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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Appellant, (papers sealed)

-against-

No. 4

TERRANCE WILLIAMS,

Respondent.

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20 Eagle Street  
Albany, New York 12207  
January 05, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Sara Winkeljohn  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 4, People v.  
2 Williams.

3 Counsel?

4 MR. MAXWELL: One minute for rebuttal,  
5 please.

6 CHIEF JUDGE LIPPMAN: One minute, sure.

7 MR. MAXWELL: Thank you, Judge. My name is  
8 Jim Maxwell. I'm here on behalf of the People of the  
9 State of New York. This is a People's appeal from  
10 the reduction of the count of an indictment. We're  
11 asking you to reinstate a count of reckless  
12 endangerment in the first degree. This is a case  
13 where the - - -

14 CHIEF JUDGE LIPPMAN: Is that the same as  
15 depraved indifference, counsel?

16 MR. MAXWELL: Yeah, this is the depraved  
17 indifference under the - - -

18 CHIEF JUDGE LIPPMAN: Okay, why - - -

19 MR. MAXWELL: - - - reckless endangerment  
20 setting.

21 CHIEF JUDGE LIPPMAN: Why, in this case,  
22 where the call was made saying gee, you better - - -

23 MR. MAXWELL: Um-hum.

24 CHIEF JUDGE LIPPMAN: - - - get checked;  
25 there was a letter of apology saying gee, I hope, you

1 know, the - - - this didn't, you know, cause terrible  
2 consequences to you. Can we say that there was a  
3 depraved indifference to whether the person in  
4 question lived or died?

5 MR. MAXWELL: Yes, Your Honor.

6 CHIEF JUDGE LIPPMAN: Why?

7 MR. MAXWELL: Because you have to - - -

8 CHIEF JUDGE LIPPMAN: Today - - - given  
9 today's science?

10 MR. MAXWELL: Well, let me put science  
11 aside for the moment.

12 CHIEF JUDGE LIPPMAN: Okay, go ahead.

13 MR. MAXWELL: We'll talk about science in a  
14 moment. What I'd ask you to focus on - - -

15 CHIEF JUDGE LIPPMAN: Yeah.

16 MR. MAXWELL: - - - is the conduct at the  
17 time this happened.

18 God bless you.

19 JUDGE RIVERA: Thank you.

20 MR. MAXWELL: As opposed to what he said  
21 later. Although a lot of what he said later, I  
22 think, illustrates depraved indifference very well.

23 CHIEF JUDGE LIPPMAN: You're saying your  
24 first point is the conduct speaks for itself and it  
25 doesn't matter what he says later?

1 MR. MAXWELL: Well, I - - - I think what he  
2 says later hurts him. I think he helps - - - he  
3 helps the state of the law in New York because he  
4 helps us define depraved indifference.

5 JUDGE READ: Well, let's - - - let's focus  
6 on - - -

7 MR. MAXWELL: We owe him that but - - -

8 JUDGE READ: Let's focus on the conduct at  
9 the time. What evidence shows that it's more than  
10 just reckless?

11 MR. MAXWELL: Because he al - - - he  
12 himself is HIV positive. He knows risks. He knows  
13 what it - - - what it involves. And four times, the  
14 victim asked him, is it okay. Four times he says  
15 yes. He takes the condom out of the victim's hand.

16 JUDGE READ: So he lied?

17 MR. MAXWELL: He - - - he misled. He lied.  
18 He - - -

19 JUDGE READ: And that - - - that shows a  
20 dep - - - depraved intent of mind?

21 MR. MAXWELL: Given that he knows that he  
22 is HIV positive; he's gone through what he's about to  
23 put the victim through. And not only does he lie,  
24 but then they engage in this four or five times. He  
25 - - - he doesn't do anything about it until he

1 suddenly - - -

2 CHIEF JUDGE LIPPMAN: What if - - - what if  
3 what he does can't create an imminent risk of death?

4 MR. MAXWELL: Well, you - - -

5 CHIEF JUDGE LIPPMAN: Let's get to the  
6 science aspect.

7 MR. MAXWELL: All right.

8 JUDGE READ: That's the second question.

9 CHIEF JUDGE LIPPMAN: Yeah.

10 MR. MAXWELL: Okay.

11 CHIEF JUDGE LIPPMAN: What - - - what if he  
12 knows that it - - - it can't; that modern science  
13 tells us that he - - - that he can't - - - that it  
14 can't create an imminent risk of death?

15 MR. MAXWELL: Well - - -

16 CHIEF JUDGE LIPPMAN: If that's the modern  
17 science, how does that impact on - - - on the  
18 depraved indifference?

19 MR. MAXWELL: Right. Well, again, we're  
20 working from the record as developed - - -

21 CHIEF JUDGE LIPPMAN: Yeah, go ahead.

22 MR. MAXWELL: - - - before the grand jury.

23 CHIEF JUDGE LIPPMAN: Sure.

24 MR. MAXWELL: We have a doctor who  
25 testifies that he has patients who are - - - are

1 multidrug resistant who - - - you know, there - - -  
2 there's some people who are multidrug resistant  
3 patients and they die. Page 9 of the second - - -

4 CHIEF JUDGE LIPPMAN: Well, it's  
5 conceivable - - -

6 MR. MAXWELL: It's not only conceivable;  
7 it's part of what happened.

8 CHIEF JUDGE LIPPMAN: But - - - but - - -  
9 but if - - - yes. But if - - - if we know - - - if  
10 we take notice of what the science is today, even  
11 though it's conceivable that you could die, does that  
12 carry the day rather than the broad sweep of what  
13 modern science tells us? Because it's possible that  
14 create - - - then the imminent danger is created. Is  
15 that your argument?

16 MR. MAXWELL: Yeah, I'd ask you again to  
17 focus on what was before this grand jury.

18 CHIEF JUDGE LIPPMAN: Yeah. Go ahead.

19 MR. MAXWELL: Not what was in amici brief.  
20 Not what was in - - -

21 CHIEF JUDGE LIPPMAN: Sure.

22 MR. MAXWELL: - - - other people's studies.

23 CHIEF JUDGE LIPPMAN: Go ahead.

24 MR. MAXWELL: And you have a doctor who  
25 says that for a majority of patients, they can put

1 the virus to sleep.

2 JUDGE READ: Isn't that enough to show  
3 there's no imminent or grave risk of death?

4 MR. MAXWELL: No, and let me give you an  
5 example. If we had a conduct that's going to make  
6 right-handed people sick but they're going to be  
7 okay, but left-handed people are going to die. Well,  
8 there's a grave risk of death there, although we  
9 would know who's left-handed and who's right-handed.

10 JUDGE READ: So you're saying - - -

11 MR. MAXWELL: Here we don't know - - -

12 JUDGE READ: - - - because he didn't know  
13 whether he would be multidrug resistant?

14 MR. MAXWELL: Exactly. That - - -

15 JUDGE ABDUS-SALAAM: Well, what about - - -  
16 counsel, does the level of risk of the activity that  
17 the two folks engaged in, does that have anything to  
18 do with - - - with whether this could be reckless or  
19 whether it's depraved indifference? Wasn't there  
20 some testimony about the risk being fairly low based  
21 upon the activity that these two individuals engaged  
22 in, the type of sex they engaged in? Isn't the risk  
23 of contraction of HIV low in those individuals?

24 MR. MAXWELL: Okay. And again, I have to  
25 reference the grand jury presentation here. And the

1 doctor said he didn't know what - - - what the victim  
2 and the defendant, how they engaged in their sexual  
3 activity. The victim described the first time that -  
4 - - that they did this without a condom as anal  
5 receptive by the defendant. But we don't know the  
6 four or five - - - four other times, three or four  
7 other times, how - - - how that conduct was.

8 But we do know from the doctor's testimony  
9 before the grand jury that with repeated contact, the  
10 chance of infection are increased. We know from the  
11 defendant's own statement that he was infected,  
12 according to him, by one time of unprotected sex with  
13 a previous partner. And the grand jury saw the  
14 results here; that we have a defendant infected by  
15 one time. We have a victim infected by four or five  
16 times. I think there's a certain - - - again, giving  
17 - - - viewing the grand jury evidence in the light  
18 most favorable to the People, that's it's reasonable  
19 for the grand jury to assume that this is risky  
20 behavior. That this is - - - and the risk - - - it's  
21 a grave risk of death because once H - - - if you get  
22 HIV, it - - - again, we - - - we - - - we're dealing  
23 with reckless endangerment. We're not dealing with a  
24 death case. With a - - - but - - -

25 JUDGE READ: No, but with - - - but the

1 depravity is the same state of mind.

2 MR. MAXWELL: Yes.

3 JUDGE READ: I mean, we - - - we're - - -  
4 and that's where I'm having trouble, frankly.

5 MR. MAXWELL: Um-hum.

6 JUDGE READ: Is - - - I mean, extremely  
7 reckless.

8 MR. MAXWELL: Um-hum.

9 JUDGE READ: But this other indifference as  
10 to whether or not, you know, somebody lives or dies.  
11 That - - - that's hard for me to see, frankly, in  
12 this - - -

13 MR. MAXWELL: All right.

14 JUDGE READ: - - - series of facts. And  
15 you've said, well, he lied.

16 MR. MAXWELL: Um-hum.

17 JUDGE READ: Are there any other factors  
18 that would lead one to - - - that - - - that would -  
19 - - you know, that would support your position that  
20 this - - -

21 MR. MAXWELL: Well - - -

22 JUDGE READ: - - - is a depraved set of  
23 mind - - - state of mind, not just reckless?

24 MR. MAXWELL: God bless you.

25 The - - - if you look again at the things

1 the defendant himself said both to Detective Eggers  
2 and in his e-mail or his chat-line letter to the - -  
3 - to the - - - to the victim, he's saying things like  
4 I - - - I can't bel - - - I now know I was - - - how  
5 - - - how terrible this is. I - - - I've been awful.  
6 I feel so badly. He knew this was depraved  
7 indifference, and that's what he's telling us. And  
8 this is for - - -

9 JUDGE READ: Well, he knew he did something  
10 wrong he shouldn't have done.

11 MR. MAXWELL: Well, he went beyond saying I  
12 did something wrong. "I consciously made the  
13 decision not to say anything."

14 JUDGE READ: Yeah.

15 MR. MAXWELL: "I made my biggest mistake of  
16 my life that night. I said I didn't want to use a  
17 condom knowing my status but still being so deep in  
18 love." Well, again, a grand jury could see through  
19 that and say well, he was thinking not of the - - -  
20 of the victim at all. He was thinking of himself.  
21 "I was not a good person and I realize that. I was  
22 selfish, and I was concerned with my own false  
23 happiness rather than your health. And all the  
24 sorries are not going to be enough. I'm trembling in  
25 the fact that I did this to somebody. I don't want

1           you to think that I did this to you intentionally."  
2           It's not intentional conduct.  It's depraved  
3           indifference conduct.

4                         JUDGE PIGOTT:  If - - - if - - - if - - -  
5           if the victim here had died, would it, in your view,  
6           be depraved indifference murder?

7                         MR. MAXWELL:  Yes.  And one of the things I  
8           know I'm up against is the awful cases where a  
9           fifteen-month-old is battered to death like in  
10          Barboni.

11                        JUDGE READ:  Right.

12                        MR. MAXWELL:  It's awful.  Well, that would  
13          have - - - it would have been awful to this victim,  
14          as well, if he had contracted HI - - - he has  
15          contracted HIV.  He's near - - - he nearly contracted  
16          AIDS.  His - - - the CD4 cell level, which is talked  
17          about in the record, went down to around 250 - - -  
18          and 200 is AIDS - - - out of where it should be  
19          around 1,000.  He's, fortunately, in - - - has had  
20          recovery, as well.  He's - - - he's responded to the  
21          medicine, but it's not been a - - - a straight  
22          improvement all the time.

23                        And I want to just take a moment and  
24          compare this to what this court wrote in Barboni at  
25          page 403.  It's Barboni 21 NY3rd.  "A brutal course

1 of conduct against a vulnerable victim occurring over  
2 a prolonged or extended period of time is more likely  
3 to be associated with the mental state of depraved  
4 indifference to human life than brutality that is  
5 short in duration and is" - - - "is not repeated."

6 JUDGE READ: That's - - - that's following  
7 up on what we said in Suarez.

8 MR. MAXWELL: Yes. And in Suarez you  
9 talked about - - - you used want - - - the words  
10 wanton, brutal, and callous. Now, Barboni was  
11 brutal. No doubt about it. This case is more in the  
12 category of wanton and callous, wanton being  
13 completely irresponsible and callous being  
14 unsympathetic. And the fact that the victim has - -  
15 - has responded doesn't mean that it wasn't depraved,  
16 because you have to look at it based on what was  
17 presented - - - presented to the grand jury and based  
18 on what happened at the time of the contact.

19 JUDGE PIGOTT: If I remember this right,  
20 Judge Brunetti talked about imminent. And I - - -  
21 and I - - - is imminent in the statute?

22 MR. MAXWELL: I think imminent is in some  
23 of the case law.

24 JUDGE PIGOTT: A cost of grave risk of  
25 death, right? Is - - -

1 MR. MAXWELL: Yes. And - - - and one of  
2 the things I wanted to - - - to - - - why I wanted to  
3 cite Barboni is - - - is imminent - - - I think in  
4 this context, it's - - - it's inapp - - -  
5 inappropriate to equate imminent with immediate. For  
6 instance, some of these cases involving torture are  
7 not immediate death. Barboni himself is - - - part  
8 of the reasons he was found to have committed  
9 depraved indifference murder was that he delayed two  
10 hours. Here we have a defendant who delayed two  
11 months. And AIDS isn't going to cause death at the  
12 moment of infection. But it's still - - -

13 JUDGE READ: Well, in Barboni, though,  
14 wasn't the - - - wasn't the victim near death when  
15 the two - - - two - - - two-hour delay came? I mean  
16 isn't that quite different?

17 MR. MAXWELL: I think it illustrates the  
18 same - - - but it is different to some extent. But I  
19 think it illustrates the idea that death can be  
20 imminent. You can create an injury - - - or - - - or  
21 infect a person and death - - - if that person is not  
22 going to respond to the medicine, death is looming  
23 over that person and it's going to result - - -

24 JUDGE ABDUS-SALAAM: Is there - - -

25 JUDGE RIVERA: Does it matter - - - I'm

1           sorry. Go ahead, please.

2                       JUDGE ABDUS-SALAAM: I was going to say is  
3 there a difference in this case than the usual  
4 depraved indifference case, because we have two  
5 adults consenting to an activity as opposed to what  
6 usually happens where the victim has no say so in  
7 what happens to him or her?

8                       MR. MAXWELL: Yes, Your Honor.

9                       JUDGE ABDUS-SALAAM: Is there a difference?  
10 And wh - - - how - - - how do we factor that  
11 difference?

12                      MR. MAXWELL: My suggestion of how you  
13 factor that in is that - - - I mean, there's some  
14 victim blaming going in the amici brief and in the  
15 defendant's brief. Yes, the def - - - the - - - the  
16 victim did engage in some risky conduct. He did it  
17 under false pretenses. He did it as being misled.  
18 And that's where the recklessness on - - - perhaps on  
19 his part compared to the defendant whose recklessness  
20 goes beyond that to depraved indifference, where not  
21 only did he engage in that contact, but he did so  
22 with - - - under false pretenses. With misleading,  
23 outright lying, saying it's okay.

24                      And there is, I think, a way to illustrate  
25 for you the difference between the victim engaging in



1 love in that sense, right?

2 MR. MAXWELL: Well, no.

3 JUDGE RIVERA: You do it and - - - and they  
4 may not die today - - -

5 MR. MAXWELL: Um-hum.

6 JUDGE RIVERA: - - - but they'll die  
7 eventually, and I thought that might have been your  
8 analogy.

9 MR. MAXWELL: Well - - -

10 JUDGE RIVERA: But this case has that - - -  
11 that difference, it's slightly different from what  
12 Judge Abdus-Salaam is asking you about. What - - -  
13 how do you think we should address that issue?

14 MR. MAXWELL: I think you should address it  
15 as - - - as finding that this is an illustration of  
16 depraved mind, depraved indifference. That is, yes,  
17 the victim engaged - - - voluntarily engaged in this  
18 conduct, but he did it under a fal - - - a false  
19 trust, a - - - a - - - being misled. And - - - and  
20 there's - - -

21 JUDGE RIVERA: No, I understand that  
22 argument. I'm sorry to interrupt you. I mean from  
23 the - - - the - - - the depraved indifference mens  
24 rea that we're - - - we're focused on which is the -  
25 - - the act of the defendant, right.

1 MR. MAXWELL: Um-hum.

2 JUDGE RIVERA: And in this type of a  
3 relationship the defendant may indeed not be thinking  
4 he's opening someone up to the possibility of death.  
5 After all, he says I love this person.

6 MR. MAXWELL: Well, he - - - he should  
7 have. He - - - he's been through it and - - - and  
8 recently through it.

9 JUDGE RIVERA: I think this is going back  
10 to Judge Read's point, you know, about reckless  
11 behavior. And people perhaps do things that - - -  
12 very recklessly.

13 MR. MAXWELL: Um-hum. Well, and in one of  
14 the amici briefs they talk about how difficult it is  
15 to disclose. But this isn't the victim saying can we  
16 do this. Are you read - - - this is the defendant  
17 saying, let's do this. I'm going to take the condom  
18 out of your hand, because you can trust me. It's  
19 safe. Well, it wasn't safe. It - - - it's nev - - -  
20 I - - - I guess one of the amici briefs - - -

21 JUDGE RIVERA: It's not unusual in intimate  
22 relationships to perhaps be less than truthful.

23 MR. MAXWELL: Right, but to go out of your  
24 way to - - - to pursue this - - -

25 JUDGE RIVERA: Um-hum.

1 MR. MAXWELL: - - - mendacity.

2 JUDGE RIVERA: Um-hum.

3 MR. MAXWELL: I think there's where you go  
4 beyond recklessness into depraved indifference.

5 JUDGE RIVERA: Um-hum.

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

8 Counselor?

9 MS. MCDERMOTT: Kristen McDermott from the  
10 Hiscock Legal Aid Society for Mr. Terrance Williams,  
11 may it please the court. The lower court's decisions  
12 here were correct that there was insufficient  
13 evidence of reckless endangerment because both of the  
14 elements were missing. Both grave risk of death and  
15 depraved indifference.

16 JUDGE PIGOTT: If he - - - if he died would  
17 it have been depraved indifference murder?

18 MS. MCDERMOTT: No, absolutely not.

19 JUDGE PIGOTT: What would it have been?

20 MS. MCDERMOTT: I don't think it would have  
21 been a crime.

22 JUDGE PIGOTT: You don't think there's a  
23 crime here at all?

24 MS. MCDERMOTT: I mean, perhaps the  
25 misdemeanors that he's still charged with.

1                   JUDGE PIGOTT: No, no, no. I'm saying he's  
2 dead. He dies and you - - - and - - - and you don't  
3 see depraved indifference here when someone knows  
4 they have a - - - they have a potentially deadly  
5 disease and they know they're going - - - there's a -  
6 - - there's a high degree of probability that they're  
7 going to give it to somebody, that that's not  
8 depraved indifference if the person dies, murder?

9                   MS. MCDERMOTT: Well, there's not a high  
10 probability that he would give it to him.

11                  JUDGE PIGOTT: Well, let's talk about that.

12                  MS. MCDERMOTT: Okay.

13                  JUDGE PIGOTT: Let's assume - - - you  
14 mentioned, I think, roulette, Russian roulette. I  
15 think you called something else in your brief. Now  
16 if you've got one - - - one bullet in a - - - in a -  
17 - - in a gun, you got a twenty-percent chance of  
18 killing yourself. Does that mean it's not depraved  
19 indifference?

20                  MS. MCDERMOTT: I would argue that twenty  
21 percent is not high enough. As - - - as Judge - - -

22                  JUDGE PIGOTT: So if you're passing a - - -  
23 if you take this to - - - putting it to somebody's  
24 head and just, you know, rolling and clicking it,  
25 that's not depraved indifference murder if you shoot

1 him?

2 MS. MCDERMOTT: Well, if it's only - - - if  
3 it's only one bullet.

4 JUDGE PIGOTT: Right.

5 MS. MCDERMOTT: Because as Judge Brunetti  
6 found at the trial court, a one-in-five chance isn't  
7 grave. And - - -

8 JUDGE PIGOTT: So you're saying - - -  
9 you're saying that - - - that somebody who's playing  
10 Russian roulette with somebody else and is - - - and  
11 is putting a gun to somebody's temple and pulling it  
12 knowing that there's a fifty - - - or a twenty-  
13 percent chance that the person's going to die is not  
14 depraved indifference?

15 MS. MCDERMOTT: I think that's certainly a  
16 lot closer to depr - - - to depraved indifference  
17 than what we do have here, certainly.

18 JUDGE PIGOTT: Well, what I'm - - - what  
19 I'm fencing with you over is the twenty percent. And  
20 - - - and if it is depraved, if - - - if - - - let's  
21 - - - let's concede what Mr. Maxwell wants to say  
22 that this conduct is depraved. It's reckless. It's  
23 - - - and the - - - and the person dies, it would be  
24 depraved indifference murder. Now, the fact that the  
25 odds are twenty percent, does that change it?

1 MS. MCDERMOTT: Well, the odds aren't  
2 twenty percent. We don't have anywhere near twenty  
3 percent.

4 JUDGE PIGOTT: Let's assume you've got  
5 somebody drunk driving down the road and he - - - and  
6 he's driving at a high rate of speed and he hits  
7 someone and kills them. Is the odds that a  
8 pedestrian was beyond that bridge at that time less  
9 than five percent mean that he was not guilty of  
10 depraved indifference murder?

11 MS. MCDERMOTT: I mean maybe not - - -  
12 maybe not in that case because of the - - - the risk.

13 JUDGE PIGOTT: So - - - so - - - and I'm -  
14 - - and I'm worried about how we're going to write  
15 this assuming we agree with you. We're - - - we're  
16 going to say all right, so he was drunk, he was going  
17 100 miles an hour, and he was going down a - - - a  
18 local street. But, Jesus, who expects to see  
19 pedestrians at 4 in the morning, so that's not  
20 depraved indifference murder.

21 MS. MCDERMOTT: Well, I think if he was on  
22 a street where there were very rarely pedestrians  
23 there and he wouldn't have any reason to think there  
24 would be, I actually think there wouldn't be depraved  
25 - - -

1 JUDGE PIGOTT: That's just an accident?

2 MS. MCDERMOTT: I mean it's - - - it's  
3 maybe another crime. But I think depraved  
4 indifference is a very, very high level.

5 JUDGE PIGOTT: Let's assume in Boston that  
6 they're - - - they're making - - - a compounding  
7 company is making compound drugs. And as a result,  
8 people are getting meningitis. Is that depraved  
9 indifference if they're simply making - - - knowing  
10 they're making these and that they're dangerous and  
11 they're - - - and they're distributing to people?

12 MS. MCDERMOTT: I think that - - - that  
13 could be.

14 JUDGE PIGOTT: And people die. Would that  
15 be depraved indifference murder?

16 MS. MCDERMOTT: I - - - I think in that  
17 case that would be one of the more - - -

18 JUDGE PIGOTT: And could you then say we  
19 distributed a million peop - - - pills and only  
20 sixty-four people died, so that's a less than five  
21 percent. I mean, that couldn't be depraved  
22 indifference murder, could it?

23 MS. MCDERMOTT: I - - - I would - - - I  
24 think that depraved indifference cases are very fact  
25 specific. And so I don't think that they're very

1 subject to a - - - a percentage cut-off - - -

2 JUDGE PIGOTT: I agree. That's why I  
3 curious when the - - - when the court said well, it's  
4 only at five percent or only it's twenty percent.  
5 That's not a standard by which we should be measuring  
6 these, correct?

7 MS. MCDERMOTT: I think that makes sense.

8 JUDGE READ: Is there - - -

9 JUDGE PIGOTT: So if we can - - - I'm  
10 sorry. Go ahead.

11 JUDGE READ: Is there any question that if  
12 - - - if the Register standard were still the law,  
13 you lose? Is there any question about that or not?

14 MS. MCDERMOTT: No, I don't think so. I  
15 think that there was - - -

16 JUDGE READ: This will be - - - this - - -  
17 this - - - this would not be - - - this would be  
18 under Register, you think - - -

19 MS. MCDERMOTT: I think we - - -

20 JUDGE READ: - - - you'd still win?

21 MS. MCDERMOTT: - - - would win under  
22 either standard because the - - - the risk of death  
23 here was exceedingly low. We have a risk of death  
24 that - - -

25 JUDGE READ: But you - - - okay. You're

1 talking about the - - - the second piece of it. I'm  
2 just talking about the intent. Okay? But you're - -  
3 - because of the - - - of the difference between  
4 Register and Feingold on depravity.

5 MS. MCDERMOTT: Mental culpability.

6 JUDGE READ: And mental - - - yeah, the  
7 mental. You think that this would qualify under  
8 Register?

9 MS. MCDERMOTT: I don't. I don't think  
10 that it would depraved indifference in either case.  
11 I think it's reckless, and I think it was a mistake.  
12 But to - - - to say that this conduct, even looked at  
13 objectively, could demonstrate that someone didn't  
14 care whether another person lived or died at that  
15 very, very rare extraordinary high - - -

16 JUDGE READ: That's the Feingold standard.  
17 But the Register standard is objectively  
18 unreasonable, which kind of goes to some of Judge  
19 Pigott's questions about what the chances are and so  
20 forth, what the odds would be.

21 MS. MCDERMOTT: Right. I - - - I mean I  
22 still think under - - - under either standard I don't  
23 think that - - -

24 JUDGE READ: You win? You think under  
25 either standard you win?

1 MS. MCDERMOTT: I - - - I do.

2 JUDGE READ: All right. I was just curious  
3 as to your answer to that.

4 JUDGE RIVERA: And in this case the  
5 exposure is to HIV positive, not AIDS. I mean, AIDS  
6 is what eventually will kill you.

7 MS. MCDERMOTT: Right. So the risk that we  
8 have to look at is the risk that somebody would both  
9 be exposed to HIV, contract it, then subsequently die  
10 from the virus. And so the combination of those two  
11 risks is actually very, very low.

12 There was discussion about multidrug  
13 resistance. I'd just like to point out that the  
14 expert mentioned that this could potentially happen  
15 to somebody, but the district attorney didn't ask him  
16 how likely it was or how frequently this occurs. If  
17 the district attorney wants to rely on the fact that  
18 the drugs might not work to show that there was a  
19 grave risk of death here, I think at the very least  
20 we need to know how often this is happening.

21 JUDGE PIGOTT: Well, now you're getting  
22 into, it seems to me, the trial. And - - - and what  
23 we're looking at here is what the grand jury had in  
24 front of it, and it had the conduct of the defendant  
25 and - - - and what they put in. I realize it's their

1 proof. They put in the proof as Mr. Maxwell's  
2 described it. And then they had the doctor who said  
3 this guy could die. It's twenty-five - - - twenty  
4 percent if he doesn't get the meds, five percent if  
5 he gets the meds, I guess, or something like that.  
6 And can a jury reach a determination that that's - -  
7 - that should go to a jury?

8 MS. MCDERMOTT: He - - - he didn't - - - he  
9 didn't say that - - - that it would be twenty percent  
10 if he didn't get the meds and five percent if he did,  
11 if I could just clarify that. He said that if he  
12 didn't realize that he had contracted HIV until he  
13 developed AIDS, at that point, if he was put on the  
14 medication, it would be a twenty-percent risk.

15 JUDGE PIGOTT: So isn't that - - - I don't  
16 want to say an affirmative defense, but if this - - -  
17 if this same situation happened in someplace where  
18 the defendant couldn't get the treatment that he got,  
19 what do we got?

20 MS. MCDERMOTT: I think that - - - that  
21 would be a completely different scenario.

22 JUDGE PIGOTT: All right. So why are we  
23 saying in Onondaga County this could be - - - this is  
24 not depraved indifference assault and in - - - it's -  
25 - - I'll pick on Jefferson County, that it is.

1 MS. MCDERMOTT: Well, I think probably any  
2 - - - anywhere in New York State I think- -

3 JUDGE PIGOTT: All right.

4 MS. MCDERMOTT: - - - that we're okay in  
5 terms of grave risk of death because here, where we  
6 happen to live in our state, we have access to these  
7 lifesaving - - -

8 JUDGE PIGOTT: In Jamestown, New York,  
9 that's where Nushawn Williams was, and - - - and he  
10 pled guilty to this - - -

11 MS. MCDERMOTT: Right.

12 JUDGE PIGOTT: - - - knowing that he had  
13 the - - - the - - - the disease; that he gave it to  
14 people. What's the difference?

15 MS. MCDERMOTT: Well, I - - - I - - - I  
16 don't know - - - I don't know that if that had been  
17 reviewed by an Appellate Court that would have been  
18 upheld as depraved indifference. I - - - I don't  
19 think it would have.

20 JUDGE PIGOTT: You don't think that him  
21 wandering around - - - around town and - - - I think  
22 infecting a number of young ladies - - - was depraved  
23 indifference? Or you think it doesn't cause death  
24 and therefore it's not depraved indifference assault?

25 MS. MCDERMOTT: Right. I don't think that

1           there - - - there still can't be a grave risk of  
2           death because of how far the science and medicine  
3           have come. And so - - - so no, I don't think that -  
4           - -

5                         JUDGE PIGOTT: But even if they die you  
6           don't think it's - - - you - - - you think that's - -  
7           - that's just unfortunate that they didn't get the  
8           medication?

9                         MS. MCDERMOTT: I think - - - yes, I mean,  
10          even if that bad consequence happens, you're still -  
11          - - what you're criminalizing is the risk that it  
12          would happen. And so even if this person, you know,  
13          was unlucky enough to contract HIV and then unlucky  
14          enough to be multidrug resistant and die, that was  
15          still a very low chance of it happening.

16                        JUDGE PIGOTT: What you're saying - - - you  
17          - - - you - - - what you're saying is we're  
18          criminalizing the risk.

19                        MS. MCDERMOTT: Yes.

20                        JUDGE PIGOTT: That's what we intend to do,  
21          grave risk.

22                        MS. MCDERMOTT: Right.

23                        JUDGE PIGOTT: You're saying you're  
24          criminalizing that. That's what the statute says you  
25          should criminalize.

1 MS. MCDERMOTT: No, exactly right. I'm  
2 saying the statute is intended to criminalize the  
3 risk, and so if this negative consequence does  
4 happen, as it's going to happen for a very small  
5 percentage of people will have that negative  
6 consequence. It - - -

7 JUDGE READ: You're saying it's not grave?

8 MS. MCDERMOTT: Exactly. It - - - this  
9 just - - - we can't - - -

10 CHIEF JUDGE LIPPMAN: It's a risk but not a  
11 grave risk?

12 MS. MCDERMOTT: Absolutely, yeah. I mean  
13 there - - - there - - - based on the expert's  
14 testimony, there was a risk here that somebody could  
15 die from HIV based on this conduct. But it was so  
16 exceedingly small. It's - - -

17 JUDGE PIGOTT: All right. So you're saying  
18 it could be depraved indifference assault except that  
19 the - - - that the percentages are low, right?

20 MS. MCDERMOTT: I don't think it could be  
21 depraved indifference even - - - even if there was a  
22 grave risk of death. I think the fact that he warned  
23 the complainant to get tested is the crucial factor  
24 that - - -

25 JUDGE PIGOTT: Okay. So if I - - - so if I

1           - - - if I shoot you in the head and then say, you  
2 know, go to the hospital, you could die, I'm okay now  
3 because I really felt bad when I shot you in the  
4 head?

5           MS. MCDERMOTT: No. I think that there is  
6 a fundamental difference between this type of injury  
7 and - - -

8           JUDGE PIGOTT: Well, it's at the - - - it's  
9 at the time that you do it, right? I mean, if - - -  
10 if he - - - if he causes a grave risk to somebody and  
11 then two days later feels badly about it and - - -  
12 and - - - and calls up and says gee, I'm sorry. I  
13 just gave you Ebola, you know, don't do anything for  
14 twenty-one days and stay home, I don't think that  
15 exonerates him, does he - - - does it from - - - from  
16 causing someone to possibly die of Ebola?

17           MS. MCDERMOTT: It does show that he wasn't  
18 indifferent to his life. It does show that - - -

19           JUDGE PIGOTT: Well, at the time, though.  
20 It's got to be at the time, right?

21           MS. MCDERMOTT: Well, I think that in this  
22 case it was - - - it - - - it's - - - we have sort of  
23 an expanded time line here because HIV is such a slow  
24 infection that won't kill somebody for five to ten  
25 years and because HIV won't show up on a test for

1 three months.

2 JUDGE PIGOTT: All right. Let me give you  
3 another hypothetical in - - - in memory of Judge  
4 Smith. Let's - - - let's assume for a minute that I  
5 do think that it's going to infect you and I do think  
6 it's going to kill you. And I'm go - - - and I have  
7 - - - I have sex with somebody anyway. Have I - - -  
8 is - - - is that depraved indifference assault?

9 MS. MCDERMOTT: If you're - - - if you're -  
10 - -

11 JUDGE PIGOTT: I know it. I intend it.  
12 And then - - - and then three days later, it's, you  
13 know, I really thought about it and, gee, I'm sorry.  
14 I - - - you know, I - - - I gave you AIDS and I  
15 didn't mean to - - - or I gave you HIV.

16 MS. MCDERMOTT: I - - - I would say that if  
17 somehow you could prove at that moment that - - -  
18 that that person was truly indifferent to his life,  
19 perhaps at that - - -

20 JUDGE PIGOTT: That's the key, right, at  
21 the moment. It's not later.

22 MS. MCDERMOTT: I don't - - - I don't think  
23 so. I think that it's all relevant, and I think that  
24 even if he cares about his life, you know, enough to  
25 warn him two months later, I - - -

1                   JUDGE PIGOTT: But he didn't care at the  
2 time. I mean you - - - you commit the crime at the  
3 time, right?

4                   MS. MCDERMOTT: I - - - I think that it's  
5 all - - - it's all part of it.

6                   JUDGE PIGOTT: If I give the money back, I  
7 still robbed the bank.

8                   MS. MCDERMOTT: Well, I would look at  
9 People v. Barboni.

10                  JUDGE PIGOTT: Right.

11                  MS. MCDERMOTT: And in Barboni it was - - -  
12 the action was beating the fifteen-month-old. It was  
13 the inaction for two hours that really showed his  
14 depraved state of mind. And so here we have an  
15 expanded time line. The action was the transmission  
16 of HIV. He wasn't - - - he didn't - - - wasn't - - -  
17 didn't do nothing for - - - for - - - until this  
18 person was - - - died from AIDS. He - - - he then  
19 took action two months later and said, I care about  
20 your life. I - - - it's very important to me that I  
21 warn you that you could have been infected so that I  
22 can prevent any grave grievous consequences.

23                  JUDGE RIVERA: Yeah, that - - - it seems to  
24 reflect an understanding that - - - that medical  
25 advances have made it possible to prevent death.

1 Which I - - - I - - - if I'm understanding your  
2 argument, you're also suggesting - - - it's almost  
3 collapsing these two components. You're suggesting  
4 that with that knowledge, right - - - that knowledge  
5 in our community that medical advances now are what  
6 they are, that this individual can't be deprived by  
7 merely exposing his sexual partner to HIV positive.  
8 Or am I not understanding your argument?

9 MS. MCDERMOTT: No. I think that's  
10 absolutely correct. Yes. He - - - if he knows - - -

11 CHIEF JUDGE LIPPMAN: You read into his  
12 mind that he knows modern science?

13 MS. MCDERMOTT: Well, I mean, I think that  
14 they didn't demonstrate that he - - - you know, it's  
15 - - - obviously it's the district attorney's burden  
16 to put this proof of his deprived indifference on the  
17 record, and they didn't demonstrate that he thought -  
18 - - that he was mistaken about the true risks.

19 CHIEF JUDGE LIPPMAN: So that's what they  
20 would have to do to - - - to - - - to have a deprived  
21 indifference? That based on what we know happened  
22 afterwards, you'd have to show that at the time you  
23 actually were saying, I don't care whether this  
24 person lives or dies, therefore I'm going to give  
25 them whatever the disease is. Absent that, then all

1           these circumstances go to show it wasn't depraved  
2           indifference. Is that - - -

3                       MS. MCDERMOTT: Right. I think that that's  
4           correct. I mean you - - - you still - - - even if  
5           you could show that at the time that he had the  
6           mistaken belief that HIV would kill somebody  
7           automatically, you still wouldn't get reckless  
8           endangerment because that was - - -

9                       JUDGE PIGOTT: So if Nushawn Williams went  
10          and made - - - made a 440 motion saying, you know,  
11          Court of Appeals had just said in a recent case that  
12          these - - - these eight girls aren't going to die and  
13          I - - - I pled guilty to this. I - - - you know,  
14          it's obviously a mistake of law, and I should - - -  
15          you know, all of my convictions should be set aside,  
16          he'd be right?

17                      MS. MCDERMOTT: Well, I mean, I think be -  
18          - - because of the guilty plea in that case that - -  
19          -

20                      JUDGE PIGOTT: That's what 440s help you  
21          get out of.

22                      MS. MCDERMOTT: Right. Right. I mean I  
23          think he would be correct in - - - in asserting that  
24          he's - - - he didn't meet the elements of reckless  
25          endangerment. I mean, this - - - this evidence



1 line?

2 MR. MAXWELL: I think the dividing line is  
3 the very illustration we talked about with Judge  
4 Abdus-Salaam's question earlier. If - - - if the  
5 defendant didn't know whether he had HIV and didn't  
6 go get tested and wanted to go engage in this  
7 conduct, there's a reckless component to that. But  
8 he knew and knowing he - - - not - - - not just  
9 continued a safe sex part of their relationship. He  
10 went beyond that and - - - and he - - - and he  
11 convinced the victim to engage in this conduct. And  
12 there was the - - - there was the depravity.

13 JUDGE PIGOTT: Assuming - - -

14 JUDGE ABDUS-SALAAM: That's the difference  
15 - - -

16 JUDGE PIGOTT: Sorry.

17 JUDGE ABDUS-SALAAM: - - - because he - - -  
18 he was asked and he said he - - - he told a lie and  
19 said it's okay. But if he had not been asked, then  
20 you wouldn't be here?

21 MR. MAXWELL: I don't think I'd be here.

22 JUDGE ABDUS-SALAAM: Okay.

23 JUDGE PIGOTT: Let's assume that - - -

24 MR. MAXWELL: Excuse me, Your Honor. May I  
25 just clarify just real quick? I'm sorry.

1 JUDGE PIGOTT: Sure. Please.

2 MR. MAXWELL: He - - - he did more than was  
3 - - - he had stopped the victim. The victim reached  
4 for the condom. He - - - he interceded. So it was  
5 more than just - - - he's the one who brought - - -  
6 he changed the relationship. I - - - I don't know if  
7 that makes a difference but I wanted to put that out.  
8 Yes, I'm sorry, Judge Pigott.

9 JUDGE PIGOTT: On the percentage thing,  
10 let's assume you have a heterosexual couple and the -  
11 - - the - - - the guy's got an STD, doesn't tell his  
12 partner, and she gets an STD. Is that depraved  
13 indifference assault?

14 MR. MAXWELL: Possibly.

15 JUDGE PIGOTT: No, because he's not going  
16 to die.

17 MR. MAXWELL: I - - - well, assault, you  
18 said.

19 JUDGE PIGOTT: Oh, I'm sorry. Yes.

20 MR. MAXWELL: Yeah.

21 JUDGE PIGOTT: But not second degree,  
22 right? Not with a grave risk of death?

23 MR. MAXWELL: I - - - I - - - I find it  
24 kind of strange to be arguing in front of a five-  
25 judge panel and saying a twenty-percent risk of death

1           isn't grave.

2                   JUDGE RIVERA: Well - - -

3                   JUDGE PIGOTT: We feel your pain.

4                   JUDGE RIVERA: I mean he - - - he - - - he  
5           is not absolved of - - - of criminal prosecution.  
6           It's just whether or not it rises to what we have  
7           said in the past, is the kind of very rare case. And  
8           I think that's - - - that's the point. Why isn't  
9           this just reckless? It might be tremendously  
10          reckless, don't get me wrong.

11                   MR. MAXWELL: Well - - -

12                   JUDGE RIVERA: Why is this in that rare  
13          case?

14                   MR. MAXWELL: Well, I - - - I think part of  
15          the reason it's rare is the defendant pretty much  
16          defined depraved indifference for you when he spoke  
17          with Detective Eggers and when he - - - when he sent  
18          his message to the - - - to the victim.

19                   JUDGE RIVERA: Um-hum.

20                   MR. MAXWELL: I - - - I was concerned with  
21          - - - with my own pleasure, my own happiness.

22                   JUDGE RIVERA: Yeah, but we recently  
23          decided a case where someone was driving all through  
24          Brooklyn and, you know - - -

25                   MR. MAXWELL: Well, he was trying - - -

1 JUDGE RIVERA: They were only concerned  
2 with escaping. And they - - -

3 MR. MAXWELL: Well - - -

4 JUDGE RIVERA: - - - put many people in  
5 danger and they killed somebody.

6 MR. MAXWELL: Well, I - - - I - - -

7 JUDGE RIVERA: And you know who wrote that.

8 MR. MAXWELL: Yes. I know who dissented,  
9 too.

10 JUDGE RIVERA: Oh, you do?

11 MR. MAXWELL: But I think this is  
12 different. Thank you.

13 CHIEF JUDGE LIPPMAN: Okay. Thank you  
14 both. Appreciate it.

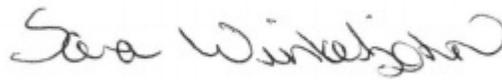
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Terrance Williams, No. 4 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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