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COURT OF APPEALS  
STATE OF NEW YORK

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PEOPLE,  
Respondent,

-against-

No. 174 & 175

MARTIN HEIDGEN,  
Appellant.

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PEOPLE,  
Respondent,

-against-

No. 176

TALIYAH TAYLOR,  
Appellant.

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PEOPLE,  
Respondent,

-against-

No. 177

FRANKLIN MCPHERSON,  
Appellant.

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20 Eagle Street  
Albany, New York 12207  
October 8, 2013

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



1 CHIEF JUDGE LIPPMAN: 174, 75, 76, and 77.

2 Okay, counsel, you're in Heidgen?

3 MS. HARRINGTON: Yes, sir. Yes, sir.

4 CHIEF JUDGE LIPPMAN: And, okay, do you  
5 want any rebuttal time?

6 MS. HARRINGTON: Two minutes, Your Honor,  
7 please.

8 CHIEF JUDGE LIPPMAN: You want two minutes  
9 out of your twelve, sure. Go ahead.

10 MS. HARRINGTON: Good afternoon, Your  
11 Honors, may it please the court, my name is Jillian  
12 Harrington and I represent Mr. Heidgen on these  
13 appeals.

14 As Your Honors are, of course, aware, we  
15 raised five issues in our brief.

16 CHIEF JUDGE LIPPMAN: Counsel - - -

17 MS. HARRINGTON: Yes?

18 CHIEF JUDGE LIPPMAN: Tell us first, in  
19 your case, how this differs from Valencia?

20 MS. HARRINGTON: Well, these cases  
21 involving depraved indifference are - - - are very  
22 fact-specific. In this case we have Mr. Heidgen, who  
23 was even more intoxicated than Mr. Valencia. Mr.  
24 Heidgen was a .28. And the argument that we make  
25 here is not that an intoxicated per - - - an

1 intoxicated person can never evince depraved  
2 indifference.

3 CHIEF JUDGE LIPPMAN: Yeah, but this - - -  
4 this goes to the jury, right? Isn't this an issue  
5 that - - - that ultimately goes to the jury here in  
6 these - - - in this case as in the other cases?

7 MS. HARRINGTON: Yes, Your Honor, it does.

8 CHIEF JUDGE LIPPMAN: So when the jury  
9 found that - - - that, you know, that this wasn't  
10 totally in a vacuum, and that, you know, your client  
11 could be - - - could be held for - - - responsible  
12 for depraved indifference, why isn't that up to them?

13 MS. HARRINGTON: Well, if it was up to  
14 them, then the jury was wrong, and first of all, this  
15 never should have been charged as a depraved  
16 indifference case, because the People simply don't  
17 have the evidence.

18 CHIEF JUDGE LIPPMAN: But you acknowledge  
19 that - - -

20 MS. HARRINGTON: We need more - - -

21 CHIEF JUDGE LIPPMAN: - - - intoxication  
22 isn't always necessarily a defense - - - you can have  
23 depraved indifference even within - - -

24 MS. HARRINGTON: Absolutely, and in the  
25 cases where other courts have found depraved

1 indifference in - - - in drunk driving cases, there  
2 was something more, and this is a big theme of our  
3 case has always been - - -

4 CHIEF JUDGE LIPPMAN: Go ahead, counsel.

5 MS. HARRINGTON: - - - that there needs to  
6 be something more. And in other cases - - -

7 JUDGE READ: So what's the something more?  
8 The something more here is - - - is what? Is his  
9 suicidal tendencies, is that what the something more  
10 is?

11 MS. HARRINGTON: Well, according to the  
12 People, their something more is that he realized he  
13 was going on the wrong side of the road, and they've  
14 kind of changed their theory as they went along. I  
15 think originally it was suicidal, and now in - - - in  
16 their most recent brief, they said it was not  
17 suicidal, it was self-destructive tendencies, which  
18 they cite cases talking about prostitution.

19 JUDGE SMITH: But would you - - - would you  
20 - - -

21 JUDGE GRAFFEO: But you also had quite a  
22 few witnesses who testified here that he failed to  
23 veer away from them, or was str - - - I think they  
24 used the word "tracking", that he - - - that this  
25 particular individual was tracking them. That's a

1 bit different than the Valencia case, isn't it?

2 MS. HARRINGTON: Absolutely. And actually  
3 the Appellate Division is - - - is the one who kind  
4 of came up with this theory that he was tracking.  
5 Most of the - - -

6 JUDGE GRAFFEO: Well, but the testimony was  
7 there for the jury to hear, and the judge did give a  
8 charge on an intoxication defense - - -

9 MS. HARRINGTON: Yes, Your Honor.

10 JUDGE GRAFFEO: - - - which apparently the  
11 jury did - - -

12 MS. HARRINGTON: Yes, but in this case,  
13 what we have is - - -

14 JUDGE GRAFFEO: - - - not accept.

15 MS. HARRINGTON: - - - we have no proof  
16 that he realized he was going in the wrong direction.  
17 There - - - there was evidence that there were some  
18 headlights coming at him. The majority of those had  
19 moved off to the side by the time they got to him.  
20 The only one who actually passed him, as - - - as we  
21 talked about in detail in our brief, is Mr. Caruso  
22 (ph.). And then we have the limousine. And the most  
23 important thing with regard to that is that he slowed  
24 down. If he were sui - - -

25 JUDGE ABDUS-SALAAM: Without the

1 motorcyclist who was driving along the road in the  
2 right direction - - - the direction that he was  
3 driving, at about the same speed, according to the  
4 motorcyclist - - -

5 MS. HARRINGTON: Yeah.

6 JUDGE ABDUS-SALAAM: - - - with a very loud  
7 motorcycle trying to get his attention - - -

8 MS. HARRINGTON: Yes, Mr. Weber (ph.)  
9 testified that he was going pretty much parallel to  
10 him on the correct side and that he was going about  
11 seventy miles an hour. The only problem with that is  
12 we have no idea that Mr. Heidgen knew. In fact, the  
13 People's own witness, Dr. Causin (ph.), testified  
14 that when you are extremely inebriated - - - and I  
15 don't think anybody can argue that a .28 is not  
16 extremely inebriated - - - that he had tunnel vision,  
17 meaning that he could only focus on one thing at a  
18 time.

19 JUDGE PIGOTT: No, but doesn't that - - -  
20 you were about to say that he slowed down.

21 MS. HARRINGTON: Yes.

22 JUDGE PIGOTT: And didn't the - - - didn't  
23 the testimony of the motorcyclist defeat that  
24 argument?

25 MS. HARRINGTON: Well, he - - - he - - -

1           they got separated, and the way that I read the  
2           testimony is, I think, they came to some kind of  
3           either a - - -

4                         JUDGE SMITH:   So he had - - - he - - - he  
5           slowed down, in your theory, after he parted company  
6           with the motorcyclist?

7                         MS. HARRINGTON:   Either simultaneous with,  
8           or after.   The - - - according to the expert  
9           testimony, and it's unrefuted expert testimony,  
10          because the defense is the only one who put in any  
11          kind of speed estimate, if we believe the People's  
12          witnesses that he was going about seventy miles an  
13          hour, the unrefuted testimony by this speed expert  
14          was that he was going between thirty-three and  
15          thirty-eight miles an hour at the time of this  
16          horrific accident.

17                         And if I could just say quickly that we - -  
18          - this is a tragic accident, and none of our  
19          arguments are meant to minimize the horrific result  
20          of this traffic accident.

21                         JUDGE SMITH:   Would you - - - would you  
22          admit - - - if he were on a suicide mission, if he  
23          decided I want to end my life, and the way I want to  
24          do it is to drive the wrong way on the highway until  
25          I crash head-on into something, would that be

1           depraved indifference?

2                   MS. HARRINGTON: I think there's a good  
3 argument that could be made that that was an  
4 intentional crime, if that's what he did, that he  
5 intended to crash into somebody else.

6                   JUDGE SMITH: But he doesn't care whether  
7 he kills him, he just wants to crash into them.

8                   MS. HARRINGTON: Then if you're - - - if  
9 you're not going with the intentional, then - - -  
10 then I think that would be more akin to the Suarez  
11 quintessential example.

12                   JUDGE SMITH: But what was - - - what can  
13 you infer from the evidence? What's the most  
14 favorable inference to the defense from the evidence?  
15 What was in his mind? What was he thinking when he  
16 got in that car? Why did he get in the car?

17                   MS. HARRINGTON: That he was trying to get  
18 home, that he was a young man; he had been drinking  
19 all day. He was at a party with his friends - - -

20                   JUDGE SMITH: It was a party where he was  
21 welcome to stay, where there were designated drivers.

22                   MS. HARRINGTON: Yes. I will not - - - not  
23 - - - I will not argue with any of that. He got in  
24 the car. He got lost. He'd only been living in the  
25 area for a few months. He called - - -

1 JUDGE RIVERA: So you were describing what  
2 they thought was the plus. What do you think is the  
3 plus, or is that not your formula?

4 MS. HARRINGTON: I'm sorry?

5 JUDGE RIVERA: To ratchet this up to  
6 depraved indifference.

7 MS. HARRINGTON: I don't think it is  
8 depraved indifference. I think that they missed - -  
9 -

10 JUDGE RIVERA: No, no, I know that. What  
11 in - - -

12 MS. HARRINGTON: I'm sorry.

13 JUDGE RIVERA: I understand that. What in  
14 your mind would be the rule that would ratchet the  
15 drinking, the intoxicated person, to someone who acts  
16 in the way that meets the standard of depraved  
17 indifference? You were describing their plus factor.

18 MS. HARRINGTON: Um-hum.

19 JUDGE RIVERA: But I didn't hear what - - -  
20 whether or not you thought that was the right  
21 formula, or if you have a different plus factor.

22 MS. HARRINGTON: To answer Your Honor's  
23 question in kind of a general sense. First, I don't  
24 think that there is a formula that we could create.  
25 I think this is a very fact-centric type of issue.

1 CHIEF JUDGE LIPPMAN: You don't think  
2 there's any general rules or guidelines that we could  
3 issue to help us, rather than saying each case is  
4 different? There's not some general formula that we  
5 might apply?

6 MS. HARRINGTON: I think in - - - in this  
7 type of case, it's difficult. If the court wanted to  
8 go so far as to say that an extremely intoxicated  
9 person - - - and where you would draw that line would  
10 be up to the court - - - that an extremely  
11 intoxicated person does not have the mental capacity  
12 to form the mens rea of depraved indifference.

13 CHIEF JUDGE LIPPMAN: Well, assume that - -  
14 - assume that we say that there can be an  
15 intoxication defense, and that defense is rejected.  
16 If you're saying it's a fact-specific case, why - - -  
17 why don't we leave it at that?

18 MS. HARRINGTON: Because the jury was  
19 wrong. And - - - and all of the evidence points to  
20 that - - -

21 CHIEF JUDGE LIPPMAN: They were wrong, why?  
22 As a matter of law, they're wrong? You're saying you  
23 can - - - you acknowledge, let's say, that there can  
24 be an intoxication defense, and they're saying it's  
25 not met.

1 MS. HARRINGTON: Because in this case, the  
2 People did not prove that he had the mens rea of  
3 depraved indifference and in Feingold, which - - -

4 JUDGE GRAFFEO: How would you prove that?  
5 Can you give us some example of how you would prove  
6 that?

7 MS. HARRINGTON: Well, absolutely. And - -  
8 -

9 JUDGE GRAFFEO: Other than by the acts,  
10 because certainly there's testimony here as to his  
11 course of travel on the road.

12 MS. HARRINGTON: The testimony here is to  
13 his course of travel, but now after Feingold, which I  
14 had the pleasure of arguing before this court, we  
15 have to look into the mind of the defendant. And  
16 there's no proof here that he knew he was going in  
17 the wrong direction.

18 I don't believe it has ever been the  
19 People's position that he purposely got onto the  
20 Meadowbrook Parkway going in the wrong direction.  
21 That - - - I believe that their argument - - - and I  
22 don't mean to speak for the prosecutor - - - has been  
23 that once he realized he was going in the wrong  
24 direction, that by continuing to do so without  
25 stopping, that that is what made him depraved.

1 JUDGE PIGOTT: You need a goal - - -

2 MS. HARRINGTON: The problem - - -

3 JUDGE PIGOTT: - - - if I understand what  
4 you're saying. In other words, if - - - if somebody  
5 just gets drunk and does dumb stuff, and that's  
6 essentially what you're saying is happening here, no  
7 matter how tragic the result is, that's not depraved  
8 indifference.

9 MS. HARRINGTON: Absolutely.

10 JUDGE PIGOTT: If the goal is - - - and I  
11 think the - - - the Appellate Division here reached  
12 the conclusion that he was trying to end his life - -  
13 - I mean, they - - - in construing the evidence that  
14 way. If that's true, then you would not have a  
15 problem with depraved indifference. I'm not speaking  
16 - - - will get you off in this particular case, but  
17 the - - - it's got to be the activity and then the  
18 goal.

19 If the goal is suicidal, if the goal is to  
20 prove something to my spouse, if there's - - - I  
21 mean, if there's some reason why you're acting like a  
22 nut, and you - - - and you end up killing people,  
23 that may be depraved. But just being drunk and doing  
24 something that ends up tragically is not.

25 MS. HARRINGTON: Well, absolutely, because

1 otherwise we would have to charge depraved  
2 indifference in every DWI case, because even if  
3 nobody was hurt, we would have a reckless  
4 endangerment, arguably.

5 JUDGE PIGOTT: Or pass a new statute having  
6 to do with vehicular - - -

7 MS. HARRINGTON: Absolutely. And now, we -  
8 - - obviously the legislature has enacted some new  
9 statutes which of course is off topic, but here - - -

10 JUDGE SMITH: I mean, let - - - let me come  
11 back to where - - - I think it was somebody - - - the  
12 Chief, I think started. Isn't this case Valencia all  
13 over again?

14 MS. HARRINGTON: This case, I think, starts  
15 out with a portion of Valencia, and then we get into  
16 a situation where the People allege that he was  
17 trying to kill himself, or didn't care if he killed  
18 himself, and - - -

19 JUDGE SMITH: But you - - - you say - - -  
20 you say the evidence just isn't there. So you - - -  
21 I mean, you say this is Valencia. They say they've  
22 got a suicide mission, and that's - - - that's what  
23 we have to decide?

24 MS. HARRINGTON: Well, the problem here is  
25 that now after Feingold, we have our subjective

1 standard. We have to look into his mind. And he was  
2 driving. Yes, there were some signs that - - - that  
3 he - - - that he would have seen the backs of, but  
4 there was also one sign that he would have seen the  
5 front of, because it was a two-sided sign.

6 So what we have here is a situation where  
7 we have to look into his mind and they did not prove  
8 that he consciously disregarded the risk. They  
9 proved that - - - here's what they proved. They  
10 proved he was drinking all day. They proved that he  
11 went a party. They proved he left the party. They  
12 proved he got onto the Meadowbrook Parkway going in  
13 the right direction. That's what they proved.

14 JUDGE PIGOTT: Well - - -

15 JUDGE READ: Let's say we agree with you  
16 that this is not depraved indifference, then what do  
17 you ask us to do?

18 MS. HARRINGTON: In the perfect world, I  
19 would ask the court to then dismiss the indictment.

20 JUDGE READ: Yes.

21 MS. HARRINGTON: But I understand that it's  
22 been the court's course of action over the past as  
23 many years - - -

24 JUDGE READ: To reduce the charges to man  
25 2?

1 MS. HARRINGTON: Yes, to reduce the  
2 charges, and remand for resentencing.

3 JUDGE ABDUS-SALAAM: Going - - - going back  
4 to a couple of points that you made, the first one,  
5 the latter one, you said that just the drinking - - -  
6 we have to look into his mind, and that he wasn't on  
7 a suicide mission, but he was also a very practiced  
8 drinker, wasn't he? He belonged to seven clubs in  
9 Arkansas, drinking clubs in Arkansas. And at that  
10 party, he seemed to be - - - his friends said that he  
11 just seemed to be buzzed, that he had the ability to  
12 call the host of the party at some point, probably -  
13 - - possibly looking for directions, although I'm not  
14 sure that that was clear from the record.

15 So it seemed like he was pretty much intact  
16 for some part of the - - - not oblivious as was the  
17 defendant in Valencia. So I'm not so sure this is  
18 Valencia all over again.

19 MS. HARRINGTON: Well, this whole  
20 practiced-drinker theory is a theory that the People  
21 had - - - had put forward. I don't think that  
22 there's really proof, although, yes, there were some  
23 witnesses at the party who said that he was standing  
24 on his feet; he wasn't falling down. But he was a  
25 .28. And - - -

1                   JUDGE PIGOTT: Well, the Appellate Division  
2                   seemed to take interest in what he said to the police  
3                   in the - - - in the letter. Now how do we - - - how  
4                   do we ignore that? Or how do we say they're - - -

5                   MS. HARRINGTON: Well, the first thing that  
6                   I would point out which is, I think, a very important  
7                   aspect, which the Appellate Division left out and the  
8                   People usually leave out, is that during that  
9                   conversation with police, first of all, it was - - -  
10                  it was ten hours later; he had no idea that two  
11                  people had tragically been killed in the accident.

12                  The next part is that three times the  
13                  police asked him are you trying - - - were you trying  
14                  to kill yourself, and all three times he  
15                  unequivocally said, no, I was not trying to kill  
16                  myself. So what the Appellate Division and the  
17                  People would have us do, is believe the first part,  
18                  and then leave out the second part.

19                  And then you have the letter that he wrote  
20                  to his friends. And if you - - - and we go through  
21                  all of the pieces of the letter in our briefs, and we  
22                  explain that everything in that letter was actually  
23                  proven at trial. He wasn't drinking at home. We  
24                  know he was at a bar and at a party. He had told the  
25                  police that he was drinking at home. He had told



1 I'm - - - I'm not sure what you're asking me, Judge.

2 JUDGE SMITH: Well, doesn't Valencia  
3 establish that if all you've got is a drunk guy going  
4 the wrong way on the highway, it's not depraved  
5 indifference murder?

6 MS. MCCORMICK: No, Your Honor, I don't  
7 think Valencia does establish that. To the contrary,  
8 I believe you have a fact finder in that case who  
9 specifically dealt with the issue of intoxication and  
10 found that driver - - -

11 CHIEF JUDGE LIPPMAN: So how is - - -

12 MS. MCCORMICK: - - - oblivious.

13 CHIEF JUDGE LIPPMAN: How is this case  
14 different? Tell us the difference between this and  
15 Valencia, the same thing we asked your adversary.

16 MS. MCCORMICK: Because there is a finder  
17 of fact who has a valid line of reasoning and  
18 permissible inferences to draw the conclusion that in  
19 spite of this defendant's blood alcohol concentration  
20 level, he was not oblivious. There's a world of  
21 difference between being unsafe to operate a motor  
22 vehicle - - -

23 CHIEF JUDGE LIPPMAN: So this is, in your  
24 mind, the opposite of Valencia in terms of the  
25 particular driver and the findings?

1 MS. MCCORMICK: I think that this is the  
2 opposite of Valencia because the fact finder found  
3 different facts.

4 CHIEF JUDGE LIPPMAN: And what's the - - -

5 MS. MCCORMICK: They are rational.

6 CHIEF JUDGE LIPPMAN: And what is the line  
7 of reasoning here?

8 MS. MCCORMICK: The line of reasoning is  
9 that this defendant, as has been discussed, was just  
10 at a party where he was observed by his friends to  
11 not to be in a state of being - - -

12 JUDGE SMITH: But what - - - what - - -

13 MS. MCCORMICK: - - - falling down drunk.

14 JUDGE SMITH: But what do you - - - you can  
15 say what he's not, but what do you say he was? What  
16 was in his mind?

17 MS. MCCORMICK: It's important to deal with  
18 what he's not, though, Judge, because he - - -

19 JUDGE SMITH: Okay - - - okay, but humor  
20 me, and deal with what he was, first.

21 MS. MCCORMICK: Okay, we will then go to  
22 the fact that even with the alcohol on board in his  
23 system, he's driving on that roadway. He is  
24 confronted with at least six sets of headlights that  
25 are coming directly at him in the tunnel of his

1 vision - - -

2 JUDGE SMITH: I - - - I understand your  
3 point. What inference do you say the jury could draw  
4 beyond a reasonable doubt as to his state of mind?

5 MS. MCCORMICK: The inference that they  
6 could draw is that he was aware he was going the  
7 wrong way, and went that way anyway.

8 JUDGE SMITH: And - - - and why would  
9 anyone do that, except to kill himself?

10 MS. MCCORMICK: Judge, there is no motive  
11 requirement, as opposed to the goal that was stated.

12 JUDGE SMITH: Well, but no, but you have to  
13 - - - but you have to try to imagine a state of facts  
14 that would make some sense.

15 MS. MCCORMICK: Well, unfortunately there  
16 are many criminal entities and criminal activities  
17 that there is no explainable behavior. Let's take  
18 the lion in the cage at the zoo.

19 JUDGE SMITH: Well, but we did - - - but -  
20 - - but I'm sorry; we do have to - - - you've got to  
21 show that he really didn't care, that he - - - that  
22 he - - - that he - - - essentially, that he knew the  
23 possibility that he would kill someone and he didn't  
24 care. I suppose if he knew he was going the wrong  
25 way, you can draw that inference, but - - -

1 MS. MCCORMICK: That is exactly the point.

2 JUDGE SMITH: But what - - - what - - -  
3 what would make you think that he knew he was going  
4 the wrong way?

5 MS. MCCORMICK: Because, Judge, back to the  
6 number of cars that are in his path, the number of  
7 signs, the huge signs that - - -

8 CHIEF JUDGE LIPPMAN: What would - - - what  
9 would - - - what would - - - what are the two  
10 different kinds of conduct that could happen with the  
11 cars coming at him, the headlights? What are the two  
12 different patterns of conduct that would give us  
13 different conclusions?

14 MS. MCCORMICK: Judge, as opposed to what  
15 was alleged by the appellant that this defendant was  
16 lost or confused on that roadway, everything about  
17 his behavior on that roadway - - -

18 CHIEF JUDGE LIPPMAN: What specifically in  
19 relation to seeing the headlights going the other  
20 way?

21 MS. MCCORMICK: He didn't stop. He made no  
22 effort to pull over. He did not exhibit that he was  
23 confused or lost. He acted boldly and deliberately.

24 JUDGE PIGOTT: Well, I guess - - -

25 MS. MCCORMICK: He maintained his lane and

1 his speed.

2 JUDGE PIGOTT: I asked myself when you - -  
3 - when you're going through these facts, let's  
4 suppose he'd sideswiped a truck, would we charge him  
5 with depraved indifference assault?

6 MS. MCCORMICK: Yes.

7 JUDGE PIGOTT: You think so?

8 MS. MCCORMICK: Yes, Your Honor. The issue  
9 here - - -

10 JUDGE PIGOTT: Then there'll be an awful  
11 lot of depraved indifferent assault cases in auto  
12 accidents where somebody was drinking and struck  
13 another car.

14 MS. MCCORMICK: Hardly, Your Honor.

15 JUDGE PIGOTT: They don't - - -

16 MS. MCCORMICK: Over the twenty years since  
17 - - -

18 JUDGE PIGOTT: - - - but they don't occur.

19 MS. MCCORMICK: Over the 20 years since  
20 Fein - - - excuse me, since Register, there have been  
21 18,000 deaths, and only 9 reported vehicular homicide  
22 charges that used depraved indifference, and that was  
23 before Feingold.

24 JUDGE SMITH: I mean, isn't - - - I guess -  
25 - - I - - - I guess, what I - - - what I thought

1 Judge Pigott was suggesting, is because of the  
2 horrible, incredibly horrible consequence here, you  
3 overcharged the case. Is that true?

4 MS. MCCORMICK: It's not the matter of the  
5 consequence, Your Honor.

6 JUDGE PIGOTT: Hold on, but that's exactly  
7 what I was asking, though. I mean, and you just  
8 point out that there's 18,000 of these, and it's only  
9 charged 9 times?

10 MS. MCCORMICK: Nine reported cases in  
11 twenty years, Judge.

12 JUDGE PIGOTT: So - - - so my point is  
13 valid. If somebody - - - if somebody sideswipes  
14 another car, they don't get charged with depraved  
15 indifference assault.

16 MS. MCCORMICK: I'm - - - I apologize. I  
17 thought you - - - what you were asking me is if they  
18 were continuing in the same manner, but instead of  
19 killing people - - - in other words, still traveling  
20 the wrong way, they sideswiped another car.

21 JUDGE PIGOTT: Which happens a lot, and - -  
22 -

23 MS. MCCORMICK: Not traveling the wrong  
24 way, Judge.

25 JUDGE PIGOTT: Yeah, more - - - more - - -

1 MS. MCCORMICK: That's extremely uncommon.

2 JUDGE PIGOTT: Well, it's not in Erie  
3 County; I'm sorry to tell you. But - - - maybe after  
4 the Bills - - -

5 JUDGE READ: Maybe it's the snow.

6 JUDGE PIGOTT: I shouldn't be flip. But my  
7 - - - my point is simply this, that it doesn't happen  
8 a lot, and - - - and this is a terrible, terrible  
9 case. And going through your mind when you're  
10 reading it is was there an overcharge? Was there - -  
11 - was there too much sympathy on the part of the  
12 jury?

13 I'm not sure that's our job to decide, but  
14 when you - - - when you get down to the - - - you  
15 know, what it requires, generally speaking, for a  
16 depraved indifference assault or a depraved  
17 indifference murder, where does - - - alcohol's in  
18 that balance. I mean, where - - - you're arguing  
19 that he can't be so drunk as to be oblivious, but if  
20 he's somewhat drunk, then he can be charged with  
21 depraved indifference murder.

22 MS. MCCORMICK: I'm arguing that that's a  
23 question of fact for the jury, and there was - - -  
24 there was support in the record for a valid - - -

25 JUDGE PIGOTT: Right. I'm not - - - I'm

1 not - - -

2 MS. MCCORMICK: - - - line of reasoning.

3 JUDGE PIGOTT: And the third one would be  
4 that if he's stone sober, then he couldn't be charged  
5 with depraved indifference, absent something else.

6 MS. MCCORMICK: To the contrary, Your  
7 Honor. And exactly when it was asked of me, how is  
8 it that you could say that he knew the grave risks of  
9 death? Any person who is operating for a continued  
10 amount of miles on a limited access highway, speeding  
11 and maintaining their lanes in the face of oncoming  
12 traffic, if that person is sober, than I think that  
13 we - - - we have a much easier time showing that that  
14 is depraved.

15 JUDGE PIGOTT: Like Prindle.

16 MS. MCCORMICK: No, Prindle was not going  
17 the wrong way.

18 JUDGE PIGOTT: Prindle t-boned a car coming  
19 off a - - - you know, blew a red light and t-boned a  
20 car coming off an expressway.

21 MS. MCCORMICK: I'm familiar with the  
22 Prindle facts from the dissent, Your Honor, but in  
23 the Prindle - - -

24 JUDGE PIGOTT: I understand, ma'am, but  
25 what I'm suggesting is you're looking at me like I'm

1 nuts, and saying he wasn't going the wrong way. I  
2 get that. What I'm saying is here's a person who's  
3 stone sober, that ends up killing a young girl,  
4 trying to escape a crime, and we say that's not  
5 depraved indifference.

6 MS. MCCORMICK: Your Honor, the decision in  
7 Prindle does not really give much guidance as to what  
8 the basis of this court's finding was, and the only  
9 thing that I can discern from having looked at the  
10 arguments is that because that defendant had a motive  
11 - - - he had something in his mind, other than that  
12 he wanted to endanger everyone on the roadway, that  
13 he wanted to escape the police - - - that this court  
14 found that that was a reason for him - - -

15 CHIEF JUDGE LIPPMAN: Counsel, what's the -  
16 - -

17 MS. MCCORMICK: - - - not to be considered  
18 depraved.

19 CHIEF JUDGE LIPPMAN: What's the  
20 overarching rule here within which we make - - - we  
21 look at this factual - - - factually different  
22 situation? What's the overarching rule relating to  
23 intoxication and depraved indifference?

24 MS. MCCORMICK: I think that if we begin,  
25 Judge, that where you have a collision, that it must

1 operate under the same premise as the other  
2 quintessential examples that are in Suarez. Is there  
3 such a grave risk of death, is the behavior that  
4 creates that grave risk of death - - - that grave  
5 risk of death, excuse me - - - such that any  
6 objective person looking at this would say, oh, my  
7 God, it's only a miracle if somebody doesn't die.  
8 That's the first threshold.

9 CHIEF JUDGE LIPPMAN: How - - - how does  
10 intoxication fit into that equation?

11 MS. MCCORMICK: It fits into the equation  
12 as a question of fact for the jury, and in this case,  
13 Judge, this jury had a mountain of evidence to tell  
14 them that this defendant knew he was going the wrong  
15 way. Every one of those signs, every one of those  
16 headlights, operated to him, that driver, as - - - as  
17 though the passenger was screaming at him to stop and  
18 he did not. Why he did not? The alcohol could be -  
19 - -

20 JUDGE SMITH: You - - - you - - - you would  
21 - - - you would - - - you seem to assume, you would  
22 agree, that it can't be depraved indifference murder  
23 unless he knew he was going the wrong way?

24 MS. MCCORMICK: I would say, Your Honor,  
25 that it's a question of fact for the jury, and this -

1 - -

2 JUDGE SMITH: Well, I - - - I - - - I  
3 realize that, but the jury has to find he was going  
4 the wrong way or they can't convict him of depraved  
5 indifference murder.

6 MS. MCCORMICK: The jury has to find that  
7 he - - -

8 JUDGE SMITH: That he knew he was going the  
9 wrong way.

10 MS. MCCORMICK: - - - that there was a  
11 subjective mental state. And in order for him to  
12 have - - -

13 JUDGE SMITH: Okay, try - - - try - - - try  
14 a yes or no to the precise question. Does the jury  
15 have to find that he knew he was going the wrong way  
16 in order to convict him of depraved indifference  
17 here?

18 MS. MCCORMICK: Under the facts of this  
19 case, yes.

20 JUDGE ABDUS-SALAAM: Counsel, getting back  
21 to what you said about the intoxication being a  
22 mitigating factor or defense, and you mentioned it's  
23 an open question. How should we decide that  
24 question?

25 MS. MCCORMICK: Well, in this - - - you

1 don't have to decide that question in this case,  
2 Judge. It's actually a moot point, because this jury  
3 was instructed to consider intoxication. They did  
4 consider intoxication and they rejected it. There  
5 is, again, a world of difference between the level of  
6 intoxication that makes a person an unsafe driver and  
7 that which makes them manic or incapable of forming a  
8 mental state.

9 JUDGE PIGOTT: Did you oppose that - - -  
10 that charge to the jury? Did the People oppose it?

11 MS. MCCORMICK: When the original charge  
12 came down? It was immediately after the Feingold  
13 decision had been received, and frankly, the People's  
14 position was that since the question was open, there  
15 was no reason for the criminal jury instructions to  
16 immediately assume that intoxication - - - excuse me  
17 - - - that intoxication could negate - - -

18 JUDGE PIGOTT: Right, so well, that's why -  
19 - -

20 MS. MCCORMICK: - - - a mental state.

21 JUDGE PIGOTT: I wanted to go back to Judge  
22 Abdus-Salaam's question.

23 JUDGE ABDUS-SALAAM: You didn't object.

24 JUDGE PIGOTT: If you objected to it, and I  
25 think you did, but - - - and that's fine, I don't

1 mind that. What - - - what should - - - should there  
2 be a charge to the jury on - - - on intoxication, in  
3 your view?

4 MS. MCCORMICK: Under the history and the  
5 cases in this state, it is not the usual view that an  
6 unintentional crime could be affected by  
7 intoxication. The basis of depraved indifference  
8 still begins with recklessness, and recklessness  
9 still rejects intoxication as a defense, and - - -  
10 but even here, it is not a defense in the true sense  
11 of the word. It's a mitigation. It's a question of  
12 fact. And it's frankly beyond the review of this  
13 court.

14 JUDGE ABDUS-SALAAM: You have - - - you  
15 have no problem with the - - - it being charged in  
16 this case, since you didn't object?

17 MS. MCCORMICK: Well, as the Judge pointed  
18 out, I believe that we did object, actually - - -

19 JUDGE ABDUS-SALAAM: You did object?

20 MS. MCCORMICK: - - - because Feingold had  
21 - - - had nothing to do with intoxication and so I  
22 think that they - - - we believed that there was a  
23 leap from that decision to the criminal jury  
24 instructions and that it was an unwarranted leap.

25 JUDGE PIGOTT: Well, I'm just wondering.

1           Going forward, you would still be of that opinion?

2           You don't think that - - - that intoxication can

3           serve as a defense to depraved indifference?

4                   MS. MCCORMICK: I believe that the court  
5           has to speak on that. And it would be our position  
6           that no, intoxication should not negate depraved  
7           indifference. It goes against the public policy that  
8           underlines extreme recklessness.

9                   JUDGE SMITH: Before you - - - before you  
10          run out of time, I want to switch to - - - how - - -  
11          how were - - - how come you were allowed to draw his  
12          blood without a warrant? Doesn't that recent Supreme  
13          Court case give you a problem?

14                   MS. MCCORMICK: Not at all, Judge. In the  
15          McNeely case, actually, Judge Sotomayor references  
16          the deemed consent statutes in all fifty states  
17          approvingly. In fact, that's what happened in this  
18          case - - -

19                   JUDGE SMITH: You say - - - you say the  
20          consent statute essentially allows you to do it  
21          without a warrant?

22                   MS. MCCORMICK: I'm saying that the deemed  
23          consent portion of VTL 1194 does permit it when  
24          there's been a serious injury or death.

25                   JUDGE SMITH: So can - - - I mean, what - -

1 - where's the limit to that? Can you - - - could  
2 they pass a statute saying anybody who's in a car  
3 consents to have a - - - anybody who drives a car  
4 consents to having his blood drawn without a warrant,  
5 period?

6 MS. MCCORMICK: Not under the McNeely  
7 decision, but that's not - - -

8 JUDGE SMITH: Well, then why - - -

9 MS. MCCORMICK: - - - the facts of this  
10 case.

11 JUDGE SMITH: Why does consent work for one  
12 purpose and not the other?

13 MS. MCCORMICK: Because - - -

14 JUDGE SMITH: I mean, under the McNeely  
15 decision, without consent, you couldn't draw this  
16 guy's blood, right?

17 MS. MCCORMICK: Because there was no  
18 serious injury or death. This is a statutory  
19 provision.

20 JUDGE SMITH: I understand that, but yeah,  
21 why - - - and that's a condition that's in the  
22 statute. I'm saying, suppose the legislature takes  
23 that condition out of the statute, is the statute  
24 still valid?

25 MS. MCCORMICK: Suppose the legislature

1 takes out serious physical injury or death from the  
2 warrant provisions?

3 JUDGE SMITH: Yes.

4 MS. MCCORMICK: Yes, because as I have  
5 noted - - -

6 JUDGE SMITH: Still - - - they can do it;  
7 it's still okay.

8 MS. MCCORMICK: Only under deemed consent,  
9 only when you're unconscious. There is - - - you are  
10 - - - you are deemed to have consented to the - - -  
11 with the privilege of driving - - -

12 JUDGE SMITH: Only when - - - only when  
13 you're unconscious. So you - - - yeah - - - so but  
14 if he - - - if he'd been conscious and said no, don't  
15 draw my blood, the statute couldn't say - - - they  
16 couldn't say, oh, wait a minute, you consented.

17 MS. MCCORMICK: Not under McNeely. As it  
18 stands, Judge, what you have is that when you are  
19 driving a car, you have consented to give your blood.  
20 The only thing that you can do is not actually  
21 refuse, but with - - - withdraw your previously given  
22 consent under the statute.

23 CHIEF JUDGE LIPPMAN: Okay, counsel,  
24 thanks.

25 MS. MCCORMICK: Thank you.

1 CHIEF JUDGE LIPPMAN: Counsel, rebuttal?

2 MS. HARRINGTON: Thank you, Your Honor.

3 I'd just like to point out that the first thing that  
4 the - - - that the People said when they stood up was  
5 that Mr. Heidgen was consciously driving on the wrong  
6 direction. Again, it all comes back to that they  
7 can't prove that he was consciously driving, because  
8 now under Feingold, we're not looking at the  
9 objective circumstances, we're looking at the  
10 subjective circumstances: what was in his mind?

11 She also mentioned that she had no - - -  
12 I'm sorry, the People mentioned that they had no - -  
13 - no requirement to prove motive. Absolutely true,  
14 they had no requirement to prove motive.

15 But as Your Honor had noted, we need to get  
16 past the fact that everybody who testified about him  
17 that day, said he was happy. They said he was in a  
18 good mood. They said that he was happy with his job.  
19 They said that he was in a good mood when he left the  
20 party. He had been partying all day. How do we - -  
21 -

22 JUDGE PIGOTT: Well, the Appellate Division  
23 made specific findings that - - - can we go beyond?  
24 I mean, they - - - you know, we've gone over the, you  
25 know, focus and the, you know, all of the - - - and

1 the speed, et cetera; can we - - - can we controvert  
2 that?

3 MS. HARRINGTON: When those findings are  
4 wrong, and they leave things out, and they left very  
5 important things out, including the fact that three  
6 times he said he was not trying to kill himself. And  
7 this - - -

8 JUDGE ABDUS-SALAAM: So you're - - - you're  
9 saying that this is a legal sufficiency argument, not  
10 a weight of the evidence argument?

11 MS. HARRINGTON: I - - - I think that the  
12 two in this case are intertwined, because if the  
13 People can't prove - - - if they don't have  
14 sufficient evidence to prove his mental state, which  
15 we know now is an element of the crime, then they  
16 couldn't prove their case.

17 One of Your Honors - - -

18 JUDGE SMITH: You're - - - you're saying  
19 that no reasonable jury could find beyond a  
20 reasonable doubt that he knew he was driving the  
21 wrong way?

22 MS. HARRINGTON: Absolutely. If you look  
23 at all of the facts - - -

24 JUDGE SMITH: And - - - and - - - I - - -  
25 it sounds to me that you may agree with your

1 adversary that the case turns on that?

2 MS. HARRINGTON: I - - - I think in this  
3 particular case - - - I think in this particular  
4 case, maybe we do agree on that, that if we're at  
5 point where we know he was .28 - - -

6 JUDGE SMITH: If the question is could - -  
7 - could the - - - could the jury find that he knew he  
8 was in the northbound, not the southbound, lane? Or  
9 which - - - or the other way around.

10 MS. HARRINGTON: On the evidence that was  
11 presented to them, no. They could not. When you  
12 factor in the fact that he was a .28, and that he had  
13 this tunnel vision that their own witness testified  
14 about, I don't think that there is any way that they  
15 could find that.

16 JUDGE PIGOTT: Your opponent talked a  
17 little bit at the end about a public policy with  
18 respect to this, and it does seem odd that we'd say  
19 that someone who blows a .28 cannot commit depraved  
20 indifference murder. Someone that could - - - that  
21 drinks half that, can.

22 MS. HARRINGTON: Well, I think - - - and I  
23 apologize, Your Honor, I think we had gotten off  
24 track when you had mentioned the whole practiced  
25 drinker argument, which is an argument that the

1 People had used - - - have used in this case.

2 And really, the practiced drinker argument  
3 is - - - is - - - I'm not even sure exactly what it  
4 is. Is he an alcoholic? Is he somebody who drinks a  
5 lot? He was a twenty-three-old man, recently  
6 graduated from college. Yes, he had some bar cards  
7 in his wallet. Those are for bars in Arkansas, where  
8 he no longer lived, so he wasn't using them.

9 JUDGE ABDUS-SALAAM: But it shows that he  
10 drank a lot, and that he could possibly hold his  
11 liquor and still be able to function, essentially.

12 MS. HARRINGTON: I mean, it shows that he  
13 drank. I don't know if it proved that he drank a  
14 lot. The fact that he went to bars while he was in -  
15 - - in college and - - - and - - - and in his early  
16 twenties, I don't - - - I don't think that that  
17 necessarily proved that he was drinking every day.  
18 There's no evidence whatsoever that he was an  
19 alcoholic or even drank regularly. He was a .28. I  
20 don't think that we can discount what - - -

21 CHIEF JUDGE LIPPMAN: Do you mean that if  
22 we knew he was alcoholic, that that says something  
23 more than he's not an alcoholic in this particular  
24 situation?

25 MS. HARRINGTON: I think that what the

1 People have tried to argue is that because he was  
2 this practiced drinker, this label that he gave them,  
3 which no medical authority - - -

4 CHIEF JUDGE LIPPMAN: Yeah, but that def -  
5 - - all I'm saying, that definition of alcoholic,  
6 whatever it is, wouldn't really be dispositive in  
7 terms of this - - - as you say, this factual  
8 question.

9 MS. HARRINGTON: Yeah, he was - - -

10 CHIEF JUDGE LIPPMAN: However - - -  
11 whatever label you put on him, we have to look at the  
12 facts of this case or how the jury looked at the  
13 facts of this case.

14 MS. HARRINGTON: Absolutely. Even if he  
15 was a - - - let's just say that for the sake of this  
16 argument - - -

17 CHIEF JUDGE LIPPMAN: Yeah, that's what I'm  
18 saying. Right.

19 MS. HARRINGTON: - - - which I don't  
20 concede - - - that he was a practiced drinker. A .28  
21 is a .28. The fact that he could walk from here to  
22 there - - -

23 CHIEF JUDGE LIPPMAN: All right.

24 MS. HARRINGTON: - - - and get in his car  
25 and start it, I don't think takes away from the fact

1           that he was - - -

2                       CHIEF JUDGE LIPPMAN:  You're saying that  
3           the .28 speaks for itself.

4                       MS. HARRINGTON:  I think it has to.

5                       CHIEF JUDGE LIPPMAN:  Okay.  Thanks,  
6           counsel.

7                       MS. HARRINGTON:  Thank you very much, Your  
8           Honors.

9                       CHIEF JUDGE LIPPMAN:  Thank you both.  
10           Let's go to 176, Taylor.  Counsel?

11                       MS. HORWITZ:  Good afternoon, Your Honors.  
12           Two minutes for rebuttal, please.

13                       CHIEF JUDGE LIPPMAN:  Sure, go ahead,  
14           counsel.

15                       MS. HORWITZ:  Erica Horwitz from Appellate  
16           Advocates for Appellant Taliyah Taylor.

17                       CHIEF JUDGE LIPPMAN:  How does her  
18           situation differ from the first case?

19                       MS. HORWITZ:  Well, this really is  
20           Valencia, in that this is - - - the People's  
21           undisputed evidence shows that she was entirely  
22           oblivious to the risk that she was creating; that she  
23           was extremely intoxicated and she was entirely  
24           oblivious to the danger that she was creating, and  
25           this was - - - this were - - -



1           - - - what's different is this is someone who takes  
2           an Ecstasy several hours earlier, and she doesn't - -  
3           - there's no indication she has the slightest idea  
4           that she's going to be getting into a car; that she's  
5           going to be drive - - - that she's going to be  
6           driving a car. She takes it to help her concentrate  
7           better. And instead, it has some atypical extreme  
8           reaction. She pulls - - -

9                         CHIEF JUDGE LIPPMAN: What about her  
10           conduct after the accident, you know, as to what her  
11           mood or - - -

12                        MS. HORWITZ: Yes, she continues to act in  
13           an irrational manner. She is extricated from an  
14           overturned car that's totaled. And she starts  
15           jumping up and down in front of gawking bystanders,  
16           chanting "money, power, respect". She's naked - - -

17                        JUDGE SMITH: She - - - but she - - - she  
18           wasn't - - - I mean, afterwards, I assume she wasn't  
19           insane - - - I mean, you didn't even - - - she didn't  
20           even try an insanity defense, did she?

21                        MS. HORWITZ: She opened on an insanity  
22           defense; it was withdrawn, Your Honor.

23                        JUDGE SMITH: Uh-huh.

24                        MS. HORWITZ: But there was evidence - - -

25                        JUDGE SMITH: So - - - so if - - - if she's



1 about her statement, counsel, in the other case?  
2 There was this - - - the People indicated that they -  
3 - - based on the defendant's statement that he might  
4 have been on a suicide mission, and your client also  
5 said, I'm - - - you know, her father was dead; she  
6 was driving toward the light to her dad.

7 MS. HORWITZ: Well, this was - - - this was  
8 the People's theory on appeal after the Heidgen case  
9 had been decided to try to come within - - - within  
10 the rule that the Appellate Division had - - - had  
11 articulated, because they didn't have any of the - -  
12 - she was notif - - - she was alerted - - -

13 JUDGE ABDUS-SALAAM: Well, if she were on a  
14 suicide mission, you know, to kill herself, and  
15 wouldn't that indicate that she didn't care what  
16 would happen to anybody else?

17 MS. HORWITZ: But there was no - - - in  
18 this case - - - this is an isolated statement made  
19 ten hours later. What the evidence showed was that  
20 she was angry; that she was frustrated. There was no  
21 evidence of despair or self-destructiveness.

22 This is a case in which the People  
23 dismissed that statement and the other ones as the  
24 kind of wacky and stupid things that people say when  
25 they're intoxicated. This was not the basis - - -

1 this could not have been the basis for the jury's  
2 decision. It was yet one more irrational statement  
3 that she made that - - - that cast doubt on her state  
4 of mind.

5 She behave - - - she made statements that  
6 she had stripped herself and her nephew to get the  
7 evil from entering them. She - - -

8 JUDGE ABDUS-SALAAM: Can I just ask a  
9 slightly different question - - -

10 MS. HORWITZ: Right.

11 JUDGE ABDUS-SALAAM: - - - about the - - -  
12 the intoxication defense which was also charged in  
13 this case, as well. And what's your view on that,  
14 about whether the CJI jumped the gun in putting that  
15 in or whether this - - -

16 MS. HORWITZ: No, no, I would say - - -

17 JUDGE ABDUS-SALAAM: - - - court should put  
18 that on - - -

19 MS. HORWITZ: - - - certainly not, because  
20 this isn't just - - - as this court held in Feingold  
21 and in other cases, this is not simply a matter of  
22 recklessness. It's recklessness plus.

23 And the plus is - - - is - - - and what's  
24 clearly missing here, there's absolutely no evidence,  
25 let alone - - - much less proof beyond a reasonable

1           doubt that Ms. Taylor possessed "a wicked, uncommonly  
2           brutal, or utterly depraved state of mind." And the  
3           jury, you know, was told - - - and this is a  
4           different heightened state of mind to which  
5           intoxication, I would argue, should apply; that the  
6           CJI was correct.

7                         But what the jury doesn't understand is  
8           that this is supposed to - - - the DA argued, oh, you  
9           know, she purposely took the drugs because she knew  
10          it altered her state of mind, although it had the  
11          entirely different affect than what it had had in the  
12          past and what she anticipated, and then she caused  
13          this terrible accident. And what's happened here is  
14          it's really - - - the whole focus of the People was  
15          that she - - - that the results were so gruesome that  
16          she was necessarily depraved and inhuman and what was  
17          more brutal than what happened here?

18                         And I would ask this court, at a minimum,  
19          that it - - - that - - - suggest as far as adopting a  
20          rule, that it should adopt the rule that was  
21          articulated by Judge Jones in the concurrence in  
22          Valencia, which is that there has to be also some  
23          temporal proximity between the ingestion of the  
24          intoxicants and the act - - - the dangerous act, the  
25          getting into the car.

1                   And it would be an entirely different case  
2                   today if I had a client who's popped five Ecstasies  
3                   and now she's doing it - - - she's saying there's  
4                   nothing better than driving high, and I'm going to go  
5                   out there, and everybody - - - I'm going to take a  
6                   wild ride and everyone out there tonight, you know,  
7                   better just watch out, and then gets right into a  
8                   car.

9                   JUDGE SMITH: Well, she did say - - - she  
10                  did say the first half of it. She did say I'm going  
11                  to take a wild ride, or not quite that. She said I'm  
12                  going to drive as fast as it'll go.

13                 MS. HORWITZ: This is hours later after  
14                 taking one Ecstasy, and not to lose control, not to  
15                 get high. She - - -

16                 JUDGE SMITH: You're - - - you're talking  
17                 about her state of mind when she took the stuff.

18                 MS. HORWITZ: When she took it, yes.

19                 JUDGE SMITH: I see.

20                 MS. HORWITZ: And that's really what the  
21                 concurrency talks about, that it can't be remote.  
22                 And here actually, it's not - - -

23                 JUDGE ABDUS-SALAAM: Well, how she - - -

24                 MS. HORWITZ: - - - she never even took it  
25                 to - - - I'm sorry.

1                   JUDGE ABDUS-SALAAM: Talk about - - - we  
2 focus mostly on her conduct with respect to the  
3 murder.

4                   MS. HORWITZ: Yes.

5                   JUDGE ABDUS-SALAAM: But what about the  
6 endangerment of the couple that was at the stop light  
7 after she hit Mr. Simon, then she must have been  
8 aware that something horrible was going to happen  
9 then.

10                  MS. HORWITZ: Well, all she was aware was  
11 that - - - and another witness said he was there and  
12 then he disappeared. She's driving in the dark; he's  
13 not cross - - - she sees him. She sees the man and  
14 he's gone, and in three seconds - - -

15                  JUDGE SMITH: That doesn't - - - can't that  
16 - - - that observation be thought to reflect a kind  
17 of heartlessness and depraved indifference?

18                  MS. HORWITZ: No, no, she was asked, you  
19 know, what happened? She said she saw him. No,  
20 there was none of this callousness. She had no  
21 opportunity - - - the People's own expert testified  
22 about how compromised her ability would be to do a  
23 complicated task like driving a car. And - - -

24                  JUDGE SMITH: But - - - but - - - but how -  
25 - - but it's - - - I know we're talking about compli

1           - - - complicated tasks. I mean, were you - - - most  
2           people, when you say, what about the person you  
3           killed, you - - - you - - - you would think he would  
4           say something to suggest some regret that the person  
5           had died.

6                       MS. HORWITZ: Well, first of all, answering  
7           - - - I mean, this is - - - there's no opportunity  
8           here. That - - - there's she describing what it is  
9           she did, and the entirely sober - - - there's no  
10          evidence, and it's against - - - it's the  
11          prosecutor's own expert, I think, would dispute that  
12          somebody in that condition could, in three seconds,  
13          sober up, put her foot on the brake, or swerve or  
14          whatever to avoid the other car, and in fact, the  
15          driver of that car is sober, is sitting at a light,  
16          sees her coming, and he says, in that second or two,  
17          he is only able to move a fraction before she hits  
18          him.

19                      CHIEF JUDGE LIPPMAN: Okay, coun - - -  
20          okay, counsel. Thanks.

21                      MS. HORWITZ: Thank you.

22                      CHIEF JUDGE LIPPMAN: You'll have your  
23          rebuttal.

24                      MS. GRADY: Good afternoon, may it please  
25          the court, my name is Anne Grady. I represent the

1 People of the State of New York in this matter.

2 CHIEF JUDGE LIPPMAN: Counsel, your  
3 adversary talked extensively about the condition of  
4 the defendant and that she was in another world, that  
5 would, in essence, prevent an enda - - - depraved  
6 indifference finding. What is it about her condition  
7 that you think one could reasonably say was - - - was  
8 depraved and indifferent in this particular  
9 situation?

10 MS. GRADY: The fact that her behavior was  
11 purposeful throughout. The fact that she made the  
12 kinds of choices - - -

13 CHIEF JUDGE LIPPMAN: How so - - - how so?  
14 How so?

15 MS. GRADY: She knows she's getting into a  
16 car. She knows she's taken intoxicants earlier. She  
17 knows that she's putting the car in drive, and that  
18 she's going to drive it as fast as it will go. She  
19 succeeds in that endeavor. She describes how she  
20 successfully navigated, moving her hands like this  
21 around the obstacles in her path.

22 JUDGE SMITH: Does it - - - does it make  
23 any difference that she was obviously very mentally  
24 disturbed? I mean, that she - - - she thought she  
25 was driving toward the light, and getting in touch

1 with her father?

2 MS. GRADY: I think that that's - - -

3 JUDGE SMITH: And she - - - and she took  
4 off all her clothes? I mean, this is - - - this - -  
5 - this lady was weird.

6 MS. GRADY: Well, Judge, I think that  
7 first, remember that the reckless mens rea includes  
8 the conduct of a reasonable person. We do expect  
9 that the law does permit holding people accountable  
10 for their actions. The defendant, as far as her  
11 weird, as you say, behavior, the People don't have to  
12 prove that she is a rational, good, wise person. If  
13 anything, the contrary. We're proving that she had  
14 depraved indifference - - -

15 JUDGE SMITH: Even - - - even if you had  
16 the - - -

17 MS. GRADY: - - - to the value of life.

18 JUDGE SMITH: You don't - - - you don't - -  
19 - you don't get a lot of models of sainthood and  
20 stability when you're prosecuting homicide cases, but  
21 even by that standard, this one's pretty far - - -  
22 pretty high on the chart, isn't it?

23 MS. GRADY: I think at that point, it's  
24 simply a jury question. The - - - as far as whether  
25 despite her admitted impairment, whether she still

1 was making conscious choices.

2 CHIEF JUDGE LIPPMAN: And what tells us  
3 that she was?

4 MS. GRADY: She - - - her description of  
5 her behavior afterwards. Her own description - - -  
6 first of all, she doesn't describe any blackouts.  
7 She is able to articulate all of her actions that  
8 evening. And so that shows that she was aware of  
9 them. She was conscious of what she was doing.

10 She's able to explain later her motives and  
11 her reasons for them. She's able to describe that  
12 she got in the car, and how she got in the car. Her  
13 girlfriend was fighting her and - - - but the  
14 girlfriend got out of the car and she hopped in.

15 And as far of the movie, I - - - that's an  
16 example of one of the myriad facts in this case that  
17 the defendant has an inference that she would have  
18 drawn, then there's the inference that's in the  
19 People's favor. And this court is obliged to draw  
20 every inference of every fact in the People's favor.  
21 So take the movie comment.

22 She said she loved action movies and that  
23 they were more and more part of her real life. She  
24 said that she felt like this was a movie, but she  
25 knew it was real. She said, I knew it was real. But

1 she also said it felt like a movie. She was  
2 exhilarated by this event. She didn't care who she  
3 was hurting, she just was having - - -

4 JUDGE PIGOTT: Well, you don't hurt anybody  
5 in a movie.

6 MS. GRADY: - - - frankly, she was having  
7 fun. I beg your pardon?

8 JUDGE PIGOTT: You don't hurt anybody in a  
9 movie.

10 MS. GRADY: Fast & Furious? I don't know  
11 what movie she was talking about, these action moves  
12 that she liked to watch. But she was - - -

13 JUDGE PIGOTT: You don't hurt - - -

14 MS. GRADY: - - - she enjoyed this crime.

15 JUDGE PIGOTT: You don't hurt anyone in a  
16 movie. If she had said - - - thought she was in a  
17 movie, it meant she couldn't hurt anybody.

18 MS. GRADY: I don't know what movie she was  
19 talking about, Judge, but she saw the man in the  
20 street, and she didn't stop or swerve. She hit him  
21 anyway.

22 JUDGE PIGOTT: These are really difficult.  
23 You know, I - - - it makes you wish you had Register  
24 back. But the - - - but the fact of the matter is,  
25 you're trying - - - you're trying to prove that she

1 had enough wits about her to - - - to make that kind  
2 of conscious decision to not care, and they're trying  
3 to prove that she has - - - that she's so bad off,  
4 that she can't make that decision not to care.  
5 You're both trying to prove a negative, it seems to  
6 me.

7 MS. GRADY: And - - - wait, and then the  
8 reason that the People must prevail in this case is  
9 that that debate is one that was made to the jury,  
10 resolved by the jury - - -

11 JUDGE PIGOTT: Did you object to the  
12 intoxication charge?

13 MS. GRADY: I knew you were going to ask me  
14 that, Judge. I don't remember. If we did, though,  
15 this case actually, it reminds me - - - this court  
16 had a case a couple of years ago, I think it was  
17 Sorroco, Sorrico (ph.), and it was actually an  
18 intentional murder. Admittedly the man was drunk,  
19 he'd been drinking - - - this is the bow and arrow  
20 case.

21 JUDGE PIGOTT: Bow and arrow case, yeah.

22 MS. GRADY: But - - - right? And the court  
23 - - - and he did not get the intoxication charge.  
24 And this court affirmed, because the defendant's  
25 behavior, and then his after-the-crime statements

1 reflected purposeful conduct. Taliyah Taylor  
2 reflected purposeful conduct.

3 JUDGE PIGOTT: But he was pretty good with  
4 a bow, too. I mean - - -

5 MS. GRADY: She was pretty good with the  
6 car. She didn't hit anything until she's driving on  
7 the wrong side of the road, and I - - - I don't want  
8 to - - - I don't want to omit - - - to remember to  
9 mention she's driving eighty on a local road.

10 JUDGE PIGOTT: But see, it - - - it just  
11 seems to me that the arguments that are made by the  
12 People, and I'm not being critical; it makes sense.  
13 That you're really making a Register argument and  
14 you're trying to fit it into Feinberg (sic) standard.  
15 Because objectively, these are easy, it seems to me.  
16 I mean, the society does not like this stuff at all.  
17 But you now have to do something more. You have to -  
18 - - you have to prove that somehow they had the  
19 requisite mens rea to offend society. And that's  
20 really difficult to do.

21 MS. GRADY: Depraved indifference to the  
22 value of human life, as the statute says.

23 JUDGE PIGOTT: Right.

24 MS. GRADY: As the court has held, she - -  
25 - they - - - she did not care whether anyone lived or

1           died. And that's - - - I don't want to forget  
2           either. We're not arguing that she was suicidal.  
3           This going to the light with her father, that's a  
4           statement made at 5:10 the next morning, when any  
5           intoxication has worn off, and it's - - - it's,  
6           frankly, glib. It shows that at the time she  
7           committed the crime - - -

8                        CHIEF JUDGE LIPPMAN: What about I saw him  
9           and he was gone? What - - - what do we - - -

10                      MS. GRADY: Glib, as well.

11                      CHIEF JUDGE LIPPMAN: - - - make of that?

12                      MS. GRADY: Glib, as well. She's not even  
13           asking - - - this is, remember, the statement made to  
14           Detective Signarelli (ph.) from, I believe, 12:30  
15           a.m. to 3 a.m. And she's got ninety minutes to  
16           express some level of remorse. She doesn't. She  
17           doesn't. She doesn't care even then. And this is  
18           long after any intoxication has worn off, to  
19           supposedly, you know, deaden her ability to  
20           appreciate her - - - the gravity of her actions.

21                      And I also don't want to sit down before I  
22           correct something from my brief. She did swerve; she  
23           just didn't swerve on purpose. She did not swerve to  
24           avoid hitting these people, but she did maintain  
25           control of her car. She's - - - she hits a human

1 body, and as a witness Defrey (ph.) said, he was  
2 standing at the curb outside the Chick N Bones  
3 restaurant on Forest Avenue.

4 And he watches - - - he hears a rev of her  
5 engine; he sees her coming. He sees the man in the  
6 street, and he sees the collision. He then - - - the  
7 car then swerves for a second toward him. This is at  
8 page 73 of the appendix. It swerves for a second.  
9 She then regains control. And she continues in her -  
10 - - in his words, she then "roared down the street."  
11 Foot on the accelerator, she continues her  
12 determination to drive the car as fast as it will go,  
13 notwithstanding the fact that she's just hit a man.

14 JUDGE PIGOTT: But fundamentally, doesn't  
15 it trouble you that she's nude? I mean, this does  
16 not sound like a logical person who's - - -

17 MS. GRADY: And we don't have to prove she  
18 was a logical person, Judge. And no - - - yes - - -

19 JUDGE PIGOTT: No, I understand that, but  
20 when you - - - when you put it all together, you're  
21 thinking what - - - what in the world was going on  
22 here? And depraved indifference doesn't spring to  
23 mind.

24 MS. GRADY: She - - - well. Her behavior  
25 was not that, I would say, of a reasonable person;

1           that's part of her culpability. But she's also able  
2           to articulate, maybe not a reason that we would  
3           relate to, but she's able to put together and explain  
4           to Detective Signarelli why she did that. And it was  
5           because she felt like, you know, she's - - - she's  
6           natural and she should be accepted as she is.

7                        CHIEF JUDGE LIPPMAN: So she does - - - she  
8           does crazy things, and then afterwards can  
9           articulate, I mean, things that don't make too much  
10          sense, but in the kind of - - -

11                       MS. GRADY: In her way.

12                       CHIEF JUDGE LIPPMAN: - - - serious manner,  
13          in her own mode, say that, you know, exactly what  
14          happened. That in and of itself tells you that - - -  
15          that she was capable of depraved indifference?

16                       MS. GRADY: Capable being the operative  
17          word there, yes.

18                       CHIEF JUDGE LIPPMAN: Yeah.

19                       MS. GRADY: That she's able - - -

20                       CHIEF JUDGE LIPPMAN: You figured she was  
21          kind of in a serious way able - - - not seriously  
22          what she's saying, but kind of say - - -

23                       MS. GRADY: Exactly. She's not oblivious.  
24          She's not in a state of oblivion. She's not in a  
25          state of mania. Her intoxication was not - - -

1 CHIEF JUDGE LIPPMAN: But if it's all  
2 gibberish, though, does it matter?

3 MS. GRADY: It depends what - - - and also,  
4 I - - - Judge, I would also remind, this was a self-  
5 serving statement. She's making this to - - -  
6 everything we know about this is to the detective,  
7 and the jury's free - - -

8 JUDGE SMITH: Well, what about - - - what  
9 about the screaming - - - she's chanting "money,  
10 power, respect", when they get to her. Isn't - - -  
11 if she's not oblivious, she's a little detached from  
12 reality, isn't she?

13 MS. GRADY: I would argue, and I think that  
14 the jury was entitled to infer, she was detached from  
15 the gravity of her own actions. She was detached - -  
16 - she didn't care about what had just happened.  
17 She's only - - - she's still - - -

18 CHIEF JUDGE LIPPMAN: A reasonable person  
19 could say that she - - - she was guilty of depraved  
20 indifference.

21 MS. GRADY: Yes, Judge. I - - -

22 CHIEF JUDGE LIPPMAN: That's the issue here  
23 as it was in the other case.

24 MS. GRADY: Yes, and I think that the  
25 common denominator of all three cases is our - - -

1           defendants who are taking purposeful action; they are  
2           making conscious choices, notwithstanding their  
3           intoxication. That is what makes them depravedly  
4           indifferent. This is not just a human tragedy. A  
5           hurricane is a human tragedy, but a hurricane doesn't  
6           make choices. These defendants did.

7                        CHIEF JUDGE LIPPMAN: Okay, counsel.

8                        MS. GRADY: Thank you.

9                        CHIEF JUDGE LIPPMAN: Thanks, counsel.

10                      Rebuttal, counsel?

11                      MS. HORWITZ: First I'd like to confirm  
12           that the People did not object to the charge that was  
13           handed over to all the parties ahead of time. It's  
14           in my brief, and there was no objection even though  
15           it was - - -

16                      CHIEF JUDGE LIPPMAN: Counsel, you could  
17           have mental problems and still be guilty of depraved  
18           indifference, right?

19                      MS. HORWITZ: Absolutely, Your Honor.

20                      CHIEF JUDGE LIPPMAN: She had mental  
21           problems; that's clear.

22                      MS. HORWITZ: Yeah, but what's missing here  
23           is - - -

24                      CHIEF JUDGE LIPPMAN: Yeah.

25                      MS. HORWITZ: - - - that it was the

1 People's burden to show that she was - - - that she  
2 appreciated that there was a grave risk. What's  
3 missing is any appreciation that she was creating a  
4 grave risk to get - - -

5 CHIEF JUDGE LIPPMAN: What about her  
6 discuss - - - your adversary refers to her discussion  
7 afterwards to the officers.

8 MS. HORWITZ: Well, I would say it was a  
9 pretty bizarre statement back and forth, telling her  
10 whole history, but I think you have to look more  
11 closely to what happened right after the crash, and -  
12 - - which suggested that she was detached from  
13 reality. This court has held also as far as  
14 speeding, that she knew she was speeding, that  
15 speeding alone - - -

16 CHIEF JUDGE LIPPMAN: Or detached from the  
17 consequences of what she did? Could - - -

18 MS. HORWITZ: Well, there's absolutely - -  
19 -

20 CHIEF JUDGE LIPPMAN: Could you interpret  
21 it that way?

22 MS. HORWITZ: Yeah, well, there's  
23 absolutely no evidence that she was aware that she  
24 was creating a grave risk of death and she simply  
25 didn't care about it. What's missing is the

1 awareness that what she was doing, and this court has  
2 held that speeding by sober people in Prindle and  
3 speeding in other cases is not enough to - - - to - -  
4 -

5 JUDGE ABDUS-SALAAM: What about your  
6 adversary's point that the People are entitled to  
7 every favorable inference that can be drawn from any  
8 of the facts that we have here?

9 MS. HORWITZ: Well, our argument is that  
10 all the inferences show that there was no depraved  
11 indifference, that the ones that they were stretching  
12 for - - - and they're abandoning the suicidal  
13 argument now, but it is in the brief - - - that the  
14 intoxication had worn off, that this is a political  
15 statement. The nudity is a political statement, when  
16 it's obviously a - - - the result of a - - - some  
17 paranoia that she had about evil entering.

18 The issue here is not as - - - depraved  
19 indifference has never been defined simply as a  
20 purposeful act or a voluntary act. You have to - - -  
21 the issue isn't did she know she took a drug, did she  
22 know she was driving, but did she have that very  
23 unusual rare state of mind that makes a reckless act  
24 the same - - - as blameworthy as intentional.

25 CHIEF JUDGE LIPPMAN: Okay.

1 MS. HORWITZ: And we would just argue that  
2 that's simply not the case here.

3 CHIEF JUDGE LIPPMAN: Okay, counsel.  
4 Thanks, counsel.

5 Counsel? McPherson.

6 MR. EDELSTEIN: Good afternoon, Your  
7 Honors. My name is Jonathan Edelstein. I represent  
8 Franklin McPherson.

9 CHIEF JUDGE LIPPMAN: What - - -

10 MR. EDELSTEIN: With the court's permission  
11 - - -

12 CHIEF JUDGE LIPPMAN: What - - -

13 MR. EDELSTEIN: - - - I would like to  
14 reserve two minutes for rebuttal.

15 CHIEF JUDGE LIPPMAN: Okay. What's the  
16 difference between this case and the first two?

17 MR. EDELSTEIN: Your Honor, the difference  
18 between this case and the first two is that, unlike  
19 either Mr. Heidgen or Ms. Taylor, there is no  
20 evidence that Mr. McPherson was under the - - - under  
21 any mental disturbance prior to driving drunk.

22 CHIEF JUDGE LIPPMAN: But there was  
23 evidence as to guns and drugs, et cetera, right?

24 MR. EDELSTEIN: There was evidence that he  
25 was apparently - - -

1 CHIEF JUDGE LIPPMAN: Shots being fired.

2 MR. EDELSTEIN: - - - angry at losing - - -  
3 losing some drugs and that somebody fired shots,  
4 although there was no testimony that it was him.  
5 These shots were fired when he was - - - assuming  
6 that it was him, he was facing the opposite direction  
7 from the club. Delroy McCalla was quite clear about  
8 that. He said that he never saw Mr. McPherson facing  
9 toward the club. And cer - - -

10 JUDGE READ: Well, this is an ineffective  
11 assistance case, right?

12 MR. EDELSTEIN: Yes, the - - - there's a -  
13 - -

14 JUDGE READ: What difference does that  
15 make? Or does it make a difference?

16 MR. EDELSTEIN: Your Honor, I would - - - I  
17 would suggest that under the circumstances of this  
18 case, it does not. That in - - - this is - - - the  
19 development of depraved indifference is something  
20 practically unique in New York law or at least in the  
21 recent history of New York law. There's been not a  
22 single change, but a process of incremental change  
23 that's gone on - - -

24 CHIEF JUDGE LIPPMAN: Yeah, but if this law  
25 is in flux - - -

1 MR. EDELSTEIN: - - - over a period of  
2 years.

3 CHIEF JUDGE LIPPMAN: If the law is in  
4 flux, what is the responsibility of the attorney?  
5 Can you be as demanding when the law is evolving as  
6 it was in this particular case - - - in your case?

7 MR. EDELSTEIN: Your Honor, I would argue  
8 that when the law is in flux, that's the time to be  
9 more demanding, because that's when an attorney's  
10 assistance is needed most, and that's when a  
11 defendant most needs the attorney to protect the rest  
12 - - -

13 CHIEF JUDGE LIPPMAN: Is that - - -

14 JUDGE GRAFFEO: Well, is - - - was that  
15 issue properly preserved? I mean, a Feingold-type  
16 argument wasn't raised, was it?

17 MR. EDELSTEIN: That is correct. The  
18 attorney - - - the defendant's attorney was aware of  
19 Feingold, and in fact, argued Feingold on summation,  
20 but did not include a Feingold argument in his trial  
21 motion to dismiss, which is why we are raising  
22 ineffective assistance.

23 JUDGE GRAFFEO: That - - - that alone  
24 equates to ineffective assistance?

25 MR. EDELSTEIN: I would argue under the

1           circumstances of this case that it does. That he  
2           failed to preserve an issue that, had it been  
3           preserved, would have been completely dispositive of  
4           the defendant's guilt of depraved indifference  
5           murder. That had he preserved this - - -

6                        CHIEF JUDGE LIPPMAN: Could he reasonably  
7           have known that at the time?

8                        MR. EDELSTEIN: Feingold had already been  
9           decided. He was - - -

10                      JUDGE SMITH: The judge - - - the judge had  
11           mentioned it to him.

12                      MR. EDELSTEIN: The judge had mentioned it  
13           to him, and he was aware of it, because he made  
14           Feingold-type arguments to the jury. So he - - - cer  
15           - - - there was certainly no reason in the world for  
16           him not to say, during his trial motion to dismiss,  
17           by the way, judge, Feingold. There was no strategic  
18           reason - - -

19                      JUDGE GRAFFEO: And - - - and why would it  
20           have been dispositive?

21                      MR. EDELSTEIN: Because this - - -

22                      JUDGE GRAFFEO: There's - - - there is no  
23           reasonable view of the evidence that the judge would  
24           have felt let the jury determine - - -

25                      MR. EDELSTEIN: No.

1                   JUDGE GRAFFEO: - - - whether to not there  
2 was a view - - - a reasonable view of the evidence  
3 that he acted with a depraved state of mind?

4                   MR. EDELSTEIN: Well, I don't believe there  
5 was, Your Honor, because this case is functionally  
6 identical to Valencia. The district attorney, in the  
7 argument over Mr. Heidgen's case, made a concession  
8 that in order to find depraved indifference murder,  
9 you would have to find that this defendant knew that  
10 he was going the wrong way.

11                   Every indicia of knowledge that the People  
12 have cited in this case: the backwards signs, the  
13 wrong-way signs, cars coming towards Mr. McPherson,  
14 blowing horns - - - all of those were present in the  
15 Valencia case.

16                   JUDGE SMITH: Your - - - your adversary - -  
17 - well, your adversary, who is also someone else's  
18 adversary, said - - - said earlier that in Valencia  
19 you had a fact finding; that the guy was oblivious.  
20 Do you think Valencia turned on that?

21                   MR. EDELSTEIN: I do not, Your Honor. The  
22 - - - unlike Feingold, where this court made very  
23 plain that it was deferring to an unusual finding of  
24 fact made by a judge at a bench trial, the per curiam  
25 opinion in Valencia simply says the trial evidence

1 established only that the defendant was extremely  
2 intoxicated, and did not establish that he acted with  
3 the culpable mental state of depraved indifference.

4 JUDGE SMITH: And it also said the evidence  
5 was insufficient.

6 MR. EDELSTEIN: Correct, which is that this  
7 court found that the totality of the evidence at Mr.  
8 Valencia's trial was not sufficient to support a  
9 finding of depraved indifference, meaning, all of  
10 those things, like the wrong-way signs, the horns,  
11 the cars coming toward the defendant, did not  
12 establish depraved indifference.

13 JUDGE ABDUS-SALAAM: So it's your position  
14 that the finding by the trial judge at a bench trial  
15 that the defendant in Valencia was oblivious was just  
16 sort of a throw-in, a throw-away?

17 MR. EDELSTEIN: Well - - -

18 JUDGE ABDUS-SALAAM: Not that relevant?

19 MR. EDELSTEIN: It was certainly - - -  
20 doesn't appear to be relevant to the memorandum  
21 opinion, which does not refer to it, and it certainly  
22 does not hinge on it. The trial - - - the me - - -  
23 the per curiam opinion doesn't say, we're agreeing  
24 with the trial judge, you know, because the trial  
25 judge said he's oblivious. It says, the trial

1 evidence does not establish; the evidence is  
2 insufficient. That's a finding based on the totality  
3 of the evidence.

4 And certainly, if you want obliviousness in  
5 Mr. McPherson's case, the accident - - - the analysis  
6 done after the accident found that there was no  
7 braking, either by his vehicle or by the victim.  
8 This - - - Mr. McPherson made no attempt to avoid the  
9 crash.

10 And certainly, unless you're going to posit  
11 that he is suicidal, which the People did not posit,  
12 that would have to mean that he's oblivious. Nobody  
13 who is not oblivious will plow right into - - - head  
14 on into another vehicle at sixty miles an hour, or  
15 even more, without even making an attempt to avoid  
16 the collision.

17 And not only that, but in Valencia, the  
18 defendant said, I don't know and I don't care, after  
19 he had been informed that he was going to - - - that  
20 he had injured people. Certainly, if Mr. Valencia  
21 did not have a depraved indiff - - - depravedly  
22 indifferent mental state, then Mr. McPherson  
23 certainly did not.

24 JUDGE ABDUS-SALAAM: Well, isn't the  
25 statement by Valencia the reason, probably, that the

1 trial judge decided he was oblivious, because he  
2 didn't care - - - he didn't know and he didn't care?

3 MR. EDELSTEIN: Well - - -

4 JUDGE ABDUS-SALAAM: Because if he knew and  
5 he cared, he wouldn't have been oblivious, right?

6 MR. EDELSTEIN: That may or may not be.

7 There's certainly nothing in the - - - in the  
8 Valencia opinion to suggest that that was the reason  
9 or that the case turned on that.

10 A couple of things, very briefly. I know  
11 that counsel has mentioned that out of 18,000 deaths  
12 resulting from DWI, there have only been 9 cases  
13 charged as depraved indifference. I - - - I don't  
14 think that - - - or I would submit that the fact that  
15 the prosecution has exercised discretion in other  
16 cases is not a reason to affirm in this case. That  
17 if the evidence is not sufficient, then you can't  
18 just say, well, we'll trust to the prosecutor's  
19 discretion to only do this in the most horrific  
20 circumstances.

21 And indeed, horrific circumstances are not  
22 what separates manslaughter from murder. The  
23 brutality as defined in Suarez is a matter of  
24 conduct, not a matter of the result or the extent of  
25 the injuries.

1 I'm out of time, Your Honors. I'll reserve  
2 for rebuttal.

3 CHIEF JUDGE LIPPMAN: Yeah, good, counsel.  
4 You'll have your rebuttal.

5 MS. MCCORMICK: Good afternoon, again, Your  
6 Honors. With respect to Mr. McPherson, there are  
7 strong similarities between the McPherson case and  
8 the Heidgen case with the distinction, of course,  
9 being that first, prior to Mr. McPherson getting into  
10 the car, he is exhibiting the depravity of his  
11 mindset by going to the back of that car.

12 The circumstantial evidence shows  
13 specifically that he went to the back of the car,  
14 where there were forty-one rounds of nine millimeter  
15 ammunition, eight rounds in a magazine clip, and  
16 while the witness, Delroy McCalla, claims that he  
17 looked down at the moment that the shots were fired,  
18 an angry Franklin McPherson was firing shots, because  
19 he was saying over and over again, that I lost my  
20 shit - - -

21 JUDGE SMITH: But isn't - - - isn't it a  
22 stre - - - I mean, isn't it a kind of a remote inf -  
23 - - from the fact that he was - - - you can draw the  
24 inference that he was firing shots, and you infer  
25 from that that he knew he was going the wrong way on

1 the highway?

2 MS. MCCORMICK: No, Your Honor. I'm  
3 inferring - - -

4 JUDGE SMITH: What - - - what - - - do - -  
5 - I think you've conceded that with Heidgen, you had  
6 to - - - you had to show he knew he was going the  
7 wrong way. Same true of McPherson?

8 MS. MCCORMICK: Same is true of McPherson,  
9 and the same facts prove it in McPherson. He is  
10 displaying to everyone - - - to the jury - - -

11 JUDGE SMITH: All the wrong-way signs and  
12 the lights?

13 MS. MCCORMICK: Yes. He - - -

14 JUDGE SMITH: Didn't you have those in  
15 Valencia, too?

16 MS. MCCORMICK: Your Honor, this is a  
17 question of fact for the jury. And the question of  
18 fact is - - -

19 JUDGE SMITH: Isn't - - - isn't - - - yeah,  
20 but isn't your adversary right, the memoran - - -  
21 very, very short opinion in Valencia says the  
22 evidence was insuffi - - - insufficient. There is  
23 insufficient evidence to support a conviction. It  
24 doesn't say the jury - - - it doesn't say the fact  
25 finder resolved the issues against the People.

1 MS. MCCORMICK: And yet, that is what  
2 happened. There was a fact finder who made a  
3 specific statement during the verdict, indicating  
4 that it was his opinion that there was oblivion.

5 JUDGE SMITH: Okay, but that - - - that  
6 does not seem to be what our decision turned on in  
7 Valencia. We said insufficient. Did we not mean it?

8 MS. MCCORMICK: There was a very short  
9 decision, and I would say that it is not instructive  
10 as to how far that - - - what the court actually  
11 intended, because never before has this court found  
12 that a person could not be intoxicated, and be - - -  
13 or rather, could not be intoxicated and depraved at  
14 the same time. This issue of how the alcohol or the  
15 drugs affects the individual defendant - - -

16 JUDGE SMITH: I don't - - - I don't - - - I  
17 don't think anyone's suggesting it's impossible to be  
18 intoxicated and depraved at the same time. The  
19 question is whether you prove the depravity.

20 MS. MCCORMICK: Well, the issue then turns,  
21 Judge, on whether or not there's a distinction being  
22 made just because it's the operation of a motor  
23 vehicle. And I would argue that because something is  
24 in common use does not mean that it is per se not  
25 capable of producing a depraved indifference result.

1 Here you have a circumstance, where although people  
2 drive regularly, it's the manner in which it's used.

3 JUDGE SMITH: But I guess I - - - I'm not  
4 sure it can be - - - I'm not sure it can be. I think  
5 pretty much everyone agrees that if somebody  
6 deliberately goes the wrong way on a highway, you've  
7 got - - - you've got a pretty good case for depraved  
8 indifference.

9 On the other hand, that's also - - - as  
10 your adversary was saying, that's a very, very  
11 strange thing to do. When someone's going the wrong  
12 way on a highway, you almost have to assume either  
13 he's - - - either he's suicidal, or he's so drunk  
14 that he doesn't know what he's doing. How do you  
15 prove that this was the - - - that this guy did know  
16 what he was doing?

17 MS. MCCORMICK: It's the contrary, Judge.  
18 I think that be - - - in between those two facts of  
19 that he was suicidal or he was so oblivious, he  
20 didn't know what he was doing, is that you have an  
21 enraged and emboldened, perhaps by alcohol, defendant  
22 in the same way that Heidgen may have been emboldened  
23 by alcohol, who gets on that road and says, you're  
24 going to have to get out of my way.

25 But the reality is, the facts that were

1 presented to this jury - - - and this is a very windy  
2 portion of the Southern State Parkway - - - is that  
3 this defendant maintained that road. He maintained  
4 his lane; he maintained his speed. He operated with  
5 deliberateness that indicates a purposefulness, that  
6 indicates a nonoblivion, that - - -

7 JUDGE PIGOTT: Do you believe - - - do you  
8 believe that they - - - they - - - he defended - - -  
9 he expected to survive? That - - - that in do - - -  
10 in each one of these cases, that - - - that they - -  
11 - they were not trying to kill themselves, that they  
12 were - - - that they were ob - - - not oblivious to  
13 their own possible death, but they were somewhere in  
14 between?

15 MS. MCCORMICK: I believe that - - - that  
16 it is not part of the People's case to prove the  
17 motive behind it, and so to say, did the defendant  
18 believe he would survive? There's no indication that  
19 he didn't think he would survive. The indication in  
20 McPherson's case is that after firing this gun, he  
21 says, let's get out of here. And he gets onto the  
22 Southern State Parkway, and he's traveling at a high  
23 speed for that roadway, but people are getting out of  
24 his way.

25 JUDGE PIGOTT: But isn't that Prindle? I

1 hate to bring Prindle up to you a second time.

2 MS. MCCORMICK: Judge, it is Prindle with a  
3 twist.

4 JUDGE PIGOTT: How?

5 MS. MCCORMICK: Because in this case you  
6 have this defendant is intoxicated. You have that he  
7 has already displayed his depravity in terms of  
8 firing that gun. But you don't have the specific  
9 motive that he's fleeing police. No one is chasing  
10 him at that point.

11 He gets onto that roadway, and very much  
12 like Mr. Heidgen, he does not brake. I know counsel  
13 said that it's unrefuted testimony, but the People  
14 would argue that there was - - - the speed in Heidgen  
15 was absolutely refuted by the independent witnesses.

16 This should not turn on the sort of  
17 ridiculous premise that a person could be so  
18 oblivious in one second and then aware at the last  
19 second and hit the brakes, and now all of a sudden  
20 he's not depraved. He has created this grave risk of  
21 death by driving continuously - - - in spite of all  
22 of the warnings that he ignores, he continues at  
23 these poor, defenseless, random and innocent people.  
24 This is depravity in its core.

25 This man, as he drove down that highway,

1           came within inches of Sergeant Schulze. He was - - -  
2           there was a construction truck as he got on the  
3           highway that blew an air horn long and loud. For  
4           five miles he continued the wrong way. He did not  
5           care who was in his way, much like Mr. Heidgen. He  
6           simply wanted to do what he wanted to do, and whether  
7           it was fueled by the alcohol that he drank that gave  
8           him the courage or the stupidity, he still wanted to  
9           do what he wanted to do, and other people had to get  
10          out of his way, not the other way around.

11                           The consid - - -

12                           JUDGE ABDUS-SALAAM: So both those cases,  
13           you're saying, that they were both pretty much  
14           playing chicken with other people on the road.

15                           MS. MCCORMICK: I'm saying that they wanted  
16           to go where they wanted to go, and other people be  
17           damned, was what I was saying.

18                           JUDGE SMITH: You don't have - - - you  
19           don't have what you call the tracking in McPherson.

20                           MS. MCCORMICK: There's no indication of  
21           tracking in McPherson. He stayed in the left lane  
22           throughout his five miles on the roadway. And other  
23           people narrowly escaped him as he passed. Mr.  
24           Burgess, unfortunately, was around a curve and didn't  
25           have the opportunity to get out the way.

1           It's late. It's 4 o'clock in the morning.  
2           And yet there was substantial traffic, because  
3           there's always substantial traffic in Nassau County,  
4           New York. So there is no possibility that he did not  
5           know the grave risk of death that he was causing.

6           If you have the awareness - - - and every  
7           indication from the circumstances indicates that he  
8           did have the awareness that he was driving the wrong  
9           way because, if he didn't, he would have, on the  
10          first turn, made it into the weeds, and Mr. Burgess  
11          would have been spared, the same as the Flynns and  
12          the Tangneys (ph.) and the Rabinowitz would have been  
13          spared, had they, God willing, been oblivious, unable  
14          to purposely drive that car. But both of them were,  
15          and the facts showed it, and the jury found it. This  
16          is a valid line of reasoning with permissible  
17          inferences.

18          But actually, Judge, this is a case about  
19          ineffective assistance of counsel. And this  
20          defendant - - -

21                 JUDGE SMITH: Suppose it was - - - how do -  
22          - - your defense lawyer, a year after Feingold's  
23          decided, how do you not make a Feingold motion?

24                 MS. MCCORMICK: Because it is an issue of  
25          fact, Judge. You know, in New York State - - -

1                   JUDGE SMITH: The defense lawyer's supposed  
2 to think that way?

3                   MS. MCCORMICK: Well, the defense lawyer  
4 had had contact with the judge who had made  
5 indications on and off the record that he was not  
6 amenable to that Feingold motion.

7                   JUDGE SMITH: So you're saying - - - so  
8 you're - - - so this guy's never heard of making a  
9 motion he might lose to preserve the record?

10                  MS. MCCORMICK: No, I'm certain that he has  
11 heard of that, Judge. But in a circumstance where  
12 he's viewing the record, where the jury has been  
13 charged that intoxication can be used to negate  
14 depraved indifference, and there is a factual basis  
15 for that jury to make their decision, he opted on the  
16 number two version of what it is - - -

17                  JUDGE SMITH: I guess - - - I guess I - - -  
18 I understand your point. You have an argument,  
19 certainly, that the motion would have been properly  
20 denied if he'd made it. Can you really say that it's  
21 a reason - - - that it's so clear - - - that that  
22 motion was such a clear loser, it was a reasonable  
23 decision not to bother making the motion?

24                  MS. MCCORMICK: No, Judge, I'm saying that  
25 this is one of those - - -

1 JUDGE SMITH: Well, can you?

2 MS. MCCORMICK: I'm - - - well, no, this is  
3 one of those motions that falls in the second  
4 category. You have the clear losers. You have the  
5 ones with some merit that don't rise to the level of  
6 ineffective assistance of counsel. I'm saying that  
7 it falls under that category.

8 JUDGE SMITH: Well, then, because - - -  
9 because - - - because you're saying it didn't have  
10 all that much merit.

11 MS. MCCORMICK: I'm saying - - -

12 JUDGE SMITH: Suppose we disagree with you  
13 on this. Suppose we think the motion should have won  
14 if it had been made. Any excuse for not making it?

15 MS. MCCORMICK: Judge, the effectiveness of  
16 counsel in this circumstance can't be viewed in  
17 hindsight. It has to be viewed at the time. And - -  
18 - and this counsel actually argued very persuasively  
19 in his opening statement. He argued very seriously,  
20 crossed hard on the issue of the mental state. He  
21 was not ineffective to this defendant.

22 And the fact is that in spite of not having  
23 made that motion, this defendant is not prejudiced.  
24 The defendant's claim was reviewed by the Appellate  
25 Division in the interest of justice, and there it was

1           decided.

2                   CHIEF JUDGE LIPPMAN:   Okay, counsel.

3                   MS. MCCORMICK:   Thank you.

4                   CHIEF JUDGE LIPPMAN:   Thanks.

5                   Counsel, rebuttal?

6                   MR. EDELSTEIN:   Yes, Your Honor.   On  
7           ineffective assistance, as we've argued, the  
8           tripartite Turner, Ennis, and Carter structure is not  
9           really a good fit in cases such as this where the  
10          court - - - where the law is in a state of long-term  
11          flux.  It presupposes an ability by the attorney to  
12          decide based on settled law whether a motion is  
13          clear-cut, whether it may have some merit, whether it  
14          may have no merit.

15                   That was the certainly not the case in - -  
16          - at the time of Mr. McPherson's trial, when Feingold  
17          had been decided.  It certainly wasn't clear that  
18          Feingold was the last step.  It's not even clear that  
19          we've reached the last step today in the evolution of  
20          depraved indifference.  There was no excuse not to  
21          make that motion.  There was no excuse not to protect  
22          the record.

23                   Now, with this step - - -

24                   JUDGE PIGOTT:   He argued it - - - he argued  
25          it in summation, did he not?

1                   MR. EDELSTEIN: He did, Your Honor. He  
2 did, Your Honor. There was no - - - no downside to  
3 also arguing it to the judge, even briefly.

4                   Also, with the issue of emboldened by  
5 alcohol, Mr. McCalla at page 280 of the appendix, 878  
6 of the record.

7 "Q. Was he angry?"

8 "A. No, he was not - - - he was a little bit."

9                   And then it's not Mr. McPherson saying,  
10 let's get out of here. He's telling Mr. McCalla to  
11 get his girlfriend out of there, on the same page of  
12 the record.

13                   So the whole notion of him playing chicken,  
14 emboldened by alcohol, doesn't care, everyone's going  
15 to get out of his way. That's a good story. But it  
16 wasn't proven in this case. And certainly if it  
17 wasn't proven as to Mr. Valencia, with identical  
18 facts, it wasn't proven as to this defendant.

19                   Finally, just one - - - a brief comment on  
20 public policy. The arbiter of public policy in this  
21 state is the legislature. And the legislature is  
22 well aware of these wrong-way accidents, because  
23 they've occurred with some regularity. And some of  
24 them have met with a legislative response, in terms  
25 of increasing penalties for injuries or deaths caused

1 by drunk drivers.

2 The legislature could easily, at any point,  
3 have said we're going to make a crime called  
4 "vehicular murder" or we are going to add a provision  
5 to 125.25 to define DWI homicides as depraved  
6 indifference. It has not done so. This court should  
7 not. Thank you.

8 CHIEF JUDGE LIPPMAN: Thank you, counselor.  
9 Thank you all.

10 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Martin Heidgen, Nos. 174 & 175, and People v. Taliyah Taylor, No. 176, and People v. Franklin McPherson, No. 177 were prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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