

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

No. 2022-0140

State of New Hampshire

v.

Nyok Deng Luwal

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Appeal Pursuant to Rule 7 from Judgment  
of the Hillsborough (North) Superior Court

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BRIEF FOR THE DEFENDANT

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Christopher M. Johnson  
Chief Appellate Defender  
Appellate Defender Program  
10 Ferry Street, Suite 202  
Concord, NH 03301  
NH Bar # 15149  
603-224-1236  
cjohnson@nhpd.org  
(15 minutes oral argument)

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## QUESTION PRESENTED

Whether the Superior Court has jurisdiction to review a Circuit Court detention order issued in the context of a pre-trial revocation of bail.

Issue preserved by defense request for review, the defense objection to the State's motion to dismiss, the hearing on the matter, and the court's order. Supp. 38-44; A12-A15; H2 2-19.\*

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\* Citations to the record are as follows:

"Supp." refers to the Supplement attached to this brief, containing the order from which Luwal appeals;

"A" refers to the separate appendix to this brief, containing other relevant documents;

"H1" refers to the transcript of the Circuit Court hearing on December 30, 2021, on the State's motion to revoke bail;

"H2" refers to the transcript of the Superior Court hearing on February 17, 2022, on the defense effort to appeal the Circuit Court's ruling.

## TEXT OF RELEVANT AUTHORITIES

### **RSA 597:1 Release and Detention Authority Generally.**

Except as provided in RSA 597:1-a, 597:1-c, or 597:1-d, all persons arrested for an offense shall be eligible to be released pending judicial proceedings upon compliance with the provisions of this chapter.

### **RSA 597:2 Release of a Defendant Pending Trial.**

I. Upon the appearance before the court or justice of a person charged with an offense, the court or justice shall issue an order that, pending arraignment or trial, the person be:

(a) Released on his personal recognizance or upon execution of an unsecured appearance bond, pursuant to the provisions of paragraph II;

(b) Released on a condition or combination of conditions pursuant to the provisions of paragraph III; or

(c) Temporarily detained to permit revocation of conditional release pursuant to the provisions of paragraph V.

I-a. Except as provided in RSA 597:1-d, a person charged with a probation violation shall be entitled to a bail hearing. The court shall issue an order that, pending a probation violation hearing, the person be:

(a) Released on his or her personal recognizance or upon execution of an unsecured appearance bond, pursuant to the provisions of paragraph II;

(b) Released on a condition or combination of conditions pursuant to the provisions of paragraph III; or

(c) Detained.

II. The court or justice shall order the prearrest or pretrial release of the person on his or her personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to the condition that the person not commit a crime during the

period of his or her release, and subject to such further condition or combination of conditions that the court may require, unless the court determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of the person or of any other person or the community. The court may also consider as a factor in its determination under this paragraph or paragraph III that a person who is detained as a result of his or her inability to meet the required conditions or post the required bond is the parent and sole caretaker of a child and whether, as a result, such child would become the responsibility of the division of children, youth, and families.

III. If the court or justice determines that the release described in paragraph II will not reasonably assure the appearance of the person as required or, as described in paragraph II or VI, will endanger the safety of the person or of any other person or the community, he shall issue an order that includes the following conditions:

(a) The condition that the person not commit a crime during the period of release; and

(b) Such further condition or combination of conditions that he determines will reasonably assure the appearance of the person as required and the safety of the person or of any other person or the community, which may include the condition that the person:

(1) Execute an agreement to forfeit, upon failing to appear within 45 days of the date required, such designated property, including money, as is reasonably necessary to assure the appearance of the person as required, and post with the court such indicia of ownership of the property or such percentage of the money as the court or justice may specify;

(2) Furnish bail for his appearance by recognizance with sufficient sureties or by deposit of moneys equal to the amount of the bail required as the court or justice may direct; and

(3) Satisfy any other condition that is reasonably necessary to assure the appearance of the person as required



and to assure the safety of the person or of any other person or the community.

In considering the conditions of release described in subparagraph III(b)(1) or III(b)(2), the court may upon its own motion, or shall upon the motion of the state, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the designation, or the use as collateral, of property that because of its source will not reasonably assure the appearance of the person as required.

III-a. If a person is charged with any of the offenses listed in RSA 173-B:1, I or with violation of a protective order issued under RSA 458:16, III or RSA 173-B, the court or justice may order preventive detention without bail, or, in the alternative, restrictive conditions including but not limited to electronic monitoring and supervision, if there is clear and convincing evidence that the person poses a danger to another. The court or justice may consider, but shall not be limited to considering, any of the following conduct as evidence of posing a danger:

- (a) Threats of suicide.
- (b) Acute depression.
- (c) History of violating protective orders.
- (d) Possessing or attempting to possess a deadly weapon in violation of an order.
- (e) Death threats or threats of possessiveness toward another.
- (f) Stalking, as defined in RSA 633:3-a.
- (g) Cruelty to or violence directed toward pets.

III-b. A no-contact provision contained in any bail order shall not be construed to:

(a) Prevent counsel for the defendant to have contact with counsel for any of the individuals protected by such provision; or

(b) Prevent the parties, if the defendant and one of the protected individuals are parties in a domestic violence or marital matter, from attending court hearings scheduled in such matters or exchanging copies of legal pleadings filed in

court in such matters.

IV. In a release order issued pursuant to the provisions of this section, the court or justice shall include a written statement that sets forth:

(a) All of the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct; and

(b) The provisions of RSA 641:5, relative to intimidation of witnesses and informants.

V. A person charged with an offense who is, and was at the time the offense was committed, on

(a) Release pending trial for a felony or misdemeanor under federal or state law;

(b) Release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any offense under federal or state law; or

(c) Probation or parole for any offense under federal or state law, except as provided in RSA 597:1-d, III may be detained for a period of not more than 72 hours from the time of his arrest, excluding Saturdays, Sundays and holidays. The law enforcement agency making the arrest shall notify the appropriate court, probation or parole official, or federal, state or local law enforcement official. Upon such notice the court shall also direct the clerk to notify by telephone the division of field services, department of corrections, of the pending bail hearing. If the official fails or declines to take the person into custody during that period, the person shall be treated in accordance with the provisions of law governing release pending trial. Probationers and parolees who are arrested and fail to advise their supervisory probation officer or parole officer in accordance with the conditions of probations and parole may be subject to arrest and detention as probation and parole violators.

VI. Notwithstanding any law to the contrary, upon the appearance of a person charged with a class B misdemeanor, the court or justice shall issue an order that, pending arraignment, the person be released on his personal recognizance, unless the court determines that such release

will endanger the safety of the person or of any other person or the community. The court shall appoint an attorney to represent any indigent person charged with a class B misdemeanor denied release for the purpose of representing such person at any detention hearing.

**RSA 597:6-e: Review and Appeal of Release or Detention Order.**

I. If a person is ordered released by a bail commissioner, the person, or the state, shall be entitled to a hearing, if requested, on the conditions of bail before a justice within 48 hours, Sundays and holidays excepted.

II. The person or the state may file with the superior court a motion for revocation of the order or amendment of the conditions of release set by a municipal or district court, by a justice or by a bail commissioner. The motion shall be determined promptly. However, no action shall be taken on any such motion until the moving party has provided to the superior court certified copies of the complaint, affidavit, warrant, bail slip, and any other court orders relative to each charge for which a release or detention order was issued by a justice or a bail commissioner. In cases where a district court justice has made a finding, pursuant to RSA 597:2, III-a that the person poses a danger to another, the superior court shall, after notification to both parties, the police department that brought the charges in district court, and the victim, conduct a hearing and make written findings supporting any modifications and reasons for new conditions or changes from the district court order. The reviewing court shall take into consideration the district court's written findings, orders, pleadings, or transcript when making a modification.

III. The 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 597:7-a: Detention and Sanctions for Default or Breach of Conditions. –**

I. A peace officer may detain an accused until he can be brought before a justice if he has a warrant issued by a justice for default of recognizance or for breach of conditions of release or if he witnesses a breach of conditions of release. The accused shall be brought before a justice for a bail revocation hearing within 48 hours, Saturdays, Sundays and holidays excepted.

I-a. If a person violates a restraining order issued under RSA 458:16, III, or a protective order issued under RSA 633:3-a, or a temporary or permanent protective order issued under RSA 173-B by committing assault, criminal trespass, criminal mischief, or another criminal act, a peace officer shall arrest the accused, detain the accused pursuant to RSA 594:19-a, bring the accused before a justice pursuant to RSA 594:20-a, and refer the accused for prosecution. Such arrest may be made within 12 hours after a violation without a warrant upon probable cause whether or not the violation is committed in the presence of the peace officer.

II. A person who has been released pursuant to the provisions of this chapter and who has violated a condition of his release is subject to a revocation of release, an order of detention, and a prosecution for contempt of court.

III. The state may initiate a proceeding for revocation of an order of release by filing a motion with the court which ordered the release and the order of which is alleged to have been violated. The court may issue a warrant for the arrest of a person charged with violating a condition of release, and the person shall be brought before the court for a proceeding in accordance with this section. The court shall enter an order of revocation and detention if, after a hearing, the court:

(a) Finds that there is:

(1) Probable cause to believe that the person has

committed a federal, state, or local crime while on release; or

(2) Clear and convincing evidence that the person has violated any other condition of release or has violated a temporary or permanent protective order by conduct indicating a potential danger to another; and

(b) Finds that:

(1) There is no condition or combination of conditions of release that will assure that the person will not flee or that the person will not pose a danger to the safety of himself or any other person or the community; or

(2) The person is unlikely to abide by any condition or combination of conditions of release.

If there is probable cause to believe that, while on release, the person committed a federal or state felony, a rebuttable presumption arises that no condition or combination of conditions will assure that the person shall not pose a danger to the safety of any other person or the community. If the court finds that there are conditions of release that shall assure that the person will not flee or pose a danger to the safety of himself or any other person or the community, and that the person will abide by such conditions, he shall treat that person in accordance with the provisions of RSA 597:2 and may amend the conditions of release accordingly.

IV. The state may commence a prosecution for contempt if the person has violated a condition of his release.

**RSA 597:10: Copies, on Appeal.**

In case of appeal, the municipal and district courts shall cause true and attested copies of the complaint, other process, records and recognizances, together with any cash bail in the case, to be filed with the clerk of the superior court within 10 days after the date of such order for recognizance.

## STATEMENT OF THE CASE AND FACTS

Nyok Luwal was arrested on October 5, 2021, and charged in the Ninth Circuit Court – District Division (Manchester) with three counts of simple assault (domestic violence) and one count of criminal threatening. H1 3. Following an arraignment on October 7, the court (Chabot, J.) set various conditions of release, including a prohibition on contact with the alleged victim. H1 3-4; A6.

On December 27, 2021, the police arrested Luwal for a violation of bail conditions. H1 4. The State also brought a new charge, alleging stalking. A6-A7. The prosecutor then filed a motion to revoke Luwal's bail, to which the defense objected. A3-A5; H1 7-10.

After a hearing on December 30, the court (Lyons, J.) on January 4, 2022, revoked Luwal's bail, ordering him detained without bail on the assault case. A6-A8. The court also set cash bail in the new stalking case. A7-A8.

Luwal then sought Superior Court review of the Circuit Court's ruling. At a hearing in Superior Court, the State argued that that court lacked jurisdiction. H2 3-6, 13-16. In a pleading and at the hearing, the defense contended that the Superior Court had jurisdiction. A12-A15; H2 7-13, 16-17. At the conclusion of the hearing, the court (Delker, J.) granted the State's motion to dismiss, finding lack of jurisdiction. H2 18-19. The court also issued a written order, adopting the

reasoning of another Superior Court judge in a prior case adjudicating the same issue. Supp. 38-44.

On March 17, 2022, Luwal filed a Notice of Appeal in this Court. On March 29, 2022, the State filed a *nolle prosequi* terminating the Circuit Court prosecution of the charges on which Luwal had been held. A11. Luwal is presently not incarcerated.

## SUMMARY OF THE ARGUMENT

RSA 597 – the bail chapter – expressly provides for Superior Court review of Circuit Court orders detaining pre-trial defendants. As a matter of statutory interpretation, this Court must reject the view, adopted by the Superior Court, that such Superior Court jurisdiction extends only to orders issued in the general bail-determination process – the process of determining initially whether to release or detain a defendant. Rather, the language and structure of RSA 597 compel the conclusion that Superior Court also has jurisdiction to review Circuit Court detention orders issued in the context of bail revocation.

Although Luwal is now free because the State dropped the Circuit Court charges holding him, this Court should nevertheless decide this appeal. It presents a legal issue of pressing public interest that is capable of repetition while evading review. Litigants and the courts need to know whether a defendant can challenge a Circuit Court bail-revocation order in the Superior Court, or rather can only seek review in this Court. Given the pace of misdemeanor prosecutions in Circuit Court, questions about bail will often become moot before appellate review in this Court can conclude.



I. THE SUPERIOR COURT ERRED IN REFUSING TO REVIEW THE CIRCUIT COURT’S RULING REVOKING BAIL AND ORDERING LUWAL DETAINED.

RSA 597 – the bail chapter – provides for Superior Court review of Circuit Court orders detaining defendants pre-trial. The State argued, and the Superior Court ruled, that the chapter authorizes Superior Court review only when pre-trial detention results from a general<sup>1</sup> Circuit Court bail decision. On that view, the Superior Court cannot review a Circuit Court detention order issued on a motion to revoke bail. Luwal argued, on the contrary, that the chapter’s provisions for Superior Court review make no such distinction. Rather, when the Circuit Court orders pre-trial detention, the defendant can challenge the ruling in the Superior Court and need not immediately appeal to this Court.

The dispute raises a question of statutory interpretation. “The interpretation of a statute is a question of law, which [this Court] review[s] *de novo*.” State v. Mfataneza, 172 N.H. 166, 169 (2019). When called upon to interpret a statute, this Court looks first to the language of the statute, construing it, if possible, in accord with its plain and ordinary

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<sup>1</sup> The Superior Court order used the term “initial” to refer to any judicial decision about bail other than a decision on a motion to revoke bail. Supp. 41-42. This brief mostly uses the term “general” for that purpose, to avoid the unintended implication that the Superior Court can review only the first Circuit Court bail ruling. Some such term is necessary to distinguish the bail rulings that all agree are subject to Superior Court review, from Circuit Court bail revocation rulings, which the Superior Court declared unreviewable.

meaning. State v. Horner, 153 N.H. 306, 309 (2006). “During this exercise, [the Court] can neither ignore the plain language of the legislation nor add words which the lawmakers did not see fit to include.” Mfataneza, 172 N.H. at 169. Further, the Court interprets “statutes in the context of the overall statutory scheme and not in isolation.” State v. Moran, 158 N.H. 318, 321 (2009). To that end, the Court aims to “effectuate the statute’s overall purpose and to avoid an absurd or unjust result.” State v. Paige, 170 N.H. 261, 264 (2017).

The parties’ arguments and the court’s analysis focused on a few specific sections in the bail chapter. Among the sections that attracted particular attention were: RSA 597:2, X (establishing the principle of Superior Court review); RSA 597:6-e (captioned “Review and Appeal of Release or Detention Order”); and RSA 597:7-a (captioned “Detention and Sanctions for Default or Breach of Conditions”). The parties also advanced arguments based on the chapter’s structure, while accusing the opposing position of countenancing absurd results. This brief accordingly begins by presenting an overview of the bail chapter.

RSA 597:1 codifies the general principle that all arrested persons are eligible for release pending adjudication. That statute acknowledges specific circumstances, codified in RSA

597:1-a,<sup>2</sup> RSA 597:1-c,<sup>3</sup> and RSA 597:1-d,<sup>4</sup> identifying defendants who are not eligible for release. Aside from those specific circumstances, though, in “New Hampshire, the general rule regarding pre-trial release is that all persons arrested for an offense shall be eligible to be released pending judicial proceedings.” State v. Furgal, 161 N.H. 206, 209 (2010) (quoting RSA 597:1).

RSA 597:2, captioned “Release of a Defendant Pending Trial,” contains ten paragraphs. Collectively, those paragraphs describe the release and detention options available to a court,<sup>5</sup> the standards governing a court’s choice between options,<sup>6</sup> some of the procedures that construct the record on which the court makes its decision,<sup>7</sup> and some rules relating to the form and content of the court’s decision.<sup>8</sup> Finally, as noted above, RSA 597:2, X establishes the principle of Superior Court review of Circuit Court detention decisions. That paragraph provides:

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<sup>2</sup> Governing the eligibility for release of convicted defendants awaiting sentencing or appeal.

<sup>3</sup> Governing the eligibility for release of defendants charged with crimes punishable by life imprisonment.

<sup>4</sup> Governing the eligibility for release of defendants on probation or parole.

<sup>5</sup> RSA 597:2, I and II identify, respectively, the possible outcomes for ordinary defendants and for defendants on probation. Essentially, the options are detention, release on recognizance, or release on conditions.

<sup>6</sup> RSA 597:2, III identifies the issues a court should consider. These boil down to dangerousness, flight risk, and failure to abide by previous bail conditions.

<sup>7</sup> RSA 597:2, IV, for example, addresses questions of evidence and the availability of a hearing.

<sup>8</sup> For example, RSA 597:2, V addresses the implications of a no-contact order, while RSA 597:2, VII specifies the required contents of an order releasing a defendant.

A person detained by a circuit court has the right to:

(a) In the first instance, a hearing in circuit court within 36 hours after the filing of the motion, excluding weekends and holidays[,] on a motion to reconsider the original detention order; and

(b) A decision upon a *de novo* appeal, pursuant to RSA 597:6-e, II, to the superior court within 36 hours of the filing of the appeal, excluding weekends and holidays.

RSA 597:2, X.

Having thus begun, in RSA 597:1, with a statement of broad principle, and in RSA 597:2, with a thorough statement of outcomes, standards and procedures, the chapter continues with sections that fill in details on miscellaneous specific topics. Among others, these include provisions relating to fees,<sup>9</sup> the handling of money deposited as bail,<sup>10</sup> specific offenses or circumstances,<sup>11</sup> the licensure of bail recovery agents,<sup>12</sup> and the penalties authorized for various kinds of violations of the chapter<sup>13</sup> or for committing new

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<sup>9</sup> See, e.g., RSA 597:2-b, captioned “Determination of Indigence and Payment of Bail Commissioner Fee.”

<sup>10</sup> See, e.g., RSA 597:3, captioned “Money Deposited.”

<sup>11</sup> See, e.g., RSA 597:4 (persons charged with murder); RSA 597:5-a (persons charged with probation violations); RSA 597:6-d (release or detention of material witnesses); RSA 597:14 (juveniles).

<sup>12</sup> RSA 597:7-b.

<sup>13</sup> See, e.g., RSA 597:12 (for violations of RSA 597:10); RSA 597:13 (imposed on judge who orders a person released notwithstanding the person’s failure to post bail as set).

crimes while released on bail.<sup>14</sup> Subsequent sections of the chapter contain provisions on bail commissioners,<sup>15</sup> recognizances of witnesses,<sup>16</sup> the form of recognizance,<sup>17</sup> the discharge of bail,<sup>18</sup> forfeitures of recognizances and actions thereon,<sup>19</sup> the discharge of prisoners unable to procure bail,<sup>20</sup> and recognizances upon arrest for an offense committed in another county.<sup>21</sup>

Two statutes codified amongst those miscellaneous provisions require close attention, given the issue in this appeal. The first of these is RSA 597:6-e, which develops the principle of higher-level review of lower-level bail decisions. The second is RSA 597:7-a, which addresses bail revocation. This brief discusses each in a separate sub-section below.

A. RSA 597:6-e

RSA 597:6-e elaborates on the principle of higher-level review of a lower-level bail decision. Paragraph I authorizes judicial review of a bail commissioner's decision to release a person. It provides:

If a person is ordered released by a bail commissioner, the person, or the state,

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<sup>14</sup> RSA 597:14-b.

<sup>15</sup> RSA 597:15 through :21.

<sup>16</sup> RSA 597:22 through :23.

<sup>17</sup> RSA 597:24 through :26.

<sup>18</sup> RSA 597:27 through :30.

<sup>19</sup> RSA 597:31 through :38-B.

<sup>20</sup> RSA 597:39.

<sup>21</sup> RSA 597:40 through :42.

shall be entitled to a hearing, if requested, on the conditions of bail before a justice within 48 hours, Sundays and holidays excepted.

RSA 597:6-e, I. Paragraph II, quoted and discussed in detail below, authorizes Superior Court review of a Circuit Court decision. Finally, paragraph III authorizes Supreme Court review of a lower court's release or detention order. It provides:

The 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.

Paragraph II bears directly on the issue in this case, as it authorizes Superior Court review of lower-level bail rulings.

The paragraph begins by stating that principle thus:

Subject to RSA 597:2, X, the person or the state may file with the superior court a motion for revocation of the order or amendment of the conditions of release set by a municipal or district court, by a justice, or by a bail commissioner....

Some points bear mention. First, the statute mentions RSA 597:2, X, in which, as noted above, the chapter first articulates the right of Superior Court review. Second, the

statute gives that right of Superior Court review both to the defendant and to the State. Third, the statute broadly defines the content of Superior Court review, allowing the filing of a motion for revocation or a motion for amendment of a Circuit Court order.

RSA 597:6-e, II next addresses some questions of timing and procedure in the Superior Court review. It provides:

The motion shall be determined promptly. However, no action shall be taken on any such motion until the moving party has provided to the superior court certified copies of the complaint, affidavit, warrant, bail slip, and any other court orders relative to each charge for which a release or detention order was issued by a justice, or a bail commissioner.

One point bears emphasis. Before the aggrieved party can get a Superior Court ruling, that party must supply that court with any and all rulings of the lower-level decision-maker (here, the Circuit Court) on the issue of bail. That broad language is consistent with Superior Court review of detention whether it results from a general bail ruling or from a revocation order.

RSA 597:6-e then speaks to the circumstance in which the Circuit Court has found that the defendant poses a risk of danger to another. In particular, the statute commands that the Superior Court hold a hearing and issue written findings

before making any modification to the Circuit Court's order. Also, the statute mandates a degree of deference to the Circuit Court, in that it obliges the Superior Court to consider the Circuit's Court proceedings and orders. It provides:

In cases where a district court justice has made a finding, pursuant to RSA 597:2, IV that the person poses a danger to another, the superior court shall, after notification to both parties, the police department that brought the charges in district court, and the victim, conduct a hearing and make written findings supporting any modifications and reasons for new conditions or changes from the district court order. The reviewing court shall take into consideration the district court's written findings, orders, pleadings, or transcript when making a modification.

The text of RSA 597:6-e favors Luwal's view that Superior Court jurisdiction extends to detention orders issued following bail revocation. RSA 597:6-e, II speaks comprehensively as to the parties who may appeal ("the person or the state"), the kinds of relief they may request in Superior Court ("a motion for revocation of the order or amendment of the conditions of release"), and the extent of the Circuit Court record that must be provided to the Superior Court ("the complaint, affidavit, warrant, bail slip, and any other court orders relative to each charge for which a



release or detention order was issued”). Had the legislature intended to bar Superior Court review of Circuit Court bail revocation orders, it would plainly have said so. It did not. See Mfataneza, 172 N.H. at 169 (Court “can neither ignore the plain language of the legislation nor add words which the lawmakers did not see fit to include”).

In ruling to the contrary, the Superior Court reasoned that RSA 597:6-e makes no reference to bail revocation. Supp. 41. In fact, though, the term “revocation” appears twice in the statute, once in RSA 597:6-e, II and once in RSA 597:6-e, III. Moreover, the statute contains no language excluding Superior Court review of Circuit Court detention orders issued in the context of bail revocation.

In the face of the statute’s broad language, the court proposed that RSA 597:2 through RSA 597:6-e “all address the initial determinations made on bail. It is not until Section 597:7-a that there is any consideration of bail revocation and there is nothing in the bail revocation section that refers to a right of appeal to the superior court.” Supp. 41-42. Three flaws undermine that reasoning.

First, it assumes its conclusion, in claiming that the general principle of Superior Court review, first articulated in RSA 597:2, X, does not extend to bail revocation matters. Also, as just noted, provisions in RSA 597:6-e do explicitly address bail revocation. See, e.g., RSA 597:6-e, III (addressing

Supreme Court review, referring to bail revocation). This Court must therefore reject the contention that RSA 597:2 through RSA 597:6-e deal only with general bail decisions but not with bail revocation.

Second, if the boundary between RSA 597:6-e and RSA 597:7 indeed separated provisions dealing with general bail from provisions dealing with bail revocation, none of the sections after RSA 597:7 would have any application to general bail determinations. But some do. For example, RSA 597:13 criminalizes the act of a judge who releases a person despite the person not meeting the requirements for release, and RSA 597:14-b establishes penalties for the commission of new offenses while released on bail. See also RSA 597:14 (governing the release of minors on bail).

Third, even if all provisions preceding RSA 597:7 regulate the general, non-revocation bail determination, and all provisions including and after RSA 597:7 regulate bail revocation, Luwal still would prevail on this appeal. One section codified after RSA 597:7 refers to Superior Court review of Circuit Court bail decisions. RSA 597:10 provides that:

In case of appeal, the municipal and district courts shall cause true and attested copies of the complaint, other process, records and recognizances, together with any cash bail in the case, to be filed with the clerk of the superior

court within 10 days after the date of such order for recognizance.

By its plain terms, RSA 597:10 contemplates Superior Court review of a Circuit Court bail order. If, as the court reasoned, a provision's location within the bail chapter has interpretive significance, RSA 597:10's placement immediately following other revocation-related sections indicates that the legislature allowed for Superior Court review of Circuit Court detention orders issued in the context of bail revocation. The court thus erred in declaring that "there is nothing in the bail revocation section that refers to a right of appeal to the superior court." Supp. 42.

B. RSA 597:7-a

RSA 597:7 establishes the authority of a court to order a person jailed, at least temporarily, when the person unreasonably delays complying with a bail condition that requires some affirmative action by the person. RSA 597:7-a, captioned "Detention and Sanctions for Default or Breach of Conditions," empowers courts to revoke bail when a person violates a bail condition. RSA 597:7-a requires close attention, given the issue in this appeal.

Paragraph I authorizes the police to arrest a person for breach of bail, while also granting the defendant a right to a hearing within forty-eight hours of the arrest. Paragraph I-a

addresses the circumstance in which the person violates a restraining or protective order. Paragraph II provides that a person who violates a condition of release “is subject to a revocation of release, an order of detention, and a prosecution for contempt of court.” Paragraph III specifies the mechanism – a motion – by which the State may initiate the revocation of an order of release.

Paragraph III goes on to describe the considerations bearing on the court’s decision whether to revoke bail. To revoke bail, the court must make the requisite finding in two distinct categories. First, the court must find that the person, while on release, either committed a crime, violated any other condition of release, or violated a protective order by conduct indicating a potential danger to another. RSA 597:7-a, III(a). Second, the court must also find that the person poses a flight risk, a danger, or is otherwise unlikely to abide by conditions of release. RSA 597:7-a, III(b).

An additional provision establishes a rebuttable presumption that, if the person committed a felony while on release, no condition will be adequate to assure that the person will not pose a danger. If, despite that presumption, the court finds that there are conditions of release adequate to protect safety, the court shall then “treat the person in accordance with the provisions of RSA 597:2 and may amend the conditions of release accordingly.” RSA 597:7-a. Finally,

RSA 597:7-a, IV empowers the State to prosecute for contempt of court a person who has violated a condition of release.

In the part of its order addressing RSA 597:7-a, the Superior Court declared that “the factors that the court considers on bail revocation are quite different from the factors considered in setting bail or imposing preventive detention.” Supp. 42. The statute belies that claim. Certainly, before it may retract a prior grant of pre-trial liberty, a court must find that the person has, while on release, committed a new crime or otherwise violated a bail condition. However, once that finding of misconduct has been made, the factors a court considers in a bail revocation proceeding are not “quite different” from the factors initially considered in setting bail. On the contrary and as noted above, flight risk, danger, and the person’s likelihood of complying with conditions of release form the essential considerations in both contexts. Compare RSA 597:7-a, III(b) with RSA 597:2, III.

C. Policy considerations

Finally, as noted already, in construing statutes, this Court strives to avoid absurd results. Several circumstances combine to support the view that the Superior Court has jurisdiction to review Circuit Court orders of detention issued in the bail revocation context.

First, the only alternative to Superior Court review of Circuit Court bail-revocation detention orders is Supreme Court review. Although this Court has mechanisms for expediting the processing of bail appeals, those mechanisms cannot compete for speed with the forty-eight hours contemplated in RSA 597. No reason exists to relegate review of erroneous Circuit Court bail-revocation decisions to a process much slower than that available for the review of erroneous Circuit Court general bail decisions. The person suffers the same injury – loss of liberty – in either circumstance.

Second, the order asserted two points in support of the claim that Superior Court review of a Circuit Court revocation order is unworkable or illogical. Neither can withstand scrutiny. First, the order stated that, “[i]n a sense, bail revocation decisions are akin to contempt of court proceedings and the Court is not aware of any authority for the right of a defendant to appeal a circuit court contempt finding to the superior court.” Supp. 42.

For at least two reasons, that point has little force. First, a contempt prosecution, when successful, produces a criminal conviction, and the fact that the Superior Court might lack jurisdiction to review a criminal conviction signifies nothing about whether it has jurisdiction to review a pre-trial, bail-related ruling. Second, there can be Superior

Court review of a Circuit Court contempt prosecution. If, in a contempt prosecution, the Circuit Court sentences a defendant to more than six months in jail, the defendant has a constitutional right to a *de novo* trial by jury in Superior Court. See Duncan v. Louisiana, 391 U.S. 145 (1968) (United States Constitution guarantees right to trial by jury for all non-petty offenses; defining as non-petty any conviction for which the sentence exceeds six months). The rough analogy to criminal contempt prosecutions thus does not defeat Luwal's interpretation.

Second, in a footnote, the order notes that

Unlike initial bail hearings, revocation of bail hearings are often evidentiary hearings.... Apparently, no one has suggested that defendants are entitled to a second evidentiary bail hearing in superior court after being preventively detained following an evidentiary hearing in the circuit court but that is essentially what Defendant is asking for in this case.

Supp. 42. That notion also fails to justify the Superior Court's reading of the statute.

First, while not required to do so in every case, courts have the authority to convene evidentiary hearings when addressing bail in the general or pre-revocation setting. See RSA 597:2, IV(a) (when State seeks preventative detention, "the defendant may request a subsequent bail hearing where

live testimony is presented to the court”); State v. Zhukovskyy, 174 N.H. 430, 435 (2021) (acknowledging trial court’s discretion to hold an evidentiary hearing). Nothing in that circumstance disables the Superior Court from reviewing a Circuit Court bail order. Indeed, the legislature expressly contemplated Superior Court review following a Circuit Court hearing, including an evidentiary hearing. See, e.g., RSA 597:6-e, II (“The reviewing court shall take into consideration the district court’s written findings, orders, pleadings, *or transcript* when making a modification”) (emphasis added).

Second, counsel here did argue that persons detained following a Circuit Court order revoking bail could be entitled to an evidentiary hearing in Superior Court. H2 10-11. This does not necessarily mean that in every such case, the Superior Court must convene an evidentiary hearing; evidentiary hearings are only required when the parties dispute material facts. Zhukovskyy, 174 N.H. at 439 (affirming denial of evidentiary hearing when record disclosed no material disputed facts). But Luwal’s interpretation of the statute is not rendered absurd by the fact that, under it, the Superior Court might sometimes have to convene an evidentiary hearing in the bail-revocation context. Certainly, that possibility is no more concerning than the prospect that every person detained as a result of a Circuit Court bail revocation order can seek review only in the Supreme Court.



D. Conclusion

For all the reasons stated above, the Superior Court has jurisdiction to review Circuit Court detention orders, not only of initial or general bail rulings, but also of rulings on motions to revoke bail. Moreover, this Court should decide the issue even though the State later entered a *nolle prosequi* of the charges, after which Luwal was released.

Luwal's release renders the appeal moot as to him. However, in appropriate circumstances, this Court will decide appeals that have become moot as to a party. See, e.g., State v. Hill, 172 N.H. 711, 712 (2019) (deciding case raising issue of interpretation of RSA 579, despite fact that it had become moot as to Hill); Olson v. Town of Grafton, 168 N.H. 563, 566 (2016) (deciding issue after it became moot as to the parties, when in broad sense the appeal is "not moot because it presents legal issues that are of pressing public interest and are capable of repetition yet evading review"); Fischer v. Superintendent, Strafford County House of Corr., 163 N.H. 515, 518 (2012) (same); Royer v. State Dept. of Employment Sec., 118 N.H. 673 (1978) (same).

"Mootness is not subject to rigid rules, but is a matter of convenience and discretion." Royer, 118 N.H. at 675. When a case presents an important question that, if answered, would avoid future litigation of the same issue, a court can decide it. Id. Thus, appellate courts will decide an issue that no longer

affects the parties in the case if the issue will tend in future to arise and become moot before appellate review can fully engage. See Weinstein v. Bradford, 423 U.S. 147, 148 (1975) (favoring decision of issues that are “capable of repetition, yet evading review”).

This case presents a question important to the administration of justice. Litigants and the courts need to know whether a challenge to a Circuit Court order revoking bail goes first to the Superior Court, or rather runs directly and immediately to this Court. Also, a misdemeanor defendant’s bail status and, indeed, status as a pre-trial defendant, often can change at a pace that overtakes the deliberative schedule of an appellate court. This Court should conclude that this case “presents legal issues that are of pressing public interest and are capable of repetition yet evading review.” Hill, 172 N.H. at 712.

CONCLUSION

WHEREFORE, Mr. Luwal respectfully requests that this Court reverse the ruling of the Superior Court.

Undersigned counsel requests fifteen minutes of oral argument before a full panel.

The appealed decision is in writing and is appended to the brief.

This brief complies with the applicable word limitation and contains approximately 4499 words.

Respectfully submitted,

By /s/ Christopher M. Johnson  
Christopher M. Johnson, #15149  
Chief Appellate Defender  
Appellate Defender Program  
10 Ferry Street, Suite 202  
Concord, NH 03301

CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief is being timely provided to the Criminal Bureau of the New Hampshire Attorney General's office through the electronic filing system's electronic service.

/s/ Christopher M. Johnson  
Christopher M. Johnson

DATED: June 15, 2022

# SUPPLEMENT

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THE STATE OF NEW HAMPSHIRE  
JUDICIAL BRANCH  
SUPERIOR COURT

Hillsborough County

Hillsborough Superior Court Northern District

**State v. Nyok Luwal**

**No. 216-2022-CV-00090**


**ORDER ON STATE'S MOTION TO DISMISS**

The Court held a hearing on the defendant's motion to appeal an order of the Circuit Court revoking the defendant's bail. The State moved to dismiss the appeal based on the Court's lack of jurisdiction. Considering the arguments of both parties, the Court finds that RSA 597:6-e does not authorize this Court to hear an appeal of a Circuit Court order of revocation. The Court adopts the well-reasoned decision of Judge Anderson in State v. Gilberto Brown, No. 216-2021-CV-00291 (May 11, 2021), which is attached hereto and incorporated by reference.

For these reasons, the defendant's appeal of the Circuit Court order of revocation is DISMISSED.

February 17, 2022

Date

  
Judge N. William Deiker

Clerk's Notice of Decision  
Document Sent to Parties  
on 02/18/2022

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS  
NORTHERN DISTRICT

SUPERIOR COURT

State of New Hampshire

v.

Gilberto Brown

216-2021-CV-291

Order on Circuit Court Bail Appeal

Pursuant to RSA 597:6-e, Defendant Gilberto Brown appeals the circuit court's order revoking bail in one case and setting bail at \$2,000 in another case. The appeal is DENIED because this Court concludes that RSA 597:6-e does not authorize an appeal of a decision to revoke bail and, even if the statute does permit this appeal, the Court finds that the State has established that Defendant's bail should be revoked under RSA 597:7-a.

Facts

In 456-2021-CR-833, Defendant is charged with three counts of domestic violence simple assault and one count of obstructing report of a crime. As part of the initial bail order, Defendant was ordered on April 4, 2021 to have no contact with H.T. and was ordered not to go within 300 feet of where she might be. On April 22, 2021, police responded to 75 Dubuque Street, Apt. No. 2, the residence of H.T., for report of an open door. When police arrived, they saw the Defendant in the kitchen of the residence. When one of the officers moved around the building, he made eye contact with the Defendant who then left the living room and immediately went downstairs.

Police entered the residence and called down to the basement asking if Defendant was there. When they received no answer, police brought in the canine unit at which point Defendant came upstairs and was placed arrest. He was charged with Stalking and Resisting Arrest.

The circuit court found there was clear and convincing evidence that Defendant violated his bail conditions. The court also found that no set of conditions or combination of conditions would sufficiently protect the public and H.T. Based on those two findings, the Court revoked Defendant's bail under RSA 597:7-a. On the new charges, 456-2021-CR-1011, the circuit court set bail at \$2,000 cash.

### Analysis

#### I. Jurisdiction

When interpreting legislation, trial courts are instructed to "first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning." *Petition of Carrier*, 165 N.H. 719, 721 (2013). As noted by Defendant, legislation must be interpreted "in the context of the overall statutory scheme and not in isolation." *State v. Gubitosi*, 153 N.H. 79, 81 (2005).

The first two sections of RSA 597:6-e (the third section addresses appeals from the superior court and is not relevant here) are as follows:

I. If a person is ordered released by a bail commissioner, the person, or the state, shall be entitled to a hearing, if requested, on the conditions of bail before a justice within 48 hours, Sundays and holidays excepted.

II. Subject to RSA 597:2, X, the person or the state may file with the superior court a motion for revocation of the order or amendment of the conditions of release set by a municipal or district court, by a justice, or by a bail commissioner. The motion shall be determined promptly. However, no action shall be taken on any such motion until the moving party has provided to the superior court certified copies of the complaint, affidavit, warrant, bail slip, and any other court orders relative to each charge for which a release or detention order was issued by a justice, or a bail commissioner. In



cases where a district court justice has made a finding, pursuant to RSA 597:2, IV that the person poses a danger to another, the superior court shall, after notification to both parties, the police department that brought the charges in district court, and the victim, conduct a hearing and make written findings supporting any modifications and reasons for new conditions or changes from the district court order. The reviewing court shall take into consideration the district court's written findings, orders, pleadings, or transcript when making a modification.

RSA 597:6-e. These provisions, analyzed sentence by sentence, make clear that the statute only applies to initial bail decisions. The first paragraph addresses only decisions by the bail commissioner to release a defendant and the conditions attached to that release. The first sentence of the second paragraph provides that the State or a defendant may seek the revocation of the order or amendment of the conditions of release set by a "municipal or district court, by a justice, or by a bail commissioner." There is no mention of decisions to revoke bail and certain no reference to the statutory criteria in RSA 597:7-a. The second sentence requires the "moving party" to provide the superior court with all pleadings "relative to each charge for which a release or detention order was issue by a justice or a bail commissioner." Finally, the third and fourth sentences address the procedural requirements for the superior court before it can modify a bail order that is based on a finding that the defendant is dangerous.

Although the statute addresses initial orders and amendments to "the conditions of release", noticeably absent from this list is the circuit court's revocation of a bail order. Had the legislature wanted to include revocations of bail in this provision, it presumably would have done so expressly. It is not the role of the courts to add language that the legislature chose not to include.

Moreover, considering the structure of the statute as a whole, it is quite clear that Section 6-e does not extend to revocations of bail under RSA 597:7-a. RSA 597:2 and the sections between it and RSA 597:6-e all address the initial determinations made on

bail. It is not until Section 597:7-a that there is any consideration of bail revocation and there is nothing in the bail revocation section that refers to a right of appeal to the superior court. And because the factors that the court considers on bail revocation are quite different from the factors considered in setting bail or imposing preventive detention, the absence of any reference to an appellate right is noteworthy.<sup>1</sup> In a sense, bail revocation decisions are akin to contempt of court proceedings and the Court is not aware of any authority for the right of a defendant to appeal a circuit court contempt finding to the superior court.

Further, the second paragraph refers specifically to circuit court decisions that a defendant poses a danger to the community. It notes that if a superior court is to change such an order, it must make specific findings in support of that decision and provide notice to specified parties. The statute, however, makes no reference at all to bail revocation decisions, let alone the different criteria laid out in Section 597:7-a, or how a superior court should approach an appeal of a decision to revoke bail. Given the legislature's concern about the superior court's vacating preventive detention decisions, it is not reasonable to suggest that the legislature intended to allow appeals of bail revocation decisions but yet provided no guidelines to the superior court in addressing such decisions.

Ultimately, this Court bases its conclusion on the absence of any reference in Section 6-e to bail revocation decisions. Defendant points to the language in Section 7-a that notes that if revocation is warranted, the trial court shall issue "an order of

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<sup>1</sup> Unlike initial bail hearings, revocation of bail hearings are often evidentiary hearings which is another difference that counsels against treating them as the same for bail appeals under Section 6-e. Apparently no one has suggested that defendants are entitled to a second evidentiary bail hearing in superior court after being preventively detained following an evidentiary hearing in the circuit court but that is essentially what Defendant is asking for in this case.

revocation and detention." But Section 6-e simply does not address bail revocation decisions by the circuit court and it is not the role of the court to add language to that provision.

Finally, Defendant argues that the Court's interpretation creates an "absurd" result. But Defendant is not without direct appellate routes to the New Hampshire Supreme Court. Moreover, notwithstanding the appellate rights under Section 6-e and the availability of *de novo* jury trials in the superior court, generally decisions of the circuit court are appealed to the supreme court. See Supreme Court Rule 3 ("A mandatory appeal is. . . an appeal from a final decision on the merits issued by a superior court, district court, probate court, or family division court"). Accordingly, requiring defendants to exercise such rights is consistent with the overall relationship between the circuit courts and the supreme court.


## II. Revocation

Assuming that this Court does have jurisdiction, this Court would also revoke Defendant's bail. Under 597:7-a, there is undoubtedly clear and convincing evidence that Defendant violated a condition of his release. Further, given the Defendant's blatant violation of the bail order, the Court finds that he is unlikely to "abide by any condition of combinations of conditions." Although Defendant claimed that he did not understand that the order prevented contact with H.T. if she initiated the contact, his attempt to hide in the basement when he saw police strongly suggests otherwise.

In sum, the Court finds that it lacks jurisdiction to entertain an appeal of a bail revocation by the circuit court and that even if it has jurisdiction, it would revoke the Defendant's bail. Accordingly, Defendant's appeal is DENIED.

SO ORDERED.

May 11, 2021  
Date

  
\_\_\_\_\_  
Judge David A. Anderson

Clerk's Notice of Decision  
Document Sent to Parties  
on 05/11/2021