State of New Hampshire
Supreme Court

LAWRENCE SLEEPER

v.

MERRIMACK COUNTY
SUPERIOR COURT

and

BRUCE W. CATTELL, WARDEN,
NEW HAMPSHIRE STATE PRISON

N.H. Sup.Ct. _____

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PETITION FOR WRIT OF HABEAS CORPUS

NOW COMES Petitioner Lawrence Sleeper, by and through his attorney, Joshua L. Gordon, and respectfully requests this honorable court to grant him a new trial because there is evidence that the jury may have reversed the burdens of proof in his criminal trial.

As grounds it is stated:

QUESTION PRESENTED

1. Faced with statements of jurors immediately after announcement of its verdict that the jury may have reversed the burden of proof, should the trial court have notified the parties before the jury was discharged, reassembled the jury, conducted a *voir dire* investigation of the jury's understanding of the burden of proof in criminal cases, and taken immediate action based on the results of the investigation?

STATEMENT OF THE CASE and PRESERVATION OF QUESTION

2. In 2002 Lawrence Sleeper was convicted of having sexual relations with two under-aged women by a Merrimack County Jury (and later sentenced to imprisonment for a period of 10 to 20 years). *See State v. Sleeper*, 150 N.H. 725 (decided April 16, 2004). The entirety of the evidence consisted of testimony by the two young women, Sarah Rossignol, *Nov. 20, 2002 Trn.* at 32-105, and Katie Higgins, *id.* at 106-153; and testimony by the defendant, Lawrence Sleeper. *Id.* at 163-207. Leaving out details of times and places, it was a simple he-said-she-said trial. The two young women testified Mr. Sleeper had sex with them; Mr. Sleeper said he didn't.

3. Mr. Sleeper was convicted, and the jury was polled, just after noon on November 22, 2002. *Nov. 22, 2002 Trn. passim.* Immediately after the verdict, the trial judge (*Edward J. Fitzgerald, III*, J.) spoke privately to the jury, *id.* at 7, to thank its members for their service, and to discharge them. During the conversation, the judge recalled that the foreperson told the judge "the prosecution put on all this evidence and we (the jury) kept asking why he (the defendant) didn't put on any evidence that he didn't do it." ORDER (Nov. 26, 2002), *attached*. A court employee also in the jury room recalled that the foreperson said, "there was all these accusations and evidence being offered . . . but the defendant did not really offer anything or explain why he was not guilty." *Id.*

4. The court apparently did nothing about these events for several days. On November 26, four days after the verdict and the jury comments, the court issued an order notifying the parties, explaining the judge's concern that "the comments could reflect improper burden shifting on the part of the jury," and inviting the parties to file memoranda of law regarding the "use of a

juror's 'testimony' to impeach a verdict." *Id.* The defendant filed a motion to reconvene the jury, to which the State objected. Three months later, the court denied the motion, finding that "[t]he comments . . . do nothing more than reflect on the jury's proper function of weighing the credibility of each and every witness that testifies including the defendant and do not reflect a general burden shifting to the defendant." ORDER ON DEFENDANT'S MOTION TO RECONVENE JURY (Feb. 18, 2003), *attached.*

5. Mr. Sleeper appealed his conviction. Among the questions posed in his notice of appeal was "[w]hether the trial court erred in denying the defense motion to reconvene the jury because the foreman's comments to the trial judge indicated the [] jury shifting the burden [of] proof to the defense?" The issue was not pursued in Mr. Sleeper's brief by his appointed counsel, and this Court issued its opinion without regard to the matter. *Sleeper*, 150 N.H. at 725.

6. Having lost his liberty under circumstances in which the jury's application of the presumption of innocence can be questioned, Mr. Sleeper now brings this Petition. *In re Kerry D.*, 144 N.H. 146, 148 (1999) ("When court action results in the loss of a constitutionally protected liberty interest, it may be collaterally attacked by way of petition for writ of habeas corpus after the time for direct appeal has expired.").

PARTIES

7. The *corpus* of the petitioner, Lawrence Sleeper, can be found at the place in which he is incarcerated, the New Hampshire State Prison for Men, 281 North State Street, City of Concord, County of Merrimack, State of New Hampshire.

8. The respondent, Bruce W. Cattell, is the acting Warden of the New Hampshire State

Prison, 281 N. State St. (P.O. Box 14), Concord, N.H. 03302, and has immediate and direct custody over Mr. Sleeper.

9. The Merrimack County Superior Court is reachable through its Clerk, William McGraw, at 163 North Main Street (P.O. Box 2880), Concord, NH 03302.

JURISDICTION

10. The federal and state constitutions preserve the right of ***habeas corpus.*** U.S. CONST. art. I, § 9, cl. 2; N.H. CONST. pt. II, art. 91; ***see also*** RSA 534:1, ***et seq.***

11. This Court's original jurisdiction over ***habeas corpus*** petitions was once a "question of grave doubt," ***Petition of Moebus***, 73 N.H. 350, 351 (1905), but now it is well-established. RSA 490:4 ("The supreme court . . . may issue writs of . . . habeas corpus, and all other writs and processes."); ***Petition of Hamel***, 137 N.H. 488 (1993); ***Martel v. Hancock***, 115 N.H. 237, 237-38 (1975); ***Boody v. Watson***, 64 N.H. 162, 169 (1886). Although it is exercised "sparingly," ***LaBelle v. State***, 108 N.H. 241, 241 (1967), this Court uses its ***habeas corpus*** original jurisdiction when there are special and important reasons. SUP. CT. R. 11(1).

WHY THIS COURT SHOULD EXERCISE ORIGINAL JURISDICTION

12. This Court has identified several factors to determine whether a ***habeas*** petition should be filed in the Supreme Court or in the trial court.

13. When the petition involves a question of fact, relief should be had in the superior court. ***Labelle v. State***, 108 N.H. 241, 241 (1967) (because "allegations with reference to . . . conviction involve questions of fact," petition better heard in superior court); ***Dunne v. Vitek***, 114 N.H. 667 (1974) (because attack of conviction required reference to facts, petition better heard in

superior court); *McMichaels v. Hancock*, 110 N.H. 168 (1970) (same); ***but see Nelson v. Morse***, 91 N.H. 177 (1941) (original jurisdiction exercised when dispute about names on ballot concern an imminent election)

14. But when this court has the trial transcript and is already familiar with the facts, it will hear an original ***habeas corpus*** claim. *Amero v. Hancock*, 106 N.H. 227 (1965) (original ***habeas*** heard where Supreme Court had trial transcripts and was familiar with facts of case).

15. This court will rule on the merits of an original jurisdiction case when going first to the superior court is superfluous. *In re Moebus*, 73 N.H. 350 (1905); *see McMichaels v. Hancock*, 110 N.H. 168, 169 (1970) ("where the initial action of the Superior Court would be a mere formality we have not hesitated to consider the petition").

16. In addition, when "questions will have to be decided eventually by this court . . . [it is] the sensible course is to consider them now." *Petition of LaForest*, 110 N.H. 508, 509 (1970), *citing Nelson v. Morse*, 91 N.H. 177 (1940).

17. In Mr. Sleeper's case, there are no unresolved issues of fact – the trial judge heard the statements of the jurors and made a determination that the jury should not be recalled. This Court is in possession of the transcripts, and having issued an opinion in the case – to the extent they are relevant here – is familiar with the facts. The superior court has already made its position clear; and returning there to request a writ of ***habeas corpus*** would be superfluous. Moreover, it would impose an undue hardship because of the predisposition of the lower court against Mr. Sleeper's allegations, and because of the expense of filing there first when the issue will no doubt be appealed by either he or the State.

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18. The New Hampshire Constitution provides that "[i]t is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit." N.H. CONST., pt. I, art. 35. Mr. Sleeper's allegations, detailed below, are that by delaying action based on the jury's post-verdict statements, the Superior Court forced a characterization of the issue in a way that could not be won by the defendant. Seeking this writ of ***habeas corpus*** in the Superior Court would be asking that court to review itself. Humanity generally does not admit impartiality in such a situation, and therefore this Court must exercise jurisdiction.

19. The matter Mr. Sleeper seeks to raise here is related to the question mentioned in Mr. Sleeper's notice of appeal and then not pursued by the appellate defender in its brief. To the extent that Mr. Sleeper's appellate counsel failed to discharge his duty, that failure occurred in this Court, and the Superior Court does not have any expertise with the Supreme Court's procedures to evaluate prejudice that might have been caused by Mr. Sleeper's lawyer.

WHY THIS COURT SHOULD ISSUE A WRIT OF HABEAS CORPUS

20. Whether a juror's testimony can be used to impeach a verdict is how the trial judge formulated the issue in his initial order. ORDER (Nov. 26, 2002) (inviting parties to file memoranda regarding "use of a juror's 'testimony' to impeach a verdict."). The parties dutifully filed pleadings limited to that issue, and the defendant's notice of appeal raised the same question. It is not surprising that Attorney Chris Johnson, appellate defender, did not argue the issue in Mr. Sleeper's brief. This is because there is little doubt that, with rare exception, jurors' testimony cannot impeach a verdict. The logic is persuasive and aged:

> If it were once settled that the affidavits of jurors could be received to prove that they had misunderstood the instruction given them by the court, and that such misunderstanding was a legal ground for granting a new trial, the consequences would be most mischievious. For a very little tampering with individual jurors after the trial would enable any party to procure such affidavits and no verdict could be permitted to stand.

Tyler v. Stevens, 4 N.H. 116, 118 (1827).

21. Using juror testimony to impeach a verdict, however, is not the issue here, and should not have been below either, had the court acted more speedily.

22. Trial courts "must investigate colorable claims of improper influence on the deliberative process." *State v. Smart*, 136 N.H. 639, 659 (1993). *United States v. Ortiz-Arrigoitia*, 996 F.2d 436, 442 (1st Cir. 1993) ("When a non-frivolous suggestion is made that a jury may be biased or tainted by some incident, the [trial] court must undertake an adequate inquiry to determine whether the alleged incident occurred and if so, whether it was prejudicial.") (holding that court's questioning of suspected juror was adequate investigation)

23. To be "colorable," or "non-frivolous" a claim must merely "satisfy a rather low threshold of significance." *Neron v. Tierney*, 841 F.2d 1197, 1202 (1st Cir 1988). Investigate means more than just inviting memos; it means questioning those with relevant information. *Ortiz-Arrigoitia*, 996 F.2d at 436; *Neron*, 841 F.2d at 1202 (commending trial court for scheduling a "prompt evidentiary hearing"); *Danaher v. Department of Labor, Licensing & Regulation*, 811 A.2d 359, 377 (Md.App.,2002) (investigate means a 'careful search' and a 'systematic inquiry') (citing dictionaries); *Tallahassee Furniture Co., Inc. v. Harrison*, 583 So.2d 744 (Fla.App. 1991) (investigate means to conduct a thorough evaluation); *In re Pennell*, 583

A.2d 971, 973 (Del.Super.1989) ("To investigate means 'to search into as to learn the facts; inquire into systematically.'") (quoting dictionary).

24. There can be little doubt that misapplication of the burden of proof by shifting it to the defendant in a criminal case is error by the jury. *In re Winship*, 397 U.S. 358 (1970); *State v. Linsky*, 117 N.H. 866 (1977); U.S. CONST. amd. 14; N.H. CONST. pt. I, art. 15.

25. At some point after announcing the verdict, the concern for biasing the jury (noted in cases such as *Tyler v. Stevens*, 4 N.H. 116 (1827)) becomes overwhelming. Courts differ greatly regarding what that point is. It may be determined by the formal pronouncement of discharge,[1] by whether the verdict is deemed complete and accepted by the court,[2] by whether the jury has separated and had an opportunity to be influenced by outside interests,[3] by whether the jury had actually "thrown off their characters as jurors, and had mingled with their fellow citizens

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[1]*See e.g., State v. Dunbar*, 772 A.2d 533 (Vt.,2001); *People v. McGee*, 636 N.W.2d 531 (Mich.App.,2001); *Commonwealth v. Brown*, 323 N.E.2d 902 (Mass. 1975); *West v. State*, 92 N.E.2d 852 (Ind. 1950); *Clark v State*, 97 SW2d 644 (Tenn. 1936) (jury could not be recalled after it had been formally discharged regardless of whether members consorted with public).

[2]*See e.g., People v. Lee Yune Chong*, 29 P. 776 (Cal. 1892).

[3]*Summers v. United States*, 11 F.2d 583, 586 (4th Cir. 1926), *cert. denied*, 271 U.S. 681 (although judge had told jury it was discharged, jury recalled as it was "still not dispersed" and "no one has spoken to them"); *Montanez v. People*, 966 P.2d 1035 (Colo. 1998); *State v. Green*, 995 S.W.2d 591 (Tenn.App. 1998) (jury could not be recalled even though were being escorted by bailiff who reported no jurors had conversed with public, because jury had opportunity to do so); *People v McNeeley*, 575 NE2d 926 (Ill.App. 1991) (jury recalled where members were still under control of bailiff and in the courtroom); *State v Fornea*, 140 So 2d 381 (La. 1962) (jury recalled when members still in jury box, no evidence that any had spoken to outsiders).

free from any official obligation,"[4] by whether the party opposing reassembly can prove contamination actually occurred,[5] by whether the members of the jury have left the presence of the court,[6] by a measure of the time during which the jury is out of the presence of the court,[7] and depending upon whether the defect in the verdict can be characterized as technical or substantive.[8]

26. Whatever standard is employed, when the judge here visited the jury and heard its comments, the point-of-no-return not been reached. The jury was still in the custody of the court, it had not been discharged, it had rendered its verdict just moments before, the members had no opportunity to mingle with outsiders and no actual mingling took place. The trial court in Mr. Sleeper's case thus had the authority to question the jury, and the court erred in not immediately

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[4]*State v Edwards*, 552 P2d 1095 (Wash.App. 1976) (jury could be recalled even though discharged because had not actually had any contact with outsiders); *People v. Lee Yune Chong*, 29 P. 776 (Cal. 1892).

[5]*Masters v. State*, 344 So 2d 616 (Fla.App. 1977) (recall several minutes after discharge where no evidence of outside influence).

[6]*See e.g., Hayes v. State*, 214 So.2d 708 (Ala.App.1968) (no reassembly where jurors left the court's "immediate, continuous control"); *People v. Rushin*, 194 NW2d 718 (Mich.App. 1971) (reassembly not allowed where jurors had left the courtroom); *Melton v. Commonwealth*, 111 S.E. 291 (Va. 1922) (reassembly not allowed where jurors had left the "presence of the court").

[7]*West v. State*, 340 S.W.2d 813 (Tex.Crim. 1960) (reassembly allowed where separation was "momentary").

[8]*See e.g., Commonwealth v. Johnson*, 59 A.2d 128, 130 (Pa.1948) ("In some instances the jury may be reassembled to correct or amend their verdict when the defect is merely one of form, or is apparent on its face, or is of such nature that the court itself could have corrected it without the aid of the jury."); *Curry v. Commonwealth*, (1966, Ky) 406 SW2d 733,(allowing recall for correction of defect in form of verdict one day after jury discharged and members had returned to community).

reconvening the jury for the purpose of investigation.

27. It is not sufficient to merely say that because juror testimony cannot impeach a verdict therefore no investigation was necessary. *Blodgett v. Park*, 76 N.H. 435 (1912) (although affidavits of jurors inadmissible for impeaching verdict: "Notwithstanding the court could have summoned the jurors to appear before him, and cross-examined them as to how they reached their verdict.").

28. Despite the court's greatly delayed finding that the jury's comments were indicative of nothing, they betray a fundamental misunderstanding by the jury of the burden of proof in a criminal case.

29. As noted, only three people testified – the accusers and the accused. A review of Mr. Sleeper's testimony reveals that he not only repeatedly denied his culpability, but that he affirmatively asserted he did not commit the acts charged. The jury's wondering "why he (the defendant) didn't put on any evidence that he didn't do it" or its belief that "the defendant did not really offer anything or explain why he was not guilty," ORDER (Nov. 26, 2002), is simply at odds with the record. These comments cannot logically be construed as being about "weighing the credibility of each and every witness" as the trial judge concluded. ORDER ON DEFENDANT'S MOTION TO RECONVENE JURY (Feb. 18, 2003). Rather they show that the jury had been improperly waiting for the defendant to prove his innocence.

30. Because it did not recognize the importance of the jury's comments, the court made a fatal error. By not acting immediately, the opportunity for remedial action evaporated. At the time the judge heard the jury's comments, any plausible standard existing in the law would

have mandated reconvening. *Commonwealth v. Johnson*, 59 A.2d 128, 130 (Pa.1948) ("If any mistake should have occurred, it may be immediately corrected."). By delaying, however, the court forced a legal situation that is virtually unwinnable for a convicted defendant – requiring a request to reconvene long after the jury had disbanded. *See State v. Dunbar*, 772 A.2d 533 (Vt. 2001).

31. Had the court acted immediately, it or the parties could have conducted an individual *voir dire* of each juror to determine whether they understood the burden of proof in criminal cases and correctly applied it – that is, whether the jury did its job.

32. Moreover, by characterizing the question for the parties memos as impeachment of the verdict rather than recalling the jury, the court paved the way for denial. By not conducting an investigation, the court failed its duty to ensure a fair trial consistent with Mr. Sleeper's federal and state due process rights.

33. By the time the court notified the parties four days after the jury disbanded, it was already too late for any effective remedy. The only available way to restore Mr. Sleeper's right to proof beyond a reasonable doubt is by holding a new trial. *See e.g., Hackett v. Boston & M. R.* R., 89 N.H. 514 (1938) (new trial is only available remedy for jury error of improperly averaging damages); *Leighton v. Sargent*, 31 N.H. 119 (1855) (new trial based on juror use of liquor during deliberations).

WHEREFORE, Lawrence Sleeper respectfully requests this honorable Court to issue a writ of ***habeas corpus,*** and because the court's errors are not any longer correctable, to order a new trial.

Respectfully submitted
for Lawrence Sleeper
by his attorney,

Dated: July 8, 2005

Joshua L. Gordon, Esq.
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I hereby certify on this 8nd day of July 2005, a copy of the foregoing is being forwarded to Bruce Cattell, Warden, New Hampshire State Prison; to Daniel St. Hilaire, Merrimack County Attorney; William McGraw, Clerk, Merrimack County Superior Court; and to the Office of the Attorney General.

Dated: July 8, 2005

Joshua L. Gordon, Esq.

ATTACHMENTS

1. Court's ORDER (Nov. 26, 2002)

2. Court's ORDER ON DEFENDANT'S MOTION TO RECONVENE JURY (Feb. 18, 2003)