

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

No. 2021-0009

State of New Hampshire

v.

Ernesto Rivera

---

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

---

---

REPLY BRIEF FOR THE DEFENDANT

---

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

TABLE OF CONTENTS

|  | <u>Page</u> |
|--|-------------|
| Table of Authorities .....   | 3           |
| Question Presented .....   | 4           |
| Statement of the Case and Facts.....   | 5           |
| Argument   |             |
| I.    THE 2020 SENTENCING COURT ERRED<br>IN INCREASING RIVERA'S SENTENCES<br>ON TWO OF THE SFK DOCKET<br>CONVICTIONS ..... | 6           |
| Conclusion.....  | 8           |

TABLE OF AUTHORITIES

Page

**Cases**

|  |   |
|--|---|
| <u>State v. Cook,</u><br>158 N.H. 708 (2009) .....     | 6 |
| <u>State v. MacInnes,</u><br>151 N.H. 732 (2005) ..... | 6 |

**Rules**

|                                   |   |
|-----------------------------------|---|
| N.H. Supreme Court Rule 16-A..... | 6 |
|-----------------------------------|---|

## QUESTION PRESENTED

Whether the court erred by denying Rivera's request to vacate the sentences pronounced in 2020 in the San Francisco Kitchen (SFK) case.

Issue preserved by defense motion, the State's objection, the hearing on the motion, and the court's ruling. AD 29-45; A3-A157; V 3-16.\*

---

\* Citations to the record are as follows:

"DB" refers to the designated page of Rivera's opening brief;

"SB" refers to the designated page of the State's brief;

"AD" refers to the addendum attached to Rivera's opening brief, containing the order from which Rivera appeals;

"A" refers to the separate appendix to Rivera's opening brief, containing relevant pleadings;

"H1" refers to the transcript of a hearing held on October 9, 2015;

"H2" refers to the transcript of a hearing held on November 19, 2015;

"S" refers to the consecutively-paginated transcript of the sentencing hearing held over two days on January 2 and 9, 2020;

"V" refers to the transcript of the hearing on the motion to vacate sentence, held on October 19, 2020.

## STATEMENT OF THE CASE AND FACTS

In his opening brief, Rivera contended that the court in January 2020 erred in re-sentencing him on convictions entered in the SFK docket, to the extent that it increased those sentences. The brief supported that contention through a primary claim and a secondary or derivative claim. Both the primary and derivative claims were advanced in the Superior Court in a pleading filed in July 2020 and at a hearing in October 2020.

The primary claim asserted that the sentencing court in January 2020 lacked the authority to increase a valid sentence previously pronounced. The derivative claim asserted that, if such authority arose only because of the failure of Rivera's lawyer in January 2020 to object, that lawyer rendered ineffective assistance. By an order issued in December 2020, the Superior Court rejected both the primary and derivative claims on the merits. In the main, the order focused on the primary claim, and held that the re-sentencing court in 2020 had the authority to increase sentences in the SFK docket.

In its brief on appeal, the State proposes that this Court apply plain error review to Rivera's primary claim. SB 8. This reply brief responds to that argument.

I. THE 2020 SENTENCING COURT ERRED IN INCREASING RIVERA’S SENTENCES ON TWO OF THE SFK DOCKET CONVICTIONS.

The doctrine of plain error review authorizes this Court to decide on appeal arguments that are not preserved because they were not presented to the trial court. See, e.g., State v. MacInnes, 151 N.H. 732, 736-37 (2005) (noting then-recent adoption, in Supreme Court Rule 16-A, of plain error review and describing its elements). Supreme Court Rule 16-A provides that a “plain error that affects substantial rights may be considered even though it was not brought to the attention of the trial court or the supreme court.” Plain error review does not apply in circumstances in which the appellant raised the claim in the trial court. State v. Cook, 158 N.H. 708, 711 (2009) (plain error rule inapplicable as to issues that were preserved in trial court).

Therefore, plain error review does not apply here because the claims Rivera advances on appeal were preserved. They were raised in the Superior Court and decided on the merits by that court in its December 2020 order. AD 29-45. That court did not reject Rivera’s primary claim on the grounds of untimeliness or lack of preservation. Rather, the court upheld the January 2020 sentences, finding that it had the authority to issue them.

To the extent that the December 2020 order relied on the defense’s consent in January 2020 to resentencing on the

SFK convictions, that circumstance gives rise to Rivera's secondary claim, alleging ineffective assistance of counsel. That claim also was raised and addressed on the merits in the December 2020 order. Plain error review accordingly does not apply.

CONCLUSION

WHEREFORE, for the reasons stated above as well as those given in his opening brief and those to be offered at oral argument, Mr. Rivera requests that this Court vacate the sentences for simple possession and criminal threatening, and remand for re-sentencing on those convictions.

This brief complies with the applicable word limitation and contains fewer than 700 words.

Respectfully submitted,

*/s/ Christopher M. Johnson*

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

CERTIFICATE OF SERVICE

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

*/s/ Christopher M. Johnson*

\_\_\_\_\_  
Christopher M. Johnson

DATED: March 18, 2022