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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE

Respondent,

-against-

No. 135

JOSE MALDONADO

Appellant.

20 Eagle Street
Albany, New York 12207
June 4, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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1 CHIEF JUDGE LIPPMAN: Number 135, People v.
2 Maldonado.

3 Take your time, counselor, we have - - -
4 we're going to wait a minute or two for - - - for
5 everybody to leave.

6 MR. LEVINE: Thank you, Your Honor.

7 CHIEF JUDGE LIPPMAN: One more minute,
8 counselor.

9 MR. LEVINE: Okay.

10 CHIEF JUDGE LIPPMAN: Okay, counselor, why
11 don't you begin? Do you want any rebuttal time,
12 counselor?

13 MR. LEVINE: Two minutes, please, Your
14 Honor.

15 CHIEF JUDGE LIPPMAN: Two minutes, sure.
16 Go ahead.

17 MR. LEVINE: Good morning, Your Honors, and
18 may it please the court. I'm Joshua Levine,
19 representing Jose Maldonado in this depraved
20 indifference case. Just like Michael Edward Prindle,
21 appellant, although he was plainly driving in an
22 unsafe manner, he actively attempted to avoid
23 collisions - - -

24 JUDGE SMITH: More than unsafe; he was
25 reckless.

1 MR. LEVINE: He - - - very reckless, and
2 summation is a different story, but as - - - as an
3 argument to a judge, not in Supreme Court, not in the
4 Appellate Division, in the lower court, and not here
5 before this court - - -

6 CHIEF JUDGE LIPPMAN: Why wasn't he more
7 like the Defendant Gomez?

8 MR. LEVINE: Pardon me, Your Honor?

9 CHIEF JUDGE LIPPMAN: Why wasn't he more -
10 - - why isn't this case more like Gomez?

11 MR. LEVINE: Because Gomez, by his actions
12 and by his words, showed that he did not care whether
13 anyone who - - - whom he endangered lived or died.

14 CHIEF JUDGE LIPPMAN: Your defendant almost
15 kills a woman and then goes and - - - and does it.

16 MR. LEVINE: But it's very different
17 because Gomez - - -

18 CHIEF JUDGE LIPPMAN: Why is it very
19 different?

20 MR. LEVINE: Gomez first ran over a child
21 riding a bicycle, and he had a passenger who said
22 you've got to put on the brakes, and Gomez said, I
23 can't; I've already killed somebody. And he cuts
24 across to another sidewalk.

25 JUDGE SMITH: How can the jury - - -

1 JUDGE GRAFFEO: So if your - - - if this
2 individual had hit the first pedestrian and then
3 continued on - - -

4 MR. LEVINE: It still would have been
5 different, Your Honor, and this is established by the
6 testimony - - -

7 JUDGE GRAFFEO: How?

8 MR. LEVINE: - - - of the police officers.

9 JUDGE GRAFFEO: I'm missing why.

10 MR. LEVINE: This was at Milton Street.
11 Officer Truglio said the defendant proceeded around
12 the woman, he swerved back into the northbound lane,
13 that if he had not done that, he would have struck
14 the woman, but instead, he swerved and he went around
15 her. Lieutenant Roy stated that at that moment the
16 defendant made an adjustment back into - - - he said
17 the yellow lane; I assume he meant the yellow lines.

18 JUDGE GRAFFEO: They're still going through
19 multiple red lights and it was exceeding - - -

20 MR. LEVINE: There were - - -

21 JUDGE GRAFFEO: - - - exceedingly reckless
22 what we had going on here.

23 MR. LEVINE: It was exceedingly reckless,
24 but as this court has made clear - - -

25 JUDGE GRAFFEO: And certainly he - - - he

1 was aware that there - - - he was creating danger
2 after danger.

3 MR. LEVINE: Yes, he was aware that there
4 was risk creation. Risk creation, however, is not
5 the same as utter depravity as to whether anyone
6 lives or dies.

7 CHIEF JUDGE LIPPMAN: Reckless is different
8 than utter depravity?

9 MR. LEVINE: Reckless is different; they
10 are separate - - -

11 CHIEF JUDGE LIPPMAN: Extreme recklessness?

12 MR. LEVINE: Extreme recklessness.

13 CHIEF JUDGE LIPPMAN: This is extreme
14 recklessness, no?

15 MR. LEVINE: I wouldn't contest that, but
16 as this court has made clear in Suarez, in Lewie, et
17 cetera, that the words "depraved indifference to
18 human life", especially the word "indifference",
19 those words are to be taken literally.

20 JUDGE PIGOTT: Were we under the same
21 standard in both Prindle and this case?

22 MR. LEVINE: No, we are not, Your Honor.

23 JUDGE PIGOTT: Could you tell me what the
24 difference is?

25 MR. LEVINE: And I'm aware that Your Honor

1 was - - - wrote the dissent in Prindle, but both the
2 majority and the dissent in Prindle decided that
3 under the Register standard. Now, I will not presume
4 to state how the dissenters would have ruled, had
5 that case been reviewed under the Feingold standard,
6 but it certainly doesn't hurt my case.

7 JUDGE READ: Well, your position,
8 basically, is that there's no way to separate this
9 case from Prindle?

10 MR. LEVINE: Not at all. In fact, if this
11 - - -

12 JUDGE READ: Right. I mean, that's right?
13 I'm characterizing your position - - -

14 MR. LEVINE: It is, and - - -

15 JUDGE READ: - - - accurately?

16 MR. LEVINE: Except on the law, the
17 difference between Register and Feingold, but if this
18 were - - -

19 CHIEF JUDGE LIPPMAN: Well, Feingold
20 changed the world, didn't it?

21 MR. LEVINE: It did, but - - -

22 CHIEF JUDGE LIPPMAN: In this - - - in the
23 world of DIM, what we're talking about?

24 MR. LEVINE: But of course this case is so
25 akin, identical to Prindle - - -

1 CHIEF JUDGE LIPPMAN: So in that - - -

2 MR. LEVINE: - - - that it happens - - -

3 CHIEF JUDGE LIPPMAN: - - - in that
4 respect, it doesn't matter that it's post- or pre-
5 Feingold?

6 MR. LEVINE: I shouldn't say it doesn't
7 make a difference because - - -

8 JUDGE SMITH: Well, your position is - - -

9 MR. LEVINE: - - - that's the standard.

10 JUDGE SMITH: - - - it changed the world in
11 your favor.

12 MR. LEVINE: Your Honor?

13 JUDGE SMITH: Your position is it changed
14 the world in your favor.

15 MR. LEVINE: In my favor, yes.

16 JUDGE SMITH: You can't - - - you say you
17 can't lose under - - - win under Register and lose
18 under Feingold?

19 MR. LEVINE: No, because - - - especially
20 because of what police witness after police witness
21 and civilian witness after civilian witness testified
22 to in this case, and that was my - - -

23 JUDGE GRAFFEO: And you never have an
24 extremely reckless driver that does enter the realm
25 of DIM - - -

1 MR. LEVINE: But recklessness - - -

2 JUDGE GRAFFEO: - - - under Feingold?

3 MR. LEVINE: Recklessness is not the same
4 as utter depravity as to whether anyone lives or
5 dies.

6 JUDGE SMITH: Well, we held in Heidgen that
7 - - - that driving can be - - - that somebody killing
8 someone with a car can be depravedly indifferent.
9 Why - - - why is this different from Heidgen?

10 MR. LEVINE: Because in Heidgen, the - - -
11 the Defendant Heidgen and McPherson were on the
12 parkways. Taylor was on a darkened Staten Island
13 Street. But the two men on the highways, Heidgen, in
14 particular, he was tracking other vehicles. He was
15 tracking, as if playing, as this court said, a high-
16 speed game of chicken.

17 JUDGE SMITH: They were both going the
18 wrong way, and I guess - - - I think the - - - the
19 court found there that they knew they were going the
20 wrong way. The jury found they were - - - knew - - -

21 MR. LEVINE: The jury found that they knew
22 they were going the wrong way.

23 JUDGE GRAFFEO: So why is tracking cars on
24 a parkway any different than - - -

25 MR. LEVINE: Because, Your Honor - - -

1 JUDGE GRAFFEO: - - - going through red
2 lights and traveling in an unsafe - - -

3 MR. LEVINE: Because there's no - - -

4 JUDGE GRAFFEO: - - - rate of speed on city
5 streets where you know there could be a lot of
6 pedestrians?

7 MR. LEVINE: Because there's no attempt and
8 there's no mindset, in Heidgen, to avoid other
9 vehicles, to avoid pedestrians - - -

10 JUDGE SMITH: Well, there's - - -

11 MR. LEVINE: - - - whereas my client did
12 so.

13 JUDGE SMITH: - - - a suggestion that he
14 was deliberately playing chicken in Heidgen.

15 MR. LEVINE: In Heidgen he was deliberately
16 playing chicken. Here the defendant was cutting out
17 of the way. For instance, at the scene of the fatal
18 accident, which is at India Street, there were cars
19 facing at the red light in both directions, and so my
20 client swerved one way to get around the cars and
21 then swerved the other way to get around the other
22 cars - - -

23 CHIEF JUDGE LIPPMAN: You client is - - -

24 MR. LEVINE: - - - to continue northbound.

25 CHIEF JUDGE LIPPMAN: - - - trying to avoid

1 the - - - the police?

2 MR. LEVINE: He was trying to avoid the
3 police, like Prindle.

4 CHIEF JUDGE LIPPMAN: And being reckless
5 because he's trying to avoid the police? Is that
6 your argument that - - -

7 MR. LEVINE: Well, he certainly was.

8 CHIEF JUDGE LIPPMAN: - - - to the extent
9 he's wildly reckless, it's not because he doesn't
10 care who he hits; it's because he wants to get away
11 from the cops. Is that the argument?

12 MR. LEVINE: I think that's the People's
13 argument that - - - but that if he - - - his desire
14 to escape from the police - - -

15 CHIEF JUDGE LIPPMAN: No, but - - - yeah,
16 but - - -

17 MR. LEVINE: - - - means that he didn't
18 care whom he hit - - -

19 CHIEF JUDGE LIPPMAN: No, no, your argument
20 is he's just trying to escape from the police - - -

21 MR. LEVINE: That's sort of the causation.

22 CHIEF JUDGE LIPPMAN: - - - and he's not -
23 - - he's not without a care about or depraved
24 indifference - - -

25 MR. LEVINE: Oh, yes, I'm sorry.

1 CHIEF JUDGE LIPPMAN: - - - as to what
2 happened.

3 MR. LEVINE: I - - -

4 CHIEF JUDGE LIPPMAN: Your argument is that
5 what he's really trying to do is get away from the
6 cops.

7 MR. LEVINE: Yes.

8 CHIEF JUDGE LIPPMAN: And that - - - and
9 that that doesn't show that he is depraved
10 indifference to murder, is that - - -

11 MR. LEVINE: No, that - - - that he was
12 trying to avoid capture. He's not - - -

13 CHIEF JUDGE LIPPMAN: You're saying he may
14 have been reckless in doing that; is that your
15 argument?

16 MR. LEVINE: He was certainly reckless.

17 CHIEF JUDGE LIPPMAN: Right.

18 MR. LEVINE: He was certainly creating a
19 risk.

20 JUDGE READ: He might have been extremely
21 reckless, but that's different from utterly
22 indifferent?

23 MR. LEVINE: It is very different from
24 utterly indifferent.

25 JUDGE SMITH: Suppose - - -

1 JUDGE RIVERA: I thought you were arguing -
2 - - I may be mistaken. I thought you were also
3 arguing, in addition to of course trying to escape
4 capture, he was taking actions to actually avoid
5 hitting people. Did I misunderstand - - -

6 MR. LEVINE: That's correct, Your Honor.

7 JUDGE RIVERA: - - - your argument? All
8 right. So what is the evidence of that?

9 MR. LEVINE: We have at least, I believe,
10 five witnesses. Truglio testified, Officer Truglio,
11 that to keep proceeding and avoid traffic, and to go
12 through red lights, Maldonado crossed double yellow
13 lines and swerved in and out of traffic. Lieutenant
14 Roy said the defendant was eluding and going in and
15 out of traffic. At Milton Street, where the first
16 pedestrian was almost struck, Truglio - - - well, I
17 actually went over that.

18 JUDGE RIVERA: So even if you are
19 recklessly trying to avoid people, nevertheless
20 you're trying to avoid hitting people?

21 MR. LEVINE: That's correct, which means
22 that - - -

23 JUDGE SMITH: Suppose - - - suppose
24 hypothetical, the evidence shows that - - - in this
25 case, the police did stop following him. He obv - -

1 - apparently he didn't realize they were no longer
2 chasing him, but they did stop. Suppose he did know
3 it, but he says to himself, hey, this is fun, I'm
4 going to keep doing it; is that depraved indifference
5 murder?

6 MR. LEVINE: No, Your Honor, not if he - -

7 -

8 JUDGE SMITH: Why not?

9 MR. LEVINE: - - - continues to keep trying
10 to avoid striking other vehicles and striking
11 pedestrians.

12 JUDGE SMITH: I don't know.

13 MR. LEVINE: It's just additional risk
14 creation.

15 JUDGE SMITH: Does my hypothetical change
16 the case at all?

17 MR. LEVINE: Pardon me?

18 JUDGE SMITH: Doesn't it sound a little
19 more depraved in my hypothetical?

20 MR. LEVINE: No, it sounds like it's
21 creating a higher degree of risk and creating more
22 risk.

23 JUDGE SMITH: Oh, no, no, creating exactly
24 the same risk. He's doing exactly the same thing.

25 MR. LEVINE: Well, no - - -

1 JUDGE SMITH: It's just that his state of
2 mind - - -

3 MR. LEVINE: No, Your Honor, because
4 additional time goes by; additional driving is
5 additional risk creation. There are more people
6 involved, more people on the streets, but it is still
7 additional risk creation, and it does not demonstrate
8 that the defendant was utterly indifferent to whether
9 anyone whom he put at risk - - -

10 JUDGE RIVERA: So - - -

11 MR. LEVINE: - - - lived or died.

12 JUDGE RIVERA: So you're saying that at no
13 point during the car chase might his state of mind
14 change?

15 MR. LEVINE: It could have, hypothetically,
16 but the People have a burden of proof, and they - - -
17 they have, in this case, in their respondent's brief,
18 made an attempt to turn that burden of proof on its
19 head. Now, it sometimes is very easy - - -

20 CHIEF JUDGE LIPPMAN: Counsel, but
21 following up with Judge Smith's hypothetical, where
22 you're saying the - - - the - - - increasing the
23 length of time increases the risk, doesn't there come
24 a point when you keep doing it, where you say the
25 mental state is that - - - that he has reckless

1 disregard as to whether anybody is hurt - - - I mean,
2 depraved disregard. Doesn't that happen? If - - -
3 if you keep going, doesn't there come a point where
4 you don't care what happens, who gets hurt? And
5 you're not just increasing the risk, you're - - -

6 MR. LEVINE: The evidence would have to
7 show - - -

8 CHIEF JUDGE LIPPMAN: - - - it shows you
9 that your ment - - - that it shows that his mental
10 state has changed.

11 MR. LEVINE: No, it's not just a matter of
12 going a few more blocks or going ten more blocks.
13 The evidence would have to show that utter depravity.
14 For instance, the defendant here was on the street
15 the whole time.

16 CHIEF JUDGE LIPPMAN: But just by
17 continuing isn't demonstrating utter depravity?

18 MR. LEVINE: No, Prindle, for instance - -
19 -

20 CHIEF JUDGE LIPPMAN: They're continuing
21 because - - -

22 MR. LEVINE: Prindle continued.

23 CHIEF JUDGE LIPPMAN: - - - because I just
24 want to have fun?

25 MR. LEVINE: No, Prindle continued, for

1 example, when he struck a truck. He kept going. And
2 that was certainly - - - under the Register standard
3 did not show depraved indifference.

4 JUDGE GRAFFEO: If you had the exact facts
5 of this case but he drove down three blocks of
6 sidewalks with pedestrians, would - - - would your
7 analysis be the same?

8 MR. LEVINE: And if he says, like Gomez,
9 well, I already struck somebody, I don't care, I'm
10 not going to put on the brakes; no, my analysis would
11 not be the same. And that's not what my client did.
12 That's very different.

13 Let's take a playground. Let's say this
14 was at 2 o'clock in the afternoon, if there was a
15 playground and there were children on the playground.
16 If he had blasted through there and it's filled with
17 kids, that sounds like depraved indifference.

18 JUDGE SMITH: You're - - -

19 MR. LEVINE: But if there were a couple of
20 kids - - -

21 JUDGE SMITH: You're positing a case where
22 he virtually knows he has to kill someone. That's -
23 - - at a certain point it's intentional murder,
24 right?

25 MR. LEVINE: Well, I was going to contrast

1 that with, let's say there are three people shooting
2 basketball at one end, and he cuts around them, it's
3 extremely dangerous, it's high-risk creation, Your
4 Honor, but it's not necessarily depraved
5 indifference.

6 JUDGE SMITH: Well, if - - -

7 MR. LEVINE: But he did not drive through a
8 playground.

9 JUDGE SMITH: If it's - - -

10 MR. LEVINE: He did not drive on a
11 sidewalk.

12 JUDGE SMITH: - - - a substantial certainty
13 that he's going to kill him, that's not depraved
14 indifference either; that's intent, right?

15 MR. LEVINE: No, it - - - it isn't, Your
16 Honor, and not - - - according to Suarez; even - - -
17 even risk creation that carries an inevitable risk of
18 death does not suddenly turn reckless manslaughter or
19 reckless homicide into depraved indifference - - -

20 CHIEF JUDGE LIPPMAN: Okay, counselor, your
21 - - -

22 JUDGE SMITH: But - - -

23 CHIEF JUDGE LIPPMAN: Sorry, Judge Smith.

24 JUDGE SMITH: - - - it does turn it into
25 intent, doesn't it?

1 MR. LEVINE: No, it does not turn it into
2 intent. Intent is intending to kill someone.

3 CHIEF JUDGE LIPPMAN: Okay, counsel.
4 You'll have your rebuttal time. Let's hear from your
5 adversary.

6 MS. EISNER: Good afternoon, Your Honor.
7 Diane Eisner for the respondent.

8 CHIEF JUDGE LIPPMAN: Counselor, what makes
9 this depraved indifference murder? Why is it
10 different than Prindle?

11 MS. EISNER: It's completely different from
12 Prindle.

13 CHIEF JUDGE LIPPMAN: Why?

14 MS. EISNER: Well, I'd like to tell you
15 why.

16 CHIEF JUDGE LIPPMAN: Yeah, tell us.

17 MS. EISNER: Okay. In Prindle and in this
18 - - - in Prindle and in this case, we have two
19 defendants who are driving cars who are trying to
20 avoid hitting other vehicles, yes. But we don't have
21 evidence in Prindle that that defendant was willing
22 to sacrifice a pedestrian in order to avoid hitting
23 another vehicle. And we do have evidence here that
24 this defendant's conduct showed that he was willing
25 to hit a pedestrian in order to not hit a vehicle.

1 JUDGE SMITH: You say "sacrifice"; are you
2 saying he knew he was going to kill her or just that
3 he took an unacceptably high risk that he was going
4 to kill her?

5 MS. EISNER: He didn't care, and that's
6 what depraved indifference murder was.

7 JUDGE SMITH: How do we know he didn't
8 care? I mean, you would think, even - - - even if
9 the man's a complete moral monster, he would just as
10 soon not hit her, under the circumstances?

11 MS. EISNER: He would just as soon not hit
12 anything that was going to bring his vehicle to a
13 halt, under these circumstances, because that was the
14 end game and then he gets arrested.

15 JUDGE SMITH: Yes.

16 MS. EISNER: So what we have is a defendant
17 who's looking for any opening that he can find
18 between vehicles, whether it's in his lane - - -

19 JUDGE PIGOTT: But that's - - -

20 MS. EISNER: - - - it's in the next lane -
21 - -

22 JUDGE PIGOTT: - - - that's still Prindle.
23 I mean, as you know, I - - - I kind of agreed with
24 the People in Prindle, but you saw where that went.
25 And in this one, I mean, he gave a statement where -

1 - - where he said he was looking in the rearview
2 mirror, they were following me, when I looked forward
3 she was there, I tried to swerve. And he admitted
4 that he stopped looking in the rearview mirror and
5 then he hit the girl.

6 MS. EISNER: Well, first, the fact that he
7 says he's looking in the rearview mirror shows that
8 he's willing to sacrifice a pedestrian is - - -

9 JUDGE SMITH: But did the jury have to - -
10 -

11 JUDGE PIGOTT: Whoa, whoa, whoa - - -

12 JUDGE SMITH: Did the jury have to - - -

13 JUDGE PIGOTT: I mean, looking in the
14 rearview mirror is - - - is depraved indifference?
15 I'm afraid I do that an awful lot.

16 MS. EISNER: Not when you're driving on a -
17 - - on a highway at fifty-five miles an hour. But
18 when you choose to look in a rearview mirror and
19 you're in the lane for opposing traffic, you're going
20 maybe sixty to ninety miles an hour on the city
21 street and you're going through a red light, so
22 you're now breaking every single traffic rule that's
23 enacted for public safety. And at that point, you
24 can't even keep your eyes on the road ahead of you so
25 that you can steer around an obstacle; you're too

1 busy looking to see if the police are on your tail -
2 - -

3 JUDGE PIGOTT: Sounds negative.

4 MS. EISNER: - - - and when you look down,
5 that lady's right in front of you, and she's dead.
6 That's depraved indifference.

7 JUDGE SMITH: Would the jury - - - to
8 convict him of depraved indifference, would the jury
9 have to disbelieve his statement that he tried to
10 swerve?

11 MS. EISNER: He didn't say he tried to
12 swerve, not when he hit the victim. He said - - - he
13 said he looked in - - - he said he was looking in his
14 rearview mirror, and the next thing he knows he hit
15 the girl in the hand or something, he didn't stop - -
16 -

17 CHIEF JUDGE LIPPMAN: So where is that - -
18 -

19 MS. EISNER: - - - he kept on going.

20 CHIEF JUDGE LIPPMAN: So where is that DIM?
21 How does that translate to DIM? Exactly what you
22 said, let's - - - that's what it is; that's what the
23 record shows. Why is that DIM?

24 MS. EISNER: It's depraved indifference
25 because he can't even keep his eye on the road when

1 he's doing everything - - -

2 CHIEF JUDGE LIPPMAN: Is he saying - - -

3 MS. EISNER: - - - that could lead to the
4 death of a - - -

5 CHIEF JUDGE LIPPMAN: - - - I'm not going
6 to keep my eye on the road because I don't care
7 whether I kill somebody?

8 MS. EISNER: His behavior shows that. And
9 furthermore, Your Honor, the jury didn't have - - -

10 CHIEF JUDGE LIPPMAN: Does it show that?

11 MS. EISNER: It shows that he didn't care
12 enough to pay attention when he's creating - - -

13 JUDGE RIVERA: Well doesn't it show - - -

14 MS. EISNER: - - - all of these risks.

15 JUDGE RIVERA: - - - he's trying to escape,
16 and he may be just very reckless in this attempt to
17 avoid people, which it sounds like what counsel's
18 arguing.

19 MS. EISNER: Well, because this is a
20 Feingold case, this was a question that was put to
21 the jury. And these arguments were made to the jury.
22 And every argument that - - - that my adversary has
23 made to this court was made to the jury. And another
24 argument was made by the People, and there's no
25 reason why the - - - the jury here had enough

1 evidence to follow the People's argument, which is
2 you can't break every traffic law that's enacted for
3 public safety. You can't go into the opposing lane,
4 blow a red light, be driving maybe a hundred miles an
5 hour, by this defendant's - - -

6 JUDGE SMITH: I mean - - -

7 MS. EISNER: - - - own estimate, and - - -

8 JUDGE SMITH: - - - is this - - -

9 MS. EISNER: - - - then not even look where
10 you're going. That's depraved indifference.

11 JUDGE SMITH: But it sounds - - - I mean,
12 when you say you can't break every traffic law and
13 not even look where you're going, it sounds to me
14 like recklessness. Isn't that a des - - - isn't that
15 the prototype of reckless driving?

16 MS. EISNER: It is recklessness; nobody's
17 saying it isn't. But the question is, is it - - - is
18 it recklessness, and in addition, does it show that
19 this defendant had a depraved indifference to human
20 life while he was being reckless. We're not
21 disputing that he's reckless.

22 JUDGE SMITH: I mean, the - - - I - - - I
23 could see the point that if he had no - - - that if
24 he had no - - - if he didn't - - - if the cops
25 weren't chasing him, the - - - the hypothetical I

1 gave to your - - - to your adversary, wouldn't that
2 be a different case? If he's doing this for the fun
3 of it, you might say he's depraved and indifferent to
4 human life, but he's doing it for very, very selfish
5 reasons. Caring more about yourself than other
6 people is not usually what we meant by depraved
7 indifference.

8 MS. EISNER: Not caring about people is
9 what constitutes depraved indifference. Not caring
10 if somebody lives or dies; it really doesn't matter
11 so much that his intention is to avoid becoming - - -
12 being arrested or his intention is I'm having fun and
13 this is fun.

14 JUDGE SMITH: So you say those two cases
15 are just the same.

16 MS. EISNER: Yes, if he doesn't care who he
17 hits when he's doing it, if - - - if the result is -
18 - -

19 JUDGE SMITH: Okay. Well, how do we - - -

20 MS. EISNER: - - - I need to get where I'm
21 going.

22 JUDGE SMITH: How do we know he didn't
23 care, as opposed to just simply having more things he
24 thought were - - - objectives he thought were more
25 important?

1 MS. EISNER: Well, we can't x-ray his
2 brain, so we do what we always do when you find a
3 mental state; you leave it to the jury to look to the
4 circumstances surrounding the conduct. Here we have
5 repeated acts of recklessness, repeated acts of
6 putting the - - - the public in danger. And he does
7 it over and over and over again. And - - - and we
8 have the pedestrian at Milton Street. We - - - and
9 now - - -

10 JUDGE READ: It sounds like you're getting
11 close to saying that the depraved state of mind can
12 be shown by extreme recklessness, but - - -

13 MS. EISNER: No.

14 JUDGE READ: - - - haven't we said that's
15 not the case?

16 MS. EISNER: It can be shown by
17 circumstantial evidence, part of which here is his
18 extreme recklessness. Part of it is his statement
19 that he's going - - - he knows he's going ninety to a
20 hundred miles an hour. You can't stop when you're
21 going that fast.

22 JUDGE SMITH: No, well, that's also - - -

23 MS. EISNER: But he doesn't care.

24 JUDGE SMITH: You say - - - but that is
25 extreme recklessness. I guess you say part of it is

1 extreme recklessness. What else have you got?

2 MS. EISNER: Well - - - well, depraved
3 indifference murder involves - - - involved - - -
4 this is reckless murder. This involves reckless
5 conduct.

6 JUDGE SMITH: I understand, but - - - I
7 understand you can be both. But I - - - have you got
8 anything - - - aren't you simply asking us to infer
9 depraved indifference from extreme recklessness?

10 MS. EISNER: The jury is being asked - - -
11 the jury is being asked - - -

12 JUDGE SMITH: So - - - I'm sorry, you know
13 what?

14 MS. EISNER: - - - under a Feingold charge,
15 to infer - - -

16 JUDGE SMITH: But you're saying - - -

17 MS. EISNER: - - - it, yes.

18 JUDGE SMITH: You're saying a jury may,
19 from extreme recklessness, and nothing else, infer a
20 depraved indifference?

21 MS. EISNER: No, from repeated acts of
22 extreme recklessness. It's not just one act of - - -
23 of extreme recklessness - - -

24 JUDGE READ: Is that the rule?

25 MS. EISNER: - - - but we have repeated

1 acts.

2 JUDGE READ: Is that the rule, repeated
3 acts?

4 MS. EISNER: We have a jury getting a
5 certain package of evidence from which they are
6 instructed that they are - - -

7 JUDGE RIVERA: So - - -

8 MS. EISNER: - - - entitled to - - -

9 JUDGE RIVERA: So what - - -

10 MS. EISNER: - - - to draw an inference.

11 JUDGE RIVERA: - - - what would distinguish
12 - - - doesn't that then mean that every car chase
13 being depraved indifference, if someone ends up being
14 killed at the end?

15 MS. EISNER: No, because here - - -

16 JUDGE RIVERA: What will distinguish these
17 cases then?

18 MS. EISNER: What distinguishes this case
19 is, first of all, the pedestrian at Milton Street.
20 You have a wakeup call. Anybody who cares about
21 human life is going to have to modify their behavior
22 after they have that near miss with that pedestrian.
23 That defendant went through that intersection and - -
24 - and we dispute my adversary's view of that
25 evidence; he did not swerve. The evidence from the

1 police officers is he's heading right for her.

2 JUDGE ABDUS-SALAAM: How is this different

3 - - -

4 MS. EISNER: She's in the southbound lane.

5 JUDGE ABDUS-SALAAM: - - - counsel, than
6 Prindle almost hitting a truck while he's trying - -

7 -

8 MS. EISNER: Excuse me?

9 JUDGE ABDUS-SALAAM: - - - to get away?
10 How is this different than Prindle almost hitting a
11 truck when he's trying to get away from the police?

12 MS. EISNER: Okay, well - - -

13 JUDGE ABDUS-SALAAM: You said a pedestrian.
14 There was a truck on Prindle, so how is that
15 different?

16 MS. EISNER: Well, there's a big difference
17 between pedestrians and vehicles, and I think one of
18 the things in Prindle was - - - and the dissent gave
19 us a lot of facts about what was going on in Prindle,
20 with respect to the driving, and it wasn't any
21 reference to pedestrians.

22 And in the appellant's brief that we cited,
23 he points out that - - - when he's distinguishing
24 Gomez, I think, that - - - that there's a difference
25 between vehicles and pedestrians. People in vehicles

1 have certain protections around them, protective
2 zones.

3 JUDGE PIGOTT: All right. Add to that. I
4 mean, let's assume you've got a - - - a parent who's
5 rushing to get a child to the hospital, and exactly
6 the same things that happened here happened there.
7 He or she almost hits a pedestrian, is going down the
8 wrong way, trying to get the child to the hospital as
9 - - - as quickly as he can, hits - - - hits a
10 pedestrian. Depraved indifference murder.

11 MS. EISNER: If the jury decided that that
12 parent cares nothing for anybody else on the street
13 but their own child - - -

14 JUDGE RIVERA: Well, it - - -

15 MS. EISNER: - - - then they could come - -
16 -

17 JUDGE RIVERA: It sounds like - - -

18 MS. EISNER: - - - to that conclusion.

19 JUDGE RIVERA: - - - a stronger case,
20 right?

21 MS. EISNER: Excuse me?

22 JUDGE RIVERA: The parent will do anything
23 to get their child to the hospital; that sounds like
24 a stronger case.

25 MS. EISNER: It sounds - - - excuse me? It

1 - - -

2 JUDGE RIVERA: It sounds like a stronger
3 case; a parent will do anything to get their child to
4 the hospital in time to save a child's life, doesn't
5 care who they're going to run over.

6 MS. EISNER: It would depend on - - -

7 JUDGE RIVERA: Sounds pretty strong to me.

8 MS. EISNER: It would depend on all of the
9 circumstances of the case. But the fact that this
10 defendant is fleeing from the police makes it worse.

11 JUDGE PIGOTT: I agree, but I don't think
12 by saying he almost hit one pedestrian, it would have
13 put him on notice that, oh, now I better slow down
14 and drive more carefully. I mean, that was not
15 entering his mind, no matter what, and nor was it
16 entering Mr. Prindle's mind, do I think.

17 MS. EISNER: It wasn't entering his mind,
18 but that just goes to show his depraved state, that
19 he's willing to drive at a hundred miles an hour,
20 knowing he can't stop. He's willing to put every
21 pedestrian - - - and this - - - and this is an area,
22 unlike Prindle - - -

23 JUDGE PIGOTT: You're making - - - you're
24 saying Prindle and this one are different because
25 Prindle was a truck and - - - and this one's a

1 pedestrian?

2 MS. EISNER: I'm saying that Pri - - - this
3 is worse than Prindle - - - not that Prindle wasn't
4 bad, but this is worse than Prindle, because you're
5 on a Brooklyn street at 2 o'clock in the afternoon on
6 a sunny April afternoon, and there are pedestrians
7 all over the place. And pedestrians will step off
8 the sidewalk.

9 JUDGE PIGOTT: Well, they have - - -

10 MS. EISNER: And the chances of impact - -
11 -

12 JUDGE PIGOTT: - - - pedestrians in
13 Rochester.

14 MS. EISNER: Excuse me?

15 JUDGE PIGOTT: We have pedestrians in
16 Rochester.

17 MS. EISNER: But we don't hear about any of
18 them in the dissent in Prindle, Your Honor, so I
19 think that what we're talking about here is this
20 defendant knew he was surrounded by pedestrians. The
21 risk of hitting a pedestrian - - -

22 JUDGE RIVERA: But again, your adversary -
23 - - defense counsel here is simply arguing that, yes,
24 but he didn't want to hit any of them. He's reckless
25 in trying not to hit any of them, but his state of

1 mind is I don't want to hit any of them. So what's
2 the evidence that gets you past the hump of the
3 reckless attempt to avoid hitting anybody?

4 MS. EISNER: Because the evidence here is
5 that he didn't want to hit a vehicle, and in Prindle
6 - - -

7 JUDGE RIVERA: Why is that?

8 MS. EISNER: - - - all he was avoiding were
9 - - -

10 JUDGE RIVERA: He stopped the car by
11 hitting - - -

12 MS. EISNER: - - - were vehicles.

13 JUDGE RIVERA: - - - a vehicle.

14 MS. EISNER: Excuse me?

15 JUDGE RIVERA: But how can that be? He
16 stopped his car by hitting a vehicle. He did - - -

17 MS. EISNER: Well, only - - -

18 JUDGE RIVERA: - - - exactly at the end
19 what you say he was trying to avoid the whole time.

20 MS. EISNER: Oh, no, only when he had no
21 place else to go. He had - - - he didn't hit that
22 vehicle. He had no place to go. And - - - and if a
23 pedestrian - - -

24 JUDGE RIVERA: He had no place to go
25 because why?

1 MS. EISNER: Because he's in the southbound
2 lane, heading north, he - - - Mr. James Helmbold is
3 in a truck waiting for the light, in the southbound
4 lane. And as this defendant is barreling through
5 that southbound lane, Helmbold has nothing to do but
6 force - - - is forced into opposing traffic. So
7 Helmbold takes the lane that maybe this defendant
8 would have otherwise taken, like he did at the other
9 intersections. Maybe he would have shot for the - -
10 - to get back into the northbound lane, but Helmbold
11 took it, so now he's got no place to go, other than
12 to try to go to Helmbold's left, at which point he
13 crashes the car. Had there been a pedestrian in that
14 intersection, what would have happened? That
15 pedestrian would have been dead, not because this
16 defendant cared, because this defendant was looking
17 for any gap between cars that he could take to flee
18 from the police. He didn't care if a pedestrian got
19 killed. He had to make his way through the cars
20 because the cars were going to bring him to a stop,
21 the pedestrians weren't, and that was his focus.

22 JUDGE RIVERA: So again, how is it
23 different from every other high-speed car chase?

24 MS. EISNER: It's the repeated acts here,
25 Your Honor. It's the density of the population.

1 It's the fact that everything is taking place in a -
2 - - in a densely populated city street with
3 pedestrians everywhere.

4 JUDGE READ: It sounds like you're talking
5 about the surrounding circumstances. It sounds like
6 Register.

7 MS. EISNER: Well, to some extent - - -

8 JUDGE READ: Why aren't you just describing
9 the Register standard?

10 MS. EISNER: To some extent, that's what
11 the jury has to look at when - - - when the jury is
12 asked to infer a - - - a mental state, the jury has
13 to look at the surrounding circumstances. And this
14 is a typical depraved indifference murder kind of
15 case. It's - - - it's a kind of conduct that
16 endangers many people. This is not a one-on-one
17 where this court is pulling back from - - - from
18 depraved indifference murder being charged in one-on-
19 one killings. But this was your classic depraved
20 indifference murder situation, where the law hasn't
21 changed very much, and where a jury is going to have
22 to look at the circumstances surrounding the conduct
23 in order to infer the mental state. And everything
24 here - - -

25 CHIEF JUDGE LIPPMAN: Okay, counsel - - -

1 MS. EISNER: - - - told the jury that this
2 man was depravedly indifferent.

3 CHIEF JUDGE LIPPMAN: Thanks, counselor.
4 Counselor, rebuttal?

5 MR. LEVINE: A couple of brief corrections,
6 Your Honor. First of all, Prindle actually hit a
7 truck; Prindle didn't almost hit a truck. My client
8 almost hit a pedestrian before the fatal incident but
9 did not actually do so.

10 Second of all, my adversary stated that the
11 defendant, in a statement to police, said nothing
12 about swerving before he struck Ms. - - - Ms. Kryzak.
13 He did. "He" - - - and this is quote - - - "tried to
14 swerve", he said, "but I struck her in the hand or
15 something". So that's right there in the record.

16 The People - - - this is very important - -
17 - they do have a burden of proof, and they have an
18 underlying theme in their brief of stating that the
19 jury could have inferred that because he was trying
20 to escape from police that he had - - - that he just
21 didn't care.

22 But just like in Gomez, there is proof on
23 the record to show why Gomez evinced - - - if - - -
24 if this were a post-Fein - - - Feingold case, for
25 instance, if - - - if Gomez were, you know, that he

1 was depravedly indifferent as to whether anyone lived
2 or died. That is completely absent in my case.

3 Judge Smith asked what else you got? Judge
4 Rivera, you also asked similar questions. My
5 adversary came up with nothing, except to somehow
6 subtly imply that the lack of evidence that my client
7 wasn't depravedly indifferent would give jury rise -
8 - - the jury rise to infer that he was depravedly
9 indifferent. But of course, I have repeatedly shown
10 also the opposite that there is - - - there is
11 evidence in this case, positive evidence, that he
12 swerved repeatedly before, at, and after the fatal
13 incident to avoid traffic.

14 As for the rearview mirror, we know that my
15 client swerved left, swerved right, and suddenly
16 struck the victim. It's not as if he were driving
17 for blocks looking in the rearview mirror. It was an
18 instant; it was glimpse. Certainly, because of his
19 reckless speed, that was reckless conduct.

20 CHIEF JUDGE LIPPMAN: Okay, counselor.
21 Thank you.

22 MR. LEVINE: Thank you, Your Honor.

23 CHIEF JUDGE LIPPMAN: Thanks both of you.

24 (Court is adjourned)

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I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of People v. Jose Maldonado, No. 135, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

Signature: _____

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