

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.

HILLSBOROUGH COUNTY SUPERIOR COURT - NORTH  
STATE OF NEW HAMPSHIRE

V.

ADAM MONTGOMERY

216-2022-CR-20

216-2022-CR-2372

**MOTION TO SEVER DOCKET NUMBERS 216-2022-CR-20 AND 216-2022-CR-2372**

NOW COMES the defendant, Adam Montgomery, by and through counsel, Caroline L. Smith, Esq., and James T. Brooks, Esq., and respectfully requests this Honorable Court sever the above dockets for trial.

In support of this request, the following is stated:

1. Adam Montgomery is charged in docket number 216-2022-CR-20 with second degree assault for allegedly causing bodily injury to Harmony Montgomery between July 1 and July 22, 2019. In docket number 216-2022-CR-2372, Adam Montgomery is charged with second degree murder and related offenses in connection with the December 7, 2019 death of Harmony Montgomery.

2. In November 2022, the defense filed an assented-to motion to join the cases for trial, which the Court granted. See N.H. R. Crim. P. 20(a)(3) (“Upon written motion of a defendant, ... the trial judge may join for trial two or more charges of unrelated offenses ....”). In so filing, Montgomery’s defense was satisfied that joining the offenses would allow for fair and just verdicts on each individual charge. The second degree assault and second degree murder charges were two discrete allegations separated by roughly five months and differing circumstances. A jury would heed the Court’s instructions to consider the charges separately.

3. In recent weeks, the state of the evidence has changed dramatically. The State now portrays the second degree assault and second degree murder charges as mere parts of a larger, pervasive, and sustained pattern of abuse. See State’s Partial Objection to Defendant’s Motion in Limine – Allegations of Prior or Subsequent Bad Acts at ¶ 16. According to the State, “in the months and weeks prior to Harmony’s death, she appeared to be malnourished and covered in bruises.” See

id. Though not having filed any notice of Rule 404(b) evidence as required by the Rules of Criminal Procedure, much less timely notice, the State now and belatedly avers that “Harmony’s physical frailty at the time of her murder shows the defendant’s intent (i.e., that he acted recklessly and with extreme difference) ....” See id.

4. Last Thursday, January 11, the defense received a Zwicker letter from the State imparting information from Kayla Montgomery that marks a substantial departure from her prior statements. Kayla has previously stated that, aside from the charged second degree assault, she did not see any injuries on Harmony until the family was homeless and living out of the Chrysler Sebring. See Transcript of 6/3/22 proffer 1<sup>st</sup> half at 67. Now, as of less than a week ago, Kayla says that she witnessed Adam strike Harmony during the week prior to the family becoming homeless. See 1/11/24 Zwicker letter.

5. Kayla has previously informed the police that she did not know why Adam ceased all communication with Harmony’s biological mother in April 2019. When asked, Kayla replied, “I don’t know why he stopped doing that .... I don’t know why he just stopped all of a sudden.” See Transcript of 6/3/22 proffer 1<sup>st</sup> half at 61. Now, as of less than a week ago, Kayla asserts that Adam “cut Crystal Sorey off because of the bruises on Harmony and the fear that Crystal would report him.” See 1/11/24 Zwicker letter. The clear import of this new assertion is that Adam was assaulting Harmony as early as April 2019, evidence that Montgomery’s defense could not have divined when moving to join in November 2022.

6. The Zwicker letter from last week also discloses that Kayla now claims Harmony to have been “skinny” and “always look[ing] exhausted” during the time the family lived in their car. See id. This description is new and seemingly contradicts Kayla’s prior statement that Harmony weighed between sixty and sixty-five pounds at death. See 6/3/22 proffer 2<sup>nd</sup> half at 15.

7. The State is not entitled to join the above-referenced dockets. Joinder of offenses is governed by New Hampshire Rule of Criminal Procedure 20(a). Rule 20(a)(2) provides that “[i]f a defendant is charged with two or more related offenses, either party may move for joinder of such charges. The trial judge shall join the charges for trial unless the trial judge determines that joinder is not in the best interests of justice.” Rule 20(a)(1) defines “related” offenses as those that “(A) [a]re alleged to have occurred during a single criminal episode; or (B) [c]onstitute parts of a common scheme or plan; or (C) [a]re alleged to have occurred during separate criminal episodes,

but nonetheless, are logically and factually connected in a manner that does not solely demonstrate that the accused has a propensity to engage in criminal conduct.”

8. In evaluating the logical and factual connection between offenses, a court is to consider (1) the temporal and spatial relationship, (2) commonality of victims or participants, (3) the similarity in the defendant’s mode of operation, (4) the duplication of the law, and (5) the duplication of witnesses, testimony, and evidence. See State v. Brown, 159 N.H. 544, 551-552 (2010). No single factor is dispositive. See id. at 552. Here, the second degree assault and second degree murder charges, though sharing a common victim, allegedly occurred roughly five months apart and in separate locations within the city of Manchester. The similarity of the alleged mode of operation – striking the victim with one’s fist – differs in the degree of force and number of blows. The law for the jury to apply differs in both *mens rea* and *actus reus*. While there exists some overlap in witnesses, such overlap pales in comparison to the number of witnesses – law enforcement, record keepers, and all the experts – and evidence pertaining solely to the second degree murder charge. Conversely, there are witnesses, including, but not limited to, Kevin Montgomery who have relevant information to impart solely with respect to the second degree assault. Because the offenses in the two dockets are unrelated as defined by Rule 20, the dockets should be severed for trial.

9. The above dockets should also be severed “in the interests of justice.” N.H. R. Crim. P. 20(a)(5) (“If it appears that a joinder of offenses is not in the best interests of justice, the court may upon its own motion or the motion of either party order an election of separate trials or provide whatever other relief justice may require.”). It is evident from the State’s recent pleadings and Zwicker letters that the State intends to employ a trial strategy of bootstrapping the separate offenses and portray a long and unrelenting pattern of abuse and neglect that defies a jury’s ability to impartially consider the charges separately on their own individual merits.

WHEREFORE, Adam Montgomery respectfully requests this Honorable Court sever the above-captioned dockets for trial.

Respectfully submitted,

/s/ Caroline L. Smith

---

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

/s/ James T. Brooks

---

James T. Brooks, Esq.  
NH Bar #14876  
NH Public Defender  
27 John Stark Highway  
Newport, NH 03773  
(603) 865-1460

**CERTIFICATE OF SERVICE:**

I hereby certify that a copy of this motion to sever has been forwarded to Senior Assistant Attorney General Benjamin J. Agati and Assistant Attorney General R. Christopher Knowles on this 15th day of January 2024.

/s/ Caroline L. Smith

---

Caroline L. Smith, Esq.