

THE STATE OF NEW HAMPSHIRE

COOS, SS.

SUPERIOR COURT

STATE

V.

VOLODYMYR ZHUKOVSKYY

214-2019-CR-78

OBJECTION TO STATE'S MOTION IN LIMINE #1

NOW COMES the Defendant, Volodymyr Zhukovskyy, by and through counsel, Jay Duguay and Steve Mirkin, Public Defenders, and objects to the State's Motion in Limine #1 relative to prior instances of conduct while driving.

In support of this objection, the following is stated:

Facts

June 3, 2019 Accident in Baytown, TX

1. While operating a commercial tractor-trailer style truck carrying five cars on Highway 10 in Baytown, Texas, Mr. Zhukovskyy was involved in a motor vehicle accident.
2. The accident occurred when a vehicle cut in front of Mr. Zhukovskyy's fully loaded truck. Mr. Zhukovskyy took evasive action and was able to successfully avoid a collision

with the car. In order to avoid the collision, Mr. Zhukovskyy had to swerve off of the roadway and was unable maintain control of the truck causing a rollover accident.

3. The accident was investigated by Baytown Police Officer Jack Mueller.
4. According to the investigation report, Off. Mueller found that impairment was not a factor in the accident. He also found that driver inattention was not a factor in the accident.
5. Mr. Zhukovskyy was never charged with any offense related to the motor vehicle accident.
6. On June 24, 2019, Mr. Zhukovskyy was interviewed by investigators from the NH State Police. During that interview Mr. Zhukovskyy discussed his drug use and briefly discussed the accident in Baytown, Texas.
7. At no point during the interview did Mr. Zhukovskyy suggest that at the time of the Baytown accident he was using drugs.
8. To the contrary, he asserted that while on the road for FBI Express he did not use drugs, and that when driving a big truck he was not using.

June 15, 2013 DUI in Westfield, MA

9. On June 15, 2013, Mr. Zhukovskyy was arrested for DUI in Westfield, MA after he was involved in a motor vehicle accident.
10. An officer who responded to the scene reports that Mr. Zhukovskyy smelled of an alcoholic beverage, was unsteady on his feet, his speech was slurred, he had much difficulty following instructions, and was frantically pacing back and forth.

11. Prior to the arrest Mr. Zhukovskyy performed standardized field sobriety tests including the horizontal gaze nystagmus test, the one leg stand, and the walk and turn. According to the officer, he failed all three tests.
12. After his arrest Mr. Zhukovskyy submitted to a breath alcohol test that showed a .146 BAC.

LEGAL ANALYSIS

13. Evidence of other crimes, wrongs, or acts committed by a criminal defendant are inadmissible unless such evidence is relevant for some purpose other than to show the defendant's propensity or character. N.H. R. Ev. 404(b).
 14. In order to be admissible, the proponent of the evidence must establish "(1) that the evidence is relevant for a purpose other than character or disposition; (2) that there is clear proof that the defendant committed the prior act; and (3) that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice to the defendant." State v. Roy, 167 N.H. 276, 287(2015) (internal quotation marks omitted)."
 15. In order to meet its burden under the first prong [of Rule 404(b)], the State is required 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." State v. Kim, 153 N.H. 322, 328(2006).
 16. Applying this framework, this Court should deny the State's Motion *in Limine* and exclude the evidence requested by the State.
- I. The Defendant's June 3, 2019 crash in Baytown, Texas is not admissible under Rule 404(b) because it lacks a logical or factual connection to any issue actually in dispute, there is no clear proof that the accident was related to inattention, and the negligible probative value is substantially outweighed by the danger of unfair prejudice.**

A. The Baytown crash is not relevant because it lacks a precise chain of reasoning by which it would prove or disprove an issue actually in dispute.

17. The State argues that the defendant's June 3, 2019 crash is relevant for the purpose of showing he knew and was aware of the risks involved in driving a commercial truck and trailer, and that his personal knowledge is beyond that which would be expected of the average driver. The state further suggests that this knowledge is relevant to prove the defendant's subjective awareness of the substantial and unjustifiable risk posed by his conduct.

18. The State did not, however, articulate the precise chain of reasoning which would establish this relevance. The State's motion suggests in the paragraph heading for section I. A. that the issue of driver inattention provides the logical link between the Baytown accident and the mental state at issue in this case, but they fail to detail in the ensuing paragraphs how exactly that is true.

19. The State's claims that the Baytown crash demonstrates Mr. Zhukovskyy's awareness of the risk of involved with inattention while driving a commercial vehicle is belied by the facts of the accident itself. Specifically, the investigation of the Baytown accident determined that it was not related to driver inattention. Additionally, it was never determined that Mr. Zhukovskyy was at fault for the Baytown accident.

20. An accident unrelated to inattention for which Mr. Zhukovskyy was not at fault could not possibly be relevant to prove Mr. Zhukovskyy's knowledge of the dangers of inattention. No such logical chain of reasoning exists.

B. Although there is clear proof the defendant was involved in the June 3, 2019 crash in Texas, no such proof exists for the facts the state relies on to establish its relevance.

21. Mr. Zhukovskyy does not contest that he was involved in an accident on June 3, in Baytown, Texas, however that alone is not sufficient to establish relevancy of the evidence. The State relies on the additional assertion that the accident was related to driver inattention in order to establish its relevancy.

22. There is no proof that inattention was a factor and the state as offered none in support of its claim.

C. Any negligible probative value of the Baytown accident is substantially outweighed by the risk of unfair prejudice.

23. The Baytown accident holds little probative value for the purposes proposed by the state. First, as discussed above, the facts of the accident provide no support for the claim for the state's assertions of relevance. Second, the truck driven by Mr. Zhukovskyy at the time of the Baytown accident bears no resemblance whatsoever to the vehicle involved in the accident in this case.

24. In the Baytown accident, Mr. Zhukovskyy was operating a full size tractor-trailer truck pulling a trailer loaded with five vehicles. At the time of the accident in this case, he was operating a pickup truck with an empty trailer. There is virtually nothing analogous in the facts of the two accidents beyond Mr. Zhukovskyy as the driver.

25. Accordingly, the Baytown accident holds no probative value when the supposed purpose is to suggest that Mr. Zhukovskyy was aware of the risks posed by his conduct on June 21, 2019 in Randolph, because the Baytown accident bears no resemblance, factually or logically to the conduct in this case.

26. Conversely, the unfair prejudice is manifest. Allowing the jury to hear that Mr. Zhukovskyy was involved in an accident in Baytown, Texas, just weeks prior to the

accident in this case would likely induce to the jury to base its decision upon something other than the established propositions in the case, such as outrage, instinct to punish for the prior conduct, or improper propensity inferences regarding Mr. Zhukovskyy's driving.

27. Further, the State's own argument concedes the likelihood that jurors would be troubled by Mr. Zhukovskyy's prior motor vehicle accident.

28. The negligible probative value is substantially outweighed by the danger of unfair prejudice and the State's motion should be denied on those grounds.

II. The defendant's June 3, 2019 crash in Texas is not admissible under 404(b) because there is no proof that the Baytown accident involved illegal drugs.

29. The State's entire argument relative to the admissibility under section II of its motion relies on the proposition that Mr. Zhukovskyy admitted that the Baytown accident involved the use of illegal drugs.

30. Both the claim that the accident is probative of Mr. Zhukovskyy's knowledge of the danger of driving while impaired and the claim that it is probative as to Mr. Zhukovskyy's manifestations of impairment rely entirely on the proposition that he was in fact impaired at the time of the Baytown accident.

31. In support of this claim, the State asserts that "the defendant strongly insinuated that he knew the drugs were the cause of the crash" when he stated "Well, I mean, I do heroin... I always like to do it like once in a while, and I got in an accident before this. Before this accident I flipped my truck in Texas." The quote proposed by the State is both heavily edited and deliberately removed from any proper context.

32. The relevant part of the exchange between the investigator and Mr. Zhukovskyy is as follows:

INV: Do you have a drug problem?

VZ: I do, kind of, I do

INV: you do, kind of,

VZ: I do have a drug problem, I'm going to admit it, you know.

INV: What's, What's your choice?

VZ: Well, I mean I do heroin, I mean I sniff it, I don't shoot it, I just sniff it.

INV: yeah, ok

VZ: But I mean, like, I am not really like, like a, like a big drug addict I would say, you know. I would like, do it, like, once in a while and then like, I got in an accident before this.

INV: Mmm-hmm

VZ: Before this accident I flipped my truck in Texas.

INV: Mmm-hmm

VZ: So it's been just too much on me you know.

33. Later in the interview, Mr. Zhukovskyy states:

I was staying clean though, I was on the road for like 3,4 months, I would not come home and then I would come home and then, like, I would start, I would do it for like a couple of weeks then I would stop, I would go back on the road. You know, cause, like, on the road you can't always do anything cause when you're driving a big truck you can't do nothing, you know.

34. Not only did the state take Mr. Zhukovskyy's initial statements out of context, The State also conspicuously ignores Mr. Zhukovskyy's unambiguous affirmation that he did not use while driving long distance as he was at the time of the Baytown accident.

35. Read in their proper contexts, Mr. Zhukovskyy's statements are clearly not an admission that he "knew the drugs were the cause of the crash" as the State claims but rather a specific affirmation to the contrary. The State provides no other evidence to support its assertion that drugs were involved in the Baytown accident, and the investigation by the Baytown Police found no evidence that impairment was a factor in the accident.
36. Because there is no clear proof of the singular fact that provides the entire basis for the State's argument for admissibility, the Court should deny the motion on these grounds.

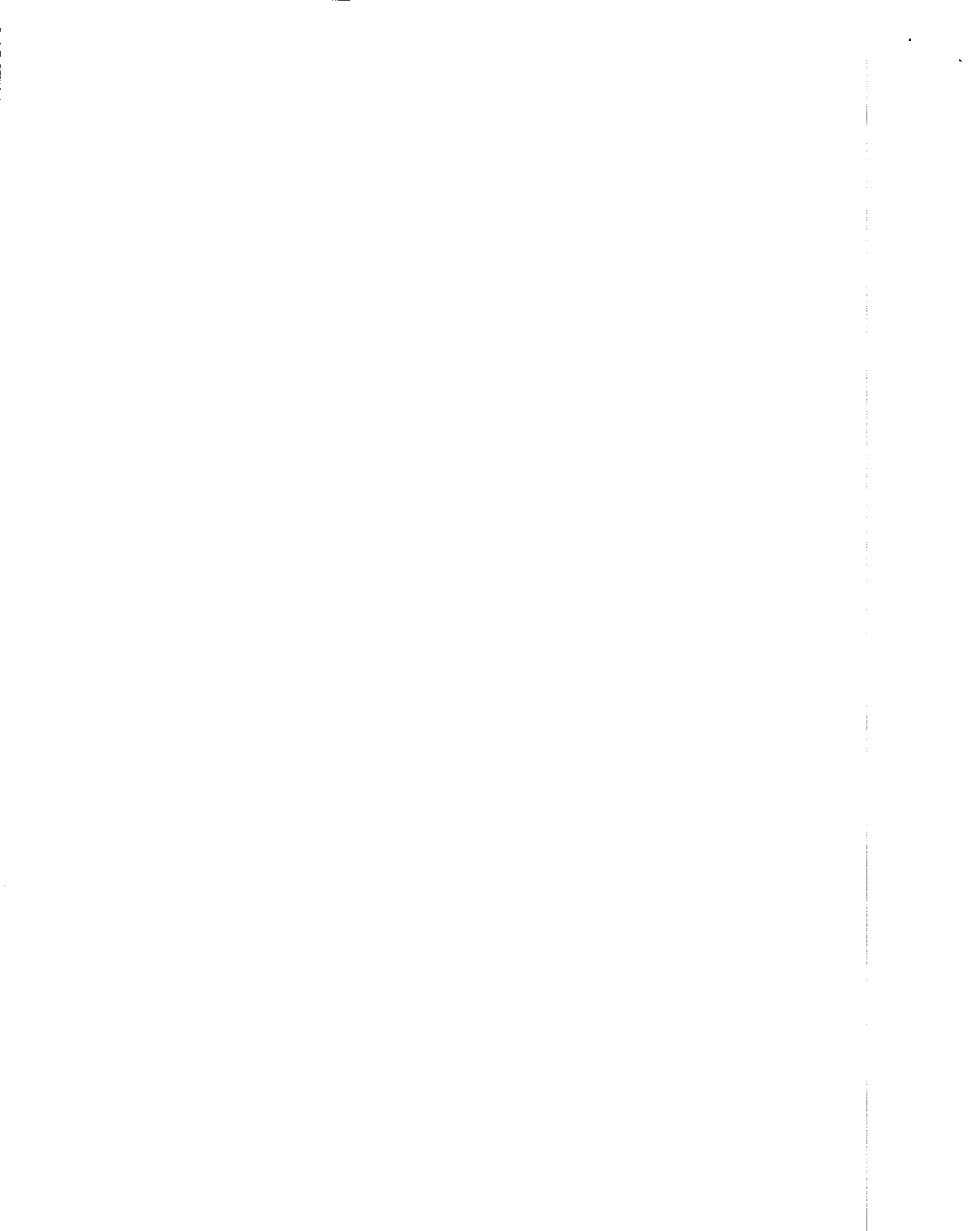
III. Neither Mr. Zhukovskyy's plea to sufficient facts for a conviction of OUI on June 10, 2014, nor the underlying facts of that OUI is admissible under 404(b).

A. The Evidence of a single allegation of operating under the influence is not relevant to establish Mr. Zhukovskyy's knowledge that he was acting recklessly in this case.

37. The State relies exclusively on State v. Dushame, 136 N.H. 309, 317 (1992) for the principle that the Mr. Zhukovskyy's admission to sufficient facts for a conviction for OUI is relevant to his mental state in this case. However, *Dushame* cannot be read so broadly.
38. In *Dushame*, the Court held that the defendant's "past experience of repeated arrests, convictions and punishment for DWI may be deemed relevant to the question of whether the defendant acted recklessly when he subsequently drove his vehicle in an intoxicated condition." Id. at 316-17. However, even the Trial Court in *Dushame* did not allow evidence of the defendant's first conviction.
39. Here there is but one incident which did not result in a conviction. Mr. Zhukovskyy does not have a history of repeated arrests, convictions, and punishments. Accordingly, there does not exist the same chain of reasoning that the Court relied on in *Dushame* to establish relevance.

B. The Probative value of the evidence when used to establish Mr. Zhukovskyy's knowledge that his conduct was reckless is substantially outweighed by the danger of unfair prejudice in this case.

40. Even if the Court finds that under the principle outlined in *Dushame*, evidence of Mr. Zhukovskyy having admitted to sufficient facts for conviction on an OUI has some relevance as to his knowledge of the risks associated with his conduct in this case, the probative value of the evidence used for that purpose is substantially outweighed by the danger of unfair prejudice in this case.
41. In *Dushame*, the issue was not whether evidence of a prior DUI was always admissible to prove recklessness, but rather, whether under the particular facts of that case, the Court abused its discretion in admitting that evidence. Id. Ultimately, the Court determined that there was no abuse of discretion. Id.
42. However, the facts in *Dushame* are readily distinguishable from the facts in this case. In *Dushame*, the Defendant had 5 prior DUI convictions. Id. at 312. The Court allowed evidence of all but the oldest which was approximately eight years old at the time of the accident. Id. The Court found considerable probative value in the evidence on the issue of the defendant's recklessness. Id. at 317.
43. Here, Mr. Zhukovskyy was charged with an OUI but was never convicted of the offense. The case was continued without a finding and eventually dismissed. Additionally, the OUI arrest occurred on June 15, 2013, almost exactly six years before the accident in this matter, when he was seventeen years of age.



44. A single incident that is nearly six years old and didn't result in a conviction does not carry the same probative value on the defendant's recklessness as does four convictions in less than 8 years as was the case in *Dushame*. Here, the probative value is minor.
45. Again, the danger of unfair prejudice is manifest and vastly outweighs the limited probative value of the evidence. Allowing the jury to learn that Mr. Zhukovskyy was arrested for and admitted to sufficient facts for conviction on a prior OUI would likely induce to the jury to base its decision upon something other than the established propositions in the case, such as outrage, instinct to punish for the prior conduct, or improper propensity inferences regarding Mr. Zhukovskyy's driving while impaired. See State v. Cochran, 132 NH 670, 672 (1990).
46. The risk is particularly high in this case because the allegation involves causing the accident while impaired. It would be impossible for the jury to distinguish the nuanced allowable use, proof of Mr. Zhukovskyy's knowledge that his conduct was reckless, and the disallowed use, propensity.
47. This risk of unfair prejudice is substantially outweighed by the limited probative value of this use of the evidence. Accordingly, the Court should deny its admission on these grounds.
- C. The facts underlying the 2013 OUI arrest are not admissible because they not relevant for any purpose other than propensity.**
48. The State argues that the facts underlying the 2013 arrest are relevant to establish that typical symptoms of impairment do not manifest in a typical way with Mr. Zhukovskyy. Specifically, the state argues that despite a BAC of .146, Mr. Zhukovskyy exhibited "minimal overt signs of impairment." This argument is without merit.

49. First, it is factually inaccurate that Mr. Zhukovskyy exhibited “minimal overt signs of impairment.” The arresting officer in the 2013 incident noted a multitude of overt signs of impairment including that Mr. Zhukovskyy smelled of an alcoholic beverage, was unsteady on his feet, his speech was slurred, he had much difficulty following instructions, and was frantically pacing back and forth. Additionally, Mr. Zhukovskyy performed standardized field sobriety tests including the horizontal gaze nystagmus test, the one leg stand, and the walk and turn and, according to the officer, he failed all three tests.
50. Second, during the 2013 incident Mr. Zhukovskyy was alleged to have been under the influence of alcohol whereas here, the State is alleging that he was under the influence of controlled drugs. The manifestations of impairment presented by an individual who consumed alcohol have no bearing or relevance on the manifestation of impairment that would present in an individual after having consumed a completely different and distinct classification of drug.
51. The State has provided no basis upon which this Court could find that Mr. Zhukovskyy’s physiological reaction to alcohol could provide any admissible insight into his physiological reaction to the drugs alleged in this case.
52. According, the State has failed to establish a 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. Accordingly, the Court should deny the State’s motion on these grounds

WHEREFORE, Mr. Zhukovskyy respectfully requests that this Honorable Court:

1. Deny the State's Motion in Limine #1;
2. Conduct a hearing on the motion if not denied on its face; and
3. Grant all other relief deemed just and proper.

Respectfully submitted,

/s/Jay Duguay
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CERTIFICATE OF SERVICE

I, Jay Duguay, do hereby certify that a copy of the foregoing Motion has been delivered this 15th Day of June 2020 to County Attorney John McCormick.

/s/Jay Duguay

Jay Duguay

