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COURT OF APPEALS  
STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 190

HECTOR MARTINEZ,

Appellant.

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27 Madison Avenue  
New York, New York 10010  
October 9, 2012

Before:

HONORABLE JONATHAN LIPPMAN, CHIEF JUDGE  
HONORABLE CARMEN BEAUCHAMP CIPARICK  
HONORABLE VICTORIA A. GRAFFEO  
HONORABLE SUSAN PHILLIPS READ  
HONORABLE ROBERT S. SMITH  
HONORABLE EUGENE F. PIGOTT, JR.  
HONORABLE THEODORE T. JONES

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: People v. Martinez,  
2 190.

3 Counsel, would you like any rebuttal time?

4 MR. NEUSTADTER: I'll take two minutes,  
5 Your Honor. Stanley Neustadter for Hector Martinez.

6 CHIEF JUDGE LIPPMAN: Go ahead, counsel.

7 MR. NEUSTADTER: I'll take the path of  
8 least resistance here. I'm compatible with your own  
9 work in the area is just to affirm for the reasons  
10 stated in the dissent below - - - to reverse, excuse  
11 me - - - on the basis of the dissent below.

12 JUDGE READ: That would be novel to affirm  
13 on the dissent below, wouldn't it?

14 MR. NEUSTADTER: The rule of law I am  
15 arguing for I can state in three different ways.  
16 This is a depraved indifference homicide. Depraved  
17 indifference is measured by the defendant's mental  
18 state toward the deceased, not by an objective  
19 assessment of collateral risks to non-targets.

20 JUDGE CIPARICK: So do we apply Register or  
21 we're applying Feingold? Why don't you - - -

22 MR. NEUSTADTER: This is Feingold. This is  
23 a Feingold case. Feingold direct - - -

24 JUDGE CIPARICK: This is a - - -

25 JUDGE GRAFFEO: This is a 1995 trial,

1 correct?

2 MR. NEUSTADTER: Correct.

3 JUDGE CIPARICK: Yeah.

4 JUDGE GRAFFEO: So the objection here was  
5 not based on the grounds in Feingold. So why  
6 wouldn't the facts of this case be evaluated under  
7 Register?

8 JUDGE CIPARICK: Register.

9 MR. NEUSTADTER: Actually the objection was  
10 voiced in terms of Feingold. The objection was, and  
11 I'll read it to you right from the record, "Either  
12 the jury will believe the defendant intentionally got  
13 a gun and shot and killed the deceased or they'll  
14 acquit. I don't think there's any set of facts that  
15 would indicate the defendant committed the crime with  
16 reckless disregard."

17 JUDGE READ: But that's different - - -  
18 that's different.

19 CHIEF JUDGE LIPPMAN: Or without the  
20 sufficiency of the proof - - -

21 JUDGE CIPARICK: Right.

22 MR. NEUSTADTER: It's the adequacy of the  
23 proof - - -

24 CHIEF JUDGE LIPPMAN: The objection is  
25 on - - -

1 MR. NEUSTADTER: - - - to allow the case to  
2 go to the jury.

3 CHIEF JUDGE LIPPMAN: - - - depraved  
4 indifference, yeah.

5 MR. NEUSTADTER: That's correct.

6 CHIEF JUDGE LIPPMAN: Complicit - - -

7 JUDGE GRAFFEO: It wasn't a mens rea type  
8 of objection though - - -

9 JUDGE CIPARICK: It was - - - yeah.

10 JUDGE GRAFFEO: - - - that you would - - -  
11 that was voiced in later cases.

12 MR. NEUSTADTER: He didn't say the phrase  
13 mens rea but recklessness is a state of mind.

14 JUDGE READ: Yeah, but that's a different -  
15 - - isn't that different? The difference between  
16 intentional and reckless - - - you have to be  
17 reckless, but then didn't we also say there was a  
18 mens rea requirement? Isn't that something  
19 different?

20 MR. NEUSTADTER: Reckless is a mens rea  
21 requirement.

22 JUDGE READ: Well we talked about the  
23 depraved indifference - - -

24 JUDGE CIPARICK: Depravity.

25 JUDGE READ: - - - the depravity as being a

1           - - -

2                   JUDGE CIPARICK: Right.

3                   JUDGE READ:   - - - as being a mens rea.

4                   MR. NEUSTADTER: That is correct.

5                   JUDGE PIGOTT: But is it - - -

6                   JUDGE READ: He didn't object to that?

7                   MR. NEUSTADTER: No, he didn't object to  
8 that but recklessness is - - - without reckless - - -  
9 let's put it this way, depraved indifference murder  
10 requires recklessness.

11                   JUDGE PIGOTT: But it is an objective  
12 standard or a subjective standard?

13                   MR. NEUSTADTER: Subjective standard. And  
14 it - - -

15                   CHIEF JUDGE LIPPMAN: Did he say that he  
16 did not have the culpable state - - - mental state?

17                   MR. NEUSTADTER: He said, "I don't think  
18 there's any circumstances that would indicate the  
19 defendant committed the crime with reckless  
20 disregard." That sure sounds like mental state to  
21 me.

22                   JUDGE PIGOTT: At that point, though, we  
23 were using an objective standard, were we not?

24                   MR. NEUSTADTER: Then, but he - - - the  
25 language is the language that sort of anticipated

1 Feingold.

2 JUDGE PIGOTT: Oh, he was ahead of the  
3 curve?

4 MR. NEUSTADTER: Yeah, well some lawyers  
5 are. There's got to be the first - - -

6 JUDGE SMITH: Feingold was, presumably.

7 MR. NEUSTADTER: Excuse me?

8 JUDGE READ: Feingold was.

9 MR. NEUSTADTER: Feingold, yes, step-by-  
10 step, Feingold was one of those first on the block to  
11 announce the - - - really that I am - - -

12 JUDGE SMITH: No, I mean Mr. Feingold.

13 MR. NEUSTADTER: Mr. - - -

14 JUDGE SMITH: I mean he anticipated  
15 Feingold.

16 MR. NEUSTADTER: He anticipated Feingold,  
17 and we're - - - you know, Your Honor asked about the  
18 1995 trial, the - - -

19 JUDGE SMITH: And was this a stroke of  
20 genius that he decided I'll wait around for fifteen  
21 years and see - - -

22 MR. NEUSTADTER: For the record - - - the  
23 Appellate Division didn't dismiss the appeal. I  
24 don't know - - - I wasn't counsel at the prior  
25 proceeding, so I don't know the cause of the delay.

1 He got lucky in a sense, but also, you know, he's  
2 been in for eighteen years. If the appeal had been  
3 perfected closer to Feingold, he would have saved  
4 himself a lot of time. So it's not all windfall  
5 here.

6 And in any event, the law in this  
7 jurisdiction is explicitly clear; you apply the law  
8 that exists at the time of the direct appeal. We're  
9 still on direct appeal by one way or another.

10 JUDGE READ: Well we don't have a dispute  
11 with that.

12 JUDGE CIPARICK: Well one - - -

13 JUDGE READ: I guess the question is  
14 whether or not - - -

15 JUDGE CIPARICK: Right.

16 JUDGE READ: - - - the proper objection was  
17 made, whether or not it was preserved.

18 MR. NEUSTADTER: Well how about the  
19 response to the objection by the trial judge? Let me  
20 read you that. Maybe that will help. He responded  
21 as - - - let's see, "While the issue may be - - -  
22 while the facts in evidence certainly considered with  
23 the charge of reckless disregard" - - - he's using  
24 the same mens rea language - - - "the defendant is  
25 accused of taking a gun and firing it in a very

1 confined area where two people were visibly present  
2 and therefore I'm going to leave it in."

3 Those are Register standards, but it deals  
4 with state of mind, and that was the language that  
5 the lawyer used.

6 JUDGE SMITH: So you would paraphrase it as  
7 the defense lawyer saying he doesn't have the  
8 requisite state of mind and the judge saying that's  
9 not the test under Register - - -

10 MR. NEUSTADTER: Right, that's exactly  
11 right. And that's why he lost.

12 JUDGE CIPARICK: All right. Assuming that  
13 it was properly preserved, where do we go from there,  
14 assuming preservation?

15 MR. NEUSTADTER: Well then you just use the  
16 Feingold standard and you get to one of three ways of  
17 articulating the rule that should be clearly  
18 announced once and for all. I announced - - - I gave  
19 you one earlier. Let me give you another one.

20 A killing that risks but does not take the  
21 lives of others nearby, does not negate the fatal  
22 design directed toward the target who is killed.

23 This is a murder case. It's depraved  
24 indifference of murder.

25 JUDGE CIPARICK: Well there were three

1 people there. There were three people in the  
2 vestibule, correct?

3 MR. NEUSTADTER: They didn't die.

4 CHIEF JUDGE LIPPMAN: Isn't this kind of -  
5 - -

6 MR. NEUSTADTER: Only one died.

7 CHIEF JUDGE LIPPMAN: Isn't this kind of in  
8 between Suarez and the crowd scenario? You kind of  
9 have the two different poles of this thing; one-on-  
10 one versus shooting into a crowd? Isn't this kind of  
11 in between the two? And if it is, how do we  
12 determine, you know, which way to go?

13 MR. NEUSTADTER: Well - - -

14 JUDGE GRAFFEO: You're saying this is  
15 equivalent to a one-on-one?

16 MR. NEUSTADTER: This is equivalent to a  
17 one-on-one - - -

18 JUDGE GRAFFEO: Could you answer the  
19 Chief's question?

20 MR. NEUSTADTER: Yes, this is equivalent to  
21 a one-on-one. And don't forget, the Penal Law is not  
22 devoid of punishments to apply for the risks to the  
23 other people.

24 JUDGE PIGOTT: But what did the jury - - -  
25 what did the judge charge the jury with respect to

1 the standard for depraved indifference?

2 MR. NEUSTADTER: He charged standard  
3 Register language.

4 JUDGE PIGOTT: And there was no objection  
5 to that?

6 MR. NEUSTADTER: There was no objection but  
7 that's part of the argument - - -

8 JUDGE SMITH: Well did he really charge  
9 standard Register language? I read the charge. I  
10 thought the charge could almost be given today.

11 MR. NEUSTADTER: Well it looked more like  
12 Register than Feingold. And the - - -

13 JUDGE SMITH: I don't see the word  
14 "objective" in there.

15 MR. NEUSTADTER: Yeah, that's correct.  
16 But he did talk about the other people present, and  
17 that's objective. That's not frame of mind. And - -  
18 -

19 CHIEF JUDGE LIPPMAN: But your argument is  
20 you don't have to object to the charge.

21 MR. NEUSTADTER: You don't have to object  
22 to it because - - -

23 CHIEF JUDGE LIPPMAN: That's your - - -

24 MR. NEUSTADTER: - - - he already lost that  
25 argument when the judge decided to submit

1 reckless to the jury under the Register plan - -  
2 -

3 JUDGE SMITH: I guess I am having trouble  
4 seeing - - - I mean, maybe I should maybe asking your  
5 adversary, I'm having trouble finding the language I  
6 would have objected to if I had been him.

7 MR. NEUSTADTER: Well he thought that  
8 battle was lost and didn't quibble. As long as  
9 reckless disregard was going to the jury, he was a  
10 loser, and there was no point in just irking the  
11 trial judge with a pointless objection.

12 JUDGE GRAFFEO: I don't see how we view  
13 this as a one-on-one which is pretty much what  
14 Gonzalez, Hafeez, that line of cases said when he  
15 holds another person in front of him as a shield.

16 MR. NEUSTADTER: But that's - - -

17 JUDGE GRAFFEO: I mean clearly - - -

18 MR. NEUSTADTER: - - - but that's - - -

19 JUDGE GRAFFEO: - - - your client could  
20 have - - -

21 MR. NEUSTADTER: - - - line of thinking  
22 ended with Feingold.

23 JUDGE GRAFFEO: - - - not fired at that  
24 point. He had the opportunity not to fire at that  
25 point.

1 MR. NEUSTADTER: Well we don't know the  
2 sequence of the shots.

3 JUDGE GRAFFEO: He knew there was another  
4 person at grave risk at that juncture.

5 MR. NEUSTADTER: All of that is true, but  
6 that's objectivizing what - - - we have to think of  
7 his state of mind. You're going back to Register and  
8 objectivizing using the surrounding circumstances - -  
9 -

10 JUDGE GRAFFEO: No, we've said that there's  
11 certain areas that still remain appropriate - - -

12 MR. NEUSTADTER: No, not - - -

13 JUDGE GRAFFEO: - - - for depraved  
14 indifference.

15 MR. NEUSTADTER: Well, I - - - there's  
16 dicta to that extent but that ended with Feingold - -  
17 -

18 JUDGE GRAFFEO: And this may not be a crowd  
19 but it's still a group of people. It's, you know - -  
20 - it's an apartment - - -

21 MR. NEUSTADTER: The Penal Law is not  
22 without its remedies towards those people. We have  
23 to look at the defendant's state of mind under  
24 Feingold. The defendant's state of mind was to kill  
25 that fellow Lee.

1 CHIEF JUDGE LIPPMAN: It doesn't matter who  
2 gets in the way though?

3 MR. NEUSTADTER: Not for purposes - - - it  
4 doesn't make the homicide recklessly indifferent.  
5 It's still an intentional homicide. We're talking  
6 about a homicide case. Had any of those two other  
7 people in the lobby died, then you might have an  
8 argument about depraved indifference homicide as to  
9 them but they didn't die. And this is a homicide  
10 case; and his intent, his state of mind, which is  
11 what Feingold focuses in on, is intent and he had it  
12 aplenty. According to the People's case, he - - -  
13 this was a revenge killing essentially. He was - - -

14 CHIEF JUDGE LIPPMAN: What about that there  
15 were three people, does that matter? It's still - -  
16 -

17 JUDGE CIPARICK: Three.

18 CHIEF JUDGE LIPPMAN: There were three  
19 people there. I mean, the target and the other two,  
20 does it matter that - - -

21 MR. NEUSTADTER: No.

22 CHIEF JUDGE LIPPMAN: - - - there was a  
23 third person?

24 MR. NEUSTADTER: It doesn't matter. It  
25 doesn't change his intent.

1 CHIEF JUDGE LIPPMAN: It's the intent that  
2 carries it here.

3 MR. NEUSTADTER: It's his - - - you can't  
4 get anymore intentional than a revenge killing. How  
5 much more intentional can you get? Now it's, you  
6 know, it's - - - let's put it this way. The victim  
7 of the homicide, we're dealing with a murder case  
8 here, there has to be a body connected to the state  
9 of mind. Whatever reckless disregard might have been  
10 shown to the other two was not shown toward the  
11 deceased. That's the victim of the homicide. You  
12 have to link those two up.

13 The victim has to be someone - - - if  
14 you're going to convict of depraved indifference  
15 homicide, the victim has to be someone within the  
16 range or zone of disregard, not within the zone or  
17 range of intent. And there's only one guy who was in  
18 the zone of intent and that was the deceased.

19 CHIEF JUDGE LIPPMAN: What about Judge  
20 Graffeo's point that he could have not shot at  
21 that - - - when he used the other person as the  
22 shield, he could have said, oh, there are other  
23 people involved here. You know, I'm just not going  
24 to go there.

25 MR. NEUSTADTER: Right. And for that, he

1 was - - -

2 CHIEF JUDGE LIPPMAN: Is it reckless not to  
3 have said that?

4 MR. NEUSTADTER: Reckless toward those  
5 other two people, not reckless towards the victim of  
6 a homicide. We're dealing with a homicide case here,  
7 not a reckless endangerment of bystanders' case. If  
8 the bystanders had died, you would have reckless  
9 indifference murder charged as to those two victims.

10 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank  
11 you.

12 MR. NEUSTADTER: Thank you.

13 JUDGE CIPARICK: Why wasn't this adequately  
14 preserved?

15 MR. FONCELLO: Good morning. May it please  
16 the Court - - -

17 JUDGE CIPARICK: Good morning.

18 MR. FONCELLO: - - - Martin Foncello on  
19 behalf of the People.

20 CHIEF JUDGE LIPPMAN: Now why wasn't that  
21 adequately preserved?

22 JUDGE CIPARICK: Yes.

23 MR. FONCELLO: Why was it not preserved?  
24 Our position is that defense counsel did preserve an  
25 argument that the proof was insufficient to make out

1           depraved indifference murder as that crime was  
2           undisputed in 1995.

3                   JUDGE CIPARICK:   So it was a sufficiency  
4           argument - - - he was making a sufficiency argument?

5                   MR. FONCELLO:   Yes, he was arguing the  
6           quantum of proof didn't make out recklessness, which  
7           was understood as the mens rea back in 1995.

8                   JUDGE SMITH:   You mean that he - - - when  
9           he says this doesn't make out recklessness, he is  
10          implicitly saying this doesn't make out recklessness  
11          as defined in Register?   How could anybody possibly  
12          preserve the - - - a Feingold claim that way?   Do you  
13          have to say, as it will be defined in eleven years in  
14          Feingold?

15                  MR. FONCELLO:   People actually have  
16          preserved - - - I mean this court has found certain  
17          claims preserved.

18                  JUDGE SMITH:   Yeah, and with preservation  
19          rather similar to this.

20                  MR. FONCELLO:   Well it's actually - - - it  
21          wouldn't be unreasonable to expect counsel to make  
22          such an argument because all he'd have to do is look  
23          at the dissent in Register.   The dissent in Register  
24          says that the mens rea for depraved indifference  
25          murder should be depraved indifference.

1 CHIEF JUDGE LIPPMAN: Yes, but didn't he in  
2 effect say that he didn't have the culpable mental  
3 state? Isn't that really what he says?

4 MR. FONCELLO: He's arguing that the  
5 culpable mental state - - -

6 CHIEF JUDGE LIPPMAN: What more could - - -

7 MR. FONCELLO: - - - all the evidence  
8 proves intent - - -

9 CHIEF JUDGE LIPPMAN: - - - what more could  
10 he - - -

11 MR. FONCELLO: - - - and none proves  
12 reckless.

13 CHIEF JUDGE LIPPMAN: What more could you  
14 possible need to do?

15 MR. FONCELLO: Alert the Court to the fact  
16 that you think that the elements of mens rea should  
17 be charged as depraved indifference. That it's a  
18 heightened state, different than the state applicable  
19 to involuntary manslaughter.

20 JUDGE SMITH: I mean you're really saying  
21 that he has to say, in substance, I recognize that  
22 Register is against me, but I want to preserve the  
23 point in case Register is overruled.

24 MR. FONCELLO: Absolutely.

25 JUDGE SMITH: But did - - -

1 MR. FONCELLO: That's what attorneys do, to  
2 move the law in a different direction.

3 JUDGE SMITH: But did - - - so who said  
4 that? I mean whoever says that, we've reversed a lot  
5 of cases under the new depraved indifference  
6 standard, and I don't remember ever seeing one where  
7 the defendant said at trial I'm preserving the point  
8 in case the law changes?

9 MR. FONCELLO: Is that a question, Your  
10 Honor?

11 JUDGE SMITH: Yeah.

12 MR. FONCELLO: I can't speak for what  
13 you've seen. I understand that this court has heard  
14 enough cases - - -

15 JUDGE SMITH: Okay. Well what have you  
16 seen, is my question? Can you cite me one where  
17 somebody actually gave the - - - where somebody did  
18 the kind of preservation you say is required?

19 MR. FONCELLO: Well I don't know the  
20 details in the briefing of the case but in  
21 Jean-Baptiste, this court found that the attorney had  
22 adequately preserved a claim as to the legal  
23 elements, the elements of the crime, such that he  
24 didn't have to object to the jury instructions and  
25 that he could raise the Feingold claim. That's a

1 case where this court found preservation. Again,  
2 your opinion doesn't lay out the details of the  
3 preservation but that's an example of this - - -

4 CHIEF JUDGE LIPPMAN: It's highly unlikely  
5 that it was exactly along the lines that Judge Smith  
6 laid out, wouldn't you agree?

7 MR. FONCELLO: That this is on the same  
8 lines?

9 CHIEF JUDGE LIPPMAN: That it was - - -  
10 that they would say that gee, you know, Register's  
11 going the wrong way and I know the law's against me  
12 but that's the ground on which I am raising.

13 MR. FONCELLO: I mean our position is that  
14 if an attorney is trying to advocate for a change in  
15 the law - - -

16 CHIEF JUDGE LIPPMAN: They can never really  
17 preserve under your position in this kind of  
18 circumstance.

19 MR. FONCELLO: No, they could preserve. He  
20 would have to say that Register - - -

21 CHIEF JUDGE LIPPMAN: It would be very - -  
22 -

23 MR. FONCELLO: - - - was wrong, and that  
24 the dissent in Register is what should be the law.

25 CHIEF JUDGE LIPPMAN: Okay.

1                   MR. FONCELLO: That recklessness - - - he  
2 does argue - - - and again, we have said that - - -  
3 he's preserved the claim that recklessness is not  
4 established under the quantum of proof. He has not  
5 said you can't look at objective circumstances  
6 surrounding the crime. You can't - - - he has not  
7 said - - -

8                   CHIEF JUDGE LIPPMAN: Counsel, - - -

9                   MR. FONCELLO: - - - depraved indifference  
10 is a separate mens rea.

11                  CHIEF JUDGE LIPPMAN: - - - let's go to the  
12 merits.

13                  JUDGE CIPARICK: Merits, yeah.

14                  CHIEF JUDGE LIPPMAN: What do you - - -  
15 what is your position? Why is this more akin to  
16 shooting into a crowd than looking to hurt one  
17 person? Isn't that the intent that was involved  
18 here?

19                  MR. FONCELLO: It's actually remarkable,  
20 sitting here watching co-counsel stand up here and  
21 pointing directly at you, as if he was there in 1991  
22 when the shooting took place.

23                  CHIEF JUDGE LIPPMAN: Pointing at somebody  
24 else.

25                  MR. FONCELLO: Right?

1 CHIEF JUDGE LIPPMAN: He wasn't pointing at  
2 me.

3 MR. FONCELLO: We have a small confined  
4 space where four bullets are being shot in there.  
5 There's three people - - -

6 CHIEF JUDGE LIPPMAN: Yeah but what's his  
7 intent, counsel? That's the question.

8 MR. FONCELLO: The intent - - - the jury  
9 found his intent was to harm Lee but not to kill him,  
10 and he acted recklessly and depravedly with respect  
11 to the grave risk of death to the other two. That  
12 was the jury's finding here. They acquitted of  
13 intentional murder. They convicted him of  
14 intentional assault of the bystander on a transferred  
15 intent theory.

16 CHIEF JUDGE LIPPMAN: Why isn't this akin  
17 to almost a one-on-one?

18 MR. FONCELLO: Well it's not a one-on-one.  
19 Here's - - -

20 CHIEF JUDGE LIPPMAN: Because that's what  
21 you're trying to do? He's looking at you. He's  
22 trying to hurt you.

23 MR. FONCELLO: Well you would have - - - to  
24 find this to be a one-on-one would be to ignore the  
25 grave risk of death that you're posing to the other

1 two individuals.

2 CHIEF JUDGE LIPPMAN: But we agree when the  
3 quintessential DIM case is the big crowd, you shoot  
4 into the crowd; clearly, you know, depraved  
5 indifference. When you go as to hurt one person, why  
6 isn't that just intentional?

7 MR. FONCELLO: The jury found that it was  
8 intent to hurt. He intended to harm Lee. So we're  
9 agreeing here that there was an intent here, and we  
10 know that he has a motive for shooting him. But the  
11 jury didn't find the proof - - -

12 JUDGE SMITH: Just so I'm - - -

13 MR. FONCELLO: - - - beyond a reasonable  
14 doubt - - -

15 JUDGE SMITH: Just so I'm clear, you're  
16 arguing that this proof is sufficient under today's  
17 law. Is that the argument you're making now?

18 MR. FONCELLO: Absolutely. We're saying  
19 this is just an application of the Trappier rule.  
20 The jury found that while defendant intended to cause  
21 serious physical injury to Lee, he was depravedly  
22 indifferent, reckless towards the greater result of  
23 death to Lee and the others. The statute permits for  
24 that finding that it doesn't have to be the same  
25 person.

1 CHIEF JUDGE LIPPMAN: But really anytime  
2 anyone - - - if you're in a one-on-one situation and  
3 anytime anyone gets hurt in the context of that, it  
4 can be depraved indifference?

5 MR. FONCELLO: No, I mean I would certainly  
6 need to know more facts.

7 CHIEF JUDGE LIPPMAN: What's the  
8 circumstance then where it is depraved indifference?

9 MR. FONCELLO: Well, what this court has  
10 said in that progression of cases, Hafeez on and up  
11 through Feingold, if you're going to see depraved  
12 indifference, there have to be multiple persons that  
13 are actually endangered - - - whose lives are  
14 actually in danger.

15 JUDGE CIPARICK: So if all three people had  
16 been killed and these were three homicides, all three  
17 of them qualify as depraved indifference.

18 MR. FONCELLO: Yes, I don't think - - -

19 JUDGE CIPARICK: Even though his intent was  
20 to kill - - -

21 MR. FONCELLO: - - - it matters who dies  
22 here.

23 JUDGE CIPARICK: - - - the person in the  
24 middle.

25 MR. FONCELLO: I don't think it matters who

1 dies in this case.

2 JUDGE CIPARICK: He was a bad shot.

3 MR. FONCELLO: I mean, our view that this  
4 is the unique scenario where you should be charging  
5 to the jury, intentional and depraved and then let  
6 them just sort it out because there are plausible,  
7 reasonable inferences in favor of either theory.

8 JUDGE CIPARICK: Could that be done today?

9 JUDGE JONES: Does it matter - - -

10 JUDGE CIPARICK: Could that be done today  
11 if the trial was today?

12 MR. FONCELLO: This should be the same  
13 today.

14 JUDGE CIPARICK: How would this be  
15 different?

16 MR. FONCELLO: I think this case presents a  
17 wonderful opportunity for the Court to harmonize the  
18 depraved indifference to this case.

19 CHIEF JUDGE LIPPMAN: Judge Jones.

20 JUDGE JONES: Does it matter at all that  
21 the wounded bystander was pulled into the line of  
22 fire by the victim?

23 MR. FONCELLO: Well if anything, it helps  
24 support our position that it is depraved indifference  
25 because you do have an opportunity - - - you see the

1 person now is right in the line of fire to be shot  
2 and the defendant still fires without regard.

3 JUDGE JONES: Well suppose he was dragged  
4 into the line of fire at the last second, as the  
5 person was firing?

6 MR. FONCELLO: I mean, I think ultimately  
7 it doesn't matter much, because here we have a  
8 confined space that you're shooting into. I'd say  
9 this is akin to shooting fish in a barrel and he may  
10 have wanted to hit one of the fish but he sure as  
11 heck doesn't care about the others.

12 JUDGE SMITH: Well, why is this case  
13 different from Sanchez?

14 MR. FONCELLO: Sanchez?

15 JUDGE SMITH: Yeah.

16 MR. FONCELLO: Sanchez, I believe is the  
17 case where the guy turns around and shoots behind the  
18 door at the other person.

19 JUDGE READ: Yes, that's the one.

20 MR. FONCELLO: Well, this court in Sanchez,  
21 I know it's been overruled as far as on the law, this  
22 court has several times - - -

23 JUDGE SMITH: Well, are you suggesting that  
24 Sanchez would come out the same way today?

25 MR. FONCELLO: I don't know if it would.

1 This court a few times has indicated that Sanchez - -  
2 - there's a theory for why it might be acceptable  
3 today being that there are children that are present  
4 and there was a heightened risk of unintended injury.  
5 I don't know if it would come out the same today.

6 Our case, the risk of unintended injury is  
7 much greater than there are in Sanchez. And I don't  
8 know all of the details of Sanchez, but in ours, you  
9 have a very confined space, and you've seen the  
10 photos in the appendix, there's three people present  
11 there. The defendant shot - - - he may have wanted  
12 to hit one of them but he sure as heck didn't care if  
13 the others lived or died. That's why this is a  
14 quintessential example of depraved indifference  
15 murder. The jury had it - - -

16 JUDGE CIPARICK: Well that's what  
17 counsel - - - that's what your adversary was saying  
18 that the others didn't die. Had they died, it would  
19 have been depraved indifference as to them but he's  
20 claiming that as to Mr. Lee, it was intentional  
21 murder because that's who he intended to kill.

22 MR. FONCELLO: I would say if that was the  
23 facts, if the bystander had died instead of Lee, you  
24 could have still convicted on intentional murder for  
25 transfer intent and for all the reasons he says this

1 is intentional. This is a unique scenario where you  
2 can charge both to the jury, let them sort it out.  
3 That's what we do. I mean, the juries have been  
4 entrusted with this remarkable - - -

5 JUDGE SMITH: Yeah, but isn't that - - -  
6 basically what Judge Rosenblatt's dissent in Sanchez,  
7 which I think probably is now the law, said is we've  
8 done too much of this giving these cases two counts  
9 to the jury and let them sort it out. We've got to  
10 stop this.

11 MR. FONCELLO: And I think that - - -

12 JUDGE SMITH: Isn't that the point of what  
13 we were doing when we overruled Sanchez?

14 MR. FONCELLO: Yes.

15 JUDGE SMITH: To say we're going to say  
16 these twin count indictments and we're going to  
17 insist that the jury - - - where somebody's a  
18 murderer, the jury's got to call him an intentional  
19 murderer.

20 MR. FONCELLO: I think that that's right.  
21 I agree with that principle. And at worst when  
22 you're talking a case where there's a single person  
23 whose life is endangered, because in that scenario,  
24 the question posed to the jury is did the defendant  
25 intend to kill or merely intend to harm and it

1           resulted in death; murder or manslaughter, that's it.  
2           They shouldn't get a false choice of depraved murder,  
3           and that makes perfect sense. Now all of a sudden -  
4           - -

5                         JUDGE SMITH: But what about your  
6           adversary's - - -

7                         MR. FONCELLO: - - - there's a multiple  
8           choice and you have multiple - - -

9                         JUDGE SMITH: - - - point that that logic  
10          only works if the person who died was one of the  
11          bystanders? I mean if by hypothesis he's trying to  
12          kill the man who died, how can that be anything but  
13          an intentional murder of the man who died?

14                        MR. FONCELLO: I'm sorry?

15                        JUDGE SMITH: I thought you previously  
16          assumed that if no one else were around, this would  
17          be intentional murder.

18                        MR. FONCELLO: Yes.

19                        JUDGE SMITH: That assumes, of course, that  
20          he was trying to kill the man who died, right?

21                        MR. FONCELLO: Yes.

22                        JUDGE SMITH: On that assumption - - -

23                        MR. FONCELLO: Assuming - - -

24                        JUDGE SMITH: - - - on that assumption, how  
25          can this murder of this victim be anything but

1 intentional murder just because he also endangered  
2 the lives of some people who didn't die?

3 MR. FONCELLO: Well if the jury here had  
4 found that he - - - his conscious objective was to  
5 bring about the defendant's death, they would have  
6 convicted him of intentional murder but they didn't  
7 because they didn't find the proof that he had - - -

8 JUDGE SMITH: You could make that argument  
9 even if no bystanders were nearby.

10 MR. FONCELLO: Of course. But that's what  
11 defines the limits of the court's legal sufficiency  
12 review. It's not can we think of that there's an  
13 alternate possible, you know, verdict that a  
14 different rational jury could come up with. No, it's  
15 the verdict the jury came up with, view the evidence  
16 in the light most favorable to the People, draw all  
17 rational inferences in favor of the People, and then  
18 ask yourself can a rational jury have come to this  
19 verdict? And I think the answer in this case has to  
20 be yes. He's firing multiple bullets into a confined  
21 space where three people are present. He may have  
22 wanted to hit one of them but he certainly didn't  
23 care about the other two.

24 Are there any other questions?

25 CHIEF JUDGE LIPPMAN: Thank you, counsel.

1 MR. FONCELLO: Thank you.

2 CHIEF JUDGE LIPPMAN: Appreciate it.

3 Counsel, rebuttal?

4 MR. NEUSTADTER: In closing, the shooting  
5 in the crowd - - - the shooting in the crowd cases  
6 reflect an indifference. There is no target. It's  
7 just an indifference. I don't care who I hit. This  
8 is a case where there was a target and other people  
9 might have been in danger but they didn't die and  
10 this is a homicide case and we haven't heard an  
11 answer to that from the People. Thank you.

12 CHIEF JUDGE LIPPMAN: Thank you. Thank you  
13 both. Appreciate it.

14 (Court is adjourned)

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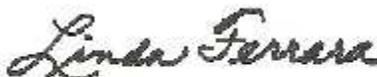
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C E R T I F I C A T I O N

I, Linda Ferrara, certify that the foregoing transcript of proceedings in the Court of Appeals of PEOPLE v. HECTOR MARTINEZ, No. 190 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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