

**THE STATE OF NEW HAMPSHIRE**

NH Supreme Court

The State of New Hampshire

v.

Jerry Newton

2018-0606

**SUPPLEMENTAL MEMORANDUM IN FURTHER SUPPORT OF PRAYER B OF  
DEFENDANT’S MOTION FOR REVIEW OF DETENTION ORDER**

Defendant, Jerry Newton (“Newton”), through counsel, Theodore Lothstein, Esq., submits this Supplemental Memorandum in further support of prayer B of his Motion for Review of Detention Order filed with this Court on January 12, 2021.

Mr. Newton appeals from the lower court’s denial of bail pending appeal. Under RSA 597:1-a, a person appealing from a felony conviction and sentence shall be detained, unless the person establishes, and the court finds:

- 1) By clear and convincing evidence, taking into consideration the nature of the crime and the length of the sentence imposed, that the person is not likely to fail to appear to answer the judgment following the conclusion of the appellate proceeding, or to pose a danger to himself or herself or to any other person or the community, or to intimidate witnesses, or otherwise to interfere with the administration of justice; and
- 2) By a preponderance of the evidence that the appeal will not likely be frivolous or taken merely for delay.

A court that makes findings that appellant has met these burdens of proof “shall order the release of the person in accordance with the provisions of RSA 597:2.”

First, this Court should order Mr. Newton released on bail, because his submission to the lower court satisfied the burden of proving by clear and

convincing evidence that he is not likely to fail to appear, to pose a danger to himself or others, to intimidate witnesses or otherwise to interfere with the administration of justice. Prior to conviction and sentence, Mr. Newton lived in Hillsborough with his wife, Marion Newton. He has lived in New Hampshire for almost two decades, since 2001. He is an automotive master technician. Since 2011, he has owned and operated Honest Engine, a popular and well-respected business in the community. At sentencing, the Court received at least 40 letters of support, many from people who were very satisfied customers of the business.

Since his imprisonment over two years ago, Marion Newton has operated the business. Newton provided pay stubs to the lower court showing that the business continues to employ two full-time employees.

Mr. Newton is 56 years old. He served his country in the Army, receiving his Honorable Discharge in 1985. His adult son followed in his footsteps, serving in the United States Navy.

Mr. Newton has no prior criminal record. Counsel, who did not represent Mr. Newton in the trial court, is not aware of any history of Mr. Newton failing to appear for a court proceeding. He is not a risk of flight.

The circumstances that brought about this request for bail also strongly support the conclusion that Mr. Newton will not flee the jurisdiction, commit new crimes or otherwise implicate any of the factors in RSA 597:1-a. He filed his request for bail asserting that on January 15, 2021, Mr. Newton's wife Marion Newton was scheduled for a major surgery: Robotic hysterectomy, bilateral salpingectomy (surgical removal of fallopian tubes), anticipated lysis of

adhesions (removal of scar tissue from previous surgeries that causes chronic abdominal and pelvic pain).

He submitted letters from the hospital that the estimated recovery time from this surgery is 6 weeks, but there is a “possibility of extended recovery time due to her risk factors.” Because of Mrs. Newton’s medical history, there is a lengthy and disturbing list of potential complications, some of which would necessitate further surgeries, and some of which would be life threatening. These include “venous thrombotic event (clot in lung, heart, brain which could be catastrophic.”). The letter ends with the statement that depending on the complications, “the severity of bowel or bladder injury can take 3 to 6 months to repair and recover.”

Mr. Newton sought bail pending appeal, so he can care for his wife during what will be a lengthy recovery period from the surgery, and during a period when complications could lengthen her recovery or put her life at risk. He also makes this request, so he can operate what has become the family business, Honest Engine Auto Repair in Henniker during a period when Mrs. Newton cannot run its operations. If the business fails because Mrs. Newton cannot operate the business, she will lose her only income source.

To update things for the Court: Mrs. Newton underwent her abdominal surgery. It went well. She is home resting now. She was receiving help from an adult daughter on the day that we checked in on her, Friday, January 22, 2021. She was told her recovery period will be six to eight weeks.

Thus, Mr. Newton’s home, business, and wife recovering from major surgery are all here in New Hampshire. He has already served almost two years

of his sentence. He is not a person who, having never been imprisoned, may panic and flee based on imagined horrors of what prison life may be like. He will be advised by counsel that if he flees the jurisdiction, this will likely constitute an abandonment of his appeal, causing its dismissal and forever eliminating his opportunity to gain relief on appeal from his convictions and sentence.

Further, he already has the benefit of an Order from the lower court that the lower court will review sentencing if this Court affirms in all respects. It is not in his interest to jeopardize his chance at a reduced sentence by fleeing now.

Finally, considering the nature of the case, Mr. Newton is an ideal candidate for release on bail. This is a nonviolent financial crime committed by a now-56 year old man with no prior criminal record whatsoever, who has strong ties to the community, and strong motivating factors to adhere to all conditions of bail.

In further support of prayer B, which requests that this Court revoke the detention order, Newton incorporates by reference all of the arguments in his Brief on Appeal filed with this Court on January 19, 2021, to demonstrate that the appeal is not frivolous or brought merely for delay and thus, satisfies the second prong RSA 597:1-a.

In his Brief, Newton argued that the Superior Court in fact found trial counsel's performance unreasonable and deficient when counsel provided the prosecution with incriminating text messages they would not have otherwise

had. Brief at 29. Newton argues, however, that the court erred in its ruling that he was prejudiced by the disclosure of the text messages. Brief at 30-35.

Newton also argues that the court erred in ruling that trial counsel did not render ineffective assistance of counsel by calling Newton's wife, Marion Newton, as a witness. Brief at 36. In his argument, Newton distinguishes the facts from *State v. Candello*, 170 N.H. 220 (2017) from his circumstances, arguing that counsel called Marion as a witness at Newton's behest, without thoroughly informing Newton of the associated risks. Brief at 37-39.

Third, Newton argues that the court erred in rejecting his claim that trial counsel rendered ineffective assistance of counsel when he elicited inadmissible opinion testimony from Investigator O'Brien. Brief at 40. Further, the court erred in determining that Newton was not prejudiced by trial counsel's actions. Brief at 43-44.

Lastly, Newton argues that the court unsustainably exercised its discretion by excluding testimony that was probative of Newton's mental state and not barred by the rules of evidence. Brief at 44. Below, the State argued that Newton cannot be eligible for bail pending appeal on a post-conviction discretionary appeal, but only on a direct appeal. The State relied on federal authorities in making this sweeping argument that would prevent consideration of bail even for a post-conviction defendant who had DNA evidence demonstrating her innocence of the offense, a reliable confession by the person who actually committed the crime, etc. Newton does not agree with the State's sweeping argument, especially not in this circumstance where all of the appeal issues are consolidated together. But if the State is correct, then

this Court should look to the final issue on appeal, the lower court's exclusion of evidence of out-of-court statements probative of his mental state, in determining whether his appeal is nonfrivolous.

Further, in paragraph (13) of its submission below, the State argued that his request for bail must be denied because a request for bail must be made prior to the filing of a Notice of Appeal, because RSA 597:1-a provides that the request for bail to the trial court must be accompanied by a "good faith representation that he or she *shall* file a timely notice of appeal." The State argues that "shall" in this context means "in the future" and therefore, if the person has already filed a Notice of Appeal, he cannot seek bail ever again.

Newton, however, contends that the plain and obvious purpose of this language is to prevent people from seeking bail who have no intention of filing an appeal, thereby misleading the sentencing court and thwarting justice. The State's novel construction would lead to the absurd result that if a highly prepared lawyer's staff electronically filed a pre-prepared Notice of Appeal minutes *before* the lawyer electronically submitted a written request for bail pending appeal to the lower court, bail would be denied because the pleadings were filed in the wrong order. That would be an absurd result, and therefore this Court must reject the State's argument. Further, the State correctly took the position below that under *State v. Gubitosi*, 153 N.H. 79, 81 (2005), the trial court retains jurisdiction to consider the issue of bail pending appeal even after the appeal is filed. While the Court was addressing the issue of revocation of bail in *Gubitosi*, it spoke more broadly in stating the governing jurisdictional rule:

However, the general rule . . . does not prohibit the Trial Court from passing on collateral, subsidiary or independent matters affecting the case. Bail pending appeal is an independent matter and thus falls within this exception to the general rule.

*Id.* at 81.

In conclusion, this Court should order that the lower court erred in denying bail pending appeal, and remand for the lower court to reinstate the bail previously set.

Respectfully submitted,



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Theodore M. Lothstein  
N.H. Bar. No. 10562  
Lothstein Guerriero, PLLC  
Five Green Street  
Concord, NH 03301  
TEL: (603) 513-1919

CERTIFICATE OF SERVICE

I hereby certify that this memorandum has been electronically filed, and copies forwarded by e-service this 22 January 2021 to the prosecutor, Bryan Townsend, Esq., Assistant Attorney General, Medicaid Fraud Control Unit, and to Sean Gill, Assistant Attorney General, Criminal Justice Bureau, New Hampshire Department of Justice, 33 Capitol Street Concord, NH 03301, and mailed to Jerry Newton, NCF Berlin.



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Theodore Lothstein