THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2021-0168

State of New Hampshire

v.

Volodymyr Zhukovskyy

DEFENDANT'S MEMORANDUM ON BAIL

Volodymyr Zhukovskyy faces charges in the Coös County Superior Court of manslaughter, negligent homicide, reckless conduct and aggravated driving under the influence, in connection with a motor vehicle accident on June 21, 2019. On that day, a truck driven by Zhukovskyy collided with motorcycles, resulting in the deaths of seven motorcyclists and in serious bodily injury to an eighth.

On June 25, 2019, the court (Bornstein, J.), without a hearing but with the parties' agreement, entered an initial bail order placing Zhukovskyy in preventive detention. AD 27-30.[1] The order checked a box on the bail order form stating that Zhukovskyy would

> be placed in preventive detention pursuant to RSA 597:2, IV(a). This order for detention is not based solely on evidence of drug or alcohol addiction or

[1] Citations to the record are as follows:
"AD" refers to the attached addendum containing the decisions appealed from and relevant pleadings;
"SA" refers to the sealed appendix containing the confidential version of the State's objection to Zhukovskyy's third motion for a bail hearing.

> homelessness. In ordering preventive detention, the court finds *by clear and convincing evidence* release will endanger the safety of the defendant or the public for the following reasons…

AD 27 (emphasis in original). Below that box, in a space reserved for a statement of the court's reasons, there appeared the following:

> Defendant's criminal and driving history exhibit a pattern of operating a motor vehicle in a dangerous manner. If released, he will likely present a danger to the safety of defendant or the public.

Id.

The order also checked boxes on the form specifying various conditions applicable in the event of Zhukovskyy's release. AD 28. These included, for example, bans on travel outside New Hampshire, possession of a firearm, and consumption of an excessive amount of alcohol. Id. The order further required that he sign a waiver of extradition before release on bail. Id. Under a checked box marked "other," the court wrote that Zhukovskyy "shall surrender his passport prior to any future release. Defendant shall not operate a motor vehicle." Id.

On March 27, 2020, the defense filed a motion for an evidentiary bail hearing. AD 38-41. The motion asserted that, following the original bail order in June 2019, the State provided additional discovery that "substantially altered the original information available at the time of the bail hearing." AD 38. Initial information had indicated that Zhukovskyy's vehicle was

> 1.5 ft over the center line into eastbound lane of travel at the time of impact. The report indicated that there was no evidence that the motorcycles were on the wrong side of the road at the time of the impact. The report noted that the first visible tire mark associated with the truck occurred at a position where the truck was protruding 4 feet into the eastbound lane of travel.

AD 38.

However, months later, the State disclosed "a report from Crash Labs, an independent accident reconstruction firm, which shows that the State Police CAR Team's initial assessment was deeply flawed and that all the above information was incorrect." Id. The new report concluded that "the point of impact did not occur in the eastbound lane of travel." AD 38-39. Rather, it appeared that the impact occurred directly over the center line and that the motorcycle "was in fact protruding over the center line when it struck the truck." AD 39. It appeared that the lead motorcyclist was turned around facing the cycles behind him "just prior to the accident," and that that motorcyclist's blood alcohol concentration was .135. Id. The collision between Zhukovskyy and the lead motorcyclist caused a catastrophic loss of tire pressure in Zhukovskyy's front tire, resulting in Zhukovskyy's truck crossing into oncoming traffic where it collided with the following motorcycles. AD 39.

The State objected. AD 42-49. The State argued that "no information released in discovery … has any legal impact on the

considerations … requiring the defendant to be held in preventative detention.” AD 43. The objection proceeded to make several assertions about the facts of the case, leading to the conclusion that only by preventive detention could the court “ensure the safety of the public, and the defendant.” AD 43-48.

First, the prosecutor contended that Zhukovskyy “was impaired” on the day in question. The objection described the results of testing on a sample of Zhukovskyy’s blood, revealing the presence of fentanyl and metabolites of heroin and cocaine. AD 43-44. The State cited Zhukovskyy’s admission to the police to having used substances that day, and to still feeling their effects during the journey that ended with the accident. The objection also described Zhukovskyy’s admissions about his heavy substance use generally around that time. AD 43-45.

Second, the State cited evidence that Zhukovskyy drove erratically on the day in question. Thus, “multiple witnesses observed the defendant driving in a manner consistent with impairment … weav[ing] his truck and trailer within his lane, and [they saw him] cross the double-yellow line on several occasions.” AD 44. “Moreover,” the State argued, “the defendant admitted in a later interview with police that at the time of the collision he diverted his attention from the road and oncoming traffic, and was attempting to retrieve an object from the center console of his

truck, when he drove left of the double-yellow line, and into the oncoming motorcyclists." Id.

Third, the State focused on Zhukovskyy's criminal record. It noted that "one month prior to the crash he was released on bail for another charge of driving while under the influence of suspected drugs; and that the defendant's criminal history proves that he is a danger." AD 43. Later paragraphs described that criminal history. AD 45-46.

With respect to the new information, the State contended that Crash Lab's "findings still demonstrate that the defendant was not operating fully within his appropriate lane of travel at the time he collided with the first motorcycle, before his truck and trailer traveled into the oncoming lane of travel, striking, killing, and maiming additional motorcyclists." AD 46-47. The motion concluded by asserting a new basis for detention – a concern about flight risk. AD 47-48.

By a notation order, the court denied the defense motion. AD 31, 39. In lieu of a statement of reasons, the order simply cited certain paragraphs of the State's objection. Id. The reference to those paragraphs reveals that the court confirmed its prior finding of dangerousness and did not rely on the flight-risk concern.

The defense moved for reconsideration. AD 50-58. The motion pointed out that Zhukovskyy's impairment at the time of the collision

was a disputed, rather than a conceded or established, fact. AD 51. None of the many law enforcement officers who interacted with Zhukovskyy after the collision noted any sign of impairment, nor did any of the several civilians who had contact with him immediately before and after the collision. AD 51-52. In addition, the defense contended that reports in discovery contradicted the State's claim that Zhukovskyy's blood test results revealed the presence of a metabolite of heroin. AD 52-53.

Furthermore, in the defense's view, the State's characterization of Zhukovskyy's statements to police suffered from a lack of context. Rather than clear admissions, "his responses were inconsistent on the question of whether and to what extent he was feeling the effects of drug use at the time of the crash…." AD 53. The motion proceeded to identify other features of the State's objection, relating to the circumstances of the collision and Zhukovskyy's prior criminal record, that were not borne out by the record, or otherwise did not justify the conclusion that Zhukovskyy must be preventively detained. AD 53-55. The motion concluded by renewing the request for an evidentiary hearing.

The State objected, repeating points it had earlier made. AD 59-64. The prosecutor contended that, even viewing the disputed facts in the light most favorable to Zhukovskyy, the court would still have to order preventive detention. More fundamentally, the State disputed the

relevance of questions about the strength of the evidence of guilt to a preventive-detention finding of dangerousness. AD 61.

In a short order issued on April 20, 2020, the court denied the motion to reconsider. AD 32. In substance, the court said only that it had not overlooked or misapprehended any point of fact or law. Id.

In September 2020, the defense again requested a bail hearing. AD 65-71. The renewed motion noted that, at the time of the March 2020 motion, it was anticipated that Zhukovskyy would stand trial in November 2020. AD 65; see also AD 51. However, in late August, the trial was continued until at least March 2021. AD 65-66. By that date, Zhukovskyy would have spent twenty-one months incarcerated pre-trial, without a bail hearing. The motion incorporated the prior bail pleadings in which counsel marshaled the evidence that, viewed in the light most favorable to the defense, Zhukovskyy was not impaired at the time of the collision. AD 65-67.

In addition, counsel cited a new addendum, disclosed in discovery in September 2020, to the Crash Labs report. AD 67. It detailed further evidence that the lead motorcycle had been on the center line at the time of the collision. In addition, it estimated that Zhukovskyy would have had only "2-3 seconds to see the lead motorcycle and identify that its position in the roadway would require evasive action." AD 67. It

concluded that the amount of time available to the lead motorcyclist and to Zhukovskyy "to identify the vehicle lane positions [and] the time available for hazard analysis and implementation of any emergency response [was] limited." AD 67-68. Moreover, physical evidence at the scene indicated that Zhukovskyy "did in fact identify the hazard and initiate an emergency response by applying and locking the brakes prior to impact." AD 68.

The State again objected. AD 72-84. Having previously prevailed on this issue, the State repeated, in general terms, the propositions on which it had thus far successfully relied: evidence showed that Zhukovkyy was impaired; he had at the time a serious substance abuse problem, as shown by his statements and criminal record; he was on bail on an intoxicated-driving charge at the time of the collision; and the question of dangerousness had little to do with the question of the strength of the State's case for guilt.

In addition, the State noted that some of the pending homicide charges did not require proof of impairment. AD 79-80. Also, the State denied that anything in the new addendum to the Crash Labs report warranted reconsideration of the issue of dangerousness. AD 80. Finally, the State renewed its claim that Zhukovskyy posed a risk of flight. AD 81.

In a brief order dated October 14, 2020, the court denied the defense motion. AD 33. Once again, in lieu of an original statement of reasons, the court merely cited the paragraphs of the State's objection arguing dangerousness. Id. The court did not cite the paragraphs asserting flight risk.

On April 7, the disputed issue of bail arose again[2] when defense filed a third motion for an evidentiary bail hearing. AD 85-97. The motion began by relating the procedural history of the case and the bail litigation. That recitation reported that in January 2021, the parties agreed to postpone trial to May 2021.

Further disclosures of discovery and further discussions between the parties then led in February 2021 to an agreement to delay trial to late June 2021. AD 86. However, at the end of March 2021, the State announced that trial at any point in 2021 was "not feasible." AD 87. The defense replied that it would be ready for trial by September 2021. Id. The court entered an order scheduling jury selection to begin in November 2021. Id. Given the further delay of trial, the defense contended that the court could not continue to hold Zhukovskyy without a bail hearing. If trial began in late November 2021, Zhukovskyy would

[2] Shortly before the defense filed its third motion for a bail hearing, a seemingly undisputed bail-related matter arose. On April 1, 2021, the State filed an amended bail order, subsequently approved by the court, apparently only for the purpose of updating the list of persons covered by the no-contact provision of Zhukovskyy's bail order. AD 34-36.

have spent almost two and a half years in jail, pre-trial, without a bail hearing.

Counsel argued that the lengthy passage of time itself tended to undermine the earlier finding of dangerousness. By the time of the motion, Zhukovskyy had lived twenty-one months of sobriety in jail. The risk that he would resume a habit of substance abuse upon release was, accordingly, diminished. AD 89-90. Insofar as his prior criminal record reflected offenses committed by a person afflicted by substance abuse, the probative force of that record on the issue of dangerousness likewise diminished over time.

In addition, the defense pointed out a potential sign of some loss of confidence, on the part of the State, in the factual allegations it advanced at the beginning of the case. In March 2021, the State obtained new manslaughter and negligent homicide indictments omitting the allegation that Zhukovskyy crossed into the oncoming traffic lane. AD 89, 91.

The motion incorporated the assertions contained in the prior pleadings and supplemented the defense attack on the strength of the State's case with new observations. AD 90-91. In that connection, the defense challenged the probative force, in context, of Zhukovskyy's admissions to feeling the effects of cocaine at the time of the crash. The defense also disputed the State's claim that eyewitnesses had seen

Zhukovskyy operate the truck erratically, or to an extent that suggested impairment.

In its legal analysis, the motion argued that the court should hold an evidentiary bail hearing. The defense cited authority for the proposition that the strength of the evidence of guilt matters in the dangerousness inquiry. Also, the defense argued that the court had to consider the availability and efficacy of less-restrictive measures that could ensure the safety of the public without requiring the incarceration of a pre-trial defendant.

The State objected. AD 98-115; SA 3-20.[3] The objection first disputed any implication of State responsibility for the delay in trial. AD 101-03. The State next repeated its prior arguments on the issue of dangerousness. AD 103-11. The State challenged some of the defense's assertions about the strength of the evidence, such as the claim that eyewitnesses had not positively identified Zhukovskyy as driving erratically moments before the collision. AD 107. The State also disputed aspects of the defense's exculpatory characterization of the Crash Lab report. AD 108-09. For example, the State denied that Crash Lab

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[3] The State filed two versions of its objection: one under seal and one redacted. The redacted version is appended to this memorandum of law. AD 98-115. The sealed version is being filed, under seal, in a separate appendix to this memorandum. SA 3-20. The only redaction appears in a paragraph addressing issues involving the scheduling of trial. AD 102. It concerns a matter that does not warrant discussion in this memorandum.

concluded that the catastrophic loss of air pressure in a tire caused the truck to cross into the oncoming travel lane. AD 108-09. Finally, the State again advanced a concern about flight risk. AD 112-13.

By an order issued on April 22, 2021, the court denied the defense motion. AD 37. Consistent with its previous bail orders in this case, the court did not articulate original reasoning. Rather, it cited, as embodying the court's reasoning, the paragraphs of the State's objection that advanced a dangerousness argument. It did not cite the State's flight-risk paragraphs.

ARGUMENT

RSA 597:2, I (effective September 2020), sets out in general terms the options with respect to pre-trial detention or release. Those options include: 1) release on personal recognizance or upon execution of an unsecured bond; 2) release on a combination of conditions; 3) detention; or 4) temporary detention pending revocation of conditional release.

RSA 597:2, III enacts considerations pertinent to the decision whether to release or detain a person. Paragraph III(a) establishes "safety of the public" as such a consideration and provides in relevant part:

> If a person is charged with any criminal offense … the court may order preventive detention without bail, or, in the alternative, may order restrictive conditions including but not limited to electronic

> monitoring and supervision, only if the court determines by clear and convincing evidence that release will endanger the safety of that person or the public. In determining whether release will endanger the safety of that person or the public, the court may consider all relevant factors presented pursuant to paragraph IV.

RSA 597:2, III(a).

Paragraph IV addresses the procedures for presenting evidence. Paragraph IV(a) provides that "[e]vidence in support of preventive detention shall be made by offer of proof at the initial appearance before the court. At that time, the defendant may request a subsequent bail hearing where live testimony is presented to the court." RSA 597:2, IV(a). The statute proceeds to address questions relating to the manner in which, at a subsequent evidentiary bail hearing, evidence may be presented. The statute does not expressly articulate the circumstances in which a trial court must, or should, convene an evidentiary bail hearing.

In State v. Spaulding, 172 N.H. 205, 207 (2019), this Court stated that a trial court's ruling detaining a pre-trial defendant as dangerous is reviewed for an unsustainable exercise of discretion. "In determining whether a trial court ruling is an unsustainable exercise of discretion, [this Court] consider[s] whether the record establishes an objective basis sufficient to sustain the discretionary judgment made." Id. at 207-08.

In this appeal, though, Zhukovskyy raises a preliminary question about his entitlement to an evidentiary bail hearing. That claim, in turn,

depends at least in part on whether, as a matter of law, the factual issues disputed by the parties had any bearing on the determination of Zhukovskyy's dangerousness. Because this appeal thus raises a question of law about the proper operation of the bail statute, this Court's review is *de novo*. See State v. Mfataneza, 172 N.H. 166, 169 (2019) (Court reviews *de novo* questions of law).

As a general matter, a court should convene an evidentiary hearing when, to decide whether to grant or deny requested relief, the court must resolve a factual dispute. See, e.g., State v. Zorzy, 136 N.H. 710, 714-15 (1993) (trial court must *sua sponte* order evidentiary hearing whenever legitimate doubt about defendant's competency to stand trial). However, when the material facts are not disputed, or when the disputed facts are irrelevant to the decision a court must make, a court obviously need not hold an evidentiary hearing. See, e.g., State v. Widi, 170 N.H. 163, 164 (2017) (court may deny coram nobis petition without holding an evidentiary hearing "if the record clearly demonstrates that the defendant is not entitled to coram nobis relief"); Beane v. Diana S. Beane & Co., P.C., 160 N.H. 708, 711-12 (2010) (no evidentiary hearing necessary when "issues before the trial court were limited to legal analysis of the facts asserted by the plaintiff").

Here, as described above, the pleadings are replete with disputes of fact. In its pleadings, the State adamantly insisted on the correctness of its interpretations of those factual disputes. In its orders, the court cited and relied on those paragraphs in the State's pleadings, thereby adopting the State's view of the disputed facts. Zhukovskyy's claim of entitlement to an evidentiary hearing, therefore, depends on whether those disputed facts are relevant to the issue of his dangerousness. If they are, this Court should remand with instructions to convene an evidentiary hearing.

The starting point for the analysis is the statute. RSA 597:2 does not narrowly define the kinds of information pertinent to an assessment of dangerousness. Rather, "[i]n determining whether release will endanger the safety of … the public, the court may consider *all relevant factors* presented…." RSA 597:2, III(a) (emphasis added). The test, then, is relevance. Evidence Rule 401 defines that concept broadly. Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence." N.H. R. Ev. 401(a). The fact that the Rules of Evidence do not apply at bail hearings, see N.H. R. Ev. 1101(d)(3), suggests an especially broad openness in bail hearings to the receipt and consideration of proffered information. The disputed facts

here are relevant because their establishment would make more or less probable Zhukovskyy's dangerousness.

In the broadest sense, the questions of fact disputed here divide into two categories: 1) facts about Zhukovskyy and the charged crimes; and 2) facts about the availability and efficacy of mechanisms of control over Zhukovskyy, short of incarceration. For the reasons set forth below, this Court should find that both categories of fact are relevant to the question of dangerousness. The trial court therefore erred in denying the requests for an evidentiary hearing.

As described above, the parties advanced conflicting views on a considerable number of points about Zhukovskyy or the collision. Among other matters, disputes arose about four major issues: whether Zhukovskyy was impaired at the time of the accident; whether it was Zhukovskyy's truck or the lead motorcycle that encroached onto the lane of the other, precipitating the initial collision; whether after the initial collision Zhukovskyy steered into oncoming traffic; and the extent to which Zhukovskyy's criminal record supported an inference that he is currently dangerous. Connected with those broad factual disputes were conflicting views about subsidiary points. With respect to impairment, the parties disputed whether Zhukovskyy was seen to drive erratically (and if so, to what extent), whether his admissions to the police, in

context, were as incriminating as the State suggested, and whether the results of a chemical analysis of a blood sample confirmed his recent use of heroin. With respect to whether Zhukovskyy steered into oncoming traffic, the parties disputed whether the catastrophic tire failure caused the truck to cross into the oncoming-traffic lane. For several reasons, those factual disputes mattered to the issue of dangerousness.

First, they mattered because they tended to shed relevant light on Zhukovskyy's character and on the risk of danger he posed. For example, in arguing that Zhukovskyy was dangerous, the State repeatedly highlighted the fact that he had driven while impaired. AD 43-45, 60, 77-79, 106-08. If Zhukovskyy was not in fact impaired at the time of the collision, that argument lost all force. Similarly, if Zhukovskyy did not steer into oncoming traffic after colliding with the lead motorcycle, but instead helplessly crossed into it as a result of catastrophic tire failure, one would draw a very different conclusion about the extent to which Zhukovskyy posed a risk of danger as a driver. Finally, as defense counsel pointed out, by the time of the third motion for a bail hearing, the passage of twenty-one jailed months raised an important doubt about whether Zhukovskyy was currently dangerous, even if he was dangerous when initially arrested.

Second, and more generally, the strength of the State's case for guilt matters in a dangerousness inquiry. As observed by the United States District Court for the District of Columbia:

> The Court must … review the "weight of the evidence against the" defendant as an indicia of whether any conditions of pre-trial release will reasonably assure the safety of the community. If the government possesses overwhelming evidence that the defendant is guilty of the crime charged – and the nature of the charged offenses involves a danger to the community – then the second factor will help meet the government's burden of persuasion. And if the government's evidence is weak – even where the charged offense involves a danger to the community – the government will have a more difficult row to hoe.

United States v. Taylor, 289 F.Supp.3d 55, 66 (D.D.C. 2018). In other words, where the State's evidence is weak, the nature of the charged offenses becomes less significant. Trial courts must follow this logic for otherwise one could be held without bail for an offense the State has little chance of proving at trial, simply because of the nature of the charged crime and the defendant's prior criminal record.

In convening an evidentiary bail hearing at which the defense can challenge the strength of the State's case for guilt, the court does not commit itself to holding a full-blown trial. The rules of evidence do not apply at bail hearings, and the burden of proof borne by the State is less, at a bail hearing, than it is at a trial. Moreover, the bail pleadings have identified discrete disputed factual issues bearing on the question of the

defendant's dangerousness, enabling the court at an evidentiary bail hearing to focus on those issues.

Third, the factual disputes also mattered because they would shed relevant light on the extent to which the authorities could manage Zhukovskyy through conditions of release on bail. The State repeatedly cited Zhukovskyy's impaired and dangerous driving at the time of the collision, emphasizing that he was on that day subject to conditions of release on bail. AD 45, 72-75, 98, 104. The implication of the State's arguments is that Zhukovskyy thereby demonstrated his contempt for compliance with bail conditions, and thus the inability of such conditions to keep the public safe. If, though, Zhukovskyy was not impaired at the time of the collision nor driving erratically, this State's argument also loses much of its force.

In so arguing, Zhukovskyy acknowledges this Court's statement in Spaulding that "the statute [does not] require the trial court to consider less restrictive alternatives to detention without bail before ordering such detention." Spaulding, 172 N.H. 205, 209 (2019) (quotations omitted). However, it is doubtful that this Court intended its statement in Spaulding to be understood in an unrealistic sense. In practice, courts can order pre-trial release with varying degrees of control and surveillance, depending on the particular defendant's needs and risks. To

insist that a court, in evaluating dangerousness, consider the efficacy in a given case of those familiar tools is merely to ask a court to do what it ordinarily does, when setting conditions of release.

Second, in Spaulding, unlike in this case, trial counsel did not argue that there were "circumstances outside the offense" relevant to dangerousness. Id. More importantly, the opinion in Spaulding reflects only that this Court construed the terms of the statute and found in them no basis to require trial courts to consider such additional circumstances as the availability of less restrictive alternatives. This Court did not address any argument – evidently because one was not made – that the Constitution requires a court to consider such circumstances. Zhukovskyy here makes that argument.

Read literally, the Court's statement in Spaulding conflicts with the requirements of the Federal and State Constitution. U.S. CONST. Amend. V, XIV; N.H. CONST. pt. I, art. 15. In United States v. Salerno, the Court held that a provision of the Bail Reform Act of 1984 (hereinafter "Act"), providing for pretrial detention without bail, was constitutional under both the Due Process Clause of the Fifth Amendment and the Eighth Amendment. 481 U.S. 739, 741 (1987). The Court set forth three conditions on the constitutionality of pre-trial detention without bail: 1) there is probable cause to believe the defendant committed the alleged

offenses, 2) the defendant is afforded a speedy trial, and 3) the trial court must find by clear and convincing evidence that no set of conditions of release will reasonably assure the safety of the accused and the community. Id. at 747, 750. The Court reasoned,

> Nor is the Act by any means a scattershot attempt to incapacitate those who are merely suspected of these serious crimes. The Government must first of all demonstrate probable cause to believe that the charged crime has been committed by the arrestee, but that is not enough. In a full-blown adversary hearing, the Government must convince a neutral decisionmaker by *clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or person.*

Id. at 750 (citing 18 U.S.C. § 3142(f)) (emphasis added).

In so holding, the Court emphasized that the federal bail statute was constitutional because it required the Government to establish more than simply probable cause to believe that the accused committed a crime. The heightened inquiry required of a constitutional detention statute commands trial courts to determine whether there are "conditions [of release] that will reasonably assure … the safety of any other person and the community…." Salerno, 481 U.S. at 742, citing 18 U.S.C. § 3142(e). Thus, this Court should hold that Part I, Article 15, consistent with the holding in Salerno, requires trial courts to find by clear and convincing evidence that no conditions of release can reasonably assure the safety of the defendant and the community, before

ordering the detention of a defendant without bail. See United States v. Tortora, 922 F.2d 880, 884 (1st Cir. 1990) ("courts cannot demand more than an objectively reasonable assurance of community safety.")

The Supreme Court, recognizing that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception," Salerno, 481 U.S. at 755, has held that the Constitution commands this standard, and it therefore must be adopted by this Court. During these uncertain times, the need for such a standard becomes even more acute. Because of the pandemic, unless released on bail, Zhukovskyy will have been jailed for at least a period of almost two and a half years prior to trial. In the absence of a finding that the community cannot be protected by less restrictive alternatives, such a result is inconsistent with the protections afforded to defendants under the Due Process Clause.

Zhukovskyy calls this Court's attention to its reasoning in State v. Furgal, 161 N.H. 206, 215 (2010). There, the Court observed that,

> Our conclusion that RSA 597:1-c passes constitutional muster is buttressed by the fact that, as noted in *Salerno*, detention without bail is strictly limited in duration. In *Salerno*, the Court made note that pretrial detention was limited by "the stringent time limitations of the Speedy Trial Act." In this state, pretrial detention is limited by the superior court's speedy trial policy.

Id. (citation omitted). Jury trials have largely been suspended since April 17, 2020,[4] and only very recently have resumed.

Even if the Federal Constitution does not require that trial courts find by clear and convincing evidence that no conditions of release can reasonably assure the safety of the defendant and the community before ordering a person preventatively detained, this Court should nonetheless find that, in refusing to hold the requested evidentiary hearing, the court in this case erroneously failed to consider "the nature and gravity of the danger posed by [Zhukovskyy's] release." See Tortora, 922 F.2d at 884. A defendant might be dangerous in the abstract or dangerous if released unconditionally, but not dangerous if required to comply with well-designed and readily-available conditions. In this sense, the court's failure to hold the evidentiary hearing necessary to a resolution of disputed questions about the efficacy of less restrictive alternatives, under the circumstances of this case, requires a remand.

If released, Zhukovskyy could be supervised by the appropriate authorities and subjected to conditions such as that he not drive nor consume drugs or alcohol. His whereabouts could be monitored electronically and he could be required to participate in mental health or

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[4] New Hampshire Judicial Branch, https://www.courts.state.nh.us/press/2020/Covid19-Juryext.htm (last visited May 18, 2021).

substance abuse treatment. Release on such conditions would promote the safety of the community and his rehabilitation.

CONCLUSION

On the strength of the points and authorities set forth above, this Court must conclude that the court erred in denying Zhukovskyy's requests for an evidentiary hearing on the issue of bail. Because there are disputed issues of fact that bear on the issue of dangerousness, this Court must remand for an evidentiary hearing.

Respectfully submitted,

By */s/ Christopher M. Johnson*
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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum is being timely provided to the State of New Hampshire through the electronic filing system's electronic service.

/s/ *Christopher M. Johnson*
Christopher M. Johnson, #15149

DATED: May 24, 2021

ADDENDUM

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STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
http://www.courts.state.nh.us

Court Name: Coos Superior Court

Case Name: State v. Volodymyr Zhukovskyy

Case Number: 214-19-CR-78

SUPERIOR COURT BAIL ORDER

Police Agency: ______________________ Agency Case Number: __________

Date of Felony Offense: ______________________

You are required to appear for a hearing/arraignment on ______________ (Date) at ________ (Time)

☒ The parties waive hearing and agree as follows:

☐ After hearing, the court determines and orders as follows:

It is hereby ordered that the defendant shall:

A. ☐ Be released on personal recognizance.

B. ☐ Be released on an unsecured appearance bond in the amount of $ ______________.

C. ☐ Be detained for not more than 72 hours to allow for filing of a probation violation.

D. ☐ Be released on $ ____________ cash or corporate surety bail. The Court finds that this financial condition will not be the cause for continued detention, unless:

(1) ☐ A hearing to determine the source of funds for bail is required before posting bail, OR

(2) ☐ The court finds by a *preponderance of the evidence* the conditions set forth above will not reasonably assure the appearance of defendant for the following reasons:

☐ See record of hearing.

E. ☑ Be placed in preventive detention pursuant to RSA 597:2, IV(a). This order for detention is not based solely on evidence of drug or alcohol addiction or homelessness. In ordering preventive detention, the court finds *by clear and convincing evidence* release will endanger the safety of the defendant or the public for the following reasons:

☐ See record of hearing.

Defendant's criminal and driving history exhibit a pattern of operating a motor vehicle in a dangerous manner. If released, he will likely present a danger to the safety of defendant or the public.

Case Name: ______
Case Number: ______
SUPERIOR COURT BAIL ORDER

The defendant's release is subject to the following additional conditions:
Defendant shall not commit a federal, state or local crime while on release, must appear at all court proceedings as ordered and must advise the court in writing of all changes of address within 24 hours.

1. ☑ Shall have no contact, direct or indirect, or through a third party with See Addendum to be filed.
2. ☐ Shall live at: ______
3. ☑ Shall not travel outside of New Hampshire.
4. ☑ Shall not possess a firearm, destructive device, dangerous weapon, or ammunition.
5. ☑ Shall not consume an excessive amount of alcohol, or use any narcotic drug or controlled substance as defined in RSA 318-B.
6. ☐ Comply with the following curfew: ______
7. ☑ Sign a waiver of extradition before release on bail.
8. ☐ Shall follow all terms and conditions of probation and/or parole. The defendant shall report to probation no later than ______.
9. ☐ Shall apply to ______ for an intake assessment within ____ days of release.
10. ☐ Shall meaningfully participate in and continue in treatment at ______. If the defendant leaves the program for any reason other than successful completion of the program, bail automatically converts to ______.
11. ☐ The Criminal Bail Protective Order issued on ______ remains in full force and effect.
12. ☐ The defendant has received a copy of "What You Need to Know".
13. ☑ Other:

Defendant shall surrender his passport prior to any future release. Defendant shall not operate a motor vehicle.

______.

Defendant Information
Name ______ DOB ______
Physical address ______
Mailing address (if different) ______
Home phone # ______ Cell phone # ______ email ______

______
Defendant Signature

So Ordered:

______ Date
______ Bail Commissioner Signature and printed name
BC Fee ______

For Court Use Only:
☐ Adopted ☐ Adopted as modified ☐ See Supplemental Bail Order

So Ordered: 6/25/19
Date

[signature]
Presiding Judge
Peter H. Bornstein
Presiding Justice

AG 6/26/19
☒ County Attorney/~~AGs Office~~
☒ Defense Counsel
☒ House of Correction.
☐ Sheriff's Department
☐ NH Department of Corrections
☒ Other VWC
☒ Defendant
☐ Surety

State's Addendum to Superior Court Bail Order

Defendant Shall Have No Contact with:

Mary Welch

Brittany Mazza

Alycia Maregni

Nicholas Corr

William Perry

Daniel Cook

Debra Cook

Matthew Ferazzi

Shirley Ferazzi

Helen Pereira

Joshua Morin

Joy Morin

Steven Lewis

Manny Ribeiro

PENALTY FOR OFFENSE COMMITTED WHILE ON RELEASE

I. A person convicted of an offense while released pursuant to this chapter shall be sentenced, in addition to the sentence prescribed for the offense to:

a. A term of imprisonment of not more than 7 years if the offense is a felony; or

b. A maximum term of imprisonment of not more than 1 year if the offense is a misdemeanor.

A term of imprisonment imposed pursuant to this section shall be consecutive to any other sentence of imprisonment. Neither the penalty provided by this section nor any prosecution under this section shall interfere with or prevent the forfeiture of any bail or the exercise by Court of its power to punish for contempt, but section shall be construed to provide an additional penalty for failure to appear.

DETENTION AND SANCTIONS FOR DEFAULT OR BREACH OF CONDITIONS

II. a. A peace officer may detain an accused until he can be brought before a judge if he has a warrant issued by a judge for default of recognizance or for breach of condition of release or if he witnesses a breach of conditions of release. The accused shall be brought before a judge for a bail revocation hearing within 48 hours. Saturdays, Sundays and holidays excepted.

b. A person who has been released pursuant to the provisions of RSA 597:2 and who has violated a condition of this release is subject to a revocation of release, and order of detention, and a prosecution for contempt of Court under the provisions of RSA 597:7-a.

c. The State may initiate a proceeding for revocation of an order of release by filing a motion with the Court, which ordered the release, and the order alleged to have been violated. The Court may issue a warrant for the arrest of a person charged with violating a condition of release, and the person shall be brought before the Court for a proceeding in accordance with the section.

RSA 641:5 TAMPERING WITH WITNESS AND INFORMANTS. CLASS B FELONY IF:

III. a. Believing that an official proceeding, as defined in RSA 641:1, II or investigation is pending or about to be instituted, defendant attempts to induce or otherwise cause a person to:

1. Testify or inform falsely, or
2. Withhold any testimony, information, document or thing; or
3. Elude legal process summoning him to provide evidence; or
4. Absent himself from proceeding or investigation to which he has been summoned; or

b. Defendant commits any unlawful act retaliation for anything done by another in defendant's capacity as witness or informant; or

c. Defendant solicits, accepts, or agrees to accept, any benefit in consideration of defendant's doing any of the things specified in paragraph 1.

travel. The report concludes that the initial impact occurred between the left side of Mr. Mazza's motorcycle and the left front tire of Mr. Zhukovskyy's truck. Critically, they determined that the impact occurred directly over the center line and that Mr. Mazza's motorcycle was in fact protruding over onto the center line when it struck the truck.

7. The report goes on to say that the impact caused catastrophic air loss to the left front tire of the truck which left a tire mark on the center line of the road. This tire mark had initially been attributed to an "unsuccessful avoidance maneuver" by Mr. Mazza, a position that the State has since retracted.
8. The State also provided information in discovery showing that Mr. Mazza had been turned around looking back at the group of riders behind him just prior to the accident.
9. Finally, autopsy reports show that at the time of the crash, Mr. Mazza's blood alcohol concentration was .135, well in excess of the statutory per se limit of impairment of .08.
10. Given the dramatically different factual circumstances as they are known at this time, Mr. Zhukovskyy respectfully requests an evidentiary hearing on the continuing need for preventative detention.
11. Mr. Zhukovskyy would not present a danger to himself or other and concerns about appearance for trial could be addressed through appropriate measures including living with his parents where he returned and remained after the accident, surrendering his passport, and not operating a motor vehicle while on bail.
12. Mr. Zhukovskyy requests an evidentiary hearing at which further exploration of the above and other relevant issues can be presented for the benefit of the Court.

Wherefore, The Defendant, Volodymyr Zhukovskyy, respectfully requests this Honorable Court schedule an evidentiary hearing on the continuing need for preventative detention and his release on conditions of bail.

For the reasons set forth in paragraphs 1-10 of the State's Objection, the Court denies the defendant's motion.

/s/ Peter H. Bornstein
Honorable Peter H. Bornstein
April 7, 2020

Clerk's Notice of Decision
Document Sent to Parties
on 04/07/2020

Respectfully submitted,

__/s/ Jay Duguay_________
Jay Duguay, Esq.
N.H. Bar #20347
N.H. Public Defender
134 Main Street
Littleton, NH 03561

THE STATE OF NEW HAMPSHIRE

COÖS, SS. **SUPERIOR COURT**

No. 214-2019-CR-00078

State of New Hampshire

v.

Volodymyr Zhokovskyy

ORDER ON DEFENDANT'S MOTION FOR RECONSIDERATION

On April 7, 2020, the Court denied the defendant's Motion for Evidentiary Bail Hearing. This matter is now before the Court on the defendant's Motion for Reconsideration (Index #60), in which he requests that the Court reconsider its April 7, 2020 order. The State objects. (Index #61.) Having considered the parties' pleadings and arguments and the applicable law, the Court concludes that it has not overlooked or misapprehended any point of law or fact. See N.H. R. Crim. P. 43(a). Accordingly, the Court DENIES the defendant's Motion for Reconsideration.

So Ordered.

Date: 4/20/2020

Hon. Peter H. Bornstein
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 04/20/2020

THE STATE OF NEW HAMPSHIRE

COÖS, SS. **SUPERIOR COURT**

No. 214-2019-CR-00078

State of New Hampshire

v.

Volodomyr Zhukovskyy

ORDER

This matter is before the Court on the defendant's Renewed Motion for Bail Hearing (Index #103), to which the State objects. (Index #105.) Having considered the parties' pleadings, the applicable law, and all relevant factors, the Court DENIES the defendant's motion for the reasons that the State articulates in paragraphs 1, 4—19, and 23 of its Objection.

So Ordered.

Date: 10/14/2020

Hon. Peter H. Bornstein
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 10/14/2020

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File Date: 4/1/2021 2:17 PM
Coos Superior Court
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STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
http://www.courts.state.nh.us

Court Name: **Coos Superior Court**

Case Name: **State v. Volodymyr Zhukovskyy**

Case Number: **214-2019-CR-78**

SUPERIOR COURT BAIL ORDER

Police Agency: ______________________

Agency Case Number: ______________________

Date of Felony Offense: ______________________

You are required to appear for a hearing/arraignment on ______________ (Date) at ________ (Time)

☐ The parties waive hearing and agree as follows:

☒ After hearing, the court determines and orders as follows:

It is hereby ordered that the defendant shall:

A. ☐ Be released on personal recognizance.

B. ☐ Be released on an unsecured appearance bond in the amount of $ ______________.

C. ☐ Be detained for not more than 72 hours to allow for filing of a probation violation.

D. ☐ Be released on $ __________ cash or corporate surety bail. The Court finds that this financial condition will not be the cause for continued detention, unless:

(1) ☐ A hearing to determine the source of funds for bail is required before posting bail, **OR**

(2) ☐ The court finds by clear and convincing evidence that no reasonable alternative or combination of conditions will:

☐ Reasonably assure the appearance of the defendant, and/or

☐ Reasonably assure that the defendant will not commit an offense while on release

E. ☑ Be placed in preventive detention pursuant to RSA 597:2, III(a) based on clear and convincing evidence that the defendant's release will endanger the safety of the defendant or of the public.

The defendant is subject to the following additional conditions:

Defendant shall not commit a federal, state or local crime while on release, must appear at all court proceedings as ordered and must advise the court in writing of all changes of address within 24 hours.

1. ☑ Shall have no contact, direct or indirect, or through a third party with
   See addendum attached to this order

If released:

2. ☐ Shall live at: ______________________
3. ☑ Shall not travel outside of New Hampshire.
4. ☑ Shall not possess a firearm, destructive device, dangerous weapon, or ammunition.
5. ☑ Shall not consume an excessive amount of alcohol, or use any narcotic drug or controlled substance as defined in RSA 318-B.
6. ☐ Comply with the following curfew: ______________________

Case Name: State v. Volodymyr Zhukovskyy
Case Number: 214-2019-CR-78
SUPERIOR COURT BAIL ORDER

7. ☑ Sign a waiver of extradition before release on bail.
8. ☐ Shall follow all terms and conditions of probation and/or parole. The defendant shall report to probation no later than ______________.
9. ☐ Shall apply to ______________ for an intake assessment within ____ days of release.
10. ☐ Shall meaningfully participate in and continue in treatment at ______________. If the defendant leaves the program for any reason other than successful completion of the program, bail automatically converts to ______________.
11. ☐ The Criminal Bail Protective Order issued on ______________ remains in full force and effect.
12. ☐ The defendant has received a copy of "What You Need to Know".
13. ☑ Other:

Defendant shall surrender his passport prior to any future release. Defendant shall not operate a motor vehicle.

Defendant Information

Name ______________ DOB ______________

Physical address ______________

Mailing address (if different) ______________

Home phone # ______________ Cell phone # ______________

email ______________

____
Defendant Signature

So Ordered:

______________ ______________
Date Bail Commissioner Signature and printed name

BC Fee ☐ Paid ☐ Pmt arrangement ☐ Not paid

FOR COURT USE ONLY

/s/ Peter H. Bornstein
Honorable Peter H. Bornstein
April 2, 2021

Clerk's Notice of Decision
Document Sent to Parties
on 04/02/2021

State's Addendum to Superior Court Bail Order

Defendant shall have no contact with:

Mary Welch
Brittany Mazza
Alycia Maregni
Nicholas Corr
William Perry
Daniel Cook
Debra Cook
Matthew Ferazzi
Shirley Ferazzi
Helen Pereira
Joshua Morin
Joy Morin
Steven Lewis
Manny Ribeiro
Valerie Ribeiro
David Bark
William Hooker
Patricia Sweeney
Dawn Brindley
Douglas Hayward
Drenda Hayward
Dana Thompson
Tad Duarte
Debra Duarte
Michael McEachern
Sarah McEachern

THE STATE OF NEW HAMPSHIRE

COÖS, SS. **SUPERIOR COURT**

No. 214-2019-CR-00078

State of New Hampshire

v.

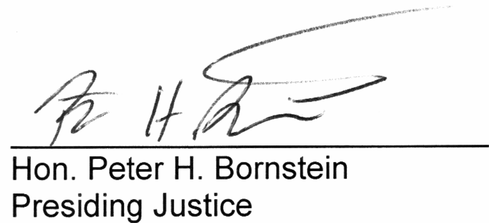
Volodomyr Zhukovskyy

ORDER

This matter is before the Court on the defendant's Third Motion for Bail Hearing (Index #166), to which the State objects. (Index #170.) Having considered the parties' pleadings, the applicable law, and all relevant factors, the Court DENIES the defendant's motion for the reasons that the State articulates in paragraphs 1, 12–17, 19–30, and 34 of its Objection.

So Ordered.

Date: 4/22/2021



Hon. Peter H. Bornstein
Presiding Justice

Clerk's Notice of Decision
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Coos Superior Court
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THE STATE OF NEW HAMPSHIRE

COOS, SS. COOS COUNTY SUPERIOR COURT

STATE OF NEW HAMPSHIRE

V.

VOLODYMYR ZHUKOVSKYY

214-19-CR-78

Motion for Evidentiary Bail Hearing

NOW COMES the defendant, Volodymyr Zhukovskyy, by and through counsel, Jay Duguay and Steve Mirkin, Public Defenders, and respectfully requests this Honorable Court schedule this matter for an evidentiary bail hearing on the issue of the continuing need for preventative detention.

In Support of this motion Mr. Zhukovskyy states the following:

1. Mr. Zhukovskyy is charged with several offenses related to a motor vehicle accident that occurred on June 21, 2019 and is currently being held in preventative detention at the Coos County House of Corrections.
2. At arraignment on June 25, 2019, Mr. Zhukovskyy waived arraignment and argument on the State's request for preventative detention. Mr. Zhukovskyy later waived arraignment on additional indictments on October 29, 2019.
3. Since that time the State has provided discovery that has substantially altered the original information available at the time of the bail hearing.
4. Specifically, State Police C.A.R. team initially determined that initial point of impact occurred between Mr. Zhukovskyy's trailer and Albert Mazza's motorcycle. They further concluded that the trailer was 1.5 ft over the center line into eastbound lane of travel at the time of impact. The report indicated that there was no evidence that the motorcycles were on the wrong side of the road at the time of the impact. The report noted that the first visible tire mark associated with the truck occurred at a position where the truck was protruding 4 feet into the eastbound lane of travel.
5. The State recently disclosed a report from the Crash Labs, an independent accident reconstruction firm, which shows that the State Police CAR Team's initial assessment was deeply flawed and that all the above information was incorrect.
6. The new report found that the point of impact did not occur in the eastbound lane of

travel. The report concludes that the initial impact occurred between the left side of Mr. Mazza's motorcycle and the left front tire of Mr. Zhukovskyy's truck. Critically, they determined that the impact occurred directly over the center line and that Mr. Mazza's motorcycle was in fact protruding over onto the center line when it struck the truck.

7. The report goes on to say that the impact caused catastrophic air loss to the left front tire of the truck which left a tire mark on the center line of the road. This tire mark had initially been attributed to an "unsuccessful avoidance maneuver" by Mr. Mazza, a position that the State has since retracted.
8. The State also provided information in discovery showing that Mr. Mazza had been turned around looking back at the group of riders behind him just prior to the accident.
9. Finally, autopsy reports show that at the time of the crash, Mr. Mazza's blood alcohol concentration was .135, well in excess of the statutory per se limit of impairment of .08.
10. Given the dramatically different factual circumstances as they are known at this time, Mr. Zhukovskyy respectfully requests an evidentiary hearing on the continuing need for preventative detention.
11. Mr. Zhukovskyy would not present a danger to himself or other and concerns about appearance for trial could be addressed through appropriate measures including living with his parents where he returned and remained after the accident, surrendering his passport, and not operating a motor vehicle while on bail.
12. Mr. Zhukovskyy requests an evidentiary hearing at which further exploration of the above and other relevant issues can be presented for the benefit of the Court.

Wherefore, The Defendant, Volodymyr Zhukovskyy, respectfully requests this Honorable Court schedule an evidentiary hearing on the continuing need for preventative detention and his release on conditions of bail.

For the reasons set forth in paragraphs 1-10 of the State's Objection, the Court denies the defendant's motion.

/s/ Peter H. Bornstein
Honorable Peter H. Bornstein
April 7, 2020

Clerk's Notice of Decision
Document Sent to Parties
on 04/07/2020

Respectfully submitted,

__/s/ Jay Duguay_________

Jay Duguay, Esq.
N.H. Bar #20347
N.H. Public Defender
134 Main Street
Littleton, NH 03561

(603) 444-1185

__/s/ Steve Mirkin________
Steve Mirkin, Esq.
N.H. Bar #1771
N.H. Public Defender
485 Rte 10
Orford, NH 03777
(603) 353-4440

CERTIFICATE OF SERVICE:

I hereby certify that a copy of this Motion for Evidentiary Bail Hearing has been forwarded to the Coos County Attorney John McCormick on this __27th day of March, 2020.

__/s/ Jay Duguay________
Jay Duguay, Esq.

Filed
File Date: 4/6/2020 3:55 PM
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THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

COÖS, SS. APRIL TERM, 2020

THE STATE OF NEW HAMPSHIRE

V.

VOLODYMYR ZHUKOVSKYY

217-2019-CR-78

STATE'S OBJECTION TO DEFENDANT'S MOTION FOR EVIDENTIARY BAIL HEARING

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, who respectfully requests that this Honorable Court deny the defendant's motion for an evidentiary bail hearing. In support of its request, the State says as follows:

1. On June 21, 2019 the defendant was involved in a motor vehicle crash resulting in the deaths of seven people, serious bodily injury to another person, and placing additional oncoming drivers in danger. The defendant was arrested and charged with seven counts of negligent homicide on June 24, 2019. He waived arraignment on the charges on June 25, 2019, and entered a plea of not guilty. The defendant was indicted on October 18, 2019, on seven charges of manslaughter, seven charges of impaired negligent homicide, seven charges of negligent homicide, one charge of aggravated driving while intoxicated, and one charge of reckless conduct with a deadly weapon. The defendant waived arraignment on these additional charges and waived argument as to the State's request for preventative

detention. The defendant is being held without bail pending trial. The defendant now moves for an evidentiary bail hearing alleging discovery provided by the State has substantially altered the original information available at the time he was arraigned. However, no information released in discovery has any legal impact on the considerations for requiring the defendant to be held in preventative detention. Nothing about the discovery provided by the State, that forms the basis of the defendant's motion, changes the fact that the defendant was impaired on June 21, 2019; that one month prior to the crash he was released on bail for another charge of driving while under the influence of suspected drugs; and that the defendant's criminal history proves that he is a danger, and preventative detention is the only way the court can ensure the safety of the public, and the defendant.

2. Preventative detention is governed by RSA 597:2 which states in pertinent parts:

> If a person is charged with any criminal offense…the court may order preventive detention without bail, or, in the alternative, may order restrictive conditions including but not limited to electronic monitoring and supervision, only if the court determines by clear and convincing evidence that release will endanger the safety of that person or the public. The court may consider all relevant factors bearing on whether the release will endanger the safety of that person or the public.

RSA 597:2. Release of the defendant will endanger the safety of the public and the defendant.

3. The defendant has a history of drug use and driving while impaired. On June 21, 2019, he was using illegal street drugs while driving a large commercially operated vehicle, with an attached trailer, in Randolph, New Hampshire.[1] The defendant was involved in a collision that left numerous motorcyclists dead and injured. After the crash, the

[1] The combined weight of the truck and trailer was over 10,000 pounds.

defendant consented to have a sample of his blood drawn for chemical testing. The test revealed that the defendant's blood contained 6.7 nanograms per milliliter (ng/ml) of fentanyl, 21 ng/ml of morphine[2] and over 1000 ng/ml of benzoylecgonine (a metabolite of cocaine). The defendant told police that the morning of the fatal crash he had consumed two "superman" branded baggies of heroin and a half of a gram of cocaine. The defendant told police that he combines the heroin and cocaine when he uses them. The defendant also admitted to the authorities that he could still feel the effects of the cocaine at the time he left a car dealership in Gorham, New Hampshire about a half-hour before the crash occurred, and further stated he could feel the effects of the cocaine at the time the fatal crash occurred. During the half-hour before the crash, multiple witnesses observed the defendant driving in a manner consistent with impairment. The witnesses observed the defendant weave his truck and trailer within his lane, and cross the double-yellow line on several occasions. Moreover, the defendant admitted in a later interview with police that at the time of the collision he diverted his attention from the road and oncoming traffic, and was attempting to retrieve an object from the center console of his truck, when he drove left of the double-yellow line, and into the oncoming motorcyclists.

4. The defendant's drug use was not an isolated event. He admitted that he would take drugs **each day** before beginning his work as a commercial truck driver, sometimes stopping by his home during the day to consume **more drugs** before driving again. Additionally, the defendant admitted that after the fatal crash on June 21, 2019, and prior to his arrest on June 24, 2019, he returned to his home in West Springfield, where he continued

[2] The defendant's blood also tested positive for 6-monoacetylmorphine (6-MAM) which is the 6-monoacetylated form of morphine, which is pharmacologically active. When present, it is generally indicative of recent heroin use.

to consume what he understood to be heroin. Although the defendant initially told police that he uses about three to four bags of heroin per day, on June 25, 2019, while being held at the Coös County House of Corrections, the defendant requested medical attention because he was detoxing. When asked what he was detoxing from, the defendant responded "dope and alcohol," stating that he is an "alcoholic." When asked what quantities of these substances the defendant consumes on a daily basis, he responded that he drinks a bottle of "Hennessy" brand liquor every day, and consumes ten approximately "quarter-sized" bags of heroin each day. Based on this information alone, there is sufficient proof to order the defendant held without bail, but there is more.

5. The defendant's admissions regarding drug use on June 21 are egregious, not just because of the results that followed, but also because the defendant was on bail. At the time of the fatal crash on June 21, 2019, the defendant had been previously released on bail of a $2,500 non-surety bond for another criminal charge of driving under the influence of drugs, originating in East Windsor, Connecticut on May 11, 2019. In that case, police officers were dispatched to a Walmart parking lot for a man who was acting erratically and had been observed revving the engine of his vehicle in the parking lot. When officers arrived, they identified the defendant as the person of interest. The defendant was twitching, making random, spontaneous movements with his arms and legs, appeared to have sores around his mouth, and was speaking in a hyperactive manner, among other observations. The defendant's pants were wet in the area of his crotch, and his pants were observed to be unzipped. The defendant agreed to perform a number of field sobriety tests, which he failed. The defendant was arrested for driving while under the influence, and submitted to a breathalyzer test at the police station, which came back with a reading of 0.000 blood alcohol

concentration. The defendant was then offered the opportunity to take a blood test, which he refused.

6. Additionally, on January 10, 2014, the defendant pleaded to sufficient facts to support a conviction of operating under the influence of liquor in West Springfield, Massachusetts. In that case the defendant was observed driving straight through a stop sign and striking a parked vehicle, which had been parked on the opposite side of the road from the defendant's lane of travel. The defendant then continued to drive away, and was observed by a witness to have thrown an object from his vehicle into some bushes, the object was later recovered by police and discovered to be a 375 ml. bottle of Hennessy Cognac, that was about a quarter-full of liquid. The defendant failed a number of field sobriety tests, and submitted to a breathalyzer test, which yielded results of 0.148 and 0.146 blood alcohol concentration, almost double the legal limit to drive.

7. The defendant's criminal record further demonstrates his pattern of illicit drug and alcohol use. On March 21, 2018, the defendant pleaded guilty of possession of heroin, and cocaine. On February 11, 2019, the defendant was arrested by the Baytown, Texas Police for possession of drug paraphernalia.

8. Based on the facts surrounding the crash on June 21, the fact that the defendant was on bail, the defendant's drug use, and his prior criminal history, it is clear that only preventative detention will be sufficient to protect the public and the defendant. Nothing the defendant cites in this motion is to the contrary.

9. In his motion, the defendant cites a report that was provided by the State. However, nothing in that report changes the facts cited by the State that justify preventative detention. The information provided by the Crash Lab's findings still demonstrate that the

defendant was not operating fully within his appropriate lane of travel at the time he collided with the first motorcycle, before his truck and trailer traveled into the oncoming lane of travel, striking, killing, and maiming additional motorcyclists.

10. That result must be considered in light of the defendant's admitted drug use that day, his history of prior drug use, his bail status at the time, and his criminal history. Together, those facts prove that the defendant should continue to be held pursuant to RSA 597:2.

11. Although the defendant's dangerousness to himself and the community justify his preventative detention, he also poses a significant flight risk due to his immigration status and ties to a foreign nation. RSA 597:2 provides:

> The court shall order the pre-arraignment or pretrial release of the person on his or her personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, or cash or corporate surety bail, subject to the condition that the person not commit a crime during the period of his or her release, and subject to such further condition or combination of conditions that the court may require unless the court determines by a preponderance of the evidence that such release will not reasonably assure the appearance of the person as required.

On information and belief, the defendant is a Ukraine national and has a status as a long-term permanent residence in the United States. An active detainer for deportation has been filed by the United Stated Immigration and Customs Enforcement agency, as a result of the defendant's alleged criminal conduct. Given this information, there is a significant motivation for the defendant to abscond from any future hearings despite any combination of bail conditions imposed by this court. This consideration alone is sufficient to prove by a preponderance of the evidence that release will not reasonably assure the appearance of the defendant. Moreover, upon information and belief, the defendant has immediate family members currently living in Ukraine. Because of his flight-risk, particularly in light of his

continued pattern of criminal conduct, discussed supra, and his known ties to a foreign nation, this Court should find that no condition or set of conditions could reasonably assure the defendant's appearance in the future.

WHEREFORE, the State respectfully requests this Honorable Court:

A. Deny the defendant's motion for evidentiary bail hearing ; or

B. Schedule a hearing in this matter; and

C. Grant such other relief as this Court deems just and equitable.

Respectfully submitted,

/S/ John G. McCormick
John G. McCormick. Esq.
Coös County Attorney
NH Bar #16183
Office of the Coös County Attorney
55 School Street Suite 141
Lancaster, NH 03584
(603) 788-5559

/S/ Benjamin W. Maki
Benjamin W. Maki, Esq.
Assistant Attorney General
NH Bar #20117
New Hampshire Department of Justice
33 Capitol Street

Concord, N.H. 03301-6397
(603) 271-3671

/S/ Shane B. Goudas
Shane B. Goudas, Esq.
Attorney
NH Bar #269581
New Hampshire Department of Justice
33 Capitol Street
Concord, N.H. 03301-6397
(603) 271-3671

CERTIFICATE OF SERVICE

I, Benjamin Maki, do hereby certify that I have forwarded this a true copy of the within motion to counsel for the defendant on this 6th day of April 2020.

/S/ Benjamin W. Maki

Filed
File Date: 4/9/2020 2:28 PM
Coos Superior Court
E-Filed Document

COÖS, SS. **SUPERIOR COURT**

State of New Hampshire

v.

Volodomyr Zhukovskyy

19-CR-078

MOTION FOR RECONSIDERATION

NOW COMES the accused, Volodomyr Zhukovskyy, by and through counsel, Jay Duguay, Esq., and Steve Mirkin, Esq., and respectfully moves the Court pursuant to Rule 43 of the New Hampshire Rules of Criminal Procedure to reconsider its ruling of April 7, 2020, denying his Motion for Evidentiary Bail Hearing herein. As grounds for such Motion, the accused states as follows:

1. By Motion filed on March 27, 2020, he sought an evidentiary hearing on the issue of the continuing need for preventive detention. The State submitted its written objection thereto on April 6, 2020.
2. The Court entered its Order on April 7, 2020, denying the defense's Motion, "for the reasons set forth in paragraphs 1-10 of the State's Objection", with no further elaboration.
3. The accused respectfully submits that the Court, in so ruling, has overlooked or misapprehended points of law and fact, and particularly points of fact that would be presented and developed at an evidentiary hearing, as will be set forth herein. NHRCP Rule 43(a).

4. At the outset, it should be noted that the accused has been in custody under detention since on or about June 24, 2019. Trial herein is currently scheduled for November 2020, by which time, unless released on bail, he will have been in custody for more than sixteen months. This assumes no further delays owing to the complexity of the issues herein, to the ongoing indefinite shutdown of many court and other operations due to coronavirus, or to other unforeseen causes. The accused reasserts his right to reasonable bail as guaranteed by the Eighth and Fourteenth Amendments, and by Part I, Article 33 of the State Constitution.
5. It should further be noted that the analysis commissioned by the State and conducted by The Crash Lab, Inc., which substantially contradicted the State Police's reconstruction analysis of the collision giving rise to these charges, was not completed until February 14, 2020, and was provided to the defense on February 27, 2020.

A. "[T]he defendant was impaired on June 21, 2019"

6. In ¶ 1 of its Objection, the State alleges "Nothing about the discovery provided by the State, that forms the basis of the defendant's motion, changes the fact that the defendant was impaired on June 21, 2019; …" In fact, as would be developed at an evidentiary hearing, the accused's "impairment" at the time of the crash is far from an established fact.
7. **Multiple trained law enforcement officers had contact with the accused directly after the crash; none noted any indication of impairment on his part.**

   According to discovery from the State these include, but are not necessarily limited to, the following:

- Off. Brian Lamarre, Northumberland PD (retired Gorham PD), the first officer on the scene and first to speak with the accused;
- Off. Patrick Riendeau, Gorham PD, spoke to him at scene;
- Off. Norman Brown, Jefferson PD, spoke to him at scene;
- Corp. Mitchell Doolan, Coos County Sheriff's Office, spoke to him at scene, transported him to Jefferson Fire Dept., and was with him for more than an hour;
- Capt. Keith Roberge, Coos County Sheriff's Office, spoke to him at scene;
- Sgt. Matthew Favreau, NHSP, spoke to him at scene;
- Tpr. Derek Newcomb, NHSP, met him at Jefferson Fire Dept. approximately an hour after the crash, drove him to Weeks Hospital in Lancaster, was with him during the two blood draws, took him to Lancaster Police Department and interviewed him for well over an hour, then took him to Coos Motor Inn, was with him for more than four hours;
- Sgt. Michael Cote, NHSP, interviewed him with Tpr. Newcomb, was with him at least 1½ hours;
- Tpr. Jeremy Brann, NHSP, served subpoena on him in motel room, spoke directly to him for eight minutes.

8. **Several civilians had contact with the accused immediately before and after the crash; none noted any sign of impairment on his part.** According to discovery from the State these include, but are not necessarily limited to, the following:

- Steven Landers, Berlin City Auto, who transacted business with him shortly before the crash and described him as "coherent and not intoxicated";
- Tad Duarte, Jarheads MC, confronted him face-to-face immediately after the crash;
- Michael McEachern, Jarheads MC, had direct contact with him immediately after the crash and before Off. Lamarre arrived;
- Emma Stone, RN, Weeks Hospital, conducted two blood draws approximately an hour apart;
- Sarika Patel, Coos Motor Inn, spoke with him on two occasions when he arrived there with Tpr. Newcomb, said he "acted normal";
- Christine Janvrin, Big Apple Store, Lancaster, spoke with him after he checked into Coos Motor Inn.

9. The State in its ¶ 3 references certain conclusions of blood analysis to support its contention that the accused was impaired at the time of the crash. Specifically, the

State noted in footnote 2 that 6-monoacetylmorphine (6-MAM) was detected, which the State says, "when present, is generally indicative of recent heroin use". *Id.,* fn. 2

10. On June 24, 2019, the NH State Forensic Lab tested the blood collected from Mr. Zhukovskyy. Those results came back negative for 6-MAM. The blood samples were then sent to NMS Labs for further analysis. Analyses on both samples were originally reported to be negative for 6-MAM as well. 12 days after the original report was issued by NMS, a second report was issued which included a positive result for 6-MAM at less than 1 ng/ml in one of the samples.
11. According to NMS labs' policy for reporting results, a positive result will not be reported unless the substance is present at a level above the limit of detection. The limit of detection is generally defined as the lowest quantity at which a substance can be reliably detected and is determined by the precision of the equipment and methodology used for the test. For 6-MAM, the NMS Labs limit of detection is 1 ng/ml. Reporting a positive result for 6-MAM at a level below the limit of detection of 1mg/ml contravenes NMS Labs' own policy.
12. Whether, and if so to what degree, blood analysis indicates that the accused was impaired at the time of the crash, is a determination that can only be made pursuant to an evidentiary hearing.
13. As to the accused's statements referenced in the State's Paragraphs 3 and 4, statements made to police by him on June 21 and 24 were in the context of two lengthy interrogations, and do not represent the total of his responses on the subject; rather, his responses were inconsistent on the question of whether and to what extend he was feeling the effects of drug use at the time of the crash, and to

this extent the State is “cherry-picking” certain of his comments to the exclusion of others. Indeed, the statement cited by the State in ¶ 3, to the effect that he could feel the effects of cocaine at or near the time of the crash, is inconsistent with the NMS Labs analysis of his blood samples. As to the statements attributed to him by Coos County House of Corrections personnel on June 25, 2019, the accused states that said account is not accurate, and further is inconsistent with the evidence in this case.

B. **“Nothing in [the Crash Lab] report changes the facts cited by the State…”**

14. The essential component of the State’s case is the repeated allegation that the accused “cross[ed] into the opposite lane of travel, thereby causing a collision” which resulted in the deaths of the various decedents. The Crash Lab report, **commissioned by the State**, concludes that that did not happen; rather, the collision between the accused’s truck and Mr. Mazza’s motorcycle occurred *directly over* the center line, and that one immediate result of that collision was a “catastrophic air loss” in the truck’s left front tire, which caused the truck to pull further to the left into the opposite lane. Additionally, toxicology reports provided by the State establish that Mr. Mazza was well above the *per se* standard for driving while impaired by alcohol, RSA 265-A:2 (1)(a). None of this was known at the time of the accused’s arraignment, but these facts now bear directly on the strength of the State’s case, in ways that can only be evaluated after an evidentiary hearing.

C. Prior Criminal History.

15. The State asserts the accused’s prior criminal history as grounds for continued detention. The accused does not contest the allegation in ¶ 5 that at the time of the

crash herein he was on bail for a DUI charge in Connecticut, although he does not accept all of the factual characterizations contained therein. ¶ 6 references a DUI offense that occurred more than six years ago, when he was 17 years of age. ¶ 7 references a Possession conviction from 2018, although discovery received does not document the fact of a conviction on such charge, and a Possession of Paraphernalia charge in Texas, for which the State does not allege he has been convicted. This criminal history, while not particularly commendable, is no worse than those of numerous defendants who are routinely released on bail without the State alleging that their very presence in the community would endanger the public safety.

D. Application of RSA 597:2

16. The bail statute, RSA 597:2, IV(a), provides that the Court may order detention *only* if it "determines by clear and convincing evidence that release will endanger the safety of [the accused] or the public." Even upon such a determination, the court may still order restrictive conditions in lieu of detention. RSA 597:2, IV(b) permits the accused to have a hearing featuring live testimony at a bail hearing subsequent to his initial appearance. The accused hereby makes such a request.
17. The accused respectfully submits that the State has not shown by "clear and convincing evidence" that his release would endanger his safety, or that of the community. If the State has such evidence, it should be presented in open Court, and subjected to cross-examination and the presentation of evidence in opposition. The accused's fundamental Constitutional right to reasonable bail is at stake.

18. The State relies on “the facts surrounding the crash on June 21, the fact that the defendant was on bail, the defendant’s drug use, and his prior criminal history”, Objection, ¶ 8, to support its claim that “only preventive detention will be sufficient to protect the public and the defendant.” *Id.* As shown herein, the “facts surrounding the crash on June 21” are very different than what the State put forth initially, as will be further demonstrated at an evidentiary hearing. The remaining factors are not of the sort that have historically justified preventive detention in this Court.
19. The accused respectfully submits that, by summarily denying his request for an evidentiary bail hearing herein, the Court has misapprehended the workings of RSA 597:2, IV, and has overlooked and misapprehended the nature of the “evidence” asserted by the State, and particularly the dramatic change in such evidence brought by the Crash Lab report.
20. RSA 597:2, IV(b) requires the accused to move in writing for evidence at a bail hearing to be presented in-Court. The accused hereby makes such Motion.
21. Finally, to the extent that the Court may find “clear and convincing evidence” of dangerousness should he be released, the accused states that the Court may still impose less restrictive conditions than preventive detention. The State’s concern appears to be that he would drive again, and would do so under the influence of alcohol and/or drugs. Certainly the accused will not be hired as a driver by anyone; his name is now prominently known throughout New England. The Court could order, and the accused would assent to, conditions including GPS monitoring, a ban on driving (upon information and belief his license is now under suspension), and regular alcohol and drug screens.

22. As the Court specifically excluded the State's ¶ 11 as a basis for its Order, and as NHRCP 43(a) limits motions such as this to no more than ten pages, the accused will not herein address the allegations made in ¶ 11.

WHEREFORE, the accused respectfully prays that the Court:

A. Reconsider its Order of April 7, 2020, denying his Motion for Evidentiary Bail Hearing;
B. Schedule such a hearing, and direct pursuant to RSA 597:2, IV(b) that evidence therein be presented live and in-Court;
C. Order his release on Personal Recognizance or on an unsecured appearance bond subject to reasonable non-financial conditions; and
D. Provide such further relief as may be just.

Respectfully submitted,

___/s/ Steve Mirkin____________

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____/s/ Jay Duguay___________

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded this 9th day of April, 2020, to John G. McCormack, Esq., Coos County Attorney; Shane Goudas, Esq., Assistant Attorney General; and Benjamin W. Maki, Esq., Traffic Safety Resource Prosecutor.

/s/ Steve Mirkin
Steve Mirkin, Esq.

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THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

COÖS, SS. APRIL TERM, 2020

THE STATE OF NEW HAMPSHIRE

V.

VOLODYMYR ZHUKOVSKYY

217-2019-CR-78

STATE'S OBJECTION TO DEFENDANT'S MOTION FOR RECONSIDERATION

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, who respectfully requests that this Honorable Court deny the defendant's motion for reconsideration on the pleadings and without a hearing. In support of its request, the State says as follows:

1. The defendant's motion for reconsideration must be denied because the defendant has failed to allege any point of law or fact, pertinent to considerations under RSA 597:2, which this Court has overlooked or misapprehended. Rule 43 of the New Hampshire Rules of Criminal Procedure governs motions for reconsideration and requires the moving party in a motion for reconsideration to "state, with particular clarity, points of law or fact that the court has overlooked or misapprehended." NH R. Crim. Pro. 43. The defendant has failed to do so.

2. This Court properly denied the defendant's motion for an evidentiary bail hearing, because sufficient information supported a finding by clear and convincing evidence

that release of the defendant will endanger himself and the public. The defendant has failed to show this Court overlooked or misapprehended any fact or law, but instead attempts to inject new factual information not previously discussed in his initial filing. See Defendant's Motion to Reconsider at ¶7-8. As such, the defendant has failed to properly present information to this Court to consider in the first instance, and therefore this Court could not have misapprehended it.

3. None of the new information alleged by the defendant changes the defendant's dangerousness to the public or himself. The defendant's dangerousness is proved by the matters which he cannot contest. The defendant had concentrations of multiple illegal drugs in his blood, while commercially driving a truck and trailer weighing in excess of 10,000 lbs. He did this having been previously released on bail for an impaired driving charge occurring the month before the immediate crash, and having previously admitted to sufficient facts to support another DUI conviction before that. What the defendant acknowledges as a "not particularly commendable" criminal history, highlights the defendant's disregard for the safety of the community or himself, requiring preventative detention pursuant to RSA 597:2. Defendant's Motion to Reconsider ¶15. Even if this Court considers the defendant's new assertions in his motion for reconsideration, the facts still support preventative detention because even when viewed as the defendant asserts them, there is no meaningful impact on considerations for bail. The defendant asserts that a number of witnesses made no observations of the defendant's impairment, but fails to account for, or acknowledge in entirety, the witnesses who directly observed the defendant's significantly erratic operation prior to, and immediately before, the collision at issue. See State's Objection to Defendant's Motion for Evidentiary Bail Hearing ¶3, Defendant's Motion to Reconsider ¶7-8.

4. The defendant's assertions in his motion for reconsideration have a de minimis, if not inconsequential effect, on the fact that release of the defendant will endanger the public and himself. The defendant argues that developed discovery has impacted the "strength of the State's case." Defendant's Motion to Reconsider ¶14. However, the strength of the State's case is more properly a consideration for those crimes which are governed under RSA 597:1-c, which relates to crimes that are punishable by up to life in prison. This is not such a case. The current bail considerations before this Court are governed by RSA 597:2 (release of the defendant will endanger the safety of the person or the public), and not undertaken pursuant to the standard of RSA 597:1-c and State v. Furgal, 161 N.H. 206 (2010) ("Any person arrested for an offense punishable by up to life in prison, where the proof is evident or the presumption great, shall not be allowed bail). Thus, the strength of the State's case has limited impact on the consideration before this Court. See RSA 597:2. Thus, this Court properly gave weight to the additional factors of the defendant's history leading up to the moment of the crash when ordering preventative detention, and was not limited to only the defendant's dangerous conduct in the immediate case, but his criminal history as well.

5. The defendant's criminal history further supported this Court's order for preventative detention. The defendant argues in ¶15 that others with similar criminal histories have been released on bail. However, the history of others is not a consideration that is either a misapprehension of law or fact. The defendant's criminal history highlights the dangerousness of *this* defendant, especially when considered in light of all the other evidence, particularly the admissions the defendant made to the police. See State's Objection to Defendant's Motion for Evidentiary Bail Hearing ¶3-4. Among his admissions, the

defendant confessed to consuming heroin and cocaine on the day of the crash; engaging in the practice of combining heroin and cocaine while ingesting it; and most telling of his dangerousness, that he felt the effects of the cocaine prior to, and at the time, of the fatal collision. See id.

6. The defendant improperly asks this Court to reconsider an argument he failed to previously raise, and as a result it is outside the scope of a motion for reconsideration. *Loeffler v.Bernier,* --A.3d--, 2020 WL 1522678, *5 (March 31, 2020) ("It is in the interest of judicial economy to require a party to raise all possible objections at the earliest possible time, especially when an argument raised in a motion for reconsideration was readily apparent to the moving part at the time he initially filed for relief."). The defendant, in his motion for reconsideration asks this Court for the first time to interpret the meaning of language in RSA 597:2, IV(a). Defendant's Motion to Reconsider ¶16-17. Because the defendant failed to previously raise this issue, it is improperly before this Court in his motion for reconsideration. This Court was not given an opportunity to consider this novel argument in the first instance. As a result, the defendant cannot properly accuse this Court of a misapprehension of the law it was not asked with specificity to consider. Even if the issue was arguably raised, it is inconsequential. This Court properly concluded that the facts support, by clear and convincing evidence, that the release of the defendant will endanger the safety of himself and the public, based on the defendant's criminal history, illegal drug use, particularly while working as a commercial driver operating a multi-ton truck, and his specific driving conduct leading up to the collision in this matter. Because the defendant failed to demonstrate any misapprehension of law or fact by this Court, his motion for reconsideration must be denied.

WHEREFORE, the State respectfully requests this Honorable Court:

A. Deny the defendant's motion for reconsideration on the pleadings and without a hearing; and

B. Hold the defendant on preventative detention; and

C. Grant such other relief as this Court deems just and equitable.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Benjamin Maki, do hereby certify that I have forwarded this a true copy of the within motion to counsel for the defendant on this 6th day of April 2020.

/S/ Benjamin W. Maki____________

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COÖS, SS. **SUPERIOR COURT**

State of New Hampshire

v.

Volodomyr Zhukovskyy

214-19-CR-078

RENEWED MOTION FOR BAIL HEARING

NOW COMES the accused, Volodomyr Zhukovskyy, by and through counsel, Jay Duguay and Steve Mirkin, Esq., and respectfully moves this Honorable Court pursuant to the Eighth and Fourteenth Amendments; to Part I, Art. 33 of the New Hampshire Constitution; and to RSA 597:2 as amended effective September 14, 2020, for release on bail pending trial herein, and for an evidentiary hearing, including the appearance of witnesses in an in-court proceeding. As grounds for such Motion, the accused states as follows:

1. He reasserts and incorporates by reference herein each and every statement made in his previous Motion for Evidentiary Bail Hearing, dated March 27, 2020, which was denied without hearing by the Court, and in his subsequent Motion for Reconsideration thereof, dated April 9, 2020, which was also denied without hearing by the Court.
2. After the Court's denials of said previous motions, it was anticipated that the accused would have to remain incarcerated until his trial, then scheduled for November 2020, some seventeen months after his arrest and incarceration herein.
3. Subsequently, on August 20, 2020, at a conference between the Court and parties, it was established that due to continuing Covid-19 considerations, the trial herein

will need to be continued to a date no sooner than March 2021, twenty-one months after incarceration. Even that date cannot be presumed, as there are many unknowns regarding the anticipated logistics of such a lengthy trial as is contemplated here, in relation to continuing Covid protocols.

4. The State continues to maintain that Mr. Zhukovskyy's impairment on the day of the accident justifies his continued preventative pre-trial detention. However, the State willfully ignores the objective and overwhelming evidence that Mr. Zhukovskyy was not impaired. Beginning directly after the accident, at least eight law enforcement officers from various agencies had personal contact with Mr. Zhukovskyy. Some of those officers had short conversations or interactions with him, some had lengthy and extensive contact with him over the course of hours. Not a single one of those officers noted any sign, symptom, or indication that Mr. Zhukovskyy was impaired at any point. One such officer was a veteran N.H. State Trooper who, in addition to the standard DUI detection and standardized field sobriety testing training attended by all certified law enforcement officers, had undergone a specialized certification program designed to "train law enforcement officers to observe, identify, and articulate the signs of impairment related to drugs, alcohol or a combination of both."[1] That specially trained Trooper spent in excess of four hours, beginning shortly after the accident until almost midnight, with Mr. Zhukovskyy and did not detect or identify a single indication of impairment at any point.

5. In addition to the already existing evidence that Mr. Zhukovskyy was not impaired, the most recent supplemental report prepared by the State's independent expert,

[1] 2013 ARIDE manual, "Course goals."

the Crash Labs, Inc., at the State's request, eviscerated any remaining argument on the issue of impairment.

6. On or about September 2, 2020, the State provided the defense with an Addendum to the accident reconstruction report originally produced in February 2020 by The Crash Lab, Inc., Hampton, N.H., which had been retained by the State to perform expert reconstructive services herein. Such Addendum was apparently produced in order to take into account reports produced after the original Crash Lab report, both by Tpr. Andrew Wilensky of the New Hampshire State Police, and by Stephen Benanti, the reconstruction expert retained by the defense.
7. In said Addendum, the reconstructionists at The Crash Lab reiterated their initial conclusion that the initial contact between the accused's Dodge Ram 2500 truck and the Harley-Davidson motorcycle driven by Albert Mazza occurred directly over the center line of the highway, rather than within the motorcycle's lane of travel, as had initially been alleged by the State Police reconstruction team.
8. Furthermore, the Crash Lab team, having further reviewed the documented physical evidence at the scene, made two crucial findings. First, the Crash Lab team reiterated that when taking into account the curvature and slope of the roadway along with the approximate speeds of the two vehicles, Mr. Zhukovskyy only had 2-3 seconds to see the lead motorcycle and identify that its position in the roadway would require evasive action. They further stated that established understandings of driver reaction times in similar circumstances were upwards of 1.6 seconds. Based on that, the report concludes that "considering the time available for Mazza and Zhukovskyy to

identify the vehicle lane positions, the time available for hazard analysis and implementation of any emergency response is limited." (Addendum, p. 26, ¶¶ 53-55).

9. Second, the Crash Lab concluded that the objective physical evidence found at the scene and during the post-crash inspection of the Dodge Ram truck and trailer showed that during this "limited" time Mr. Zukovskyy had to react, he did in fact identify the hazard and initiate an emergency response by applying and locking the brakes prior to impact. This is in direct contradiction to the State Police CAR team report, which has since proven to be wrong in almost all material aspects.

> "Because the right rear tire of the Ram 2500 begins to leave a mark when the front of the Ram 2500 is at, or very close to impact, suggests Zhukovskyy detected, recognized and initiated an emergency response to a hazard prior to the impact. For a driver to respond to a potential hazard, he/she must first detect, and identify that potential hazard. Once the hazard is recognized, the driver must decide what action he/she will take. In this case, Zhukovskyy initiated an emergency brake application. It should be noted that once the brake is applied, it can take up to 250 milliseconds (0.25 seconds) for the brake system to achieve enough pressure to lock the wheels." Addendum, pp. 25-26, ¶ 52.

10. This finding, that the accused attempted to brake sharply within roughly a second of being able to identify the potential hazard of Mazza's motorcycle intruding on or over the center line of the highway[2], has not previously been expressed by the State or any expert on its behalf. It is further in contradiction of the State's theory, as expressed in the Indictments herein, that the accused was either reckless,

[2] It bears repeating that Mazza was impaired by alcohol as a matter of law, his blood alcohol level at autopsy having been established at 0.135, well in excess of the maximum permissible by statute, RSA 265-A:2, I(b).

negligent, or negligent as a consequence of being under the influence of a controlled drug, and thus "cross[ed] into the opposite lane of travel, thereby causing" the collision herein.

11. It should also be borne in mind that previous reconstruction reports herein by the respective outside experts agree that the Ram's left front tire incurred an immediate and "catastrophic" loss of air pressure upon impact, which is what caused the truck to cross over into the eastbound traffic lane where it collided with the other motorcycles.

12. The accused respectfully submits that the additional delay of at least four months in trial, as well as the dramatic new findings in the Crash Lab Addendum, represent substantially changed circumstances which must be factored into any ongoing consideration of his bail status. Given the lengthy delays in trial which are not in any way the fault of the accused,[3] and given the new evidence drastically weakening the structure of the State's case against him, the accused would reassert before the Court that his release pending trial cannot be seen to be shown by "clear and convincing evidence", RSA 597:2, III(a), to endanger the safety of the public. Certainly there are any number of restrictive conditions the Court could impose as contemplated by said section, such as confinement to his residence, electronic monitoring, surrendering of his passport, and regular drug testing, to allay any residual concerns about public safety.

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[3] Nor, obviously, of the State or the Court.

13. The accused respectfully submits that pretrial incarceration of twenty-one months or more, not caused by any action of the accused, of an individual with no history of violence, in a case where the State's own experts have issued findings that appear inconsistent with and contrary to the State's theory as expressed in its Indictments, would violate his Constitutional protections as asserted above, as well as the intent of RSA 597:2.

14. The accused requests an evidentiary hearing, and specifically one conducted in open court with live witness testimony, RSA 597:2, IV(a) and (b), to address the issues raised herein.

WHEREFORE, the accused respectfully prays the Court for an in-court evidentiary hearing to be held hereon; for his release on Personal Recognizance pending trial, with such conditions as the Court deems appropriate, and for such further relief as may be just.

Respectfully submitted,

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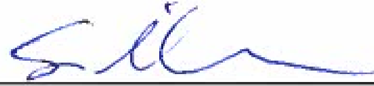
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded this 16th day of September, 2020, to John G. McCormack, Esq., Coos County Attorney; Shane Goudas, Esq., Assistant Attorney General, and Scott Chase, Esq., Assistant Attorney General.



Steve Mirkin, Esq.

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THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

COÖS, SS. SEPTEMBER TERM, 2020

THE STATE OF NEW HAMPSHIRE

V.

VOLODYMYR ZHUKOVSKYY

214-2019-CR-78

STATE'S OBJECTION TO DEFENDANT'S RENEWED MOTION FOR BAIL

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, who respectfully requests that this Honorable Court deny the defendant's renewed motion for bail. In support thereof, the State submits the following:

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 took those lives, seriously injured another, and risked the lives of additional motorists, while he was distracted, failing to maintain control of his commercial truck and attached trailer, after having admittedly ingested fentanyl and cocaine, both of which were in his blood following the collision. Even more troubling—and demonstrative of the defendant's danger, regardless of any conditions placed upon him by the Court—is that he committed these crimes a month after he was released on bail after being charged with driving under the influence of drugs in

Connecticut. Had the defendant not continued to escalate his pattern of drug use and driving while impaired, Albert Mazza, Daniel Pereira, Michael Ferazzi, Edward Corr, Joan Corr, Aaron Perry, and Desma Oakes, would still be alive; Joshua Morin, would still be walking on his own two legs, not having to bear the incredible pain and physical impairment caused by serious injuries from the crash. Nothing in the latest accident reconstruction report issued by the Crash Lab changes that. The defendant was and remains a danger to the public, and himself. Accordingly, this Court should once again deny the defendant's demand to be released.

2. After causing the accident that left motorcycles mangled and bodies strewn across Route 2, the defendant was arrested and charged with seven counts of negligent homicide on June 24, 2019. He waived arraignment on those charges and entered pleas of not guilty on June 25, 2019. On October 18, 2019, the defendant was indicted on seven charges of manslaughter, seven charges of impaired negligent homicide, seven charges of negligent homicide, one charge of aggravated driving while intoxicated, and one charge of reckless conduct with a deadly weapon. The defendant waived arraignment on these additional charges, and waived argument as to the State's request for preventative detention.

3. On March 27, 2020, the defendant filed a previous motion for a bail hearing, similarly arguing that updated and contested developments in an expert accident reconstruction analysis report issued by the Crash Lab warranted the defendant's release on bail. On April 6, 2020, the State filed an objection, arguing that the defendant's undisputed and substantial recent history of drug abuse, and driving while impaired, warranted his continued detention pending trial. On April 7, 2020, the Court denied the defendant's motion for bail, citing the reasons set forth in ¶¶ 1-10 of the pleading captioned STATE'S

OBJECTION TO DEFENDANT'S MOTION FOR EVIDENTIARY BAIL HEARING. The defendant filed a motion to reconsider, which was objected to by the State, and likewise denied by the Court on April, 20, 2020.

4. The defendant's newest motion, albeit more demanding, remains largely unchanged in substance from its predecessor. Once again, the defendant argues the merits of the case, by contesting whether the defendant was impaired at the time of the crash. He argues the State cannot prove the defendant was impaired, and thus he must be released from preventative detention. However, just as before, whether the defendant should be released on bail does not hinge upon whether the State can prove that he was impaired, though the State is capable of proving so. The critical consideration for purposes of preventative detention is whether there is "clear and convincing evidence that release will endanger the safety of [the defendant] or the public." RSA 597:2, IV(a). The defendant is a demonstrated threat to the public and himself. Nothing in the defendant's newest motion, or discovery provided to defense, changes that.

5. Preventative detention is governed by RSA 597:2, which states in pertinent part:

> If a person is charged with any criminal offense...the court may order preventive detention without bail, . . . only if the court determines by clear and convincing evidence that release will endanger the safety of that person or the public. The court may consider all relevant factors bearing on whether the release will endanger the safety of that person or the public.

RSA 597:2. Release of the defendant during the pendency of this case will endanger the safety of the public and the defendant. This is demonstrated by the fact that the defendant was already released and on bail of a $2,500 non-surety bond in connection with another charge of driving under the influence of drugs, on May 11, 2019, in East Windsor,

Connecticut, the month before the immediate fatal collision, which notably also involved the defendant's use of drugs.

6. Regarding the defendant's Connecticut arrest on May 11, 2019, the police were dispatched to a Walmart parking lot at about 9:40 a.m., for a man who was acting erratically and had been observed revving the engine of his vehicle in the parking lot. The defendant was identified by the officers as the person of interest, and was observed twitching, making random, spontaneous movements with his arms and legs, appeared to have sores around his mouth, and was speaking in a hyperactive manner, among other observations. The defendant's pants were wet in the area of his crotch, and his pants were unzipped. The defendant agreed to perform a number of field sobriety tests, which he failed. The defendant was arrested for driving under the influence, and submitted to a breathalyzer test at the police station, which came back with a reading of 0.000 blood alcohol concentration. The defendant was given an opportunity to then take a blood test, which he refused. As a result of his refusal to take a chemical alcohol test, the defendant's right to operate a motor vehicle in Connecticut was revoked for a period of forty-five days by the Connecticut Department of Motor Vehicles. The defendant's conduct only escalated in seriousness a month after he was charged and bailed in connection with this incident. Indeed, the defendant has already once been afforded bail in the face of a serious criminal charge involving similar conduct, and yet persisted in a course of drug use while driving, that was patently dangerous to himself and the public. Conduct that culminated in seven fatalities, life-altering injuries, and immeasurable misery to other people.

7. Nor is the immediate collision or Connecticut arrest even the defendant's first foray in impaired driving. On January 10, 2014, the defendant pleaded to sufficient facts to

support a conviction of operating under the influence of liquor in West Springfield, Massachusetts. In that case the defendant was observed driving straight through a stop sign and striking a parked vehicle, which had been parked on the opposite side of the road from the defendant's lane of travel. The defendant then continued to drive away, and was observed by a witness to have thrown an object from his vehicle into some bushes, the object was later recovered by police and discovered to be a 375 ml. bottle of Hennessy Cognac, that was about a quarter-full of liquid. The defendant failed a number of field sobriety tests, and submitted to a breathalyzer test, which yielded results of 0.148 and 0.146 blood alcohol concentration, almost double the legal limit to drive.

8. Further, the defendant's criminal record demonstrates his pattern of illicit drug and alcohol use. On March 21, 2018, the defendant pleaded guilty of possession of heroin, and cocaine. On February 11, 2019, the defendant was arrested by the Baytown, Texas Police for possession of drug paraphernalia, after he was observed acting erratically in a Denny's Restaurant while on a long-distance commercial trucking haul.

9. The dangerousness of the defendant's drug consumption could not have been made clearer to him than it was on May 5, 2019, just prior to his arrest in Connecticut, and also the month before the fatal collision at issue. On that day, the defendant suffered an overdose in a parking lot in Agawam, Massachusetts. Agawam police and fire rescue were called to a parking lot where the defendant was found lying on the ground, blue in the face, with a weak pulse and fixed pinpoint pupils. The defendant was administered two intranasal doses of Narcan by police, and a third intravenous dose of Narcan. After being administered the third dose of Narcan, the defendant finally became responsive, and confessed that he had

snorted three bags of heroin. Thus, there is no doubt that the defendant was aware of the extreme dangerousness and impairing effects of the street drugs he was consuming.

10. To the extent the defendant argues there is a lack of evidence that the defendant was impaired during the immediate collision at issue, he is wrong. On June 21, 2019, the defendant combined a mixture of illegal street drugs while driving a large commercially operated vehicle, with an attached trailer, in Randolph, New Hampshire.[1] The defendant told police in an interview on June 24, 2019, that he had consumed two "superman" branded baggies of heroin, and a half of a gram of cocaine on the morning of the fatal crash, and that he combined the heroin and cocaine when he used them. The defendant also admitted that was still feeling the effects of the cocaine at the time he left a car dealership in Gorham, New Hampshire, about a half-hour before the crash occurred. He even admitted that he could still **feel the effects of the cocaine at the time the fatal crash occurred**. After the crash, the defendant consented to have a sample of his blood drawn for chemical testing. The test corroborated the defendant's admissions, as his blood contained 6.7 nanograms per milliliter (ng/ml) of fentanyl, 21 ng/ml of morphine[2], and over 1000 ng/ml of benzoylecgonine (a metabolite of cocaine).

11. The defendant's drug use and admissions are further corroborated by eyewitness observations on the day of fatal collision. During the half-hour before the crash, multiple witnesses observed the defendant driving in a manner consistent with impairment and certainly in a manner that endangered the public. The witnesses observed the defendant's

[1] The combined weight of the truck and trailer was over 10,000 pounds.
[2] The defendant's blood also tested positive for 6-monoacetylmorphine (6-MAM) which is the 6-monoacetylated form of morphine, which is pharmacologically active. When present, it is generally indicative of recent heroin use.

truck and trailer weaving within his lane, and cross the double-yellow line on several occasions. More telling, is an oncoming motorist who, immediately preceding the crash, had to slam on his brakes and swerve out of the way to avoid the defendant's truck, which was driving the wrong way in his lane of travel.

12. Nor was the defendant's knowledge that he had just been involved in a collision while using illegal street drugs, in which seven people were horrifically killed and another maimed, enough of a catalyst to halt his drug consumption. The defendant told investigators that after the collision on June 21, 2019, and prior to his arrest on June 24, 2019, that he returned to his home in West Springfield, where he continued to consume what he believed to be heroin.

13. While the defendant initially told investigators he uses about three to four bags of heroin per day, on June 25, 2019, while being held at the Coös County House of Corrections, the defendant requested medical attention because he was detoxing. When asked what he was detoxing from, the defendant responded "dope and alcohol," stating that he is an "alcoholic." When asked what quantities of these substances the defendant consumes on a daily basis, he responded that he drinks a bottle of "Hennessy" brand liquor every day, and consumes ten approximately "quarter-sized" bags of heroin each day.

14. The defendant's motion for bail does not attempt to address these specific and previously articulated points, which demonstrate the out of control and dangerous behavior of the defendant—prior to, the day of, and immediately following the fatal collision in this case. Instead, the defendant's newest argument attempts to sidestep the proper statutory considerations of dangerousness under RSA 597:2, by arguing: (1) the law enforcement officers who interacted with him did not detect his impairment; and (2) the Crash Lab's

newest report concludes that a brake mark indicates the defendant perceived the hazard and applied the brakes in a reasonable time.

15. The State does not need to prove that the defendant was "stumble down drunk." There is more than sufficient evidence to prove the defendant was impaired beyond a reasonable doubt, especially given that "the State [is] required only to prove that [his] ability to operate [his] vehicle was 'impaired to any degree.'" *State v. Kelley*, 159 N.H. 449, 451 (2009). However, the State need not address the merits of the case in this pleading because "[the Court] rules do not provide for a pretrial determination of the sufficiency of the evidence in criminal cases." *State v. Valentin*, No. 2016-0209, at 6 (N.H. June 30, 2017) (non-precedential order) (citing *State v. Bisbee*, 165 N.H. 61, 65–66 (2013)).

16. Even assuming *arguendo* that the evidence of his impairment was insufficient to prove beyond a reasonable doubt that he was legally impaired, the defendant remains charged with seven charges of manslaughter, seven charges of negligent homicide pursuant to RSA 630:3,I, and one charge of reckless conduct with a deadly weapon, all charges which do not require proof that he was legally impaired. However, evidence of his impairment would still be admissible to support convictions for those charges. See, e.g., *State v. Ebinger*, 135 N.H. 264, 267 (1992) (evidence of defendant's alcohol consumption was relevant to charge of criminally negligent vehicular homicide even if the evidence was insufficient to convict him of causing the death of another while driving under the influence of alcohol).

17. Beyond the defendant's impairment by illicit narcotics, the defendant was inattentive. The defendant was driving a commercial motor vehicle with a commercial driver's license. Commercial carriers have a heightened need for attention and safety, given the increased size of the vehicles they operate, and extended periods of driving they engage

in. However, the defendant admitted that when he failed to keep his commercial truck in his lane of travel, and smashed into a group of oncoming motorcycles, he had completely diverted his attention from the roadway and oncoming traffic. He said that he was attempting to retrieve a beverage from the center console of his truck. In fact, the defendant was so distracted that after he careened through a group of motorcycles, dragging bodies and motorcycles across the oncoming lane, he told investigators in an interview conduct the night of the crash that he did not even know what he had hit. According to him, he thought he had hit another car, not a group of motorcycles.

18. Based on the facts surrounding the crash on June 21, 2019, the fact that the defendant was on bail, the defendant's unyielding drug use, and his prior related criminal history, preventative detention is the only sufficient means for this Court to protect the public and the defendant.

19. In his latest motion, the defendant cites a supplemental report issued by the Crash Lab on August 31, 2020, that was provided by the State in discovery. Nothing in that report changes the facts cited by the State that justify preventative detention. The information provided by the Crash Lab's report further cements the fact that the defendant caused the collision with the first motorcycle when he failed to keep his commercial motor vehicle in his own lane of travel, which resulted in his truck and trailer veering into the oncoming lane, where he struck, killed, and maimed additional motorcyclists. That result must be considered in light of the defendant's admitted drug use that day, his history of prior and unrelenting drug use, his bail status at the time, and his criminal history. Together, those facts prove that the defendant should continue to be held pursuant to RSA 597:2.

20. Beyond the defendant's dangerousness to himself and the community, preventative detention is necessary because he poses a significant flight risk. New Hampshire RSA 597:2 provides:

> The court shall order the pre-arraignment or pretrial release of the person on his or her personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, or cash or corporate surety bail, subject to the condition that the person not commit a crime during the period of his or her release, and subject to such further condition or combination of conditions that the court may require unless the court determines by a preponderance of the evidence that such release will not reasonably assure the appearance of the person as required.

The defendant has been indicted on numerous felonies and faces the potential penalty of decades in prison. If his bail conditions on his driving while impaired charge could not keep him from simply driving again—never mind driving safely—there are no conditions that this Court could put in place to guarantee his future appearance.

21. Moreover, the defendant is a Ukrainian national, with a status as a long-term permanent residence in the United States. As a result of the defendant's criminal conduct, an active detainer for deportation has been filed by the United Stated Immigration and Customs Enforcement agency. As such, the defendant has a significant motivation to abscond from any future hearings, regardless of any combination of bail conditions imposed by this Court.

22. The defendant's flight risk alone is sufficient to establish by a preponderance of the evidence that release will not reasonably assure the appearance of the defendant. Moreover, upon information and belief, the defendant has immediate family members currently living in Ukraine. Because of his flight-risk, particularly in light of his continued pattern of criminal conduct, discussed supra, and his known ties to a foreign nation, this Court should find that no condition or set of conditions could reasonably assure the defendant's appearance in the future.

23. The defendant claims that it would be unconstitutional to continue his pretrial detention, in part, because he is "an individual with no history of violence." Def.'s Mot., at ¶ 13. This is not a question about whether the defendant is "violent." Danger comes in many shapes and sizes. In this instance, it comes from a man who chose to mix together and snort street narcotics before driving his 10,000 pound commercial vehicle while transporting other cars. He chose to do this despite having previously plead to sufficient facts to support a conviction for operating under the influence and other drug-related crimes; despite having been actively facing another criminal charge for driving while under the influence of drugs; despite having suffered the personal consequences of an overdose the month before; and even despite the clear warning signs that he was unable to operate his commercial truck and attached trailer as he weaved back and forth on the road in the time preceding the crash. The defendant may not be "violent," but he is no less dangerous to himself or others. Bail conditions and several other glaring red flags, all of which should have individually served as a sufficient warning as to the dangerousness of his conduct, did not keep him from turning his 10,000 pound truck and trailer into a destructive weapon in Randolph, and there are no bail conditions this Court is capable of setting that will protect the public or the defendant, short of preventative detention.

24. Lastly, to the extent that the defendant points to an established understanding that the trial in this matter will be continued to a date no sooner than March 2021, due to Covid-19 considerations—the length of preventative detention is not a consideration enumerated in RSA 597:2. See Defendant's motion at ¶ 3. For the aforementioned reasons discussed supra, there is sufficient evidence to support by a finding of clear and convincing

evidence that the release of this defendant will endanger the safety of the public and himself. The defendant's motion should therefore be denied.

WHEREFORE, the State respectfully requests this Honorable Court:

A. Deny the defendant's renewed motion for bail; and

B. Hold the defendant on preventative detention; or

C. Schedule a hearing in this matter; and

D. Grant such other relief as this Court deems just and equitable.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

September 25, 2020

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CERTIFICATION

I certify that this pleading has been provided to Jay Q. Duguay, Esq., and Steve Mirkin, Esq., New Hampshire Public Defender's Office, 134 Main Street, Littleton, NH 03561, through the Superior Court's electronic filing system.

/S/ Scott D. Chase
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Coos Superior Court
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COÖS, SS. **SUPERIOR COURT**

State of New Hampshire

v.

Volodomyr Zhukovskyy

214-19-CR-078

THIRD MOTION FOR BAIL HEARING

NOW COMES the accused, Volodomyr Zhukovskyy, by and through counsel, Jay Duguay and Steve Mirkin, Esq., and respectfully moves this Honorable Court pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments; to Part I, Arts. 14, 15 and 33 of the New Hampshire Constitution; and to RSA 597:2 as amended effective September 14, 2020, for release on bail pending trial herein, and for an evidentiary hearing, including the appearance of witnesses in an in-court proceeding. As grounds for such Motion, the accused states as follows:

1. He was arrested herein on June 24, 2019, at his home in Massachusetts, at which time he waived extradition and voluntarily came to New Hampshire to face the charges herein.
2. Upon arraignment, he did not object to being detained without bail, but neither did he waive his right to seek release on reasonable bail conditions at a future date.
3. Because of the anticipated complexity of legal and evidentiary issues herein, in January 2020 the parties agreed to a proposed trial schedule that would have had the trial begin in November 2020, which schedule was adopted by the Court.

4. On March 27, 2020, the accused filed a Motion for an Evidentiary Bail Hearing, which was denied by the Court on April 7, 2020, without opinion beyond a citation to the first ten paragraphs of the State's Objection thereto.
5. On April 9, 2020, the accused moved to reconsider said Order, laying out in detail numerous areas where additional evidence being produced in discovery tended to negate the State's narrative of the accused's guilt. Said Motion was denied on April 20, 2020, without opinion.
6. On August 20, 2020, the Court and parties agreed that continuing Covid protocols would preclude a November trial, and trial was rescheduled to March 2021. On September 16, 2020, citing the delay in his trial along with further discovery from the State's experts tending to further negate the State's narrative of his guilt, the accused filed a Renewed Motion for Bail Hearing. Said Motion was denied by the Court by Order dated October 14, 2020, again without opinion beyond a citation to specific paragraphs of the State's Objection on which it relied..
7. In January 2021, with Covid protocols continuing to be in place for the foreseeable future, the parties agreed to postpone the trial to May 2021, and the Court so ordered.
8. At some point in January 2021, counsel for the State informed counsel for the accused that a substantial volume of additional discovery had come to the State's attention in the form of documented communications between and among law enforcement personnel during the course of the investigation herein; that some of such communications related to matters of potential expert testimony in the case; and further that some of such communications might tend to be exculpatory in

nature. Based on that information, it was agreed among counsel that planned depositions of the State's experts would not be scheduled until such discovery was completed.

9. In a teleconference with the Court on February 22, 2021, it was mutually agreed that between the delays in discovery and uncertainty about when and to what degree Covid protocols might be lifted, it would be more appropriate to move the trial back to late June 2021. The Court indicated it would so Order upon receipt of an appropriate Motion.

10. On March 29, 2021, in a teleconference requested by the State, things changed. The State referred to a trial date *at any time in 2021* as "not feasible," citing as reasons:

    a) Its ongoing efforts at discovery compliance, for which it estimated it would need another 30 to 45 days (i.e., early- to mid-May);
    b) The fact that defense depositions had not yet been taken (which the defense pointed out is due to the ongoing delays in discovery, as noted above;
    c) That an effort at resolution in January and February this year, initiated at the State's request, had consumed time and effort;
    d) Continuing uncertainty as to the effect of Covid on jury trials in Coös County;
    e) That Attorney Goudas will be leaving the Attorney General's office within the next three weeks; and
    f) That Attorney Chase is scheduled to try a bifurcated double-murder/insanity case in Strafford County in September and October 2021[1].

11. The defense for its part asserted that it would be ready for trial by September 2021, assuming the State completes its discovery compliance in a timely manner.

12. The Court has now entered an Order setting the trial to begin with jury selection on November 29, 2021. The defense has moved separately to reschedule the start of

[1] On March 30, Atty. Chase provided updated information showing that the Strafford trial is scheduled to begin September 20 and end November 4.

trial to November 18, to provide adequate time for jury selection and trial before running into the Christmas break; the State has indicated that it will object thereto.

13. In either event, by the time trial begins, the accused will have been in custody, without so much as a hearing on bail, for two and one-half years.
14. This period of pre-trial delay, without so much as a hearing as to possible release on bail, is unconscionable.
15. Of the six factors asserted by the State in justifying its request for this extensive delay on March 29, none are attributable to the defense. Other than delays due to Covid-19, all are attributable to the State. Of particular note is the additional discovery, first mentioned to the defense by the State in January 2021 and for which the State assets it needs until May 2021, which is causing delays which would have occurred even if Covid-19 had not.
16. The accused has not waived his Constitutional speedy trial rights as to any of the factors asserted by the State on March 29 in justifying delay of his trial until 2022, or late November 2021, and the accused hereby reasserts his rights, under both the United States and New Hampshire Constitutions, to a speedy trial herein.
17. As pointed out by the State in its Objection to Defendant's Renewed Motion for Bail Hearing dated September 25, 2020, ¶ 24, "the length of preventive detention is not a consideration enumerated in RSA 597:2". Nonetheless, the accused asserts that preventive detention lasting two and one-half years, *without benefit of an evidentiary hearing* as provided for by RSA 597:2, IV, is contrary to the purpose of the statute, as well as to the Constitutional guarantees against unreasonable bail.

18. The accused re-asserts and incorporates by reference each of the assertions of fact contained in his above-referenced motions dated March 27, April 9, and September 16, 2020, rather than re-state each such assertion herein.

19. While the State can, and no doubt will, reassert each of its points made in opposition to such motions, it is significant to note that on March 10, 2021, the State obtained 22 substitute indictments from a Grand Jury, in which it deleted the reference to "crossing into the opposite lane of travel" from each of the seven Manslaughter and Negligent Homicide indictments, thus reflecting that continued investigation has revealed that he did not in fact cross into the opposite lane of travel, whether recklessly or negligently, as was originally alleged by the State Police Reconstruction team.

20. The State's assertions as to "dangerousness", relied upon by the Court pursuant to RSA 597:2, III (a) in ordering his continued detention without benefit of a hearing, are of progressively less weight as additional time goes by. At the outset, it should be apparent that he has not used drugs of any type for twenty-one months while incarcerated.

21. In its previous pleadings in objection to the accused even receiving a hearing as to bail, the State has relied heavily on his prior record, *see* State's Objection to Defendant's Renewed Motion for Bail, September 25, 2020, ¶¶ 5-9. To be sure, the accused in 2014 stipulated sufficient facts to establish a DUI that occurred when he was 17 years old, and he had a pending DUI charge at the time of the incident herein, as well as prior misdemeanor convictions for possession of a controlled substance and possession of a pipe. That he has a history of

substance abuse is not a secret. Yet such a history does not establish "clear and convincing evidence" that he will indefinitely into the future pose a danger to himself or others. He has been clean and sober for twenty-one months and counting, as could be further developed at an evidentiary hearing.

22. The State asserted, *Id.* at ¶ 10, that the accused "admitted he could still feel the effects of the cocaine at the time the fatal crash occurred." The State does not acknowledge that such "admission" was an out-of-context response to statements by the two interrogating officers after he had been pressured by them for over an hour while maintaining that he felt fine while driving immediately prior to the crash, as could be further developed at an evidentiary hearing. Nor does it acknowledge that such an "admission" is actually inconsistent with the findings of the State's lab analysts, based on blood samples taken from the accused after the crash, as could be further developed at an evidentiary hearing.

23. The State further asserted, *Id.* at ¶ 11, that "eyewitness observations on the day of the fatal collision" corroborate the allegation of his impairment. However, the State does not acknowledge that, as set out in other pleadings herein, some of these "eyewitnesses" were in fact describing a vehicle that was not the one operated by the accused, and others were referring to conduct that might well be considered "only ordinary negligence" rather than criminal negligence, State v. Shepard, 158 NH 743, 746 (2009), as could be further developed at an evidentiary hearing.

24. At ¶ 19 of its September 25, 2020, Objection, the State brushes aside the findings of its own reconstruction experts, Crash Lab Inc., asserting that it "cements the fact that the defendant caused the collision with the first motorcycle when he failed to keep his commercial motor vehicle in his own lane of travel, which resulted in his truck and trailer veering into the oncoming lane"; the State fails to mention that the Crash Lab found that the operator of the first motorcycle, who was impaired by alcohol as a matter of law, failed to keep his vehicle in his own lane of travel, and further that the accused perceived the threat and reacted by braking, within the time range expected of a normal driver, and that it was the tire failure resulting from that impact that caused his truck and trailer to veer into the oncoming lane; once again, all of this could be further developed at an evidentiary hearing. As noted above, the State's efforts to obtain newly reworded indictments in March 2021 appear to be inconsistent with its averment quoted herein.

25. A court may order the preventative detention of a defendant without bail, or order restrictive conditions, such as electronic monitoring and supervision, "only if the court determines by clear and convincing evidence that release will endanger the safety of that person or the public." RSA 597:2, IV. The statute permits the court to consider "all relevant factors." *Id.* Under the Federal Bail Reform Act of 1984, to which RSA 597:2 is similar in pertinent aspects, a court is to "take into account the following: (1) the nature and circumstances of the offense charged; (2) **the weight of the evidence as to guilt or innocence**; (3) the history and characteristics of the accused, including past conduct; and (4) the nature and

gravity of the danger posed by the person's release." United States v. Tortora, 922 F. 2d 880, 884 (1st Cir. 1990) (emphasis added).

26. As recently observed by the United States District Court for the District of Columbia,

> The Court must . . . review the "weight of the evidence against the" defendant as an indicia of whether any conditions of pretrial release will reasonably assure the safety of the community. If the government possesses overwhelming evidence that the defendant is guilty of the crime charged – and the nature of the charged offenses involves a danger to the community – then the second factor will help meet the government's burden of persuasion. And, if the government's evidence is weak – even where the charged offense involves a danger to the community – the government will have a more difficult row to hoe.

United States v. Taylor, 289 F.Supp.3d 55, 66 (D.D.C. Cir. 2018). In other words, where the State's evidence is weak, the nature of the charged offenses becomes less significant. Trial courts must follow this logic, for otherwise, one could be held without bail for an offense the State has little chance of proving at trial, simply because of the nature of the charged crime and the defendant's prior criminal record.

27. Again, as investigation and discovery have proceeded herein, the State's case has become consistently less settled than the initial narrative put forth based on the State Police investigation[2].

28. The accused also asserts that the court must consider less restrictive alternatives to detention without bail. The accused is aware of dicta in State v. Spaulding, 172 NH 205, 209 (2019) to the contrary, but would respectfully submit that such an

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[2] Again it should be remembered that the State has yet to provide further discovery, which it acknowledges may tend to exculpate the accused.

interpretation of RSA 597:2 conflicts with the requirements of the Federal and State Constitution. U.S. CONST. Amend. V, XIV; N.H. CONST. pt. I, art. 15.

29. In United States v. Salerno, 481 U.S. 739 (1987), the Supreme Court held that a provision of the Bail Reform Act of 1984, providing for pretrial detention without bail, was constitutional under both the Due Process Clause of the Fifth Amendment and the Eighth Amendment. The Court set forth three requirements for pre-trial detention without bail to be constitutionally sound: 1) there is probable cause to believe the defendant committed the alleged offenses, 2) the defendant is afforded a speedy trial, and 3) the trial court must find by clear and convincing evidence that no set of conditions of release will reasonably assure the safety of the accused and the community. *Id.* at 747, 750. The Court reasoned,

> Nor is the [Bail Reform] Act by any means a scattershot attempt to incapacitate those who are merely suspected of these serious crimes. The Government must first of all demonstrate probable cause to believe that the charged crime has been committed by the arrestee, but that it is not enough. In a full-blown adversary hearing, the Government must convince a neutral decisionmaker **by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or person.**

Id. at 750 (citing 18 U.S.C. § 3142(f)) (emphasis added). In so holding, the Court emphasized that the federal bail statute was constitutional because it required the Government to establish more than simply probable cause to believe that the accused committed a crime. The heightened inquiry required of a constitutional detention statute commands trial courts to determine whether there are "conditions [of release] that will reasonably assure . . . the safety of any other person and the community . . .." *Salerno*, 481 U.S. at 742, citing18 U.S.C.

§ 3142(e). Thus, the accused respectfully submits that Part I, Article 15, consistent with the holding in *Salerno*, requires trial courts to find by clear and convincing evidence that no conditions of release can reasonably assure the safety of the defendant and the community, before ordering the detention of a defendant without bail. *See Tortora*, 922 F.2d 880, 884 (1990) ("courts cannot demand more than an objectively reasonable assurance of community safety." The Supreme Court, recognizing that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception," *Salerno*, 481 U.S. at 755, has held the Constitution commands this standard, and it therefore must be adopted by this Court.

30. The accused calls the Court's attention to the New Hampshire Supreme Court's reasoning in State v. Furgal, 161 N.H. 206, 215 (2010). There, the Court observed that:

> Our conclusion that RSA 597:1-c passes constitutional muster is buttressed by the fact that, as noted in *Salerno*, detention without bail is strictly limited in duration. In *Salerno*, the Court made note that pretrial detention was limited by "the stringent time limitations of the Speedy Trial Act." In this state, pretrial detention is limited by the Superior Court's speedy trial policy.

Id. (citation omitted).

31. When interpreting a statute, a Court "construe[s] the Criminal Code according to the fair import of its terms and to promote justice." State v. Breest, 167 NH 212, 213 (2014) (quotation and citation omitted). An interpretation of RSA 597:2 which does not require trial courts to consider all relevant evidence pertaining to dangerousness, including whether less

restrictive conditions would ensure the safety of the accused and the public, would lead to an absurd result. *Id.* at 212 (while statute only addressed DNA results obtained by court order, interpreting statute to deny relief to defendants who had obtained DNA results by consent of the State would be absurd).

32. Even if the Federal Constitution does not require trial courts to find by clear and convincing evidence that no conditions of release can reasonably assure the safety of the defendant and the community before ordering a person preventively detained, this Court should nonetheless consider "the nature and gravity of the danger posed by [the accused's] release." See *Tortora*, 922 F.2d at 884.

33. As previously stated in prior Motions, there are numerous conditions that could be imposed, and by which he would abide, that would address any such concerns. If released, the accused would reside with his parents and his nuclear family in West Springfield, Mass., at the address where he was residing when arrested in June 2019. Having previously waived extradition to New Hampshire herein, he would do so again. He could be precluded from operating a motor vehicle; be ordered to participate at his own expense in a program of electronic monitoring to ensure that he remains at the residence other than for specifically authorized appointments; be ordered to submit to regular drug/alcohol screening at his own expense and to authorize release of all such results to the State and the Court; even be ordered to stay out of New Hampshire except to attend Court

proceedings or meet with his counsel. All of these proposed conditions could be further addressed and developed at an evidentiary hearing.

34. RSA 597:2, III (a), permits the Court to order preventive detention or alternative restrictive conditions "**only** if the Court determines by clear and convincing **evidence** that release will endanger the safety of that person or the public." (emphasis added). To date, while the Court has adopted various of the State's arguments in asserting such a finding, it has not heard actual evidence. The mechanism for the Court to hear evidence, from which it may make such a finding, is set forth in RSA 597:2, IV (a) providing that a defendant "may request a subsequent bail hearing where **live testimony** is presented to the Court." (emphasis added). *See* State v. Spaulding, 172 NH 205 (2019) (evidence presented at probable cause hearing of defendant's frequent and contemporaneous threats to harm complainant, and access to weapons, sufficient to support finding of dangerousness).

35. As matters currently stand, the accused will spend thirty months – two and one-half years – in the Coös County Detention Center before standing trial, because of delays attributable solely to the State over and above the Covid-19 factor, without so much as the opportunity to challenge the factual basis for the State's contention that his release would pose a danger, let alone to present evidence to the contrary, unless relief is granted herein. This can hardly be seen as consistent with the purpose of RSA 597:2, to say nothing of the Fifth, Sixth, Eighth and Fourteenth Amendments and of Part I, Arts. 14, 15 and 33.

WHEREFORE, the accused respectfully prays the Court:

A) To note his assertion of right to speedy trial;

B) To grant an evidentiary hearing herein;

C) To Order his release on bail pending trial, subject to reasonable and appropriate conditions; and

D) For such further relief as may be just.

Respectfully submitted,

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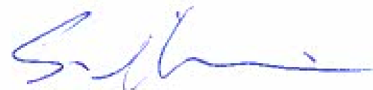
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded this 7th day of April, 2021, to John G. McCormack, Esq., Coös County Attorney; Shane Goudas, Esq., Assistant Attorney General; and Scott Chase, Esq., Assistant Attorney General.



Steve Mirkin

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PUBLIC VERSION - REDACTED

STATE OF NEW HAMPSHIRE

Coös, SS. Superior Court

State of New Hampshire

v.

Volodymyr Zhukovskyy

Superior Court Case: 214-2019-CR-78

STATE'S OBJECTION TO DEFENDANT'S THIRD MOTION FOR BAIL HEARING

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, who respectfully requests that this Honorable Court deny the defendant's renewed motion for bail. In support thereof, the State submits the following:

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 took those lives, seriously injured another, and risked the lives of additional motorists, while he was distracted, failing to maintain control of his commercial truck and attached trailer, and after having admittedly ingested heroin and cocaine, both of which were in his blood following the collision. Even more troubling—and demonstrative of the defendant's danger, regardless of any conditions placed upon him by the Court—is that he committed these crimes a month after he was released on bail after being charged with driving under the influence of drugs in Connecticut. Had the defendant not continued to escalate his pattern of drug use and driving while impaired, Albert Mazza, Daniel Pereira, Michael Ferazzi, Edward Corr, Joan Corr, Aaron Perry, and Desma Oakes, would

still be alive; Joshua Morin, would still be walking on his own two legs, not having to bear the incredible pain and physical impairment caused by serious injuries from the crash. None of the accident reconstruction reports promulgated by any of the experts in this case, or the updated indictments that were returned by the grand jury on March 11, 2021, change that. The defendant was arraigned on the newest indictments, and the Court entered the new bail order requesting preventative detention submitted by the State on April 2, 2021. The defendant was and remains a danger to the public, and himself. Accordingly, this Court should—for the third time—deny the defendant's demand to be released.

2. After causing the accident that left motorcycles mangled and bodies strewn across Route 2, the defendant was arrested and charged with seven counts of negligent homicide on June 24, 2019. He waived arraignment on those charges and entered pleas of not guilty on June 25, 2019. On October 18, 2019, the defendant was indicted on seven charges of manslaughter, seven charges of impaired negligent homicide, seven charges of negligent homicide, one charge of aggravated driving while intoxicated, and one charge of reckless conduct with a deadly weapon. The defendant waived arraignment on these additional charges, and waived argument as to the State's request for preventative detention.

3. On March 27, 2020, the defendant filed a motion for a bail hearing, arguing that updated and contested developments in an expert accident reconstruction analysis report issued by the Crash Lab warranted the defendant's release on bail. On April 6, 2020, the State filed an objection, arguing that the defendant's undisputed and substantial recent history of drug abuse, and driving while impaired, warranted his continued detention pending trial. On April 7, 2020, the Court denied the defendant's motion for bail, citing the reasons set forth in ¶¶ 1-10 of the pleading captioned, "State's Objection to Defendant's Motion for Evidentiary Bail Hearing."

The defendant filed a motion to reconsider, which was objected to by the State, and likewise denied by the Court on April, 20, 2020.

4. The defendant next filed a renewed motion for bail hearing on September 16, 2020, reiterating many of the same arguments found in his first motion for bail, with an emphasis on the merits of the State's case regarding the issue of impairment. The defendant argued the State could not prove that the defendant was impaired and should thus be released from preventative detention. The State filed an objection to the defendant's motion on September 25, 2020, arguing that whether the defendant should be released on bail does not hinge upon whether the State can prove that he was impaired, though the State is capable of proving so. The critical consideration for purposes of preventative detention is whether there is "clear and convincing evidence that release will endanger the safety of [the defendant] or the public." RSA 597:2, IV(a). The State argued that the defendant is a demonstrated threat to the public and himself and nothing in the defendant's motions, or discovery provided to defense, changes that. The Court issued an order denying defendant's renewed motion for bail hearing on October 14, 2020.

5. The defendant's newest motion remains largely unchanged in substance from its predecessors, with the exception of making a more forceful argument that incorrectly lays effectively all of the blame for trial delays upon the State's shoulders. The defendant continues to argue the merits of the case, falsely submitting that the new indictments confirm what he characterizes as the weaknesses with the State's case, notwithstanding the fact that the defendant has been aware since early 2020 that the State intended to re-present the case to the Grand Jury following release of the Crash Lab report. Apart from the additional speedy trial arguments, the defendant's motion presents a repackaged attack on the merits of the case that were presented in his earlier motions for bail.

TRIAL SCHEDULING

6. Although on August 20, 2020, trial was scheduled for November 2020, the Court and both parties later agreed that the continuing Covid protocols would preclude a November 2020, jury trial, and trial was rescheduled to begin in March 2021. As the defendant noted, in January 2021, "the parties agreed" to a May 2021 trial due to ongoing Covid protocols making a March 2021 trial unrealistic. Def.'s Mot., at ¶ 7. Accordingly, the trial was postponed to May 2021. In February 2021, the parties agreed to postpone the trial to June 2021.

7. While now presenting the veneer of outrage at the trial delays, the defendant acknowledges that both the defendant and the State agreed that due to the Covid protocols being "in place for the foreseeable future, the parties agreed to postpone the trial to May 2021." Def.'s Mot., at ¶ 7. It has been the State's understanding that the defense intends to depose approximately twenty State's witnesses.[1] Yet, as of January 2021 they had failed to depose a single expert or law enforcement witness for the trial scheduled first for November 2020, then for March 2021, May 2021, and ultimately June 2021. That number of outstanding depositions made a trial for March 2021, May 2021, or June 2021 highly unrealistic and unlikely. To date, the defendant has still failed to depose a single State's witness, or propose any available dates for its experts to be deposed.

8. As this Court is aware, a teleconference was held on March 29, 2021, in which both parties agreed a June 2021 trial was not feasible. The State recommended an early 2022 trial and the defendant requested a September 2021 trial. The State detailed a conflict with the

[1] Defense counsel have indicated that they will be doing depositions of the following State's witnesses: approximately ten responding law enforcement officers; the State's collision analysis and reconstruction experts; and its toxicology experts.

September trial timeframe.[2] In consideration conflicts presented by both parties and the state of Covid-19, the Court focused on jury trial dates in the November 2021/December 2021, timeframe. Following the hearing, the Court issued a scheduling order setting jury selection to begin on November 29, 2021, docketing a ten-day jury trial to begin on December 1, 2021. The State took no position to the defendant's April 1, 2021, motion to reschedule trial for earlier in November, and the Court granted defendant's request to move jury selection to November 16, 2021, with a 17-day jury trial to commence on November 29, 2021.

9. The scheduling history illustrates the degree to which all parties and the Court have been working diligently to set realistic trial dates. To assign responsibility for the most recent delay solely to the State at this point is inconsistent with both external forces surrounding Covid-19 and resulting court closures and restrictions, and disregards the internal actions of the parties in preparation for trial, including [redacted]

[redacted].

10. Regarding the emails, the prosecution team contacted defense counsel, at the latest, in January 2021, to inform them that it was made aware of a number of e-mails in the State's custody that would need to be reviewed for exculpatory evidence, and that exculpatory material would be provided to defense counsel to the extent that such material is contained within the e-mails. Due to the substantial volume of e-mails, the State has been providing defense counsel with material determined to be exculpatory on a weekly basis, and anticipates

[2] As the Court is aware, Assistant Attorney General Scott Chase is currently scheduled for a bi-furcated first degree murder trial in Strafford County from the end of September 2021, until the beginning of November 2021. Due to the scheduling of this matter, the Attorney General's Office is working toward removing Attorney Chase from the Strafford County murder trial.

completing its review and providing all potentially exculpatory material based on its review within approximately 30 days.

11. Although the e-mails being reviewed by the State and provided to defense counsel weekly have been offered by the defendant as the principal reason for the latest trial delay, the defendant has not conducted a single deposition of any of the law enforcement officers or expert witnesses identified by the State (even prior to the State alerting the defendant to the existence of the e-mails when the matter was docketed for a March, 2021, jury trial and November, 2020, before that). Further unacknowledged by the defendant, is that he also continues to provide supplemental expert reports to the State. Defense counsel provided a supplemental expert report from Steve Benanti, its traffic accident reconstruction specialist, on March 26, 2021, the Friday before the most recent status conference. Finally, the defendant has indicated that a further expert report will be forthcoming from its toxicology expert, Edward Sellers.

DANGEROUSNESS

12. The critical consideration for purposes of preventative detention is whether there is "clear and convincing evidence that release will endanger the safety of [the defendant] or the public." RSA 597:2, IV(a). The defendant is a demonstrated threat to the public and himself. Nothing in the defendant's newest motion, or discovery provided to defense, change that.

13. Preventative detention is governed by RSA 597:2, which states in pertinent part:

> If a person is charged with any criminal offense...the court may order preventive detention without bail, . . . only if the court determines by clear and convincing evidence that release will endanger the safety of that person or the public. The court may consider all relevant factors bearing on whether the release will endanger the safety of that person or the public.

RSA 597:2. Release of the defendant during the pendency of this case will endanger the safety of the public and the defendant. This is demonstrated by the fact that the defendant was already released and on bail of a $2,500 non-surety bond in connection with another charge of driving under the influence of drugs, on May 11, 2019, in East Windsor, Connecticut, the month before the fatal collision, which notably also involved the defendant's use of drugs.

14. Regarding the defendant's Connecticut arrest on May 11, 2019, the police were dispatched to a Walmart parking lot at about 9:40 a.m., for a man who was acting erratically and had been observed revving the engine of his vehicle in the parking lot. The defendant was identified by the officers as the person of interest, and was observed twitching, making random, spontaneous movements with his arms and legs, appeared to have sores around his mouth, and was speaking in a hyperactive manner, among other observations. The defendant's pants were wet in the area of his crotch, and his pants were unzipped. The defendant agreed to perform a number of field sobriety tests, which he failed. The defendant was arrested for driving under the influence, and submitted to a breathalyzer test at the police station, which came back with a reading of 0.000 blood alcohol concentration. The defendant was given an opportunity to then take a blood test, which he refused. As a result of his refusal to take a chemical alcohol test, the defendant's right to operate a motor vehicle in Connecticut was revoked for a period of forty-five days by the Connecticut Department of Motor Vehicles. The defendant's conduct only escalated in seriousness a month after he was charged and bailed in connection with this incident. Indeed, the defendant has already once been afforded bail in the face of a serious criminal charge involving similar conduct, and yet persisted in a course of drug use while driving, that was patently dangerous to himself and the public. Conduct that culminated in seven fatalities, life-altering injuries, and immeasurable misery to other people.

15. Moreover, neither the immediate collision nor his Connecticut arrest were the defendant's first foray into impaired driving. On January 10, 2014, the defendant pleaded to sufficient facts to support a conviction of operating under the influence of liquor in West Springfield, Massachusetts. In that case the defendant was observed driving straight through a stop sign and striking a parked vehicle, which had been parked on the opposite side of the road from the defendant's lane of travel. The defendant then continued to drive away, and was observed by a witness to have thrown an object from his vehicle into some bushes, the object was later recovered by police and discovered to be a 375 ml. bottle of Hennessy Cognac, that was about a quarter-full of liquid. The defendant failed a number of field sobriety tests, and submitted to a breathalyzer test, which yielded results of 0.148 and 0.146 blood alcohol concentration, almost double the legal limit to drive.

16. The defendant's criminal record also illustrates a dangerous pattern of illicit drug use. On March 21, 2018, the defendant pleaded guilty of possession of heroin, and cocaine. On February 11, 2019, the defendant was arrested by the Baytown, Texas Police for possession of drug paraphernalia, after he was observed acting erratically in a Denny's Restaurant while on a long-distance commercial trucking haul.

17. The dangerousness of the defendant's drug consumption could not have been made clearer to him than it was on May 5, 2019, just prior to his arrest in Connecticut, and also the month before the fatal collision at issue. On that day, the defendant suffered an overdose in a parking lot in Agawam, Massachusetts. Agawam police and fire rescue were called to a parking lot where the defendant was found lying on the ground, blue in the face, with a weak pulse and fixed pinpoint pupils. The defendant was administered two intranasal doses of Narcan by police, and a third intravenous dose of Narcan. After being administered the third dose of Narcan, the

defendant finally became responsive, and confessed that he had snorted three bags of heroin. Thus, there is no doubt that the defendant was aware of the extreme dangerousness and impairing effects of the street drugs he was consuming.

18. Although not explicitly tied to the defendant's drug use on the day of another collision on June 3, 2019, it is important to inform the Court that the defendant, while operating a tractor-trailer carrying five vehicles in tow and traveling down an interstate in Baytown, Texas, flipped the 18-wheeler when an "unknown unit" cut him off – a crash that occurred just 18 days prior to the collision in Randolph that resulted in tremendous tragedy, 29 days after he overdosed at the Pynchon Point parking lot in Agawam, Massachusetts, and 23 days after he was arrested in East Windsor, Connecticut for driving under the influence of controlled drugs.

19. The defendant's perception of his unlawful impairment at the time of the crash is wrong. The evidence demonstrates impaired and reckless driving on June 21, 2019. The defendant readily discards the shocking fact that he admitted that before getting behind the wheel of a commercially operated truck and trailer, he ingested a mixture of potent illegal street drugs.[3] The defendant told police in an interview on June 24, 2019, that he had consumed two "superman" branded baggies of heroin, and a half of a gram of cocaine on the morning of the fatal crash, and that he combined the heroin and cocaine when he used them. The defendant also admitted that was still feeling the effects of the cocaine at the time he left a car dealership in Gorham, New Hampshire, about a half-hour before the crash occurred. He even admitted that he could still **feel the effects of the cocaine at the time the fatal crash occurred**. After the crash, the defendant consented to have a sample of his blood drawn for chemical testing. The test corroborated the defendant's admissions, as his blood contained 6.7 nanograms per milliliter

(ng/ml) of fentanyl, 21 ng/ml of morphine, and over 1000 ng/ml of benzoylecgonine (a metabolite of cocaine). While the defendant claims his admission of feeling the effects of cocaine was "inconsistent" with certain lab findings, he ignores the presence of 6-monoacetylmorphine (6-MAM) in his blood, which is the 6-monoacetylated form of morphine, which is pharmacologically active, and when present, it is generally indicative of recent heroin use.

20. The defendant's drug use and admissions are further corroborated by eyewitness observations on the defendant's failure to maintain control of his commercial vehicle on the day of fatal collision. During the half-hour before the crash, multiple witnesses observed the defendant driving in a manner consistent with impairment and certainly in a manner that endangered the public. The witnesses observed the defendant's truck and trailer weaving within his lane, and cross the double-yellow line on several occasions. More telling, is an oncoming motorist who, immediately preceding the crash, had to slam on his brakes and swerve out of the way to avoid the defendant's truck, which was driving the wrong way in his lane of travel. Contrary to defendant's assertions in his motions for bail, many of the State's witnesses positively identified the defendant's dangerous, erratic driving moments before the collision that resulted in the deaths of seven motorcyclists and serious injury to an eighth rider.

21. What is more, the fact that he had just caused a crash that killed seven people and maimed another was not enough of a catalyst to halt his drug consumption. The defendant told investigators that after the collision on June 21, 2019, and prior to his arrest on June 24, 2019, that he returned to his home in West Springfield, where he continued to consume what he believed to be heroin.

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[3] The combined weight of the truck and trailer was over 10,000 pounds.

22. While the defendant initially told investigators he historically used about three to four bags of heroin per day, on June 25, 2019, while being held at the Coös County House of Corrections, the defendant requested medical attention because he was detoxing. When asked what he was detoxing from, the defendant responded "dope and alcohol," stating that he is an "alcoholic." When asked what quantities of these substances the defendant consumes on a daily basis, he responded that he drinks a bottle of "Hennessy" brand liquor every day, and consumes ten approximately "quarter-sized" bags of heroin each day.

23. The defendant's motion for bail does not attempt to address these specific and previously articulated points, which demonstrate the out of control and dangerous behavior of the defendant—prior to, the day of, and immediately following the fatal collision in this case. Instead, the defendant simply incorporates the unavailing arguments that he previously made, which sidestep the proper statutory considerations of dangerousness under RSA 597:2, by arguing: (1) the law enforcement officers who interacted with him did not detect his impairment; and (2) the Crash Lab's February 14, 2020 report and August 31, 2020, addendum conclude that a brake mark indicates the defendant perceived the hazard and applied brakes in a reasonable time.

24. The defendant also plainly mischaracterizes certain findings by The Crash Lab. The defendant claims that The Crash Lab found that "it was the tire failure resulting from that impact that caused his truck and trailer to veer into the oncoming lane." Def.'s Mot, at ¶24. The Crash Lab made no such conclusion. In the first instance, the Crash Lab concluded that defendant's driver's side truck tires were traveling atop the double-yellow centerlines, and that "the outer left edge of the unladen trailer would have been approximately 12 inches into the eastbound lane" (the motorcyclists' lane of travel) just prior to collision and at the point of initial

collision. See Addendum to our Analysis Report dated February 14, 2020, finalized by the Crash Lab on August 31, 2020 (hereinafter "The Crash Lab Addendum") at ¶ 56; and see also Fig. 6. Further clarifying its position, The Crash Lab noted, "[W]e determined that the front wheel of the Harley Davidson would have been approximately 6 inches inside the eastbound lane [the motorcyclists' lane of travel] from the southern yellow centerline." Id. at ¶ 45. The Crash Lab documented the presence of the Dodge Ram 2500's front driver's side tire blowout upon impact that resulted in a catastrophic loss of air, to which defendant now attributes his loss of control. However, the Crash Lab did not conclude that the catastrophic loss of air as the result of the initial contact with the lead motorcycle caused him to veer further into the motorcyclists' lane of travel. The only conclusion about the air loss to the tire was that "[t]he characteristics of the flat tire mark caused by the catastrophic air loss of the Ram 2500's left front tire indicates the wheel was still rolling, generally in a forward direction." Id., at ¶ 37.

25. The State does not need to prove that the defendant was "stumble down drunk." There is more than sufficient evidence to prove the defendant was impaired beyond a reasonable doubt, especially given that "the State [is] required only to prove that [his] ability to operate [his] vehicle was 'impaired to any degree.'" State v. Kelley, 159 N.H. 449, 451 (2009). However, the State need not address the merits of the case in this pleading because "[the Court] rules do not provide for a pretrial determination of the sufficiency of the evidence in criminal cases." State v. Valentin, No. 2016-0209, at 6 (N.H. June 30, 2017) (non-precedential order) (citing State v. Bisbee, 165 N.H. 61, 65–66 (2013)).

26. Even assuming *arguendo* that the evidence of his impairment was insufficient to prove beyond a reasonable doubt that he was legally impaired, the defendant remains charged with seven charges of manslaughter, seven charges of negligent homicide pursuant to RSA

630:3,I, and one charge of reckless conduct with a deadly weapon, all charges which do not require proof that he was legally impaired. Notably, evidence of his impairment would still be admissible to support convictions for those charges. See, e.g., State v. Ebinger, 135 N.H. 264, 267 (1992) (evidence of defendant's alcohol consumption was relevant to charge of criminally negligent vehicular homicide even if the evidence was insufficient to convict him of causing the death of another while driving under the influence of alcohol).

27. Beyond the defendant's impairment by illicit narcotics, the defendant was inattentive. The defendant was driving a commercial motor vehicle with a commercial driver's license. Commercial carriers have a heightened need for attention and safety, given the increased size of the vehicles they operate, and extended periods of driving they engage in. However, the defendant admitted that when he failed to keep his commercial truck in his lane of travel, and smashed into a group of oncoming motorcycles, he had completely diverted his attention from the roadway and oncoming traffic. He said that he was attempting to retrieve a beverage from the center console of his truck. In fact, the defendant was so distracted that after he careened through a group of motorcycles, dragging victim's bodies and motorcycles across the oncoming lane, he told investigators in an interview conducted the night of the crash that he did not even know what he had hit. According to him, he thought he had hit another car, not a group of motorcycles.

28. Based on the facts surrounding the crash on June 21, 2019, the fact that the defendant was on bail, the defendant's unyielding drug use, and his prior related criminal history, preventative detention is the only sufficient means for this Court to protect the public and the defendant.

29. In his latest motion, the defendant cites the State's new indictments that were returned by the Statewide Grand Jury for Coös County on March 11, 2021, in support of his argument that the Court should consider the merits of the charges in reaching a decision on bail. The tenor of his latest motion is that the defendant has only now, upon return of the new indictments by the Statewide Grand Jury, learned of the reason for why the State eliminated certain language from the indictments. Any such inference is inconsistent with the facts. The information that compelled the language adjustment and return of the case to the grand jury was made available to the State and the defendant in early 2020 – at which time the State communicated to defense counsel that it would be returning to the grand jury in order to eliminate certain language.

30. The defendant has offered, as a basis for bail, the Crash Lab's conclusions in their Analysis Report dated February 14, 2020, in every one of his motions for bail, and included the Crash Lab's Addendum to analysis dated August 31, 2020, as one basis for his Renewed Motion for Bail Hearing that was filed on September 16, 2020. But nothing in the Crash Lab's report or addendum change the facts cited by the State that justify preventative detention. The information provided by the Crash Lab's report further cements the fact that the defendant caused the collision with the first motorcycle when he failed to keep his commercial motor vehicle in his own lane of travel, which resulted in his truck and trailer veering into the oncoming lane, where he struck, killed, and maimed additional motorcyclists. That result must be considered in light of the defendant's admitted drug use that day, his history of prior and unrelenting drug use, his bail status at the time, and his criminal history. Together, those facts prove that the defendant should continue to be held pursuant to RSA 597:2.

FLIGHT RISK

31. Beyond the defendant's dangerousness to himself and the community, preventative detention is necessary because he poses a significant flight risk. New Hampshire RSA 597:2 provides:

> The court shall order the pre-arraignment or pretrial release of the person on his or her personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, or cash or corporate surety bail, subject to the condition that the person not commit a crime during the period of his or her release, and subject to such further condition or combination of conditions that the court may require unless the court determines by a preponderance of the evidence that such release will not reasonably assure the appearance of the person as required.

The defendant has been indicted on numerous felonies and faces the potential penalty of decades in prison. If his bail conditions on his driving while impaired charge could not keep him from simply driving again—never mind driving safely—there are no conditions that this Court could put in place to guarantee his future appearance.

32. Moreover, the defendant is a Ukrainian national, with a status as a long-term permanent residence in the United States. As a result of the defendant's criminal conduct, an active detainer for deportation has been filed by the United Stated Immigration and Customs Enforcement Agency. As such, the defendant has a significant motivation to abscond from any future hearings, regardless of any combination of bail conditions imposed by this Court. Additionally, in review of recent summary translations of the defendant's recent recorded jail conversations with his family, the defendant discussed the prospect of residing in Ukraine in the future and his immediate family expressed to the defendant that his family in Ukraine will welcome him with open arms.

33. The defendant's flight risk alone is sufficient to establish by a preponderance of the evidence that release will not reasonably assure the appearance of the defendant. Moreover, upon information and belief, the defendant has immediate family members currently living in Ukraine. Because of his flight-risk, particularly in light of his continued pattern of criminal conduct, discussed *supra*, and his known ties to a foreign nation, this Court should find that no condition or set of conditions could reasonably assure the defendant's appearance in the future.

34. The defendant claims that it would be unconstitutional to continue his pretrial detention, in part, because he is "an individual with no history of violence." Defendant's Mot., at ¶ 13. This is not a question about whether the defendant is "violent." Danger comes in many shapes and sizes. In this instance, it comes from a man, who chose to mix together and snort street narcotics before driving his 10,000 pound commercial vehicle while transporting other cars. He chose to do this despite having previously plead to sufficient facts to support a conviction for operating under the influence and other drug-related crimes; despite having been actively facing another criminal charge for driving while under the influence of drugs; despite having suffered the personal consequences of an overdose the month before; despite crashing a tractor trailer on an interstate in Baytown, Texas two-and-a-half weeks prior to the Randolph collision; and even despite the clear warning signs that he was unable to operate his commercial truck and attached trailer as he weaved back and forth on the road in the time preceding the crash. The defendant may not be "violent," but he is no less dangerous to himself or others. Bail conditions and several other glaring red flags, all of which should have individually served as a sufficient warning as to the dangerousness of his conduct, did not keep him from turning his 10,000 pound truck and trailer into a destructive weapon in Randolph, and there are no bail

conditions this Court is capable of setting that will protect the public or the defendant, short of preventative detention.

35. Lastly, to the extent that the defendant points to an established understanding that the trial in this matter will be continued to a date no sooner than November 2021—the length of preventative detention is not a consideration enumerated in RSA 597:2. For the aforementioned reasons discussed supra, there is sufficient evidence to support by a finding of clear and convincing evidence that the release of this defendant will endanger the safety of the public and himself. The defendant's motion should therefore be denied.

WHEREFORE, the State respectfully requests this Honorable Court:

A. Deny the defendant's renewed motion for bail; and
B. Hold the defendant on preventative detention; or
C. Schedule a hearing in this matter; and
D. Grant such other relief as this Court deems just and equitable.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

April 16, 2021

/S/ John G. McCormick

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CERTIFICATION

I certify that this pleading has been provided to Jay Q. Duguay, Esq., and Steve Mirkin, Esq., New Hampshire Public Defender's Office, 134 Main Street, Littleton, NH 03561, through the Superior Court's electronic filing system.

/S/ John G. McCormick
John G. McCormick, Esq.
Coos County Attorney