The State of New Hampshire
Superior Court
Rockingham, SS.

STATE OF NEW HAMPSHIRE

V.

JOHN LANIEFSKY

NO. 218-2012-CR-0813

ORDER REGARDING BAIL PENDING TRIAL

The defendant, John Laniefsky, was charged with Aggravated Felonious Sexual Assault ("AFSA") in the 10th Circuit Court – District Division – Derry. Bail was set in the amount of $50,000 cash only with additional conditions, including but not limited to that he not have any contact with minor females under the age of 16. The defendant filed a motion to review bail pending indictment. This Court held a hearing on the motion on October 1, 2012.

At the hearing, the State argued that the amount of cash bail set by the Circuit Court was necessary not only to ensure the defendant's appearance at future proceedings, but also to protect the public. The State pointed out that the defendant had an earlier conviction relating to sexual misconduct with a minor. The State proffered that the alleged victim in the pending charge came forward because, despite the earlier conviction, the defendant still had access to minor children and she was concerned for the safety of those children. The State further proffered that the defendant had made statements that he was "sick" and "needed help" when confronted with the allegations against the alleged victim in the case at bar.

The defendant argued that the $50,000 cash bail was not necessary to protect the community, but, even if it were, that "protecting the community" was an improper consideration in setting the amount of bail. The defendant argued that the amount of cash, surety, or personal recognizance could only be tied to ensuring the defendant's appearance in court. The defendant argued that if the defendant violated any other conditions of bail other than failure to appear, the Court could not order the bail be forfeited. In other words, the defendant argued that if the defendant violated a bail condition such as a general requirement not to commit any new crimes or a condition that he not have contact with minors, the only remedies available were incarceration of the defendant pending trial or a criminal charge for contempt of court.

The Court at that time rejected the defendant's argument that the amount of bail could not be tied to the safety of the community. Rather, the Court concluded that the amount of bail – whether it be cash, surety, or personal recognizance – could be viewed as an incentive to ensure the defendant's compliance with **all** of the bail conditions. In other words, if the bail was set as cash only the defendant risked losing that cash bail by way of forfeiture of the cash posted if he violated any of the bail conditions. The Court concluded that the $50,000 cash only bail set by the Circuit Court was appropriate both to ensure the defendant's presence for trial and to guarantee the safety of the community in light of the defendant's criminal record and the offer of proof made by the State.

The defendant was subsequently indicted on seven counts of AFSA and two counts of Felonious Sexual Assault. The State also filed a misdemeanor information alleging indecent exposure and lewdness. On November 28, 2012, the defendant was

scheduled for an arraignment. He waived arraignment but requested to be heard on the issue of bail. The defendant renewed his earlier argument regarding the cash bail. He argued that $50,000 cash only bail was not necessary to ensure the defendant's appearance in this case given his ties to the community and the lack of any defaults on his record. He further argued that the Court could not consider the factor of the safety of the community in determining the amount of the bail. He argued that the statutes did not authorize the Court to forfeit the bail for violating any condition other than failure to appear. Based on this, he again argued that the only remedies for violating the "public safety" bail conditions were revocation of bail and/or prosecution for contempt of court. The defendant presented a trial court order from State v. Sean Hendricks, No. 226-2011-CR-0603 (Hills-S Super. Ct. decided June 7, 2012) (Nicolosi, J.) (holding that trial court could not consider public safety in setting the amount of the cash bail because cash bail could only be forfeited based on a failure to appear). The State objected and argued that the public safety was a relevant factor in setting the amount of the cash bail.

RSA ch. 597 establishes the statutory procedures for releasing a defendant on bail. With certain exceptions, "all persons arrested for an offense shall be eligible to be released pending judicial proceedings . . . ." RSA 597:1 (2001). RSA 597:2 (Supp. 2012) establishes the procedures the trial court must follow in setting bail pending trial. Paragraph II provides that a person shall be released on 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 . . . ." RSA 597:2, II (Supp. 2012). This "unsecured appearance bond" is commonly known as a personal

recognizance bond or "PR bail."[1] If the Court determines that release of a defendant on a personal recognizance bond subject to conditions "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 has the authority to impose additional conditions as part of the pretrial release. See RSA 597:2, II and III (Supp. 2012). In this situation, the Court "shall" issue an order that includes the condition that the defendant not commit a crime during the period of release and "[s]uch condition or combination of conditions that [the Court] 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 . . . ." RSA 597:2, III (Supp. 2012). The statute then goes on to list three possible conditions that this bail order "may include":

> (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;
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> (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
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> (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.

[1] The Court may order a defendant released simply on the person's promise to appear and abide by the bail conditions. This is known as "personal recognizance." RSA 597:2, I(a). Alternatively, the Court may impose an "unsecured appearance bond." In other words, if the Court sets the bail at $1000 personal recognizance, the defendant must execute a bond pledging to pay $1000 if he fails to appear or violates other conditions set by the Court. This simply means that the defendant does not have to post money or security upfront to ensure his release. Rather, the defendant is agreeing to be liable for the amount of the PR bond if he defaults on the bail conditions. If a defendant does not appear for a hearing, the Court can order the defendant to pay the amount of the personal recognizance bail.

RSA 597:31 (2001) provides: "If any party recognized to appear makes default, the recognizance shall be declared forfeited, and the state may cause proceedings to be had immediately for the recovery of such forfeiture." This is the provision of law that addresses the issue presented before the Court: whether the Court can order the cash bail forfeited for violation of a condition other than the failure to appear. The language currently in the statute is derived from virtually identical statutory language dating back to 1865. See N.H. Gen. Statutes 241:9 (1867). As with the interpretation of any statute, the Court must begin with an analysis of the meaning of the language employed by the Legislature.

"New Hampshire does not follow the common law rule that criminal statutes are to be strictly construed." Derosia v. Warden, 149 N.H. 579, 579 (2003) (citing RSA 625:3). Rather, the Court must "construe the Criminal Code provisions according to the fair import of their terms and to promote justice." Id. (quotation and citation omitted). "In doing so, [the Court] first look[s] to the plain language of the statute to determine legislative intent." State v. Hull, 149 N.H. 706, 709 (2003) (citation omitted). If "the statutory language is subject to more than one reasonable interpretation," the Court must "examine the nature of the offense and the policy considerations for punishing the conduct in question." Id. (citation omitted).

In order to understand this statute, it is first important to understand the meaning of the language used in the statute. Given the somewhat ancient origins of RSA 597:31 and the use of statutory language that has become somewhat outdated, the Court will first analyze the meaning of the language used in this provision. The first part of that statute governs a case where a defendant has "recognized to appear." A defendant is

"recognized" when he has "entered into a recognizance." See Black's Law Dictionary at 1271 (6th ed. 1990). "Recognizance" means

> An obligation entered into before a court or magistrate duly authorized for that purpose whereby the recognizor acknowledges that he will do some act required by law which is specified therein. The act of recognizing is performed by the recognizor's assenting to the words of the magistrate and acknowledging himself to be indebted to a certain party in a specific amount to be paid if he fails to perform the requisite act.
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> An obligation undertaken by a person, generally a defendant in a criminal case, to appear in court on a particular day or to keep the peace. It runs to the court and may not require a bond. In this case it is called personal recognizance.

Id. (emphasis added and citations omitted).

RSA 597:31 does not simply refer to entering a "recognizance." Rather, the statute uses the phrase: "recognized to appear." Thus, the Court must determine what entering an appearance means. Again, Black's Law Dictionary is informative. "Appear" means: "To be properly before a court; as a fact or matter of which it can take notice. To be in evidence; to be proved. Coming into court by a party to a suit, whether plaintiff or defendant. See Appearance." Id. at 97. An "appearance" is "[a] formal proceeding by which a defendant submits himself to the jurisdiction of the court. The voluntary submission to a court's jurisdiction." Id. Thus, viewed in this context, the concept "recognized to appear" is a term of art which means not merely the physical presence in court but a formal submission to the jurisdiction of the court. In essence, a defendant who has "recognized to appear" agrees to be bound by the bail conditions, including a requirement that he appear for all hearings and that he be of good behavior or comply with other conditions imposed by the bail order.

The next relevant phrase in the statute addresses the situation when a defendant who has "recognized to appear" (i.e., a defendant who is subject to the bail conditions)

"makes default." Again, according to Black's Law Dictionary, "default" means "a failure. An omission of that which ought to be done. Specifically, the omission or failure to perform a legal or contractual duty to observe a promise or discharge an obligation or to perform an agreement. . . ." Id. at 417 (citations omitted).

The term "default" is not limited to failing to be physically present in Court. According to the definition of the terms used in RSA 597:31, a defendant who fails to comply with his promises to appear and abide by other conditions is considered in default of the court's order. Thus, a default on any condition can trigger the forfeiture of the bail posted on the recognizance (i.e., the defendant's release pending resolution of the case on the promise to be subject to a bail conditions). This interpretation is consistent with both the case law interpreting RSA 597:31 and other provisions of the statutes.

In State v. Walker, 56 N.H. 176, 176-77 (1875), the defendant was charged with a criminal offense and released on bail in the sum of $200 subject to the conditions that he appear in court and "and in the meantime that he be of good behavior" and not violate the state statutes prohibiting the sale of alcohol. Id. at 176. Following the defendant's release, he violated the term of the bail condition by unlawfully selling alcohol. Id. at 176-77. The bail was apparently in the form of a personal recognizance or unsecured bond because the defendant did not post the cash and the State brought an action against the defendant and his sureties to recover the $200 for violating the condition that he not sell alcohol while on release. Id. at 177.

The defendants objected, in relevant part, on the ground that the condition not to sell alcohol in violation of state law was not intended to be a basis to seek forfeiture of

the bail. Id. at 178. The Court explained, at some length, the concept of "recognizance" as it was understood at common law. Id. In essence, the concept is consistent with the definition from Black's Law Dictionary recited above. Id. The Supreme Court observed that most case law and many statutes primarily address the issue of recognizance to appear. Id. Nonetheless, the Court held: "But it is equally true, that recognizances to keep the peace have also been long known." Id. The Court then recited numerous examples from the ancient common law where the condition to "keep the peace" has formed a basis to seek forfeiture of the bail posted by a defendant. Id. at 178-79. The Court then quoted the bail forfeiture statute that was in existence in this State in 1875. Id. at 179. That statute is identical, in relevant part, to RSA 597:31.[2] Id. The Court observed that the ancient common law practice has been applied in New Hampshire and remained unchanged under the precursor statute to RSA 597:31. Id. Accordingly, the Court held that the defendant's sale of alcohol in violation of the bail condition could form a basis for an action to recover the $200 bail against the defendant and his sureties. Id. at 180. Justice Smith, concurring in this conclusion, made the following observation:

> The practice of taking recognizances to keep the peace is of long standing, and unless there is some way to ascertain whether the conusor has violated his recognizance, the practice is no better than an idle ceremony.
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> The defendant recognized to do two things: (1) to appear at the supreme court and answer to all such matters and things as should be objected against him on behalf of the state; and (2) that in the meantime he would be of good behavior, and would not violate any of the provisions of the statutes relating to the sale of intoxicating liquors. In order to entitle the state to recover, it must appear that the condition of this recognizance

[2] The only distinction between RSA 597:31 and the statute in effect in 1875 is that, at that time, the statute permitted the county to seek forfeiture. RSA 597:31 now, instead, vests that authority with the State.

> has been forfeited in one or the other of these two things. As to the first matter which the defendant bound himself to do, his default would appear by his neglecting to appear and answer, and would be established upon his being called and his default recorded. As to the other matter which he bound himself not to do, that is, not to violate the statute, his default could only be established upon due inquiry to see whether he had kept the terms of his recognizance in that respect. If the verdict of the jury should be that he had not, the default, upon the recording of the verdict would become matter of record, just as when, in the other case, the defendant is called, and not appearing, his default is recorded by the clerk.

Id. at 181 (Smith, J., concurring); see also State v. Wheeler, 67 N.H. 511, 512 (1894) (holding that where the defendant pled guilty to selling alcohol in violation of a bail condition prohibiting that conduct, the State could seek the $200 bail posted by the defendant to secure his release).

RSA 597:32 (2001) supports the conclusion that the Court can order the forfeiture of bail for violation of any condition. That provision reads: "Any court, for good cause, may strike off a default upon a recognizance or order it to be struck off at a future day, upon a substantial compliance with the condition." (Emphasis added). Thus, this provision makes it clear that the Court has the discretion to mitigate the forfeiture if the defendant later demonstrates substantial compliance with the conditions of his release. Indeed, that statute is not limited to the defendant's appearance in court. Rather, RSA 597:32 makes it clear that if the defendant comes into compliance with any condition of the recognizance, the Court may strike the default or reduce the amount of the forfeiture.

More recent amendments to RSA 597:2 and 597:7-a do not undermine this interpretation of RSA 597:31 or change the common law. At that outset, it is also important to note that the Court should not interpret statutory changes to conflict with the common law or the Court's prior interpretation of statutory language. As the New

Hampshire Supreme Court has observed:

> "Statutes which impose duties or burdens or establish rights or provide benefits not recognized by the common law have frequently been held subject to strict, or restrictive, interpretation. Where there is any doubt about their meaning or intent they are given the effect which makes the least, rather than the most, change in the common law." 3 N. Singer & J.D. Singer, Statutes and Statutory Construction § 61.1, at 314 (7th ed. 2008). "We have often stated that we will not interpret a statute to abrogate the common law unless the statute clearly expresses that intent." State v. Elementis Chem., 152 N.H. 794, 803, 887 A.2d 1133 (2005) (quotation omitted).

State v. Etienne, 163 N.H. 57, 74 (2011); see also State v. McGurk, 163 N.H. 584, 587 (2012). As outlined above, the common law and early New Hampshire case law held that the Court may order bail be forfeited upon breach of any condition – not only the failure of the defendant to appear for court. In enacting changes to RSA ch. 597, "the legislature is presumed to be aware of the common law: [the Court] will not construe a statute as abrogating the common law unless the statute clearly expresses such an intention." State v. Hermsdorf, 135 N.H. 360, 363 (1992) (quotations omitted).

At first blush, RSA 597:2, III (Supp. 2012) appears to support the defendant's argument that forfeiture of cash bail is only tied to the defendant's failure to appear. But closer examination of the language of the statute and the overall context of the statutory scheme reveals this provision does not limit the Court's authority to order forfeiture only for the failure to appear.

As a threshold matter, Paragraph III addresses those situations where the Court determines that the defendant's release on an unsecured bond will not ensure the defendant's appearance or the safety of the community. In these situations the statute only imposes one mandatory condition, i.e. "that the person not commit a crime during the period of release." RSA 597:2, III(a). However, the statute then gives the Court

broad discretion to craft a bail order "which may include" three other conditions. RSA 597:2, III(b) (emphasis added). By using "may" instead of "shall," the legislature has indicated that the provision is permissive not mandatory. See In re Liquidation of Home Ins. Co., 157 N.H. 543, 553 (2008). Indeed, RSA 597:2, III(b) clearly provides the Court discretion to impose any condition or combination of conditions that the Court "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 . . . ." (Emphasis added).

First, Paragraph III(b)(1) provides that the bail order "may include" a condition that the defendant "[e]xecute 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." This provision simply permits the Court to impose a condition that bail or surety will automatically be forfeited by agreement of the defendant 45 days after the failure to appear. In other words, if the bail order contains this condition and the defendant does not appear within 45 days, the Court does not need to hold a separate hearing pursuant to RSA 597:31 or :32 to determine the reasons for the default.[3] Thus, RSA 597:3, III(b)(1) does not preclude the Court from ordering forfeiture of bail pursuant to RSA 597:31 for a condition other than the failure to appear.

Additionally, Paragraph III(b)(2) provides that the bail order may include a condition that the defendant "[f]urnish bail for his appearance by recognizance with

[3] As Justice Smith noted in State v. Walker, a defendant's failure to appear speaks for itself and requires no further proceedings to trigger forfeiture, whereas a violation of other provisions of the bail order "could only be established upon due inquiry to see whether he had kept the terms of his recognizance in that respect." Walker, 56 N.H. at 181 (Smith, J., concurring).

sufficient sureties or by deposit of moneys equal to the amount of the bail required as the court or justice may direct." The interpretation of this provision hinges on the meaning of the concept "appearance by recognizance." As discussed above in the context of the statutory analysis of RSA 597:31, a defendant who has "recognized to appear" agrees to be released pending final adjudication of the case subject to conditions imposed by the Court. As established by the case law discussed above, those conditions may include the obligation to appear and to keep the peace. Thus, as used in RSA 597:2, III(b), the concept "appearance by recognizance" is a term of art that is not exclusively limited to the defendant's appearance in court.

Without a doubt, the primary purpose of any bail bond in a criminal case is to secure the defendant's appearance to resolve the pending charges. See 8 C.J.S. Bail § 157 (2012). But while the defendant is subject to the jurisdiction of the court, the conditions of bail can also be designed to ensure the safety of the defendant, a specific individual, or the general public. See RSA 597:2, III. Thus, the term "recognized to appear" means the defendant's agreement to be bound by the terms of the bail order until the matter is resolved. In other words, a defendant who has "recognized to appear" agrees to appear in court for all proceedings in the case and be subject to the conditions imposed by the court pending final resolution of the case. Interpreted in this light, RSA 597:2, III(b)(2) permits the Court to set bail in the amount of cash or surety to ensure the defendant's compliance with the conditions imposed as part of the bail order.

Finally, RSA 597:2, III(b)(3) provides a catch-all that gives the Court discretion to require the defendant to "[s]atisfy 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." This statutory provision is open-ended and could be interpreted to give the Court the authority to impose a condition that the defendant post cash or surety which would be forfeited upon failure to comply with certain conditions such as being of good behavior, not having contact with minors, being subject to random drug or alcohol testing, or any myriad of other conditions necessary to protect the safety of the defendant or the community.

The defendant also points to RSA 597:7-a (Supp. 2012) to support his claim that revocation of release, detention pending trial, or contempt of court are the only remedies for violating a public safety condition of bail. RSA 597:7-a, II provides: "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 revocation of release, an order of detention, and a prosecution for contempt." Nothing in RSA 597:7-a, II, however, states that these are the exclusive remedies for violating a condition of bail. Pursuant to RSA 597:1 (2001) a defendant is presumed to be eligible for release prior to trial. Thus, RSA 597:7-a simply makes it clear that, despite this presumption in favor of release, the Court has the authority to detain a defendant who has breached a condition of bail.[4]

This authority to order revocation of bail and detention is not inconsistent with the authority to order forfeiture of bail. For example, in some cases, the Court may order the defendant released on personal recognizance bail subject to certain conditions, such as, for example, not consuming alcohol or continuing to attend AA meetings. If the defendant is indigent, an order of forfeiture (or an action for debt to enforce the unsecured appearance bond) may not provide any incentive for the defendant to comply

[4] Indeed, RSA 597:14-a (2001) provides explicitly that the authority to sentence the defendant to an enhanced sentence for committing a new offense while on release does not deprive the Court of its authority to order the forfeiture of any bail or otherwise punish the defendant for contempt.

with the conditions of bail. Thus, revocation and detention may be the only effective remedy to enforce the public safety conditions of bail. In other cases, however, a defendant's violation of bail conditions may be part of an escalating pattern of conduct that presents a risk to public safety. The defendant's violation of bail conditions may not yet rise to a level that justifies incarcerating the defendant for a lengthy period of time prior to trial. For example, if a defendant misses several AA meetings or is caught consuming alcohol, the Court could order all or a portion of cash bail forfeited and require the defendant to post additional cash bail. Such an order emphasizes to the defendant that compliance with the bail conditions is necessary to protect the defendant or the public and provides the defendant an incentive, short of incarceration, to correct his behavior before the defendant harms himself or someone else. Thus, an order of forfeiture provides a middle ground between doing nothing to enforce the bail conditions and taking the drastic step of incarcerating the defendant for weeks or months prior to trial. As Justice Smith recognized in State v. Walker more than 135 years ago, "The practice of taking recognizances to keep the peace is of long standing, and unless there is some way to ascertain whether the conusor has violated his recognizance, the practice is no better than an idle ceremony." 56 N.H. at 181.

Since there is more than one reasonable interpretation of the provisions of RSA 597:2 and 597:7-a, it is also appropriate for the Court to examine the legislative history of those provisions to determine the meaning of the language contained in those statutes. See In re Liberty Assembly of God, 163 N.H. 622, 627 (2012) ("We review legislative history to aid our analysis when the statutory language is ambiguous or subject to more than one reasonable interpretation."). The bail statutes were

substantially revised in 1988. See 1988 N.H. Laws ch. 110. More specifically, a defendant's pretrial release on bail was governed by former RSA 597:6-a. See 1988 N.H. Laws 110:4. That statute established a complex procedure for detaining a defendant without bail pretrial if he or she posed a danger to the community. Id. If the court determined that such pretrial detention was not appropriate, the Court could not set high cash bail as a means of guaranteeing compliance with "public safety conditions" of a bail order. More specifically, the 1988 statute provided, in relevant part: "The court may not impose a financial condition that results in the pretrial detention of the person." Id.

In 1989, the N.H. Attorney General's Office requested that RSA 597:6-a be repealed and replaced by RSA 597:2 because courts were interpreting the 1988 changes as prohibiting high cash bail to protect the public. Attorney General Stephen Merrill articulated that one of the purposes of the 1989 amendments to the bail statute was to allow judges to consider dangerousness to community in setting bail. See Letter from Attorney General Stephen Merrill to Rep. Thomas Gage, Chairman of the N.H. House Judiciary Committee at 3 (Apr. 24, 1989) ("It retains the requirement of present law that a mandatory condition of bail be that the person not commit a crime, and permits the court to consider dangerousness as well as risk of flight in determining what bail is appropriate."). More specifically, then-Deputy Attorney General Jeffrey Howard testified about the reasons for the request for legislative change less than one year after the statute was enacted:

> When Chapter 110 was passed in 1988, the legislative intent was to have a profound effect with respect to pretrial status of certain defendants. Essentially what we wanted to do was to give courts the opportunity in cases where there was a substantial risk of danger to the community or

> individual persons in the community that a defendant could be incarcerated pretrial, detained pretrial, for the protection of society. The bill has had that effect in certain few cases that have come up since that time when it was appropriate to use it for that, however, it has had an unintended side effect which we think has been just as profound and that is what we want to correct. The bill inadvertently traded off, pretrial detention to the ability of district court judges to set cash bail if they need to. Cash bail frankly, in many instances results incarceration pretrial if the individual can't meet the bail.
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> Under the law as amended, in those instances we have found many judges who believe that if they are to uphold their oath and apply the law fairly, if an individual simply cannot raise the bail that the judge thinks is appropriate, they have to let them go. That is what we want to do to correct this.
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> The principle section of this bill and probably the section that will have the most contraversy is the very first section were we try to put into place the prior place [sic]. Put it back in place to allow judges to set cash bail were appropriated, even if setting that bail would result in detention because individual can't place bail.

Sen. Comm. on Judiciary, Hearing on SB 196-FN: An Act Relative To Bail Reform at 2 (Jan. 30, 1989) (testimony of Deputy Attorney General Jeffrey Howard). The N.H. Municipal Association took a similar position in support of the 1989 amendments to the bail statute:

> Our 231 member cities and towns voted at our annual meeting to support a revision of the bail reform law which was enacted in the 1988 session to enable District Court justices to establish bail levels sufficient to assure pretrial detention of defendants who are potentially dangerous to the community.
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> The reasoning behind this policy support is that the 1988 amendments have resulted in significant confusion among courts and prosecutors as to the authority of courts to set any bail amount which may be beyond a defendant's reasonable ability to meet. The result has been that legal police departments are called upon to expend significant resources in dealing with repeat offenders who pose clear and present dangers to the public. In fact, in one community an accused person was released on bail and committed a sex offense while on bail from another court for a similar

> offense and with a record of conviction from still another court for a similar crime.

N.H. House Comm. on Judiciary, Hearing on SB 196-FN (written testimony of Maura Carroll on behalf of the N.H. Municipal Assocation).

This interpretation of New Hampshire statutes and case law is also consistent with the majority rule in this country. See State v. Korecky, 777 A.2d 927, 933-34 (N.J. 2001). As the New Jersey Supreme Court has recognized, the economic incentive presented by the forfeiture of a surety bond can provide a powerful way for the surety to monitor the defendant's compliance with the bail conditions. Id. The same logic applies when the defendant posts cash bail himself or someone else posts the bail on his behalf. Posting the cash bail presents an investment intended to secure the defendant's compliance with the bail conditions. If the defendant abides by the terms of bail, he (or his surety) gets the money back. Thus, the defendant or his surety has an interest in the defendant's compliance with the bail conditions in order to ensure the return of the cash bail.

Finally, the Court would note that this holding is consistent with the standard practice in most cases in this state. The express terms of the bond are not limited to securing the defendant's appearance in court. The typical bond in a criminal case provides that the cash is posted "to secure the defendant's compliance with the Conditions of Bail . . . ." The bond then lists the conditions of bail or attaches a copy of the Court's bail order. The bond further provides: "If the defendant does not comply with any condition(s) Cash Bail shall be forfeited to the State and execution may issue against the defendant for Personal Recognizance and against the corporate surety or surety. In addition, the court may order the arrest of the defendant." (Emphasis added).

Thus, a defendant who signs a bond for release "recognizes" (i.e. agrees) to comply with all conditions of bail with an understanding that the cash or surety will be forfeited if he fails to do so.

For all of these reasons, the Court may take into account the safety to the community in setting the amount of cash, surety, or unsecured bond. In other words, a defendant who poses a greater risk to the public based on his criminal record and other information presented to the Court may require a higher bail to provide sufficient incentive to comply with all of the bail conditions. In this case, the Court reaffirms its earlier order and the order of the Circuit Court that $50,000 cash only bail is necessary to secure the defendant's appearance for trial and compliance with "the public safety" conditions contained in the bail order. Accordingly, the conditions of bail as previously set in this case shall remain in full force and effect.

SO ORDERED.

_____ _____

Date Presiding Justice