THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2016-0006

State of New Hampshire

v.

Ernesto Rivera

Appeal Pursuant to Rule 7 from Judgment
of the Hillsborough (South) Superior Court

REPLY BRIEF FOR THE DEFENDANT

Christopher M. Johnson
Chief Appellate Defender
Appellate Defender Program
10 Ferry Street, Suite 202
Concord, NH 03301
NH Bar # 15149
603-224-1236
cjohnson@nhpd.org
(15 minutes oral argument)

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QUESTION PRESENTED

Whether the court erred by denying the defense request to sever for trial the drug charge from the other charges.

Issue preserved by defense motion to sever, the State's objection, the hearing on the motion, and the trial court's ruling. AD 25-31; A3-A25; H 18-65.*

* Citations to the record are as follows:
"DB" refers to the designated page of Rivera's opening brief;
"SB" refers to the designated page of the State's brief;
"AD" refers to the supplement attached to Rivera's opening brief, containing the order from which Rivera appeals;
"A" refers to the separate appendix to Rivera's opening brief;
"H" refers to the transcript of the hearing on the motion to sever;
"T" refers to the transcript of the trial held over two days in December 2015;
"S" refers to the transcript of the two-day sentencing hearing held in January 2020.

STATEMENT OF THE CASE AND FACTS

In his opening brief, Rivera contended that the court erred in denying the defense motion to sever the drug charge from the other charges. DB 13-21. In making that claim, the brief advanced an argument about the proper boundaries of a "single criminal episode." The brief focused on that point because, in joining those charges, the trial court relied on Criminal Procedure Rule 20's "single criminal episode" variant of relatedness. AD 27-28.

In its brief, among other arguments, the State relies on the factors articulated in State v. Brown, 159 N.H. 544 (2009), a case addressing a question about the meaning of the "logically and factually connected" variant. SB 15, 17. The State also cites State v. Locke, 166 N.H. 344 (2014), as supporting the trial court's ruling. This reply brief responds to the State's reliance on Brown and Locke.

I. THE COURT ERRED IN JOINING FOR TRIAL THE DRUG CHARGE WITH THE OTHER CHARGES.

For at least two reasons, this Court must reject the State's reliance on Brown. First, insofar as the State contends that the Brown factors shed light on the scope of the "single criminal episode" variant of relatedness, this Court must reject that argument as a matter of law. In Brown, the trial court found the various charges to have arisen in separate criminal episodes. Brown, 159 N.H. at 549. As a consequence, the litigation in the trial court, and later in the Supreme Court, focused on the scope of the "logically and factually connected" variant. Id. at 549-50. In its opinion, this Court described the "logically and factually related" as a "category for joinder" that is distinguishable from the "single criminal episode" and "common plan" categories. Id. at 551.

The Brown Court took note of the fact that the joinder rule lacked any factors or guidance as to the scope of the "logically and factually related" category. Id. To remedy that problem, this Court "develop[ed] guiding criteria for assessing whether offenses that occur during separate criminal episodes are related under" the "logically and factually related variant," a rule then codified as Superior Court Rule 97-A(I)(A)(iii), and now located in Criminal Procedure Rule 20(a)(1)(C). Brown, 159 N.H. at 551. The five factors articulated in Brown thus aid the analysis only under that variant. They do not speak to the "single criminal episode"

variant of relatedness. The State accordingly errs in proposing to bring the Brown factors to bear on a question of the scope of the "single criminal episode" variant.

Second, insofar as the State asks this Court to affirm joinder on the alternative basis that the drug charge and the other charges, despite not being part of a single criminal episode, were "logically and factually connected," this Court must reject that argument also. The trial court did not find that the drug charge and the other charges were logically and factually related to each other in the relevant sense. Thus, to the extent that the State on appeal asserts that they were, it asks this Court to affirm the decision of the trial court on an alternative ground not relied on by the trial court. This Court must refuse that invitation.

The State overlooks recent caselaw establishing the standard of review this Court applies when considering whether to affirm on an alternative ground. This Court "may sustain the trial court's ruling on a[n alternative] ground … only if there is only one way the trial court could have ruled as a matter of law." State v. Cavanaugh, 174 N.H. 1, 259 A.3d 805, 815 (2020). Here, had the trial court ruled on whether the charges "were logically and factually connected in a manner that d[id] not solely demonstrate that [Rivera] ha[d] a propensity to engage in criminal conduct," that ruling would have been discretionary, in the sense of involving a weighing of several factors. See State v. Girard, 173 N.H. 619, 623

(2020) (noting discretionary nature of decision to join or sever charges). The State does not argue that the trial court was compelled, as a matter of law, to find that the charges were logically and factually connected in a non-propensity manner.

Nor could any such argument be supported on this record. The possessory drug offense overlapped temporally and spatially with the charged assaults and the charged threat, but the possession continued elsewhere and after the other crimes, just as it had begun before them. The drug offense involved no victim, and the assault/threat victim, C.G., did not participate in the drug offense in any way. No similarity in the defendant's mode of operation linked the drug possession with the assaults or the threat, nor was there any duplication in the law governing the assaults/threat and the drug-possession charge. Finally, the only duplication of witnesses would arise from the fact that the officer who arrested Rivera for the assaults later found the drugs during booking. The testimony of all other witnesses related solely to the assault and threat charges. The trial court here could sustainably have rejected the applicability of the "logically and factually related" variant, as the Brown factors do not support a finding that the drug charge was logically and factually connected with the other charges.

Finally, this Court must reject the State's reliance on Locke. Citing Locke, the State asserts that the "single criminal episode analysis … is related to compulsory joinder,

not to whether charges should be tried separately." SB 16. Criminal Procedure Rule 20 contradicts the State's assertion.

Rule 20 establishes the fact of occurrence during a "single criminal episode" as one of the three variants of relatedness that inform a court's analysis of whether to join or sever charges. If charges are not related, consent of the defendant is required to join them for trial. N.H. Crim. Pro. Rule 20(a)(3). By moving to sever the charges here, Rivera withheld consent to joinder. Because the trial court relied on a "single criminal episode" analysis in denying Rivera's request to sever, the "single criminal episode" concept is crucial to this appeal.

Nothing in Locke justifies the trial court's ruling here. That case involved a circumstance in which, following an acquittal on some charges arising out of a criminal episode, the State brought further charges arising out of that same episode. The case did not, however, require this Court to elaborate on the definition of a criminal episode, as it was clear and undisputed that the charges prosecuted at Locke's first and second trials arose from the same criminal episode. Rivera's case, by contrast, raises a question of the boundaries of a "criminal episode." If, as Rivera contends, the drug and the assault/threat charges were not part of the same criminal episode, the compulsory joinder rule of Locke, applicable to charges that arise out of the same criminal episode, adds nothing to the resolution of the present dispute.

CONCLUSION

WHEREFORE, for the reasons stated above as well as those given in his opening brief and those to be offered at oral argument, Mr. Rivera requests that this Court reverse his convictions.

This brief complies with the applicable word limitation and contains fewer than 1320 words.

Respectfully submitted,

/s/ Christopher M. Johnson

By_____

Christopher M. Johnson, #15149
Chief Appellate Defender
Appellate Defender Program
10 Ferry Street, Suite 202
Concord, NH 03301

CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief is being timely provided to Assistant Attorney General Elizabeth Woodcock, Esq., through the electronic filing system's electronic service.

/s/ Christopher M. Johnson

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Christopher M. Johnson

DATED: January 6, 2022