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IN THE UTAH SUPREME COURT

ACLU OF UTAH, DISABILITY LAW
CENTER, UTAH ASSOCIATION OF
CRIMINAL DEFENSE ATTORNEYS, ON
BEHALF OF INDIVIDUALS IN
CRIMINAL CUSTODY IN THE STATE OF
UTAH AT RISK OF CONTRACTING
COVID-19,

Plaintiffs-Petitioners,

v.

STATE OF UTAH, et al.,

Defendants-Respondents.

REPLY TO MOVANTS' BRIEF

Case No. 20200281

Petitioners hereby submit this reply brief to the brief submitted on April 25, 2020 by
crime victims' representatives Amanda J. Hunt, William Allen Powell, Tania Portuondo, and

Alex Portuondo and crime victims Rachel Booth, L.L., K.G., L.G., Kristen Miller, and Shandra Pingree (together, the “the Movants”)

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I. Introduction

Initially, now that the responses are in, there is more than ample support to show that it is not appropriate for Movants to intervene in this civil rights petition. To the contrary, their asserted interests are not genuinely at risk in these proceedings, and Respondents are more than adequate to represent them. In any event, whether considered as a response by intervenors, or as an amicus brief, Movants' arguments on the substance of the dispute (and on various policy issues) do not avail. Though Movants contend otherwise, this Court has jurisdiction over a habeas petition calling into question unconstitutional confinement. Public interest standing is settled law, and this Court has already carefully considered and rejected the same arguments Movants assert. Movants' attack on this Court's original jurisdiction over this matter misses the mark, as only swift, systemic, statewide action is appropriate to remedy the threat incarcerated people in Utah face from the COVID-19 pandemic. Movants' unhelpful argument about the unnecessary rigor clause, moreover, is not persuasive in this dispute. Finally, Movants' concerns with the special master remedy are unfounded given this Petition does not seek to alter Respondents' duties to crime victims and that Respondents all acknowledge and reaffirm those duties.

II. Respondents' and Movants' Briefing in Response to the Petition Make Clear that Intervention is Not Warranted

In reading the Respondents' responses, it is clear that the Movants' professed interest in this case involving notice and opportunity to be heard on prisoner releases will not be impaired or impeded in this action, and that those interests are "adequately represented by existing parties," making intervention by Movants inappropriate. *Supernova Media, Inc. v. Pia Anderson*

Dorius Reynard & Moss, LLC, 297 P.3d 599, 607 (Utah 2013). Petitioners have made clear they are not proposing to circumvent victim notice or hearing opportunities, and in their responses, none of the Respondents disavow their responsibilities to make those available to victims as part of any release procedures ordered by this Court. In fact, all Respondents acknowledge issues involving notification and hearing of victims, with the State Respondents citing those issues as an independent reason as to why they believe the relief in this Petition should not be granted. *See* State Respondent’s Brief at pp. 24-26. Respondents’ emphasis on these issues makes them more than adequate representatives of Movants’ asserted interests.¹ Petitioners take no position on whether any decision on intervention here should be published.

III. This Court Has Jurisdiction Over this Petition

Movants’ argument that Rule 65B does not confer jurisdiction to the Court here misses the mark. This Court has at least twice held that a Utah state habeas petition is an appropriate vehicle to address claims of unconstitutional conditions of confinement. In *Wickham v. Fisher*, 629 P.2d 896, 900 (Utah 1981), the Court acknowledged a County’s argument that “a writ of habeas corpus is an inappropriate remedy for attacking the conditions of confinement as opposed to the legality of confinement.” *Wickham* then soundly rejected this argument and ordered certain improvements in the conditions at that County’s jail in response to a prisoner’s habeas petition. *See id.* at 900-902. In *Termunde v. Cook*, 786 P.2d 1341, 1342 (Utah 1990), the Court,

¹ It is further evident from the extensive cross references between briefs that Respondents and Movants shared their briefs before filing them, making it clear that the Respondents are working closely with Movants to ensure that Movants’ interests are not just adequately, but fully and directly, represented by Respondents.

citing *Wickham*, explained that “[t]he law has developed to a point where a habeas corpus petition is the proper vehicle to assail as unconstitutional conditions of confinement in prisons...” There is no indication in *Termunde* that the Court was discussing federal law, and that decision was in response to a state law habeas petition. *See id.*

Movants’ argument that Utah does not recognize the use of state habeas petitions to address conditions of confinement boils down to: (1) selectively quoting *Wickham* and asking the Court to ignore that *Wickham* granted relief concerning jail conditions in response to a state habeas petition, and (2) telling the Court, in a footnote, to assume that the Court in *Termunde* was confused as to whether *Wickham*-- and apparently *Termunde* itself-- was applying state or federal law. Movants make these two requests based on an unconvincing discussion of articles and cases predating *Wickham* and *Termunde* purporting to set out an “original meaning” analysis. Because the Court need look no further than the plain holdings of *Wickham* and *Termunde* repeatedly establishing that state habeas relief is available to address claims premised on unconstitutional conditions, the Petitioners will refrain from further discussion of Movants’ multi-page academic argument otherwise.

Movants also contend that a habeas petition is not a suitable means to address conditions of confinement because if there is a possibility that the prisoner might be released as a remedy, any victim would need to be joined as a necessary party. In support, they assert that “a prisoner cannot be released unless a victim is given notice and an opportunity to be heard,” citing Utah Const., art. I, § 28(1)(b). (Movants’ Brief at 17.) Movants, however, cite no authority substantiating this radical, sweeping reading of the Utah constitution and it is not one the Court should adopt. Indeed, this Court has made clear that “[o]nly the State and the defendant are

actual parties to a criminal action,” *State v. Lane*, 2009 UT 35, ¶ 17, 212 P.3d 529, 522, and there is no authority to hold that anyone except Respondents and Petitioners are actual parties to habeas petitions. Moreover, the Rights of Crime Victims Act does not provide for continued incarceration of a prisoner whose constitutional rights were violated as a remedy to any State violation of victim notice and hearing requirements in a habeas action or otherwise. *See generally* Utah Code §77-38-1 *et seq.*² Even assuming for argument’s sake that this argument had merit, it does not explain why habeas is not appropriate in this situation, only that the proceedings might have more parties.

IV. Public Interest Standing is Appropriate

The Petitioners explain in detail in their reply to the State Respondents why they meet the test for public interest standing. In their brief, Movants make an argument spanning over a dozen pages of why this Court should abandon the public interest doctrine. This Court has considered all of the arguments advanced by Movants before, *see Gregory v. Shurtleff*, 2013 UT 18, ¶¶ 63-121, 299 P.3d 1098, and rejected them, *see id.* at ¶¶ 11-18. This Court should do the same here if it decides to entertain this question at all. To the extent that Movants intermingle their argument against the public interest standing in general with arguments about why the Petitioners purportedly do not meet it, those arguments are addressed in their reply to the State Respondents and incorporated herein.

² Moreover, prohibiting courts from remedying constitutional violations against prisoners unless victims were included as parties would violate federal due process requirements, an outcome incompatible with Utah statute. *See* Utah Code §77-38-2(4) (Rights of Crime Victims Act “shall be construed to conform to the Constitution of the United States.”)

V. This Court Has Original Jurisdiction Over this Action

As conceded by Movants, it is appropriate to file for extraordinary relief directly in this Court when “it is impractical or inappropriate to file the petition for a writ in the district court.” Utah R. App. P. 19(b)(5). There is no serious dispute that the still-raging pandemic creates an incredible amount of risk that requires swift, extraordinary, systemic action. As such, the only practical and appropriate recourse is for this Court, the sole tribunal with the necessary scope of authority to address the danger to incarcerated people in Utah on a statewide level, to take decisive action.

Movant and Respondents’ opinion that this proposition is mere hyperbole or frivolous is flatly contradicted by the actions of this Court. That is, this Court recently again recognized the enormity of the threat still facing people who are required to congregate together in this time and has taken unprecedented statewide action in the Utah criminal justice system to remedy it. On May 11, 2020, this Court issued an “Administrative Order for Court Operations During Pandemic.” At Paragraph 10(a) of that Order, the Court directed all district and justice court judges to “suspend all criminal jury trial (whether the defendant is or is not in custody) . . . pending further administrative orders.” This new directive superseded the Court’s prior order of March 21, 2020 that trials only be suspended until June 1, 2020. Based on this guidance, it is clear that from the Court’s perspective, it is still too dangerous to legally require people to gather, even to fulfill their most solemn civic duty of serving on a criminal jury trial, and there is presently no way to know how long it will be before it is safe to do so.

As such, this Court has used an administrative order to indefinitely suspend the right to a speedy trial of all defendants in Utah facing state charges, all of whom are presumed innocent.

There were other potential options to address the crisis in a way that preserved the right of some to a speedy trial that the Court did not take. For example, the Court did not release a district-by-district survey of what precautions courts in those districts could put into place that might potentially lessen the risk that COVID-19 could spread to jurors, court personnel, judicial officers, attorneys, the public, and defendants based on the conditions in those districts or their courthouses. Likewise, the Court did not restart trials in counties where infection numbers are presently low. Clearly, the risk is too high, and any measures are too imperfect, to make such tailoring attempts feasible now, or for the undetermined future. Petitioners are not aware of any situation in Utah's history where the Court has taken such action, and it remains to be seen what constitutional ramifications it will have for the cases of those presumed innocent defendants who have already faced months with no recourse to a trial, many in custody.

What Petitioners ask with respect to prisoner safety here mirrors the extraordinary steps this Court has taken to protect people involved in the criminal justice system. In this context, on this record, Movants' assertions that Petitioners are exaggerating ring particularly hollow.

Moreover, Movants misconstrue the reason Petitioners filed in this Court originally. It is not because Petitioners believe that district courts are closed but because at the time of filing, there were strong reasons to believe that the nature of the problem faced by all incarcerated prisoners in Utah required systemic relief that piecemeal litigation in each district court in Utah could not achieve. The Petitioners also did not file this Petition in this Court to thwart any notice or hearing obligations that Respondents have to victims: no Petitioner has any such obligations and they can be carried out by the proper parties as appropriate.

Movants also miss the mark in their critique of the factual basis for the Petition. While it

is true that declarations are a more typical manner of presenting facts, it is worth noting that Movants make no effort to discredit any of the sources cited by Petitioners. Moreover, the Petitioners are filing a supplemental factual briefing in a confidential manner along with their reply briefs. If the Court is unpersuaded by the factual bases for the Petition, of which it may take judicial notice should the Court find it appropriate, it should deny the Petition. The mere fact that the Petition's facts are based on public sources is not a reason alone to dismiss or declare the Petition frivolous.³

VI. Petitioners Have Established Constitutional Violations

The Movants adopt Respondents' substantive arguments on constitutional violations here, and Petitioners address those in their replies. Movants also lay out a gratuitous and unconvincing academic analysis of Utah's unnecessary rigor clause unrelated to the issues at hand. Movants claim no expertise or particular interest in this question, but only maintain that their analysis is useful. Petitioners disagree for the reasons set forth in their replies to the arguments actually associated with the present dispute.

VII. A Special Master is Appropriate

Movants' discussion of the special master remedy is not helpful. Petitioners more fully explain this proposed remedy in their reply to State Respondents' response, and adopt those

³ It is surprising that Movants' counsel would suggest that Petitioners (three non-profit organizations not seeking attorney fees here) only filed this Petition to help the ACLU raise funds given Rule 3 of the Utah Standards of Professionalism and Civility, and given the fact that the Utah Crime Victims Legal Clinic and the University of Utah S.J. Quinney College of Law have "donate" and "give" buttons prominently on their websites. Petitioners regret this uncivil, unprofessional innuendo by Movants' counsel, which suggests personal motives to attack the ACLU untethered to any interests Movants assert and argues strongly against intervention in these proceedings.

arguments in reply to Movants. To summarize the point with the most relevance to Movants, Petitioners do not seek to excuse the proper parties, such as prosecutors, of their responsibilities to provide notice and opportunity to be heard for crime victims when doing so is required. Likewise, no Respondent disavows their duties to victims, and all make clear that they would hold to them during any procedures ordered by this Court. As such, the Court need not address Movants' speculative arguments regarding special master procedures in response to this Petition.

CONCLUSION

For all of these reasons, the Court should grant this Petition for Extraordinary relief and order further proceedings to determine appropriate relief.

Dated May 13, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 13, 2020, I sent copies of this brief via electronic mail to the following:

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