THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0665

Kenneth H. Hart

v.

Warden, New Hampshire State Prison

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

BRIEF FOR THE PETITIONER

Christopher M. Johnson
Chief Appellate Defender
Appellate Defender Program
10 Ferry Street, Suite 202
Concord, NH 03301
NH Bar #15149
603-224-1236
(Fifteen minutes oral argument)

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QUESTION PRESENTED

Whether the court erred in denying Hart's petition for habeas corpus, either because he was not competent to represent himself, or because the record does not establish that he knowingly waived his right to counsel.

Issue preserved by the amended petition for a writ of habeas corpus, the memorandum of law in support of the petition, and the trial court's order. Supp. 1-9; A42-A53, A80-A124.*

* Citations to the record are as follows:
"A" refers to the Appendix filed under separate cover with this brief;
"Supp." refers to the documentary supplement attached to this brief;
"H1" refers to the transcript of the probable cause hearing, held on November 23, 1998;
"H2" refers to the transcript of a hearing held on March 11, 1999;
"H3" refers to the transcript of a competency hearing held on July 21, 1999;
"H4" refers to the transcript of a hearing held on August 31, 1999;
"T1" refers to the transcript of the first day of trial, held on January 24, 2000;
"T2" refers to the transcript of the second day of trial, held on January 25, 2000;
"T3" refers to the transcript of the third day of trial, held on January 26, 2000;
"T4" refers to the transcript of the fourth day of trial, held on January 27, 2000;
"T5" refers to the transcript of the fifth day of trial, held on January 28, 2000;
"T6" refers to the transcript of the sixth day of trial, held on January 31, 2000;
"T7" refers to the transcript of the seventh day of trial, held on February 1, 2000;
"T8" refers to the transcript of the eighth day of trial, held on February 2, 2000;
"S" refers to the transcript of the sentencing hearing on April 10, 2000.

STATEMENT OF THE CASE

In 1998, Kenneth Hart was charged in Hillsborough County (North) Superior Court with two alternative-theory counts of aggravated felonious sexual assault (AFSA). T1 41-43. The State also charged Hart with witness tampering and with a misdemeanor count of resisting arrest. T1 43-44. During pre-trial proceedings, appointed counsel briefly represented Hart until he expressed a desire to represent himself. After proceedings described in detail below, the court (Groff, J.) allowed Hart to represent himself at trial, accompanied by stand-by counsel.

After an eight-day trial in January and February 2000, a jury convicted Hart on all charges. T8 19-29. In April 2000, the court sentenced him to a stand-committed term of ten to twenty years for AFSA. S 46. The court pronounced a consecutive suspended sentence of one to three years for witness tampering, permitting that sentence to be brought forward on a motion filed within ten years. S 45, 47. Finally, the court pronounced a suspended sentence of twelve months for resisting arrest, to run concurrently with the witness tampering sentence, and permitting that sentence to be brought forward on a motion filed within two years. S 47-48.

After trial, the court appointed a different stand-by counsel to aid in the preparation of a notice of appeal. A18. Some litigation followed in the superior court as Hart and stand-by counsel took conflicting views about the nature of stand-by counsel's role in the preparation and filing of a notice of appeal. A19-A23. Meanwhile, in a series of orders, this Court extended the deadline for

filing either the notice of appeal or a motion for the appointment of counsel for the purpose of filing a notice of appeal. A24-A29. Ultimately, on February 28, 2001, because no notice of appeal or motion for the appointment of counsel had been filed, this Court declared the appeal waived. A30. In the years that followed, Hart, representing himself, attempted without success to re-instate his appeal.

In January 2017, Hart filed a complaint, A33-A34, in the Merrimack County Superior Court that the court (Schulman, J.) construed as a petition for a writ of habeas corpus. A35. In recognition of the fact that, "[d]ue to Mr. Hart's disability and difficulty in framing his claims," he "was not able to fully articulate his claims at the status conference," the court appointed the Public Defender to represent Hart. A40. That marked the first time Hart had counsel to represent him in a challenge to his conviction.[1]

Counsel filed an amended habeas petition challenging Hart's conviction on the ground that the trial court erred in permitting him to represent himself at trial and for the purpose of filing a notice of appeal. A42-A53. The petition also sought relief on the ground that Hart had not knowingly waived his right to counsel. The State filed an objection, A54-A79, after which counsel for Hart filed a memorandum of law in support of the petition, A80-A124. In October 2017, the court (Abramson, J.) issued an order denying the petition. Supp. 1-9.

[1] For a period of time in 2011, Hart had court-appointed counsel in the Sentence Review Board, in proceedings that ultimately stalled on a competency issue. A31-A32.

STATEMENT OF THE FACTS

The Evidence at Trial

On October 21, 1998, thirty-three-year-old C.G. moved into the Cathedral Manor rooming house on Pine Street in Manchester. T2 32; T3 6, 8-9; T5 162. Kenneth Hart also had recently moved into the building. T3 204; T5 148; T6 104. C.G. testified that she encountered Hart in a hallway on October 22, and exchanged greetings. T3 10-12. Soon afterwards, she mentioned to the building's maintenance supervisor, Donald Belware, that Hart "really kind of gives [her] the creeps. . . ." T3 10, 12. She saw him again on October 22 when she turned around after cleaning a shower in a communal bathroom. T3 12-13.

According to C.G., on the morning of October 23, she used a bathroom and went downstairs to make a phone call and leave a note for the landlord. T3 14, 48. She then returned to her room, leaving the door open. T3 14, 71, 115. She testified that when she turned around to leave, she found Hart standing in her room. T3 14, 39, 49, 90. C.G. asked him why he was there, and he asked her if she needed money. T3 15, 91-92, 99. C.G. testified that she replied: "yeah, I need money, but I work for my money, I get my money legally." T3 15, 126. She then told him that she had to go and he needed to get out of her room. T3 15, 68, 92-93, 193-94.

C.G. testified that the next thing she "clearly remember[ed]" was being in her closet, with Hart behind her trying to undo her jeans. T3 16. She testified that she told him "no" and that she had to leave, but he pulled down her jeans and underwear. T3 16-17, 118. C.G. tried to hold her jeans up, but testified

that she was "petrified, frozen, scared for [her] life." T3 16, 145. Hart pulled down his jeans and underwear and "bent [her] forward [with] one arm around the waist [and] the other arm in the middle of [her] shoulders." T3 17. In that position, he "proceeded to penetrate [her] with his penis vaginally." T3 17. C.G. testified that she kept saying "no," and telling him that she needed to leave as she had things to do. T3 17-18, 43. She testified that Hart "proceeded [to have] intercourse with [her] until he ejaculated, which was quite some time later." T3 18-19. C.G. acknowledged that she did not otherwise resist, saying that she "wanted to get out of there alive, unbeaten, frozen, petrified." T3 19, 112.

Afterwards, according to C.G., Hart pulled up his jeans, sat on a suitcase, and urged her to take a shower "to help her relax." T3 19, 21-22. He also asked her several times not to tell anybody about their encounter.[2] T3 20-22. C.G. refused to take a shower, but did change her clothes. T3 19. During that time, Hart "said something about having some rich guy come over at midnight that night to meet him at the back door and the guy would pay [her] to give him a blow job." T3 20. Testifying that she was prepared at that point to say anything to leave the room, C.G. agreed. T3 20. When Hart told her to check to make sure nobody was in the hallway, C.G. did so and reported back to Hart. T3 20, 22. At that point, Hart left the room. T3 20, 128. C.G. also left, and went to look for Belware. T3 22, 131-32.

C.G. found Belware and told him that Hart raped her. T3 23. Belware advised her to go to the police, but C.G. decided first to find her boyfriend,

[2] The State relied on that testimony to prove the charge of witness tampering. T1 43.

Jamie Hudon. T3 23. C.G. testified that, as she and Belware went downstairs, they encountered Hart in a stairway. T3 23-24. C.G. went to a nearby business from which she called Hudon's workplace. T3 23-24. Hudon testified that, when he got to C.G., she seemed "real shaky, crying, real upset, just overall not really with it." T2 35; T3 24-25. He took her first to the police station and then to the hospital. T2 36; T3 25-28; T5 71-72. C.G. told a treating doctor and a nurse that she had been raped. T5 13-14, 57, 200. After leaving the hospital, C.G. returned to the police station. T3 28-30.

On the afternoon of October 23, after speaking with C.G., police officers went with her to Cathedral Manor to gather evidence and look for Hart. T3 31-34; T6 27-38. In C.G.'s room, the police collected the clothing that she had worn through most of her encounter with Hart. T3 31-34. Subsequent DNA testing established the presence of Hart's DNA in a sperm sample taken from C.G.'s underwear and jeans. T4 49, 56-58.

In a further effort to prove Hart's presence in C.G.'s room, the State elicited evidence that the police found in Hart's possession a note Belware wrote to C.G. about a shower curtain. C.G. testified that the note was in her room when she last saw it. T3 35-38, 48; T6 60-62, 97-98. Also, the State introduced testimony from the Cathedral Manor manager that he spoke with Hart on October 23 about the accusation, and Hart said "something about a girl having a good time and these are situations you run into," and "I was with her, I had a good time; we had a good time." T5 147-52, 186.

The police found Hart in a kitchen at Cathedral Manor that afternoon. When asked about the allegation, Hart replied that he could not comment on it. T6 43-47, 194-95. When the police arrested him, Hart said, "this is wrong; you can't arrest me," and he declined to put his arms behind his back. T6 49-50. An officer grabbed him and a brief struggle ensued, at the end of which the police handcuffed Hart. T6 50-51, 125-37. That event gave rise to the charge of resisting arrest or detention.

At one point during trial, Hart suggested that the sexual encounter had been consensual, by asking C.G. whether she had wanted to have sex with him. T3 74. C.G. answered that she had not. T3 74. At another, he implied that the words about money had constituted a "negotiation." T3 93-94, 100. C.G. denied that she had in any way invited Hart into her room. T3 95, 115. The State objected to his question as to whether C.G. had ever had sex for money. T3 99; see also T3 105; T5 92, 124; T6 174 (Hart unsuccessfully attempting to elicit evidence suggesting prostitution as a defense theory).

The Procedural History of the Competency Inquiry

By early January 1999, Hart expressed the desire to represent himself. A1. In March, the State objected to Hart's request to proceed *pro se*, A2, and filed a motion for a competency evaluation. A8-A9.

In an order dated March 17, 1999, the court (Barry, J.) noted that Hart "claims to be the victim of an ongoing conspiracy, being perpetrated by unnamed members of the local, state, and federal governments resulting in the pending prosecution of him." A4. After quoting a "soliloquy" delivered by Hart

at a prior hearing, the court noted that "although [Hart] appears articulate, he has consistently demonstrated an inability to understand the trial process and the procedures necessary for his defense." Id. The order further declared:

> with the approach of trial on the pending charges, Mr. Hart has become increasingly concerned with the perceived conspiracy against him and has become increasingly incoherent with each filing and court appearance. During the most recent hearing, despite repeated admonitions from the court to discuss only the matter at issue, he repeatedly engaged in harangues ranging from the topic of race to the issue of locating his father.

A5. Noting that the State would introduce DNA evidence at the trial, the court expressed "grave reservations about the defendant's ability to effectively cross-examine the State's experts and to mount a proper defense without the assistance of counsel." A6. The court accordingly ordered a psychiatric evaluation. A6-A7.

Dr. Albert Drukteinis evaluated Hart and testified that while he believed Hart competent to stand trial, he did not believe Hart competent to represent himself or knowingly waive the right to counsel. H3 17-18, 27, 29. Drukteinis noted that Hart had "a tendency to be rambling, at times tangential and sort of going on and on in peripheral matters with some difficulty coming to the point at hand. It isn't that he couldn't get to the point; he was frequently able to be redirected to the point, but he would then take off in sort of a soliloquy of long rambling discourse." H3 8-9.

With respect to Hart's cognitive understanding of the charges, the criminal process and the roles of the participants, Drukteinis found no

significant deficits. H3 14-15. With respect to the question of a mental health diagnosis, Drukteinis found no acute psychotic illness. However, he added:

> I do think there is some evidence of paranoid personality traits and some grandiosity. He sees himself as perhaps more powerful and more able than he is. He also may have some antisocial traits that would need further documentation through an accurate criminal record. So, I felt that he had a personality disorder, probably a nonspecific kind of personality disorder, but that was . . . did not rise to the level of a major mental illness that should prevent him from being competent to stand trial. Now, I should add that I would not be surprised at all if there is a history of mental illness in his background . . . but there's no way I could tell for sure without an accurate background history.

H3 16-17.

Drukteinis postulated that "the competency or ability to defend oneself *pro se* is a higher threshold [than] being able to stand trial." H3 18. In that regard, Drukteinis concluded that Hart's "paranoid personality traits would interfere with a meaningful or reasonable defense of himself." Id. He explained: "there would be too much tendency to get into peripheral matters and tangential matters and thereby really hurt his own defense, and I don't believe he sees that adequately to make a knowing decision about waiving counsel." Id. Though Hart "strenuously . . . want[ed] to be found competent," he "still exhibited a long, rambling and tangential thought process," "had difficulty focusing on the issue of a question," and "would go off and talk about whatever was on his mind at the time." H3 21. While acknowledging that "many of [Hart's] arguments had some legitimacy to them," Drukteinis observed that Hart "often cannot get to the essential elements of his arguments." H3 27.

Under further questioning about competency to waive the right to counsel, Drukteinis opined that Hart understood that he has a constitutional right to counsel. H3 30. When asked whether Hart's deficit manifested simply in the failure to appreciate how difficult self-representation is, Drukteinis answered that "it might be a little more than that." Id. He explained: "I don't think he understands how his own abilities coupled with his paranoid thinking are going to prevent him from doing anything close to what needs to be done." Id. The court (Groff, J.) summarized Drukteinis's view by asking:

> If he's his own lawyer . . . he would be basically unable to effectively cross-examine or exam[ine] a witness because he wouldn't be able to focus, even if he was aware of what the important issues and elements were, he wouldn't be able to focus on those in any meaningful way?

H3 31. Drukteinis agreed with that characterization, adding, "yes, I think he would go off on tangents, he would recognize there might be other things there, but he would not stick to them." H3 32. In response to a further question from the court as to whether that inability to examine witnesses unhindered by paranoia would similarly undermine Hart's capacity to make arguments to the jury or about the law, Drukteinis agreed that it would. Id.

The court (Groff, J.) found Hart competent to stand trial. H3 40-42; A13. The court voiced the view that a finding of competency to stand trial necessarily implied a defendant's competency to waive counsel and represent himself. H3 41-42. However, it deferred the question of self-representation to Judge Barry, who was designated the trial judge. H3 42.

Because Judge Barry did not resume his prior role on the case, the issue of self-representation was resolved at a hearing on August 31, 1999, over which Judge Groff presided. The court conducted a colloquy with Hart about his desire to represent himself, H4 3-8, and granted his request. H4 8-9; A14.

Hart's performance at trial substantiated the concerns Dr. Drukteinis articulated. Before any witnesses had been called, Hart asked to continue the trial, asserting irrelevant and previously-rejected arguments. T1 6-29. Newly appointed stand-by counsel approached the bench to express "a grave concern over [Hart's] ability and competency to represent himself in the trial of this matter," based on observations made during jury selection. T1 36-37. The court re-confirmed its finding of competency. T1 38-39.

Hart then delivered a rambling opening statement, interrupted several times by objections to improper comments. T1 67-91. For example, shortly after the court advised Hart that, although his allocated half-hour had expired, the court would allow him five minutes to conclude, Hart continued his opening statement thus:

> Hum. Hum. It is very extremely hard to be black. It is too hard to be black. An experience that you have never felt before until you have experienced it. When you grow up and you don't know nothing about it you keep growing up and one day you find out that there is something because you are black, you see people and they go . . . they don't know why. They ask themselves, what is it? Maybe somebody thinks that it is easier to a person who is a minority, since black is also a minority means they don't have a whole lot of leadership, don't have a lot of capital resources. You look at our Congressmen and our Senators, there may be one, there may be two, but there are not fifty and there are not ten. So we had a choice, and if they were going to choose, all the Senators

> and all the Congressmen choose to vote according to their race, the black people would get nothing. We only maybe got one in there. So if we voted towards the race, well, we'd end up in the ocean somewhere like fish, and you know the human body can't do that much fishing.

T1 87-88. The opening statement continued in that largely incoherent fashion until the court brought it to a close a few minutes later. T1 90.

During witness examinations, the court repeatedly sustained relevance objections to Hart's questions. See, e.g., T2 49-55, 80; T3 41, 46-47, 52, 76, 82-86, 99-101, 104-05, 158-59, 164, 172, 175, 177-78, 180, 191-92, 194; T4 119-21; T5 30, 41-42, 47-48, 53-56, 79-80, 98-99, 104, 123-28, 156, 160-61, 164, 166-68, 177-79, 183, 195; T6 149, 182-83, 196; T7 11, 13-20. Often Hart asked the same question multiple times, provoking "asked-and-answered" objections. See, e.g., T2 53, 58, 80, 93-97 T3 45, 89, 101-02, 110-11, 123, 125, 140, 147, 149-51, 156, 163, 165-68, 173-74, 182, 190-93, 195-96, 213; T4 125; T5 40, 46-50, 57-58, 61-62, 97, 126-27, 134; T6 86, 92-93, 136, 142-43, 186-89, 192-95, 199. During the cross-examination of many witnesses, the court cautioned Hart that he was wasting time pursuing irrelevant matters, and the court repeatedly threatened to end Hart's examinations at a stated time deadline. T2 52, 56, 74-75, 88, 99-101; T3 142-43, 170-71; T4 127-29; T5 53-54, 58, 61-62, 66-67, 106-07, 132-35, 140-41; T6 197-204.

As everybody's patience wore thin, Hart with some frequency asked argumentative questions, provoking objections that the court sustained. See, e.g., T2 66-68; T3 51, 126-27, 141-42, 158, 163; T4 126; T5 165-66, 168, 194; T6 145, 170-71, 184-85. At times, long silent pauses passed between one

question and the next, prompting the court to urge Hart to ask a question or conclude his examination. See, e.g., T4 82, 84, 121, 126-28, 155; T5 25, 27-29, 176, 178, 187, 190; T6 86-88, 102, 121, 143, 171, 178; T7 18. During the trial's fourth day, the court made the following statement:

> I just want to place on the record that during Mr. Hart's cross-examination he has long pauses where he has acknowledged to the court that he's writing out the questions, the answers, and the ruling of the court. This is taking a tremendous amount of time. The cross-examination itself is only a fraction of the time during which cross-examination continues. I know Mr. Hart is *pro se*. . . but . . . the court is going to have to impose arbitrary limitations on the time of cross-examination if this continues. I think an example in point was the last witness whose testimony was, quite frankly, of little import . . . but the purpose of this record is just to tell Mr. Hart that he's going to have to eliminate those pauses and ask his questions in an efficient manner and get to the point in this questioning, and it seems to the court that an hour of cross-examination should be full, fair and adequate time . . . .

T4 155-56.

Later, in a similar vein, the court addressed Hart as follows:

> It is my opinion that you would continue to examine a witness for hours on end with no appreciable thought to any questions. It is obvious to me that you don't even know half the time what your next question is going to be; that there are great pauses which don't appear in the record between each one of your questions . . . . It was obvious [with respect to the prior witness] that you had no . . . you didn't even really know whether there were any more questions to ask and what you asked on the whole were either irrelevant or asked and answered, and that's why I imposed the restrictions.

T5 66-67. Hart responded by defending as relevant a line of questioning in which he sought to ask a doctor whether she had ever been raped. T5 68.

On several occasions, Hart pursued lines of inquiry damaging to his defense. For example, he elicited from the doctor who examined C.G. her belief that C.G. told the truth in alleging rape. T5 34, 37. Hart unsuccessfully tried to withdraw the question. T5 37-38. He then asked about the basis for her belief, which led her to testify that, in her twelve years in emergency medicine, it was not her experience that a person will undergo a rape kit procedure in order to make a false allegation. T5 38-39. Hart later elicited from a police officer the testimony that C.G. seemed "very genuine, she appeared very upset, visibly upset, and I had no other reason not to believe her." T5 91, 100-01; see also T5 182 (Hart eliciting from building manager opinion that Hart raped C.G.).

Hart's lack of understanding of the nature of self-representation manifested on a number of occasions when he asked stand-by counsel to perform duties that only a lawyer representing a client would undertake, or otherwise expressed confusion about stand-by counsel's role. See, e.g., T2 84-88; T3 87-88; T4 183-84; T5 52, 63-67. For example, Hart complained that stand-by counsel Timothy Arel would not assist him, prompting Arel to explain that Hart asked Arel "to run his case for him." T2 85. Hart responded by saying that he asked Arel only "to provide effective assistance of counsel," in that Hart wanted Arel to "marshal this testimony" or "to tie it together so [Hart] could close this witness out." T2 85-86. On another occasion, Hart said that Arel "is supposed to be my advocate," a statement that prompted the court to disagree, whereupon Hart seemed to acknowledge that Arel was not his advocate. T3 87. Nevertheless, later in trial, Hart said that Arel "has just informed me that he's

not to write any legal questions, he's only to assist me in answering questions so I'm out here all by myself all alone, Judge." T5 52. Arel later put on the record that Hart asked him "to write down his next line of questioning." T5 63. Hart responded by complaining: "it seems that counsel believes they can stand by and allow an error to occur, to allow a miscarriage of justice when they have the professional quality, the knowledge and experience and the wherewithal to defend or to provide the procedural information and guidance." T5 64. This struck Hart as improper because

> competently reasonable of [sic] effective assistance of counsel is precisely what the law dictates, that counsel should use their best efforts throughout any proceeding to potentially defend the defendant in every instance that he's being challenged by either State's witnesses or State's evidence. . . .

T5 65.

During the defense case, Hart listed a number of witnesses he wished to call. Several were lawyers who had some prior involvement in the case. T6 9-25, 205-06. The court was "not able to understand in any remote manner how there is any relevant information coming from these witnesses that would be admissible in this case. . . ." T6 24. When given the opportunity to proffer, *in camera*, what relevant testimony some intended witnesses could give, Hart could identify no admissible evidence, and the court barred him from calling most of them. T6 209-24, 229-31; T7 7-8. From the witnesses he did call, Hart elicited no pertinent information. T7 10-20, 25-28, 33-34. For reasons he did not give, Hart declined to ask any questions of one defense witness who did appear. T7 29-33. After the court ordered that a police officer who, on account

of illness, had resisted appearing to testify would have to come the following day, Hart unexpectedly rested, thereby releasing the witness. T7 34-41.

At the time of defense closing argument, the following transpired:

> The Court: Mr. Hart, you argue first, if you would like to proceed.
>
> (Pause).
>
> Mr. Hart: Thank you. I've prepared a base list of objections I would like to submit to the Court at this time.
>
> The Court: At this time, Mr. Hart, is your chance to present your closing argument to the jury, that's what we're here for. I'll allow that later. Right now you have an hour's time to give your closing argument to the jury, unless you don't wish to proceed with the closing argument.
>
> Mr. Hart: I have an article from the Union Leader, it is dated Saturday, February 13th, 1999. It is section A3 caption Italian judge defending his decision on gene [sic] rape. I submit this in my defense.
>
> The Court: Counsel.
>
> [Prosecutor]: Objection, your Honor.
>
> The Court: Sustained. It is not admissible evidence. Continue with your closing, please.
>
> Mr. Hart: I did not rape [C.G.]. Thank you. That's it, Judge.

T7 44-45.

SUMMARY OF THE ARGUMENT

The habeas court erred in denying Hart's amended petition. As a matter of law, Hart contends that a different and higher minimum standard of competency applies to defendants who seek to self-represent than to defendants who will stand trial while represented by counsel. With respect to the legal basis of that claim, Hart contends first that the United States Constitution establishes that higher minimum standard for self-representing defendants. In the alternative, he contends that the New Hampshire Constitution affords greater protection than the federal Constitution, in establishing the higher minimum competency standard for self-representing defendants. With respect to the claim's factual basis, the record reflects that, while Hart may have been competent to stand trial if represented by counsel, he did not meet the higher minimum standard applicable to self-representing defendants.

Second, regardless of whether the law establishes that higher minimum standard for self-representing defendants, the record does not establish that Hart knowingly waived his right to counsel. For this additional reason, the habeas court erred in denying the petition.

As a result, the prosecution of Hart led to a trial that failed both as a reliable test of the prosecution's case and as a demonstration of respect for a criminal defendant's dignity and autonomy. The law neither requires nor permits New Hampshire courts to countenance such trials.

I. THE COURT ERRED IN PERMITTING HART TO REPRESENT HIMSELF.

The amended petition raised claims under the Sixth and Fourteenth Amendments and Part I, Article 15 of the New Hampshire Constitution, challenging the ruling permitting Hart to represent himself at trial and for filing a notice of appeal. A42-A53. The petition first asserted that a higher minimum standard of competency applies to a defendant who wishes to self-represent than applies to the assessment of whether a represented defendant is competent to stand trial. Second, the petition claimed that Hart did not knowingly waive his right to counsel.

The State objected. A54-A79. On the merits, the State argued that neither the state nor federal Constitution sets a higher or different standard of competency for self-representing defendants than for represented defendants. Moreover, the State argued that, even if a higher standard of competency applies, Hart met it. In response to Hart's second claim, the State argued that Hart knowingly and voluntarily waived his right to counsel. Finally, to the extent that Hart relied on Indiana v. Edwards, 554 U.S. 164 (2008), the State argued that that decision does not apply retroactively.

Counsel filed a memorandum of law in support of the petition. A80-A124. The memorandum further developed Hart's claims and responded to the State's non-retroactivity argument.

Without convening a hearing, the court denied the petition by a written order. Supp. 1-9. The court ruled first that Hart knowingly and voluntarily waived his right to counsel. Supp. 5-6. With regard to competency, the court

rejected the argument that the law establishes a higher standard for the self-representing defendant. Supp. 6-8. The order did not address retroactivity.

Section A sets forth the federal constitutional doctrine, and argues that federal constitutional law sets a higher standard of competency to represent oneself than to stand trial. Section B contends, in the alternative, that the New Hampshire Constitution affords greater protection in this context. Finally, Section C describes the higher standard of competency and argues that Hart did not meet it, and also that he did not knowingly waive his right to counsel.

This Court reviews questions of law *de novo*. Barnet v. Warden, 159 N.H. 465, 468 (2009). That standard applies here because the habeas court's rulings rested on legal grounds. Insofar as the trial court's rulings also rested on legal judgments about the standard rather than on any finding discrediting Dr. Drukteinis's factual opinions, they also are subject to *de novo* review.

A. The Federal Constitutional Claim.

The United States Constitution guarantees criminal defendants the right to the assistance of counsel at trial. Gideon v. Wainwright, 372 U.S. 335 (1963). Criminal defendants also have the constitutional right to represent themselves, after an appropriate colloquy leading to a knowing and voluntary waiver of the right to counsel. Faretta v. California, 422 U.S. 806 (1975).

The Due Process Clause guarantees defendants the right not to be tried while incompetent to stand trial. Drope v. Missouri, 420 U.S. 162 (1975); Pate v. Robinson, 383 U.S. 375, 378 (1966); Dusky v. United States, 362 U.S. 402 (1960). In two cases, the Supreme Court has articulated doctrines with respect

to the minimum standard of competency required for a defendant to exercise the Faretta right to self-representation. Indiana v. Edwards, 554 U.S. 164 (2008); Godinez v. Moran, 509 U.S. 389 (1993). Two questions arise with respect to competency and self-representation. First, is a higher minimum degree of functioning and understanding required to be competent to represent oneself at trial than is required to be competent to stand trial with counsel? Second, what understanding is required for a defendant to waive the Sixth Amendment right to counsel?

1. The Minimum Standard of Competency to Self-Represent.

The Supreme Court has not expressly decided whether the stand-trial competency standard governs the analysis of self-representation competency. Godinez states no holding on competency to self-represent at trial because the defendant pled guilty. Godinez, 509 U.S. at 392-93. Edwards emphasized that limitation on the scope of Godinez in stating:

> In Godinez, the higher standard sought to measure the defendant's ability to proceed on his own to enter a guilty plea . . . . To put the matter more specifically, the Godinez defendant sought only to change his pleas to guilty, he did not seek to conduct trial proceedings, and his ability to conduct a defense at trial was expressly not at issue. Thus we emphasized in Godinez that we needed to consider only the defendant's "competence to *waive the right*." 509 U.S. at 399 (emphasis in original). And we further emphasized that we need *not* consider the defendant's "technical legal knowledge" about how to proceed at trial. Id. at 400.

Edwards, 554 U.S. at 172 (emphasis in original).

Edwards also states no holding on the content of the federal constitutional rule, because Edwards held only that a State may set a higher

standard of competency to self-represent at trial than is required to stand trial with counsel. Id. at 173-74. In the absence of an express holding on the content of the federal constitutional rule, Hart argues that the federal constitution requires a higher standard for self-representation at trial.

Support appears in cases that preceded Edwards. Examining its prior decisions, the Edwards Court found reason to recognize a difference between minimal competency to stand trial and minimal competency to self-represent at trial. The cases defining the minimum standard of competency to stand trial assume representation by counsel in that they incorporate an ability to consult with counsel into the standard. Edwards, 554 U.S. at 174. The Dusky standard refers to the defendant's "present ability to consult with his lawyer." Dusky, 362 U.S. at 402; see also Drope, 420 U.S. at 171 (referring to "capacity . . . to consult with counsel," and ability "to assist [counsel] in preparing the defense"). Because the competency-to-stand-trial standard involves, as an essential element, an assessment of the defendant's ability to interact with counsel, that standard cannot serve in a context in which the underlying assumption – representation by counsel – does not apply. As Edwards said,

> These [stand-trial] standards assume representation by counsel and emphasize the importance of counsel. They thus suggest (though they do not hold) that an instance in which a defendant who would choose to forego counsel at trial presents a very different set of circumstances, which in our view, calls for a different standard.

Edwards, 554 U.S. at 174-75.

The proposition finds support also in Faretta. Indeed, Faretta "rested its conclusion in part upon pre-existing state law set forth in cases all of which are consistent with, and at least two of which expressly adopt, a competency limitation on the self-representation right." Id. at 175 (citations omitted).

Practical and logical considerations support a distinction. Edwards acknowledged the variability of mental illness over time and in degree, as well as its capacity to "interfere[] with an individual's functioning at different times in different ways." Id. As a result, "an individual may well be able to satisfy Dusky's mental competency standard, for he will be able to work with counsel at trial, yet . . . he may be unable to carry out the basic tasks needed to present his own defense without the help of counsel." Id. at 175-76.

Also, the Court recognized that "a right of self-representation at trial will not 'affirm the dignity' of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel." Id. at 176 (citing McKaskle v. Wiggins, 465 U.S. 168, 176-77 (1984) ("dignity" and "autonomy" of individual underlie self-representation right)). On that point, the Court observed:

> To the contrary, given th[e] defendant's uncertain mental state, the spectacle that could well result from his self-representation at trial is at least as likely to prove humiliating as ennobling. Moreover, insofar as a defendant's lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial.

Edwards, 554 U.S. at 176; see also United States v. Ferguson, 560 F.3d 1060, 1068 & n.4 (9th Cir. 2009) ("standard for defendant's mental competence to

stand trial is now different from the standard for a defendant's mental competence to represent himself or herself at trial").

Thus, this Court must conclude that, as a matter of federal constitutional law, the stand-trial competency standard cannot be the same as the self-representation at trial standard. In Section C, this brief develops the content of that higher standard of competency.

2. The Validity of a Waiver of the Right to Counsel.

Courts will accept a waiver of the right to counsel only if done "competently and intelligently." Johnson v. Zerbst, 304 U.S. 458 (1938). In Godinez, the Court considered competency to waive the right to counsel in the context of a defendant who intended to plead guilty. Godinez, 509 U.S. at 400-02. The Court noted that a

> finding that a defendant is competent to stand trial . . . is not all that is necessary before he may be permitted to . . . waive his right to counsel. In addition to determining that a defendant who seeks to . . . waive counsel is competent, a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary. In this sense there *is* a heightened standard . . . for waiving the right to counsel, but it is not a heightened standard of *competence*.

Id. at 400-01 (emphasis in original). In a footnote, the Court explained that the

> focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the *ability* to understand the proceedings. . . . The purpose of the 'knowing and voluntary' inquiry, by contrast, is to determine whether the defendant actually *does* understand the significance and consequences of a particular decision . . . .

Id. at 401 n.12 (emphasis in original).

With respect to the waiver of the right to counsel, thus, the inquiry focuses not on a defendant's ability to perform at trial, but rather on the defendant's understanding of the right and of the implications of waiving it. In Section C, this brief argues that the record does not demonstrate that Hart understood the nature of the right to counsel and the implications of waiving it.

B. The New Hampshire Constitutional Claim.

This Court has long recognized that the protections guaranteed by the New Hampshire Constitution may exceed those guaranteed by the United States Constitution. State v. Ball, 124 N.H. 226, 231-33 (1983). Thus, "although in interpreting the New Hampshire Constitution we have often followed and agreed with the federal treatment of parallel provisions of the federal document, we never have considered ourselves bound to adopt the federal interpretations." Id. at 233.

In a variety of contexts, the Court has found the New Hampshire Constitution to be more protective than the United States Constitution. See, e.g., State v. Canelo, 139 N.H. 376 (1995) (Fourth Amendment); State v. Scarborough, 124 N.H. 363 (1983) (Sixth Amendment, right to counsel). In the competency context, this Court interpreted the New Hampshire Constitution as more protective in at least one context. See State v. Veale, 158 N.H. 632, 637-39 (2009) (rejecting Paul v. Davis, 424 U.S. 693 (1976), and holding that "competency determinations sufficiently implicate reputational interests to warrant the protection afforded by the State Due Process Clause").

With respect to the standard for measuring competency to stand trial with counsel, this Court follows Dusky. State v. Decato, 165 N.H. 294, 296-97 (2013). Often, per its post-Ball practice, the Court addresses competency claims under the state Constitution. See, e.g., Veale, 158 N.H. at 636-37; State v. Zorzy, 136 N.H. 710, 714-15 (1993). The Court, has, on a few occasions, found a particular competency principle to have independent status under the New Hampshire Constitution. See State v. Faragi, 127 N.H. 1, 9 (1985) (citing State v. Bertrand, 123 N.H. 716, 725 (1983), as adopting the rule approved in Pate v. Robinson regarding court's *sua sponte* obligation to raise competency "as an affirmative requirement of the State Constitution").

In State v. Champagne, 127 N.H. 266, (1985), the Court ruled that the standard of competency to plead not guilty by reason of insanity is the same as the standard of competency required to stand trial. See also Faragi, 127 N.H. 1 (equating standard of competency to stand trial with competency to waive insanity defense); Roy v. Perrin, 122 N.H. 88, 94 (1982) (equating standard of competency for standing trial with standard for pleading guilty). This Court, however, has not previously confronted a case raising the question of the standard governing competency to represent oneself at trial. See Berger, The Aftermath of Indiana v. Edwards: Re-evaluating the standard of competency needed for pro se self-representation, 68 Baylor L.Rev. 680, 720 n.220 (2016) (listing New Hampshire among states in which question not resolved).

Several considerations combine to support the conclusion that New Hampshire law mandates a higher standard of competency for self-

representation than for standing trial with counsel. First, the analysis of United States Supreme Court precedent in Edwards applies equally to this Court's precedent. That is, this Court's cases defining the minimum standard of competency to stand trial assume representation by counsel, in that they incorporate an ability to consult with counsel into the stand-trial competency standard. For example, in State v. Moncada, 161 N.H. 791, 797-98 (2011), the Court affirmed a finding of competency to stand trial where the defendant argued that he would be competent only if the court appointed a second lawyer. This Court endorsed the trial court's reasoning that "defendant's current attorney can explain the proceedings to the defendant beforehand, and as they unfold, so that the defendant will be able to understand the nature of the process." Id. at 797. In other cases, this Court has relied on the presence of counsel in finding a defendant competent to stand trial. See, e.g., State v. Kincaid, 158 N.H. 90, 94 (2008) ("a defendant can consult with and assist his trial counsel with a reasonable degree of rational understanding without necessarily remembering an event . . . "); State v. Gourlay, 148 N.H. 75, 78 (2002) (to be competent to stand trial, defendant "must be sufficiently coherent to provide his counsel with the information necessary to construct a defense"); Champagne, 127 N.H. at 270 ("defendant must have a sufficient present ability to consult with and assist his lawyer . . . . He must also have the ability to communicate meaningfully with his lawyer. . ."). As a matter of logic, when the assumed presence of counsel does not apply because the defendant will self-represent, courts must use a standard that does not rely on that assumption.

Second, the Faretta right serves an interest in dignity and autonomy that is not advanced by the spectacle of a mentally-ill and manifestly incapable defendant attempting to present a defense at trial. Hart incorporates here the various considerations that led Edwards to caution against a single standard transferred from the stand-trial context to the self-representation context. Such a standard will fail to come to terms with the reality that "[i]n certain instances an individual may well be able to satisfy Dusky's mental competence standard, for he will be able to work with counsel at trial, yet at the same time he may be unable to carry out the basic tasks needed to present his own defense without the help of counsel." Edwards, 554 U.S. at 175-76.

In addition, this Court often gives special weight to decisions interpreting the Massachusetts Constitution. State v. Roache, 148 N.H. 45, 49 (2002) (noting shared language and history of Part I, Article 15 of New Hampshire Constitution, and Part I, Article 12 of Massachusetts Constitution); Sirrell v. State, 146 N.H. 364, 390 (2001) (same). While no recent Massachusetts case has confronted whether to require a higher minimum standard of competency in self-representation cases, in at least two cases, the Supreme Judicial Court ("SJC") has alluded to the issue. In Commonwealth v. Means, 907 N.E.2d 646, 661 (Mass. 2009), the SJC held that the scope of the inquiry into a mentally ill defendant's competency to waive counsel and self-represent are determined by "the circumstances at hand." The SJC further noted that it is "mindful of the admonition of the United States Supreme Court, which recently 'cautioned against the use of a single mental competency standard for deciding both (1)

whether a defendant who is represented by counsel can proceed to trial and (2) whether a defendant who goes to trial must be permitted to represent himself.'" Id. (quoting Edwards, 554 U.S. at 175). See also Commonwealth v. Gibson, 54 N.E.3d 458, 467 (Mass. 2016) (citing Means and Edwards, affirming need to "exercise caution in applying a single mental competency standard in determining whether a defendant may be permitted to represent himself").

Other states have used a different minimum standard for self-representation than for standing trial while represented by counsel. See, e.g., People v. Johnson, 267 P.3d 1125 (Cal. 2012); State v. Connor, 973 A.2d 627, 650-51 (Conn. 2009); State v. Jason, 779 N.W.2d 66 (Iowa App. 2009); State v. Lane, 707 S.E.2d 210, 219 (N.C. 2011); State v. Klessig, 564 N.W.2d 716, 723-24 (Wis. 1997); see also Berger, 68 Baylor L. Rev. 680 (proposing higher standard for self-representation). For all these reasons, the New Hampshire Constitution likewise does not permit courts to use, for the trial of a self-representing defendant, a standard designed to measure a represented defendant's competency to stand trial.

C. The Court erred in permitting Hart to represent himself.

As noted, Hart's claims speak to two distinct, albeit related, concerns. First, he contends that he was not competent to represent himself at trial and for the filing of a notice of appeal. Second, he contends that he was not competent to, and did not, knowingly waive his right to counsel. The brief addresses the first claim in sub-section (1) and the second in sub-section (2).

1. Hart was not competent to represent himself.

It remains to define the content of the appropriate standard for measuring a defendant's competency to self-represent. In Johnson, the California Supreme Court considered a variety of possible measures. Johnson, 267 P.3d at 1131. One formulates the standard as "whether the defendant can conceive of a defense and coherently communicate it to the judge and jury." Id. Another would require "a defendant who wishes to represent himself [to] demonstrate an understanding of the charges, defenses, and punishments, and an ability to rationally communicate." Id. A third

> stated a test for the cognitive and communicative skills involved in competently representing oneself: Such skills are present where the accused: (1) possesses a reasonably accurate awareness of his situation, including not simply an appreciation of the charges against him and the range and nature of possible penalties, but also his own physical and mental infirmities, if any; (2) is able to understand and use relevant information rationally in order to fashion a response to the charges; and (3) can coherently communicate that response to the trier of fact.

Id.

The California court further cited "two thoughtful law review articles" that suggested "more specific standards." Id. (citing Marks, State Competence Standards for Self-Representation in a Criminal Trial: Opportunity and Danger for State Courts after Indiana v. Edwards, 44 U.S.F. L. Rev. 825, 847 (2010); Johnston, Representational Competence: Defining the Limits of the Right to Self-Representation at Trial, 86 Notre Dame L.Rev. 523, 595 (2011)). One suggested the following standard:

> A criminal defendant is mentally incompetent to represent himself or herself at trial if and only if a mental disorder or disability would prevent the defendant from achieving a basic understanding of the charges, law, and evidence, from formulating simple defense strategies and tactics, or from communicating with the witnesses, the court, the prosecutor, and the jury in a manner calculated to implement those strategies and tactics in at least a rudimentary manner.

Marks, supra, at 847. Drawing on "social problem-solving theory," the second proposed a "more technical standard:"

> to represent oneself at a criminal trial, one should possess foundational abilities to perceive problematic situations, generate alternative courses of action, maintain mental organization, and communicate decisions to a functionary of the court. Within the context of a prosecution, a defendant should also possess the ability to identify a plausible source of the prosecution, an ability to gather information to evaluate the state's case, a willingness to attend to the prosecution, and an ability to withstand the stress of trial. Finally, for certain key decisions, such as selecting the defense to pursue at trial, a defendant should be capable of justifying a decision with a plausible reason.

Johnston, supra, at 595.

Ultimately, the California court turned to Edwards for the appropriate standard. Johnson, 267 P.3d at 1132. Thus, minimum competency to self-represent involves

> the ability to carry out the basic tasks needed to present one's own defense without the help of counsel. [Edwards] also said the states may deny self-representation to those competent to stand trial but who suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.

Id. (citation and quotation marks omitted). Preferring that standard, the California court thought "it best not to adopt a more specific standard," though it recognized that the various other contemplated standards "suggest relevant factors to consider." Id.

In Wisconsin, "in making a determination on a defendant's competency to represent himself," the trial court "should consider such factors as the defendant's education, literacy, fluency in English, and any physical or psychological disability which may significantly affect his ability to communicate a possible defense to the jury." Klessig, 564 N.W.2d at 723-24. Other courts similarly have adopted a standard of minimal competency to self-represent. The Connecticut Supreme Court adopted a standard focusing on whether the defendant has

> the ability to carry out the basic tasks needed to present his own defense without the help of counsel, notwithstanding any mental incapacity or impairment serious enough to call that ability into question. Of course, in making this determination, the trial court should consider the manner in which the defendant conducted the trial proceedings and whether he grasped the issues pertinent to those proceedings, along with his ability to communicate coherently with the court and the jury.

Connor, 973 A.2d at 657. See also Lane, 707 S.E.2d at 219 (articulating standard as whether defendant is "unable to carry out the basic tasks needed to present his own defense without the help of counsel").

Hart does not take a position as between these various formulations of the standard, beyond contending that some such formulation applies to his case. Indeed, the differences between the formulations seem less a matter of

substance than of emphasis, nuance, and degree of specificity. None of the possible alternatives conflicts with any of the others.

The relevant record involves not just the pre-trial hearings, but also the trial. Trial courts have a duty *sua sponte* to investigate a good faith concern about a defendant's competency. Bertrand, 123 N.H. at 725. Moreover, "even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." Id. at 726 (quoting Drope, 420 U.S. at 181).

This brief incorporates herein by reference the description of the relevant facts presented above. Both before and during trial, judges noted Hart's inability to focus, and often, to communicate coherently. Dr. Drukteinis testified that Hart suffered from paranoia and a personality disorder. He further expressed the opinion that Hart was not competent to represent himself. No party introduced any evidence to contradict Drukteinis's assessment. See State v. Haycock, 146 N.H. 5, 8 (2001) ("[w]hen . . . a defendant establishes a *prima facie* case of incompetency through the introduction of uncontroverted expert testimony, the trial court should delineate its reasons for rejecting that testimony and those reasons must be supported by the record").

Hart's defense at trial was a shambles. He pursued irrelevant matters at great length. He invited the introduction of damaging evidence. Long periods of time passed in silence between one question and the next. His opening

statement was largely incoherent and he gave no meaningful closing argument. Hart was not capable of carrying out the basic tasks of the defense.

In permitting Hart to represent himself, the trial court made no finding of fact inconsistent with Drukteinis's view of Hart's capacities. Indeed, both Judge Barry and Judge Groff at times noted Hart's incoherence and tendency to focus on irrelevant matters. Rather, in allowing Hart to represent himself, the trial court seemed to equate the minimum standard of competency to stand trial with the minimum standard of competency to self-represent. The court's erroneous ruling, thus, reflects not a dispute about any facts so much as a dispute about the content of the governing legal standard. Hart does not now contend that he was incompetent to stand trial if represented by a lawyer. Thus, if the Court agrees that the minimum competency standards differ, no trial court factual finding stands in the way of granting habeas relief. Applying any reasonable version of the higher minimum standard of competency applicable to defendants who would self-represent, this Court must conclude that Hart failed to meet that standard. The trial court therefore erred in permitting self-representation, and the habeas court erred in denying the writ.

2. Hart did not knowingly waive his right to counsel.

As described above, an inquiry into whether a waiver was knowing focuses on "whether the defendant actually *does* understand the significance and consequences of a particular decision. . . ." Godinez, 509 U.S. at 401 n.12 (emphasis in original). The dispositive question therefore is whether the record

establishes that Hart actually understood the significance and consequences of his decision to represent himself.

At the hearing on August 31, 1999, the Court conducted a colloquy with Hart, during which he responded affirmatively to questions about whether he understood his right to counsel. H4 3-8. A defendant's ability to give the obviously required answer to a yes-or-no question, though, does not necessarily establish that the defendant actually understands what it meant to represent himself. See State v. Horak, 159 N.H. 576, 582 (2010) (court must view in context answers given during colloquy assessing compentency). Hart's interactions with stand-by counsel show that Hart did not understand the significance and consequences of the choice to self-represent. Rather, he continued to believe that stand-by counsel Arel would serve as his "advocate," T3 87, would "run his case for him," T2 85, and had an obligation to provide effective assistance of counsel. T2 85-86; T5 65. Only one who had that understanding could express, as Hart did with evident surprise, that counsel "has just informed me that he's not to write any legal questions, he's only to assist me in answering questions so I'm out here all by myself all alone, Judge." T5 52. The record thus establishes that Hart did not understand the significance and consequences of his waiver of counsel.

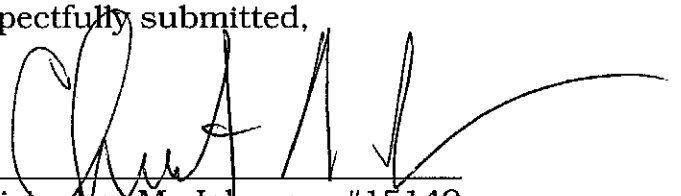
CONCLUSION

WHEREFORE, Mr. Hart respectfully requests that this Court reverse the Superior Court's ruling denying his petition for a writ of habeas corpus.

Undersigned counsel requests fifteen minutes of oral argument before a full panel.

The appealed decision is in writing and is appended to the brief.

Respectfully submitted,

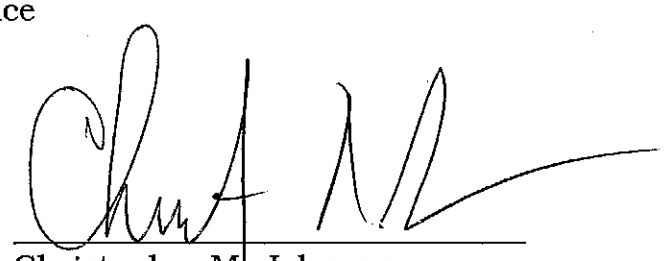


By _____
Christopher M. Johnson, #15149
Chief Appellate Defender
Appellate Defender Program
10 Ferry Street, Suite 202
Concord, NH 03301

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



Christopher M. Johnson

DATED: February 9, 2018

SUPPLEMENT

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THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Merrimack Superior Court
163 North Main St./PO Box 2880
Concord NH 03302-2880

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

NOTICE OF DECISION

File Copy

Case Name: **Kenneth H. Hart v Warden, New Hampshire State Prison**
Case Number: **217-2017-CV-00023**

Enclosed please find a copy of the court's order of October 02, 2017 relative to:

ORDER

October 17, 2017

Tracy A. Uhrin
Clerk of Court

(485)

C: Offender Records; Michael G. Valentine, ESQ; Office Of Cost Containment; Christopher M. Johnson, ESQ

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **SUPERIOR COURT**

Kenneth Hart

v.

Warden, New Hampshire State Prison

No. 217-2017-CV-00023

ORDER

Currently before the Court is petitioner Kenneth Hart's writ of habeas corpus, in which he asks the Court to vacate his aggravated felonious sexual assault conviction. Respondent, in his capacity as Warden of the New Hampshire State Prison, objects. Given the issue presented and the exhibits submitted by the parties, the Court does not find a hearing would aid its analysis. Upon consideration of the pleadings, arguments, and applicable law, the Court finds and rules as follows.

Factual Background

On October 23, 1998, petitioner was arrested and charged with aggravated felonious sexual assault. By January 8, 1999, petitioner had expressed his desire to proceed *pro se* at trial. (Pet.'s Mem. Ex. A1.) The State objected to petitioner proceeding *pro se*. At a hearing on the matter, the court (Barry, J.) found a "*bona fide* and legitimate doubt" existed as to petitioner's competence, noting that "[a]lthough the defendant appears articulate, he has consistently demonstrated an inability to understand the trial process and the procedures necessary for his defense." (Id. at Ex. A2–7.) The court ordered petitioner to undergo a psychiatric evaluation; however, he initially refused to speak with Dr. Adams, who worked for the New Hampshire Prison's

Secure Psychiatric Unit, informing him he would only agree to be evaluated by a private psychiatrist. (Id. at A10.)

Thereafter, the court ordered petitioner be evaluated by Dr. Albert Drukteinis. (Id. at A11.) On July 21, 1999, the court held a competency hearing, at which Dr. Drukteinis testified. The court (Groff, J.) found defendant competent beyond a reasonable doubt. (Id. at A13.) The court noted that Dr. Drukteinis testified petitioner "clearly understood the nature of the proceedings and the criminal justice process itself in an intelligent and rational way" and had the "ability to understand his right to counsel and the duties, responsibilities and advantages having counsel provides." (Id. at A12–13.) The court also noted that, although Dr. Drukteinis felt petitioner "[didn't] understand how deficient his performance as his own counsel would be and the potential prejudice that would present to his defense," it was "clear he [understood] his right to counsel." (Id. at A13.)

At a pending motions hearing on August 31, 1999, the court (Groff, J.) had the following exchange with petitioner:

The court:	Mr. Hart, still wish to proceed *pro se* in this matter; is that correct?
	. . .
Mr. Hart:	Yes, I'm prepared to proceed *pro se*.
The court:	That's what you want to do?
Mr. Hart:	That's what I want to do.
The court:	You understand you have the absolute right under the federal and state constitution to be represented by counsel?
Mr. Hart:	I do understand that right.
The court:	And even though you can't afford your own counsel the State appoints one for you; you understand that?
Mr. Hart:	I understand that as well.
The court:	I just want to be clear, understanding all of this and understanding the absolute right you have to counsel, it is your desire not to have counsel, to waive your right to counsel and to proceed to represent yourself? I just want to be very clear about that.

Mr. Hart: Yes, that's correct, it is my right and it is my knowing and intelligent opinion to waive counsel and proceed *pro se*.

The court: Okay. Now, it is incumbent upon me under the law – well, you understand Mr. Hart, that now – we're dealing here with what is the maximum penalty, ten to twenty on these, counsel?

The State: That's right.

The court: There's a maximum sentence on each one of these charges of not less than ten years nor more than – not more than ten years to twenty years on each one of these charges. If you were found guilty you could be sentenced to that imprisonment term on each one of them consecutive; do you understand that?

Mr. Hart: I understand that there's a maximum penalty, yes.

The court: And you understand that as representing yourself you are going to be required to follow the Rules of Evidence, follow the rules of court, many things which take lawyers years and years to understand, and quite frankly some of them still don't understand them? Do you understand you are going to have to pick a jury?

Mr. Hart: Yes.

The court: That you are going to have to examine witnesses direct and cross-examination?

Mr. Hart: Yes.

The court: You are going to have to make an opening statement to the jury, you are going to have to make a closing argument; do you understand all of these things that you are going to have to do?

Mr. Hart: I understand I'll have to do all the things that a licensed attorney would have to do.

The court: Those aren't easy things, Mr. Hart.

Mr. Hart: I don't think they are easy things at all.

. . .

The court: And one of the things about a lawyer is that a lawyer is always able to be, hopefully, objective and dispassionate and therefore could look at things clearly without making decisions that, you know, you've got to deal with your own emotional involvement in the case to the extent it can cloud your complete objectivity. I mean you understand you at least have to deal with that problem if you are going to represent yourself, you understand that?

Mr. Hart: I do understand. I have no clouded misunderstanding at this time.

(Pending Mot. Hr'g. Tr. p. 3–8, August 31, 1999.)

The court (Groff, J.) found petitioner's waiver of his right to counsel knowing, intelligent, and voluntary, noting petitioner was "aware of the serious nature of the charges against him, the potential sentence which may be imposed, the complex factual

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and legal issues presented by this case, and the serious limitations in acting as his own counsel." (Pet.'s Mem. Ex. A14.) The court also appointed standby counsel, to assist petitioner in procedural matters and strategic decisions.

Legal Analysis

I. Knowing, Intelligent, and Voluntary Waiver

Petitioner contends the trial court, by allowing him to proceed *pro se*, violated his constitutional right to the assistance of counsel and for the purpose of filing a notice of appeal. The Court is unpersuaded.

"Both Part I, Article 15 of the State Constitution and the Sixth Amendment of the United States Constitution guarantee a criminal defendant the right to self-representation and the right to counsel." State v. Ayer, 154 N.H. 500, 516 (2006). "The two rights are mutually exclusive; the exercise of one right nullifies the other." Id. "To be effective, an assertion of the right to self-representation must be: (1) clear and unequivocal; (2) knowing, intelligent and voluntary; and (3) timely." Id.

"Even then, it is incumbent upon the trial judge to ascertain whether the defendant has 'knowingly and intelligently' relinquished 'the traditional benefits associated with the right to counsel.'" State v. Barham, 126 N.H. 631, 637 (1985) (quoting Faretta v. Cal., 422 U.S. 806, 835 (U.S. 1975)). "The court must indulge in every reasonable presumption against waiver of counsel." Id. "The court must also make the defendant aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." Id.

Here, the Court finds petitioner knowingly, intelligently, and voluntarily waived his right to counsel. The record demonstrates that between October 1998 and August 1999, petitioner consistently maintained his desire to proceed *pro se*. The court (Groff, J.) explained to petitioner the dangers and disadvantages of representing himself *pro se*. In a long colloquy, the court informed petitioner he would be required to follow the rules of evidence and the court rules, which the court explained could be difficult even for a seasoned lawyer. The court informed petitioner he would need to make an opening statement and closing argument. The court informed defendant he would need to question witnesses, directly and on cross-examination. Finally, the court warned petitioner of the danger of not having a lawyer who—as opposed to a party in the case—can view the case objectively and dispassionately. Being warned of the foregoing, petitioner still plainly and unequivocally waived his right to counsel.

II. Competence

Petitioner next contends he was not competent to represent himself at trial because the New Hampshire Constitution requires a higher level of minimum competence to represent oneself at trial than to be competent to stand trial. See Indiana v. Edwards, 554 U.S. 164 (2008). The United States Supreme Court has recognized this distinction in Edwards, in which it permitted state trial courts to deny a defendant's request to proceed *pro se* in situations in which he is "competent to stand trial" under Dusky, but still suffered from mental illness to the point that he "lack[ed] the mental capacity to conduct his trial defense unless represented." Id. at 2385–86.

However, the Supreme Court's holding in Edwards is permissive, as it allows, but does not require, state courts to impose counsel on defendants who suffer from some

mental illness but are nonetheless competent to stand trial. See Panetti v. Stephens, 727 F.3d 398, 414 (5th Cir. 2013) ("Even then, Edwards is permissive, *allowing* the state to insist on counsel, but not requiring that the state do so."); see also United States v. Stafford, 782 F.3d 786, 791 (6th Cir. 2015); United States v. Ferguson, 560 F.3d 1060, 1070 n. 6 (9th Cir. 2009); United States v. Berry, 565 F.3d 385, 391 (7th Cir. 2009); United States v. DeShazer, 554 F.3d 1281, 1290 (10th Cir. 2009).

Petitioner acknowledges that Edwards created a permissive rule but argues the New Hampshire Constitution "mandates a higher standard of competence for self-representation than for standing trial with counsel." (Pet.'s Mem. p. 34.) The Court disagrees.

In State v. Champagne, the New Hampshire Supreme Court addressed whether the standard for competence to stand trial differed from the standard for competence to plead not guilty by reason of insanity. 127 N.H. 266, 274 (1985). In Champagne, the trial court held that "a finding and ruling that Mr. Champagne is competent to stand trial does not encompass as a matter of law a finding and ruling that he is competent to plead guilty by reason of insanity; nor is the converse true." Id. The trial court reasoned that:

> Although the test [for competence] is the same in both situations, it focuses on a defendant's understanding of the proceedings against him. Obviously, trial proceedings against a defendant are different from proceedings at which a defendant pleads not guilty by reason of insanity. The proceedings being different, the standard, as applied, also differs. A defendant may understand what is involved in standing trial but may not understand that by pleading he is waiving a variety of constitutional rights.

Id. The Supreme Court disagreed, holding "that a defendant cannot be competent for some trial proceeding purposes and incompetent for others. He is either competent or

he is incompetent." Id. Therefore, given defendant was found competent beyond a reasonable doubt to stand trial, the Court finds he was competent to waive his right to be represented by counsel. See Godinez v. Moran, 509 U.S. 389, 399 (U.S. 1993) (holding the competency standard to stand trial is the same as the competency standard to waive one's right to the assistance of counsel).

To the extent petitioner argues his ineffective performance at trial establishes his lack of competence to represent himself at trial, the Court is again unpersuaded. "[A] defendant has a constitutional right to represent himself, whether or not that representation will be to his detriment." State v. Barham, 126 N.H. 631, 639 (1985). "Once a defendant knowingly and intelligently foregoes his right to counsel, he cannot thereafter complain that the quality of his own defense amounted to a denial of effective assistance of counsel." United States v. Manjarrez, 306 F.3d 1175, 1180–81 (1st Cir. 2002); see also Faretta, 422 U.S. at 834 ("[A]lthough [a defendant] may conduct his own defense ultimately to his own detriment, his choice must be honored out of that respect for the individual which is the lifeblood of the law."); United States v. Benefield, 942 F.2d 60, 66 (1st Cir. 1991) ("The fact that [the *pro se* defendant] was not a very effective advocate does not mean he was improperly permitted to proceed without the aid of counsel.").

Accordingly, because petitioner does not contest he possessed the minimum standard of competence to stand trial, (see Pet.'s Mem. p. 43.), and New Hampshire does not have a higher standard of competence to waive one's right to counsel, his petition is DENIED.

SO ORDERED.

10/2/17
Date

Gillian L. Abramson
Presiding Justice