

\COÖS, SS.

SUPERIOR COURT

State of New Hampshire

v.

Volodymyr Zhukovskyy

214-2019-CR-078

Response to State’s Objection to Motion in Limine RE: NH State Lab 6-

Monoacetylmorphine Finding Below Reporting Limit

The Defendant Volodymyr Zhukovskyy, by and through counsel, Jay Duguay and Steve Mirkin, Esq., respectfully submits the following response to the State’s objection to the Defense motion to exclude any evidence or testimony related to supposed finding by the NH State Forensic Lab related to 6-monoacetylmorphin (6-MAM)..

In support of this motion the Defendant States the following:

1. The State’s objection asks the Court to deny the Defense motion as untimely while nearly simultaneously filing its own Motion in Limine regarding policy changes at NMS labs. The irony of their request would be difficult to overstate. The Court need not engage in any further analysis to deny that request out of hand.
2. With respect to the substance of the State’s objection, the Court should reject the state’s arguments as well. As the gatekeeper of expert evidence, the Court’s function is “ensuring a methodology's reliability before permitting the fact-finder to determine the weight and credibility to be afforded an expert's testimony.” Baker Valley Lumber Inc.. Ingersoll Rand Co., 148 N.H. 609, 616 (2002).
3. The State is arguing that Criminalist Casey should be allowed to provide patently unreliable testimony. The State goes as far as to claim, erroneously, that “[t]here is no

indication in the defendant's pleading, in Criminalist Casey's deposition, or in the State's Zwicker letter that her test methodology itself is unreliable."

4. However, that is clearly false. Criminalist Casey testified in her deposition that the method detection limit for 6-MAM testing at the NH State forensic lab is 2.5 ng/ml. When asked specifically, she said that the method detection limit was the lowest amount that the lab's equipment and procedures allow analysts to reliably detect. That Method detection limit is generated during the validation study for the testing procedure itself. The State lab itself has said that the test methodology is not reliable for detecting concentrations below 2.5ng/ml and Criminalist Casey confirmed that. There is ample evidence that she employed testing methodology that is not reliable for the findings she purports to make.
5. The State is arguing that while employing the equipment and procedures of the State Lab, that somehow, Criminalist Casey can make findings below the validated method detection limit. The argument defies logic. The premise that Lynn Casey, using equipment and methodology only reliable down to 2.5 ng/ml, can somehow make reliable findings below that limit; that she is not confined by the limitation of the equipment and procedures that she employed, is baseless.
6. The State in its motion acknowledges that the validated limits of the testing methodology are legitimate, agreeing that reporting a quantity below the limit of quantification, which is 10ng/ml, would be unreliable. The fact is, while Lynn Casey may be experienced, she is confined by the limitations of the equipment and methods she employs. If her findings are not scientifically reliable enough to be included as a positive finding on the lab's report, she cannot be allowed to testify to those findings.

Respectfully submitted,

/s/Jay Duguay _____
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded this 24nd day of July, 2022, to John G. McCormack, Esq., Coös County Attorney, and Scott Chase, Esq. and Josh Speicher, Esq., Assistant Attorneys General.

/s/Jay Duguay _____
Jay Duguay

