APL-2020-00020

To be argued by
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(15 MINUTES REQUESTED)

Court of Appeals

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

CARLOS TORRES,

Defendant-Appellant.

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BRIEF FOR RESPONDENT

INTRODUCTION

By permission of the Honorable Paul G. Feinman, granted on February 10, 2020, defendant Carlos Torres appeals from a September 23, 2019 order of the Appellate Term, First Department, unanimously affirming the September 13, 2017 judgment of the Criminal Court of the City of New York, New York County (Steven M. Statsinger, J., at motion to dismiss; Joanne Watters, J. at plea and sentencing), convicting him, upon his plea of guilty, of Failure to Exercise Due Care to Avoid Collision with a Pedestrian (VTL § 1146[c][1]) and Failure to Yield to a Pedestrian (N.Y.C. Admin. Code [hereinafter "AC"] § 19-190[b]). *People v. Torres*, 65 Misc. 3d 19 (App Term, 1st Dep't 2019). The court revoked defendant's driver's license for six months and sentenced him to a conditional discharge, requiring him to pay a $750

fine and complete a driving program. Defendant has paid the fine and completed the driving course.

Defendant's conviction stems from his conduct on February 12, 2016 while he was driving a loaded truck from Brooklyn to New Jersey to deliver dirt. At about 10:02 a.m., defendant stopped at a red light on West 37th Street and Eleventh Avenue in Manhattan. When the light turned green, defendant made a right turn. As defendant turned, he drove over and killed a woman. The woman was crossing the street inside a pedestrian crosswalk with the "WALK" sign in her favor. Defendant did not see the woman, but thought that it "felt funny" as he turned. When he realized that he had struck and killed someone, defendant pulled over and called 911.[1]

On April 6, 2016, defendant was charged by misdemeanor complaint, Docket Number 2016NY024559, with Failure to Exercise Due Care to Avoid Collision with a Pedestrian (VTL § 1146[c][1]) and Failure to Yield to a Pedestrian (AC § 19-190[b]).

On March 31, 2017, defendant moved to dismiss the count of AC § 19-190 on the grounds that the ordinance unconstitutionally imposed criminal liability based on a civil negligence standard, and that it was preempted by state law. On May 2, 2017, the Honorable Steven M. Statsinger denied defendant's motion.

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[1] The facts presented here are gathered from the minutes of the April 29, 2016 appearance (A168-170), the minutes of the September 13 2017 plea and sentencing proceeding (A170-177), the misdemeanor complaint (A11-12), and the People's voluntary disclosure form (A16-21).

On September 13, 2017, defendant pled guilty as charged in exchange for a recommended sentence of a six-month license revocation, and a conditional discharge requiring him to pay a $750 fine and complete a driving program. That same day, the court sentenced defendant as promised.

On appeal to the Appellate Term, First Department, defendant reiterated his claims that AC § 19-190 was unconstitutional and preempted by state law. Defendant also contended that his plea was involuntary because the court failed to specify the amount of time following his guilty plea he had to complete the conditions of his sentence, and that his $750 fine was excessive.

On September 23, 2019, the Appellate Term upheld the constitutionality of AC § 19-190 and unanimously affirmed defendant's conviction. Specifically, the court rejected defendant's preemption arguments and found that "[c]riminal liability for death caused by ordinary negligence" could be "imposed by statute." *Torres*, 65 Misc. 3d at 22-23 (*quoting People v. Haney*, 30 N.Y.2d 328, 334 n.7 [1972]). The court also concluded that defendant's guilty plea was knowing, voluntary, and intelligent and that there was no basis to reduce his $750 fine. *Id.* at 23. On February 10, 2020, Judge Feinman granted defendant's application for leave to appeal. *People v. Torres*, 34 N.Y.3d 1163 (2020).

On appeal to this Court, defendant again contends that AC § 19-190 unconstitutionally imposes criminal liability based on a civil negligence standard and that it is preempted by the Vehicle and Traffic Law and the Penal Law. Defendant

also reiterates his claim that his guilty plea was involuntary and requests dismissal of the entire complaint.

QUESTIONS PRESENTED

1) Does AC § 19-190 constitutionally impose criminal penalties where a defendant fails to exercise due care?

   The Appellate Term answered this question in the affirmative.

2) Is AC § 19-190 preempted by either the Penal Law or the Vehicle and Traffic Law?

   The Appellate Term answered this question in the negative.

3) Did the court's decision to advise defendant of the length he would have to complete the conditions of his conditional sentence at the sentencing proceeding, but moments after he pled guilty, deprive him of his constitutional right to due process?

   The Appellate Term answered this question in the negative.

SUMMARY OF ARGUMENT

In this case, defendant negligently struck and killed a woman while driving his truck, in violation of VTL § 1146 and AC § 19-190. Both statutes impose criminal liability where a defendant fails to exercise "due care," a mental state equitable with ordinary, civil negligence. The Appellate Term correctly concluded that civil negligence was an acceptable *mens rea*. The court reasoned that if strict liability crimes which require no culpable mental state at all pass constitutional muster, then ordinary negligence—a more culpable mental state—should as well. That decision comported with precedent from this Court, federal courts, and other state courts, which have

recognized that "[c]riminal liability for death caused by ordinary negligence is sometimes imposed by statute." . *Haney*, 30 N.Y.2d at 334 n.7 .

Moreover, as the Appellate Term recognized, AC § 19-190 is not preempted by State law. The New York City Council routinely passes parallel legislation regulating traffic, and the Vehicle and Traffic Law expressly authorizes it to do so. *See* VTL §§ 1640, 1642. Likewise, the Penal Law does not circumscribe the field of permissible criminal mental states. This Court has, for example, recognized depraved indifference as a culpable mental state even though it is not enumerated in the Penal Law.

Finally, defendant's plea was knowing and voluntary and he failed to preserve the challenge he attempts to raise on appeal.

RELEVANT PROCEEDINGS

Defendant's Motion to Dismiss

On March 31, 2017, defendant moved to dismiss the count of AC § 19-190 on the grounds that the ordinance unconstitutionally imposed criminal liability based on a civil negligence standard, and that it was preempted by both the Vehicle and Traffic Law and the Penal Law (3/31/17 Defense Motion: A25-37).[2] In response, the People argued that civil negligence was an acceptable criminal *mens rea*, and that AC § 19-190 was not preempted by state law (Undated People's Response: A42-64).

[2] Parenthetical references preceded by "A" are to defendant's appendix.

On May 2, 2017, the Honorable Steven M. Statsinger denied defendant's motion, finding that AC § 19-190 "makes out a strict liability 'public welfare offense' and does not contain a *mens rea* element at all" (5/2/17 Decision: A158). The court recognized that both the City and the District Attorney's Office had taken the position that AC § 19-190 was not a strict liability offense, but still held that due care did "not describe a mental state at all – it describe[d] a manner of driving" (5/2/17 Decision: A163, 165).

The court held that AC § 19-190 was not preempted by the Penal Law because it was applying strict liability, one of the enumerated culpable mental states in the Penal Law (5/2/17 Decision: A164). Judge Statsinger further held that AC § 19-190 was not preempted by the Vehicle and Traffic Law because it "punishe[d] conduct that [wa]s more severe" than VTL § 1146 (5/2/17 Decision: A166). The judge explained that AC § 19-190, unlike VTL § 1146, covered "conduct only in those areas where the pedestrian . . . had the right of way" and could "lay legitimate claim to a right to safe passage" (5/2/17 Decision: A166).

The Plea and Sentencing Proceeding

On April 29, 2016, defendant appeared with counsel before the Honorable Joanne Watters. The People recommended a plea to both counts charged in the complaint—VTL § 1146(c) and AC § 19-190—in exchange for a six-month license revocation, a $750 fine, and completion of a driving program (Plea: A172). Defense counsel indicated that defendant wanted to plead guilty, but asked that defendant's

license merely be suspended and that the total time of the suspension be lowered because "a suspension would essentially put [defendant] out of a job" (Plea: A173). The prosecutor responded that a license revocation was appropriate because defendant had killed a woman and because defendant had been in other collisions while driving "the same exact vehicle" earlier that year (Plea: A173). After taking "everything into consideration," the judge concluded that she would offer defendant the plea recommended by the People, including a six-month license revocation. Defendant stated that he wanted to accept the offer (Plea: A174-75).

In response to the court's questions, defendant confirmed that he had discussed the case with his attorney and that he was pleading guilty of his own free will because he was, in fact, guilty of the charged crimes (Plea: A175). The court informed defendant that, by pleading guilty, he was giving up his rights to a trial, to confront and cross-examine the People's witnesses, to testify or remain silent, and to have the People prove their case beyond a reasonable doubt (Plea: A175). Defendant confirmed that he understood that he was forfeiting those rights (Plea: A175).

Then, defendant formally pled guilty, admitting that, on February 12, 2016, at the corner of West 37th Street and Eleventh Avenue, he "failed to yield to [a] pedestrian[ ] who had the right of way" and "struck a pedestrian, causing this individual to die" (Plea: A176). Counsel noted that defendant was "reserving his right to challenge the constitutionality [of AC § 19-190] on appeal" (Plea: A176).

Defendant declined his opportunity to speak before sentencing (Plea: A176). Then, the court sentenced defendant as promised to a conditional discharge, "the condition being that [he] pay a $750 fine [and] that [he] sign up to complete the Attitudinal Driving Program." The court also ordered that defendant's "license and privilege to drive in the State of New York w[ould] be revoked for six months," and that defendant would be required to pay an $88 mandatory surcharge (Plea: A177). In response to the court's questions, defendant confirmed that he understood that he needed "to show proof of completion of the program, [and] payment of the fine and surcharge" on or before November 15, 2017 (Plea: A177).

Defendant's Appeal to the Appellate Term

On appeal to the Appellate Term, First Department, defendant argued in pertinent part that AC § 19-190 was unconstitutional for impermissibly imposing criminal liability based on a civil negligence standard and that it was preempted by the Vehicle and Traffic Law and the Penal Law (Defendant's Brief to the Appellate Term, First Department: A189, 191, 195-18). Defendant also argued that his plea was invalid because the court did not inform him of the length of his conditional discharge term until moments after he pled guilty (Defendant's Brief to the Appellate Term, First Department: A200).

In a decision and order dated September 23, 2019, the Appellate Term, First Department unanimously affirmed defendant's conviction. *Torres*, 65 Misc. 3d at 20. The court observed that legislatures have "'always been allowed wide freedom to

determine the extent to which moral culpability should be a prerequisite to conviction of a crime,'" *id.* at 21 (*quoting Powell v. Texas*, 392 US 514, 545 [1968] [Black, J., concurring]) and that strict liability crimes were "legal and constitutional." *Id.* In recognition of those facts, the court held that, "if there is no constitutional infirmity in a crime that requires no mental state at all, then, a fortiori, there is no constitutional infirmity in an offense that requires proof of defendant's failure to exercise due care, a more culpable mental state." *Id.* at 22. The court noted that "the failure to exercise due care standard" in AC § 19-190 was "identical" to the standard in VTL § 1146 "which, inter alia, punishes as a class B misdemeanor a driver who injures a pedestrian or bicyclist while failing to exercise due care, if the driver has a prior conviction for such an offense within the last five years." *Id.* (*citing* VTL § 1146[d]). Accordingly, the court ruled that civil negligence was a "constitutional *mens rea* for criminal liability." *Id.*

The Appellate Term similarly rejected defendant's claims that AC § 19-190 was preempted by State law. Relying on this Court's decision in *People v. Lewis*, 295 N.Y. 42 (1945), the court noted that local laws "which do not prohibit what the State law permits nor allow what the State law forbids are not inconsistent." *Torres*, 65 Misc. 3d at 22. The court concluded that, "instead of criminalizing an act that the state law allows, section 19-190 essentially strengthens the criminal penalty for injuring pedestrians . . . already authorized by VTL § 1146." *Id.* Because the local law "merely

provide[d] a greater penalty than state law," it did not "run afoul of the conflict preemption doctrine." *Id.* (*citing Zakrzewska v. New School*, 14 N.Y.3d 469 [2010]).

Similarly, the court held that the Penal Law did not prevent the City Council from "utilizing a standard of culpability independent of those set forth in article 15 of the Penal Law." *Torres*, 65 Misc. 3d at 22. Because Penal Law § 15.05 was inapplicable to crimes "defined outside the Penal Law," the court rejected defendant's claim that the doctrine of field preemption prohibited the City Council from using "other standards of culpability" beyond those listed in the Penal Law. *Id.* at 23.

The court also concluded that defendant's guilty plea was knowing, voluntary, and intelligent. *Torres*, 65 Misc. 3d at 23. In the alternative, the court held that defendant's requested relief—"dismissal of the accusatory instrument, rather than vacatur of the plea"—was not "in any way appropriate." *Id.* Because defendant "expressly request[ed]" affirmance if the court would "not grant dismissal," the court affirmed defendant's conviction on that "basis as well." *Id.* (*citing People v. Conceicao*, 26 N.Y.3d 375, 385 n.1 [2015]).

POINT I

THE APPELLATE TERM PROPERLY DETERMINED THAT ADMINISTRATIVE CODE § 19-190 WAS CONSTITUTIONAL AND WAS NOT PREEMPTED BY THE VEHICLE AND TRAFFIC LAW OR THE PENAL LAW (Answering Defendant's Brief, Point I).

Defendant claims that AC § 19-190 is unconstitutional because it imposes criminal liability on the basis of an ordinary, civil negligence standard. Defendant also

maintains that the ordinance is preempted by both the Vehicle and Traffic Law and the Penal Law (Defendant's Brief [hereinafter "DB"]: 7, 22, 24).

At the outset, it is not clear that defendant's complaints are properly before this Court. To be sure, challenges to the constitutionality of a statute under which a defendant is convicted survive a guilty plea. *See People v. Lee*, 58 N.Y.2d 491, 493-94 (1983). However, "[a]ny issue concerning the proper interpretation or application of [a] statute" is forfeited by a guilty plea. *People v. Levin*, 57 N.Y.2d 1008, 1009 (1982). Furthermore, generally, a party has standing to attack the constitutionality of a statute only insofar as it was applied to him. *See County Court of Ulster County, N.Y. v. Allen*, 442 U.S. 140, 154-55 (1979); *Matter of Sarah K.*, 66 N.Y.2d 223, 240 (1985).

Here, as applied to defendant, AC § 19-190 was deemed to be a strict liability offense (5/2/17 Decision: A158, 161, 164). But defendant's arguments are all premised on AC § 19-190 imposing criminal liability on the basis of civil negligence, not strict liability. Accordingly, defendant presents a preliminary question of statutory interpretation concerning AC § 19-190, but would seem to have forfeited that claim via his plea.[3] To the extent that defendant's claims are properly before this Court, his arguments are meritless.

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[3] To be sure, defendant attempted to "reserve[ ] the right to present these claims on appeal" (DB: 20). However, as in *People v. Di Raffaele*, that reservation is unenforceable. Instead, defendant would at most, be "entitled, if he wishes, to withdraw his plea of guilty" on the basis that his plea was predicated on a false assurance that he could "preserve his right of appeal." *People v. Di Raffaele*, 55 N.Y.2d 234, 241 (1982).

A. Civil negligence is a constitutional *mens rea* for criminal liability.

Even if this court were to reach defendant's challenge to AC § 19-190, it is clear that ordinary, civil negligence is a constitutional criminal standard in New York. Statutory enactments are presumed to be valid, and a defendant seeking to invalidate a statute as unconstitutional must demonstrate its invalidity "beyond a reasonable doubt." *People v. Tichenor*, 89 N.Y.2d 769, 779 (1997) (*citing People v. Pagnotta*, 25 N.Y.2d 333, 337 [1969]).

AC § 19-190(a) states that "any driver of a motor vehicle who fails to yield to a pedestrian or person riding a bicycle when such pedestrian or person has the right of way shall be guilty of a traffic infraction." AC § 19-190(b) continues that a driver who violates subsection (a) and "whose motor vehicle causes contact with a pedestrian or person riding a bicycle and thereby causes physical injury, shall be guilty of a misdemeanor." Finally, AC § 19-190(c) states, "It shall not be a violation of this section if the failure to yield and/or physical injury was not caused by the driver's failure to exercise due care."

The parties are in accord that in order to sustain a conviction under AC § 19-190, the People are required to prove, among other things, that the defendant failed to exercise due care. Both parties further agree that strict liability crimes are legally permissible. In defendant's view, however, criminal liability in New York cannot be premised on civil negligence because the law "does not allow for an additional *mens rea* category in between strict liability and gross negligence" (DB: 17).

He argues that to allow the imposition of criminal responsibility based on civil negligence would "abrogate centuries of common law and contravene clear legislative intent" (DB: 26). Defendant's argument is at odds with settled law.

Penal Law § 15.10 states that "[t]he minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which he is physically capable of performing." Penal Law § 15.10 goes on to explain that, "[i]f such conduct is all that is required for commission of a particular offense, or if an offense or some material element thereof does not require a culpable mental state on the part of the actor, such offense is one of 'strict liability.'" Clearly, criminal negligence is not the minimum requirement for criminal liability – strict liability crimes are possible, legal, and constitutional. If there is no *per se* constitutional infirmity in a strict liability offense, it follows that there cannot be one in an offense that requires proof of the defendant's ordinary negligence, a more culpable mental state. *See*, *e.g.*, *Haney*, 30 N.Y.2d at 334 n. 7 ("Criminal liability for death caused by ordinary negligence is sometimes imposed by statute").

Moreover, criminal statutes are not limited to one of the mental states defined in Penal Law §§ 15.05 or 15.10. Penal Law § 15.00(6) states that "[c]ulpable mental state' means 'intentionally' or 'knowingly' or 'recklessly' or with 'criminal negligence' as these terms are defined in section 15.05." Defendant argues that those mental states comprise an exhaustive list that is applicable to all criminal statutes "both in and

outside of the Penal Law" (DB: 14) (emphasis in original). However, Penal Law § 15.05 specifies that the definitions therein "are applicable to this chapter" only. Thus, as the Appellate Term correctly recognized, the Penal Law "does not limit" the mental states that could apply to offenses defined outside of the Penal Law. *Torres*, 65 Misc. 3d at 23. Moreover, this Court has made it abundantly clear that, even for the purposes of the Penal Law, there are more than those four culpable mental states. Most notably, in *Feingold*, this Court stated that "depraved indifference" was a culpable mental state. *See People v. Feingold*, 7 N.Y.3d 288, 294 (2006); *see also People v. Williams*, 24 N.Y.3d 1129 (2015); *People v. Matos*, 19 N.Y.3d 470, 475 (2012); *People v. Prindle*, 16 N.Y.3d 768, 770-71 (2011).

Defendant admits that this Court has recognized "depraved indifference" as a culpable mental state even though it is not itemized in the Penal Law (DB: 16-17). However, he insists that depraved indifference is an "additional element that the People must prove for first-degree reckless endangerment," along with proof that the defendant "recklessly engaged in conduct creating a risk of death—*i.e.*, one of the enumerated mental states" (DB: 16-17, *citing Feingold*, 7 N.Y.3d at 294) (emphasis in original). Defendant is correct that first-degree reckless endangerment contains two culpable mental states – depraved indifference and recklessness. *See* Penal Law § 120.25. But the mere fact that this particular statute contains two mental states does not obviate the Court's "explicit[ ]" proclamation that "depraved indifference to human life is a culpable mental state." *Feingold*, 7 N.Y.3d at 294. Tellingly, defendant

points to no authority that suggests that criminal statutes in New York must contain at least one of the mental states listed in the Penal Law.

To be sure, Penal Law § 15.15(2) states that if a statute does not contain a "culpable mental state" then one "may nevertheless be required" if the "proscribed conduct necessarily involves such mental state." The statute continues that, unless a crime is clearly defined as one of strict liability, it should be construed as defining a "crime of mental culpability." Because AC §19-190 is not explicitly a strict liability crime, it should be considered to define a crime "of mental culpability." And because the ordinance does, in fact, contain a "culpable mental state"—the failure to exercise due care—there is no need to read in another mental state.

In that regard, there are crimes beyond reckless endangerment that contain mental states that are not defined in Penal Law §§ 15.10 and 15.15. For example, Reckless Driving, a misdemeanor codified in VTL § 1212, is defined as operating a vehicle "in a manner which unreasonably interferes with the free and proper use of the public highway, or unreasonably endangers users of the public highway." Although that crime requires proof of "[m]ore than mere negligence," *People v. Bohacek*, 95 A.D.3d 1592, 1594 (3d Dep't 2012), this Court has observed that a charge of reckless driving can be sustained by conduct that does "not rise to the level of moral blameworthiness required to sustain a charge of criminally negligent homicide." *People v. McGrantham*, 12 N.Y.3d 892, 892-94 (2009) (holding that grand jury evidence regarding defendant's operation of a vehicle was legally sufficient to support a charge

of reckless driving, but not a charge of criminally negligent homicide). Thus, although VTL § 1212 does not contain any of the mental states identified in the Penal Law, it still validly imposes criminal penalties.

Crucially, criminal liability based on civil negligence is not a novel concept in New York and is used in other statutes. In fact, the mental state in AC § 19-190—the failure to exercise due care—is identical to the mental state set forth in VTL § 1146, which defines a class B misdemeanor, as well as a traffic infraction. Like AC § 19-190, VTL § 1146 sets out a statutory scheme that establishes both a traffic infraction and a misdemeanor for vehicles colliding with pedestrians and cyclists. VTL § 1146(a) states that "[e]very driver of a vehicle shall *exercise due care* to avoid colliding with any bicyclist, pedestrian, or domestic animal upon any roadway." VTL § 1146(b)(1) continues that "[a] driver of a motor vehicle who causes physical injury . . . to a pedestrian or bicyclist while failing to exercise due care in violation of subdivision (a) of this section, shall be guilty of a traffic infraction." VTL § 1146(c)(1) provides the same penalty for a driver who causes "serious physical injury." However, "[a] violation of subdivision (b) or (c) of this section committed by a person who has previously been convicted of any violation of such subdivisions within the preceding five years, shall constitute a class B misdemeanor." VTL § 1146(d). Thus, VTL § 1146 plainly establishes a class B misdemeanor requiring proof of the failure to exercise "due care."

Notably, defendant does not challenge the constitutionality of VTL § 1146, of which he was also convicted. This inconsistency undermines his attack – if the constitutionality of a civil negligence standard in a criminal case was defendant's real concern, one would expect him to challenge both VTL § 1146 and AC § 19-190. Inasmuch as defendant does not contest the constitutionality of VTL § 1146, it appears that he accepts that a due care *mens rea* passes constitutional muster. And because both statutes have the same civil negligence *mens rea*—"due care"—AC § 19-190 should be constitutional as well.

Furthermore, this Court has noted that "[c]riminal liability for death caused by ordinary negligence is sometimes imposed by statute." *Haney*, 30 N.Y.2d at 334 n.7. It went on to explain that, while "most of these statutes are confined to deaths arising out of automobile accidents," there are also examples of "ordinary negligence sufficient to establish liability for nonvehicular homicide." *Id.*

Notably criminal statutes containing a civil negligence *mens rea* have been upheld by federal courts. *See*, *e.g.*, *United States v. Pruett*, 681 F.3d 232, 242 (5th Cir. 2012) (holding that Clean Water Act "requires only proof of ordinary negligence"); *United States v. Ortiz*, 427 F.3d 1278, 1279 (10th Cir. 2005) (finding Clean Water Act "criminalizes any act of ordinary negligence that leads to the discharge of a pollutant into the navigable waters of the United States"); *United States v. Hanousek*, 176 F.3d 1116, 1121 (9th Cir. 1999), *cert. denied*, 528 U.S. 1102 (2000) ("It is well established that

a public welfare statute may subject a person to criminal liability for his or her ordinary negligence without violating due process").

Likewise, courts in many other states have upheld criminal culpability on the basis of ordinary, civil negligence. *See*, *e.g.*, *State v. Hazelwood*, 946 P.2d 875, 879 (Alaska 1997) ("It is firmly established in our jurisprudence that a mental state of simple or ordinary negligence can support a criminal conviction"); *People v. Brunette*, 194 Cal. App. 4th 268, 284-85, 124 Cal. Rptr. 521, 534 (Cal. Ct. App. 2011) (noting that ordinary negligence "will generally serve as the basis for tort liability and occasionally for criminal liability"); *Hoover v. State*, 958 A.2d 816, 821 (Del. 2008) (recognizing the "power of a legislature to define a crime based upon ordinary negligence"); *State v. Tabigne*, 88 Hawai'i 296, 304, 966 P.2d 608, 616 (Haw. 1998) (upholding legislative introduction of "a less culpable state of mind called 'simple negligence'—essentially a civil standard of negligence"); *State v. Labonte*, 120 Vt. 465, 468-469, 144 A.2d 792, 794 (Vt. 1958) (allowing imposition of criminal penalties upon a showing of "ordinary negligence such as would impose civil liability" so long as the negligence was "proved beyond a reasonable doubt"). In fact, many states impose criminal liability on the basis of civil negligence specifically with respect to vehicular

crimes.[4] Other states go so far as to allow convictions for manslaughter to be based on ordinary, civil negligence.[5]

Still other states allow civil negligence as a basis for criminal culpability, but only when the statute defines a public welfare offense,[6] or where the defendant

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[4] For example, many states allow vehicular manslaughter charges on the basis of civil negligence. *See*, *e.g.*, *Egle v. People*, 159 Colo. 217, 222, 411 P.2d 325, 327 (Colo. 1966) ("A showing of simple negligence, therefore, was sufficient to support the conviction" for causing death by driving in a careless manner while under the influence of alcohol); *State v. Kluttz*, 9 Conn. App. 686, 695, 521 A.2d 178, 183 (Conn. App. Ct. 1987) (vehicular negligent homicide statute lawfully criminalized "the ordinary civil standard of negligence, namely, the failure to use due care"); *Commonwealth v. Angelo Todesca Corp.*, 446 Mass. 128, 137, 139 842 N.E.2d 930, 939 (Mass. 2006) ("A finding of ordinary negligence suffices" to establish vehicular homicide; "simple negligence" is "determined by the same standard employed in tort law"); *Commonwealth v. Carlson*, 447 Mass. 79, 85, 849 N.E.2d 790, 795 (Mass. 2006) ("finding of ordinary negligence is sufficient to establish a violation" of vehicular homicide statue); *People v. Marshall*, 74 Mich. App. 523, 526, 255 n.1 N.W.2d 351, 353 n.1 (Mich. Ct. App. 1977) ("We reject the interpretation that ordinary negligence cannot support criminal liability. Negligent driving resulting in death supports criminal liability"); *State v. Mollman*, 674 N.W.2d 22, 25, 2003 SD 150 (S.D. 2003) ("A finding of ordinary negligence is sufficient to establish vehicular homicide and therefore the appropriate standard of causation is 'that employed by tort law'"). Others allow civil negligence to be the basis of a driving under the influence crime, *see, e.g.*, *Koch v. State*, 222 So.3d 1088, 1094(Miss. Ct. App. 2017) or for careless driving. *See, e.g.*, *State v. Yarborough*, 122 N.M. 596, 603, 930 P.2d 131, 138 (N.M. 1996) (holding that convictions for petty misdemeanors, including careless driving, requires only a showing of ordinary civil negligence).

[5] *People v. Traylor*, 46 Cal. 4th 1205, 1209, 210 P.3d 433, 436 (2009) (recognizing crime of manslaughter based on "ordinary negligence"); *Kelly v. Commonwealth*, 267 S.W.2d 536, 539 (Ky. Ct. App. 1954) (recognizing "three degrees of manslaughter," one of which requires proof of "ordinary negligence" and carries "the smallest penalty"); *State v. Hayes*, 244 Minn. 296, 299-300, 70 N.W.2d 110, 113 (Minn. 1955) (Allowing that "the legislature may make ordinary negligence sufficient as a standard to support a charge of felony" manslaughter for "shooting another with a gun. . . when resulting from carelessness in mistaking the person shot for a deer"); *Ball v. State*, 173 P.3d 81, 91 (Okla. Crim. App. 2007) ("this Court held that ordinary negligence resulting in death is sufficient to warrant a conviction for second-degree manslaughter"); *State v. Williams*, 4 Wash. App. 908, 913, 484 P.2d 1167, 1171 (Wash. App. 1st Div. 1971) (involuntary manslaughter "committed even though the death of the victim is the proximate result of only simple or ordinary negligence").

negligently engages in inherently dangerous activities.[7] Indeed, the Supreme Court has recognized that the scope of criminally culpable mental states has grown over time, "especially in the expanding regulatory area involving activities affecting public health, safety, and welfare." *United States v. Freed*, 401 U.S. 601, 607 (1971). In that light, it is clear that it is constitutional to utilize ordinary, civil negligence as a *mens rea* in a criminal statute.

Nevertheless, defendant insists that AC § 19-190 violates the principles of due process and that "more than civil negligence is required for a criminal act" (DB: 24). First, defendant complains that "negligence" is a vague term that "offers no guide to courts, law enforcement, and individuals" (DB: 25). At the outset, the term "negligence" does not appear in AC § 19-190. Instead, the ordinance identifies a driver's failure to exercise "due care" to avoid striking pedestrians and cyclists under the circumstances—a fairly specific description of both the physical and mental conduct required to sustain a conviction. In any event, negligence is a foundational principle of our legal system, easily comprehendible by laypeople and regularly reiterated by courts. *See*, *e.g.*, *Bethel v. New York City Transit Authority*, 92 N.Y.2d 348,

(…Continued)

[6] *See Haxforth v. State*, 117 Idaho 189, 191, 786 P.2d 580, 582 (Idaho Ct. App. 1990); *Cornella v. Justice Court*, 132 Nev. 587, 377 P.3d 97, 99 (Nev. 2016).

[7] *See State v. Barnett*, 218 S.C. 415, 427, 63 S.E.2d 57, 61 (S.C. 1951) (finding "simple negligence causing the death of another" sufficient to impose criminal liability if the negligent act is "necessarily dangerous to human life or limb").

351 (1998) (recognizing the "basic negligence standard of reasonable care under the circumstances"); *see also* Prosser and Keeton, Torts § 34, at 210 ([5th ed]).

Defendant also argues that the "'reasonable person' standard" in civil negligence is "inconsistent with the conventional requirement for criminal conduct" (DB: 24, *quoting Elonis v. United States*, 135 S.Ct. 2001, 2011 [2015]). But, the "reasonable person" standard is encapsulated in New York's definition of criminal negligence, which has passed constitutional scrutiny. Penal Law § 15.05(4); *see*, *e.g.*, *Haney*, 30 N.Y.2d at 333-35; *People v. Rosenbloom*, 45 A.D.2d 794, 794 (3d Dep't 1974); *Rossi v. County Court of Schoharie County*, 31 A.D.2d 715, 716 (3d Dep't 1968).[8]

Moreover, defendant's argument rests heavily on a misapplication of the United States Supreme Court's decision in *Elonis v. United States*, 135 S. Ct. 2001 (2015) (DB: 25-26). But contrary to defendant's claims, *Elonis* did not hold that a civil negligence *mens rea* in any criminal statute is unconstitutional. To the contrary, *Elonis*'s very narrow holding was that, for a particular federal criminal statute governing threats that was silent with respect to the required mental state, negligence was not the proper *mens rea*. 135 S. Ct. at 2013 ("Our holding makes clear that negligence is not sufficient to support a conviction under Section 875[c]"). Instead, defendant has

[8] It bears note that all of the protections inherent in a criminal proceeding still inure to the defendant's benefit, even if under a civil negligence standard. Foremost, the People are still required to prove the defendant's guilt beyond a reasonable doubt. And, of course, the defendant enjoys the rights to counsel, to trial, and to be free from self-incrimination like any other criminal defendant.

made an inferential leap to conclude that civil negligence standards can never be constitutionally applied to a criminal statute. That decision was not warranted by the Supreme Court's decision in *Elonis*, which was specific to the federal statute that it was examining. *See United States v. Kirsch*, 151 F. Supp. 3d 311, 317-18 (W.D.N.Y. 2015) ("*Elonis* is a case of statutory construction, and as such, is limited to 18 U.S.C. § 875[c]"); *Council on American-Islamic Relations Action Network, Inc. v. Gaubatz*, 123 F. Supp. 3d 83, 87 (D.D.C. 2015) (*Elonis* hold was not a "constitutional ruling" and was instead premised "on longstanding principles guiding the interpretation of Federal criminal laws").

In short, defendant's argument that a civil negligence *mens rea* is unconstitutional is wholly without merit.

B. AC § 19-190 is not preempted by New York State law.

Defendant's claim that AC § 19-190 must be struck down because it is preempted by state law is equally unavailing. By the "home rule" provisions of the State Constitution and statutory authority, the New York City Council has been granted the authority to adopt local laws relating to the public welfare. *See* N.Y. Const., art. IX, § 2(c)(ii); Municipal Home Rule Law § 10(1).[9] Although broad, the City's power is not limitless. First, the City may not enact a law that conflicts with the State Constitution or statutes. *See DJL Rest. Corp. v. City of New York*, 96 N.Y.2d 91, 95

[9] Municipal Home Rule Law § 11 lists the areas where the City is prohibited from enacting local laws. Vehicle and traffic regulation is not among them.

(2001). A local law conflicts with State law where it prohibits what would be permissible under the State law or imposes additional restrictions or prerequisites on rights granted under State law. *Patrolmen's Benev. Ass'n of the City of New York, Inc. v. City of New York*, 142 A.D.3d 53, 61-62 (1st Dep't 2016) (*citing Zakrzewska v. New School*, 14 N.Y.3d 469, 480 [2010]).

Second, the City may not legislate in a field in which "the State Legislature has assumed full regulatory responsibility." *See DJL Rest. Corp.*, 96 N.Y.2d at 95. The Legislature may expressly articulate its intent to occupy the field, or may do so by implication. *Id.* In particular, the Legislature's enactment of a "comprehensive and detailed regulatory scheme in a particular area" will be found to preempt a local law in the same field. *See N.Y. State Club Ass'n v. City of New York*, 69 N.Y.2d 211, 217 (1987); *Consol. Edison Co. v. Town of Red Hook*, 60 N.Y.2d 99, 105 (1983).

It is important to note that local governments are expected to pass their own traffic laws and regulations. Indeed, the State Constitution provides that "every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to . . . [t]he acquisition, care, management and use of its highways, roads, streets, avenues and property." N.Y. Cost., art. IX §2(c)(ii)(6); *see also* Municipal Home Rule Law § 10(2)(a)(6); *People v. Randazzo*, 60 N.Y.2d 952 (1983). AC § 19-190 falls squarely within the ambit of authorized legislation.

1. AC § 19-190 is not preempted by a conflict with the Vehicle and Traffic Law.

On appeal to this court, defendant argues that AC § 19-190 is preempted by a direct conflict with VTL § 1146 because AC § 19-190 purportedly punishes "the same conduct (but less severe results) more harshly" (DB: 23). This argument misapprehends the doctrine of conflict preemption and runs counter to what local governments are authorized to enact. The mere fact that AC § 19-190 provides for harsher punishment than VTL § 1146 does not invalidate the city ordinance.

Conflict preemption requires that the "local law, in direct opposition to the pre-emptive scheme, would render illegal what is specifically allowed by State law." *People v. De Jesus*, 54 N.Y.2d 465, 472 (1981). As detailed below, instead of criminalizing something that state law allows, AC § 19-190 merely strengthens the criminal penalty for injuring pedestrians that was already authorized by VTL § 1146. Because AC § 19-190 does "not prohibit what the State law permits nor allow what the State law forbids," it is "not inconsistent" with state law. *Wholesale Laundry Bd. Of Trade v. New York*, 17 A.D.2d 327, 329 (1st Dep't 1962), *aff'd* 12 N.Y.2d 998 (1963). And, "penal statutes in which the local law provides a greater penalty are not void for this reason." *Id.* (*citing Lewis*, 295 N.Y. at 50 [noting that having harsher punishments under New York City Administrative Code than under state law for selling black

market chickens during wartime did not invalidate statute]); *see Zakrzewska*, 14 N.Y.3d at 480-81 ("A local law may, however, provide a greater penalty than state law").[10]

As a preliminary matter, VTL § 1800 does not preclude the City Council from passing legislation that elevates behavior that the State Legislature has classified and punished as a traffic infraction to a misdemeanor. VTL § 1800(a) states that "[i]t is a traffic infraction for any person to violate any of the provisions of this chapter or of any local law . . . unless such violation is by this chapter or other law of this state declared to be a misdemeanor or felony." "Traffic infraction" is defined as "[t]he violation of any provision of this chapter . . . or of any law . . . which is not declared by this chapter or other law of this state to be a misdemeanor or felony." VTL § 155. Reasonably interpreted, these statutes do not explicitly forbid a city's legislative body from elevating the penalties from a traffic infraction to a misdemeanor. The Legislature has already deemed that violating the right of way and injuring a pedestrian can be criminally punished; VTL § 1146(d) establishes a misdemeanor for essentially the same behavior as AC § 19-190. The difference is that AC § 19-190 establishes an unclassified misdemeanor for a first offense, whereas VTL § 1146 would classify the same conduct as a traffic infraction, reserving the misdemeanor for repeat offenders.

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[10] Defendant attempts to discount the *Zakrzewska* decision as merely "a case involving civil penalties," and suggests that it does not apply in the criminal context (DB: 23) (emphasis in original). To be sure, *Zakrzewska* involved civil penalties, but defendant's argument ignores the criminal cases in which an identical rule has been applied. *See*, *e.g.*, *Lewis*, 295 N.Y. at 50.

It is not uncommon for the City Council to pass such parallel legislation to increase criminal penalties. For example, in 2004 the City Council passed AC § 10-163 which prohibits people from "engag[ing] in any race, exhibition or contest of speed involving a vehicle, or to aid or abet such race, exhibition or contest of speed, on any highway, street, alley, sidewalk, or any public or private parking lot or area." A violation of AC § 10-163 is a misdemeanor punishable by up to six months in jail for a first-time offender, and up to one year in jail for a subsequent offense within ten years. AC § 10-163(f). VTL § 1182 similarly prohibits "races, exhibits or contests of speed" on public roadways and is a misdemeanor, but is only punishable by up to 30 days in jail for first-time offenders, and up to six months in jail for a second offense within one year. VTL §§ 1182(1), (2).[11]

The interplay between state and local provisions that prohibit drag racing is analogous to the relationship between VTL § 1146 and AC § 19-190. VTL § 1182 made it a crime to engage in a speed contest on a highway and established minimal penalties; AC § 10-163 made it a crime to engage in a speed contest on a highway in New York City, but it also expanded the prohibited locations to include alleys, sidewalks, and parking lots—features of the city that are not as prevalent elsewhere in the state. The more significant expansion, however, was that AC § 10-163 increased

[11] There are several other instances where conduct deemed to be a traffic infraction under the Vehicle and Traffic law were codified as misdemeanors under the Administrative Code of the City of New York. *Compare* VTL § 1144(a) with AC § 10-164 (failure to yield to emergency vehicles); VTL § 1234 with AC § 19-176 (bicycling on the sidewalk).

the penalty for engaging in the proscribed conduct.[12] In a similar fashion, VTL § 1146 made it an offense for a driver to strike and injure a pedestrian with a car if the driver failed to exercise due care and had a prior conviction for doing the same; AC § 19-190 made it a crime to strike and injure a pedestrian with a car while failing to exercise due care and if the victim had the right of way. The penalties for VTL § 1146 were minimal – in fact, for a first time offense, it was not even a crime, but a traffic infraction. AC § 19-190 is harsher than VTL § 1146 in some ways but not as harsh in others. AC § 19-190 makes it a misdemeanor to cause physical injury for a first offense, whereas VTL § 1146 does not impose criminal sanctions until a second conviction. However, AC § 19-190 also requires proof that the victim had the right of way at the time of the collision—an element not contained in VTL § 1146—which limits the local law's reach. Accordingly, VTL § 1146 does not conflict with AC § 19-190.

Defendant further maintains that VTL §§ 1600 and 1604 evince the Legislature's intent to "occupy the field of motor vehicle regulation" (DB: 22-23). It is true that VTL § 1600 mandates that "no local authority shall enact or enforce any local law, ordinance, order, rule or regulation in conflict with the provisions of this

[12] According to the Historical Note in the statute's legislative history, the City Council was well aware of VTL § 1182, but found that its "penalty [wa]s inadequate" and that "actively participating in a drag race, particularly within the congested environs of New York City, warrant[ed] an increased penalty." Provisions of L.L. 46/2004, Section One, Legislative findings and intent (2004). There have been no reported challenges to the constitutionality of AC § 10-163 since it was enacted 16 years ago.

chapter unless expressly authorized herein" (*see* DB: 21). However, as explained above, AC § 19-190 does not conflict with the Vehicle and Traffic Law. Moreover, and despite defendant's claim to the contrary (DB: 22), the Vehicle and Traffic law expressly authorizes the City Council to enact laws like AC § 19-190. VTL §§ 1640, 1642.

VTL § 1640(a)(16) states that "[t]he legislative body of any city or village, with respect to highways" may "[a]dopt such additional reasonable local laws . . . with respect to traffic as local conditions may require subject to the limitations contained in the various laws of this state." This statute gives the City Council broad power to enact reasonable traffic laws that local conditions might necessitate, and local conditions in New York City require more stringent laws protecting pedestrians. After all, that is the primary purpose behind the Vision Zero laws. Further, VTL § 1642, which authorizes "[a]dditional traffic regulations in cities having a population in excess of one million," provides even more specific authority for the City Council to have passed AC § 19-190. VTL § 1642(a) states that the "legislative body of any city having a population in excess of one million" may "prohibit, restrict or regulate traffic on or pedestrian use of any highway . . . in such city." VTL § 1642(a)(10) specifies that local laws regarding the "[r]ight of way of vehicles and pedestrians" are one of the "enumerated subjects" where local laws can supersede the state law (*contra* DB: 22). AC § 19-190, a law entitled "Right of Way," which governs the right of way of vehicles and pedestrians, fits squarely into the exception to VTL § 1600 that is

explicitly laid out in VTL § 1642. *See Burke v. Santoro*, 172 A.D.2d 579, 579 (2d Dep't 1991) (noting in personal injury civil action that local regulations, enacted pursuant to VTL §§ 1640 and 1642, "shall supersede the provisions of the Vehicle and Traffic Law where inconsistent or in conflict with respect to matters involving the right-of-way of vehicles and pedestrians and the regulation of traffic").

In short, AC § 19-190 is not preempted by the Vehicle and Traffic Law.

2. AC § 19-190 is not preempted by the Penal Law.

Defendant also relies upon the doctrine of field preemption to claim that AC § 19-190 should be struck down. Specifically, defendant contends that AC § 19-190 is preempted by the Penal Law because it attempts to introduce a culpable mental state of civil negligence when Penal Law §§ 15.05 and 15.15 purportedly evince the State's intent to occupy the field of criminally culpable mental states (DB: 13-14). Defendant's claim is devoid of merit.

Under the field preemption doctrine, local laws are preempted when "the State has clearly evinced a desire to preempt an entire field thereby precluding any further local regulation" because local regulation "would tend to inhibit the operation of the State's general law and thereby thwart the operation of the State's overriding policy concerns." *Jancyn Mfg. Corp. v. County of Suffolk*, 71 N.Y.2d 91, 97 (1987) (citations and quotation marks omitted).

Defendant's field preemption argument is little more than a rehashing of his argument that civil negligence is not a permissible *mens rea* for criminal offenses. As

explained above in detail, this is incorrect. Briefly, Penal Law § 15.15(1) is limited to offenses defined in the Penal Law, implying that beyond the four culpable mental states enumerated in Penal Law § 15.15(1), there are other possible mental states allowed for non-Penal Law offenses. The Penal Law also provides for crimes of strict liability, *see* Penal Law § 15.10, and the rules of construction for strict liability crimes apply to "offenses defined both in and outside" the Penal Law. *See* Penal Law § 15.15(2). Plainly, then, the Legislature did not intend to limit criminal liability to conduct that was committed with one of the mental states set forth in Penal Law § 15.15(1) (*contra* DB: 14). *See People v. M&H Used Auto Parts & Cars, Inc.*, 22 A.D.3d 135, 143 (2d Dep't 2005) (noting that the "clear language [of Penal Law § 15.15(1)] suggests that this section does not apply to crimes defined outside the Penal Law").

To be sure, staff notes from 1964 suggest that the Legislature expressed a desire to clarify many "hazy adverbial terms" into more "familiar concepts," and ultimately settled on the four mental states in Penal Law § 15.15 (DB: 13-14 [*citing* 1964 Bartlett Commission Staff Notes at A315-16]). But in the three-quarters of a century since then, both the State and Federal government have imposed criminal liability on the basis of civil negligence. *See*, *e.g.*, VTL § 1146(d); Agriculture and Markets Law § 370; *Pruett*, 681 F.3d at 242; *Ortiz*, 427 F. 3d at 1279; *Hanousek*, 176 F. 3d at 1121. Moreover, as was noted above, this Court has upheld the use of culpable mental states in criminal statutes beyond those delineated in the Penal Law. *See*, *e.g.*, *Williams*, 24 N.Y.3d at 1129 (recognizing depraved indifference to human life as a

culpable mental state); *Feingold*, 7 N.Y.3d at 294 (same); *McGrantham*, 12 N.Y.3d at 893-94 (tacitly acknowledging that the misdemeanor of Reckless Driving defined in VTL § 1212 has a lesser mental state than criminal negligence as defined in Penal Law § 15.05).

Accordingly, because the Penal Law does not preempt any law from utilizing a *mens rea* other than those defined in Penal Law §§ 15.05 and 15.15, defendant's field preemption argument, like his conflict preemption argument, fails.

C. AC § 19-190 would qualify as a public welfare offense and, accordingly, pass constitutional muster if it were a strict liability crime requiring no culpable mental state at all.

As noted above, the lower court held that AC § 19-190 was a strict liability offense. The imposition of strict liability in this case not only faithfully adheres to New York's statutory scheme, it also fully comports with the requirements of due process.

It has been consistently recognized that a legislature may, through criminal statutes, protect public safety and welfare without regard to mental culpability. *See Freed*, 401 U.S. at 607; *Morissette v. United States*, 342 U.S. 246, 254 (1952); *United States v. Balint*, 258 U.S. 250, 251-52 (1922); *see also* Penal Law § 15.10; *Morgenthau v. Khalil*, 73 A.D.3d 509, 510 (1st Dep't, 2010). Such "public welfare offenses," even though imposing strict liability, do not violate due process. *See Balint*, 258 U.S. at 252 (states may punish certain acts without regard to the actor's intent or knowledge).

Public welfare offenses have several distinct characteristics. First, they typically regulate "potentially harmful or injurious items" in the broad interest of protecting public safety. *See Staples v. United States*, 511 U.S. 600, 607 (1994); *Morissette*, 342 U.S. at 255. The conduct targeted by such statutes need not be immediate, and often "merely create[s] the danger or probability" of later harms; thus, "whatever the intent of the violator, the injury is the same." *Morissette*, 342 U.S. at 256. Moreover, the violator stands in the best position to prevent the harm simply by exercising reasonable care. *Id.* at 256-57; *Balint*, 258 U.S. at 254; *see also Freed*, 401 U.S. at 609-10. Additionally, public welfare statutes generally impose only "light penalties," such as fines or short periods of incarceration, and convictions entail relatively little social stigma. *See Staples*, 511 U.S. at 616-17; *Morissette*, 342 U.S. at 256.

An examination of these factors plainly reveals that the prohibition against drivers striking and injuring pedestrians with their vehicles provided in AC § 19-190 can be read as a public welfare statute. First, cars, particularly when driven through areas in which pedestrians have the right of way, pose a significant danger to the public.[13] Without any reference, defendant claims that "the City Council plainly does not regard driving as an inherently dangerous activity," and that the People "conceded

[13] For example, in 2014, 249 New Yorkers were killed as a result of a motor vehicle crash and over 60,000 people were injured. New York State Department of Motor Vehicles, Summary of New York City Motor Vehicle Crashes 2014, Table 1, *available at* http://on.ny.gov/2iSmyEa. At that rate, a New Yorker is either killed or seriously injured by a motor vehicle collision every two hours. City of New York, Vision Zero Action Plan, 7 (2014), *available at* http://on.nyc.gov/2iSbarG.

as much in their original response" to the motion to dismiss (DB: 20-21). A review of the People's response reveals no such concession. And, in its amicus brief to the Appellate Term, the City explicitly argued that "an 'automobile is an inherently dangerous instrument'" (A294) (*quoting Manning v. Brown*, 91 N.Y.2d 116, 121 [1997]).

Regardless, common sense dictates that a loaded truck poses significant danger when driven through areas where pedestrians have the right of way. For that matter, there is an entire body of law devoted to regulating the use of motor vehicles in this state, covering every conceivable facet of car ownership from how taillights are maintained to where vehicles can be driven. Many of those statutes impose criminal culpability on the basis of strict liability. Indeed, the State requires all drivers to become licensed, *see* VTL § 501, and to pass both written and practical examinations before allowing them to get behind the wheel. *See* VTL § 502. In recognition of the inherent, sometimes unavoidable, danger posed by automobiles, all drivers are required to carry liability insurance to cover "damages for care and loss of services because of bodily injury to or death of any person and injury to or destruction of property arising out of the ownership, maintenance, use, or operation of such motor vehicle." VTL § 345(b)(3). Certainly, defendant should have been well aware that striking a pedestrian with his vehicle was prohibited by law. *See*, *e.g.*, VTL § 1146.[14]

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[14] Citing *Staples v. United States*, 511 US.. at 619, defendant complains that driving cannot be considered "inherently dangerous" (DB: 20). But defendant's reliance on *Staples* is misplaced. In *Staples*, the defendant was convicted for failure to register an assault rifle. The (Continued…)

Moreover, as is common in public welfare offenses, the increased likelihood of injury to the public, and thus the danger, remained equally grave regardless of defendant's mental state. And, a person driving a vehicle in an area where pedestrians have the right of way is in the best position to avert any harm, and, in exercising "no more care than society might reasonably expect," can readily avoid striking pedestrians with his or her vehicle. *See Morissette*, 342 U.S. at 256-57. Finally, as the trial judge noted, "the maximum penalty for violating AC § 19-190 is 30 days' imprisonment" (5/2/17 Decision: A164), a relatively modest penalty that would typically be associated with a public welfare offense. *See Staples*, 511 U.S. at 616. Here, for instance, defendant killed a woman who was lawfully crossing the street and, as punishment, was merely required to pay a $750 fine. Thus, the City Council was justified in requiring "a degree of diligence for the protection of the public," *Morissette* 342 U.S. at 257, and a strict liability reading of AC § 19-190 would be constitutional.

In short, the strict liability reading of AC § 19-190 that was applied to defendant is constitutional. The ordinance meets all of the requirements to constitute

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(…Continued)
Staples court recognized the "long tradition of widespread lawful gun ownership by private individuals in this country" without the need for registration and feared that individuals would accidentally run afoul of the federal statute simply by "inherit[ing] a gun from a relative and le[aving] it untouched in an attic or basement." *Staples*, 511 U.S. at 610, 615. There is no such tradition with respect to automobiles. As noted above, individuals are well aware that they are subject to punishment for failure to comply with the rules of the road, generally without regard to their state of mind.

a public welfare offense and, accordingly, could criminalize behavior without regard to any culpable mental state.

* * *

In sum, AC § 19-190 is constitutional and is not preempted by New York State law.

POINT II

DEFENDANT'S GUILTY PLEA WAS KNOWING, VOLUNTARY, AND INTELLIGENT (Answering Defendant's Brief, Point II).

Although defendant killed a woman and was charged with a misdemeanor and a traffic infraction, his attorney negotiated a plea where defendant received a conditional discharge and completely avoided incarceration. While represented by counsel, defendant confirmed that he had discussed the plea with his attorney, that he understood the rights he was waiving, and that he wanted to accept the court's offer. Defendant admitted that he had failed to yield to a pedestrian who had the right of way, struck her with his car, and killed her.

On appeal, defendant argues that his guilty plea was invalid because the court did not inform him of the length of the conditional discharge term until moments after he pled guilty, and asks this court to dismiss the accusatory instrument (DB: 29). However, defendant's complaint is unpreserved and his requested relief is entirely inappropriate. *See People v. Kripanidhi*, 59 Misc. 3d 148(A), *1 (App. Term 1st Dep't), *lv. denied*, 32 N.Y.3d 938 (2018).

Preliminarily, defendant's claim is unpreserved because he never raised any objection to the length of his conditional discharge below. To be sure, defendant was sentenced on the same day he pled guilty, but the period to meet the conditions of defendant's discharge were discussed at that proceeding, albeit after defendant entered his plea. Judge Watters explicitly stated the date on which defendant had to "show proof of completion" of the conditions of his sentence (Plea: A177), and defendant signed a conditional discharge form which detailed the conditions of his sentence and the "COMPLIANCE ADJOURNMENT DATE" (Conditional Discharge Form: A15).

Notably, neither defendant nor his attorney voiced any concern over the length of the conditional discharge period. Rather, defendant confirmed that he understood the terms of his sentence, including the length of the conditional discharge (Plea: A177). Moreover, defendant has provided no reason why he could not have moved to vacate the judgment of conviction pursuant to CPL 440.10. *See People v. Lopez*, 71 N.Y.2d 662, 665 (1988). Had he done so, defendant would have afforded the plea court "an opportunity to correct any error in the proceedings below at a time when the issue c[ould] be dealt with most effectively." *Id.*

Defendant's failure to raise any complaint below makes sense in light of his requested relief. Defendant does not merely seek to have his plea vacated – the only relief he would have been entitled to had he raised an objection below. Instead, he seeks complete dismissal of the accusatory instrument. However, in *People v. Conceicao*,

26 N.Y.3d 375 (2015), this Court made clear that where the basis for reversal is a deficient plea allocution, "the People do not agree that dismissal is the appropriate corrective action in th[e] case," and there are "circumstances" that show a "penological purpose," a remand for further proceedings is the appropriate remedy. *Id.* at 384-85 & n.1 (citation and internal marks omitted).

Here, dismissal of the complaint would be utterly inappropriate, particularly because defendant killed someone. Defendant's case is hardly the sort of minor crime in which outright dismissal could conceivably be an appropriate remedy. *See generally People v. Allen*, 39 N.Y.2d 916, 918 (1976). Moreover, the degree of a future VTL § 1146 conviction could be increased based on a conviction in this case. *See* VTL § 1146(d). Ensuring that an enhanced sentence will be available is a valid penological reason for declining to dismiss a case. *See People v. Roopchand*, 107 A.D.2d 35, 38 (2d Dep't), *aff'd on opinion below*, 65 N.Y.2d 837 (1985). So too, allowing defendant to walk away with no repercussions for causing a senseless and easily avoidable death would run counter to general principles of deterrence.

Defendant's only effort to justify dismissal is that he has completed his sentence (DB: 32-33). But that was the case in *Conceicao* as well. 26 N.Y.3d at 389 (Rivera, J., dissenting). Should this Court find a problem with defendant's plea, the real and pressing need to protect the public from his dangerous driving provides more than sufficient reason for continuing this prosecution and obtaining a conviction for his crime.

In addition, to grant dismissal of the accusatory instrument instead of a remand for further proceedings would promote gamesmanship by encouraging defendants to negotiate favorable plea agreements and then use the appellate process to secure even greater benefits. That is not a tactic that the criminal justice system should reward. *See People v. Prescott*, 66 N.Y.2d 216, 220 (1985) (it is "important" that a defendant who pleads guilty under a negotiated bargain "should not keep the benefits," such as "eliminating the risks" of a "more severe sentence," while being relieved of the disadvantages of the bargain); *see also Padilla v. Kentucky*, 559 U.S. 356, 372-73 (2010) ("The nature of relief secured by a successful collateral challenge to a guilty plea—an opportunity to withdraw the plea and proceed to trial—imposes its own significant limiting principle: Those who collaterally attack their guilty pleas lose the benefit of the bargain obtained as a result of the plea."). Given that defendant is perusing the entirely inappropriate remedy of dismissal, his conviction should be affirmed.

In any event, defendant's claim fails on the merits. A court reviewing the validity of a guilty plea must determine whether the plea was knowing, voluntary, and intelligent. *People v. Harris*, 61 N.Y.2d 9, 17 (1983). This Court has "repeatedly steered clear of a uniform mandatory catechism of pleading defendants in favor of broad discretions controlled by flexible standards." *People v. Alexander*, 19 N.Y.3d 203, 219 (2012) (quotation marks omitted); *see also People v. Tyrell*, 22 N.Y.3d 359, 365 (2013).

Here, the record established the validity of defendant's guilty plea. First, the court confirmed that defendant wanted to plead guilty to VTL § 1146(c)(1) and AC

§ 19-190, and that defendant would need to attend an attitudinal driving program, pay a $750 fine, and have his license revoked for six months (Plea: A174-75). The judge then listed the rights defendant would waive by pleading guilty, including the right to remain silent, to a trial, to confront and cross-examine witnesses, and to have the People prove their case beyond a reasonable doubt. Defendant assured the judge that he understood that he was waiving those rights. The court also ensured that defendant had discussed the case with his attorney, and that he was pleading guilty voluntarily because he was, in fact, guilty (Plea: A175).

The "rationality of the 'plea bargain,'" *Harris*, 61 N.Y.2d at 16, also supports the conclusion that defendant's guilty plea was knowing, voluntary, and intelligent. Had defendant gone to trial, he could have been sentenced to 30 days in jail, *see* AC § 19-190(b), but the plea deal allowed him to completely avoid incarceration. Instead of going to jail, he was required only to complete a driving course, pay a fine, and forfeit his license for six months. Defendant could have faced the same fine and license revocation on top of a 30-day jail sentence. *See id.* Such an opportunity to avoid a jail term highlights the value of the bargain for defendant, further demonstrating the validity of his plea.

Moreover, the "'competency, experience and actual participation by counsel,'" whose effectiveness defendant does not challenge, confirm that defendant's plea was knowing, voluntary, and intelligent. *Conceicao*, 26 N.Y.3d at 383 (*quoting Harris*, 61 N.Y.2d at 16). Defendant was ably represented by Takiya Wheeler, Esq., of the Legal

Aid Society for more than a year throughout his arraignment, plea, and sentencing. Ms. Wheeler successfully argued for defendant to be released on his own recognizance at the arraignment, and, although ultimately unsuccessful, she drafted a 19-page motion to dismiss AC § 19-190 on constitutional grounds. Most importantly, she negotiated a plea deal that allowed defendant to avoid jail time. Thus, defendant's discussion of his plea deal with his attorney, who "actively litigated' the case, certainly buttressed his understanding of his plea deal. *See Conceicao*, 26 N.Y.3d at 383.

In response, defendant contends that his plea was invalid because the court did not advise him of "the specific duration of the conditional discharge" (DB: 29). He maintains that the length of the discharge period was a "direct consequence" of his guilty plea, and therefore his conviction must be vacated (DB: 29-30). However, defendant has identified no basis for relief.

During a plea colloquy, the court must inform a defendant of the "direct consequences" of a plea, which "are those that have a definite, immediate and largely automatic effect on defendant's punishment." *People v. Harnett*, 16 N.Y.3d 200, 205 (2011) (quotation marks omitted). In contrast, the "trial judge may, but need not, mention" most "'collateral consequences . . . [which] are peculiar to the individual and generally result from the actions taken by agencies the court does not control.'" *People v. Gravino*, 14 N.Y.3d 546, 553-554 (2010) (*quoting People v. Ford*, 86 N.Y.2d 397, 402 [1995]).

Foremost, defendant's argument fails because this Court has already delineated the direct consequences of a guilty plea, and the length of a conditional discharge term is not among them. *People v. Belliard*, 20 N.Y.3d 381, 387 (2013) ("The direct consequences of a plea . . . are essentially the core components of a defendant's sentence: a term of probation or imprisonment, a term of postrelease supervision, a fine. Our cases have identified no others"). In *People v. Catu*, 4 N.Y.3d 242 (2005), this Court held that plea courts were required to inform defendants about post-release supervision because it was a "direct consequence" of a plea with "definite, immediate, and largely automatic effect[s]," which were "significant." *Id.* at 244-45. However, in *Ellsworth*, 14 N.Y.3d at 558 (companion case to *Gravino*), the defendant unsuccessfully relied on *Catu* to argue that his probation conditions, which prevented him from contacting his young children, needed to be explained during the plea colloquy. The Court held that probation conditions were "collateral" and also noted that the trial court could modify or enlarge the conditions at any time, meaning that an explanation of the conditions during the plea colloquy could be a "conjectural and contingent exercise." *Id.* at 558-559. Similarly, in *Belliard*, 20 N.Y.3d at 388, the Court decided that the plea court was not required to inform the defendant that his sentence would run consecutively to a sentence he had previously received, because even without that information, the defendant was aware of the "core elements of his sentence." *Id.* at 388.

As in *Ellsworth* and *Belliard*, the term of a conditional discharge is a collateral consequence, not a "core element" of defendant's sentence. Unlike post-release supervision, a conditional discharge does not impose consequences apart from the specific conditions set forth by the court. *See Belliard*, 20 N.Y.3d at 387 (noting that this Court has not identified any "direct consequences" of a conviction other than "a term of probation or imprisonment, a term of postrelease supervision, [or] a fine") (quotation marks omitted). And certainly, the practical significance of the length of a conditional discharge term pales in comparison to the probation conditions in *Ellsworth*, 14 N.Y.3d at 558, and the consecutive nature of the prison term imposed in *Belliard*, 20 N.Y.3d at 388. In addition, like in *Ellsworth*, the sentencing judge here had the power to alter the conditional discharge term depending on whether defendant complied with the conditions of his sentence. *See* CPL 410.90(3)(b).[15]

Here, the court informed defendant of the immediate and direct consequences of his plea – his license was revoked, he had to pay a fine, and was required to complete a driving course.

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[15] Notably, in several recent cases, this Court has denied leave to review claims arguing that the length of a conditional discharge term is a direct consequence of a guilty plea. *People v. Kripanidhi*, 59 Misc. 3d 148(A) *1, *lv. denied* 32 N.Y.3d 938 (2018); *see also People v. Gonzalez-Florian*, 57 Misc. 3d 151(A), *1 (App. Term 1st Dep't 2017), *lv. denied* 30 N.Y.3d 1105 (2018); *People v. Cardenas*, 51 Misc. 3d 141(A), *1 (App. Term 1st Dep't), *lv. denied* 27 N.Y.3d 1148 (2016) (finding unavailing the claim that the defendant "was not specifically advised during the plea allocution that his sentence would include a conditional discharge" because he "agreed to the one day of community service, the sole condition imposed, without raising any objection").

In sum, the record demonstrates that defendant's plea was knowing, voluntary, and intelligent.

CONCLUSION

The order of the Appellate Term should be affirmed.

Respectfully submitted,

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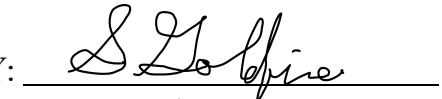
BY: 
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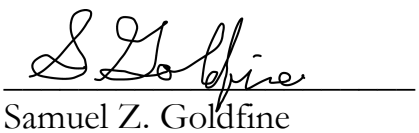

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