

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

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NEW HAMPSHIRE
SUPREME COURT

2018 JUN -4 P 2:07

No. 2017-0443

State of New Hampshire

v.

Joel Martin

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

REPLY BRIEF FOR THE DEFENDANT

Eric S. Wolpin
Assistant Appellate Defender
Appellate Defender Program
10 Ferry Street, Suite 202
Concord, NH 03301
NH Bar # 18372
603-224-1236
(15 minutes for oral argument)

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii
Question Presented	1
Statement of the Case and Facts	2
Argument	
I. MARTIN HAD A RIGHT TO CHOICE OF COUNSEL AS HE WAS NOT REPRESENTED BY APPOINTED COUNSEL.	5
Conclusion.....	8
Appendix	A1-A2

TABLE OF AUTHORITIES

Page

Cases

State v. Brouillette,
166 N.H. 487 (2014) 2, 3

Statutes

RSA 494:3, VI 3
RSA 604-9 7
RSA 604-A:2 3, 4, 7
RSA 604-A:6 2

QUESTION PRESENTED

Whether the court erred by failing to inquire how Martin intended to proceed if the court granted his motion to fire retained counsel.

Issue preserved by Martin's motion to withdraw, A1-A2, the hearing on the matter, M 1-9, and the court's oral and written orders. M 9; A1.*

* Citations to the record are as follows:

"A" refers to the Appendix to Martin's opening brief;

"DB" refers to Martin's opening brief;

"FPT" refers to the transcript of the Final Pretrial Hearing held on February 15, 2017;

"M" refers to the transcript of the Motion to Withdraw Hearing held on February 21, 2017;

"MH" refers to the transcript of a motion hearing held on February 23, 2017;

"RB A" refers to the Appendix to Martin's reply brief;

"SB" refers to the State's brief;

"SBA" refers to the Appendix to the State's brief.

STATEMENT OF THE CASE AND FACTS

In his opening brief, Martin argued that his motion to fire his retained attorney implicated the constitutional right to choice of counsel. DB 14-20. In response, the State asserted that this constitutional right did not apply as Martin's counsel was appointed, not retained. SB 11-14. The application of the constitutional right in question hinges on whether counsel was retained or appointed. DB 16, n.1. As such, Martin herein outlines the factual and procedural history of trial counsel's retention.

In May 2015, the New Hampshire Public Defender was appointed to represent Martin. A8-A10. Martin hired attorney Paul Garrity to represent him, and, on June 3, 2015, Garrity entered an appearance. A11-A13.¹ The Public Defender withdrew. A14-A15.

On December 6, 2016, Martin submitted a motion for services other than counsel and a financial affidavit. SBA 4 (financial affidavit and motion for funds for a private investigator filed on December 6, 2016); see also id. (motion for funds for a forensic pathologist dated December 8, 2016). Three days later, the court approved these funds. Id.; RSA 604-A:6 (authorizing funds for indigent defendants); State v. Brouillette, 166 N.H. 487, 490-93 (2014) (indigent defendants represented by retained counsel are entitled to seek funds for expert and investigative services).

On February 15, 2017, the court conducted a final pretrial hearing. FPT 2-27. Martin was not in the courtroom. FPT 17 ("Mr. Martin is downstairs," and

¹ On January 23, 2017, Attorney Justin Shepherd entered an appearance as co-counsel. A16.

Garrity would have to “go down and talk to Martin.”). Near the hearing’s conclusion, Garrity informed the court that Martin had not paid him in full for his services. FPT 25. Garrity previously had requested the New Hampshire Judicial Council, the governmental entity responsible for funding indigent defense, to appoint him as Martin’s attorney, but it repeatedly refused to do so. Id.; see RSA 494:3, VI (authorizing Judicial Council to administer the indigent defense delivery system); RSA 604-A:2 (setting forth the procedure for appointment of counsel). The court told Garrity to “file a motion so we have a vehicle to address the issue.” FPT 26. The court noted it did not have “a problem conceptually” with appointing Garrity and Shepherd as counsel, but it would have to confer with the Chief Justice of the Superior Court “to make sure [the court] can do that.” Id. The court did not appoint Garrity as counsel at that hearing. Id. at 26-27.

On February 16, 2017, Garrity filed a motion requesting the court appoint him and Shepherd to represent Martin. SBA 16-18. The motion does not indicate that Martin concurred with this request or that he was notified of the motion prior to its filing. Id. at 18 (noting a copy of the motion was sent to Martin).

On February 18, 2017, Garrity met with Martin at the prison. A1. Martin informed Garrity that he did not want Garrity to represent him. Id. On February 21, 2017, Garrity filed a motion to withdraw as counsel. A1-A2. The court held a hearing the same day at which Martin moved to fire Garrity. M1-9; DB 8-9. The Court denied this request. Id.; A1.

On February 23, 2017 the court held a hearing to address pending motions. During that hearing, Garrity asked the court how he would be compensated “*in the event* [the court] were to grant that motion for appointment.” MH 19 (emphasis added). The court explained how it expected the reimbursement would work, but stated not to “hold [it] to that” as it had not yet issued a ruling. Id.

Trial began on March 1, 2017. On March 3, the court issued a written order appointing Garrity and Shepherd to represent Martin.² Id. In a footnote, the court noted counsel could seek reimbursement for billings made after February 17, 2017, the date counsel filed its motion. SBA 22.

On November 21, 2017, the court issued “Notification of Eligibility, Appointment of Counsel, Notification of Liability and Repayment Orders” finding Martin eligible for appointment of counsel and appointing Shepherd and Garrity. RB A1-A2.

² Appellate Counsel was unaware of this order, appended to the State’s brief as SBA 19-23, prior to the filing of the appellant’s opening brief. The State informed Counsel that it obtained the order from the Judicial Council as the parties did not see it in the Superior Court clerk’s file. Martin does not contest the order’s authenticity.

I. MARTIN HAD A RIGHT TO CHOICE OF COUNSEL AS HE WAS NOT REPRESENTED BY APPOINTED COUNSEL.

Three considerations support Martin's position that he had a right to choice of counsel when the court addressed his motion to fire Garrity. DB 14-20. First, counsel was retained when Martin sought to fire him. At the time of the hearing and argument, February 21, 2017, Garrity was retained, rather than appointed counsel. The question Martin raised and the court addressed at the hearing was whether he could fire his retained counsel. On appeal, Martin challenges the court's resolution of that question. DB 14-20. The State's characterization of the February 21 hearing as raising a claim about Martin's efforts to fire *appointed* counsel, SB 11, fails to acknowledge that that was not the issue presented or ruled upon by the court. The later order appointing counsel does not change the issues presented, considered, and resolved at that hearing.

To the extent the State asserts that the court's March order modified the issue before the court in February, Martin asserts such a conclusion is erroneous. To hold that a later order appointing retained counsel retroactively changed counsel's prior status would put a defendant and the court in an untenable situation. As discussed in both the State and Martin's briefs, different rights and analytical tools apply to motions to fire retained and appointed attorneys. DB 15-18; SB 12-20. A defendant seeking to fire retained counsel with whom he is dissatisfied should expect an inquiry and ruling tailored to address his request. Similarly, courts must apply the law in accordance with the facts presented to them. An appellate court should not

review a litigant's rights under circumstances not in existence at the time those rights were addressed by the trial court.

Second, to the extent the State is asserting that the court retroactively appointed Garrity as of February 17, 2017, rather than from the date of the order, March 3, 2017, such a conclusion is erroneous. SB 13. In his motion, Garrity requested the court "authorize appointment of [Garrity and Shepherd] as the accused's attorneys." SBA 17. The order "appoint[ed] Attorney Garrity and Shepherd as defendant's counsel." SBA 22. Although, in a footnote, the court authorized Garrity's reimbursement for services provided after the date of the motion's filing, the order does not state the appointment was retroactive. Id. The State's argument that Martin sought to fire appointed counsel on February 21, 2017 fails because Garrity was not then appointed.

Third, appointing a defendant his retained attorney after he has expressed an intent to fire that attorney unfairly defeats his constitutional right to choice of counsel. The right to hire and fire retained counsel is a fundamental right, the denial of which amounts to structural error. DB 19. Courts must not be permitted to sidestep the invocation of this constitutional right by assigning counsel a status the defendant did not request.

Martin did ask to court to appoint Garrity. In December, Martin filed a financial affidavit to obtain the services of an expert and an investigator, not to request the appointment of counsel. In February, Martin was not in the courtroom when Garrity asked to be appointed, and the written motion does not indicate Martin's assent. Two days after the motion was filed and mailed to

Martin, he effectively objected to Garrity's appointment by asking him to withdraw. Although the request to appoint counsel may have been, as Garrity explained, a "motion near and dear to myself," it was not similarly near and dear to Martin. MH 19.

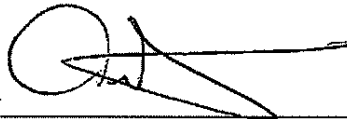
The decision to request appointment of counsel rests with the defendant, see RSA 604-A:2, III(b) (authorizing court to appoint counsel without defendant's application only where defendant suffers from mental illness), as does the obligation to reimburse the State for those expenses. RSA 604-9; see RB A1-A2 (holding Martin liable for \$20,000 in legal fees for court-appointed counsel). The statute does not authorize the appointment of counsel to reimburse a private attorney who has received only partial compensation. RSA 604-A:2. Where Martin did not request appointed counsel, the court cannot eliminate the right to counsel he invoked by turning private counsel into appointed counsel.

CONCLUSION

WHEREFORE, Joel Martin respectfully request that this Court reverse his convictions.

Undersigned counsel requests fifteen minutes oral argument.

Respectfully submitted,

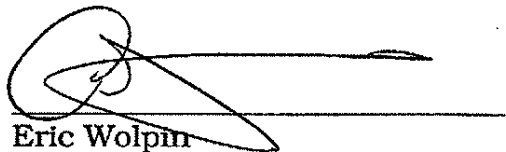


By _____
Eric S. Wolpin # 18372
Assistant Appellate Defender
Appellate Defender Program
10 Ferry Street, Suite 202
Concord, NH 03301

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief have been mailed, postage prepaid, to:

Criminal Bureau
New Hampshire Attorney General's Office
33 Capitol Street
Concord, NH 03301



Eric Wolpin

DATED: June 4th, 2018.

A P P E N D I X

APPENDIX – TABLE OF CONTENTS

	<u>Page</u>
Notification of Eligibility, Appointment of Counsel, Notification of Liability and Repayment Order	A1-A2

SUPERIOR COURT

Hillsborough Superior Court Northern District
300 Chestnut Street
Manchester NH 03101

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

NOTIFICATION OF ELIGIBILITY, APPOINTMENT OF COUNSEL
NOTIFICATION OF LIABILITY AND REPAYMENT ORDER (ADULT/CR)

Case Name: State v. Joel Martin
Case Number: 216-2015-CR-00650

Check if an Appeal
 Amended date: _____

Superior Court Case Number: _____ Date Superior Court affirmed appointment: _____

The Petition/Affidavit having been considered pursuant to the New Hampshire Code of Administrative Rules Chapter Adm. 1000 as adopted by the Department of Administrative Services, the Court finds:
The defendant is eligible for appointed counsel.

COUNSEL APPOINTMENT Check only one category

Joel Martin charged with a violation of the following:
Charge ID 1076075C Charge RSA: 630:1-b Charge Degree: Class A Felony
 1160341C 630:1-b Class A Felony
 1160342C 631:2 Class B Felony
 1160343C 631:2 Class B Felony
 1302290C 159:3 Felony

Witness or Victim representation. Name of Witness or Victim _____
 Other**: Probation Violation, Parole Revocation, etc. Specify _____
** To be checked when counsel is otherwise appointed to protect constitutional rights

Counsel appointed is: Public Defender. Name, address, phone number of attorney appointed to represent y

Name: Paul J. Garrity, ESQ Phone Number: 603-434-4106
Address: Garrity Law Office 14 Londonderry Road Londonderry NH 03053

Defendant is responsible for contacting Attorney. (Note: Liability begins with this appointment – not the trial)

Hearing is scheduled for Scheduling Conference 1/25/16 1:30 PM

Additional hearing is scheduled for

Additional hearing is scheduled for

Defendant is detained on \$ bail at Choose from list _____

NOTICE TO THE APPLICANT: Pursuant to RSA 604-A:9, you are liable to reimburse the state for legal expenses based on the appointment of counsel. You are ordered to contact the Office of Cost Containment (OCC) located at State House Annex, Room 400, 25 Capitol Street, Concord, NH 03301, (603) 271-1436 within 5 days of this order to verify your address and make payment arrangements as follows:

MINIMUM liability for your legal expense \$ 20,000.00. Pursuant to statute you may also be liable for other costs of representation and additional legal expenses at the end of your trial or hearing.

Your first payment due within five days of this order is \$ N/A. Unless you make other arrangements with OCC or they determine a different ability to pay, you are to pay this monthly until the minimum liability is re

FAILURE TO COMPLY WITH THIS ORDER MAY RESULT IN THE ISSUANCE OF A CONTEMPT CITATION THE DEDUCTION OF WAGES SUBJECT TO THE PROVISIONS OF RSA 512:21, OR BOTH.

Liabe Party Current Information – VERIFY YOUR MAILING ADDRESS:

Name: Joel Martin Phone Number: _____
Address: NHSP #79163 DOB: 11/04/1988
 PO Box 14
 Concord NH 03302

November 21, 2017
Date

/s/
Tina L. Nadeau, Chief Justice

SUPERIOR COURT

100 North Broadway Court Northern District
Concord, NH 03301

Telephone: 1 855 212 1234
TTY/DD Relay: (800) 735 2064
http://www.courts.state.nh.us

NOTIFICATION OF ELIGIBILITY, APPOINTMENT OF COUNSEL
NOTIFICATION OF LIABILITY AND REPAYMENT ORDER (ADULT/CR)

Case Name: State v. Joel Martin
Case Number: 216-2015-CR-00650

Check if an Appeal
 Amended date _____

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1160341C	630:1-b	Class A Felony
1160342C	631:2	Class B Felony
1160343C	631:2	Class B Felony
1302290C	159:3	Felony

Witness or Victim representation. Name of Witness or Victim: _____
 Other: Probation Violation, Parole Revocation, etc. Specify: _____
* To be checked when counsel is otherwise appointed to protect constitutional rights

Counsel appointed is: Public Defender. Name, address, phone number of attorney appointed to represent you:
Name: Justin Shepherd, ESQ Phone Number: 603-595-5525
Address: Shepherd & Osborne 351 Main Street, Nashua, NH 03060

Defendant is responsible for contacting Attorney. (Note: Liability begins with this appointment - not the trial)
Hearing is scheduled for Scheduling Conference 1/25/16 @1:30 PM
Additional hearing is scheduled for _____
Additional hearing is scheduled for _____

Defendant is detained on \$ bail at Choose from list: _____

NOTICE TO THE APPLICANT: Pursuant to RSA 604-A:9, you are liable to reimburse the state for legal expenses based on the appointment of counsel. You are ordered to contact the Office of Cost Containment (OCC) located at State House Annex, Room 400, 25 Capitol Street, Concord, NH 03301, (603) 271-1436 within 5 days of this order to verify your address and make payment arrangements as follows:

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FAILURE TO COMPLY WITH THIS ORDER MAY RESULT IN THE ISSUANCE OF A CONTEMPT CITATION, THE DEDUCTION OF WAGES SUBJECT TO THE PROVISIONS OF RSA 512:21, OR BOTH.

Liabe Party Current Information - VERIFY YOUR MAILING ADDRESS:

Name: Joel Martin Phone Number: _____
Address: NHSP #79163 DOB: 11/04/1988
PO Box 14
Concord NH 03302

November 21, 2017 _____
Tina L. Nadour, Chief Justice