

THE STATE OF NEW HAMPSHIRE

COÖS, SS.

OCTOBER 2021

State of New Hampshire

v.

Volodymyr Zhukovskyy

214-2019-CR-00078

**STATE'S MOTION IN LIMINE TO INTRODUCE STATEMENTS AS PRESENT  
SENSE IMPRESSIONS AND/OR EXCITED UTTERANCES**

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Coös County Attorney and the Office of the Attorney General, and respectfully requests that the Court admit certain statements. In support thereof, the State submits the following:

**I. BACKGROUND**

1. On June 21, 2019, the defendant caused a motor vehicle crash that resulted in the deaths of seven people, serious bodily injury to another person, and placed numerous additional motorists in danger of serious bodily injury and death. The defendant was arrested and charged with seven counts of negligent homicide on June 24, 2019. He currently stands charged with seven counts of manslaughter, seven counts of impaired negligent homicide, seven counts of negligent homicide, one charge of aggravated driving while intoxicated, and one charge of reckless conduct with a deadly weapon. Jury selection is scheduled to begin on November 16, 2021, and the jury trial is scheduled to begin on November 29, 2021.

2. The State now seeks a ruling on the admissibility of certain statements made by various witnesses the State expects to call during its case-in-chief. The State seeks this ruling

now, in advance of trial, in order to avoid confusion and delay, and provide the parties with clarity on what evidence will be allowed.

## II. FACTS

### a. Stephen Piwowarski Statements to Annie Baron<sup>1</sup>

3. On June 21, 2019, Stephen Piwowarski was travelling with his wife, Annie Baron, from their residence in Maine to a wedding in Vermont, via Route 2 in Gorham towards Randolph. Piwowarski drove the car, while Baron sat in the backseat with their young child.

4. While travelling west on Rt. 2 in the area of Gorham Hill in Gorham, Piwowarski observed a black pick-up truck towing a trailer, driving in front of him. Piwowarski observed the truck drive onto the shoulder, and then cross the westbound travel lane and travel into the opposing lane of traffic on multiple occasions. Due to his observations of the truck, Piwowarski slowed down to create more space between his car and the truck.

5. As he drove behind the truck, Piwowarski described the erratic driving of the truck to Baron. In a recorded interview, Baron told investigators that she was looking at her phone trying to get directions when Piwowarski said, “Oh, my God, this guy is crazy.” June 22, 2019 Interview of Annie Baron, p. 5, lines 14-15. Baron asked what Piwowarski was talking about, and Piwowarski said “look it, he’s swerving all over the place.” *Id.* at lines 16-17. Baron then looked up and observed the truck repeatedly driving into the oncoming lane of traffic, before correcting back into the correct travel lane. Baron looked back down to get directions, and then heard Piwowarski say “well, I’m backing off. I’m going to back way off.” *Id.* at lines 24-25. Piwowarski then slowed down the car to create distance between them and the truck.

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<sup>1</sup> The proffered statements from Stephen Piwowarski come from the transcript of the recorded interview of Annie Baron conducted by the New Hampshire State Police on June 22, 2019, beginning at bates label 013777. The transcript of Ms. Baron’s interview is attached hereto as Exhibit A.

6. Shortly afterwards, Baron felt Piwowarski slam on the brakes. When she looked up, she saw smoke and fire. She and Piwowarski exited their car and attempted to provide aid to those they encountered at the scene of the crash.

**b. Nicholas Belanger’s Customer’s Statement<sup>2</sup>**

7. On June 21, 2019, Nicholas Belanger was working at the sales department of Berlin City Auto Group in Gorham. While he was working, Belanger observed a truck dropping off a white Rav-4, and later observed the operator of the truck come into the showroom. Belanger was outside on the lot when he later saw the truck pulling the trailer as it drove out of the parking lot and left the dealership.

8. Belanger was standing on the lot with a customer when he saw the truck drive out of the lot. Belanger observed the truck drive very fast, and said that it “whipped the corner pretty quickly with that trailer” as it exited. Belanger stated that the truck drove erratically enough that he and the customer both were startled enough to comment to each other about the operation of the vehicle. Belanger stated that he and the customer “were like, whoa.”

**III. LEGAL ARGUMENT**

**a. Present Sense Impressions**

9. The testimony the State seeks to admit is hearsay. Thus, it may only be admitted if it falls within a recognized exception to the rule against hearsay. *N.H. R. Evid.* 802.

10. In this case, each of the statements the State seeks to admit qualify as present sense impressions, pursuant to Rule 803(1). The rule defines present sense impression as “[a] statement describing or explaining an event or condition, made while or immediately after the declarant

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<sup>2</sup> The proffered statements from Nicholas Belanger and his customer come from the recorded interview of Belanger conducted on June 24th, 2019 by the New Hampshire State Police. The audio recording of the interview has been provided in discovery.

perceived it.” *Id.* To constitute a present sense impression, “the statement must be essentially contemporaneous with the event.” *Simpkins v. Snow*, 139 N.H. 735, 738 (1995) (quotations omitted). “One reason for this requirement is to assure that there is little time for calculated misstatement. *Id.*”

11. Here, the Piwowarski statements to Baron undoubtedly qualify as present sense impressions. In the statements, Piwowarski either commented on or described the erratic nature of the driving of the truck as he observed it driving in front of him. First, he stated “oh my God, this guy is crazy,” as he observed the truck repeatedly drive into the oncoming lane of traffic. Shortly afterward, he stated “look it, he’s swerving all over the place.” Finally, Piwowarski told Baron “well I’m backing off. I’m going to back way off.” Piwowarski made these statements to Baron while he was sitting in the driver’s seat, watching the truck as he drove behind it. They therefore satisfy the requirement that they be made “while or immediately after” Piwowarski, the declarant, perceived the events in question.

12. Piwowarski described the events in question as he observed the truck driving. It would be impossible for his statements to be any more contemporaneous. He did not report his observations of the truck’s driving hours or even minutes later; instead, he did so as it continued to drive in front of him. The Piwowarski statements are therefore distinguishable from those that the New Hampshire Supreme Court has determined did not meet the contemporaneity requirement of the rule. *See Simpkins v. Snow, supra* (“some lapse of time” occurred between the declarant hearing the allegedly defamatory statements and relating them to others at a meeting).

13. Belanger’s description of his customer’s reaction to seeing the truck drive through the dealership’s parking lot, where the customer said something to the effect of “whoa,” similarly qualifies as a present sense impression. The customer and Belanger both remarked on the erratic

driving of the truck as they observed it. The remarks were therefore made contemporaneously with the event being described, with no time for reflection.

14. The statements in the 911 calls were made nearly immediately after the crash; the content of the calls make clear that the callers are describing the aftermath of an accident that occurred mere minutes beforehand. One of the callers, Dawn Brindley, made statements not only about the scene of the crash, but also about how the crash occurred. These statements meet the contemporaneity requirement of the rule.

15. The Piwowarski statements, as made to Baron, and the statements made to Belanger by his customer, qualify as present sense impressions and are therefore admissible because they are not hearsay.

**b. Excited Utterances**

16. Notwithstanding the fact that the Piwowarski statements are not hearsay since they qualify as present sense impressions, they also meet the criteria to qualify as excited utterances. Rule 803(2) defines an excited utterance as “[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.” “To qualify as an excited utterance, the statement must be a spontaneous verbal reaction to some startling or shocking event, made at a time when the speaker was still in a state of nervous excitement produced by that event and before [s]he had time to contrive or misrepresent.” *State v Pennock*, 168 N.H. 294, 302 (2015), quoting *State v. Pepin*, 156 N.H. 269, 274 (2008). “The basis of the excited utterance exception rests with the spontaneity and impulsiveness of the statement.” *Id.*

17. Here, the Piwowarski statements meet the requirements for qualification as excited utterances. The content of the statements make clear that when Piwowarski was still under the

stress of excitement of the event of driving behind and observing the truck as it drove erratically. The statements, as reported by Baron, were made in the present tense – “oh my God, this guy is crazy,” and “look it, he’s swerving all over the place.” This is not a case where Piwowarski observed an event and then described it later after the event had concluded, after he had time to change or potentially misrepresent his recollection. *See MacDonald v. B.M.D. Golf Associates, Inc.*, 148 N.H. 582 (2002) (statement of the nephew of the person injured in a golf cart accident to a bystander, minutes after the accident, was properly admitted where it was made while the nephew “was still upset from experiencing the accident first hand”). *Cf. State v. Thompson*, 161 N.H. 507 (2011) (statements made by a child five days after an alleged sexual assault were not admissible as excited utterances).

18. For these reasons, the Piwowarski statements should be admissible as excited utterances.

WHEREFORE, the State of New Hampshire respectfully requests that this Honorable Court:

- (A) Grant the relief requested; and
- (B) Grant such further relief as may be deemed just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorney,

JOHN M. FORMELLA  
ATTORNEY GENERAL

Date: October 21, 2021

/s/ Joshua L. Speicher  
Joshua L. Speicher, Bar # 273020  
Assistant Attorney General  
Criminal Justice Bureau  
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CERTIFICATE OF SERVICE

I certify that this pleading has been provided to counsel of record through the Superior Court's electronic filing system.

/s/ Joshua L. Speicher  
Joshua L. Speicher

# **EXHIBIT A**

UNITED STATES OF AMERICA

NATIONAL TRANSPORTATION SAFETY BOARD

\* \* \* \* \*

Investigation of:

TRUCK/MOTORCYCLE COLLISION

RANDOLPH, NEW HAMPSHIRE

JUNE 21, 2019

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\*  
\*  
\* Accident No.: HWY19MH010  
\*  
\*

\* \* \* \* \*

Interview of: ANNIE BARON, Witness

Via telephone

Saturday,  
June 22, 2019

FREE STATE REPORTING, INC.  
Court Reporting Transcription  
D.C. Area 301-261-1902  
Balt. & Annap. 410-974-0947

APPEARANCES:

MICHAEL COTE, Sergeant  
New Hampshire State Police

SHAWN TORSEY, Detective  
New Hampshire State Police

FREE STATE REPORTING, INC.  
Court Reporting Transcription  
D.C. Area 301-261-1902  
Balt. & Annap. 410-974-0947

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I N D E X

ITEM

PAGE

Interview of Annie Baron:  
By Sergeant Cote

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Court Reporting Transcription  
D.C. Area 301-261-1902  
Balt. & Annap. 410-974-0947

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I N T E R V I E W

(6:57 p.m.)

1  
2  
3 SERGEANT COTE: Okay. So today's date is June 22nd, 2019,  
4 and I have 1857. We were just on the phone with Stephen, who is  
5 Annie's husband, and he was able to locate her. So we have -- we  
6 are on the phone with Annie.

7 I asked if I could record this conversation. Is that still  
8 okay?

9 MS. BARON: Yes, that's fine.

10 SERGEANT COTE: Okay. This is Sergeant Michael Cote. I'm  
11 with the New Hampshire State Police. And also in the room with me  
12 is Shawn Torsey. He was a detective with the state police.

13 MS. BARON: Great.

14 SERGEANT COTE: So, Annie, so I just got off the phone  
15 with -- we just got off the phone with your husband, who was able  
16 to recollect what happened yesterday in the accident scene. So  
17 I'd like to do the same with you.

## INTERVIEW OF ANNIE BARON

18  
19 BY SERGEANT COTE:

20 Q. My understanding is that you were the passenger in the  
21 vehicle that was driven by your husband yesterday?

22 A. Yeah. I was sitting behind him.

23 Q. Okay. So in the rear seat or in the front seat?

24 A. Yeah, in the rear seat, because I was next to our son. I was  
25 in the, like, rear seat. He was in the middle seat, and so I was

1 next to him.

2 Q. Okay.

3 A. So I was right behind my husband.

4 Q. Okay. So what can you tell me about the -- what you saw  
5 yesterday?

6 A. Well --

7 Q. What --

8 A. I guess --

9 Q. When did you first -- when did -- maybe a little more  
10 specific, when did you first remember seeing the black truck that  
11 was involved in the crash?

12 A. Well, so Steve just all of the sudden -- so I was in the  
13 middle. I think I was getting directions or something on my phone  
14 to try and get us somewhere. And then he just said, oh, my God,  
15 this guy is crazy. Like he's just not -- and I was like, what are  
16 you talking about? And he's like, look it, he's swerving all over  
17 the place.

18 And he was. He was -- he kept, like, crossing the line. But  
19 then, like, he would cross over into the other oncoming traffic,  
20 but there was nobody oncoming. And then he would come back, like  
21 he would correct himself. And then he would go, like, in the  
22 right lane for a while, and then he would do it again.

23 And then, so I looked down. I'm like, well, I'm getting  
24 directions, you know? And Steve's like, well, I'm backing off.  
25 I'm going to back way off. And so he did, so we had the guy way

1 in front of us because he seemed, like, dangerous. And then he  
2 was saying -- well, I don't think he said anything else actually  
3 at that point.

4 And then, all of the sudden, I -- like I said, I was getting  
5 directions, and then all of the sudden, I felt just, like, us  
6 really slamming on -- Steve was -- must have been slamming on the  
7 brakes. And I was like, oh, my God, what's happening? And I  
8 looked up, and like, you could just see smoke and fire, and --  
9 not, like, a ton of fire, but like, a lot of smoke. And it was  
10 just -- like, you could just see motorcycles on the ground, and  
11 people.

12 And so he was -- you have to, like, stop our car in order to  
13 unlock the doors. So he was, like, stopping the car, and he was  
14 like, unlock the doors, unlock the doors. And I ran out.

15 Q. Okay.

16 A. And, I mean, I could -- you want me to keep going about what  
17 I saw?

18 Q. So what do you -- I just want to get -- pull you back in and  
19 just kind of chronologically walk through it in a little bit more  
20 detail. So when --

21 A. Sure.

22 Q. How far before the crash scene do you -- are you made -- do  
23 you visually see or are made aware of some of what -- maybe some  
24 -- what you're categorizing as erratic driving?

25 A. I would say, like, a few minutes.

1 Q. Okay.

2 A. And it -- like I said, it would -- and I would say that  
3 because he would do it, and then he would, like, correct himself  
4 and be driving on the right -- like, the correct way. Like, you  
5 know, on the right side of the road --

6 Q. Okay.

7 A. -- for a little bit. And then you would see him swerving  
8 again.

9 Q. So when you say --

10 A. And then --

11 Q. When you say he's swerving, is he to the left of the yellow,  
12 the right of the white, or something else?

13 A. Right, to the left of the yellow. So it would be, like, as  
14 if there were oncoming traffic, then he would hit them.

15 Q. Okay.

16 A. You know? But he didn't because there was nobody oncoming.  
17 I think we went past one car, but he had corrected himself in  
18 time.

19 Q. Okay. So how much of the vehicle is across the yellow line  
20 do you think?

21 A. I would say --

22 Q. That's -- of course this is an estimate.

23 A. Well, I mean, it was a couple of different times. Like one  
24 of the times, I would -- you know, you're talking about, like,  
25 kind of, like, a vertical -- you know, like I would say half of

1 the vehicle. So maybe if you were a passenger, you wouldn't have  
2 been across the line. But then the second time, it was, like,  
3 most of the vehicle. I would say out -- like, at least 75 percent  
4 of the vehicle was across the line.

5 Q. So what -- so you're not saying it's just a little bit across  
6 the line. This is egregious.

7 A. No, it was definitely on the other side of the road. But --

8 Q. Okay. So and this happens a couple of times before the  
9 crash, correct?

10 A. Yeah. It definitely happened a -- I saw two or three times.  
11 And then, like I said, I was just like, I don't know what to do.  
12 And Steve said, well, I'll just back off.

13 Q. Okay. And --

14 A. And then he -- and then I looked down again. I wasn't still  
15 watching.

16 Q. Okay. So did you -- were you looking up at the time of  
17 impact?

18 A. No.

19 Q. Okay. So you didn't see how -- you didn't see the vehicle --  
20 if the vehicle was on the other side of the road again or not?

21 A. I did not see that.

22 Q. Okay. Where was the black truck the first time when you  
23 picked your head up and you saw it?

24 A. When I saw, it was basically, like, parked -- I mean, it --  
25 when we left last night, it was in the same spot. So basically

1 the black truck was up a little bit of a hill.

2 Q. Okay.

3 A. And it was facing in towards the woods. And I believe the  
4 trailer was half on the road. I'm just trying to think, is --  
5 where the guys were --

6 Q. So you didn't --

7 A. -- on the road.

8 Q. Okay. So you didn't see the collision or the vehicle?

9 A. No, nothing.

10 Q. Okay.

11 A. No, I did not. I saw it, like --

12 Q. The aftermath.

13 A. -- way before and then once we were stopped and everybody was  
14 down.

15 Q. Okay. And when -- and then you guys got out, and I will just  
16 say that, you know, you guys helped out -- helped in first aid?

17 A. Yeah. Oh, yeah.

18 Q. Okay.

19 A. And, like, triaged and just kind of tried to figure out who  
20 was still alive.

21 Q. Yeah. Right. Annie, who was -- how far before the accident  
22 did you happen to see the truck go over the line? Was it before  
23 the gas station or after the gas station?

24 A. You know, to be honest, I do not know.

25 Q. Okay.

1 A. I thought we were going up a little bit of an incline, but I  
2 -- honestly, I really don't know.

3 Q. And that's fine.

4 A. I know when Steve and I drove back, he was shocked at how far  
5 before. Like he thought it was only, like, a minute or two.

6 Q. Yeah.

7 A. But then, when we were driving back through, he thought it  
8 was -- but I don't know.

9 Q. Okay. All right. Annie, just one more quick question.

10 A. Sure.

11 Q. What is your date of birth?

12 A. 7/9/84.

13 SERGEANT COTE: Okay. All right. I don't have anything  
14 else, Annie. Thank you for -- if we have anything else, is it  
15 okay if we reach back out to you folks?

16 MS. BARON: Oh, yeah.

17 SERGEANT COTE: Okay.

18 MS. BARON: And I think I gave you another phone number --

19 SERGEANT COTE: Yeah.

20 MS. BARON: -- because we're going to be in Scotland. So --

21 SERGEANT COTE: Yes.

22 MS. BARON: Okay, great. Yeah, so that one will probably be  
23 the best way to reach us after tomorrow.

24 SERGEANT COTE: Okay. I appreciate it, and thank you for all  
25 your help on scene.

1 MS. BARON: Okay. And good luck with everything. This is  
2 such hard --

3 SERGEANT COTE: Oh, yes.

4 MS. BARON: Such a hard situation.

5 SERGEANT COTE: Well, thank you very much. And I have --

6 MS. BARON: Okay.

7 SERGEANT COTE: -- 1905, and I'm going to go ahead and shut  
8 the recording off.

9 (Whereupon, at 7:05 p.m., the interview was concluded.)

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CERTIFICATE

This is to certify that the attached proceeding before the  
NATIONAL TRANSPORTATION SAFETY BOARD

IN THE MATTER OF: TRUCK/MOTORCYCLE COLLISION  
RANDOLPH, NEW HAMPSHIRE  
JUNE 21, 2019  
Interview of Annie Baron

ACCIDENT NO.: HWY19MH010

PLACE: Via telephone

DATE: June 22, 2019

was held according to the record, and that this is the original,  
complete, true and accurate transcript which has been transcribed  
to the best of my skill and ability.



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Christy Wilson  
Transcriber