STATE OF NEW HAMPSHIRE

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STATE OF NEW HAMPSHIRE

v.

JESSE T. BROOKS

09-S-319, 08-S-579, 07-S-2885

DEFENDANT'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF UNRELATED EVENTS

Defendant Jesse T. Brooks, by and through counsel, hereby moves in limine under N.H. Rules of Evidence 401, 403, and 404(b) for an order excluding from trial in this matter certain putative evidence regarding acts of Mr. Brooks that are entirely unrelated to the crime with which he is charged. The discovery that the State has produced in this case to date suggests that the State has undertaken a wide-ranging investigation of the life and background of Mr. Brooks. The State's witness lists suggest that the State intends to put much of that life and background on trial in this case. Yet, much of the State's putative evidence constitutes classically irrelevant or improper character and propensity evidence. Such evidence includes evidence regarding Mr. Brooks' prior involvement in unrelated legal proceedings, evidence regarding unrelated events in Mr. Brooks' life that long predate the conspiracy alleged in this case, evidence of illicit drug possession and use, evidence of firearms possession by Mr. Brooks, and evidence regarding Mr. Brooks' conduct during his pretrial detention. Mr. Brooks submits that such evidence must be excluded from trial in this matter.

Of course, the State has an affirmative obligation to notify Mr. Brooks of its intent to "offer at trial ... evidence of other crimes, wrongs or acts committed by the defendant." See Superior Ct. R. 98(A)(v). Counsel for Mr. Brooks recognize that, where the State has not

provided the Rule 98 notice of its intent to offer such evidence at trial, nor conferred with counsel for Mr. Brooks regarding such intent, it may be appropriate to delay ruling on the issues raised herein until the record is more fully developed. However, as set forth below, Mr. Brooks submits that the evidence cited herein could serve no valid purpose in the State's case at trial under Rules 401, 403, or 404(b), and therefore believes it appropriate to address that evidence in the present Motion.

In further support of this Motion, Mr. Brooks states as follows:

1. Mr. Brooks, who is 32 years old, is charged with one count of conspiracy to commit murder in connection with the death of Jack Reid, Sr. in Deerfield on June 27, 2005.[1] Unlike in the cases of his co-defendants, there has been no allegation in this case that Mr. Brooks was in New Hampshire, let alone in Deerfield, on that date. The entire span of the charged conspiracy is alleged, in the most recent indictment (09-S-319), to be from September 30, 2003 to August 31, 2005.

2. Mr. Brooks was initially arraigned on a criminal complaint in this case in February 2007. Since then, the State has produced a substantial amount of discovery related to its investigation concerning Mr. Brooks and his co-defendants. That discovery indicates that the State's investigation has reached well beyond both the alleged timeframe and details of the crime with which Mr. Brooks had been charged. More specifically, it includes materials regarding multiple events in the life of Mr. Brooks that have nothing to do with the conspiracy to murder alleged in the indictment.

[1] Mr. Brooks has been charged with one count of conspiracy to commit murder in three different indictments, each of which is still pending. The State has represented that the third indictment is intended to supersede the previous two.

3. On July 1, 2009, the State filed its witness list in the case. That list identifies 184 individuals as potential witnesses at trial in this matter. The State filed a supplemental witness list on July 24, 2009. That supplemental list identifies 194 potential witnesses.

4. The State's witness lists suggest that the State intends to present evidence at trial regarding many of the purported events in the life of Mr. Brooks addressed in the State's discovery that are entirely unrelated to the charges in this case. The lists include multiple individuals whose only potential significance is to present testimony regarding events in Mr. Brooks' life that should be excluded under the Rules of Evidence.

5. It is, of course, a basic necessity that evidence be relevant to be admissible. See N.H. R. Evid. 402. Even relevant evidence, however, "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." N.H. R. Evid. 403. "The danger of unfair prejudice bears directly upon the fairness of the trial and the integrity of the system." State v. Pelkey, 145 N.H. 133, 136 (2000) (quotation and citation omitted). Hence the test under Rule 403, like that required under Rule 404(b), is intended to preclude evidence if "its primary purpose or effect is to appeal to a jury's sympathies, arouse its sense of horror, provoke its instinct to punish, or trigger other mainsprings of human action that may cause a jury to base its decision on something other than the established propositions in the case." State v. McGlew, 139 N.H. 505, 510 (1995) (quoting State v. Bruyette, 604 A.2d 1270, 1274 (Vt. 1992)).

6. Rule 404(b), moreover, states that "[e]vidence of other crimes, wrongs, or acts is inadmissible to prove the character of a person in order to show that the person acted in conformity therewith." N.H. R. Evid. 404(b). To be admissible under Rule 404(b), "(1) the evidence must be relevant for a purpose other than proving the defendant's character or

disposition; (2) there must be clear proof that the defendant committed the act; and (3) the probative value of the evidence must not be substantially outweighed by its prejudice to the defendant." State v. Kim, 153 N.H. 322, 326 (2006).[2]

7. "The purpose of Rule 404(b) is to ensure that the defendant is tried on the merits of the crime as charged and to prevent a conviction based upon evidence of other crimes or wrongs." Kim, 153 N.H. at 326. The State has the burden "to specify the purpose for which the evidence is offered and articulate the precise chain of reasoning by which the offered evidence will tend to prove or disprove an issue actually in dispute, without relying upon forbidden inferences of predisposition, character, or propensity." Id. at 327.

8. Although Mr. Brooks has received no notice from the State regarding its intent to meet this burden as to any particular evidence, certain evidence that the State appears ready to offer at trial has no conceivably valid affirmative purpose in this case. Applying the requirements of Rules 401, 403, and 404(b) to the State's discovery and witness lists, there are, as set forth below, at least several categories of evidence that should properly be excluded from trial in this matter.[3]

9. None of this evidence is relevant to proof of the crime with which Mr. Brooks has been charged. See Rule 402. To the extent that such evidence constitutes evidence of bad character or propensity, it must be excluded under Rule 404(b). On the other hand, to the extent that such evidence is relevant and beyond the scope of Rule 404(b), any probative value that it

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[2] The analyses required for evidence under Rules 401 and 403 are incorporated into the requisite analysis under Rule 404(b). See State v. Watkins, 148 N.H. 760, 767 (2002) ("Because the first and third prongs of [the Rule 404(b)] test entail determinations of relevance and probative value versus prejudice, we need not separately address the defendant's contentions [under] Rules 401 (relevance) and 403 (probative value substantially outweighed by danger of, among other things, prejudice).").

[3] As indicated by the examples cited, these categories overlap and some evidence may fit into more than one category.

may have is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. See Rule 403.

Prior Legal Proceedings

10. The State's discovery and witness list indicate that the State intends to present evidence at trial of Mr. Brooks' prior involvement in legal proceedings unrelated to this case. These include Mr. Brooks' 2005 arrest and misdemeanor conviction in Nevada for possession of a concealed weapon (see Bates Nos. 22188-89).

11. Evidence of Mr. Brooks' involvement in previous, unrelated legal proceedings, such as his misdemeanor conviction in Nevada, is certainly not relevant to proof of his involvement in the conspiracy with which he is charged. See Rules 401, 404(b). Moreover, such evidence is classic bad character or propensity evidence subject to exclusion under Rule 404(b).

12. A prior conviction need not be "for a particularly 'odious or provocative' act" to be properly excluded under Rule 404(b). State v. Watkins, 148 N.H. 760, 767-68 (2002) (citation omitted). The New Hampshire Supreme Court has "recognized that unfair prejudice is inherent in evidence of ... prior convictions." Id. (reversing under Rule 404(b) admission of evidence of prior conviction).[4] Moreover, the inherent unfair prejudice of evidence of Mr. Brooks' involvement in prior, unrelated legal proceedings is not counterbalanced by any probative value of such evidence in this case. Hence, the court should exclude such evidence from trial in this matter.

[4] If Mr. Brooks testifies at trial, his misdemeanor conviction in Nevada would still be inadmissible even for impeachment purposes under Rule 609 because it is not a crime "punishable by ... imprisonment in excess of one year under the law under which [Mr. Brooks] was convicted." See Rule 609(a); see also Clark County (Nev.) Code 12.04.180, 12.04.220.

Outdated Conduct

13. The State's discovery and witness list also indicate the State's intent to put in evidence testimony regarding conduct by Mr. Brooks that is both unrelated to the conspiracy charged and that occurred years before that conspiracy allegedly began (in September 2003). For example, the State's discovery includes reports regarding a putative fight in June 1996—seven years before the conspiracy alleged in this case, when Mr. Brooks was 19 years old—that involved Mr. Brooks and David Nadeau (see Bates Nos. 21658-62, 22675). Mr. Nadeau, whose 2007 statement to the N.H. State Police in connection with the investigation in this case focused entirely on the 1996 incident (22675), is on the State's witness list. The State's discovery also includes police reports regarding a purported December 1996 incident in which Daniel Nadeau and Danielle Wescott reported that Mr. Brooks had pointed a gun at them (see Bates Nos. 21654-57). Daniel Nadeau and Danielle Wescott (now Danielle Nadeau) gave statements to the N.H. State Police in 2007 regarding this incident (22670-71), and both are on the State's witness list.

14. Likewise, the State's discovery includes a 2007 statement and a 2008 statement to the N.H. State Police by Jason L'Etoile regarding a fight that he was involved in with Mr. Brooks when both were still in high school (Bates Nos. 14202, 24144-45). According to Mr. L'Etoile, therefore, the fight occurred at least eight years before the conspiracy charged in this case is alleged to have begun. Yet, Mr. L'Etoile is also on the State's witness list.

15. To meet the "first prong" relevancy requirement of Rule 404(b), a prior act cannot be "so remote in time as to eliminate the nexus" between that act and the "material events constituting the crime charged." Kim, 153 N.H. at 327. None of these acts that the State appears

prepared to offer in evidence meets that temporal element of relevance. See id.;[5] see also McGlew, 139 N.H. at 507 (reversing under Rule 404(b) trial court's admission of testimony regarding separate offense that had "occurred six years prior to the charged act"). Nor do they have any other relevance, for any valid purpose, to the crime charged. Cf. State v. Sawtell, 152 N.H. 177, 182 (2005) (noting that "evidence of prior assaults was admissible [under Rule 404(b)] because the prior conduct involved the same victim, a similar weapon, and occurred in a like circumstance," and therefore constituted valid evidence of intent). Finally, the unfair prejudice to Mr. Brooks of evidence regarding these events substantially outweighs any probative value that they might have. As evidence of bad character or propensity, they are therefore inadmissible under Rule 404(b).

16. In the trial of co-defendant John "Jay" Brooks, the court (Lynn, C.J.) precluded essentially this same evidence during the guilt phase of the case. The State had moved in limine to admit certain "bad acts" evidence, which included testimony from the Nadeau family and from Jason L'Etoille related to the events described herein. See State's Motion in Limine to Admit Evidence of Other Bad Acts of Defendant, State v. John A. Brooks, Superior Court (Rockingham County) Nos. 07-S-1028-1031 (June 2, 2008), at 5-7. The court denied the State's motion, concluding that the proffered evidence had "no relevancy for any proper purpose specified" in Rule 404(b). See Order on Motions in Limine, State v. John A. Brooks (July 8, 2008), at 1.

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[5] In Kim, the court affirmed admission of evidence of defendant's "financial decline" in the years preceding the crime charged as relevant evidence of defendant's motive and thus "for purposes other than bad character and propensity under Rule 404(b)." See 153 N.H. at 327-30.

Drug Possession & Use

17. The State's discovery includes statements to the N.H. State Police during its investigation in this case by several individuals who reference illicit drug possession and/or use by Mr. Brooks. Although many of these statements include nothing relevant to proving Mr. Brooks guilty of the conspiracy with which he has been charged—and, at least in some instances, do not even provide a timeframe for the drug possession or drug use referenced—the individuals who made those statements appear on the State's witness list (see, e.g., Bates Nos. 21617 (Shane Collins), 21605-06 (Wesley Wright), 22676 (Andrea Swanson), 14196-97 (Mike Small)).[6]

18. Such evidence, especially without any referential timeframe, is simply irrelevant character or propensity evidence. Cf. State v. Glodgett, 148 N.H. 577, 579-80 (2002) (prior drug and alcohol use by defendant admissible as evidence of *plan* to use alcohol and drugs to lure sexual assault victim to defendant's trailer). Admission of such evidence in this case would be severely prejudicial to Mr. Brooks with little or no corresponding probative value. See Pelkey, 145 N.H. at 136-37 (citing "extreme" potential prejudice and limited probative value of evidence that defendant was drug dealer in case of driving while intoxicated). It would thus serve no valid purpose at trial and should be excluded.

Firearms Possession

19. The State's discovery and witness list also suggest an intent to introduce evidence of Mr. Brooks' possession of firearms at various times in the years before the conspiracy alleged. For example, Mr. Brooks purportedly once appeared with a handgun at a neighborhood party, the date of which is not evident, at the home of his parents' neighbors in Derry (see, e.g., Bates Nos.

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[6] In other instances, potential witnesses for the State reference illicit drug use or possession by Mr. Brooks that occurred years before the conspiracy charged and that would, therefore, also be temporally irrelevant (see, e.g., Bates Nos. 22506, 22519 (Benton)).

14221-22, 7715-16). Also, in 2003, Mr. Brooks reportedly turned over to the Manchester Police Department a rifle that he kept in his car after contacting law enforcement regarding concerns for his safety and reporting that he had the rifle in his car. The Manchester Police Department reportedly took possession of the rifle for safekeeping (see Bates Nos. 23840-44). Mr. Brooks had valid firearms licenses for approximately a decade until 2005.

20. Witnesses regarding each of these events appear on the State's witness list (Duval, Sweeney, Manchester Police Lt. Matthew Larochelle and Officer Anthony Battistelli). As with the other acts cited above, however, evidence of these events could serve no proper purpose in the State's case at trial. Moreover, there is not even an allegation that a firearm was used by anyone in causing the death of Mr. Reid, nor that Mr. Brooks provided a firearm—or, for that matter, any weapon—to anyone in connection with the death of Mr. Reid. The events described are irrelevant to the crime charged, would be substantially prejudicial to Mr. Brooks if admitted in evidence, and have little or no probative value. Cf. State v. Newcomb, 140 N.H. 72, 76 (1995) (evidence of prior use by defendant of particular firearm was admissible to show defendant's possession of murder weapon). Evidence of these acts is simply irrelevant bad character and propensity evidence that must be excluded.

Pretrial Detention Conduct

21. As the Court is aware from the pleadings and arguments related to Defendant's Motion for Release on Bail Pending Trial (Jan. 26, 2009), the State has previously alleged—with no proof—that Mr. Brooks has engaged in substantial and repeated misconduct while in pretrial detention in this case. See Supp. to State's Obj. to Def.'s Motion for Release on Bail (Mar. 5, 2009) ¶ 5 (alleging Mr. Brooks' participation in planning an "inmate uprising that would involve the taking of correctional officers as hostages"). Although the State has yet to prove even that

Mr. Brooks has been subject to any disciplinary action as a result of such alleged conduct, the State apparently both has continued to pursue its investigation of Mr. Brooks' conduct during his 17 months of pretrial detention and is presently pursuing a theory that evidence of such conduct may somehow be admissible at trial.[7]

22. The State's witness lists include at least 11 corrections officers from the Rockingham and Hillsborough County Houses of Corrections. What valid and relevant testimony any such witnesses could possibly have to proof that Mr. Brooks is guilty of the conspiracy with which he is charged (which, of course, is alleged to have ended in 2005 approximately two-and-a-half years before Mr. Brooks' pretrial detention began in February 2008) is beyond defense counsel's comprehension. Evidence regarding Mr. Brooks' conduct during pretrial detention should be excluded from trial.

23. As noted above, counsel for Mr. Brooks has not yet received from the State notice of its intent to "offer at trial ... evidence of other crimes, wrongs or acts committed by the defendant." See Superior Ct. R. 98(A)(v). Mr. Brooks reserves the right to move in limine hereafter to exclude—and to object at trial to—any evidence that is properly subject to the restrictions of the Rules of Evidence, including Rule 404(b).

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[7] As described during the pendency of the Motion for Release on Bail, Mr. Brooks' alleged participation in planning a hostage-taking uprising purportedly occurred while Mr. Brooks was being housed at the Hillsborough County House of Corrections, from which Mr. Brooks was transferred to the Carroll County House of Corrections in September 2008—approximately eleven months ago. To date, the State has not proven this conduct. Moreover, as the Court may recall, at the time of Mr. Brooks' motion his record of actual disciplinary action during more than a year of pretrial detention was limited to confinement to his cell for one shift and loss of commissary use for one week both due to his receipt, on one occasion, of several commissary snack items from a departing inmate.

WHEREFORE, Defendant Jesse T. Brooks respectfully requests that this Honorable Court:

A. Schedule a hearing;

B. Allow this Motion in Limine;

C. Exclude from trial in this matter each of the categories of evidence cited herein; and;

D. Grant such other relief as is equitable and just

Respectfully submitted,
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Dated: August 3, 2009

Certificate of Service

I hereby certify that a copy of the foregoing was forwarded on this date, August 3, 2009, to all counsel of record by electronic mail and U.S. mail.

Peter D. Anderson