

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0403

The State Of New Hampshire

v.

John T. Brawley

APPEAL FROM A JUDGMENT OF THE ROCKINGHAM COUNTY
SUPERIOR COURT

SUPPLEMENTAL BRIEF FOR THE STATE OF NEW HAMPSHIRE

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COUNTERSTATEMENT OF THE ISSUES PRESENTED

On February 14, 2018, this court issued an order and an amicus announcement soliciting amicus curiae briefs in this case. The announcement specifically identified the following two issues to be addressed in any amicus brief:

1. Does a defendant's acquittal divest the superior court of jurisdiction to enforce a payment order previously issued to the defendant pursuant to RSA 604-A:9 (2001)?
2. Do the notice provisions set forth in RSA 604-A:9, I-c (2001) apply to a defendant who has been acquitted?

The American Civil Liberties Union of New Hampshire, Professor Albert E. Scherr, and New Hampshire Legal Assistance collectively filed an amicus curiae brief in support of the appellee, John T. Brawley (hereinafter "Amicus Brief"). In that brief, amici agreed with the State's position on both of the issues before the court in this appeal. *See* Amicus Brief at 1, 6, 18, 32. Therefore, it is the State's position that the Amicus Brief requires no response.

However, in their brief, amici also attempt to expand the scope of this appeal, listing additional issues in their Questions Presented which are not properly before the court¹, attaching numerous documents that are not part of the record on appeal², attempting to raise new constitutional claims³, and making legal arguments based on

¹ Brawley did not file a cross-appeal, and this court does not review issues not raised in a notice of appeal. *See Guyotte v. O'Neill*, 157 N.H. 616, 623 (2008).

² The record on appeal consists of the "papers and exhibits filed and considered in the proceedings in the trial court . . . , the transcript of proceedings, if any, and the docket entries of the trial court." *Sup. Ct. R.* 13(1).

³ "It is a long-standing rule that parties may not have judicial review of matters not raised in the forum of trial." *74 Cox St., LLC v. City of Nashua*, 156 N.H. 228, 232 (2007).

hypothetical facts that bear no relation to the case before the court.⁴ This court is not the proper forum for amici to initiate a new civil action. This court should decline to consider these additional issues and legal arguments because they were not raised in the State's notice of appeal, were not solicited by the court⁵, and bear no relation to the facts of the case currently before this court. The State responds to the Amicus Brief out of an abundance of caution, without waiving its position that the additional issues raised by amici are not properly before the court and should be disregarded.

⁴ "Except as provided in Part II, Article 74, the judicial power in this State is limited to deciding *actual*, and not hypothetical, cases." *Duncan v. State*, 166 N.H. 630, 641 (2014) (emphasis in original).

⁵ The State submits that the court's statement in the amicus announcement that amicus curiae briefs should "focus on the ramifications of a decision" was not an invitation to expand the issues on appeal.

ARGUMENT

I. A DEFENDANT’S ACQUITTAL DOES NOT DIVEST THE SUPERIOR COURT OF JURISDICTION TO ENFORCE A PAYMENT ORDER PREVIOUSLY ISSUED PURSUANT TO RSA 604-A:9.

Amici agree with the State that “[u]nder RSA 604-A:9, the superior court of criminal jurisdiction is granted the jurisdiction to enforce OCC payment orders, *even if the debtor is acquitted.*” Amicus Brief at 18 (emphasis added). Amici do not argue in their brief that such a holding by this court would result in any adverse ramifications; instead, they urge the court to go outside the record of this case and opine on hypothetical cases not before this court. *See* Amicus Brief at 18-32. For the reasons discussed below, this court should decline that invitation.

A. Amici seek an improper advisory opinion on the application of RSA 604-A:2-f.

First, amici ask the court to opine on the application of RSA 604-A:2-f, a new statute which was not in effect at the time of these proceedings and which, in any event, is not applicable to the facts of this case. Specifically, amici argue that courts enforcing OCC payment orders must comply with RSA 604-A:2-f, and that the trial court in this case failed to do so. Amicus Brief 18-23.

RSA 604-A:2-f was enacted with an effective date of August 1, 2017, more than a month after the proceedings at issue in this appeal. “Except as provided in Part II, Article 74, the judicial power in this State is limited to deciding *actual*, and not hypothetical, cases.” *Duncan v. State*, 166 N.H. 630, 641 (2014) (emphasis in original). “Generally, “[o]ur constitutional republic confines the judiciary to deciding cases and not serving as a

‘super law firm,’ no matter how high the stakes or how important the question.’” *Id.* (quoting *Petition of Public Serv. Co. of N.H.*, 125 N.H. 595, 598 (1984)).

Amici seek an advisory opinion on the application of RSA 604-A:2-f to the enforcement of OCC payment orders. Relying on documents that are not part of the record on appeal, amici make the broad claim that trial courts statewide are not currently complying with the new statute⁶ and seek a ruling from this court that “going forward, OCC payment procedures need to be conducted in accordance with RSA 604-A:2-f.” Amicus Brief at 23. This court should not issue such an advisory opinion.

In any event, even if the court were to consider amici’s arguments regarding the application of the statute to the enforcement of OCC payment orders generally, those arguments bear no relation to the facts of this particular case. RSA 604-A:2-f, I, provides:

No defendant shall be incarcerated ***after a final hearing for nonpayment of an assessment*** or nonperformance of community service unless counsel has been appointed for a defendant who is indigent or such defendant has executed a valid waiver of counsel for the final hearing. Incarceration of such defendant may occur only if the court, ***after having conducted an ability to pay or ability to perform final hearing*** at which the court has made a specific inquiry of the defendant concerning his or her financial circumstances and his or her reasons for nonpayment or nonperformance, finds that the defendant willfully failed to pay the assessment or perform the community service.

RSA 604-A:2-f, I (emphasis added). Presuming, for sake of argument only, that the term “assessment” in the statute includes OCC payment obligations, the trial court in this case was never able to hold an ability to pay hearing because Brawley never appeared in court

⁶ Notably, the vast majority of the “evidence” amici submit in their appendix in support of this claim of noncompliance predates the effective date of RSA 604-A:2-f.

as ordered. Both of the notices of hearing issued in this case informed Brawley that failure to appear in court “may result in an order for [his] arrest.” State’s App.⁷ at 8, 11; *see also id.* at 5 (OCC repayment order notifying Brawley that failure to comply “may result in the issuance of a contempt citation”). Nothing in RSA 604-A:2-f affects a trial court’s independent ability to issue an arrest warrant for an individual’s failure to appear at a show cause hearing. *See In re Kosek*, 151 N.H. 722, 726 (2005) (“Contempt is an offense at common law—a specific and substantive offense that is separate and distinct from the matter in litigation out of which the contempt arose.”).

Because the trial court never held a “final hearing for nonpayment” and Brawley was not incarcerated for failure to pay his OCC obligation, the provisions of RSA 604-A:2-f are irrelevant to this appeal.

B. Amici seek an improper advisory opinion on whether bail orders set in the amount owed to OCC are unconstitutional.

Next, amici argue that the issuance of cash bail orders in the amount owed to OCC violates the right to equal protection and the right to be free from excessive bail. Amicus Brief at 23-32. Again, amici seek an advisory opinion from this court on the constitutionality of procedures not followed by the trial court in this case.

When Brawley failed to appear at the first show cause hearing scheduled for February 10, 2017, the trial court issued an arrest warrant setting bail in the amount of \$50, not the amount owed to OCC. State’s App. at 9. When Brawley again failed to appear at the June 9, 2017 hearing, the court denied OCC’s request for the issuance of another arrest warrant. In its order, the trial court expressly declined to “reach the

⁷ “State’s App.” refers to the Appendix attached to the initial brief filed by the State.

question of whether any of the bail conditions requested by OCC would have been consistent with Part I, Articles 15 and 33 of the New Hampshire Constitution (relating to due process and excessive bail).” State’s App. at 4. Amici now ask this court to address that unresolved question in the context of a hypothetical case in which a trial court takes the opposite action from the trial court in this case and does issue a bail order in the amount owed to OCC. This court should not issue an advisory opinion on this question.

Moreover, even if the court were to consider this question, amici’s arguments are misguided because they all relate to incarceration for failure to pay, not failure to appear. The arrest warrant the trial court issued in this case clearly states that it issued because Brawley “[f]ailed to appear for a hearing on February 10, 2017.” State’s App. 9. The trial court further explained in its June 15, 2017 order that the “only purpose of bail for an OCC violation is to ensure the defendant’s appearance for a show cause hearing.” State’s App. 4 (emphasis in original). There is no evidence that the trial court in this case would have incarcerated Brawley without first taking into account his ability to pay. In fact, the trial court scheduled the two show cause hearings for the express purpose of “determin[ing] [Brawley’s] present ability to reimburse the State for legal fees [he] incurred in this case.” State’s App. 8, 11. Amici’s constitutional challenge to the issuance of cash bail orders in the amount owed to OCC bears no relation to the facts of this case and should not be considered by this court.

II. THE NOTICE PROVISIONS OF RSA 604-A:9, I-C DO NOT VIOLATE THE RIGHT TO EQUAL PROTECTION.

Amici also agree with the State on the second issue raised in this appeal. *See* Amicus Brief at 32 (“As a matter of statutory interpretation, the notice provisions set forth in RSA 604-A:9, I-c concerning the enforcement of OCC payment orders apply to all debtors, even if the debtor is acquitted.”). However, amici argue that the notice provisions of RSA 604-A:9, I-c violate the right to equal protection under Part I, Articles 1 and 2 of the New Hampshire Constitution and the Fourteenth Amendment to the United States Constitution because they treat OCC debtors differently from civil judgment debtors. *Id.* at 1, 32. This constitutional claim was not raised before the trial court; therefore, it is not properly before the court in this appeal. *See 74 Cox St., LLC v. City of Nashua*, 156 N.H. 228, 232 (2007) (“It is a long-standing rule that parties may not have judicial review of matters not raised in the forum of trial.”); *see also Guyotte v. O’Neill*, 157 N.H. 616, 623 (2008) (This court does not review issues not raised in a notice of appeal.).

Even if this court were to address amici’s new constitutional claim, the claim fails. This court “presume[s] statutes to be constitutional and . . . will not declare one invalid except upon inescapable grounds.” *Lennartz v. Oak Point Assocs., P.A.*, 167 N.H. 459, 462 (2015). Notably, amici’s constitutional challenge to the notice provision of

RSA 604-A:9 does not allege a due process violation, only an equal protection claim. *See* Amicus Brief at 32-35.⁸

Because federal equal protection offers no greater protection than our State equal protection guarantee, this court analyzes equal protection claims under the State Constitution. *In re Sandra H.*, 150 N.H. 634, 637-38 (2004). “The ‘equal protection guarantee is essentially a direction that all persons similarly situated should be treated alike.’” *Lennart*, 167 N.H. at 462 (quoting *Alonzi v. Northeast Generation Servs. Co.*, 156 N.H. 656, 662 (2008)). “In considering an equal protection challenge under our State Constitution, [this court] must first determine the appropriate standard of review by examining the purpose and scope of the State-created classification and the individual rights affected.” *Libertarian Party N.H. v. State*, 154 N.H. 376, 383 (2006) (quoting *Sandra H.*, 150 N.H. at 637). Because the classification alleged here does not involve a suspect class, a fundamental right or an important substantive right, this court applies the rational basis test. *See Opinion of the Justices*, 121 N.H. 531, 538 (1981) (applying rational basis review when considering proposed amendment to RSA 604-A:9 which distinguished between defendants whose sentences include incarceration in the State prison and those whose sentences do not, imposing repayment obligation only on the

⁸ While amici cite *Nault v. Tirado*, 155 N.H. 449, 451 (2007) for the proposition that, in the context of traditional civil cases, “[s]trict compliance with the statutory requirements for service of process is required to provide the defendant with *constitutionally sufficient notice* of the action, and to vest the trial court with jurisdiction over the defendant[,]” amici do not fully develop a due process challenge to RSA 604-A:9, I-c. Amicus Brief at 34 (emphasis in brief). In any event, amici concede that the trial court here retained jurisdiction over Brawley after he was acquitted, so service of process is not necessary to vest the court with jurisdiction. Moreover, there is no evidence that Brawley did not receive notice of the two show cause hearings mailed to his address. At the time he made the bond payment in lieu of arrest, Mr. Brawley reported the same address that was on file with the court and OCC. State’s App. at 10.

latter class); *see also In re Sandra H.*, 150 N.H. at 639. “The rational basis test under the State Constitution requires that legislation be only rationally related to a legitimate governmental interest.” *State v. Hass*, 155 N.H. 612, 613 (2007).

This court has held that RSA 604-A:9 “bears a rational relationship to the legitimate government interest of recouping costs from defendants who can afford to pay for the legal services they receive from the State.” *Id.* at 614. In reaching this conclusion, the court relied on the fact that the statute “inquires into a defendant’s ability to pay *and outlines procedures for* recoupment orders, *collection* and appeal of such orders.” *Id.* at 613-14 (emphasis added). Nevertheless, amici here challenge the constitutionality of one aspect of those collection procedures, namely, the notice provision. *See* RSA 604-A:9, I-c (placing the burden on the defendant to notify the court and the OCC of any change of address and providing that “[w]henver notice to the defendant is required, notice to the last mail address on file shall be deemed notice to and binding on the defendant”). Amici argue that “there is no reasonable rationale for treating OCC debtors—who have simply invoked their right to counsel and are indigent—differently from civil judgment debtors.” Amicus Brief at 35. Amici are wrong.⁹

⁹ Amici’s reliance on *James v. Strange*, 407 U.S. 128 (1972) and *Opinion of the Justices*, 121 N.H. 531 (1981) is misplaced. Both of those cases held that it would violate equal protection for a recoupment statute to deprive indigent criminal defendants of the protective exemptions afforded to other civil judgment debtors. *See James*, 407 U.S. at 139; *Opinion of the Justices*, 122 N.H. at 358. Neither case addresses the notice required when a defendant violates a court repayment order.

As discussed in the State’s opening brief, the legislature created this statutory scheme—empowering OCC to collect repayment within the criminal docket—in order to ease the burden on the State in recovering these public funds. The State is constitutionally obligated to provide counsel to indigent criminal defendants, which results in a significant burden on public revenues. *See James v. Strange*, 407 U.S. 128, 141 (1972) (recognizing the important state interests supporting recoupment laws). The sheer number of these cases alone provides a rational basis for treating the collection of this public debt different from the collection of a purely private debt. *See id.* at 138 (recognizing that “the State’s claim to reimbursement may take precedence, under appropriate circumstances, over the claims of private creditors, and that *enforcement procedures with respect to judgments need not be identical*”) (emphasis added).

Moreover, in requesting the appointment of counsel at the public’s expense, a defendant expressly acknowledges that he or she “shall be liable for all legal fees” and “will be ordered to repay the state according to [his or her] ability.” Amicus Brief, Appendix at 40 (Financial Affidavit & Application for Court Appointed Counsel). The defendant further acknowledges that he or she “must contact OCC within 5 days to confirm [his or her] mailing address” and “notify the OCC and the court of every change of address while [he or she] still owe[s] the state for the cost of . . . representation.” *Id.* When counsel is appointed, the court again expressly notifies the defendant of his or her obligation to reimburse the state for legal expenses and to contact the OCC within 5 days of the order to verify his or her address and make payment arrangements. State’s App. at 5. Given this express notice, there is no logical reason to impose on the State the

additional financial and administrative burden of tracking down and personally serving defendants who violate the court's order.

Finally, unlike a judgment rendered in a civil action, a trial court's repayment order is based on an assessment of the defendant's ability to pay. A criminal defendant must submit a financial affidavit with his or her request for appointed counsel; therefore, an inquiry into the defendant's ability to make payments has already been made at the time the trial court issues its repayment order. Amicus Brief, Appendix at 39-42; State's App. at 5. This is in stark contrast to the collection of a private civil debt.

The significant differences between the OCC collection procedures and private civil debt collections provide a rational basis for the different notice requirements.

CONCLUSION

For the foregoing reasons and the reasons set forth in the State's previously filed opening brief, the Department of Administrative Services, Office of Cost Containment respectfully requests that this Court reverse the ruling of the trial court and remand this matter for further proceedings on OCC's Motion to Show Cause.

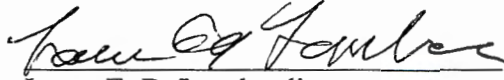
Respectfully submitted,

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF ADMINISTRATIVE
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CONTAINMENT

By its attorney,

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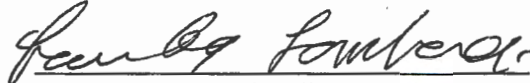
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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing were mailed this 21st day of May 2018, postage prepaid, to, John Brawley, 7 Briar Lane, Derry, New Hampshire 03038, and to counsel for *amicus curiae* American Civil Liberties Union of New Hampshire, Professor Albert E. Scherr, and New Hampshire Legal Assistance.



Laura E. B. Lombardi