STATE OF MAINE

SUPREME JUDICIAL COURT
Sitting as the Law Court
Docket No. SJC-23-2

State of Maine ex rel. Angelina
Dube Peterson, et al.

v.

Peter A. Johnson, et al.

MEMORANDUM OF LAW OF PARTY-IN-INTEREST STATE OF MAINE

Party-in-Interest the State of Maine, pursuant to this Court's Order of November 14, 2023, hereby provides its Memorandum of Law with respect to whether hearings under Maine law for consideration or review of preconviction bail constitute a "critical stage" of a criminal prosecution.[1]

A. Establishment and review of preconviction bail under Maine law.

Maine law on preconviction bail provides, "At the initial appearance before a judicial officer of a defendant in custody for a crime bailable as of right preconviction, the judicial officer may issue an order that, pending trial, the defendant be released," on personal recognizance or pursuant to bail conditions. 15 M.R.S.A. § 1026(1). "In setting bail, the judicial officer shall, on the basis of an interview with the defendant, information provided by the defendant's attorney and information provided by the attorney for the State or an informed law enforcement officer if the attorney for the State is not available and other reliable information that can be obtained, take into account the available information concerning . . . [t]he nature and

[1] To state a claim upon which relief can be granted, Petitioners' claim that their right to counsel pursuant to the Sixth Amendment of the United States Constitution requires that Petitioners allege that they have been denied counsel at a "critical stage" of their prosecutions. The evidence presented by Petitioners at the November 14, 2023 hearing, including the record evidence of Petitioners' underlying criminal matters, establish that Petitioners have each respectively appeared at an initial appearance and two subsequent (2) bail review hearings. Petitioners were each represented by a Lawyer of the Day at their initial appearances and subsequent bail review hearings.

circumstances of the crime charged; [t]he nature of the evidence against the defendant; and [t]he history and characteristics of the defendant . . . ." 15 M.R.S.A. § 1026(4).

Following the initial bail determination, "Any defendant charged with a crime bailable as of right who is aggrieved by a decision of the court made at arraignment or initial appearance as to the amount or conditions of bail set may file a petition with the Unified Criminal Docket for a de novo determination of bail by another justice or judge in accordance with the procedures set forth in Rule 46(d) of the Maine Rules of Unified Criminal Procedure." 15 M.R.S.A. § 1028-A (further providing, "The court making the initial decision shall advise the defendant of the right to obtain a de novo determination of bail," and "[t]he de novo determination by a justice or judge under this section is final and no further relief is available.").[2] With respect to the procedure for judicial review of bail, "Any defendant charged with a crime bailable as of right who is aggrieved by a decision of the court made at arraignment or initial appearance as to the amount or conditions of bail set may file one petition for redetermination of bail by another justice or judge. Such petition must be filed with the court no later than 14 days before the date set for the defendant's dispositional conference." M. R. U. Crim. P. 46(d). Additionally, pursuant to the Standing Order on Initial Assignment of Counsel (Nov. 3, 2023),[3] "When an in-custody

[2] A defendant may seek modification of conditions imposed as part of a bail determination independent from the *de novo* review of Section 1028-A. 15 M.R.S.A. § 1026(3)(C) ("Upon motion by the attorney for the State or the defendant and after notice and upon a showing of changed circumstances or upon the discovery of new and significant information, the court may amend the bail order to relieve the defendant of any condition of release, modify the conditions imposed or impose further conditions authorized by this subsection as the court determines to reasonably ensure the appearance of the defendant at the time and place required, that the defendant will refrain from any new criminal conduct, the integrity of the judicial process and the safety of others in the community.").

[3] This Court may take judicial notice of the process established by the publicly available Standing Order as "a fact that is not subject to reasonable dispute because it . . . [c]an be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." M. R. Evid. 201(b)(2); *see also In re Jonas*, 2017 ME 115, ¶ 38 n.10, 164 A.3d 120 ("When a court takes judicial notice of a final judgment, from a Maine court or another court of competent jurisdiction, however, that "notice" is limited to the existence of the judgment, and the action of the court. "[A] court may take notice of another court's order only for the limited purpose of recognizing the 'judicial act' that the order represents or the subject matter of the litigation." (quoting *United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994)).

defendant is entitled to court-appointed counsel, but counsel is unavailable for assignment at the time of the initial appearance, that person shall be brought before the court," and, with the assistance of a Lawyer of the Day, "The court shall proceed to hear motions regarding bail and other matters as necessary and may take such action as the court deems appropriate."

B. The United States Supreme Court has not ruled that a hearing to establish or review preconviction bail as conducted under Maine law is a "critical stage" for the purpose of the Sixth Amendment right to counsel.

The "critical stage" designation establishes whether or not a criminal defendant must establish prejudice in order to state a cognizable claim for deprivation of counsel in violation of the Sixth Amendment of the United States Constitution. *Cf. United States v. Cronic*, 466 U.S. 648, 659 (1984) ("The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial.") and *Strickland v. Washington*, 466 U.S. 668, 694 (1984) ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."). The U.S. Supreme Court has observed, "We have spared the defendant the need of showing probable effect upon the outcome, and have simply presumed such effect, where assistance of counsel has been denied entirely or during a critical stage of the proceeding. When that has occurred, the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary. But only in 'circumstances of that magnitude' do we forgo individual inquiry into whether counsel's inadequate performance undermined the reliability of the verdict." *Mickens v. Taylor*, 535 U.S. 162, 166 (2002) (addressing question of whether actual prejudice must be established based on conflict of interest in ineffective assistance of counsel claim) (quoting Strickland, 466 U.S. at 685–686) (internal citations and quotations omitted).

Courts applying the "critical stage" analysis to Sixth Amendment claims have disagreed on whether a "critical stage" designation is sufficient to support a presumption of prejudice. Cf. *Van v. Jones*, 475 F.3d 292, 311-312 (6th Cir. 2007) ("It is settled that a complete absence of counsel at a critical stage of a criminal proceeding is a per se Sixth Amendment violation warranting reversal of a conviction, a sentence, or both, as applicable, *without analysis for prejudice or harmless error*.") (emphasis added) *and Satterwhite v. Texas*, 486 U.S. 249, 256 (1988) ("Some constitutional violations, however, by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless. Sixth Amendment violations *that pervade the entire proceeding* fall within this category.") (emphasis added); *see also State v. Charlton*, 23 Wash. App. 2d 150, 167–68, 515 P.3d 537, 547 (2022)[4] ("[W]hen a defendant is deprived of the right to counsel at a critical stage in the criminal proceedings, the presumption of prejudice applies only when the violation pervades and contaminates the entire case. If not, the constitutional harmless error analysis applies.").

The identifying characteristics of a "critical stage" in a form readily applicable to any event following the initiation of criminal proceedings are, in contrast to the legal effect of a "critical stage" designation, elusive. *See Van*, 475 F.3d at 312 ("One would welcome a comprehensive and final one-line definition of 'critical stage.'"). A "critical stage" in a criminal prosecution is a stage at which "counsel's absence at such stages might derogate from [defendant's] right to a fair trial." *Wade*, 388 U.S.at 227–28 (counsel's absence at forensic analyses did not violate the Sixth Amendment right to counsel at "critical stages" because, "they are not critical stages since there is minimal risk that [defendant's] counsel's absence at such stages might derogate from his right to a fair trial."); *Cronic*, 466 U.S. at 658 ("Absent some

[4] The Washington Supreme Court has granted review of the *Charlton* decision. *State v. Charlton*, 200 Wash. 2d 1025, 523 P.3d 1182 (2023).

effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated."); *Coleman v. Alabama*, 399 U.S. 1, 9 (1970) ("The determination whether the hearing is a 'critical stage' requiring the provision of counsel depends, as noted, upon an analysis 'whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice.'" (quoting *Wade*, 388 U.S. at 227)). Federal caselaw has "defined critical stages as proceedings between an individual and agents of the State (whether "formal or informal, in court or out," that amount to "trial-like confrontations," at which counsel would help the accused "in coping with legal problems or . . . meeting his adversary." *Rothgery*, 554 U.S. at 212 n.16 (quoting *United States v. Ash*, 413 U.S. 300, 312–313 (1973)) (internal citations omitted). "[T]he [Supreme] Court has clarified that not every 'critical' pretrial event comes with Sixth Amendment protection: the possibility that [such an event] may have important consequences at trial, standing alone, is insufficient to trigger the Sixth Amendment right to counsel." *United States v. Boskic*, 545 F.3d 69, 82 (1st Cir. 2008) (quoting *Moran v. Burbine*, 475 U.S. 412, 432 (1986)) (internal quotations omitted). Addressing the question from the perspective of what stages are *not* "critical," the Sixth Circuit Court of Appeals observed, "We do not label as a critical stage proceedings where even the likelihood of later prejudice arising from the failure to appoint [counsel] is absent." *Van*, 475 F.3d at 312 (quoting *Lundberg v. Buchkoe*, 389 F.2d 154, 158 (6th Cir. 1968) (internal quotations omitted).

The closest procedural analogue to a Maine bail hearing which the Supreme Court has addressed directly is the preliminary hearing in a criminal prosecution pursuant to Alabama law. *Coleman*, 399 U.S. at 10 ("[T]he Alabama preliminary hearing is a 'critical stage' of the State's criminal process at which the accused is 'as much entitled to such aid (of counsel) . . . as at the

trial itself.'"). While federal courts holding that a bail hearing is a "critical stage" frequently cite to *Coleman* in support of that conclusion, as stated in *Coleman*, "[U]nder Alabama law the sole purposes of a preliminary hearing are *to determine whether there is sufficient evidence against the accused to warrant presenting his case to the grand jury* and, if so, to fix bail if the offense is bailable." *Coleman*, 399 U.S. at 8 (emphasis added); *cf. Caliste v. Cantrell*, 329 F. Supp. 3d 296, 314 (E.D. La. 2018) (citing *Coleman* for proposition that, "a preliminary bail hearing is a 'critical stage ... at which the accused is ... entitled to [counsel].)'"). The court in *Coleman* specified that the "probable cause" component of that hearing, specifically noting "witnesses testimony" and "opportunity for cross-examination," was the component having a potential effect on a defendant's opportunity to have a fair trial. *Coleman*, 399 U.S. at 9. *Coleman* does not supply controlling precedent on whether a bail hearing, standing alone, is a "critical stage." *Cf. Higazy v. Templeton*, 505 F.3d 161, 172 (2d Cir. 2007) ("In the Sixth Amendment context, the Supreme Court found that a bail hearing is a 'critical stage of the State's criminal process at which the accused is as much entitled to such aid (of counsel) ... as at the trial itself.'") (quoting *Coleman*, 399 U.S.at 9–10). "[T]he [Supreme] Court has not addressed whether a bail hearing constitutes a critical stage. The closest it may have come is its statement in *Coleman*, where, in finding Alabama's preliminary hearing to be a critical stage, it observed that "counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as ... bail." *Guill v. Allen*, 2023 WL 6159978, at *28 (M.D.N.C. Sept. 21, 2023) (quoting *Coleman*, 399 U.S. at 9)).

The clearest recent statement by the United States Supreme Court on whether a bail hearing is a "critical stage" appears in Justice Alito's concurrence in *Rothgery*, "Whereas the temporal scope of the right is defined by the words '[i]n all criminal prosecutions,' the right's

substantive guarantee flows from a different textual font: the words 'Assistance of Counsel for his defence.' [] In interpreting this latter phrase, we have held that "defence" means defense at trial, not defense in relation to other objectives that may be important to the accused." *Rothgery*, 554 U.S. at 216 (Alito, J., concurring) (citing, *inter alia*, *Gerstein v. Pugh*, 420 U.S. 103, 122–123 (1975)); *see also id.* at 217 ("Noting that pretrial events have been deemed 'critical stages' where those "pretrial events may so prejudice the outcome of the defendant's prosecution that, as a practical matter, the defendant must be represented at those events in order to enjoy genuinely effective assistance at trial." (citing *Ash*, 413 U.S. at 309–310; *Wade*, 388 U.S. at 226))). "[T]he central question in determining whether a proceeding is a critical stage is "whether potential substantial prejudice to defendant's rights inheres in the ... confrontation and the ability of counsel to help avoid that prejudice." *Jackson v. Miller*, 260 F.3d 769, 777 (7th Cir. 2001) (quoting *Coleman*, 399 U.S. at 9); *see also Rothgery*, 554 U.S. at 217 ("[W]e have held that an indigent defendant is entitled to the assistance of appointed counsel at a preliminary hearing if 'substantial prejudice ... inheres in the ... confrontation' and 'counsel [may] help avoid that prejudice.'") (Alito, J., concurring) (quoting *Coleman*, 399 U.S. at 9) (internal quotation marks omitted)).

C. Courts reviewing the Supreme Court's jurisprudence on whether a bail hearing is a "critical stage" have come to inconsistent conclusions.

The Second Circuit Court of Appeals has found that bail hearings are "critical stages." *United States Sec. & Exch. Comm'n v. Ahmed*, 2020 WL 468444, at *4 (D. Conn. Jan. 29, 2020) ("Bail hearings, which determine 'whether a defendant will be allowed to retain, or forced to surrender, his liberty during the pendency of his criminal case' and which 'fit comfortably within the sphere of adversarial proceedings closely related to trial,' are 'critical stages' for purposes of the Sixth Amendment.") (quoting *Higazy*, 505 F.3d at 173). The Second Circuit's holding in

Higazy followed a discussion of bail hearings in the context of the claimed violation of a convicted defendant's right to a "public trial" relied on the court's prior decision in *United States v. Abuhamra* addressing the use of *ex parte* evidence in a bail hearing. 389 F.3d 309, 323–24 (2d Cir. 2004). Likewise, Courts in the Fifth Circuit have, in a recent series of cases, concluded that preconviction bail is a "critical stage." *See Booth v. Galveston Cnty.*, 352 F. Supp. 3d 718, 738 (S.D. Tex. 2019) ("There can really be no question that an initial bail hearing should be considered a critical stage of trial." (citing *Higazy*, 505 F.3d at 172; *Caliste*, 329 F. Supp. 3d at 314); *Caliste*, 329 F. Supp. at 314 ("There is no question that the issue of pretrial detention is an issue of significant consequence for the accused.").

In the Third Circuit, courts have held that a bail hearing is not a "critical stage", based on the Supreme Court's focus on the effect of decisions on the conduct of the eventual trial. *United States v. Hooker*, 418 F. Supp. 476, 479 (M.D. Pa.) ("A bail reduction hearing is not a 'critical stage' of the proceedings where the defense on the merits would be impaired without the assistance of counsel." (citing *Gerstein*, 420 U.S. at 122; *United States ex rel. Reed v. Anderson*, 461 F.2d 739, 742 (3rd Cir. 1972)); *cf. United States v. Johnson*, 516 F. Supp. 696, 699 (E.D. Pa. 1981) (noting that, if bail hearing was a "critical stage," then "statements obtained from [criminal defendant] that resulted from the Government's failure to honor this right to counsel must be suppressed," in opinion suppressing statements made at bail hearing).

Some federal courts addressing the issue of bail, frequently considered at a procedural event involving other questions (*i.e.* a probable cause determination at an initial appearance), have followed the approach in *Rothgery* of referencing but not separately addressing, a bail determination as part of that procedural event. *See, e.g., Smith v. Lockhart*, 923 F.2d 1314, 1319–20 (8th Cir. 1991) ("Given the important issues that were considered a*nd the fact that*

defenses could be irretrievably lost if not raised, we conclude that the November 6th omnibus hearing was a critical stage necessitating the assistance of counsel.") (emphasis added). As with *Coleman*, subsequent courts have relied on precedent addressing hearings at which issues directly affecting the eventual trial, including the preservation of defenses to the underlying criminal charges, were considered along with bail determinations. *See, e.g., Booth*, 352 F.Supp.3d at 739 (citing *Coleman* for proposition that "Sixth Amendment required the presence of counsel at preliminary hearing because, in part, counsel could make effective arguments about the necessity of bail," and *Lockhart* for the holding that "hearing on bail reduction motion was a critical stage of proceeding . . . .").

A separate line of analysis in federal courts questions whether the "critical stage" designation uniformly dispenses with the need to show prejudice, holding that the absence of counsel at a "critical stage" is subject to "harmless error" analysis absent a showing of "structural defects in the constitution of the trial mechanism," which affect "[t]he entire conduct of trial from beginning to end." *United States v. Owen*, 407 F.3d 222, 226 (4th Cir. 2005) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309–10 (1991)). The *Owen* court held that a criminal defendant's uncounseled entry of a not guilty plea and assertion of his right to a jury trial, which "did not irrevocably waive any defenses or make any irreversible admissions of guilt," or provide the opportunity for either, was subject to harmless error analysis. *Id.* at 227. As the *Owen* court observed, "In particular, with respect to arraignments, the Supreme Court has held that the denial of counsel at an arraignment required automatic reversal, without any harmless-error analysis, in two situations: when defenses not pleaded at arraignment were irretrievably lost, and when a full admission of guilt entered at an arraignment without counsel was later used against the defendant at trial, despite its subsequent withdrawal." *Id.* at 226–27

(citing *Hamilton v. Alabama*, 368 U.S. 52, 53–54 (1961); *White v. Maryland*, 373 U.S. 59, 60 (1963)); *see also Ayala v. Wong*, 756 F.3d 656, 673 (9th Cir. 2014) (citing *Owen*, 407 F.3d at 227) ("The use of the phrase 'critical stage' in this excerpt can be somewhat deceptive: although the Batson proceedings represented a "critical stage" in the sense that Ayala had the right to counsel during those proceedings, they were not necessarily the sort of 'critical stage' at which the deprivation of that right constituted structural error."). Subsequent review and reversal of the Ninth Circuit's opinion in *Ayala* did not address petitioner's denial of counsel claim, the four dissenting justices referenced an understanding of the "critical stage" as dispensing with any requirement to show prejudice, "[I]n a future case arising in a direct review posture, the Court may have occasion to consider whether the error that the Court assumes here gives rise to "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Davis v. Ayala*, 576 U.S. 257, 296 (2015) (Sotomayor, J., dissenting) (citing *Mickens*, 535 U.S. at 166).

CONCLUSION

There is no controlling caselaw establishing that a bail hearing or bail review under Maine law is a "critical stage" in the context of the Sixth Amendment to the United States Constitution.

Dated: November 21, 2023

Respectfully submitted,

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