

THE STATE OF NEW HAMPSHIRE

Coos County, ss.

March Term, 2021

STATE OF NEW HAMPSHIRE

v.

214-19-CR-78

Volodymyr Zhukovskyy

NOTICE OF CONFLICT RESOLUTION
AND REQUEST TO APPOINT CONFLICT COUNSEL

The New Hampshire Public Defender (NHPD), by and through counsel, Mary B Hawkes, respectfully requests that this Honorable Court take notice that NHPD has appropriately determined that no actual conflict of interest exists in the present case.

In support of this Motion, it is stated:

1. Mr Zhukovskyy is charged with 7 counts of Negligent Homicide.
2. He is represented by NHPD attorneys Jay Duguay and Steve Mirkin.
3. Trial is scheduled for June 2021.
4. Attorney Duguay has been lead counsel on this case since June of 2019 and has invested such a significant amount of time on Mr. Zhukovskyy's defense that he is essentially irreplaceable.
5. While representing Mr. Zhukovskyy, Attorney Duguay was assigned the case of a client named Joseph Darwazeh.
6. Attorney Duguay negotiated a plea that would resolve the matter to Mr. Darwazeh's satisfaction. A Notice of Intent to Plea and an Acknowledgement and Waiver of Rights were filed by Attorney Duguay. Prior to the plea being entered and the matter being concluded, Mr. Darwazeh told Attorney Duguay that he had spoken to the state police about Mr. Zhukovskyy's case. Attorney Duguay immediately terminated the conversation and withdrew from Mr. Darwazeh's case.
7. Mr. Darwazeh's case was transferred to the then Managing Attorney, Melissa Davis. After conferring with the prosecutor it did not appear to Attorney Davis that Mr. Darwazeh was likely to be a witness in Mr. Zhukovskyy's case, nor was there any re-negotiation of the terms of his plea agreement. Attorney Davis closed the case upon the Court's acceptance of his plea and entry of a conviction.

Granted

/s/ Peter H. Bornstein
Honorable Peter H. Bornstein
March 26, 2021

Clerk's Notice of Decision
Document Sent to Parties
on 03/29/2021

8. Attorney Davis later left NHPD for a new position at the UNH Law School. She has never discussed any information about Mr. Darwazeh with Attorney Duguay or Attorney Mirkin.
9. The NHPD conflict policy directs attorneys to submit a list of “true witnesses” to a conflict neutral. The conflict neutral then makes sure that there are no potential conflicts of interest. Typically, especially in more serious cases, there are hundreds of witnesses mentioned in discovery. Usually, the number of those who become actual trial witnesses in very small, or a case may reach a negotiated resolution, so NHPD does not want to unnecessarily withdraw from (and find contract counsel at additional expense) every case that has a potential conflict at an early stage. For this reason, NHPD policy asks that Attorneys only file conflict forms on true, or likely, witnesses.
10. Attorney Mary Hawkes, the conflict neutral on this case for NHPD, has been in touch with the State about the potential witnesses in Mr. Zhukovsky’s case. This is not uncommon in cases of this size and seriousness, as NHPD tries to narrow down the list of true witnesses from the many names mentioned in discovery.
11. The State has been cooperative in trying to narrow the possible witness list. With regard to Mr. Darwazeh, they were unable to say whether he would be on their trial witness list until March 17, 2021, when they confirmed that he would be on the list.
12. Because Mr. Darwazeh is now a true witness, NHPD has taken steps to resolve the Attorney Duguay’s potential conflict in order to be able to continue representing Mr. Zhukovskyy.
13. Joseph Darwazeh currently has no open cases with NHPD and NHPD will not accept any new cases with him until Mr. Zhukovskyy’s cases are resolved. All of Mr. Darwazeh’s NHPD cases are “sealed”. This means that no NHPD attorneys other than conflict neutrals can access these files.
14. Co-counsel Attorney Mirkin alone will do all preparation work with regard to Mr. Darwazeh as a possible state’s witness. If Mr. Darwazeh takes the stand at trial, Attorney Duguay will be absent from the Court room and Attorney Mirkin will conduct the cross-examination. Attorney Mirkin does not have a possible conflict with regard to Mr. Darwazeh- he never represented Mr. Darwazeh, does not have any client confidential information about him, and has never spoken with Attorney Duguay about him.
15. NHPD’s conflict of interest policy generally requires attorneys who have previously provided representation to a witness to withdraw from a case because of a potential conflict of interest. It also requires the neutrals who resolve the conflicts to take into consideration the harm to a client that could be caused by withdrawal; in Mr.

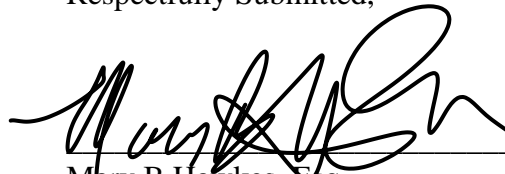
Zhukovskyy's case, the harm of an NHPD withdrawal at this stage would be enormous. NHPD also has been directed to look carefully at each individual case when making conflict determinations in an effort to increase efficiency and decrease the frequency of sending large cases to contract counsel.

16. In this case, precautions have been taken, and will continue to be taken, in order to ensure that there is not an actual conflict going forward.
17. In an abundance of caution, NHPD requests that this court appoint independent counsel to Mr. Zhukovskyy for the purpose of advising him regarding the steps NHPD took, and will continue to take, to resolve the potential conflict. Although we can not know yet whether Mr. Darwazeh will actually testify at trial, it is prudent to take these steps now in order to avoid any complications or delays at trial.

WHEREFORE, New Hampshire Public Defender respectfully requests that this Honorable Court:

- a) Take notice of the appropriate resolution of the described potential conflict by NHPD; and
- b) Appoint Attorney Joseph Garrison to advise Mr. Zhukovskyy in this matter and obtain a waiver of conflict if necessary.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I, Mary B Hawkes, hereby certify that a copy of the forgoing Motion has been forwarded this 24th day of March, 2021 to Benjamin Maki, Office of Attorney General, and John McCormick, Coos County Attorney's office.

