

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.

HILLSBOROUGH COUNTY SUPERIOR COURT - NORTH
STATE OF NEW HAMPSHIRE

V.

ADAM MONTGOMERY

216-2022-CR-2372

216-2022-CR-20

**DEFENDANT’S RESPONSE TO STATE’S RESPONSE TO DEFENDANT’S MOTION
TO SEVER**

NOW COMES the defendant, Adam Montgomery, by and through counsel, Caroline L. Smith, Esq., and James T. Brooks, Esq., and hereby responds to the State’s response to Montgomery’s motion to sever, respectfully stating as follows:

1. The purpose of this pleading is to address the State’s contention in its response to Montgomery’s motion to sever that Kayla’s new statements in the January 11, 2024 Zwicker letter do not mark a dramatic departure from the previous state of the evidence. Attached to this motion is an exhibit containing in numerical order the Bates-stamped discovery pages referenced in this pleading.

2. In its response, the State first argues that “[t]he defendant has known of evidence since November 2022 that Harmony had been beaten and suffered bruises the week prior to ... when the defendant and Kayla became homeless.” See State’s Objection at page 4. That is incorrect. In the January 11, 2024 Zwicker letter, Kayla claimed for the first time that “Adam began to hit Harmony in front of her when Harmony had urinated or defecated in her pants less than a week before they began living in their car.”

3. To support its claim, the State first cites Bates 5837, which is attached. There, Tabitha Scott, during a July 19, 2022 interview, told police that she spoke with Kayla regularly and Kayla “had told her that Adam hit Harmony in the head multiple times and was abusive to her during the year time span they had her.” See State’s Objection at page 5; Bates 5837. This statement attributed to Kayla by Scott, even if Kayla had made it, does not suffice as notice of Kayla’s new claim that Adam was striking Harmony the week prior to becoming homeless. More importantly, however, Kayla had already provided a pair of proffer sessions to the police – June 3, 2022 and

June 23, 2022 - and indicated no such thing, much less that Adam was hitting Harmony due to her incontinence prior to being evicted from their Gilford Street home.

4. In further support of its claim, the State also references Harmony allegedly having bruises after the family was already homeless. See State's Objection at page 5. Again, such a claim, even if true, fails to fairly apprise a reasonable person that Kayla would later claim that Adam was hitting Harmony the week *prior* to homelessness.

5. The State next claims that the defense should not be concerned with regard to Kayla's new assertion that Adam ceased all communication with Crystal Sorey because he was afraid Crystal would discover bruises on Harmony and report him. After all, the State reasons it will neither seek to introduce this "opinion" in its case in chief, nor amend its response to Montgomery's Rule 404(b) motion regarding Kayla. That is all beside the point, however. The point is that Kayla now appears to claim that Adam was assaulting Harmony all the way back in April 2019, eight months prior to Harmony's death.

6. The State's claim to the contrary, this development could not have reasonably been foreseen by Montgomery's defense. The State again points to Bates 5837. There, Tabitha Scott told police that Kayla had indicated to her that "Adam hit Harmony in the head multiple times and was abusive to her during the year time span they had with her." Kayla, herself, however, has not until less than one week ago ever indicated as much to the State, despite having two proffer sessions prior to Scott's statement (June 3, 2022 and June 23, 2022) and one after (March 16, 2023). Instead, Kayla had told the police that, aside from the charged second degree assault and apart from one time having missed her buttocks while spanking her and red marks from having grabbed her arm, she had not seen any injuries on Harmony caused by Adam until the family was homeless starting in late November 2019. See Transcript of 6/3/22 proffer 1st half at 67; Transcript of 6/23/22 proffer at 203.

7. The State lastly claims that the defense has been aware of Harmony's physical condition since March 2022, see Objection at page 7, which the State has described as "frail." See State's Partial Objection to Defendant's Motion *in Limine* re: Allegations of Prior Subsequent Bad Acts (hereinafter "State's 404(b) partial objection") at ¶ 16. This is not correct, as prior to the January 11 Zwicker letter, Kayla had never described Harmony as thin, malnourished, or frail.

8. In making this particular claim, the State cites Bates 4821-4826. The pages consist

of records from a June 2, 2019 doctor's visit. The pertinent medical records can be found within the attached exhibit. They state Harmony's weight to be 35.2 pounds and her temperature to be 110.4 degrees Fahrenheit. The physical exam revealed a "[w]ell appearing child, appropriate for her age, no acute distress." Her ears, mouth, neck, and skin were examined with no notation of injury other than the diagnosis of impetigo around her mouth. See Bates 4821-4824.

9. The State also cites a January 4, 2022 police report documenting an interview with Lesley Rivera. See Bates 307. During the interview, Rivera described once seeing Harmony when Harmony came to her home to take a shower during the summer of 2019. She described Harmony as looking "malnourished." See id. This lone observation aside, the rest of the discovery offers nothing to suggest that Harmony was malnourished, unhealthily thin, or frail.

10. Indeed, during this same time period, DCYF worker Demetrios Tsaros paid visits to the Montgomery family, some of which were unannounced. On July 29, 2019, Tsaros saw Harmony and "did not observe any concerns." See Bates 2086. During an August 7, 2019 visit, Tsaros saw a red mark on Harmony's right eye and a faded bruise under her eyelid but otherwise observed that "Harmony appeared to be clean and healthy with no visible concerns." See Bates 2091. During an October 1, 2019 visit, Tsaros observed Harmony and saw that she "appeared to be fine with no visible concerns." See Bates 2098-2099. In addition, in-between one of these visits, Sergeant Michael Bergeron, on September 11, 2019, responded to the Montgomery residence and observed that all three children, Harmony included, "appeared to be clean and fed. Their clothing was appropriate for the current conditions." See Bates 2145-2147.

11. In sum, prior to the State's Partial 404(b) Objection and the latest Zwicker letter, both of which have been submitted this month, the defense reasonably expected that each of the charges in this case could be considered fairly and separately by a jury in a joined trial. Now, however, regardless of how the Court might rule on the Rule 404(b) issues, it is plain that the State intends on using the second degree assault alleged as evidence of the second degree murder charge. Rather than allowing the two charges to be considered separately, the State now seeks to treat them as a course of conduct.

WHEREFORE, Adam Montgomery respectfully requests this Honorable Court:

- (A) Grant his motion to sever; or
- (B) If the Court is disinclined to grant Montgomery's request to sever based on the pleads, schedule an evidentiary hearing; and
- (C) Grant such other and further relief as deemed fair and just.

Respectfully submitted,

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CERTIFICATE OF SERVICE:

I hereby certify that a copy of this pleading has been forwarded to Senior Assistant Attorney General Benjamin J. Agati and Assistant Attorney General R. Christopher Knowles on this 12th day of January 2024.

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