

**THE STATE OF NEW HAMPSHIRE  
SUPREME COURT**

State Of New Hampshire

v.

Jerry Newton

Case Nos. 2018-0606; 2020-0338

**STATE'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S  
PRAYER TO REVOKE TRIAL COURT'S DETENTION ORDER**

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the New Hampshire Attorney General, and submits this memorandum in opposition to defendant's prayer to revoke trial court's detention order, stating as follows:

**I. BACKGROUND**

On July 19, 2018, a jury convicted the defendant, Jerry Newton, on three class A felony counts of financial exploitation of an elderly adult, contrary to RSA 631:9, RSA 631:10. T<sup>1</sup> 601-02. On October 4, 2018, the

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<sup>1</sup> Citations to the record are as follows:

"BA\_\_" refers to the addendum to the State's bail memorandum and page number.

"DM\_\_" refers to the defendant's memorandum on bail and page number.

"NOA\_\_" refers to the defendant's mandatory Notice of Appeal filed on October 29, 2018 and page number.

"DNOA\_\_" refers to the defendant's discretionary Notice of Appeal filed on July 24, 2020 and page number.

"CNOA\_\_" refers to the State's cross-Notice of Appeal filed on July 30, 2020 and page number.

"T\_\_" refers to the consecutively paginated transcript of the trial held July 16-19, 2018 and page number.

trial court (*Brown, J.*) sentenced the defendant to serve, among other things, 7½ -15 years in the New Hampshire State Prison, stand committed. S 45. At that time, the defendant moved, pursuant to RSA 597:1-a, for release pending appeal. *See* S 46. The trial court denied his motion. *Id.*

The defendant then filed a timely mandatory appeal notice to this Court. *See* NOA. The defendant did not, either at that time or since, challenge the trial court's initial determination denying his release pending appeal. On May 31, 2019, this Court stayed the defendant's direct appeal, allowing him the opportunity to file and litigate a post-conviction motion for new trial in the trial court. The defendant filed his motion for a new trial (based on ineffective assistance of counsel) with the trial court on June 17, 2019.

On March 24, 2020, the trial court (*Brown, J.*) denied the defendant's motion for a new trial. DNOA 16. The trial court found trial counsel's disclosure of certain text message communications to the State prior to trial was deficient. *Id.* at 28. Nonetheless, the trial court concluded that the guilty verdicts were not prejudiced because the State presented overwhelming evidence to prove the defendant's guilt. *Id.* at 31. The trial court agreed, however, to schedule a sentence review hearing because it acknowledged it relied heavily on the text messages during sentencing. *Id.* at 34.

On July 13, 2020, at the State's request, the trial court (*Brown, J.*) stayed the sentence review hearing to allow for both parties to file discretionary appeals from the its rulings. *Id.* at 38 The defendant did not

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"S\_\_" refers to the transcript of the sentencing hearing held on October 4, 2018 and page number.

object to the stay, nor did he make any request at that time for release pending appeal. *Id.* On July 24, 2020, the defendant appealed the trial court's denial of his motion for a new trial. DNOA 1-4. The State timely cross-appealed the trial court's deficiency determination and its grant of a sentence review hearing. *See generally* CNOA 1-12. This Court accepted the discretionary appeals and consolidated them with the defendant's direct appeal.

On December 23, 2020, the defendant filed a motion for bail pending appeal based on "extenuating circumstances" in this Court. On December 28, 2020, the defendant filed a nearly identical motion in the trial court. He then withdrew his motion in this Court. The State objected to the defendant's motion filed in the trial court. On January 11, 2021, the trial court (*Brown, J.*) denied the defendant's motion. The defendant now appeals that decision.

## II. ARGUMENT

RSA 597:1-a governs a defendant's release pending appeal. *See State v. Clarke*, 151 N.H. 56, 58 (2004). "Granting bail pending appeal is within the discretion of the trial judge." *State v. Marini*, 117 N.H. 71, 73 (1977). Unless specifically challenged, this Court "assumes that the trial court made all findings necessary to support its decision." *State v. Silva*, 158 N.H. 96, 102 (2008). "The Court will reverse the trial court's decision only on evidence of a compelling nature." *Marini*, 117 N.H. at 73.

RSA 597:1-a requires the trial court to deny release for a defendant who has been found guilty of a felony, sentenced to a term of imprisonment, and made a good faith representation that he or she shall file a timely appeal, unless the defendant can prove:

- (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.

RSA 597:1-a, III(a)(1)-(2).

**1. The Trial Court Did Not Err in Rejecting the Defendant's Argument that Extenuating, Temporary Circumstances Necessitated His Release on Bail.**

The defendant argued in the trial court for release based on what he termed "extenuating circumstances." *See* BA 15.<sup>2</sup> These extenuating circumstances included temporarily caring for his spouse while she recovers from surgery (approximately six weeks), and also working during this period. *See id.* The defendant's bail request relied upon these extenuating, temporary circumstances as independent grounds for release on bail, wholly apart from the factors under RSA 597:1-a, III(a). *See id.* at 6. That is, the defendant made no argument to the trial court that these extenuating, temporary circumstances made it any more likely that he would not flee the jurisdiction once released. *See id.*

The trial court rejected his argument and sustainably exercised its discretion in doing so. The legislature has set forth the exclusive considerations for release pending appeal, which are set forth above. *See* RSA 597:1-a, III(a)(1)-(2). There is no support for the defendant's argument that extenuating, temporary circumstances necessitate his release. The defendant cited no statute, rule, or relevant legal principle before the trial court to support this argument. The defendant is not entitled to a medical parole under these circumstances, *see* RSA 651-A:10-a, nor does he cite authority for compassionate release under such circumstances.

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<sup>2</sup> The State has attached and cites the defendant's motion filed at the trial court. The defendant attached multiple exhibits to that motion, including medical documentation concerning the defendant's spouse. While the defendant did not seal those exhibits at the trial court, the State nonetheless, given privacy concerns, does not attach those exhibits in its addendum. The medical records are not necessary to evaluate the State's argument on this issue.

In his memorandum before this Court, the defendant abandons this original argument. Instead, he now couches the “extenuating circumstances” directly under the factors set forth in RSA 597:1-a, III(a). He cannot do so, however, because he did not make this argument to the trial court, and as a result, his argument on this basis is not preserved for review. *See State v. Plantamuro*, 171 N.H. 253, 258 (2018) (the Court does not consider arguments raised on appeal that were not presented to the trial court).

Even assuming a legal mechanism exists for granting release outside of RSA 597:1-a, III(a), the temporary circumstances alleged here do not support release. The trial court (*Brown, J.*) already rejected the defendant’s request that he not be incarcerated, and instead be allowed to work. At sentencing, the defendant’s trial counsel stressed, “If [the defendant is] incarcerated, for even a brief amount of time, his business probably will not make it.” S 37. The trial court then not only imposed a lengthy stand committed prison sentence, but also, at the same hearing, denied his motion for release pending direct appeal. S 46. The defendant attempts to make the same argument here, but this time with less force given the temporary nature of the alleged “need” to work. The trial court sustainably exercised its discretion in rejecting his argument once again.

That leaves the defendant’s argument that he must provide care to his spouse during her temporary recovery. But, this argument is undercut by his dual assertion that he intends to also work during this time. Further, the defendant’s release is not necessary to care for his spouse. While the defendant would like to care for his spouse while she recovers, he is not the only individual able to do so, as is evidenced by his memorandum. The

defendant states that the surgery went well and that his adult daughter is caring for his spouse. *See* DM 3. The defendant's spouse is being taken care of and she will be recovered in approximately one month. There is no need to release the defendant on this basis.

**2. The Trial Court Did Not Err in Rejecting the Defendant's Additional Rationale for Release.**

Though the defendant's claims of extenuating circumstances formed the primary basis for his requested relief below, he also argued, separately, that he could satisfy the elements of RSA 597:1-a, III(a). The trial court sustainably exercised its discretion in denying the defendant's motion on this basis.

First, RSA 597:1-a, III(a) does not authorize a defendant's release on the basis of a discretionary appeal following a post-conviction proceeding. The language of RSA 597:1-a, III(a) is substantially similar to the Federal Bail Reform Act of 1984, *see* 18 U.S.C.A. § 3143(b). That Act provides, in pertinent part:

The judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds: (A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released . . . and (B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in (i) reversal, (ii) an order for a new trial, (iii) a sentence that does not include a term of imprisonment, or (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

Federal courts interpret this Act to “not apply to [defendants] seeking post-conviction relief.” *United States v. Mett*, 41 F.3d 1281, 1282 (9th Cir. 1994); *see also United States v. Kelly*, 790 F.2d 130, 139 (D.C. Cir. 1986). This Court should interpret RSA 597:1-a, III(a) so that it does not apply to a defendant who is seeking post-conviction relief.

The defendant’s argument in the trial court as to RSA 597:1-a below was premised on the purported lack of frivolousness of his discretionary appeal issues in a “post-conviction review proceeding.” *See Sup. Ct. R. 3* (decisions on motions for new trial are post-conviction review proceedings excluded from the mandatory appeal definition). He did not purport to argue any issues in his original direct appeal notice were not frivolous (and in fact, the defendant has not argued any of those issues in his recent brief). RSA 597:1-a, III(a), which is similar in language to the Federal Bail Reform Act, simply does not allow for relief under these circumstances.<sup>3</sup>

The State acknowledges that the defendant has not yet exhausted his direct appeal, and the parties’ discretionary appeals have been consolidated with the direct appeal. But this does not alter the fact that the defendant’s argument for release was premised solely on his post-conviction motion for a new trial. The defendant does not challenge, nor has he ever challenged, the trial court’s original denial of release prior to his direct appeal, and it is far too late for him to do so now. This bars the defendant’s requested relief.

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<sup>3</sup> Federal courts have allowed the consideration of bail to be “reserved [for] . . . extraordinary cases” in Writs of Habeas Corpus under 28 U.S.C. § 2255. *See United States v. Dade*, 959 F.3d 1136, 1138 (9th Cir. 2020). As the defendant has not filed a Writ of Habeas Corpus, this extraordinary remedy, which the federal court allows, does not apply.



The defendant contends this interpretation 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.” DM 5. However, in the defendant’s hypothetical, the post-conviction defendant could anticipate that the post-conviction court would vacate his conviction and, as a consequence, his sentences. In this circumstance, RSA 597:1-a simply is not the appropriate statute for release.

The defendant also argues that if the State’s interpretation 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.” DM 6. This Court cannot do so, however, because the defendant never made this argument before the trial court in support of his release. *See generally* BA 1-7. Thus, this argument is not preserved. *See Plantamuro*, 171 N.H. at 258. While the defendant only added this issue recently and after the trial court’s order, this does not excuse the fact that the defendant did not raise it in time for the trial court to consider it as part of his bail motion.

Even if defendants seeking post-conviction appeals are eligible to seek relief under RSA 597:1-a, III(a), the defendant’s argument on this basis was far too late. RSA 597:1-a, III(a) requires motions for release pending appeal, in the first instance, be made *prior* to appeal. “In matters of statutory interpretation, this Court is the final arbiter of the legislature’s intent as expressed in the words of the statute considered as a whole.” *State v. Papillon*, 173 N.H. 13, 34 (2020). This Court looks to “the language of the statute itself, and, if possible, construe[s] that language according to the

plain and ordinary meaning.” *Id.* The Court interprets “legislative intent from the statute as written and will not consider what the legislature might have said or add language it did not see fit to include.” *Id.*

By its terms, the introductory paragraph of section III(a) limits its application to a defendant: (1) who has been found guilty of a felony; (2) who has been sentenced to a term of imprisonment; and (3) who has made a good faith representation that he or she *shall file a timely appeal*. *Id.* The word “shall,” expresses future conduct. *Webster’s Third Int’l Dictionary*, at 2085 (2002) (defining “shall” as an expression of “what will likely happen in the future.”). Importantly, this supports a reading that once the appeal *is filed*, a defendant has simply waived his opportunity to seek release in the first instance, particularly where he could have made the same argument prior to the appeal.

The language of the Federal Bail Reform Act is again relevant here. The language of the Act requires a defendant to actually file his appeal prior to consideration of bail pending appeal. *See* 18 U.S.C. § 1343(b)(1) (applying to a defendant “who has filed an appeal.”). The legislature, which clearly borrowed from the Federal Bail Reform Act in RSA 597:1-a, did not adopt this language. Instead, the legislature limited requests for relief to defendants who “made a good faith representation that he or she shall file a timely appeal.”

Here, the defendant’s post-conviction motion was decided in March 2020, and the court thereafter stayed the sentence review hearing. The defendant had ample time in which to raise the issue of bail pending appeal. He chose not to. Instead, he filed his discretionary appeal on the post-

conviction motion July 24, 2020. The time for the defendant's request has simply come and gone.

The defendant now argues that the plain and obvious purpose of the language is to prevent people from seeking bail who have no intention of filing an appeal, thereby misleading the sentencing court. He argues that the State's interpretation would lead to an "absurd" result if a "highly-prepared" advocate filed an appeal before seeking bail. He, however, provides no rationale for why this would be "absurd." Statutes and rules mandating the appropriate timing to raise an issue exist in all levels of the courts, and do so for a reason. Here, by using the word *shall*, as opposed to the language Federal Bail Reform Act, the legislature established a requirement that the initial request take place *before* the filing of the notice of appeal.

The defendant also cites *State v. Gubitosi*, 153 N.H. 79, 81 (2005) in support of an alternative reading, and notes that, below, the State agreed that the trial court retains jurisdiction to consider "issues of bail" pending appeal. DM 6. The defendant's argument wholly misses the point. The State is not arguing that the trial court *lacked jurisdiction* to consider the defendant's bail argument. Rather, the State contends the bail statute requires the defendant move for release, in the first instance, prior to filing an appeal. If the defendant fails to do so, he may not thereafter seek relief. The argument is one of timing and waiver, not of jurisdiction.

Finally, assuming the Court reaches the merits, the trial court sustainably exercised its discretion in denying bail. The trial court found the State's evidence overwhelming to convict the defendant on three class A felony counts of financial exploitation of a vulnerable adult. That is, the

defendant was convicted of taking more than \$300,000 from his mother, who suffered from dementia. The defendant was thereafter sentenced to a lengthy stand committed term. Both of these are factors that weigh in support of rejecting bail. *See* RSA 597:1-a, III(a)(1) (the court may consider the nature of the crime and the length of the sentence in determining whether the defendant poses a danger to the community or will otherwise interfere with the administration of justice.). Moreover, the fact that the trial court determined the State's evidence to convict was of an overwhelming nature supports that his arguments to challenge his convictions are frivolous.

Based on the foregoing, the trial court sustainably exercised its discretion in denying the defendant's motion for bail based on extenuating circumstances. The State requests that the Court deny prayer B of the defendant's motion.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

THE OFFICE OF THE NEW  
HAMPSHIRE ATTORNEY GENERAL

January 29, 2021

/s/Bryan J. Townsend, II

Bryan J. Townsend, II

NH Bar No.: 19842

Assistant Attorney General

New Hampshire Department of Justice

33 Capitol Street, Concord, N.H. 03301

(603) 271-7094

**CERTIFICATE OF SERVICE**

I, Bryan J. Townsend, II, hereby certify that a copy of the foregoing State's memorandum in opposition to defendant's prayer to revoke trial court's detention order was served on Theodore M. Lothstein, Esquire, counsel for the defendant, through this Court's electronic filing system.

January 29, 2021

/s/Bryan J. Townsend, II  
Bryan J. Townsend, II

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**THE STATE OF NEW HAMPSHIRE**

Hillsborough County Superior Court-North

The State of New Hampshire

v.

Jerry Newton

2016-2017-CR-0999

**MOTION FOR BAIL PENDING APPEAL BASED ON  
EXTENUATING CIRCUMSTANCES  
-STATE OBJECTS-**

The defendant, through counsel, Theodore Lothstein, Esq., respectfully requests that this Court schedule a hearing, and grant him release on personal recognizance bail pending appeal. The basis for this motion is that Mr. Newton's wife is undergoing a major surgery scheduled for January 15, 2021. Mr. Newton seeks bail pending appeal so that he can care for his wife during a lengthy recovery process that is fraught with risk of complications, and so he can strive to keep the family business afloat which supports his wife and employs two New Hampshire residents.

In support, it is stated:

1. As a result of convictions for Financial Exploitation of the Elderly, on October 4, 2018, this court (Brown, J.) sentenced Mr. Newton to serve not less than 7-1/2, and not more than 15 years in prison. Up until the time of sentencing, Mr. Newton had been released on bail. His August 17, 2017 bail order, entered with the State's agreement, required him to post \$500 cash only bail on conditions. The bail order is enclosed as an Exhibit to this motion.

2. At that time of sentencing, Mr. Newton made a request for bail pending appeal, which was immediately denied. The record on that request in its entirety reads as follows:

[DEFENSE COUNSEL]: Thank you, Your Honor. Your Honor, we would ask for the Court to consider bail pending appeal.

THE COURT: Denied.

Transcript of Sentencing at 46.

3. The above-captioned convictions are currently on direct appeal to the New Hampshire Supreme Court, and also on discretionary review from this court's post-conviction denial of motion for new trial, appeals which are consolidated into one proceeding.
4. Although Mr. Newton's case in all respects is currently on appeal, the Superior Court retains jurisdiction to hear this motion to grant bail pending appeal. "Bail pending appeal is an independent matter and thus falls within this exception to the general rule' that 'the perfection of an appeal divests the Trial Court of jurisdiction of the cause and transfers it to the appellate court.'" *State v. Looney*, 154 N.H. 801, 804 (2007) (quoting *State v. Gubitosi*, 153 N.H. 79, 81 (2005)).

#### Procedural History

5. On May 31, 2019, the Supreme Court granted Mr. Newton's assented-to motion to vacate the briefing deadline and stay the direct appeal, so that Mr. Newton could prepare and litigate a motion for new trial.
6. On June 17, 2019, Mr. Newton filed a motion for new trial in this court based on ineffective assistance of counsel. The State filed an



- objection. This court conducted a structuring conference and issued an order governing pre-hearing discovery.
7. On January 27, 2020, after conducting discovery, including the deposition of former counsel, Mr. Newton filed an Amended Motion for New Trial. The State filed an Amended Objection.
  8. On March 24, 2020, this court issued its decision. It determined that with respect to one of Mr. Newton's claims, former counsel failed to provide effective assistance of counsel at trial.
  9. This court found that Mr. Newton did not meet the prejudice prong of the *Strickland* ineffective assistance of counsel standard with respect to the outcome of the trial. This court did hold, however, that former counsel's ineffective assistance may have impacted its decision as to sentence. Accordingly, this court denied the motion for new trial, but ordered that a sentence review hearing would be scheduled.
  10. On April 2, 2020, the State filed a motion to reconsider. In that motion, in addition to asking this court to reconsider its decision on the merits, the State asked this court in the alternative to stay the sentence review hearing until after the appeal in the matter is concluded.
  11. After filing certain motions related to the sentence review hearing, Mr. Newton notified this court that he did not object to the stay of that hearing pending appeal.

12. On July 13, 2020, this court ordered a stay of the sentence review hearing pending appeal. At that time, Mr. Newton did not make a new request for bail pending appeal.
13. Thus, Mr. Newton has continued to serve his original sentence throughout these proceedings. The State Prison's inmate locator website indicates that Mr. Newton's minimum release date is 3/30/2026, reflecting the fact that he has served well over two years of his minimum sentence.
14. Mr. Newton now requests this Court grant him bail pending appeal.  
Basis for Request for Bail Pending Appeal.
15. On January 15, 2021, Mr. Newton's wife Marion Newton is 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). See attached letters dated 11/10/20, 11/19/20, and 12/15/20 from Concord Hospital.
16. As indicated in the enclosed letters, 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.”

17. Mr. Newton seeks 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.
18. 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.

19. 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.”
20. Clear and convincing evidence demonstrates Mr. Newton is not a risk of flight. 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.
21. Since his imprisonment over two years ago, Marion Newton has operated the business. Pay stubs are enclosed, redacted to remove personal identifying information, showing that the business continues to employ two full-time employees.
22. 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.
23. 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.
24. Thus, Mr. Newton’s home, business, and wife are all here in New Hampshire. He is not a risk of flight.

25. As far as the second prong of the standard: It is apparent on the face of the record that Mr. Newton's appeal is not frivolous and is not taken merely for delay. This court has found his former counsel to have rendered ineffective assistance of counsel. This court found that former counsel's ineffective counsel did not affect the outcome of the trial, a conclusion that Mr. Newton disagrees with, but also found that it affected the outcome of sentencing, a conclusion that the State disagrees with. This finding raises serious questions about the fundamental fairness of the trial proceedings. The mere fact that the State has filed a cross-appeal illustrates that this is not a frivolous appeal, taken merely for delay.

26. The State, through Bryan Townsend, Esq., objects to this motion.

Accordingly, the accused respectfully request that this Court:

- A. Grant this motion;
- B. Schedule a bail hearing (Mr. Newton has no objection to a video or telephonic hearing);
- C. Grant such further relief as serves justice.

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 copies have been forwarded by e-service this 28 December 2020 to the prosecutor, Bryan Townsend, Esq., Assistant Attorney General, and any other registered subscribers on the electronic filing account, and mailed to Jerry Newton, NCF Berlin.

A handwritten signature in blue ink that reads "Theodore Lothstein". The signature is written in a cursive style with a horizontal line under the name.

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Theodore Lothstein

**THE STATE OF NEW HAMPSHIRE  
JUDICIAL BRANCH  
SUPERIOR COURT**

Hillsborough Superior Court Northern District  
300 Chestnut Street  
Manchester NH 03101

Telephone: 1-855-212-1234  
TTY/TDD Relay: (800) 735-2964  
<http://www.courts.state.nh.us>

**NOTICE OF DECISION**

**File Copy**

Case Name: **State v. Jerry Newton**  
Case Number: **216-2017-CR-00999**

Enclosed please find a copy of the court's order of August 17, 2017 relative to:

Bail Order

September 01, 2017

W. Michael Scanlon  
Clerk of Court

(832)

C: Brooksley C. Belanger, ESQ; Bryan J. Townsend, II, ESQ; James P. O'Rourke, Jr., ESQ

THE STATE OF NEW HAMPSHIRE  
JUDICIAL BRANCH  
http://www.courts.state.nh.us

Court Name: Hillsborough Superior Court Northern District  
Case Name: State v. Jerry Newton  
Case Number: 438-2017-CR-0099a  
(if known)

BAIL ORDER

This Bail Order is made  By Agreement  After Hearing

Pending  trial  violation of probation hearing  sentencing  appeal; the defendant shall.

- I. A.  Be released on \$ \_\_\_\_\_ personal recognizance.
- B.  Be released on \$ 500.00 cash or corporate surety CASH ONLY.

II. DEFENDANT'S RELEASE IS SUBJECT TO THE CONDITIONS THAT:

- A. Defendant not commit a federal, state or local crime while on release.
- B. Defendant shall keep on file with this Court a current mailing address and check daily at that address for receipt of notices in this case, and appear at all times specified in notices issued by the Court.

III. The Court determines that because the above conditions will not reasonably assure the appearance of the defendant as required or will endanger the safety of the defendant or of any other person or the community, the following additional conditions of release will be imposed:

- 1.  Defendant shall have no contact, direct or indirect, with Hazel Newton
- 2.  The defendant shall live at: \_\_\_\_\_
- 3.  The defendant shall not travel outside of New Hampshire.
- 4.  The defendant shall execute a Waiver of Extradition approved by the Court.
- 5.  The defendant shall refrain from possessing a firearm, destructive device, dangerous weapon, or ammunition.
- 6.  The defendant shall refrain from the excessive use of alcohol and the use controlled drugs as defined in RSA 318-B.
- 7.  The defendant shall comply with the following curfew: \_\_\_\_\_
- 8.  The defendant shall report, in person, to the NH Dept. of Corrections Field Office on today's date.
- 9.  The defendant shall report, in person, to the \_\_\_\_\_ Police Department:  
 daily  weekly, at a time to be set by the police dept. and be subject to random drug testing.
- 10.  The defendant shall abide by all the terms and conditions of probation and/or parole.
- 11.  The defendant shall surrender his/her passport to the Court, and/or not obtain a passport.
- 12.  The defendant shall apply to \_\_\_\_\_ for an intake assessment within \_\_\_\_\_ days of release.
- 13.  The defendant shall meaningfully participate in treatment at \_\_\_\_\_  
If the defendant leaves the program for any reason other than successful completion, bail shall automatically convert to \_\_\_\_\_.
- 14.  See attached pretrial services bail order.
- 15.  Other: \_\_\_\_\_

8/17/17  
Date

[Signature]  
Presiding Justice

- County Attorney's Office/ Attorney General's Office
- Defense Counsel
- Defendant
- \_\_\_\_\_ County House of Corrections

- Sheriff's Department
- NH Department of Corrections
- Surety
- Other \_\_\_\_\_

HO30N 17 AUG 16 PM 0122



## THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS  
NORTHERN DISTRICT

JANUARY 2021 TERM

## STATE OF NEW HAMPSHIRE

v.

JERRY NEWTON  
216-2017-CR-0999STATE'S OBJECTION TO DEFENDANT'S MOTION FOR BAIL  
PENDING APPEAL BASED ON EXTENUATING CIRCUMSTANCES

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General, and objects to the defendant's *Motion for Bail Pending Appeal Based on Extenuating Circumstances*, stating as follows:

**I. Background**

1. On July 19, 2018, a jury convicted the defendant, Jerry Newton, on three class A felony counts of financial exploitation of an elderly adult, contrary to RSA 631:9, :10. On October 4, 2018, this Court (*Brown, J.*) sentenced the defendant to serve 7 ½ - 15 years in the New Hampshire State Prison, stand committed. At that time, the defendant moved, pursuant to RSA 597:1-a, for release pending appeal. The Court denied his motion.

2. The defendant filed a mandatory appeal notice to the New Hampshire Supreme Court. The defendant did not, either at that time or since, challenge the trial court's decision to deny his release pending appeal. On May 31, 2019, the Supreme Court stayed the defendant's direct appeal, allowing him the opportunity to file and litigate a post-conviction motion for new trial in this Court. The defendant filed his motion for a new trial (based on ineffective assistance of counsel) with this Court on June 17, 2019.

3. On March 24, 2020, the Court (*Brown, J.*) denied the defendant's motion for a new trial. The Court found that trial counsel's disclosure of certain text message communications to the State prior to trial was deficient. Nonetheless, the Court concluded that the guilty verdicts were not prejudiced because the State otherwise presented overwhelming evidence to prove the defendant's guilt. However, the Court agreed to schedule a sentence review hearing because it acknowledged it relied heavily on the text messages during sentencing.

4. On July 13, 2020, at the State's request, the Court (*Brown, J.*) stayed the sentence review hearing to allow for both parties to file discretionary appeals from the Court's rulings with the Supreme Court. The defendant did not object to the stay, nor did he make any request at that time for release pending appeal. The defendant appealed the Court's denial of his motion for a new trial. The State cross-appealed the Court's deficiency determination and its grant of a sentence review hearing. The Supreme Court accepted the discretionary appeals, thereafter consolidating them with the defendant's direct appeal.

5. The defendant now moves, once again, for release pending appeal.

## **II. Argument**

6. This Court retains jurisdiction to rule on the defendant's bail motion. *See State v. Gubitosi*, 153 N.H. 79, 81 (2005) (following appeal, trial court retains jurisdiction to consider bail issues). RSA 597:1-a governs a defendant's release pending appeal. *See State v. Clark*, 151 N.H. 56, 58 (2004). The statute requires the Court to deny release for a defendant who has been found guilty of a felony, sentenced to a term of imprisonment, and made a good faith representation that he or she shall file a timely appeal, unless that defendant can prove:

(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.

RSA 597:1-a, III(a)(1)-(2).

**1. The defendant is not entitled to release based on extenuating, temporary circumstances.**

7. The defendant argues for release based on what he terms “extenuating circumstances.” He maintains his release is necessary so that he may care for his spouse while she recovers from surgery (approximately six weeks), and so that he may work at his automotive business during this time. However, RSA 597:1-a does not allow for release based on these circumstances. The legislature has set forth the exclusive considerations for release pending appeal, which are set forth above. *See* RSA 597:1-a, III(a)(1)-(2). The defendant’s extenuating, temporary circumstances are not relevant to either element, and as a result, “the court shall order that [he] . . . be detained.” RSA 597:1-a, III(a).

8. Importantly, the defendant cites no other statute, rule, or relevant legal principle to support release of a defendant on bail under these circumstances, especially where, as here, the defendant has already been denied bail pending appeal. The defendant is not entitled to a medical parole under these circumstances. *See* RSA 651-A:10-a. Further, the State does not believe this Court has the authority to consider arguments of compassionate release related to bail.

9. Even assuming a legal mechanism exists for granting release outside of RSA 597:1-a, III(a), the temporary circumstances alleged here do not support release. The Court (*Brown*, J.) has already rejected the defendant’s request that he not be incarcerated, and instead be allowed to work. At sentencing, the defendant’s trial counsel stressed, “If [the defendant is] incarcerated, for even a brief amount of time, his business probably will not make it.” *Sent. Tr. at 37* (attached).

The Court then not only imposed a lengthy stand committed prison sentence, but also, at the same hearing, denied his motion for release pending direct appeal. *Sent. Tr.* at 46 (attached). The defendant attempts to make the same argument here, but this time with less force given the temporary nature of the alleged “need” to work—approximately six weeks.

10. That leaves the defendant’s argument that he must provide care to his spouse during her temporary recovery. But, this argument is largely undercut by his dual assertion that he intends to also work during this time. Thus, to the extent the Court rejects the defendant’s argument that he must be released to work, the Court should likewise reject the argument that his release is somehow *necessary* solely to provide care to his spouse.

**2. This Court should reject the defendant’s additional rationales for release pending appeal.**

11. Though the defendant’s “extenuating circumstances” form the primary basis for his requested relief, he also argues that he can satisfy the elements of RSA 597:1-a, III(a) as to his post-conviction appeal. RSA 597:1-a, III(a), however, does not authorize release of defendants on a discretionary appeal following a post-conviction proceeding. The language of RSA 597:1-a, III(a) is nearly identical to the Federal Bail Reform Act of 1984, *see* 18 U.S.C.A. Sec. 3143(b). Federal courts interpret the language of that Act to “not apply to [defendants] seeking post-conviction relief.” *U.S. v. Mett*, 41 F.3d 1281, 1282 (9<sup>th</sup> Cir. 1994); *see also U.S. v. Kelly*, 790 F.2d 130, 139 (D.C. Cir. 1986). Here, the defendant’s argument for release is premised on the purported lack of frivolousness of his discretionary appeal in a “post-conviction review proceeding.” *See* Sup. Ct. R. 3 (decisions on motions for new trial are post-conviction review

proceedings excluded from the mandatory appeal definition). Under the plain language of RSA 597:1-a, III(a), he is not entitled to release.<sup>1</sup>

12. The State acknowledges the defendant has not yet exhausted his direct appeal, and the parties' discretionary appeals have been consolidated with the direct appeal. But this does not alter the fact that the defendant's argument (at least as to frivolousness) is premised solely on his post-conviction motion for a new trial. He does not challenge, nor has he ever challenged, the denial of release prior to his *direct appeal*, and it is far too late for him to do so now. This Court should rule that he is not entitled to another determination based on his appeal of a post-conviction motion.

13. Even if defendants seeking post-conviction appeals are eligible to seek relief under RSA 597:1-a, III(a), the defendant's argument on this basis is far too late. RSA 597:1-a, III(a) requires motions for release pending appeal, in the first instance, be made *prior* to appeal. By its terms, the introductory paragraph of section III(a) limits its application to a defendant: (1) found guilty of a felony; (2) sentenced to a term of imprisonment; and (3) who has made a good faith representation that he or she *shall* file a timely appeal. *Id.* The word "shall," used in this way, expresses "future" conduct. *Webster's Third Int'l Dictionary*, at 2085 (2002) (defining "shall" as an expression of "what will likely happen in the future."). Once the appeal *is filed*, a defendant has waived his opportunity to seek release.<sup>2</sup>

14. The defendant's post-conviction motion was decided in March 2020 and the sentence review hearing was thereafter stayed. The defendant had ample time in which to re-raise the

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<sup>1</sup> The federal courts have allowed the consideration of bail to be "reserved [for] . . . extraordinary cases" in Writs of Habeas Corpus under 28 U.S.C. §2255. See *United States v. Dade*, 959 F.3d 1136, 1138 (9<sup>th</sup> Cir. 2020). As the defendant has not filed a Writ of Habeas Corpus, this extraordinary remedy, which the federal court allows, does not apply.

<sup>2</sup> Relevant to this analysis, the federal bail reform act differs slightly in language from RSA 597:1-a, III(a), applying to a defendant "who *has filed* an appeal." This difference in language shows our legislature's intent, by using "shall," to have issues of bail pending appeal be decided, in the first instance, *prior* to an appeal being taken.

issue of bail pending appeal. He chose not to. Instead, he filed his discretionary appeal on the post-conviction motion in July 2020. The time for the defendant's request has simply come, and long since gone.

15. Assuming the Court reaches the merits of his argument, the defendant's motion must still be denied. The defendant cannot show that his appeal is not frivolous. As to the critical element of prejudice under *Strickland*, this Court concluded that the State's evidence was overwhelming to support his convictions. While the State has challenged the finding of deficient performance and the granting of a sentence review hearing, given the Court's finding of overwhelming evidence, the defendant cannot establish his challenge to his conviction is not frivolous.

WHEREFORE, the State of New Hampshire respectfully requests that this Honorable Court:

- (A) Deny the defendant's *motion for bail pending appeal based on extenuating circumstances*;
- (B) Grant a hearing, only if deemed necessary; and
- (C) Grant such further relief as may be deemed just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

Gordon J. MacDonald  
Attorney General

January 7, 2021

/s/ Bryan J. Townsend, II  
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent electronically on January 7, 2021, to the defendant's counsel of record, Theodore Lothstein, Esq.

/s/ Bryan J. Townsend, II  
Bryan J. Townsend, II, Esq.

1 character and no doubt she be protected, but she did not know  
2 what was going on. She was deemed incompetent before this  
3 Court.

4 It seems that the State, once again, will cherry  
5 pick what they choose to believe from what they hear. And  
6 they'll choose to believe Hazel Newton sometimes, and other  
7 times, they'll say well, she's incompetent, and that  
8 information doesn't help us, so not credible.

9 One of the counts, the IRA, Jerry Newton was told by  
10 his father to make himself the beneficiary. That is the money  
11 that he spent, and the money, if there is restitution, he  
12 would have received, at least a third of that, upon her  
13 passing -- upon Hazel's passing.

14 The State refers to these nameless, faceless,  
15 financial advisors. There is a name and a face and it's Steve  
16 Thompson, who avoided service, would not be subpoenaed, would  
17 not come up, and he's the financial planner that gave Jerry  
18 Newton advice.

19 Attorney Greenblott stated it much more eloquently  
20 than I could. Jerry Newton did his best for his family.  
21 Putting him in prison will do nothing for restitution when it  
22 is awarded. Mr. Newton can provide restitution if he's out.  
23 If he's incarcerated, for even a brief amount of time, his  
24 business probably will not make it.

25 There was no scheme. There was no plan. So we ask,





1 THE COURT: Attorney O'Rourke, I'm going to mark  
2 your letters of support so it's part of the record, as well as  
3 the State's exhibit.

4 MR. O'ROURKE: Thank you, Your Honor. Your Honor,  
5 we would ask for the Court to consider bail pending appeal.

6 THE COURT: Denied.

7 Joni, do you have a manila -- oh, and probation and  
8 parole is, of course, going to be marked, too, as an exhibit.  
9 All Court exhibits. Okay.

10 Remanded.

11 (Proceedings concluded at 1:39 p.m.)

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