

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0161

State of New Hampshire

v.

Jesse Warren

Appeal Pursuant to Rule 7 from Judgment of the
Tenth Circuit Court – District Division – Salem

BRIEF FOR THE DEFENDANT

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(15 minutes oral argument)

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QUESTIONS PRESENTED

1. Whether the court erred by reinstating the complaint because Warren was not represented by counsel.

Because the right to counsel is fundamental, Warren was not required to raise the issue in the trial court. Even if he was, the issue was preserved by Warren's request for a lawyer at the reinstatement hearing, H* 4, the court's order reinstating the complaint, AD 3, 4; H 6, Warren's motion to reconsider, A 27, the State's objection to his motion to reconsider, A 33, Warren's reply to the State's objection, A34, the parties' arguments, T 4-13, and the court's ruling. AD 6; T 13-14. To the extent the issue is not preserved, it is raised as plain error.

2. Whether the court erred by reinstating the complaint because it did not find that Warren was able to pay the fine by the deadline.

Issue preserved by Warren's arguments at the reinstatement hearing, H 4-6, the court's order reinstating the complaint, AD 3, 4; H 6, Warren's motion to reconsider, A 27, the State's objection to his motion to reconsider, A 33,

* Citations to the record are as follows:

"A" refers to the appendix to this brief containing documents other than the appealed decisions;

"AD" refers to the appendix to this brief containing the appealed decisions;

"H" refers to the transcript of the hearing on the State's motion to reinstate the complaint on October 17, 2018;

"PS" refers to the transcript of the plea and sentencing hearing on March 29, 2018;

"T" refers to the transcript of the bench trial on January 3, 2019.

Warren's reply to the State's objection, A 34, the parties' arguments, T 4–13, and the court's ruling, AD 6; T 13–14. To the extent this issue is not preserved, it is raised as plain error.

STATEMENT OF THE CASE AND FACTS

In March 2017, the State filed a complaint in the Tenth Circuit Court – District Division – Salem alleging that Jesse Warren drove with a suspended license, a subsequent offense. A 4; see RSA 263:64, I, VI. The State filed notice of its intent to seek Class A misdemeanor penalties. A 6; see RSA 625:9, IV(c)(2). Warren retained Attorney Charles Keefe, who filed an appearance. A 5. In September 2017, the State filed a new complaint, based on the same conduct as the driving-after-suspension complaint, alleging that Warren committed disorderly conduct. A 9.

On March 29, 2018, pursuant to a negotiated resolution, Warren pleaded guilty to the disorderly conduct complaint. PS 3–4. The court (Stephen, J.) sentenced Warren to 90 days in the house of corrections, with 15 days to serve and 75 days deferred. A 9; PS 6. The court also fined Warren \$1860, with \$620 to pay and \$1240 suspended. A 9; PS 5. The court placed the driving-after-suspension complaint on file without a finding, conditioned on Warren’s good behavior and compliance with the terms of the disorderly-conduct sentence. A 8; PS 2. The prosecutor explained that a conviction for driving after suspension would have caused the Department of Motor Vehicles to certify Warren a habitual offender. PS 5; see RSA 259:39; RSA 262:18–26.

Attorney Keefe informed the court that Warren had only \$1.27 in his checking account and requested thirty days to pay the fine. PS 5–6. The court responded by telling Keefe and Warren to “talk to the clerks’ office about that.” PS 6. After the hearing, Warren signed a payment plan calling on him to pay the \$620 plus an extra \$25 by April 28, 2018. A 11.

When Warren had not paid the fine by May 3, 2018, the clerk added \$50 to the fine and recommended that the Department of Motor Vehicles suspend Warren’s license. A 11–12. When Warren had not paid the fine by July 12, 2018, the State filed a motion to issue an arrest warrant, reinstate the driving-after-suspension complaint, and impose the balance of the disorderly-conduct sentence. A 13. On July 26, 2018, the court issued an arrest warrant, setting as bail the \$695 that Warren owed, and ordered that a hearing be scheduled upon Warren’s apprehension. A 13–14.

On August 30, 2018, Warren paid the full \$695 at the courthouse. A 15–16. The extra \$75 that Warren paid was equivalent to an annualized interest rate of 31.1%. The arrest warrant was vacated and a hearing on the State’s motion was scheduled for October 17, 2018. A 16–17.

In September 2018, Attorney Keefe filed a motion to withdraw as counsel, citing Warren’s failure “to meet his

contractual obligations” and failure to communicate. A 18. The court granted the motion. A 19–20.

At the hearing on the State’s motion on October 17, 2018, Warren appeared pro se. H 3–4. The State acknowledged that Warren had a right to counsel on the motion to impose the deferred sentence, necessitating a continuance of the hearing on that request. H 3. The State requested, however, that the court immediately reinstate the driving-after-suspension charge, notwithstanding Warren’s lack of counsel. H 3–4.

Warren told the court that he wanted a lawyer but could not afford one. H 4. The court instructed Warren to complete a financial affidavit and indicated that, if Warren qualified, it would appoint counsel on the motion to impose the deferred sentence. H 4.

Warren asked the court “dismiss” the State’s motion, noting that he had paid the fine in full. H 4–5. The State objected, noting that Warren did not pay the fine “in the time period that the [c]ourt gave him to comply.” H 5. The State added, “[W]hen you don’t abide by the [c]ourt’s orders, there’s a consequence for it.” H 5.

Warren acknowledged that he “failed to pay [the fine] on time,” but explained that he “had several cases open,” some in Massachusetts and some in New Hampshire, “all of them needing fines to be paid.” H 5–6. He explained that the

outstanding fines “total[ed] thousands of dollars,” but that, by the time of the hearing, he had paid all of them. H 6.

The court denied Warren’s motion to “dismiss” the State’s motion. H 6. The court then granted the State’s motion to reinstate the driving-after-suspension complaint and ordered that a trial be scheduled. AD 3–4; H 6. The court explained, “[T]hese orders have meaning, and they need to be followed.” H 6.

Warren completed a financial affidavit later that day, which included assets totaling \$52.14, and the court appointed the Public Defender to represent him. A 21–25. Attorney Daniel Donadio filed an appearance on October 29, 2018. A 26.

On December 3, 2018, Donadio filed an objection to the State’s motion to impose the deferred sentence and a motion to reconsider the court’s order reinstating the driving-after-suspension complaint. A 27. Citing Stapleford v. Perrin, 122 N.H. 1083 (1983), he argued that a defendant facing a motion to reinstate a charge that had previously been placed on file without a finding is entitled to due process, which includes, among other things, the right to counsel. A 29–30. Citing Bearden v. Georgia, 461 U.S. 660 (1983), he also argued that it violated due process for the court to reinstate the complaint without finding that Warren had the ability to pay the fine by the deadline. A 30–31.

The State objected. A 33. It argued, first, that Warren's motion to reconsider was untimely because it was not filed within ten days of the reinstatement of the complaint. A 33. It noted that, although Warren was not represented by counsel at the hearing, he was represented "when these matters were resolved and when he did not timely pay the fine." A 33. It argued that "[t]he raising now of an ability to pay or 'willful noncompliance' are non-factors." A 33.

In his reply to the State's objection, Warren's lawyer noted that he had to obtain a recording of the hearing and otherwise "get up to speed on the case" before he could file the motion to reconsider, which he did "as soon as it was practicable." A 35. He argued that due process required that Warren "be afforded an opportunity to contest the reinstatement of the complaint with the benefit of counsel." A 36.

The court addressed Warren's motion just prior to the start of trial. T 4. Warren reiterated his argument that due process required an evidentiary hearing on whether he had the ability to pay the fine by the deadline. T 6. He argued that such a hearing was a prerequisite "to a [motion to reinstate a charge] placed on file," just "as it would [be] to a [motion to impose a] deferred sentence, or a suspended sentence, or [to a motion to revoke] probation, or [to] any of the unquestionable Stapleford categories." T 7.

The State reiterated its argument that Warren’s motion to reconsider was untimely “and should be denied on its face for that reason alone.” T 9. The State also noted that Warren explained his failure to pay the fine at the hearing. T 11–12. Donadio acknowledged that “some of these issues got floated,” but noted that Warren was not represented by counsel and that the court made no finding regarding Warren’s ability to pay. T 12–13.

The court denied Warren’s motion to reconsider, both “as untimely and on its merits.” AD 6; T 13–14. It ruled that “sufficient due process was provided on the placed on file reinstatement.” AD 6; T 14.

Following the bench trial, the court found Warren guilty of driving after suspension. T 48. It sentenced Warren to 180 days in the house of corrections, with 20 days to serve and 160 days suspended. A 41; T 61. It also imposed a fine of \$1800, with \$450 to pay and \$1350 suspended. A 41, T 61.

On the disorderly-conduct conviction, the court re-suspended the \$1240 fine and did not impose any of the deferred jail sentence. T 52; A 38–39. Although the court did not find that Warren was able to pay the fine by the deadline, Warren did not further challenge the court’s disorderly-conduct sentence.

Warren initially appealed the operating-after-suspension conviction to the Superior Court for a de novo jury trial. A 42, 48; T 58, 61–62; see RSA 599:1 (authorizing appeal “to obtain a de novo jury trial in the superior court”). However, Warren later waived his right to a jury trial and the Superior Court found him guilty, based on the State’s offer of proof, and sentenced him. A 43, 48. On appeal from that conviction, the parties agreed that the Superior Court was required to remand the case to Circuit Court immediately upon Warren’s waiver of the right to a jury trial. State v. Warren, No. 2019-0701 (N.H. Jan. 29, 2021) (unpublished order) (reprinted at A 48). This Court vacated the Superior Court conviction and remanded the case to the Superior Court, with instructions to remand the case again to the Circuit Court. Id.

Upon remand, the Circuit Court reimposed the sentence set forth above and Warren appealed directly to this Court. A 49–51; see RSA 599:1 (authorizing appeal of “questions of law” directly to this Court following remand from the Superior Court and reimposition of sentence). The Circuit Court stayed the sentence pending appeal. A 51.

SUMMARY OF THE ARGUMENT

1. Multiple statutory and constitutional provisions guarantee the right to counsel in criminal cases, in hearings on a defendant's non-payment of a financial obligation that may result in incarceration, and in proceedings implicating a defendant's conditional liberty interest. At the hearing on the State's motion to reinstate the complaint, Warren had a right to counsel under all these provisions. The court erred by reinstating the complaint despite Warren's lack of counsel.

2. Multiple statutory and constitutional provisions prohibit a court from incarcerating a defendant for failure to pay a financial obligation without finding that the defendant had the ability to pay. The court erred by reinstating the complaint without making the required finding.

I. THE COURT ERRED BY REINSTATING THE COMPLAINT BECAUSE WARREN WAS NOT REPRESENTED BY COUNSEL.

Warren's right to counsel was protected by four sets of statutory and constitutional provisions. First RSA 604-A:2 and :3 guarantee the right to counsel in felony and class A misdemeanor proceedings, from initial appearance until final judgment. Second, Part I, Article 15 of the New Hampshire Constitution and the Sixth and Fourteenth Amendments to the United States Constitution guarantee the right to counsel in criminal proceedings. Third, RSA 604-A:2-f guarantees the right to counsel when the defendant's nonpayment of a financial obligation may result in incarceration. Fourth, the due process clauses of Part I, Articles 2 and 15 of the New Hampshire Constitution and the Fourteenth Amendment to the United States Constitution guarantee the right to counsel in other proceedings implicating a defendant's conditional liberty interest. By reinstating the complaint despite Warren's lack of counsel and in the absence of any waiver of the right to counsel, the court violated all these provisions.

A. RSA 604-A:2 and :3

RSA 604-A:2 provides:

In every criminal case in which the defendant is charged with a felony or a class A misdemeanor and appears without counsel, the court before which he or she appears shall advise

the defendant that he or she has a right to be represented by counsel and that counsel will be appointed to represent him or her if he or she is financially unable to obtain counsel. Unless the defendant waives the appointment of counsel, if the defendant indicates to the court that he or she is financially unable to obtain counsel, the court shall instruct the defendant to complete a financial statement under oath in such form as designated by the unit of cost containment. If after review of the financial statement under oath and application of the rules established pursuant to RSA 604-A:10, IV the court is satisfied that the defendant is financially unable to obtain counsel, the court shall appoint counsel to represent him or her.

RSA 604-A:2, I. RSA 604-A:3 provides, “A defendant for whom counsel is appointed shall be represented by counsel from his initial appearance before the court at every stage of the proceedings until the entry of final judgment.” Questions of statutory interpretation are reviewed de novo. Bellevue Properties v. 13 Green Street Properties, ___ N.H. ___ (Oct. 8, 2021).

Here, Warren was charged in a criminal case with driving after suspension, subsequent offense, which, because the State filed notice of intent to seek class A misdemeanor penalties, was a class A misdemeanor. See RSA 263:64, VI

(defining the offense as an unclassified misdemeanor); RSA 625:9, IV (c)(2) (unclassified misdemeanor is a class A misdemeanor if the State files notice of intent to seek Class A misdemeanor penalties). Warren indicated that he was unable to obtain counsel, and the court did not find otherwise. H 4. Thus, he was entitled to the appointment of counsel under RSA 604-A:2.

The hearing on the State's motion to reinstate the complaint took place after Warren's initial appearance before the court and prior to entry of final judgment. Thus, Warren had the right to counsel at that hearing under RSA 604-A:3.

State v. Vest, 744 P.2d 288 (Or. Ct. App. 1987), a case with a procedural history very similar to Warren's, confirms this analysis. In Vest, the defendant was charged with driving under the influence and the court appointed counsel to represent her. Id. at 289. She pleaded not guilty and entered diversion. Id. The State later asked to terminate diversion because the defendant failed to attend alcohol counseling. Id.

At the defendant's request, the originally appointed attorney asked the court to re-appoint her to represent the defendant in the diversion-termination proceedings. Id. The court denied that motion, terminated diversion without an evidentiary hearing, and re-appointed the attorney to represent the defendant in subsequent proceedings. Id.

The defendant's lawyer then moved that the court reconsider its order terminating diversion, both because the court failed to hold an evidentiary hearing and because the defendant did not have counsel. Id. The court, agreeing only that an evidentiary hearing was required, vacated its order terminating diversion and conducted an evidentiary hearing, but prohibited the defendant's counsel from participating. Id. After again terminating diversion, the defendant was convicted in a stipulated-facts trial at which she was represented by counsel, and the defendant appealed. Id.

On appeal, the court construed a state statute that, like RSA 604-A:2 and :3, provided that "the court shall appoint counsel for an indigent defendant who is before a court charged with a crime," and that such appointment "shall continue during all criminal proceedings resulting from the defendant's arrest through acquittal or the imposition of punishment." Id. at 289 (internal quotation, ellipsis and brackets omitted). The court construed that statute in light of a state constitutional provision that, like Part I, Article 15 of the New Hampshire Constitution, provided that "the accused shall have the right to be heard by himself and counsel in all criminal prosecutions." Id. at 290 (internal quotation omitted); see also N.H. Const. Pt. I, Art. 15 ("Every subject [held to answer for any crime, or offense] shall have a

right . . . to be fully heard in his defense, by himself, and counsel.”).

The State argued that “diversion termination is collateral to the criminal prosecution, involves distinct facts and a civil standard of proof and, therefore, does not require appointment of counsel.” Id. The court, however, rejected that argument. Id. at 290. It noted that the right to counsel under its state constitution “extend[ed] at least to . . . all court proceedings from arraignment through probation revocation where, without the assistance of counsel, the legal interests of the defendant might be prejudiced.” Id. (internal quotation omitted). In other words, “a defendant has the right to have counsel present at . . . any pre-trial adversarial contact of the state and a defendant at which some benefit of counsel would be lost if counsel is not present, that is, at which the state’s case may be enhanced or the defense impaired due to the absence of counsel.” Id. (internal quotation and brackets omitted).

The court explained that a diversion-termination hearing satisfied that definition:

At the diversion termination hearing, the issue between the state and defendant was whether she had failed to fulfill the diversion agreement. Both parties could present evidence and cross-examine witnesses. The hearing was adversarial and trial-like.

Defendant was presumably without the training, education and skill to cope with the procedures. The hearing could have enhanced the state's case in the subsequent offense proceeding and prejudiced defendant's defense because, in the subsequent proceeding, the state could use evidence obtained at the termination hearing. At the time of sentencing, the court could also take into account that it had been established at the diversion termination hearing that defendant had failed fully to fulfill the terms of the diversion agreement. Moreover, the termination hearing was an integral step in the processing of the [driving-under-the-influence] charge.

Id. (internal citation omitted). The court held that the statute, read in light of the state constitutional right to counsel, provides a right to counsel at diversion-termination proceedings. Id.

The court concluded that, by reinstating the charge after a hearing at which the defendant was not represented counsel, the trial court erred. It vacated both the defendant's conviction and the order reinstating the charge, and remanded for a new hearing on whether to reinstate the charge.

Here, just as in Vest, Warren had a statutory right to counsel at the hearing to determine whether to reinstate the complaint. The court erred by reinstating the complaint even

though Warren did not have counsel and did not waive counsel. As in Vest, this Court should vacate Warren's conviction and the order reinstating the complaint, and remand for a new hearing on the State's motion.

B. Part I, Article 15 of the New Hampshire Constitution and the Sixth Amendment to the United States Constitution.

In addition to RSA 604-A:2 and :3, Warren had a right to counsel under the State and Federal Constitutions. Part I, Article 15 of the New Hampshire Constitution provides, "Every subject [held to answer for any crime, or offense] shall have a right to be fully heard in his defense, by himself, and counsel." It further provides, "Every person held to answer in any crime or offense punishable by deprivation of liberty shall have the right to counsel at the expense of the state if need is shown; this right he is at liberty to waive, but only after the matter has been thoroughly explained by the court." The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." The right to counsel guaranteed by the Sixth Amendment applies to the states through the due process clause of the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335, 342-44 (1963). Questions of constitutional law are reviewed de novo. Carrigan v. New Hampshire Dep't of Health & Hum. Servs., ___ N.H. ___ (July 20, 2021).

The right to counsel expressly guaranteed by the State and Federal Constitutions applies if three requirements are satisfied. First, the case must be serious enough to trigger the right to counsel. State v. Paige, 170 N.H. 261, 265 (2017); Argersinger v. Hamlin, 407 U.S. 25, 27–40 (1972). Second, the right to counsel must have attached. State v. Jeleniewski, 147 N.H. 462, 467–68 (2002); Rothgery v. Gillespie County, 554 U.S. 191, 198 (2008). Third, the matter must constitute a “critical stage” of the proceedings. State v. Almodovar, 158 N.H. 548, 555 (2009); Marshall v. Rodgers, 569 U.S. 58, 62 (2013).

Under the New Hampshire Constitution, a case is serious enough to trigger the right to counsel if it might result in the defendant’s incarceration. Paige, 170 N.H. at 265. Under the Federal Constitution, a case is sufficiently serious if it does, in fact, result in the defendant’s incarceration. Scott v. Illinois, 440 U.S. 367, 373–74 (1979). Here, the case was sufficiently serious under the State Constitution because it carried the possibility of incarceration. See RSA 651:2, I (“A person convicted of a felony or a Class A misdemeanor may be sentenced to imprisonment.”). It was sufficiently serious under the Federal Constitution because Warren was, in fact, sentenced to incarceration. A 41, T 61.

Under both the State and Federal Constitutions, the right to counsel attaches at the initiation of adversary judicial

proceedings. State v. White, 163 N.H. 303, 308 (2012); Rothgery, 554 U.S. at 198. Under the State Constitution, this occurs upon the filing of a complaint, information or indictment. Jeleniewski, 147 N.H. at 467–68. Under the Federal Constitution, adversary judicial proceedings commence, at the latest, at the defendant’s initial appearance. Rothgery, 554 U.S. at 213. Here, the right to counsel had attached under the State Constitution at the time of the hearing on the State’s motion to reinstate the complaint because the State had filed the complaint in court. The right to counsel had attached under the Federal Constitution because Warren had appeared in court.

The right to counsel is not limited to trial; it applies to various pre-trial hearings, as well as to sentencing. 3 Wayne R. LaFare et al., Criminal Procedure § 11.2(b) (4th ed. Dec. 2020 update). Under the State and Federal constitutions, a proceeding may constitute a “critical stage” because it “has a consequence adverse to the defendant as to the ultimate disposition of the charge which could have been avoided or mitigated if defendant had been represented by counsel at that proceeding.” Id.; see also Mempa v. Rhay, 389 U.S. 128, 134, (1967) (a critical stage is that at which “substantial rights of a criminal accused may be affected,” including sentencing and probation revocation hearings); Hamilton v. Alabama, 368 U.S. 52, 53 (1961) (arraignment constituted a

critical stage because pleas of insanity, pleas in abatement and motions challenging grand jury proceedings had to be made then, or the opportunity lost). A proceeding may also constitute a “critical stage” if it “offered a potential opportunity for benefitting the defendant as to the ultimate disposition of the charge through rights that could have been exercised by counsel.” 3 LaFave et al., supra § 11.2(b); Coleman v. Alabama, 399 U.S. 1, 9 (1970) (preliminary hearing was a critical stage, given the various ways in which counsel could benefit the accused). Proceedings falling within either of these categories constitute a “critical stage” unless the “adverse consequence could have been avoided, or the lost opportunity regained, by action that subsequently provided counsel could have taken.” 3 LaFave et al., supra § 11.2(b); see also White v. Maryland, 373 U.S. 59, 59 (1963) (preliminary hearing was a critical stage because, although defendant’s uncounseled guilty plea could later be withdrawn, it was admissible at trial).

Here, the hearing on the State’s motion to reinstate the complaint was a “critical stage” of the case because the potential consequence — reinstatement of the complaint — was adverse to Warren as to the ultimate disposition of the charge, and because that consequence could have been avoided or mitigated if Warren was represented by counsel. It was also a critical stage because it presented an opportunity

to benefit Warren as to the ultimate disposition of the charge by persuading the court to deny the motion to reinstate. Cf. Coleman, 399 U.S. at 9 (preliminary hearing was a critical stage because, among other things, counsel could have “expose[d] fatal weaknesses in the State’s case that may lead the magistrate to refuse to bind the accused over.”).

As the procedural history here establishes, subsequently provided counsel could not have taken any action to avoid reinstatement of the complaint. When Donadio filed a motion to reconsider the reinstatement of the complaint, the State objected, arguing that the motion was untimely because it was not filed within ten days of the hearing. A 33; T9. The court adopted this argument, denying subsequent counsel’s motion, in part, because it found the motion untimely. AD 6; T 14.

For these reasons, the hearing on the State’s motion to reinstate the complaint was a “critical stage” of the proceedings, and Warren was entitled to counsel.

C. RSA 604-A:2-f

RSA 604-A:2-f provides, “No defendant shall be incarcerated after a final hearing for nonpayment of an assessment or nonperformance of community service unless counsel has been appointed for a defendant who is indigent or such defendant has executed a valid waiver of counsel for the final hearing.” RSA 604-A:2-f, I. The statute further

provides, “The court shall appoint counsel to represent an indigent defendant at a final hearing on an ability to pay or perform held pursuant to this section if incarceration is a possible outcome of the final hearing.” RSA 604-A:2-f, III.

Warren had a right to counsel under RSA 604-A:2-f because incarceration was a possible outcome of the hearing, in two ways. First, immediately upon reinstating the complaint, the court could have set bail, resulting in Warren’s detention. See RSA 597:2, I (authorizing pretrial detention of “a person charged with an offense”). Second, if the reinstated complaint resulted in a conviction, the court could sentence Warren to incarceration. See RSA 651:2, I. For these reasons, Warren had a right to counsel, under RSA 604-A:2-f, at the hearing on the State’s motion to reinstate the complaint.

D. Due Process

Part I, Articles 2 and 15 of the New Hampshire Constitution and the Fourteenth Amendment to the United States Constitution guarantee the right to due process. In some circumstances, due process requires the provision of counsel even if counsel is not directly required by the right-to-counsel clauses. 3 LaFave et al., supra § 11.1(b).

The test for whether due process requires a procedural safeguard, such as the right to counsel, is the same under the State and Federal Constitutions. Courts balance: “the private interest that will be affected by the official action”; “the risk of

an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards”; and “the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” State v. Addison, 165 N.H. 381, 589 (2013); Wilkinson v. Austin, 545 U.S. 209, 211 (2005).

While the test is the same under both constitutional provisions, this Court has found a due process right to counsel in a broader range of circumstances than has the United States Supreme Court. This Court, for instance, has found that a due process right to counsel always applies to: “(1) parole violations, (2) violations of probation, (3) when a case marked continued for sentencing is brought forward, (4) when a suspended sentence is to be revoked, (5) when some condition set by the court has not been met and incarceration is the proposed remedy, or (6) whenever the defendant requests that a suspended sentence be continued and the State contests the request.” Stapleford v. Perrin, 122 N.H. 1083, 1088 (1982). The United States Supreme Court has held that due process only sometimes requires the appointment of counsel in parole and probation revocation hearings. Gagnon v. Scarpelli, 411 U.S. 778, 790–91 (1973).

Due process under Part I, Articles 2 and 15 of the New Hampshire Constitution always requires the appointment of counsel for an indigent defendant facing a motion to reinstate a complaint that might result in incarceration. Such a defendant has “a significant liberty interest . . . which is worthy of due process protection.” Stapleford, 122 N.H. at 1088. As noted above, the defendant’s liberty interest is implicated in two ways: the possibility of pre-trial detention if the complaint is reinstated and the possibility of a sentence of incarceration if the complaint is reinstated and the defendant is found guilty.

The risk of erroneous deprivation is substantial. Like the proceedings expressly enumerated in Stapleford, a hearing on a motion to reinstate a complaint involves “whether the defendant has been of good behavior or has in some way violated the terms” of the complaint being placed on file, conditions which might be numerous and complex. Id. at 1089.

Finally, the government’s interest in avoiding the appointment of counsel in this circumstance is minimal. The defendant already had the right to counsel when the complaint was filed and when the defendant agreed to place the complaint on file. If the complaint is reinstated, such a defendant will have the right to counsel at all subsequent proceedings. The government has nothing to gain by carving

an exception to the right to counsel for a single proceeding that is both preceded and succeeded by other proceedings at which the right to counsel indisputably applies.

Even if Part I, Articles 2 and 15 do not always require the appointment of counsel for indigent defendants facing a motion to reinstate a complaint that might result in incarceration, both they and the Fourteenth Amendment require appointment in some cases. See Gagnon, 411 U.S. at 790 (counsel may be required if there is a request for counsel and either “a timely and colorable claim” that no violation occurred or “substantial reasons . . . justified or mitigated the violation . . . and [those] reasons are complex or otherwise difficult to develop or present.”) Here, Warren requested the appointment of counsel and explained that multiple other financial obligations caused his delay in paying the fine. See Bearden v. Georgia, 461 U.S. 660, 669 (1983) (a defendant’s inability to pay a fine or restitution “provides a substantial reason which justifies or mitigates the violation and makes revocation inappropriate,” quotation and brackets omitted). Because the court failed to inquire into whether due process required the appointment of counsel in this case, this Court should vacate the order reinstating the complaint.

E. Fundamental Right, Structural Error

As a general rule, this Court will not review issues that the appellant did not raise in the trial court. State v. Wilson,

169 N.H. 755, 768 (2017). The denial of the right to counsel, however, is among a narrow class of claims that need not be raised in the trial court. Johnson v. Zerbst, 304 U.S. 458, 464–465 (1938); People v. Vaughn, 821 N.W.2d 288, 298 (Mich. 2012) (“Because the right to counsel invokes, of itself, the protection of a trial court, preservation of the right does not require an affirmative invocation,” quotation omitted); State v. Dial, 838 S.E.2d 501, 504 (S.C. 2020) (“A notable exception to th[e] general rule requiring a contemporaneous objection is found when the record does not reveal a knowing and intelligent waiver of the right to counsel.”). The right to counsel “would be nullified by a determination that an accused’s ignorant failure to claim his rights removes the protection of the Constitution.” Johnson, 304 U.S. at 465; see also Rice v. Olson, 324 U.S. 786, 788 (1945) (state inmate did not waive right to counsel by silence); Dial, 838 S.E.2d at 504 (“The pro se defendant cannot be expected to raise this issue without the aid of counsel.”).

Where the right to counsel is concerned, the question is not whether the defendant invoked the right, but whether the defendant waived it. New York v. Hill, 528 U.S. 110, 114 (2000) (“For certain fundamental rights, [including the right to counsel and the right to plead not guilty], the defendant must personally make an informed waiver.”) Here, Warren did

not waive his right to counsel on the State's motion to reinstate the complaint.

Even if Warren was required to raise the issue below, he did so requesting counsel at the hearing. H 4. The issue was further preserved by the motion to reconsider filed by Warren's subsequently appointed counsel. A 27. In that motion, as well as in his reply to the State's objection to that motion, Warren's lawyer argued that Warren had a right to counsel at the hearing on the State's motion to reinstate the complaint. A 30.

Even if the issue is not preserved, this Court should find plain error. This Court may reverse for plain and prejudicial errors that seriously affect the fairness, integrity or public reputation of judicial proceedings. State v. Stillwell, 172 N.H. 591, 608 (2019); Sup. Ct. R. 16-A. Although plain error "should be used sparingly, its use limited to those circumstances in which a miscarriage of justice would otherwise result," Stillwell, 172 N.H. at 608, the denial of the constitutional right to counsel constitutes such a circumstance.

For the reasons stated above, Warren plainly had a right to counsel at the hearing on the State's motion to reinstate the complaint. Prejudice is not required because, as explained below, the error was structural. Even if prejudice is required, Warren was prejudiced because, without counsel,

he was severely hindered in presenting his claim that other court-imposed financial obligations necessitated the delay in paying the fine. Finally, the error seriously affected the fairness, integrity or public reputation of judicial proceedings because the court forced an indigent defendant to proceed pro se at a hearing at which he had the constitutional right to counsel.

The denial of the right to counsel constitutes structural error. State v. Ayer, 150 N.H. 14, 24–25 (2003). The appellant need not make any showing of prejudice and the harmless error doctrine does not apply. State v. Dupont, 149 N.H. 70, 75 (2003).

II. ALTERNATIVELY, THE COURT ERRED BY REINSTATING THE COMPLAINT BECAUSE IT DID NOT FIND THAT WARREN WAS ABLE TO PAY THE FINE BY THE DEADLINE.

If this Court concludes that the Circuit Court violated Warren's right to counsel, then it should vacate the conviction and the order reinstating the complaint and remand for a new hearing on the State's motion to reinstate the complaint. Because Warren was erroneously denied the aid of counsel to argue to the Circuit Court, at the hearing on the State's motion to reinstate the complaint, that the motion could not be granted unless the court found that he had the ability to pay the fine by the deadline, this Court should remand the case to Circuit Court to address the issue.

If this Court does not conclude that the Circuit Court violated Warren's right to counsel, then it should go on to consider whether it erred by granting the State's motion without finding that Warren was able to pay the fine by the deadline.

A. RSA 604-A:2-f

RSA 604-A:2-f provides, "Incarceration of [a defendant for nonpayment of an assessment or nonperformance of community service] may occur only if the court, after having conducted an ability to pay or ability to perform final hearing at which the court has made a specific inquiry of the defendant concerning his or her financial circumstances and

his or her reasons for nonpayment or nonperformance, finds that the defendant willfully failed to pay the assessment or perform the community service.” RSA 604-A:2-f, I. Under this provision, where a charge has been placed on file contingent upon a defendant’s payment of money, the charge may not be reinstated without the required inquiry and findings regarding the defendant’s willfulness.

The statute applies because reinstatement of the complaint can directly lead to a defendant’s incarceration, either because the defendant is detained pretrial or because the defendant is found guilty and sentenced to incarceration, as occurred here. The court violated RSA 604-A:2-f by reinstating the complaint without the required inquiry and findings.

B. Due Process and Equal Protection

Part I, Articles 2 and 15 of the New Hampshire Constitution and the Fourteenth Amendment to the United States Constitution protect the rights to due process and equal protection. “Due process and equal protection principles converge” when courts consider “the treatment of indigents in our criminal justice system.” Bearden, 461 U.S. at 664–65.

In Bearden, the defendant pleaded guilty to burglary and theft. Id. at 662. The trial court did not enter a judgment of guilt but placed the defendant on probation for three years

and deferred further proceedings. Id. As a condition of probation, the court ordered the defendant to pay a \$500 fine and \$250 in restitution by a specified deadline. Id. When the deadline passed, the defendant had paid only \$200, and the State filed a motion to revoke his probation. Id. at 663. After an evidentiary hearing, the court revoked the defendant's probation, entered a conviction, and sentenced him to prison. Id. The court made no findings about the defendant's ability to pay the fine by the deadline. Id. at 673. An intermediate appellate court affirmed, and the state supreme court denied review. Id. at 663.

The United States Supreme Court held that the trial court violated the Fourteenth Amendment's due process and equal protection clauses because it failed to find that the defendant was able to pay the fine. Id. at 661–62. The Court held that, “if the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it.” Id. at 667–68. “[I]f the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available.” Id. at 668–69.

The court set forth the procedure that trial courts should follow:

[I]n revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment. Only if alternate measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay.

Id. at 672.

This Court has recognized and applied Bearden's holding. See State v. Fowlie, 138 N.H. 234, 237 (1994) (court erred by revoking probation without finding that defendant had the ability to pay); State v. Morrill, 123 N.H. 707, 711 (1983) (defendant did not have the right to a jury trial for a fine-only offense because "the only reason why he might be imprisoned would be his refusal to pay a fine that he was able

to pay.”). It has clarified that the defendant has the burden of proving inability to pay. Fowlie, 138 N.H. at 237.

The facts of this case are not meaningfully distinguishable from those of Bearden. As in Bearden, proceedings in Warren’s case were stayed and Warren was given the opportunity to avoid conviction and incarceration if he satisfied certain requirements, including the payment of money by a specified deadline. Like the defendant in Bearden, Warren failed to pay the money by the specified deadline but claimed that he was unable to do so. As in Bearden, the court revoked that opportunity and resumed proceedings without finding that Warren had the ability to pay the money by the deadline.

Warren acknowledges that incarceration was not an inevitable result of the court’s order; Warren was first tried and found guilty, and even then, the court was not required to impose a sentence of incarceration. But this was also true in Bearden; nothing required the court, upon revocation of Bearden’s probation, to enter a conviction or impose a sentence of incarceration. Here, as in Bearden, the resumption of proceedings was sufficiently linked to the defendant’s incarceration as to require the court to find that the defendant had the ability to pay.

Additionally, as much as in Bearden, the facts of this case implicate basic principles of equal justice. As the Court

affirmed in Bearden, “there can be no equal justice where the kind of trial a man gets depends on the amount of money he has.” Bearden, 461 U.S. at 664. If the State is permitted to place criminal charges on file without a finding, conditioned absolutely upon the payment of money without consideration of each defendant’s ability to pay, then it could implement a system in which affluent criminals purchase their way out of conviction and incarceration, reserving solely for indigent criminals the stigma of conviction and the burden of incarceration. If Warren is to be convicted and incarcerated for driving with a suspended license, it must be because the criminal justice system determines that he deserves to be convicted and incarcerated, not because he was simply too poor to pay the price demanded to avoid those consequences.

C. Preservation

The issue was preserved because Warren told the Court, at the hearing on the State’s motion to reinstate the complaint, that he did not pay the fine by the deadline because he “had several cases open” in two different states, “all of them needing fines to be paid,” which “total[ed] thousands of dollars,” H 5–6. The issue was further preserved by the motion to reconsider filed by Warren’s subsequently appointed counsel. A 27. In that motion, Warren’s lawyer cited Bearden, argued that the complaint could not be reinstated unless the court found that Warren “willfully

refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay,” and noted that the court had made no such finding. A 30–31. At the hearing on the motion, Warren’s lawyer reiterated that the court could not reinstate the complaint without “a hearing on [Warren’s] ability to pay.” T 8.

Even if the issue is not preserved, this Court should find plain error. See Stillwell, 172 N.H. at 608; Sup. Ct. R. 16-A. For the reasons stated above, reinstating the complaint without a finding that Warren had the ability to pay the fine by the deadline was plainly erroneous. The error prejudiced Warren because it resulted in his conviction and a sentence of incarceration. The error seriously affects the fairness, integrity or public reputation of judicial proceedings because, had Warren not been indigent, he would not have been convicted or sentenced to incarceration.

CONCLUSION

WHEREFORE, Jesse Warren respectfully requests that this Court reverse.

Undersigned counsel requests 15 minutes oral argument.

The appealed decisions are in writing and are included in a separate appendix containing no other documents.

This brief complies with the applicable word limitation and contains 7,360 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief is being timely provided to Zachary Higham of the New Hampshire Attorney General's Office through the electronic filing system's electronic service.

/s/ Thomas Barnard
Thomas Barnard

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