

STATE OF NEW YORK: SUPREME COURT
SUFFOLK COUNTY: COUNTY COURT: PART 2

PRESENT: HONORABLE FERNANDO M. CAMACHO, JUSTICE

THE PEOPLE OF THE STATE OF NEW YORK

Motion: Inspect/Dismiss

against

Ind. Nos.: 508A-2016
508B-2016

CARLOS PINO and
STEVEN ROMEO,

Defendants

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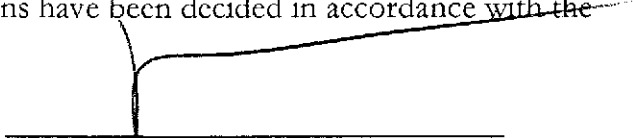
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The defendants' foregoing applications have been decided in accordance with the accompanying memorandum.

DATED: October 26, 2016
Suffolk County, New York


Fernando M. Camacho, J.

STATE OF NEW YORK: SUPREME COURT
COUNTY OF SUFFOLK: COUNTY COURT: PART 2

THE PEOPLE OF THE STATE OF NEW YORK

against

By: **Fernando M. Camacho, J.**

Date: **October 26, 2016**

**CARLOS PINO and
STEVEN ROMEO,**

Defendants,

Ind. Nos.: **508A-16
508B-16**

X

The Defendants, separately, seek inspection of the Grand Jury transcript, dismissal of the Indictment or alternatively, counts therein, and release of the Grand Jury transcript.

Defendant Pino's initial application, by Notice of Motion, was filed May 27, 2016, to which the People filed an Affirmation in Opposition and the defendant filed a Reply [Motion Sequence One]. Subsequent to that initial motion, the defendant filed an additional application seeking release of the Grand Jury transcript. The People filed an Affirmation in Opposition and the defendant filed a Reply. That application was resolved by an Order of this Court dated July 15, 2016, which released limited portions of the Grand Jury transcript. Upon release of those portions of the transcript, the defendant filed another application seeking dismissal of the Indictment or counts therein, dated August 5, 2016. The People filed an Affirmation in Opposition, dated August 30, 2016 and the defendant filed a Reply dated September 2, 2016 [Motion Sequence Two].

Defendant Romco's application, by Notice of Motion, was filed on April 29, 2016. The People filed an Affirmation in Opposition on May 16, 2016. Only the portion of this defendant's application seeking inspection and release of the grand jury transcript and dismissal of the Indictment or counts therein will be addressed in this Decision and Order. The remaining remedies sought in this defendant's motion will be addressed under separate cover.

The defendants' foregoing applications have been decided in accordance with the accompanying memorandum.

STATE OF NEW YORK: SUPREME COURT
COUNTY OF SUFFOLK: COUNTY COURT: PART 2

THE PEOPLE OF THE STATE OF NEW YORK

against

CARLOS PINO and
STEVEN ROMEO,

Defendants,

By: Fernando M. Camacho, J.

Date: October 26, 2016

Ind. Nos.: 508A-16
508B-16

On July 18, 2015, at approximately 5:00 pm, in the Hamlet of Cutchogue, four young women were killed and four others suffered serious injuries when their limousine, operated by Carlos Pino, was struck by a pickup truck driven by Steven Romeo. Toxicology tests revealed that Pino was not intoxicated or impaired by alcohol or drugs at the time of the collision. Romeo was estimated to have a blood alcohol level of .09% at the time of the crash.

In November of 2015, a special Grand Jury was convened and heard evidence in a matter which the Suffolk County District Attorney's Office entitled An Investigation Into The Limousine Crash in Cutchogue, New York. At the conclusion of the evidence, the Grand Jury returned an indictment charging Carlos Pino with four counts of Criminally Negligent Homicide, four counts of Assault in the Third Degree, Reckless Driving, one count each of Failing to File a Required Report Upon an Accident, Turning at an Intersection, Failure to Yield Right-of-Way and Failing to Stay in a Designated Lane. In the same indictment, the Grand Jury charged Steven Romeo with two counts of Driving While Intoxicated as a Misdemeanor and one count of Driving While Impaired, a Traffic Infraction.¹ Both defendants seek dismissal of the Indictment or alternatively, counts therein. The defendants' application is granted to the extent that the Court has inspected the Grand Jury minutes. Although some portions of the Grand Jury transcript were previously released to the defendant Pino, I feel compelled to discuss all of the evidence, as well as the prosecutors' legal instructions, in order to fully explain how I arrived at this decision.

The following evidence was presented to the Grand Jury:

On July 18, 2015, the young women arranged for Ultimate Class Limousine to transport them on a tour of wineries in Eastern Suffolk County. Carlos Pino, a driver who had been employed by Ultimate Class Limo for three years, drove the women to several locations throughout the day, and had just picked them up from Vineyard 48, their last stop

¹ At this point both defendants are still charged on the same indictment and have not been severed.

before heading home. All vehicles exiting Vineyard 48 must initially turn right and proceed eastbound on Route 48. Pino pulled out of the Vineyard 48 parking lot, made a right turn on Route 48, and proceeded eastbound looking for the first opportunity to make a U-turn and head west. He found it a short distance east of Vineyard 48 where Route 48 intersects with Depot Lane.

Route 48 is a public roadway with two lanes of traffic in each direction heading east and west and separated by a grassy median in the middle. At the intersection of Depot Lane, Route 48 has a separate left turning lane in each direction where U-turns are permitted. In order to travel westbound, drivers exiting Vineyard 48 must either make a U-turn at Depot Lane, the first intersection as you travel east, or make a left onto Depot Lane heading northbound and then turn around and proceed back to Route 48 and make a right turn. The evidence clearly showed that left turns and U-turns were routinely made by all types of vehicles at that intersection. Neighborhood residents testified that despite the community's repeated complaints to state and local authorities, U-turns remained legal and continued to be permitted at that intersection. A witness familiar with Vineyard 48, and the intersection of Route 48 and Depot Lane, testified that he regularly observed limousines making the U-turn at that intersection in order to head west after leaving the winery. A Southold Police Detective who is also familiar with that intersection testified as follows:

Q. Detective, how familiar are you with that intersection?

A. Very.

Q. And have you personally seen limousines attempting to make the same U-turn Mr. Pino made that day?

A. Yes, all the time.

The posted speed limit on Route 48 is fifty-five (55) miles per hour. At the time, there was a blinking yellow light signaling both east and west bound vehicles to proceed with caution as they approached the intersection.²

Pino entered the left turning lane at Depot Lane, stopped his vehicle, and according to statements he made to police officers later on, was intending to make a U-turn. His view of oncoming traffic in the two westbound lanes, particularly of the westbound lane closest to the center median, was obstructed by a Jeep Liberty which was stopped in the westbound turning lane waiting to turn left and head south on Depot Lane. The Jeep was not able to move into the intersection because the limousine had taken up the entire intersection as it

²Vehicle and Traffic Law Section 1113, in pertinent part states, "Vehicular traffic.... facing a circular yellow signal may proceed through the intersection.... only with caution."

prepared to make the turn. Pino looked for westbound traffic, and later told police, that when he did not see any cars, he proceeded into the westbound lane. As he did so, and before he had the opportunity to turn his vehicle in a westbound direction, the limousine was struck by Romeo's pick-up truck which was traveling in the westbound lane closest to the median. The evidence showed that when Pino looked toward the east to check for oncoming traffic, the truck was most likely in a position directly behind the Jeep Liberty where Pino could not see it. An eyewitness to the incident who was directly behind the limousine in the turning lane waiting to make a u-turn testified as follows:

...We pulled into the turning lane to make a U-turn, and the limousine started out at the lane, where you are supposed to stop, and then waited, then since it's a longer car, he pulled forward so he could swing the turn. And there was a Jeep Liberty in the other turning lane that was going to head south on Depot. And where there is a car in that turning lane you can't see what is going to come toward you....

Romeo's truck made contact with the limousine on the passenger side while the limousine was positioned almost perpendicular to Route 48. At the point of impact Romeo's truck was traveling at an estimated fifty-one (51) to fifty-six (56) miles per hour.

Pino remained in his car for some time after the collision and spoke to investigators. Romeo, who suffered minor injuries, got out of his truck and initially stayed nearby drinking a bottle of water. At some point he disappeared from the scene. Police Officer Garrett Lake, the officer who arrested Romeo testified as follows:

...When I got out of the car, the lieutenant told me that the driver of the pick-up was missing... Um, he said to me that he thought he went over the fence. We kind of looked. The grass is pretty high right there so you can see a trail, looked like footprints going through the grass. So we decided, I decided to jump over the fence and follow the footprints, which led me down into Southold Town Waste Management, which is the town dump. It led me down there... I walked down and I had to go down about, I would say about seven to ten foot drop into the waste management, and as I could see east of me, I could see a subject walking pretty far away from me, away from the scene.... I got down into, down there, and yelled for him to stop.... I assumed that he could not hear me because we were pretty far away from each other. So I ran up to him a little closer. I yelled again for him to stop. He turned around, put his hands up. I told him to get down on the ground and he complied.... Um, I had him stand up and asked him why he left the scene. And he said, I am not 100% to the statement, but it was I was, I had a lot of stuff going on in my life and I'm scared.

Based upon his observations of Romeo at the scene, and Romeo's performance during a field sobriety test, the officer concluded that Romeo was intoxicated and placed him under arrest.³ After being taken to the hospital, Carlos Pino was told by police officers that he was not being charged and was free to leave. There is no evidence that Pino was issued any traffic citations.

Toxicology tests indicate that Pino was not intoxicated or impaired by alcohol or drugs at the time of the crash. Toxicology tests indicate that Romeo, approximately two hours after the crash, had a blood alcohol level of .06%⁴ and through reverse extrapolation⁵, was estimated to have a blood alcohol level of .09% at the time of the crash. Both drivers had valid driver's licenses with clean driving records and no suspensions or revocations.

As to the cause of the collision, the accident reconstruction witness testified that Romeo's intoxication was not a factor in the collision because, according to a collision re-enactment conducted by his investigative team, Romeo, even if he had been sober, would not have been able to bring the truck to a full stop before striking the limousine. According to the witness, Romeo would not have been able to react to the limousine until he was two hundred (200) feet from the point of the collision, and that based upon his calculations, Romeo would have needed two hundred sixty-three (263) feet to bring his car to a full stop right before the collision. There was no evidence presented to the Grand Jury regarding whether Romeo, at the point that the witness says he would have been able to react to the limousine, would have been able to slow his vehicle down to less than the fifty-one (51) to fifty-six (56) miles per hour that it was traveling at the time of impact. The only testimony was that he could not have come to a *complete stop* before the collision.

The evidence before the Grand Jury was that Romeo did not begin to apply his brakes until he was forty-two (42) feet from the point of impact when his vehicle was traveling between fifty-seven (57) and sixty-one (61) miles per hour. At the point of impact, forty-two (42) feet after he initially applied the brakes, Romeo's truck was traveling at an estimated fifty-one (51) to fifty-six (56) miles per hour. When asked by a Grand Juror whether the pick-up truck should have slowed down because of the blinking yellow light, the witness responded:

Blinking yellow light is cautionary. Blinking yellow lights are cautionary;

³ Of all of the police officers on the scene, Officer Lake was the only officer who testified that Romeo exhibited any indicia of intoxication. Another officer testified that he was told by a fellow officer that a portable breathalyzer test was given to Romeo at the scene and the results showed that Romeo had a .00 blood alcohol content.

⁴ Romeo consented to have blood drawn for the purpose of chemical testing.

⁵ A scientific estimate based upon an accepted normal enzymatic metabolic rate.

Blinking red lights are stop... So his direction is a blinking yellow light, which is cautionary. It doesn't tell him to slow down. The speed limit of the road is 55.....

The accident reconstruction witness further concluded, after ruling out roadway defects and vehicular defects as contributing factors, that the *sole* cause of the collision: "...was the limousine, the operator of the limousine failing to yield the right of way to the pick-up truck, and improper lane usage...". As to the limo's failing to yield the right of way to the pick-up truck the witness stated, "Despite the possibility he may not have seen, as the photos we looked at, he may not have seen the vehicle, it's still your responsibility to yield the right of way to vehicles already in the travel lane."⁶ With respect to the improper lane usage, the witness reasoned that even though there are no signs posted at the intersection prohibiting U-turns, a vehicle making a U-turn is required to complete the U-turn "to that portion of the highway nearest the marked center line." In this case, in order to enter the designated lane, the limousine would have had to complete his turn into the westbound lane closest to the median.⁷ Even though Pino had not even started to execute the U-turn, and was still perpendicular to Route 48 when the collision occurred, the witness reasoned that because the limousine was twenty-eight (28) feet long, it would have been physically impossible to make the turn into the proper lane.

Defendant Pino's Motion to Dismiss the Indictment

- 1) The Evidence In this Case is Insufficient as a Matter of Law to Establish Criminally Negligent Homicide.

When reviewing the sufficiency of an Indictment, the court must view the evidence in a light most favorable to the People and assess whether it would be sufficient to support a determination of guilt, *People v. Jennings*, 69 NY2d 103 (1986); *People v. Jensen*, 86 NY2d 248 (1995). The reviewing court is limited to whether the evidence and logical inferences supply proof of each element and whether the grand jury could rationally draw the inference of guilt, *People v. Boampong*, 57 Ad3d 794 (2008); *People v. Bello*, 92 NY2d 523 (1998). In order to determine whether the evidence presented to the Grand Jury was sufficient to support the charges, one must understand the difference between civil negligence and criminal negligence.

⁶ After reviewing a number of cases dealing with failure to yield right of way, it is not clear to this Court that a motorist who fails to yield the right of way, but did not do so knowingly in that they legitimately failed to perceive the incoming vehicle, would be guilty of this traffic infraction.

⁷Romeo's pick-up was also traveling in the westbound lane closest to the median.

Civil Negligence is defined in the New York Pattern Civil Jury Instructions as a lack of ordinary care, a failure to use that degree of care that a reasonably prudent person would have used under the same circumstances and may arise from doing an act that a reasonably prudent person would not have done under the same circumstances.

The definition of negligence in a criminal context is substantially different. Under **Penal Law Sections 125.10 and 15.05(4)**, a person is guilty of Criminally Negligent Homicide when that person acts with criminal negligence, when he or she engages in blameworthy conduct so serious that it creates or contributes to a substantial and unjustifiable risk that another person's death will occur, and when he or she fails to perceive that risk, and when the risk is of such nature and degree that failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation. Under our civil laws, a person is required to exercise the ordinary care that a reasonably prudent person would exercise, while under our criminal laws, a person is required to refrain from engaging in conduct that is *so serious* that it creates a *substantial and unjustifiable risk* of such a degree that failure to perceive it constitutes a *gross deviation* from the standard of care that a reasonable person would observe in the situation.

The issue of what type of conduct rises to the level of criminal negligence in homicide cases has been dealt with by our highest court on numerous occasions. *People v. Haney*, 30 NY2d 328 (1972), provides an early look at the Court's attempt to distinguish those unintended homicides which give rise to criminal liability from those which give rise to civil liability for negligence. The Court emphasized that there must be "extra qualities" in those cases of unintended homicides in order for there to be criminal liability. The Court observed that criminal liability cannot apply to every careless act merely because the carelessness results in the death of another person. In trying to identify those "extra qualities" the Court reasoned that the conduct must be obviously socially undesirable and the actor must be insensitive to the interests of other persons in society. They emphasized that it is "appreciably greater" than 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."

In 1989, the Court of Appeals revisited the issue in *People v. Ricardo B.*, 73 NY2d 228 (1989), and set forth the following guiding principles:

First, criminal liability cannot be predicated upon every careless act merely because it results in another's death; Second, criminal negligence involves the failure to perceive the risk in a situation where the offender has a legal duty of awareness; Third, liability for criminal negligence should not be imposed unless the inadvertent risk created by the conduct would be apparent to anyone who shares the community's general sense of right and wrong. *Id.*

The actor's failure of perception must be serious enough to constitute conduct that should be "condemned". *Id.*

How can the law possibly "condemn" Pino's conduct in this case, and how can his actions constitute a "gross deviation" which is "apparent to anyone who shares the community's general sense of right and wrong", when the evidence is clear that vehicles at that intersection, including limousines, for a very long time, have routinely made the same turn that Pino was attempting? This is particularly true in this case where local and state agencies had been on notice for some time that these U-turns were routinely being made at that intersection by all types of vehicles, and decided, despite repeated requests from local residents, not to place traffic lights with left turn signals or "No U-Turn" signs at the intersection.

In *People v. Boutin*, 75 NY2d 692 (1990), the Court found a defendant who struck a marked police vehicle stopped on the Interstate in poor weather conditions, but who wasn't speeding, did not create the risk. The Court reasoned that there was no question the defendant's failure to see the vehicle stopped ahead of him resulted in the fatal accident. However, the fact that the defendant inexplicably failed to see the vehicle until he was so close that he could not prevent the collision may very well constitute civil negligence, but was not the type of "risk creating" conduct that could give rise to criminal liability. As the Court observed "non-perception of a risk, even if death results is not enough." *Id.* The fact that Pino failed to see the oncoming vehicle constitutes "non-perception of risk", not "risk-creation", and does not constitute criminal conduct.

The carelessness required for criminal negligence must be such that its seriousness would be apparent to anyone who shares the community's general sense of right and wrong, *People v. Cabrera*, 10 NY3d 370 (2008). In *Cabrera*, the Court found that a seventeen year old defendant who drove down a tricky downhill curve, the site of other accidents, at a rate of speed well in excess of the posted speed limit, and lost control of his vehicle causing it to slide down an embankment killing three passengers, was not criminally negligent. The Court reasoned that while the behavior was certainly negligent and unquestionably "blameworthy" it was not the kind of moral blameworthiness necessary for criminal liability. They noted that "this crash resulted from non-criminal failure to perceive risk; it was not the result of criminal risk-creation." *Id.* Not only must the defendant fail to perceive a risk of death, but there must also be serious blameworthiness in the conduct that caused the death.

The focus must be on the defendant's conduct, and not the results, no matter how tragic, *People v. Badke*, 21 Misc.3d 471 (Suff. Cty., 2008). In *Badke*, the Court found the evidence to be insufficient where a teenager, traveling between eighty-two (82) and eighty-seven (87) miles per hour in a fifty-five (55) miles per hour zone, crashed into another vehicle, killing the two occupants of his car and one in the other car. Relying on *Cabrera*, the Court reasoned that the element of 'risk creation', that is, some additional affirmative action

by the defendant, that would transform his conduct into that of the appreciably more serious blameworthy carelessness described in *Boutin*, was lacking.

At this point it would be instructive to review the following cases where courts determined that the evidence was sufficient to establish criminal negligence and compare those cases to the instant matter: *People v. Ricardo B.*, 73 NY2d 228 (1989), (the defendant was traveling at an excessive speed and failed to observe the plainly visible car in front of him while engaged in a drag race on a busy divided road in a populated area); *People v. Haney*, 30 NY2d 328 (1972), (the defendant, traveling in excess of the speed limit, did not stop at a red traffic signal and as a result, struck and killed a pedestrian who had the right of way and who was halfway across the street); *People v. Paul V.S.*, 75 NY2d 944 (1990), (a defendant traveling ninety (90) miles per hour in a fifty-five (55) miles per hour zone, who accelerated his speed after his passenger warned him to slow down, and who sped past a line of cars that were stopped by police and who ultimately struck a state trooper, killing him); *People v. Battease*, 124 AD2d 807 (2nd Dept., 1986), (defendant made an illegal left hand turn and continued to drive, in excess of seventy (70) miles per hour, eastbound in the westbound lane of a winding road, in sleeting rain, crossed over the double yellow lines to avoid two oncoming cars, then return back to the eastbound lane while being followed by Troopers with the turret lights of their marked vehicles flashing and who ultimately collided into an oncoming vehicle while having a blood alcohol level of .05%); *People v. Sadian*, 81 AD3d 987 (2nd Dept., 2011), (defendant traveling almost twice the posted speed limit, in a heavy pedestrian traffic area, in heavy rain and with poor visibility struck and killed a pedestrian); *People v. Soto*, 44 NY2d 683 (1978), (while engaged in a ‘drag race’ at an excessive rate of speed on a moderately traveled city street, defendant crashed into a vehicle stopped at a traffic signal, killing that driver); *People v. Maher*, 79 NY2d 978 (1992), (defendant was driving in excess of the speed limit, failed to obey traffic signals and was driving while impaired when he struck a pedestrian crossing the street); *People v. Rooney*, 57 NY2d 822 (1982), (defendant was operating vehicle at an excessive rate of speed on the wrong side of the road, while intoxicated and struck another vehicle causing the death of a person in that vehicle); and *People v. Olsen*, 124 AD3d 1084 (3rd Dept., 2015), (defendant was swerving in and out of the lanes of traffic, passing several vehicles, causing other cars to move off the road to avoid collision, while looking at her phone, ultimately lost control of her vehicle and drove onto the front lawn of the victim’s home, striking and killing the victim.)

In those cases, the evidence established that the defendant failed to perceive a substantial and unjustifiable risk which constituted a gross deviation from the standard of care that a reasonable person would observe in the situation, *Cabrera*, supra; evinced the kind of seriously blameworthy carelessness whose seriousness would be apparent to anyone who shares the community’s general sense of right and wrong, *Boutin*, supra; and engaged in the kind of “risk creating” conduct that needs to be “condemned”, *Ricardo B.*, supra. Here, defendant Pino, was not traveling in excess of the posted speed limit; was not intoxicated or impaired by alcohol or drugs; and was not texting, reading or talking on his cellular phone at

the time of the collision. Pino was attempting to make a U-turn at an intersection where U-turns are permitted, the same thing that countless other limousine drivers had regularly and routinely done at that intersection in the past.

Most recently, the Court of Appeals rendered a decision which, in my view, is controlling here. In *People v. McGranham*, 12 NY3d 892 (2009), the defendant, while trying to get onto the Belt Parkway, mistakenly drove onto the exit ramp instead of the entrance ramp despite signs warning “Do Not Enter” and “One Way”. He was not speeding and was not intoxicated or impaired by drugs. Once he was on the parkway traveling in the wrong direction he had access to ample paved and grassy shoulder areas from which he could have safely and carefully determined how to extricate himself from the dangerous situation. Instead, he made a U-turn across three lanes of traffic and was struck by a motorcycle traveling westbound. The motorcyclist was traveling fast and changing lanes quickly based upon eyewitness testimony. The motorcyclist was killed. The Court of Appeals found that the defendant’s choice to make a U-turn did not rise to the level of moral blameworthiness required to sustain a charge of criminally negligent homicide. The Court reasoned that:

Defendant’s decision to make a U-turn across three lanes of traffic to extricate himself from a precarious situation was not wise, but it does not rise to the level of moral blameworthiness required to sustain a charge of criminally negligent homicide.

In my view, Pino’s actions in this case are substantially less blameworthy than McGranham’s, and while his actions may not have been wise, they were not criminal.

The People’s attempts to distinguish the instant facts from those in *McGranham* are unavailing. They argue that *McGranham* was not driving a limousine and that the size of the respective vehicles is significant. They claim that had Pino been able to complete the U-turn as he intended, it would have been illegal under the **Vehicle & Traffic Law** because, as a result of the size of the limousine, he could not have made the turn into the westbound lane closest to the median and would have committed a traffic infraction by failing to stay in the designated lane. I do not find that argument persuasive for several reasons. First of all, the size difference of the vehicles does not change the “risk creation” versus “non-perception of risk” analysis. Pino was making a U-turn at an intersection where there are no signs prohibiting U-turns and where several witnesses testified U-turns are made all the time, including by limousines. Secondly, even though the evidence showed that Pino told police officers later that he had intended to make a U-turn, the U-turn was never actually executed. *Pino never actually made the U-turn.* The evidence shows that the limousine was still perpendicular to the westbound lanes when it was struck by Romeo. Lastly, even if Pino had been driving a smaller vehicle and been able to make the turn into the westbound lane closest to the median as the **Vehicle & Traffic Law** requires, he would have still been struck by Romeo’s truck because Romeo was traveling in the westbound lane closest to the median; *the*

same lane Pino would have entered had he gone into the designated lane.

The People also try to distinguish *McGratham* from the instant case by focusing on the actions of the other driver. They point out that the other vehicle in *McGratham* was speeding and suggest that, unlike the instant case, the other operator contributed to the collision. That argument is also unpersuasive considering that in the instant case, Romeo, the other driver involved in the collision, was a local resident of that community who must have been familiar with that particular intersection⁸, was driving a vehicle while legally intoxicated, was approaching an intersection with a blinking yellow light requiring motorists to proceed with caution, had an opportunity to observe the Jeep Liberty blocking his view of the east bound turning lane from which vehicles make u-turns, did not begin to apply his brakes until he was forty-two (42) feet from the point of impact when he was traveling between fifty-seven (57) and sixty-one (61) miles per hour, and struck the limousine at a speed of between fifty-one (51) and fifty-six (56) miles per hour.

In essence, the People claim that Pino was criminally negligent because he intended to make a U-turn in a limousine. The sole basis underlying their theory is that it would have been physically impossible for the twenty-eight (28) foot limousine to complete a U-turn into the designated lane, the westbound lane closest to the median, and that if Pino had actually executed the U-turn, it would have been illegal. In other words, it is their position that an illegal U-turn, and nothing more, can be the type of seriously blameworthy conduct that can give rise to a charge of Criminally Negligent Homicide. Although it was never explicitly discussed in *McGratham*, I am fairly certain that a U-turn across three lanes of traffic, across the median of the Belt Parkway in Brooklyn, was also an illegal U-turn.

It is apparent to this Court that *McGratham* is controlling here and that the evidence presented to the Grand Jury in this case is legally insufficient to support the charge of Criminally Negligent Homicide. That is exactly what the Grand Jurors were told by the Assistant District Attorneys who acted as their legal advisors. It is equally apparent that the grand jurors either intentionally disregarded those instructions or were so confused that they failed to follow the law.

The Court has reviewed the instructions given by the Assistant District Attorneys to the Grand Jury with respect to the Crime of Criminally Negligent Homicide. It is incumbent upon the District Attorney to provide the grand jurors with enough information so that they can make an intelligent decision whether a crime has been committed and whether legally sufficient evidence to establish the elements of that crime have been presented, *People v. Calbud*, 49 NY2d 389 (1980).

⁸ Several first responders testified that they knew Romeo because he was a long time resident of that community.

During the Grand Jury presentation, the prosecutors properly instructed the Grand Jury that *People v. McGranham* constituted controlling authority in New York State, and that pursuant to that authority, they could not charge Pino with Criminally Negligent Homicide. After defining the crime of Criminally Negligent Homicide, one of the prosecutors instructed them as follows:

Additionally, as your legal advisor, I am going to bring to your attention a case, The People of the State of New York versus James McGranham, which is a Court of Appeals case from 2009, which states that the defendant – in this case – defendant’s decision to make a U-turn did not rise to the level of moral blameworthiness required to sustain a charge of criminally negligent homicide.

After that instruction, a long colloquy ensued during which the Assistant District Attorneys and the Grand Jurors discussed the significance of the *McGranham* case. The colloquy clearly suggests that either the jurors were totally confused about how to apply the holding in *McGranham* or simply chose to disregard the instructions of their legal advisors. In order to avoid the possibility of taking any part of that colloquy out of context I have decided to include the entire colloquy in this decision.

Sometime after the prosecutor first instructed the Grand Jury about the *McGranham* case, the following exchange occurred:

GRAND JUROR: The Court of Appeals case that you mentioned, can you say that one more time, please?

PROSECUTOR: That is the People versus McGranham, which states that, in this case, the defendant’s decision to make a U-turn did not rise to the level of moral blameworthiness required to sustain a charge of criminally negligent homicide.

GRAND JUROR: Just piggybacking off of that, that’s the ultimate holding in the case, but what were the circumstances surrounding why that defendant’s decision to make a U-turn was not improper?

GRAND JUROR: Can you repeat the question again? I just want to hear it again.

GRAND JUROR: I was just asking what the circumstances were surrounding the Court of Appeals’ decision that the defendant in that case didn’t make a U-turn improperly or sufficient to cause criminally negligent homicide.

PROSECUTOR: As your legal advisor to the Grand Jury, I’m going to comment a little bit about the Court of Appeals decision. The Court of Appeals in the State of New

York is the controlling authority with respect to the concept of stare decisis. In common language, case law. And as such dictates its holdings are binding across the state in all four appellate departments, as well as every jurisdiction therein. The holding of this case, in a vehicle making a u-turn, the Court of Appeals found and held, and it is now controlling authority, that a defendant's decision to make such a U-turn did not rise to the level of moral blameworthiness, which is required as a matter of law to sustain a charge of criminally negligent homicide. Again, the decision to make a U-turn did not rise to the level of moral blameworthiness. And that is the controlling case. That is the controlling authority. And with respect to the facts, that is the law in the State of New York.

GRAND JUROR: But they did specify in that case. Maybe there were different facts involved in that case that were not involved here.

PROSECUTOR: As your legal advisor, you are to consider this holding, okay with respect to the Court of Appeals findings, and with respect to, in the findings, with respect to the court's decision, and that decision is the final decision which we all must follow in this state.

GRAND JUROR: Would that case be all-encompassing of all vehicles regardless of length and size? A tractor trailer, for example, or something like that?

PROSECUTOR: Absent any – until that particular aspect gets addressed, this is the controlling authority on that matter.

GRAND JUROR: If someone was driving recklessly, backwards, whatever the case may be, and the fact that he was driving recklessly and made this U-turn, does that not supercede the basic U-turn and thought to that case that it was just a car making a basic U-turn, not driving recklessly?

PROSECUTOR: Again, I'm going to refer you back to the findings of the reconstructionist in this particular case. I'm also going to, again, you must stay within the bounds of the decision, and you must stay within the bounds of the law. You are not permitted – you are not permitted to speculate with respect to the findings of the court in the McGranham decision. It is found that, and again, that a subject's decision to make an ill-advised or a U-turn, again, did not rise to the level of moral blameworthiness, which is what is, that is the element that is needed for the crime of criminally negligent homicide. Okay? The decision of the court is final in that regard.

GRAND JUROR: I have a question off of that. Is that any U-turn or is it the U-turn in the case? I guess I'm just confused about the court. Are they saying that the U-turn, or any U-turn? Or based on this limousine case, that U-turn.

PROSECUTOR: As your legal advisor, okay, in this particular matter, I'm instructing you as a matter of law, the McGranham decision is the controlling decision, with respect to this case, with respect to the moral blameworthiness element of criminally negligent homicide. Are there any other questions?

GRAND JUROR: I understand you continuing to bring up that case, and I can understand that. But in this particular case we had an expert witness testify that the U-turn was an illegal U-turn, and you are charging him also of leaving a lane of traffic. And that in itself could be cause for a True Bill on the charges relating to him making a U-turn and possibly causing, foreseeing the death. What he did was illegal and he would not be able to have accomplished it, according to the expert witness.

PROSECUTOR: Okay, not talking about that particular case, but – and perhaps I'll come back in with the facts, because I'm not just looking at my phone, I'm reading the exact facts in the McGranham case. Technology is wonderful. There are, the fact that moral blameworthiness might – the court finds that moral blameworthiness is deficient in the McGranham holding, and saying that does not and would not preclude other charges such as traffic infractions. Just because you have one does not necessarily mean it rises to the level. And, again, that is the controlling, that's the controlling authority across the entire State of New York.

GRAND JUROR: So why are we wasting our time here? If we can't vote that way, if we are given the opportunity and we are not allowed to vote that way, then why give us the opportunity?

GRAND JUROR: Why is it being charged then?

PROSECUTOR: Often times the community is asked to review evidence, and this is a two-part, as you were picked in this Special Grand Jury, this is a two-part action to this particular case. And from this point we'll now be going back into other matters pertaining to the limousines, the roadway configuration, safety aspects as to vehicles, and recommendations to municipalities. If that makes sense. Go ahead, sir.

GRAND JUROR: So wouldn't something of this nature be a plausible causality to have that said written law changed, if it would be brought up to the court?

PROSECUTOR: As your legal advisors we are obligated to instruct you. We must follow the dictates and parameters of that decision.

GRAND JUROR: You are telling us how to vote. We should be given the opportunity to vote. You are telling us how to vote.

PROSECUTOR: We are instructing you as to the state of the law as it is in the State of New York.

GRAND JUROR: Why would the District Attorney's office bring up a charge on something that we can't act on?

PROSECUTOR: We are asking you –

GRAND JUROR: The question is what would happen if we didn't listen and vote that way? What would be the repercussions? I think is what is on everyone's minds. As our legal advisor, what would be our repercussions? Would we be in contempt of due process or anything, not following –

PROSECUTOR: It would be improper for me – you know what, give me 30 seconds. Let's take a 30-second break, okay?

PROSECUTOR: As your legal advisor I can advise you as to the facts of that case. I believe it would be improper for you to have the actual case notes in front of you. Any time that you have questions with respect to any of the matter of law, it is incumbent upon us as your legal advisor to provide you the answers. I do, however, I can provide you with the basis of the court's findings. They are relying on facts, in pertinent part, the following: The evidence – and I'm quoting from the decision – before the Grand Jury in that particular case, if accepted as true, established that in the early morning hours the defendant drove his vehicle in the wrong direction onto an exit ramp leading from the westbound Belt Parkway, herein after "the parkway," in Brooklyn, despite the signs warning "do not enter" and "one way." Upon reaching the parkway, the defendant had access to substantial paved and grassy shoulder areas. However, instead of utilizing the shoulders to correct his direction, the defendant upon realizing that he had in fact driven onto the exit ramp, instead of the intended entrance ramp, made a slow right turn across the parkway in order to loop around and face the direction of the traffic. So as your legal advisor, based upon the conduct in that particular case, a car going across the entire three lanes of the Belt Parkway, heading in the wrong direction, and the court had found in that particular case, that these actions however not thought out, and as a matter of fact there is a part in the decision where there is an investigating police officer investigating and the defendant, the defendant responded "my own stupidity", does not, the fact that the driver's own stupidity, again, going the wrong way, going up an exit ramp instead of an entrance ramp, then going across three lanes of traffic on the Belt Parkway, the court finds, the Court of Appeals finds that that conduct does not rise to the level of moral blameworthiness which is required to sustain a charge of criminally negligent homicide. Again, that is the Court of Appeals, that's the controlling authority in the State of New York. As your legal advisor, I'm instructing you that is the law that you must follow.

GRAND JUROR: So in accordance with that, the manslaughter charge against the driver would also be subject to that same Court of Appeals? Because manslaughter is higher up?

PROSECUTOR: That is correct. However, that does not preclude – that is with respect to the charge of criminally negligent homicide. Okay? Any other questions on that? It has come to my attention there has been another question with respect to a law charge.

GRAND JUROR: We feel that we are being directed to vote a certain way even though we strongly feel one way versus another. And it kind of bothers me personally because it feels like the fact that the limo driver was--

PROSECUTOR: Without getting into specifics as the subject of whatever, I do want the record to reflect this. I'm your legal advisor. By no means am I directing you to vote in any particular fashion or in any particular way. I charged you with the law. I have advised you as to the law. However you have heard all the facts of this particular case, you have heard all the witnesses in this case. You are the determiners of the facts and the considerations, and by no means am I trying to substitute myself, and I am not, let the record reflect, I'm not directing any particular thing and I'm telling you to apply the law as I have given it to the facts. And that's how you make your determination.

The District Attorney has an obligation to provide legal instructions that are not so incomplete, misleading or confusing as to substantially undermine the grand jury's essential function of preventing unfounded prosecutions, *Calbud*, supra; *People v. Goetz*, 68 NY2d 96 (1986). A failure to do so may impair the integrity of the grand jury to an extent that prejudice to the defendant may result and the exceptional remedy of dismissal required, *People v. Huston* 88 NY2d 400 (1996); *People v. Batashure*, 75 NY2d 306 (1990).

Potential prejudice is a question of law and depends on the specific facts of each case, including the weight and nature of the admissible evidence introduced, *Huston*, supra; *People v. Adessa*, 89 NY2d 677 (1997). Not every impermissible question, parcel of inadmissible testimony or mere mistake renders an indictment defective or creates potential prejudice, *Huston*, supra. Here, however, the insufficient evidence presented, coupled with the grand jurors' apparent confusion regarding the legal instructions, created a potential for substantial prejudice. Although the Assistant District Attorney told the jurors that he was not telling them how to vote, it is apparent that the jurors either did not understand how to follow the instructions that they were given and were confused, did not know how to apply them to the facts presented, or simply chose to disregard the law.

For the foregoing reasons Counts One (1), Two (2), Three (3) and Four (4), charging the Defendant with Criminally Negligent Homicide under **Penal Law § 125.10**, are hereby dismissed.

2) The Evidence In this Case is Insufficient as a Matter of Law to Establish Assault in the Third Degree.

Assault in the Third Degree as charged under Counts Five (5), Six (6), Seven (7) and Eight (8), states as follows: A person is guilty of assault in the third degree when: With criminal negligence, he causes physical injury to another person by means of a deadly weapon or a dangerous instrument, **Penal Law § 120.00-3**.

In light of the foregoing analysis, the evidence presented to the Grand Jury was insufficient to find that the defendant engaged in criminally negligent conduct, *Cabrera*, supra. Additionally, the potential prejudice to the defendant as a result of the confusion concerning the instructions given by the Assistant District Attorney impaired the integrity to such an extent that the extreme remedy of dismissal is required, *Huston*, supra; see *People v. Draper*, 32 Misc.3d 1238A (Nassau Cty., 2011). Accordingly, Counts Five (5), Six (6), Seven (7) and Eight (8) are hereby dismissed.

3) The Evidence In this Case is Insufficient as a Matter of Law to Establish Reckless Driving.

Reckless driving is defined as driving in a manner which unreasonably interferes with the free and proper use of the public highway, or unreasonably endangers users of the public highway, **Vehicle & Traffic Law § 1212**. Recklessness is not an element of reckless driving, however, just as with criminal negligence, more than mere negligence is required; the defendant must operate a vehicle under circumstances evincing a reckless disregard of the consequences, *People v. Earley*, 121 AD3d 1192 (3rd Dept., 2014) *lv den* at 25 NY3d 1200 (2015); *People v. Goldblatt*, 98 AD3d 817 (3rd Dept., 2012) *lv den* at 20 NY3d 932 (2012); *People v. Bohacek*, 95 AD3d 1592 (3rd Dept., 2012). For a defendant's conduct to rise to this level, there must be additional aggravating acts beyond a single violation of the rules of the roads, *Id*; *People v. Garo*, 208 Misc. 496 (Broome Cty., 1955), or more than involvement in a motor vehicle accident, *People v. McKenzie*, 52 Misc.3d 1217A (Kings Cty., 2016). Merely making a U-turn would not constitute reckless driving, however doing so across three lanes of traffic on a parkway could be considered reckless, *McGratham*, supra.

Reckless driving has been found and upheld by our courts in circumstances where the defendant was operating a vehicle, in an intoxicated condition, with his eyes closed, across the road's dividing line, across the lanes of oncoming traffic and struck several parked cars, *McKenzie*, supra; where the defendant was operating a vehicle, in an intoxicated condition, crossed over the center lines so far that the oncoming vehicle's attempt to avoid the

defendant's car by swerving as far as possible was not successful in avoiding the collision, *Earley*, supra; where a defendant, who did not have a driver's license, drove off the road to avoid apprehension from law enforcement officers, then swerved toward an officer at a high rate of speed causing that officer to jump out of the way to avoid being struck then sped past the officer's vehicle, *People v. Harris*, 128 AD3d 1172 (3rd Dept., 2015); where a defendant disregarded signs to reduce speed, failed to stay on the road, failed to reduce speed once he drove his car off the road onto gravel and grass and ultimately struck and killed two pedestrians, *Goldblatt*, supra.

Stopping in the turning lane of an intersection, failing to see an oncoming vehicle positioned behind another vehicle in the opposite turning lane and beginning to execute a turn, as in the instant case, is not sufficient to find that the defendant operated his vehicle with such reckless disregard of the consequences of his turn to amount to interfering with the free and proper use of a public highway or unreasonably endangering users of a public highway. Accordingly, Count Nine (9) of the Indictment is hereby dismissed.

- 4) The Remainder of the Indictment is Defective: Failing to File a Required Report Upon an Accident (**VTL § 605-a**), Turning at an Intersection (**VTL § 1160-e**), Failure to Yield Right of Way (**VTL § 1141**) and Failing to Stay in a Designated Lane (**VTL § 1128-a**).

The entire Indictment against defendant Pino is defective and must be dismissed in light of the potential prejudice created by the instructions given by the Assistant District Attorneys as discussed herein, *Huston*, supra. Accordingly, Counts Ten (10), Eleven (11), Twelve (12) and Thirteen (13) are hereby dismissed.

Defendant Romeo's Motion to Dismiss the Indictment

- 1) The Evidence in this Case is Sufficient as a Matter of Law to Establish Driving While Intoxicated and Driving While Ability Impaired by Alcohol.

The defendant argues that the charges against him must be dismissed based upon legal insufficiency pursuant to **Criminal Procedure Law § 210.20-1(b)**. Specifically, he argues that the breath and blood test results do not rise to the requisite limit necessary for Driving While Intoxicated. Contrary to this argument, the People satisfied the elements of those charges by introducing evidence that the defendant, *at the time he operated the vehicle*, had a blood alcohol content of .08 percent or greater, *People v. Mertz*, 68 NY2d 136 (1986); *People v. MacDonald*, 227 AD2d 672 (3rd Dept., 1996); *People v. Stiffler*, 237 AD2d 753 (3rd Dept., 1997). Additionally, the evidence presented, as discussed herein, was sufficient to establish that the defendant exhibited common law signs of intoxication. As to the impairment charge, the defendant's argument that there was a complete lack of evidence that his ability to operate a

motor vehicle was impaired is unavailing in light of the discussion herein.

To the extent that the defendant alleges defects in the presentation of the case to the Grand Jury, the Court finds that the presentation was not defective as a matter of law as to this defendant. The minutes reveal that a quorum of the grand jurors were present during the presentation of evidence and at the time that the District Attorney instructed the Grand Jury on the law. No unauthorized person within the meaning of **Criminal Procedure Law § 190.25** was present at any time during the proceedings, *see People v Sayavong*, 83 NY2d 702 (1994).

The defendant argues that the expert testimony in the area of retrograde extrapolation was impermissible based upon a lack of proper foundation and therefore the integrity of the presentment was impaired, **Criminal Procedure Law §§ 210.35(5)**. This application is denied, *MacDonald*, *supra*; *People v. Cross*, 273 AD2d 702 (3rd Dept., 2000). No irregularity that would impair the integrity of the Grand Jury occurred as to this defendant, *see People v Adessa*, 89 NY2d 677 (1997); *People v Huston*, 88 NY2d 400 (1996).

Accordingly, the Court finds that sufficient legal evidence was adduced to establish the commission of each crime charged against defendant Romeo⁹ and the defendant's application for dismissal of the Indictment or charges therein is hereby denied.

Order entered accordingly.

Date: October 26, 2016
Suffolk County, New York



Fernando M. Camacho, J.

⁹ Counts Fourteen (14), Fifteen (15) and Sixteen (16).