

State of New Hampshire  
Supreme Court

NO. 2006-0283

2008 TERM

JUNE SESSION

State of New Hampshire

v.

Steve Gubitosi

RULE 7 APPEAL OF FINAL DECISION OF  
MERRIMACK COUNTY SUPERIOR COURT

REPLY BRIEF OF DEFENDANT STEVE GUBITOSI

By: Joshua L. Gordon, Esq.  
N.H. Bar No. 9046  
Law Office of Joshua L. Gordon  
26 S. Main St., #175  
Concord, NH 03301  
(603) 226-4225  
[www.AppealsLawyer.net](http://www.AppealsLawyer.net)

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... *ii*

STATEMENT ADDITIONAL FACTS ..... *1*

ARGUMENT ..... *3*

    I.    State Did Not Preserve RSA 7:33-g Argument ..... *3*

    II.   Appointment of Special Assistant County Attorney was not Approved by the  
          Attorney General ..... *4*

    III.  Conflict of Interest Applies to Prosecutor’s Office ..... *5*

    IV.  RSA 7:33-g Does Not Cure Failed Procedure ..... *7*

        A.    Wayne Coull Was Not a “Special Assistant County  
              Attorney” ..... *7*

        B.    State’s Solution Does Not Solve the Conflict of Interest  
              Problem ..... *7*

        C.    State’s Interpretation Would Render County Attorney  
              Replacement Statutes Nugatory ..... *9*

CONCLUSION ..... *10*

CERTIFICATION ..... *11*

APPENDIX ..... *following p. 11*

**TABLE OF AUTHORITIES**

**FEDERAL CASES**

*Pearson v. First NH Mortg. Corp.*,  
200 F.3d 30 (1st Cir. 1999) ..... 5

**NEW HAMPSHIRE CASES**

*Chagnon Lumber Co., Inc. v. Stone Mill Const. Corp.*,  
124 N.H. 820 (1984) ..... 10

*Fisher v. Minichiello*,  
155 N.H. 188 (2007) ..... 9

*Franklin v. Callum*,  
146 N.H. 779 (2001) ..... 5

*Lambert v. Belknap County Convention*, Slip.Op. 2007-566 \_\_ N.H. \_\_, 2008 WL 2389216  
(N.H. June 13, 2008) ..... 10

*State v. Veale*,  
154 N.H. 730 (2007) ..... 5, 7

**OTHER STATES' CASES**

*Aldridge v. State*,  
583 So. 2d 203 (Miss. 1991) ..... 6

*Commonwealth v. Breighner*,  
684 A.2d 143 (Pa.Super. 1996) ..... 8, 9

*Commonwealth v. Eskridge*,  
604 A.2d 700 (1992) ..... 8, 9

*Greene v. Greene*,  
391 N.E.2d 1355 (N.Y. 1979) ..... 5

*McCall v. District Court for Twenty-First Judicial District*,  
783 P.2d 1223 (Colo. 1989) ..... 5

*People v. County Court, City and County of Denver*,  
854 P.2d 1341 (Colo. App. 1992) ..... 5

|  |       |
|--|-------|
| <i>People v. Eaglin</i> ,<br>586 N.E.2d 1280 (Ill.App. 1992) .....             | 7, 10 |
| <i>People v. Garcia</i> ,<br>698 P.2d 801 (Colo. 1985) .....                   | 5, 10 |
| <i>People v. Lanigan</i> ,<br>818 N.E.2d 829 (Ill.App. 2004) .....             | 6     |
| <i>State v. Bunyan</i> ,<br>555 N.E.2d 980 (Ohio.App.1988) .....               | 6     |
| <i>State v. Gonzales</i> ,<br>119 P.3d 151, 163 (N.M. 2005) .....              | 6     |
| <i>State v. Tippecanoe County Court</i> ,<br>432 N.E.2d 1377 (Ind. 1982) ..... | 5     |

## NEW HAMPSHIRE STATUTES & RULES

|                                      |                   |
|--------------------------------------|-------------------|
| RSA 7:33 .....                       | 2, 9, 10, 11      |
| RSA 7:33-g .....                     | 1, 3, 4, 7, 8, 11 |
| RSA 7:34 .....                       | 7                 |
| RSA 661:9 .....                      | 3                 |
| RSA 661:9, III .....                 | 2, 9, 10, 11      |
| N.H. R.PROF'L.COND. R. 1.10(a) ..... | 5                 |

## SECONDARY SOURCE

|  |   |
|--|---|
| <i>Restatement (Third) of The Law Governing Lawyers</i> § 123 (1998) ..... | 6 |
|--|---|

## STATEMENT OF ADDITIONAL FACTS

The State filed misdemeanor allegations in the Merrimack County Superior Court on April 1, 2003. Several days later the State's prosecutor filed his appearance. The appearance is signed by Wayne Coull. It identifies him as "Deputy County Attorney." It lists his address as "Belknap County Attorneys Office, 64 Court St., Laconia, NH 03246." It also lists his phone number as 527-5440, which is known to be that of the Belknap County Attorney in Laconia. APPEARANCE (Apr. 4, 2003), *Appx. to Reply* at 12. A review of the superior court docket reveals that Wayne Coull repeatedly corresponded with the court and with the parties on stationery from the "Office of the Belknap County Attorney." It includes information normally found on stationery, and lists "Wayne P. Coull," as "Deputy County Attorney." *See e.g.*, TRANSMITTAL LETTER FROM WAYNE P. COULL, TO MERRIMACK COUNTY SUPERIOR COURT (Sept. 6, 2005), *Appx. to Reply* at 24.

The formal criminal charges in this case were signed by "Wayne P. Coull, Deputy County Attorney, Belknap County." INFORMATION, *Appx. to Opening Brf.* at 32, 33, 34. Dozens of pleadings were filed by both the State and Mr. Gubitosi in the proceedings below, concerning substantive evidentiary issues, procedural arrangements, scheduling, etc. Each of the State's begins by reciting: "Now Comes the State of New Hampshire by and through the Belknap County Attorney's Office, Wayne P. Coull, Deputy County Attorney ...." *See e.g.*, ASSENTED TO MOTION TO TRANSFER TAPE (Jan. 7, 2004), *Appx. to Reply* at 22; OBJECTION TO MOTION FOR INTERLOCUTORY APPEAL (Jan. 2, 2004), *Appx. to Reply* at 20. Likewise, each of them ends with Wayne Coull signing as "Deputy County Attorney." *Id.*

During the course of the proceedings below, Mr. Gubitosi attempted to take an interlocutory appeal on the same issue presented in this appeal. His interlocutory appeal

statement quotes, cites, and discusses both RSA 7:33 and RSA 661:9, III, which the State in its brief suggests was not preserved. INTERLOCUTORY APPEAL STATEMENT (Dec. 26, 2003), *Appx. to Reply* at 13.

The State objected to taking an interlocutory appeal, and the court below ultimately did not approve it. Nonetheless, in the State's objection, Wayne Coull wrote:

The defense moved to disqualify the prosecutor, claiming he lacks authority to prosecute the case. The prosecutor is the Deputy Belknap County Attorney and is handling the matter due to a perceived conflict with the Merrimack County Attorney's Office. The defendant was a police officer for approximately 18 years in Merrimack County and the Merrimack County Attorneys Office did not wish there to be the slightest impression of a conflict.

OBJECTION TO MOTION FOR INTERLOCUTORY APPEAL (Jan. 2, 2004) ¶ 1, *Appx. to Reply* at 20.<sup>1</sup>

Several items are of interest in the objection:

- The State explained the nature of the potential conflict of interest was because Mr. Gubitosi was a police officer *in Merrimack County*;
- The State noted that the conflict existed with the "*Merrimack County Attorneys Office*" and not any particular person;
- Wayne Coull identified himself as the "*Deputy Belknap County Attorney*";
- As with all other pleadings in the lower court, Wayne Coull began the objection with "Now Comes the State of New Hampshire by and through the *Belknap County Attorney's Office*, Wayne P. Coull, *Deputy County Attorney ...*";
- As with all other pleadings in the lower court, Wayne Coull signed the objection as "*Deputy County Attorney*."

Finally, nowhere in the record below is there any known indication that Wayne Coull was acting as a "special assistant county attorney" as now suggested by the State in its brief.

---

<sup>1</sup>The pleading is both misspelled and misdated. Citations here have been corrected.

## ARGUMENT

### I. State Did Not Preserve RSA 7:33-g Argument

The first time the State cited RSA 7:33-g, or even alluded to its existence, is in its appellate brief. Accordingly, the argument was not preserved and should be ignored by this Court.

On the other hand, the State claims that Mr. Gubitosi did not preserve his argument for the application of RSA 661:9. The statute was quoted, cited, and discussed in Mr. Gubitosi's request before the lower court for approval of an interlocutory appeal almost two years before commencement of trial. The State objected to that request below, and noted the interlocutory attempt in its brief before this Court. *State's Brf.* at 11.

The trial court had many opportunities to correct its error regarding its lack of jurisdiction due to an improperly-appointed prosecutor. The State cannot now claim the issue was not preserved.

## **II. Appointment of Special Assistant County Attorney was not Approved by the Attorney General**

The statute, offered here for the first time by the State, provides that a “county attorney may appoint, with the *approval of the attorney general*, special assistant county attorneys.” RSA 7:33-g (emphasis added). Wayne Coull, however, repeatedly identified himself as a Belknap Deputy County Attorney, and never as a “special assistant county attorney.” There was never an “approval” filed, or even referred to, purporting to appoint Mr. Coull to Mr. Gubitosi’s case.

The affidavit, which the State claims represents the “approval” necessary to satisfy RSA 7:33-g, was signed by the Attorney General on April 30, 2008, after the filing of Mr. Gubitosi’s appellate brief, more than two years after Mr. Gubitosi was convicted, and more than five years after Wayne Coull filed his appearance as Deputy Belknap County Attorney.

Moreover, beyond its caption, the affidavit does not betray any knowledge by the Attorney General that Mr. Gubitosi’s case even existed. Rather, it shows a general awareness of the practice of appointing. It reads:

I am aware of, and have approved, the practice of county attorneys utilizing the services of deputy and assistant county attorneys from other counties to prosecute criminal cases in which the county attorney’s office of the prosecuting county has a conflict of interest.

AFFIDAVIT OF KELLY A. AYOTTE (Apr. 30, 2008), *State’s Appx.* at 4. The affidavit thus cannot constitute the “approval” necessary to proceed under the statute.



### III. Conflict of Interest Applies to Prosecutor's Office

Whether or not the fact that Mr. Gubitosi was a police officer in Merrimack County created a conflict of interest in the Merrimack County Attorney's office is not an issue here. That it did was assumed by all parties below and also here on appeal. *See e.g., People v. County Court, City and County of Denver*, 854 P.2d 1341 (Colo. App. 1992) (appearance of impropriety sufficient to disqualify prosecutor's office).

The general rule is that if a law firm has a conflict of interest, the entire firm is equally conflicted. N.H. R.PROF'L.COND. R. 1.10(a). The rule applies to private law firms. *Franklin v. Callum*, 146 N.H. 779 (2001); *Pearson v. First NH Mortg. Corp.*, 200 F.3d 30 (1<sup>st</sup> Cir. 1999); *Greene v. Greene*, 391 N.E.2d 1355 (N.Y. 1979). It also applies to public bodies because:

By their nature, the non-economic conflicts – friendship, loyalty, pride, fear of ostracism or retaliation – operate with equal vigor on the individual lawyer in the public firm. It is he who feels the conflict, not the form of his law association, upon whom the ethical considerations must prevail.”

*State v. Veale*, 154 N.H. 730, 733 (2007).

Thus the rule applies to the public defender, *id.*, “and public law firms, such as a district attorney's office.” *McCall v. District Court for Twenty-First Judicial Dist.*, 783 P.2d 1223, 1227 (Colo. 1989) (dicta).

When a single member of a prosecutor's office has a personal conflict, for public policy reasons the entire office is often, but not necessarily, conflicted out, depending upon the nature of the conflict, extent of inter-office information-sharing, and other factors. *See e.g., People v. Garcia*, 698 P.2d 801 (Colo. 1985) (prosecutor's office disqualified because member was witness for violation of bail); *State v. Tippecanoe County Court*, 432 N.E.2d 1377 (Ind. 1982)

(prosecutor's office disqualified because elected prosecutor had formerly represented defendant); *Aldridge v. State*, 583 So.2d 203 (Miss. 1991) (prosecutor's office disqualified because member had formerly represented defendant); *Restatement (Third) of The Law Governing Lawyers* § 123 (1998) (cited in *Veale*, 154 N.H. at 734).

But when, as here, the *entire office* has a conflict due to prosecution of crimes alleged against law enforcement officers, prosecutors' offices are routinely disqualified. *See e.g., People v. Lanigan*, 818 N.E.2d 829 (Ill.App. 2004) (appointment of special state's attorney for prosecution of off-duty sheriff's deputies regarding car chase and shooting); *State v. Gonzales*, 119 P.3d 151, 163 (N.M. 2005) (prosecutor's office disqualified from prosecuting former employee because "appearance of unfairness or impropriety no curative measure can dissipate"); *State v. Bunyan*, 555 N.E.2d 980 (Ohio.App.1988) (where defendant was a police officer, court appointed special prosecutor in place of elected prosecutor attorney who had past dealings with defendant).

#### **IV. RSA 7:33-g Does Not Cure Failed Procedure**

In Mr. Gubitosi's case, the Merrimack County Attorney attempted to do the right thing. Recognizing that "lawyers in [a] group have mutual access to confidential information," *Veale*, 154 N.H. at 732, as well as the comity among members in the "group," *id.* at 733, the Merrimack County Attorney reached outside it and found a qualified prosecutor in another county who did not share its offices, files, computers, phones, physical address, collective knowledge, or water-cooler talk. *See e.g., People v. Eaglin*, 586 N.E.2d 1280 (Ill.App. 1992) (appointment of special prosecutor from neighboring county).

As the State points out, *State's Brf.* at 21-22, county attorneys may act only "for the county" and their authority is restricted to cases "in which the county is interested." RSA 7:34. The problem here arises from the lack of proper procedure in the appointment of Wayne Coull as prosecutor, as detailed in Mr. Gubitosi's opening brief.

The State now claims that RSA 7:33-g cures the lack of correct appointment procedure. The argument fails, however, for several reasons.

##### **A. Wayne Coull Was Not a "Special Assistant County Attorney"**

First, there is absolutely nothing in the record suggesting that Wayne Coull was a "special assistant county attorney" for the county of Merrimack. Everything in the record specifies he was a "Deputy Belknap County Attorney." The invocation of the statute is simply at odds with the facts.

##### **B. State's Solution Does Not Solve the Conflict of Interest Problem**

Second, the statute now cited by the State specifies that "[s]pecial assistant county attorneys shall act under the supervision, direction, and control of the county attorney." RSA

7:33-g. The purpose of bringing in an outside prosecutor was to remove the conflict of interest (or its appearance) that tainted the *office* of the Merrimack County Attorney. If Wayne Coull was a “special assistant county attorney” as now suggested by the State, then he necessarily acted “under the supervision, direction, and control” of the Merrimack County Attorney. Acting “under the supervision, direction, and control” of the Merrimack County Attorney means he also acted under its conflict of interest. Thus, purporting to have been appointed pursuant to RSA 7:33-g does nothing to solve the problem the situation presented.

A series of Pennsylvania cases illustrate the issue. In both, a criminal defendant was charged with homicide after a fatal car collision, and was also sued on behalf of the deceased. The part-time public prosecutors in both cases were also members of the civil plaintiff’s law firms, and due to the conflicts of interest, designated district attorneys from neighboring counties to conduct the prosecutions. In *Commonwealth v. Eskridge*, 604 A.2d 700 (1992), the Pennsylvania Supreme Court held that where a conflict of interest affecting the district attorney exists, prosecution by that district attorney or any other attorney in his office is barred regardless of whether actual prejudice can be established. In *Eskridge*, the defendant accepted prosecution by the designated neighboring county district attorney. In *Commonwealth v. Breighner*, 684 A.2d 143 (Pa.Super. 1996), however, the defendant invoked a statute providing that the state Attorney General – and not the conflicted district attorney – designates the replacement prosecutor. The defendant in *Breighner* claimed that the conflict was not erased because the conflicted prosecutor should not be allowed to make any decisions regarding the prosecution – not even naming the replacement. The *Breighner* court held that when the conflicted prosecutor designated the new one, the new prosecutor became under the “supervision, guidance and control” of the conflicted

prosecutor.

The first step the conflicted district attorney took here was officially to appoint the designated prosecutor as an assistant district attorney of Adams County in order to confer jurisdiction upon him. The designated prosecutor had to be made an assistant of the conflicted district attorney in order to handle the case. He technically became a member of the Adams County District Attorney's Office, thereby bringing this case within the ambit of *Eskridge*. The record shows that although the designated prosecutor may not have sought guidance or supervision from the conflicted district attorney, the very posture of the case required him to have contact with the conflicted district attorney and his staff. Indeed, the circumstances of this case illustrate that even where a conflicted district attorney attempts to cure a conflict by temporarily naming another district attorney as his assistant, some amount of supervision, guidance and control on the part of the conflicted district attorney is unavoidable.

*Breighner*, 684 A.2d at 147 (citations omitted). The *Breighner* court went further than Mr. Gubitosi's claim of error here. "We hold that once a conflict arises, it is improper for the conflicted district attorney to engage in any decision-making in the case, including choosing who will handle the prosecution." *Id.* The *Breighner* court thus vacated the conviction.

**C. State's Interpretation Would Render County Attorney Replacement Statutes Nugatory**

As noted in the State's brief, "[w]hen interpreting two or more statutes that deal with a similar subject matter," this Court "construe[s] them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statutes." *Fisher v. Minichiello*, 155 N.H. 188, 191 (2007).

The State's position is that a generalized later-sworn affidavit by the Attorney General is sufficient to appoint a replacement prosecutor, even though both RSA 7:33 and RSA 661:9, III, explicitly set forth the procedures to be followed in the circumstances. This Court recently held, under the very same statute at issue here, that county officers must be appointed with procedural

exactitude. *Lambert v. Belknap County Convention*, Slip.Op. 2007-566 & 2007-685, \_\_ N.H. \_\_\_, 2008 WL 2389216 (N.H. June 13, 2008). The appointment procedures specified here by RSA 7:33 and RSA 661:9, III, are simple, clear, and not burdensome. See *People v. Eaglin*, 586 N.E.2d 1280 (Ill.App. 1992) (where prosecutor had conflict of interest, court appointed replacement in accord with statute); *People v. Garcia*, 698 P.2d 801 (Colo. 1985) (where prosecutor was witness for violation of bail, court appointed replacement from neighboring county). The State’s argument, however, “would render the statute[s] nugatory,” *Chagnon Lumber Co., Inc. v. Stone Mill Const. Corp.*, 124 N.H. 820, 823 (1984), and would also migrate temporary replacement power to the Attorney General away from the trial court where the Legislature has placed it.

### CONCLUSION

In light of the forgoing, Steve Gubitosi requests that all Merrimack County convictions should be voided, or set for a new trial.

Respectfully submitted,

Steve Gubitosi  
By his Attorney,

**Law Office of Joshua L. Gordon**

Dated: June 27, 2008

---

Joshua L. Gordon, Esq.  
26 S. Main St., #175  
Concord, NH 03301  
(603) 226-4225

**CERTIFICATION**

I hereby certify that on June 27, 2008, copies of the foregoing will be forwarded to Susan P. McGinnis, Esq., Senior Assistant Attorney General.

Dated: June 27, 2008

---

Joshua L. Gordon, Esq.  
N.H. Bar No. 9046  
Law Office of Joshua L. Gordon  
26 S. Main St., #175  
Concord, NH 03301  
(603) 226-4225

**APPENDIX**

1. APPEARANCE (Apr. 4, 2003) ..... 12

2. INTERLOCUTORY APPEAL STATEMENT (Dec. 26, 2003) ..... 13

3. OBJECTION TO MOTION FOR INTERLOCUTORY APPEAL (Jan. 2, 2004) ..... 20

4. ASSENTED TO MOTION TO TRANSFER TAPE (Jan. 7, 2004) ..... 22

5. TRANSMITTAL LETTER FROM WAYNE P. COULL, TO MERRIMACK COUNTY  
SUPERIOR COURT (Sept. 6, 2005) ..... 24

6. RSA 7:33-g ..... 25

7. RSA 7:33 ..... 26

8. RSA 661:9, III ..... 27