

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

2014 TERM

CASE NO. 2014-_____

State of New Hampshire

v.

Dennis Surprenant

On Appeal Pursuant to Rule 11 from the Nashua 9th Circuit District Court and Hillsborough
County Superior Court South
(Case No. 2012-cr-7101, Honorable Thomas E. Bamberger, District Court Judge, and Honorable
Jacalyn A. Colburn, Superior Court Judge)

**DEFENDANT/PETITIONER DENNIS SURPRENANT'S EMERGENCY PETITION
FOR EXPEDITED ORIGINAL JURISDICTION PURSUANT TO SUPREME COURT
RULE 11 WITH REQUEST FOR AN IMMEDIATE STAY**

Gilles R. Bissonnette, Esquire (N.H. Bar. No. 265393, Lead Counsel)
New Hampshire Civil Liberties Union
18 Low Avenue
Concord, NH 03301
Phone: (603) 224-5591
Fax.: (603) 226-3149
Gilles@nhclu.org

Albert E. Scherr, Esquire (N.H. Bar No. 2268)
Professor of Law
University of New Hampshire School of Law
2 White Street
Concord, NH 03301
Phone: (603) 513-5144
Buzz.Scherr@law.unh.edu

Counsel for Defendant/Petitioner Dennis Surprenant

INTRODUCTION

Defendant/Petitioner Dennis Surprenant (“Petitioner”) hereby petitions the New Hampshire Supreme Court on an emergency basis for an order vacating the decision issued yesterday afternoon, on February 19, 2014, by the Nashua 9th Circuit District Court (Bamberger, J.). Under the Circuit Court’s decision, Petitioner will be jailed if he does not pay (after already paying \$90) the remaining \$212.50 he owes in outstanding Office of Cost Containment (“OCC”) fees by 9:00 a.m. tomorrow, February 21, 2014. The Circuit Court made this decision without, as is constitutionally required, making any formal findings as to whether Petitioner, who is indigent, has an ability to pay these fees and therefore was wilfully evading his obligations. The United States Supreme Court has made clear that the United States Constitution prohibits jailing defendants who are unable to pay fines and fees assessed against them. *See Williams v. Illinois*, 399 U.S. 235 (1970); *Tate v. Short*, 401 U.S. 395 (1971). Despite this decades-old principle, it unfortunately appears that this practice exists in New Hampshire courts and may even be applied in situations where defendants are not represented by counsel. *See* N.H. Const. Part I, Art. 15 (every person held to answer for an “offense punishable by deprivation of liberty” is entitled to the “right to counsel” at state expense if indigent).¹ Petitioner respectfully requests that this Court make clear that this practice has no place in the courts of New Hampshire because it is antithetical to this State’s values and discriminates against New Hampshire citizens who are economically disadvantaged.

The Office of the Attorney General received a copy of this Petition prior to its filing and

¹ Public defenders are instructed not to represent their clients in OCC “failure to repay” proceedings because of a perceived conflict of interest given that these OCC fees are designed to repay the State for providing indigent defendants with a defense. In this case, Petitioner was (fortunately) represented by public defender counsel before the Circuit Court during this OCC proceeding only because the public defender counsel initially was under the impression that the scheduled hearing was related to the underlying case.

is aware of the relief it seeks.

I. DECISIONS TO BE REVIEWED:

There are three decisions at issue in this case, all issued yesterday on Wednesday, February 19, 2014.

- The first decision is the oral order of the Nashua 9th Circuit District Court (Bamberger, J.) issued during the morning of February 19, 2014. Under this oral order, Petitioner was to be jailed if he did not pay \$302.50 in outstanding OCC fees by the close of business that day.
- The second decision is the oral and written decision of the Nashua 9th Circuit District Court (Bamberger, J.) issued on February 19, 2014 at approximately 3:15 p.m. Under this order, Petitioner, after paying \$90.00, is to be jailed if he does not pay the remaining \$212.50 in outstanding OCC fees by 9:00 a.m. tomorrow, February 21, 2014. As the order makes clear, “[s]hould defendant [f]ail to comply for any reason, he shall be, immediately, transported to the HCHOC [Hillsborough County House of Correction] to be held until the amount is paid in full.” (emphasis in original). This written decision can be found at Addendum (“ADD”) 7.
- The third decision is the written order of the Hillsborough County South Superior Court (Colburn, J.) denying Petitioner’s “Ex Parte Emergency Appeal to Vacate District Court’s Unconstitutional Oral Order Jailing Defendant If He Fails To Pay Office Of Cost Containment Fees And Request For Stay Of District Court Order And All Related Proceedings Before The District Court.” The Superior Court’s Order states as follows: “Denied. The jurisdiction of an appeal on the merits of a

circuit court order was with the Supreme Court. To the extent that the relief sought is akin to that of a habeas corpus petition, that does not appear to be ripe.”

This Order can be found at ADD 11.

II. QUESTION PRESENTED FOR REVIEW:

Did the Nashua 9th Circuit District Court (Bamberger, J.) violate the equal protection provisions of both the Fourteenth Amendment to the U.S. Constitution and Part I, Articles 1 and 2 of the New Hampshire Constitution when it ordered, without making findings as to Petitioner’s ability to pay, that Petitioner, who is indigent, be jailed if he does not pay the \$212.50 he owes in Office of Cost Containment (“OCC”) fees by tomorrow at 9:00 a.m.?

III. CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, OR REGULATIONS INVOLVED IN THE CASE:

There are three constitutional provisions at issue in this Petition:

- U.S. Const., amend. XIV, § 1 (guaranteeing equal protection of the law): “.... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*” (emphasis added).
- N.H. Const. Part I, Article 1 (guaranteeing equal protection of the law): “All men are born equally free and independent: Therefore, all government, of right, originates from the people, is founded in consent, and instituted for the general good.”
- N.H. Const. Part I, Article 2 (guaranteeing equal protection of the law): “All men have certain natural, essential, and inherent rights—among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting,

property; and, in a word, of seeking and obtaining happiness. Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin.”

IV. INSURANCE POLICY PROVISIONS, CONTRACTS, OR OTHER DOCUMENTS INVOLVED IN THE CASE, VERBATIM:

Not applicable.

V. A CONCISE STATEMENT OF THE CASE CONTAINING THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED, WITH APPROPRIATE REFERENCES TO THE APPENDIX, IF ANY:

a. Circuit Court Proceedings

On October 30, 2012, Petitioner was charged with misdemeanor conduct after a vehicle accident pursuant to RSA 264:25 (hereinafter, the “underlying charge”). Petitioner is represented by a public defender, Attorney Suzanne Ketteridge, in the underlying action now pending in Nashua 9th Circuit District Court.²

Beginning in approximately January 2013, the OCC apparently began sending Petitioner requests for repayment of attorneys’ fees related to the underlying charge. However, at this time, Petitioner was homeless due to a serious drug addiction and therefore did not receive the notices. Petitioner entered a drug rehabilitation program for four (4) months from May 2013 to September 2013. An OCC “counsel fees” hearing was apparently scheduled in September 2013 but Petitioner does not recall receiving notice, as he was in treatment. He therefore failed to appear and a warrant was issued.

On November 12, 2013, after Petitioner became aware of the warrant, Petitioner’s public defender—under the impression that the warrant was for Petitioner’s failure to appear on the underlying charge—filed a motion to vacate the warrant. The warrant was vacated the next day,

² A plea hearing for the underlying charge is scheduled for June 18, 2014.

and a review hearing was scheduled for yesterday, February 19, 2014. The notice did not specify what the review hearing was for. A copy of this case's docket is at ADD 12-13.

Yesterday morning, the review hearing was held. Petitioner's public defender was of the belief that this review hearing was related to the underlying charge and therefore she attended the review hearing on Petitioner's behalf. However, the review hearing was related to the OCC's attempt to obtain \$302.50 in fees resulting from the public defenders' representation pursuant to RSA 604:A-9. *See* RSA 604:A-9, I ("Any adult defendant who has had counsel or a public defender assigned to the defendant at the expense of the state shall be ordered by the court under paragraph I-b to repay the state through the unit of cost containment, the fees and expenses paid by the state on the defendant's behalf ...").

At yesterday's review hearing in the morning, the Circuit Court (Bamberger, J.) orally held that Petitioner will go to jail if he does not pay the \$302.50 in outstanding OCC fees by that day's close of business.³ The Circuit Court instructed Petitioner that he cannot leave the courthouse until the full \$302.50 amount is paid. This forced Petitioner to miss a day of work at Dracut Appliances Center—a job he has only had for approximately two weeks and needs to survive financially. Petitioner's public defender explained to the Circuit Court that Petitioner only has \$90 in his possession and is financially unable to pay the remainder by the end of the day. Petitioner's public defender further explained that Petitioner was homeless and drug dependent when the OCC sent notices of repayment. She explained that Petitioner has since (i) graduated from the drug rehabilitation program, (ii) obtained his GED, and (iii) secured a job at Dracut Appliances Center. She also explained that Petitioner is now putting his life back together and that jailing him would not only set him back on his course to recovery, but also

³ The undersigned counsel were not present for the hearings before the Circuit Court on February 19, 2014. Descriptions of what occurred during these proceedings were derived from communications with Petitioner's public defender counsel.

would put him at risk of losing his job at Dracut Appliances Center.

The Circuit Court did not change its ruling in response to this information, apparently concluding that Petitioner did not timely respond to the OCC's notices of repayment—a fact that has no nexus to his ability to pay. The Circuit Court did not make any findings as to Petitioner's ability to pay, nor did the Circuit Court make a finding that Petitioner willfully failed to pay the OCC. Given his inability to pay and fear that he would lose his liberty within hours, Petitioner, through his public defender, contacted the New Hampshire Civil Liberties Union ("NHCLU") for emergency representation.

As NHCLU counsel was driving to the Nashua courthouse to file an appeal before the Hillsborough County South Superior Court of the Circuit Court's oral order, the Circuit Court held an additional hearing at approximately 3:15 p.m. The Circuit Court was notified by Petitioner's public defender that Petitioner had retained NHCLU counsel and that NHCLU counsel would be arriving shortly. The Circuit Court declined to continue the proceedings until NHCLU counsel arrived, even where the Circuit Court was aware that Attorney Suzanne Ketteridge could not represent Petitioner with respect to this issue. Instead, the Circuit Court ordered Petitioner to pay the \$90 he had in his possession. The Circuit Court further required Petitioner to pay the remaining \$212.50 balance by 9:00 a.m. on Friday, February 21, 2014. The Circuit Court stated in its subsequent written order the following: "Should defendant [f]ail to comply for any reason, he shall be immediately, transported to the HCHOC [Hillsborough County House of Correction] to be held until the amount is paid in full." ADD 7. Like the order from that morning, the afternoon order does not make any inquiry into Petitioner's ability to pay, as is constitutionally required. In fact, the order states that he will be jailed if he fails to comply for "any" reason, which includes an inability to pay.

b. Superior Court Proceedings

Following the issuance of the Circuit Court's afternoon order, NHCLU counsel arrived at the Nashua courthouse and filed before the Hillsborough County South Superior Court Petitioner's "Ex Parte Emergency Appeal to Vacate District Court's Unconstitutional Oral Order Jailing Defendant If He Fails To Pay Office Of Cost Containment Fees And Request For Stay Of District Court Order And All Related Proceedings Before The District Court." This pleading, including exhibits, is attached as ADD 1-10.

The Superior Court (Colburn, J.) denied the Motion, holding as follows: "The jurisdiction of an appeal on the merits of a circuit court order was with the Supreme Court. To the extent that the relief sought is akin to that of a habeas corpus petition, that does not appear to be ripe." *See also* RSA 534:1 (under New Hampshire habeas corpus statute, "[a] person imprisoned or otherwise restrained of his personal liberty, by an officer or other person, except in the cases mentioned in the following section, is entitled of right to a writ of habeas corpus according to the provisions of this chapter"); N.H. Circuit Court R. 1.11 (addressing appeals from Circuit Court to Supreme Court on questions of law after a decision on the merits). This Order can be found at ADD 11.

VI. A CONCISE STATEMENT SPECIFYING THE STAGE OF THE PROCEEDINGS IN THE LOWER COURT OR ADMINISTRATIVE AGENCY AT WHICH THE QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED, THE MANNER IN WHICH THEY WERE RAISED, AND THE WAY IN WHICH THEY WERE PASSED UPON BY THE LOWER COURT OR ADMINISTRATIVE AGENCY:

See prior section.

VII. A DIRECT AND CONCISE ARGUMENT AMPLIFYING THE REASONS RELIED UPON FOR PETITIONING THIS COURT TO EXERCISE ITS ORIGINAL JURISDICTION AND SETTING FORTH WHY THE RELIEF SOUGHT IS NOT AVAILABLE IN ANY OTHER COURT OR CANNOT BE HAD THROUGH OTHER PROCESSES:

The Circuit Court's order jailing Petitioner if he does not pay the remaining \$212.50 in OCC fees by 9:00 a.m. tomorrow is unconstitutional and inconsistent with the decisions of this Court, especially where the Circuit Court failed to examine Petitioner's ability to pay. Unfortunately, relief is necessary because the Circuit Court's order has "so far departed from the accepted or usual course of judicial ... proceedings as to call for an exercise of this court's power of supervision." *See* N.H. Sup. Ct. R. 11(1).

The United States Constitution prohibits jailing defendants who are unable to pay fines and fees assessed against them. *Williams v. Illinois*, 399 U.S. 235 (1970) (holding that a state may not under the Equal Protection Clause subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency); *Tate v. Short*, 401 U.S. 395 (1971) (holding that U.S. Constitution prohibits states from imposing a fine as a sentence and then automatically converting the fine into a jail term solely because the defendant is indigent). Indeed, while courts are permitted to incarcerate those who willfully refuse to pay fines and fees, those who lack the resources to meet their court-imposed financial obligations cannot be incarcerated for failing to do so. To jail those who cannot afford to pay fines and fees would produce an "impermissible discrimination that rests on ability to pay" forbidden by the Equal Protection Clause of the Fourteenth Amendment. *Williams*, 399 U.S. at 241, 244. Accordingly, the United States Supreme Court has made clear that no individual may be incarcerated for failure to pay fines and fees unless the court first "inquire[s] into the reasons for the failure to pay." *Bearden v. Georgia*, 461 U.S. 660, 672 (1983) (holding that, if a

probationer has willfully refused to pay the fine or restitution when he has the resources to pay or has failed to make sufficient bona fide efforts to seek employment or borrow money to pay, the State is justified in using imprisonment as a sanction to enforce collection). Unfortunately, the American Bar Association Journal recently noted that, although the “Supreme Court has unambiguously held that criminal defendants can’t be jailed for inability to pay through no fault of their own . . . [,] state courts across the country routinely ignore that command and send people to jail without the required hearing to determine whether a defendant is indigent.”⁴

These constitutional principles have been acknowledged by the New Hampshire Supreme Court. *See State v. Fowlie*, 138 N.H. 234 (1994) (citing *Bearden*, and holding that the trial court erred when it based its decision to impose a criminal sentence on a presumption of ability to pay restitution at the time of the original sentence, rather than on defendant’s actual ability to pay at any time during the existence of the order to pay); *State v. Morrill*, 123 N.H. 707, 711 (1983) (noting that “[t]he defendant acknowledges that he could not be imprisoned if his indigency rendered him unable to pay the fine imposed”); *see also* N.H. Circuit Court R. 2.7(d) (“Conduct which amounts to willful failure to pay any fine or perform community service as ordered, may be punishable as contempt of court or through the provisions of RSA 618:9.”) (emphasis added); RSA 618:10 (“Whenever a person under conviction for a criminal offense and confined in a county correctional facility is unable to pay the fine, the superior court, upon petition of the prisoner or the superintendent and satisfactory proof of such inability, may order the prisoner to be discharged upon such terms as they may think proper.”). Indeed, as this Court has held, Part I, Articles 1 and 2 of the New Hampshire Constitution embody equal protection principles that are at least coextensive with the Fourteenth Amendment’s Equal Protection Clause. *In re Sandra*

⁴ John Gibeaut, *Get Out of Jail—But Not Free: Courts Scramble to Fill Their Coasters by Billing Ex-Cons*, A.B.A. J., July 2012, at 52.

H., 150 N.H. 634, 637 (2004) (“We have held, in accordance with the United States Supreme Court, that the equal protection guarantee” in the State Constitution “is ‘essentially a direction that all persons similarly situated should be treated alike.’”) (quoting *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985)).

As was explained to the Circuit Court by Petitioner’s public defender,⁵ Petitioner is indigent. Given his economically disadvantaged status, he is not willfully failing to pay these OCC fees. As a result, any order jailing Petitioner if he fails to pay these fees discriminates against him because he is poor in violation of the equal protection principles of both the United States and New Hampshire Constitutions. Thus, the Circuit Court erred as a matter of law in ordering that Petitioner be jailed if he does not pay the remaining \$212.50 owed to the OCC. The Circuit Court’s order must be vacated immediately. Moreover, Petitioner is unable to pay the remaining OCC fees by tomorrow morning at 9:00 a.m. without borrowing money from his mother. Petitioner should not have to rely on the kindness of a family member to comply with an unconstitutional order that threatens to deprive him of his liberty within 24 hours. It also goes without saying that jailing Petitioner for failing to pay these fees will only hinder his ability to meet this financial obligation, will place his new job at Dracut Appliances Center in jeopardy, and will impede Petitioner’s ability to get his life in order at a time when he is making substantial progress.⁶

⁵ Following the Circuit Court’s oral order yesterday morning, Petitioner filled out a financial affidavit, but inadvertently neglected to sign it. This affidavit was submitted to the Superior Court in Petitioner’s appeal. *See* ADD 8-10. Counsel for Petitioner will be prepared to submit a signed version of this affidavit. Additionally, pages two and four of the affidavit are not included because the affidavit submitted to the Superior Court was double sided, but it was copied as a single-sided document prior to filing. Petitioner will submit the outstanding two pages when they are retrieved.

⁶ Petitioner started a new job at Dracut Appliances Center approximately two weeks ago. Petitioner is under no obligation to use his limited income to pay OCC fees in lieu of food and other basic necessities. What matters is not whether Petitioner receives a paycheck, but whether Petitioner is indigent and therefore is deemed financially unable to pay. The Circuit Court did not engage in this constitutionally-required inquiry and, as a result, any order requiring him to go to jail if OCC fines remain unpaid is unconstitutional.

Relief has been sought in both the Circuit Court and the Superior Court to no avail. To the extent this matter presents a question of law “after a decision on the merits” under Circuit Court Rule 1.11 (which does not appear to be the case because the District Court has retained jurisdiction over this issue), the Superior Court referred Petitioner to the New Hampshire Supreme Court for relief and expressed a reluctance to vacate the Circuit Court’s order until Petitioner is actually incarcerated. *See* RSA 534:1 (New Hampshire habeas statute applying to those who are imprisoned or otherwise have their personal liberty restrained). Here, the threat presented by the Circuit Court’s order to Petitioner’s personal liberty is real. Petitioner should not have to wait to be jailed, and therefore be irreparably harmed, before his constitutional right to not be incarcerated as a result of his economic status is vindicated. Given the threat of jail and the lack of any alternative forum to obtain relief before tomorrow at 9:00 a.m., there are clearly special and important reasons for this Court to grant this Petition under Supreme Court Rule 11(1).

VIII. THE JURISDICTIONAL BASIS FOR THE PETITION, CITING THE RELEVANT STATUTES OR CASES:

RSA 490:4 which provides:

The supreme court shall have general superintendence of all courts of inferior jurisdiction to prevent and correct errors and abuses, . . . shall have exclusive authority to issue writs of error, and may issue . . . other writs and processes to other courts . . . and shall do and perform all the duties reasonably requisite and necessary to be done by a court of final jurisdiction of questions of law and general superintendence of inferior courts.

IX. A STATEMENT, IF APPLICABLE, THAT EVERY ISSUE SPECIFICALLY RAISED HAS BEEN PRESENTED TO THE ADMINISTRATIVE AGENCY AND HAS BEEN PROPERLY PRESERVED FOR APPELLATE REVIEW BY A CONTEMPORANEOUS OBJECTION OR, WHERE APPROPRIATE, BY A PROPERLY FILED PLEADING:

All issues specifically raised in this Petition were presented to (i) the Nashua 9th Circuit

District Court (Bamberger, J.) in hearings that took place both in the morning and afternoon of Wednesday, February 19, 2014, and (ii) the Hillsborough County South Superior Court (Colburn, J.). All such issues have been preserved for appellate review at the hearings that took place on February 19, 2014 before the Nashua 9th Circuit District Court, as well as in Petitioner's "Ex Parte Emergency Appeal to Vacate District Court's Unconstitutional Oral Order Jailing Defendant If He Fails To Pay Office Of Cost Containment Fees And Request For Stay Of District Court Order And All Related Proceedings Before The District Court," filed with the Hillsborough County South Superior Court on Wednesday, February 19, 2014.

X. A LIST OF ALL PARTIES OF RECORD AND THEIR COUNSEL, AND THE ADDRESSES OF ALL PARTIES AND ALL COUNSEL:

<p>Suzanne Ketteridge, Esq. Public Defender 44 Franklin Street, 2nd Floor Nashua, NH 03060 Telephone No.: (603) 598-4986</p> <p>(counsel to Petitioner Dennis Surprenant in underlying action)</p>	<p>Stephen D. Fuller, Esq. Ann Rice, Esq. State of New Hampshire Department of Justice 33 Capitol Street Concord, NH 03301 Telephone No.: (603) 271-1202</p>
<p>Patricia M. LaFrance, Esq. Hillsborough County Attorney 300 Chestnut Street Manchester, NH 03101 Telephone No.: (603) 627-5605</p>	<p>Christopher Keating, Esq. Executive Director New Hampshire Judicial Council State House Annex – Room 424 25 Capitol Street Concord, NH 03301 Telephone No.: (603) 271-1112</p>
<p>Kathy Gallagher, Administrator State of New Hampshire Department of Administrative Services Office of Cost Containment State House Annex – Room 400 25 Capitol Street Concord, NH 03301 Telephone No.: (603) 271-1416</p>	

XI. A STATEMENT AS TO WHETHER A TRANSCRIPT OF ANY PROCEEDINGS WILL BE NECESSARY IF THE PETITION IS ACCEPTED FOR FURTHER REVIEW BY THE COURT:

No transcript will be required.

REQUEST FOR RELIEF

WHEREFORE, Defendant/Petitioner respectfully requests the following relief:

a) That the Circuit Court's oral and written order from the afternoon of February 19, 2014 requiring that Defendant/Petitioner be jailed if, after paying \$90.00, he does not pay the remaining \$212.50 by 9:00 a.m. on Friday, February 21, 2014 be vacated; or

b) Alternatively, this Court immediately stay all proceedings before the Circuit Court concerning Office of Cost Containment fees until this Court has had the opportunity to review further the issues presented in this Petition; and

c) Any such other and further relief that this Court deems just and proper.

Respectfully submitted,

DENNIS SURPRENANT,

By his attorneys,

A handwritten signature in black ink, appearing to be "Gilles R. Bissonnette", written over a horizontal line.

Gilles R. Bissonnette (N.H. Bar. No. 265393)
New Hampshire Civil Liberties Union
18 Low Avenue
Concord, NH 03301
Tel.: (603) 224-5591
Fax.: (603) 226-3149
Gilles@nhclu.org

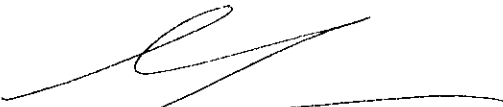
Albert E. Scherr, Esquire (N.H. Bar No. 2268)
Professor of Law
University of New Hampshire School of Law
2 White Street
Concord, NH 03301
Phone: (603) 513-5144
Buzz.Scherr@law.unh.edu

Dated: February 20, 2014

CERTIFICATE OF SERVICE

I hereby certify that a copy of forgoing was served this 20th day of February, 2014 by first class mail, postage prepaid, and by electronic mail where applicable on the following parties:

Suzanne Ketteridge, Esq. (sketteridge@nhpd.org) Public Defender 44 Franklin Street, 2nd Floor Nashua, NH 03060 Telephone No.: (603) 598-4986 (counsel to Petitioner Dennis Surprenant in underlying action)	Stephen D. Fuller, Esq. (stephen.fuller@doj.nh.gov) Ann Rice, Esq. (ann.rice@doj.nh.gov) State of New Hampshire Department of Justice 33 Capitol Street Concord, NH 03301 Telephone No.: (603) 271-1202
Patricia M. LaFrance, Esq. (plafrance@hcao.net) Hillsborough County Attorney 300 Chestnut Street Manchester, NH 03101 Telephone No.: (603) 627-5605	Christopher Keating, Esq. (Christopher.Keating@judcouncil.state.nh.us) Executive Director New Hampshire Judicial Council State House Annex – Room 424 25 Capitol Street Concord, NH 03301 Telephone No.: (603) 271-1112
Kathy Gallagher, Administrator (kathy.gallagher@nh.gov) State of New Hampshire Department of Administrative Services Office of Cost Containment State House Annex – Room 400 25 Capitol Street Concord, NH 03301 Telephone No.: (603) 271-1416	


Gilles R. Bissonnette, Esq.

STATE OF NEW HAMPSHIRE

COUNTY OF HILLSBOROUGH
SOUTHERN DIVISION

SUPERIOR COURT

Docket No. 2012-cr-7101

STATE OF NEW HAMPSHIRE

v.

DENNIS SURPRENANT

Ex Parte

**DEFENDANT'S ^AEMERGENCY APPEAL TO VACATE DISTRICT COURT'S
UNCONSTITUTIONAL ORAL ORDER JAILING DEFENDANT IF HE FAILS TO PAY
OFFICE OF COST CONTAINMENT FEES & Request for Stay of**

Pursuant to Criminal Rule 2.13, Defendant Dennis Surprenant ("Defendant"), by and ^{District Court Order + All Related Proceedings Before District Court} through his attorney, hereby appeals on an emergency basis the oral decision made today, on February 19, 2014, by the Nashua 9th Circuit District Court (Bamberger, J.) that Defendant will be jailed if he does not pay approximately \$~~320~~^{2,302} in outstanding Office of Cost Containment ("OCC") fees by the close of business today. The District Court instructed the Defendant that he cannot leave the courthouse until the full \$320 amount is paid. This order is unconstitutional and must be immediately vacated because Defendant is financially unable to pay this amount, as he is indigent and is therefore not wilfully failing to pay these OCC fees. The United States Supreme Court has made clear that the United States Constitution prohibits jailing defendants who are unable to pay fines and fees assessed against them. *See Williams v. Illinois*, 399 U.S. 235 (1970); *Tate v. Short*, 401 U.S. 395 (1971). This appeal is being filed on an emergency basis because Defendant risks losing his liberty in just hours as a result of the District Court's unconstitutional order.

ADD 1

Facts

On October 30, 2012, Defendant was charged with misdemeanor conduct after a vehicle accident pursuant to RSA 264:25 (hereinafter, the “underlying charge”). Defendant is represented by a public defender, Attorney Suzanne Ketteridge, in this action now pending in Nashua 9th Circuit District Court.¹

Beginning in approximately January 2013, the OCC apparently began sending Defendant requests for repayment of attorneys’ fees related to the underlying charge. However, at this time, Defendant was homeless due to a serious drug addiction and therefore did not receive the notices. Defendant entered a drug rehabilitation program for four (4) months from May 2013 to September 2013. An OCC “counsel fees” hearing was apparently scheduled in September 2013 but Defendant does not recall receiving notice, as he was in treatment. He therefore failed to appear and a warrant was issued.

On November 12, 2013, after Defendant became aware of the warrant, Defendant’s public defender—under the impression that the warrant was for Defendant’s failure to appear on the underlying charge—filed a motion to vacate the warrant. The warrant was vacated the next day, and a review hearing was scheduled for today, February 19, 2014. The notice did not specify what the review hearing was for.

Today, the review hearing was held. Defendant’s public defender was of the belief that this review hearing was related to the underlying charge and therefore she attended the review hearing on Defendant’s behalf. However, the review hearing was related to the OCC’s attempt to obtain approximately \$320 in fees resulting from the public defenders’ representation pursuant to RSA 604:A-9. *See* RSA 604:A-9, I (“Any adult defendant who has had counsel or a public

¹ A plea hearing for the underlying charge is scheduled for June 18, 2014.

defender assigned to the defendant at the expense of the state shall be ordered by the court under paragraph I-b to repay the state through the unit of cost containment, the fees and expenses paid by the state on the defendant's behalf").

At this review hearing, the District Court (Bamberger, J.) orally held that Defendant will go to jail if he does not pay the \$320 in outstanding OCC fees by the close of business today. The District Court instructed the Defendant that he cannot leave the courthouse until the full \$320 amount is paid. Defendant's public defender explained that Defendant only has \$90 in his possession and is financially unable to pay the remainder by the end of today. Defendant's public defender further explained that Defendant was homeless and drug dependent when the OCC sent notices of repayment. She explained that Defendant has since (i) graduated from the drug rehabilitation program, (ii) obtained his GED, and (iii) secured a job at Dracut appliances and hopes to pay the OCC in the next several weeks. She also explained that Defendant is now putting his life back together and that jailing him would not only set him back on his course to recovery, but would put him at risk of losing his job.

The District Court did not change its order in response to this information. The District Court did not conduct a formal hearing on Defendant's ability to pay, nor did the District Court make a formal finding that Defendant willfully failed to pay the OCC. Since the oral order was issued, Defendant has contacted his mother, with whom he lives, seeking financial support to pay the \$320 in OCC fees. However, she does not have the money to pay these fees. Given his inability to pay and fear that he would lose his liberty within hours, Defendant, through his public defender, contacted the New Hampshire Civil Liberties Union for emergency representation. This appeal follows.

Please see addendum.

Argument

The District Court's oral order that Defendant will be jailed if he does not pay approximately \$320 in OCC fees by the end of the day today is clearly unconstitutional and must be immediately vacated, especially where the District Court did not conduct a formal hearing on Defendant's financial status and made no findings as to whether his failure to pay OCC fees was wilful.

The United States Constitution prohibits jailing defendants who are unable to pay fines and fees assessed against them. *Williams v. Illinois*, 399 U.S. 235 (1970); *Tate v. Short*, 401 U.S. 395 (1971). While courts are permitted to incarcerate those who willfully refuse to pay fines and fees, those who lack the resources to meet their court-imposed financial obligations cannot be incarcerated for failing to do so. To jail those who cannot afford to pay fines and fees would produce an "impermissible discrimination that rests on ability to pay," forbidden by the Equal Protection Clause of the Fourteenth Amendment. *Williams*, 399 U.S. at 241, 244. Accordingly, the United States Supreme Court has made clear that no individual may be incarcerated for failure to pay fines and fees unless the court first "inquire[s] into the reasons for the failure to pay." *Bearden v. Georgia*, 461 U.S. 660, 672 (1983). Unfortunately, the American Bar Association Journal recently noted that, although the "Supreme Court has unambiguously held that criminal defendants can't be jailed for inability to pay through no fault of their own . . . [,] state courts across the country routinely ignore that command and send people to jail without the required hearing to determine whether a defendant is indigent."² These principles have been acknowledged by the New Hampshire Supreme Court. *State v. Morrill*, 123 N.H. 707, 711 (1983); *see also* RSA 618:10 ("Whenever a person under conviction for a criminal offense and

² John Gibeaut, *Get Out of Jail—But Not Free: Courts Scramble to Fill Their Coffers by Billing Ex-Cons*, A.B.A. J., July 2012, at 52.

confined in a county correctional facility is unable to pay the fine, the superior court, upon petition of the prisoner or the superintendent and satisfactory proof of such inability, may order the prisoner to be discharged upon such terms as they may think proper.”).

As was explained to the District Court by Defendant’s public defender and as is evidenced by the attached financial affidavit, Defendant is indigent and is unable to pay the OCC fees. Given his economically disadvantaged status, he is not willfully failing to pay these fees. As a result, any order jailing Defendant if he fails to pay these fees discriminates against him because he is poor in violation of the Fourteenth Amendment’s equal protection clause. Thus, the District Court erred in ordering that Defendant be jailed if he does not pay the \$320 owed to the OCC. This oral order must be vacated immediately.

REQUEST FOR RELIEF

WHEREFORE, Defendant respectfully requests the following relief:

- a) That the District Court’s oral order requiring that Defendant be jailed if he does not pay \$320 to the OCC be vacated; and
- b) Any such other and further relief that this Court deems just and proper.

Respectfully submitted,

DENNIS SURPRENANT,

By his attorney,



Gilles R. Bissonnette (N.H. Bar. No. 265393)
NEW HAMPSHIRE CIVIL LIBERTIES UNION
18 Low Avenue
Concord, NH 03301
Tel.: 603.224.5591
Fax.: 603.226.3149
Gilles@nhclu.org

Dated: February 19, 2014

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

Court Name: County of Hillsborough, Southern Division
Case Name: State of NH v. Dennis Surprenant
Case Number: 2013-cr-7101
(if known)

AGREEMENT ADDENDUM

The parties agree as follows:

At 3:15pm on February 19, after Defendant was told earlier in the morning that he was not free to leave the courthouse until the \$302.50 had been paid in full, he was called into court for an update. The Court was notified that undersigned counsel from the NHCLU was one ~~hour~~ mile away (driving in a snow storm from Concord). The district court said he would not wait for NHCLU counsel to arrive, and ordered him to pay the \$90 he had, and that the balance must be paid by 9am on Friday, February 21 or he would be immediately transferred to jail. See attached order. Defendant will be required to miss work on Friday, just as he missed work today given the court's order that he not leave the courthouse until payment is made. Additionally, Defendant cannot pay by 9:00am on Friday, as he gets paid in the afternoon. During 3:15pm hearing again the court didn't inquire into his ability to pay. The 3:15pm ^{order} remains unconstitutional for requiring payment with the threat of jail with no finding of willful nonpayment.

2/19/14
Date

1
Plaintiff/Petitioner

Def. Dennis Surprenant
Defendant/Respondent

Attorney for Plaintiff/Petitioner

Gilles Bissonnette, Esq
Attorney for Defendant/Respondent

New Hampshire Civil Liberties Union

AGREEMENT

The State of New Hampshire

12-7101
Docket No.

ORDER ON DOCUMENT NO. _____

STATE

v

SURETY

Defendant to pay \$90 today and the balance of \$210.⁵⁰ by 9:00 AM on 2/21/14.

Should defendant fail to comply for any reason, he shall be immediately transported to the MCHOC to be held until the amount is paid in full.

2/19/14
Date

TT C3
Signature
Presiding Justice

Thomas E. Bamberger

ADD 7 0800

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH**

http://www.courts.state.nh.us

Court Name: Nashua District - 9th Circuit
 Case Name: State v Dennis Surprenant
 Case Number: 459-2012-CP-07101
 (if known)

FINE PAYMENT FINANCIAL AFFIDAVIT

Name: Dennis Surprenant Telephone #: H: _____
 Address: 218 Freda Lane W: _____
Lowell, MA C: _____

Date of Birth: 5/21/91 Age: 22

Marital Status: Single Married Divorced Separated

List all dependents you currently support, including your spouse, or any other persons who reside with you (name, relationship, date of birth, and address if different from your own).

A. _____ C. _____
 B. _____ D. _____

1. Available Money

	SELF (A)	SPOUSE/ADULT IN HOUSEHOLD (B)
a. Cash on hand	\$ <u>90.00</u>	\$ _____
b. Checking account	\$ <u>0</u>	\$ _____
Bank name: <u>Don't Have B.A.</u>		
c. Savings account	\$ <u>0</u>	\$ _____
Bank name: _____		
d. Credit cards (list the balance):		
VISA: <u>Don't Have Credit Cards</u>	\$ <u>0</u>	\$ _____
Mastercard: _____	\$ <u>0</u>	\$ _____
Other: _____	\$ <u>0</u>	\$ _____
Available credit on credit cards	\$ <u>0</u>	\$ _____
e. Stocks, Bonds, Trusts, CDs, Other	\$ <u>0</u>	\$ _____
f. Christmas Club	\$ <u>0</u>	\$ _____
g. Other	\$ <u>-</u>	\$ _____
TOTAL (1)	\$ <u>0</u>	\$ _____
	(1A)	(1B)

Case Name: _____

Case Number: _____

FINE PAYMENT FINANCIAL AFFIDAVIT

3. Assets

1. Property (Use Fair Market Value for all amounts listed)

Do you own a house or other real estate? Yes (If yes list) No

Market Value \$ _____ Mortgage Owed \$ _____

Mortgage Held By _____

Market Value \$ _____ Mortgage Owed \$ _____

Mortgage Held By _____

2. Motor Vehicles (autos, trucks, recreational vehicles ,boats, motorcycles, trailers, etc.)

Make _____ Model _____ Year _____

Market Value \$ _____ Amount Owed \$ _____

Title Holder _____

Make _____ Model _____ Year _____

Market Value \$ _____ Amount Owed \$ _____

Title Holder _____

3. Do you own any other property that is jointly owned with any other person or entity?

Yes (If yes list) No

Market Value \$ _____ Mortgage Owed \$ _____

Mortgage Held by _____

4. Sale/Transfer

Have you sold or transferred any real estate or personal property worth \$200.00 or more within the last six months? Yes (If yes list) No

Item _____ Value \$ _____

Date of Sale _____ Buyer's Name _____

Amount Received in Sale or Transfer \$ _____

Item _____ Value \$ _____

Date of Sale _____ Buyer's Name _____

Amount Received in Sale or Transfer \$ _____

4. Money Owed to You —

Does anyone owe you money? Yes (If yes list) No

Who owes you money? _____ Amount owed \$ _____

When do you expect to be paid? _____

Who owes you money? _____ Amount owed \$ _____

When do you expect to be paid? _____

ADD 9

Case Name: _____

Case Number: _____

FINE PAYMENT FINANCIAL AFFIDAVIT

4. Uninsured Health Care

a. Medical \$ _____
b. Dental \$ _____
c. Orthodontic \$ _____
d. Eye care/Glasses/Contacts \$ _____
e. Prescription drugs \$ _____
f. Therapy/Counseling \$ _____
g. Other _____ \$ _____

8. Financial

a. Federal Income tax \$ _____
b. Social Security/Medicare \$ _____
c. Loan payments \$ _____
d. Education loan \$ _____
e. 401(k)IRA \$ _____
f. IRA \$ _____
g. Other _____ \$ _____

5. Transportation

a. Primary Vehicle Payment \$ _____
b. Other Vehicle Payments \$ _____
c. Vehicle Maintenance \$ _____
d. Gas/Oil \$ _____
e. Registration fees \$ _____
f. Other _____ \$ _____

9. Other Expenses

(List only those payments made on a regular basis)
(DO NOT list any payments already listed elsewhere. e.g. rent, utilities, etc)
a. _____ \$ _____
b. _____ \$ _____
c. _____ \$ _____
d. _____ \$ _____
e. _____ \$ _____
f. _____ \$ _____

B. TOTAL MONTHLY EXPENSES (1-9) \$ _____

Financial Resources available : transfer figures from A & B to calculate amount:

A. Total cash and monthly income: \$ _____

B. Total monthly expenses: \$ 610

=

BALANCE: \$ _____

Note: Some sources of income are protected from federal and state law from execution, levy, attachment or garnishment. If any sources of your income fall into these categories, the court will determine whether or not you will be required to pay a civil judgment. You may be ordered by the court to use some of this income to pay taxes, child support, restitution and criminal fines.

I understand that it is my responsibility to notify the court in writing of any change of my address and/or financial circumstances.

I swear (affirm) under penalties of law that to the best of my knowledge and belief the foregoing information is correct and complete.

Date

Signature

STATE OF NEW HAMPSHIRE

COUNTY OF HILLSBOROUGH
SOUTHERN DIVISION

SUPERIOR COURT

Docket No. 2012-cr-7101

STATE OF NEW HAMPSHIRE

v.

DENNIS SURPRENANT

Ex Parte

**DEFENDANT'S EMERGENCY APPEAL TO VACATE DISTRICT COURT'S
UNCONSTITUTIONAL ORAL ORDER JAILING DEFENDANT IF HE FAILS TO PAY
OFFICE OF COST CONTAINMENT FEES & Request for Stay of**

District Court Order + All Related Proceedings Before District Court

Pursuant to Criminal Rule 2.13, Defendant Dennis Surprenant ("Defendant"), by and through his attorney, hereby appeals on an emergency basis the oral decision made today, on February 19, 2014, by the Nashua 9th Circuit District Court (Bamberger, J.) that Defendant will be jailed if he does not pay approximately \$~~320~~³⁰³ in outstanding Office of Cost Containment ("OCC") fees by the close of business today. The District Court instructed the Defendant that he cannot leave the courthouse until the full \$320 amount is paid. This order is unconstitutional and must be immediately vacated because Defendant is financially unable to pay this amount, as he is indigent and is therefore not wilfully failing to pay these OCC fees. The United States Supreme Court has made clear that the United States Constitution prohibits jailing defendants who are unable to pay fines and fees assessed against them. *See Williams v. Illinois*, 399 U.S. 235 (1970); *Tate v. Short*, 401 U.S. 395 (1971). This appeal is being filed on an emergency basis because Defendant risks losing his liberty in just hours as a result of the District Court's unconstitutional order.

Denied. The jurisdiction of an appeal on the merits of a circuit court order lies with the Supreme Court. To the extent that the relief sought is akin to that of a habeas corpus petition, that does not appear to be ripe.

Jacalyn A. Colburn
Presiding Justice

2/19/14 4:08 PM
ADD 11

CASE SUMMARY

CASE NO. 459-2012-CR-07101

04/17/2013	Pre-Trial Conference	
04/17/2013	Bail Order (Judicial Officer: Leary, James H) <i>dfta bw to issue \$500 pr bail</i>	<i>Index #4</i>
04/17/2013	Disposition (Judicial Officer: Leary, James H) 1. Conduct After Accident Default	
09/30/2013	Counsel Fees Hearing	
09/30/2013	Bail Order (Judicial Officer: Ryan, Michael J) <i>dfta or pay atty fees bw to issue \$302.50 cash bail</i>	<i>Index #5</i>
11/12/2013	Motion to Vacate Party: Public Defender McKinnon, Rebecca L., ESQ <i>Active Warrant.</i>	<i>Index #6</i>
11/13/2013	Granted (Judicial Officer: Leary, James H)	
11/13/2013	Amended Disposition (Judicial Officer: Leary, James H) 1. Conduct After Accident Vacated	
11/14/2013	Notice of Cleared Default	<i>Index #7</i>
02/19/2014	Review Hearing	
06/18/2014	Plea	