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COURT OF APPEALS

STATE OF NEW YORK

RICHARD GAWORECKI,

Appellant,

-against-

No. 40

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

20 Eagle Street
Albany, New York
August 31, 2021

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO

Appearances:

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1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is appeal number 40, the People of the
3 State of New York v. Richard Gaworecki.

4 Let's take a moment until Counsel has an
5 opportunity to clear out.

6 (Pause)

7 CHIEF JUDGE DIFIORE: Okay. Good afternoon,
8 Counsel.

9 MS. GORMAN: Good afternoon. May it please the
10 court, my name is Veronica Gorman. I represent the
11 appellant, Richard Gaworecki, and I would like to reserve
12 two minutes for rebuttal.

13 CHIEF JUDGE DIFIORE: You may.

14 MS. GORMAN: I'd like to begin by addressing the
15 number of blue bags because I think it's critical to the
16 analysis. Based on the People's proof, there are five
17 bags. One bag is taken by the decedent on July 20th. The
18 next day he goes to work, and he's fine. In fact, there's
19 a corroborating text that he sends to Mr. Gaworecki.

20 Another bag is given to his ex-girlfriend,
21 Alicia. She says she takes half the bag and dumps the
22 rest.

23 And then there are two bags found by Alicia and
24 the decedent's mom after his death along with two-thirds of
25 a Xanax pill, which leaves one packet possible in the



1 trashcan.

2 So I disagree with the People's assertion in
3 their brief that my client used four - - - up to four
4 bags - - - or four blue packets before his death. Also,
5 the blue packet from the trash tests positive for heroin.
6 When they recover the cooler from my client's car, that
7 blue bag tests positive for both fentanyl and heroin.

8 Also, the People have conceded that there was no
9 indication that the decedent had purchased or used blue
10 bags before he bought them on July 2nd - - - or July - - -

11 JUDGE GARCIA: Counsel. Counsel, I'm sorry to
12 interrupt you.

13 MS. GORMAN: Go ahead.

14 JUDGE GARCIA: What's the standard we're applying
15 here for a grand jury indictment?

16 MS. GORMAN: Legal sufficiency. Are you - - -

17 JUDGE GARCIA: Yeah, so this argument on
18 causation, and I appreciate it - - - that the detail, it
19 seems a difficult one to make given that standard.

20 MS. GORMAN: Well, I would respectfully disagree.
21 I think what - - - I think what has to happen, even though
22 it's not the trial standard - - -

23 JUDGE GARCIA: Right.

24 MS. GORMAN: - - - burden - - - you know, proof
25 beyond a reasonable doubt, I still think it needs



1 something, and that's what the judge reviewing the - - -
2 the grand jury presentation found, which was there has to
3 be something besides just the sale of the drugs alone, and
4 I would say that it's an additional factor. I think that
5 the trial court said aggravating factor. I believe Judge
6 Mulvey said additional factor. Here, there just isn't an
7 additional factor. And I would submit that this case can
8 be decided in line with both Pinckney and the decision in
9 Li because in Li, the aggravating or additional factor was
10 he's a pain management doctor, and Judge Stein, even in the
11 oral argument portion asked counsel for Dr. Li, well isn't
12 this different because he has a higher standard here. He's
13 a doctor based on his training and experience, and I would
14 argue he has a duty to uphold the Hippocratic Oath.

15 JUDGE WILSON: Doesn't that - - - I'm sorry.
16 Over here. Doesn't that really go more to mens rea than
17 causation here?

18 MS. GORMAN: No. I - - - I don't think so. I
19 think that it applies to causation just as much because for
20 the causation argument, he has to have - - - he has to know
21 what he's doing essentially for causation.

22 JUDGE GARCIA: Well, that sounds to me like mens
23 rea, but I'm not a criminal defense lawyer, so I - - -

24 CHIEF JUDGE DIFIORE: So let me back you up a
25 little bit. So let's assume that the vic - - - for the



1 sake of argument that the victim did die from the heroin
2 that was sold by the defendant to him. Is it your position
3 that the defendant didn't know or could not have known of
4 the substantial risk of death to this individual? Is that
5 what you're arguing to us, mainly?

6 MS. GORMAN: Yes. That is - - - that is part of
7 the argument, which is - - - and that's based on the fact
8 that other people were using this heroin, including the
9 defendant himself, and people were not dying. So there's
10 that - - - there's that first indication that the decedent
11 uses it and goes to work the next day, and he's fine. We
12 have Mr. Garcia that's using it, and he does have a bad
13 reaction, but he lives. Alicia Reger, the ex-girlfriend,
14 takes it and lives. So I don't think on its face he would
15 have known that it was particularly potent.

16 CHIEF JUDGE DIFIORE: And what about his
17 admonitions to be careful with this stuff?

18 MS. GORMAN: Well, so I - - - I attribute that be
19 careful text that he sends as more of a friendly reminder
20 in a relationship between addicts. These guys were not
21 only friends, but they were heroin addicts, and I think
22 that's clear from the proof. And so I would say that - - -

23 JUDGE SINGAS: Why couldn't that be an awareness
24 of the risk under the grand jury's standard? "Be careful".

25 MS. GORMAN: Because I don't think it rises to



1 the level that it needs. If you look at the progeny that
2 came after Pinckney it doesn't - - - that's not enough of
3 an additional factor. You see those cases. We have people
4 that are injecting drugs into the veins of the decedents
5 and a text that says be careful just isn't enough. Plus -
6 - -

7 JUDGE RIVERA: Does - - - can I ask - - - does a
8 defendant's awareness have to be at the time of the sale or
9 - - - or can it be at any time after the sale?

10 MS. GORMAN: I think for criminal liability to
11 attach, it would have to be at the time of the sale.

12 JUDGE RIVERA: Okay. So when did these events
13 that the prosecutor takes a position made him aware occur?
14 Did they occur pre the sale or at the moment of the sale?

15 MS. GORMAN: No, post-sale. So the drug sale is
16 on July 20th, and then the next day it's reported that Mr.
17 Garcia says to the defendant, hey, you know, I almost died
18 from that stuff. And that there's no indication ever that
19 Alicia Reger, the ex-girlfriend, ever makes the defendant
20 aware - - -

21 JUDGE RIVERA: Let me give you a hypothetical.
22 Let's say that either these individuals, some other
23 individuals, the girlfriend's hard because she gets it from
24 the decedent, but had - - - had made those kinds of
25 comments to the defendant, would that be a different case



1 and then mean he might have been aware, and then he fits
2 under the statute?

3 MS. GORMAN: I still don't think it - - -

4 JUDGE RIVERA: Why not?

5 MS. GORMAN: I don't think it rises to the
6 threshold that it needs to. And again, how I would compare
7 it is, let's say that the defendant is working on the
8 decedent's car, and he puts a V8 hemi engine in there, and
9 he's not - - - an unlicensed mechanic, and he says, hey,
10 dude, be careful with this. It's a lot of horsepower. And
11 the decedent, on his own, takes that car and drives 130
12 because he can and causes an accident and dies. Well, you
13 know, I don't see that - - - how this is any more different
14 in - - - than that situation, which is hey, look, it's
15 powerful.

16 The other thing, too, is that the trial court
17 said that that hey, you know, be careful, I hooked you up
18 text also ameliorates against the recklessness and says
19 that he - - - he did, in fact, try to - - -

20 JUDGE FAHEY: Well, isn't it really there, as
21 whether strong equals - - - saying this stuff is strong
22 equals a recognition that there's a substantial risk of
23 death? That's the legal standard that would have to be
24 met, whether that proof establishes prima facie or mens
25 rea, they're saying hey, if you take this, you could die.



1 And this - - - so that's one question.

2 I want to back you up a second. All right?

3 Let's go back to causation for a second. You opened up by
4 talking a great deal about a number of facts, but really,
5 the defendant here sold heroin with packets that were blue
6 packets, right?

7 MS. GORMAN: Correct.

8 JUDGE FAHEY: Correct. And that when they went
9 through the garbage and when the victim died, there were
10 packets with - - - there were blue packets, and there were
11 green packets, right?

12 MS. GORMAN: Correct.

13 JUDGE FAHEY: There's no proof - - - forget about
14 weighing the proof. There is no proof that says that we -
15 - - we can base somehow or distinguish in some way for any
16 court between the blue packets and the green packets. And
17 if we can't distinguish, then we don't know if the heroin
18 that the victim - - - or that the defendant sold is the
19 heroin that caused his death. Is that the core of your - -
20 - your causation argument?

21 MS. GORMAN: Absolutely. Yes.

22 JUDGE FAHEY: All right. All right. So - - -
23 and I think the grand jury standard here is very
24 deferential. So when we're talking about weighing proof,
25 you're beyond deferential then. And the argument, as I



1 understand it here, is not that you're weighing proof, but
2 there's simply no way to connect what was found with - - -
3 with the - - - any logical assumption that either the green
4 or the blue bags caused his death, or if all of them caused
5 it together. And that being the case, we're, once again,
6 moving beyond this.

7 So if I got it right, that's the core of your
8 causation part - - - argument.

9 On the mens rea argument, I think it's more -- a
10 little more difficult for you because like I said, you got
11 to distinguish between, hey this stuff is strong with the
12 standard - - - the prima facie standard, whereas the
13 substantial risk of death, but if you're correct on
14 causation, then I'm assuming you're arguing that that's all
15 you need, right?

16 MS. GORMAN: Correct.

17 JUDGE FAHEY: Okay. Thank you.

18 CHIEF JUDGE DIFIORE: Counsel, why is heroin,
19 with its increased potency over the years, not the
20 equivalent of what we described in Pinckney with respect to
21 what alcohol and is poisonous?

22 MS. GORMAN: Well, I - - - and I'm not really
23 sure what, and perhaps the People could answer that
24 question a little more articulately than I - - - than I
25 can, but I think it's the introduction of things like



1 fentanyl into the heroin that makes it such an issue, like
2 the mortality becomes so much more significant.

3 CHIEF JUDGE DIFIORE: So this would be a
4 different case if there was evidence that the heroin was
5 combined with fentanyl?

6 MS. GORMAN: Well, no. I think it would be a
7 different case if the People had proof that my client was
8 the one that was distributing it, and by that I mean
9 packaging it for sale, cutting it with fentanyl, or
10 anything like that. And there's also, the elephant in the
11 room that no one has really addressed, which is this Xanax
12 that is found in the decedent's system. And I believe
13 that, Judge Fahey, in your decision in Li talked about the
14 depressive effects of both heroin or oxycodone and Xanax.
15 And - - - and this has just sort of been sidestepped
16 completely, is that my client has been - - - has not been
17 accused of selling Xanax to anybody. However, there's a
18 statement in the record from the gentleman who did sell the
19 Xanax to the decedent, and he was never charged. So it - -
20 - it's just an interesting issue that kind of stays out
21 that no one's answered.

22 JUDGE FAHEY: The Li case may be at the other end
23 of the spectrum of the issues that we're talking about
24 here. Am I correct to say that this is the only
25 prosecution of a street-level drug dealer for this kind of



1 charge in New York State?

2 MS. GORMAN: That I'm aware of, yes. And I
3 actually went back, and I Shephardized Gaworecki to see if
4 any other court had referenced the - - -

5 JUDGE FAHEY: And why would say that there
6 haven't been these kind of charges brought against street-
7 level drug dealers?

8 MS. GORMAN: Be - - -

9 JUDGE FAHEY: I mean, obviously they're - - - you
10 know, they get criminal sale and possession and all of
11 that, but there's forms of homicide. Why aren't those
12 charges brought?

13 MS. GORMAN: Because I don't think that there's
14 the requisite level of proof to get over the hurdle of
15 legal sufficiency even for the grand jury threshold, and I
16 think that that's what happened here. And as I mentioned
17 in my brief, it was the defendant's position that the
18 district attorney who'd been elected was taking a strong
19 stance on drug dealers, and drug dealers were going to go
20 to jail. So.

21 JUDGE FAHEY: Well, we can - - - I don't think we
22 can hold that against a DA for wanting to put drug dealers
23 away.

24 MS. GORMAN: No, I know.

25 JUDGE FAHEY: That's not really front-page news,



1 but - - - but everybody's got to do their job. We respect
2 that and understand that. The reason I ask that is because
3 these cases have been difficult to prove, and I just wanted
4 to make sure that I didn't miss any, not so much that they
5 would do it. I - - - wouldn't criticize them for that.
6 Thank you.

7 CHIEF JUDGE DIFIORE: Counsel, if we found that
8 the People failed to establish the defendant's knowledge of
9 the substantial risk of death, and there is - - - the
10 People go back and there is additional evidence developed
11 to demonstrate the potency of the drugs, can they re-
12 present through a different grand jury?

13 MS. GORMAN: I guess they could try. There'd be
14 some complicating factors. The first would be that the
15 grand jury no-billed the criminally negligent homicide, and
16 I attribute that the confusing instructions that were given
17 regarding the charges. But additionally, some of the - - -
18 some of the people that testified at the grand jury the
19 first time around are dead now, so it would be very
20 difficult.

21 CHIEF JUDGE DIFIORE: Thank you, Counsel.

22 MS. GORMAN: Yep.

23 CHIEF JUDGE DIFIORE: Thank you. Counsel?

24 MS. BASILE: May it please the court, Rita Basile
25 representing the respondent, the People of the State of New



1 York.

2 With respect to the standard of review for grand
3 jury, we're talking about legal sufficiency. And with
4 respect to whether or not the defendant knew of the risk of
5 potential death --

6 JUDGE GARCIA: Counsel - - - Counsel, here.

7 MS. BASILE: Yes?

8 JUDGE GARCIA: So I want to get back to something
9 Judge Fahey was saying about this being a unique case. So
10 you sell heroin, there is a risk of death, right? I mean,
11 it's an inherently dangerous thing. There's a risk of
12 death there, substantial risk of death I would think, and
13 in all cases, you know, that's there, you get charged with
14 heroin dealing. What do you have in this case that raises
15 to the level of something else, a homicide, right? What do
16 you have, in addition to the fact that you're selling a
17 dangerous drug?

18 MS. BASILE: Well, I have a reckless manslaughter
19 where - - -

20 JUDGE GARCIA: Um-hum.

21 MS. BASILE: - - - that there was a justifiable
22 risk that the defendant knew and that he consciously
23 disregarded that risk, and I think that - - -

24 JUDGE GARCIA: But what's different about that
25 than I sold heroin? There's always the risk there.



1 MS. BASILE: Well, first off, the defendant knew
2 a week before he sold the heroin to the victim in this case
3 that the heroin was strong. Because when he sold the blue
4 packets to Mr. Garcia on July 14th, he told him that it was
5 very strong.

6 JUDGE GARCIA: Strong.

7 MS. BASILE: Very strong.

8 JUDGE GARCIA: Okay. He's selling strong - - -
9 anyone who sells strong heroin can possibly be guilty of
10 reckless manslaughter?

11 MS. BASILE: There's the perceived risk that very
12 strong heroin - - - it doesn't need to be cut with fentanyl
13 to be fatal, and the coroner - - -

14 JUDGE GARCIA: Is exactly - - - he's being
15 careful for a heroin dealer. You know, be careful. It's
16 strong.

17 MS. BASILE: Well, wouldn't that be the same for
18 Dr. Li, hey be careful when I'm prescribing you these
19 opiates?

20 JUDGE GARCIA: I think that's a tough analogy,
21 right. So what else, like it's - - -

22 JUDGE RIVERA: As I recall, Dr. Li was warned on
23 occasion that people were at risk of death, and he himself
24 had his own concerns about that. But I do take Judge
25 Garcia's point about strong. How much can one measure



1 that? Isn't that also subjective in the mind of the user?
2 When someone says, hey this stuff was strong, it was strong
3 for them.

4 MS. BASILE: Well, I guess it is subjective in
5 the mind of the user, and obviously with addicts, the
6 stronger the better, but also the stronger the more fatal,
7 and that's what Dr. Prindle testified to at the grand jury
8 with respect to the stronger the heroin - - -

9 JUDGE RIVERA: Well, what do you make of the fact
10 that the decedent said, I already used some, and had
11 survived that?

12 MS. BASILE: That was the day that he had sold it
13 to him on July 20th when he said, hey, just be careful, and
14 the decedent responded, yeah, I already used it.

15 JUDGE RIVERA: He said, yeah, I use - - - I used
16 some.

17 MS. BASILE: I used some.

18 JUDGE RIVERA: So where's the - - - where's that
19 risk?

20 MS. BASILE: But because of - - -

21 JUDGE RIVERA: I mean, he survived.

22 MS. BASILE: I would submit that there is an
23 inherent risk any time you're going to sell heroin, and
24 particularly when, you know, given all of the literature
25 and news concerning - - -



1 JUDGE RIVERA: So - - -

2 MS. BASILE: - - - overdose of heroin - - -

3 JUDGE RIVERA: Um-hum.

4 MS. BASILE: - - - that there's always a risk.
5 There's a risk involved.

6 JUDGE SINGAS: Yeah, but where can the people
7 point? What is your contemporaneous evidence that the
8 defendants had an awareness and consciously disregarded it?
9 Outside that statement of be careful, what do you have
10 contemporaneously to show that this defendant actually had
11 an awareness and consciously disregarded it, and at the
12 same time, how do we know it wasn't the green packets that
13 killed the person?

14 MS. BASILE: First off, he knew before he sold
15 the drugs to the decedent that they were - - -

16 JUDGE SINGAS: He knew they were strong. There's
17 different varieties of drugs on the streets from - - -

18 MS. BASILE: Then be - - - before Mr. - - -
19 before the decedent died, he knew that Garcia almost died
20 when he injected a portion of the blue packets that he had
21 sold to him the week before. So in between the time he
22 sold the drugs to the decedent and the decedent dying, the
23 defendant knew that this was a potentially fatal pack - - -
24 or packs.

25 JUDGE SINGAS: The defendant knew that two people



1 had used it and survived.

2 JUDGE WILSON: Did he not learn that - - - wasn't
3 it after the sale to Mr. McKiernan that the defendant
4 learned that Mr. Garcia said, no, it almost killed me?
5 Wasn't that the day after?

6 MS. BASILE: It is the day after, but it's also -
7 - -

8 JUDGE WILSON: So do we - - - do we measure mens
9 rea at the time of the sale?

10 MS. BASILE: I think that there's - - - that
11 there is a - - - it's foreseeable by selling - - -

12 JUDGE WILSON: I have a simpler question.
13 Simpler question. What is the point of time where we
14 measure mens rea? When the sale is made? Because I think
15 if it's after that, then what you're doing really is
16 creating a new type of liability for the failure to warn
17 after you learn something.

18 MS. BASILE: Well, it would be at the time of the
19 sale, and I'm - - - my - - - our position is that he knew
20 it was strong then because he had warned Garcia a week
21 earlier that this is very strong heroin.

22 JUDGE WILSON: And he did not - - - but he did
23 not know at the time of the sale that Mr. Garcia told him,
24 hey, this almost killed me. He didn't know that.

25 MS. BASILE: That is true, but he did know that



1 it was very strong. So - - - and our position is that it
2 would be of a strong likelihood that it could cause death,
3 and that's what he - - -

4 JUDGE RIVERA: Yeah - - - and again, Garcia's - -
5 - this is my problem with this part of your argument
6 anyway. Garcia's statement, of course, is purely
7 subjective. It could be hyperbole. These are drug users.
8 Right?

9 MS. BASILE: He testified, though, at the grand
10 jury as to what he experienced, that the physical reaction
11 that his body had and that it lasted for forty-five
12 minutes, that he had to splash water on himself, and things
13 of that nature, so - - -

14 JUDGE SINGAS: Yeah, but Counsel, the defendant
15 didn't know that.

16 MS. BASILE: That is true. The defendant just
17 knew that it almost killed him. But our - - - again, our
18 position is that he knew it was strong at the time of the
19 sale to Garcia on July 14th, so move - - - fast forward six
20 days, he knows that it's a strong heroin because he warned
21 the victim.

22 JUDGE RIVERA: But again, we're back - - - we're
23 back to this other line of questioning. That knowing that
24 something is potent doesn't mean that you fit within the
25 mens rea for purposes of this crime that it will result in



1 death. Since it hasn't, up to then, as far as you know.

2 MS. BASILE: That is true. I suppose - - -

3 JUDGE RIVERA: And of this particular decedent
4 afterwards for sure. Right?

5 MS. BASILE: Right.

6 JUDGE RIVERA: Because the decedent said, I used
7 some.

8 MS. BASILE: Right.

9 JUDGE RIVERA: He's putting him at ease.

10 MS. BASILE: We don't know how he used it. He
11 may have snorted it, or he may have injected it. We don't
12 know because - - -

13 JUDGE RIVERA: Yeah, but if there is - - - it is
14 in response to the defendant saying the - - - taking - - -
15 taking the best view of what you're saying, the defendant
16 saying be careful, and he's saying, I already used some.

17 MS. BASILE: But the same - - - I would submit
18 because he said about Li where there was a number of other
19 patients who were prescribed the same types of opiates and
20 combinations of oxycodone and Xanax that did not die, and
21 also - - - and with Li it's my und - - - the defendant did
22 not know that these people were abusing their
23 prescriptions. Like, the proof wasn't put forth that - - -
24 the People didn't present proof that the defendant knew
25 that these people were abusing their prescriptions.



1 Obviously, I suppose that the jury, as a rational trier of
2 fact, could say wait a minute, this person a week ago had a
3 prescription filled and then he's back. But what - - - but
4 the point being is that opiates - - - we all - - - it's a
5 general - - - oxycodone and Xanax, with Li, he's
6 prescribing these to many, many other patients that did not
7 die. These people abused the prescription of narcotics
8 that could be potentially fatal if used in excess, which
9 happened to the two individuals in Li. But see - - - we
10 submit that the same reasoning could be used here where the
11 defendant knew he's a drug dealer. He deals in heroin. He
12 knows heroin. He knows that it's potent. He knows that -
13 - -

14 JUDGE SINGAS: But isn't there a difference
15 between potent and deadly, between strong and deadly? I
16 mean what's the evidence that the defendant knew that what
17 he sold was going to kill him? And are you asking this
18 court every time a drug dealer deals in strong or potent
19 heroin that a criminally negligent or manslaughter charge
20 should stand?

21 MS. BASILE: No, actually what we're asking the
22 court to do is to let the jury decide these types of things
23 because now we're talk - - - we're talking about the weight
24 and sufficiency of evidence, which is the purview of the
25 grand jury not the reviewing court.



1 And that's what the lower court did in this case.
2 Our position is that the lower court usurped the role of
3 the grand jury in determining reasonable cause, instead of
4 just focusing on legal sufficiency, which is not the
5 standard. And that's the - - - our position is, is that
6 the trial court went too far in its analysis of whether or
7 not the evidence before the grand jury was legally
8 sufficient. And I believe the Appellate Division, the law
9 with this case, recognized that and said, yes, based on
10 everything that was presented to the grand jury and using
11 the correct standard of review for grand jury review, the
12 People proof - - - proved a prima facie case. Now let the
13 jury - - - to allow a jury to decide the ultimate, beyond a
14 reasonable doubt, whether or not the evidence actually
15 would prove the defendant guilty.

16 CHIEF JUDGE DIFIORE: Thank you, Counsel.

17 Counsel, you have two minutes of rebuttal.

18 MS. GORMAN: Thank you. I'd like to address for
19 a moment the distinction between the strong heroin and
20 deadly heroin. Not only is it subjective, as the Court has
21 already pointed out, but it's also a marketing strategy for
22 someone who is - - - who is selling a product, right. It's
23 strong because a heroin addict is looking for something
24 that's going to be the next level up from where they were.
25 So I can't - - - I can't support the idea or the proof - -



1 - or the argument from the People that that somehow gave
2 him knowledge that what he had was deadly. And again this
3 - - -

4 JUDGE GARCIA: Counsel, I'm sorry to interrupt
5 you. But on - - - on this point about the before and after
6 the sale, I share concerns that have been expressed here
7 about the weight of something where you have an addict
8 saying, oh, it nearly killed me. I understand that, but in
9 terms of just a pivot on a - - - on a bright line, what if
10 I sell someone heroin. That person goes on - - - away for
11 a week or so, and in that week, four people I sold the
12 heroin to die, from the - - - it's clearly from the heroin
13 I sold them. That person comes back, come over my house,
14 and they're like, wow, I haven't used that stuff you gave
15 me yet, and they are about to use it. And I don't say
16 anything. Would you say in that case because I was warned
17 after I made the initial sale to that victim, it doesn't
18 count?

19 MS. GORMAN: I meant, I think - - - from a public
20 policy point of view, I think that the dealer at that time
21 could say, hey you know, you might want to - - -

22 JUDGE GARCIA : But forget policy. Would you say
23 it doesn't matter what he learned after he sold the heroin?

24 MS. GORMAN: No, it - - - I don't think it does
25 because I think that it has to be at the time - - - your



1 mens rea has to be what it is at the time of the sale - - -

2 JUDGE GARCIA: So in that - - - in my
3 hypothetical, no reckless?

4 MS. GORMAN: No.

5 JUDGE GARCIA: No.

6 MS. GORMAN: No, unless there's some aggravating
7 or additional factor, right, that - - -

8 JUDGE GARCIA: But I know four people died from
9 the heroin I gave them.

10 MS. GORMAN: Well, no, I don't think that that's
11 enough even. I think that it would be, you know, if four
12 people died from the heroin that he gave them, and then,
13 the gentleman that he bought - - - bought the heroin sits
14 down, injects in front of him and starts to overdose, and
15 he just walks away and says - - - you know, or doesn't
16 render aid or doesn't call for help. I think that that - -
17 - I think there still has to be some - - -

18 JUDGE RIVERA: So you're saying the additional
19 factor there is not interceding after the person has now
20 ingested, in one way or another, this what, in Judge
21 Garcia's hypothetical, is a drug that, at a minimum, the
22 seller is now on notice, is deadly.

23 MS. GORMAN: Well, I think that there's an
24 argument that the People could potentially make in that
25 situation. I'm not saying that it would be - - -



1 JUDGE RIVERA: Well, no, I'm just circling back
2 to something you said when you first got up - - -

3 MS. GORMAN: Okay.

4 JUDGE RIVERA: - - - which was that you need this
5 additional factor.

6 MS. GORMAN: Yes.

7 JUDGE RIVERA: So right. So I'm just saying
8 what, in that, I'm trying to explore your - - - what you
9 seem to say the additional factor is if, okay, the guy's
10 OD'ing in front of me, and I don't do anything about it,
11 now perhaps the People can proceed with this. Otherwise,
12 no, it doesn't fit under the statute. But if as Judge
13 Garcia presented his hypothetical, I know right before I
14 see if they got - - - you said the needle, they're about to
15 put that needle in, and I don't say anything, as the seller
16 - - -

17 MS. GORMAN: Yep.

18 JUDGE RIVERA: - - - right? I don't see why one,
19 from your view, right, I can't really make my way to your
20 argument here that you have to wait until they actually
21 take it and then try to do something to save them once it
22 looks like they're OD'ing, as opposed to before when - - -
23 when the quantum of knowledge is the same in both cases.
24 Unless you think actually seeing them OD'ing is now really
25 the factor that you're talking about.



1 MS. GORMAN: Well, I - - - again, I think that
2 the knowledge that it has - - - there have been four fatal
3 overdoses, I'm going to assume, four fatal overdoses - - -

4 JUDGE RIVERA: Um-hum. Yeah.

5 MS. GORMAN: - - - that's - - - that's knowledge
6 that the dealer has, but I still think that there might
7 need to be something more.

8 And then, in all of these situations, you also
9 get into this weird issue of the Good Samaritan laws about
10 what happens when people are using drugs in front of you,
11 and whether criminal liability can attach when, you know,
12 for your failure to act, and that - - - they passed the law
13 so that people would call in those situations when people
14 were overdosing. But again, in this situation - - -

15 JUDGE RIVERA: But in this hypothetical, the - -
16 - the dealer seller has created the problem, as opposed to
17 someone just walking by and seeing you drowning and doesn't
18 do anything about it.

19 MS. GORMAN: I mean if he knows that - - -

20 JUDGE RIVERA: I mean hypothetically, he pushed
21 him in - - -

22 MS. GORMAN: Yeah so - - -

23 JUDGE RIVERA: - - - and now you're just standing
24 there.

25 MS. GORMAN: There's also a causation argument



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there too. Like, does the dealer for a fact that the person in front of him has the exact same heroin out of the exact same bundle that four people overdosed on, and I think that's a difficult question in and of itself because of how quickly heroin is used and sold.

CHIEF JUDGE DIFIORE: Thank you, counsel.

MS. GORMAN: Thank you.

CHIEF JUDGE DIFIORE: At this point, we'll take a break to exercise our cleaning protocol.

(Court is adjourned)



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

I, Michelle S. Walker, certify that the foregoing transcript of proceedings in the Court of Appeals of Richard Gaworecki v. The People of the State of New York, No. 40 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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