THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0503

State of New Hampshire

v.

Brandon Griffin

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

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 refusing to dismiss the Drug Enterprise Leader charge.

Issue preserved by defense motions to dismiss, the State's objections, and the court's orders. AD 41-57; A50-A90; A102-A149.*

* Citations to the record are as follows:
"AD" refers to the attached addendum containing the orders from which Griffin appeals;
"A" refers to the separate appendix, containing relevant pleadings and other documents;
"P" refers to the transcript of the plea hearing, held on November 21, 2016;
"H1" refers to the transcript of the hearing held on January 10, 2018;
"H2A" refers to the transcript of the first of two hearings held on January 16, 2018;
"H2B" refers to the transcript of the second of two hearings held on January 16, 2018;
"H3" refers to the transcript of the hearing held on February 15, 2018;
"H4" refers to the transcript of the hearing held on March 29, 2018;
"H5" refers to the transcript of the hearing held on July 31, 2018;
"H6" refers to the transcript of the hearing held on August 30, 2018;
"H7" refers to the transcript of the hearing held on October 4, 2018;
"H8" refers to the transcript of the hearing held on November 1, 2018;
"H9" refers to the transcript of the hearing held on November 27, 2018;
"H10" refers to the transcript of the hearing held on April 4, 2019;
"H11" refers to the transcript of the hearing held on April 29, 2019;
"H12" refers to the transcript of the hearing held on May 2, 2019;
"H13" refers to the transcript of the hearing held on May 9, 2019;
"T1" through "T18" refers to the consecutively-paginated transcript of the designated day of the eighteen-day trial held in May and June, 2019;
"S" refers to the transcript of the sentencing hearing, held on August 5, 2019.

STATEMENT OF THE CASE

The State brought seventy-two charges against Brandon Griffin. T1 166-75. Sixty-six charges reflected and arose from eleven shooting incidents, in that for each of the eleven incidents, the State brought the same six charges: accomplice to reckless conduct, accomplice to criminal mischief, solicitation to commit reckless conduct, solicitation to commit criminal mischief, conspiracy to commit criminal mischief, and felon in possession of a deadly weapon. Two of the alleged incidents involved Kelvin Reddick as the shooter, while nine named John Gebo in that role. The shooting incidents took place between April 30 and June 8, 2016, at specified times and locations in Manchester.

The remaining six indictments charged Griffin with: (1) solicitation of first-degree assault, (2) trafficking in persons, (3) first-degree assault, (4) solicitation of first-degree murder, (5) conspiracy to commit murder, and (6) being a drug enterprise leader (hereinafter, "DEL"). T1 166-69.

Griffin stood trial over eighteen days in May and June 2019. On the six unlinked charges, the jury returned guilty verdicts on three (solicitation of first-degree assault, first-degree assault, and DEL), and acquitted on three (solicitation of murder, conspiracy to commit murder, and trafficking in persons). T18 3592-93, 3598-99. With respect to the eleven alleged shooting incidents, the jury returned guilty verdicts

on some charges and acquitted on others. Specifically, the jury returned guilty verdicts on all six charges in connection with seven of the incidents. As to the other four incidents, the jury returned guilty verdicts on the same two charges (felon in possession and conspiracy to commit criminal mischief), while acquitting on the other four charges. T18 3584-3614.

The trial court (Anderson, J.) sentenced Griffin on the DEL charge to the maximum term of twenty-five years to life. S 39. On the other charges, the court pronounced additional terms, some concurrent and some consecutive, such that Griffin faces a cumulative stand-committed term of forty-eight and a half years to life. S 40-41.

STATEMENT OF THE FACTS

No fact statement of any reasonable length could describe in detail the evidence introduced at a trial lasting eighteen days. Accordingly, this statement summarizes the evidence in broad strokes. The Argument section will describe the evidence in further detail as necessary to the appellate claims.

The State alleged that Brandon Griffin played a leadership role in a Manchester drug-dealing entity called the "Squad." T1 182; T7 1307, 1422; T11 2491. The State contended that Griffin assumed the role when the prior leader, Courtney Barrett (also known as "Q"), was arrested and incarcerated around Christmas in 2015. T7 1257, 1320-21; T9 1908; T11 2477. Other members of the Squad included, at various times between January 2014 and June 2016, Charles Morrison, Hans Odige, Amanda Gurley, Kelvin Reddick, Tori Caron, Veronica Paris, John Gebo, and others. T7 1257, 1271, 1318-21, 1345; T9 1889; T11 2477; T16 3521.

The Squad's main activity was selling illegal drugs, principally cocaine and fentanyl or heroin. T1 195; T11 2470, 2514; T16 3462. Gebo, Reddick, and Paris all performed that function, and all testified that, after Barrett's incarceration, Griffin provided them the drugs they sold to users. T7 1267-87; T9 1942; T11 2470, 2514; T13 2877, 2890, 2910. Often,

they would sell drugs in "trap houses" – apartments in Manchester's high-drug-use areas that were offered or commandeered for the purpose. T2 265; T7 1272, 1424; T9 1962-64; T11 2518, 2530; T12 2577. Drug users would come to a trap house to buy drugs and sometimes would stay in the house to use them. T2 265.

The crimes charged by the State all were alleged to have some connection to that core drug-selling activity. Many of the crimes, and most of the eleven shooting incidents, directly related to an alleged turf battle with a rival drug-dealer, Dennis Jones, also known as "Mega." T9 1964; T10 2032-33; T10 2032-33; T11 2497, 2539-46; T13 2900. Thus, four of the shootings targeted a trap house on Cedar Street in which Mega sold drugs. T2 329-61; T4 712; T13 2943. The State contended that the Squad targeted Mega's Cedar Street trap house to discourage users from buying drugs from Mega. T11 2547. Three shootings targeted the residences of Mega, his family members, or close associates, with the alleged goal of intimidating Mega so that he would abandon the market to the Squad. T10 2061; T11 2558; T13 2934. Two other shootings targeted another of Mega's trap houses or a house in which another drug dealer was thought to stay. T7 1424-31; T9 1964-67; T10 2067; T13 2981, 2996, 3031. One shooting, on Spruce Street, had no connection to Mega, but targeted the home of people who had disrespected Griffin

during a street confrontation arising from a traffic dispute. T13 3040.

The State's witnesses testified that Griffin ordered each of the shootings. T11 2503; T13 2936, 2953, 2999. He would provide the gun from a locked safe in his room, require that the shooting be recorded or otherwise monitored to prove that his order was followed, and pay the Squad members who carried out the shooting. T11 2495, 2498, 2508, 2542; T13 2950. Payment came in the form of drugs and/or a reduction in the debt the Squad members owed Griffin for drugs he had fronted them or bail he had posted for them. T9 1948-56; T11 2484; T13 2976. Testimony indicated that all Squad members used drugs to some extent, and that all, other than Griffin, were addicted at various times to one or more drugs, to a greater or lesser extent. T11 2493.

Reddick fired the gun in two shootings, and Gebo fired the gun during the rest of the shootings. T12 2583. Because none of the male Squad members had a car or a driver's license, Gurley served as the driver for most of the shootings that involved transportation by car. T9 1891-92, 1948, 1951-52; T10 2033, 2041, 2050-51, 2061, 2066-67. Gurley was linked to the group initially through her intimate relationship with Barrett. T9 1886-88.

With the help of a friend, Gurley rented an apartment on Belmont Street that functioned for a time as the Squad's

headquarters. T9 1903; T11 2533. A police raid on that apartment led to the arrests of several Squad members, and the subsequent search yielded a gun and, in a bedroom associated with Griffin, three safes containing money, drugs, ammunition, and assorted papers. T2 362-63; T5 983; T6 1128-85. The police also found several cell phones from which they extracted text messages, a document specifying the debts of various Squad members, and other evidence. T2 362; T6 1128-85; T9 1757-90, 1808-11, 1837-49; T10 2169-83; T13 2796-2810.

Other charges related to punishments ordered, according to the State, by Griffin against people delinquent on debts or who otherwise offended the Squad. One first-degree-assault charge alleged that Griffin ordered Morrison to cut Paris's face as punishment for her failure to repay a debt or communicate with Griffin about it. T7 1337; T9 1925; T14 3166. Another alleged that Griffin struck Gebo with a gun, as punishment for an offense. T13 3024-25.

In addition to those charged punishments, the parties elicited evidence about uncharged acts alleged to have been punishments for transgressions against Squad members. One such incident involved a punishment inflicted on Griffin's girlfriend, Tori Caron, for having stolen from him. T7 1345-55; T10 2245; T14 3164.

The most notable such incident involved evidence of the murder of Hans Odige by Gebo. T12 2603; T14 3075-76, 3080-95. Gurley testified that Odige was formerly associated with the Squad, and in that capacity served as a bodyguard for Barrett and Gurley. T9 1908. At some point after Barrett's arrest and incarceration, Odige stole property belonging to Gurley and Barrett. T9 1908. As a result of that theft, Odige became *persona non grata* or, in terms used by witnesses, "beef on sight," within the Squad. When Squad members Gurley, Reddick and Gebo encountered Odige one day on a Manchester street, they approached him and consulted with Griffin as to what to do. T10 2126-32; T14 3090-95. According to Gebo, Griffin ordered that Odige be shot but not killed. T14 3080, 3253. When, later that day, Gebo shot Odige, he caused his death and injured another person. T10 2131-32; T12 2603-15; T14 3075-95.

The trafficking-in-persons charge alleged that Griffin compelled Paris against her will to sell drugs. The jury acquitted on that charge. T18 3599.

The solicitation and conspiracy to murder charges arose out of the conflict with Mega and alleged that Griffin solicited Gebo to kill an associate of Mega's known as "Six Mosley." T13 3009-22. Gebo testified that Griffin ordered him to kill Mosley. T14 3253. Gebo then located Mosley but aborted the plan upon finding police officers in the area. T13 3009-24.

The jury acquitted Griffin of the Mosley-related charges. T18 3592-93.

Through cross-examination of prosecution witnesses and in argument, the defense contended that the principal cooperating witnesses, Paris, Gebo, Reddick, and Gurley, lacked credibility and sought to curry favor with the State by shifting responsibility to Griffin for acts and decisions they made.[1] The State elicited evidence of a police interview with Griffin after his arrest, in which Griffin denied culpability. T7 1450-55.

[1] Indeed, the parties stipulated that, four days after her testimony concluded but before Griffin's trial had even ended, Gurley filed a motion to amend the remainder of her sentence. The State objected to that motion. T16 3515-16.

SUMMARY OF THE ARGUMENT

For two reasons, the court erred in refusing to dismiss the DEL charge. First, the prosecution of that charge violated Griffin's right to a speedy trial. Almost two years passed between arrest and trial, and sixteen months passed between charge and trial, a delay for which the State bears primary responsibility. Griffin asserted his right to a speedy trial, and the delay prejudiced the defense by requiring a change in trial counsel upon the retirement of predecessor counsel.

Second, the prosecution of the DEL charge violated Griffin's right to due process of law, as embodied in the rule of State v. Lordan, 116 N.H. 479 (1976). Lordan bars a subsequent prosecution when three triggering conditions exist. First, a defendant must commit several offenses in a single transaction. Second, the prosecutor must have knowledge of, and jurisdiction over, the offenses. Third, the defendant must have pled guilty to all such charged offenses pending at the time of the plea. When those circumstances exist, the prosecutor may not later bring an additional charge arising out of the same transaction unless the prosecutor has given notice at or before the prior plea hearing that the prosecutor may subsequently bring such charges, or the defendant otherwise knows or ought expect that the State may bring further charges. The conditions all exist here.

I. THE COURT ERRED IN DENYING THE MOTION TO DISMISS THE DEL CHARGE.

In April 2019, the defense filed two motions to dismiss the DEL charge. A50-A90. One motion cited as a principal basis the State's recent *nolle prosequi* of an earlier DEL indictment, done just after the court (Brown, J.) denied a State's request to continue the trial. A50-A63. That motion advanced a speedy trial claim. The second motion cited the State's prosecution in 2016 of Griffin for charges related to the conduct described above. A64-A90. That motion asserted, among other grounds, a Due Process argument rooted in the opinion in Lordan. The presentation of those claims requires a detailed summary of the case's relevant procedural history.

The State first charged Griffin with crimes related to the events described in the Fact Statement when, in August 2016, it indicted him with two counts of possession with intent to distribute. A150-A152 (case number 2016-CR-852). The State soon afterwards also charged him with common nuisance. A153-A155 (2016-CR-1083). In November 2016, pursuant to a negotiated plea, Griffin pled guilty to common nuisance and to possession of a controlled drug, and the State dropped the possession-with-intent charges. P 5-18. Griffin was sentenced to a twelve-month term, from which he was released in February 2017. P 7-9, 17-18; H11 21.

In June 2017, the police re-arrested Griffin and the State initially charged him just with drug-possession crimes arising out of alleged new conduct in 2017. H11 21-22. Specifically, the State charged four counts of possession with intent to distribute. A156-A161 (2017-CR-913). Griffin has been continuously incarcerated since his June 2017 arrest on those charges.

Under separate docket numbers, the State in 2017 brought additional charges referring to conduct in 2016 or earlier. Under docket 2017-CR-936, the State charged Griffin with several counts of human trafficking, first-degree assault, and witness tampering. A162-A168. Under docket 2017-CR-2199, the State brought dozens of indictments charging offenses arising out of the death of Hans Odige, the various shootings in Manchester, and other alleged conduct. A169-A196. Under other docket numbers, the State charged other offenses.

In January 2018, the State for the first time charged Griffin with DEL, alleging conduct between February 1, 2015, and May 17, 2017. A197-A199 (2018-CR-092). The State subsequently twice amended that indictment to enlarge the time period, on the first occasion by alleging an end-date of June 1, 2017. A later indictment, brought under the 2017-CR-936 docket, H5 15, enlarged the period by adding both to the beginning (January 1, 2014), and to the end (June 1,

2018). That indictment also added one person to the list of named co-conspirators, while broadening the list of drugs to encompass all schedule I and II substances.

As early as January 2018, Griffin indicated an inclination not to waive his right to speedy trial. H1 5-7; H2B 7. At that time, however, Griffin's prior counsel had just withdrawn and he was represented by newly appointed counsel. H6 15. In January, the parties filed an assented-to motion to continue the trial. A63; H4 2.

In October 2018, the State filed a motion to continue the trial on the charges in docket 2199, the docket that included dozens of charges but not a DEL charge. A4-A6. The defense objected, asserting the right to a speedy trial. A7-A10. At a hearing, the prosecutor explained that a concern had arisen about a grand-jury-composition irregularity thought to taint indictments returned by a certain Hillsborough North grand jury. H7 10-14. The defense filed a motion to dismiss those indictments. The court (Brown, J.) concluded that it shared the concern, and the parties accordingly contemplated that the State would enter *nolle prosequis* on the tainted indictments. H7 15, 20-21.

On November 1, 2018, the court convened a hearing in docket 936. At that hearing, the prosecutor noted that, because of the same grand-jury irregularity, the State would enter a *nolle prosequi* on some of the pending indictments and

re-indict those charges at the next available grand jury. H8 16-17. Because other pending charges were not affected by the grand-jury concern, the court declared an intention to schedule untainted indictments for trial in December 2018. H8 17-18.

The State resisted that idea, saying that the parties had agreed to try the charges in docket 2199 first. H8 18-20. The court, however, refused to bypass an available trial date in December when there were pending indictments available for trial merely because the State had previously planned a different sequence. H8 19-20. Pressed to select available charges for trial, the State indicated that it would go forward on the charges in docket 936, which by then included the DEL charge. H8 20; A165.

After the hearing, however, the State filed a motion to continue, arguing that it could not be ready to try the DEL charge in December. A13-A15. The defense objected to the motion to continue, A16-A19, and the court denied it. H9 2.

On November 27, at the State's request, the court convened a hearing at which the prosecutors asked the court to explain its basis for denying a continuance, so that the State might better focus a motion to reconsider. H9 2, 7-8. Among other points, the prosecutor said that, although the charges in 2199 would involve many of the same witnesses as the DEL charge, the State had not prepared those witnesses

with a view to proving the DEL charge. H9 3-6. The prosecutors also voiced a concern that the defense lawyers would not render effective assistance, were the case tried in December. H9 6-8. Although the State had not yet filed a motion to reconsider, the court indicated, based on what it had heard, that it was very unlikely to grant such a motion. H9 2, 8.

Later that day, the State entered a *nolle prosequi* on all charges pending in docket 936. A167-A168. Griffin remained incarcerated on charges still pending under other docket numbers not yet scheduled for trial.

In January 2019, the State brought new indictments under a series of new docket numbers. Many of the new indictments replaced earlier indictments implicated in the grand-jury concern. In addition, the State re-indicted Griffin on the DEL charge, though it had not been affected by the grand-jury concern. A200-A204 (docket 2019-CR-168). The new DEL charge updated the alleged period by extending the ending date to December 31, 2018,[2] and added one new name (Charles Morrison) to the list of alleged co-conspirators. A53-A54.

At a hearing on April 4, 2019, in the context of a discussion about the ability of newly-appointed defense

[2] By the time of trial, the State amended the end date back to June 10, 2016. H12 30-32; AD 42.

counsel to prepare for trial, Griffin said that he would not waive his right to a speedy trial. H10 8; H11 24-25. At a hearing later that month on the State's motion to join charges in different docket numbers for trial, the prosecutor referred to the DEL charge as linking all the charges together. H11 7-11, 17-20.

In late April 2019, the defense filed two motions to dismiss the DEL charge. A50-A90. Section A below advances the claim raised in the motion based on speedy trial doctrine. Section B below advances the claim raised in the motion asserting a due process violation.

A. The Speedy Trial Claim.

In seeking dismissal on this basis, counsel cited speedy trial doctrine and, as prejudice, concerns about the ability of newly-appointed defense counsel to be ready for trial. A50-A62. The State objected. A102-A112. The defense filed a brief response, to which it appended several documents. A126-A149.

In a written order, the court denied the defense motion. AD 41-48. For purposes of the speedy trial analysis, the court assumed that the State entered the November 2018 *nolle prosequi* in bad faith. AD 43; see State v. Allen, 150 N.H. 290, 293 (2003) (whether period between *nolle prosequi* and re-charging counts in speedy trial analysis depends on whether

State entered *nolle prosequi* in good faith); State v. Adams, 133 N.H. 818, 823 (1991) (same). On that assumption, the court calculated a delay of sixteen months between the first filing of the DEL charge in January 2018 and the start of trial in May 2019. The court next attributed much of the delay to an agreement between the parties to proceed first to trial on other charges. AD 44. With respect to Griffin's demand for a speedy trial, the court concluded that, while Griffin first asserted the right in November 2018, he had not done so consistently. AD 45. Finally, with regard to prejudice, the court noted that Griffin had been held on a variety of charges in addition to DEL, and that he had not otherwise demonstrated prejudice. AD 46-48. In so ruling, the court erred.

The Sixth and Fourteenth Amendments to the United States Constitution and Part I, Article 14 of the New Hampshire Constitution guarantee defendants the right to a speedy trial. This Court addresses speedy trial claims first under the State Constitution, citing cases construing the Federal Constitution for guidance only. State v. Brooks, 162 N.H. 570, 581 (2011). To determine whether the defendant's right to a speedy trial has been violated, the Court balances the four factors identified by the United States Supreme Court in Barker v. Wingo, 407 U.S. 514, 530 (1972). The Barker test considers: "(1) the length of the delay; (2) the

reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) the prejudice to the defendant caused by the delay." Brooks, 162 N.H. at 581. This Court defers to the trial court's factual findings, unless clearly erroneous. Id. The Court reviews the trial court's conclusions of law *de novo*. Id.

"The first factor, the length of the delay, is a triggering mechanism: [this Court does] not consider the remaining factors unless the delay is presumptively prejudicial." Id. The calculation of the length of the delay includes the time elapsed between arrest and the start of trial. State v. Berger, 125 N.H. 83, 91 (1984). Here, Griffin was arrested in June 2017, and first charged with DEL in January 2018. His trial began on May 13, 2019. Almost two years passed between arrest and trial, and sixteen months passed between charge and trial. A delay of that length triggers an analysis of the remaining factors. State v. Monahan, 125 N.H. 17, 22 (1984); see also State v. Colbath, 130 N.H. 316, 319 (1988) (noting superior court policy of inquiring into reasons for delay "whenever a felony case remains untried nine months after indictment").

The second factor assesses the reasons for the delay. "Analysis of the second factor requires that [this Court] assess why the trial has been delayed, to which party the delay is attributable and how much weight to give the delay." State v.

Locke, 149 N.H. 1, 8 (2002). Here, as noted, the court concluded that much of the delay should not be counted against the State because the parties had previously agreed that the charges in docket 2199 be tried before the DEL charge. AD 44-45. The court erred in characterizing the prioritization of 2199 as the product of an agreement.

As the court acknowledged, AD 44, no pleading documented any such agreement or understanding. In the defense objection to the State's November 2018 motion to continue, the defense denied the existence of such an agreement. A16-A17. Moreover, in an affidavit attached in April 2019 to the defense response to the State's objection, Griffin's former attorney Phillip Utter[3] declared that the "defense never agreed, assented or otherwise communicated that proceeding with 17-CR-2199 in the first instance was preferred by the defense." A130. Attorney Brian Lee, in an affidavit, confirmed that, while it was the expectation of the defense that 2199 would proceed to trial first, "this was not the product of any agreement but rather the State having informed the defense and the Court back in February 2018 that it wanted to try those charges first. That unilateral

[3] Utter was first appointed to represent Griffin early in 2018, A182, and remained as counsel through the end of 2018, when he retired. A129-A130. Had the trial gone forward in December 2018, Utter would have represented Griffin at that trial. H8 21; H9; A130.

decision was made months before the State indicted the [DEL] charge at issue." A132.

The record supports the defense position on the matter. At a hearing in February 2018, the prosecutor declared that it would make the most sense to try the charges in 2199 first. H3 6-7. At no point did defense counsel express any agreement. Indeed, as the court pointed out at that hearing, "the State has the prerogative to decide which case" to try first. H3 9. A defense preference, therefore, would not matter. Accordingly, at a later hearing, the defense reminded the court that the State "chose to go forward on 2199, and you ruled – you said that was appropriate for them to choose, which is probably right. So that's what we're doing." H4 2; see also H6 7-8, 15-16 (defense counsel stating that the "State clearly indicated back in, I believe, March, that it intended to go forward on 2199, as its first case that it wanted to go to trial. That was the State's decision…."); H7 21 (court describes trial-sequencing choice as the prosecutor's "call;" prosecutor responds by expressing intent to consider options "and determine what docket it is that we want to go forward first").

At one point after the State declared its intention to proceed first on 2199, defense counsel suggested deferring ruling on pre-trial motions in other dockets, because 2199 would be tried first. H5 13; see also H6 15-17 (noting defense

recognition of State's authority to choose which docket to try first). But such statements do not constitute agreement that 2199 should be tried first. In the absence of any evidence of an agreement, and in the face of hearing transcripts and counsels' sworn statements to the contrary, the court erred in attributing to the defense any responsibility for the delay occasioned when the State's intended sequence of trials proved infeasible. The delay that the court attributed to both parties on the assumption of an agreement must therefore instead be attributed to the State.

"This Court puts substantial emphasis on the latter two of the Barker factors." Brooks, 162 N.H. at 582 (citation and quotation marks omitted). The third factor weighs in Griffin's favor. As early as August 2018, defense counsel represented that Griffin "does not want to continue this trial." H6 8. In October 2018, the defense objected to a State's motion to continue. A7-A10. In November 2018, Griffin invoked his right to a speedy trial, when the defense again objected to a State's motion to continue the then-scheduled December trial. A16-A19. Griffin again asserted the right to a speedy trial in April 2019, by refusing to waive it. H10 8; H11 24-25; see State v. Langone, 127 N.H. 49, 55 (1985) (recognizing objections to State's motions to continue to be assertions of right to speedy trial). The defense subsequently moved to dismiss the charge for violation of the speedy trial right. A50-

A63; see State v. Eaton, 162 N.H. 190, 197 (2011) (finding invocation and weighing factor in defendant's favor).

The trial court nevertheless minimized the weight of that factor, reasoning that the defendant's objections prior to the November *nolle prosequi* and his renewed invocations in April following the January re-indictment did not manifest a consistent assertion of the right. AD 45. In so reasoning, the court erred.

At no time after the early 2018 assented-to motion to continue did Griffin ever agree to a continuance. Moreover, a defendant content to stand trial as scheduled in December 2018 on a January 2018 indictment need not gratuitously demand a speedy trial. The occasion to demand a speedy trial arose only when, shortly before the December trial, the State moved to continue it. Griffin did then demand a speedy trial. But once the State entered the *nolle prosequi*, the defense was not in a position to invoke the right again until, in January, the State re-indicted. At that point, it was the defense position that, because of the *nolle prosequi*, the charge should be dismissed.

"The final factor requires [the Court] to determine whether and to what extent the defendant suffered prejudice, including whether the delay resulted in an oppressive pre-trial incarceration, anxiety, or an impaired defense." Eaton, 162 N.H. at 198. In showing prejudice, Griffin relies in part

on considerations of anxiety and pre-trial incarceration, the latter of which he endured for almost two years from arrest, and for sixteen months from the time he was first charged with DEL.

Griffin also asserts prejudice to his defense in that the delay gave the State an unfair advantage. Attorney Phillip Utter, whom the court appointed as co-counsel with Attorney Brian Lee in February 2018, would have remained as counsel had the case gone to trial in December 2018 as scheduled. A129-A130; H8 21. During the delay caused by the November 2018 *nolle prosequi*, Utter retired and was replaced on the case by Attorney Nicholas Brodich. As a result of the State's *nolle prosequi* and the anticipated fact of Utter's retirement, A11-A12, A129-A130, Griffin ended up represented not by Lee and Utter (the latter of whom would have had about ten months to prepare for trial), but by Lee and Brodich (the latter of whom had only about six months to prepare for trial of the DEL charge).

It bears emphasis in this regard that, even with respect to the team of Lee and Utter, the State in November expressed concern about their ability to render effective assistance, given the scope of the case. H9 5-7. The trial contemplated at that time would have involved substantially fewer charges, in that it would not have included the dozens of charges associated with the drive-by shootings. However, as a result

of the State's self-granted continuance, Griffin was represented by co-counsel that had even less time to prepare, and for a trial at which Griffin faced many more charges.

Under these unique circumstances, this Court should find prejudice even without a showing of the loss of some exculpatory evidence. Balancing the four factors, the Court should find a violation of Griffin's right to a speedy trial, protected by the United States and New Hampshire Constitutions.

B. The Due Process Claim.

In late April 2019, the defense filed a motion to dismiss the DEL indictment, citing principles of due process, compulsory joinder, and double jeopardy. A64-A90. In addition, and as an alternative prayer for relief, the defense objected to a prosecution motion *in limine* seeking the admission of Griffin's statements made during the November 2016 plea colloquy. A85-A88. The State objected. A113-A125. By a written order the court denied the motion.[4] On appeal, Griffin pursues the due process claim.

The Fifth Amendment to the United States Constitution, and Part I, Article 15 of the New Hampshire Constitution

[4] Ultimately, at trial, the State chose not to introduce the statements Griffin made during his 2016 plea colloquy. However, the court took judicial notice, and so informed the jury, of Griffin's 2016 guilty plea to common nuisance. T16 3516.

guarantee the right to due process. In State v. Lordan, 116 N.H. 479 (1976), the Court confronted a circumstance in which, after an initial set of charges were resolved by guilty pleas, the State brought new charges arising out of the same incidents. This Court described the situation as follows:

> The prosecutor knew the facts on which the present charges are based at the time that the defendant pleaded guilty to the first three indictments. Nothing prevented the prosecutor from seeking the present indictments then. The submission and acceptance of the defendant's pleas to the first three indictments must have contemplated that no further charges would be brought, for the defendant by his pleas deprived himself of any meaningful defense to the present charges.

Id. at 481.

This Court held that the new charges had to be dismissed. Id. at 482. In support, the Court cited the fact that the circumstances "indicate that the defendant reasonably believed that no further charges would be brought in relation to the episode when he pleaded guilty to the first three indictments." Id. A defendant potentially facing multiple charges arising out of a single transaction "may not escape prosecution on all simply by pleading guilty to one, in the absence of an express or reasonably implied agreement with

the prosecutor." Id. In the end, the Court announced the following rule:

> Where the defendant commits several offenses in a single transaction and the prosecutor has knowledge of and jurisdiction over all these offenses and the defendant disposes of all charges then pending by a guilty plea to one or more of the charges, the prosecutor may not prefer additional charges arising from the same transaction unless either he has given notice on the record at the time of the plea of the possibility that he may prefer further charges or the defendant otherwise knows or ought reasonably to expect that further charges may be brought.

Id.

The defense motion to dismiss called the court's attention to facts bringing this case within the rule of Lordan. On June 9, 2016, the police arrested Gebo, Reddick, and Gurley in the apartment in which Griffin also lived, and soon afterwards searched it. A65. Later that day, the police also arrested Griffin. On September 6, Gurley entered into a cooperation agreement with the State, and on September 14, Veronica Paris, in an extensive proffer interview, made allegations about Griffin's leadership role in the Squad. A66, A72. The record thus reflects that, at the time of Griffin's plea colloquy on November 21, 2016, the State had a substantial

basis to suspect Griffin of playing the leadership role it later charged against him.

The transcript of that 2016 plea colloquy corroborates that conclusion and demonstrates the defense's awareness of the information possessed by the prosecution. During the colloquy, the prosecution disclosed that the police had observed drug-dealing behavior from the apartment in which Griffin lived. P 5-6. The police had watched as Griffin travelled to Massachusetts, and they learned from an informant that Griffin bought drugs in Rhode Island "at least three times a week, purportedly to . . . sell out of" the Belmont Street apartment. P 6. Notably, towards the end of the colloquy, Griffin's then-lawyer, speaking of Griffin's plan, upon release, to move to Florida where his mother lives, said the following:

> … Mr. Griffin understands that based upon what the Manchester police suspect him of, that if he were to be spending a regular amount of time in New Hampshire, they might be keeping a very close eye on him, and that it's probably in everyone's best interest that he relocate.

P 17.

In denying the motion, after quoting the rule of Lordan, the court noted that Griffin "maintains he expected no new charges arising from the same facts that he pled guilty to. However, for the reasons given above, the court disagrees and

finds no basis for a due process violation." AD 53. That reference to prior reasoning points to the court's analysis elsewhere in the order rejecting a different argument, based on compulsory joinder.

In that section of its order, the court found the compulsory joinder doctrine inapplicable because

> it is intended to apply to two or more discrete crimes arising out of a single set of facts as opposed to a complex, broadly sweeping conspiracy charge such as [DEL].

AD 51-52. After describing a New Jersey case cited in State v. Locke, 166 N.H. 344 (2014), the court acknowledged that

> the circumstances giving rise to the charges brought against [Griffin] in 2016 constitute a predicate act of the [DEL] charge, that latter charge, as evidenced by the voluminous indictments currently pending . . ., contemplates much more than any single act. Thus, while one predicate act to support a [DEL] charge had been completed, there were many more to investigate and prove. Defendant's position would compel the State either to bring a [DEL] charge the moment it charged a single predicate act, which would significantly impair its ability to prove such a case, or refrain from charging a completed crime with the expectation that the defendant would commit enough additional acts to support a charge of [DEL], which may

> or may not ever occur. Such an interpretation of the rule is illogical.

AD 52-53. In so ruling, the court erred.

As quoted above, the Lordan bar on a subsequent prosecution applies when three triggering conditions exist. Lordan, 116 N.H. at 482. First, a defendant must commit several offenses in a single transaction. Second, the prosecutor must have knowledge of, and jurisdiction over, all the offenses. Third, the defendant must have pled guilty to all such charged offenses pending at the time of the plea. When those circumstances exist, the prosecutor may not later bring an additional charge arising out of the same transaction, unless the prosecutor has given notice at or before the prior plea hearing that the prosecutor may subsequently bring such charges, or the defendant otherwise knows or ought reasonably expect that the State may bring further charges. All of the conditions exist here.

First, the DEL statute and the indictment here broadly defined the *actus reus* of the charge. The indictment alleged that Griffin "purposely conspired with one or more persons as an organizer, supervisor, financier or manager to engage for profit in a scheme or course of conduct to unlawfully sell, dispense or transport any controlled drug. . . ." A20. Those roles – organizer, supervisor, financier or manager of a drug-distribution scheme – bring a very wide range of activities

within the scope of the DEL charge, including the initial 2016 charges alleging possession of drugs and the maintenance of a common nuisance in the Belmont Street apartment. Griffin acknowledges that other subsequently-charged offenses, such as the shooting charges, were not part of the same transaction as the common nuisance and drug possession charges, because they happened at different times and places. But, as the State itself acknowledged, the DEL charge – the only charge Griffin seeks to dismiss – "is incredibly broad," and "links together all the charges" against Griffin. H11 7; see also A21, A23, A30-A31, A34-A35 (describing Griffin's 2016 convictions as "inextricably intertwined with, and intrinsic to" the DEL charge); A91 (court order endorsing idea that DEL statute "broadly covers" actions taken by organizer).

Second, the prosecutors in Hillsborough North Superior Court had knowledge of, and jurisdiction over, all of the offenses. As explained above, by the time of the plea in late November 2016, the State had already reached an agreement with Gurley and had obtained a statement from Paris about Griffin's role in the Squad's activities. Jurisdiction is confirmed by the fact that all charges, including the DEL charge, were eventually prosecuted in Hillsborough North.

Third, Griffin pled guilty to two charges in 2016, and the State entered *nolle prosequis* on the other then-pending charges. At that point, no other charges arising out of the

transaction remained pending against Griffin. At the plea hearing, the prosecutor did not state on the record an intention to prosecute further charges. Thus, all the conditions of the Lordan rule were met.

The State thus violated the rule when later it brought the DEL charge. The State could have avoided dismissal if, before or during the 2016 plea colloquy, it had given notice on the record that it might bring further charges. It did not do so. The State might also avoid dismissal if there were an indication in the record that Griffin had reason to expect further charges. Nothing in the record would support that contention. Indeed, when at the 2016 plea hearing defense counsel described Griffin's plan to relocate to Florida after his release in early 2017, the prosecutor stood by silently. If the defense then anticipated that Griffin would later face additional serious charges in New Hampshire, counsel would not have voiced the idea that Griffin would start his life anew in Florida. Because all the conditions of Lordan are satisfied, the State could not, after 2016, bring the DEL charge.

In denying the motion to dismiss, the court expressed a concern that application of the rule would put the State in an untenable position, compelled to delay charging a defendant with anything until ready to bring all charges. That dilemma, however, does not exist.

If the State truly does not yet know the basis for possible future charges, the second Lordan condition – requiring such knowledge – will not be satisfied. And if the State does have some information supporting further charges but wishes to bring a subset of possible charges first while withholding others for later, it can do so. It can either leave some charges arising out of the transaction unresolved at the time of the initial plea, so that the defendant still has pending charges after the plea. Alternatively, if the State wishes to resolve all then-pending charges, it can reserve the right to bring other charges later simply by so stating on the record before or during the defendant's initial plea.

Here, however, the State stood by silently while Griffin's lawyer said that Griffin intended to make a fresh start in Florida, where his mother lived, after his few remaining months of incarceration. As a result, rather than giving notice that the State's interest in prosecuting Griffin was not exhausted by those charges, the State created the impression that Griffin could make a fresh start after serving the balance of his twelve-month sentence. The equities of the situation thus do not justify excusing the State from application of the Lordan rule here. See State v. Gosselin, 117 N.H. 115, 119 (1977) (citing Lordan as rule aimed at preventing "abuse by prosecutors in harassing defendants").

For all the reasons stated, the Court erred in denying Griffin's motion to dismiss the DEL charge.

CONCLUSION

WHEREFORE, Mr. Griffin respectfully requests that this Court reverse his DEL conviction.

Undersigned counsel requests fifteen minutes of oral argument before a full panel.

The appealed decision is in writing and is appended to the brief.

This brief complies with the applicable word limitation and contains approximately 7077 words.

Respectfully submitted,

By */s/ Christopher M. Johnson*
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 the Criminal Bureau of the New Hampshire Attorney General's office through the electronic filing system's electronic service.

/s/ Christopher M. Johnson
Christopher M. Johnson

DATED: April 19, 2021

ADDENDUM

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STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

State of New Hampshire

v.

Brandon Griffin

Docket No. 216-2019-CR-166–168, -170–172, -174–179

ORDER

Defendant is charged with a significant number of crimes, including one count of drug enterprise leader, which have all been joined for trial. Defendant now moves to dismiss the drug enterprise leader charge on two bases: (1) that the State's conduct in *nolle prossing* and re-indicting the charge multiple times has resulted in a violation of his speedy trial rights; and (2) that the State intends to use defendant's guilty plea in a prior case as evidence against him in violation of the double jeopardy clause of the State and Federal Constitutions and his rights to due process and compulsory joinder. The State also moves *in limine* to determine the evidence it may use to prove the drug enterprise leader charge at trial. The Court will address each motion in turn.

I. Speedy Trial

In January 2018, the State brought the first charge of drug enterprise leader against defendant, alleging that he conspired with others to engage in a scheme or course of conduct for profit to sell controlled drugs from February 1, 2015, to May 17, 2017. The State brought a second drug enterprise leader charge in April 2018 which was based on the same facts but increased the timeline through June 1, 2017. In June

2018, the State brought a third drug enterprise leader charge that named additional conspirators and further expanded the timeline from January 1, 2014, through June 1, 2018. That third charge was scheduled for trial in December 2018. Representing itself to be unprepared to go forward with that trial, the State sought a continuance in November 2018. Defendant objected and asserted his right to a speedy trial at that time. The Court denied the State's motion. Following the denial, the State *nolle prossed* the drug enterprise leader charge. Approximately two months later, the State brought a fourth drug enterprise leader charge, naming yet more conspirators and further increasing the timeline from January 1, 2014, through December 31, 2018.[1] This is the charge currently scheduled for trial in May 2019 that is the subject of the instant motions.

Defendant argues that the delay caused by *nolle prossing* the drug enterprise leader charge and re-indicting him constitutes a denial of his right to a speedy trial under the New Hampshire and United States Constitutions. The test for whether there was a violation of this right is the same under both constitutions because the New Hampshire Supreme Court has adopted the same four-part test used in the federal analysis. *State v. Colbath*, 130 N.H. 316, 319 (1988); *see Barker v. Wingo*, 407 U.S. 514, 530–33 (1972).

"In order to determine whether the defendant has been denied his right to a speedy trial, [the Court] must balance four factors: (1) the length of the delay, (2) the reasons for the delay, (3) whether the defendant asserted his right, and (4) any prejudice to the defendant." *State v. Weitzman*, 121 N.H. 83, 86 (1981). No one factor

[1] The State has since moved to amend the indictment to limit the end date of the relevant timeframe to June 10, 2016.

is dispositive; "[r]ather, they are related factors and must be considered together with such other circumstances as may be relevant." *Barker*, 407 U.S. at 533. The Court will consider each factor in turn.

1. Length of Delay

The first factor is the length of the delay. This is "to some extent a triggering mechanism" and the Court does not consider the remaining factors unless the delay is presumptively prejudicial. *See State v. Lamarche*, 157 N.H. 337, 343 (2008). "For purposes of a speedy trial analysis in adult criminal proceedings the length of the pretrial delay is calculated beginning when the defendant is arrested or indicted, whichever comes first." *State v. Justus*, 140 N.H. 413, 415 (1995). Where the State has *nolle prossed* indictments in good faith, the time pending between the *nolle prosse* and the re-indictment is excluded from the calculation. *State v. Allen*, 150 N.H. 290, 292 (2003). However, "[w]here there is a finding of bad faith on the State's part in *nolle prossing* a case, then the time counted for speedy trial analysis will continue to run." *Id.* at 293. The New Hampshire Supreme Court has determined that a delay of at least nine months is presumptively prejudicial. *See Adams*, 133 N.H. at 823.

Here, the State brought the first drug enterprise leader charge against defendant on January 18, 2018. Trial is currently scheduled for May 13, 2019. For purposes of this order only, the Court assumes, without deciding, that the State's most recent decision to *nolle prosse* the charge was made in bad faith, and thus includes the time between the *nolle prosse* and re-indictment. This results in a total delay of sixteen months. The delay in this case thus "signals enough presumptive prejudice to warrant review under the remaining criteria." *Colbath*, 130 N.H. at 319.

2. Reasons for the Delay

This factor requires an assessment of "why the trial was delayed and how much weight to give the delay." *Lamarche*, 157 N.H. at 343. Delay occasioned by the normal progression of a case from arrest to trial does not carry significant weight in this analysis. *Id.* (finding if "valid reasons cause delay, the delay does not count against the state at all"). The decision of whether or not to *nolle prosse* charges rests with the State. *See Allen*, 150 N.H. at 293. "The State's discretion, however, is not unlimited, for the trial courts are empowered to curb that discretion where it is used to inflict confusion, harassment, or other unfair prejudice upon a defendant." *Id.* If the decision is in bad faith, any resulting delay weighs against the State. *Id.*

In its objection, the State indicates that the delay in reaching trial on the drug enterprise leader charge was largely due to what appears to be an informal agreement to stay the proceedings pending resolution of another case, Docket No. 216-2017-CR-2199, which contained over one hundred indictments against defendant. Although there does not appear to be a written agreement between the parties or a written waiver of speedy trial from defendant on the drug enterprise leader charge, defense counsel has previously represented to the Court that the parties had agreed to go forward with -2199 first. Defense counsel even instructed the Court not to address pending motions in the then-pending drug enterprise leader case (Docket No. 216-2017-CR-936), arguing resolution of -2199 would simplify the process. (State's Obj. Speedy Trial, Ex. 3.) This agreement appears to have been in place since the end of March 2018.

In light of this information, the bulk of the delay appears to be the result of an agreement between the parties. Nevertheless, there was an approximately five-month

delay following the State's decision to *nolle prosse* the charge just prior to the December 2018 trial. Based on the totality of the circumstances, while some delay is attributable to the State, the Court finds this factor does not weigh heavily against it.

3. Assertion of the Right

The court "puts substantial emphasis on the latter two of the *Barker* factors." *State v. Cole*, 118 N.H. 829, 831 (1978). The third factor, whether the defendant asserted his right, "is entitled a strong evidentiary weight in determining whether the defendant is being deprived of the right." *Barker*, 409 U.S. at 531–32. The Supreme Court "emphasize[d] that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Id.* at 532.

Although defendant in his motion states that he never asserted his right to a speedy trial before the previously scheduled December 2018 trial, he did in fact do so in his objection to the State's motion to continue on November 16, 2018. *See State v. Griffin*, Docket No. 216-2017-CR-936, Doc. #36 at ¶19 ("Accordingly, and with asserting his rights to a speedy trial, the defendant objects to the Motion to Continue."). Following the State's *nolle prosse* and re-indictment of the drug enterprise leader charge, defendant did not mention speedy trial until he refused to waive such right at a status conference on April 4, 2019. Finally, defendant did not file the instant motion to dismiss until April 26, 2019. Because defendant did not consistently assert his right and never raised it until the eve of trial in both cases, the Court finds this factor does not weigh strongly in defendant's favor. *See Lamarche*, 157 N.H. at 344 ("The fact that the defendant waited so long to pursue his right to a speedy trial means that although the factor weighs in his favor, it does not do so heavily"); *see also United States v. Abad*,

514 F.3d 271, 273 (2d Cir. 2008) (failure to consistently assert right weighed against defendant); *United States v. Colombo*, 852 F.2d 19, 26 (1st Cir. 1988) (finding assertion factor weighed against the defendant when he did not want a speedy trial until right to a speedy trial became a possible means by which to obtain dismissal).

4. Prejudice

The final factor of prejudice is assessed "in the light of the interests of defendants which the speedy trial was designed to protect." *Barker*, 407 U.S. at 532. The United States Supreme Court has identified the following three interests: (1) oppressive pretrial confinement; (2) anxiety and concern; and (3) impairment of the defense. *Id.* "Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.*

With respect to the first two interests, the Court notes that defendant was incarcerated and awaiting trial on a host of separate indictments, not only on the drug enterprise leader charge. Therefore, the pretrial confinement and anxiety he might have felt was not solely attributable to the delay in reaching trial on the drug enterprise leader charge, but would have occurred regardless. *See Lamarche*, 157 N.H. at 344 (finding incarceration on separate charges "substantially mitigates any prejudice attributable to [defendant's] anxiety"). Accordingly, these interests do not weigh in his favor.

Regarding prejudice, defendant first argues that his defense was impaired as a result of the replacement of co-counsel around the time the drug enterprise leader charge was *nolle prossed*. However, as noted by the State, former co-counsel's motion to withdraw included statements that he did not anticipate trial occurring until 2019 and that "[u]ndersigned counsel submits that permitting withdrawal and appointment of

substitute counsel will not harm or impact Mr. Griffin's rights." (State's Obj. Mot. Dismiss, Ex. 1.) Moreover, one of defendant's attorneys has remained on the case since the beginning. In addition, Attorney Brodich will have been assigned to the case for approximately six months by the time of trial.

In his motion, defendant states he would have been prepared to go forward to trial on the drug enterprise leader charge in December, but now argues that he is unprepared for trial some five months later due to the joinder of all of the pending charges. In addition, defendant concedes that an attempt to dismiss on speedy trial grounds in December would have failed due, in part, to lack of prejudice. However, the Court notes that the drug enterprise leader charge would have required much if not all of the same evidence contained in the additional charges joined with it; this was a large factor in the decision to join the cases. Therefore, defendant's admission that he was ready to defend against the drug enterprise leader charge in December would indicate he is even more adequately prepared now, with an additional five months to do so.

Moreover, defendant's argument of prejudice is based largely on the recent joinder of all charges for trial. However, the joinder of cases is a separate issue from defendant's right to a speedy trial. Even were the drug enterprise leader charge dismissed, the majority of cases that have now been joined would likely remain joined for trial. Therefore, the Court finds defendant has failed to articulate any prejudice resulting from joinder that was occasioned by the delay in bringing the drug enterprise leader case to trial.

Finally, at no point does defendant articulate any concerns about the impairment of access to evidence or witnesses testimony occasioned by the delay. Accordingly,

upon consideration of the foregoing, the Court finds no prejudice to defendant's ability to defend against the charges against him. As a result, defendant's motion to dismiss based on speedy trial grounds is DENIED.

II. Double Jeopardy, Compulsory Joinder, and Due Process

On June 9, 2016, in connection with a drug investigation, the police searched an apartment at 273 Belmont Street in Manchester and discovered, among other things, illegal drugs within. That same day, defendant was arrested following a traffic stop and charged with possession of a controlled drug and falsifying physical evidence after a crack pipe was discovered on the floor of the vehicle. Defendant was also charged with possession with intent to sell for the drugs located at the Belmont Street apartment. In November 2016, defendant entered into a plea deal with the State. The State *nolle prossed* the possession with intent and falsifying physical evidence charges and defendant pled guilty to one count of possession and one count of common nuisance.

The State now seeks to utilize the evidence from the 2016 prosecution as well as defendant's plea and sentencing proceedings in its prosecution of defendant for the currently pending drug enterprise leader charge. Defendant argues this violates his right against double jeopardy. "The Double Jeopardy Clauses of both the United States Constitution and the New Hampshire Constitution protect an accused from twice being tried and convicted for the same offense." *State v. Hannon*, 151 N.H. 708, 713 (2005). "Double jeopardy concerns may arise in a variety of circumstances, the most common of which include: (1) the simultaneous prosecution of multiple charges for the same offense; and (2) the subsequent prosecution of a charge involving the same underlying conduct previously prosecuted by the State." *Id.*

> The standard for determining whether multiple charges constitute the "same offense" for double jeopardy purposes is identical regardless of the particular scenario in which a double jeopardy challenge is raised. Two offenses will be considered the same unless each requires proof of an element that the other does not. The essential inquiry on this point is whether proof of the elements of the crimes *as charged* will in actuality require a difference in evidence. In making this inquiry, we review and compare the statutory elements of the charged offenses in light of the actual allegations contained in the indictments.

State v. Nickles, 144 N.H. 673, 677 (2000).

As noted by the State, the crimes of common nuisance and drug enterprise leader require proof of markedly different elements. Further, as noted in the Court's order on joinder, the definition of a drug enterprise leader in RSA 318-B:2, XII is very broad and encompasses a large variety of acts that may be undertaken by "an organizer, supervisor, financier, or manager" in furtherance of a scheme or course of conduct to manufacture, transport, and/or sell illegal drugs for profit. Further, that same statute provides that "[a] conviction as a drug enterprise leader shall not merge with the conviction for any offense which is the object of the conspiracy. Nothing in this section shall be construed to preclude or limit a prosecution or conviction of any person for conspiracy or any other offense defined in this chapter." Therefore, the two charges do not constitute the same offense for purposes of double jeopardy.

The Court finds the present circumstances analogous to federal prosecutions under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Federal courts have long held that "Congress intended separate convictions or consecutive sentences for a RICO offense and the underlying predicate offense." *United States v. Grayson*, 795 F.2d 278, 283 (3rd Cir. 1986); *see also United States v. Hawkins*, 658 F.2d 279, 287 (5th Cir. 1981); *United States v. Rone*, 598 F.2d 564, 571 (9th Cir. 1979).

"Indeed, the courts have repeatedly held that separate prosecutions and cumulative punishments for a RICO offense and its underlying predicate offenses are not inconsistent with the double jeopardy clause." *Grayson*, 795 F.2d at 283 (citing *United States v. Phillips*, 664 F.2d 971, 1009 (5th Cir. 1981) (finding "a defendant may be convicted for the predicate acts which form the basis of a RICO charge and subsequently charged under RICO"); *United States v. Boylan*, 620 F.2d 359, 361 (1980)).

In *Grayson*, defendant Grayson was convicted of conspiracy to manufacture a controlled drug in 1977 and 1983. 795 F.2d at 282. In 1984, Grayson was charged with, among other offenses, substantive violation of RICO and conspiracy to commit the same. *Id.* at 280. At trial, proof of his prior convictions was offered as evidence of the requisite predicate acts under RICO. *Id.* at 282. In finding no violation of the double jeopardy clause, the court noted that "[a] RICO offense is not, in a literal sense, the 'same' offense as one of the predicate offenses." *Id.* at 283. "A RICO offense requires the jury to find that the defendant participated in affairs of an enterprise through a pattern of racketeering activity, which requires commission of two predicate offenses within a ten-year period." *Id.* "Further, the predicate offenses and the RICO offense are intended to deter two different kinds of activity—'racketeering' on the one hand and narcotics violations on the other." *Id.* "Clearly, a RICO offense may be based in part upon a predicate offense for which the defendant has already been convicted and served a sentence." *Id.* (citing *Hawkins*, 658 F.2d at 288). "Hence, successive prosecutions for a RICO offense and its underlying predicate offenses are not inconsistent with the double jeopardy clause." *Id.*

The Court finds the same reasoning applies to the drug enterprise leader charge at issue in the instant case. Not only do the two charges at issue require proof of different elements, the drug enterprise leader statute contemplates a much more extensive course of conduct and carries with it a correspondingly serious penalty. *See* RSA 318-B:26, VI (imposing mandatory minimum penalty of twenty-five years to life). Therefore, the Court finds the use of evidence related to defendant's prior conviction in the drug enterprise leader case is not inconsistent with the double jeopardy clause.

Defendant next argues that the separate prosecution of the 2016 charges and the current drug enterprise leader charge violates the rule on compulsory joinder. In *State v. Locke*, 166 N.H. 344 (2014), the New Hampshire Supreme Court adopted Model Penal Code § 1.07(2), which provides that "a defendant shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same criminal episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction of a single court." Identical language has since been adopted in Superior Court Criminal Rule 20(a)(4). "Requiring a defendant to undergo a separate proceeding on new charges arising from the same criminal episode subjects that defendant to 'embarrassment, expense and ordeal' and compels the defendant 'to live in a continuing state of anxiety and insecurity.'" *Locke*, 166 N.H. at 346. "The State with all of its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense." *Id.* at 347.

The Court finds that compulsory joinder is inapplicable to the present circumstances as it is intended to apply to two or more discrete crimes arising out of a

single set of facts as opposed to a complex, broadly sweeping conspiracy charge such as drug enterprise leader. This is evidenced by *Locke*'s reference to *State v. Gregory*, 333 A.2d 257 (N.J. 1975), which it considered instructive. In *Gregory*, an undercover officer purchased heroin from the defendant in his apartment. *Id.* at 257. The officer observed defendant retrieve the drugs, which were contained in a small glassine envelope, from a stack of similar envelopes located in the medicine cabinet in the bathroom. *Id.* The defendant was indicted for the sale of drugs to the officer and subsequently convicted. *Id.* Following his conviction, defendant was charged with and convicted of possession with intent to sell for the same drugs the officer had originally observed during the sale. *Id.* at 258. On appeal, the supreme court found that the "common law was properly concerned with the protection of the defendant from governmental harassment and oppression by multiple prosecution for the same wrongful conduct." *Id.* Adopting Section 1.07(2) of the Model Penal Code, the supreme court found that "[u]pon any fair view of the circumstances the defendant's multiple offenses of (1) distribution and (2) possession with intent to distribute were based on the same conduct or arose from the same criminal episode." *Id.* at 263.

Here, while the circumstances giving rise to the charges brought against defendant in 2016 constitute a predicate act of the drug enterprise leader charge, that latter charge, as evidenced by the voluminous indictments currently pending against defendant, contemplates much more than any single act. Thus, while one predicate act to support a drug enterprise charge had been completed, there were many more to investigate and prove. Defendant's position would compel the State to either bring a drug enterprise leader charge the moment it charged a single predicate act, which

would significantly impair its ability to prove such a case, or refrain from charging a completed crime with the expectation that the defendant would commit enough additional acts to support a charge of drug enterprise leader, which may or may not ever occur. Such an interpretation of the rule is illogical. Therefore, the Court finds the rule on compulsory joinder was not violated in this case.

Finally, defendant argues his due process rights have been violated, relying on the following language:

> Where the defendant commits several offenses in a single transaction and the prosecutor has knowledge of and jurisdiction over all these offenses and the defendant disposes of all charges then pending by a guilty plea to one or more of the charges, the prosecutor may not prefer additional charges arising from the same transaction unless either he has given notice on the record at the time of the plea of the possibility that he may prefer further charges or the defendant otherwise knows or ought reasonably to expect that further charges may be brought.

State v. Lordan, 116 N.H. 479, 482 (1976). Defendant argues that the State had all the information it needed to charge defendant with drug enterprise leader at the time of his guilty plea, but provided no notice of any intent to do so. Therefore, defendant maintains he expected no new charges arising from the same facts that he pled guilty to. However, for the reasons given above, the Court disagrees and finds no basis for a due process violation in this case.

Accordingly, defendant's motion to dismiss is DENIED.

III. Motion *in Limine* – Drug Enterprise Leader

Referring to the 2010 draft criminal jury instructions promulgated by the New Hampshire Bar Association, the State argues it must establish the following six elements for a charge of Drug Enterprise Leader: (1) the defendant conspired with one

or more persons; (2) the conspiracy was engaged in for profit; (3) the conspiracy involved a scheme or course of conduct; (4) the scheme or course of conduct involved the commission of one or more of the following violations of New Hampshire's Controlled Drug Act: - to unlawfully manufacture, sell, prescribe, administer, dispense, or bring with or transport in this state the controlled drug methamphetamine, lysergic acid diethylamide, phencyclidine, any controlled drug classified in schedule I or II, or any controlled drug analog thereof; (5) the defendant acted as an organizer, supervisor, financier, or manager of one of more of the people in the conspiracy; and (6) the defendant acted purposefully. The State seeks to introduce evidence of "prior convictions, other charged conduct, and uncharged conduct" to prove the foregoing elements. The State argues such evidence is admissible because it is inextricably intertwined with and intrinsic to the drug enterprise leader charge. In the alternative, the State argues the evidence is admissible under the exceptions to New Hampshire Rule of Evidence 404(b).

For the first element, the State seeks to introduce the testimony of former member or affiliates of Squad, the street gang of which defendant is alleged to be the leader. For the second element, the State represents that anticipated witness testimony will establish that Squad's primary purpose was to make money through the sale of illegal drugs, particularly cocaine, crack cocaine, and heroin/fentanyl. The State further anticipates its witnesses will testify that defendant extended "credit" to Squad members and affiliates, which would be paid back through cash or other services, such as engaging in criminal conduct that furthered Squad's goals. For the third element, the State intends to introduce evidence of defendant's prior convictions, other charged

conduct, bad acts, and uncharged conduct to demonstrate the existence of a "continuity of purpose" through "two or more acts over a period of time." *See* State's Reply, Ex. 1 (defining "scheme or course of conduct").

For the fourth element, the State intends to introduce evidence and witness testimony from his 2016 trial. In addition, the State intends to introduce a recording of the State's offer of proof at defendant's sentencing hearing, the contents of which defendant did not deny. That offer of proof included statements that defendant frequently traveled out of state to purchase drugs to sell out of his residence at 273 Belmont Street in Manchester.[2]

Finally, for the fifth element, the State intends to rely on the testimony of its expert witnesses as well as former members or affiliates of Squad. These witnesses will testify that defendant controlled their debts to the organization, had the authority to punish them, assigned them tasks including shooting at rival gang members' residences, and withheld identification or other paperwork in order to control them.

"'Other act' evidence is 'intrinsic,' and therefore not subject to Rule 404(b), when the evidence of the other act and the evidence of the crime are inextricably intertwined or both acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged." *State v. Wells*, 166 N.H. 73, 77 (2014). "'Intrinsic' or 'inextricably intertwined' evidence will have a causal, temporal, or spatial connection with the charged crime." *Id.* "Typically, such evidence is a prelude to the charged offense, is directly probative of the charged offense, arises from the same events as the charged offense, forms an integral part of a witness's testimony, or completes the story

[2] The State makes an argument for the admissibility of this recording relying on the opposing party statement exception to the hearsay rule. The Court will address this argument to the extent defendant challenges its admission at trial.

of the charged offense." *Id.* at 77–78. "This type of evidence is admissible under the rationale that events do not occur in a vacuum, and the jury has a right to hear what occurred immediately prior to and subsequent to the commission of the charged act so that it may realistically evaluate the evidence." *Id.* at 78.

At the outset, the Court notes that the State's motion lacks specificity when it refers generally to introducing "bad acts" or "uncharged conduct." It is impossible for the Court to know what evidence the State is referring to, and thus the Court cannot rule on these specific items. That being said, the Court finds the remaining evidence identified by the State above is intrinsic to the drug enterprise leader charge. As the Court has repeatedly noted, drug enterprise leader is a broad conspiracy crime that can involve many acts and actors. The identified evidence provides information and context necessary to identify defendant as "an organizer, supervisor, financier, or manager" of Squad and the overall purpose of the criminal organization.

"Although intrinsic evidence is not barred by Rule 404(b), it must nonetheless satisfy the balancing test set forth in Rule 403." *Id.* at 79. Rule 403 states that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Defendant argues the inclusion of evidence relating to prostitution or abuse of women in connection with Squad's activities is inadmissible, relying on an order in a separate case against him that excluded the introduction of such evidence, finding no nexus between prostitution and allegations of the possession and sale of drugs. *State v. Brandon Griffin*, 216-2017-CR-913, Hillsborough County Superior Court – N. Dist.,

Order at 4 (1/18/18) (Abramson, J.). The Court agrees with the reasoning in that order and adopts it herein. The State's motion makes reference to defendant's control and use of women in connection with his alleged role as the leader of Squad.[3] However, none of the pending charges against defendant relate in any way to prostitution. The Court finds that the probative value of testimony relating to prostitution and the use and abuse of women in the context of sexual services is outweighed by the risk of unfair prejudice to defendant in a case otherwise entirely revolving around the sale of illegal drugs and violence related thereto. Therefore, the State is precluded from eliciting any such testimony.

Aside from the foregoing, defendant makes no reference to the State's argument that the evidence mentioned above is intrinsic to the crime of drug enterprise leader, but instead addresses the State's alternative argument that the evidence is admissible under Rule 404(b) to show defendant's identity as leader of Squad as well as his motive, intent, plan, preparation, and knowledge. However, as the Court has determined the evidence is intrinsic to the drug enterprise leader charge, it need not address this argument. Accordingly, consistent with the foregoing, the State's motion is GRANTED in part and DENIED in part.

SO ORDERED.

Mar 8, 2019
Date

David A. Anderson
Presiding Justice

[3] "The defendant used sexual services—provided by women under the defendant's control—to compensate other[s] for completing assignments . . . . The State's evidence will show that the defendant, without needing the approval of anyone else, exercised full and sole discretion over the entirety of Squad's assets—money, illicit drugs, and women—to further the defendant's goals . . . ." (State's Mot. in Limine – Drug Enterprise Leader at ¶ 25.)