STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. KENSC-CV-22-54

ANDREW ROBBINS, et al.,

Plaintiffs,

v.

MAINE COMMISSION ON INDIGENT LEGAL SERVICES, et al.,

Defendants.

**ORDER ON JOINT MOTION FOR PRELIMINARY SETTLEMENT APPROVAL**

## BACKGROUND

In a Joint Motion dated August 21, 2023, Counsel for the parties ask the Court to preliminarily approve a proposed class action settlement, direct notice of the proposed settlement to the class, and schedule a final fairness hearing. Oral argument on the Joint Motion was conducted on August 29, 2023.

Plaintiffs brought a two-count Class Action Complaint for Injunctive and Declaratory Relief on March 1, 2022. A Scheduling Order was issued, and motion practice began almost immediately. On June 2, 2022, the Court granted in part the Defendants' Motion to Dismiss. A Rule 80C claim was dismissed, as the Court found that under Maine law in effect at the time, the Maine Commission on Indigent Legal Services (hereinafter "MCILS") could but was not required to undertake rulemaking. However, the Court held that same date that the 42 U.S.C. § 1983 claim brought by Plaintiffs had sufficiently pled a cause of action, in the light most favorable to them, that the proposed Class Members had been denied counsel, both actually and constructively, because Maine's system is inadequate under Sixth Amendment standards.

The Class was certified on July 13, 2022. Discovery commenced as described in the Joint Motion, but in September 2022, the parties took the Court up on its offer to arrange for a Judicial Settlement Conference. Active Retired Justice Thomas Warren conducted four in-person settlement conferences beginning in December of 2022, and the parties afterward engaged in dozens of negotiation sessions on their own, according to the Joint Motion. The case was temporarily stayed by the Court at the request of the parties in March of 2023 so the parties could focus on the proposed Settlement Agreement (hereinafter, "Agreement") they now wish the Court to preliminarily approve.

## STANDARD OF REVIEW

Rule 23(e) of the Maine Rules of Civil Procedure states that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." M.R. Civ. P. 23(e). The parties appear to agree that the Law Court has not had the occasion to interpret the procedures and standards for approving a class action settlement under this rule. The Court's own research confirms the same. Given the apparent dearth of Law Court case law interpreting this rule, the parties turn to M.R. Civ. P. 23(e)'s federal counterpart and the federal decisions interpreting it. The Court agrees that the federal standard provides useful guidance and thus, federal law informs the Court's analysis under M.R. Civ. P. 23(e). *See McKeeman v. Duchaine*, 2022 ME 23, ¶ 8 n. 2, 272 A.3d 300 ("As we have previously noted, it is appropriate for us to consider case law and commentaries on federal rules of civil procedure that are functionally equivalent to Maine's rules of civil procedure."); *accord Clark v. Goodridge*, 632 A.2d 125, 127 & n.2 (Me. 1993); *Smith v. Tonge*, 377 A.2d 109, 112 (Me. 1977).

At this stage—where the parties request that the Court preliminarily approve the proposed settlement—the Court is asked to decide whether "'it is likely that the court will be able to approve the proposal after notice to the class and a final approval hearing.'" *Anderson v. Team Prior, Inc.*, Docket No. 2:19-cv-00452-NT, 2021 WL 3852720, at *5 (D. Me. Aug. 27, 2021); Fed. R. Civ. P. 23(e)(1)(B). This is an important litigation event and "requires courts to conduct a 'searching,' 'careful,' and 'rigorous' inquiry before preliminarily approving a settlement." *Grenier v. Granite State Credit Union*, No. 21-cv-534-LM, 2023 WL 4931857, at *2 (D.N.H. Aug. 2, 2023); *Rapuano v. Trs. of Dartmouth Coll.*, 334 F.R.D. 637, 642 (D.N.H. Jan. 29, 2020). The decision to preliminarily approve a settlement and direct notice to the class "'should be based on a solid record supporting the conclusion that the proposed settlement will likely earn final approval.'" *Anderson*, 2021 WL 3852720, at *5.

The federal standard for final settlement approval—set forth in Rule 23(e)(2) of the Federal Rules of Civil Procedure—requires a finding that the proposed settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Such an inquiry is necessary to "protect unnamed class members from unjust or unfair settlements affecting their rights when the representatives become fainthearted before the action is adjudicated or are able to secure satisfaction of their individual claims by a compromise." *Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997) (quotation marks omitted). To that end, the Court plays an important role in the approval of a class action settlement, serving as a "protector of the absentees' interests." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig.*, 55 F.3d 768, 784-85, 791 (3d Cir. 1995).

Indeed, a majority of circuits "have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries." *Reynolds v. Beneficial Nat. Bank*, 288 F.3d 277,

280 (7th Cir. 2002); *see also, e.g., Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 22 (2d Cir. 1987) ("In approving a proposed class action settlement, the district court has a fiduciary responsibility to ensure that 'the settlement is fair and not a product of collusion, and that the class members' interests were represented adequately.'"); *In re Cendant Corp. Litigation,* 264 F.3d 201, 231 (3d Cir.2001) ("Under Rule 23(e), the District Court acts as a fiduciary guarding the rights of absent class members and must determine that the proffered settlement is 'fair, reasonable, and adequate.'"); *1988 Tr. for Allen Children Dated 8/8/88 v. Banner Life Ins. Co.*, 28 F.4th 513, 521 (4th Cir. 2022) ("the district court, at all times, remains a fiduciary of the class"); *In re BankAmerica Corp. Sec. Litig.*, 350 F.3d 747, 751 (8th Cir. 2003) ("'Under Rule 23(e) the district court acts as a fiduciary who must serve as guardian of the rights of absent class members.'"); *Allen v. Bedolla*, 787 F.3d 1218, 1223 (9th Cir. 2015) ("the district court has a fiduciary duty to look after the interests of those absent class members").

While the First Circuit Court of Appeals has yet to hold that a judge's responsibility is that of a fiduciary, the Federal District Court for the District of Maine has described its role as such. *E.g., Sparks v. Mills*, 626 F. Supp. 3d 131, 136 (D. Me. 2022) ("'The court's role in reviewing a proposed settlement agreement is effectively that of a fiduciary for the class members, a duty which obtains whether or not there are objectors or opponents to the proposed settlement.'").

The principles outlined above are not at odds with Law Court precedent. In *Pike Indus., Inc. v. City of Westbrook*, the Law Court endorsed the use of a "fair, reasonable, and adequate" standard in the analogous context of approving consent decrees that affect public rights. 2012 ME 78, ¶¶ 20-24, 45 A.3d 707.[1] Moreover, the *Pike* Court was mindful of the public policy

[1] Moreover, on a number of occasions, the Maine Superior Court has applied the "fair, reasonable, and adequate" standard in the class action settlement context. *E.g., Stout v. Anthem Health Plans of Maine*, No. BCD-WB-CV-07-27 (Me. Super. April 3, 2009); *Frank v. PEC*

favoring settlement, but recognized the need for a heightened settlement approval standard in cases where public rights are at stake and where the rights of nonparties are otherwise implicated. *Id.* ¶¶ 22-24. Specifically, the Law Court highlighted the "self-evident proposition," that "consent decrees that affect public rights should be subject to closer scrutiny than those that resolve purely private disputes." *Id.* ¶ 23.

Based on the authorities above, the Court concludes that its obligations in the class action settlement context are heightened and unique: The Court must decide whether the proposed settlement is fair, reasonable, and adequate, and in doing so, acts as a fiduciary for the class. The Court's fiduciary responsibilities extend to the preliminary approval stage,[2] where the Court is tasked with deciding whether it is "likely" that the proposed settlement will earn final approval—i.e., whether it is likely that the settlement will pass the "fair, reasonable, and adequate" test. The "'court enjoys considerable range in approving or disapproving a class action settlement, given the generality of the standard and the need to balance [the settlement's] benefits and costs.'" *Robinson v. Nat'l Student Clearinghouse*, 14 F.4th 56, 59 (1st Cir. 2021).

To guide its preliminary approval decision, the Court again looks to Fed. R. Civ. P. 23(e)(2), which contains four factors that federal courts must consider when weighing a proposed settlement's fairness, reasonableness, and adequacy. Fed. R. Civ. P. 23(e)(2). Although the factors apply to final approval, the Court similarly "looks to them to determine whether it will likely grant final approval based on the information currently before the Court." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 28 (E.D.N.Y. Jan. 28, 2019). The factors identified in Fed. R. Civ. P. 23(e)(2) include "procedural checks: that 'the

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*Israel Econ. Corp.*, No. CV-99-261, 2000 WL 33675376, at *2 (Me. Super. May 12, 2000); *Am. Trucking Associations, Inc. v. Diamond*, No. CV-89-410, 1990 WL 10067329, at *1 (Me. Super. July 17, 1990).

[2] *E.g., Grenier*, 2023 WL 4931857, at *6 (recognizing the court's fiduciary role at the preliminary approval stage).

class representatives and class counsel have adequately represented the class' and that 'the proposal was negotiated at arm's length.'" *Murray v. Grocery Delivery E-Services USA Inc.*, 55 F.4th 340, 345 (1st Cir. 2022). "They also include substantive checks: that 'the relief provided for the class is adequate' and that 'the proposal treats class members equitably relative to each other.'" *Id.* The Court addresses these factors in greater detail below.[3]

***Procedural Factors***

Generally, the procedural factors (adequate representation and arm's-length negotiations) "provide assurance that the settlement resulted from a process likely to achieve a fair outcome, thereby providing 'an important foundation for scrutinizing the substance of the proposed settlement.'" *Id.*

*Adequate Representation.* The adequate representation requirement "'serves to uncover conflicts of interest between named parties and the class they seek to represent.'" *Cohen v. Brown Univ.*, 16 F.4th 935, 945 (1st Cir. 2021). Such an inquiry largely overlaps with the adequacy requirement in the class certification context (*see* M.R. Civ. P. 23(a)(4)) —a standard the Court already determined was satisfied in this case. *Cohen,* 16 F.4th 935 at 945. Recognizing the potential for redundant inquiries, the advisory committee's note to Fed. R. Civ. P. 23(e)(2)

[3] The parties' motion cites First Circuit case law for the proposition that "[i]f the parties negotiated at arm's length and conducted sufficient discovery, the district court must presume the settlement is reasonable." *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 32-33 (1st Cir. 2009). Some courts have questioned the propriety of similar presumptions in light of the recent changes to Fed. R. Civ. P. 23(e), which was amended in 2018 to include the four factors identified in the text above. *See Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1049 n. 12 (9th Cir. 2019) (noting that Fed. R. Civ. 23(e)(2) "now identifies 'whether ... the proposal was negotiated at arm's length' as one of four factors that courts must consider and does not suggest that an affirmative answer to that one question creates a favorable presumption on review of the other three"). In any event, the Court does not understand such a presumption to relieve the Court of its obligation to closely review the substance of the proposed settlement for adequacy and fairness. *See Murray*, 55 F.4th at 345 (procedural considerations like arm's length negotiations "provide assurance that the settlement resulted from a process likely to achieve a fair outcome, thereby providing 'an important foundation for scrutinizing the substance of the proposed settlement'").

instructs courts to "focus . . . on the actual performance of counsel acting on behalf of the class." Fed. R. Civ. P. 23(e)(2) advisory committee's note to 2018 amendment. Relevant considerations at this stage include "the nature and amount of discovery" performed by counsel as well as "actual outcomes of other cases." *Id.*

*Arm's-Length Negotiations*: At this step, the Court considers any signs of collusion that would undermine the settlement's fairness. *Noll v. Flowers Foods Inc.*, 1:15-cv-00493-LEW, 2022 WL 1438606, at *6 (D. Me. May 3, 2022). As with the "adequate representation" prong, the extent of discovery is relevant to the Court's analysis: "[F]ull discovery demonstrates that the parties have litigated the case in an adversarial manner and is, therefore, an indirect indicator that a settlement is not collusive but arms-length." 4 Newberg and Rubenstein on Class Actions § 13:49 (6th ed.). Moreover, the involvement of a neutral third party in the settlement negotiation process weighs in favor of a finding that the settlement was negotiated at arm's length. *Noll*, 2022 WL 1438606, at *6 (highlighting that "the parties arrived at the Settlement after nearly two years of repeated mediation sessions"); *see also Gallucci v. Gonzales*, 603 Fed. Appx. 533, 534 (9th Cir. 2015).

***Substantive Factors***

*Adequacy of Relief*. In assessing whether the relief provided for the class is adequate, the Court examines, *inter alia*, the costs, risks, and delay of trial and appeal.[4] *Noll*, 2022 WL 1438606, at *6; Fed. R. Civ. P. 23(e)(2)(C)(i). The "fundamental question is how the value of the settlement compares to the relief the plaintiffs might recover after a successful trial and appeal, discounted for risk, delay and expense." *In re Compact Disc Minimum Advertised Price Antitrust*

[4] Additional considerations include: The effectiveness of the proposed means of distributing relief to the class, including the processing of claims; the terms of any award of attorneys' fees, including the timing; and any agreement identified in connection with settlement. Fed. R. Civ. P. 23(e)(2)(C)(ii)-(iv).

*Litig.*, 216 F.R.D. 197, 207 (D. Me. 2003). The Court must be satisfied that the settlement secures adequate recovery for the class in exchange for class members' release of valuable claims against the defendant. *See 1988 Tr. for Allen Children Dated 8/8/88 v. Banner Life Ins. Co.*, 28 F.4th 513, 526-27 (4th Cir. 2022) ("As a general matter, a settlement agreement may be inadequate if it forces class members to release valuable claims for nothing in return."); 4 Newberg and Rubenstein on Class Actions § 13:51 (6th ed.) ("The court must be assured that the settlement secures an adequate recovery for the class in return for the surrender of the class members' rights to litigate against the defendants").

*Intra-class Equity.* The final Rule 23(e) factor requires the Court to consider whether the proposed settlement treats class members equitably relative to each other. Fed. R. Civ. P. 23(e)(2)(D). As part of its analysis, the Court examines whether "relief is apportioned between class members in a way that takes appropriate account of differences among their claims." *Noll*, 2022 WL 1438606, at *7 (quotation marks and citations omitted). The Court likewise considers "whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." Fed. R. Civ. P. 23(e)(2)(D) advisory committee's note to 2018 amendment. With respect to releases, the court must use "special care . . . to ensure that the release of a claim . . . not shared alike by all class members does not represent an advantage to the class . . . [bought] by the uncompensated sacrifice of claims of members, whether few or many." *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 461 (2d Cir. 1982) (quotation marks omitted). At bottom, "the court's goal is to ensure that similarly situated class members are treated similarly and that dissimilarly situated class members are not arbitrarily treated as if they were similarly situated." 4 Newberg and Rubenstein on Class Actions § 13:56 (6th ed.)

## FINDINGS AND CONCLUSIONS

The Court's analysis is divided into four sections: the nature and characteristics of the class; the nature of the agreement itself; procedural factors; and substantive factors.

***The Nature and Characteristics of the Class***

In certifying the class, the Court described its members as requested by Counsel for the Plaintiffs. In its role as fiduciary of the Class Members, the Court believes it is important to make further findings as to who these individuals are, and what is at stake for them in this litigation.

The individual persons that make up this class have been charged with serious offenses, and their constitutional rights, once attached under the Maine and federal constitutions, remain intact regardless of what stage of the criminal process they are in.

Some of the Class Members will be convicted of these charges after entering guilty pleas or after a jury or bench trial. Some of them will be acquitted after trial, and some will have a number of their charges dismissed through plea negotiations. Many of them present significant threats to public safety, while others do not.

Some Class Members will spend significant time in pre-trial custody unable to make bail, and some will be held without bail. It should be obvious that it is often difficult for incarcerated individuals to stay in regular contact with appointed counsel, particularly if their attorney does not live or practice near a particular jail. Many Class Members are released with bail conditions imposed at their first appearance which restrict liberties most Mainers take for granted. Many are subject to searches of their person, vehicle, and residence. While Class Members are expected to stay in touch with counsel, some are transient and some are homeless.

Many of them are addicted to substances and/or suffer from serious mental illness. Some of them do not speak English or have limited English proficiency. Some of them are not

American citizens. Some of them are so compromised by mental illness or developmental disabilities at the time they are arrested or charged that they will be deemed not competent to stand trial; some will be found incapable of having competence restored, and their charges will eventually have to be dismissed. All of them are presumed to be innocent and some of them did not actually commit the crimes with which they are charged.

All of these individuals are entitled to effective, court-appointed counsel under the Maine and United States Constitutions. *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963); *State v. Watson*, 2006 ME 80, ¶ 14, 900 A.2d 702. Importantly, this right attaches as soon as the prosecution commences, meaning at "the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty." *Rothgery v. Texas,* 554 U.S. 191, 194, 198 (2008). Due process prohibits the State from physically detaining citizens prior to trial unless certain procedural safeguards are met—such as providing counsel at any adversarial hearing. *United States v. Salerno,* 481 U.S. 739, 755 (1987); *see also State v. Babb*, 2014 ME 129, ¶ 10, 104 A.3d 878 ("Once the State has initiated adversary judicial proceedings, the Sixth Amendment guarantees the defendant the right to counsel at 'critical stages' of the criminal process"). And due process prohibits the government from discriminating against the poor in providing access to fundamental rights, including the freedom from physical restraints on individual liberty. *See Griffin v. Illinois*, 351 U.S. 12, 16-18 (1956).

Maine's system, with the exception of five or six attorneys who were hired as "rural public defenders," relies exclusively on private attorneys who are independent contractors. The attorneys, if deemed qualified by MCILS, are entitled to come on and off rosters maintained by MCILS as they wish. It is MCILS's obligation to maintain sufficient numbers of attorneys on their rosters, by case type, and the Judicial Branch is charged with appointing attorneys from

these rosters. This means that the system is entirely dependent on the willingness of the MCILS-qualified, independent contractor attorneys to accept or not accept certain kinds of cases. And as noted, the attorneys always have the ability to simply come off the rosters and decline to accept any new cases.

With respect to the first appearance of a Class Member before a jurist, the State provides a "Lawyer of the Day" ("LOD") from rosters that are also maintained by MCILS. The LOD's contact with the Class Member is very short-term, as the LOD's representation of him or her, will in almost every instance, last for only a day or so. After that appearance, Maine jurists can only hope that there will be a MCILS-qualified and rostered attorney to accept appointment depending on the charge or charges brought against a Class Member.

There is no legal standard in place in Maine for how long it is acceptable for an individual to be without counsel after the LOD's representation ends or, for that matter, whenever a court-appointed attorney withdraws from representation for any number of reasons approved by a court. The goal has always been, however, that counsel would be assigned during the initial proceeding where the LOD provides limited representation. It has been widely reported that this is no longer the case, and the reality is that MCILS and Maine courts are simply doing the best they can to find an attorney willing to accept full appointment. And as the number of independent contractor attorneys on the rosters waxes and wanes, courts have no choice but to appoint any qualified, available attorney from off the roster, even if the attorney lives and practices a considerable distance from where the Class Member lives or is incarcerated.

***The Nature of the Settlement Agreement***

As noted above, the case was temporarily stayed in March of 2023 as the parties worked diligently up until August 21, 2023 to finalize the Settlement Agreement now before the Court. The parties are now asking the Court to extend the stay currently in place for another four years,

during which time the parties agree to jointly undertake best efforts to achieve what they describe as structural changes. Noting that there is no "quick fix or single solution to current and future challenges to Maine's indigent criminal defense system," counsel for the parties assert that the Settlement Agreement "provides meaningful short and long-term reforms in the State's provision of legal services." The Agreement provides a ten-page list of the reforms they have agreed to advocate for over the next four years: (1) advocacy regarding funding; (2) advocacy regarding statutory initiatives; (3) "best efforts" on legislative measures and appropriations; (4) rulemaking; (5) metrics regarding caseloads/workloads; (6) metrics regarding minimum qualifications and conflicts of interest; (7) metrics regarding performance standards and evaluation; (8) metrics regarding training; (9) metrics regarding Lawyers of the Day; and (10) metrics regarding data and reporting.

The Court finds that the Settlement Agreement proposed here is highly unusual for class action litigation. It is not a Judgment that can be entered on the docket or appealed. It is not a judicially enforceable Consent Decree. It is a four-year stay—or continuance—of the litigation which was intended to decide if the State of Maine has systematically violated Class Members' Sixth Amendment rights and their rights under the Maine Constitution. And while the Court could under this Agreement find at some juncture that "the Defendants have materially breached [the Proposed Settlement] and failed to remediate the breach," the remedy proffered to the Class Members is this: a resumption of this litigation. *See* Settlement Agreement, § II(I). Depending on whether such a breach is found, and when it is found, this litigation could resume roughly four years from now. Truly, the only concrete judicial enforcement mechanism would be for the Court to issue a new Scheduling Order.

The Court has concluded that the four-year stay does not, by itself, justify a denial of the motion. As a fiduciary for the Class Members, however, the Court has an obligation to ensure

that procedural and substantive safeguards have been met before it can decide if this Agreement will likely be approved as fair, adequate, and reasonable.

***Procedural Factors***

As noted above, the Court is required to decide first, if the Class Members have received adequate representation and the Agreement was negotiated at arm's length. Adequate representation generally means the Court must focus on the actual performance of counsel (*see* Fed. R. Civ. P. 23(e)(2) advisory committee's note to 2018 amendment), while arm's length negotiations means that the parties have behaved as adversaries during litigation, conducted adequate discovery, and negotiated the proffered settlement with no signs of collusion. *See supra* pgs. 6-7. Class Counsel in this case are highly qualified, and the Court has no concerns at all about their sincere commitment to the necessity for systemic reform of Maine's indigent defense system. Given the number of settlement conferences and negotiation sessions, it appears likely that this Agreement was the best settlement they could obtain from Defendants at the present time.

The Court concludes that adequate "procedural" safeguards exist here as defined by federal case law. There is no evidence of collusion. Appropriate adversarial motion practice occurred, and discovery was aggressively pursued—at least up until the parties requested a stay in March of 2023 so they could focus on reaching this Agreement.

***Substantive Factors***

In assessing whether substantive safeguards exist to permit the Court to preliminarily approve the Agreement, the Court acting as fiduciary must be satisfied that the proposed relief is adequate and relatedly, whether the proposed Agreement treats Class Members equitably relative to each other. Fed. R. Civ. P. 23(e)(2)(C)-(D). As noted just above, it appears to the Court that Class Counsel concluded this was the best settlement they could obtain from Defendants as of

August 21, 2023. That does not of course mean the proposed Agreement contains sufficient substantive safeguards, or is otherwise in the best interest of Class Members.

As Counsel for the parties know from oral argument, the Court is—and remains—extremely concerned about the substantive rights the Class Members are giving up over the next four years in exchange for the benefits described in the Joint Motion. The Agreement, with its four-year stay of litigation, means that no individual Class Member may seek as part of these proceedings any emergency relief should further diminution of the number of rostered attorneys result in longer wait times for appointment of counsel.[5] The Agreement does not acknowledge, much less address, current conditions in the system in this regard. Counsel for the parties, on the other hand, seem to acknowledge that things are dire and deteriorating, but Agreement itself does not acknowledge anything of the kind, much less provide any path within its terms where a Class Member, represented by highly competent Class Counsel, could come to Court to obtain meaningful emergency relief. Instead, Counsel for both parties seem to expect Class Members to wait patiently for incremental changes the parties hope will come to pass during the four-year stay of litigation—even if the number of attorneys willing and able to accept appointment continue to diminish such that significant delays occur in appointment of counsel to represent Class Members at adversarial hearings. The Agreement does not adequately provide for the types

[5] The Court recognizes that the term "actual deprivation" of counsel is a legal term that may mean more than simply no attorney at all. On the one hand, there are instances of complete denial of counsel at a critical stage, and on the other hand, there are instances where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 659 (1984); *In re Children of Kacee S.*, 2021 ME 36, ¶ 30 n. 7, 253 A.3d 1063. "A constructive denial of counsel occurs when 'although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.'" *Tucker v. State*, 394 P.3d 54, 63 (Idaho 2017); *In re Children of Kacee S.*, 2021 ME 36, ¶ 30 n.7, 253 A.3d 1063. The Court will endeavor to clearly distinguish between these meanings.

of remedies that might be available to Class Members if Maine's system evolves from "constructive" deprivations of counsel (as Class counsel claim) to a situation where Class Members are simply unrepresented. The current agreement closes the courthouse doors to Class Members to even attempt to prove such a claim.

It is worth remembering that Counsel for the Plaintiffs have claimed from the beginning of this case, and throughout the arguments on the Motions to Dismiss and for Class Certification, that "the system for providing indigent legal defense in Maine is broken." Pls.' Compl. ¶ 9. That paragraph goes on to allege as follows: "Dozens of attorneys have stopped accepting cases from the MCILS roster, and the crisis is set to worsen with the anticipated spike in trials as courts begin the process of working through the enormous backlog of cases the pandemic has created." *Id.*

As it turned out, it was not just the restoration or acceleration of criminal dockets that has affected the number of available attorneys. While there may be differences of opinion as to why it happened, the parties agree that shortly after attorneys began making $150 per hour, the numbers plummeted again. At the same time, the number of attorneys accepting LOD-only cases has increased across the State, leaving the number of attorneys able and willing to go the distance with an indigent client shrinking still.

In fairness to Counsel for the parties, it appears that what occurred chronologically was that they—with the permission of the Court—ceased working on discovery and turned their focus instead to settlement, at the same time that the number of attorneys continued to shrink. This means, of course, that no one in this case really knows how bad the problem is. It is possible that the problem has been overstated. Perhaps it has been ameliorated somewhat by steps taken by a number of jurists to maintain so-called "limited rosters," apparently with the assent of MCILS. Judges use these rosters because the rosters they receive from MCILS are simply

inadequate to enable judges to meet their constitutional obligations. In order to keep the system functioning, judges are appointing attorneys who may be qualified for a case type but who have taken themselves off the MCILS rosters for that case type. This means that individual attorneys are making arrangements with individual judges to take a few cases for case types they were not permitted under the Rules to take just a few months ago as they had chosen, as is their right, to come off the official MCILS roster. Judges and Clerks continue to make calls pleading with lawyers to take cases. This arrangement may work for the attorneys and for the courts, at least temporarily, but no one is monitoring how this improvising by jurists and the ongoing instability affects Class Members in terms of delay or adequacy of representation.

And a provision in the Agreement could easily make things worse in terms of MCILS's capacity to maintain sufficient numbers of attorneys on their rosters. The Agreement calls for caseload standards—which many agree will be beneficial, and long overdue—but the timing could not be worse. Meanwhile, the Agreement talks about one "brick and mortar" public defender office opening somewhere sometime in the next four years. The Agreement refers to the goal of obtaining approval and financing to open others, but otherwise there is no plan to address the problem. Class Members just have to be patient and wait.

If it can be proven that indigent defendants are in fact going without representation because courts no longer have a sufficient number of attorneys to represent these Class Members, and if the situation is not promptly remedied, this would constitute a violation of the Class Members' constitutional rights. This is more than just some technical violation. Some courts, including the court in *Betschart v. Garrett*, have started to understand that these delays in appointing counsel significantly disadvantage indigent defendants. No. 3:23-cv-01097-CL, 2023 WL 5288098 (D. Or. Aug. 17, 2023). For instance, unrepresented pre-trial defendants "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." *Id.* at *6. [6]

Then there is the matter of Paragraph F of Section II. While the Agreement in Section II states that no releases are being provided to the Defendants, Paragraph F nevertheless closes the courthouse doors to Class Members who wish to make any systemic claims against the Defendants for a period of four years. Despite Counsel's best efforts to persuade the Court otherwise, the broad language in this paragraph does little to alleviate the Court's concerns about the ability of Class Members to reasonably comprehend what they have given up. Paragraph F of Section II reads as follows:

> Nothing in this Section precludes Plaintiffs, including all members of the Settlement Class, from asserting claims against Defendants alleging a particularized injury arising from their individual circumstances and seeking individual, as opposed to systemic, relief. *However, Plaintiffs, including all members of the Settlement Class, may not allege, as the basis for any such claims against Defendants, systemic failures or deficiencies in Maine's indigent defense system occurring within the four (4)-year settlement period following the Effective Date.*

Settlement Agreement, § II(F) (emphasis added).

Counsel for the parties stated during oral argument that the Court should not worry as the release would still permit any Class Member from making a claim against the State of Maine in a different criminal or civil case because the State of Maine is not named as a Defendant in this

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[6] *Betschart* could serve as a cautionary tale. No. 3:23-cv-01097-CL, 2023 WL 5288098 (D. Or. Aug. 17, 2023). There, the plaintiffs—a group of indigent pre-trial defendants without access to an attorney—filed a habeas corpus class action in federal court against a county sheriff and certain state circuit court judges. The United States District Court for the District of Oregon granted the plaintiffs' motion for a temporary restraining order, concluding that the class of unrepresented, in-custody defendants were likely to prevail on the merits of their Sixth and Fourteenth Amendment claims. For relief, the court ordered that the class members be released (with any appropriate conditions) if counsel was not secured within ten days of their initial appearance.

litigation. The Court as a fiduciary is not so sanguine. At the hearing on the Defendants' Motion to Dismiss, the Court asked Assistant Attorney General Magenis whether he was representing the "State as well as the Commission." Mot. Tr. 17 (May 26, 2022). He explained that if the Plaintiffs prevailed, any injunctive relief would be aimed at mandating the Commission to take certain actions. "However, the—ultimate party in interest, again, is the State of Maine. And the—the party with—who the attorney general is representing is the State of Maine." *Id.*

This exchange mirrors remarks made by MCILS's former Executive Director, who advised the Court that he had sought permission pursuant to 5 M.R.S. § 191(3)(B) to obtain separate representation on behalf of the Commission and its members, but the request was denied. He went on to agree with the Assistant Attorney General that the "State is, from the Office of Attorney General's perspective, the proper party in interest, but that that office represents the State of Maine." Mot. Tr. 20 (May 26, 2022).

This is more than an interesting legal or academic issue as to what it means to be a "real party in interest" or "the proper party in interest" under Maine law. Under Section II(F), an individual Class Member under this agreement could be barred from bringing a claim based on "particularized injury" in a civil case, or a claim of deprivation of counsel in a criminal case, if in fact the State of Maine is considered or found by a different court to have been a Defendant in this litigation. This is made even more complex given AAG Magenis's position that even if the State is not specifically named in the caption, he represented not just the named Defendants but also the State of Maine. *See Superintendent of Ins. v. Attorney Gen.*, 558 A.2d 1197 (Me. 1989). No Class Member should have to parse this language to figure out if it is even worth his or her while to mount a claim based on a particularized injury, especially if the State attorneys or State actors in any future case take an aggressive approach in representing the State's interests.

In addition, the same section bars individual Class Members for the next four years from making claims in any court alleging "systemic failures or deficiencies in Maine's indigent defense system." Settlement Agreement, § II(F). It is difficult to envision any individual claim alleging actual deprivation, constructive deprivation, or non-representation of counsel where the allegations did not touch upon alleged "systemic failures" of Maine's statewide indigent defense system. In other words, it would be difficult if not impossible to disentangle claims of deprivation of counsel from claims of systemic failures.

If conditions continue to deteriorate, it is unrealistic to expect that over the next four years an individual Class Member—who may not even have an attorney, but who would certainly be proceeding without current Class counsel—would be able to proceed with an individual claim without having to litigate what "Defendants" and a "systemic" means.

This language, at a minimum, needs to be clarified so that a Class Member could understand what they would be up against if they brought a separate claim in a different Court alleging non-representation or any other grounds for emergency relief. Burdening an individual Class Member with having to litigate these issues—whether in state or federal court, in a criminal or individual civil claim, is problematic—to say the very least.

In addition to being overbroad, this language requires all Class Members to give up their ability to demand systemic changes for the next four years while waiting for incremental change, and it does so without regard to the relative strengths of their claims. That is, the Agreement treats all Class Members the same, both in what they must sacrifice and the relief afforded, but it does so inequitably without regard to the relative strengths of the Class Members' claims. The Agreement is also unacceptable to the Court for this reason.

If proven, the claims of individual Class Members who face non-representation might be in a far better position to prevail if they were able to litigate those claims in the instant litigation, as opposed to other Class Members who currently have counsel or are closer to resolving their cases either through trial or plea negotiations. Again, based on the record before the Court, it is not possible to know with any certainty how many Class Members are currently without counsel, and for how long. It is conceivable that the number of individual Class Members who have been unrepresented in the recent past or over the next four years is or will be relatively small. And to some, requiring a small number of Class Members to sacrifice any "systemic" claim against the Defendants might not seem to be a significant concern. However, the Court is simply not willing to subject Class Members to the risk of losing the right to pursue those important constitutional claims in this action, or in another forum. What is at stake, depending on the evidence presented, could be the deprivation of the fundamental rights to due process and to liberty, and the failure on the part of the State of Maine to fulfill a core function of government.

In sum, in order to approve this release and this Agreement as a whole, the provisions would have to provide a clear path permitting individual Class Members during a stay - of any length- to seek emergency relief if evidence supports the claim. The characteristics of the Class Members described above, and the fundamental rights at stake, demand no less from the parties. Certainly, no individual Class Member should have to wait four years to seek this kind of relief in this or any other forum.

The Court therefore concludes that the parties have failed to demonstrate that the Proposed Agreement will likely be approved as fair, reasonable, adequate and in the best interest of Class Members.

## CONCLUSION

For the reasons stated above, the Court denies the Joint Motion. Counsel and the Court will meet in person at the Capital Judicial Center on September 15, 2023 at 10:00 AM. The purpose of the conference will be to either enter a Scheduling Order and proceed to resolution by trial, or for the parties to return to settlement discussions. The temporary stay ordered in March of 2023 will remain in place until further Order of the Court. The clerk is directed to incorporate this order on the docket by reference pursuant to M.R. Civ. P. 79(a).

Date: September 13, 2023

Michaela Murphy
Justice, Maine Superior Court

Entered on the Docket: 09/13/2023