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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 16

BENDER (DONALD),

Appellant.

20 Eagle Street
Albany, New York
February 10, 2026

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE WILSON: Next case on the calendar is
2 People v. Bender.

3 MR. HUTTER: Good afternoon. May it please the
4 court. I'd like to reserve three minutes - - -

5 CHIEF JUDGE WILSON: Yes.

6 MR. HUTTER: - - - for a possible rebuttal.

7 CHIEF JUDGE WILSON: Absolutely.

8 MR. HUTTER: As the court knows, this case is
9 before the court on a leave grant by Justice Clark in the
10 Third Department, in which she'd expressed, in conjunction
11 with her dissenting colleague, that the prosecution proof
12 on depraved indifference element in the reckless
13 endangerment was insufficient. And she thought that the
14 majority got it wrong. And obviously, that's the main
15 point in my brief. It's point one in my brief that what
16 she said was - - - is accurate, that the proof was
17 insufficient on that element. And that's the element we're
18 dealing with.

19 There are two mens rea, of course, in that
20 reckless endangerment: recklessly and then depraved
21 indifference to human life. Essentially, the proof would,
22 I would say at this point, establish the reckless point.
23 Now, again, I'd like to have a different say on that based
24 upon what happened with the exclusion of evidence. But on
25 this record, the real issue now is depraved indifference to

1 human life element. Now, instead of starting out on that,
2 I would like to - - - and I'm going to take a cue from this
3 court's decision in - - -

4 JUDGE RIVERA: Why isn't driving through - - -
5 going on a curb and driving through a parking lot of a
6 motel indicative of the depraved indifference?

7 MR. HUTTER: Well, first of all, Your Honor - - -

8 JUDGE RIVERA: Mens rea.

9 MR. HUTTER: - - - I don't think he was driving
10 through the parking lot. What the proof was - - - and in
11 fact, a eye witness for the prosecution said the tire had
12 blown out when he hit the curb, and he had lost control.
13 And he was not driving. He just simply wasn't doing
14 anything. So again, I don't think it was a conscious
15 effort on his part.

16 JUDGE RIVERA: But given the standard that - - -

17 MR. HUTTER: He just lost control.

18 JUDGE RIVERA: - - - given the standard, we have
19 to look at the evidence in the light most favorable to the
20 prosecutor. Why is it the jury couldn't decide that that's
21 not the case?

22 MR. HUTTER: It's - - -

23 JUDGE RIVERA: That he had not lost control.

24 MR. HUTTER: Even if they accept that, it still
25 doesn't rise to the high level - - -

1 JUDGE RIVERA: But why isn't that like driving up
2 on a curb, going through a parking lot where there are
3 people - - - of a place where people are staying?

4 MR. HUTTER: Well, first of all, no - - - no - -
5 -

6 JUDGE RIVERA: And on the curb to get to that
7 parking lot.

8 MR. HUTTER: Well, if you're - - - the
9 photographs in the record clearly indicate that he was
10 going through a wooded area and that there was no people on
11 it. No - - - no one else - - -

12 JUDGE RIVERA: Yeah. But I'm talking about the
13 parking lot.

14 MR. HUTTER: Pardon me?

15 JUDGE RIVERA: I'm talking about the park - - -
16 the curb and the parking lot.

17 MR. HUTTER: You mean in front of the hotel?
18 Well, yes. Sure. Sure. He - - -

19 JUDGE RIVERA: Yes. A hotel, not even a barren
20 area - - -

21 MR. HUTTER: Yeah. Hitting the curb - - -

22 JUDGE RIVERA: - - - a - - - a motel, I think so.

23 MR. HUTTER: But again, it - - - it's - - - does
24 that rise to the level of deliberate indifference to human
25 life?

1 JUDGE RIVERA: Well - - -

2 CHIEF JUDGE WILSON: Well, we've got a - - -

3 MR. HUTTER: It's careless driving. It's
4 reckless driving.

5 CHIEF JUDGE WILSON: Well, we've got a whole
6 sequence of events here. And I take your point that if all
7 he'd done was he's driving along, weaving in and out of
8 traffic faster than the rest of traffic, and he hits a - -
9 - tow to - - - the back of a tow truck towing a car, that
10 we wouldn't get to the standard, but he does that. Then he
11 dislodges himself with a part of his car falling apart.
12 Then he hits another - - - he rear-ends a minivan. Then he
13 hits another car and flips it over upside down. And then
14 he crashes into the side of a motel. How many more things
15 like that would have to happen before you said this guy
16 just had reckless disregard for human life?

17 MR. HUTTER: Well, a couple of things about that,
18 first, Your Honor.

19 CHIEF JUDGE WILSON: Yeah.

20 MR. HUTTER: Again, the - - - you're absolutely
21 correct with the amount of - - - there were three separate
22 collisions. And then going into the car - - -

23 CHIEF JUDGE WILSON: Yeah.

24 MR. HUTTER: - - - going into the house. But
25 keep in mind that the first collision was a sideswiping.

1 It does not appear that he - - -

2 CHIEF JUDGE WILSON: Well, he's stuck on the tow
3 truck, right?

4 MR. HUTTER: - - - that he was doing anything
5 deliberately.

6 CHIEF JUDGE WILSON: The first - - - first - - -

7 MR. HUTTER: He sideswiped.

8 CHIEF JUDGE WILSON: - - - first collision, he
9 stuck on the back of - - -

10 MR. HUTTER: That couldn't - - - that certainly
11 could not constitute depraved indifference.

12 CHIEF JUDGE WILSON: Right. But let's - - -
13 let's just get the facts straight. First - - -

14 MR. HUTTER: Second and third - - -

15 CHIEF JUDGE WILSON: Hold on. Hold - - - one
16 sec.

17 MR. HUTTER: - - - is a little - - - a little bit
18 more problematic.

19 CHIEF JUDGE WILSON: Hold on one sec. The first
20 incident is not a sideswipe. It's, he drives up the back
21 of a car that's being towed, gets stuck on that, and then
22 dislodges himself with a piece of his car falling out. Yes
23 or no?

24 MR. HUTTER: No, Your Honor. I would disagree
25 with you on that.

1 CHIEF JUDGE WILSON: Okay.

2 MR. HUTTER: The photographs show this is clear
3 sideswiping. It was the rear ending of the Di Benedetto
4 car, but not the first one.

5 JUDGE CANNATARO: He didn't get his car stuck on
6 the back of the towed car?

7 MR. HUTTER: Yes. Because the - - - the car is
8 moving, and it gets the fender on it hooked on.

9 JUDGE CANNATARO: Yeah. And he had it disengage
10 - - -

11 MR. HUTTER: But it wasn't a rear ending.

12 JUDGE CANNATARO: Well, he somehow mounted the
13 car that was being towed and then had to extract himself
14 from that. That's essentially what happened, isn't it?

15 MR. HUTTER: Oh, yeah. Yeah. Well, he
16 sideswipes. He gets hooked on.

17 JUDGE CANNATARO: But to go back - - - to go back
18 to the Chief's question because, you know, there - - - no
19 one was really injured there, he then, without any
20 interruption, proceeded to ram the back of a minivan, I
21 think it was five times, causing an injury to the driver of
22 that, didn't stop to check on whether that person was okay
23 or even yell out the window, sorry, I'm in a rush or
24 something like that. And then proceeded to go and flip
25 over a car, coming within inches of decapitating the

1 driver. And you know, the Chief Judge was interested in
2 the serial nature of it, and I'm interested in the serial
3 nature of it as well, but also the complete lack of even
4 curiosity about the consequences of those discrete acts.
5 Because to me, I can't speculate what - - - what more could
6 show depravity.

7 MR. HUTTER: Well, I - - - first of all, this
8 would be one of the lowest levels of depraved indifference
9 in a motor vehicle accident. And I'm cueing what the Chief
10 Judge wrote in his dissenting opinion in Edwards. He had
11 to be very careful about criminalizing careless, reckless
12 driving.

13 JUDGE HALLIGAN: But it's - - - it's the - - -

14 MR. HUTTER: Are you going to make it a tool - -
15 - tool for the prosecutor to go after?

16 JUDGE HALLIGAN: It's the number of incidents
17 that I think you're hearing questions about. It's not one
18 incident. It's repeated incidents, and by my read - - -

19 MR. HUTTER: Well - - -

20 JUDGE HALLIGAN: - - - of the record, over more
21 than a two-block stretch.

22 MR. HUTTER: I'm - - -

23 JUDGE HALLIGAN: So - - -

24 MR. HUTTER: I'm not disputing that, Your Honor.

25 JUDGE HALLIGAN: Okay. So - - - so - - -

1 MR. HUTTER: But again - - - I'm sorry.

2 JUDGE HALLIGAN: Why is the - - - when we look at
3 the number of incidents, why is that not sufficient?

4 MR. HUTTER: Well - - -

5 JUDGE HALLIGAN: And what more would be needed to
6 be sufficient?

7 MR. HUTTER: Well, first of all, again, I stress
8 - - - this is what Justice Clark was pointing out. All
9 this occurs over a short distance, three-tenths of a mile,
10 maybe two to three minutes at most. It's happening very
11 quickly. And also, he - - - there's no excessive speed
12 involved, which is generally the hallmark of indifferent -
13 - - indifference. There's no ignoring traffic signals, a
14 hallmark of deliberate indifferent - - - depraved
15 indifference. And there's no weave - - - there's no
16 driving against traffic. It's reckless driving. And
17 again, yes, I'm not going to discount the fact that we have
18 three - - -

19 JUDGE RIVERA: But that - - -

20 MR. HUTTER: - - - three collisions.

21 JUDGE RIVERA: But that's why I asked you, why
22 isn't it different once he goes on a curb and goes through
23 a parking lot of a business establishment? There's a motel
24 where there are, obviously, adults and children.

25 MR. HUTTER: Well, again, I think the - - -

1 JUDGE RIVERA: If I agreed with you on everything
2 else, it strikes me that that's the most challenging one
3 for you to deal with.

4 MR. HUTTER: I - - - it certainly looks - - - and
5 again, looking at the - - -

6 JUDGE RIVERA: Because that's like mounting a
7 sidewalk.

8 MR. HUTTER: Yes. Looking at the view - - -
9 taking the view, the proof the most favorable to the People
10 - - -

11 JUDGE RIVERA: Yeah.

12 MR. HUTTER: - - - it certainly looks like that.
13 But again, the eyewitness - - - and it was uncontradicted -
14 - - tire blew out. He lost control.

15 JUDGE SINGAS: Yes. But most people would stop
16 after that. I think the continuation of that behavior
17 demonstrates the recklessness of it. So if your tire blew
18 out and you sideswipe a tow truck, most people it would end
19 there.

20 MR. HUTTER: I certainly would agree with you,
21 reckless. But again, Judge, deliberate indifference?

22 JUDGE SINGAS: Well, yes, because this
23 continuation of this recklessness and indifference to
24 whether or not someone will be struck and killed by your
25 actions or not. There was also eyewitness' testimony that

1 he had his eyes wide open. He had an angry look on his
2 face, and he was deliberately steering into cars. Should
3 we just ignore that testimony?

4 MR. HUTTER: I - - - again, taking that - - -

5 JUDGE RIVERA: Well, if he's driving - - - if
6 he's driving with a flat tire, you're going to lose
7 control. And if you're not trying to stop, again, what is
8 that evincing about the depravity?

9 MR. HUTTER: Again, he continued now for maybe
10 another thirty seconds. Again, he should have stopped. It
11 certainly was reckless not to stop, but again, he didn't.
12 Does that now lead him to seven years in jail?

13 CHIEF JUDGE WILSON: Were you going to address
14 the preclusion of the psychiatric evidence or no?

15 MR. HUTTER: I'm sorry, Your Honor.

16 CHIEF JUDGE WILSON: Were you going to address
17 the preclusion of the psychiatric evidence?

18 MR. HUTTER: Oh, sure. But I - - - my point is -
19 - - and just before I do that, this last thing. Again, I
20 would stress here that - - - and one of the problems with
21 the Third Department decision - - - and I think it's an
22 inaccurate - - - he's playing bumper cars in a heavily
23 trafficked area. I think the district attorney has
24 supplied you with the video of the - - - the bus passing.
25 It wasn't all that heavily trafficked. And to the extent

1 it was heavily trafficked, I think it's amazing that there
2 were only three - - - two additional collisions. That
3 meant he was steering around. He was avoiding it. But I
4 think here, when you compare this to the other cases - - -
5 the most recent cases the court had in Edwards and Baldner,
6 this doesn't rise to the level. Reckless? Yes.

7 Now, on the preclusion, again, this is what I
8 wanted to start out with. And maybe you can help this on
9 the depraved indifference. The defense in this case was,
10 he fell asleep, and he was diagnosed with sleep apnea. The
11 medical evidence by a board-certified sleep expert said,
12 yes, sleep apnea. Sleep apnea can come on at any time.
13 Now, of course, he could not give an opinion that did
14 happen this time, but he was susceptible.

15 JUDGE HALLIGAN: So - - - so on - - -

16 MR. HUTTER: Now, again, that's a hard sell - - -

17 JUDGE HALLIGAN: - - - on that point, if I can,
18 my understanding from your briefing is that the psychiatric
19 testimony would have gone to the reason - - - the cause of
20 the sleep apnea; is that right?

21 MR. HUTTER: No. He would have gone into how
22 that bipolar diagnosis - - - he was treating him for the -
23 - -

24 JUDGE HALLIGAN: Yes.

25 MR. HUTTER: - - - psychiatric, how that would



1 have impacted upon the sleep apnea.

2 JUDGE HALLIGAN: Yes. And that - - - that's what
3 I was - - -

4 MR. HUTTER: Yes.

5 JUDGE HALLIGAN: - - - trying to convey. There
6 was testimony that came in, if I recall, about the sleep
7 apnea; is that right?

8 MR. HUTTER: Yes.

9 JUDGE HALLIGAN: Okay. So what would the
10 prejudice have been then, in any event, from precluding the
11 psychiatric testimony, if it should have otherwise been
12 admitted?

13 MR. HUTTER: Because it - - - it provided now - -
14 - again, sleep apnea - - - you know, the jury is going to
15 be look askance at that. But now, you have a triggering
16 effect. The combination now of the bipolar with the sleep
17 apnea could now change the - - - the diff - - - change the
18 things.

19 JUDGE RIVERA: That the by - - - the fact - - -
20 the argument that if he suffers and he is bipolar, that
21 that would cause the sleep apnea?

22 MR. HUTTER: It - - - it would - - - the
23 interaction, Your Honor.

24 JUDGE CANNATARO: So sleep is - - -

25 MR. HUTTER: Unfortunately, the record does not -

1 - -

2 JUDGE RIVERA: Being bipolar would cause sleep
3 apnea in that moment. Is that the argument?

4 MR. HUTTER: No. It doesn't cause it, but it
5 could - - - it would now maybe trigger it. Okay, cause,
6 I'm not going to - - -

7 JUDGE RIVERA: Isn't that the - - -

8 MR. HUTTER: - - - use that language. Now,
9 unfortunately, and this is - - - again, I have to criticize
10 the Third Department on this. The problem - - -

11 JUDGE RIVERA: But again, that - - - that expert
12 would not say that it was triggered at that moment, just
13 that bipolar - - - being bipolar might trigger - - -

14 MR. HUTTER: That's the problem - - -

15 JUDGE RIVERA: - - - an episode of sleep apnea.

16 MR. HUTTER: If I just may continue, Your Honor.

17 CHIEF JUDGE WILSON: Yes.

18 MR. HUTTER: That's the problem. There's nothing
19 in the record as to exactly what that doctor - - - what Dr.
20 Chapman was going to testify to. All the - - - all the
21 logistics - - -

22 JUDGE RIVERA: Isn't that the problem that
23 counsel didn't do that? That the counsel didn't provide a
24 - - -

25 MR. HUTTER: Here's the - - -



1 JUDGE RIVERA: - - - a basis for that expert
2 testimony?

3 MR. HUTTER: This is the problem when the - - -
4 once he found out - - - once the defense counsel found out
5 about the connection, he immediately called the prosecutor
6 - - - experienced, well-regarded prosecutor, and spilled
7 the beans. I'm going to bring this. This is what I'm
8 going to do. They had a lengthy conversation, and the only
9 response by the DA - - - that ADA was that, well, can I
10 have my psychiatrist just examine him? Of course.

11 JUDGE SINGAS: Well, I don't think - - - is that
12 accurate? I thought it was that the People viewed the
13 witness summaries and said, wait a minute, now you're
14 introducing this psychiatric part of this that we've never
15 gotten notice of - - -

16 MR. HUTTER: It - - - it's - - -

17 JUDGE SINGAS: - - - and brought it to the
18 judge's attention?

19 MR. HUTTER: No, Your Honor. It's different.
20 Here, we're - - - we're talking about that conversation
21 that took place. He told the - - - the DA what the - - -
22 Dr. Chapman was going to testify to. Basically, he gave
23 the contents of what his testimony would be.

24 JUDGE SINGAS: Right. And the DA said, that's
25 nice, but - - -

1 MR. HUTTER: Now here's the problem. Of course,
2 it's not in the record, the exact words - - -

3 JUDGE SINGAS: - - - you've never given us notice
4 of that, and there's a notice requirement in the CPL.

5 MR. HUTTER: DA never complained. So the - - -

6 CHIEF JUDGE WILSON: Well, he did when he filed a
7 motion - - - he - - - he - - -

8 MR. HUTTER: - - - the record does not show that
9 DA complained.

10 CHIEF JUDGE WILSON: He did complain when he
11 filed a motion to preclude.

12 MR. HUTTER: Why didn't he complain? He's
13 ethical. He couldn't complain because he was fed the
14 information.

15 CHIEF JUDGE WILSON: He - - - didn't he file a
16 motion to preclude?

17 MR. HUTTER: Yes.

18 CHIEF JUDGE WILSON: Isn't that a complaint?

19 MR. HUTTER: No. He - - - motion to preclude was
20 only based on the timeliness.

21 CHIEF JUDGE WILSON: Right.

22 JUDGE TROUTMAN: Right.

23 MR. HUTTER: He said nothing about the content.

24 JUDGE TROUTMAN: But Counsel - - -

25 MR. HUTTER: The issue of the content is a red

1 herring - - -

2 JUDGE TROUTMAN: But Counsel - - -

3 MR. HUTTER: - - - interjected by the Appellate
4 Division without any argument by the DA for it. The DA
5 never complained about the insufficiency.

6 JUDGE TROUTMAN: Wasn't it the responsibility of
7 the defense attorney to file the notice in the first
8 instance?

9 MR. HUTTER: Yes, without a - - - without a
10 doubt. And he should have filed it at the time he found
11 out about Dr. Chapman. He believed that his oral statement
12 to the prosecutor was sufficient. He made a mistake. Now,
13 in Sidbury - - -

14 JUDGE RIVERA: So how is it - - - how is it - - -

15 MR. HUTTER: - - - is Sidbury now going to say
16 that that should now deprive him - - -

17 JUDGE RIVERA: Excuse me. Counsel, so how - - -

18 MR. HUTTER: - - - of the right to bring that
19 evidence in?

20 JUDGE RIVERA: Counsel, how is it an abuse of
21 discretion of the court to, as a consequence, preclude the
22 proffered expert testimony - - -

23 MR. HUTTER: Because all the - - - the - - -

24 JUDGE RIVERA: - - - given that you've just said
25 the attorney made a mistake and should have done those

1 things - - -

2 MR. HUTTER: Well - - -

3 JUDGE RIVERA: - - - and didn't give timely
4 notice?

5 MR. HUTTER: Sidbury is very strong. You - - -
6 absolute preclusion when the - - - there's willful miss - -
7 - willful ignorance of it. We don't have that there. And
8 the effort to obtain an unfair advantage. There's no
9 strategic reason for that. He disclosed everything.
10 There's no bad faith here. And Sidbury says, in that
11 situation, then you look at the balancing, balancing now of
12 being deprived of the right to present evidence versus
13 prejudice. There's no prejudice to the DA, absolutely no
14 prejudice. And in that regard, I - - - this is the
15 problem, of course. And I think, Justice Singas, you were
16 getting at it. The problem, of course, is that there was -
17 - - we do not know exactly what was said - - - the link the
18 - - - of Dr. Chapman. But my point is - - -

19 JUDGE HALLIGAN: But isn't that why there is - -
20 -

21 MR. HUTTER: - - - the DA never complained about
22 the lack of that.

23 JUDGE HALLIGAN: Isn't that why there's a written
24 notice requirement, to avoid this sort of back and forth?

25 MR. HUTTER: I - - - certainly.

1 JUDGE HALLIGAN: Okay.

2 MR. HUTTER: Again, Sidbury - - - Sidbury says,
3 if there's insufficiency, you - - - you ask the judge to
4 amend it.

5 JUDGE RIVERA: Well, why didn't counsel - - -

6 MR. HUTTER: But the DA never asked it at County
7 Court?

8 JUDGE RIVERA: Why didn't counsel make a
9 representation of what the expert was going to - - -

10 MR. HUTTER: I'm sorry, Your Honor.

11 JUDGE RIVERA: Why didn't counsel make a
12 representation of what the expert was going to testify to?

13 MR. HUTTER: Because it never came up. He just
14 assumed that the DA was aware of it. I mean, if the DA was
15 on - - -

16 JUDGE RIVERA: But if you want to call an expert
17 when you've not timely filed to do so and not given
18 appropriate notice - - - excuse me - - - isn't that the
19 burden on counsel to properly make a request?

20 MR. HUTTER: No. I would - - - I would
21 respectfully disagree, Your Honor. I think this is Sidbury
22 all over again. Now, again, the problem is, I know - - - I
23 know I'm being repetitive. I'll sit down. I'm hoping I'm
24 not over abusing my privilege here. But the problem is
25 that we don't know exactly what was told to the ADA. If

1 the ADA was unsatisfied with what was said and said, no, I
2 don't have enough information to figure out this, he would
3 have said so. He never did. He never made that
4 representation to the County Court. And the first time it
5 shows up is in the Appellate Division, and it'd never been
6 argued.

7 CHIEF JUDGE WILSON: Thank you.

8 MR. YOUNG: May it please the court. Daniel
9 Young for the People. Your Honors, opposing counsel is
10 correct. Sidbury should guide this court, but it should
11 find - - - guide this court to affirm the Appellate
12 Division's decision.

13 JUDGE HALLIGAN: On that point, can I ask you
14 about the prejudice? So I think the defendant in the cross
15 motion said that the People had expressly stated they had
16 no intention of obtaining any experts and merely want to
17 preclude defendant's testimony. Was that statement ever
18 rebutted, or was that the state of affairs?

19 MR. YOUNG: So it was never rebutted. As this
20 court's noted, the timing on these motions was that the
21 People filed their motion to preclude - - -

22 JUDGE HALLIGAN: Right.

23 MR. YOUNG: - - - and then the defense filed
24 their motion.

25 JUDGE HALLIGAN: So if there was no intent to

1 obtain an expert, can you explain to me what exactly the
2 nature of the prejudice was in terms of the late notice?

3 MR. YOUNG: Absolutely. It's the inability to
4 have the defendant examined by an expert in close temporal
5 proximity to the actual crime itself.

6 JUDGE HALLIGAN: But there was a pretty long
7 delay, I thought, in any event, after the time of the crime
8 and the indictment. Am I wrong about that?

9 MR. YOUNG: Correct. There was about a year and
10 a half delay between the time of the crime and the
11 indictment.

12 JUDGE HALLIGAN: So it's the additional window
13 that you're contemplating there when you say the delay?

14 MR. YOUNG: Right. It's that additional year and
15 a half. I would also note that, in their motion, defense
16 counsel did argue that - - -

17 JUDGE TROUTMAN: But how do you say that when you
18 don't indict until a year and a half later, that you're
19 prejudiced by not having the ability to examine close in
20 time?

21 MR. YOUNG: So this was a somewhat complex case,
22 a case where I don't really believe it's before this court.
23 But in their 440 motion and then their brief to the
24 Appellate Division, the defense argued that the waiver of
25 speedy trial should be rejected because the defendant just

1 wanted outright dismissal. So this is a case where there's
2 going to be long negotiations, where defense is going to
3 bring mitigating factors to the People. So while, yes, it
4 did take a year and a half to indict - - -

5 JUDGE TROUTMAN: So was all that brought to the
6 court's attention the - - - was there a - - - did the
7 People lay out what prejudice they suffered? And then did
8 the court specifically balance all of that?

9 MR. YOUNG: So the People did raise that in their
10 motion to preclude, that they would be denied the
11 opportunity to have the defendant examined in close
12 proximity to the offense. And while the court did not
13 explicitly hold that in her ruling, it - - -

14 JUDGE TROUTMAN: Was the court required to do so?

15 MR. YOUNG: I don't believe the court is required
16 to make that explicit ruling, especially here, when the bad
17 faith on the part of the defense is just manifest on the
18 record.

19 JUDGE TROUTMAN: How do you say bad faith?
20 Wasn't there a hearing on the defendant's competency?

21 MR. YOUNG: I believe there was, but there - - -
22 it wasn't a central part of the defense. As the People
23 noted in our motion to preclude, the entire time that - - -

24 JUDGE TROUTMAN: Well, did the court preclude
25 some evidence because the lack of his ability to consent?

1 MR. YOUNG: Yes. They precluded evidence of the
2 marijuana intoxication. So I believe his statements about
3 it were precluded because of his inability to consent at
4 that time.

5 JUDGE TROUTMAN: And wasn't there some evidence
6 about his erratic behavior, et cetera, presented?

7 MR. YOUNG: Yes, there was. And I - - -

8 JUDGE TROUTMAN: So again, then, I'm having
9 difficulty not understanding why the People wouldn't know
10 that there was some indication that his state of mind, his
11 condition, psychiatrically or otherwise, would be at issue.

12 MR. YOUNG: So that we know that there might be a
13 condition, as this court has previously held, it doesn't
14 mean that we know how they're going to use it, how it ties
15 into a defense, or even if they are going to raise it in
16 defense. So the fact that we may have known about it does
17 not - - -

18 JUDGE TROUTMAN: Okay. So what was - - - what
19 about an adjournment? Why wouldn't the adjournment have
20 dealt with any prejudice that the People suffered to give
21 you an opportunity to have him examined?

22 MR. YOUNG: Well, again, it's not the inability
23 to have him examined. It's the inability to have him
24 examined at close temporal proximity to the crime - - -

25 JUDGE TROUTMAN: But you weren't going to be able

1 to have him examined in close proximi - - -

2 MR. YOUNG: Sure, Your Honor.

3 JUDGE TROUTMAN: - - - temporal proximity because
4 you didn't indict him till over a year and a half later.

5 MR. YOUNG: Sure. But that does not mean that
6 we've somehow waived the remaining amount of time. So - -
7 -

8 CHIEF JUDGE WILSON: Well, some of the remaining
9 amount of time was COVID, right?

10 MR. YOUNG: Correct.

11 CHIEF JUDGE WILSON: And everything was shut
12 down. And it's not clear you could have had him examined
13 then.

14 MR. YOUNG: I know COVID was difficult for
15 everybody. It did shut down a lot of court operations.
16 However - - -

17 CHIEF JUDGE WILSON: Including his trial, several
18 times, right?

19 MR. YOUNG: Correct, Your Honor. Phones were
20 still in use. Video chats were still in use. So while I
21 don't - - - there's - - - the record is unclear
22 specifically how that examination would have happened. I
23 don't believe it's a - - - it's fair to say that there was
24 no way we could have done it because of COVID specifically.

25 JUDGE HALLIGAN: You said there was bad faith.

1 What is your support for that characterization?

2 MR. YOUNG: So there's a few things I'd like to
3 point out in the record. First is, the People's statement
4 in their affirmation seeking to preclude this evidence.
5 There's the statement that the People were given this
6 information for the first time on April 18th of 2021, and
7 that at that point, defense counsel - - -

8 JUDGE HALLIGAN: Is that the date of the phone
9 call? I'm not sure what date you're referring to.

10 MR. YOUNG: So that - - - I believe the timing of
11 it is on April 8th of that year. Defense counsel, for the
12 first time, gives the updated witness list, which includes
13 - - -

14 JUDGE HALLIGAN: Oh.

15 MR. YOUNG: - - - Dr. Chapman. April 18th is
16 when defense counsel calls Dr. Chapman, and for the first
17 time is told about this - - - how the conditions interact.
18 And I believe that's also the same date of the phone call
19 to - - - with the prosecution.

20 JUDGE TROUTMAN: Prior to the call - - -

21 JUDGE HALLIGAN: So where - - - where is the bad
22 faith?

23 JUDGE TROUTMAN: - - - did you have bipolar
24 disorder discovery materials provided?

25 MR. YOUNG: There was. Some of Dr. Chapman's



1 notes had been turned over in September of, I believe it
2 was, 2019, a couple of months before the defendant was
3 indicted and arraigned. But again, that we - - -

4 JUDGE CANNATARO: And they mentioned bipolar
5 disorder?

6 MR. YOUNG: I believe - - - I am unsure whether
7 it specifically referenced bipolar disorder, but I can say
8 with certainty that Dr. Chapman's notes were included.

9 JUDGE HALLIGAN: So where's the bad faith in that
10 timeline?

11 MR. YOUNG: So the first part of the bad faith is
12 in that phone call. The only evidence of that phone call
13 we have is from the People's affirmation that - - - where
14 they said the - - - that defense counsel said he planned to
15 shift the defense to argue that he was in a manic state and
16 used that to defeat the mens rea at the time. That last -
17 - - that type of last second shift in the defense is the
18 exact kind of gamesmanship that CPL 250.10 is meant to
19 stop. The further evidence - - -

20 JUDGE RIVERA: So - - - I'm sorry - - - just to
21 clarify, you're saying that's the bad faith, this - - -

22 MR. YOUNG: Well - - -

23 JUDGE RIVERA: - - - change that it's not about
24 him falling asleep at the wheel, it's that he's got this
25 particular kind of - - -

1 MR. YOUNG: So - - -

2 JUDGE RIVERA: - - - disorder that would result
3 in an - - - an enraged behavior.

4 MR. YOUNG: So - - - I - - -

5 JUDGE RIVERA: Is that what you mean?

6 MR. YOUNG: - - - I want to be very clear. It's
7 not this one individual thing. I'm not saying that because
8 there is a potential change in defense that bad faith is
9 right there. It's just the - - -

10 JUDGE RIVERA: But that I describe what the
11 change of defense is exactly?

12 MR. YOUNG: Yes. That's - - - that is my
13 understanding based on the review of the record.

14 JUDGE RIVERA: Okay.

15 JUDGE HALLIGAN: But that's puzzling to me
16 because it seems to me the briefing and your adversary
17 described a different use of the testimony, which was that
18 the bipolar disorder was triggering or causative of the
19 sleep apnea, so - - -

20 MR. YOUNG: And - - - and so that is - - -

21 JUDGE HALLIGAN: - - - how do you make sense of
22 that?

23 MR. YOUNG: - - - that is somewhat of a factual
24 question that is, you know, outside this court's review
25 because we have the defense attorney replying - - - or I

1 guess, filing his motion saying that it just ties into - -
2 -

3 JUDGE HALLIGAN: So are you saying there's a
4 finding of bad faith?

5 MR. YOUNG: No. There was - - - there has not
6 been - - -

7 JUDGE HALLIGAN: Okay.

8 MR. YOUNG: - - - an explicit finding of bad
9 faith, no. But my point is that the defense is asking you
10 to speculate about that phone call based purely upon what
11 defense counsel said.

12 JUDGE HALLIGAN: But - - -

13 JUDGE CANNATARO: Well, that may be, but the
14 defense position all along was that the evidence of bipolar
15 disorder was being offered to illustrate how it somehow
16 exacerbated the sleep disorder. There's - - -- you know,
17 there's no - - - there's no motion made to, you know, to
18 call a doctor late to testify about bipolar and a manic
19 episode, right? The only place that comes from is your
20 affiant statement of what they understood the phone call to
21 be.

22 MR. YOUNG: Correct. But even within defense
23 counsel's submissions, there is no explanation for that
24 connection. I believe the best we - - -

25 JUDGE TROUTMAN: But even without the phone call,

1 the hearing that you had, there was evidence of him making
2 delusional statements. So the - - - how is it that the
3 People would have no clue? And how is that, therefore, bad
4 faith? It may be sloppy practice, but how is that bad
5 faith?

6 MR. YOUNG: Well, I think it goes to the last
7 thing I wanted to mention, which is, even when defense
8 counsel filed their motion, they failed to explain this
9 connection. They failed to explain how they planned to use
10 this testimony, and they explicitly said it will be
11 explained at trial. That is trial by ambush. That is not,
12 we were on constructive notice of what was going to happen.
13 This was defense counsel holding a defense close to his
14 chest until, I believe, three or - - - I think it was five
15 weeks before trial. And then even when he found that out,
16 he still took no steps. I think the lower court got it
17 right when they - - - when it explained that even after
18 that call, it - - - the - - - I think the court explicitly
19 said it would have arguably been too late, but at least you
20 would have done something. The defense attorney didn't do
21 that.

22 JUDGE TROUTMAN: Before you get to preclusion,
23 was the court required to balance prejudice to the
24 defendant - - - prejudice to the People as it relates to
25 his ability to present a defense?

1 MR. YOUNG: Yes. The lower court was required to
2 make that finding, but I don't think that it needed - - -

3 JUDGE TROUTMAN: Did it do so?

4 MR. YOUNG: I don't think it needed to do so
5 explicitly. I think we can read into it - - -

6 JUDGE TROUTMAN: Did it do so implicitly?

7 MR. YOUNG: Yeah. I think it did so on - - -

8 JUDGE TROUTMAN: How so?

9 MR. YOUNG: When we look at the - - - the
10 different remedies that could have been given, the - - -
11 the two - - - well, they're one - - - they're one and the
12 same. There's an adjournment to allow the People an
13 opportunity to have their expert review. And then, as this
14 court noted in People v. Sidbury, there is an - - - an
15 adjournment could be appropriate to allow the defense to
16 amend their notice. Here, again, the prejudice that we've
17 cited is not simply an inability - - -

18 JUDGE TROUTMAN: Was there a discussion about an
19 adjournment to allow those things to happen?

20 MR. YOUNG: Nothing on the record. But even
21 those adjournments still put us in the same position. They
22 don't cure the prejudice. They don't cure our inability to
23 have the defendant examined in close time to the offense.
24 All it does is puts us out another month or two.

25 JUDGE TROUTMAN: And just so that I'm clear, in

1 your definition, close time to the offense is, what? Two
2 year - - - two and a half years after?

3 MR. YOUNG: I - - - I don't have a bright line
4 rule that this court - - - that I'm asking this court to
5 adopt. I think the statute, because it contemplates within
6 a month of the arraignment, I think that's the time frame
7 the legislature wants - - - wanted to assign here. But
8 also it's important to note that - - -

9 JUDGE TROUTMAN: So the arraignment is the
10 determining factor as to whether or not that defense is a
11 viable one for you to challenge?

12 MR. YOUNG: I'm - - -

13 JUDGE TROUTMAN: His state of mind was arguably
14 different two and a half years later, correct?

15 MR. YOUNG: Exactly. And to find out what his
16 state of mind at the time of the offense in using this
17 psychiatric defense, we would need to have much closer than
18 three years away.

19 JUDGE TROUTMAN: But because of a whole array of
20 circumstances, that didn't happen because the People were
21 impacted in bringing the case for indictment.

22 MR. YOUNG: Yeah.

23 JUDGE TROUTMAN: There was COVID. And are you
24 suggesting that any of the delays were attributable to the
25 defendant during that time?

1 MR. YOUNG: Well, I think a main part of the
2 delay is because the People were given - - - you know, the
3 defense noted that they had turned over some of this
4 information in early September of 2019, and that put us on
5 constructive notice. That should have been the time.

6 JUDGE TROUTMAN: Did they ever ask for an
7 adjournment for anything before?

8 MR. YOUNG: The defense or the People?

9 JUDGE TROUTMAN: The defendant, did he ever ask
10 for an adjournment?

11 MR. YOUNG: I don't believe so. But he did have
12 a speedy trial waiver in place. So certainly, he was not
13 rushing this to trial. And then I - - - it's also very
14 important - - -

15 JUDGE TROUTMAN: So the reason I ask for the
16 adjournment, there's preclusion, there's an adjournment.
17 So the court works to see if there's something less - - -

18 MR. YOUNG: Yeah. And here, the preclusion - - -
19 it's important to keep in mind this was a very limited
20 preclusion. The defendant was still able to put on his
21 defense that he suffers from excessive daytime drowsiness,
22 which is caused by sleep apnea.

23 JUDGE TROUTMAN: But what about the context of
24 the bipolar?

25 MR. YOUNG: Well, we have no information about

1 that because defense counsel never chose to give that
2 information to anyone.

3 JUDGE RIVERA: Without being able to put that on,
4 it certainly made it more difficult to present to the jury,
5 perhaps a different view than the prosecutor, at least in
6 the closing, who argued, what person acts like this, right?

7 MR. YOUNG: Yeah. Yeah.

8 JUDGE RIVERA: When he's running to the - - -
9 excuse me - - - when he crashes into the house, and he
10 comes out, and he has this kind of behavior, perhaps the
11 fact that counsel would have had the opportunity to have an
12 expert to explain some of the mental health issues
13 defendant was suffering under, might have helped the jury
14 better understand why a defendant would act in a particular
15 way after that final collision.

16 MR. YOUNG: Well, then I think that kind of ties
17 back into the fact that defense counsel wanted to change
18 the defense in the last second.

19 JUDGE RIVERA: Fair enough.

20 MR. YOUNG: And if I may - - -

21 JUDGE RIVERA: Can - - - your white light is on.
22 Can I just ask you to - - - if we could look at the
23 depraved indifference, what's the rule? I would think you
24 would agree that, you know, some reckless driving - - -
25 some erratic driving doesn't rise to the level of depraved

1 indifference. So where's the line?

2 MR. YOUNG: I think the line in my review of the
3 case law is the defendant's attempts to mitigate the
4 damage. I think - - - you know, Chief Justice Wilson - - -
5 or Chief Judge Wilson - - - I apologize - - - you said in
6 the - - - your dissent in People v. Edwards, you noted that
7 the defendant was hitting the brakes for five seconds
8 before the final crash. Here, we have the exact opposite.
9 Not only is the defendant not hitting the brakes for eight
10 seconds before the crash, for five seconds before, he's got
11 the car at full throttle. He's trying to get that car to
12 move as fast as he can until he is brought to a stop in - -
13 - when he crashes into a house below a little girl's
14 bedroom. The lack of mitigation - - -

15 JUDGE RIVERA: What do you mean by full throttle?
16 His foot is all the way down on the pedal?

17 MR. YOUNG: Yes. He - - -

18 JUDGE RIVERA: Is that your point? Because
19 before that, he is within the speed limit, yes?

20 MR. YOUNG: Yes. And admittedly, even when he is
21 at full throttle, he is - - - I don't believe he is
22 excessively above the speed limit. But again, it's the
23 mental state. It's not - - - this court has factors it can
24 look at, but there's no single determinative factor.

25 So unless Your Honors have any further questions,

1 I ask you to affirm the judgment of the Appellate Division.
2 Thank you.

3 CHIEF JUDGE WILSON: Thank you.

4 MR. HUTTER: I will be brief. Yes. The purpose
5 of the written notice - - - written - - - is to alert the
6 DA as to what is going on so they can prepare. The notice
7 here was not given any specific information. The concern
8 is, though, as I'm trying to get at, is that the DA never
9 complained about that. Why? Because all the specifics
10 were told to him orally.

11 Now, in response to your question, Judge
12 Halligan, I think the issue can be, can oral - - - oral
13 announcement, everything, be sufficient to satisfy the
14 written? Again, remember he did serve a written without
15 it. And again, as Judge Wilson pointed out in - - - Chief
16 Judge pointed out in Sidbury, you amend the - - - amend the
17 notice. It could have been done easily.

18 JUDGE CANNATARO: But Counsel, all that is done
19 in court. We're talking about a phone call between
20 lawyers. So to me it sounds more like you're making some
21 sort of waiver argument that by having this phone call and
22 telling counsel what was going to happen and counsel saying
23 whatever they said; I want to examine the witness or
24 whatever, that they then waive the requirement of the
25 250.10 motion. Is it - - -

1 MR. HUTTER: I don't think there's any waiver
2 involved. The court's not involved at this point.

3 JUDGE CANNATARO: Right.

4 MR. HUTTER: This is all about - - - between
5 them.

6 JUDGE CANNATARO: And Sidbury is about - - -

7 MR. HUTTER: So they certainly can agree to it.

8 JUDGE CANNATARO: Sidbury is about amending your
9 notice to the court. But this is all stuff that happened
10 before. And you're saying, I didn't have to - - - I didn't
11 have to ask for permission because I got permission from my
12 adversary.

13 MR. HUTTER: When - - - when the judge - - -

14 JUDGE RIVERA: And if he said all that - - - if
15 he said all that - - - if he said all that to the
16 prosecutor, why didn't counsel just put it in writing?

17 MR. HUTTER: Pardon me?

18 JUDGE RIVERA: If he had already said all of that
19 to the prosecutor, why not just put it in writing?

20 MR. HUTTER: He didn't do it. I'm not - - -

21 JUDGE RIVERA: So again, why is it an abuse of
22 discretion of the court to consider the preclusion given
23 the circumstances?

24 MR. HUTTER: Again, using the Sidbury test, and
25 I'll conclude with that. Again, I don't want to use my - -

1 - my - - -

2 JUDGE RIVERA: Okay.

3 MR. HUTTER: - - - privilege here. This has no
4 bad faith here involved. The prejudice. Now, you heard
5 prejudice because - - - well, you - - - we could have - - -
6 we should have been investigating him many years earlier.
7 Remember, the accident happened in '18, not indicted a year
8 and a half later.

9 JUDGE GARCIA: So Counsel - - - I'm sorry. I'm
10 sorry. Is it not your view that in this case, with those
11 facts about the indictment delay, this defense lawyer could
12 have come in the morning of trial, never said anything
13 before, and said, hey, I've got a notice here? And the
14 judge, under your view, I think, not bad faith? Sure. How
15 much time do you need?

16 MR. HUTTER: Absolutely not, Your Honor.

17 JUDGE GARCIA: Why not? What's the difference?

18 MR. HUTTER: The difference here is that the
19 initial notice went to DA some three weeks before the - - -
20 three to four weeks before trial.

21 JUDGE GARCIA: So you have to rely on this phone
22 call, which is described - - -

23 MR. HUTTER: Yes.

24 JUDGE GARCIA: - - - by the defendant to say - - -

25 -

1 MR. HUTTER: Which no one disputes.

2 JUDGE GARCIA: - - - that's the notice that gets
3 you out of even filing at that time, which, at least would
4 have been about four weeks before the trial was set to
5 start, and still, despite that, no notice is filed until
6 six days before trial is beginning, and that isn't
7 different than Sidbury?

8 MR. HUTTER: Well, again, a little cagey
9 prosecutorial work here. After the - - - after the phone
10 call, the DA seemed to be okay with everything. He then
11 sits on it for two and - - - two weeks and makes the motion
12 which forces the cross motion.

13 JUDGE GARCIA: So in your - - - I'm sorry. I'll
14 refine my hypothetical. In your case then, let's say we do
15 the same thing, phone call, everything. Nothing happens.
16 Defense counsel gets up. Jury is about to come in.
17 Defense counsel says, you know what? I have a notice. I'm
18 introducing this testimony. And you think the judge has no
19 other option but to say, okay, send the jury home. I have
20 to adjourn because they had this phone call?

21 MR. HUTTER: No. I think that with that last
22 minute like that, I think that fits within Sidbury.

23 JUDGE GARCIA: And what's not last minute - - -

24 MR. HUTTER: And that it's trying to obtain a
25 strategic advantage.

1 JUDGE GARCIA: What's not last minute about six
2 days?

3 MR. HUTTER: I would not condone that, and I
4 would not make that argument.

5 JUDGE GARCIA: But - - - and - - - but you were
6 making - - -

7 MR. HUTTER: But here, everything was three weeks
8 before.

9 JUDGE GARCIA: What if it's two days before? Is
10 that Sidbury or not Sidbury?

11 MR. HUTTER: I think the closer you get - - -
12 again, two days, I think would be improper as well.

13 JUDGE GARCIA: So six days is okay?

14 MR. HUTTER: I - - - maybe you're stretching it,
15 but we're dealing with two weeks - - - two or three weeks
16 before.

17 JUDGE GARCIA: That's the oral notice you're
18 claiming.

19 MR. HUTTER: But the oral notice was - - - was
20 this - - - basically gave what the written notice would
21 have given.

22 JUDGE GARCIA: But then again I go back to my
23 hypothetical. Then why doesn't that equally apply if the
24 defense lawyer stands up the morning of trial and says,
25 hey, I have a notice here?

1 MR. HUTTER: Because it's - - - there's no time
2 to - - -

3 JUDGE GARCIA: I already orally advised the guy.

4 MR. HUTTER: There's no time to prepare. The DA
5 certainly had time to prepare after being given that oral
6 notice, Your Honor.

7 JUDGE GARCIA: But isn't that a discretionary
8 call by the judge how six days is better than the day
9 before or two days before?

10 MR. HUTTER: Well, again, we can argue that, Your
11 Honor, but I think we're losing sight of Sidbury.

12 JUDGE GARCIA: Is Sidbury six days before?

13 MR. HUTTER: Balance it - - - you're depriving
14 him of his right to present evidence. Balance it against
15 the prejudice. There's no prejudice here. We still
16 haven't seen any prejudice to the district attorney.

17 JUDGE GARCIA: But why wouldn't that also apply
18 to getting up the morning of trial?

19 MR. HUTTER: I'm sorry, Your Honor.

20 JUDGE GARCIA: Why wouldn't that analysis apply
21 any time, no matter how close to trial? You still have to
22 show prejudice. And hey, we could adjourn, and you could -
23 - -

24 MR. HUTTER: Well, there you would flunk the
25 first part of Sidbury, the bad faith - - -

1 JUDGE GARCIA: No. It's the same as the - - -

2 MR. HUTTER: - - - strategic advantage.

3 JUDGE GARCIA: - - - exception. Instead of
4 filing six days, you file that day.

5 MR. HUTTER: No. I'm not trying to encourage a
6 sharp litigating by defense counsel and courage, oh, we can
7 get away with it. I'm not condoning that. That would be
8 bad practice.

9 JUDGE GARCIA: And what would the evidence in - -
10 -

11 MR. HUTTER: And I don't think that any court
12 would - - - should accept it.

13 JUDGE GARCIA: What's the evidence in my
14 hypothetical of bad faith? I say, hey, I had a phone call
15 with the guy. He knew. I'm just raising it this morning.

16 MR. HUTTER: Again - - -

17 JUDGE GARCIA: Sorry. Bad form.

18 MR. HUTTER: Again, it may depend upon how much
19 it's going to be done with respect to the information.

20 CHIEF JUDGE WILSON: Thank you.

21 MR. HUTTER: Thank you, Your Honors.

22 (Court is adjourned)

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C E R T I F I C A T I O N

I, Brandon Deshawn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Bender (Donald), No. 16 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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