

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.

HILLSBOROUGH COUNTY SUPERIOR COURT - NORTH
STATE OF NEW HAMPSHIRE

V.

ADAM MONTGOMERY

216-2022-CR-577

MOTION TO SEVER

NOW COMES the defendant, Adam Montgomery, by and through counsel, Caroline L. Smith, Esq. and Paige Pihl Buckley, Esq., and respectfully requests that this Honorable Court order the two felony charges of Theft by Unauthorized Taking or Transfer and the two charges of Receiving Stolen Property be severed and tried separately from the charges of Felon in Possession and Armed Career Criminal.

Mr. Montgomery's severance request is based on his fundamental constitutional rights to due process and a fair trial under the United States and New Hampshire Constitutions. U.S. Constitution, Fifth and Fourteenth Amendments New Hampshire Constitution, Part 1, Article 15.

In support of this Motion, the following is stated:

1. On June 20, 2022, the defendant was indicted on two counts of Armed Career Criminal (ACC) with two lesser included counts of Felon in Possession (FIP), two counts of Receiving Stolen Property, and two alternative counts of Theft By Unauthorized Taking Or Transfer.
2. On or about August 4, 2022, by agreement, the State amended the charges of ACC and FIP to strike the listed predicate of Criminal Threatening from the enumerated prior felonies as the Criminal Threatening conviction was in fact a misdemeanor.
3. On August 18, 2022, the defendant was again indicted on two counts of ACC and two counts of FIP. These charges were indicted under the same docket number as the original ACC and FIP charges. The only difference between the new and prior amended charges of the same name is that each new ACC charge added to the list of prior convictions a June 10, 2010 felony conviction for Assault and Battery with a Deadly Weapon, and the FIP charges added the June 10, 2010 Assault and Battery charge as well as a September 9, 2014 Larceny from a person charge. Presumably the new indictments are intended to be substitute indictments for the

previously charged and amended indictments of the same name. The State has not, however, not crossed the earlier indictments.

4. NH Rule of Criminal Procedure 20 governs joinder of offenses. The Rule distinguishes between related and unrelated offenses. If either party moves for joinder of *related* offenses, the charges shall be joined unless the trial judge determines that joinder is not in the best interest of justice. NH Rules of Criminal Procedure 20(a)(2).

5. Mr. Montgomery asserts that joinder of the ACC and FIP charges with the charges of Theft by Unauthorized Taking and Receiving Stolen Property is not in the best interest of justice. The prejudice caused by evidence that the defendant may have been previously convicted of four major felony offenses of violence can not be overstated.

6. The evidence the State will use to seek to establish the *possession element* of the ACC and FIP charges is the same evidence the State will use to seek to establish the Theft and Receiving charges. However, the prior convictions listed in the ACC and FIP charges are irrelevant to, and play no role in establishing, the elements of the Theft and Receiving charges. The unfair prejudicial impact, the danger that the jury would base its decision on the defendant's perceived character based on prior convictions--would be overwhelming. The jury would view the defendant as a bad or dangerous person based solely on the alleged prior convictions, the names of the alleged prior convictions, and the number of the alleged prior convictions. This prejudice would impact any consideration of the strength of the State's evidence with regard to the Thefts and Receiving charges, especially when the guns at issue include an assault type rifle. Indeed, similar concerns that evidence of dangerousness would affect a jury verdict when there were doubts about guilt were used to justify bifurcation in insanity cases:

(S)ubstantial prejudice may result from the simultaneous trial on the pleas of insanity and "not guilty." . . . (E)vidence that the defendant has a dangerous mental illness invites the jury to resolve doubts concerning commission of the act by finding him not guilty by reason of insanity, instead of acquitting him, so as to assure his confinement in a mental hospital. *Holmes v. United States*, 124 U.S.App.D.C. 152, 153, 363 F.2d 281, 282 (1966).

Novosel v. Helgemoe, 118 N.H. 115, 124(1978)

7. Evidence that the defendant has the number and type of prior felony convictions listed in the indictments would lead to a perception of dangerousness by the jury tasked with determining whether Montgomery stole or received stolen guns. It would have the same impact the testimony

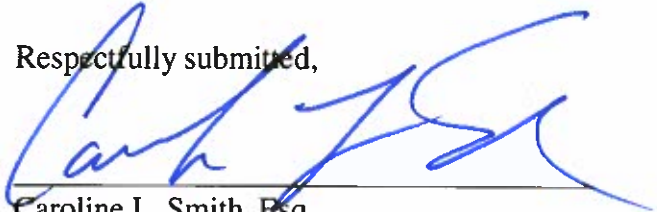
regarding the dangerous mental illness would have on the jury discussed in Novosel v. Helgemoe.

8. Because the prior felony convictions are not relevant to, and have such an overwhelming prejudicial effect on, the Theft and Receiving charges, it is in the best interest of justice that the charges not be tried together. Severance is appropriate.

WHEREFORE, counsel for Mr. Montgomery requests this Court:

- A. Sever the Armed Career Criminal and Felon in Possession charges from the Theft and Receiving Stolen Property charges, and
- B. Grant any other relief in favor of the defendant that the Court deems just and equitable.

Respectfully submitted,

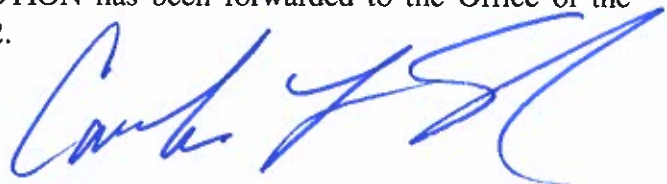


Caroline L. Smith, Esq.
N.H. Bar #5992
N.H. Public Defender
408 Union Avenue
Laconia, NH 03246
(603)524-1831

/s/ Paige Pihl Buckley
Paige Pihl Buckley
N.H. Bar #272328
N.H. Public Defender
20 Merrimack Street
Manchester, NH 03101
(603)669-7888

CERTIFICATE OF SERVICE:

I hereby certify that a copy of this MOTION has been forwarded to the Office of the Attorney General on this 1st day of August 2022.



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