. To the contrary, "depriving a person of counsel during the period before trial 'may be more damaging than denial of counsel during the trial itself.'" J.A.158 (quoting *Maine v. Moulton*, 474 U.S. 159, 170 (1985)).

The trial court set a three-day remedies trial at which the court heard extensive testimony from, among others, the MCPDS Executive Director, MCPDS Commissioners, MCPDS staff members, and experts for both parties. Following the trial, the trial court issued an order to remedy the violations it had previously identified. On Count I, the trial court issued an injunction requiring MCPDS Defendants to provide continuous representation of counsel, and further directed MCPDS Defendants to submit a plan for how they would comply with the injunction. On Count III, the court ordered that Subclass members who remained without counsel after set time periods were entitled to habeas relief in the form of discharge from custody and dismissal of charges. The court deferred ruling on injunctive and declaratory relief against the State on Count V until after it received additional requested information from the State. J.A.114.

The court's remedies order scheduled future proceedings on all counts. *Id*. Before the court could conduct these additional proceedings, however, on March 27 the State and MCPDS Defendants filed interlocutory notices of appeal on all counts.

This appeal followed.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Court can review this interlocutory appeal.

2. Whether the denial of counsel after the commencement of prosecution violates the United States Constitution's Sixth Amendment guarantee only if the indigent defendant remains unrepresented at the dispositional conference.

3. Whether Plaintiffs prevail even under Defendants' incorrect understanding of the "critical stage" analysis, because Subclass members did not have representation of counsel at their dispositional conferences and Defendants have waived any argument to the contrary.

ARGUMENT

Defendants' arguments fail on three separate grounds, any one of which is sufficient to reject their appeal. First, since there is no final judgment below and no exception to the final-judgment rule applies, this appeal is not properly before the Court. Second, Defendants misunderstand binding Supreme Court precedent in arguing that there is no cognizable violation of the Sixth Amendment unless a criminal defendant remains unrepresented at a dispositional conference. Finally, even accepting Defendants' erroneous interpretation of the "critical stage" analysis, the evidence shows that Subclass members *did* appear unrepresented at dispositional conferences—and Defendants have waived any argument to the contrary.

I. There is no final appealable judgment.

As a general matter, "[o]nly final judgments are subject to appellate review." *Griswold v. Town of Denmark*, 2007 ME 93, ¶ 16, 927 A.2d 410. This rule "prevents piecemeal litigation," "minimizes interference with the trial process," and "saves the appellate court from deciding issues which may ultimately be mooted." *Id.* (quoting *Millett v. Atl. Richfield Co.*, 2000 ME 178, ¶ 8, 760 A.2d 250).

There is no final judgment here: Not only is there no Phase II ruling, but there are also ongoing Phase I proceedings on Counts III and V against the State of Maine. As a result, there is no "decision that fully decides and disposes of the entire matter pending before the court." *Carroll v. Town of Rockport*, 2003 ME 135 ¶ 16, 837 A.2d 148 (further explaining that a final judgment leaves "no questions for the future consideration and judgment of the court"). Indeed, MCPDS Defendants must recognize there is no final judgment yet, as they previously asked the trial court to certify its decision under Me. R. of Civ. P. 54(b)(1), which authorizes a court to enter final judgment on "fewer than all of the claims or parties" if circumstances warrant. *See Guidi v. Turner*, 2004 ME 42 ¶ 8, 845 A.2d 1189 (explaining that this rule "may be invoked to permit appeal … of partial final judgments"). But shortly after filing their motion—and before the deadline for Plaintiffs to file their opposition—Defendants noticed this appeal. *See* J.A.070. The trial court highlighted this

procedural misstep, then concluded that it "lack[ed] authority to act" on MCPDS's Rule 54(b) motion "given the pending appeal on Count I." J.A.070-71.[3]

Having chosen not to wait for a ruling on their Rule 54(b)(1) motion, the MCPDS Defendants now suggest two options for circumventing the final-judgment rule: (1) the trial court "effectively" severed the Phase I and Phase II claims, and (2) this Court should recognize an exception to the final-judgment rule to protect the separation of powers. Neither argument is correct.

A. The trial court did not sever Phase I and Phase II.

Defendants' severance argument relies on two provisions of the Maine Rules of Civil Procedure: Rule 21, which states that "[a]ny claim against a party may be severed and presented separately," and Rule 42(b), which authorizes a court to "order a separate trial … of any claim … or of any separate issue." The difference matters because resolution of a claim that has been severed under Rule 21 is final and appealable, while resolution of a claim from a separate trial ordered under Rule 42(b) is not. *Acevedo-Garcia v. Monroig*, 351 F.3d 547, 559-560 (1st Cir. 2003).[4]

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[3] The MCPDS Defendants cannot justify their decision to plow ahead by pointing to the 30-day deadline for filing a notice of appeal. Because there was no final judgment, the time to appeal had not yet started to run. *See Cobell v. Jewell*, 802 F.3d 12, 19 (D.C. Cir. 2015). Rather, had the district court entered a Rule 54(b) certification, *that* order would have "started the clock running for [the MCPDS Defendants] to file a notice of appeal." *Ysais v. Richardson*, 603 F.3d 1175, 1178 (10th Cir. 2010).

[4] Because "the Maine rule regarding severance is essentially identical to the federal rule, it is proper for the court to consider constructions of the federal rule to aid in

The MCDPS Defendants argue that there was a final judgment on Phase I because the trial court *sub silentio* severed the Phase I and Phase II claims in February 2024 when it created a Subclass to pursue the Phase I claims. *See* Opening Br. 22-30. But no party in this case has ever moved to sever the claims, nor did the trial court ever suggest that it was doing so. To the contrary, the trial court's order made clear that it was *not* creating a separate action for Phase II. As the trial court explained, "the constitutional claims asserted two years ago [Phase II], and the current constitutional crisis [Phase I], are all rooted in fundamental rights guaranteed by the Sixth Amendment of the United States Constitution and Article I, Section 6 of the Maine Constitution." Feb. 2024 Order at 14. Thus, "[f]rom the point of view of Class Members, the issues of non-representation and the claims regarding the unconstitutional 'risk' of deprivation of counsel *should be resolved in the same case*." *Id.* (emphasis added). Any number of other statements in the trial court's order confirm that it intended merely to stage Phase I and Phase II for trial—not to sever them entirely under Rule 21. *E.g.*, *id.* at 16 (explaining that "creation of [the Phase I] subclass … would promote expeditious resolution of *the case*" and further that "*[t]his class action* will progress in two phases") (emphases added).

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construing and analyzing the parallel Maine provision." *See Warren v. Preti, Flaherty, Beliveau & Pachios, LLC*, 2011 WL 6131121, at *12 (Maine Bus. Ct. Oct. 25, 2011).

Defendants' theory turns on its view that severance is appropriate when two claims are "discrete and separate." Opening Br. 24 (quoting *Gaffney v. Riverboat Servs. of Ind., Inc.*, 451 F.3d 424, 442 (7th Cir. 2006)). But as the trial court explained, the claims underlying Phase I and II in this case are *not* "discrete and separate." *See supra* p. 11. Moreover, just because "a district court *may* sever claims under Rule 21, creating two separate proceedings,'" *Gaffney*, 451 F.3d at 442 (emphasis added), does not mean that it *must* do so—particularly where no one has asked. To the contrary, the concept of voluntary joinder of claims and parties means that cases proceed all the time in which some number of claims might be resolved independently, but nonetheless are resolved together.

Defendants' cited caselaw confirms that this case does not involve severance, because these authorities emphasize that the trial court's intent determines whether a claim was severed. In *Acevedo-Garcia*, the First Circuit concluded that, notwithstanding the district court's reference to Rule 42(b), "its clearly articulated intent was to sever the plaintiffs pursuant to Rule 21" because it "explicitly state[d]" that the judgment from each of four separate trials "shall be final and appealable." 351 F.3d at 560 (further noting that "this is not a case where the district court's intentions were ambiguous"). Likewise, the Third Circuit has explained that, while a district court need not "explicitly invoke[]" Rule 21, there "must be . . . a strong indication that the judge intended to effect a severance." *White v. ABCO Engineering*

Corp., 199 F.3d 140, 145 n.6 (3d Cir. 1999). Here, however, the opposite is true—the trial court plainly intended *not* to sever the two phases. *See supra* p. 11.

B. The separation of powers exception to the final-judgment rule does not apply here.

Defendants have not shown that the separation of powers warrants an exception to the final-judgment rule in this case. *See Salerno v. Spectrum Med. Grp.*, 2019 ME 139, ¶ 7, 215 A.3d 804 (party seeking exception to the final judgment rule "has the burden of demonstrating" that the exception applies). This "narrowly construed" doctrine applies "when prompt appellate review is required to prevent judicial interference with apparently legitimate executive department activity and thereby safeguard the separation of powers, and in order to avoid undue [judicial] disruption of administrative process." *Fox Islands Wind Neighbors v. Dep't of Env't Prot.*, 2015 ME 53, ¶ 9, 116 A.3d 940 (alteration in original) (citation omitted). This exception "should be deemed to justify appellate review of an interlocutory order" only in "a rare case." *Forest Ecology Network v. Land Use Regul. Comm'n*, 2012 ME 36, ¶ 23, 39 A.3d 743.

Here, Defendants do not explain how the trial court's order will interfere with executive activities. Defendants argue that the trial court violated the separation of powers by issuing an injunction requiring Defendants to provide continuous representation of counsel, and by further directing Defendants to provide certain limited information to facilitate resolution of the Count III habeas claim. Opening

Br. 31-32. But the trial court's injunction was limited to just that—directing the MCPDS Defendants to comply with the constitution and do what they are expressly charged by statute with doing. While the trial court identified certain steps Defendants *could* take to alleviate the representation crisis, the court took pains "to emphasize *it is not ordering MCPDS to take any of those steps*." J.A.113 (emphasis added). Rather, it "is completely up to [the MCPDS Defendants] to decide how they intend to come into compliance with the Sixth Amendment." J.A.113-14. Against that backdrop, Defendants make no attempt to explain how an order broadly requiring an agency to comply with the Constitution and their statutory obligations will somehow lead to "undue [judicial] disruption of administrative process." *Forest Ecology*, 2012 ME 36, ¶ 18, 39 A.3d 74 (alteration in original) (citation omitted). Defendants have therefore failed to meet their burden to show that this exception applies.

II. The trial court correctly determined that the MCPDS Defendants have violated Subclass members' right to counsel under the Sixth Amendment.

The Sixth and Fourteenth Amendments provide Subclass members the fundamental right to "the aid of counsel in a criminal prosecution." *Gideon*, 372 U.S. at 343. The parties agree on many of the principles governing that right. Defendants acknowledge that the right to counsel attaches "at or after the time that judicial proceedings have been initiated against [the defendant] 'whether by way of formal

charge, preliminary hearing, indictment, information or arraignment.'" *Brewer v. Williams*, 430 U.S. 387, 398 (1997) (quoting *Kibry v. Illinois*, 406 U.S. 682, 689 (1972)); *see also* Opening Br. 39. Once the right attaches, Subclass members are guaranteed counsel "during any 'critical stage' of the postattachment proceedings." *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 212 (2008); *see also* Opening Br. 39. And "to allow for adequate representation at any critical stage before trial, as well at trial itself," Defendants likewise recognize that "counsel must be appointed within a reasonable time after attachment." *Rothgery*, 554 U.S. at 212; *see also* Opening Br. 39. In other words, "[t]he Sixth Amendment requires not just that counsel show up on the day of a critical stage but prepare for it too." *Betschart v. Oregon*, 103 F.4th 607, 620 (9th Cir. 2024).

Applying these principles, the trial court granted Plaintiffs partial summary judgment as to liability on Count I after "conclud[ing] that Subclass members have been deprived of continuous representation after the right to counsel attaches as required in Maine by the Sixth Amendment," and further that "counsel is not being provided at critical stages as also required by the Sixth Amendment." J.A.149; *see also supra* p. 6. The court also emphasized that Maine Rule of Criminal Procedure 44 requires that counsel be provided "*at every stage of the proceeding*" for an indigent defendant who elects to proceed with counsel. M.R.U. Crim. P. 44(a)(1) (emphasis added); *see also* M.R.U. Crim. P. 5(e) (requiring appointment of counsel

"not later than the time of initial appearance"). These rules are "unambiguous" and "have the force of law." *Peterson v. Johnson*, No. SJC-23-2, at 14 (Me. Jan. 12, 2024) (Douglas, J.) (citations omitted). Maine thus "complies with the demands of the Sixth Amendment under the United States Constitution *through* Rule 44." J.A.153; *see State v. Smith*, 677 A.2d 1058, 1060 (Me. 1996) (holding that Rule 44 "implements the constitutional right to counsel in a criminal proceeding").

In so holding, the trial court rejected the MCPDS Defendants' argument that "unrepresented indigent defendants in Maine—even those who are being held in jails waiting assignment of counsel—are simply not entitled under the Sixth Amendment to representation except at certain discrete court proceedings which they insist are the only 'critical stages' that constitutionally matter." J.A.155. At summary judgment, Defendants' list of proceedings at which it agreed counsel are necessary included "the probable cause determination (but not the bail hearing) that occurs at the initial appearance or arraignment; the dispositional conference itself; and trial proceedings." *Id.* The trial court disagreed with this "very limited view of what [the MCPDS Defendants] owe indigent defendants in Maine under the Sixth Amendment." *Id.* Rather, indigent defendants in Maine are entitled to continuous representation once the right to counsel attaches at their initial appearance or arraignment. *Id*.

Defendants' view of the Sixth Amendment has grown only narrower on appeal. Defendants now argue that "to prevail and maintain their putative class status, Plaintiffs were required to prove that a named Plaintiff was unrepresented at a critical stage," which Defendants identify as the dispositional conference at the earliest—and not, apparently, the probable cause determination. Opening Br. 49. At bottom, Defendants' view is that, in "Maine's criminal process, the first 'critical stage' is the dispositional conference." *Id.* at 36.

Defendants' argument fails both factually and legally. First, the trial court correctly determined that the Sixth Amendment requires representation well ahead of the dispositional conference, in particular during (1) the general pretrial stage (including pretrial investigations), (2) bail hearings, and (3) plea bargaining negotiations. Second, Plaintiffs satisfied even Defendants' erroneous standard: The undisputed evidence shows that Subclass members had dispositional conferences without counsel, and many more Subclass members (including a class representative) were not appointed counsel until shortly before their dispositional conferences.

A. The Sixth Amendment requires counsel during the pretrial stage ahead of a dispositional conference.

A criminal defendant, regardless of his means, is entitled to "the guiding hand of counsel at every step in the proceedings against him." *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963). This guarantee "cannot be satisfied by mere formal

appointment." *Cronic*, 466 U.S. at 654-55. Rather, counsel must "be appointed within a reasonable time . . . to allow for adequate representation at any critical stage before trial, as well as at trial itself." *Rothgery*, 554 U.S. at 212. The Sixth Amendment thus requires both that counsel be present at all critical stages, and that counsel be appointed with sufficient time to prepare for and progress to all critical stages. *Id.*; *see also Betschart*, 103 F.4th at 620. Because the right to counsel protects "not [only] the fairness or reliability of the trial but the fairness and regularity of the processes that preceded it," many of these critical stages occur prior to trial. *Lafler v. Cooper*, 566 U.S. 156, 169 (2012). It is during these "earlier, 'critical' stages in the criminal justice process 'where the results might well settle the accused's fate and reduce the trial itself to a mere formality.'" *Maine v. Moulton*, 474 U.S. 159, 170 (1985) (quoting *United States v. Wade*, 388 U.S. 218, 224 (1967)).

The U.S. Supreme Court has provided a set of guiding principles for evaluating whether a particular stage is critical. A critical stage occurs when the accused "cannot be presumed to make critical decisions without counsel's advice." *Lafler*, 566 U.S. at 165. Thus, the relevant question is whether, during the stage at issue, "the accused required aid in coping with legal problems or assistance in meeting his adversary." *United States v. Ash*, 413 U.S. 300, 313 (1973).

Applying these principles, the trial court correctly concluded that, by subjecting hundreds of Subclass members to indefinite delays in appointment of

counsel, Defendants have forced Subclass members to endure structural violations of their Sixth Amendment right to counsel ahead of the dispositional conference—in particular, during the critical stages of pretrial investigation, plea negotiations, and bail hearings. Defendants' opening brief on appeal does not actually provide *any* argument to the contrary. Defendants assert that the earliest "critical stage" does not occur until the dispositional conference, but they make no attempt to engage with the trial court's detailed analysis of the earlier stages. Defendants' theory that the earliest "critical stage" does not occur until a dispositional conference cannot be squared with the Supreme Court's repeated application of the "critical stage" doctrine.

1. The pretrial period—including pretrial investigation—is a critical stage.

"[P]erhaps the most critical period" of a criminal case is "from the time of [defendants'] arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation [are] vitally important." *Powell v. Alabama*, 287 U.S. 45, 57 (1932). The U.S. Supreme Court and state supreme courts have emphasized time and again "[t]he 'vital' need for a lawyer's advice and aid during the pretrial phase." *Estelle v. Smith*, 451 U.S. 454, 469 (1981); *see also Moulton*, 474 U.S. at 170 (reaffirming that "to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself."); *Hurrell-Harring v. State*, 15 N.Y.3d 8, 21-22, 930 N.E.2d 217, 224 (N.Y.

2010) ("Also 'critical' for Sixth Amendment purposes is the period between arraignment and trial when a case must be factually developed and researched, decisions respecting grand jury testimony made, plea negotiations conducted, and pretrial motions filed."); *Lavallee v. Justs. in Hampden Superior Ct.*, 442 Mass. 228, 812 N.E.2d 895, 903-04 (Mass. 2004) (holding that "the importance of prompt pretrial preparation cannot be overstated" and recounting the "myriad responsibilities" that counsel must undertake early in pretrial investigation). As the trial court explained, the "pretrial period is a critical stage *because* it is when the defendant's counsel is preparing to try the case." J.A.159.

Members of the Subclass need the assistance of counsel to meaningfully conduct pretrial investigations. J.A.158-163. The investigations stage of a case includes obtaining and analyzing discovery, interviewing witnesses, hiring investigators, retaining experts, preserving evidence, conducting legal research, and identifying potential defenses, alibis, or mitigating factors. *Id.* If investigations do not begin promptly after initial appearance, witnesses' memories may fade, alleged crime scenes may be altered or destroyed, and evidence may be lost or erased. *Id.* All of these delays risk irreparable harm in a criminal defendant's case.

That is particularly true in Maine. Because Maine's Rules of Criminal Procedure impose uniquely quick timelines, the beginning of a case is critical. Unlike in many jurisdictions, the initial appearance in Maine is not merely a

probable-cause hearing. Instead, unrepresented defendants charged with misdemeanors are required to enter a plea—and prosecutors are permitted to convey written plea offers to unrepresented defendants charged with felony offenses. M.R.U. Crim. P. 5(d); 15 M.R.S. § 815(2)(C). As a result, "the work that must occur to reach a plea or to explore cooperating with the government begins as soon as the State initiates adversary judicial criminal proceedings." *State v. Lerman*, No. ANDCD-CR-2024-451, Unified Criminal Docket, at 11 (Lewiston Dist. Ct. June 13, 2024). In addition, Maine rules permit the prosecution to demand at any time that the defendant serve notice of any alibi defense they intend to rely on, and if the defendant fails to serve that notice within just seven days of the demand they risk losing the defense. M.R.U. Crim. 16A(b)(3). A defendant who is served with an early demand for an alibi defense and does not quickly respond could lose that defense altogether. Unrepresented defendants are also expected to make bail arguments at their regular seven-day review hearings. *See* Standing Order on Initial Assignment of Counsel (Nov. 3, 2023); 15 M.R.S. §§ 1028, 1028-A. Finally, as discussed below, *see infra* pp. 36–39, under Maine's Rules of Criminal Procedure the dispositional conference triggers a series of deadlines that require counsel to begin investigation well in advance of the scheduled conference itself.

Reflecting this timeline, MCPDS's own Standards of Practice outline a series of steps that defense counsel should undertake in the initial days of a case,

particularly with respect to pre-trial investigations. For example, counsel should meet and interview in-custody clients within seven days to obtain information "necessary to provide quality representation at the early stages of the case." MCILS Standards of Practice for Attorneys Who Represent Adults in Criminal Proceedings, 94-649, Ch. 102, at 3-5.[5] Even before that initial interview, counsel should be familiar with the elements of the charged offense and should obtain charging documents and law enforcement reports. *Id*. In an initial in-depth interview, counsel should obtain any information relevant to pretrial release and verify that information wherever possible. *Id*. at 6-7. And counsel should conduct an independent case review "as promptly as possible," which requires (among other things) that counsel decide whether to interview witnesses, secure information in the possession of the prosecution, "make a prompt request" for physical evidence or expert reports, and view the scene of the offense when appropriate. *Id*. at 7-9.

Testimony from the MCPDS Defendants confirms that it is critical for defense counsel to start work as soon as possible on pretrial investigation, plea negotiation, and bail advocacy. The trial court credited and relied on the testimony of MCPDS Commissioner Soucy that "evidence is lost when there are delays, memories fade, tapes are destroyed, opportunities are lost because of the timeline imposed by the

[5] *Available at* https://www.maine.gov/pds/sites/maine.gov.pds/files/inline-files/Chapter%202.pdf.

court." J.A.106 (cleaned up). The court likewise credited and relied on the testimony of Commission Chair Tardy that it is crucial for people to have counsel at bail hearings because of the substantive rights at stake in those hearings. *Id.* The same was true with respect to Commission Executive Director Billings: the court relied on his testimony that unrepresented defendants are "unable to meaningfully participate in plea negotiations without the assistance of counsel." J.A.107. Finally, the court heavily relied on the testimony of Defendants' own expert, District Defender Tarpinian, who explained that it is critical to address any discovery issues early in a case, and further that only an attorney will be able to do so. *Id.*

As the trial court recognized, these tasks are crucial not just for compliance with the Maine Rules of Criminal Procedure, but with the United States Constitution as well. Indeed, "[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he might have." *Cronic*, 466 U.S. at 654. The trial court thus emphasized that "[s]ubstantial federal constitutional rights are also implicated in the early stages of the criminal process"—rights that "can be at serious risk if indigent defendants must confront the State alone, without the assistance of counsel." J.A.160. To take one example, a lawyer is necessary to ensure that the State fulfills its obligation "to provide exculpatory evidence to criminal defendants as part of the discovery process." J.A.159. "Presumably the Defendants are not suggesting that

unrepresented defendants are expected to understand the rights they have to disclosure of exculpatory evidence, much less how to enforce those rights . . . if their access to Maine courts is hobbled by their lack of representation." *Id.* (further explaining that the Maine Rules "lay out a process for how defense counsel may seek redress from the court on their client's behalf if the State is falling short in meeting its discovery obligations"). Absent representation during this pretrial period, it "would be close to impossible for an unrepresented defendant to understand these processes, much less to productively access a court for redress of important federal constitutional rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments." *Id.* at 23.

2. Plea bargaining is a critical stage.

The trial court also properly concluded that plea bargaining is a critical stage. J.A.163. "[T]he right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences." *Lafler*, 566 U.S. at 169-70; *see also Missouri v. Frye*, 566 U.S. 134, 144 (2012) ("[T]he negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant."). The Supreme Court has thus "long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Padilla v. Kentucky*, 559 U.S. 356, 373

(2010); *see also White v. Maryland*, 373 U.S. 59, 60 (1963) (recognizing the same for entry of a plea).

The Subclass is being deprived of counsel during this critical plea-bargaining phase. Although plea bargaining often culminates at the dispositional conference, plea negotiations begin long before that, at the initial appearance. *See supra* pp. 21–23. Defendants charged with misdemeanors are required to enter a plea at initial appearance, and prosecutors are permitted to convey written plea offers to unrepresented defendants charged with felony offenses. M.R.U. Crim. P. 5(d); 15 M.R.S. § 815(2)(C). Thus, under Maine's unique procedures, "the work that must occur to reach a plea or to explore cooperating with the government begins as soon as the State initiates adversary judicial criminal proceedings." *State v. Lerman*, No. ANDCD-CR-2024-451, Unified Criminal Docket, at 11 (Lewiston Dist. Ct. June 13, 2024).

Subclass members need counsel's assistance to meaningfully participate in plea negotiations. J.A.163-65. And defense counsel cannot effectively advise their client on a plea offer unless they have conducted an appropriate investigation and analyzed the risks of proceeding to trial. J.A.158-65. Delay in the appointment of counsel increases pressure on Subclass members to plead guilty without adequately understanding the consequences of their plea, because there is no attorney to review

discovery with them, explain the charges, investigate the case, research the applicable law, and counsel the defendant about other options.

The lack of counsel also risks permanent loss of the opportunity for early cooperation with the government. *Premo v. Moore*, 562 U.S. 115, 126 (2011). And delays mean that unrepresented defendants may lose the opportunity to take advantage of a more favorable plea deal—while also giving "the State time to uncover additional incriminating evidence that could . . . form[] the basis of" more significant charges. *Id.* at 126.

Finally, the plea-bargaining stage is particularly important because, as the trial court recognized, in "Maine's current criminal justice system and throughout the United States, it is beyond dispute that almost all criminal cases are resolved short of trial." J.A.163. "And given the enormous pressures faced by trial courts in Maine to resolve cases, it is difficult to overstate the critical role played by counsel in ensuring that any guilty plea is made knowingly and intelligently." *Id.*

3. The bail hearing is a critical stage.

The trial court correctly held that the bail hearing is a critical stage. J.A.165-67. In *Coleman v. Alabama*, the Supreme Court held that preliminary hearings are a critical stage in part because of the early opportunity to argue "on such matters as the necessity for . . . bail." 399 U.S. 1, 9 (1970). Since then, the vast weight of authority has held that bail hearings are a critical stage. *See, e.g., Higazy v.*

Templeton, 505 F.3d 161, 172 (2d Cir. 2007) ("a bail hearing is a critical stage of the State's criminal process"); *Smith v. Lockhart*, 923 F.2d 1314, 1319 (8th Cir. 1991) (hearing on bail reduction motion was a critical stage of proceeding requiring representation by counsel); *Betschart*, 103 F.4th at 623 (affirming district court's ruling that bail hearings are a critical stage of proceedings); *Hurrell-Harring*, 930 N.E.2d at 223 ("[t]here is no question that a bail hearing is a critical stage of the [s]tate's criminal process"); *Lerman*, No. ANDCD-CR-2024-451, at 11-12 (holding that, in Maine, the period during which a defendant can exercise the right to de novo bail review is a critical stage). These cases reflect a consensus that "[t]here can really be no question that an initial bail hearing should be considered a critical stage of trial." *Booth v. Galveston Cnty.*, 352 F. Supp. 3d 718, 738 (S.D. Tex. 2019).

As the trial court found, a person's "most basic right—his freedom from incarceration—hangs in the balance at a bail hearing." J.A.166. In particular, the "possibility of pretrial detention, and counsel's ability to advocate to protect the liberty of a defendant who is presumed innocent, makes a bail hearing a critical stage." J.A.167. Delays in appointment of counsel compromise the ability of Subclass members to make arguments about bail and conditions of release. J.A.165-67. Without effective assistance of counsel, indigent defendants risk erroneous detention or excessive conditions of release, which can put the defendant at a significant disadvantage. *Id.* As empirical evidence demonstrates, case outcomes for

defendants detained pre-trial are far worse—in terms of both increased likelihood of conviction and harsher sentences—than for those released pending trial. *See, e.g.*, Douglas L. Colbert *et al.*, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 Cardozo L. Rev. 1719, 1720 (2002); *see also* J.A.105-07, 163-65. Indigent defendants also risk waiving defenses or incriminating themselves during bail hearings. *Id.* Thus, while there is "potential substantial prejudice to defendant's rights" during a bail hearing, counsel will "help avoid that prejudice." J.A.167 (quoting *Coleman*, 399 U.S. at 9).

4. Defendants misunderstand the critical stage analysis.

Defendants are wrong that the right to counsel is satisfied so long as Subclass members have lawyers at their dispositional conference. Opening Br. 36-38. As a threshold matter, Defendants all but ignore that the right to counsel requires not only the *presence* of counsel at a critical stage, but also the appointment of counsel within a reasonable time after initial appearance so that counsel can *prepare for* and *progress to* critical stages. *Rothgery*, 554 U.S. at 212; *Betschart*, 103 F.4th at 620 ("The Sixth Amendment requires not just that counsel show up on the day of a critical stage but prepare for it too."). As the Supreme Court has recognized, "a defendant subject to accusation after initial appearance is headed for trial and needs to get a lawyer working, whether to attempt to avoid that trial or to be ready with a defense when the trial date arrives." *Rothgery*, 554 U.S. at 210. Defendants'

argument "that counsel's pretrial duty to appear at critical stages encompasses only presence and not preparation" is "fundamentally incompatible" with "decades of precedent." *Betschart*, 103 F.4th at 621.

Notwithstanding this caselaw, Defendants assert that a "critical stage" occurs only when there is a "risk of irremediable loss of a right affecting the fairness of trial." Opening Br. 41. Defendants do not identify any case adopting this standard, and their articulation of the rule cannot be squared with Supreme Court's broader interpretation of the "critical stage" requirement. *See supra* pp. 17–19. As the trial court explained, "Defendants' argument that the critical stages are only those stages at which a defendant's rights *at trial* may be prejudiced by denial of counsel ignores more recent Supreme Court precedent explicitly rejecting this view." J.A.157. In particular, in *Lafler* the Supreme Court declined to adopt the argument that "[e]rrors before trial . . . are not cognizable under the Sixth Amendment unless they affect the fairness of the trial itself." 566 U.S. at 164. Rather, the Supreme Court explained that the Sixth Amendment "is not so narrow in its reach," and its 'protections are not designed simply to protect the trial." *Id.*; *see also Betschart*, 103 F.4th a 621 (recognizing that the Sixth Amendment guarantees an "ongoing right that persists throughout trial court proceedings"). Notably, Defendants' imagined standard would let them off the hook for even months- or years-long delays in providing counsel on the off-chance that some highly skilled attorney might swoop in later and obtain a

favorable result at trial. Defendants' "myopic view that the Sixth Amendment is a scattershot right—not a consistent and ongoing one—ignores decades of controlling precedent and effectively erases the Sixth Amendment from the Constitution." *Betschart*, 103 F.4th at 622.

Defendants have *no* support for their claim that the Sixth Amendment is satisfied as long as counsel is provided at the dispositional conference. *See* Opening Br. 39. To start, the single-justice decision in *Peterson v. Johnson*, Docket No. SJC-23-2 (Jan. 12, 2024) (Douglas, J.), provides Defendants no help. Defendants describe *Peterson* as "conclud[ing] that the dispositional conference … [is] the earliest 'critical stage' in a criminal prosecution in Maine." Opening Br. 45. *Peterson* said no such thing. J.A.164. Rather, *Peterson* explained that "*[a]t a minimum*," "the Sixth Amendment requires assignment of counsel *sufficiently in advance* of a dispositional conference to be able to provide effective representation in connection with the conference, as well as related matters." *Peterson*, at 21 (emphasis added). *Peterson* thus recognized that there may be earlier critical stages—and that counsel also must be appointed far enough ahead of the dispositional conference to have sufficient time to prepare for it. *Id*. at 21 & n.16; *see also Betschart*, 103 F.4th at 619 (finding Sixth Amendment violation because petitioners could not "prepare for, or progress to critical stages"); *see also infra* pp. 36–39. *Peterson* provides zero support for Defendants' view that the Sixth Amendment is satisfied as long as indigent

defendants have a lawyer stand beside them by the time of their eventual (often long-delayed) dispositional conference.

In addition, because *Peterson* was an *individual* habeas action, the single Justice was evaluating the particular facts of that case, rather than systemic, structural Sixth Amendment violations. The *Peterson* opinion thus did not address the key arguments and evidence presented by the Subclass here. Instead, the single Justice determined that he was "not able to make a final assessment" of whether the petitioners' Sixth Amendment rights were violated. *Peterson*, at 21. *Peterson* does nothing to undercut the Subclass's argument here, based on a significant factual record and settled precedent, that they are being denied counsel for the critical stages of pretrial investigation, plea negotiations, bail hearings, and dispositional conferences.

Defendants' other cited authority does not support its position. In *Nadeau v. State*, this Court recognized that arraignment is a critical stage because "issues are framed for trial," "certain defenses must be raised or forever lost," and "any attack upon the composition of the grand jury must be launched." 232 A.2d 82, 85-86 (Me. 1967). All of that takes place well ahead of the dispositional conference. If anything, *Nadeau* confirms that Defendants are framing the critical stage analysis far too narrowly. Defendants also cite to the Sixth Circuit's statement in *Van v. Jones*, that "*many* of the stages found to be critical are those in which an opportunity may be

irretrievably lost, or material may come out that may be incurably damaging." 475 F.3d 292, 314-15 (6th Cir. 2007) (emphasis added). To start, the fact that "many" critical stages match this description reflects that the Sixth Circuit did not hold that *all* do. To the contrary, the Sixth Circuit explained that, "[i]n order to assess if a given portion of a criminal proceeding is a critical stage, we must ask how likely it is that significant consequences might have resulted from the absence of counsel at the stage of the criminal proceeding." *Id.* at 313. As explained at length above, pretrial investigations, plea bargaining, and bail hearings all present the risk that "significant consequences" might result from the absence of counsel. *See supra* Sections II.1–3.

Finally, it bears emphasis that—as Defendants acknowledge (Opening Br. 40)—the Sixth Amendment violation is complete once Subclass members are denied counsel at any critical stage. Because prejudice must be presumed following a "complete denial of counsel," Subclass members need not show that the denial of counsel prejudiced the outcome of their individual criminal proceedings. *Cronic*, 466 U.S. at 659; *see also Gideon*, 372 U.S. at 344-45. While a *represented* indigent defendant making a post-conviction claim for ineffective assistance bears the burden to show that his assigned counsel impaired his ability to receive a fair trial, the same is not true for an indigent defendant who does not have counsel at all. *Cronic*, 466 U.S. at 659. The complete failure to provide counsel is "so likely to prejudice the

accused that the cost of litigating [its] effect in a particular case is unjustified." *Id.* at 658. Applying these principles, the Supreme Court "has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *Id.* at 659 n.25 (citing cases).

B. Plaintiffs have satisfied even Defendants' erroneous standard.

Even if Defendants were right on the law that only the dispositional conference counts—they are not—Plaintiffs have shown that some Subclass members were unrepresented at dispositional conferences; other Subclass members—including at least one class representative—were not appointed counsel in sufficient time to prepare for a dispositional conference; and still others had their dispositional conferences postponed precisely because they lacked representation. These Subclass members all show that Plaintiffs are entitled to summary judgment even under Defendants' cramped reading of the Sixth Amendment. Defendants have waived any argument to the contrary.

1. <u>The evidence establishes that Subclass members have appeared at dispositional conferences without representation.</u>

Undisputed court docket records and testimony from MCPDS officials establish that Subclass members have appeared unrepresented at dispositional conferences. Taking a snapshot in time between September and October 2024, docket records show that at least 60 Subclass members still had not been appointed

counsel at the time of their scheduled dispositional conference. J.A.343; J.A.168-69 (finding PSMF ¶¶ 124-126 (J.A.343-44) undisputed).[6] The docket records further show that, for several Subclass members, the court went forward and held the conference anyway—meaning Subclass members appeared without representation at dispositional conferences. J.A.343-44; J.A.168. In several of those cases, the defendant then entered a guilty plea at the dispositional conference. *Id.*

Having reviewed this evidence, the trial court correctly concluded that, "[e]ven when taken in the light most favorable to the Defendants … the undisputed facts established in the Plaintiffs' Statement of Material Facts establish that no representation is being provided by the MCPDS Defendants from the time of first appearance to the dispositional conference for a number of Plaintiffs." J.A.171. And "[m]any criminal defendants still do not have counsel at the time of their scheduled dispositional conference (Supp.'g S.M.F. ¶ 124); some proceeded through their dispositional conference without counsel (*Id.* ¶ 125); and others' cases were postponed indefinitely until counsel could be appointed (*Id.* ¶ 126)." J.A.171-72. As the trial court recognized, "[t]his is certainly not continuous representation, and it is not representation at the critical stages identified by the Court as legally required

[6] This list was based on a limited sampling of the docket records Plaintiffs were able to obtain for current Subclass members; it does not purport to be a comprehensive list of all Subclass members who were unrepresented at the time of their scheduled dispositional conference.

such that representation must be provided between the first appearance and the dispositional conference." J.A.172.

Defendants have waived any response to this conclusion. Defendants' *only* attempt to address the factual record is their assertion that "Plaintiffs' failure to meet" the proposed "critical stage" standard is "evidenced in the argument and material facts at issue in MCPDS's Motion for Summary Judgment, J.A.283-300." Opening Br. 49. Notably, their record cite (J.A.283-300) is simply their *entire* summary judgment brief, cover-to-cover. Defendants simply ignore the trial court's express finding that it was undisputed that some Subclass members appeared at dispositional conferences without counsel. J.A.171-72.

An appellant who provides only one sentence of argument in its appellate brief and then points the court to its entire brief below without explaining what the trial court did wrong is simply not engaging with the issue. It is well-established that "[a]n issue that is barely mentioned in a brief is in the same category as an issue not mentioned at all." *Melhorn v. Derby*, 2006 ME 110, 905 A.2d 290. Thus, "issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *York Hosp. v. Dep't of Health & Hum. Servs.*, 2008 ME 165 ¶ 29, 959 A.2d 67; *see also United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) (on appeal, a party must "spell out its arguments squarely and distinctly"). Relying on incorporation by reference is not a solution. *See Monsanto*

Co. v. Scruggs, 459 F.3d 1328, 1335, 1341 (Fed. Cir. 2006) (arguments made "by incorporation, such as by referring to" district court briefing, are "deemed waived"); *JP Morgan Chase Bank v. Altos Hornos de Mexico*, 412 F.3d 418, 428 (2d Cir. 2005) ("arguments not made in an appellant's opening brief are waived even if the appellant pursued those arguments in the district court").

Given Defendants' failure to address the summary judgment record and the trial court's conclusion in their opening brief, they cannot later do so on reply. *See Lincoln v. Burbank*, 2016 ME 138, ¶ 41, 147 A.3d 1165 ("We have repeatedly held, with a regularity bordering on the monotonous, that arguments not raised in an opening brief are waived." (quoting *Young v. Wells Fargo Bank, N.A.*, 717 F.3d 224, 239 (1st Cir. 2013))). Thus, Defendants' failure to argue the actual merits at all means they have conceded this aspect of the case.

2. Many more Subclass members (including a named representative) have not been appointed counsel with sufficient time to prepare for their dispositional conference.

Defendants acknowledge that if the dispositional conference is the first critical stage, Subclass members are still entitled to counsel ahead of that event. As they recognize, "[a]t a minimum … the Sixth Amendment requires assignment of counsel sufficiently in advance of a dispositional conference to be able to provide effective representation in connection with the conference as well as related matters." Opening Br. 45 (quoting *Peterson*, at 21). Thus, Defendants do not dispute that

counsel must not only be present at the dispositional conference itself, but must also be appointed early enough to prepare for the dispositional conference and "related matters." *Id*.

As the trial court found, under Maine's Rules of Criminal Procedure the dispositional conference triggers a series of deadlines that require assistance of counsel weeks before the scheduled conference itself. J.A.161-63. At least 14 days before the dispositional conference, the defendant must serve his designation of any expert witnesses, and must allow the State to view any evidence defendant intends to use at trial—both tasks that require substantial advance preparation. M.R.U. Crim. P. 16A(b)(1). And at least seven days before the dispositional conference, motions to dismiss, motions regarding joinder or severability, defense motions seeking discovery, motions to suppress evidence, and other motions related to admissibility of evidence all must be served, *see* Rule 12(b)(3)(A), along with a defendant's notice of intent to introduce expert testimony as to the defendant's mental state, *see* Rule 16A(a). Finally, the defendant "must be prepared" at the dispositional conference "to engage in meaningful discussion regarding all aspects of the case with a view toward reaching an appropriate resolution." M.R.U. Crim. P. 18(b).

Counsel cannot prepare for or meet any of these deadlines if they are appointed shortly before the dispositional conference. J.A.158-63. Among other tasks, counsel needs time to thoroughly analyze discovery, identify and address

missing discovery, understand and consult on any immigration consequences, and identify and prepare pretrial motions. J.A.163. Counsel must also draft pretrial motions—which, as the trial court found, are "potentially dispositive." J.A.161. And counsel must speak with the prosecution about potential plea deals ahead of the dispositional conference. J.A.164-65. Defendants do not dispute any of this. Opening Br. 43-46. Rather, they acknowledge that pretrial motions are "significant pretrial events" that are "timed to the date of the dispositional conference," and further that counsel must "be prepared to engage in meaningful discussion regarding all aspects of the case" at the dispositional conference. *Id.* at 46.

Here, many Subclass members had no counsel just weeks before their scheduled dispositional conference—including named Class Representative Clifford Neville. J.A.343-44. After being unrepresented for seven weeks following his initial appearance, Neville was appointed counsel on June 21 and then pled guilty to felony charges on the date of his scheduled dispositional conference just 17 days later, on July 8, 2024. *Id*. This short window of time was insufficient to ensure that Neville's counsel could not only "show up" on the day of the dispositional conference, but "prepare for it too." *Betschart*, 103 F.4th at 620; *supra* pp. 21–23, 37. Again, Defendants provide no argument to the contrary on appeal. Defendants have therefore waived any response. *See supra* pp. 35–36.

Finally, in dozens of other cases in which Subclass members remained unrepresented on the day of their scheduled dispositional conference, the court postponed the conference to a later date, sometimes delaying the conference repeatedly over several months due to lack of counsel. J.A.168. Defendants get it exactly "backwards" in arguing there is no constitutional violation because many Subclass members are not attending dispositional conferences and other critical stage hearings without counsel. *See Betschart v. Garrett*, 700 F. Supp. 3d 965, 983 (D. Or. 2023). The reason many Subclass members are not having dispositional conferences and other important court hearings is *because* they do not have a lawyer, and so courts are delaying these important hearings and preventing Subclass members from progressing to later critical stages. J.A.344. This delay demonstrates a Sixth Amendment violation, it does not excuse it.

3. Defendants' typicality argument is wrong and would not require reversal regardless.

While Defendants' argument fails regardless, Defendants are wrong that Plaintiffs can prevail only if they identify a *named* Subclass representative who has participated in a dispositional conference without counsel. Defendants' argument rests on a misreading of the Idaho Supreme Court's decision in *Tucker* and conflates class certification with liability.

In two separate decisions, the Idaho Supreme Court ruled *in favor* of the appellees asserting class action claims for systemic Sixth Amendment violations.

Tucker v. State, 394 P.3d 54, 62 (Idaho 2017) ("*Tucker I*"); *Tucker v. State*, 484 P.3d 851, 863 (Idaho 2021) ("*Tucker II*"). In so doing, the court rejected Idaho's argument that the appellees must prove "individual harm to unnamed class members" across the state, and instead held that to show standing in a class action, the appellees needed to prove only "allegations of harm by at least one named plaintiff" and a "likelihood of future systemic harm" to the class. *Tucker II*, 484 P.3d at 864-865.

There is no standing or typicality defect with the class here. The three Phase I Class Representatives each went unrepresented for six weeks or more after their initial appearance. Class Representative Williams remained without counsel for 14 weeks after the court granted prior counsel's withdrawal motion (March 21 until July 3); Class Representative Neville remained without counsel for seven weeks after his initial appearance (April 29 until June 21); and Class Representative Buck remained without counsel for six weeks after his initial appearance (April 16 until May 31). J.A.319-20. Neville and Williams both attended seven-day review hearings without appointed counsel, and courts found Sixth Amendment violations in both of their cases. J.A.319. Because of the delays in appointment of counsel, the three Class Representatives (1) were not appointed counsel within a reasonable time; and were deprived of counsel during the critical phases of (2) pretrial investigation, (3) plea negotiations, and (4) bail hearings, all in violation of the Sixth Amendment. All three Class Representatives fall squarely within the certified Subclass definition, and all

three have experienced precisely the kind of unconstitutional delay in appointment of counsel that is experienced by the Subclass as a whole.

Even if there were a typicality defect, it would be a problem with the class representatives—not with Plaintiffs' underlying legal theory. Thus, the proper remedy would be to provide Plaintiffs an opportunity to find a new class representative, rather than to reverse the trial court's legal reasoning. *See Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1278 (11th Cir. 2000) (explaining that a standing challenge to a class representative "does not end the case," and "at worst several new named representatives would have to be added to the class").

CONCLUSION

After a painstaking review of the caselaw and the record, the trial court correctly concluded that the MCPDS Defendants had violated the Sixth Amendment by failing to provide counsel at critical stages of pretrial proceedings. The MCPDS Defendants have provided no legal or factual basis for disturbing that decision on appeal. For the foregoing reasons, the decision of the trial court should be affirmed.

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Respectfully submitted.

s/ Carol Garvan
Carol Garvan
Maine Bar No. 4448
cgarvan@aclumaine.org

/s/ Zachary L. Heiden
Zachary L. Heiden
Maine Bar No. 9476
zheiden@aclumaine.org

/s/ Anahita D. Sotoohi
Anahita D. Sotoohi
Maine Bar No. 10120
asotoohi@aclumaine.org

ACLU OF MAINE FOUNDATION
PO Box 7860
Portland, Maine 04112
(207) 619-6224

/s/Kevin P. Martin
Kevin P. Martin
motion for pro hac vice admission pending
kmartin@goodwinlaw.com

/s/ Jordan Bock
Jordan Bock
motion for pro hac vice admission pending
jbock@goodwinlaw.com

/s/Samantha Jandl
Samantha Jandl
motion for pro hac vice admission pending
sjandl@goodwinlaw.com

/s/Andi Goodman
Andi Goodman
motion for pro hac vice admission pending
andigoodman@goodwinlaw.com

GOODWIN PROCTER LLP
100 Northern Avenue
Boston, Massachusetts 02210
(617) 570-1000

/s/ Matt Warner
Matt Warner
Maine Bar No. 4823
mwarner@preti.com

/s/ Alex Harriman
Alex Harriman
Maine Bar No. 6172
aharriman@preti.com

PRETI, FLAHERTY,
BELIVEAU & PACHIOS, LLP
1 City Center
Portland, Maine 04101
(207) 791-3000

Attorneys for Appellees Andrew Robbins et al.

CERTIFICATE OF SERVICE

I certify that on August 22, 2025, I served the foregoing document, Brief of Appellees in Response to Appellant Maine Commission on Public Defense Services, upon counsel for Defendants by electronically transmitting a copy of the document to:

Assistant Attorney General Sean Magenis (via email: sean.d.magenis@maine.gov)
Assistant Attorney General Paul Suitter (via email: paul.suitter@maine.gov)
Erica Johanson, Esq. (via email: ejohanson@jensenbaird.com)
Michael Lichtenstein, Esq. (via email: MLichtenstein@wheelerlegal.com)
Peter Marchesi, Esq. (via email: peter@wheelerlegal.com)
John Hamer, Esq. (via email: jhamer@rudmanwinchell.com)
Tyler Smith, Esq. (via email: tsmith@lokllc.com)
Tim O'Brien, Esq. (via email: tobrien@lokllc.com)

/s/ Carol Garvan
Carol Garvan
Maine Bar No. 4448
cgarvan@aclumaine.org

ACLU OF MAINE FOUNDATION
PO Box 7860
Portland, Maine 04112
(207) 619-6224

Attorney for Andrew Robbins, et. al.