

State of New Hampshire  
Supreme Court

No. 2020-0569

2021 Term  
July Session

State of New Hampshire

v.

Devin Miles

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APPEAL PURSUANT TO RULE 11 OF A JUDGEMENT OF THE MERRIMACK  
COUNTY SUPERIOR COURT

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BRIEF OF THE PETITIONER DEVIN MILES

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## ISSUES PRESENTED

- I. Whether the trial court erred when it denied a Motion to Quash, a renewed Motion to Quash and a Motion for Interlocutory Appeal based on the State's dilatory and erroneous use of RSA169-B:4, VII, when a juvenile petition was pending in another jurisdiction based on the same joint investigation, pattern offense allegations and factual circumstances<sup>1</sup> with the same alleged victim and defendant?
- II. Whether the trial court erred when it denied a Motion to Quash, a renewed Motion to Quash and a Motion for Interlocutory Appeal based on double jeopardy concerns?
- III. Whether the trial court erred when it denied a Motion to Quash, a renewed Motion to Quash and a Motion for Interlocutory Appeal based on mandatory joinder?

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<sup>1</sup> Inclusive of arguments based in prosecutorial bad faith acts.

## STATEMENT OF CASE

On December 31, 2019, the Defendant made an initial Motion to Quash (and Amended Motion to Quash) the charge in Merrimack County which was denied at the hearing held on February 18, 2020 (*Kissinger, J.*). A renewed Motion to Quash was filed on October 13, 2020 and denied on October 15, 2020 (*Kissinger, J.*). A Motion for Interlocutory Appeal was filed October 26, 2020 and was denied on November 2, 2020 (*Kissinger, J.*). A Motion for Findings of Fact and Rulings of Law was filed on November 12, 2020, which was denied November 24, 2020 (*Kissinger, J.*). A Petition for Writ of Certiorari was filed on December 4, 2020 and accepted. This Rule 11 Appeal followed.

## STATEMENT OF FACTS

A joint investigation was undertaken by the Bow Police Department (Merrimack County) and the Atkinson Police Department (Rockingham County) in July, 2019, regarding allegations by E.R. that she had been sexually assaulted by the defendant. See Appendix I, p.1. Two Child Advocacy Center (hereinafter “CAC”) interviews were conducted in Merrimack County and attended by representatives from both county attorney offices in July, 2019. Other interviews and search warrants were conducted by representatives of both police departments together in July and early August, 2019. See Appendix I, p.1, 2. On August 16, 2019, juvenile petitions, including a petition for alleged “pattern” conduct under RSA 632-A:2, were filed in the Brentwood Family Court by Atkinson Police Department. See Appendix III, pg 1. Attempts for approximately four months to bring Merrimack into discovery and resolution discussions were ignored. See Appendix I, p. 4, 5. Both the juvenile court as well as the Rockingham Superior Court expressed concerns about what Merrimack County was doing with their case. MHTr.6.

On New Year’s Eve in 2019, the Merrimack County Attorney sent defense counsel an indictment in the present case for a single act under RSA 632-A:2, suggested personal recognizance bail, and requested assent to transfer the matter to Rockingham County. See Appendix I, p.5. Defense counsel immediately filed a Motion to Quash, Amended Motion to Quash, and Motions to Seal all pleadings. MHTr. 3, 4. The basis to Quash included the misuse of RSA 169-B:4, VII by the State to seek such indictment, along with assertions of double jeopardy and rules of joinder. MHTr. 6,7,11.

On February 18, 2020, a Hearing on Motion to Quash was held in the Merrimack County Superior Court. Defendant was charged as an adult in Merrimack Superior Court with one count of Aggravated Felonious Sexual Assault for an act allegedly occurring on December 25, 2018. The Merrimack indictment was brought by the State while a juvenile petition for a pattern offense encompassing that December

25, 2018 date had been brought by the State in Rockingham County in August, 2019. See Appendix IV, p.2

The juvenile matter in Brentwood was certified and transferred to the Superior Court for an Acceptance hearing. See Appendix III, p.2. Acceptance was denied and the petitions sent back to Brentwood. *Id.* The main thrust of the refusal to accept the charges in Rockingham Superior Court hinged upon the fact that the “pattern” petition alleged four discrete dates, of which there was no temporal evidence, and that the allegation was more of a timeframe pattern. As such, the presumption under RSA 169-B:24 supporting transfer that the family court applied was inappropriate, and the case remanded. Appendix III, p.2.

Thus, the defendant stands charged as a juvenile for a pattern offense in one county<sup>2</sup>, and he stands charged as an adult in another county for a singular act against the same victim, within the same time span. All charges resulted from a joint and inextricably intertwined investigation between law enforcement in both counties. See Appendix I, p.1, 2. Further, there is ample evidence that the Merrimack County Attorney’s Office delayed charging the defendant with the intent to circumvent the juvenile certification process and seek indictment, only to ultimately transfer the single charge to Rockingham County for prosecution. *Supra*, Intentional Delay section.

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<sup>2</sup> Said Petition pre-dating the indictment.



## SUMMARY OF THE ARGUMENT

Defendant appeals the court's ruling of the trial court's (*Kissinger, J.*) erroneous order denying his Motion to Quash, Renewed Motion to Quash, Motion for Interlocutory Appeal, and Motion for Findings of Facts and Rulings of Law. Defendant argues his Constitutional rights under the Fifth and Fourteenth Amendments of the United States Constitution and Part 1, Article 15, Article 17, Article 18 of the New Hampshire Constitution were violated when the State charged him with a single act of Aggravated Felonious Sexual Assault when a juvenile "pattern" Aggravated Felonious Sexual Assault petition had been already filed, arising out of the same joint law enforcement investigation, with the same victim and defendant, and same factual assertions underlying the charges, the only variant being a location of the alleged acts. Defendant asserts the trial court erred when it allowed the Defendant to be prosecuted in not only different courts, but in both juvenile and adult court, and that the present charge was purposely delayed by the State to circumvent the certification process in RSA 169-B:24.

The Defendant further argues the Court erred when it failed to acknowledge the Mandatory Joinder principals incorporated in Rule 20(a)(4) of the New Hampshire Rules of Criminal Procedure.

## ARGUMENT

### Analysis of RSA 169-B and Relevant Caselaw

It is imperative to view the filing of the adult indictment in light of the purpose of the juvenile code. RSA 169-B:1. While the trial court solely analyzed the pending charge in the frame of criminal court for adults, the authority relied upon by the State to file the indictment springs from the Juvenile Code, RSA 169-B:4, VII. See Appendix IV, p.2, 3.

That section notes that when the statute of limitations has not tolled and no juvenile petition has been filed, based on acts before the minor's eighteenth birthday, the state may proceed against the person in the criminal justice system after that person's eighteenth birthday. RSA 169-B:4 VII. However, that section of the chapter falls under the purpose provision of RSA 169-B:1.

All allegations by E.R. against the defendant were brought to light in July, 2019. See Appendix IV, p.1, 2. The Bow Police and Atkinson Police investigated together, served warrants together, conducted interviews together, and attended Child Advocacy Center interview with members of the Rockingham and Merrimack County Attorney's Offices. Id.

Despite all investigation and fact gathering being borne of one investigation, it is clear that the State chose to not only seek certification through the process as outlined in RSA 169-B:24, but to ensure adult prosecution regardless of the outcome of that certification. In the first instance, the State, by way of the Atkinson Police Department, filed juvenile petitions (including a pattern Aggravated Felonious Sexual Assault) on August 16, 2019 and sought certification pursuant to RSA 169-B:24, more than three months prior to the Defendant's eighteenth birthday (d.o.b. November 23, 2001). In the second instance, the State, by way of the Merrimack County Attorney's Office, purposely delayed pursuing a charge until after the Defendant's eighteenth birthday to bring indictment. Supra, **Intentional Delay** section.

RSA 169-B:1 provides that the purpose of the juvenile code shall be "liberally

interpreted, construed and administered to effectuate the following purposes and policies:

I. To encourage the wholesome moral, mental, emotional, and physical development of each minor coming within the provisions of this chapter, **by providing the protection, care, treatment, counselling, supervision, and rehabilitative resources which such minor needs.** (emphasis added.)

II. Consistent with the protection of the public interest, **to promote the minor's acceptance of personal responsibility for delinquent acts committed by the minor, encourage the minor to understand and appreciate the personal consequences of such acts, and provide a minor who has committed delinquent acts with counseling, supervision, treatment, and rehabilitation** and make parents aware of the extent if any to which they may have contributed to the delinquency and make them accountable for their role in its resolution. (emphasis added.)

III. To achieve the foregoing purposes and policies, whenever possible, **by keeping a minor in contact with the home community and in a family environment by preserving the unity of the family and separating the minor and parents only when it is clearly necessary for the minor's welfare or the interests of public safety** and when it can be clearly shown that a change in custody and control will plainly better the minor. (emphasis added.) *Id.*

In reviewing the legislative history of RSA 169-B:1 and the history of juvenile legislation in the context of mandated adjudication within 30 days, this Court ruled that the purposes and procedures delineated in the chapter reflect the purposes outlined in RSA 169-B:1, and reflect the paramount concern for the welfare of the child and the desire to divorce juvenile proceedings from the criminal process whenever possible. *In re: Russell C*, 120 N.H. 260, 267-268, (1980). That the juvenile system has fallen short of the high expectations of its originators "in no way detracts from the broad social benefits sought or from those benefits that can survive constitutional scrutiny." *Id.*, citing *Breed v. Jones*, 421 U.S. 519, 529 (1975). The legislature has acted to clarify preexisting law,

guarantee children their constitutional rights, and encourage the use of rehabilitative and treatment resources whenever possible in a manner "[c]onsistent with the protection of the public interest," and specifically that "it is the juvenile's liberty interest that triggers the need for due process safeguards." *Id.* At 268.

"Public interest" as noted above can not simply be discretionary and arbitrary as applied by any given prosecutorial individual. The analysis of the "public interest" protections is determined as part of proceedings under RSA 169-B:24 when analyzing acts committed by those deemed delinquent. Understanding the fragility of youth, and the potential for redemption noted in later cases through scientific studies on brain development, there is a structured mechanism for the juvenile court to hear evidence and evaluate through a multi-step process whether it is appropriate for juveniles that are alleged to have committed crimes to be transferred into adult court. *Miller v. Alabama*, 567 U.S. 460 (2012) and *Kent v. United States*, 383 U.S. 541, 86 S.Ct. 1045 (1966).

This process has been evaluated and regulated by not only the United States Supreme Court in *Kent*, but also adopted and codified by the New Hampshire legislature in RSA 169-B:24, in which the State and defense have opportunity to present evidence, and the court to evaluate through structured analysis, whether a juvenile should be tried as an adult recognizes the gravity of that transition. See RSA 169-B:24. There is then an additional step of review at the Superior Court level, to ensure that all processes have been sufficiently fulfilled, again, exemplifying the gravity of the shift for an individual from a forum that is rehabilitation focused, to one that equally weighs punishment. Our system recognizes through multiple steps in 169-B, the solemn crossing of the rubric from juvenile to adult court.

Importantly in the case of *In re Trevor G.*, this Court recognized that not only is the juvenile justice system a comprehensive one that has as its primary concern as the welfare of the child, but also recognizes that one of the principal goals of the juvenile chapter is to create procedural safeguards sufficient to protect individual rights against the "vicissitudes of unlimited discretion." *Id.* 166 N.H. 52, 54 (2014.)

In *State v. Gifford*, the defendant was indicted for aggravated felonious sexual assault that he allegedly committed at the age of thirteen. 148 N.H. 215 (2002.) The defendant argued he should be prosecuted under RSA 628:1, because he was thirteen at the time of the alleged acts. *Id.* That statute indicates that “a person 13 years of age or older may be held criminally responsible for [aggravated felonious sexual assault] if the person’s case is transferred to the superior court under the provisions of RSA 169-B:24.” RSA 628:1. The State argued that RSA 169-B:4, VII granted jurisdiction over the defendant without the certification requirement of RSA 169-B:24. The Court held that 628:1 controlled as it specifically addressed those ages thirteen to fifteen. The Court went on to note that “permitting prosecution without an evaluation under RSA 169-B:24 would render meaningless the protections of the criminal responsibility statute. *Id.* at 217-218.

Further, the *Gifford* Court compared RSA 169-B:4, I which notes that the district court *shall* have jurisdiction over any minor with respect to whom a petition is filed after their eighteenth birthday<sup>3</sup> and RSA 169-B:4, VII which is more general and grants possible conditional personal jurisdiction to the criminal justice system for adults for acts committed before their eighteenth birthday and which no juvenile petition was sought. (emphasis added.) This separates out those that are not currently within the purview of the juvenile system from those that are not. RSA 169-B:1 more specifically addresses those individuals who are under 19 years of age but are an alleged delinquent within the juvenile system.

In *State v. Ferguson*, a 31-year-old defendant was indicted for an offense under RSA 632-A, alleged to have been committed when he was seventeen years of age. *Id.*, 141 N.H. 438 (1996.) The defendant argued that the State must proceed in the juvenile justice system under RSA 169-B:2, IV. While the Court rejected that argument, it did note that in isolation, that interpretation was just. However, the Court noted that such a reading “sets that statute unnecessarily in conflict with the other provisions of RSA 169-B.” *Id.* At 440. The Court went on to explain that if the legislature had intended RSA 169-B to

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<sup>3</sup> For acts committed before their eighteenth birthday.

apply to persons of any age, there would be no need for RSA 169-B:4, specifically allowing for petitions after age eighteen but before age nineteen, and further demanding closure of delinquency matters on a juvenile's twenty-first birthday. *Id.*, at 443.

In the case of *State v. Gomes*, which was decided under the prior delinquency statute, the defendant was indicted in the criminal justice system for murder that he committed when he was seventeen years old and argued to the Court that the juvenile court had jurisdiction over him, and not adult criminal court. *Id.* 116 N.H.591, 592 (1976.) No juvenile petition was filed before the defendant turned nineteen years of age. *Id.* Relevant to the matter presently at issue, the Court in *Gomes* specifically stated, "under the circumstances of this case, it cannot be said that the prosecution deliberately delayed filing a petition in the juvenile system." *Id.* Such language indicates that the factual distinction of deliberate delay by the prosecution is an important consideration in regards to forcing a case into adult court, as compared to the juvenile justice system.

The previously cited cases as well as the numerous provisions of RSA 169-B:4 regarding jurisdiction of those that have committed acts prior to the age of eighteen, including petitioning for juvenile acts after one's eighteenth birthday, RSA 169-B:4, I, as well as extending jurisdiction up until the age of twenty-one, RSA 169-B:4, IV, show a clear intent to effectuate the purpose of the juvenile code. RSA 169-B:1. In that vein, RSA 169-B:4, VII would seem to allow a safety net for those cases that were committed when the actor was under eighteen years of age, yet discovered after ability to proceed under the juvenile code. In the light of all previously cited cases and the provisions of RSA 169-B, 169-B:4, VII would appear to be safety net to capture such cases and not a strategic tool provided to allow law enforcement to sit on juvenile matters until reaching majority to avoid the certification process.

The State in the case before the court, had abundant opportunity to follow that process, replete with checks and balances. This is proven by the Atkinson police, after conducting tandem investigation with the Bow police department, DID chose this path; and obtain an order transferring the defendant's case to Superior court, who subsequently remanded it to the juvenile court. The State in the case before this court, was well aware

of the pending juvenile petition and certification. However, the State in the present case chose to not bring petitions, and do nothing to advance the case in Merrimack County during the months of July, August, September, October and November 2019. They did not answer inquiry from defense, did not send needed discovery during that time, did not bring petitions in juvenile court, and instead, they just awaited the defendant's eighteenth birthday. The State did so in an effort to avoid presenting evidence for certification, having defense refute the same, have a judge evaluate the "Kent" factors under RSA 169-B:24, and having a Superior Court review to ensure compliance with all safeguards. See *Kent v. United States*, 383 U.S. 541, 86 S.Ct. 1045 (1966). The State waited until the defendant was eighteen years of age, and indicted him directly, citing their authority to do so under RSA 169-B:4, VII, while ignoring the purpose of the chapter under which it falls.

### **State's Intentional Delay in Pursuing the Present Charge**

In the case of *State v. Gomes*, which was decided under the prior delinquency statute, the defendant was indicted in the criminal justice system for murder that he committed when he was seventeen years old, and argued to the Court that the juvenile court had jurisdiction over him, and not adult criminal court. *Id.* 116 N.H.591, 592 (1976.) No juvenile petition was filed before the defendant turned nineteen years of age. *Id.* Relevant to the matter presently at issue, the Court in *Gomes* specifically stated, "under the circumstances of this case, it cannot be said that the prosecution deliberately delayed filing a petition in the juvenile system." *Id.* Such language indicates that the factual distinction of deliberate delay by the prosecution is an important consideration in regard to forcing a case into adult court, as compared to the juvenile justice system.

In the present case, the record is replete with supporting evidence of purposeful delay to circumvent both the juvenile system and the certification process of RSA169-B:24, despite the State (by way of the Atkinson Police Department) simultaneously having done just that with the same investigation, named victim and defendant.

Defense counsel had contact with both police departments, Bow [Merrimack] and

Atkinson, on August 5, 2019, and notified them of representation. See Appendix I, pg. 2. On August 6, 2019, defense counsel wrote to the Bow Police Department lead detective noting that should a petition be sought she was the point of contact. See Appendix I, pg. 2. On August 7, 2019, confirmation was obtained from the Atkinson Police Department that a petition was drafted and certification of the juvenile would be sought. See Appendix I, pg. 2. Merrimack authorities were aware that Rockingham would seek certification, as it was a source of disagreement between the two jurisdictions ...with Merrimack choosing to wait for almost four months until the juvenile turned eighteen and simply indict him. See Appendix I, pg. 2.

On August 10, 2019, defense counsel reached out to the Bow juvenile prosecutor. On August 11, 2019, the Bow prosecutor indicated that confidentiality prohibited him from discussing cases outside of involved parties. Defense counsel noted representation of the juvenile party, to which the Bow prosecutor responded "as of the moment, however, my comments confirming/denying any case and discussing cases only with involved parties in the case still apply." See Appendix I, pg. 2.

On September 8, 2019, defense counsel again wrote to the Bow prosecutor stating following up affirming awareness of the joint investigation, the date of juvenile arraignment, and intent to address the act alleged to have occurred in Bow. This notification was coupled with a request for the status of how Bow and/or Merrimack intended to proceed. Id. The Bow prosecutor responded, "At this time I have no information I can provide." See Appendix I, pg. 2, 3. Discovery in the juvenile matter was received September 21, 2019 at which point it became clear that the Merrimack County Attorney's Office had attended the two CAC interviews with Atkinson, executed the search warrants with Atkinson and had conducted all interviews with Atkinson. Despite the juvenile matter's discovery containing this information, there were audio/video difficulties with copies of the CAC interviews (conducted in Merrimack County), as well as interviews conducted at the Bow Police Department. See Appendix I, pg. 3. The discovery and reports between the two agencies were inextricably woven together. See Appendix III, pg. 1, 2, also MHTr.3. Despite requests from Atkinson Police



Department and defense counsel to the Merrimack County Attorney and/or Bow Police Department, the discovery materials were not turned over during the pending juvenile matter pre-certification. See Appendix I, pg. 1, 2.

On October 1, 2019, defense counsel wrote to the Merrimack County Attorney's Office (with a courtesy copy to Rockingham authorities) and requested best contact information to have a coordinated conversation about various options for proceeding. See Appendix I, pg. 3 Despite the Merrimack County Attorney immediately responding that "we are happy to talk about a global resolution and consolidation," attempts to do so were unsuccessful. See Appendix III, pg. 1, 2.

There were attempts to set up a meeting on October 21, 2019, and a lengthy resolution memorandum sent from defense counsel which specifically highlighted the November 6, 2019 juvenile certification hearing date. That memorandum was accompanied with a further request for a meeting to discuss the same. See Appendix I, pg. 3. Defense counsel followed up with an additional request on October 25, 2019 with a proposed meeting date in Concord, New Hampshire. No response was received. See Appendix I, pg. 4. Defense counsel again sent the memorandum to both the elected Merrimack County Attorney and assigned prosecutor, and the Rockingham County Attorney's office on October 31, 2019. It was again noted that the juvenile certification hearing was scheduled for November 6, 2019. There was no reply from the Merrimack County Attorney's office. See Appendix I, pg. 4. Follow up correspondence was sent on November 1, 2019 to the Merrimack County Attorney's Office and the prosecutor in Atkinson. There was again, no reply from Merrimack. See Appendix I, pg. 4.

The Merrimack prosecutor responded the day before the certification hearing, noting an unwillingness to explore an alternative resolution in the case without the full support of Rockingham County and the victim's family. See Appendix I, pg. 4. On November 19, 2019, defense counsel notified all prosecution parties that the case was ordered transferred from the juvenile court, and, again, invited discussions for resolution of the matter. No response was received from the Merrimack County Attorney's Office. See Appendix I, pg. 4.

Rockingham County Superior Court held a sealed hearing on December 17, 2019 on the status of the transfer hearing. The case was sealed and noted as a juvenile case as the case had not been transferred. See Appendix I, pg. 4. All parties had long been aware a petition was filed based upon acts committed before the minor's eighteenth birthday<sup>4</sup>, and that said transfer had not yet occurred and was being contested. See Appendix I, pg. 4.

Despite all attempts to discuss the matter for months with little to no response, the first substantive correspondence from the Merrimack County Attorney's office was sent on December 31, 2019, New Year's Eve, and provided the pending indictment signed December 16, 2019, and proposing personal recognizance bail for the Defendant.

The Merrimack County prosecutor then specifically noted, "I would like to move to transfer this case to Rockingham County. Do you assent?" See Appendix I, pg. 4, 5. While Atkinson Police Department and Rockingham County prosecutors chose to pursue the appropriate path through juvenile proceedings and seek certification, the Merrimack County Attorney's Office did not engage in discovery or discussions of the underlying investigation or resolution for months. The State in this case held one alleged act until the defendant was eighteen, and then immediately noted a desire to send the case to Rockingham County. See Appendix I, pg. 4,5. Such actions are a clear attempt to ensure a circumvention of the juvenile certification process, and the "vicissitudes of unlimited discretion" which the *In re. Trevor G.* court articulated grave concerns. *Id.* 166 N.H. 52, 54 (2014.) Vermont has incorporated specific statutory provisions, only allowing proceeding in adult court through transfer, and when there has been no delay in filing. See *In re: D.K.*, 2012 VT 23 (2012) and Vt. Stat. Ann. Tit. 33, 5204a. Massachusetts has also looked critically upon scenarios in which the Commonwealth delayed proceedings in order to deprive defendants of the advantages of the juvenile system. See *Ulla U., a Juvenile v. Commonwealth*, 485 Mass. 219 (2020), as well as Mass. Gen. Laws ch. 119, 72A.

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<sup>4</sup> And well before his nineteenth birthday. RSA 169-B:4, I

Upon transfer order from the juvenile court, the Rockingham County Superior Court ordered that counsel for the State and defense in the transfer hearing had to obtain all records by joint motion to the juvenile court and receive such records under seal subject to confidentiality. See Appendix II, pg. 2. Yet absent this order, the Merrimack County Attorney's Office cited direct quotations from juvenile court orders in their Objection to the Motion to Quash. See Appendix V. Such free access and unauthorized use of the order would indicate a belief that Merrimack County Attorney's were part and parcel of the juvenile proceeding. Absent being part of the prosecution in the juvenile matter, the State should have had no access to the order. See RSA 169-B:35. Under RSA 169-B:35, law enforcement and prosecutors may gain access to police reports, however the records of the juvenile court are confidential and excluded from such access. *Id.* The State in the case before this Court, can't assume the mantel of "the State" in the juvenile prosecution to access information, and conversely argue that the two cases are separate and void of one another under RSA 169-B:4, VII. See Appendix II, pg. 3, 4, also MHT<sub>r</sub>, p. 15, 16.

Due to the State's unwillingness to engage in any discussions prior to indictment, they substantively prejudiced and prevented the defendant from engaging in any meaningful resolution of the juvenile matter. See Appendix II, pg. 4. Despite the juvenile system being premised on expeditious remedies and rehabilitation, the conduct of the State in the underlying matter stripped the defendant of resolution of the juvenile charges in any timely fashion. See RSA 169-B:1, and also *In re: Russell C*, 120 N.H. 260, 267-268, (1980); See also *State v. Knickerbocker*, 152 N.H. 467 (2005)

### **Double Jeopardy**

In *State v. Fortier*, this Court questioned "whether the State may simultaneously pursue convictions for a pattern of sexual assault under RSA 632-A:2, III and for individual sexual assaults under RSA 632-A:2 or 632-A:3 for acts perpetrated against the same victim during a common period of time." *Id.* 146 N.H. 784 (N.H. 2001). While the Court has subsequently found prosecution for separate predicate offenses acceptable

provided they were not relied upon for proof of the pattern offense, the Court has still repeatedly questioned the Constitutionality of charging predicate acts and patterns separately, and the Court should do so here in the context of separating charges between not only two courts, but also two subject matter jurisdictions, which could have been brought in one. See *State v. Jennings*, 155 N.H. 708 (2005), *State v. Glenn*, 160 N.H. 480 (2010), *State v. Wilbur*, #2011-0627, *State v. Hutchinson*, 156 N.H. 790 (2008), *State v. Carpentino*, 166 N.H. 9 (2014), *State v. Collins*, 168 N.H. 1 (2015), *State v. Locke*, 166 N.H. 344 (2014.) The Locke case acknowledges that the inconsistent approach to double jeopardy analysis by the Court creates difficulty in reconciling such cases. *Id.*, at 351.

These inherent double jeopardy considerations associated with pattern and predicate offenses should further compel relief from an individual being prosecuted in separate courts for what could otherwise be charged as the same offense. This is especially true when the courts are further distinguished with different subject matter jurisdictions, one in family court as juvenile offenses, and one in the adult criminal arena. The two courts have dramatically disproportionate goals and repercussions, that are arbitrarily being applied by the State in this instance. In *Locke*, the alternative argument to double jeopardy was advanced by the defendant, that where multiple offenses could have been addressed in the first trial, it may be appropriate to require the prosecuting authorities to join all charges growing out of the same acts or transactions so that the defendant will not be harassed by the necessity to repeated trials. *Id.*, at 346. In *Locke*, this Court turned to a joinder analysis in lieu of a double jeopardy analysis, reasoning that joinder can be broader than the double jeopardy test for the same offense, since its purpose is to alleviate the harassment and expense that result to a defendant by reason of separate trials for related offenses. *Id.*, at 346.

### **Mandatory Joinder**

Although the State has " broad discretion when charging a defendant with multiple offenses arising out of a single event ... it is important to exercise discretion with more

circumspection when charging crimes under [such] circumstances." *Locke*, citing *State v. Krueger*, 146 N.H. 541, 543, (2001). Forcing the defendant to endure more than one criminal proceeding ... at the will of the prosecutor" is harmful to the criminal defendant and to the justice system as a whole. *Locke*, at 346. 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* at 346, citing *Green v. United States*, 78 S.Ct. 221(1957).

The *Locke* Court then went on to adopt the provisions of the Model Penal Code Sections 1.07(2) and 1.07(3) which provide: (2) Limitation on Separate Trials for Multiple Offenses. Except as provided in Subsection (3) of this Section, 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. (3) Authority of Court to Order Separate Trials. When a defendant is charged with two or more offenses based on the same conduct or arising from the same criminal episode, the Court, on 166 N.H. 349 application of the prosecuting attorney or of the defendant, may order any such charge to be tried separately, if it is satisfied that justice so requires. Model Penal Code 1.07(2), (3). *Id.*, at 349.

Rule 20(a)(4) of the N.H. Rules of Criminal Procedure provides:

Mandatory Joinder-Limitations on Separate Trials for Multiple Offenses. 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." *Id.*, See also *State v. Reinholz*, 169 N.H. 22, (2016) *Locke*, at 349.

Specific to the reference of jurisdiction, all charges pending in both juvenile court and the case at hand, could have proceeded under various provisions of 169-B:4, as well

as RSA 169-B:5 permitting Venue for juvenile charges in "...any judicial district in which the minor is found or resides, or where the offense is alleged to have occurred." Id.

The December 2018 act charged in Merrimack County is within the jurisdiction of Rockingham County where the pattern offense petition was filed because the defendant resides in Rockingham County. Since the police and prosecutors in both counties were involved in one joint investigation in this matter, Rule 20(a)(4) should apply to prevent the defendant from being subject to multiple trials. The State claims that no juvenile petition was filed for the December 2018 allegation, but the December 2018 allegation falls squarely during the pattern charge which is the basis of the alleged conduct in the juvenile petition. Likewise, the State argues that the December 2018 allegation is not part of the case in Rockingham, but it is proof of the charge there and part of the pattern offense as defined by the legislature, and more importantly, should not be permitted to be purposely delayed and carved out of the "same criminal episode" in order to serve as an insurance policy for the State to achieve criminal court jurisdiction in the event of denial of transfer.

## CONCLUSION

Defendant's Constitutional rights under the Fifth and Fourteenth Amendments of the United States Constitution and Part 1, Article 15, Article 17, Article 18 of the New Hampshire Constitution were violated when the court did not Quash the pending indictment in Merrimack County.

For the foregoing reasons, this Court should reverse the trial court's (*Kissinger, J.*) erroneous orders denying the Defendant's Motion to Quash, Renewed Motion to Quash, Motion for Interlocutory Appeal, and Motion for Findings of Facts and Rulings of Law.

## CERTIFICATION

It is hereby requests oral argument of 15 minutes be held on this Rule 11 Appeal.

It is hereby certified that each written appealed decision has been submitted as an Appendix hereto, entitled “Appealed Decision Index” in compliance with Supreme Court Rule 16 (3)(I)(2). The original Order on the Motion to Quash was not in writing.

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