STATE OF MAINE
KENNEBEC, ss

MAINE DISTRICT COURT
Div. of Northern Kennebec
DOCKET NO. VI-17-20053

STATE OF MAINE,

Plaintiff,

v.

MATTHEW D. PERRY,

Defendant.

MOTION OF GOVERNOR LEPAGE TO INTERVENE, OR, IN THE ALTERNATIVE, TO FILE AMICUS BRIEF, AND INCORPORATED MEMORANDUM OF LAW

Introduction

On March 30, 2017, Governor LePage exercised his authority under the Maine Constitution, Article 5, Part 1, §11, which should have terminated this action with a remittitur of the forfeiture and penalty set forth in the judgment ordering the destruction of the subject dog. It has now become apparent that such termination and remittitur has not occurred. The Governor therefore seeks to participate in this action to enforce the exercise of his Constitutional power as reflected in his March 30 Order.[1]

BACKGROUND

This is an action pursuant to 7 M.R.S. § 3952, listing Matthew Perry as the named defendant. On March 21, 2017, the Court issued an order imposing a fine and ordering that the dog forming the subject matter of the action be euthanized. The pleadings in this matter indicate that the Court issued a warrant permitting seizure of the dog to execute the Court's March 21 Order, and that the dog was seized at the home of Linda Janeski, who on March 28, 2017 filed a motion to vacate the March 21 Order, alleging, *inter alia*, that at the time the March 21 Order

[1] The Attorney General approved a request for authorization to retain the undersigned counsel for the purpose of preparing and filing this motion. *See* 5 M.R.S. § 191.

was entered, Mr. Perry was not the owner of the dog. Two days later, on March 30, 2017, the Governor issued an order remitting the euthanization pursuant to Art. 5, pt. 1, § 11 of the Maine Constitution (hereinafter "section 11.") The Governor's March 30 Order was filed with the Court on April 6, 2017, and is attached hereto as Exhibit 1.

Despite the Governor's March 30 Order, the District Attorney has apparently continued to pursue execution of the March 21 euthanization order. Despite the filing of the Governor's March 30 Order with the Court, this action has continued, with additional filings and a hearing scheduled on July 24, 2017. It is the Governor's understanding that the dog currently remains in a shelter, with its owner barred from removing it, contrary to the Governor's March 30 Order.

DISCUSSION

I. The Court should grant the Governor intervention of right pursuant to M.R.Civ.P. 24(a).

Under Rule 24(a), an interested party may intervene as of right in an action when (1) the motion is timely and (2) the applicant "claims an interest relating to the property or transaction which is the subject of the action and the application is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest," unless (3) the applicant's interest is adequately represented by existing parties. M.R.Civ.P. 24(a).

A. Intervention is timely.

The Governor's power to remit occurs by definition "after conviction," Me. Const., Art. 5, Pt. 1, § 11, and thus was reasonably not exercised prior to entry of the March 28 Order imposing the penalty and forfeiture. Thereafter, it was not immediately known to the Governor that compliance with his March 30 Order was not forthcoming. No prejudice would occur to any party from his intervention; to the contrary, the enforcement of the Governor's March 30 Order

would end this matter immediately, disposing of pending motions and pending appeal in the Law Court. Mr. Perry and Ms. Janeski have invoked the March 30 Order and would suffer no prejudice from the Governor's participation in enforcing his order. The District Attorney would similarly profit from the Governor's participation, given her primary duty to enforce the Constitution, and to arrive at a just result in every criminal or civil action pursued in the name of the State, after a full examination and application of relevant law.

Indeed, the exercise and enforcement of the Executive's constitutional clemency powers is timely at any time. A dispute relating to the scope of a Governor's remittitur and pardon powers might be resolved well after the final entry of the underlying action. *See, e.g., Baston v. Robbins,* 153 Me. 128, 135 A.2d 279 (1957) (conviction in November 1952, released after commutation in 1956, returned prison on a parole violation warrant and matter before the Court in action for writ of habeas corpus); *In re Pardoning Power of Governor and Council*, 85 Me. 547, 27 A. 463 (1892) (conviction in September 1881, sentence in 1883, pardon pending and discussed in questions promulgated to the Supreme Judicial Court in 1892). *See also Fletcher v. Graham*, 192 S.W.3d 350 (Ky. 2006) (enforcing pardon through Governor's action for writ of mandamus).

Because the instant action remains open, the appropriate mechanism for the Governor to seek enforcement of his March 30 Order is in this action, right now, as opposed to a separate mandamus action, and his intervention is per force timely.

B. The Governor claims an interest that may be impeded in the disposition of this action.

The Governor's interest here is in enforcing his authority as provided for in section 11. His exercise of those rights affecting this action is apparently being ignored. If the Governor is not permitted to intervene, this matter may be finally disposed of in a manner inconsistent with

the exercise of his constitutional authority. His interest in avoiding that result and enforcing his authority is immediate, direct and great.

C. The existing parties do not adequately represent the Governor's interest.

As noted above, the Governor's interest is enforcing his constitutional authority under section 11. While Mr. Perry and Ms. Janeski may seek the benefits of the March 30 Order that he issued, the Governor seeks to defend his constitutional power to issue and enforce that Order, a distinct and separate interest, unique to him.

II. Alternatively, the Court should grant the Governor intervention pursuant to M.R.Civ.P. 24(b).

Because the District Attorney appears to be ignoring or rejecting, and not enforcing, the Governor's exercise of a power bestowed upon him under the Maine Constitution, the Governor's intervention in this action to enforce his authority should be deemed as of right. In any event, with respect to any executive order, Rule 24(b) provides that when a party to an action is relying on such an order administered by a state governmental officer or agency, the officer or agency may upon timely application be permitted to intervene, with the Court considering whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. Given that the Governor issued the March 30 Order and does not simply administer it, his participation should again should be deemed be of right. Indeed, a closer parallel to the existing situation is Rule 24(d), providing for intervention of right when constitutional issues are involved – here, the Governor seeks to enforce his constitutional right. But at a minimum, given, as noted above, the lack of prejudice to the parties and the timeliness of this motion, permissive intervention is appropriate. As commentators on the parallel provision in Federal Rule of Civil Procedure 24 note, the "whole thrust" of this provision is "in the direction of allowing intervention liberally to governmental agencies and officers seeking to

speak for the public interest and ... courts have permitted intervention accordingly." *See* C. Wright, A. Miller and M. Kane, 7C Federal Practice and Procedure, § 1912 at 472 (2007).

Certainly, the District Attorney represents the public interest, including the balancing of various concerns, perhaps sometimes conflicting, in each individual matter she prosecutes. As noted above, the Governor's interest is also a public one, but singularly targeted in this instance to enforce his constitutional authority. His perspective is unique and the interests grounding this provision in Rule 24(b) are squarely advanced with his participation. *See also infra* at 8.

III. Alternatively, the Court should grant the Governor leave to file an amicus brief.

As noted, because the Governor seeks to enforce his Order to end the prosecution of this matter, his interest is direct and supports intervention as a party. At the very minimum, however, his voice should be heard through an amicus curiae brief. *See In re Hooker*, 87 So.3d 401, 402 (Miss. 2012) (granting outgoing Governor's request to participate as amicus and in oral argument in action filed by state attorney general challenging pardons).

IV. The Governor's accompanying pleading pursuant to Rule 24(c) is Exhibit 1.

Rule 24(c) provides that a person desiring to intervene shall serve with a motion to intervene "a pleading setting forth the claim or defense for which intervention is sought." M.R.Civ. P. 24(c). Given that the Governor seeks to end this proceeding based on his March 30 Order, the language of Rule 24(c) appears inapplicable, in that he does not seek to advance a particular claim or defense in the matter itself, but rather to end it. He took action through the March 30 Order, and it is that Order that generates his position in this matter.

In an effort nevertheless to comply with the spirit of Rule 24(c), set forth below is a summary of the Governor's legal position as to why the Court should enter an order disposing of

this matter by vacating its order to euthanize the dog and remitting the dog back to the custody of its proper owner in accordance with March 30 Order.

Section 11 provides as follows:

§ 11. Power to pardon and remit penalties, etc; conditions

> Section 11. The Governor shall have power to remit after conviction all forfeitures and penalties, and to grant reprieves, commutations and pardons, except in cases of impeachment, upon such conditions, and with such restrictions and limitations as may be deemed proper, subject to such regulations as may be provided by law, relative to the manner of applying for pardons. Such power to grant reprieves, commutations and pardons shall include offenses of juvenile delinquency.

As this language reflects, the Governor's power under section 11 is broad, relating not just to criminal pardons, but all "forfeitures and penalties." In a similar context involving a dog euthanasia order under a New Jersey statute similar to section 3952, Governor Christine Todd Whitman, applying a provision in the New Jersey Constitution similar to section 11, issued Executive Order #7, directing the remittitur of the destruction of subject dog, with conditions. A copy of that Executive Order is attached hereto as Exhibit 2. Governor LePage's March 30 Order is the functional equivalent of Gov. Whitman's Executive Order #7.

The nomenclature used by Gov. Whitman treated the dog as property and the euthanasia order as a forfeiture of that property, which she remitted. The language of Gov. LePage's order speaks in terms of a "pardon" of the dog. (*See* Ex. 1.) These are distinctions without a material legal difference. Section 11 applies broadly to all forfeitures, penalties, commutations, reprieves and pardons. Any technical argument that the wrong language, or an incorrect process was used by Gov. LePage would fail not only because of a lack of material prejudice from any purported procedural defect, but because the Maine Supreme Judicial Court has made clear that the Governor's powers under section 11 may be exercised in the manner he sees fit, with compliance

with technical processes permissive, not exclusive. *See In re Pardoning Power of Governor and Council*, 85 Me. 547, 27 A. 463 (1892); *see also Bossie v. State*, 488 A.2d 477, 480 (Me. 1985) (citing *Baston*, *supra* noting that section 11 "prevents the legislature from controlling, regulating, or interfering with Governor's pardoning powers)."[2] Evolving views of the legal status of animals since 1994 would further justify Governor's nomenclature and approach, as would the fact that the specific person owning the dog subject to the euthanasia order in the instant matter is unclear, justifying the focus in the Order's language on the dog itself and the consequences it faces.

More generally, the Law Court has noted that the Governor's power to pardon in Maine under the Maine Constitution is extremely broad. *See State v. Hunter*, 447 A.2d 797, 802 (Me. 1982) (the Governor "has complete discretion and may exercise his power for whatever reasons he thinks appropriate"). As noted above, this power is not limited to "pardons" *per se*, but "all

[2] The District Attorney has argued in opposition to Mr. Perry's pending motion for reconsideration that the Governor did not comply with 15 M.R.S. §§ 2161 and 2166 when he issued the March 30 Order. Section 2161 relates to procedures regarding petitions to the Governor for pardon or commutation of sentences and provides that written notice shall be given to the Attorney General and District Attorney at least 4 weeks before the time of the hearing thereon, with four weeks' notice in a newspaper of general circulation in the county were the case was tried. Setting aside that this statute does not and cannot limit the Governor's powers under section 11, it imposes no duty upon the Governor in the instant context involving no petition and no hearing, resulting in remittitur of a euthanasia order. Similarly, section 2166 provides that when a convict is pardoned or his punishment is commuted, the officer to whom the warrant for that purpose is issued shall return it to the office of the Secretary of State. If the District Attorney is complaining that that Exhibit 1 was not filed with the Secretary of State, it is difficult to see how any such technical omission, if the statute did apply, would be material to the issue before the Court. In any event, if the District Attorney would like the Governor to so file his Order, he will do so. The District Attorney also omits citation of 15 M.R.S. § 2163, which provides that in any case in which the Governor is authorized by the Constitution to grant a pardon, he may upon petition of the person convicted, grant it upon such conditions and with such restrictions and under such limitations as he deems proper, and he may issue his warrant to all proper officers to carry such pardon into effect "which warrant shall be obeyed and executed[.]" If the District Attorney believes that any of these statutes in Title 15, Chapter 307 are relevant and she is withholding compliance with the March 30 Order, which is entitled a warrant issued to "ALL PERSONS," because of what she believes is a procedural omission, again, while unnecessary to make the Governor's effective and to cease this action and enforcement of the judgment, the Governor hereby makes clear that he seeks to have this warrant carried out in full effect.

forfeitures and penalties," and embraces reprieves and commutations as well. As such, his "complete discretion" includes application to the instant context.

Further, as the Court in *Hunter* noted, the power to pardon originates in the clemency power of the King. *Id.* From an historical perspective, animals have been "tried" – and "pardoned" – by the Executive since at least medieval times. *See* J. Girgen, *The Historical and Contemporary Prosecution and Punishment of Animals,* 9 Animal L. 97, 110 (2003) ("*Girgen*"); Note, *Rats, Pigs and Statues on Trial: The Creation of Cultural Narratives in the Prosecution of Animals and Inanimate Objects*, 69 N.Y.U.L. Rev. 288, 301 (1994) ("as with human beings, animals also could receive a pardon prior to punishment"). The seminal treatise on this subject matter, written in 1906, notes animal prosecutions extending up to that date of publication, and were reported as late as 1916 in Kentucky and Tennessee. *See Girgen* at 122; *see also* E.P. Evans, *The Criminal Prosecution and Capital Punishment of Animals: The Lost History of Europe's Animal Trials* (1987) ("*Evans*"). Trials were also held in England in 1771 and 1861, as noted by a Professor of Criminology and Sociology at the University of Southern Maine. P. Biernes, *The Law is an Ass: Reading E.P. Evans' The Medieval Prosecution and Capital Punishment of Animals*, 2 Society and Animals, 25, 33 (1994). *Evans* lists multiple prosecutions throughout Europe in the 18th and 19th centuries. *Evans*, Appendix F at 284-86.

While no doubt animal prosecutions had become rare as of 1820, there is no reason to conclude that the drafters of the Maine Constitution would have intended to impose any affirmative limit to the Governor's power to pardon and remit in this area. Given, moreover, the analogies between modern prosecutions for allegedly dangerous dogs and this history, *see Girgen* at 122-27, the application of executive clemency in this modern context is a logical fit as

well. Indeed, if accepted, the due process arguments *Girgen* raises would provide yet more support for the exercise of the Governor's clemency in this modern context.

Multiple institutions and people are entrusted under Maine law with enforcing the law, including the police, the District Attorney, and the Governor (*see* Me. Const., Art. 5, Pt. 1, §12 ("The Governor shall take care that the laws be faithfully executed").) But only one person is given the power to pardon, commute, remit forfeitures and penalties and grant reprieves: the Governor. *See Bossie*, 477 A.2d at 480 (Me. 1985); *State v. Sturgis*, 110 Me. 96, 85 A. 474, 477 (1912) ("the power to pardon, to commute penalties, to relieve from the sentences of the law imposed as punishments for offenses against the state, which power has not been given to the courts [are] confided exclusively to the Governor of the state[.]"). The Governor's unique power is broad, to be exercised in his discretion, as he sees fit. He has exercised that power to cancel the euthanasia directive in the Court's March 28 Order. The District Attorney and the Court should comply with and enforce the Governor's constitutionally authorized cancellation.

CONCLUSION

For the reasons given above, the Court should expunge that portion of its March 28, 2017 Order requiring the destruction of "Dakota," a husky dog, and order the dog released to the custody of her owner, as identified by the Court, without restrictions.

Dated: July 19, 2017

Catherine R. Connors, Bar No. 3400
Pierce Atwood LLP
Merrill's Wharf
254 Commercial Street
Portland, ME 04101
cconnors@pierceatwood.com
(207) 791-1100
Attorney for Governor Paul LePage

The Governor of the State of Maine

WARRANT OF FULL AND FREE PARDON

TO ALL PERSONS to whom this **WARRANT OF FULL AND FREE PARDON** shall come, let it be known that:

Dakota the Dog, (*Canis familiaris*- Huskie) was involved in a proceeding before the District Court, District Seven, Division of Southern Kennebec, located at Augusta, bearing Docket Number **VI-16-20053.** In this proceeding on the 21st day of March, 2017, **Dakota the Dog,** was sentenced to death pursuant to 7 M.R.S. §3952.

WHEREFORE, upon full consideration of the facts previously stated, I do hereby grant **Dakota the Dog** a **FULL AND FREE PARDON** respecting such offense, of which all are to take notice.

Witness, our Governor, at the State House on this 30th day of March, 2017.

Paul R. LePage
Governor