

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.

HILLSBOROUGH COUNTY SUPERIOR COURT - NORTH
STATE OF NEW HAMPSHIRE

V.

ADAM MONTGOMERY

216-2022-CR-577

216-2023-CR-507

**OBJECTION TO STATE' REPLY TO DEFENDANT'S OBJECTION TO MOTION TO
JOIN**

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. In objection to the State's reply, the defendant states as follows:

1. Docket #216-2022-CR-577, the Frain gun cases, was originally scheduled for November, 2022 but continued to permit defense counsel to incorporate new information into the defense of Mr. Montgomery. Prior to the continuance of the November trial, the State agreed that evidence regarding the MR gun allegations would not be admitted in the State's case in chief.
2. On March 17, 2023, the Grand Jury handed down indictments against Adam Montgomery, Docket #216-2023-CR-507, alleging Armed Career Criminal and Felon in Possession. Those indictments involve allegations that, between July 15 and July 19, 2019, Mr. Montgomery purchased a gun from MR. Discovery reveals that the gun was inoperable at the time.
3. The State now asserts that when the State filed its Response to the *Motion in Limine* for the November trial, allegations of the MR firearm were not fully investigated and the conduct uncharged. "The incident has since been fully investigated, presented to a Grand Jury, and the Grand Jury voted to return a true bill on each count." See Reply #3. The State asserts the "new indictment compels the State to amend its response to the *Motion in Limine*, and there are now non-propensity reasons for admitting the new evidence under Rule 404(b)." This suggests that the new investigation was related to the stated reasons provided for Joinder, i.e. the identity of Adam Montgomery as the person messaging with MR.

4. The only additional discovery received in the Frain gun case since the continuance was granted were documents received on or about November 15, 2022, March 20, 2023 and April 4, 2023, and 4 CD's. Only discovery received on April 4, 2023 contained additional information regarding the MR gun case -- three reports, one dated March 21, 2023 and two dated March 24, 2023, all regarded investigation conducted **after** the Grand Jury voted to indict on the matter. The new reports regard a NCIC search regarding the MR gun, but do not include information about Adam Montgomery. As of this filing, no additional discovery has been sent under the specific docket heading of the newly indicted MR gun case.

5. In its reply, the State asserts "there are now new non-propensity reasons for admitting the new evidence under Rule 404(b)". The non-propensity reason given is to identify Adam Montgomery as the person MR is communicating with on October 3, 2019 regarding a 12 gauge gun -- one of the guns missing from the Frain residence. Even if there is "new" evidence to make that connection, as stated in the original objection, there are ways to agree to the identity of who MR was communicating with regarding the 12 gauge **without** bringing in the allegations of the MR gun case. *See State v. Glodgett*, 144 N.H. 687 (2000).

6. Regarding the State's claim that the Frain evidence has "cross-admissibility" in the MR gun case in that it shows a common motive to obtain drugs and money for guns, the State fails to set forth any reasoning to make that connection. *See State v. McGlew*, 139 N.H. 305 (1995)("Accordingly, the State may not merely parrot the grounds set forth in the rule. Rather, it must articulate precisely how the fact of consequence may be inferred from the evidence sought to be admitted.) *Id.* at 509. In this case, the only cross-admissibility is the impermissible inference of propensity.

7. Finally, the State's reliance on *State v. Rivera*, 2022 WL 16641119, is misplaced. *Rivera* addressed the "single criminal episode" variant under NH Rules of Criminal Procedure Rule 20(s)(1). The *Rivera* court construed "single criminal episode" to mean an uninterrupted criminal occurrence or series of occurrences that are connected in some way. *Id.* In *Rivera*, the drugs were discovered during an inventory search immediately following the defendant's arrest for other offenses. Thus, they were part of a single criminal episode. The State neither argues, nor do the facts support, that the events of July 15 - July 17 are part of a single criminal episode as the events of September 29 - October 3, 2019.

8. The Rivera discussion regarding prejudice is also not applicable. The Rivera court found little evidence of prejudice in joining charges that were part of a single criminal episode. Here, the charges are not part of a single criminal episode and the prejudice is significant. Mr. Montgomery has already agreed to stipulate to his status as a felon and that he has the requisite number of applicable felonies to remove the status element of each offense from the jury. This permits the jury to decide whether Mr. Montgomery possessed, stole or received the Frain's missing firearms without the prejudice of hearing allegations regarding prior offenses, especially those involving guns. Now, the State, through joinder, is seeking to not only introduce unrelated prior criminal allegations, but also the details underlying a particular allegation of a felony criminal charge involving a gun.

9. Evidence is unfairly prejudicial if its primary purpose or effect is to appeal to a jury's sympathies, arouse its sense of horror, provoke its instinct to punish, or trigger other mainsprings of human action that may cause a jury to base its decision on something other than the established propositions in the case." McGlew at 509. Here, knowledge of prior offenses is so prejudicial that Mr. Montgomery was willing to stipulate to one element of the offense in each felon in possession and armed career criminal charge to lessen the prejudicial impact of the jury knowing he has prior convictions. The jury will also be aware that Mr. Montgomery is charged in the death of a child as a result of media attention on that matter and/or voir dire. Piling on other felony offenses only increases the prejudice and creates the very real concern that the jury will make its decision based on an instinct to punish, or other sympathies or something other than the merits of the case.

10. The MR gun case is not related to the Frain gun case. It is not part of a common plan; it is not logically or factually related and it is not part of a single criminal episode. The State's Motion to Join should be denied.

Respectfully submitted,

/s/ Caroline L. Smith
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CERTIFICATE OF SERVICE:

I hereby certify that a copy of this OBJECTION TO STATE'S REPLY TO OBJECTION TO MOTION TO JOIN 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.