

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.

HILLSBOROUGH COUNTY SUPERIOR COURT - NORTH  
STATE OF NEW HAMPSHIRE

V.

ADAM MONTGOMERY

216-2022-CR-577

**MOTION IN LIMINE**

**RE: ALTERNATIVE SUSPECT AND EXCULPATORY EVIDENCE**

NOW COMES the defendant, Adam Montgomery, by and through counsel, Caroline L. Smith, Esq., and respectfully requests this Honorable Court rule that evidence implicating an alternative suspect and exculpatory evidence is admissible.

1. The defendant is charged with two counts of Armed Career Criminals, Armed Career Criminals with lesser included offenses of Felon in Possession, two counts of Receiving Stolen Property with alternate charges of Theft.
2. The defendant is scheduled for a Final Pre-Trial Conference on May 16, 2023.
3. On October 3, 2019 the investigation into the guns that are the subject of the indictments in this case began. Chris Frain discovered that his 3 guns, a Mossberg 12 gauge shotgun, a .380 pistol and a Stag AR-15 rifle, were missing from his home. All three guns were present in the home on September 29, 2019, when Chris Frain left for business travel and Chris Frain discovered they were missing when he returned home October 2, 2019. He also discovered that although his .380 pistol was missing from the drawer where he kept it, his wife's pistol was still there. Chris Frain called the police to report all three of his guns stolen on October 3, 2019.
4. Adam Montgomery is charged with the theft and possession of the shotgun and the rifle. No one has been charged with the missing .380.
5. It is the defense in this matter that in the three days that Chris Frain was out of town, Ismael Garcia acquired all three guns from Kimberly Frain, either through sale, barter or loan, in exchange for drugs or continued access to drugs in the future.

6. Evidence of the currency for the exchange, i.e. illegal drugs, of necessity implicates Ismael Garcia as a seller of drugs and Kimberly Frain as a user of drugs. This evidence is inextricably intertwined with the evidence of the exchange of the guns by Kim Frain to Ishmael Garcia and therefore does not fall under the NHRE 404(b) analysis. Even if it did, however, there is clear proof of the involvement of both Ismael Garcia and Kimberly Frain in drug use/sale with each other in their own statements to the police. Further, the purpose of the evidence is not propensity, but rather the reason Kimberly Frain exchanged Chris Frain's three guns with Ismael Garcia. The prejudicial value of the evidence is very minor as, on information and belief, the State intends to introduce evidence of Kim Frain's drug use as well.

7. When Chris Frain spoke to the police about the missing guns, he also provided a list of items that were missing. The list included his three missing firearms as well as a silver wedding band, a Movado watch, and subwoofers. He was concerned that Kimberly Frain had sold or traded the items for drugs. Kimberly said she had nothing to do with it and that they must have been stolen.

8. Law enforcement eventually discovered that the wedding band was pawned by Kimberly Frain on or about August 5, 2019, two months prior to it being reported stolen. Evidence the ring was reported stolen on October 3, 2019 when Kimberly Frain knew it had not been stolen is evidence not only her lying to cover up her own conduct, but lying to point the finger to someone else. It is exculpatory evidence and is inextricably intertwined with the facts and allegations surrounding the report of the three guns being stolen.

9. In addition, while Mr. Montgomery is not charged with the theft or possession of the .380 Ruger, the disposition of that firearm is inextricably intertwined with the report of the other two missing firearms. It is Mr. Montgomery's defense that Kimberly Frain provided all three firearms to Ismael Garcia at or around the same time, i.e. the 3 days her husband was out of town.

10. There is evidence that Kim Frain provided the .380 as well as the other guns to Mr. Garcia. The evidence includes statements, including statements by omission, by Kim Frain, Michael Sullivan and Kayla Montgomery.

11. On February 6, 2022, MPD ran an NCIC search on Christopher Frain's missing guns. NCIC revealed that the .380 pistol was recovered during a search of residence of Omari Peterson in Massachusetts on March 5, 2021. Omari Peterson was questioned and stated that he got the .380 from Ismael Garcia.

12. Another NCIC search was conducted on February 15, 2022 with some correction information and that search revealed that MPD had custody of the Stag AR-15. The Stag was seized on October 22, 2019.

13. Michael Sullivan, a witness for the State, told the police that Ismael Garcia obtained the .380 from Kimberly Frain. In a recent deposition, he stated that Ismael Garcia stated he obtained two of the missing firearms from Kim Frain in trade for drugs.

14. Mr. Montgomery asserts that a reasonable inference from all of the evidence in this case supports the proposition that none of the guns were stolen from the Frain residence but that Kim Frain gave all three to Ismael Garcia in sale, barter or loan, in exchange for drugs or future and continued access to drugs. The evidence supporting this inference is exculpatory and admissible, as exculpatory evidence, pursuant to Kyles v. Whitley, 514 U.S. 419 (1995); United States v. Bagley, 473 U.S. 667 (1985); Brady v. Maryland, 373 U.S. 83 (1963); State v. Laurie 139 N.H. 325 (1995), as well as his right to a fair trial, due process, and right to all proofs favorable guaranteed by the 5<sup>th</sup>, 6<sup>th</sup> and 14<sup>th</sup> Amendments to the U.S. Constitution and Part 1, Article 15 of the N.H. Constitution.

WHEREFORE, Adam Montgomery respectfully requests respectfully requests this Honorable Court rule that evidence implicating an alternative suspect and exculpatory evidence is admissible.

Respectfully submitted,

/s/ Caroline L. Smith

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Caroline L. Smith, Esq.  
N.H. Bar #5992  
N.H. Public Defender  
408 Union Avenue  
Laconia, NH 03246  
(603) 524-1831

**CERTIFICATE OF SERVICE:**

I hereby certify that a copy of this MOTION IN LIMINE has been forwarded to the Office of the Attorney General on this   1st   day of May, 2023.

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