To be argued by
KATHARINE SKOLNICK
(15 Minutes)

APL-2020-00020

Court of Appeals

State of New York

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

CARLOS TORRES,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF

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April 24, 2020

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PRELIMINARY STATEMENT

By permission of the Honorable Paul G. Feinman, Associate Judge of this Court, granted February 10, 2020[1] (A2),[2] appellant appeals from an order of the Appellate Term, First Department, entered on or about September 23, 2019 (A4–10), affirming a judgment of the Criminal Court, New York County, rendered September 13, 2017, convicting him, upon a guilty plea, of violation of New York City Administrative Code § 19-190(b) (right-of-way violation involving physical injury), a misdemeanor, and V.T.L. § 1146(c)(1) (right-of-way violation involving serious physical injury), a traffic infraction; and sentencing

[1] Also on February 10, 2020, Judge Feinman issued a corrected order, modifying the roles of the parties (A3).

[2]Numbers in parenthesis preceded by "A" refer to the pages of Defendant-Appellant's Appendix.

him to a conditional discharge on the condition that he pay a $750 fine and attend a driving course (Statsinger, J., at motion to dismiss; Watters, J., at plea and sentence).

By order dated March 31, 2020, this Court assigned Robert S. Dean, Esq., Center for Appellate Litigation, to represent Mr. Torres on this appeal.

No application for a stay of execution of sentence has been made. Mr. Torres has completed his sentence.

QUESTIONS PRESENTED

1. WHETHER NEW YORK CITY ADMINISTRATIVE CODE § 19-190[B] IS (A) PREEMPTED BY BOTH THE PENAL LAW AND VEHICLE AND TRAFFIC LAW; AND (B) UNCONSTITUTIONAL BECAUSE IT CRIMINALIZES AN ACT COMMITTED WITHOUT DUE CARE, A CIVIL NEGLIGENCE STANDARD INVOLVING A SIGNIFICANTLY LOWER DEGREE OF CULPABILITY THAN THE TRADITIONAL CATEGORIES OF CRIMINAL MENS REA.

2. WHETHER BY NOT ADVISING MR. TORRES OF THE LENGTH OF THE TERM OF HIS CONDITIONAL DISCHARGE, THE COURT VIOLATED HIS RIGHT TO DUE PROCESS.

STATUTE INVOLVED

New York City Administrative Code § 19-190, codified by 2014 Local Laws for the City of New York and effective August 22, 2014:

> a. Except as provided in subdivision b of this section, any driver of a motor vehicle who fails to yield to a pedestrian . . . when such

> pedestrian or person has the right of way shall be guilty of a traffic infraction . . . .
>
> b. Except as provided in subdivision c of this section, any driver of a motor vehicle who violates subdivision a of this section 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, which shall be punishable by a fine of not more than two hundred fifty dollars, or imprisonment for not more than thirty days or both such fine and imprisonment. In addition to or as an alternative to such penalty, such driver shall also be subject to a civil penalty . . . . For purposes of this section, "physical injury" shall have the same meaning as in section 10.00 of the penal law.
>
> c. 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.

At issue in this appeal is whether the ordinance is preempted by State law and violates due process.

JURISDICTION AND REVIEWABILITY

This Court has jurisdiction to hear this appeal because 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 . . . ." C.P.L. § 450.90(1).

Furthermore, this appeal presents legal questions for this Court's review. First, it deals with the constitutionality of a statute, on preemption and due process grounds, issues of law that were preserved expressly by specific motion before the trial court. See Def. Mot. (A22–41 (arguing that Admin. Code § 19-

190(b) is unconstitutional because it imports a civil negligence standard, and because it is preempted by Penal Law Art. 15 and the Vehicle and Traffic Law)); Peo. Resp. (A42–67); see also Decision & Order (A158–67 (rejecting that the Administrative Code provision calls for a civil negligence finding and instead deeming it a strict liability offense, and finding the law not preempted by state laws)); see generally C.P.L. § 470.05(2). Such questions survive a guilty plea. People v. Lee, 58 N.Y.2d 491, 493–94 (1983) (holding that constitutional challenges to a statute raised below survive a guilty plea).

Second, Mr. Torres's case presents the issue of the voluntariness of his plea, a legal question that falls within the preservation exception where there is no meaningful opportunity to move to withdraw the plea, as when the guilty plea and sentencing take place during the same brief proceeding. See People v. Tyrell, 22 N.Y.3d 359 (2013).

SUMMARY OF ARGUMENT

There is no disputing that traffic safety is a laudable and important goal. However, departing from centuries of precedent requiring that crimes be punished only where the defendant has a guilty mind is not the way to achieve this end. Instead, the City Council, in choosing to criminalize conduct that occurs without "due care," risks upending that central tenet of criminal liability. There are alternate ways to promote pedestrian and cyclist well-being without

criminalizing acts of simple negligence—essentially, all traffic accidents in which a driver is civilly liable. Without this Court's intervention, a broad swath of everyday conduct will be criminalized.

In Point I, Mr. Torres argues that Admin. Code § 19-190(b) (hereinafter the "Due Care Provision") is unconstitutional, for several reasons. First, it is preempted by both the Penal Law, which spells out four exclusive mental states—plus a narrow exception for strict liability—of which "ordinary negligence" is not one. It is also preempted by the Vehicle and Traffic Law, which sets limits on what localities can regulate. Finally, Mr. Torres argues that a criminal conviction predicated on a civil legal standard violates due process and its attendant longstanding constitutional principles.

Mr. Torres also argues that his plea was unknowing and involuntary because he was not advised of the length of his sentence—a direct consequence of conviction long-recognized as essential to any knowing and voluntary guilty plea. See, e.g., People v. Catu, 4 N.Y.3d 242 (2005). Because he was not advised of the length of his conditional discharge term, Mr. Torres contends that the plea court did not comply with the mandates of due process. See Point II. Accordingly, this Court must reverse his conviction.

STATEMENT OF FACTS

Carlos Torres, a truck driver, was working on February 12, 2016. That morning, he was driving a load of dirt from Brooklyn to New Jersey (A169, A21). He stopped at a red light at an intersection on Manhattan's west side (A21). The light turned green, and, as he made a right turn, he struck a pedestrian, who was crossing with the walk signal (A169, A21)). Mr. Torres immediately pulled over and called 911 (A169, A21). When the police responded, the woman was pronounced dead (A11). There was no indication that Mr. Torres was speeding, intoxicated, or engaging in reckless behavior.

Mr. Torres was subsequently charged with two offenses: a right-of-way traffic infraction under V.T.L. § 1146(c)(1), and a violation of New York City Administrative Code § 19-190(b), a misdemeanor (see A11–12). The latter charge was under a provision, enacted by the New York City Council as part of the Vision Zero traffic safety plan, which criminalizes not yielding the right of way to a pedestrian and causing physical injury to that person.

Through counsel, Mr. Torres moved to dismiss the Due Care Provision charge, arguing that it unfairly criminalized a civil mental state, ordinary negligence, in violation of the State and U.S. Constitutions (A25–31). Specifically, he contended that, subject to the limited exception of narrowly drawn strict liability crimes for a small category of "inherently dangerous

activities," due process requires at minimum a criminal mental state (A28–10). For "negligent" conduct to be criminal, it must be grossly so; mere ordinary negligence will not suffice.

In his motion, Mr. Torres also raised preemption claims (A31–39). First, he argued that Penal Law Art. 15 sets forth the complete universe of permissible mental states throughout the State; because it does not include civil negligence,[3] the Due Care Provision is preempted by State law requiring something more (A38–39). Thus, because the Legislature intended for the Penal Law to occupy the field, the Due Care Provision was unconstitutional (A39).

Second, he contended that V.T.L. §§ 1146, 1600, and 1604 preempted the Due Care Provision, a local law (A34–37). Vehicle and Traffic Law §§ 1600 and 1604 demonstrate that the State provisions were meant to be exclusive (A34). Because Section 1146 is inconsistent with the Due Care Provision, which punishes identical conduct more harshly by making it a misdemeanor as opposed to non-criminal infraction, the local law therefore must yield to State law (A35–37).

The prosecution opposed, arguing that a civil negligence standard was constitutional, but it agreed that it had the burden to prove a defendant acts without due care to establish a violation of the administrative code

[3] Penal Law § 15.05(4) defines negligence in the criminal sphere as requiring gross rather than ordinary deviation from the standard of care.

provision—in part because of the plain language in Admin. Code § 19-190(c) importing a "due care" standard (A42–46). In the prosecution's view, because Penal Law § 15.10 allowed for a narrow category of strict liability crimes, gross negligence was not necessarily the minimum mens rea required for a crime in New York State (A43–44, A46–47). In addition, the prosecution argued that Penal Law Art. 15, which delineates minimum requirements for criminal liability, applies only to the Penal Law itself, and that in any event this was not an exhaustive list of mental states (A46–47). The prosecution also disagreed that there was either a conflict or field preemption problem between the V.T.L. and Penal Law, respectively, with the local law (A54–65). NYC Corporation Counsel intervened, arguing that the ordinance was constitutional because it did not violate due process and was not preempted by State law (A68–157). It expressly stated that the judgment of the City Council was that drivers who "carelessly" harm pedestrians or bicyclists "deserv[e] criminal punishment" (A69).

In a decision dated May 2, 2017, the court rejected all of Mr. Torres's arguments. Though the parties had framed the due process issue as whether a civil negligence standard could properly be imported into a criminal case, the court decided that in its view the Due Care Provision in fact made out a strict liability "public welfare offense," a recognized category under New York law (A158, 161–65). Accordingly, in its view, the law did not violate due process,

nor was it preempted by Penal Law Art. 15, which sets forth four exclusive mental states for criminal liability (A158, 165). In discussing its finding that the law was a strict liability offense, it nonetheless laid out the elements that the prosecution must establish as (1) driving, (2) failing to yield to a pedestrian or cyclist with the right of way, (3) causing contact with the pedestrian or cyclist, (4) thereby causing physical injury, and (5) "fail[ing] to exercise due care" (A160–61 (emphasis added)). Failure to exercise due care, despite the words used, was, in the court's view, "a manner of driving" rather than a mental state (A163).

It also held that there was no conflict between V.T.L. § 1146 and the Due Care Provision, as in its view the latter punishes "more serious conduct" while simultaneously imposing a greater penalty (A158, A166).

On September 13, 2017, Mr. Torres agreed to plead guilty to both counts in exchange for a sentence of "a $750 fine, six months license revocation, and the attitudinal driving course" (A172, 174). After waiving the right to prosecution by information, Mr. Torres accepted the terms of the agreement, which was a plea to the charges[4] in exchange for a "Conditional Discharge the condition being" that he "complete the Attitudinal Driving Program," "pay a $770 fine, pay an $88 mandatory surcharge," and have his license revoked for

[4] Though the court stated that both were misdemeanors, the V.T.L. count was in fact a traffic infraction (A174). This was subsequently corrected for the record (A176).

six months (A174–75). The court allocuted him, ensuring that he was pleading guilty freely and voluntarily, and because he was guilty of the charged offenses, and that, in pleading guilty, was giving up his trial rights (A175–76). Counsel expressly noted that Mr. Torres was "reserving his right to challenge the constitutionality on appeal" (A176).

The court then sentenced Mr. Torres as promised, without stating the length of the conditional discharge (A177).

Mr. Torres then appealed to the Appellate Term, First Department, raising the same arguments as in the trial-level proceedings (see A178–314). The appeals court rejected those claims, finding that if a strict liability offense can exist consistent with due process, then one predicated on a due care standard can too. People v. Torres, 65 Misc.3d 19, 22 (App. Term 1st Dept. 2019). It cited to dicta in People v. Haney, 30 N.Y.2d 328, 334 n.7 (1972), and to the unchallenged misdemeanor provision of V.T.L. § 1146(d) for the proposition that criminal liability for ordinary negligence can exist. See id. (citing Haney). It found that the V.T.L. did not preempt the Due Care Provision, and that Penal Law Art. 15 was not meant to provide an exclusive range of mental states nor apply outside the Penal Law. Torres, 65 Misc.3d at 22–23.

Finally, the court found that Mr. Torres's plea was not involuntary, but, in any event, it did not wish to dismiss the case entirely, the remedy that Mr. Torres sought. Id. at 23.

ARGUMENT

POINT I

NEW YORK CITY ADMINISTRATIVE CODE § 19-190[B] IS (A) PREEMPTED BY BOTH THE PENAL LAW AND VEHICLE AND TRAFFIC LAW; AND (B) UNCONSTITUTIONAL BECAUSE IT CRIMINALIZES AN ACT COMMITTED WITHOUT DUE CARE, A CIVIL NEGLIGENCE STANDARD INVOLVING A SIGNIFICANTLY LOWER DEGREE OF CULPABILITY THAN THE TRADITIONAL CATEGORIES OF CRIMINAL MENS REA.

By expressly requiring proof of a mental state—ordinary negligence—all but unheard of in criminal law, New York City Administrative Code § 19-190(b) violates the U.S. and New York Constitutions. Because Mr. Torres's conviction of this crime cannot stand consistent with due process and supremacy principles, it must be reversed, and the charge against him dismissed.

A. State Law Preempts Admin. Code § 19-190(b).

1. Because the Penal Law Provides for Exclusive Categories of *Mens Rea*, the Due Care Standard Adopted by the City Council Was Preempted by State Law.

At common law, more than "slight" negligence has long been required for criminal liability. See People v. Angelo, 246 N.Y. 451, 454–55 (1927)

(collecting cases dating back at least as far as 1664 that hold that "gross' negligence is required to sustain a criminal conviction); People v. Paris, 138 A.D.2d 534, 535 (2d Dept. 1988)("For centuries, the common-law courts have distinguished between ordinary negligence which should not form the basis of a criminal charge, and negligence so egregious as to be deserving of criminal punishment." (citations and quotation marks omitted)); Staples v. United States, 511 U.S. 600, 605 (1994) ("[W]e must construe . . . statute[s] in light of the background rules of the common law . . . in which the requirement of some mens rea for a crime is firmly embedded." (internal citation omitted)).

This principle was passed to "the Colony of New York." Angelo, 246 N.Y. at 455; accord N.Y. Const. art. I, § 14 (stating that all common law of the colony effective as of the date of ratification remains the "law of this state"). In turn, New York State has long held that a modicum of blameworthiness is required for criminal liability. As this Court has stated, "[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); accord Angelo, 246 N.Y. at 457 (reversing 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; criminal negligence, or a "disregard of

the consequences which may ensue from the act, and indifference to the rights of others," is required for criminal liability).

In modern times, this Court has reaffirmed that "criminal liability cannot be predicated on every act of carelessness resulting in death[.] . . . [T]he carelessness required for criminal negligence is appreciably more serious than that of ordinary civil negligence, and . . . the carelessness must be such that its seriousness would be apparent to anyone who shares the community's general sense of right and wrong . . . ." People v. Boutin, 75 N.Y.2d 692, 695–96 (1990); Haney, 30 N.Y.2d at 335 (same); see also People v. Ladd, 89 N.Y.2d 893, 898 (1996) (internal quotations omitted) (approving a jury instruction stating as much); People v. Montanez, 41 N.Y.2d 53, 56 (1976) (noting a "long distance" separates civil and criminal negligence (internal quotations omitted)).

Critically, the Penal Law, as codified in 1965 and effective in 1967, confirms this longstanding principle: Article 15 makes no mention of ordinary negligence while defining the categories of mens rea to be applied statewide. Instead, Penal Law § 15.05 provides for just four categories of "mental culpability:" criminal negligence, recklessness, knowledge, and intent. See also Penal Law § 15.00(6) (defining "culpable mental state" as these four categories). "Criminal negligence" means acting while "fail[ing] to perceive a substantial and unjustifiable risk . . . [that] is of such nature and degree that disregard thereof

constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation." Penal Law § 15.05(4) (emphasis added). Ordinary negligence is not enumerated. In fact, in discussing the meaning of "criminal negligence" that it was proposing be enacted as a category of criminal liability, the Bartlett Commission members noted, an offender's "culpability, though obviously less than that of the reckless offender, is appreciably greater than that required for ordinary civil negligence by virtue of the 'substantial and unjustifiable' character of the risk involved and the factor of 'gross deviation' from the ordinary standard of care." Staff Notes, proposed Penal Law § 45.05 (A316). Notably, too, the drafters observed that there was some debate as to whether "criminal negligence" should be included at all; eventually, it was agreed that this should be included among the culpable mental states, but that it should be "employed . . . sparingly." Id.

Further, these categories, plus strict liability, were meant to be exclusive. As Penal Law § 15.10 specifies, a voluntary act or omission is the minimum conduct for a criminal offense; if no mental state is required, the "offense is one of 'strict liability.'" Otherwise, an offense is one of "mental culpability," as defined in Penal Law § 15.05. See Penal Law § 15.10.

Of particular import to the case at bar is that this exhaustive list of mental state categories expressly applies both in and outside of the Penal Law.

See Penal Law § 15.15(2); cf. People v. M & H Used Auto Parts & Cars, Inc., 22 A.D.3d 135, 136, 143 (2d Dept. 2005) (acknowledging that Penal Law § 15.15(2) provides that the Penal Law Art. 15 mental states apply outside that Chapter and finding that the culpable mental state of "knowingly" expressly identified in the Environmental Conservation Law applied to the environmental crimes at issue).

While it is true that Article 9 of the New York Constitution allows for "home rule" by local jurisdictions, that "police power is not absolute." People v. Diack, 24 N.Y.3d 674, 676 (2015). Instead, state law remains supreme where the State has evinced a clear intent to occupy the field, as preemption constitutes "a significant restriction on a local government's home rule powers." Id. at 679 (striking down a Nassau County ordinance creating criminal liability for a registered sex offender to live within 1,000 feet of a school as preempted by the comprehensive regulatory scheme embodied in several State laws, including the Sexual Assault Reform Act and Sex Offender Registration Act). As this Court stated in Village of Nyack v. Daytop Village, Inc., 78 N.Y.2d 500, 505 (1991), "Where the State has demonstrated its intent to preempt an entire field and preclude any further local regulation, local law regulating the same subject is considered inconsistent and will not be given effect."

Penal Law § 15.15(2) provides that clear intent to occupy the field. As the Bartlett Commission noted in its commentary on general principles of criminal liability, "The proposed article designates only four culpable mental states, defines each, and stipulates that, unless an offense is one of absolute liability, at least one of these particular mental states is essential for commission of the offense;" further, "the four terms in question are 'intentionally,' 'knowingly,' 'recklessly,' and 'criminal negligence.'" Bartlett Commission Staff Notes, proposed Penal Law § 45.05 (A315). Further evincing that these mental states were intended to be exclusive was the Commission's critique of the former criminal statutes as employing "a host of largely undefined and frequently hazy adverbial terms." Id. Thus, in proposing a new provision meant to prescribe general principles of criminal liability, the Commission had settled on just four mental states. Id.; cf. People v. Feingold, 7 N.Y.3d 288, 294 (2006) (noting that while depraved indifference is an additional element that the People must prove for first-degree reckless endangerment, that statute, Penal Law § 120.25, also requires proof that a defendant recklessly engaged in conduct creating a risk of death—i.e., one of the enumerated mental states of Penal Law § 15.15(2)); see also People v. Serrano, 173 A.D.3d 1484, 1485 (3d Dept. 2019) ("to prove the requisite mens rea [for Penal Law § 120.25], the People must show both recklessness creating a grave risk of death and a depraved

indifference to human life'')(emphases added); Bartlett Commission Staff Notes (under proposed Penal Law § 45.05, later codified at 15.15,[5] "at least one of these particular mental states is essential for commission of the offense" (emphasis added) (A315)). By making an offense criminal where the mental state for guilt need be no greater than ordinary negligence, New York City violated the text of the Penal Law and principles of state-law supremacy.[6]

While it is true that strict liability offenses exist in New York, this does not allow for an additional mens rea category in between strict liability and gross negligence to be imported into the law, as the Appellate Term claimed. First, strict liability is a limited textual exception expressly provided for in Penal Law § 15.15(2): only where there is a "clear[] . . . legislative intent to impose strict

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[5]Penal Law § 15.15(1) suggests that offenses need not contain just one mens rea, but they must contain one of the enumerated ones at minimum. See also Bartlett Commission Staff Notes, proposed Penal Law § 45.05 (A315–16). Indeed, when more than one is required, that imposes additional burdens on the People in making their case. Here, by contrast, the Due Care Provision requires that they prove less than what Penal Law Art. 15 requires.

[6] It is of no moment that Mr. Torres makes no challenge to the V.T.L. provision under which he was separately convicted. This appeal is predicated on the notion that he is not criminally liable for a deviation from the ordinary standard of care, and V.T.L. § 1146(c)(1) makes a person guilty only of a traffic infraction for that same conduct (but causing serious physical injury, not just physical injury). Thus, the same constitutional problems do not inhere. Whether V.T.L. § 1146(d), which creates a B misdemeanor for this conduct where the driver has previously been found guilty of similar conduct, is constitutional is not at issue here, as Mr. Torres was not charged with nor convicted under that subsection. In any event, there is a basis for imputing a heightened degree of culpability for someone previously convicted of the infraction. See People v. Salamon, 54 Misc.3d 960, 971 (Crim. Ct. Kings County 2016) ("[A] logical reading and conclusion of V.T.L. 1146 is that lack of due care is not initially a crime, but once the defendant has been involved in a second and similar incident," he should be aware of the "dangerous repercussions of his seemingly negligent acts."). In essence, a recidivist acts "knowingly."

liability." See also Bartlett Commission Staff Notes, proposed Penal Law § 45.05 (A315) ("Such offenses are sparse in the proposed Penal Law for most must be committed with some culpable mental state.").Otherwise, the crime is one of mental culpability, and there is a strong presumption in favor of requiring that a mental state exist for criminal liability. Id. Again, acceptable mental states are the ones specified in Penal Law § 15.05.

Second, the universe of offenses defined as ones of strict liability is intended to be—and is—very small. Staples, 511 U.S. at 606 ("[O]ffenses that require no mens rea generally are disfavored"). Strict liability exists only for "public welfare" offenses, where "the element of mental culpability may be eliminated only because the objects that are the subject of the legislation are so obviously and inherently dangerous that anyone who possesses them should bear the burden of determining, at their own peril, whether they are prohibited by law." People v. Wood, 58 A.D.3d 242, 251 (1st Dept. 2008). Hallmarks of these offenses include that the penalties are relatively minor and the risk of harm to the offender's reputation small. See Morissette v. United States, 342 U.S. 246, 256 (1952).

For example, having hand grenades, whose possession is "not an innocent act," may be subject to "public welfare" regulation. United States v. Freed, 401 U.S. 601, 609 (1971). Intoxicated driving is another inherently

dangerous activity that should put the actor on notice of its illegality. See V.T.L. § 1192(2)–(3); People v. Prescott, 95 N.Y.2d 655, 659 (2001) (in the course of finding that attempted driving while intoxicated is not a cognizable offense, approving of lower court's finding that driving while intoxicated is a strict-liability crime); In re Woods, 56 A.D.3d 184, 185–86 (1st Dept. 2008) (noting that the elements of intoxicated driving are only (1) operating a motor vehicle, (2) while in an intoxicated condition or if the person's blood alcohol content is greater than 0.08).

By contrast, trafficking in sexually explicit media involving adults is not something that individuals would expect to be regulated. See United States v. X-Citement Video, Inc., 513 U.S. 64, 72–73 (1994). Accordingly, the Supreme Court found, a knowledge requirement must be read into the element that persons depicted are minors; there can be no strict liability for shipping such materials where the sender is not aware of the age of the performers. Id. at 73. Similarly, even some environmental offenses, sometimes considered classic examples of "public welfare offenses," require knowledge that the substance that one is handling is dangerous. See M & H Used Auto Parts & Cars, Inc., 22 A.D.3d at 136, 144.

Similarly, it cannot be that driving is inherently dangerous—or at least cannot be considered so without the risk of criminalizing everyday behavior.

Driving, engaged in by millions to get to work, school, leisure activities, and more, is nothing like, for example, transporting toxic waste. Even AR-15 assault rifles have not been deemed exceptionally dangerous, despite their capacity for extreme lethality. Staples, 511 U.S. at 619. As the Supreme Court stated there, "Even dangerous items can, in some cases, be so commonplace and generally available that we would not consider them to alert individuals to the likelihood of strict regulation." Id. at 612–13. The debate over per se weapons criminalized under Penal Law § 265.01(1) is similarly illustrative; where those weapons can have no purpose other than to cause bodily harm, then there can be strict liability for their possession. See, e.g., Penal Law § 265.00(15-b) (defining a "Kung Fu star" as a "disc-like object with sharpened points . . . designed for use primarily as a weapon to be thrown"). However, for certain knives that also have legitimate uses, strict liability is unfair. See Cracco v. Vance, 376 F.Supp.3d 304 (S.D.N.Y. 2019) (holding gravity knife ban unconstitutional as applied); L.2019, ch. 34, § 1 (removing gravity knives from the list of weapons banned by virtue of their design to be dangerous). Cars, like gravity knives, might pose dangers, but they are nothing if not ubiquitous and "commonplace."

Perhaps most critically, though, if the Due Care Provision was intended to be a strict-liability offense, the City Council would not have relieved a driver

from liability if they acted with "due care." See Admin. Code § 19-190(c). Put another way, only drivers who act negligently—i.e., who do not exercise ordinary due care while driving—will have violated the provision. As such, the City Council plainly does not regard driving as an inherently dangerous activity. The People conceded as much in their original response (A45–46), and the trial court was incorrect to find that this was an offense without a mental state element.

Because the Due Care Provision requires, by its plain text, no more than ordinary negligence,[7] upholding this ordinance would upend centuries of precedent, which have been expressly incorporated into State law. See N.Y. Const. art. I, § 14. Doing so would directly contradict provisions in the modern Penal Law meant to limit the reach of criminal liability to blameworthy acts, either those that, at minimum, involve a gross deviation from the standard of care of a reasonable person, or are so inherently dangerous that a person should be on notice that to engage in the act is itself a crime.

[7] The text is clear, so resort to legislative intent is unnecessary. See In re Polan v. State of New York Ins. Dept., 3 N.Y.3d 54, 58 (2004). Nonetheless, it is of note that the City took the position that the provision meant what it said when utilizing a due-care standard in a settlement reached between it and the Transit Workers Union. See Transit Workers Union of Greater New York, et al. v. Bill de Blasio, et al., Stipulated Order of Settlement, 15-cv-2225 (BMC) (E.D.N.Y. 2015) (noting that due care as used in the Administrative Code bears its ordinary meaning: that of "reasonableness under the circumstances"); see also A165, A46.

2. The Due Care Provision Is Also Preempted by the Vehicle and Traffic Law.

Similarly, while the V.T.L. delegates some powers to local authorities, this delegation is not unlimited. See generally V.T.L. Art. 35. Accordingly, laws that conflict with State enactments are void under the V.T.L. itself and principles of conflict preemption. E.g., Consolidated Edison Co. v. Town of Red Hook, 60 N.Y.2d 99, 107 (1983). Local laws are in conflict when they are "inconsistent" with State ones. Id.

As relevant here, V.T.L. § 1600 states that "the provisions of this chapter shall be applicable and uniform throughout this state and in all political subdivisions and municipalities therein and no local authority shall enact or enforce any local law, ordinance, order, rule or regulation in conflict" with the V.T.L. "unless expressly authorized herein." And, V.T.L. § 1604 provides that any local laws in conflict with the statewide scheme are void. The intent of the Legislature was to occupy the field of motor vehicle regulation and provide for uniform rules across the State. See People v. President & Trustees of Village of Ossining, 238 A.D.684, 687–88 (1st Dept. 1933).

What is left to localities to regulate is expressly enumerated in various V.T.L. provisions. Articles 39 through 42 spell out what local governments of various types may regulate. They do not expressly authorize the passage of right-of-way rules regarding motorists and pedestrians.

Instead, V.T.L. § 1146(c)(1) provides that any driver who fails to yield to a pedestrian or cyclist—and causes serious physical injury to that person—while not exercising due care shall be guilty of a non-criminal traffic infraction (unless he is a recidivist). By contrast, the Due Care Provision proscribes the same while causing mere physical injury; upon conviction, the person is guilty of a misdemeanor. Thus, by punishing the same conduct (but less severe results) more harshly, the City enactment undermines the scheme of the V.T.L. as well as contravenes the express language of V.T.L. §§ 1600 and 1604, which prohibit local legislatures from enacting contradictory laws. Specifically, a person might be guilty of a local law violation—that is, peculiarly, a criminal offense—while not even having committed a State-level infraction. By contrast, if someone is guilty of the State offense, he necessarily is also guilty of the City one, yet his punishment exceeds what the State calls for. While the Appellate Term here reasoned, citing a case involving civil penalties, see Zakrzewska v. New School, 14 N.Y.3d 469, 480–81 (2010), that a stricter local penalty alone would not be enough for a conflict, a local law cannot criminalize what the State considers a mere infraction without running afoul of conflict preemption principles. Yet, that is what happened here. Given the V.T.L. provisions, the City Council acted beyond its mandate in enacting the Due Care Provision.

B. The Administrative Code Provision Expressly Employs a Due Care Mental State, a Constitutionally Impermissible Standard for Criminal Liability.

As is clear from the text of the Due Care Provision and the foregoing, the City Council plainly employed a civil negligence standard in its enactment, not one of strict liability or gross negligence. Yet, such a provision cannot stand consistent with due process and must be struck down.

The Supreme Court has emphasized that more than civil negligence is required for a criminal act. As it noted in Elonis v. United States, using a "'reasonable person' standard is a familiar feature of civil liability in tort law, but is inconsistent with the conventional requirement for criminal conduct—awareness of some wrongdoing." 135 S.Ct. 2001, 2011 (2015) (internal citations and quotation marks omitted) (emphasis in the original); accord Morissette, 342 U.S. at 252 ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."). Criminal liability "does not turn solely on the results of an act without considering the defendant's mental state." Elonis, 135 S.Ct. at 2013. Thus, the Elonis Court found, Elonis's conviction, which had

been predicated on a charge employing "reasonable person" language, could not stand. 135 S.Ct. at 2007, 2013.

The reason that this is so has roots not only in the common law but also in constitutional principles. Fundamentally, "[t]he very fabric of our criminal justice system is that an accused person stands before a court innocent until proven guilty, and is entitled to significant constitutional protections separate and distinct from a civil case." People v. Sanson, 52 Misc.3d 980, 986 (Crim. Ct. Queens County 2016), aff'd on other grounds, 59 Misc.3d 4 (App. Term 2d Dept. 2018); accord Noah M. Kazis, Tort Concepts in Traffic Crimes, Comment, 125 Yale L.J. 1131, 1133 (Feb. 2016) (noting that the distinction between tort and criminal law is a central organizing principle of our legal system). More specifically, requiring no more than proof of civil negligence would violate the right to due process, as enshrined in U.S. Const amends. V, XIV, and N.Y. Const. art. I, § 6. As one court pointed out in analyzing the constitutionality of the Due Care Provision, legal scholars cannot even agree on how, exactly, to define negligence, with different schools of thought advocating for objective, subjective, or hybrid standards. See Salamon, 54 Misc.3d at 972–74. In our criminal legal system, such debate is inconsistent with the clarity required for a person to be held criminally liable. As the Salamon court noted, citing precedent out of this Court and the U.S. Supreme Court, vagueness offers

no guide to courts, law enforcement, and individuals; "thus, a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application, violates the first essential of due process." 54 Misc.3d at 974 (internal citation and quotation omitted).

In addition to vagueness problems, a negligence standard would abrogate centuries of common law and contravene clear legislative intent. Indeed, New York courts have regularly rejected the use of a civil negligence standard in a criminal case. See also People v. Cabrera, 10 N.Y.3d 370, 378 (2008) (noting that while the behavior of a teenage driver whose crash killed and injured others was "negligent" and "blameworthy" in that he was speeding, such conduct could not rise to the level of criminal liability); People v. Weckworth, 55 Misc.3d 1210(A), *4 (Crim. Ct. New York County Apr. 17, 2017) ("Appellate courts have carefully distinguished criminal negligence from ordinary negligence—squarely rejecting the applicability of ordinary negligence in criminal cases); People v. Washington, 54 Misc.3d 802, 817 (Crim. Ct. Kings County 2016) (in evaluating the Due Care Provision, noting that "it is clear that under New York common law and the New York and United States Constitutions, a civil negligence standard is not properly applied to a criminal prosecution"); People v. Ye, 55 Misc. 3d 1214(A), at *4 (Crim. Ct. Queens County 2017)

("Notably, ordinary negligence is not one of the codified culpable mental states.").

The Appellate Term's reliance on footnoted dicta from this Court's decision in Haney, 30 N.Y.2d at 334 n.7, is misplaced. In Haney, this Court, reviewing the recent incorporation of the Model Penal Code crime of criminally negligent homicide into the New York Penal Law, explained that someone acts with criminal negligence when he does less than "that of the reckless offender who consciously disregards the risk" but "appreciably" more "than that required for ordinary civil negligence by virtue of the 'substantial and unjustifiable' character of the risk involved and the factor of 'gross deviation' from the ordinary standard of care." Id. at 333–34 (internal citations omitted).

The passage in Haney cited by the Appellate Term, which referenced criminal liability "sometimes imposed by statute" for death caused by ordinary negligence, was dicta, since ordinary negligence was not at issue in Haney itself. See id. at n.7. Further, the purpose of this footnote was to support that criminal negligence was an appropriate development for New York State, not that ordinary negligence was a permissible (or constitutional) mens rea for imposing criminal liability in New York. The "non-vehicular" New York case illustratively cited by Haney, People v. Sandgren, 302 N.Y. 331 (1951), does not hold that ordinary negligence can alone satisfy due process requirements; the pre-revision

Penal Law provision at issue there also contained a knowledge requirement as to a dog's dangerousness when it kills a person.

* * *

Both branches of Mr. Torres's constitutional claim were preserved by specific motion to dismiss, arguing conflict and field preemption, and a due process violation, respectively. The court ultimately decided that no mental state was required, notwithstanding the clear text, finding that "without due care" was a manner of driving rather than a common phrasing for civil negligence (A163). Because the negative implication of an offense being deemed one of strict liability is that it is not one that requires a finding of ordinary negligence for liability, the court below reached the question now at issue on appeal. Similarly, it found that the city law was not preempted by either the V.T.L. or the Penal Law (A165–66).

Further, and contrary to what respondent is likely to argue, these claims both survive a guilty plea. The motion was fully briefed and argued, Mr. Torres expressly reserved the right to present these claims on appeal (A176), and this Court's precedent makes clear that Mr. Torres did not waive his constitutional claims by pleading guilty. See Lee, 58 N.Y.2d at 493–94.

Accordingly, this Court must strike down the Due Care Provision as fatally flawed, and must reverse and dismiss Mr. Torres's conviction of this offense.

POINT II

BY NOT ADVISING MR. TORRES OF THE LENGTH OF THE TERM OF HIS CONDITIONAL DISCHARGE, THE COURT VIOLATED HIS RIGHT TO DUE PROCESS. U.S. CONST. AMEND. XIV; N.Y. CONST. ART. I, § 6.

On September 13, 2017, Mr. Torres pleaded guilty to a misdemeanor and a traffic infraction. During the same short proceeding, the court sentenced Mr. Torres to a conditional discharge, with the conditions being that he pay a $750 fine and complete an Attitudinal Driving Program.

However, the court failed to advise Mr. Torres of the specific duration of the conditional discharge, a direct consequence of his sentence. Without that key advisal, his plea was unknowing and involuntary, and must be vacated. See U.S. Const. amend. XIV; N.Y. Const. art. I, § 6; Catu, 4 N.Y.3d 242. Further, in the interest of justice, the entire charging instrument should be dismissed. See People v. Burwell, 53 N.Y.2d 849 (1981).

A trial court has a duty "to prevent the State from accepting a guilty plea without record assurance that the defendant understands the most fundamental and direct consequences of the plea." People v. Peque, 22 N.Y.3d 168, 190–91 (2013); accord Brady v. United States, 297 U.S. 742, 748 (1970).

This Court has distinguished between direct and collateral consequences of a conviction and has explained that "a trial court 'must advise a defendant of the direct consequences'" prior to taking a guilty plea. People v. Harnett, 16 N.Y.3d 200, 205 (2011) (citing Catu, 4 N.Y.3d at 244 (emphasis added in Harnett)). In order to distinguish between direct and collateral consequences, one looks to whether the impact is "definite, immediate and largely automatic," i.e., a direct consequence, or whether it is "peculiar to the individual's particular circumstances . . . and not within the control of the court system," i.e., a collateral consequence. People v. Ford, 86 N.Y.2d 397, 403 (1995); accord Peque, 22 N.Y.3d 168.

Applying this well-established test, it is clear that the conditional discharge sentence of one year was a direct consequence: its occurrence was wholly within the control of the court system and it was in no way triggered by an attribute or behavior of the defendant, or external circumstance. Accordingly, the court was required to inform Mr. Torres of this consequence prior to his entering a guilty plea. The failure to do so renders the plea invalid. Harnett, 16 N.Y.3d at 205 ("omission from a plea colloquy [of direct consequences] makes the plea per se invalid").

In Harnett, the Court of Appeals reaffirmed that a defendant must be advised of the "core components" of a sentence. Id. ("The direct consequences

of a plea—those whose omission from a plea colloquy makes the plea per se invalid—are essentially the core components of a defendant's sentence: a term of probation or imprisonment, a term of postrelease supervision, a fine."). The conditional discharge term of one year was the core component of Mr. Torres's sentence.

Key to this analysis is that a conditional discharge functions much like probation or post-release supervision ("PRS"), both of which are sentence consequences of which a defendant must be informed prior to entering a plea. Id. Conditional discharge, probation, and PRS are all equivalent in the respect that the failure to abide by the conditions imposed or a new arrest can, for all three of these punishments, result in a re-sentencing. (In the case of conditional discharge, the judge also has the option of modifying or enlarging the conditions imposed. Penal Law § 65.05(2).)

By concluding that a defendant need not be advised of a sentence of conditional discharge prior to entering a guilty plea, the Appellate Term drew a spurious distinction between probation and PRS, on one hand, and conditional discharge, on the other. Each of these sentences is for a prescribed period of time. See Penal Law § 65.00(3), Penal Law § 65.05(3), Penal Law § 70.45(2)–(2-a). In addition, failure to complete the imposed conditions under any of these types of sentences can result in jail or prison time. See Penal Law § 65.00(4),

Penal Law § 65.05(2), Penal Law § 70.45(1)); see also Catu, 4 N.Y.3d at 245 (violation of PRS conditions can result in re-incarceration). Because there is no logical distinction between PRS and probation, on one hand, see Catu, 4 N.Y.3d at 244; People v. Oduro, 126 A.D.3d 523 (1st Dept. 2015) (citing Harnett, 16 N.Y.3d at 205), and conditional discharge on the other, the Harnett rule should equally apply to Mr. Torres's case.

Although Mr. Torres did not move to withdraw his plea, this Court must reach the question because he pleaded guilty and was sentenced in the same proceeding. See People v. Tyrell, 22 N.Y.3d 359, 364 (2013) (excusing failure to seek plea withdrawal where plea and sentencing occur in one proceeding). It may review a claim "where the particular circumstances of a case reveal that a defendant had no actual or practical ability to object to an alleged error in the taking of a plea that was clear from the face of the record." People v. Conceicao, 26 N.Y.3d 375, 381 (2015). This Court has made clear that failure of a court to advise a defendant of his sentencing consequences is a claim that can be raised on direct appeal, regardless of preservation. People v. Louree, 8 N.Y.3d 541, 545–46 (2007).

As a result of the due process violation here, this Court should dismiss the accusatory instrument. See, e.g., Burwell, 53 N.Y.2d at 851 (dismissing accusatory instrument in its entirety where the defendant served her sentence

and the charges involved relatively minor crimes); Tyrell, 22 N.Y.3d at 366 (misdemeanor complaint dismissed); People v. Scala, 26 N.Y.2d 753 (1970) (misdemeanor information dismissed).

CONCLUSION

FOR THE REASONS IN POINT I, ADMIN. CODE § 19-190(B) MUST BE STRUCK DOWN, AND MR. TORRES'S CONVICTION UNDER THAT PROVISION REVERSED AND THE CHARGE DISMISSED; FOR THE REASONS IN POINT II, MR. TORRES'S CONVICTION MUST BE REVERSED, AND THE CHARGE SHOULD BE DISMISSED.

Respectfully submitted,

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April 24, 2020

WORD-COUNT CERTIFICATION

I certify that, excluding the Table of Contents and Table of Authorities, the foregoing appellant's brief was prepared in Wordperfect®, using a 14-point Garamond font, and 13 points in the footnotes, and totaled 7,579 words.

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Katharine Skolnick