THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2020-0569

Petition of Devin Miles

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE MERRIMACK COOUNTY SUPERIOR COURT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

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(Fifteen-minute oral argument)

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II. Whether the petitioner has been subjected to double jeopardy where the conduct charged in the Merrimack County indictment is not included in the juvenile petition filed in Rockingham County.

III. Whether mandatory joinder applies where the charge brought in Merrimack County is not included in the juvenile petition filed in Rockingham County.

STATEMENT OF THE CASE AND FACTS

On July 16, 2019, the Bow Police Department learned from the Division for Children, Youth, and Families (DCYF) that a six-year-old victim had reported sexual abuse. AIV[1]. The victim told her mother that the victim's cousin, the petitioner, had repeatedly exposed himself to her and had asked her to touch his penis. AIV. At the time of the report, the petitioner was seventeen years old and would reach the age of eighteen in November 2019. AIV.

The victim also told her mother that the petitioner had "rubbed her private area and kissed her with his tongue in her mouth." AIV. The victim told her mother that these things had happened at her grandmother's house in Rockingham County and on Christmas 2018, in Bow. AIV.

On July 29, 2019, the victim's father met with the Bow Police Department. AIV. The victim's mother had sent him a text containing a letter of apology from the petitioner. AIV. When the victim was interviewed at the Merrimack County Child Advocacy Center (CAC), she said that the petitioner had kissed her on the lips, sticking his tongue in her mouth, and had rubbed her "vaginal area" when they were in Bow. AIV. The victim "disclosed repeated sexual contact" with the petitioner in Rockingham County. AIV.

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[1] Citations to the record are as follows:
"PB__" refers to the petitioner's brief and page number.
"A__" refers to the appendix filed by the petitioner, identified by Roman numeral, and page number.
"SA__" refers to the appendix to the State's brief and page number.
"T__" refers to the transcript of the hearing on motion to quash and arraignment held on February 18, 2020 and page number.

In August 2019, the Atkinson Police Department brought a juvenile petition in the Tenth Circuit-Family Division Court-Brentwood in Rockingham County, charging the petitioner with sexual assault. AIII:1.

On December 31, 2019, the Merrimack County Attorney's Office ("MCAO") informed the petitioner's counsel that the grand jury had returned an indictment charging the petitioner with a single count of sexual assault. AI:5. *See* RSA 632-A:2. That same day, the petitioner filed an amended motion to quash or stay the Merrimack County case "until such time as the juvenile petition" had been resolved and transferred to the superior court. AI.

The juvenile petition against the petitioner in the Tenth Circuit-Family Division Court-Brentwood was certified to Rockingham County Superior Court. AIII:2. On November 14, 2019, the State moved to transfer the juvenile case to the Rockingham County Superior Court. *See* AIV; *see also* RSA 169-B:4, VII. On November 14, 2019, the superior court rejected the State's motion to transfer. AIV.

On January 7, 2020, the Merrimack County Attorney objected. AIV. It contended that the Merrimack County charge was "not part of the transferred case in Rockingham County" and that the "indictment was properly brought in Merrimack County." AIV.

On February 18, 2020, the petitioner filed an addendum to the motion to stay or quash the indictment. AII. The petitioner contended that the Merrimack County charge was "entirely based on hearsay" and had not been disclosed by the victim during the CAC interviews. AII. The petitioner contended that the MCAO's response to the amended motion to quash mentioned a sealed order from the Family Division Court. AII.

The petitioner stated:

> Either Merrimack County Attorney was part and parcel of the investigation, and 'case' subject to the pattern indictment and course of action, and entitled to access of the records…….or they were not. (RSA 169-B:36.) But if they were, they aren't entitled to make an argument under 169-B:4, VII, that the petition attached to the Rockingham portion of the charges, doesn't bind them under that statute. (*See Also*, RSA 602:1, Parts of Offense in More than One County: If parts of an offense are committed in more than one county ….the offense shall be deemed to have been committed, the offender may be prosecuted and the trial may be had in either county.) *See also State v. Matthew Gifford*, 148 N.H. 215 (2002).

AII.

On February 18, 2020, the Merrimack County Superior Court held a hearing on the motion to quash, denied it, and arraigned the petitioner. T1. At that point, petitioner's counsel told the court that it had filed a hard copy of the addendum that morning, in part because the Rockingham County Superior Court had not yet held a transfer hearing. T2-3.

Petitioner's counsel then contended that the "criminal episode" giving rise to both the juvenile petition and the indictment in Merrimack County were "intrinsically tied together." T3. The investigation conducted by the Atkinson Police Department, counsel stated, was conducted with the Bow Police Department's investigation. T4.

The court responded: "But my fundamental problem with the position of the Defense here is that if a discrete act occurs in Merrimack County, and Rockingham County elects to go through the juvenile transfer process, I don't see why that that the statute doesn't give the State every right to proceed by waiting until your client's 18th birthday and indicting."

T4. The petitioner's counsel responded, "under 169-B:4 subsection 7, it says where a petition has not been filed." T4. The court, in response, said:

> Sure. Sure. But that's talking about the act itself in a specific county. What authority do you have for - what case law or authority do you have for the view that - let's say Rockingham County elected to proceed by that way. That's fine. But Merrimack County with the discreet - if this didn't involve the same alleged victim you couldn't argue that Merrimack County wouldn't be able to go forward with this charge.
>
> You're saying because the - there's overlap in the investigation, there [are] some similarities in terms of the allegations, that Merrimack should somehow - has to wait for the process to play out in Rockingham. I just don't see the support for that.

T4-5. Petitioner's counsel countered that, under RSA 169-B:4, VII, "it would not make sense that if Atkinson Police Department were the ones that were solely doing the investigation, if there weren't Merrimack charges… [T]he legislation [did not] anticipate[ ] that [prosecutors] would file part of the charges in juvenile court and part of the charges in adult court." T5.

The petitioner's counsel contended that, because Merrimack County had not engaged in negotiating a resolution of the Rockingham County petition, the petitioner could not resolve the Rockingham case because the Merrimack County Attorney's Office had not entered into negotiations, even though Merrimack County intended to seek transfer of the case to Rockingham County. T8. In making this argument, the petitioner directed the court to *State v. Locke*, 166 N.H. 344, 345 (2014).

The court responded:

> But *Locke* dealt with discrete acts occurring in the same county. We're not talking about a separate -- your argument flows from the fact that – you're sort of saying that these acts are somehow intertwined in a way that they should not be brought separately.

T7-8. The petitioner's lawyer responded that the petitioner had alibi defenses for some of the Rockingham County charges. T8-9. To this, the court responded:

> [T]hat's a defense that sounds like that the case might be a viable one for trial if that's if that's the case. I just don't understand the argument that Merrimack County is somehow precluded from going forward on a charge alleging conduct that took place in Merrimack County involving the Defendant and the same alleged victim simply because there's a juvenile certification process that took place in Rockingham County. I don't see -- I don't think that *Locke* controls this. And I know that that's not what the Defense views. But at this point, my inclination is not to quash the indictment, to have the indictment move forward. I'm not – I'm not persuaded.

T8. The court concluded that *Locke* was not applicable. T9.

> The petitioner's lawyer countered, arguing:
>
> [F]or purposes of the record, Your Honor, and I know I've cited *Locke* a number of times, I disagree that it talks about one event. It very clearly refers to *State v. Gregory* [333 A.2d 257 (N.J. 1975)] from New Jersey and the New Jersey criminal practice model penal code talking about criminal episodes.
>
> And the criminal episode definition in *Locke* is expanded beyond—they're very particular in expanding it beyond one discrete incident. It's talking about course of conduct, which is the basis of the pattern charge.
>
> And not only do I think that the behavior alleged in Rockingham, I think the factual underpinnings that it's all one investigation, it's all one set of discovery, and the Defendant's

> inability to meaningfully resolve things when they are brought before a court because the State's deciding to parse it out and hold back their cards in the event they don't get what they want, is exactly what the *Locke* court was considering.

T10.

The court concluded this issue, stating:

> I'm going to issue an order that future proceedings will not be kept under seal. I don't see any basis for doing that. I think the pendency of the other action -- further actions will be kept in open court. But I'm denying the motion to quash. The case will proceed.

T11.

On October 13, 2020, the petitioner filed a renewed motion to quash the Merrimack County indictment. AIII. In this pleading, the petitioner reported that the Rockingham County Superior Court held a hearing on the motion to transfer and remanded the case to the Family Court. AIII. The petitioner contended: "Subjecting the defendant to prosecution for a pattern offense as a juvenile, and a single offense as an adult, in different courts with different fact finders, is certainly not the intent of the legislators in drafting RSA 169-B:4, VII." AIII.

The petitioner asserted: "The carving out of one single charge, to proceed with in adult court clearly is counter to the intent and application of the Juvenile Code which encompasses the 'twilight' provision of 169-B:4, VII." AIII. The petitioner pointed out that, under RSA 169-B:5, the juvenile's case may proceed in the location of the offense or where the juvenile resides. The petitioner concluded that there were "concerns regarding carving out the single offense from the pattern time frame. The law clearly defines a single pattern offense, based on the location of a

single offense in a different county, is an unconstitutional double jeopardy violation, violates the intent of the legislature in defining a pattern offense, and is an abuse of discretion." AIII.

On October 14, 2020, the Merrimack County Attorney objected, contending that, under RSA 169-B:4, VII, the prosecution in Merrimack County Superior Court was perfectly proper. AV. It noted that the statute of limitations had not run. AV. No juvenile petition had been filed in the Sixth Circuit-Family Division Court-Concord and, the State contended, the "December 25, 2018 allegation is not part of the case in Rockingham County." AV.

On October 15, 2020, the Merrimack County Superior Court denied the renewed motion to quash "for the reasons expressed earlier and for the reasons set out in the State's objection." SA27.

On October 25, 2020, the petitioner filed a motion to certify the issue as an interlocutory appeal to this Court. *See* SA33. In that petition, the petitioner asserted: (1) that the Rockingham and Merrimack County cases were subject to mandatory joinder, (2) that prosecution as a juvenile in one county and as an adult in a second county conflicted with the legislature's intent in writing RSA 169-B:4, VII; and (3) that the prosecutions constituted double jeopardy. SA33-40. The State objected. SA41. The trial court denied the request for certification without elaboration. SA47.

On November 12, 2020, the petitioner asked the court to issue findings of fact and conclusions of law to support its ruling. SA48. On November 24, 2020, the court denied the request. SA50.

SUMMARY OF THE ARGUMENT

I. The trial court did not err when it denied the motions to quash and the motion for an interlocutory appeal based on alleged "dilatory and erroneous use" of RSA 169-B:4, VII. Although a juvenile petition was pending in another jurisdiction, and the police were cooperating with each other in investigating the case, these two factors did not deprive Merrimack County of jurisdiction over a crime that occurred within its county lines. While the petitioner may be frustrated by the manner in which the Merrimack County Attorney elected to proceed, the trial court was without authority to interfere with the exercise of prosecutorial discretion.

II. The trial court properly denied the motions to quash and the motion for an interlocutory appeal on the theory that he was subjected to an unconstitutional prosecution. The charged conduct in the Merrimack County indictment is not included in the juvenile petition filed in the Family Division Court in Rockingham County. The Rockingham County charges involve pattern sexual assault charges regarding incidents that occurred in that county; the Merrimack County charge is a single incident that occurred on Christmas Day 2018. These separate prosecutions do not create double jeopardy.

III. Finally mandatory joinder does not apply where the charge brought in Merrimack County is not included in the juvenile petition filed in Rockingham County.

The trial court properly denied the motions to quash and the motion for an interlocutory appeal on this claim.

ARGUMENT

I. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN DENYING THE MOTIONS TO QUASH AND IN DECLINING TO CERTIFY THIS CASE FOR INTERLOCUTORY APPEAL TO THIS COURT. THE FACTS THAT A JUVENILE PETITION WAS PENDING IN ANOTHER JURISDICTION, WHICH WAS THE PRODUCT OF A COORDINATED INVESTIGATION, DID NOT REQUIRE THE TRIAL COURT TO EITHER QUASH THE MERRIMACK COUNTY INDICTMENT OR TO CERTIFY THE CASE TO THIS COURT.

The petitioner contends that the trial court erred in denying his motion to quash, renewed motion to quash, and motion for interlocutory appeal. He asserts that, because the investigations in Rockingham County and Merrimack County were interrelated, the Merrimack County prosecutor was bound by the decisions made in Rockingham County. PB14, 16-17.

The denial of a motion to quash is discretionary with the trial court. *Coughlin v. Angell*, 68 N.H. 352, 352 (1895) ("The general tendency of the decided cases in this state is to regard a motion to dismiss or quash a proceeding as addressed to the discretion of the court.").

The trial court acted within its discretion in declining to quash the Merrimack County indictment. Although the petitioner clearly disagreed with the decision, he was not able to provide the court with any authority restricting the MCAO from seeking an indictment after the petitioner had reached the age of eighteen. Normally, a motion to quash is appropriate when a charging document fails to sufficiently charge an offense or is otherwise defective. *See, e.g., State v. Hunkins*, 43 N.H. 557, 557 (1862) (failure to meet the statute of limitations); *State v. Morin*, 111 N.H. 113,

116 (1971) (denying a motion to quash because the indictments were sufficient); *State v. Merski*, 121 N.H. 901, 914 (1981) (indictment was sufficient as it contained "the elements of the offense and enough facts to warn the accused of the specific charges against him."). As the petitioner never alleged that the indictment was flawed, the trial court acted within its discretion in declining to quash it.

For the same reason, the trial court did not exceed its discretion in declining to certify the case to this Court. As the trial court made clear in the hearing, it was not persuaded that the petitioner's argument had merit. Absent a reason to ask this Court for review, the court properly denied the request.

Turning to the merits of the petitioner's claims, he has not set forth a basis for relief. Although the petitioner acknowledges that the State may proceed against a person in the criminal justice system after the person has reached the age of eighteen, *see* RSA 169-B:4, VII, he still contends that this case is governed by "the purpose provision of RSA 169-B:1." PB10.

RSA 169-B:1 provides the following objectives:

> 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.
>
> 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.
>
> 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.
>
> IV. To provide effective judicial procedures through which the provisions of this chapter are executed and enforced and which recognize and enforce the constitutional and other rights of the parties and assures them a fair hearing.

RSA 169-B:1.

Nothing in this statute prevents the State from proceeding under RSA 169-B:4, VII, which authorizes the State to "proceed against the person in the criminal justice system after that person's eighteenth birthday," provided the statute of limitations has not run or a juvenile petition involving the same conduct has not been filed.

Still, the petitioner seems to read the reference to filing a petition to apply to any petition filed in any county, even if that petition does not encompass conduct occurring in another county. The legislature did not add the words "in any county" or any similar limitation into the statute, however, and this Court should decline to add them itself. *See State v. Hatt*, 144 N.H. 246, 247 (1999) (This Court will not "add words [to a statute] that the legislature chose not to include.").

The petitioner contends that the investigation was a joint investigation and that, because the Bow Police Department cooperated with the Atkinson Police Department, the Bow charges should have followed those brought in Rockingham County. PB15-17. The record is scant on the reasons that the two departments approached their respective charges differently, however, in its October 30, 2020 objection, the prosecutor from the MCAO stated that, while she was not "privy" to the Atkinson Police Department's decision, it might have been influenced by the fact that the petitioner lives with his young sister. SA43. The prosecutor wrote: "The benefit of filing a petition in Family [Division] Court [in Brentwood] rather than waiting for the [petitioner] to turn eighteen" was the benefit of immediate supervision from the Family Court. SA43-44.

The petitioner devotes a significant part of his brief to his attempts to negotiate a global plea and the lack of response from the Merrimack County Attorney's Office.[2] PB15-19. In that regard, the petitioner cites *State v. Gomes*, 116 N.H. 591, 594 (1976), to suggest that waiting to initiate a prosecution until the offender's eighteen birthday is in some manner suspect. *See id*. ("[I]t cannot be said that the prosecution deliberately delayed filing a petition in the juvenile court."). The quotation is dicta, as

[2] The petitioner also makes references to discussions for which he has not filed the transcripts to support his account. *See, e.g.*, PB7 ("Both the juvenile court as well as the Rockingham County Superior Court expressed concerns…"). The transcripts in which the courts expressed "concerns" were not filed as part of this appeal. The reference to the record is an account provided by the petitioner's counsel to the Merrimack County Superior Court. *See* T6 (PETITIONER'S COUNSEL: "Attempts to bring Merrimack to the table throughout the juvenile adjudication, and even with the court scratching her head in both family court and Superior Court saying, where is Merrimack? What is going on?"). Although the representations made by counsel may be generally accurate, they are not a substitute for the actual transcripts of the hearing(s) in which the courts expressed concerns.

the issue before this Court was which court had jurisdiction, not whether the prosecution had delayed bringing charges. *Id*. at 592. But even so, to the extent that the *Gomes* case sends the prosecution a message, that message was superseded by the enactment of RSA 169-B:4, VII, which specifically allows the prosecution to wait until the offender's eighteenth birthday before bringing charges.

Moreover, the petitioner's frustration with the lack of response from the county attorney is not a basis for relief from this Court. In general, courts do not involve themselves in plea negotiations. *See United States v. Davila*, 569 U.S. 597, 605 (2013) (discussing Federal Rule of Criminal Procedure 11(c)(1)); *see also United States v. Bierd*, 217 F.3d 15 (2000) (Prohibition on judicial involvement in plea negotiations preserves the court's impartiality.). As a result, the petitioner's unhappiness with the Merrimack County Attorney's Office did not give the trial court a reason to intercede.[3]

In addition, charging decisions are within the discretion afforded to prosecutors. *See State v. Peck*, 140 N.H. 333, 334 (1995) ("Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion.") (quoting *United States v. Batchelder*, 442 U.S. 114, 123-24 (1979)); *see also State v. Gooden*, 133 N.H. 674, 680 (1990) ("[P]rosecutors have broad discretion in bringing

[3] At least in the case of one of the complaints, the prosecutor acted as required by statute. *See* PB17 (The Merrimack prosecutor expressed "an unwillingness to explore an alternative resolution" without "the full support" of "the victim's family.") PB17. The prosecutor's insistence on involving the family and seeking its support in any resolution is mandated by statute. *See* RSA 21-N:8-k, II(f) (A victim has the right "to confer with the prosecution and to be consulted about the disposition of the case, including plea bargaining.").

charges against an accused."). Although trial courts have the authority to "correct any errors that might be made in the exercise of that discretion," *Gooden*, 133 N.H. at 680, the trial court in this case correctly declined to intercede because no abuse of that discretion has occurred.

Further, the petitioner's argument misconstrues the role of the county attorney, which is limited to the county in which he or she serves. *See* RSA 7:34 ("The county attorney of each county shall be under the direction of the attorney general, and, in the absence of the latter, he or she shall perform all the duties of the attorney general's office for the county. If no other representation is provided, under the direction of the county commissioners he or she shall prosecute or defend any suit in which the county is interested. The county attorney shall tax all costs arising in state or county suits in his or her county for the consideration of the court."). This statute makes each county attorney responsive to the attorney general. The county attorneys are not by statute responsible to each other.

This separation of responsibilities is also written into the New Hampshire Constitution. Part I, Article 17 provides:

> In criminal prosecutions, the trial of facts, in the vicinity where they happened, is so essential to the security of the life, liberty and estate of the citizen, that no crime or offense ought to be tried in any other county or judicial district than that in which it is committed; except in any case in any particular county or judicial district, upon motion by the defendant, and after a finding by the court that a fair and impartial trial cannot be had where the offense may be committed, the court shall direct the trial to a county or judicial district in which a fair and impartial trial can be obtained.

The crime that occurred in Bow, therefore, is constitutionally mandated to be tried in Merrimack County. Nothing on the record suggests that the petitioner cannot receive a fair trial in Merrimack County and the court has not ordered the transfer of this case.

On this record, the trial court properly denied the motions to quash and the motion for an interlocutory appeal to this Court.

II. THE TRIAL COURT ACTED WITHIN ITS DISCRETION WHEN IT DENIED THE PETITIONER'S MOTIONS TO QUASH AND MOTION FOR AN INTERLOCUTORY APPEAL BECAUSE THE PETITIONER HAS NOT BEEN SUBJECTED TO DOUBLE JEOPARDY.

The petitioner next asserts that he has been subjected to double jeopardy. PB19. He contends that there are "inherent double jeopardy considerations associated with pattern and predicate offenses" and that these considerations "should further compel relief" for what could be the same offense. PB20.

The Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The same concept is found in the New Hampshire Constitution, which "protects an accused against multiple prosecutions and multiple punishments for the same offense." *State v. Liakos*, 142 N.H. 726, 729 (1998) (citing N.H. Const. pt. 1, Art. 16). For purposes of a double jeopardy analysis, "two charged offenses cannot be regarded as the same offense if they do not arise out of the same act or transaction." *State v. Carr*, 167 N.H. 264, 273 (2015).

"Double jeopardy concerns may arise in a variety of circumstances." *State v. Nickle*s, 144 N.H. 673, 676 (2000). "The most common [concerns] include: (1) the simultaneous prosecution of multiple charges, and (2) the subsequent prosecution of a charge involving the same underlying conduct previously prosecuted by the State." *Id.* (citations omitted). "The issue of double jeopardy presents a question of constitutional law, which [this Court will] review *de novo*." *State v. Ojo*, 166 N.H. 95, 98 (2014).

The petitioner has not been denied his constitutional protections against double jeopardy. According to the petitioner's brief, he has been charged in a juvenile petition with pattern sexual assaults in Rockingham County, PB7, and a single criminal act arising out of conduct in Merrimack County, PB7.[4] Even if the Rockingham County charges include the date of the Christmas 2018 offense, the Merrimack charge would not be prosecuted in Rockingham County because it occurred in Merrimack County. *See* N.H. Const. pt. 1, art. 17. It is easily distinguishable from the pattern charges in Rockingham County since the date is specific. *Cf. State v. Hannon*, 151 N.H. 708, 715 (2005) (upholding prosecutions for a pattern sexual assault charge and two discrete sexual assault charges).

Further, the possibility that the Merrimack charge could somehow become part of the Rockingham petition is easily solved by a pre-hearing motion *in limine*. The petitioner could simply point out that he is facing a criminal prosecution in Merrimack County and that considering that charge for purposes of evaluating the juvenile petition could expose him to double jeopardy. The relevant trial courts should resolve that issue in the first instance when it arises or is raised by defense counsel. Since neither court has resolved that issue yet, the claim of double jeopardy is simply premature.

On this record, the trial court did not err when it declined to quash the Merrimack County indictment on the basis that it exposed the petitioner to duplicate punishment.

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[4] The petitioner has not provided this Court with copies of the charging documents; however, the descriptions of them are fairly clear and sufficient for purposes of this appeal.

III. THE TRIAL COURT ACTED WITHIN ITS DISCRETION WHEN IT DENIED THE PETITIONERS MOTIONS TO QUASH AND MOTION FOR AN INTERLOCUTORY APPEAL BECAUSE THE ALLEGED OFFENSES ARE NOT SUBJECT TO THE RULE ON COMPULSORY JOINDER.

Finally, the petitioner contends that the trial court erred because these cases are subject to compulsory joinder. PB20.

In *State v. Locke*, 166 N.H. 344, 345 (2014), this Court adopted a "same criminal episode" test for the compulsory joinder of criminal offenses. As a general rule, "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." *State v. Glenn*, 167 N.H. 171, 176 (2014) (quoting Model Penal Code §1.07(2) (1985)).

Under Criminal Procedure Rule 20(a), joinder is appropriate when the offenses are related. *N.H. R. Crim. P.* 20(a)(1). Offenses are related if they: "[a]re alleged to have occurred during a single criminal episode;" "[c]onstitute parts of a common scheme or plan;" or "[a]re alleged to have occurred during separate criminal episodes, but nonetheless, are logically and factually connected in a manner that does not solely demonstrate that the accused has a propensity to engage in criminal conduct." *N.H. R. Crim. P.* 20(a)(1). "[N]o single factor is dispositive on the question of relatedness." *State v. Girard*, 173 N.H. 619, 624 (2020) (citation omitted). "Rather, they serve 'as guidelines that must be sensibly applied in accord with the purposes of joinder.'" *Id.*

Setting aside for the moment that the acts alleged did not occur so that jurisdiction resides in a single court, *see Locke*, 166 N.H. at 345, the acts in this case are clearly not part of the same criminal episode as they occurred at two different locations. The victim and the petitioner are, of course, common to all of the sexual assaults, but since the acts occurred in different locations, they are not part of the same episode.

The factor regarding "common plan or scheme" uses the considerations found in New Hampshire Rule of Evidence 404(b). *See State v. Brown*, 159 N.H. 547, 552 (2009). "The distinguishing characteristic of a common plan is the existence of a true plan in the defendant's mind, which includes the charged crimes as stages in the plan's execution." *State v. Breed*, 159 N.H. 61, 69 (2009) (citation omitted). "That a sequence of acts resembles a design when examined in retrospect is not enough; the prior conduct must be intertwined with what follows, such that the charged acts are mutually dependent." *Id.* There is nothing on the record that suggests that the charged acts were part of a "true plan" as opposed to crimes of opportunity. It seems unlikely, for example, that the petitioner planned the trip to Bow at Christmas 2018 in order to assault his younger cousin. Rather, it seems more likely that the family planned the visit in order to visit their family there.

Finally, adding the Bow assault to the pattern assaults brought in the Family Division Court might very well be open to challenge as propensity evidence. The victim is, to the State's knowledge, the common witness in both prosecutions and the crime in Bow is clearly a crime of opportunity. The court who tried these cases, if they were joined for a trial or hearing, as opposed to a global resolution, might very well conclude that the petitioner

assaulted the victim each time he had the chance, a conclusion which is very close to propensity, if not propensity itself. *See, e.g. State v. Davidson*, 163 N.H. 462, 471 (2012) (rejecting evidence that showed the "defendant's propensity toward certain action").

In short, the trial court did not commit error in denying the motions to quash and declining to recommend this case for an interlocutory appeal. The offenses are not subject to compulsory joinder. The petitioner may proceed as a juvenile in Rockingham County and as an adult in Merrimack County. This result is consistent with the rules and constitutional provisions in the State of New Hampshire. This Court should affirm the trial court's ruling.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State requests a fifteen-minute oral argument.

Respectfully Submitted,

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October 5, 2021

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CERTIFICATE OF COMPLIANCE

I, Elizabeth C. Woodcock, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 5,422 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

October 5, 2021 /s/*Elizabeth C. Woodcock*
Elizabeth C. Woodcock

CERTIFICATE OF SERVICE

I, Elizabeth C. Woodcock, hereby certify that a copy of the State's brief shall be served on Kirsten Wilson, Esquire, counsel for the petitioner, through the New Hampshire Supreme Court's electronic filing system.

October 5, 2021 /s/*Elizabeth C. Woodcock*
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