

STATE OF MAINE
OXFORD, ss.

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

JOSEPH DENBOW,

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Petitioner,

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v.

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STATE OF MAINE,

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Respondent.

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

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

FACTUAL BACKGROUND

I. Dangers of COVID-19 In the Prison Setting

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

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

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

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

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

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

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

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

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

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

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

II. BACKGROUND SPECIFIC TO PETITIONER

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

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

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

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

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

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

DISCUSSION

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

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

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

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

I. Mr. Denbow’s Sentence Is Unconstitutional

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

/s/ Emma E. Bond

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

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CERTIFICATE OF SERVICE

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

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