

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

No. 2022-0140

State of New Hampshire

v.

Nyok Deng Luwal

**MEMORANDUM OF LAW IN LIEU OF BRIEF  
PURSUANT TO SUPREME COURT RULE 16(4)(b)**

The State of New Hampshire, by and through counsel, the New Hampshire Attorney General’s Office, hereby submits this Memorandum of Law in lieu of Brief pursuant to Supreme Court Rule 16(4)(b).

The defendant, Nyok Deng Luwal, appeals a decision of the superior court (*Delker, J.*) finding that the superior court lacks jurisdiction to hear an appeal of a bail revocation and detention order issued by the Ninth Circuit – District Division – Manchester (*Lyons, J.*). The defendant challenges that legal conclusion. Because the unambiguous text of RSA 597:7-a, RSA 597:2, X, and RSA 597:6-e, II, provide a defendant with a statutory right to superior court review of a circuit court’s revocation and detention order, the superior court’s decision should be reversed.

**STATEMENT OF THE FACTS AND CASE**

On October 5, 2021, the defendant, Nyok Deng Luwal, was arrested and subsequently charged in the Ninth Circuit Court – District Division (Manchester) with three counts of domestic violence simple assault and one count of criminal threatening. Defendant’s Appendix Addendum (“Def’s App.”) A6. Judge Chabot imposed bail conditions following the defendant’s arraignment, including a prohibition on contact with the alleged victim. *Id.*

On December 27, 2021, the Manchester Police Department arrested the defendant for a violation of bail conditions and charged the defendant with stalking. *Id.* at A6-A7. The prosecutor filed a Motion to Revoke Bail. *Id.* at A7. The defense objected to it. *Id.* The circuit court (*Lyons, J.*) subsequently held a hearing on the motion. *Id.*

At the hearing, the State presented evidence by offer of proof that the police had found the defendant at a particular address with the victim and her children and that the defendant had told the police that the orders against him had been dismissed. *Id.* The defendant asserted that he had received a paper from the court dismissing a civil domestic violence order of protection and mistakenly believed that the bail conditions in this matter were no longer in effect. *Id.* The circuit court rejected this argument. *Id.* It determined that an order issued by the Family Division dissolving a civil domestic violence order cannot form the basis of a mistaken legal belief that the Criminal Bail Protective Order in the District Division had been vacated. *Id.* The circuit court also determined that the defendant did not make a reasonable mistake of fact based on all the circumstances of the case. *Id.*

The circuit court then proceeded to conduct an analysis under RSA 597:7-a to determine whether a bail revocation and detention order should issue. *Id.* It found first that (a) the defendant had violated his bail conditions by clear and convincing evidence and (b) probable cause existed to believe the defendant had committed the state law crime of stalking. *Id.*; *see* RSA 597:7-a, III(a)(1-2). The circuit court then found that no condition or set of conditions would protect the safety of the public as well as the victim. Def.'s App. at A7-A8; *see* RSA 597:7-a, III(b)(1). Having made these findings, the circuit court "enter[ed] an order of revocation and detention," RSA 597:7-a, III, and ordered the defendant held without bail in the domestic violence simple assault case, Def.'s App. at A7-A8.

The defendant appealed the circuit court's detention order to the superior court. Defendant's Supplement ("Def.'s Supp.") at 38. The State moved to dismiss arguing that the superior court lacked jurisdiction. *Id.* The defendant contended that the superior court had jurisdiction. Def.'s App. at A12-A15. The superior court (*Delker, J.*) held a

hearing on bail at which he granted the State’s motion to dismiss finding a lack of jurisdiction. Transcript of Superior Court Hearing on Bail (02/17/22) at 19. The superior court issued a subsequent written order adopting the analysis and reasoning of another superior court (*Anderson, J.*) in a prior case dealing with the same issue. Def.’s Supp. at 38.

On March 17, 2022, the defendant appealed the superior court’s decision to this Court. The State subsequently filed a *nolle prosequi* terminating the circuit court prosecution of the charges on which the defendant had been held. Def.’s App. at A11.<sup>1</sup>

### ARGUMENT

#### **I. The superior court had jurisdiction to hear the defendant’s appeal of the circuit court’s detention order.**

Whether the superior court erred in finding it lacked jurisdiction to hear the defendant’s appeal of the circuit court’s detention order requires this Court to interpret certain statutes within RSA chapter 597. This Court reviews questions of statutory interpretation *de novo*. *State v. Mayo*, 167 N.H. 443, 450 (2015). It first “examine[s] statutory language, and, where possible, ascribes the plain and ordinary meanings to the words used.” *State v. Kardonsky*, 169 N.H. 150, 153 (2016) (citing *State v. Maxfield*, 167 N.H. 677, 679 (2015)). It “interpret[s] legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include.” *Id.* It “construe[s] all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result.” *Maxfield*, 167 N.H. at 679.

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<sup>1</sup> The State agrees with the defendant that the issue raised in this case is not moot despite the *nolle prosequi*. This case presents a “legal issue[] of pressing public interest” and is “capable of repetition yet evading review.” *State v. Hill*, 172 N.H. 711, 712 (2019). The superior court orders in this case alone reveal that this issue has arisen twice, in the same superior court, with two different superior court judges taking the same approach. The issue is therefore capable of repetition yet evading review and is of pressing public interest because it involves the statutory rights of persons subject to circuit court revocation and detention orders to a *de novo* appeal in superior court. *See* RSA 597:2, X (“A person detained by a circuit court has the right to . . . (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.”).

The unambiguous statutory text of RSA 597:7-a, RSA 597:2, X, and RSA 597:6-e, II confirm that the superior court had jurisdiction to hear the defendant's appeal. The circuit court's order in this case was a "revocation and detention order" issued pursuant to RSA 597:7-a, III. As a result of that "revocation and detention" order, the defendant was detained by the circuit court. RSA 597:2, X provides that:

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.

(emphasis added). This statute unambiguously confers a statutory right on any person "detained by a circuit court" to a "de novo appeal, pursuant to RSA 597:6-e, II," in "superior court." That statutory right is not limited only to circuit court detention orders issued after initial bail hearings.

Under RSA 597:6-e, II, a superior court reviews a circuit court's detention order to determine whether it should be revoked or otherwise modified. Following superior court review, the defendant, or the State pursuant to RSA 606:10, V, may appeal the superior court's decision to this Court. RSA 597:6-e, III.

Accordingly, the superior court had jurisdiction over the defendant's appeal by operation of the unambiguous statutory text of RSA 597:7-a, RSA 597:2, X, and RSA 597:6-e, II.

## **II. The superior court's analysis is erroneous and far too restrictive of the statutory right of appeal granted to defendants in RSA 597:2, X.**

The superior court's adopted analysis begins with the incorrect observation that RSA 597:2 and RSA 597:6-e are concerned solely with initial determinations made on bail and say nothing about bail revocation and detention under RSA 597:7-a. That analysis is infirm for at least three reasons.

First, no statutory language in RSA 597:2 restricts the application of RSA 597:2, X solely to initial bail determinations. RSA 597:2 bears the general title, "Release of a

Defendant Pending Trial,” and RSA 597:2, X is phrased broadly and made applicable anytime a circuit court detains a person pending trial. To find a restriction in RSA 597:2, or RSA 597:2, X more specifically, that limits the application of those provisions solely to initial bail hearings would require this Court to add language to the statute that the legislature did not see fit to include. *See State v. Zhukovskyy*, 174 N.H. 430, 435 (2021) (declining to adopt defendant’s construction of RSA 597:2 because the Court “would have to add language to the statute that the legislature did not include”).

Second, RSA 597:2 “authorizes the trial court to release or detain a defendant pending trial,” *Zhukovskyy*, 174 N.H. at 434, and expressly contemplates a defendant being released on bail subject to conditions imposed under RSA 597:2, III. *See* RSA 597:2, I(b); RSA 597:2, II(b). Under RSA 597:2, III, a court may impose conditions for the safety of the public or the defendant and may impose conditions to assure the defendant’s appearance in court. RSA 597:2, VII(a) further requires any release order to set forth “[a]ll 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.” These provisions implicitly contemplate that a circuit court may detain a defendant pre-trial for a breach of one or more bail conditions.

Third, RSA 597:7-a, III contemplates the application of RSA 597:2 to breach of bail conditions proceedings. If a circuit court finds in a revocation proceeding 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,” the circuit court “shall treat that person in accordance with the provisions of RSA 597:2 and may amend the conditions of release accordingly.” RSA 597:7-a, III.

It is within this statutory context that the broad wording of RSA 597:2, X must be considered. That statute begins as follows: “A person detained by a circuit court has a right to: . . . .” The legislature did not limit this language to initial circuit court detention orders; rather, it granted the right to all persons “detained by a circuit court” at any point

in time pretrial, RSA 597:2, X, and has granted that same right to persons post-trial prior to sentencing or while their appeal is pending, RSA 597:1-a.

It would be truly anomalous, if not absurd, to read the statutory scheme as providing all persons detained by a circuit court pre-trial and post-trial a *de novo* appeal to the superior court, except those persons subject to a revocation and detention order issued under RSA 597:7-a, III. No plausible, rational basis appears to exist for such differential, anomalous treatment. *See, e.g., State v. Breest*, 167 N.H. 210, 213-14 (2014) (finding literal interpretation of statute absurd as it would provide relief to defendants who obtained a favorable post-conviction DNA test through court order, but not those defendants who obtained the test with the State's consent); *State v. Gallagher*, 157 N.H. 421, 423 (2008) (rejecting literal interpretation of DUI sentencing statute because it would lead to "disproportionate results among people who have committed the same offenses").

The superior court's adopted analysis posits that this unequal treatment may be appropriate because initial bail hearings are typically not evidentiary, while a bail revocation is often evidentiary. Def.'s Supp. 42 & n.1. This assertion carries little persuasive weight. RSA 597:2 neither mandates nor forecloses a trial court from holding an evidentiary bail hearing. The trial court, therefore, has discretion to determine whether an evidentiary hearing is necessary. *See Zhukovskyy*, 174 N.H. at 435 ("In the absence of a statutory mandate that the trial court hold an evidentiary hearing, the court has discretion to determine whether a hearing is necessary."). If one is necessary, a defendant could still take a *de novo* appeal of any resulting detention order issued by the circuit court to the superior court and seek an evidentiary hearing in superior court. Moreover, because the defendant may take a *de novo* appeal to the superior court, nothing prohibits the superior court from holding an evidentiary hearing if it thinks the circuit court should have held one.

The superior court's adopted analysis is based largely on "the absence of any reference in [RSA 597:6-e] to bail revocation decisions." Def.'s Supp. 42. But that focus misses the mark because it begins at the end of the relevant statutory construction

analysis. A circuit court order issued pursuant to RSA 597:7-a, III is a “revocation and detention order” that results in a person being detained by a circuit court pre-trial. RSA 597:2, X confers unambiguous reconsideration and appeal rights on “[a] person detained by a circuit court.” It grants such persons a “*de novo* appeal” of a circuit court’s detention order to superior court and contemplates the superior court undertaking the same review the circuit court undertook below. It directs the review to occur “pursuant to RSA 597:6-e, II,” and RSA 597:6-e, II incorporates RSA 597:2, X by reference. Consequently, RSA 597:6-e does not need to reference expressly revocation and detention orders issued under RSA 597:7-a because they enter into the review process in RSA 597:6-e, II via another statute, RSA 597:2, X.

The superior court’s adopted analysis also suggests that the defendant still has direct appeal routes to the New Hampshire Supreme Court if revocation and detention orders issued pursuant to RSA 597:7-a, III are not subject to review under RSA 597:2, X and RSA 597:6-e, II. The only other statute that confers such appellate rights in RSA chapter 597 is RSA 597:6-e, III. Presumably, under the superior court’s adopted analysis, that statutory provision also does not apply because RSA 597:6-e does not reference bail revocation and detention decisions. That result leaves persons subject to circuit court revocation and detention orders under RSA 597:7-a, III with no avenue for appeal except by extraordinary writ to this Court. It seems highly unlikely that the legislature intended that outcome given the broad wording of RSA 597:2, X, and the evident intent of RSA 597:1, RSA 597:1-a, and RSA 597:2 to ensure that persons who do not need to be detained pre-trial and post-trial are released during those periods, subject to appropriate conditions.

A construction of RSA chapter 597 that permits persons subject to revocation and detention orders issued under RSA 597:7-a, III to exercise the rights afforded to them under RSA 597:2, X makes operational and cohesive sense. It ensures that all persons detained by a circuit court pre-trial have the same reconsideration and appellate rights and funnels that review through RSA 597:2, X, RSA 597:6-e, II, and RSA 597:6-e, III

The superior court's adopted analysis singles out for anomalous treatment a circuit court's detention order issued as a result of a breach of bail conditions. It eliminates any statutory right of appeal from such orders and provides no sound reason for this differential result. It also fails to give effect to the unambiguous statutory language of RSA 597:2, X, the evident purpose of which is to vest all persons detained by a circuit court with a uniform method through which to seek an expedited *de novo* review in superior court of pre-trial circuit court detention orders, RSA 597:6-e, II, followed by traditional appellate review of those orders through this Court, RSA 597:6-e, III. The superior court's adopted analysis thwarts that legislative purpose and design and should be reversed by this Court.

### **CONCLUSION**

Accordingly, this Court should find that the superior court had jurisdiction to review the circuit court's revocation and detention order pursuant to RSA 597:7-a, RSA 597:2, X and RSA 597:6-e, II and reverse the superior court's decision to the contrary.



Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

JOHN M. FORMELLA  
ATTORNEY GENERAL

and

ANTHONY J. GALDIERI  
SOLICITOR GENERAL

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/s/Anthony J. Galdieri  
Anthony J. Galdieri  
N.H. Bar No. 18594  
Solicitor General  
New Hampshire Department of Justice  
33 Capitol Street  
Concord, NH 03301-6397  
(603) 271-3671

**CERTIFICATE OF COMPLIANCE**

This memorandum complies with the word limitation set out in Supreme Court Rule 16(4)(b), by not exceeding 4,000 words in length.

**CERTIFICATION OF SERVICE**

I hereby certify that a copy of the foregoing was served via the e-file system to Christopher M. Johnson, Esq., counsel for the defendant.

July 28, 2022

/s/Anthony J. Galdieri  
Anthony J. Galdieri