

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.

HILLSBOROUGH COUNTY SUPERIOR COURT - NORTH
STATE OF NEW HAMPSHIRE

V.

ADAM MONTGOMERY

216-2022-CR-577

216-2022-CR-507

OBJECTION TO MOTION TO JOIN (REDACTED)

FILED UNDER SEAL

NOW COMES the defendant, Adam Montgomery, by and through counsel, Caroline L. Smith, Esq., and respectfully requests this Honorable Court deny the State's Motion for Joinder.

1. In this docket, Adam Montgomery is charged with multiple counts of Armed Career Criminal, with lesser included counts of Felon in Possession, as well as two counts of Receiving Stolen Property and alternative counts of Theft (hereinafter, the Frain gun cases). Prior to the indictments in this case, Mr. Montgomery had charges pending regarding Harmony Montgomery.

2. All of the counts in this docket revolve around guns that Chris Frain discovered were missing from his home on October 2, 2019. According to Chris Frain's statement, all three of his guns were present in his home when he went out of town on September 29, 2019. All three of his guns, a .380 pistol, an AR-15 rifle, and a shotgun, were missing when he returned on October 2, 2019. According to Chris Frain, all three guns were stolen in the short period of time he was out of town. His wife, Kim Frain, also gave statements to police that, if not specifically stated, certainly suggested that all three guns were stolen at the same time. Adam Montgomery's charges involve two of those three missing guns. It is the State's theory that Mr. Montgomery stole guns from the Frain residence in order to sell them for money or drugs.

3. Two of the guns missing from the Frain home were recovered. One was recovered on October 22, 2019. Another was recovered in January 2020 from Omari Peterson, who told police he purchased the gun in the fall or winter of 2019 from Ismael Garcia. Michael Sullivan, a potential witness in this matter, has stated that Kim Frain told him that Ismael Garcia stole two of

the guns, but that Ismael Garcia told him that he had traded drugs for the guns with Kim. Ismael Garcia denies ever being in possession of the Frain's firearms.

4. Trial on all the pending gun charges was originally scheduled for November 2022. The case was continued on October 27 and subsequently rescheduled for May 31, 2023.

5. The continuance of the November 2022 trial was due to late disclosure of significant evidence testimony obtained by the State from Kayla Montgomery, a significant witness in both the gun cases and the cases involving Harmony Montgomery. On June 3 and 23, 2022, Kayla Montgomery significantly changed her prior statements, including statements given to the Grand Jury, yet the State did not disclose those statements until on or about October 7, 2022. A Motion to Continue the Trial was argued and granted on October 27, 2022 to enable defense counsel to analyze and incorporate in its defense the newly disclosed June statements.

6. Between October 4 and October 12, 2022, (the Motion in Limine deadline) defense counsel filed several Motions in Limine in preparation for the November trial. Included in those filings was a Motion in Limine: Evidence of Other Firearms. The defendant sought the specific preclusion of all allegations of other firearm possession, including, but not limited to, the firearm allegedly obtained from MR, and an AK-47 allegedly sold to Mr. Montgomery by "Britney" and obtained by her from Sean Houle.

7. The State responded in pertinent part to the Motion in Limine that it "**does not intend to introduce evidence of the MR or Britney firearms in its case-in-chief.**" See paragraph 1 of the State's Response to Defendant's Motion In Limine: Evidence of other Firearms.

8. On March 17, 2023, almost five months after the original gun trial was continued and the State had represented it did not intend to introduce evidence of the MR or Britney firearms in its case-in-chief, Mr. Montgomery was indicted for Armed Career Criminal and Felon in Possession for the firearm allegedly obtained from MR (hereinafter the MR gun case). On March 28, 2023, the State filed State's Motion for Joinder seeking to join the newly indicted MR gun case with the upcoming May trial for the Frain gun cases.

9. The State asserts that the MR gun case is related to the Frain gun case because they involve a common scheme or plan -- "to trade and distribute illegal drugs and firearms without legal consequences" (see paragraph 14). This argument is essentially a propensity argument.

10. In State v. McIntyre, 151, NH. 465, 467 (2004) the Court adopted the definition of common plan as the same as under 404(b), and noted that the distinguishing characteristic of a

common plan under Rule 404(b) is the existence of a true plan in the defendant's mind which includes the charged crimes as stages in the plan's execution. Id.

11. The Court in State v. Brown, 156 N.H. 440 (2007) applied the common plan definition to four drug sales charges where the exchanges were arranged by police with the use of a cooperating individual at different locations chosen by the defendant . The Court noted that each sale committed by the defendant was a discrete event and involved different people, and that the defendant did not formulate a plan that was dependent upon the success of each sale. Rather, he merely took advantage of opportunities as they arose. Id. at 4443. "Since the acts were not so intertwined as to be mutually dependent, there can be no common plan and joinder of the offenses was error." Id.

12. Here, the two cases do not involve a common scheme or plan. In the Frain gun cases, it is alleged that in October 2019, Mr. Montgomery unlawfully removed guns from the Frain residence, purportedly while Kim Frain was asleep. Mr. Montgomery's defense to these allegations is that he did not steal the guns and did not possess the guns. Mr. Montgomery has filed a Motion to Admit 404(b) evidence against an alternative suspect. In the MR gun cases, it is alleged that in July 2019, MR offered Mr. Montgomery a gun and then traveled with the gun to the Montgomery residence to sell it to Mr. Montgomery. It is further alleged that, subsequently, Mr. Montgomery appeared in a video with the gun claiming the the gun was inoperable. Nothing in these two very disparate and discreet scenarios supports a common scheme or plan. They are neither intertwined nor mutually dependent.

13. Further, defense counsel disagrees with certain representations of the facts in the State's motion and puts it to its proof by seeking an evidentiary hearing should its motion not be denied on the pleadings.

14. The State also asserts that joinder is appropriate as the cases are logically and factually connected. Again, Mr. Montgomery disagrees with some of the representations by the State and puts the State to its proof.

15. The above-mentioned Brown case was retried after the 2007 decision discussed above and, in the second trial the charges were joined under a new theory pursuant to a new joinder law. After a guilty verdict in the second trial, the case returned to the NH Supreme Court in State v. Brown, 159 NH 544 (hereinafter Brown 2). In Brown 2, the Court again addressed the joinder of the sales charges and made no change to the definition of common scheme or plant but did determine that, under the circumstances of that case, the sales charges were appropriately joined

as logically and factually connected. The Court set forth factors to aid in discerning whether charges arising from separate criminal episodes are related: (1) the temporal and spatial relationship among the underlying charged acts; (2) the commonality of the victim(s) and/ or participant(s) for the charged offenses; (3) the similarity in the defendant's mode of operation; (4) the duplication of law regarding the crimes charged; and (5) the duplication of witnesses, testimony and other evidence related to the offenses. Id. at 552. No single factor is dispositive. Id. The Brown 2 Court then ruled that, because each offense charged the same crime, all four occurred within about three weeks, each crime was conducted in essentially the same manner (in the same car using a cooperating individual, where the drug sold by the defendant was exchanged for money) involved common witnesses (the same cooperating individual and primarily the same police officers), and testimony would overlap regarding the contextual background of the case as well as the surveillance evidence linking the defendant to the gray sedan, joinder was appropriate.

16. Here, there is no temporal or spatial relationship between guns purportedly stolen from the Frain residence on October 2, 2019 and the alleged exchange between MR and Mr. Montgomery in July 2019. The victims in the Frain gun case are the Frains. They are not victims in the MR case and MR is not a victim in either case. The manner of the crimes alleged is not similar -- in the Frain gun case, it is alleged that Mr. Montgomery stole guns from the residence of the Frains. In the MR case, it is alleged that MR offered to sell a gun to Mr. Montgomery then traveled to the Montgomery residence for the exchange. There are substantial differences in legal arguments including issues of theft/receiving in the Frain case, and whether the MR gun was operable and thus a firearm in the MR case. Finally, there are multiple civilian witnesses in the Frain gun cases and, other than MR, few if any are likely to cross over into the MR case.

17. The State further argues that each case would be admissible in the other for identification and motive. First, as noted before, the State previously agreed that the MR gun would not be admitted in its case in chief negating its argument that joinder is necessary for identification. If there is an issue of identification of who MR was communicating with in October 2019 regarding guns, the matter can be resolved without introduction of the very prejudicial information regarding alleged reasons for communication between MR and Montgomery in July 2019. The State's argument regarding motive is patently inadmissible character and propensity evidence.

18. Finally, the State argues that joinder is in the interest of justice. It is not. The State's prior agreement in response to defendant's Motion in Limine re: Evidence of other Firearms to not introduce evidence of the MR gun, and the failure by the State to even seek an indictment for almost five months after the original trial was continued, show that this is a strategic move by the State to introduce highly prejudicial evidence of other alleged gun possession.

19. Joinder of the Frain gun case with the MR gun case will severely prejudice Mr. Montgomery in both matters, will very likely confuse the issues with the jury, as the allegations are not at all similar and each has legal issues the other does not, and deny Mr. Montgomery due process and his right to a fair trial as guaranteed by the 5th, 6th and 14th amendments to the U.S. Constitution, and Part 1, Article 15 of the New Hampshire Constitution.

WHEREFORE, Adam Montgomery respectfully requests this Honorable Court:

- a) Deny the State's motion without a hearing, or,
- b) Hold an evidentiary hearing on the State's Motion; and
- c) Grant such further relief as may be just and proper.

Respectfully submitted,

/s/ Caroline L. Smith
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CERTIFICATE OF SERVICE:

I hereby certify that a copy of this OBJECTION TO MOTION TO JOIN (REDACTED) has been forwarded to the Office of the Attorney General on this 11th day of April 2023.

/s/ Caroline L. Smith
Caroline L. Smith, Esq.

