

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH COUNTY SUPERIOR COURT
NORTHERN JUDICIAL DISTRICT

HILLSBOROUGH, SS

JUNE 2023

STATE OF NEW HAMPSHIRE

V.

ADAM MONTGOMERY
Docket No. 216-2022-CR-577

MOTION FOR A RICHARDS HEARING

NOW COMES counsel for witness Ismael Garcia and respectfully requests that this Honorable Court conduct a Richards Hearing. The following is advanced in support of this motion:

1. Adam Montgomery stands accused of two counts of theft by unauthorized taking, receiving stolen property, felon in possession, and armed career criminal.
2. Counsel was recently assigned to represent potential defense witness Ismael Garcia.
3. On May 23, 2023, the Honorable Court held a hearing with respect to several motions *in limine*.

One motion, titled Defendant's motion *in limine* for Prior Bad Acts of Witnesses (Frain, Peterson, Ramirez, Sullivan, Garcia, sought to introduce at trial "evidence of other crimes, wrongs or acts" pursuant to Rule 404(b). The court's order reflects that "[T]he State does not object to the defendant's request to admit evidence of drug use, sales or arrests of Kimberly Fran, Ismael Garcia or Michael Sullivan". Further, "The parties agree that this evidence is inextricably intertwined with the other evidence in the case". Additionally, the defendant filed a motion *in limine* to Admit Evidence of Alternative Suspect and Exculpatory Evidence. *See generally: State v. Gay*, 169 N.H. 232, 246 (2016). As outlined by the court, the defense seeks to introduce evidence that:

- a. Ismale Garcia and Kimberly Fain used and exchanged drugs with one another.

- b. A missing .380 was found in Omari Peterson's possession. Omari said that he received the .380 from Ismael Garcia. Michael Sullivan told police that Ismael Garcia obtained the .380 from Kimberly Frain. During a deposition Michael Sullivan testified that Ismael Garcia claimed to have obtained two of the missing firearms from Kimberly Frain in exchange for drugs.
4. This Honorable Court ruled that "Ismael Garcia's alleged acquisition of the .380 from Kimberly Frain demonstrates that, at a minimum, Garcia had the opportunity to acquire or steal the other two firearms. The statements of Omari Peterson and Michael Sullivan provide "clear proof" under the Rule that Ismael Garcia was in possession of the .380 and acquired it from Kimberly Frain.
5. Counsel requests that this Honorable Court conduct a Richards Hearing. See: State v. Richards, 129 N.H. 669 (1987). Both the State and Federal Constitutions provide a privilege against self-incrimination. N.H. CONST. pt. 1, art. 15, U.S. CONST. amend V. Ismael Garcia has an absolute right to assert his rights under both the federal and state constitutions to remain silent. Ismael Garcia intends to exercise his right to remain silent. Thus, "When a witness asserts his or her Fifth Amendment rights, the trial court must determine "whether a truthful and complete response might be incriminating and in most cases the court will be unable to give reasoned consideration to the privilege claim until the witnesses' refusal to answer a particular question is viewed in the light of all the circumstances of the particular case." Thus, "in order to legitimately exclude testimony based upon the witnesses Fifth Amendment right, the trial court must conduct a so-called Richards hearing to determine if the privilege is being properly invoked." State v. King (2001).
6. It's clear that Ismael Garcia has a Richards issue with respect to several general areas of potentially relevant defense inquiry. For example, that Ismael purportedly used controlled

substances with Kimberly Frain could lead to his prosecution for a plethora of potential charges, to include the possession and/or sale of a controlled substance. Similarly, any questions pertaining to firearms, the possession and/or transfer of the .380 as is alleged by others, raise obvious state and federal 5th Amendment concerns. The answers to the defendant's line of inquiry could open the door to a prosecution for felon in possession of a firearm, theft, receiving stolen property and sale of a firearm to a felon. Ismael could potentially face criminal liability for Possession of a Firearm by a Prohibited Person 18 U.S.C. 922(g)(1) or the possession of a firearm by an unlawful user or addict of a controlled substance. 18 U.S.C. 922 (g)(3) or the use of a firearm while drug trafficking or committing a drug felony. 924 C. or the possession of a stolen firearm.

WHEREFORE, Counsel requests that this Honorable Court:

- A. Conduct a Richards Hearing outside the presence of the jury to determine if Ismael Garcia will assert his fifth amendment privilege in response to the specific questions asked by the proponent.

Respectfully submitted,

/s/ Justin C. Shepherd, Esq. #14611
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CERTIFICATE OF SERVICE

I, Justin Shepherd, do hereby certify that a copy of the foregoing has been delivered to Attorney Carrie Smith and Attorney General Ben Agati via EFILE on this 1st day of June 2023.

/s/ Justin Shepherd