STATE OF MAINE

SUPREME JUDICIAL COURT
Docket No. SJC-23-2

STATE OF MAINE, *ex rel.* ANGELINA DUBE PETERSON and UNKNOWN OR UNCERTAIN PERSONS,

Petitioners,

v.

Petitioners' Traverse

PETER A. JOHNSON, Aroostook County Sheriff, *in his official capacity*; WILLIAM L. KING, York County Sheriff, *in his official capacity*; UNKNOWN JAILERS, *all in their official capacities;* HON. SARAH GILBERT, Judge of the Maine District Court, *in her official capacity*; HON. CARRIE LINTHICUM, Judge of the Maine District Court, *in her official capacity*; and UNKNOWN JUDGES AND JUSTICES OF THE MAINE UNIFIED CRIMINAL DOCKET, *all in their official capacities,*

Respondents.

Petitioners Robert Ruffner and Rory McNamara hereby reply to the responses of Sheriffs Johnson and King and Judges Gilbert and Linthicum.

I. The Maine Rules of Civil Procedure have but limited applicability.

Each of the Respondents asserts that some provision or another of the civil rules precludes all or some of the relief Petitioners seek. However, the Maine Rules of Civil Procedure have no applicability regarding the

"beginning or conducting" of a habeas corpus proceeding such as ours. *See* M.R.Civ.P. 81(b)(1)(A). Rather, to the extent there exist provisions of Chapter 609, it is those specific statutory provisions which control; where Chapter 609 is not specific, the common law controls. *See* M.R.Civ.P. 81(b)(1) ("In respects not specifically covered by statute or other court rules, the practice in these proceedings shall follow the course of the common law ... ."); *see also* 4 M.R.S. § 7 (this Court has common-law jurisdiction).

M.R.Civ.P. 12(b)(6) does not apply. *Iqbal* and *Twombly* are, by quite a distance, anachronisms in our common-law jurisdiction. Avowed originalists agree: Rule 12(b)(6)'s "has no place in habeas." *Banister v. Davis*, 140 S.Ct. 1698, 1715 (2020) (Alito, J. dissenting).

At common law, there was no "response," in such a name, either. Rather, the "respondent" filed a return and produced the body of the persons on whose behalf the petition was filed. *See* Paul D. Halliday, *Habeas Corpus: From England to Empire*, 48-53 (2012); *see* 14 M.R.S. § 5520. Chapter 609 uses this term – the return. *See, e.g.*, 14 M.R.S. § 5529 ("Form of return"). Petitioners have no objection to this Court's decision to instead order the respondents file "responses," of course; our point is that the Rules of Civil Procedure will provide little insight in our case.

A case in point is Respondent Johnson's contention that no discovery is possible because, in Johnson's view, there is no "pending action" per M.R.Civ.P. 34(b). *See* Response of Johnson ¶ 14. However, in our jurisdiction, *see* 14 M.R.S. § 5520, it is the responsibility of "[t]he person making the return" to "bring the body" before this Court. Because such would be an unwieldy way of accomplishing discovery (*i.e.*, who is imprisoned without representation?), this Court might instead resort to the common law or Rules 26(a) and 34 and Administrative Order JB-05-20 (A.4-21) to provide equivalent relief. In either case, there is no "appeal," as Respondents Judges Gilbert and Linthicum would have it, of the Judicial Branch's refusal to provide Petitioners with the information necessary to unlock the identities of those on whose behalf relief is sought. *See* Judges' Response at 20-21. Notwithstanding their diligence prior to this action, Petitioners seek that right attendant to this petition. Their right to access to judicial records of this nature is accorded by the First and Sixth Amendments, their Maine correspondents, and, apropos of this Court's jurisdiction, common law. *See United States v. Wecht*, 484 F.3d 194, 207-09 (3d Cir. 2007) (on common law right to access to judicial records, generally). Transparency and accountability require dissemination of the minimal information Petitioners seek.

II. The petition is otherwise sufficient.

Respondents Judges Gilbert and Linthicum object that Petitioners have not "served any respondents other than the State Respondents." Judges' Response at 14. However, by filing dated September 29, 2023, the Judges waived any objection to "insufficiency of service or process." *See* Acknowledgement of Service. Regardless, this Court's Procedural Order of September 22 was sent to three different assistant attorneys general and Attorney General Frey himself. *See* Email of Dep. Clerk Biron of Sept. 22, 2023.

Regardless, service of a habeas petition is not accomplished pursuant to the Rules of Civil Procedure. The 1998 Committee Note to M.R.Crim.P. 46(d) suggests that service is accomplished by the criminal rules. The habeas statute itself does not speak of service; its touchstone is notice. *See, e.g.*, 14 M.R.S. § 5522. While Petitioners sympathize with Respondent King's suggestion that the local district attorneys should instead appear in their capacities, Petitioners did, via their initial email-filing, notify D.A.s Slattery and Collins of this petition. *See* email of Attorney McNamara of Sept. 20, 2023. Apparently, they do not care to appear.

Were it necessary, Petitioners would be happy to swear to the contents of their petition and this traverse. However, when, as here, those filings

constitute only the initiating documents (rather than a device for actually bringing persons before this Court), such is not necessary. *Cf. State v. Clark*, 420 A.2d 240, 242 (Me. 1980) (unsworn complaint meant only for initiating proceeding rather than for arrest of the defendant is not a jurisdictional defect). Moreover, signatures of Maine attorneys import more than those of others. *See* 4 M.R.S. § 1910(1)(C).

Nor is the petition deficient for being "speculative" or uncertain. That is the nature of habeas corpus; it is meant as a process for ensuring the questionable lawfulness of liberty restrictions. To the extent that Petitioners seek relief for future similarly situated individuals, that can be accomplished in either of two manners. First, this Court's ruling on the merits will be precedential, carrying with it the import of vertical stare decisis. *See* 4 M.R.S. § 1; ME. CONST., Art. VI, § 1. Second, this Court, within it common law jurisdiction, additionally retains authority to "declare rights, status and other legal relations whether or not further relief is or could be claimed." 14 M.R.S. § 5953. It could do that here.

III. Petitioners have standing.

Respectfully, Respondents Judges Gilbert and Linthicum repeatedly conflate Ms. Angelina Dube Peterson with Petitioners. *See, e.g.*, Judges' Response ¶¶ 6-7, 11, 13. Petitioners are Attorneys Robert Ruffner and Rory

McNamara. Ms. Peterson was a person on whose behalf this petition is brought per 14 M.R.S. § 5511. One could term the role of Petitioners Ruffner and McNamara as next-friends *plus*.[1]

"The common law permitted next-friend suits for prisoners as far back as the seventeenth century, and the federal habeas statute now explicitly authorizes them. In theory, next friends do not assert third-party standing because they are not parties at all[.]" Curtis A. Bradley *et al.*, *Unpacking Third-Party Standing*, 131 YALE L.J. 1, 63 (Oct. 2021). "A 'next friend' does not himself become a party to the habeas corpus action in which he participates, but simply pursues the cause on behalf of the detained person, who remains the real party in interest." *Whitmore v. Arkansas*, 495 U.S. 149, 163 (1990).

The annals of common law are replete with third parties bringing petitions on behalf of others. *See, e.g.*, *The Case of the Hottentot Venus*, (1810) 13 East 195 (K.B.) (petition by third parties on behalf of unknown woman believed by them to be unlawfully held).[2] A popular 1800s treatise on habeas corpus practice in the United States acknowledges the authority of third parties to seek relief on behalf of those for whom relief is sought

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[1] In addition to having been able to bring such a petition at common law, Petitioners have the additional statutory authority to do so here.

when those persons are "coerced" or otherwise unable to pursue the writ on their own. *See* William S. Church, *A Treatise on the Writ of Habeas Corpus*, § 89 (2d 1893). Counter to Respondent King's argument, see his Motion to Dismiss at 8-9, 19, it would be a "departure" from prevailing practice at common law to permit pro se petitions. Judith Farbey *et al.*, *The Law of Habeas Corpus*, 239-40 (3d ed. 2011).

Moreover, our statute explicitly authorizes Petitioners to seek relief on behalf of an "unknown person." *See* 14 M.R.S. §§ 5527, 5528 ("Designation of unknown person; restrained person"). Again, this accords with common law: Throughout history, habeas corpus has been sought on behalf of unknown combatants and slaves. *See* Carolyn Pereira *et al., Habeas Corpus and 'Enemy Combatants,'* 72 SOCIAL EDUCATION 5, 236-45 (2008). To limit this practice, as Respondent King would have this Court do, see his Motion to Dismiss at 10, would create an incentive for detainers to keep their prisoners in even darker dungeons, so to speak. That is not common law, let alone Chapter 609.

Nonetheless, Petitioners have collected more information since the petition was filed. They hereby identify by name the following individuals who are entitled to relief: Joseph Maile, AROCD-CR-2023-40672 (in custody 31 days as of filing); Tiffany Soucy, AROCD-CR-2019-20125 (28 days);

Benjamin Stewart, AROCD-CR-2023-30475 (18 days); Bruce Hoyt, Jr., AROCD-CR-2023-40359, AROCD-CR-2023-40360, AROCD-CR-2023-40688 (11 days). Petitioners have obtained the individuals' assent to be identified in this proceeding.

IV. The judges are indeed proper parties under both the statute and common law.

Respondents Judges contend that they are improper parties because they do not have "custody" of anyone. *See* Judges' Response 6-7, 10. There are two errors in their reasoning. First and most bluntly, Chapter 609 is not limited to "custody." Rather, it is a right of anyone whose "personal liberty" is unlawfully deprived. 14 M.R.S. § 5501. Our statute specifically contemplates relief for those illegally "imprisoned *or* restrained." 14 M.R.S. § 5515 (emphasis added). Surely, the conjunctive "or" is not a typo. The Judges, with all respect, have muddled our statute's plain language by referring instead to "custody" and "custodian" when the text of the statute is more plain.

Yet, were the Judges' conflation of terms to be adopted, common law nonetheless independently proves their assertion unfounded. Even when habeas corpus is restricted to those "in custody," it is available to even those unlawfully subject only to conditions as minimal as their own "recognizance." *Hensley v. Municipal Court, San Jose-Milpitas Judicial*

Dist., 411 U.S. 345, 351-53 (1973). Pretrial conditions qualify under this rubric so long as the conditions constitute "'restraints not shared by the public generally.'" *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294 (1984) (quoting *id.* at 351). This is another way of saying that even federal courts subject to the restrictive whims of Congress and the Antiterrorism and Effective Death Penalty Act of 1996 recognize that pretrial conditions of release are cognizable via habeas corpus. This is hardly an innovation; at common law:

> the person bailed is in the eye of the law, for many purposes, esteemed to be as much in the prison of the court by which he is bailed, as if he were in the actual custody of the proper gaoler.

William Hawkins, *A Treatise on the Pleas of the Crown, Volume II*, 138-39 (1726). Pretrial conditions of release constitute liberty restrictions cognizable in this petition.

In fact, via the post-conviction-review statute, the legislature recognizes "conditional release" as a form of "restraint." 15 M.R.S. § 2124(1)(B). This is telling because, in enacting 15 M.R.S. § 2121 *et seq.*, the legislature intended to "replace[] the remedies available pursuant to post-conviction habeas corpus... ." "The canons of statutory construction favor the consistent use of terms throughout a statute. A term appearing in several places in a statutory text is generally read the same way each time it appears."

Schneider v. Feinberg, 345 F.3d 135, 146 (2d Cir. 2003) (internal citation and quotation marks omitted). Restraints such as conditional release are cognizable deprivations in habeas corpus.

V. Requiring unrepresented individuals to "exhaust" their options in the underlying criminal cases is futile, welcomes coercion, and would obliterate a key function of the writ of habeas corpus.

As defense attorneys, Petitioners regret the Judges' suggestion, see their response at 19-20, that unrepresented parties should first exhaust all potential remedies in their underlying criminal cases. These are people sitting in jail or subject to onerous conditions of relief who face disruptions in their lives and careers. Without lawyers to preserve evidence, marshal defenses, or negotiate with prosecutors, they are being deprived of the opportunity to present their defenses. Many, no doubt, have already decided to plead guilty just to end the ordeal. The implication that these individuals should simply ply for themselves does not reflect reality and suggests a startling ignorance about the role of defense attorneys.

In a state where there have been perhaps only two or three known speedy-trial violations in collective memory and only two or three M.R.U.Crim.P. 48(b) dismissals for "unnecessary delay," the Judges must know that their proposal would likely lead to seemingly interminable delay pending trial. Certainly, prosecutors seem to understand this dynamic.

Fundamentally, a strict "exhaustion" barrier is counter to the historical availability of the writ of habeas corpus to pretrial defendants. In each pretrial habeas proceeding, there remains the possibility of "relief" in the underlying matter. Exhaustion in the context of federal habeas corpus review of state-court matters carries additional concerns about comity and federalism that are not present here.

VI. Counsel for the judges misstate constitutional law.

Given Petitioners' request for discovery, consideration of the merits is premature. Nonetheless, Petitioners write to correct a significant misstatement in filing made on Judges Gilbert's and Linthicum's behalf.

Counsel for the judges assert that Petitioners awaiting trial have not been deprived of assistance at a critical stage. *See* Judges' Response at 16-18. Respectfully, it is black-letter law that these individuals are currently being deprived of assistance at a critical stage: The period from arraignment until the beginning of trial is perhaps "'the most critical'" stage. *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (quoting *Powell v. Alabama*, 287 U.S. 45, 57 (1932)). Who is there to advise the individuals subject to relief of potential defenses? Who is available to help them preserve or obtain evidence? Who is there to propose agreeable resolutions to the State's attorney? Who is there to bring a motion for bail or modification of

conditions based upon changed circumstances? Who is there to ensure that a trial is not unlawfully delayed?

It may be that some of these individuals will eventually have criminal trials. The defenses offered in those trials will inevitably be hamstrung by delay in the provision of counsel. *Cf. State v. Wai Chan*, 2020 ME 91, ¶ 7 n. 3, 236 A.3d 471 (potentially exculpatory evidence is destroyed before counsel, who had just been appointed, is able to preserve it). The individuals will suffer needless delays in preparing for trial, unable to effectively seek release or lessened conditions of relief. Many will decide to plead guilty rather than wait around in hopes that a lawyer will eventually be appointed.

There is irony in counsel for the Judges' argument. Two skilled jurists are represented by counsel in this very pretrial proceeding. Their attorney has preserved their objections and presented their version of the facts. Yet, those judges would find no prejudice to unskilled laypersons who are deprived of the assistance of counsel in their criminal cases while incarcerated or subject to restrictive conditions of release. These divergent positions are not logically reconcilable.

The State of Maine is simply not ready and able to prosecute those entitled to relief. Unless and until it is able to do so, these individuals must not have their liberty restricted attendant to criminal prosecutions. For

these people, the system is broken. The process they are due is simply not available to them.

WHEREFORE, this Court should overrule all objections and defenses proffered by Respondents. It should proceed with discovery and, in due course, reach a decision on the merits.

Respectfully submitted this 16th Day of October 2023,

By the Petitioners,

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that:

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

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