

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

RECEIVED
NEW HAMPSHIRE
SUPREME COURT

2018 JUL 12 P 3:14

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

REPLY 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)

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii
Question Presented	1
Statement of the Case and of the Facts	2
Argument	
I. THIS COURT MUST REJECT THE STATE'S PROCEDURAL DEFAULT ARGUMENT	3
Conclusion.....	6

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
<u>Avery v. Cunningham</u> , 131 N.H. 138 (1988)	4
<u>State v. Avery</u> , 126 N.H. 208 (1985)	4
<u>State v. Blackmer</u> , 149 N.H. 47 (2003)	3
<u>State v. Cheney</u> , 165 N.H. 677 (2013)	3
<u>State v. Pepin</u> , 159 N.H. 310 (2009)	4, 5
<u>State v. West</u> , 167 N.H. 465 (2015)	3
<u>State v. Willis</u> , 165 N.H. 206 (2013)	3

QUESTION PRESENTED

Whether the court erred by 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 Hart's opening brief;
"Supp." refers to the documentary supplement attached to Hart's opening brief;
"DB" refers to the designated page of Hart's opening brief;
"SB" refers to the designated page of the State's brief.

STATEMENT OF THE CASE AND OF THE FACTS

In its responsive brief, in addition to opposing Hart's claims on their merits, the State advanced a procedural default argument. SB 10-14. Specifically, the State argued that Hart's failure to pursue the claims on direct appeal bars him from raising them in habeas proceedings. Id. Counsel files this reply brief to address the State's procedural default argument.

I. THIS COURT MUST REJECT THE STATE'S PROCEDURAL DEFAULT ARGUMENT.

For two independent reasons, this Court must reject the State's procedural default argument. First, the State failed to preserve that argument in the Superior Court. In the pleading the State filed in the Superior Court in response to Hart's amended petition, the State at no point asserted the procedural default now advanced for the first time on appeal.¹ See, e.g., State v. West, 167 N.H. 465, 468 (2015) (applying preservation obligation to State, with respect to arguments it makes on appeal); State v. Willis, 165 N.H. 206, 223 (2013) (same). In State v. Cheney, 165 N.H. 677, 679 (2013), this Court refused to consider an untimeliness argument made by the State for the first time on appeal. For the same reason, it must reject the procedural default argument pressed by the State on appeal, but not made by the State in the Superior Court.

Second, the argument would fail even if the State had preserved it. The State's procedural default argument first contends that Hart should have raised his claims on direct appeal. SB 11. The flaw in that argument is that the trial court's order allowing self-representation left Hart in the position of having to vindicate his rights on appeal despite being incompetent to do so. Hart proved no more competent to represent himself for the purposes of securing an appeal than he had been at trial, as shown by the fact that this Court

¹ The State did make a non-retroactivity argument in the Superior Court, A71-A72, but the State has not pursued that argument on appeal. This Court will not consider arguments that are not developed on appeal. State v. Blackmer, 149 N.H. 47, 49 (2003) (Court will "confine [its] review only to those issues that [are] fully briefed").

ultimately dismissed the direct appeal because Hart failed to file either a notice of appeal or a motion for the appointment of counsel to represent him in the preparation of a notice of appeal. A30. If, as Hart contends in this habeas action, the court erred in allowing him to represent himself at trial because he was not competent to do so, it necessarily follows that the Court cannot fault Hart for failing to comply with the rules associated with filing a notice of appeal. The fault rather lies with the trial court that erroneously put Hart in the position of having to navigate those procedures *pro se*.

Avery v. Cunningham, 131 N.H. 138 (1988), cited by the State, does not support the State's view. In habeas corpus, the petitioner raised a claim that he had been incompetent to stand trial, and this Court rejected the claim on the ground that the failure to raise it on direct appeal defaulted it. Id. at 142-44. Application of the procedural bar there was fair, though, because Avery had counsel at trial and on direct appeal. See State v. Avery, 126 N.H. 208, 210-11 (1985) (referencing trial counsel, and showing that the Appellate Defender represented Avery on a delayed direct appeal, after a prior appeal had been dismissed, attributable to ineffective assistance of appellate counsel). That case, therefore, did not involve the invocation of a procedural default against an incompetent and self-representing defendant.

Support for Hart's position further appears in State v. Pepin, 159 N.H. 310 (2009). In that post-conviction proceeding, Pepin argued, among other claims, that trial counsel was ineffective for failing to raise certain due process issues. Id. at 310-12. The Superior Court denied the petition, concluding that

Pepin's claims were defaulted because the underlying basis was not raised on direct appeal. *Id.* at 311. This Court reversed. *Id.* at 312-13. If ineffective assistance of counsel constitutes a reason not to apply a procedural bar defaulting due process claims that could previously have been raised, then so also must the incompetency of a defendant erroneously permitted to represent himself at trial and for purposes of filing a notice of appeal.

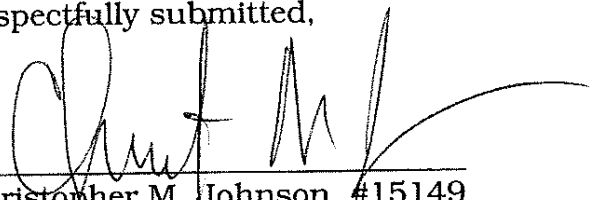
Similar considerations defeat the contention that Hart's claims should be defaulted because he did not raise them in an earlier post-conviction proceeding. Nothing in the record suggests that Hart strategically withheld the claims. Indeed, he did not raise anything related to competency even in his *pro se* complaint in January 2017. A33-A34. A competency issue was raised only when, for the first time since before the trial, any court had appointed a lawyer to represent Hart in a challenge to his conviction.

Thus, this Court must reject the State's procedural default argument for either or both of two independent reasons. First, it is unpreserved. Second, it would lack merit even if preserved.

CONCLUSION

WHEREFORE, for the reasons stated above as well as those given in Mr. Hart's opening brief and those to be offered at oral argument, Hart respectfully requests that this Court reverse the ruling denying his amended petition for a writ of habeas corpus.

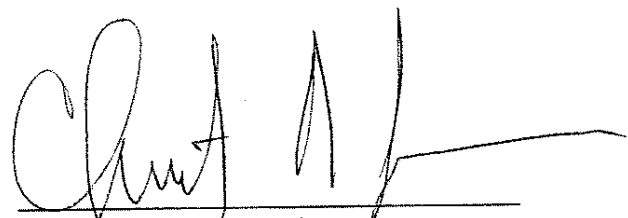
Respectfully submitted,


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:

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



Christopher M. Johnson

DATED: July 12, 2018

