THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0557

The State of New Hampshire

v.

James Castine

STATE'S MEMORANDUM OF LAW IN LIEU OF BRIEF UNDER SUPREME COURT RULE 16(4)(b)

STATEMENT OF THE CASE AND FACTS

The defendant, James Castine, was charged in the circuit court with three counts of selling heroin. Sur. Br. App. 2.[1] *See* RSA 318-B:2 (2017). The circuit court set bail in the amount of $10,000 cash or corporate surety. Sur. Br. App. 2.

On April 6, 2017, the Rockingham County Superior Court (*Delker*, J.) held a hearing regarding the source of funds for the defendant's bail. *See* Tr. 4–6; Sur. Br. App. 2. At that hearing, in addition to eliminating the source-of-funds requirement, the court required the defendant to live in Epping, New Hampshire, and to refrain from the use of controlled drugs as conditions of his release. Tr. 9; Sur. Br. App. 2.

That same day, Second Chance Bail Bonds (the surety) posted a $10,000 bond and the defendant was released. Sur. Br. App. 2. The bond form signed by the surety

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[1] References to the surety's notice of appeal will be made as "NoA __."
References to the surety's brief will be made as "Sur. Br. __."
References to the appendix to the surety's brief will be made as "Sur. Br. App. __."
References to the transcript of the hearing on April 6, 2017, will be made as "Tr. __."

required the surety to "secure the defendant's compliance with Conditions of Bail," including the following conditions in addition to the defendant's appearance:

> 3. The defendant immediately shall notify any New Hampshire Court in which this case is pending of any change of address.
>
> 4. The defendant shall keep the peace and be of good behavior.
>
> ....
>
> If the defendant does not comply with any condition(s) Cash Bail shall be forfeited to the State and execution may issue against the defendant for Personal Recognizance and against the corporate surety or surety. In addition, the court may order the arrest of the defendant.

Sur. Br. App. 6.

Shortly after the bond was posted, a warrant was issued for the defendant's arrest for violation of the bail conditions. Sur. Br. App. 2. Prior to the issuance of the warrant, the police found the defendant and his girlfriend passed out in a vehicle in a Walmart parking lot in Sturbridge, Massachusetts. Sur. Br. App. 2. The police believed they had overdosed and called EMTs. Sur. Br. App. 2. When the EMTs arrived, they administered Narcan and both were eventually revived. Sur. Br. App. 2–3.

The defendant told the officers that the two were moving from New Hampshire to the Carolinas. Sur. Br. App. 3. The officers also observed suitcases and other belongings in the bed of the defendant's truck. Sur. Br. App. 2. After the couple were arrested, booked, and released, the police learned that the defendant's girlfriend had sent a text to her sister saying that she was living in South Carolina, and telling her, "Don't give the address to anyone!" Sur. Br. App. 3 (brackets omitted). A search

of the defendant's truck revealed nine grams of heroin, cocaine, buprenorphine, and a hypodermic needle. Sur. Br. App. 23. Also, the defendant had $1,125 in cash on his person. Sur. Br. App. 23.

Pursuant to the warrant, the defendant was arrested and appeared before the superior court on April 24, 2017. Sur. Br. App. 3. The court revoked the defendant's bail for violating his bail conditions. Sur. Br. App. 3. A show-cause hearing regarding the bail forfeiture was held on June 1, 2017, at which the surety argued that it had agreed only to an "appearance bond," and the defendant had not missed any court dates. Sur. Br. App. 3. Further, the surety argued that it should not be required to ensure that the defendant followed the other bail conditions beyond appearing in court because it had no way to do so. Sur. Br. App. 3.

On June 30, 2017, the court issued an order finding that the surety had not supervised the defendant's compliance with his bail conditions, and ordered the defendant's bail forfeited. Sur. Br. App. 3–4, 8. It found that the bail form that the surety had signed made it clear that the surety was responsible for the defendant's compliance with *all* the bail conditions, not just the defendant's appearance in court. Sur. Br. App. 6–7. Further, the court found that the surety had taken no steps to supervise the defendant or to ensure compliance with the conditions of release. Sur. Br. App. 7–8. It rejected the surety's argument that the surety had no real means of doing so. Sur. Br. App. 7–8.

The surety asked the court to reconsider the forfeiture order. Sur. Br. App. 12–16. On August 30, 2017, the court issued an order denying the Surety's motion for reconsideration. Sur. Br. App. 19, 25. The court expanded on its previous order to explain why forfeiture of the full amount was appropriate. Sur. Br. App. 20. Following the nine-factor analysis set out in *State v. Korecky*, 777 A.2d 927 (N.J. 2001), the court concluded that the surety had an adequate opportunity to ensure the defendant's compliance with the bail conditions, but made absolutely no effort to supervise the defendant in any way or to impose any conditions on him. Sur. Br. App. 21, 23.

The court contrasted the complete lack of effort in this case to the actions of other corporate sureties in other cases, "ranging from electronic monitoring through GPS for the highest risk defendants to periodic in-person or telephonic check-in for lower risk defendants." Sur. Br. App. 22. The court noted that some have also required drug treatment or drug testing, depending on the individual defendant. Sur. Br. App. 22. The court also noted that even when family members were the surety, they had taken greater steps, like enrolling defendants in counseling. Sur. Br. App. 22. In this case, however, the court found that the surety didn't even make "a pretext of supervising the defendant …." Sur. Br. App. 22. Further, the court found the surety's "total and utter lack of effort … particularly appalling in the context of a corporate surety which profits from the defendant's release." Sur. Br. App. 21.

On September 26, 2017, the Surety filed a notice of mandatory appeal under Supreme Court Rule 7; the appeal was accepted by this Court on October 18, 2017.

ARGUMENT

1. The appeal should be dismissed because a mandatory appeal under Supreme Court Rule 7 is not the proper vehicle to bring the surety's claim.

The surety does not have the authority—by statute or otherwise—to bring an appeal of the lower court's forfeiture order in the criminal case now before this Court. RSA chapter 597 (2001 & Supp. 2017) governs bail and recognizances. The section regarding appeals from bail orders to this Court provides that "[t]he person, or the state pursuant to RSA 606:10, V, may appeal to the supreme court from a court's release or detention order, or from a decision denying revocation or amendment of such an order. The appeal shall be determined promptly." RSA 597:6-e, III (2001).

On its face, RSA 597:6-e, III unambiguously vests the authority to appeal from a bail or recognizance order in only "[*t*]*he person*, or the state." (Emphasis added.) Although chapter 597 does not explicitly define "the person," the chapter, read as a whole, demonstrates that "the person" in RSA 597:6-e, III is the arrestee or the person subject to the bail order. *See* RSA 597:1 (2001) (except in certain cases, "*all persons arrested for an offense* shall be eligible to be released pending judicial proceedings upon compliance with the provisions of this chapter" (emphasis added)); RSA 597:6-e, I (2001) ("[i]f *a person* is ordered released by a bail commissioner, the person, or the state, shall be entitled to a hearing" (emphasis added)).

The term "bail recovery agent" is defined for purposes of licensing in RSA 597:7-b (Supp. 2017). Further, "sureties" are referred to many times in the chapter. For example, the term appears in the sections regarding when and how a surety can be discharged of liability. *See* RSA 597:27 (2001); RSA 597:28 (2001). Nothing in chapter 597, however, confers upon a surety the right to file a mandatory appeal in a criminal case from a court order forfeiting a defendant's bail. Thus, there is no indication that the legislature ever intended that chapter 597 vest in a surety the authority to file an appeal from a bail forfeiture order.

Moreover, only the State and the defendant are the actual parties to a criminal case. *See Petition of Lath*, 169 N.H. 616, 622 (2017) ("a crime is a public wrong, raising an issue between the State and the accused" (brackets omitted) (quoting 1 R. McNamara, *New Hampshire Practice: Criminal Practice and Procedure* § 1.01, at 1 (2010))). The ability of defendants and the State to file direct appeals in criminal cases is well defined by the rules of this Court. *See*, *e.g.*, *Sup. Ct. R.* 3 (defining "mandatory appeal" as encompassing "an appeal filed by the State pursuant to RSA 606:10, or an appeal from a final decision on the merits," with exceptions); *id.* (defining "decision on the merits" as an "order, verdict, opinion, decree, or sentence following a hearing on the merits or trial on the merits and the decision on motions made after such order, verdict, opinion, decree or sentence"); *Sup. Ct. R.* 7(1)(C) (setting deadlines for filing appeals in criminal cases). There is no provision for the filing of a mandatory, interlocutory appeal by a surety.

The surety's interest arises because of the forfeiture of the recognizance to the state. "The recognizance was a contract between the sureties and the state for the production of the principal at the required time. The sureties upon an action for breach of this contract are not accused of crime. The proceeding is civil …." *Lamphire v. State*, 73 N.H. 463, 464 (1906). "Upon default, the failure of the defendant to appear, the recognizance or bond is declared forfeited, and the state may begin proceedings to recover the forfeiture." 1 R. McNamara, *New Hampshire Practice: Criminal Practice and Procedure* § 16.24, at 438–39 (5th ed. 2010) (citing RSA 597:31 (2001)). "Such actions are civil in nature and may be brought by action of debt or by *scire facias*." *Id.*, § 16.24, at 439. "A defendant surety cannot question the facts in the record upon which the *scire facias* is founded nor resort to any defense he could have made to the proceedings before the taking of the recognizance; only if the recognizance was illegally taken or unauthorized will judgment be entered for the defendant surety." *Id.* Therefore, regardless of the legality of the forfeiture, the surety's remedy is not to bring a mandatory, Rule 7 appeal in the criminal case.

The State recognizes that there have been cases brought by sureties in which this Court has considered appeals from forfeiture orders. *See State v. McGurk*, 163 N.H. 584 (2012); *State v. Moccia*, 120 N.H. 298 (1980). However, in neither case did this Court discuss the issue that the State presents here—whether the surety may take a direct appeal in the criminal case from a forfeiture order. *See McGurk*, 163 N.H. at 586–87; *Moccia*, 120 N.H. at 300–03. Indeed, the correct nature of a bail forfeiture

proceeding as a civil proceeding is described in *State v. Kinne*, 39 N.H. 129 (1859), cited in *Criminal Practice and Procedure* § 16.24, at 439 nn.4, 5.

> Upon the forfeiture of a recognizance, the practice in this State is, if the recognizance is not paid or settled to the satisfaction of the prosecuting officers, to bring *scire facias* against the recognizors, by which they are summoned to show cause why execution should not issue against them for the amount forfeited, and costs of the *scire facias*. It is a civil proceeding ….

Kinne, 39 N.H. at 137.

And finally, the question presented here was answered unambiguously in *State v. Sun Sur. Ins. Co.*, 99 P.3d 818, 820 (Utah 2004) ("The dispositive question presented is whether a surety can bring an independent direct appeal of a bond forfeiture order in a criminal case when the defendant in the same action takes no appeal."). In that case, the court concluded that

> [a] surety cannot bring a direct appeal in a criminal case because it is not a party to the criminal case. While [the surety] certainly had an interest in the proceedings as the surety behind the bail bond, only the state and the defendant are actual parties to the criminal action. Because [the surety] was not a party, an independent direct appeal was improper. Moreover, where an appeal is not properly taken, an appellate court lacks jurisdiction and must dismiss.

Id. (brackets, citations, quotation marks, and ellipsis omitted).

Here, the defendant, James Castine, did not appeal from the bail forfeiture order under RSA 597:6-e, III. The surety, who is not a party to the criminal case, cannot do so on his behalf. Therefore, since the surety is not a party to this criminal case, and has no statutory or other authority to file a direct, mandatory appeal in the case, this appeal must be dismissed.

2. The lower court correctly found that forfeiture was appropriate where the defendant had fled New Hampshire, in possession of drugs, and was found unconscious from an overdose in another state.

The surety first argues that forfeiture was not appropriate because the surety merely agreed to an "appearance bond," and the defendant never missed a scheduled appearance in court. Sur. Br. 8–9. The surety argues that it relied on "prior custom and practices," and asserts, without citation, that "it has generally been the practice in New Hampshire courts that the surety is responsible for the [d]efendant's appearance." Sur. Br. 8.

It is within the lower court's discretion whether to order forfeiture on a bail bond. *See*, *e.g.*, *State v. Nelson*, 384 P.3d 923, 935 (Haw. Ct. App. 2016) ("a lower court's order denying relief from a judgment of bail bond forfeiture on grounds that a surety has not, [by statute,] shown good cause why execution should not issue upon the judgment is reviewed for abuse of discretion"); *State v. Korecky*, 777 A.2d 927, 933 (N.J. 2001); *Commonwealth v. Hann*, 81 A.3d 57, 71 (Pa. 2013). Thus, this Court should reverse only for an unsustainable exercise of discretion. *See State v. Lambert*, 147 N.H. 295, 296 (2001) (describing this standard of review). Here, the lower court was well within its discretion.

The majority position in both the federal and state courts "is that bail may be forfeited for a violation of a condition other than nonappearance." *Korecky*, 777 A.2d at 933. The New Jersey Supreme Court reasoned that this is the better rule:

> The driving force behind a surety's provision of a bond is the profit motive. As the Appellate Division recently stated, "[t]he private interest

> affected by the forfeiture judgments is one engaged in for economic advantage; one that involved a known business risk. The surety obligated itself to guarantee the presence of a defendant at a criminal proceeding for economic gain—the premium paid for the bond." The same motivation, as well as the same essential obligations, *i.e.*, supervising the client and preventing breach of the condition, are present in both nonappearance conditions and other types of conditions.

Id. at 934 (citation omitted).

In any event, the surety's argument is belied by the terms of the bond in this case. As the trial court properly concluded, "[a]t a minimum, [the surety] assumed responsibility to ensure that the defendant [did] not commit any new crimes and notified the court immediately of any change of address." Sur. Br. App. 7. "Thus, the express terms of the bond made it clear that breach of 'any condition(s)' could result in proceedings against the corporate surety for forfeiture of the bond." Sur. Br. App. 7. "Historically, the release of a criminal defendant on a bail bond had the effect of transferring custody to the surety." *Moccia*, 120 N.H. at 302. While the defendant was supposed to be in the surety's custody, he breached several of the conditions of the bond, including refraining from using drugs, being of good behavior, and living in Epping, New Hampshire. Thus, forfeiture of the bond was appropriate under its terms.

If the surety could not guarantee the defendant's compliance, there were several options for the surety to exercise in order to discharge its obligation under the bond. Under RSA 597:27 (2001), "[a] surety for the appearance of a party or witness may be discharged … from further liability upon surrendering the party in open court, during the pendency of the original cause and before trial, on payment of the costs of

any proceeding against them ...." And under RSA 597:28 (2001), "[s]ureties may be discharged before forfeiture of the recognizance by committing the principal to the jail of the county," and by complying with certain other requirements. Finally, the court "for good cause, may strike off a default upon a recognizance ... upon a substantial compliance with the condition." RSA 597:32 (2001). The surety sought to exercise none of those options, however.

For these reasons, the court's decision to order forfeiture was not an unsustainable exercise of discretion.

3. Forfeiture of the entire amount of the bond was not excessive under the circumstances of this case.

Under RSA 597:33 (2001), "[t]he superior court may render judgment for the whole amount of any forfeited recognizance and interest and costs, or for such part thereof as, after hearing counsel, the court may think proper, according to any special circumstances in evidence affecting the case or the party liable." In setting out its reasons for ordering the forfeiture of the entire amount of the bond, the lower court relied on the nine-factor analysis set out in *State v. Korecky*. In that case, the court said:

> We first note that a court will assess various factors when determining whether a forfeiture of bail should be allowed. In cases involving a condition other than appearance, courts should consider: (1) whether the applicant is a commercial bondsman; (2) the extent of the bondsman's supervision of the defendant; (3) whether the defendant's breach of the recognizance of bail conditions was willful; (4) any explanation or mitigating factors presented by the defendant; (5) the deterrence value of forfeiture; (6) the seriousness of the condition

> violated; (7) whether forfeiture will vindicate the injury to public interest suffered as a result of the breach; (8) the appropriateness of the amount of the recognizance of bail; and (9) the cost, inconvenience, prejudice or potential prejudice suffered by the State as a result of the breach. That list is not exhaustive, and trial courts may consider other factors as interests of justice require.

Korecky, 777 A.2d at 934–35 (citations and quotation marks omitted). The lower court here properly exercised its discretion in balancing all the circumstances in the case.

As the lower court found, the surety admitted that it took no steps to supervise the defendant to ensure that the defendant did not take drugs or commit any other crimes. Sur. Br. App. 7. Indeed, it was uncontested that the surety took no action, either formally or informally, to ensure that the defendant complied with the terms of his release. *See* Sur. Br. App. 7–8. To the contrary, as the lower court properly found, the surety didn't even make "a pretext of supervising the defendant," Sur. Br. App. 22, and its complete "lack of effort [was] particularly appalling in the context of a corporate surety which profits from the defendant's release," Sur. Br. App. 21.

The court also noted that in its experience, other corporate sureties took appropriate steps, based on the risk presented by the individual defendant. *See* Sur. Br. App. 22. The surety here is a corporate surety, and runs its business knowing the risk it runs with its clients. *Cf. Korecky*, 777 A.2d at 936. As the New Jersey court noted, how successful a surety's oversight of a defendant is not the dispositive issue. "Effort remains relevant," and here, as in *Korecky*, "they apparently made no effort …." *Id.*

The surety argues that forfeiture was excessive because there was no cost or inconvenience to the State. Sur. Br. 10. It also argues that it is the prospect of incarceration, and not forfeiture on a bond, that has any deterrent effect on a defendant's behavior, and that forfeiture does very little to vindicate the public interest. Sur. Br. 12. And finally, it argues that requiring close supervision for fear that the entire amount will be forfeited would increase costs, and therefore decrease the ability of arrestees to find sureties willing to post a bond. Sur. Br. 13. These arguments are answered in *Korecky*.

The *Korecky* court noted that the cost and prejudice to the State is but one consideration. *Korecky*, 777 A.2d at 939. This consideration is offset by the important public interest in controlling the activities of defendants while on bail. *Id.* As the defendant here demonstrated, while on bail, he presented a danger to himself and another. Thus, as the *Korecky* court recognized, "[t]he focus of a court reviewing a forfeiture application should be on the surety's efforts, rather than upon the expenses incurred by the State as a result of the defendant's failure to appear or the prejudice to the State's case caused by the defendant's absence." *Id.* at 938–39.

Furthermore, the defendant's breach of the conditions here was especially egregious. He was found in another state, suffering from a drug overdose. He had drugs and money on him, and he and his girlfriend were planning to move to South Carolina. These facts also demonstrate the importance of the deterrence factor. The law must give sureties the incentive to closely monitor defendants, especially where

the defendant may otherwise engage in destructive behavior. *Cf. id.* at 936 (forfeiture was appropriate where the defendant's breach of a no-contact condition was not a mere "technical violation; it was willful").

Finally, the *Korecky* court recognized the risk that greater monitoring could incur greater costs for sureties, which could "in turn … impair the ability of defendants, particularly defendants without significant financial resources, to obtain bonds. Such a result would not only defeat the purpose of the bail bond, but would result in gross unfairness." *Id.* at 939. The State recognizes that this concern should be taken into account when trial courts set bail conditions and order forfeiture. *See id.* Nevertheless, there are cases, like the instant case, where the bail conditions are appropriate for the defendant, and where the totality of the circumstances justifies total forfeiture. *Cf. id.* at 940 (forfeiture of bail is appropriate where the defendant has acted willfully to subvert the public interest).

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State waives oral argument. *See Sup. Ct. R.* 16(4)(b).

Respectfully submitted,

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April 16, 2018

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CERTIFICATE OF SERVICE

I, Stephen D. Fuller, hereby certify that I have sent one copy each of this motion to counsel for Second Chance Bail Bonds and to counsel for the defendant, by first-class mail postage prepaid, at the following addresses:

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April 16, 2018

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