

**THE STATE OF NEW HAMPSHIRE  
SUPREME COURT**

**No. 2009-0328**

**State of New Hampshire**

**v.**

**John Gebo**

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**Appeal Pursuant to Rule 7 from Judgment  
of the Hillsborough County Superior Court / North**

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**BRIEF FOR THE DEFENDANT**

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**Stephanie Hausman  
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Concord, NH 03301  
NH Bar #15337  
(603) 228-9218  
(15 Minutes Oral Argument)**

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QUESTIONS PRESENTED

1. Whether the trial court erred in denying Gebo's motion to dismiss the charges at the end of the State's case for lack of sufficient independent evidence to corroborate Gebo's admissions.

Issue preserved by motion to dismiss, State's objection, and trial court's ruling. T.\* 87-89.

2. Whether the trial court committed plain error by sentencing Gebo for being a felon in possession of a firearm, as alleged in indictment 07-S-2884, when the jury instructions did not include a firearm element.

Issue raised as plain error pursuant to Supreme Court Rule 16-A.

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\*Citations to the record are as follows:  
"App." refers to the Appendix to this brief;  
"NOA." refers to Gebo's notice of appeal;  
"S" refers to the transcript of the sentencing hearing held on March 9, 2009;  
"T" refers to the consecutively-paginated transcripts of the trial held on October 30 and 31, 2008.

STATEMENT OF THE CASE

A Hillsborough (North) County Grand Jury indicted John Gebo on charges of being a felon in possession of a firearm and falsifying physical evidence. App. 1-2. Both offenses were alleged to have been committed on or about November 4, 2007. Id.

After a trial in October 2008, the jury convicted Gebo on both charges. T 123-24. The trial court (Morrill, J.) sentenced Gebo to three and a half to seven years stand committed on the felon in possession charge and a consecutive suspended three and a half to seven on the falsifying physical evidence charge. S 13-15.

STATEMENT OF THE FACTS

Stephanie Lane lived with Steven Martello until the end of October 2007. T 22-23. When Lane moved out, she told Martello that she was moving in with her boyfriend, John Gebo. T 23. Martello owned what he described as a Kel-Tec 9 millimeter automatic pistol. Id. Lane knew that Martello kept the gun on the top shelf in his closet. T 24. At 11:30 p.m. on Friday, November 2, 2007, Martello placed the gun in his closet and the extra clip on the bureau. T 23-24. He remained in the home alone until Sunday, November 4. T 25-26. At about 4:00 p.m. that afternoon, Martello went to a friend's house to watch the Patriots game. T 26.

While there, he received a call from Julie Frost. T 27. She indicated that she was at the house with Lane to remove Lane's belongings. Id. Martello said that they could remove Lane's belongings from the garage, but that they could not enter the house until he returned. Id. Martello, as was his habit, had left the back door unlocked. T 27-28; 30; 35.

When Martello returned home around 7 p.m., he saw that Lane's belongings had been removed from inside the home. T 30. He also found other things missing, including the gun. T 30-31. Martello called the police to report the gun stolen and also placed numerous calls to Lane and Gebo, asking that they return the gun. T 31.

Martello spoke with Gebo the next evening. T 32. Gebo indicated that he had been at Martello's house with Lane to get her belongings but denied entering Martello's house or having the gun. Id.

Detective Sanclemente called Lane the day after the incident, indicating that the police were investigating a report of a stolen gun. T 48; 54. The detective spoke with Lane on November 12. T 43. Sanclemente and Detective Patterson spoke with Gebo on December 14. T 44-45.

Gebo told the detectives that he had accompanied Lane to Martello's on November 4 in order to retrieve Lane's belongings. T 48. Gebo was aware that Lane had been there previously with Frost. T 65; see also T 36. Gebo told the officers that he remained outside of the house. T 49; 64-66. He denied stealing the gun. T 53; 66.

The police confronted Gebo with Lane's statement that Gebo had stolen the gun. T 52-53; 77. Gebo told the police that he found out the gun was in his home after Sanclemente called Lane the day after they had gone to Martello's house. T 54; 57; 77-78. Lane admitted she took Martello's gun and Gebo demanded that she give it to him. T 52; 78. Gebo was concerned that his seven year old nephew, who was at the apartment, would find the gun and injure himself. T 53; 67; 84. Gebo told the police that when Lane gave him the gun, he broke it down into its constituent

parts and placed the parts, including two magazines, at the bottom of a trash barrel outside. T 57; 78.

When asked why he did not return the gun to Martello, Gebo said that he was afraid that, because he had disassembled it, his fingerprints would be on the gun. T 79. Gebo indicated he was concerned that he would be charged with stealing the gun. T 56; 71. He also admitted that he was a felon. T 56. Gebo said that he later decided to give the gun back to Martello, but when he went to retrieve it, the trash had been collected and the gun was gone. T 57. At the time of the interview, Gebo could not remember which trash barrel he had placed the gun in. T 58.

The gun was entered into a national database of stolen guns, but by the time of trial, the police had not been notified that it had been found by any other agency, T 41-42, nor had the Manchester Police recovered the gun. T 67. The police did not speak to anyone who said they had seen Gebo with the gun. T 68.

In instructing the jury on the elements of felon in possession, the court advised the jury that it must find that Gebo possessed a "deadly weapon." T 113. "Deadly weapon" was defined as "any firearm, knife, or other substance or thing which in the manner it is used, intended to be used or threatened to be used, is known to be capable of producing death or serious bodily injury." Id.

At sentencing, the State argued that Gebo was subject to a three to six year mandatory minimum sentence on the felon in possession charge. S 4; 12. Gebo argued that the mandatory minimum did not apply. S 7-8 The court, without indicating its reasoning, sentenced Gebo to three and a half to seven years stand committed on the felon in possession charge. S. 13.

## SUMMARY OF THE ARGUMENT

1. The trial court erred in denying Gebo's motion to dismiss at the end of the State's case. The State presented insufficient independent evidence to corroborate Gebo's admission that he possessed and removed a gun. The only corroborating evidence pertained to collateral events which did not establish the trustworthiness of Gebo's admissions.

2. The trial court committed plain error in sentencing Gebo for being a felon in possession of a firearm, as alleged in indictment 07-S-2884, when the jury instructions did not include a firearm element. The jury was only instructed to determine whether Gebo possessed a deadly weapon. With no firearm entered into evidence and no finding that Gebo possessed a firearm, this charge should be remanded for resentencing. RSA 651:2, II-g, which mandates a minimum sentence of three to six years for any felony an element of which is possession of a firearm, should not apply.

I. THE TRIAL COURT SHOULD HAVE DISMISSED THE CHARGES BECAUSE THERE WAS INSUFFICIENT INDEPENDENT EVIDENCE TO CORROBORATE GEBO'S ADMISSIONS.

In a challenge to the sufficiency of the evidence, "the defendant must prove that no rational trier of fact, viewing all of the evidence and all reasonable inferences from it in the light most favorable to the State, could have found guilt beyond a reasonable doubt." State v. Breed, No. 2007-654, slip op. at 3 (N.H. July 2, 2009) (quotation and citation omitted). This Court will "examine each evidentiary item in context, not in isolation." Id.

"An accused may not be convicted on the basis of an uncorroborated confession or admission alone." State v. Miller, 145 N.H. 667, 669 (2001) (citation omitted). There must be "substantial independent evidence ... that the admission of the defendant is true." Id. (quotation, citation and brackets omitted). Thus, a defendant's confession "must be sufficiently corroborated by independent evidence to establish its trustworthiness." Id. at 670 (citations omitted).

The corroboration rule aims "to prevent the conviction of an innocent individual by false confession, whatever the motive for the confession." Id. at 669. The similar federal rule was based "in a long history of judicial experience with confessions and in the realization that sound law enforcement requires police investigations which extend beyond the words of the accused."

Smith v. U.S., 348 U.S. 147, 153 (1954). In addition to the danger of "coerced or induced" confessions, a defendant's uncorroborated confession "may reflect the strain and confusion attending his predicament rather than a clear reflection of his past." Id. The federal rule, in cases where the crime has no *corpus delicti*,<sup>1</sup> is that the corroborating evidence "must implicate the accused in order to show that a crime has been committed." Id. at 154.

This Court has held that "the corroborative evidence need not provide independent proof of the crime," however when the corroborating evidence does not relate to the "*corpus delicti*" of the crime, that "may ... be an important factor for the court to consider." Miller, 145 N.H. at 670. Indeed, in each New Hampshire case considering the corroboration rule, the corroborating evidence established that the defendant had committed the crime charged. Id. at 671 (in habitual offender trial, independent evidence that defendant was the driver, and not his girlfriend who had testified to being the driver, corroborated defendant's statement that he had been the driver); State v. George, 109 N.H. 531, 534 (1969) (in incest trial, independent evidence of victim's pregnancy corroborated defendant's statement that he had had sexual intercourse with

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<sup>1</sup>The *corpus delicti* has been described as the "tangibile injury" resulting from the crime. Id. at 154.

her); State v. Hanley, 116 N.H. 235, 237 (1976) (in attempted burglary trial, independent evidence of defendant's knowledge of contents of building corroborated defendant's statement that he had been in the building); State v. Zysk, 123 N.H. 481, 487 (1983) (in burglary and theft trial, independent evidence that theft occurred corroborated defendant's statement that he committed the offenses).

The State's evidence that Gebo possessed and disposed of a gun consisted of Gebo's statement to the police. No witness observed him possess or dispose of the gun. Though the State argued that several of Gebo's statements were corroborated by independent evidence, the evidence did not support many of these arguments. For example, the State argued that Gebo admitted he called Martello, as Martello had testified. T 88. However, Gebo's statement admitted in evidence did not include any reference to speaking to Martello. The State also argued that Gebo said that he was at Martello's home during the Patriots' game, T 96, and that Martello was not home at the time, T 97. Again, Gebo's admission to the police does not contain these statements. Finally, the State argued that Gebo admitted to disposing of two magazines with the gun, which corroborated Martello's report that both magazines were missing. T 97. However, Martello did not testify that both magazines were missing.

The only statements of Gebo that the State corroborated through independent evidence were that Lane had gone to Martello's house to retrieve her belongings, that Frost had accompanied her on one trip,<sup>2</sup> that Martello had a garage, that Sanclemente called Lane the next day inquiring about the gun, and that Gebo was a felon. The State also argued that Gebo's admission to disposing of the gun was corroborated by the fact that the gun, at the time of trial, had not been recovered. T 98.

However, the circumstances of Gebo's admissions call their truthfulness into question. Some of Gebo's admissions were contradicted by other evidence. For example, Gebo told police that Lane had made arrangements with Martello to retrieve her belongings on November 4. T 48. However, Martello testified that he first learned that Lane was at the house to get her things when Frost called him from Martello's house. T 27. Furthermore, Gebo made the admissions upon being confronted with Lane's accusations that Gebo stole the gun. T 52-54; 77-78. Gebo became upset and emotional when confronted with that accusation. T 53-54; 59-60; 77.

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<sup>2</sup>Neither Lane nor Frost testified at trial. Martello testified that he got a call from Frost indicating that she and Lane were at the house to pick up Lane's belongings. T 27. This hearsay testimony was not admitted to establish the truth of the matter asserted and cannot be considered as substantive evidence.

The independent evidence thus did not sufficiently corroborate Gebo's admissions to ensure the trustworthiness of those statements. The independent evidence did not corroborate any of the acts that comprise the *actus reus* of the crimes and only supported Gebo's description of what occurred the day prior to the offenses. The circumstances of his admission, and its conflict with other evidence, cast doubt on its trustworthiness. His admission, in the face of being accused of stealing the gun, may only "reflect the strain and confusion attending his predicament rather than a clear reflection of his past." Smith, 348 U.S. at 153. The convictions are not supported by substantial evidence, independent of Gebo's admissions, and must be reversed.

II. THE TRIAL COURT ERRED IN SENTENCING GEBO FOR POSSESSION OF A FIREARM WHEN THE JURY ONLY FOUND THAT GEBO HAD POSSESSED A DEADLY WEAPON.

Gebo was charged with being a felon in possession of a firearm. App. A1. However, the jury was only instructed to determine whether he possessed a "deadly weapon," defined as "any firearm, knife, or other substance or thing which in the manner it is used, intended to be used or threatened to be used, is known to be capable of producing death or serious bodily injury." T 113. At sentencing, the State argued that Gebo was subject to a mandatory minimum of three to six years for possession of a firearm. S 4; 12; see also RSA 651:2, II-g. The court sentenced Gebo to three and a half to seven years in prison on the felon in possession charge. S 13.

Since trial counsel did not object to application of the mandatory minimum based on a lack of jury finding that Gebo possessed a firearm, Gebo relies on this Court's plain error rule. Sup. Ct. R. 16-A. Under that rule, this Court considers the following elements: "(1) there must be an error; (2) the error must be plain; (3) the error must affect substantial rights; and (4) the error must seriously affect the fairness, integrity or public reputation of judicial proceedings." State v. MacInnes, 151 N.H. 732, 737 (2005) (citation omitted).

Under the Fifth Amendment of the United States Constitution and Part I, Article 15 of the New Hampshire Constitution, Gebo

has a due process right to proof beyond a reasonable doubt and a unanimous jury determination of "any fact that increases the penalty of a crime," other than a prior conviction. Apprendi v. N.J., 530 U.S. 466, 487 (2000); see also, State v. Higgins, 149 N.H. 290, 299-300 (2003). Gebo was sentenced based on possession of a firearm when that fact was not found by the jury. Rather, the jury was instructed on, and found that he possessed, a "deadly weapon."

In Higgins, this Court found that, even though the jury was instructed on the definition of "deadly weapon," the jury instructions as a whole communicated that the jury must determine whether Higgins possessed a firearm. 149 N.H. at 302. The Court found that the indictments "isolated particular moments" during which the defendant used a firearm and the trial court had repeatedly relayed and reiterated to the jury that Higgins was alleged to have used a firearm as a deadly weapon. Id. at 301-02. Thus, this Court found no error. Id.

Here, however, not only did the court instruct the jury on the element and definition of "deadly weapon," but its instructions to the jury did not clarify that the deadly weapon at issue was a firearm. The only time the court mentioned the allegation of a firearm was in introducing the name of the crime and, in so doing, the court instructed the jury that Gebo was charged with possessing a firearm or a deadly weapon. T 113

("The first indictment is felon in possession of a firearm or deadly weapon.") (emphasis added). Thus, a finding at sentencing that Gebo possessed a firearm violated his constitutional rights.

This Court must next decide whether sentencing, in a range outside of the facts found by the jury, is subject to harmless error review. The United States Supreme Court has held that failure to submit an element of the offense to the jury, as well as failure to submit a sentencing factor, are both subject to harmless error review under federal law. Neder v. U.S., 527 U.S. 1, 9-11 (1999) (failure to instruct on an element subject to harmless error review); Washington v. Recuenco, 548 U.S. 212, 222 (2006) (failure to instruct on sentencing factor subject to harmless error review). However, this Court has interpreted the state constitution independently of the federal constitution on the issue of whether the failure to instruct on an element is subject to harmless error review. State v. Williams, 133 N.H. 631, 634 (1990). In its most recent cases addressing these questions, this Court has held that such errors are not subject to harmless error review. Id. at 634-35 (failure to instruct on element not subject to harmless error review); State v. Henderson, 154 N.H. 95, 98 (2006) (failure to instruct on sentencing factor would not be harmless error).

While no New Hampshire case has directly addressed the holdings in Neder and Recuenco, there is sound reason to

interpret the New Hampshire Constitution more expansively, at least on the question of sentencing factors. Indeed, the Washington Supreme Court came to same conclusion on remand in Recuenco. State v. Recuenco, 163 Wash.2d 428 (2008). The Court found that, under the Washington Constitution, failure to instruct on a sentencing factor was not subject to harmless error review. Id. at 442.

Harmless error review may save the trouble of a new trial and "promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." Rose v. Clark, 478 U.S. 570, 577 (1986) (quotation and citation omitted). This prevents litigants from abusing the judicial process. Id. (quotation and citation omitted). However, where, as here, the State fails to ensure jury instructions that support a sentence that it seeks, the purpose of the harmless error rule is defeated. The prosecutor could remain silent at the time of jury instructions, feeling more confident in his or her ability to convince one person (the court) of the missing factor than the twelve people on the jury. However, that possibility "is an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system." Apprendi, 530 U.S. at 498. Such a practice would diminish "the jury's historic capacity to prevent the punishment from getting too far

out of line with the crime" and its role "as circuitbreaker in the State's machinery of justice." Recuenco, 548 U.S. at 229 (Ginsburg, J., dissenting) (quotations and citations omitted).<sup>3</sup>

Furthermore, where, as here, the court has failed to instruct on the firearm element, the court has no authority to sentence in a range based on possession of a firearm. Henderson, 154 N.H. at 97-98. See also, Recuenco, 163 Wash.2d at 439 ("The sentencing judge then committed error by imposing a sentence outside the judge's authority, a sentence that was not authorized by the jury.").

When the missing element is related to the severity of the sentence, a finding of error does not require a new trial. Thus, one of the concerns underlying the harmless error doctrine, the burden of retrying defendants for insignificant error, is not implicated. See, e.g., Neder, 527 U.S. at 19 (harmless error review "blocks setting aside convictions for small error or defects that have little, if any, likelihood of having changed the result of trial.") (quotation and citation omitted). Here, there was no error at trial and Gebo was validly convicted of

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<sup>3</sup>One cannot say that this possibility is remote. Without doing exhaustive research, counsel found that this exact issue (sentencing for possession of a firearm when the jury only instructed on a deadly weapon) has been raised in Higgins, 149 N.H. 290, Recuenco, 548 U.S. 212, and two cases currently pending before this Court, State v. Kousounadis, 2008-0248, and State v. Russell, 2008-0458.

being a felon in possession. See, e.g., Recuenco, 163 Wash.2d at 441-42. However, the State and the court are constrained at sentencing by the choices that they made at the time the jury was instructed.

Even if this Court were to find that the failure to instruct on a sentencing factor was subject to harmless error review, the error in this case was not harmless. In this case, the instructions, as a whole, did not fairly instruct the jury that it had to be unanimous in finding that Gebo used a firearm. The court did not read the indictments or mention the allegation of the use of a firearm in its instructions to the jury. Rather, the court instructed the jury that it must be unanimous in finding that Gebo used a deadly weapon. T 113. It instructed the jury that a deadly weapon may be "any firearm, knife or other substance or thing which in the manner it is used, intended to be used or threatened to be used, is known to be capable of producing death or serious bodily injury." Id.

Furthermore, the facts adduced at trial may have resulted in the jury finding that a deadly weapon other than a firearm was used. A firearm is defined as "any weapon, including a starter gun, which will or is designed to or may readily be converted to expel a projectile by force of gunpowder." RSA 173-B:1, XI; see also, State v. Beaudette, 124 N.H. 579, 581 (1984) (firearm requires use of gunpowder). The court did not provide this

definition to the jury. This is significant because no evidence was presented that the item at issue met the definition of a firearm. There was no testimony at trial about how the gun functioned, either from its owner or any expert, and no gun was produced at trial. Cf. State v. St. John, 129 N.H. 1 (1986) (evidence sufficient to prove firearm where gun introduced into evidence, testimony about ammunition and use in hunting); State v. Taylor, 136 N.H. 131 (1992) (evidence sufficient to prove firearm where testimony regarding use and mechanics of gun). Without a more conclusive finding or the actual weapon, the jury may have convicted Gebo if they believed he had possessed any kind of a gun, even one that does not use gunpowder. See, e.g., Thomas v. Commonwealth, 25 Va. App. 681 (1997) (BB gun does not use gunpowder). Such a gun may be considered a deadly weapon, because capable of causing serious bodily injury, but would not meet the definition of a firearm. See also, Recuenco, 163 Wash.2d at 437 (firearm definition requires gunpowder or other explosive).

Without an instruction that the jury unanimously find beyond a reasonable doubt that Gebo possessed a firearm, it was a due process violation to sentence Gebo for possession of a firearm. This error was plain and seriously affected Gebo's right to due process. "Because the sentence was illegal, the third and fourth elements of the plain error rule have also been satisfied."

Henderson, 154 N.H. at 99. Accordingly, this charge must be remanded for re-sentencing.

CONCLUSION

WHEREFORE, Mr. Gebo respectfully requests that this Court vacate his convictions or remand for re-sentencing.

Undersigned counsel requests fifteen minutes of oral argument.

Respectfully submitted,

By Switt  
Stephanie Hausman  
Assistant Appellate Defender  
Appellate Defender Program  
2 White Street  
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NH Bar #15337  
(603) 228-9218

CERTIFICATE OF SERVICE

I, Stephanie Hausman, hereby certify that two copies of the foregoing Brief have been mailed, postage prepaid, to the Office of the Attorney General, 33 Capitol Street, Concord, New Hampshire 03301, this 21st day of September, 2009.

Switt  
Stephanie Hausman

DATED: September 21, 2009

A P P E N D I X

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D.O.B. 03/15/1986  
Manchester Police Department 07-83824

RSA Ch. 159:3, I  
Felon In Possession Of Dangerous  
Weapon  
Class B Felony  
3 1/2 to 7 years, \$4000

07 20

**STATE OF NEW HAMPSHIRE**  
HILLSBOROUGH, SS. SUPERIOR COURT

**INDICTMENT**

At the Superior Court holden at Manchester, within and for the County of Hillsborough aforesaid, in the month of **December**, in the year of **two thousand and seven**, the **GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE**, on their oath, present that

**JOHN GEBO**  
372 Cedar Street  
Apt. 1  
Manchester, NH 03101

on or about the **fourth** day of **November** in the year **2007**, at **Manchester, NH** in the County of Hillsborough aforesaid, **did commit the crime of Felon in Possession of a Firearm**, in that John Gebo knowingly possessed a Keltec 9mm semi automatic handgun after having been previously convicted of the felony offense of **Breaking and Entering** on **September 20, 2004** in **Haverhill District Court in Massachusetts** contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.

This is a true bill.

Date 12/20/07

Carol Flanagan  
Foreperson

arguerite L. Wageling  
Hillsborough County Attorney

Arraigned on: 2/18/08  
Plea of not guilty entered  
Judge: Abrahamson  
Monitor: Chase  
Clerk: John Safford

Nicole R. Fortune  
Nicole R. Fortune, Assistant County Attorney

Verdict: Guilty  
10/31/08  
Judge: McMill  
Clerk: Wickwire  
Monitor: Bailey

D.O.B. 03/15/1986  
Manchester Police Department 07-83824  
Manchester, [DOCKET NUMBER]

RSA Ch. 641:6  
Falsifying Physical Evidence  
Class B Felony  
3 1/2 to 7 years, \$4000

07 2885

**STATE OF NEW HAMPSHIRE**

HILLSBOROUGH, SS.

SUPERIOR COURT

**INDICTMENT**

At the Superior Court holden at Manchester, within and for the County of Hillsborough aforesaid, in the month of **December**, in the year of **two thousand and seven**, the **GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE**, on their oath, present that

**JOHN GEBO**  
372 Cedar Street  
Apt. 1  
Manchester, NH 03101

on or about the **Fourth** day of **November** in the year 2007, at **Manchester, NH** in the County of Hillsborough aforesaid, **did commit the crime of Falsifying Physical Evidence**, in that **John Gebo**, believing that an investigation is pending or about to be instituted, purposely removed a Keltec 9mm semi-automatic handgun with a purpose to impair its availability in said investigation when he disassembled the handgun and put it in the bottom of a trash container contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.

This is a true bill.

Date 12/20/07

*Carol Flanagan*  
Foreperson

arguerite L. Wageling  
Hillsborough County Attorney

*Nicole R. Fortune*  
Nicole R. Fortune, Assistant County Attorney

ended on: 2/15/08  
if not guilty entered  
by: Thomas  
or: Chase  
John Safford

3/1/08 verdict: Guilty  
Judge: R.K. Morrill  
We: Vickwire  
and for: Bailey