

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0443

The State Of New Hampshire

v.

Joel Martin

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE
THE SUPERIOR COURT FOR THE NORTHERN DISTRICT OF
HILLSBOROUGH COUNTY

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

Gordon J. MacDonald
Attorney General

Katherine A. Triffon
N.H. Bar ID No. 268833
Attorney
Criminal Justice Bureau
33 Capitol Street
Concord, N.H. 03301-6397

(5 minutes, 3JX)

TABLE OF CONTENTS

TABLE OF AUTHORITIESii

ISSUES PRESENTED 1

STATEMENT OF THE CASE2

STATEMENT OF FACTS3

 A. The Crime.....3

 B. The appointment of defense counsel.....7

SUMMARY OF THE ARGUMENT 10

ARGUMENT..... 11

I. THE TRIAL COURT DID NOT ERR IN DENYING THE
DEFENDANT’S REQUEST TO FIRE HIS COUNSEL..... 11

 A. The defendant had appointed counsel, and therefore was not entitled
to counsel of his choice. 12

 B. The court performed a sufficient inquiry in order to determine if the
defendant had good cause to have new counsel appointed. 14

 1. Timeliness of the Motion. 14

 2. Adequacy of the Court’s Inquiry Into the Defendant’s
Complaint. 15

 3. Total Lack of Communication Preventing an Adequate
Defense..... 17

II. THE TRIAL COURT’S JURY INSTRUCTIONS WERE SUFFICIENT. 23

CONCLUSION.....29

CERTIFICATE OF SERVICE30

APPENDIX TABLE OF CONTENTS.....31

TABLE OF AUTHORITIES

Cases

Alvarado v. United States, 429 U.S. 1099 (1977)24

Boria v. Keane, 99 F.3d 492 (2d Cir. 1996) 18

Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989) 12, 13

Commonwealth v. Myers, 748 N.E.2d 471 (Mass. App. Ct. 2001)22

N.H. Ball Bearings, Inc. v. Jackson, 158 N.H. 421 (2009)23

State v. Burke, 122 N.H. 565 (1982)24, 26, 27

State v. Davidson, 163 N.H. 462 (2012).....23

State v. Dixon, 144 N.H. 273 (1999)24

State v. Furgal, 164 N.H. 430 (2012).....27

State v. Gonzalez, 170 N.H. 398 (2017) 12

State v. Lambert, 147 N.H. 295 (2001) 12

State v. Letendre, 133 N.H. 555 (1990).....27

State v. McMillan, 158 N.H. 753 (2009)23

State v. Moussa, 164 N.H. 108 (2012)..... 14, 15, 17, 18

State v. Saucier, 128 N.H. 291 (1986).....27

<i>State v. Sprague</i> , 166 N.H. 29 (2014).....	23, 24, 28
<i>State v. Sweeney</i> , 151 N.H. 666 (2005)	15, 20, 21, 22
<i>State v. Thomas</i> , 150 N.H. 327 (2003)	21
<i>State v. Wentworth</i> , 118 N.H. 832 (1978)	27
<i>Tuitt v. Fair</i> , 822 F.2d 166 (1st Cir. 1987).....	14, 19
<i>United States v. Allen</i> , 789 F.2d 90 (1st Cir. 1986).....	14, 16
<i>United States v. Brown</i> , 785 F.3d 1337 (9th Cir. 2015)	13
<i>United States v. Dodge</i> , 538 F.2d 770 (8th Cir. 1976), <i>cert. denied</i>	24
<i>United States v. Gonzalez-Lopez</i> , 548 U.S. 140 (2006)	12, 13
<i>United States v. Jimenez-Antunez</i> , 820 F.3d 1267 (11th Cir. 2016).....	14
<i>United States v. Mangual-Corchado</i> , 139 F.3d 34 (1st Cir. 1998)	15
<i>United States v. McKee</i> , 649 F.2d 927 (2d Cir. 1981).....	17
<i>United States v. Musa</i> , 220 F.3d 1096 (9th Cir. 2000)	21
<i>United States v. Prochilo</i> , 187 F.3d 221 n.8 (1st Cir. 1999)	15
<i>United States v. Richardson</i> , 894 F.2d 492 (1990).....	14
<i>United States v. Rivera-Corona</i> , 618 F.3d 976 (9th Cir. 2010).....	13
<i>United States v. Telfaire</i> , 469 F.2d 552 (D.C. Cir. 1972).....	24, 25

United States v. Woodard, 291 F.3d. 95 (1st Cir. 2002) 14, 20

United States v. Young, 482 F.2d 993 (5th Cir. 1973)..... 16

Statutes

RSA 159:3 (2014).....2

RSA 604-A:3 (2001)..... 13

RSA 630:1-b (2016)2

RSA 631:2 (2016).....2

Constitutional Provisions

N.H. Const. pt. 1, art. 15 12, 22

U.S. Const. Amend. VI..... 12, 22

ISSUES PRESENTED

1(a) Whether the trial court unsustainably exercised its discretion when it denied the defendant's motion to fire appointed counsel.

1(b) Whether the trial court had an obligation to specifically ask the defendant if he wanted to proceed *pro se* during its inquiry.

2. Whether the trial court's jury instruction on eyewitness reliability was sufficient.

STATEMENT OF THE CASE

On November 25, 2015, the defendant, Joel Martin, was indicted by a Hillsborough County Grand Jury on two counts of second degree murder, two counts of second degree assault, and one count of being felon in possession of a deadly weapon, for crimes he committed on May 9, 2015. DBA: 3-7.¹ See RSA 630:1-b (2016) (second degree murder); RSA 631:2 (2016) (second degree assault); RSA 159:3 (2014) (felon in possession).

After a week-long trial, a jury found the defendant guilty of murder and both counts of assault. T: 1085-87. The defendant had previously waived his right to a jury trial on the charge of felon in possession, and the trial court (Brown, J.) found the defendant guilty of that charge on March 8, 2017. T: 8-9; 1089.

On June 28, 2017, the court sentenced the defendant to a term of forty years to life on the murder conviction, ten to thirty years on each count of second degree assault (with one running consecutively to the sentence on the murder), and five to ten years on the felon-in-possession charge, to run concurrently with the murder sentence. S:45-49.

¹ "A" refers to the Appendix of the State's brief.

"DB" refers to the defendant's brief.

"DBA" refers to the Appendix in defendant's brief.

"FPT" refers to the transcript of the Final Pre-Trial hearing.

"M" refers to the transcript of the motion to withdraw hearing from February 21, 2017.

"MH" refers to the transcript of the motion hearing from February 23, 2017.

"S" refers to the transcript of the sentencing hearing on June 28, 2017.

"T" refers to the transcripts of trial from February 27, 2017 to March 8, 2017.

STATEMENT OF FACTS

A. The Crime.

Late on Friday, May 8, 2015, the defendant and his girlfriend, Kayla Thomas, entered a nightclub in downtown Manchester called “Club Drynk.”

T: 197. Shortly after they entered, the defendant was observed speaking with three other men, including the murder victim, D.R., by the bar. T: 332–34. A fight broke out between the defendant and these three other men, and several other people—including Tresor Kapila, a promoter at the club, Jamal Anderson, and Aleksander Dobrovic, also employed by the club—intervened to break up the fight. Both Dobrovic and Kapila knew the defendant from previous interactions with him. T: 320, 455. Dobrovic saw the defendant holding a knife right after the fight, and was afraid for his safety. T: 457. Dobrovic testified that he was 100 percent certain that he saw the defendant with a knife, T: 461, and was immediately able to show Detective Fleming a Facebook picture of the defendant when the detective questioned him at Club Drynk later that night, T: 107; 117. No one else but the defendant had a knife that night. T: 430.

After this initial fight was broken up, the defendant retreated to another part of the bar, but very soon after he was seen holding a knife, walking quickly to where D.R. was standing. T: 335–38. The defendant stabbed D.R. twice, once in the chest and once on the buttock, and D.R. slumped over and said, “I got stabbed,

I got stabbed.” T: 340–42. Police and paramedics attempted to save D.R.’s life, but he died later that night at the hospital from the stab wound to his chest. T: 704. The stab wound the defendant inflicted to D.R.’s chest punctured his heart and lung, and was done with such force that it fractured one of his ribs. T: 687–91. Additionally, the defendant sliced D.R. on his left buttock, creating a nearly six-inch incise wound, which was so deep that it exposed the fat and muscle. T: 698–700.

Immediately after the stabbing, Alex Blaisdell, a security guard at the club, ran over to where the defendant and D.R. were and wrestled with the defendant, trying to pull him off D.R. T: 197; 754; 792. Blaisdell then felt a stab to his left hamstring and cried out, “Help—he’s poking me.” T: 756; 791. Another bouncer, James Santiago, heard Blaisdell and took it to mean that he was getting stabbed. T: 791. Santiago came in and grabbed the defendant and reached in between him and Alex and felt a knife. T: 757; 791–92. Santiago then felt the knife close and heard the defendant scream. T: 791–92. As Santiago was struggling with the defendant, he felt a poke in his palm and a slash to his finger from the knife and was later treated at the hospital for a puncture wound and laceration to his hand. T: 791–93. Blaisdell was subsequently treated at the hospital for the stab wound to his thigh and received stitches. T: 758.

Santiago got a hold of the defendant, picked him up, and dragged him toward one of the club exits. T:803. This was captured on surveillance footage, and during his testimony, Santiago identified himself on that footage, and stated that the man struggling with Blaisdell was the same man he carried out of the club. T: 791-95. The individual on the surveillance footage being carried by Saniago was identified by Detective Leshney as the defendant. T: 249, 803.

Kim Beaulieu, an EMT, responded to reports of a stabbing at Club Drynk on May 9, 2015, at around 1:15 a.m. T:569. She and her partner were waived down by a police officer because there was a person bleeding behind Harry Theo Lane; that person was the defendant. T: 570. Beaulieu testified that the defendant had significant injuries to his finger and was wholly uncooperative; he refused to answer any questions including how he sustained his injuries. T: 571-73. The only thing the defendant said to her was, "Don't cut my clothing off." T: 574.

The defendant sustained a laceration to his neck and his finger was partially amputated. T:572. The defendant was seen on video surveillance leaving the club with a towel or piece of cloth around his hand. T:202-03. Detective Justin Breton, who processed the crime scenes later that night, testified that there was a trail of blood from the parking lot of Drynk to the parking lot of the Shell gas station at 570 Elm Street and then into the lot at 533 Elm Street, which was adjacent to Harry Theo Lane, where the defendant was discovered by police. T: 527-30, 570.

The defendant was transported to the Elliot Hospital for treatment of his injuries. T: 574. Officer Jared Maguire responded to the Elliot Hospital and made contact with the defendant. T: 587. Officer Maguire saw that the defendant was bandaged in multiple locations and asked the defendant how he got his injuries. T: 587. The defendant told Officer Maguire that he did not want to speak to him regarding the fight. T: 587-88. The defendant's clothing was taken as evidence by Officer Jered Maguire while at the hospital. T: 588. The defendant was ultimately transported to Mass General Hospital for further medical treatment. T: 620. Following his treatment, the defendant was taken into custody by the Boston Police. T: 620.

A body warrant was executed on the defendant while he was in the custody of Boston Police. T: 620-21. As part of the body warrant, Detective Dupont swabbed the defendant's cheeks and buccal area for a DNA sample, sealed the swabs in an evidence box, and labeled it. T: 620, 628. The defendant's DNA was sent to the State Laboratory and compared with other evidentiary items, including the defendant's blood-stained polo shirt and Blaisdell's jeans and tee shirt. T: 644-55. The defendant's polo shirt and Blaisdell's jeans and tee shirt both contained the defendant's DNA. T:648, 54-55. The defendant's shirt also had DNA from a second individual, but was in such a small amount that it could not be identified. T: 648.

B. The appointment of defense counsel.

On May 12, 2015, the defendant was found eligible to be represented by New Hampshire Public Defenders, and Eric Raymond and Kyle Robidas were appointed. DBA: 8–9. On June 3, 2015, Paul Garrity filed a notice of appearance and Raymond and Robidas subsequently withdrew. DBA: 11–15.

On February 16, 2017, Garrity filed a motion for appointment of counsel. A: 16–18. In this motion, Garrity stated that he had not been paid since July 18, 2015, and the total fees received were less than called for by a fee agreement that had been entered into by the defendant’s family. A: 16. The defendant had filed a financial affidavit on December 6, 2016 and was found to be indigent. A: 20. This situation was further explained to the court on February 15, 2017, when Garrity stated that the defendant’s family had paid a portion of the fee agreement, but then ran out of money “a while ago” and because he was “fully invested” in the case, he didn’t want to withdraw. FPT: 25–27. The court stated that it would not “have a problem with [appointing Garrity].” FPT: 26.

On February 23, 2017, Garrity addressed the court regarding this motion, asking, “Would there be a date that it [the motion for appointment] will be effective? I’ve been keeping track of my hours for the last month or so.” MH:19. The court then stated that the appointment would be effective from the date of filing, but not retroactive for purposes of payment from before that date. MH: 19.

On March 3, 2017, the court issued an order granting Paul Garrity and Justin Shepherd's motion to be appointed as defendant's counsel. A: 23. The order found that the defendant was indigent and could not afford to pay for legal services, and that continuing the trial in order to allow the Public Defender's Office to get up to speed would prejudice both the defendant and the State. A: 21. The court concluded that Garrity and Shepherd were the only "adequate representation" available to represent the defendant at trial. A: 22. The court ended by noting that this order holds no precedential value and was limited entirely to the unique facts of this particular case. A: 23.

Notices of eligibility and appointment of counsel were included in the official court file for attorneys Garrity and Shepherd on November 21, 2017, and Garrity was listed as "court appointed." A: 1; 14.

On February 21, 2017, defense counsel filed their motion to withdraw, stating therein that after a meeting with the defendant on February 18, 2017, the defendant requested that attorneys Garrity and Shepherd withdraw from his case. DBA: 1. The court held a hearing on this matter on February 21, 2017. M: 1. The court inquired of the defendant why he was dissatisfied with his attorneys and the defendant listed his reasons: they were late in getting him discovery; he wanted a second opinion on a forensic issue; he felt his attorney wanted him to plead guilty; he believed that evidence had been tampered with; and he wanted a certain person

called as a witness for the defense and his attorneys were not inclined to call them. M: 3-6. The court gave Garrity an opportunity to respond and Garrity explained that he did obtain a second opinion on the forensic issue and it was not the answer the defendant wanted; he had merely conveyed the State's offer to his client; he had his investigator actively talking to witnesses and looking for exculpatory material however there wasn't any; the witness the defendant wanted to call was the defendant's girlfriend who had a number of issues, and he had decided that strategically, it was not a good idea to call her. M: 6-7. After hearing from both the defendant and Garrity, the court denied the motion. DBA: 1; M: 8. The defendant's case proceeded to trial on February 27, 2017, with attorneys Garrity and Shepherd representing him.

SUMMARY OF THE ARGUMENT

1(a). The defendant's constitutional right to counsel of choice is contingent on whether or not that counsel was appointed or retained. In this case, attorneys Garrity and Shepherd were appointed by the trial court, effective beginning February 16, 2017. Under the law, if a defendant has appointed counsel, he is not entitled to counsel of his choice.

1(b). The court performed a sufficient inquiry when the defendant stated that he was dissatisfied with his counsel. The court allowed the defendant to state his reasons for wanting new counsel, and also gave Garrity an opportunity to respond. The reasons the defendant gave for his dissatisfaction did not meet the threshold of good cause for the purpose of having new counsel appointed. Because the court conducted a sufficient inquiry and found good cause lacking, the court was not then obligated to ask the defendant how he wished to proceed at trial.

2. The court was under no obligation to include a factor of alcohol impairment as an element of things the jury should consider in evaluating the reliability of eyewitness testimony. The trial court's final jury instructions accurately and adequately stated the law for the jury to apply.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S REQUEST TO FIRE HIS COUNSEL.

The defendant raises three issues on appeal, the first two of which both concern the trial court's inquiry when the defendant expressed the desire to dismiss his attorney before trial. First, the defendant argues that the trial court failed to conduct a sufficient inquiry regarding whether the defendant wanted to represent himself at trial. DB: 8-13. Next, the defendant argues that he had the constitutional right to his counsel of choice regardless of his reasons for wanting to replace his current attorney, and therefore that he did not need to show good cause to dismiss his attorney. Rather, the only determination the trial court needed to make was how the defendant wished to proceed. DB: 13-20.

In this brief, the State will first argue that because the defendant's attorney was appointed, and not retained, he did not have the same right to counsel of choice that a defendant with retained counsel would have had. From this premise, the State will then discuss the factors that this Court should consider in deciding whether the defendant demonstrated good cause to dismiss his appointed attorney. And finally, the State will argue that the inquiry conducted by the court on this point was sufficient.

Cases which involve the denial of a defendant's request to have new counsel appointed are reviewed for an unsustainable exercise of discretion by the

trial court. In order to have new counsel appointed, the defendant needed to show good cause, which he was unable to do. Therefore there was no abuse of discretion by the trial court here. *See State v. Lambert*, 147 N.H. 295 (2001).

A. The defendant had appointed counsel, and therefore was not entitled to counsel of his choice.

Part 1, article 15 of the New Hampshire Constitution and the Sixth Amendment to the United States Constitution guarantee the right to counsel of one's choice, but only when counsel is retained, not when counsel is appointed. *State v. Gonzalez*, 170 N.H. 398, 404 (2017). This point is clearly addressed in a case heavily cited by the defendant, *United States v. Gonzalez-Lopez*, 548 U.S. 140, 142 (2006): "A criminal defendant's right, under the Federal Constitution's Sixth Amendment, to counsel of choice is circumscribed in several important respects, as (1) the right to counsel of choice does not extend to defendants who require counsel to be appointed for them"

The defendant references a quote from *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 (1989), DB: 16, that also illustrates this holding: "The Amendment guarantees defendants in criminal cases the right to adequate representation, but those who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts." The United States Court of Appeals for the

Ninth Circuit has also held that when the court has appointed an attorney for an indigent defendant, the defendant, like all criminal defendants, has a constitutional right to effective counsel, but does not have the right to counsel of his choice. *United States v. Brown*, 785 F.3d 1337, 1343 (9th Cir. 2015); *United States v. Rivera-Corona*, 618 F.3d 976, 979 (9th Cir. 2010).

As previously mentioned, the defendant qualified for appointed counsel when he was first charged with these crimes in May 2015, and had the New Hampshire Public Defender appointed to his case for one month. DB:19. Paul Garrity was retained soon after by the defendant's family, but they ran out of money sometime in July 2015. FPT: 26–27; A: 16–17. The defendant signed a financial affidavit affirming his indigency sometime after this. A: 16. Paul Garrity and Justin Shepherd were “appointed counsel” under RSA 604-A:3 (2001) from the date the motion for appointment was filed: February 16, 2017. A: 20–23. They were therefore appointed counsel when the defendant was before the court on the motion to withdraw on February 21, 2017. MH: 19.

The defendant falls under the category described in *Caplin* and *Gonzalez-Lopez* of those who cannot hire their own lawyers, but who are eligible for appointed counsel. Because Garrity and Shepherd were appointed, the defendant did not have the right to counsel of his choice at the time the motion was raised.

B. The court performed a sufficient inquiry in order to determine if the defendant had good cause to have new counsel appointed.

Because Garrity and Shepherd were appointed to the defendant as of February 16, 2017, in order to replace them, the defendant would have had to show good cause. “An indigent criminal defendant who seeks appointed counsel does not have a right to have a particular lawyer represent him nor to demand a different appointed lawyer except for good cause.” *United States v. Jimenez-Antunez*, 820 F.3d 1267, 1271 (11th Cir. 2016).

This Court has adopted the following factors to be used in determining whether or not good cause exists: “The timeliness of the motion, the adequacy of the court’s inquiry into the defendant’s complaint and whether the conflict between the defendant and his counsel was so great it resulted in a total lack of communication preventing an adequate defense.” *State v. Moussa*, 164 N.H. 108, 114 (2012) (citing *United States v. Woodard*, 291 F.3d 95, 106 (1st Cir. 2002)).

1. Timeliness of the Motion.

The First Circuit has consistently held that this type of motion brought on the day of trial is untimely. *See United States v. Richardson*, 894 F.2d 492, 497–98 (1990) (defendant moved to substitute a privately-paid lawyer for his court-appointed attorney on the morning of trial); *Tuitt v. Fair*, 822 F.2d 166, 168 (1st Cir. 1987) (defendant informed the court on the day of trial that he wished to retain counsel); *United States v. Allen*, 789 F.2d 90, 93 (1st Cir. 1986) (defendant

filed a motion for counsel to withdraw two weeks before trial). Here, the defendant brought the motion six days before trial even though the record reflects that his dissatisfaction with counsel had been going on for months: “I originally requested to see the video of the night in question a year ago.” M:4. The First Circuit in *United States v. Mangual-Corchado*, 139 F.3d 34, 42 (1st Cir. 1998), dismissed as untimely a motion to replace counsel filed by the defendant who had failed to act until three weeks before trial, even though he claimed that counsel had kept him waiting for five or six months for documents. Here, the trial court specifically held, “I’m not going to replace counsel on the eve of trial.” M: 8. The trial court found the defendant’s request to be untimely under the standard set by the First Circuit, and such a finding did not constitute an “unsustainable exercise of discretion.”

2. Adequacy of the Court’s Inquiry Into the Defendant’s Complaint.

“When a defendant voices objections to counsel, the trial court should inquire into the reasons for the dissatisfaction.” *Moussa*, 164 N.H. at 114. Here, the State does not dispute that when the defendant asked Garrity to withdraw, it constituted a “triggering statement,” and necessitated an inquiry by the court. *State v. Sweeney*, 151 N.H. 666, 672 (2005). The extent and nature of the required inquiry may vary in each case, however; it need not amount to a formal hearing. *See United States v. Prochilo*, 187 F.3d 221, 229 n.8 (1st Cir. 1999). Here, after

counsel filed their motion to withdraw, the court immediately asked the defendant why he wanted to fire them and the defendant went on to list several reasons: He felt that counsel was pressuring him to take a plea, he believed counsel was late in getting him discovery, and he wanted counsel to call his girlfriend as a witness.

DBA: 1-2; M: 1-9. The court gave the defendant all the time he wanted to explain his reasoning, and then also gave counsel an opportunity to give their version of events. M: 8.

In *Allen*, defense counsel was appointed and the defendant believed that his lawyer's suggestion to plead guilty indicated that the lawyer thought he was guilty. The court, citing *United States v. Young*, 482 F.2d 993, 995 (5th Cir. 1973), held that the defendant did not have a right to demand a different appointed lawyer, except for good cause, and finding good cause lacking, denied the defendant's request to fire counsel: "The court convened a session at which appellant's complaint was aired. The court invited appellant to make a statement, listened to his reasons for being dissatisfied with his counsel, and found them to be without merit." *Allen* 789 F.2d at 93.

Alone, the defendant's opinion that counsel has been inadequate is not sufficient to show good cause that new counsel must be appointed. "Good cause for substitution of counsel cannot be determined solely according to the subjective

standard of what the defendant perceives.” *United States v. McKee*, 649 F.2d 927, 932 (2d Cir. 1981).

There was no indication here either from the defendant or from counsel that counsel was not prepared to proceed to trial, nor did the defendant’s dissatisfaction give rise to the necessity of having a new attorney appointed. The court stated, “I’m not going to replace counsel on the eve of trial based upon what I just heard.” M:8. This was an entirely proper and justifiable ruling given the defendant’s representations to the court and the timing of the motion.

3. Total Lack of Communication Preventing an Adequate Defense.

When assessing the third factor, whether a total breakdown in communication has occurred, the court must determine “whether [defense counsel’s] preparation was so deficient as to constitute ineffective assistance.” *Moussa*, 164 N.H. at 116. Here, the court specifically addressed the thoroughness of defense counsel’s work on the case, stating, “I’ve seen the work that your counsel have put into this, to think it hasn’t been competently pursued, diligently pursued, so motion to withdraw denied.” M: 8.

The defendant said that counsel “ignore[d] most of [his] requests and he actually [was] trying to get [him] to—persuade [him] into taking the State’s plea, which [he didn’t] want to whatsoever.” M: 5. Regardless of whether the defendant wanted to accept the State’s plea offer, an attorney is obligated to convey a plea

offer to his client. “A defense lawyer in a criminal case has the duty to advise his client fully on *whether a particular plea to a charge appears to be desirable.*” *Boria v. Keane*, 99 F.3d 492, 496 (2d Cir. 1996) (emphasis added). Garrity never indicated that he was unwilling to proceed to trial or was unable to represent the defendant. In fact, Garrity expressly voiced his desire to remain on the defendant’s case in his motion for appointment because of the “impracticality of the Public Defender’s Office taking over a murder case approximately a week and a half before trial.” A: 16. It is also worth noting that the defendant never said that he felt coerced into accepting the plea offer.

Additionally, Garrity listed the actions he had taken in response to each of the defendant’s requests and complaints, which in and of itself proves that communication was occurring and ongoing. He also stated his reasoning behind those actions: “Strategically it may not be in his best interest” M: 7. “Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” *Moussa*, 164 N.H. at 117. The defendant’s complaints do not meet the standard set by *Moussa*, and there is nothing in the record to suggest that a total lack of communication preventing an adequate defense had occurred.

Defense counsel filed their motion to withdraw on February 21, 2017, six days before the defendant’s homicide trial was to begin. DBA: 1. Later that same

day, the court held an *ex parte* hearing and spoke with the defendant, explicitly asking, "Tell me in your own words why you think you're entitled to new counsel?" M: 3. The defendant proceeded to go through a list of grievances he had against his attorneys, specifically: it took them a while to get him discovery on the case; he wanted a second opinion on a "forensic issue" which his attorneys allegedly denied; he felt that his counsel were trying to get him to take the State's offer; counsel allegedly refused to speak with other witness who the defendant felt would exonerate him; and counsel refused to investigate possible evidence tampering that the defendant believed took place. M: 3-6.

The court then asked for Garrity's position on these issues. M: 6. Garrity stated that he had looked into the "forensic issue" the defendant mentioned and met with an expert, and the defendant was just not happy with the expert's answers. M: 6. Attorney Garrity also stated that his investigator was actively talking to witnesses and looking for any possible exculpatory information, but none had been uncovered. As for calling the witness the defendant believed would exonerate him, Garrity said there were issues with that witness and it was not a good tactical move. M: 7.

"An attorney is not obligated to pursue weak options when it appears, in light of informed professional judgment that a defense is implausible or insubstantial." *Tuitt*, 822 F.2d at 172. Just because the defendant thought that his

girlfriend would make a good witness does not mean that his attorney must then call her as a witness. M: 7. Additionally, Garrity spoke with an expert at the defendant's behest but then deemed the testimony that the expert would offer unhelpful to their case. M: 6. The defendant's displeasure at these developments does not create good cause to have new counsel appointed. *See Woodard*, 291 F.3d at 108 ("Good cause cannot be determined solely according to the subjective standard of what the defendant perceives. Loss of trust, standing alone, is insufficient.").

The defendant devotes most of his first argument to the position that the trial court was obligated to inquire specifically into whether he intended to invoke his right to self-representation. For this, the defendant relies heavily on *State v. Sweeney*, 151 N.H. 666 (2005). This reliance is misplaced.

The issue at the heart of *Sweeney* was not that the defendant tried to invoke his right to self-representation and this right was denied, but rather that there is no way of knowing what the defendant wanted to do, because no inquiry was conducted. "The difficulty is that we have no way of knowing which of these two scenarios—or perhaps some third scenario—is the true story. And the reason the true story is not known is that the [trial] court did not inquire and make findings." *Sweeney*, 151 N.H. at 672. Thus, *Sweeney* is inapposite because the defendant in *Sweeney* received absolutely no inquiry from the court.

The court in *Sweeney* dismissed the defendant's query whether he could fire his lawyer with a perfunctory "no." *Id.* at 669. There was no follow-up questioning by the court, and no further exploration or explanation. Indeed, this Court held that "the trial court had the duty to eliminate the ambiguity of the question by asking the defendant why he wanted to fire counsel." *Id.* at 671. "We strongly prefer that trial court judges conduct an inquiry with a defendant who wishes to waive his right to counsel" *State v. Thomas*, 150 N.H. 327, 329 (2003). In stark contrast to *Sweeney*, the trial court here explicitly told the defendant, "Mr. Martin, tell me in your own words why you think you're entitled to new counsel." M: 3.

One of the reasons reviewing courts prefer an inquiry is explained in *United States v. Musa*, 220 F.3d 1096, 1102 (9th Cir. 2000): "The absence of any inquiry by the district court deprives this court of a sufficient basis to conduct our review of [the defendant's] request." As in *Sweeney*, the trial court in *Musa* conducted no inquiry, leaving no substance for the reviewing court to work with in determining whether the trial court's rejection of the request constituted an abuse of discretion. The trial court here did inquire—in fact, the court had an entire dialogue with the defendant—asking the defendant why he wanted to fire his counsel, giving him adequate time to answer and responding with follow-up inquiry and reasoning.

While the statement made by the defendant in *Sweeney* was indeed a "triggering statement," it was not a bright line request to proceed *pro se*, and it is

misplaced for the defendant to argue that. “While we agree with the State that the defendant’s question did not, by itself, constitute a demand to proceed *pro se*, see *Commonwealth v. Myers*, 748 N.E.2d 471, 475 (Mass. App. Ct. 2001), we hold that it was sufficient to trigger the court’s duty to inquire further.” *Sweeney*, 151 N.H. at 670. As discussed at length above, the trial court conducted such an inquiry. M: 3–8. For every complaint the defendant put forth, Garrity was able to detail how he had followed up with the defendant’s requests, from retaining the services of a forensic pathologist, to sending his investigator out to interview witnesses in order to try to find any exculpatory information. M: 6–8. The defendant was unable to make a showing of good cause for firing counsel, and having satisfied the duty of inquiry, the trial court was under no obligation to ask the defendant how he wished to proceed. There was no violation of the defendant’s constitutional rights under either part 1, article 15 or the Sixth Amendment.

II. THE TRIAL COURT'S JURY INSTRUCTIONS WERE SUFFICIENT.

The defendant claims error in the trial court's final jury instructions. He argues that the trial court erred when it failed to add an intoxication instruction to the standard eyewitness identification instruction. "When reviewing jury instructions, [this Court will] evaluate allegations of error by interpreting the disputed instructions in their entirety, as a reasonable juror would have understood them, and in light of all the evidence in the case." *State v. Davidson*, 163 N.H. 462, 472 (2012).

Specifically, the defendant wanted the court to add: "whether, at the time of the observation, the witness was under the influence of alcohol and, if so, to what degree." DB: 21. As the defendant points out, "jury instructions are within the sound discretion of the trial court." *State v. Sprague*, 166 N.H. 29, 33 (2014) (quotation omitted). The purpose of jury instructions is to identify issues of material fact, and to explain to the jury, in clear and intelligible language, the appropriate standard of law by which it is to resolve them." *N.H. Ball Bearings, Inc. v. Jackson*, 158 N.H. 421, 433-34 (2009). "Whether or not a particular jury instruction is necessary, and the scope and wording of the instruction, is within the sound discretion of the trial court, and [this Court will] review the trial court's decisions on these matters for an unsustainable exercise of discretion." *State v. McMillan*, 158 N.H. 753, 756 (2009). The defendant must therefore establish that

the trial court's denial of the inclusion of this element was "clearly untenable or unreasonable to the prejudice of his case." *Sprague*, 166 N.H. at 33. "The defendant bears the burden to show that he has been prejudiced by the charge as given." *State v. Dixon*, 144 N.H. 273, 282 (1999). The defendant is unable to show this. The trial court's overall charge to the jury stated the law correctly.

In *State v. Burke*, 122 N.H. 565 (1982), cited by the defendant, this Court held that in cases where eyewitness identification is essential to the State's case, this Court:

like the United States Circuit Court of Appeals for the Eighth Circuit, "will view with grave concern the failure to give specific and detailed instructions on identification . . . where identification of the defendant is based solely or substantially on eyewitness testimony." See *United States v. Dodge*, 538 F.2d 770, 784 (8th Cir. 1976), *cert. denied*, *Alvarado v. United States*, 429 U.S. 1099 (1977). We suggest that the trial courts be guided by the instruction set forth in *United States v. Telfaire*, 469 F.2d 552, 558-59 (D.C. Cir. 1972), where applicable. In the *Telfaire* instruction, the jury is asked to examine whether the witness had the capacity and an adequate opportunity to observe the offender; whether the witness' identification was the product of his own recollection; whether the witness had ever failed to identify the defendant, or identified him incorrectly; and whether the witness was credible.

Id. at 571.

The *Telfaire* instruction is more or less exactly what the trial court instructed the jury on. The elements of the *Telfaire* instruction are as follows:

Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender?

Are you satisfied that the identification made by the witness subsequent to the offense was the product of his own recollection? You may take into account both the strength of the identification, and the circumstances under which the identification was made.

You may take into account any occasions in which the witness failed to make an identification of defendant, or made an identification that was inconsistent with his identification at trial.

Finally, you must consider the credibility of each identification witness in the same way as any other witness, consider whether he is truthful, and consider whether he had the capacity and opportunity to make a reliable observation on the matter covered in his testimony.

Telfaire, 469 F.2d, at 558-59.

The instruction read by the trial court here was:

In your appraising the identification testimony of a witness, you should consider the following: did the witness have the capacity and adequate opportunity to observe the person in question at the time of the crime?

In determining this, you may consider such factors as the length of time available for the observation; the distance between the witness and the person observed; the lighting conditions; the witness's degree of attention to the person observed; the accuracy of any prior description of the alleged perpetrator; whether the witness had an occasion to see or know the person identified in the past; was the identification made by the witness after the crime; the part of his or her own recollection.

You must consider the credibility of each identification witness in the same way as any other witness, including whether you consider the witness to be truthful; and whether the witness had the capacity and opportunity to make a reliable observation on the matter covering the identification testimony.

T: 1063.

The defendant argues that the instruction “directed jurors away from considering an eyewitness’s level of intoxication in evaluating the reliability of his identification” DB: 24. Rather than directing jurors away, by incorporating standard language in the jury instructions on the evaluation of eyewitness testimony, the trial court neither commented on the evidence nor directly supported the State’s theory of the case. The court merely set forth possible factors to consider. Furthermore, as the State argued when this issue was first raised at trial, it was entirely appropriate for the defendant to argue intoxication as a factor during his summation which the defendant did indeed do. T: 963; 984. The opportunity to argue elements of jury instructions in closing argument was also discussed in *Burke*: “In addition, all of the factors mentioned in the requested instruction were scrutinized during cross-examination of Mr. Doiron. Furthermore, during his closing argument, Mr. Flynn's attorney emphasized the inconsistencies in the witnesses’ testimony and the factors which might have detracted from the reliability of Mr. Doiron’s identification.” *Burke*, 122 N.H. at 571.

Not only did the trial court instruct the jury on all of the *Telfaire* elements, but also twice included in its eyewitness testimony instruction a statement that the jury “must be satisfied beyond a reasonable doubt of the accuracy of identification, and: “If, after examining the evidence, you have a reasonable doubt

as to the accuracy of the identification, you must find the defendant not guilty.”

T: 1062–63.

The defendant submits that because the trial court failed to offer intoxication as an element for the jury to consider, it was a *de facto* order for the jury not to consider it because “a reasonable juror could conclude that the court, and thus the law, regarded the impact of intoxication as less important than the listed factors.” DB: 24. This argument fails to compute. “The purpose of a trial court’s instruction is to state and explain to the jury, in clear and intelligible language, the rules of law applicable to the case.” *State v. Saucier*, 128 N.H. 291, 299 (1986). The eyewitness testimony instruction given by the trial judge did just that, and what is more: “The trial court is not required to use the specific language requested by the defendant.” *State v. Furgal*, 164 N.H. 430, 434 (2012).

This Court addressed the issue of a jury instruction which deviated significantly from the model jury instructions in *State v. Letendre*, 133 N.H. 555, 556 (1990). The *Letendre* trial court failed to use the definition of reasonable doubt that had been heavily encouraged by this Court in *State v. Wentworth*, 118 N.H. 832, 835 (1978). However even in light of that deviation, this Court still held that the “charge as a whole conveyed the correct concept.” *Id.* at 559.

Even if the Court were to put aside the holdings of *Burke* and *Furgal*, the trial court’s jury instruction on eyewitness credibility was more than sufficient

when reviewed in light of all the evidence presented by both sides at trial. The trial court gave an almost-verbatim *Telfaire* instruction, and the defendant had ample opportunity to cross examine the State's eyewitnesses, and to argue their reliability (or lack thereof) in closing statements, which he did. T: 977-96; 1062-63. The defendant has not met the burden of showing that the court's discretion was "clearly untenable or unreasonable to the prejudice of [the defendant's] case." *Sprague*, 166 N.H. at 29.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State requests a 15-minute oral argument.

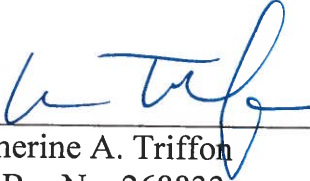
Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

Gordon J. MacDonald
Attorney General

May 14, 2018



Katherine A. Triffon
NH Bar No. 268833
Attorney
Criminal Justice Bureau
33 Capitol Street
Concord, N.H. 03301-6397

CERTIFICATE OF SERVICE

I, Katherine A. Triffon, hereby certify that I have sent two copies of the State's brief to counsel for the defendant, Eric S. Wolpin, Assistant Appellate Defender, by first-class mail postage prepaid, at the following address:

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

May 14, 2018



Katherine A. Triffon

APPENDIX TABLE OF CONTENTS

1. Case Summary1-15

2. Defendant’s Motion For Appointment of Counsel.....16-18

3. Court Order.....19-23

HILLSBOROUGH SUPERIOR COURT NORTHERN DISTRICT

CASE SUMMARY
CASE NO. 216-2015-CR-00650

State v. Joel Martin

§
§
§
§

Location: Hillsborough Superior Court
 Northern District
 Judicial Officer: Brown, Kenneth C
 Filed on: 06/01/2015

CASE INFORMATION

Offense	Statute	Deg	Date	Case Type:	Criminal
Jurisdiction: Manchester					
1. 2nd Degree Murder	630:1-b	FELA	05/09/2015	Case Status:	11/25/2015 Pending
ChargeID: 1076075C	ACN: 007025J151076075001				
Arrest:	MANC - Manchester Police Department				
2. 2nd Degree Murder	630:1-b	FELA	05/09/2015		
ChargeID: 1160341C	ACN: 007025J151160341002				
Arrest:					
3. 2nd Degree Assault	631:2	FELB	05/09/2015		
ChargeID: 1160342C	ACN: 007025J151160342003				
Arrest:					
4. 2nd Degree Assault	631:2	FELB	05/09/2015		
ChargeID: 1160343C	ACN: 007025J151160343004				
Arrest:					
5. Felon in Possession of Dangerous Weapon	159:3	F	05/09/2015		
ChargeID: 1302290C	ACN: 007025J151302290005				
Arrest:					

Related Cases

456-2015-CR-02703 (Information Only Cross Reference)

PARTY INFORMATION

Defendant	Martin, Joel NHSP #79163 P.O. Box 14 Concord, NH 03302 Black Male Height 5' 9" Weight 180 DOB: 11/04/1988 Age: 26	<i>Attorneys</i> Garrity, Paul J., ESQ Court Appointed 603-434-4106(W)
Prosecutor	Attorney General's Office NH Department Of Justice 33 Capitol Street Concord, NH 03301	
Co-Counsel - Defendant/Respondent	Shepherd, Justin C., ESQ Shepherd & Osborne PLLC 351 Main Street 2nd Floor Nashua, NH 03060	
Jail Facility	Offender Records NH State Prison PO Box 14 Concord, NH 03302-0014	
Plaintiff	Attorney General's Office NH Department Of Justice 33 Capitol Street Concord, NH 03301	

DATE	EVENTS & ORDERS OF THE COURT	INDEX
05/27/2015	Interim Condition for Martin, Joel (Judicial Officer: Lyons, William H) - Standard Bail Conditions of RSA 597 to be held without bail	
05/27/2015	Boundover - Probable Cause Found/Waived	

HILLSBOROUGH SUPERIOR COURT NORTHERN DISTRICT

CASE SUMMARY
CASE NO. 216-2015-CR-00650

<i>Charges: 1</i>		
06/01/2015	Complaint <i>Charges: 1</i>	<i>Index #1</i>
06/08/2015	Appearance Filed by: Attorney Garrity, Paul J., ESQ	<i>Index #2</i>
06/10/2015	Notice of Boundover <i>Charges: 1</i>	<i>Index #3</i>
06/11/2015	Withdrawal <i>Eric Raymond, Esq.</i>	<i>Index #4</i>
06/15/2015	Withdrawal <i>Melissa Lynn Davis, Esq.</i>	<i>Index #5</i>
08/26/2015	Motion to Extend Deadlines Filed by: Plaintiff Attorney General's Office <i>to Seek Indictment to 10/25/15 Assented-to</i>	<i>Index #6</i>
09/01/2015	Granted (Judicial Officer: Brown, Kenneth C)	
09/02/2015	Ntc of Eligibility and Appt of Counsel	<i>Index #7</i>
10/15/2015	Motion to Extend Deadlines Filed by: Attorney Kennedy, John J., ESQ <i>Time to Seek Indictment Assented-to</i>	<i>Index #8</i>
10/22/2015	Granted (Judicial Officer: Brown, Kenneth C) <i>After review, motion granted, no further continuances for the same reason.</i>	
11/25/2015	Indictment <i>Charges: 1, 2, 3, 4</i>	<i>Index #9</i>
12/07/2015	Transport Order Party: Defendant Martin, Joel <i>Charges: 1, 2, 3, 4</i>	<i>Index #10</i>
12/14/2015	Entry of Not Guilty Plea and Waiver of Arraignment Filed by: Attorney Garrity, Paul J., ESQ	<i>Index #11</i>
12/14/2015	Bail Order (Judicial Officer: Abramson, Gillian L) <i>No bail</i>	<i>Index #12</i>
12/14/2015	Interlm Condition for Martin, Joel (Judicial Officer: Abramson, Gillian L) - Standard Bail Conditions of RSA 597 <i>to be held without bail</i>	
12/15/2015	CANCELED Arraignment/Bail Hearing	
12/17/2015	Transport Order <i>NHSP for 1/25/15</i>	<i>Index #13</i>
01/20/2016	Assented to Motion to Continue	<i>Index #14</i>
01/21/2016	Granted (Judicial Officer: Brown, Kenneth C)	

HILLSBOROUGH SUPERIOR COURT NORTHERN DISTRICT

CASE SUMMARY

CASE NO. 216-2015-CR-00650

01/25/2016	CANCELED Scheduling Conference	
01/26/2016	Transport Order <i>NHSP for 2/5/16</i>	<i>Index #15</i>
01/28/2016	Appearance Filed by: Co-Counsel - State Kaelin, Stacey R., ESQ	<i>Index #16</i>
02/05/2016	Scheduling Conference (Judicial Officer: Brown, Kenneth C) <i>Hearing Held</i>	
02/05/2016	Structuring Conference Order (Judicial Officer: Brown, Kenneth C)	<i>Index #17</i>
02/05/2016	Appearance <i>John McCormack, Esq., AAG</i>	<i>Index #18</i>
02/16/2016	Motion to Return Property Filed by: Co-Counsel - State McCormack, IV, John J., ESQ <i>Assented-to</i>	<i>Index #19</i>
02/22/2016	Granted (Judicial Officer: Abramson, Gillian L) <i>after review</i>	
04/04/2016	Motion for Bail Hearing	<i>Index #20</i>
04/11/2016	Granted (Judicial Officer: Abramson, Gillian L) <i>Consistent with the States Objection and Cross motion</i>	
04/05/2016	Transport Order <i>NHSP 5/2/16</i>	<i>Index #21</i>
04/08/2016	Objection <i>To Motion for bail hearing</i>	<i>Index #22</i>
04/11/2016	Order Made (Judicial Officer: Abramson, Gillian L) <i>" The state's cross Motion is granted. The requested bail hearing is rescheduled to October 2016. Counsel are responsible for providing the court with a rescheduling date."</i>	
04/20/2016	Agreement <i>RE: Return Evidence, from MPD</i>	<i>Index #23</i>
04/20/2016	Approved (Judicial Officer: Smukler, Larry M)	
05/02/2016	CANCELED Bail Hearing	
09/28/2016	Transport Order <i>NHSP for 10/24/16</i>	<i>Index #24</i>
10/04/2016	Transport Order	<i>Index #25</i>
10/24/2016	CANCELED Bail Hearing	
10/31/2016	Bail Hearing (Judicial Officer: Brown, Kenneth C) <i>Hearing to Resume Another Day</i>	

HILLSBOROUGH SUPERIOR COURT NORTHERN DISTRICT

CASE SUMMARY
CASE NO. 216-2015-CR-00650

10/31/2016	Assented to Motion to Continue Filed by: Co-Counsel - State McCormack, IV, John J., ESQ <i>(Expedited)</i>	Index #26
10/31/2016	Granted (Judicial Officer: Brown, Kenneth C)	
10/31/2016	Transport Order <i>NHSP</i>	Index #27
11/09/2016	Assented to Motion to Continue	Index #28
11/15/2016	Denied (Judicial Officer: Brown, Kenneth C)	
11/19/2016	Indictment <i>Charges: 5</i>	Index #29
11/21/2016	Motion to Reconsider Filed by: Attorney Garrity, Paul J., ESQ <i>Assented to</i>	Index #30
11/29/2016	Denied (Judicial Officer: Brown, Kenneth C)	
11/21/2016	Waiver of Speedy Trial	Index #31
11/22/2016	Motion to Amend Indictment Filed by: Attorney Kennedy, John J., ESQ <i>Scrivener's error</i>	Index #32
11/22/2016	Granted (Judicial Officer: Brown, Kenneth C)	
12/06/2016	Financial Affidavit	Index #33
12/06/2016	Sealed Document <i>Motion for Services. Private investigator.</i>	Index #34
12/09/2016	Granted	
12/06/2016	Sealed Document <i>Motion for Authorization for Services. Creamer Investigative Agency. \$5,000.00</i>	Index #35
12/09/2016	Granted (Judicial Officer: Brown, Kenneth C)	
12/08/2016	Sealed Document <i>Motion for Services. Forensic pathologist</i>	Index #36
12/09/2016	Granted (Judicial Officer: Brown, Kenneth C)	
12/08/2016	Sealed Document <i>Motion for authorization to obtain services. Dr. Jennifer Kehne Lipman. \$2,500.00</i>	Index #37
12/09/2016	Approved (Judicial Officer: Brown, Kenneth C)	
01/05/2017	Bail Hearing (Judicial Officer: Kissinger, John C, JR) <i>Hearing Held</i>	
01/05/2017	Arraignment (Judicial Officer: Kissinger, John C, JR) <i>Hearing Held</i>	
01/05/2017	Entry of Not Guilty Plea and Waiver of Arraignment	Index #38

HILLSBOROUGH SUPERIOR COURT NORTHERN DISTRICT

CASE SUMMARY
CASE NO. 216-2015-CR-00650

01/05/2017	Exhibit List	Index #39
01/09/2017	Telephonic Hearing (Judicial Officer: Brown, Kenneth C) <i>Hearing Held</i>	
01/09/2017	Motion <i>State's assented to motion to modify structuring order</i>	Index #40
01/09/2017	Granted (Judicial Officer: Brown, Kenneth C)	
01/10/2017	Court Order (Judicial Officer: Brown, Kenneth C) <i>RE: Bail</i>	Index #41
01/10/2017	Order Made (Judicial Officer: Brown, Kenneth C)	
01/12/2017	Transport Order <i>2/15</i>	Index #42
01/12/2017	Transport Order <i>2/27</i>	Index #43
01/13/2017	Witness List <i>State</i>	Index #44
01/17/2017	Sealed Document <i>Ex Parte Motion for Services (Stenographer for deposition of Dr. Andrews)</i>	Index #45
01/19/2017	Granted (Judicial Officer: Abramson, Gillian L)	
01/17/2017	Sealed Document <i>604-A (Avicore \$350.00)</i>	Index #46
01/19/2017	Approved (Judicial Officer: Abramson, Gillian L)	
01/17/2017	Sealed Document <i>Ex Parte Motion for Services (Stenographer for deposition of Dr. Kim Rumril)</i>	Index #47
01/19/2017	Granted (Judicial Officer: Abramson, Gillian L)	
01/17/2017	Sealed Document <i>604-A (Avicore \$350.00)</i>	Index #48
01/19/2017	Approved (Judicial Officer: Abramson, Gillian L)	
01/20/2017	Applic Sumn Witness from Out State Filed by: Attorney Kennedy, John J., ESQ <i>(Petition) Jermall Anderson 4116 Scotts Mill Court, Saugus MA 01906</i>	Index #49
01/23/2017	Approved (Judicial Officer: Brown, Kenneth C)	
01/20/2017	Affidavit Filed by: Attorney Kennedy, John J., ESQ	Index #50
01/20/2017	Other (Judicial Officer: Brown, Kenneth C) Filed by: Attorney Kennedy, John J., ESQ <i>Certificate to Summons Witness Located Outside the State of NH: Jermall Anderson (DOB: 07/25/79) 4116 Scotts Mill Court, Saugus, MA</i>	Index #51

HILLSBOROUGH SUPERIOR COURT NORTHERN DISTRICT

CASE SUMMARY
CASE NO. 216-2015-CR-00650

01/23/2017	Appearance <i>J. Shepherd</i>	Index #52
01/23/2017	Motion Filed by: Co-Counsel - State McCormack, IV, John J., ESQ <i>to Admit Impeachment Material</i>	Index #53
02/15/2017	Granted in Part (Judicial Officer: Brown, Kenneth C) <i>"Motion granted in part - no objection filed, State may cross examine the defendant regarding his past record by reference to the number of felony convictions, but not by crime specific."</i>	
01/23/2017	Motion in Limine Filed by: Co-Counsel - State McCormack, IV, John J., ESQ <i>#1 to Exclude Evidence of Victim's Criminal Record and Drug Activity</i>	Index #54
02/15/2017	Granted (Judicial Officer: Brown, Kenneth C) <i>"After review, Motion granted (no objection filed.)"</i>	
01/23/2017	Motion in Limine Filed by: Co-Counsel - State McCormack, IV, John J., ESQ <i>#2 to Exclude Irrelevant Evidence</i>	Index #55
02/15/2017	Granted (Judicial Officer: Brown, Kenneth C) <i>"After review, Motion granted - (no objection filed.)"</i>	
01/23/2017	Motion in Limine Filed by: Co-Counsel - State McCormack, IV, John J., ESQ <i>#3 to Exclude Alternative Perpetrator Evidence</i>	Index #56
02/15/2017	Denied (Judicial Officer: Brown, Kenneth C) <i>"Motion Denied - See defendant objection - may go to credibility and police practice and procedure - but proper foundation required."</i>	
01/23/2017	Motion in Limine Filed by: Co-Counsel - State McCormack, IV, John J., ESQ <i>#4 to Admit D's Statement Made in His Hospital Room</i>	Index #57
02/15/2017	Granted (Judicial Officer: Brown, Kenneth C) <i>"After review, Motion granted (no objection filed.)"</i>	
01/23/2017	Motion in Limine Filed by: Co-Counsel - State McCormack, IV, John J., ESQ <i>#5 to Introduce Excited Utterances and Dying Declarations</i>	Index #58
02/15/2017	Granted (Judicial Officer: Brown, Kenneth C) <i>"After review, motion granted (no objection)."</i>	
01/25/2017	Sealed Document <i>Ex Parte Motion for In Camera Review</i>	Index #59
01/27/2017	Granted (Judicial Officer: Brown, Kenneth C)	
01/27/2017	Sealed Document <i>Order (Brown, J.)</i>	Index #60
01/27/2017	Witness List <i>State's</i>	Index #61
01/27/2017	Motion	Index #62

HILLSBOROUGH SUPERIOR COURT NORTHERN DISTRICT

CASE SUMMARY

CASE NO. 216-2015-CR-00650

Motion to Take Videotaped trial testimony depositional before the court in lieu of Trial Testimony

01/30/2017	Granted (Judicial Officer: Brown, Kenneth C) <i>" Motion granted, date and time to be coordinated with clerk's office"</i>	
01/27/2017	Motion to Continue	<i>Index #63</i>
01/30/2017	Notice of Extended Term Filed by: Attorney Kennedy, John J., ESQ; Co-Counsel - State McCormack, IV, John J., ESQ	<i>Index #64</i>
01/30/2017	Objection to Motion to Continue Filed by: Attorney Kennedy, John J., ESQ; Co-Counsel - State McCormack, IV, John J., ESQ <i>or in the Alternative to Exclude Evidence</i>	<i>Index #65</i>
02/01/2017	Denied (Judicial Officer: Brown, Kenneth C)	
01/31/2017	Motion Filed by: Co-Counsel - Defendant/Respondent Shepherd, Justin C., ESQ <i>to Set Aside Ruling on State's Motion to Take Videotaped Trial Deposition before the Court in Lieu of Trial Testimony so that the Accused may have an Opportunity to Respond to the Motion</i>	<i>Index #66</i>
02/02/2017	Denied (Judicial Officer: Brown, Kenneth C) <i>" After review , of the state's objection motion denied."</i>	
02/01/2017	Obj-Motion Filed by: Attorney Kennedy, John J., ESQ <i>to Set Aside Court's Order</i>	<i>Index #67</i>
02/02/2017	Sealed Document <i>In Camera Brady/Giglio Material Review Order (Brown, J.)</i>	<i>Index #68</i>
02/03/2017	Motion to Reconsider Filed by: Attorney Garrity, Paul J., ESQ <i>Denial of Motion to Continue</i>	<i>Index #69</i>
02/07/2017	Denied (Judicial Officer: Brown, Kenneth C) <i>" The court did not overlook nor misapprehend law or fact in its initial ruling , motion denied."</i>	
02/06/2017	Supplemental Motion Filed by: Attorney Garrity, Paul J., ESQ <i>to Reconsider Denial of Motion to Continue</i>	<i>Index #70</i>
02/07/2017	Order Made (Judicial Officer: Brown, Kenneth C) <i>" Noted, however request for funds suggest otherwise."</i>	
02/06/2017	Obj-Motion to Reconsider Filed by: Attorney Kennedy, John J., ESQ	<i>Index #71</i>
02/06/2017	Sealed Document <i>Exparte Motion for Services</i>	<i>Index #72</i>
02/07/2017	Granted (Judicial Officer: Brown, Kenneth C)	
02/06/2017	Sealed Document <i>Exparte 604-A</i>	<i>Index #73</i>
02/07/2017	Approved (Judicial Officer: Brown, Kenneth C)	

HILLSBOROUGH SUPERIOR COURT NORTHERN DISTRICT

CASE SUMMARY
CASE NO. 216-2015-CR-00650

02/08/2017	Supplemental Motion Filed by: Attorney Garrity, Paul J., ESQ <i>to Reconsider Denial of Motion to Continue and Further Motion to Reconsider</i>	Index #74
02/15/2017	Denied (Judicial Officer: Brown, Kenneth C) <i>"Defendant is merely trying to paper the file with a 2nd motion to Reconsider - Motion Denied."</i>	
02/10/2017	Objection Filed by: Attorney Kennedy, John J., ESQ <i>to Defendant's Further Supplement to Motion to Reconsider</i>	Index #75
02/14/2017	Motion to Sequester Witnesses Filed by: Co-Counsel - State McCormack, IV, John J., ESQ	Index #76
02/14/2017	Granted (Judicial Officer: Brown, Kenneth C)	
02/14/2017	Motion Filed by: Attorney Kennedy, John J., ESQ; Co-Counsel - State McCormack, IV, John J., ESQ <i>to Limit the Testimony of Dr. Jennifer Lipman</i>	Index #77
02/22/2017	Denied (Judicial Officer: Brown, Kenneth C) <i>"Goes to weight - Motion Denied."</i>	
02/15/2017	Final Pretrial (Judicial Officer: Brown, Kenneth C) <i>Hearing Held</i>	
02/15/2017	Objection Filed by: Attorney Garrity, Paul J., ESQ <i>to State's Motion in Limine #3</i>	Index #78
02/15/2017	Final Pre-Trial Order (Judicial Officer: Brown, Kenneth C)	Index #79
02/15/2017	Motion in Limine Filed by: Attorney Garrity, Paul J., ESQ; Co-Counsel - Defendant/Respondent Shepherd, Justin C., ESQ	Index #80
02/15/2017	Granted (Judicial Officer: Brown, Kenneth C) <i>"By agreement motion granted."</i>	
02/16/2017	Motion for Appointment of Counsel Filed by: Attorney Garrity, Paul J., ESQ	Index #81
02/16/2017	Sealed Document <i>Exparte Motion for Services</i>	Index #82
02/22/2017	Granted (Judicial Officer: Brown, Kenneth C)	
02/16/2017	Sealed Document <i>Exparte 604-A</i>	Index #83
02/22/2017	Approved (Judicial Officer: Brown, Kenneth C)	
02/17/2017	Other Filed by: Co-Counsel - State McCormack, IV, John J., ESQ <i>Notice of Supplement to Application of Extended Term of Imprisonment</i>	Index #84
02/21/2017	Other Proceeding (Judicial Officer: Brown, Kenneth C)	

HILLSBOROUGH SUPERIOR COURT NORTHERN DISTRICT

CASE SUMMARY
CASE NO. 216-2015-CR-00650

Deposition of witness with judge present at depo.

02/21/2017	Other Proceeding <i>Deposition</i>	
02/21/2017	Motion to Withdraw as Counsel Filed by: Attorney Garrity, Paul J., ESQ; Co-Counsel - Defendant/Respondent Shepherd, Justin C., ESQ <i>Paul Garrity and Justin Shepherd</i>	<i>Index #85</i>
02/21/2017	Denied (Judicial Officer: Brown, Kenneth C) <i>"After hearing - Motion to withdraw denied."</i>	
02/21/2017	Objection Filed by: Attorney Garrity, Paul J., ESQ <i>to State's Motion to Limit the Testimony of Dr. Jennifer Lipman</i>	<i>Index #86</i>
02/21/2017	Motion Filed by: Attorney Garrity, Paul J., ESQ; Co-Counsel - Defendant/Respondent Shepherd, Justin C., ESQ <i>to Preclude Non-Expert Opinion Testimony as to Cause of Accused's Injuries</i>	<i>Index #87</i>
02/23/2017	Granted (Judicial Officer: Brown, Kenneth C) <i>"Motion granted - see record of 2/15/17 hearing. Witnesses eye witness observations are allowed."</i>	
02/21/2017	Motion Filed by: Attorney Garrity, Paul J., ESQ; Co-Counsel - Defendant/Respondent Shepherd, Justin C., ESQ <i>to Limit the Testimony of Dr. Thomas Andrew</i>	<i>Index #88</i>
02/22/2017	Denied (Judicial Officer: Brown, Kenneth C)	
02/21/2017	Sealed Document <i>Motion for Authorization to Cross Examine</i>	<i>Index #89</i>
02/22/2017	Transport Order <i>from NHSP for 2/23/17 Hrg</i>	<i>Index #90</i>
02/22/2017	Objection Filed by: Attorney Kennedy, John J., ESQ <i>to Defendant's Motion to Limit the Testimony of Dr. Thomas Andrew</i>	<i>Index #91</i>
02/23/2017	Hearing on Pending Motions (Judicial Officer: Brown, Kenneth C) <i>Hearing Held</i>	
02/23/2017	Objection Filed by: Attorney Kennedy, John J., ESQ <i>to Defendant's Motion to Preclude NON-Expert Opinion Testimony as to Cause of Accused's Injuries</i>	<i>Index #92</i>
02/23/2017	Motion in Limine Filed by: Attorney Garrity, Paul J., ESQ <i>Re: Opinion Testimony on Accused's Behavior</i>	<i>Index #93</i>
02/23/2017	Granted in Part (Judicial Officer: Brown, Kenneth C) <i>"Motion granted in part. Degree of cooperation admissible - EMT's opinion of defendant is</i>	

HILLSBOROUGH SUPERIOR COURT NORTHERN DISTRICT

CASE SUMMARY
CASE NO. 216-2015-CR-00650

not. See record of hearing."

02/23/2017	Response to Motion Filed by: Co-Counsel - State McCormack, IV, John J., ESQ <i>In Limine</i>	Index #94
02/23/2017	Sealed Document <i>Exparte M/Services</i>	Index #95
02/23/2017	Granted (Judicial Officer: Brown, Kenneth C)	
02/23/2017	Sealed Document <i>Exparte 604-A</i>	Index #96
02/23/2017	Approved (Judicial Officer: Brown, Kenneth C)	
02/27/2017	Jury Selection (Judicial Officer: Brown, Kenneth C) <i>Hearing Held</i>	
02/27/2017	Ntc of Eligibility and Appt of Counsel <i>PD</i>	Index #101
02/27/2017	Ntc of Eligibility and Appt of Counsel <i>Carl Olson (Amended) for witness Julio Vargas</i>	Index #102
02/27/2017	Stipulation Filed by: Attorney Garrity, Paul J., ESQ; Co-Counsel - Defendant/Respondent Shepherd, Justin C., ESQ; Attorney Kennedy, John J., ESQ; Co-Counsel - State McCormack, IV, John J., ESQ <i>of the Parties to the Court</i>	Index #103
02/27/2017	Stipulation Filed by: Attorney Garrity, Paul J., ESQ; Co-Counsel - Defendant/Respondent Shepherd, Justin C., ESQ; Attorney Kennedy, John J., ESQ; Co-Counsel - State McCormack, IV, John J., ESQ <i>of the Parties to the Jury</i>	Index #104
02/28/2017	Jury Trial (Judicial Officer: Brown, Kenneth C) <i>Jury Trial Held</i>	
02/28/2017	Richards Hearing (Judicial Officer: Brown, Kenneth C) <i>Hearing Held</i>	
03/01/2017	Jury Trial (Judicial Officer: Brown, Kenneth C) <i>Jury Trial Held</i>	
03/02/2017	Jury Trial (Judicial Officer: Brown, Kenneth C) <i>Jury Trial Held</i>	
03/03/2017	Jury Trial (Judicial Officer: Brown, Kenneth C) <i>Jury Trial Held</i>	
03/03/2017	Court Order (Judicial Officer: Brown, Kenneth C) <i>RE: Apt. of Counsel</i>	Index #97
03/06/2017	Jury Trial (Judicial Officer: Brown, Kenneth C) <i>Jury Trial Held</i>	
03/07/2017	Jury Trial (Judicial Officer: Brown, Kenneth C) <i>Jury Trial Held</i>	

HILLSBOROUGH SUPERIOR COURT NORTHERN DISTRICT

CASE SUMMARY

CASE NO. 216-2015-CR-00650

03/07/2017	Proposed/Req. Jury Instructions Filed by: Attorney Garrity, Paul J., ESQ; Co-Counsel - Defendant/Respondent Shepherd, Justin C., ESQ	Index #98
03/08/2017	Jury Trial (Judicial Officer: Brown, Kenneth C) <i>Jury Trial Held</i>	
03/08/2017	Court Order (Judicial Officer: Brown, Kenneth C) <i>Re: Correction to a Footnote</i>	Index #99
03/08/2017	Sealed Document <i>Motion to Exceed</i>	Index #100
03/08/2017	Granted (Judicial Officer: Brown, Kenneth C)	
03/08/2017	Exhibit List	Index #105
03/08/2017	Disposition (Judicial Officer: Brown, Kenneth C) 2. 2nd Degree Murder Jury Verdict of Guilty 3. 2nd Degree Assault Jury Verdict of Guilty 4. 2nd Degree Assault Jury Verdict of Guilty 5. Felon in Possession of Dangerous Weapon Guilty by Court	
03/08/2017	Disposition (Judicial Officer: Brown, Kenneth C) 1. 2nd Degree Murder Jury Verdict of Guilty	
03/09/2017	Jury Trial (Judicial Officer: Brown, Kenneth C)	
03/10/2017	Transport Order <i>from NHSP for 6/29/17 Hrg</i>	Index #106
04/20/2017	Sealed Document <i>Exparte Motion for Services</i>	Index #107
04/24/2017	Granted (Judicial Officer: Brown, Kenneth C) <i>"Motion granted, but lack of a report will not justify a continuance of the sentencing hearing."</i>	
04/20/2017	Sealed Document <i>Exparte 604-A</i>	Index #108
04/24/2017	Approved (Judicial Officer: Brown, Kenneth C)	
05/12/2017	Sealed Document <i>Exparte Motion for Services</i>	Index #109
05/12/2017	Sealed Document <i>Exparte 604-A</i>	Index #110
06/22/2017	Assented to Motion to Continue - Filed by: Attorney Garrity, Paul J., ESQ <i>6/29/17 Hearing</i>	Index #111

HILLSBOROUGH SUPERIOR COURT NORTHERN DISTRICT

CASE SUMMARY
CASE NO. 216-2015-CR-00650

06/22/2017	Granted (Judicial Officer: Abramson, Gillian L) <i>"Granted; to be rescheduled as soon as calendar permits."</i>	
06/23/2017	Transport Order NHSP for 6/28/17 Charges: 1, 2, 3, 4, 5	Index #112
06/23/2017	Appearance Filed by: Co-Counsel - State Hinckley, Peter, ESQ	Index #113
06/23/2017	Sentencing Memorandum Filed by: Plaintiff Attorney General's Office	Index #114
06/28/2017	Sentencing (Judicial Officer: Brown, Kenneth C) <i>Hearing Held</i>	
06/28/2017	Sentence Sheet (Judicial Officer: Brown, Kenneth C) Charges: 2	Index #115
06/28/2017	Sentence Sheet (Judicial Officer: Brown, Kenneth C) Charges: 3	Index #116
06/28/2017	Sentence Sheet (Judicial Officer: Brown, Kenneth C) Charges: 4	Index #117
06/28/2017	Sentence Sheet (Judicial Officer: Brown, Kenneth C) Charges: 5	Index #118
06/28/2017	Application for Sentence Review Filed by: Attorney Garrity, Paul J., ESQ	Index #119
06/28/2017	Sentence (Judicial Officer: Brown, Kenneth C) 2. 2nd Degree Murder NH State Prison Condition - Adult: 1. 13 Good Behavior, 06/28/2017, Active 06/28/2017 2. Law Enforcement may Return Evidence to Rightful Owner, 06/28/2017, Active 06/28/2017 3. Law Enforcement may Destroy Evidence, 06/28/2017, Active 06/28/2017 4. 09 Counseling, Treatment or Educational Programs, 06/28/2017, Active 06/28/2017 Confinement Effective Date: 06/28/2017 Agency: State Prison - Concord Maximum Life Mandatory Minimum Term: 40 Years Credit for Time Served Credit Term: 46 Days Restitution Amount: \$6,767.00 Payable through Department of Corrections Comment: \$1,767.00 to Robinson Family, \$5,500.00 to Victims Compensation Fund	
06/28/2017	Sentence (Judicial Officer: Brown, Kenneth C) 4. 2nd Degree Assault NH State Prison Condition - Adult:	

HILLSBOROUGH SUPERIOR COURT NORTHERN DISTRICT

CASE SUMMARY

CASE No. 216-2015-CR-00650

1. 09 Counseling, Treatment or Educational Programs, 06/28/2017, Active 06/28/2017
2. 13 Good Behavior, 06/28/2017, Active 06/28/2017
3. Law Enforcement may Return Evidence to Rightful Owner, 06/28/2017, Active 06/28/2017
4. Law Enforcement may Destroy Evidence, 06/28/2017, Active 06/28/2017

Concurrent/Consecutive:

Concurrent

Count: with 1160342C

Confinement

Effective Date: 06/28/2017

Agency: State Prison - Concord

Maximum

Term: 30 Years

Mandatory Minimum

Term: 10 Years

Restitution

Amount: \$3,554.13

Payable through Department of Corrections

Comment: to Am Trust North America

06/28/2017 **Sentence** (Judicial Officer: Brown, Kenneth C)

5. Felon in Possession of Dangerous Weapon

NH State Prison

Condition - Adult:

1. 09 Counseling, Treatment or Educational Programs, 06/28/2017, Active 06/28/2017
2. 13 Good Behavior, 06/28/2017, Active 06/28/2017
3. Law Enforcement may Return Evidence to Rightful Owner, 06/28/2017, Active 06/28/2017
4. Law Enforcement may Destroy Evidence, 06/28/2017, Active 06/28/2017

Confinement

Effective Date: 06/28/2017

Agency: State Prison - Concord

Maximum

Term: 10 Years

Mandatory Minimum

Term: 5 Years

Concurrent/Consecutive:

Concurrent

Count: with 1160341C

06/29/2017 **CANCELED Sentencing**

07/11/2017 **Sentence** (Judicial Officer: Brown, Kenneth C)

3. 2nd Degree Assault

NH State Prison

Condition - Adult:

1. 09 Counseling, Treatment or Educational Programs, 07/11/2017, Active 07/11/2017
2. 13 Good Behavior, 07/11/2017, Active 07/11/2017
3. Law Enforcement may Return Evidence to Rightful Owner, 07/11/2017, Active 07/11/2017
4. Law Enforcement may Destroy Evidence, 07/11/2017, Active 07/11/2017

Concurrent/Consecutive:

Consecutive

Count: to 1160341C

Confinement

Effective Date: 06/28/2017

Agency: State Prison - Concord

Maximum

Term: 30 Years

Mandatory Minimum

Term: 10 Years

07/12/2017 **Mittimus**

Charges: 2

Index #120

HILLSBOROUGH SUPERIOR COURT NORTHERN DISTRICT

CASE SUMMARY
CASE No. 216-2015-CR-00650

07/12/2017	Mittimus <i>Charges: 3</i>	<i>Index #121</i>
07/12/2017	Mittimus <i>Charges: 3</i>	<i>Index #122</i>
07/12/2017	Mittimus <i>Charges: 5</i>	<i>Index #123</i>
07/14/2017	Sheriff's Return on Mittimus <i>CID #1160342C</i> <i>Charges: 3</i>	<i>Index #124</i>
07/14/2017	Sheriff's Return on Mittimus <i>CID #1160341C</i> <i>Charges: 2</i>	<i>Index #125</i>
07/14/2017	Sheriff's Return on Mittimus <i>CID #1160343C</i> <i>Charges: 4</i>	<i>Index #126</i>
07/14/2017	Sheriff's Return on Mittimus <i>CID #1302290C</i> <i>Charges: 5</i>	<i>Index #127</i>
07/19/2017	Motion to Return Property Filed by: Attorney Kennedy, John J., ESQ <i>(Assented)</i>	<i>Index #128</i>
07/20/2017	Granted (Judicial Officer: Brown, Kenneth C)	
08/03/2017	Notice of Appeal to Supreme Court	<i>Index #129</i>
08/10/2017	Sealed Document <i>Exparte M/Services</i>	<i>Index #130</i>
08/17/2017	Correspondence <i>from Supreme Court</i>	<i>Index #131</i>
08/21/2017	Supreme Court Order <i>Case accepted</i>	<i>Index #132</i>
08/23/2017	Sealed Document <i>Exparte 604-A</i>	<i>Index #133</i>
09/05/2017	Supreme Court Order <i>Preparation of transcript</i>	<i>Index #134</i>
09/11/2017	Motion to Amend Filed by: Attorney Kennedy, John J., ESQ <i>Scrivener's Error on Sentencing Form</i>	<i>Index #135</i>
11/21/2017	Ntc of Eligibility and Appt of Counsel <i>P. Garrity</i>	<i>Index #136</i>
11/21/2017	Ntc of Eligibility and Appt of Counsel <i>J. Shepherd</i>	<i>Index #137</i>

CASE SUMMARY

CASE NO. 216-2015-CR-00650

TARGET DATE

TIME STANDARDS

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, S.S.

SUPERIOR COURT NORTHERN DISTRICT
DOCKET NO: 216-2015-CR-00650

STATE

V.

JOEL MARTIN

MOTION FOR APPOINTMENT OF COUNSEL

NOW COMES Paul Garrity and Justin Shepherd, attorneys for the accused and respectfully request that this Court appoint them as the accused's counsel as the accused is indigent and cannot afford to pay for his attorneys services.

In support of this motion, the above referenced attorneys state as follows:

1. The accused stands charged with Second Degree Murder, Second Degree Assault and being a Felon in Possession.
2. Attorney Paul Garrity was initially retained by the accused to represent him on or about May 15, 2015. At that time the accused, the accused's family and Attorney Garrity entered into a fee agreement for Attorney Garrity's services as the accused's counsel and Attorney Garrity received an initial payment. The final payment received by Attorney Garrity to represent the accused was on July 18, 2015. The total fees received by Attorney Garrity were substantially less than was called for by the fee agreement.
3. Subsequent to this last payment the accused filed a financial affidavit affirming his indigency. This Court has approved requests for services other than counsel on the basis of the accused's financial status.

4. Attorney Justin Shepherd has recently filed an appearance as co-counsel for the accused.

5. The undersigned counsel, due to the accused's indigency and his family's inability to pay for the undersigned's services, has spoken on a number of occasions to the Judicial Council regarding whether the undersigned could be appointed as the accused's counsel and receive payment from the State. Each time, including a conversation on February 15, 2017, the undersigned counsel has been informed that the Judicial Council will not authorize payment/appointment of the undersigned counsel as pursuant to the order of appointment the Public Defender's Office would take the case if the undersigned counsel were allowed to withdraw. See, RSA 604-A:2. Therefore, the undersigned counsel has been informed by the Judicial Council that the State will not authorize payment/appointment of the undersigned.


6. The undersigned counsel are fully invested in this case and do not wish to withdraw as the accused's counsel nor are they seeking authorization to withdraw. Nevertheless, the undersigned have expended a substantial amount of uncompensated time in representing the accused preparing for his trial. Due to the accused's indigency, and the impracticality of the Public Defender's Office taking over a murder case approximately a week and half before trial, the undersigned counsel are requesting that this Court appoint them as the accused's counsel for the remainder of the accused's case.

WHEREFORE, Attorney Paul Garrity and Attorney Justin Shepherd respectfully request that this Court authorize appointment of them as the accused's attorneys and that this Court authorize payment for their services by the State of New Hampshire pursuant to RSA 604-A:4.

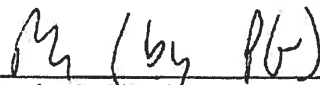
Respectfully submitted
Joel Martin,

By his Attorneys,

Date: February 16, 2017



Paul J. Garrity
Bar No. 905
14 Londonderry Road
Londonderry, NH 03053
603-434-4106



Justin C. Shepherd
Bar No. 14611
Shepherd & Osborne, PLLC
351 Main Street
Nashua, NH 03060
603-595-5525

CERTIFICATE OF SERVICE

I, Paul J. Garrity, herein certify that on this 16th day of February, 2017, a copy of the within Motion to Continue was mailed, postage pre-paid, to the Prosecutor, John Kennedy, Esq. of the Attorney General's Office, and Joel Martin.



Paul J. Garrity

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

State of New Hampshire

v.

Joel Martin

Docket No. 216-2015-CR-00650

ORDER

Defendant, Joel Martin, is charged with two alternative counts of second degree murder, two counts of second degree assault, and one count of felon in possession. Pursuant to RSA chapter 604-A, Attorneys Paul Garrity and Justin Shepherd now move to be appointed as defendant's counsel and be compensated for their services.

Defendant initially retained Attorney Garrity on May 15, 2015 pursuant to a fee agreement. Shortly thereafter, however, defendant became unable to pay Attorney Garrity for his services. Nevertheless, despite defendant's indigency, Attorney Garrity continued to represent him. In November 2016, Attorney Garrity contacted the Judicial Council (the "Council") and inquired into whether he could be appointed counsel for defendant as a result of his indigency. The Council responded that it lacked the authority to appoint Attorney Garrity, as RSA chapter 604-A dictates that, following a finding of indigency, a defendant is to be appointed counsel from the New Hampshire Public Defender or, if they are conflicted out, an available contract attorney. Notwithstanding this response, Attorney Garrity continued to represent defendant.

On December 3, 2016, Attorney Shepherd—a contract attorney—contacted the Council and asked whether he could be appointed counsel for defendant and represent him along with Attorney Garrity. Consistent with its response to Attorney Garrity, the Council informed Attorney Shepherd that he could only be appointed if defendant was indigent and the Public Defender was conflicted out of the case.

Subsequently, on December 6, 2016, defendant filed a financial affidavit with the Court and was found to be indigent. Shortly thereafter, Attorney Garrity requested funds under RSA 604-A for a private investigator, forensic pathologist, and a medical expert, which the Court in turn granted. On January 23, 2017, Attorney Shepherd filed an appearance on defendant's behalf. On February 16, 2017, Attorney Garrity filed the instant motion requesting the Court appoint him and Attorney Shepherd as co-counsel, citing the "substantial amount of uncompensated time in representing [defendant]," defendant's indigent status, and the "impracticality of the Public Defender's Office taking over a murder case approximately a week and a half before trial." (Mot. Appoint, ¶ 6.) Defendant's jury trial was set to begin on February 27th and conclude on March 8th.

Legal Analysis

RSA 604-A:3 states, in pertinent part, "[i]f at any stage of the proceedings, the court having jurisdiction of the case finds that the defendant is financially unable to pay counsel whom he had retained, the court may appoint counsel to represent him, as justice may require." Applying the foregoing provision to the specific and unusual facts of this case, the Court finds justice requires Attorneys Garrity and Shepherd to be appointed as defendant's counsel and, in turn, compensated for their services.

As indicated above, defendant is indigent and thereafter could not afford to pay for Attorney Garrity's services. As he has represented defendant in this matter for nearly two years, Attorney Garrity possesses an intimate knowledge of the facts of this case and is ready, able, and willing to proceed on defendant's behalf.¹ While RSA 604-A:2 does dictate that, following a finding of indigency, the Public Defender's Office is to be appointed, the Court finds it is extremely unlikely, if not impossible, that—given the short period of time between the finding of indigency and the trial date in this case—the Public Defender's Office would have been ready, able, and willing to represent defendant in a murder trial on such short notice.

Moreover, under the facts of this case, continuing the trial to allow the Public Defender's Office to get up to speed would substantially prejudice both defendant and the State.² See State v. Nelson, 103 N.H. 478, 484 (1961) (noting that the Court has wide discretion in granting a continuance as it is in "the best position to weigh what would be fairest to both parties"); Cromlish, 146 N.H. at 282 (citing Perry v. Rushen, 713 F.2d 1447, 1451–52 (9th Cir. 1983) ("The State has a strong interest in assuring the orderly administration of justice.")). Defendant was charged and incarcerated in May 2015, and has remained incarcerated for nearly two years. A continuance would force defendant to remain incarcerated for an additional substantial period of time while he awaits his day in court. Similarly, as the State has been preparing for the set trial date, a number of witnesses have been subpoenaed and planned their schedules accordingly. Additionally, both lead counsel and co-counsel for the State have conflicts

¹ In fact, Attorney Garrity has begun representation of defendant at trial.

² The Court has also expended its resources and arranged its schedule to accommodate the instant matter. State v. Cromlish, 146 N.H. 277, 282 (2001) ("Any further delay would have required the court to repeat the work necessary to call up and choose another jury as well as adjust its calendar to accommodate the continuance.")

moving forward. Lead counsel, Attorney McCormack, has multiple other trials scheduled after defendant's and would be unable to reschedule defendant's trial until May 2018; while co-counsel, Attorney Kennedy, is scheduled for paternity leave from April to August 2017. Therefore, a continuance would lead to either: (1) an, at minimum, fourteen-month continuance; or (2) requiring the State to replace one, or both, of its attorneys assigned to this case, who would thereafter need time to get up to speed with the case.

Finally, the Court finds its application of RSA 604-A:3 to be in harmony with the general purpose of RSA chapter 604-A, which states:

The purpose of this chapter is to provide adequate representation for indigent defendants in criminal cases, as a precondition of imprisonment . . . Representation *shall* include counsel and investigative, expert and other services and expenses, including process to compel the attendance of witnesses, as may be necessary for an adequate defense before the courts of this state.

Here, the Court finds Attorneys Garrity and Shepherd are not only ready, willing, and able to represent defendant—but, as stated above, are the only **adequate representation** available to represent him at trial. (emphasis added).

Therefore, the Court appoints Attorneys Garrity and Shepherd as defendant's counsel. At the conclusion of the trial, Attorneys Garrity and Shepherd shall submit "a written statement specifying the time expended, services rendered and expenses incurred while the case was pending before the Court." RSA 604-A:4.³ After which, they shall be compensated in accordance with Supreme Court Rule 47, which states attorneys will be compensated "\$100 per hour for major cases," including homicide, with a "[m]aximum fee (per co-counsel) for homicides" of \$20,000. However, the Court notes

³ Attorneys Garrity and Shepherd will only be reimbursed for the time incurred from the date of their motion—February 17, 2017.

Attorney Garrity has already been compensated an unspecified amount by defendant pursuant to their fee agreement. As such, Attorney Garrity's compensation under Rule 47 will be reduced by such amount that he has already collected from defendant.

As a final matter, the Court notes its finding holds no precedential value and is limited in its entirety to the unique facts of this case. In the future, in the event a client can no longer afford to pay retained counsel, retained counsel shall do the following. First, instruct the client to inform the Court he or she is indigent and have them submit a financial affidavit attesting to such. Next, retained counsel should file a motion to withdraw as counsel. Upon the Court granting retained counsel's motion, the Court will appoint defendant counsel in accordance with RSA 604-A:2. RSA 604-A:2, II, states, in pertinent part, counsel will be appointed in the following order:

[F]irst, appointment of the public defender program under RSA 604-B if that office is available; second, in the event the public defender program is not available, appointment of a contract attorney under RSA 604-A:2-b if such an attorney is available; and third, in the event that neither the public defender program nor a contract attorney is available, the appointment of any qualified attorney under paragraph I.

Accordingly, for the foregoing reasons, Attorneys Garrity and Shepherd's motion to be appointed defendant's counsel and be compensated for their services is GRANTED.

SO ORDERED.

3/2/17

DATE



Kenneth C. Brown
Presiding Justice