

COÖS, SS.

SUPERIOR COURT

State of New Hampshire

v.

Volodymyr Zhukovskyy

19-CR-078

2019 AUG 29 P 1:39  
SUPERIOR COURT

**MOTION TO STRIKE STATE'S RULE 404 (b) NOTICE**

NOW COMES the accused, Volodymyr Zhukovskyy, by and through counsel, Jay Duguay and Steve Mirkin, Esq., and respectfully moves this Honorable Court pursuant to the Fifth, Sixth and Fourteenth Amendments; to Part I, Article 15 of the New Hampshire Constitution; to Rule of Criminal Procedure 12 (b)(1)(F); and to New Hampshire Rule of Evidence 404 (b), to strike the State's purported Notice dated August 16, 2019. As grounds for such Motion, the accused states as follows:

1. He is charged with seven counts of Negligent Homicide, arising from a collision occurring on June 21, 2019, and for which he was arrested on June 24, 2019. He has not yet been indicted, but is being detained pending trial in the Coös County House of Corrections.
2. On or about August 16, 2019, the State forwarded to defense counsel a letter (copy attached and incorporated by reference herein) citing Rule 12(b)(1), asserting the State's intent "to introduce evidence at trial relevant to the defendant's motive, intent, opportunity, plan, knowledge, identity, absence of mistake or accident, and state of mind, to include evidence of the following:
  - The defendant's prior conviction for possession of controlled drugs;
  - The defendant's driving record;

- The defendant's driving history, to include any motor vehicle crashes in which he was involved;
  - Videos of the defendant driving, taken by the defendant or others;
  - The defendant's own statements, to the extent that they discuss his past drug use and drug use the day of the crash;
  - The defendant's own statements, to the extent they discuss his prior driving record, or motor vehicle crashes in which he was involved;
  - Statements made by others, to include family members, acquaintances, and unrelated witnesses, to the extent that they discuss his past drug use and drug use the day of the crash;
  - Statements made by others, to include family members, acquaintances, and unrelated witnesses, to the extent they discuss his prior driving record, or motor vehicle crashes in which he was involved;
  - The defendant's multiple recorded jail calls."
3. The defense respectfully submits that the above-quoted "notice" is insufficient under the Rule, largely unsupported by discovery provided thus far, and largely beyond the acceptable scope of Rule 404 (b).
4. Rule 12 (b)(1)(F) of the Rules of Criminal Procedure requires the State to provide, within 45 days of the entry of a Not Guilty plea, "[n]otification of the State's intention to offer at trial pursuant to Rule of Evidence 404(b) evidence of other crimes, wrongs, or acts committed by the defendant, as well as copies of or access to all statements, reports or other materials that the State will rely on to prove the commission of such other crimes, wrongs or acts."
5. N.H. Rule of Evidence 404(b) states as follows:
- "Other Crimes, Wrongs, or Acts.**
- (1)** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
- (2)** Evidence of other crimes, wrongs or acts is admissible under this subsection only if:
- (A)** it is relevant for a purpose other than proving the person's character or disposition;

(B) there is clear proof, meaning that there is sufficient evidence to support a finding by the fact-finder that the other crimes, wrongs or acts occurred and that the person committed them; and

(C) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.”

6. The New Hampshire Supreme Court “has warned against the mechanical recitation of intent, or other permissible Rule 404(b) grounds, ‘as the password for admissibility.’ The rule requires more.” State v. McGlew, 139 NH 505, 508 (1995), quoting State v. Hastings, 137 N.H. 601, 606 (1993); see State v. Davidson, 163 NH 462, 469 (2012).
7. The Court in *McGlew* went on to quote with approval the following language from the Supreme Court of Michigan in People v. Golochowicz, 319 N.W. 2d 518, 523-24 (Mich. 1982): “Experience in the trial courtroom and review of trial records on appeal suggest rather incontrovertibly that, when asked by the trial judge to specify the grounds for admission of similar-acts evidence, prosecutors often loose a ‘shotgun’ fusillade of reasons which typically include most, if not all, of the purposes named in the statute. Such a response hints, of course, if it does not demonstrate, that the prosecutor . . . is unclear as to precisely why the evidence is or is not admissible.” That, of course, is precisely what the State has done in its Notice herein.
8. The Supreme Court has laid out with precision what must be shown, and why, before evidence of other alleged “crimes, wrongs or acts” may be introduced against an accused:

“The purpose of Rule 404(b) in a criminal trial is to ensure that the defendant is tried on the merits of the crime as charged and to prevent a conviction based on evidence of other crimes or wrongs.’ *McGlew*, 139 N.H. at 509 (quotations omitted). ‘The concern that a defendant

might be convicted because of his character is the gravamen of Rule 404(b).’ *Id.* Thus, in order for evidence to be admissible under Rule 404(b), it ‘must be relevant for a purpose other than proving the defendant’s character or disposition; there must be clear proof that the defendant committed the act; and the probative value of the evidence must not be substantially outweighed by its prejudice to the defendant.’ *Id.* at 507.” State v. Davidson, *supra*, 163 NH 462, 469 (2012).

9. In its Notice herein, the State has not identified an acceptable purpose for such evidence beyond “proving [his] character or disposition.” “To meet the relevancy requirement, the other bad acts evidence must have some **direct bearing** on an issue **actually in dispute**, and there must be a **clear connection** between the particular evidentiary purpose, as articulated to the trial court, and the other bad acts.” *Davidson, supra* at 469, quoting State v. Kirsch, 139 N.H. 647, 654 (1995) (emphasis added). “To admit evidence over a defendant’s Rule 404(b) objection, ‘the State is required to state the **specific 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.’ *Davidson, Id.*, quoting State v. Glodgett, 144 N.H. 687, 690 (2000) (emphasis added).
10. As to the second part of the test for admissibility as stated in *McGlew* and *Davidson, supra*, the State must show that there is clear proof the defendant committed each such act. Although it is still early in the discovery process, the defense submits that as to many of the items referenced in its “notice”, the State has not yet produced any evidence supporting same. The accused cannot be

held to respond with any more specificity to the State's notice of intent to introduce Rule 404(b) evidence without being provided with the evidence itself.

11. Additionally, as to any such evidence which the State may at some point identify as having an acceptable purpose under Rule 404(b), it is still incumbent on the State to establish that the probative value of such evidence is not substantially outweighed by the danger of unfair prejudice to him; *see* Rule of Evidence 403.
12. The proponent of purported Rule 404(b) evidence has the burden of establishing that such evidence is admissible under the three-part test identified by *McGlew. State v. Ellsworth*, 142 NH 710, 716 (1998). Unless and until the State complies with its obligations under Rule of Criminal Procedure 12(b)(1)(F) and Rule of Evidence 404(b), the defense has no choice but to object to any and all attempts to introduce such evidence. Accordingly, the accused respectfully moves to strike the "notice" submitted by the State herein.

WHEREFORE, the accused respectfully prays the Court:

- A) To strike the State's Notice dated August 16, 2019;
- B) Alternatively, to preserve his objection to any and all the prospective evidence referenced in such Notice pending specific notice by the State as to (1) the specific proposed purpose for such evidence; (2) clear proof of same; and (3) that such evidence is of sufficient probative value so as not to unfairly prejudice the accused; and
- C) For such further relief as may be just.

Respectfully submitted,



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Steve Mirkin, Esq., Bar ID# 1771  
New Hampshire Public Defender  
485 NH Route 10  
Orford, NH 03777  
(603) 353-4440

Jay Duguay, Esq., Bar ID# 20347  
New Hampshire Public Defender  
134 Main St., Third Floor  
Littleton, NH 03561

(603) 444-1185

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been forwarded this 27<sup>th</sup> day of August, 2019, to John G. McCormack, Esq., Coos County Attorney; Benjamin W. Maki, Esq., Traffic Safety Resource Prosecutor; and Shane Goudas, Esq., Assistant Attorney General.



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Steve Mirkin, Esq.

# Office of the Coös County Attorney

55 SCHOOL STREET, SUITE 141, LANCASTER, NH 03584

*John G. McCormick*  
County Attorney

*Jessica L. Cain*  
Assistant County Attorney

*Scott J. Whitaker*  
Assistant County Attorney

*Christine Brann*  
Victim / Witness Coordinator



County Attorney  
TEL. 603-788-5559

Victim / Witness Coordinator  
TEL. 603-788-3812

FAX 603-788-5560

August 16, 2019

## VIA EMAIL & FIRST-CLASS MAIL

Jay Duguay, Esquire  
New Hampshire Public Defender  
134 Main Street  
Littleton, NH 03561

Re: State v. Volodymyr Zhukovskyy

Dear Attorney Duguay:

In accordance with the Superior Court Rule 12(b)(1), we are notifying you that we intend to introduce evidence at trial relevant to the defendant's motive, intent, opportunity, plan, knowledge, identity, absence of mistake or accident, and state of mind, to include evidence of the following:

- The defendant's prior conviction for possession of controlled drugs;
- The defendant's driving record;
- The defendant's driving history, to include any motor vehicle crashes in which he was involved;
- Videos of the defendant driving, taken by the defendant or others;
- The defendant's own statements, to the extent that they discuss his past drug use and drug use the day of the crash;
- The defendant's own statements, to the extent they discuss his prior driving record, or motor vehicle crashes in which he was involved;
- Statements made by others, to include family members, acquaintances, and unrelated witnesses, to the extent that they discuss his past drug use and drug use the day of the crash;
- Statements made by others to include family members, acquaintances, and unrelated witnesses, to the extent they discuss his prior driving record, or motor vehicle crashes in which he was involved;
- The defendant's multiple recorded jail calls.

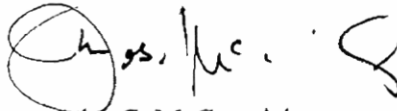
Attorney Jay Duguay

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While the State may not consider all of these as Rule 404(b) evidence, to the extent the defense does we are providing notice of the State's possible use of this evidence at trial.

If you have any questions about this, please let me know.

Sincerely,

A handwritten signature in black ink, appearing to read "John G. McCormick". The signature is stylized with a large initial "J" and "M".

John G. McCormick  
Coos County Attorney  
Bar No. 16183

Cc: Benjamin W. Maki, Esq.  
Traffic Safety Resource Prosecutor  
New Hampshire Department of Justice  
(603) 271-3671

Shane Goudas, Esq.  
NH Attorney General  
New Hampshire Department of Justice  
33 Capitol Street  
Concord, NH 03301