IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRIAN WINNINGHAM	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	
v.	)	No. 143, 2022
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S *CORRECTED* OPENING BRIEF

Elliot Margules, Esquire [#6056]
Office of the Public Defender
Carvel State Building
820 N. French St.
Wilmington, Delaware 19801
(302) 577-5141

Attorney for Appellant

DATE: August 23, 2022

TABLE OF CONTENTS

TABLE OF CITATIONS ii

NATURE AND STAGE OF THE PROCEEDINGS 1

SUMMARY OF THE ARGUMENT 2

STATEMENT OF FACTS 4

ARGUMENT:

I. NO RATIONAL TRIER OF FACT COULD FIND WINNINGHAM GUILTY BEYOND A REASONABLE DOUBT OF CRIMINALLY NEGLIGENT HOMICIDE BECAUSE THE STATE FAILED TO MEET ITS BURDEN TO PROVE THAT HIS CONDUCT CREATED A RISK OF DEATH SO GREAT THAT HE WAS GROSSLY DEVIANT FOR NOT RECOGNIZING THAT RISK 7

II. THE TRIAL COURT VIOLATED WINNINGHAM'S RIGHT TO DUE PROCESS WHEN IT CONVICTED HIM OF CRIMINALLY NEGLIGENT HOMICIDE WITHOUT HOLDING THE STATE TO ITS BURDEN OF PROVING THAT HE NEGLIGENTLY FAILED TO PERCEIVE A RISK OF DEATH POSED BY HIS CONDUCT 16

Conclusion 25

Verdict and Findings Pursuant to Super. Ct. R. 23(c) ..... Exhibit A

Sentence Order ..... Exhibit B

TABLE OF CITATIONS

Case

Back v. Neill, 279 N.W. 471, 473 (Neb. 1938) 12

Cannon v. State, 181 A.3d 615 (Del. 2018) ..... *passim*

Dolan v. State, 925 A.2d 495 (Del. 2007) 23

DuPree v. State, 310 So. 2d 396 (Fla. Dist. Ct. App. 1975) ..... 9—10

Frey v. Goshow-Harris, 2009 WL 2963789 (Del. Super. Ct. Sept. 16, 2009) 12

Harris v. Rivera, 454 U.S. 339 (1981) 23

Harrison v. State, 170 A.3d 780 (Del. 2017) 17

Jardel Co., Inc. v. Hughes, 523 A.2d 518 (Del. 1987) 8

Lloyd v. State, 152 A.3d 1266 (Del. 2016) 16

McCloskey v. McKelvey, 174 A.2d 691 (Del. Super. Ct. 1961) 34

McNally v. State, 980 A.2d 364 (Del. 2009) 23

Mills v. State, 201 A.3d 1163 (Del. 2019) 17

Mills v. State, 732 A.2d 845 (Del. 1999) 17, 22, 24

People v. Cabrera, 887 N.E.2d 1132 (N.Y. 2008) 11

People v. Faucett, 206 A.D.3d 1463 (N.Y. 2022) 9, 11

Plummer v. State, 702 A.2d 453 (Md. Ct. Spec. App. 1997) 13

Queeman v. State, 520 S.W.3d 616 (Tex. Crim. App. 2017) ..... 9, 12—15

Smith v. State, 317 A.2d 20 (Del. 1974) 23

State v. Belleville, 88 A.3d 918 (N.H. 2014) 14

State v. Dion, 62 A.3d 792 (N.H. 2013) 14

State v. Green, 647 S.E.2d 736 (W. Va. 2007) 9

State v. Hudson Cr. A. No. S97–10–0231, Lee, R.J. (Del.Super. March 9, 1998) 9

State v. Jones, 151 S.W.3d 494 (Tenn. 2004) 12

State v. Kang, 2002 WL 1587852 (Del. Super. Ct. 2002) 9

State v. Knight, 1999 WL 1427766 (Del. Super. Ct. Dec. 20, 1999) 13

State v. Sharpley, 2009 WL 406797 (Del. Super. Ct. Jan. 30, 2009) .....9, 13—15

State v. Van Tassel, 2009 WL 1684072 (Minn. Ct. App. 2009).....14

Taylor v. State, 822 A.2d 1052 (Del. 2003).....16

United States v. Argueta-Rosales, 819 F.3d 1149 (9th Cir. 2016) 17

United States v. Palermo, 259 F.2d 872 (3d Cir. 1958) 17

Williamson v. State, 113 A.3d 155 (Del. 2015) 7

Statutes and Rules

11 *Del. C.* § 231 .....8, 9, 12, 18

11 *Del. C.* § 628 18

11 *Del. C.* § 628A 18

11 *Del. C.* § 631 .....8, 13, 19

Del. Super. Ct. Crim. R. 29.....7

U.S. Const. amend. XIV 17

Other Authority

Delaware Criminal Pattern Jury Instructions.....19

Findings in Jury-Waived Cases, FED. PRAC. & PROC. CRIM. (4th ed.).....16

Wayne R. LaFave, *Substantive Criminal Law*, (3d ed. 2017).....18

Center for Disease Control and Prevention, *Distracted Driving* (accessed on August 3, 2022) *available at* http://www.cdc.gov/motorvehiclesafety/distracted_driving/.....12

State of Delaware, *Delaware Criminal Code with Commentary* (1973).....8, 9, 12—13

NATURE AND STAGE OF PROCEEDINGS

On September 24, 2019, Brian Winningham was involved in a four-car accident which resulted in the death of two people, and injuries to two others. On September 8, 2020, following an investigation into the accident, Winningham was indicted on two counts of Criminally Negligent Homicide, and one count each of Vehicular Assault Second Degree, Vehicular Assault Third Degree, False Record of Commercial Motor Vehicle Driver's Duty Status, Inattentive Driving, and Following a Motor Vehicle Too Closely. A7–10.

On September 28, 2021, Winningham waived his right to a jury trial and proceeded to a two-day bench trial. A13–18. On September 30, 2021, the trial court found Winningham not guilty of Making a False Record of Commercial Motor Vehicle Driver's Duty Status and Following a Motor Vehicle Too Closely, but guilty of Criminally Negligent Homicide (both counts), Vehicular Assault Second Degree, Vehicular Assault Third Degree, and Inattentive Driving. Exhibit A at 13–16.

On April 1, 2022, Winningham was sentenced to twenty-three years at level 5, suspended after four months and followed by probation. Winningham was also ordered to pay restitution. Ex. B.

This is Winningham's opening brief to his timely filed notice of appeal.

SUMMARY OF ARGUMENT

1. There was insufficient evidence to convict Winningham of Criminally Negligent Homicide. Criminal negligence requires more than "simple" negligence. It requires flagrant and extreme conduct which grossly deviates from the reasonable person standard of care. No reasonable fact finder could conclude this level of negligence was established with respect to Winningham's Criminally Negligent Homicide charges.

Winningham was driving his tractor-trailer on a highway within a few miles of the speed limit. He was not aggressively passing other vehicles, following them too closely, talking on the phone, or intoxicated. He did, however, divert his attention from the road for four seconds, during which time he crashed into cars in front of him which had come to a complete stop. Winningham's inattentiveness was negligent; but not criminally negligent. The evidence suggests his state of mind was indistinguishable from any driver's negligence in a routine "fender bender." The fact that his inattention resulted in a tragedy should not be minimized, but nonetheless, does not turn his simple negligence into a homicide.

2. The trial court violated Winningham's due process rights by convicting him of two counts of Criminally Negligent Homicide without requiring the State to prove the requisite *mens rea*. The only element of any charge which Winningham disputed at trial was the *mens rea* – criminal negligence – in the two Criminally Negligent Homicide charges. Criminal negligence in the homicide context required the State to prove, in part, that Winningham negligently failed to perceive a risk of *death*, and is distinguished from the criminal negligence at issue in the Vehicular Assault Second and Third Degree charges, which required the State to prove that he negligently failed to perceive risks of a *serious physical injury*, and *physical injury*, respectively.

Instead of requiring the State to prove Winningham failed to perceive a risk of death, the trial court declared it would convict Winningham of Criminally Negligent Homicide if the State proved he failed to perceive a risk of death, or alternatively, if the State only proved he failed to perceive a risk of serious injury. To be sure, in issuing the factual findings upon which Winningham's convictions are based, the judge did not ever find that he negligently failed to perceive a risk of death.

STATEMENT OF FACTS

On September 24, 2019, Brian Winningham ("Winningham") was driving southbound on Interstate 95 (I-95) in a tractor trailer. Ex. A at 5. After resting for several hours at a rest-stop in New Jersey, he began to make his way through Delaware towards his destination in North Carolina. Exhibit A ("Ex. A") at 5.

Although the vehicle was fully loaded, it was not particularly heavy. A212. The posted speed limit in the relevant portion of I-95 is 65 miles per hour (mph). A117. Winningham maintained a speed of around 67–68 mph. A178–79; A275. The vehicle's dash cam reveals that Winningham was traveling at a similar speed to most vehicles on the highway – he passed some, and others passed him. A353.[1]

Around rush hour, Winningham approached the exit for 896. Traffic was "fairly normal" at that time. A35. Winningham was in the far-right lane, which was not an exit lane. Ex. A at 6–7. He was driving straight and maintaining his lane. A353. Cameras on Winningham's vehicle show that in the period immediately preceding the accident there were no cars visibly in front of him in his lane of travel, and the lane to his left was open. A353. Approximately four seconds before the accident, stand still traffic in Winningham's lane suddenly becomes visible on the video. A353. Winningham did not slow down, attempt to swerve out of the way, or

[1] The video of the incident, included as A353, is approximately 24 minutes long and begins with Winningham's truck parked in a service area. The truck leaves the service area at 3:15. The accident occurs at 21:15.

hit the brakes until at or around the time of the collision. A278–79; A306. The judge concluded that Winningham had not been paying attention. Ex. A at 12.

The accident involved three vehicles other than Winningham's. Ex. A at 3. Occupants of all vehicles were tragically injured: two died, one was paralyzed from the neck down, and a fourth suffered numerous injuries to his back and neck. Ex. A at 9–10. Sergeant Dermot Alexander, a supervisor in the Delaware State Police's Collision Reconstruction Unit, testified extensively about the mechanics of the accident and, in part relying on medical records, how it caused the injuries. A86–129; A253–57.

During a recorded interview with police, Winningham recalled taking his eyes off the road, and specifically remembered reaching for a drink and then seeing a grey vehicle enter his lane, which he was unable to avoid hitting before the accident. A152, A354. A civilian heard him make a similar statement at the scene of the accident. A47. However, the video evidence was inconsistent with the portion of his statement about the vehicle. Ex. A at 6–7. Recognizing that the statement was given just hours after this traumatic incident, while Winningham was still suffering from injuries in a hospital bed (A181–82), trial counsel asked the trial court to "give [it] little to no weight." A341. The judge did not suggest Winningham was deliberately dishonest, but noting the "inaccuracy" in his statement, "accord[ed] little weight to his explanation." Ex. A at 8–9.

Winningham caused this tragic accident, but there is no question he did not intend to do so. Ex. A at 10–11. The judge found Winningham was traveling just two mph above the speed limit. Ex. A at 9. He was well rested. A340. He was not aggressively passing other vehicles. He was not following other vehicles too closely. Ex. A at 16. He had not used drugs or alcohol. Ex. A at 8. He was not using his phone. Ex. A at 8. He had maintained his truck in good working order (A191–92; A209), and there were no violations of any of the numerous Commercial Driving restrictions governing driving hours, resting hours, and maintaining records thereof. Exhibit A at 5, 15. However, he took his eyes off the road for a few seconds, failed to see the traffic he was approaching, and tragically collided into the stopped cars. Ex. A at 8.

I. NO RATIONAL TRIER OF FACT COULD FIND WINNINGHAM GUILTY BEYOND A REASONABLE DOUBT OF CRIMINALLY NEGLIGENT HOMICIDE BECAUSE THE STATE FAILED TO MEET ITS BURDEN TO PROVE THAT HIS CONDUCT CREATED A RISK OF DEATH SO GREAT THAT HE WAS GROSSLY DEVIANT FOR NOT RECOGNIZING THAT RISK.

Question Presented

Whether any rational trier of fact could find Winningham guilty beyond reasonable doubt of Criminally Negligent Homicide when the State failed to prove that his conduct created a risk of death so great that he was grossly deviant for not recognizing that risk?[2] A1, D.I. #4.

Standard and Scope of Review

This Court reviews the sufficiency of the evidence to determine whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find a defendant guilty beyond a reasonable doubt.[3]

Argument

At Winningham's bench trial the judge found that he was driving just two mph over the speed limit. Ex. A at 9. Winningham was not tailgating or following too closely. Ex. A at 16. He was well rested. Ex. A at 5. He was not impaired by

[2] *See* Del. Super. Ct. Crim. R. 29(a).

[3] *Williamson v. State*, 113 A.3d 155, 158 (Del. 2015) ("[W]here the defendant has entered a plea of 'not guilty' but fails to formally move for a judgment of acquittal in a bench trial . . . the sufficiency of the evidence will be reviewed . . . as if there had been a formal motion for a judgment of acquittal."). A1, D.I. #4.

drugs or alcohol, and he was not using his cell phone. Ex. A at 8. Nonetheless, during a few seconds of inattentiveness, Winningham failed to notice that the cars in front of him had come to a complete stop in a highspeed traffic lane. Ex. A at 13. The State did not establish Winningham had committed a single other driving infraction, or any violation whatsoever of the commercial driving requirements regarding which it presented extensive testimony. While Winningham's inattention was negligent, he did not engage in the "abnormal"[4] risk taking which forms the basis of Criminally Negligent Homicide. Thus, Counts 1 and 2 must be reversed.

A. ***Criminal negligence requires proof of flagrant and unordinary risk taking.***

To convict Winningham of criminally negligent homicide, the State was required to prove that he caused the death of another person with criminal negligence.[5] Criminal negligence in the homicide context is a failure to perceive a risk of death of such a nature and degree that the failure to perceive it is a "gross deviation" from the standard of conduct a reasonable person would observe in the situation.[6] There must be "more than ordinary inadvertence or inattention."[7] It is not enough to prove the accused's negligent conduct posed a risk of death.[8]

---

[4] *Cannon v. State*, 181 A.3d 615, 620 (Del. 2018) (citing State of Delaware, *Delaware Criminal Code with Commentary* (1973) [hereinafter Delaware Commentary]).
[5] 11 *Del. C.* § 631.
[6] 11 *Del. C.* § 231 (a).
[7] *Jardel Co., Inc. v. Hughes*, 523 A.2d 518, 530 (Del. 1987).
[8] *Cannon*, 181 A.3d at 620.

Driving on a highway necessarily includes a risk of death. To be criminally negligent, the failure to recognize the risk of death must be "abnormal," and "markedly disparate" from how a reasonable person would grasp the situation.[9] Negligent driving that results in a death is not criminally negligent driving unless there is "a glaring or flagrant, deviation" from the reasonable person standard.[10] Acts of driving appropriately punished as criminally negligent include driving while intoxicated,[11] "racing around rural roads as an exhibitionist,"[12] or intentionally driving on the wrong side of the road.[13] Criminal negligence is "egregious [or] shocking risk taking."[14] By contrast, failing to pay attention to the road – even on a highway, and even while going 67 mph – is an almost ubiquitous error surely familiar to most drivers. The result of Winningham's conduct was an undeniable catastrophe, but his negligence simply did not rise to a criminal level.[15]

---

[9] *Cannon*, 181 A.3d at 620 (citing Delaware Commentary).
[10] Delaware Commentary § 231 at 33.
[11] *State v. Kang*, 2002 WL 1587852 (Del. Super. Ct. 2002).
[12] *State v. Sharpley*, 2009 WL 406797 at *3 (Del. Super. Ct. Jan. 30, 2009).
[13] *State v. Hudson* Cr. A. No. S97–10–0231, Lee, R.J. (Del.Super. March 9, 1998), as cited in *Sharpley*, 2009 WL 406797 n.13.
[14] *Queeman v. State*, 520 S.W.3d 616, 627 (Tex. Crim. App. 2017).
[15] *Sharpley*, 2009 WL 406797 at *3 (holding excessive speed and four seconds of inattentive driving is not criminal negligence); *People v. Faucett*, 206 A.D.3d 1463, 1465 (N.Y. 2022) (holding tractor-trailer driver who hit Department of Transportation truck on road's shoulder was not criminally negligent despite traveling 70 mph in 65 mph zone and "unexplained failure" to see the truck); *State v. Green*, 647 S.E.2d 736, 747 (W. Va. 2007) (holding no reasonable juror could find (1) driving four mph above 55 mph limit and (2) inattentive driving "resulting in [driver's] inability to avoid a collision," was criminally negligent); *DuPree v. State*,

B. ***The judge's findings establish Winningham was negligent, but not that he engaged in flagrant or unordinary risk taking.***

The judge found that Winningham's

> *actions of traveling at a high rate of speed in a far right lane while approaching an exit and failing to maintain a proper lookout for other cars created an obvious risk of death or serious physical injury to the other motorists on the roadway.* [His] *failure to perceive that risk also was a gross deviation from the standard of conduct that a reasonable person would observe in the situation. In reaching that conclusion. I believe the following factors established the gross deviation beyond a reasonable doubt:*
>
> *First, the vehicle's speed. Although the vehicle's speed was not substantially above the posted speed limit, it was a high rate of speed, particularly given the lane of travel, the fact of an approaching exit, the type of vehicle the defendant was driving, the time of day, that is, near rush hour, and the amount of other traffic on the roadway.*
>
> *Second, the sustained period of inattention . . . the defendant completely removed his attention from the roadway for at least four seconds. Certainly this period of inattention was negligent. But given the rate at which he was traveling, the lane in which he was traveling, and the visible signs an exit was approaching, this period of inattention exceeded mere negligence and was a gross deviation from what a reasonable person would observe.*
>
> *Third, the defendant's failure to attempt to slow down or otherwise avoid the stopped vehicles. Underscoring the sustained period of inattention is the fact the defendant plainly never saw the parked cars or stopped cars, I should say, even when they were immediately in front of him. He never slowed the truck or attempted to avoid traffic by moving to the improved shoulder or Lane 3, which was clear of traffic. This shows that not only was defendant not*

---

310 So. 2d 396 (Fla. Dist. Ct. App. 1975) (finding evidence tractor-trailer driver was falling asleep, and driving a few mph above speed limit when he struck vehicle on wrong side of road was insufficient for "culpable negligence").

> *entirely watching the road in front of him, he was not paying attention at all to any of his surroundings for an extended period of time.* Ex. A at 12–13.

The trial court correctly found that, while Winningham's "inattention was negligent," it was not criminally negligent on its own. Ex. A at 13. However, the judge erred in finding that other factors –

> *the amount of other traffic on the roadway . . . [t]he rate at which he was traveling . . . the lane in which he was traveling . . . visible signs an exit was approaching . . . [and Winningham's] failure to attempt to slow down or otherwise avoid the stopped vehicles* (Ex. A at 12)

–elevated his mental state to criminal negligence. Two of these factors– Winningham's failure to respond to visible signs or attempt to avoid the stopped cars– cannot elevate negligent inattention into criminal negligence because they are not aggravators, but consequences of, inattention.[16] In other words, Winningham did not miss these cues *in addition* to being inattentive, he failed to notice them *because* he was inattentive. And Winningham's speed– just a few mph above the speed limit –does not transform the "simple negligence" of inattention into the flagrant and unordinary risk taking necessary for criminal negligence.[17]

[16] *See People v. Faucett*, 170 N.Y.S.3d 372 (App. Div. 2022) ("if defendant failed to see the victim's vehicle, he would not have been aware of the necessity to slow down and move left.").

[17] *People v. Cabrera*, 887 N.E.2d 1132, 1136 (N.Y. 2008) ("it takes some additional affirmative act by the defendant to transform 'speeding' into 'dangerous speeding.'").

i. The trial court's findings as to Winningham's inattentive driving describe "simple," not criminal negligence.

The failure to perceive the risks of inattentive driving is only a "gross deviation" from the standard of care if it is an "[a]bnormal failure to perceive."[18] Short periods of distracted driving, like Winningham's, are common departures from the standard of care,[19] not gross deviations; and although the frequency of bad outcomes does not define the standard of care,[20] the frequency of specific acts of negligence is essential in determining the degree to which conduct deviates from that standard.[21]

The consequences of Winningham's inattention were uniquely tragic, but the circumstances and features of his state of mind were indistinguishable from that in

---

[18] Delaware Commentary § 231 at 33.

[19] *See* Center for Disease Control and Prevention, *Distracted Driving* (accessed on August 3, 2022) (describing prevalence of distracted driving) *available at* http://www.cdc.gov/motorvehiclesafety/distracted_driving/.

[20] *See Frey v. Goshow-Harris*, 2009 WL 2963789, at *2 (Del. Super. Ct. Sept. 16, 2009) ("it is improper to use statistical evidence of death or brain damage frequency when patients undergo a specific treatment to show a doctor complied with his standard of care.").

[21] Other States have recognized that the "gross deviation" components of their own criminal negligence statutes accounts for frequency of the negligence. *State v. Jones*, 151 S.W.3d 494, 501 (Tenn. 2004) (relying on survey which found that only sixty percent (60%) of children wear seatbelts to conclude failure to use seatbelt is not gross negligence); *Queeman v. State*, 520 S.W.3d 616, 630 (Tex. Crim. App. 2017) (finding speeding and tailgating were negligent, but, given that "[t]hese types of driving errors are often made by many drivers" they are not "a gross deviation from an ordinary standard of care"); *Back v. Neill*, 279 N.W. 471, 473 (Neb. 1938) (finding negligent speeding was not a gross deviation from standard of care because other cars on the road were traveling the same speed).

a routine "fender bender." A343. His inattention was not inordinately long.[22] While the State is not required to prove what caused his inattention, the absence of any evidence suggesting that the reason was one of "extraordinary or outrageous character," is still important.[23] Certainly, he lacked any intention to cause an accident or injure anyone. Ex. A at 10–11. And, unlike the defendant in *Knight*, for example, Winningham was not "driving without lawful purpose."[24] Winningham was doing an important and difficult job;[25] and, despite the State's attempts to establish the contrary, the judge was not persuaded that Winningham violated any of the numerous requirements imposed on commercial drivers. Ex. A at 15. Winningham was rested. Ex. A at 5. He was "not impaired by drugs or alcohol." Ex.

---

[22] The State attempted to establish that Winningham was inattentive for twenty seconds (A28, 296), but the judge found the State only established four seconds of inattention. Ex. A at 8. Notably, only a portion of the four seconds are actually supported by the record. The State's expert, Sergeant Alexander, provided undisputed testimony that a driver's "perception reaction time" requires 1.5 seconds to brake *after* one perceives the event that requires braking. A283–84. Thus, a reasonable fact finder could only attribute the first 2.5 seconds of the failure to brake to inattentiveness, because the final 1.5 seconds are entirely explainable as perception reaction time.

[23] *Plummer v. State*, 702 A.2d 453, 465 (Md. Ct. Spec. App. 1997) (finding driver's inattention was negligent, but without evidence as to why, he was not criminally negligent); *see Queeman*, 520 S.W.3d at 630 (finding driver had not "engaged in acts that might be characterized as grossly negligent in the context of his . . . [inattentiveness], such as talking on a cell phone, texting, or intoxication.").

[24] *Sharpley*, 2009 WL 406797 at *3 (citing *State v. Knight*, 1999 WL 1427766 (Del. Super. Ct. Dec. 20, 1999)).

[25] *See* Delaware Commentary § 631 at 178 ("[when it comes to criminal negligence, "[m]uch will depend upon the nature and social utility of the defendant's conduct.").

A at 8. He was not texting[26] or talking on the phone.[27] Ex. A at 8. Winningham's inattentiveness is a textbook example of "simple" negligence, not the "abnormal failure" necessary for criminal negligence.

ii. Winningham's speed – just two to three mph above the limit – does not suggest criminal negligence and had no causal connection to the accident or injuries.

Winningham's speed – two to three mph above the speed limit – was negligent *per se*, but the trial court erred in finding that it elevated his state of mind to criminally negligent.[28] High speeds always present a risk of death but are only negligent when they are "excessive."[29] And the judge's description of Winningham's speed–it "appeared [] to be a somewhat hurried manner," and he "travel[ed] with alacrity" – hardly conveys conduct that would transform simple negligence into something which "veered far [enough] off course" to become criminal.[30] Ex. A at 5–

[26] *State v. Belleville*, 88 A.3d 918, 923 (N.H. 2014) (concluding texting long enough to cross three lanes of traffic into opposite travel lane was criminally negligent).
[27] *State v. Dion*, 62 A.3d 792 (N.H. 2013) (concluding inattentive driving caused by use of cellular phone was sufficient to support criminally negligent homicide).
[28] *Sharpley*, 2009 WL 406797, at *3 (holding 16 mph above posted 50 mph speed limit, and distraction from the road for four seconds is not criminal negligence).
[29] *See Queeman*, 520 S.W.3d at 625 ("focus on whether appellant drove *excessively* over the speed limit was pertinent to whether appellant was criminally negligent rather than ordinarily negligent") (emphasis added); *State v. Van Tassel*, 2009 WL 1684072 (Minn. Ct. App. 2009) (finding 70 mph in a 55 mph zone while approaching a slippery intersection is too fast, but not gross negligence.)
[30] *See Cannon*, 181 A.3d at 624 (distinguishing lower court's finding about the "risk of potential catastrophic harm including death," from the requirement to show "the nature and degree of that risk").

6. Indeed, no evidence suggests the accident could have been avoided, or any less injurious if Winningham had been going 65 mph instead of 67.[31]

The trial court's reliance on the "amount of other traffic on the roadway" and "the lane that he was traveling in" is belied by the evidence. The "roadway" is a fast-moving interstate highway, not a road with stop signs or traffic lights which might give a reasonable person reason to anticipate an abrupt standstill.[32] He was not in an exit lane,[33] and the highway was not congested. A166. As the judge acknowledged, he was not tailgating or otherwise following too closely, and there were no cars in the lane adjacent to him. Ex. A at 7, 16. The video shows Winningham's speed was around the same as the other cars on the road. A353. Certainly, this was not a situation in which "traffic [was] in such a chaotic condition, the [] driver should have been aware of the possibility [of] an unusual incident."[34]

---

[31] *Id.* at 620 (requiring but-for and proximate causation link between negligence and death of victim) (citing 11 *Del. C.* § 263); *Queeman*, 520 S.W.3d at 625 ("no evidence was offered as to whether a collision at or below the speed limit" would have lessened the injury); *Sharpley*, 2009 WL 406797 n.17 ("no clear evidence . . . to indicate that but for the excessive speed the accident would not have occurred . . . [or] that the victims would have had an appreciably better chance of survival").

[32] Some locals were aware that 896 exit traffic routinely overflowed into the non-exit lane Winningham was in (A40, A52, A65), but a traveler in Winningham's position would not have reason to anticipate a sudden standstill.

[33] The lane is not an exit lane, but does "approach[] an exit." A291.

[34] *McCloskey v. McKelvey*, 174 A.2d 691, 695 (Del. Super. Ct. 1961) (describing "cars backed up from the traffic light for some distance on the middle and outside lanes of the DuPont Highway").

II. THE TRIAL COURT VIOLATED WINNINGHAM'S RIGHT TO DUE PROCESS WHEN IT CONVICTED HIM OF CRIMINALLY NEGLIGENT HOMICIDE WITHOUT HOLDING THE STATE TO ITS BURDEN OF PROVING THAT HE NEGLIGENTLY FAILED TO PERCEIVE A RISK OF DEATH POSED BY HIS CONDUCT.

Question Presented

Whether a trial court violates an individual's right to due process by convicting them of criminally negligent homicide without requiring the State to prove that the individual negligently failed to perceive a risk of death?[35] A18, A33.

Standard of Review

Constitutional claims, errors of law, and denials of requested jury instructions are reviewed *de novo*.[36]

Argument

The only issue in dispute at Winningham's bench trial was whether, as to the two counts of Criminally Negligent Homicide, he acted with criminal negligence when he caused the death of another person. Despite the fact that the "criminal negligence" element of Criminally Negligent Homicide requires proof of a failure to perceive a risk of *death*, the judge unconstitutionally convicted him of both

[35] "A request for special findings is the appropriate way to preserve for appeal a contention that the court applied an erroneous standard of law." *Findings in Jury-Waived Cases*, 2 FED. PRAC. & PROC. CRIM. § 374 (4th ed.). Winningham argued for the proper standard and requested special findings. A18, A33.

[36] *Lloyd v. State*, 152 A.3d 1266, 1271 (Del. 2016) (jury instructions); *Taylor v. State*, 822 A.2d 1052, 1055 (Del. 2003) (constitutional claims and legal errors).

homicide counts without finding that the State proved this mental state.[37] To the contrary, the judge affirmatively misstated the burden as requiring proof of criminal negligence as to the risk of death "*or physical injury*" and applied this mischaracterized law to the court's factual findings wherein the judge convicted Winningham of two Criminally Negligent Homicides for failing to perceive a "risk of death *or serious physical injury*." Ex. A at 12. Because the law applied by the judge "materially misdescribes an essential element of" Criminally Negligent Homicide, Winningham's convictions of that offense must now be reversed.[38]

A. ***Criminally Negligent Homicide requires proof of criminal negligence with respect to a risk of death.***

The State charged Winningham with four offenses that required proof of "criminal negligence" (A7–8): Criminally Negligent Homicide (Counts 1 and 2), Vehicular Assault Second Degree (Count 3) and Vehicular Assault Third Degree (Count 4). Criminal negligence is defined as follows:

---

[37] *Mills v. State*, 732 A.2d 845, 849–50 (Del. 1999) ("The Due Process Clause of the Fourteenth Amendment requires the government to prove the defendant's guilt by presenting sufficient evidence to establish every factual element of a charged offense beyond a reasonable doubt."); U.S. Const. amend. XIV.

[38] *Mills v. State*, 201 A.3d 1163, 1179 (Del. 2019); *Harrison v. State*, 170 A.3d 780 (Del. 2017) ("[s]ince this was a bench trial jury instructions are not involved, but the principle is the same"); *see United States v. Palermo*, 259 F.2d 872, 882 (3d Cir. 1958) ("in determining whether a reversal is required . . . there is no difference between a trial judge formally instructing the jury . . . [and] instructing [them]self"); *United States v. Argueta-Rosales*, 819 F.3d 1149, 1156 (9th Cir. 2016) ("legal error regarding the elements of an offense . . . is reviewed using the same harmless error standard that would apply to an erroneous jury instruction").

> *A person acts with criminal negligence with respect to* ***an element of an offense*** *when the person fails to perceive a risk that* ***the element*** *exists or will result from the conduct. The risk must be of such a nature and degree that failure to perceive it constitutes a gross deviation of the standard of conduct a reasonable person would observe in the situation*.[39]

As the statute informs, "criminal negligence" is not a uniform state of mind; instead, it requires a failure to perceive a risk of the specific level of harm associated with the underlying offense; and different offenses, of course, address different harms.[40] For example, the failure to perceive the "risk of *physical injury*" associated with the criminal negligence of Vehicular Assault Third Degree,[41] is insufficient to establish Vehicular Assault Second Degree, which requires a failure to perceive a "risk of a *serious* physical injury."[42]

Relevant here, proof that an act is criminally negligent as to a risk of serious physical injury is *per se* insufficient for Criminally Negligent Homicide, which requires proof that the accused negligently failed to recognize "a risk that *death*

---

[39] 11 *Del. C.* § 231(a) (emphasis added).
[40] Wayne R. LaFave, *Substantive Criminal Law,* § 5.4(e) *Risk of what harm?* (3d ed. 2017) ("With crimes of negligence and recklessness, where a risk of harm to others is required, the type of harm involved is not [] the same for all such crimes").
[41] 11 *Del. C.* § 628 ("person's criminally negligent driving or operation of said vehicle causes *physical injury* to another person") (emphasis added).
[42] 11 *Del. C.* § 628A ("person's criminally negligent driving or operation of said vehicle causes *serious* physical injury to another person") (emphasis added).

would result."[43] Accordingly, in *Cannon v. State*, this Court reversed a criminally negligent homicide conviction where the conduct caused a death, and was (at least) criminally negligent as to a risk of injury, but not as to the risk of death.[44]

B. *The State failed to recognize that its burden in proving criminal negligence with respect to homicide charges is higher than with vehicular assaults, despite Winningham having placed the issue front and center.*

Winningham's defense at trial flowed from the variability in the requirements of criminal negligence. He did not dispute the vehicular assault charges whatsoever, including their respective criminal negligence elements. But, as to the two counts of Criminally Negligent Homicide, he argued that the State could not prove the requisite criminal negligence. In other words, Winningham did not argue the State failed to prove his conduct negligently created risks of physical injury or even serious physical injury (as necessary to sustain the vehicular assault convictions), but he did argue the State had not proven his conduct created a risk of death with criminal negligence. A33–34; A343–44. Winningham was clear about this defense in both his opening statement and closing argument. In his opening, he told the judge

[43] 11 *Del. C.* § 631 (emphasis added); *see* Criminal Pattern Jury Instructions at 244 ("'Criminally negligent' means Defendant failed to recognize there was a risk that death would result from Defendant's conduct"), *available at* https://courts.delaware.gov/superior/pattern/pdfs/pattern_criminal_jury_rev5_2022a.pdf.
[44] *See Cannon*, 181 A.3d at 625.

he was only contesting the homicide charges, Counts 1 and 2, because the State would be unable to prove Winningham's conduct

> *posed a **risk of death** of such a nature and degree that his failure to perceive it constitutes a gross deviation of the standard of conduct a reasonable person would observe in the situation*. A33–34.

He did the same in his closing argument, where he again explicitly informed the judge that he only disputed Counts 1 and 2. A344.

For its part, the State did not spell out the nature of the risk at issue in the indicted offenses. A1–2. Nor did it mention the varying requirements of criminal negligence in either its opening statement or closing arguments. Instead, despite Winningham's defense resting on the distinction between the nature of the risks, the State simply glossed over the difference to claim, "as it relates to Counts 1, 2, 3, and 4, they're all bound by the same criminal negligence standard." A31.

This deficiency in the State's case was made especially clear in its response to the judge's question, after the State's closing argument, about how Winningham's case could be distinguished from this Court's decision in *Cannon v. State*. A333–336. In *Cannon*, this Court reversed a criminally negligent homicide adjudication on two separate grounds (1) Cannon's conduct –engaging in a physical fight in a bathroom– was not criminally negligent as to a risk of death,[45] and (2) the victim's

[45] *Id.* at 623–25.

death was not a reasonably foreseeable result of Cannon's conduct (causation).[46] The State only argued Winningham's case was distinguishable from *Cannon*'s second ground for reversal (causation). A333–336. But, Winningham had not made a causation argument. Winningham's argument –his conduct was not sufficiently negligent for Criminally Negligent Homicide – aligned with the *Cannon* Court's first ground for reversal (the conduct was not grossly negligent as to a risk of death), and which the State did not, and could not, distinguish.

C. ***The judge violated Winningham's constitutional right to have the State prove every element beyond a reasonable doubt by applying the wrong legal standard to the Criminally Negligent Homicide charges.***

In rendering the court's verdict, the judge stated that

> *the primary issue before the Court is whether the defendant's conduct rose to the level of criminal negligence. Since Counts 1 through 4 turn on that standard, I will begin by addressing it. With respect to Counts 1 through 4, in order to prove the defendant acted with criminal negligence, the State must prove beyond a reasonable doubt that he failed to perceive that a risk of death or physical injury existed or would result from his conduct . . . the Court must consider whether the risk is of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.* Ex. A at 11.

This statement reveals both the judge's misunderstanding of "the primary issue before the Court" and an incorrect statement of the law it would apply to that issue.

[46] *Id.* at 625–30.

The actual issue was limited to "whether the defendant's conduct rose to the level of criminal negligence" with respect to Counts 1 and 2 only. The judge failed to recognize that the proper standard for Counts 1 and 2 was more burdensome than that of Counts 3 and 4, and simply conflated the criminal negligence elements of all four counts. The judge went on to apply this inaccurate reading of the law, and convict Winningham based on the insufficient finding that "the defendant's actions . . . created an obvious risk of death *or serious physical injury* to the other motorists on the roadway." Ex. A at 11–12.

When the law applied by a judge in a bench trial "materially misdescribes an essential element of an offense . . . [its effect is to] relieve[] the state of its obligation" of proving every element beyond a reasonable doubt.[47] Here, the judge reduced the burden on the State to prove the homicide charges by ruling a negligent failure to perceive a risk of either "death *or* serious physical injury" would suffice, rather than requiring a risk of death specifically. As a result of the erroneous legal standard applied by the judge, the court's findings as to the only issue in dispute –whether Winningham was criminally negligent as to a risk of *death* – addressed a strawman: whether Winningham was criminally negligent as to a risk of serious physical injury

[47] *Mills v. State*, 201 A.3d 1163, 1179 (Del. 2019).

or death. These findings are insufficient on their face and resulted in Winningham's convictions of two crimes without proof of all requisite elements.[48]

There is no reasonable basis to conclude the trial court applied any standard other than the flawed one the judge used in the order, twice. Just as juries are presumed to follow a judge's instructions,[49] judges are presumed to "follow their own instructions when they are acting as factfinders."[50] Viewing the judge's verdict "as a whole"[51] provides no basis to overcome this presumption. The only definition of criminal negligence that the judge identified was legally incorrect. Even though Winningham's defense was that the State's failed to establish a criminally negligent "risk of death," nowhere did the judge find Winningham negligently created a risk of death. Instead, the judge concluded that "the defendant was criminally negligent" by applying a generic and inadequate version of the concept. Ex. A at 13–15. At no time in announcing the verdicts in Counts 1—4 did the judge define the specific level of risk found with respect to each count, or signal that the trial court recognized that a different definition applied to different charges. Ex. A at 13—15. And finally, the judge could not even use the indictment as a guide to apply the proper standard

[48] *Dolan v. State*, 925 A.2d 495, 501–02 (Del. 2007) (reversing bench trial conviction where judge applied incorrect legal interpretation of criminal statute and failed to make factual findings that would sustain a conviction under proper interpretation).
[49] *See Smith v. State*, 317 A.2d 20, 23 (Del. 1974).
[50] *Harris v. Rivera*, 454 U.S. 339, 346 (1981).
[51] *McNally v. State*, 980 A.2d 364, 367 (Del. 2009).

as the Criminally Negligent Homicide counts (1 and 2) were indicted without mention of the type of risk at issue.[52] A7–8.

[52]*Mills*, 201 A.3d at 1178 (considering argument that, despite flawed instructions, reading of indictment which included the proper law, sufficed to correct the error).

CONCLUSION

For the reasons and upon the authorities cited herein, the Defendant's aforesaid convictions should be vacated.

Respectfully submitted,

/s/ Elliot Margules
Elliot Margules [#6056]
Office of Public Defender
Carvel State Building
820 North French Street
Wilmington, DE 19801

DATED: August 23, 2022