*To be Argued by:*
NATHANIEL Z. MARMUR
*(Time Requested: 30 Minutes)*

APL-2020-00021
Criminal Court of the City of New York, New York County
Docket No. 2017NY054915

# Court of Appeals

*of the*

# State of New York

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent,*

– against –

DAVE LEWIS,

*Defendant-Appellant.*

## BRIEF FOR DEFENDANT-APPELLANT DAVE LEWIS

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## PRELIMINARY STATEMENT

By permission of Associate Judge Paul G. Feinman, granted February 10, 2020, A3,[1] Dave Lewis appeals from the decision and order of the Appellate Term, First Department, dated October 24, 2019, A4-A5. That decision affirmed the judgment of the Criminal Court of the City of New York, County of New York, rendered October 25, 2018, convicting Lewis, following a bench trial, of violating New York City Administrative Code §19-190(b) and New York State Vehicle and Traffic Law §1146(c)(1), and sentencing him principally to 30 days' incarceration. A6-A11.

## JURISDICTION AND REVIEWABILITY

This Court has jurisdiction to hear this pursuant to CPL §450.90(1), as it is an appeal by a "defendant . . . from an[] adverse . . . order of an intermediate appellate court entered upon an appeal taken to such intermediate appellate court . . . ." Moreover, the appeal presents legal questions for this Court's review, namely, the interpretation of a state statute and a local ordinance, whether that ordinance is otherwise preempted or unconstitutional, and the sufficiency of the evidence.

All issues raised were expressly preserved in a pretrial motion to dismiss and/or at trial by appropriate requests to charge, objections and a motion for a trial order of dismissal. Moreover, the motion and trial courts explicitly

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[1] "A__" refers to the Appendix of Defendant-Appellant Dave Lewis.

decided the questions presented. See CPL 450.05(2)(a "protest" "is sufficient . . . if in response to a protest by a party, the court expressly decided the question raised on appeal"). As to the proper interpretation of the statute, see A158 (defense request to charge asking trial court to "apply a criminal negligence standard"); A129-A142 (trial court oral decision "disagree[ing] with "defendant['s] conten[tion] that . . . the mens rea element for count one should be criminal negligence"); A17-A18 (trial court written decision). As to preemption and constitutionality, see A31 (Lewis pretrial motion arguing that that AC §19-190 is preempted both by the VTL and the Penal Law). And as to sufficiency of the evidence, see motion and renewed motion for a trial order of dismissal, A144-A145, A163.

## QUESTIONS PRESENTED

1. Whether the lower court erred in charging that the statutes require proof of civil negligence rather than criminal negligence.

2. Whether the evidence was insufficient to prove criminal negligence.

## INTRODUCTION

This appeal asks the Court to police New York State's long-established wall separating civil and criminal liability for traffic accidents. The statutes here threaten to breach that wall by attaching criminal sanctions to a failure

to exercise "due care" – an approach that is explicitly prohibited by the Penal Law and that would transform innumerable ordinary negligence cases into criminal matters. What occurred here was tragic, but it should not be used to upend centuries of established jurisprudence assigning matters of ordinary negligence to civil court.

To be sure, the facts are heart-wrenching. Dan Hanegby, a Citi Bike rider, died when his bicycle collided with a commuter bus driven by Dave Lewis. Lewis, a conscientious and sober driver with a clean record, was dropping off passengers on West 26th Street when he spotted Hanegby riding in the same direction ahead of him. Lewis honked his horn, but Hanegby, who was wearing over-the-ear headphones, a backpack and no helmet, and was distracted by a couple on the nearby sidewalk, apparently did not hear the warning. As both the bus and the bicycle proceeded through the middle lane of the street, which was bookended by two parked cars, Hanegby drifted to his left and made contact with the bus. He tumbled to the ground and was run over by the bus's rear wheels.

Lewis pulled over, exited the bus to aid Hanegby, and waited for the police to arrive. Visibly shaken, Lewis accurately reported what had occurred. All in all, he did everything one would expect of any responsible citizen involved in a traffic accident. Hanegby died at the hospital. Ultimately, Lewis left the scene without being issued a traffic ticket.

Nevertheless, months later, Lewis was charged with violating Administrative Code ("AC") §19-190(b) and Vehicle and Traffic Law ("VTL") §1146(c)(1) for failing to exercise "due care" to avoid the collision. After a bench trial, and over a defense objection, the court charged itself that the term "due care" embodied a civil negligence standard and it returned a guilty verdict.

As demonstrated in Point I, however, the Penal Law requires proof of one of four mental states in criminal cases (including cases charging a violation of the Administrative Code and the Vehicle and Traffic Law). To be culpable, a person must act "intentionally," "knowingly," "recklessly," or with "criminal negligence." PL §15.05. These mental states do not include civil negligence, and thus the trial court fundamentally erred in applying that lower mens rea here. Whether Lewis committed simple negligence is an issue for civil court, but in this State we do not incarcerate individuals for failing to exercise the judgment of a reasonable person. The critical question was whether Lewis was criminally negligent, but the trial did not answer that question. Nevertheless, as shown in Point II, a retrial is not required because the evidence was insufficient to meet the criminal negligence standard.

The convictions should be reversed.

## FACTS AND PROCEDURAL HISTORY

On June 12, 2017, Dave Lewis drove a Coach commuter bus from Orange County into the City. Shortly after 8:00 a.m., he made a right turn from Eighth Avenue onto West 26th Street, a one-way street, heading east to drop off passengers. The accident occurred when the bus was between Eighth Avenue and Seventh Avenue.

### A. The Eyewitnesses

Caroline Eriss testified that she was walking on the south (right) sidewalk of West 26th Street when she saw a bicyclist riding along the south side of the street "behind . . . [a] row of cars." A71. She also saw a Coach bus travelling at "normal speed" behind the bicyclist. A72; see also A100 (speed limit on street was 25 miles per hour). Although the bus was traveling in a "straight line," the bicyclist "swerved left" "around [a] [parked] white van" and "towards the bus" when the two collided. A77-A78, A80; see also A79 (the bicyclist was not traveling in "a straight line" but went "left to circumvent the van"); A80 (the "only movement [she saw] at the point of collision was the bike coming left . . . into the lane").

Following the collision, the bus stopped and Lewis and several passengers disembarked to aid the injured bicyclist. A74. Meanwhile, Eriss called

911 to report the accident. A72-A73. While on the phone she tried to talk to the bicyclist but he could not communicate. A75-A76.

Through Eriss, the People introduced videos of the accident taken by nearby street cameras. A74; People's Exh. 1. The clearest video was consistent with Eriss's testimony and showed Hanegby bicycling on the right side of the street wearing over-the-ear headphones; turning his head to the right toward a couple standing on the sidewalk; looking up and seeing a parked white van; and proceeding left around the van and into the middle lane. Both the bus and Hanegby continued east through the lane between a black SUV parked on the north side of the street and the white van parked on the south side. While in that lane, Hanegby's bike drifted left into the path of the bus. Sandwiched between the bus and the van, Hanegby's handlebars collided with the bus's front right wheel-well, which caused him to tumble to the ground and to be run over by the bus's right rear tires.

Bus rider Lanette Perez also testified for the prosecution. She regularly rode the bus from the Newburgh depot to her job in lower Manhattan. A111-A112. On June 12, 2017, she boarded the bus around 6:30 a.m. She sat in the front row on the passenger side, closest to the window. A112-A113. Between 8:00 a.m. and 8:15 a.m., while on West 26th Street, Perez looked out the window and saw a bicyclist "in front of [her]." A113. When the bus was about

"2-3 car lengths behind him" she heard the driver blow his horn. A113-A114. She thought to herself, "'[w]here does he want the cyclist to go?'" A113. She also noticed a "black [J]eep" parked on the north side of the street "protruding" a bit, and "a[n] oversized wide van" on the south side. A96. Although the bus was travelling "at regular speed," Perez felt that it was "really close" when it was alongside the bicyclist. A113, A115. The bus did not slow down as it passed the bicyclist and, when she turned back, he was no longer there. Id. At that point, the driver looked at his rear-view mirror, said "'oh, shoot. I think I ran over his foot,'" and stopped the bus. A114. After getting off the bus, Perez gathered the bicyclist's belongings and held them for the police. A117-A118.[2]

When the police arrived, Perez told them she "wanted to make a statement." A117. That statement – which she denied on the stand having made, A124, A126 – was inconsistent with her trial testimony: she told a police officer that she "didn't blame the driver," and she did not claim that "the bus veered into" or "brushed" the bicyclist, A87-A88.

Moreover, on cross-examination, Perez acknowledged: (i) that in the three months that Lewis had been her driver neither she nor any other rider had "vocalized any complaints about the manner in which he drove" or complained

[2] In contrast to the testimony of the other eyewitness and the video evidence, Perez claimed that Hanegby was going "[j]ust straight." A121.

that he was speeding or driving recklessly, A119; (ii) that Lewis was not speeding on the day of the accident, A120, A123; (iii) that she never warned Lewis or told him to "slow down," A122; and (iv) and that "there was space for Mr. Hanegby to move his bike at the time that the horn was honked and th[e] ten seconds thereafter to move south towards the curb . . . prior to the incident," A127. She also acknowledged that Hanegby appeared to be looking "to his right" immediately before the accident. A125.

**B. The Police Response**

NYPD Officer Christopher Thompson of the 10th Precinct responded to the scene within minutes. There, he saw a crowd of people around Hanegby, who was "on the ground" and "in pain," and called for an ambulance. A81-A82. The crowd identified Lewis, who acknowledged, "'I'm the bus driver.'" A82-A83. After EMS arrived, Officer Thompson interviewed Lewis, who was "calm but he was worried about the bicyclist." A85. Lewis forthrightly told Officer Thompson that "he was going eastbound on West 26th Street" when a bicyclist "on the right side of the bus . . . was trying to go around [a] parked vehicle." A84. The bicyclist "jostled" and "came in contact with the bus." Id. Following the interview, Officer Thompson handed Lewis back his license without placing him under arrest or issuing him a ticket, and Lewis left to complete his route. A85, A91. Officer Thompson then escorted EMS to the hospital, where Hanegby died around 10:15

a.m. A85. At that time, Officer Thompson called Lewis and asked him to return to the scene, which he did. A86. Officer Thompson also testified that, during his investigation, he did not see any "skid" marks or other indication that the bus was speeding. A89-A90.[3]

Michael O'Connor of the NYPD Collision Investigation Squad responded two hours after the accident. A61. He surveilled the scene, recovered videos, and canvassed unsuccessfully for witnesses. A62-A64. He also interviewed Lewis, who presented as "someone who was just involved in an accident" and was "shaken up." A65. O'Connor testified as follows:

> [Lewis said he] then made a right turn from 8th Avenue onto West 26th Street where he saw a bicyclist in the middle of the road. He hit his horn, but he was unsure as to whether the bicyclist heard him because he had over-the-ear headphones. At which point, he proceeds in the left to go around the bicyclist. He then heard a commotion, felt something, stopped, looked in the mirror and saw the bicyclist was on the ground.

A64-A65.

Officer O'Connor also testified that Lewis passed a portable breath test and other drug and field sobriety tests and did not otherwise appear to be intoxicated. A66. After conducting his investigation and viewing video footage of

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[3] Officer Thompson acknowledged that he found nothing that "led [him] to believe that the driver had committed a crime," A92, although this testimony may have been introduced only for the purposes of a Huntley/Dunaway hearing that was held in conjunction with the bench trial.

the accident, Officer O'Connor did not issue Lewis any tickets for speeding, reckless or distracted driving, failing to yield, or any other infractions. A67. Finally, Officer O'Connor testified about the videos played at trial. He acknowledged that the videos of the moments immediately before the accident showed the bicyclist "looking to his right" toward a "woman in blonde hair" and a "white-shirted gentleman" on the sidewalk, and then drifting left toward the bus. A68-A69.

Officer Michael Cardimone of the NYPD's Collision Technician Group arrived at the scene approximately three hours after the accident to collect evidence. A99, A101, A109. He did not see any debris on the street or damage to the bus. A101. He inspected the bus and reported that it weighed "approximately 50,000 pounds," had "ten tires" and "three ax[le]s," and was 8 feet 10 inches wide. A103-A105. He "mad[e] sure that the turn signals were working" and that the bus had a "valid inspection." A102. He also found scuff marks on the rear right tires, A106, presumably from the bus running over the bicycle.

### C. The Dimensions of the Street

Both parties introduced evidence about the dimensions of West 26th Street. Officer Thompson testified that the street had one lane of traffic but was "big enough for two," A95; that there were no lane markers, A96; that when he arrived on the scene he could safely drive his police car around the crowd in the

street surrounding Hanegby, A97-A98; and that even while he was ministering to Hanegby the street was not shut down because there was "enough room for vehicles" to pass, A93-A94.

Officer Cardimone testified that the street was 33 feet 4.47 inches wide from curb to curb and had no markings indicating "parking, moving or bicycle lanes." A107-A108. A video taken of the street later in the day showed that there was a UPS box truck on the north side of the street, a Coach bus on the south side, and "certainly enough space to drive . . . [an] NYPD vehicles, whether or not it's [an] SUV or a car," between the two. A110 (testimony of Officer Cardimone); People's Exh. 3.

Finally, John Karpovich testified as a defense expert in traffic accident reconstruction. He visited the scene about two hours after the accident and took measurements. A146, A152. He determined that the street – from "curb to curb" – was 33.5 feet wide; that the bus was 8.5 feet wide and had side-view mirrors extending outward approximately one foot on each side; that the white van parked on the south side of the street was 6.6 feet wide; and that the black SUV parked on the north side was 6.2 feet wide. A147-A148; Defense Exh. B. Based on these measurements and a study of the surveillance videos, he concluded that the distance between the white van and the bus was "approximately five feet."

A149. And he testified that a standard bike lane in New York City is five feet at its widest. A151.[4]

**D. Procedural History**

On October 2, 2017, Lewis was charged in an accusatory instrument with violating the Right of Way of Pedestrians and Bicyclists, Causing Physical Injury, AC §19-190(b), a misdemeanor, and Failing to Exercise Due Care While Driving, Causing Serious Physical Injury, VTL §1146(c)(1), a traffic infraction. A29-A30. On December 15, 2017, Lewis moved to dismiss the accusatory instrument on the grounds of facial insufficiency, preemption and unconstitutionality. A31-A47. In a written opinion dated March 14, 2018, the motion court denied the application. A21-A28. It wrote that the allegations regarding Lewis's alleged failure to "look out for [the] bicyclist" and "avoid hitting [him]" were "sufficient to make out the elements of criminal negligence." A23 (emphasis added). The court also held that AC §19-190 was neither preempted nor unconstitutional. A23-A27.

The parties appeared before the trial court on September 12, 2018. At that time, the People offered Lewis, on a plea to the charges, a promised sentence

[4] Karpovich testified that an east-west "tar line" in the street served as a reference point to determine the bike's path. Based on the diminishing distance between the bike and that line, the video highlighted that the bicycle drifted north toward the bus immediately prior to impact. A150.

of a $1,000 fine, the completion of a driving course, and a six-month license suspension. A58-A59. Lewis declined the offer, A59, and trial commenced that day.

A key legal issue at trial was whether the failure to exercise "due care" element of the statutes required a finding that Lewis had acted with criminal negligence, as Lewis argued, or whether ordinary civil negligence was sufficient, as the People contended. The trial court sided with the People. It found that the statutory language was "plain and clear," A18, and thus it charged itself that "due care," for purposes of both offenses, was "that care which is exercised by reasonably prudent drivers," id. The trial court also rejected Lewis's argument that the motion court's reliance on the criminal negligence standard constituted binding "law of the case." A143.

On October 2, 2018, after five days of testimony and argument, the court found Lewis guilty of both counts. A165. On October 25, 2018, Lewis was sentenced principally to 30 days' incarceration. A169-A170. He has completed that sentence.

Lewis appealed to the Appellate Term, First Department, which affirmed the judgment. A4-A5. Relying on its recent decision in People v. Torres, 65 Misc. 3d 19 (App. Term 1st Dept 2019), the court held that AC §19-190 was neither unconstitutional nor preempted for using a civil standard of negligence. It

further held that Lewis's sufficiency challenge was unpreserved and, in any event, lacked merit. A5. The court, applying the general "due care" standard, also held that the verdict was not against the weight of the evidence. Id.

On February 10, 2020, Associate Judge Paul G. Feinman granted leave to appeal both in this case and in Torres. A3.[5]

## SUMMARY OF ARGUMENT

In Point I, we show that the trial court erred in charging itself that Lewis was guilty if he committed ordinary civil negligence. That ruling conflicts with the common law rule, codified in Penal Law Article 15, that criminal statutes turn on the moral blameworthiness of the individual defendant rather than the hypothetical "reasonable person." Article 15 dictates that either a statute imposes strict liability (which these plainly do not) or at least criminal negligence. Moreover, to the extent that the statutes could be interpreted to embody a civil negligence standard, AC §19-190, an enactment of the New York City Council, would be preempted as inconsistent with the state Penal Law, and both laws would violate the due process clauses of the federal and state constitutions.

[5] The Torres case comes to this Court in a slightly different procedural posture. By going to trial, Lewis preserved (i) his statutory claim that both laws, correctly read, embody a criminal negligence standard and (ii) his secondary argument that, if they are read to require only civil negligence, then they are unconstitutional and AC §19-190 is preempted. Torres, by contrast, pleaded guilty and thus preserved only his constitutional and preemption challenges to AC §19-190.

In Point II, we show that the proof was insufficient to establish criminal negligence. A defendant is criminally negligent when he engages in "gross and flagrant" conduct with a "disregard of the consequences" and an "indifference to the rights of others." His conduct must be so egregious that he is to be condemned as morally "blameworthy." No reasonable person could find that Dave Lewis acted in such a manner. To the contrary, he was a careful driver who regularly completed his daily route without incident or complaint. On June 12, 2017, he was as conscientious as always. When he saw Hanegby, he blew his horn to signal his presence. Moreover, Lewis reasonably and in good faith perceived that the bus and the bicycle could proceed safely through the middle lane of the street, which was wide enough to accommodate a standard bike lane. Lewis continued on a straight line, but Hanegby, who was wearing over-the-ear headphones and was distracted by pedestrians on the sidewalk, drifted to his left, colliding with the bus. Responsibly, Lewis stopped the bus, came to Hanegby's aid, and truthfully recounted to the police what had occurred. To call Lewis's conduct "criminally negligent" is to give new meaning to that term.

The convictions should be reversed.

## ARGUMENT

## POINT I

## THE TRIAL COURT ERRED IN CHARGING A CIVIL STANDARD OF NEGLIGENCE RATHER THAN THE CRIMINAL STANDARD REQUIRED BY THE PENAL LAW

The trial court convicted Dave Lewis of criminal conduct and sentenced him to thirty days in jail because it found that he failed to exercise the care of a "reasonably prudent driver." That standard, familiar in civil law, does not make Lewis a criminal. The correct standard is criminal negligence, and thus the court's charge was fundamentally erroneous.

### A. The Statutes

Mr. Lewis was convicted under two statutes, one local and one of State-wide application. New York City Administrative Code §19-190 provides that "any driver of a motor vehicle who fails to yield to a . . . person riding a bicycle when such . . . person has the right of way" and "whose motor vehicle causes contact with a . . . person riding a bicycle and thereby causes physical injury" is guilty of a misdemeanor punishable by up to 30 days' incarceration. AC §19-190(a, b). It is not a violation of the statute, however, "if the failure to yield and/or physical injury was not caused by the driver's failure to exercise due care." AC §19-190(c).

New York State Vehicle and Traffic Law §1146(a) states that "every driver of a vehicle shall exercise due care to avoid colliding with any bicyclist . . . upon any roadway and shall give warning by sounding the horn when necessary." And VTL §1146(c)(1) provides that any driver who fails to exercise due care and thereby "causes serious physical injury" to a bicyclist is guilty of an infraction punishable by up to 15 days' incarceration. (One who commits a second offense within five years is guilty of a misdemeanor. See VTL §1146(d)).

As can be seen, the touchstone of both statutes is the driver's failure to exercise "due care," and the relevant statutory and decisional law applies equally to both. See People v. Urena, 54 Misc. 3d 978, 983 (Queens Cty. Crim. Ct. 2016)("the laws are consistent in language and intent"); People v. Washington, 54 Misc. 3d 802, 810 (Kings Cty. Crim. Ct. 2016)(AC §19-190 was modeled after VTL §1146).

**B. The Trial Court Wrongly Applied a Civil Negligence Standard**

The trial court ruled that the term "due care" is "plain and clear" and, citing a run-of-the mill tort case, means "'that care which is exercised by reasonably prudent drivers.'" A18 (quoting Russell v. Adduci, 140 A.D.2d 844, 845 (3d Dep't 1988)). That perfunctory analysis ignores the key point that this is a criminal case and not a civil matter. See Washington, 54 Misc. 3d at 813 (holding that "the use of the term 'due care' in AC §19-190(c) does not alter the long-

standing doctrine that a civil negligence standard is not the applicable standard in a criminal case").[6]

i. The Common Law Does Not Recognize Civil Negligence as a Basis for Criminal Liability

For over a century, New York has held that moral blameworthiness is critical to a determination of guilt. In 1913, the Court of Appeals recognized that "[a] distance separates the negligence which renders one criminally liable from that which establishes civil liability." People v. Rosenheimer, 209 N.Y. 115, 123 (1913). Thus, in 1927, the court reversed a murder conviction where the trial court refused to charge the jury that "slight negligence" might "support a civil action for damages" but not a criminal conviction. People v. Angelo, 246 N.Y. 451, 457 (1927). Rather, the court held, the law requires criminal negligence – a "disregard of the consequences which may ensue from the act, and indifference to the rights of others." Id.; see also id. at 455 (tracing origins of the civil-criminal distinction to precedents as far back as 1664); People v. Paris, 138 A.D.2d 534, 535 (2d Dep't 1988)("For centuries, the common-law courts have distinguished between ordinary negligence which should not form the basis of a criminal charge,

[6] The Appellate Term, for its part, did not state whether the statutes employ a criminal or civil negligence standard. At most, the court implicitly suggested – by referencing its decision in Torres rejecting the preemption challenge – that the statutes employ a civil negligence standard. A4.

and negligence so egregious as to be deserving of criminal punishment.")((citations and quotation marks omitted).

More recently, this Court reaffirmed that "criminal liability cannot be predicated on every act of carelessness resulting in death" because "[t]he carelessness required for criminal negligence is appreciably more serious than that for ordinary civil negligence." People v. Ladd, 89 N.Y.2d 893, 898 (1996)(citation and alterations omitted); see also People v. Conway, 6 N.Y.3d 869, 873 (2006)(criminal liability reflects the community's sense of moral outrage toward a defendant's blameworthy conduct); People v. Montanez, 41 N.Y.2d 53, 56 (1976)(a "long distance" separates civil and criminal negligence); People v. Haney, 30 N.Y.2d 328, 376 (1972). In fact, ordinary negligence does not justify even the imposition of punitive damages in a civil case, much less incarceration in a criminal case. See Chauca v. Abraham, 30 N.Y.3d 325, 331 (2017)(in light of common law, New York Human Rights Law punitive damages provision requires proof of "wrongful conduct that goes beyond mere negligence").[7]

[7] See also Staples v. United States, 511 U.S. 600, 606-07 (1994)(holding that although a "reasonable person" standard is "a now familiar type" of civil liability in tort law, it is inconsistent with "the conventional requirement for criminal conduct – awareness of some wrongdoing"); Rollin M. Perkins & Ronald N. Boyce, Criminal Law 842 (3d ed. 1982)("Common sense compels the conclusion that there may be a grade or degree of fault sufficient to call for the payment of damages in a civil suit, but quite insufficient to authorize criminal punishment, and this is exactly the result reached by the common law.").

ii. The Penal Law Does Not Recognize Civil Negligence as a Culpable Mental State

In 1967, the Legislature codified the common law by expressly excluding civil negligence as a defined mental state in the new Penal Law. First, PL 15.00(6) provides that "Culpable mental state means 'intentionally' or 'knowingly' or 'recklessly' or with 'criminal negligence,' as these terms are defined in section 15.05." This list is exclusive and does not include "civil negligence" or "due care." See Donnino, Practice Commentary to PL §15.00 (Article 15 defines "the several culpable mental states")(emphasis added); 1964 Proposed New York Penal Law, Commission Staff Notes (under §15.05, "at least one of these particular mental states is essential for commission of the offense"); People v. Fitzgerald, 45 N.Y.2d 574, 579 (1978)("[u]nder the Revised Penal Law criminal negligence is listed as one of the 'culpable mental states'")(emphasis added); People v. Ye, 55 Misc. 3d 1214(A), 2017 WL 1591179, at *4 (Queens Cty. Crim. Ct. May 2, 2017)("Notably, ordinary negligence is not one of the codified culpable mental states (PL §15.05)"); People v. Weckworth, 55 Misc. 3d 1210(A), 2017 WL 1391130, at *3 (NY. Cty. Crim. Ct. Apr. 17, 2017)("for any criminal offense requiring mental culpability, the applicable mental state is one of the four states listed in §15.05").

The original practice commentary underscores that these four states are exclusive. One of the purposes of recodification was to bring clarity to the

Penal Law, a policy that would be hindered were undefined standards such as "due care" or "civil negligence" be allowed to creep back into the statutory lexicon. Here is what the drafters had to say on the matter:

> This section seeks to limit and crystallize the culpable mental states involved in the criminal law.
>
> One of the main defects of the former New York statutes defining offenses involving culpability was their use of a host of largely undefined and frequently hazy adverbial terms, such as "intentionally," "wrongly," "recklessly," "negligently," "with culpable negligence," "with criminal negligence," and much more. The revised section designates only four culpable mental states, defines each, and stipulates that, unless an offense is one of strict liability, at least one of the particular mental states is essential for commission of the offense; the four terms in questions are "intentionally," "knowingly," "recklessly," and "criminal negligence."

Denzer & McQuillan, Practice Commentary to PL §15.05 (1967)(emphasis added). See also Fine & Cohen, Comment, Is Criminal Negligence a Defensible Basis for Penal Liability? 16 Buffalo L. Rev. 749, 749 (Spring 1967)(explaining that drafters followed Model Penal Code (1962) approach by including only these four categories of mental culpability); Note, The Proposed Penal Law of New York, 64 Colum. L. Rev. 1469, 1481 (1964)("the proposed penal law replaces an existing morass of mens rea requirements with a clear and logical system that comprises precise definitions of the four mental states required for criminal liability").

Second, §15.15(2) requires that every non-strict liability offense be interpreted as employing one of those four mental states. It provides:

> A statute defining a crime, unless clearly indicating a legislative intent to impose strict liability, should be construed as defining a crime of mental culpability. This subdivision applies to offenses defined both in and outside this chapter.

See generally People v. Campbell, 72 N.Y.2d 602, 609 (1988). In other words, unless a statute is one of strict liability, it should either include – or, as here, "be construed" to include – one of the four defined terms of mental culpability.[8]

Critically for this appeal, the last sentence of PL §15.15(2) makes this rule applicable to offenses throughout the State. See 6 Greenberg N.Y. Practice, Criminal Law, §1.8 (mental culpability requirement is thereby "expressly made applicable to offenses defined in the Penal Law and elsewhere (e.g., the Vehicle and Traffic Law)"); see also People v. Byrne, 77 N.Y.2d 460, 468

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[8] People v. Feingold, 7 N.Y.3d 288, 294 (2006), which the People relied on below, does not change this analysis. In Feingold, the Court held that "depraved indifference to human life" is a culpable mental state for purposes of PL §120.25 (reckless endangerment in the first degree) in addition to the recklessness element of the crime. See PL §15.15(2)(requiring only that a criminal statute containing a mens rea element "be construed as defining a crime of mental culpability") (emphasis added); 1964 Proposed New York Penal Law, Commission Staff Notes (under §15.05, "at least one of these particular mental states is essential for commission of the offense")(emphasis added).

(1991)(interpreting non-Penal Law statute "consisten[t] with Article 15"); People v. Chesler, 50 N.Y.2d 203, 209 (1980)(applying §15.15(2) to Lien Law larceny offense); People v. Hildebrandt, 308 N.Y. 397, 400 (1955)(for sake of "consistency," criminal VTL offense would be interpreted in same manner as analogous Penal Law provision); People v. Schneider, 176 Misc. 2d 223, 225 (App. Term 2d Dep't 1998)(applying §15.15(2) to Environmental Conservation Law offense).

This principle of uniform application of the mens rea requirement was an important part of the 1967 overhaul of the Penal Law. In re-codifiying and re-organizing crimes to streamline the new Law, the drafters relocated innumerable regulatory offenses to their more convenient statutory home. See The Proposed Penal Law of New York, supra, 64 Colum. L. Rev. at 1469. But the drafters wanted to ensure that, wherever criminal offenses were found, the Penal Law's interpretive principles would still apply. See PL §5.05(2)("[u]nless otherwise expressly provided, or unless the context otherwise requires, the provisions of this chapter shall govern the construction of and punishment for any offense defined outside of this chapter"). And they added the last sentence to §15.15(2) to make absolutely clear that the mental culpability rule applies throughout the State.

Finally, these rules of construction apply equally to local laws, such as the New York City Administrative Code. See F.T.B. Realty Corp. v. Goodman,

300 N.Y. 140, 144 (1949)(holding that New York City Administrative Code provision was a "statutory provision of the state"); People v. Torres, 35 Misc. 3d 1220(A), 2012 WL 1570819, at *2 (Bronx Cty. Crim. Ct. May 4, 2012)(holding that Penal Law attempt provisions apply to New York City Administrative Code through PL §5.05(2)). Thus, the court in People v. Olwes, 191 Misc. 2d 275, 279 (Kings Cty. Sup. Ct. 2002), held that an Administrative Code provision silent on mens rea must be interpreted to include a knowledge requirement. It wrote: "[section 15.15(2) makes] clear that the state legislature intended all crimes to be construed as containing a mental culpability element to the offense unless the statute contains a clear legislative intent to impose strict liability." Id. at 279. See also People v. Barrett, 13 Misc. 3d 929, 941 (N.Y. Cty. Crim. Ct 2006)(applying §15.15(2) to Administrative Code); People v. Bezjak, 11 Misc. 3d 424, 435 (N.Y. Cty. Crim. Ct. 2006)(same).

* * *

In summary: (i) the Penal Law defines four culpable mental states (intentionally, knowingly, recklessly, and criminally negligent), PL §§15.00(6), 15.05; (ii) if an offense is not one of strict liability, then it must be construed as

including one of these four states, PL §15.15(2); and (iii) this is true whether the offense is codified in the Penal Law, the VTL or the Administrative Code, id.[9]

a. VTL §1146 and AC §19-190 are not Strict Liability Offenses and Thus Must be Construed as Defining Crimes of Mental Culpability

The statutes here are not strict liability offenses because they require proof of a failure to exercise "due care" in addition to the voluntary act of driving a bus, and thus they must be read to include a culpable mental state. PL §15.15(2). To begin, there is a strong presumption against strict liability statutes. Id. (strict liability obtains only where "clearly indicat[ed]"); Donnino, Practice Commentary to PL §15.00 ("The Penal Law . . . does not favor offenses of strict liability."). Even a criminal statute that lacks an express mens rea does not impose strict liability "if the proscribed conduct necessarily involves such culpable mental

[9] The Appellate Term did not address any of these points, which were clearly made in Point I of our brief. Instead, the court merely cited Torres for the proposition that a civil negligence standard would not be preempted by the Penal Law. A4-A5. The analysis in Torres, however, suffered from two fundamental errors. First, the Torres Court opined that the four mental states are mere examples, 65 Misc. 3d at 23, but failed to account for the limiting language of §15.00(6) and the legislative history of Article 15, discussed above. Second, the Torres Court cited People v. M & H Used Auto Parts & Cars, Inc., 22 A.D.3d 135, 143 (2d Dep't 2005), for the proposition that "Penal Law §15.05 is inapplicable to crimes, such as violations of Administrative Code §19-190, that are defined outside the Penal Law," 65 Misc. 3d at 23, when the case actually holds the exact opposite. See 22 A.D.3d at 142 (culpable mental states found in §15.05 are, by operation of §15.15(2), applicable to chapters outside the Penal Law, including the Environmental Conservation Law).

state." PL §15.15(2); People v. Wood, 58 A.D.3d 242, 276-47 (1st Dep't 2008). A statute imposes strict liability if it "specifies only an actus reus, where the purpose of the law suggests that it is a strict liability offense and where the legislative history indicates an intent that the offense was one of strict liability." Campbell, 72 N.Y.2d at 609.

Administrative Code §19-190 (and VTL §1146) does not meet these criteria. Most obviously, it does not "clearly indicat[e]" that strict liability applies, but requires proof that the driver "fail[ed] to exercise due care." AC §19-190(c). For example, it would not be enough if a driver caused an accident because the brakes failed or the bus got a flat tire; the very essence of the offense "necessarily involves [a] culpable mental state." PL §15.15(2). See Weckworth, 55 Misc. 3d 1210(A), 2017 WL 1391130, at *2 (holding that the "due care" language in AC §19-190 "indicates that the legislature did not intend to create a strict liability crime . . . [but] clearly contemplated some degree of mental culpability"); Washington, 54 Misc. 3d at 811 (same).

Perhaps most importantly, the People have conceded that AC §19-190 is not a strict liability offense. See A50 (acknowledging that "[a] clear legislative intent to impose strict liability does not appear from the plain language of A.C. §19-190"). At the charge conference they argued that "it is a civil negligence standard." A135. And the City, which appeared in the trial court to defend AC

§19-190, took the same position below. See A55-A56. Accordingly, the statutes here do not impose strict liability.[10]

b. These Offenses Require Proof of Criminal Negligence

Because AC §19-190 and VTL §1146(c)(1) require more than strict liability, they must "be construed as defining . . . crime[s] of mental culpability." PL §15.15(2). Of these four mental states, it is "criminal negligence" that most obviously breathes life into the "failure to exercise due care" standard.

As discussed above, the common law equated criminal culpability with moral blameworthiness. The Penal Law codified this rule by requiring non-strict liability offenses to contain a mens rea element that focuses on the individual's state of mind. PL §§15.05, 15.15(2). Thus, criminal negligence focuses on the state of mind of the defendant rather than the state of mind of the hypothetical "reasonable person." Section 15.05(4) provides:

> A person acts with criminal negligence with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross

[10] The City took the same position in a stipulation entered in recent federal litigation, see Weckworth, supra (citing Stipulated Order of Settlement, Transport Workers v. De Blasio, No. 15 cv. 2235 (BMC), at 3 (E.D.N.Y. Aug. 28, 2015)(City acknowledging "due care" language does not impose strict liability)).

> deviation from the standard of care that a reasonable person would observe in the situation.

(Emphasis added). See People v. Futterman, 86 A.D.2d 70, 74 (4th Dep't 1982)("The factors which impose the greater degree of culpability on a criminally negligent defendant [as opposed to a civilly negligent one] are that the risk which he fails to perceive is so substantial that his failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would exercise in those circumstances.")(emphasis added). The other definitions in §15.05 underscore the point. They provide that a person acts "intentionally" when it is "his conscious objective is to cause [a] result"; that a person acts "knowingly" when "he is aware [of] his conduct"; and that a person acts "recklessly" when "he is aware of and consciously disregards a substantial and unjustifiable risk." (Emphases added). To ensure consistency with the Penal Law's focus on an individual's responsibility for his actions, the "failure to exercise due care" element in VTL §1146 and AC 19-190 must be construed as imposing a criminal negligence standard.

The First Department's decision in People v. Caban, 51 AD.3d 455 (1st Dep't 2008), rev'd on other grounds, 14 N.Y.3d 369 (2010), is instructive. The defendant there was charged with criminally negligent homicide arising out of an automobile accident. In reviewing the sufficiency of the evidence, the court explained that the "defendant was not charged with having intended to cause the

victim's death . . . but with having failed to use due care to avoid an unintended result." Id. at 456. The court thus equated "due care" with "criminal negligence." See Washington, 54 Misc. 3d at 813 ("[w]hile the words 'due care' are often used in tort law" they take on a different meaning in criminal statutes).

Several lower courts have applied this principle to the very statutes at issue here. See, e.g., Weckworth, 55 Misc. 3d 1210(A), 2017 WL 1391130, at *3 ("even though A.C. § 19–190(b) is an offense defined outside the Penal Law, P.L. §15.15(2) requires that A.C. § 19–190(b) be construed as a crime of 'mental culpability,'" i.e., criminal negligence); Washington, 54 Misc. 3d at 819 (Kings Cty. Crim. Ct. 2016)("because AC § 19–190(b), being an offense defined outside the Penal Law, is not clearly designated as a crime of strict liability, its mens rea must conform to the Penal Law's definition of "mental culpability").

Finally, but importantly, traditional rules of construction reinforce our interpretation. First, New York common law holds that "penal statutes are to be narrowly construed against the party seeking their enforcement and in favor of the person being prosecuted." People v. Miller, 138 Misc. 2d 639, 649 (N.Y. Cty. Ct. 1998)(citing McKinney's Statutes §271). Although this axiom does not apply to Penal Law offenses, it continues to apply to criminal offenses found in other statutory schemes. See PL §5.00 ("[t]he general rule that a penal statute is to be strictly construed does not apply to this chapter"); Miller, 138 Misc. 2d at 650 (in

light of the plain language of §5.00, applying "the common-law rule of narrow construction in favor of the defendant" to Election Law offense).

Second, "it is familiar law that a statute should be construed so as to avoid doubts concerning its constitutionality." Lorie C. v. St. Lawrence County Dep't of Soc. Servs., 49 N.Y.2d 161, 171 (1980). See also People v. Davidson, 27 N.Y.3d 1083, 1094 (2016); People v. Epton, 19 N.Y.2d 496 (1967). As is clear from the numerous lower court cases that reached differing results, see infra n. 12, there is a substantial question whether a civil standard of care passes constitutional muster. Reading VTL §1146 and AC §19-190 to require proof of criminal negligence allows the Court to avoid that thorny question and uphold the statutes. See Washington, 54 Misc. 3d at 817 (applying doctrine of constitutional avoidance to require proof of criminal negligence for AC §19-190). Thus, well-established principles of statutory construction further compel application of a criminal negligence standard.

* * *

Accordingly, the trial court erred in charging itself based on a civil negligence standard.

iii. Under the Trial Court's Interpretation, AC §19-190(b) Is Inconsistent with the Penal Law and is Therefore Preempted

We argued above that under PL §15.15(2) the "failure to exercise due care" language of AC §19-190 must be construed to require proof of criminal negligence. Were this Court to find such a construction untenable, however, then the statute should be struck down as preempted.

In general, New York's "home rule" doctrine grants municipalities "authority to adopt local laws to the extent that they are not inconsistent with either the State Constitution or any general law." Eric M. Berman, P.C. v. City of New York, 25 NY3d 684, 690 (2015). This authority includes police power "relating to the welfare of its citizens." New York State Club Assn. v. City of New York, 69 N.Y.2d 211, 217 (1987), aff'd. 487 U.S. 1 (1988). But this authority is not unlimited. Among other things, a local government may not adopt a law "that directly conflicts with a State statute." DJL Restaurant Corp. v. City of New York, 96 N.Y.2d 91, 95 (2001). And that is precisely what occurred here.

As shown, the Penal Law sets uniform rules for criminal offenses throughout the State, and one of those rules is that an offense must either clearly indicate that it is one of strict liability or contain one of the four culpable mental states listed in PL §15.05. See PL §15.15(2). Administrative Code §19-190, were

it found to impose criminal liability for civil negligence, does neither, and thus directly conflicts with the Penal Law.

Indeed, if AC §19-190 is upheld as a civil negligence statute, then nothing would prevent the City from imposing criminal liability for assault, drug possession or larceny committed through civil negligence, to name just a few examples. Article 15 was intended to prevent such localized disruption of our State's comprehensive, carefully-constructed Penal Law. See People v. Salamon, 54 Misc. 3d 960, 964 (Kings Cty. Crim. Ct. 2016) (rejecting the People's "unsubstantiated and dubious proposition that a legislative body enacting a criminal law could avoid the mandated definitions of culpable mental states under Penal Law Article 15 by enacting a criminal law outside the Penal Law and inside other municipal and state laws which deal with specific crimes").

None of this is to say that the City cannot adopt traffic regulations. But it cannot impose criminal sanctions for violating those regulations predicated on a mental culpability standard not found in the Penal Law. For these reasons, to the extent that "due care" in AC §19-190 means ordinary negligence, it is an invalid exercise of the New York City Council's legislative powers. See

Washington, 54 Misc. 3d at 820 (AC §19-190(b) is not preempted because it would be read to employ PL §15.05(4)'s criminal negligence standard).[11]

iv. The Trial Court's Interpretation Would Render the Statutes Unconstitutional

Finally, if a civil standard applies, the statutes are facially unconstitutional under the due process clauses of the federal and state constitutions. To that end, we hereby adopt and incorporate the constitutional arguments being made by Carlos Torres in his appeal also pending before this Court. As that brief demonstrates, the statutes here should be struck down because they "suffer[] from wholesale constitutional impairment." People v. Davis, 13 N.Y.3d 17, 23 (2009)(internal quotations omitted). Specifically, the "use of a civil tort liability standard of negligence in a criminal case violates a defendant's rights under the Fifth and Fourteenth Amendments of the federal constitution and state constitutional protections." People v. Sanson, 52 Misc. 3d 980 (Queens Cty. Crim. Ct. 2016), affirmed on other grounds, 59 Misc. 3d 4 (App. Term 1st Dep't 2018); Salamon, 54 Misc. 3d 960 at 976 ("Both the introduction of criminal guideline

[11] We also join Point I(A)(2) of Torres's brief, which argues that AC §19-190 is preempted by VTL §1146.

elements into civil negligence liability standard and the resulting vagueness violate the defendant's rights of due process.").[12]

* * *

For the reasons set forth above, the statutes here must be construed to require proof of criminal negligence or should be struck down.

[12] We note that several trial courts have ruled on this issue, reaching contrary conclusions. Compare Washington, 54 Misc. 3d at 818 ("In order to preserve the constitutionality of AC §19-190(b), this Court finds it is appropriate to read the statute's use of the term 'due care' to incorporate the criminal negligence mens rea of Penal Law §15.05(4)."), People v. Sanson, 52 Misc. 3d 980 (Queens Cty. Crim. Ct. 2016)(where parties agreed that civil standard was applicable, holding that AC §19-190 is unconstitutional under federal and state law), affirmed on other grounds, 59 Misc. 3d 4 (App. Term 1st Dep't 2018), and Salamon, 54 Misc. 3d 960 (Kings Cty. Crim. Ct. 2016)(same), with People v. Gurung, 54 Misc. 3d 1208(A), 2017 WL 189523 (N.Y. Cty. Crim. Ct. Jan. 13, 2017)(AC§ 19-190 is not unconstitutional), People v. Green, 52 Misc. 3d 1214(A), 2016 WL 4098310 (Queens Cty. Crim. Ct. July 27, 2016)(same), and People v. Urena, 54 Misc. 3d 978 (Queens Cty. Crim. Ct. 2016)(statute is constitutional).

## POINT II

## THE EVIDENCE WAS INSUFFICIENT TO PROVE CRIMINAL NEGLIGENCE

Whether Lewis committed ordinary negligence is a question for civil court, but it does not make him a criminal. The Appellate Term rejected Lewis's sufficiency claim because it found he was not civilly negligent. As set forth above, it should have looked to whether Lewis was criminally negligent, and the proof failed to meet that more exacting standard.[13]

### A. The Sufficiency Issue is Clearly Preserved

Before addressing the merits we pause briefly to address the Appellate Term's holding that Lewis's challenge to the sufficiency of the evidence was unpreserved. Not only is the record to the contrary, but preservation is so obvious that the People never argued otherwise. See People v. Hawkins, 11 N.Y.3d 484, 492 (2008)("To preserve for this Court's review a challenge to the legal sufficiency of a conviction, a defendant must move for a trial order of dismissal, and the argument must be 'specifically directed' at the error being urged.").

[13] Assuming that the Court agrees with us that the statutes require proof of criminal negligence, then Mr. Lewis's sufficiency argument must be addressed under that standard, either by this Court or the Appellate Term on remittitur, because double jeopardy principles prohibit a retrial where the evidence of guilt is insufficient. See Matter of Suarez v. Byrne, 10 N.Y.3d 523, 532-33 (2008). We respectfully submit that, as discussed below, it is clear beyond peradventure that the evidence here does not constitute criminal negligence and thus there is no need to remit the case for further proceedings.

At the close of the People's case, Lewis moved "for a trial order of dismissal for [the] People's failure to establish a prima facie case" under both AC §19-190 and VTL §1146. A144-A145. He argued that the People had not established "a failure of due care" because "the evidence did not establish where the bicycle came from, where the bicycle started, where in fact and if in fact it was the bus driver who failed to yield to the bicycle"; that "there [was] no evidence of misconduct; speeding; distracted driving; anything other than an allegation made by a witness"; that there was "no indication as to whether the bus struck the biker or vice versa"; and that there was "ample area for the biker to go." A144-A145. As required, Lewis renewed that motion following the defense case, see People v. Lane, 7 N.Y.3d 888, 889 (2006), and the court denied it again, see AA163. If Lewis's arguments were not enough to challenge the sufficiency of the evidence, then no defendant could meet the preservation standard.[14]

**B. The Evidence was Insufficient to Show Criminal Negligence**

The Penal Law defines criminal negligence as follows:

> A person acts with criminal negligence with respect to a result or to a circumstance described by a statute defining

[14] Although the motions for a trial order of dismissal clearly preserved the sufficiency challenge, they were unnecessary. After all, the court had already rejected Lewis's central legal argument that the statutes required proof of criminal negligence, and it was therefore useless to assert that the evidence was insufficient to meet an element that the court had held does not exist. Still, Lewis made the motions in an abundance of caution.

> an offense when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

PL §15.05(4). The proof at trial was insufficient to meet this definition, and thus the conviction must be reversed. See People v. Danielson, 9 N.Y.2d 342, 349 (2007).

As can be seen, criminal negligence is more than just the exercise of poor judgment. It is "gross and flagrant" conduct, People v. Ladd, 89 N.Y.2d 893 (1996), committed with a "disregard of the consequences which may ensue from the act, and indifference to the rights of others," People v. Angelo, 246 N.Y. 451, 457 (1927), that is so reprehensible the community would condemn the defendant as morally "blameworthy," People v. Conway, 6 N.Y.3d 869, 872 (2006). See also People v. Futterman, 86 A.D.2d 70, 75 (4th Dep't 1982)("To stigmatize the defendant with the brand of a criminal for an incident, which though tragic, was the result of an error in judgment, would be wholly inappropriate [and] inconsistent with the purpose of the criminal law.").

Under these standards, ordinary accident cases do not amount to criminal negligence. As this Court has held, for a driver "to badly misgauge his ability to handle road conditions is not the kind of seriously condemnatory behavior that the Legislature envisioned when it defined 'criminal negligence,'

even though the consequences . . . were fatal." People v. Cabrera, 10 N.Y.3d 370, 378 (2008). Accord, People v. Smith, 62 Misc. 3d 12, 14 (App. Term 1st Dep't 2018)(driver's failure to "make wise and prudent choices" that caused fatal accident did not amount to criminal negligence); People v. Badke, 21 Misc. 3d 471, 478 (Suffolk Cty. Ct. 2008)(driver who allegedly exercised "extremely poor judgment with devastating results" could not be found criminally negligent).

The evidence here fell far short of that exacting standard. It showed that Lewis was a conscientious driver who never sped or drove recklessly, but who calmly and diligently steered his passengers though their daily commute. On the morning of June 12, 2017, he was as careful as he always was. He was sober, drove at a normal rate of speed, and did not swerve, stop suddenly, or accelerate quickly. No passenger voiced a concern or objected to his driving during the entire trip, including immediately before the accident. A later inspection of the bus confirmed that it was in full working order.

When Lewis turned east onto 26th Street, he saw Hanegby ahead of him. Diligently, Lewis honked his horn to warn Hanegby that he was proceeding through the lane next to him. Measurements later confirmed that there was sufficient room for the bus and the bicyclist to pass through safely, even with the SUV and the van parked on opposite sides of the street. Indeed, the unrebutted testimony was that there was "approximately five feet" between the bus and the

parked van, A149; see also People's App. Term Br. at 15, and that a standard bike lane in New York City is five feet at its widest, A151. In other words, the bus and Hanegby shared a space that New York City finds more than suitable to safely accommodate a motor vehicle and a bicyclist.[15] At the very least, it was understandable that Lewis could harbor that perception given that the street was wide enough to contain a regulation bicycle lane and to allow him to pass by unimpeded. And although Lewis drove in a straight line, Hanegby – whose headphones muffled the horn and who was distracted by a couple on the sidewalk – veered left into the bus.

What Lewis did following the collision is what one would expect of any responsible citizen. He stopped the bus, got out, and went to aid Hanegby. He was distraught over what had occurred – visibly "shaken," as one officer put it. After being advised by law enforcement that he could complete his route, which he did, Lewis returned to the scene when he was requested to do so. He submitted to a breathalyzer and other tests, all of which confirmed his sobriety. He sat for a voluntary interview in which he honestly recounted the events of the morning. Finally, he was released without a summons or a ticket.

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[15] See also New York City Department of Transportation Street Design Manual at 55, 59 ("a standard [bicycle] lane" of five feet provides "enhance[ed] safety"), available at https://www1.nyc.gov/html/dot/downloads/pdf/nycdot-streetdesignmanual-interior-lores.pdf (last visited on April 21, 2020).

Just to state these facts is to recognize that Lewis did not act with the moral blameworthiness that is the touchstone of criminal negligence. A canvass of other accident cases from this Court confirms the point. For example, this Court has rejected findings of criminal negligence (i) where a defendant drove the wrong way on an exit ramp and then tried to correct his mistake by making a U-turn across three lanes of traffic, killing a young motorcyclist, People v. McGrantham, 12 N.Y.3d 892 (2009); (ii) where "a young and inexperienced driver[] entered a tricky downhill curve, the site of other accidents, at a rate of speed well in excess of the posted warning sign," People v. Cabrera, 10 N.Y.2d 370, 378 (2008); and (iii) where on a rainy and foggy night a defendant smashed into a marked police car parked in the right lane of a highway with its emergency lights flashing, People v. Boutin, 75 N.Y.2d 692, 694 (1990).

On the other hand, this Court has affirmed convictions predicated on criminal negligence where the conduct was far more egregious than what occurred here. For example, (i) where an intoxicated defendant was driving on the wrong side of a foggy road at 4:30 a.m., People v. Ladd, 89 N.Y.2d 893, 894-95 (1996); (ii) where a defendant drove at least 90 miles per hour in a 55 miles per hour speed zone, accelerated after his passengers warned him to slow down, continued past a line of stopped cars, and ultimately struck a State Trooper, People v. Paul V.S., 75 N.Y.2d 944, 945 (1990); (iii) where an intoxicated defendant sped through a

residential street that was under construction, People v. Loughlin, 76 N.Y.2d 804, 807 (1990); and (iv) where a defendant was drag racing on a thoroughfare, ran a red light, and struck a vehicle, People v. Ricardo B., 73 N.Y.2d 228, 231 (1989).[16]

Lewis's conduct falls squarely within the former group of cases. He believed in good faith that he could safely proceed in a straight path within the speed limit if he honked his horn to warn Hanegby; that there was abundant room behind the white van for Hanegby to pull over; and that, even if Hanegby continued on, the street was wide enough to accommodate both of them. Finally, Lewis's appropriate response to the accident, and his forthright cooperation with the investigation, confirm that he lacked moral blameworthiness. See People v.

[16] See also People v. Harris, 81 N.Y.2d 850, 851 (1993)(affirming conviction where "defendant, while legally intoxicated, drove his motor vehicle in the dark of night from a public highway into an unfamiliar farmer's field, accelerated at times to a speed approximating 50 miles per hour, intermittently operated the vehicle without headlights, and suddenly and forcefully drove through a hedgerow of small trees and shrubs, not knowing what obstacles and dangers lurked on the other side"); People v. Conway, 6 N.Y.3d 869, 872 (2006)(evidence was sufficient to support finding of criminal negligence where "Defendant tried to jockey himself into position to apprehend a suspect fleeing on foot from his patrol car by simultaneously manipulating a gun, with his finger on the trigger, and the steering wheel with his right (nondominant) hand while reaching out of the open window of the moving car and grappling with the suspect with his left hand").

Lowe, 314 A.D.2d 1, 6 (1st Dep't 1995)(looking to defendant's responsible post-accident conduct as a factor in determining moral blameworthiness).[17]

Whether Lewis erred in his perception, whether Hanegby was responsible because he was distracted and veered from his path, or whether some combination of the two caused the accident, are questions for civil litigation. But a well-intentioned misjudgment does not equate to criminal negligence. Surely his conduct was "not the kind of seriously condemnatory behavior that the Legislature envisioned when it defined 'criminal negligence.'" Cabrera, 10 N.Y.3d at 379.

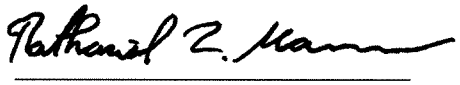
[17] At sentencing, the prosecutor took note of Lewis's post-accident conduct: "[H]is behavior after the fact is something I must acknowledge. The defendant did stop the bus. He did approach the victim as he lay dying on the street. He did cooperate with the police, and I believe he was truthful in his statement to the police." A166-A167.

## CONCLUSION

Dave Lewis was convicted of driving a bus with civil negligence, which is not a crime in our State. What is a crime is to drive a bus with criminal negligence, but the evidence at trial was insufficient to prove that offense. Accordingly, the convictions should be reversed.

Dated: New York, New York
May 4, 2020

THE LAW OFFICES OF
NATHANIEL Z. MARMUR, PLLC

By: 

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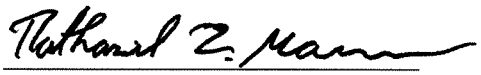
## WORD COUNT CERTIFICATION

I certify that, excluding the Table of Contents and Table of Authorities, the foregoing brief was prepared on Microsoft Word using a 14-point Times New Roman font, and totals 10,113 words.



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