PRELIMINARY STATEMENT

Aaron Munise, charged by Montgomery County Indictment 052-202, appeals from a judgment of conviction, entered upon his conviction after a jury trial, of criminally negligent homicide (P.L. §125.10) (DiMezza, J.). On July 9, 2021, the court imposed a sentence of 1 to 3 years in prison.

As of the date of this filing, the Department of Corrections and Community Supervision website shows that Mr. Munise is in custody on this conviction.[1] He had no co-defendant.

[1] http://nysdoccslookup.doccs.ny.gov/GCA00P00/WIQ1/WINQ000 (last visited December 9, 2022).

QUESTIONS PRESENTED

1. Did the People fail to prove appellant's guilt beyond a reasonable doubt, and was the verdict against the weight of the evidence, where appellant's inattentiveness was the sole cause of the accident?

Court below: The jury convicted appellant of criminally negligent homicide.

2. Should this Court reverse appellant's conviction and order a new trial because the court denied defense counsel's for-cause challenge to a two prospective jurors whose relationships to witnesses for the prosecution demonstrated implied bias that could not be cured by expurgatory oaths?

Court below: The court denied counsel's for cause challenges on the ground they could be impartial.

3. Did the needless admission of gruesome photographs of the deceased injuries violate appellant's right to a fair trial?

Court below: The court admitted the photographs as being related to the medical examiner's testimony.

4. Should this Court reduce appellant's sentence in the interest of justice?

Court below: The court imposed a sentence of 1 to 3 years in prison.

STATEMENT OF FACTS

Jury Selection

During the first round of jury selection, Prospective Juror # 26 informed the court that he was a 911 dispatcher in the Schoharie County Sherrif's Office and believed "it may be an ethical conflict of interest" because he was a member of the fire department and emergency and disaster management department in the county (A-75). He explained that he knew "many of the state troopers and other people" who appeared on the witness list, and could not guarantee that he would not respect their testimony more than other witnesses (A-75-76). When the court inquired whether he would be influenced by his relationship with law enforcement, Juror #26 stated that he would do his best to "weigh everyone's testimony of fair and equal value" (A-76).

When the prosecutor asked during *voir dire* whether Juror #26 could remind himself "that these [officers] are just men and women who wake up in the morning and go to a job just like you do," Juror #26 said he "would be doing [his] very best at that" (A-80). He also agreed that officers should be treated the same as any other witness, and that

hewould do his best to evaluate all witnesses fairly regardless of who they were (A-80).

Defense counsel inquired during *voir dire* whether Juror #26 among others, whether he could hold the People to their burden of proof, and the juror said "correct" (A-88). The court directed additional inquiry of Juror #26 (A-84). When the court challenged the juror's earlier statements that he would do his very best to be impartial, asking for an assurance that he could, in fact, do so, Juror 26 said "yes." (A-85). Defense counsel asked pointedly whether the juror could guarantee he could be fair and impartial, as opposed to just doing his best, Juror #26 said that "there are no guarantees in life" but that he believed he would be able to weigh a testimony equally (A-85-86). The court then inquired about Juror #26's change from being uncertain if he could treat all witnesses the same, to his current position that he could, the juror said,

> throughout the lunch break, I took some time and made some personal reflection on whether or not I believe that I can fairly and impartially be a part of this jury, and I believe that I can do that. However, I wanted . . . all of the information out there for everyone's sake so that if an attorney had questions about whether or not they thought I could be fair and impartial, they had the

> opportunity to make that know and/or dismiss me if that was the decision they felt was best for either side of the case (A-86-87).

At the ensuing challenge conference, defense counsel challenged Juror #26 for cause, arguing that the juror had flip-flopped his assurance of partiality (A-94). The court disagreed and denied the for-cause challenge (A-94-95). Defense counsel thereafter used a peremptory challenge to strike Juror #26 from the jury (A-95).

During the second round of jury selection, Prospective Juror #135 disclosed to the court that he had a conflict due to his friendship with Robert Crews, one of the drivers involved in the traffic accident at the heart of this case (A-101-02). Juror #135 explained that Mr. Crews had discussed the accident and that he had "prior knowledge of what he will say" (A-102). He said he would try to put it out of his mind but that "once you heard, you cannot unhear" and that it might be difficult for him to remain fair and impartial (A-102). The juror said that he saw Mr. Crews at social gatherings around town, and it was at once such gathering shortly after the accident that Mr. Crews told his story about it (A-103). When pressed by the court and the prosecutor about whether he could

disregard anything Mr. Crews said previously and render a verdict based only on the evidence presented in court, the juror responded, "yes" (A-104). Defense counsel confirmed that the juror had discussed specifics of the case with Mr. Crews and moved to have him removed, but the court reserved decision pending further inquiry (A-105).

The court conducted general *voir dire* with the prospective jurors during which Juror #135 disclosed that his son was an Albany County Corrections Officer, but the juror said this would not affect his ability to remain impartial (A-106-07). When the prosecutor asked Juror #135 during *voir dire* whether Juror #135 could assess all the witness similarly, even law enforcement and the witness he knew personally, the juror said "yes" (A-108).

Defense counsel asked Juror #135 whether he agreed with the People having the burden of proof and the juror answered affirmatively. Counsel also asked whether he would be biased in favor of the police, to which the juror responded "no," and whether he promised to give Mr. Munise a fair trial, to which the juror said "yes" (A-109, 110).

At the close of *voir dire*, the court brought Juror #135 into chambers for followup questioning during which the juror explained that he and Mr. Crews had been classmates and had become acquaintances who were friendly when they see one another, such as at a mutual friend's house shortly after the accident (A-111). Juror #135 said that the accident was traumatic for Mr. Crews, whom he considered a friend, and that everyone at the gathering feld bad for him (A-112). The juror expected that Mr. Crews had told them everything he was likely to say in court, but that, during deliberations, he would only consider what Mr. Crews said in court (A-112). Juror #135 also said he would be able to set aside what Mr. Crews had said previously, which could conflict with the trial testimony (A-113). He also claimed he did not recall the details of what Mr. Crews said at the party (A-113), and that, in any event, he could be a fair and impartial juror (A-114).

At the second-round challenge conference, defense counsel challenged juror #135 for cause because of his direct contact with a witness who had given him information about the case but the court denied the challenge on the ground the juror had given an unequivocal

assurance that he could be impartial (A-120-21). Defense counsel used a peremptory challenge to strike Juror #135 (A-121), and exhausted his peremptory challenges, after which an additional juror was seated (A-122).

The Trial

The People's Case

The Accident

At about 7:40 a.m. on November 27, 2018, ROBERT CREWS, driving eastbound on N.Y. 5S in a red pickup truck pulling a trailer saw a westbound car about to make a left turn (A-192, A-196, A-198). He slowed down to give the car room to turn but the car was struck from behind by a truck pushing it into Mr. Crew's path causing his truck to collide with the car (A-198).

New York State Trooper STEPHANIE RALSTON was outside the Fonda trooper barracks shoveling snow when she saw Trooper Jeremy VanNostrand's car slow to turn into the barracks parking lot (A-134-35). She heard a loud bang and saw a white truck push the car into the oncoming lane into the path of Trooper VanNostrand's car (A-136).

Trooper NATHAN HARDER, who was also outside the barracks at the time heard, the accident, turned to see a white truck continuing past it westbound while an eastbound red pickup truck go off the road in front of the barracks (A-150). Trooper PETER BRUNDAGE, while doing paperwork inside the barracks, heard the crash and went outside (A-175). As Trooper Harder approached, he saw that a blue car was involved in the accident as well (A-151). The red pickup and blue car ended up on the lawn in front of the barracks (A-151; A-176). The white truck ended up approximately 950 feet west of the accident (A-145).

As Trooper Ralston put her car into the roadway for safety, Trooper Harder, joined by Troopers Brundage and BLAKE LUBIC, all ran to the scene (A-137; A-150; A-161; A-176). Troopers Lubic, Brundage and Harder cut Trooper VanNostrand's seatbelt and were able to remove him from his car (A-162; A-177; A-154). The troopers helped load Trooper VanNostrand onto a waiting ambulance (A-164; A-178).

After the ambulance left for the hospital, Trooper Brundage began to look for the other drivers involved in the crash. Upon seeing someone vomiting, he approached that man, Mr. Munise, and asked if he had been

involved in the accident (A-179). Mr. Munise told him he had been driving the truck (A-179). As Trooper Brundage walked Mr. Munise inside the barracks, Mr. Munise told him that the truck's automatic braking collision avoidance system kept going off, as it often did in bad weather, and when he hit the brakes, there were no brakes (A-182). He told the trooper, "I told him that truck was unsafe for months. I told him it would cause an accident" (A-182).[2] Before Trooper Brundage could ask Mr. Munise any questions, and investigator told him, "Don't do anything. Investigator Kligbeil's going to come down" (A-183).

The Investigation

Trooper MATTHEW TODD LIEBIG, a commercial vehicles inspector, responded to the scene of the collisions at 9:30 a.m. on November 27, 2018 (A-207). He tested the brakes on Mr. Munise's truck and found them to be operational (A-218; A-227). He also noted that there was a radar detector in the truck that was turned on (A-224). It was illegal to use a radar detector in a commercial vehicle (A-224).

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[2] DAVID RIPLEY, who worked for CLYNK Recycling assigning trucks, routes, and staffing, testified that Mr. Munise had been running late the day of the accident, but had never told him that the collision mitigation system on his truck was unsafe (A-346-47).

Trooper RUSSELL DENNIE gave Mr. Munise a field sobriety test and a pre-screen blood test and found no trace of alcohol in Mr. Munise's system (A-241-43). Nor did he see any sign of impairment (614). Trooper MATTHEW WHEELER conducted a 12-step Drug Recognition Evaluation and a blood test and found no indication of impairment due to use of drugs (A-256).

New York State Investigator DONALD KLINGBEIL interviewed Mr. Munise at approximately 8:35 a.m. about the events leading up to the accident (A-362, A-382). Mr. Munise told him that he was supposed to have been at work at CLYNK recycling at 6:00 a.m. that morning but that he was an hour late because of the snow (A-362). He picked up his truck in Glenville and drove westbound toward Clinton, New York. The truck was equipped with a collision mitigation system, and the cruise control was set for 43 m.p.h. (A-363). As he was driving the collision avoidance system signaled an error, showing red lights, and the automatic brakes engaged, causing snow to slide from the roof onto the windshield (A-363). As he turned on the wipers, the truck collided with the car in front that he had been following for a couple of miles (A-363-64). He tried to hit the

brakes when they automatically engaged but they were hot working properly, which is why it took so long for the truck to stop (A-370). He had not been on the phone at the time of the accident (A-370). Investigator Klingbeil reduced Mr. Munise's statement to writing, had him review it and then sign it (A-762). Investigator Klingbeil came to find out that cell phone records indicated that Mr. Munise had not, in fact, been using his cell phone at the time of the accident (A-793).

Investigator Klingbeil left the interview room for a time, and when he returned, Mr. Munise added to his statement that he had been traveling 43 m.p.h. with the cruise control on and that the collision mitigation system could not be deactivated with the cruise control on (A-366, A-371-72). Mr. Munise did not describe the collision mitigation system having amber lights (A-390).

Investigator Klingbeil interviewed Mr. Munise again on December 6, 2018, at his mother-in-law's home, with respect to his job training (A-373). Mr. Munise had spent three days working with other drivers who taught him where to go and how to pick up and stack recyclables (A-376). He was given no training with respect to the collision mitigation system

or the operation of the trucks he drove (A-376). The investigator wrote Mr. Munise's statement and had him review and sign it (A-376-77).

Trooper Liebig spoke with Mr. Munise after Investigator Klingbeil had taken his statements the morning of the accident (A-209-10). Mr. Munise told the trooper that as he was driving, the collision mitigation system came on, applying the brakes automatically, snow fell from the roof, and he hit something then turned on the wipers (A-212). He said that the collision mitigation system was always on, that he could drive for 70 miles without touching the pedals, and that he had the cruise control set at 43 to 45 m.p.h. that day (A-212, A-213). Mr. Munise also said that the system was flashing red and that this meant it was not working properly (A-213). Mr. Munise said he had stepped on the brakes after they had been automatically applied, and after the collision (A-214-15).

On July 3, 2020 Trooper WILLIAM KEMMET arrested Mr. Munise (A-400). During pedigree questioning, Mr. Munise said he had told his wife that the truck was going to kill someone and that the truck coasted to a stop after the accident because the brakes were not working properly (A-402).

The Autopsy Evidence

Doctor BERNARD NG, a coroner pathologist in the Albany County Coroner's Office, conducted the autopsy of Jeremy VanNostrand on November 27, 2018 (A-317-18). Dr. Ng testified concerning numerous lacerations, bone fracture, internal bleeding, and head trauma including a fatal skull fracture resulting from a "high amount of force" (A-320-22).

Prior to Doctor Ng's testimony, the prosecutor moved *in limine* to introduce four autopsy photographs, from a total of 57 included in the autopsy report, on the grounds that they would "assist the pathologist during his testimony in explaining the nature of the injuries sustained by the victim" (A-46; *see* A-324; A-885-92). Specifically, the prosecutor argued that the photographs were relevant to injury locations, cause of death, and the amount of force required to cause such injuries (A-47). The defense objected to the introduction of the photographs (A-324). Defense counsel had argued, prior to trial, that the photographs were too graphic and prejudicial with little probative value (A-71-72). The court found that the photographs were "relevant to demonstrate the risk posed by the defendant's allegedly criminally negligent conduct," and were "not so

inflammtory as to outweigh their probative value," and ruled them admissible (A-50-51).[3]

Doctor Ng testified that People's Exhibit #25 showed a c-shaped bruise and a distortion of the upper arm indicative of a fracture (723, 726). People's exhibit s#26 and 27 showed a deep laceration of the head indicative of force resulting from an accident at a speed in excess of 40 m.p.h. (A-326, A-331). And People's Exhibit #28 was a photograph of the inside of the skull showing the "distribution of the fracture at the base of the skull" (A-326, A-332). Doctor Ng further testified that since the base of the skull is particularly strong, a "pretty significant amount of force" would be required to cause the fracture (A-328).

Expert Testimony

CHARLES BRODIE was a customer service representative of WABCO, the company whose product, the Ongaurd Active collission mitigation system ("CMS") was installed in the Freightliner box truck that Mr. Munise had been driving (A-267-69). Mr. Brodie was familiar with

[3] The prosecutor did not reference either the testimony of Dr. Ng or the autopsy photographs during his summation, relying instead on photographs of the damaged Nissan to demonstrate the severity of the collisions.

the product and responsible for handling service issues related to it in the field (A-267-69).

The CMS employed an adaptive cruise control capability that automatically slowed a vehicle from the m.p.h. at which it was set to a speed that will maintain a safe following distance when approaching a vehicle moving slower (A-270). It also featured an automatic braking capability that engages when approaching an object ahead too quickly (A-272). That CMS system, which the driver cannot disable (A-276), has three features: 1) a red forward collision warning light that is displayed when there is an impending collision, 2) a "haptic" collision warning that causes the brief application of the brakes to get a driver's attention, and 3) collision mitigation braking which automatically applies the brakes at 50% of total braking capacity (A-273-74). Engagement of the CMS warning and braking features has no bearing on the driver's ability to apply the brakes manually (A-276).

Mr. Brodie explained that the CMS records "fault" information when it is not working and the CMS is disabled (A-272, A-286). An active fault indicates and ongoing problem while a stored fault indicates a problem

that was resolved, returning the system to operational condition (A-282-83). The system records the speed, engine temperature, and odometer reading at the moment a fault code first goes active, and last goes active, since the last time that fault codes were cleared from the system (A-283-87). When an active code has disabled the CMS, it displays a "service vehicle" or "service system" message (A-287). When a fault code is active, the display is amber; it returns to blue or green when the fault is resolved, the code is stored, and the system functionality returns (A-288). The existence of a fault that disables the CMS does not affect the driver's ability to manually operate the vehicle. The CMS does not record when a fault code is resolved and stored, only that it had been stored by the time the CMS report was created (A-303).

New York State Investigator ROBERT L. MOWER was the collision reconstruction expert who conducted the accident reconstruction for the prosecution (A-418, A-424). His report was introduced into evidence as People's Exhibit #1 (A-865; A-430). He interviewed witnesses, examined and photographed the scene, examined the vehicles, and collected CMS, GPS, and engine data from the Freightliner (A-426-46). Mr. Mower found

that while it had been snowing and the road was wet and slushy, there were no road defects at the time of the accident and the roadway sloped slightly downward westbound (A424, A-428). The road was in a 55 m.p.h. zone (A-432).

According to Mr. Mower, Mr. Munise's Freightliner over-rode the blue Nissan's bumper, pushing the car counterclockwise into the oncoming lane where it was struck by Mr. Crews's red pickup (A-434, A-436). The Freightliner then continued forward until Mr. Munise pulled it over (A-437, A-442). Trooper VanNostrand had been wearing his seatbelt (861). Mr. Mower could not determine whether the Freightliner coasted to a stop after the collision or was braked (A-441). He did determine, however, that damage to filaments in the brake lights indicated that they were on at the time of the crash, and that the brake pedal had been depressed (A-465, A-473, A-569-70). He also testified that a crush analysis on the Nissan would not have been appropriate in this case because of the type of damage involved (A-462, A-562).

Mr. Mower's analysis of the collision resulted in his conclusions that,1) Mr. Munise's Freightliner had been traveling at 60 m.p.h. when it

struck the Nissan, 2) the brake pedal was depressed and the truck slowed to 44 m.p.h. upon impact, 3) the Nissan had been stopped or nearly stopped at the moment of impact, 4) the Nissan accelerated to 40 m.p.h. after impact, 5) the distance the truck traveled after impact, 952 feet, indicates very little braking, and 6) there being no roadway or vehicle defects, and no indication of intoxication, the cause of the collision was that the driver of the truck had been inattentive (A-473-78, A-514).

Mr. Mower explained that he believed, based on data from the truck, that the brakes were applied, either by the CMS or by Mr. Munise, at the time of impact (A-511). He also testified that, based on the braking force that would be required to decelerate the truck from 55 m.p.h. to a stop, it would have taken about 16 seconds to do so (A-514).

The Defense Case

Forensic accident reconstructionist SHAWN HARRINGTON was employed by the defense in the days after the accident and he wrote a report that was admitted into evidence as Defense Exhibit #B (A-893, A-589, A-593, A-594). In it, Mr. Harrington set forth an analysis of the accident that was based on information he obtained from the CMS, GPS,

and engine data from the Freightliner, and simulations using a similar Freightliner and OnGuard CMS system (A-597-600).

Using four different methods for calculating the truck's speed at impact, Mr. Harrington concluded that it was traveling at 45 m.p.h. when it struck the Nissan (A-608). After doing a crush analysis of the rear of the Nissan, Mr. Harrington concluded that it had been traveling at between 11 and 13 m.p.h. when it was struck from behind and then accelerated to 20 m.p.h. when it was then struck by the red pickup (A-612, A-613). Mr. Harrington also plotted the second-by-second position of the truck leading up to the collision and determined that it had been traveling at 60 m.p.h. when, approximately 75 feet from the spot of impact, the red collision alert appeared on the CMS screen, and the brakes were applied — first by the CMS and then manually to maximum capacity — slowing the truck to 45 m.p.h. when it hit the Nissan (A-617-17, A-614). The brakes were on for about one second before impact (A-653). Mr. Harrington believed from his analysis that Mr. Munise's statement that he had been traveling at 43 to 45 m.p.h. before the collision was not accurate (A-714).

Mr. Harrington testified that, given his speed and braking calculations, and depending on how fast the Nissan had been traveling before slowing to turn, the brake lights on the Nissan would have been illuminated for between approximately 10 and 17 seconds before the collision (A-717-18, A-719). Mr. Harrington ultimately agreed that the cause of the accident was Mr. Munise's inattention to the roadway ahead of him (A-618). It was Mr. Harrington's opinion, however, that had it not been for the participation of the red pickup in the accident, the injuries to Trooper VanNostrand would not have been fatal A-636).

During cross-examination, the prosecutor introduced People's Exhibits #33, 34 and 35, which were videos of simulation tests Mr. Harrington had made driving the similar Freightliner truck and OnGuard CMS (A-762-76).

The Motion for a Trial Order of Dismissal

Defense counsel filed a written argument in support of his motion for a trial order of dismissal (A-52). In it, counsel argued that, even in the light most favorable to the People, his inattentiveness in causing the accident that resulted in Trooper VanNostrand's death did not amount to

criminal negligence. He likened Mr. Munise's inattentiveness to that of the defendant in *People v. Boutin*, 75 N.Y.2d 692 (1990), who was driving a truck between 40 and 65 m.p.h., failed to see a police car stopped on the road in front of him with its emergency lights flashing, and crashed into it killing it's officer occupants. The Court held that the driver's "nonperception" of a risk was not enough to assign criminal responsibility for the accident (A-52-53).

Counsel also cited cases holding that the mere fact that one vehicle strikes another is not enough to establish criminal negligence; something more, such as dangerous speeding, failure to obey traffic signals, deliberately driving dangerously, or other such conduct was required (A-53).

The court, "considering all the evidence in its totality" found that "it would be error to take the case from the jury" and denied the motion (A-780).

Deliberations and Verdict

The jury asked to review video evidence, People's Exhibits #33, 34, and 35, and requested reinstruction on the law of criminally negligent

homicide three times (A-785, A-797, A-803). It also requested testimony concerning the training Mr. Munise received from CLYNK to drive his truck (A-786). After several hours of deliberations, the jury convicted Mr. Munise of criminally negligent homicide (A-814-15).

The Sentencing

Mr. Munise, 34 years old at the time of sentencing, was a first felony offender whose only brush with the law was a misdemeanor conspiracy conviction from 9 years earlier for which he was sentenced to a conditional discharge and fine of $250 (PSI 1, 4). He grew up in an unstable environment caused by his abusive father and lived in various safe houses and relatives until the age of sixteen when his mother became ill and he dropped out of school to get a job to support his family (PSI 10, 12). Nevertheless he succeeded in obtaining various jobs over the years and was employed driving the truck in this case (PSI at 12). At some point he became addicted to prescription drugs, but was under treatment at the time of the accident and there was found to have not been intoxicated or impaired at the time of the accident (PSI 7, 13, 14). The arresting officer

reported that Mr. Munise was cooperative with the investigation and remorseful for what the officer believed was an accident (PSI 7).

At sentencing, the prosecutor elicited numerous victim impact statements from the family of Jeremy VanNostrand (A-823-50), and the defense submitted numerous letters on behalf of Mr. Munise (A-854). Citing Mr. Munise's statement in the Pre-Sentence Investigation report that the collision was an accident, the prosecutor argued that Mr. Munise was not accepting full responsibility for his actions and asked the court to impose a sentence of 1 to 3 years in prison (A-851). The prosecutor also argued that Mr. Munise's prior driving record outlined in the People's *Molineux* application supported the imposition of a prison sentence (A-852-53).

Defense counsel explained that Mr. Munise had not minimized his conduct by stating that it was an accident, which is how the PSI characterized it, and that he was remorseful (A-854). He then argued that Mr. Munise's "extended lapse in concentration" was unlike behavior like intoxication or excessive speed and that prison time was not warranted (A-855). Finally, counsel argued that Mr. Munise's driving record did not

indicate that he was reckless and that his minimal criminal history did not support imposition of a prison sentence (A-856).

Mr. Munise began his statement to the court by recognizing the pain and sadness he had caused (A-858). He said that he was "very truly sorry for causing the accident that claimed [Trooper VanNostrand's] life" (A-858). He also expressed his own pain and sorrow for having taken Trooper VanNostrand from his family, who would not enjoy his presence during the rest of their lives (A-859).

The court, referring to the victim impact statements and defense letters of support, and stating that Mr. Munise had failed to "act carefully, consciously and deliberately," and finding that he had driven in excess of the speed limit, imposed a sentence of 1 to 3 years in prison (A-859, A-860).

ARGUMENT

POINT I

THE PEOPLE'S EVIDENCE THAT APPELLANT'S INATTENTIVENESS CAUSED THE FATAL ACCIDENT WAS INSUFFICIENT TO PROVE HIS GUILT OF CRIMINALLY NEGLIGENT HOMICIDE BEYOND A REASONABLE DOUBT AND THE VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE

It is undisputed that Mr. Munise caused the accident that claimed the life of Trooper VanNostrand. The evidence established that Mr. Munise had been inattentive to the road for an unreasonably long period of time, so that he was unable to brake in time to prevent the collision. Because inattentiveness alone is insufficient to establish criminal negligence, the People failed to prove his guilt beyond a reasonable doubt and the verdict was against the weight of the evidence. U.S. Const., Amend. XIV; N.Y. Const., Art. 1, § 6; *Jackson v. Virginia*, 443 U.S. 307 (1979); *People v. Bleakley*, 69 N.Y.2d 490 (1987).

An appellate court must reverse or modify a conviction if (1) the trial evidence was legally insufficient to sustain the conviction; or (2) the verdict of conviction was factually against the weight of the evidence.

Bleakley, 69 N.Y.2d at 495. A reviewing court must first determine whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *People v Leonard,* 19 N.Y.3d 323, 329-30 (2012) (quoting *Jackson*, 443 U.S. at 319). Specifically, the intermediate appellate court must determine "whether there is any valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial and as a matter of law satisfy the proof and burden requirements for every element of the crime charged." *Bleakley*, 69 N.Y.2d at 495. If the jury's conclusion is irrational, the conviction must be reversed.

In addition, the verdict must not be against the factual weight of the evidence. "Even if all the elements and necessary findings are supported by some credible evidence, the court must examine the evidence further. If based on all the credible evidence a different finding would not have been unreasonable, then the appellate court must, like the trier of fact below, "'weigh the relative probative force of conflicting testimony and

relative strength of conflicting inferences that may be drawn from the testimony.'" *Bleakley*, 69 N.Y.2d at 495 (quoting *People ex rel. MacCracken v. Miller*, 291 N.Y. 55, 62 (1943); *People v. Danielson*, 9 N.Y.3d 342, 349 (2007).

Even viewed in the light most favorable to the People, there was no evidence that Mr. Munise had been negligent in any way other that being inattentive to the road. He did not cross the center line, disobey a traffic signal, or drive recklessly. While the court credited testimony that Mr. Munise was driving at 60 m.p.h., 5 m.p.h. faster than the posted speed limit, this was far from reckless. Common experience recognizes that many, if not most, drivers exceed the speed limit at some time or another and are rarely stopped and ticketed for driving 60 m.p.h. in a 55 m.p.h. zone. Mr. Munise simply was not driving at excessive speed. The prosecutor did not argue otherwise in his opposition to defense counsel's motion to set aside the verdict.

The Court of Appeals has established that driver inattention alone cannot be the basis for a conviction of criminally negligent homicide. *People v. Conway*, 6 N.Y.3d 869, 872 (2006) ("'Nonperception' of a risk . . .

is not enough"to establish criminal negligence), *cited in People v. Gerbino*, 161 A.D.3d 1220, 1222 (3d Dept. 2018). In *People v. Boutin*, 75 N.Y.2d 692, 694 (1990), the Court's decision began with: "The unexplained failure of a driver to see the vehicle with which he subsequently collided does not, without more, support a conviction for the felony of criminally negligent homicide." The defendant in that case was driving a truck on Interstate 87, on an overcast and foggy night, on wet and slushy pavement, when it approached a marked police car stopped in the roadway behind a disabled vehicle. Although the emergency lights on the police car were flashing, neither the driver nor the passenger saw the lights and the truck collided with the police car, killing its occupants, a Trooper and the driver of the disabled vehicle. *Id.* Expert testimony established that the defendant had been traveling at between 60 and 65 m.p.h. and did not brake before the collision. *Id.* at 695.

This Court affirmed the defendant's conviction and the Court of Appeals reversed, pointing out that "criminal liability cannot be predicated on every act of carelessness resulting in death." *Id.*, *quoted in People v. Faucett*, 206 A.D.3d 1463, 1465 (3d Dept. 2022). Rather, some

"culpable 'risk creation' is essential." *Boutin*, 75 N.Y.2d at 695 (quoting *People v. Stanfield*, 36 N.Y.2d 467, 472 (1975)). The Court held that Boutin may well have been civilly negligent but he was not criminally negligent. *Id.* at 697. Because the facts of that case are materially indistinguishable from the facts of this one, it controls, and this Court must reverse Mr. Munise's conviction for that reason alone.

This Court very recently came to the same conclusion in a case with similar facts. In *Faucett*, 206 A.D.3d at 1464, the defendant was driving a tractor-trailer when it struck a DOT pickup truck parked on the shoulder of a four-lane highway, killing the DOT worker. This Court explained that although it was a clear day and the DOT truck was equipped with an orange "Road Work Ahead" sign and a large board of flashing lights, the defendant's failure to see the signs and stay in his lane did not constitute criminally negligent conduct. *Id.* at 1466.

The Court of Appeals's discussion in *Boutin* explains why this was the correct result in *Faucett* and should be the result in this case. In *Boutin*, the Court distinguished the defendant Boutin's conduct from that of defendants in other cases who had engaged in risk-creating conduct. In

People v. Haney, 30 N.Y.2d 328, 336 (1972), the defendant ran a red light at an excessive rate of speed, killing a pedestrian. In *People v. Ricardo B.*, 73 N.Y.228, 236 (1989), the defendant was drag racing through a city street at between 70 and 90 m.p.h. when he ran a red light and collided with a car crossing the intersection. Another city drag racer was properly convicted after his car collided with a car stopped at a traffic signal in *People v. Soto*, 44 N.Y.2d 683, 684 (1978). Finally, in *People v. Paul V.*, 75 N.Y.2d 944, 945 (1990), the defendant was driving at least 90 m.p.h. in a 55 m.p.h. zone and, when his passenger warned him to slow down, he instead accelerated, ultimately killing a State Trooper. Here, Mr. Munise was not drag racing, driving at excessive speed, ignoring traffic signals, or otherwise creating risk. He was simply inattentive and that was insufficient to make him guilty of criminally negligent homicide.

The decisions of this Court and the Court of Appeals cited by the prosecutor in his opposition to defense counsel's motion to set aside the verdict bear out the importance of risk-creating conduct to a criminally negligent homicide conviction, and actually support reversal of Mr. Munise's conviction (People's Opposition at 4). *People v. Asaro,* 21 N.Y.3d

677, 684-85 (2013) (using two-lane road as a drag strip, accelerating to double the 55 m.p.h. speed limit and crossing double yellow line constituted criminal negligence); *People v. Cabrera*, 10 N.Y.3d 370, 378 (2008) (reversing conviction a criminally negligent homicide where inexperienced but sober driver entering a "tricky downhill curve" driving "well in excess" of the posted speed did not constitute sufficiently morally blameworthy conduct); *Ricardo B.*, 73 N.Y.2d at 235-36 (affirming conviction of criminally negligent homicide of defendant who was drag racing at high speed on city street and ran a red light); *People v. Van Sickle*, 120 A.D.2d 897, 898 (3d Dept. 1986) (affirming conviction of criminally negligent homicide where defendant was intoxicated and driving on the shoulder of the road in four inches of snow); *People v. O'Dell*, 34 A.D.2d 856, 857 (3d Dept. 1970) (affirming conviction of criminally negligent homicide based on reckless driving of a vehicle with defective and unsafe brakes and steering).

In a seminal decision concerning criminally negligent homicide, the Second Department discussed the creation of risk in a case involving a driver who was driving safely on a city street when the car suddenly

accelerated and veered left across a double yellow line, crashing into a phone booth, killing the passenger in the car. *People v. Paris*, 138 A.D.2d 534, 534 (2d Dept. 1988). The court reversed the defendant's conviction, explaining that there was no evidence that the defendant had deliberately accelerated and crossed the double yellow line as opposed to having fallen asleep or having lost control of the vehicle. *Id.* at 537-38. In short, there was no proof that the defendant had "consciously engaged in any sort of conduct which, wittingly or unwittingly, resulted in the creation of an unjustifiable risk of death." *Id.*

Mr. Munise's insufficiency claim was fully preserved by defense counsel's written Trial Order of Dismissal Brief received by the court on April 21, 2021, at the close of the People's case (A-586), and by the court addressing, and denying the application after the defense rested (A-780). C.P.L. § 470.05(2). For the above reasons, it cannot be said that the People proved Mr. Munise's guilt beyond a reasonable doubt. Rather, the verdict was against the weight of the credible evidence. Accordingly, this Court should reverse Mr. Munise's conviction and dismiss the indictment.

POINT II:

THE TRIAL COURT DEPRIVED APPELLANT OF HIS DUE PROCESS RIGHTS TO A FAIR TRIAL AND AN IMPARTIAL JURY WHEN IT DENIED DEFENSE COUNSEL'S FOR-CAUSE CHALLENGES TO TWO PROSPECTIVE JURORS WHOSE RELATIONSHIPS TO WITNESSES DEMONSTRATED IMPLIED BIAS THAT COULD NOT BE CURED BY UNEQUIVOCAL ASSURANCES OF IMPARTIALITY.

During jury selection, Prospective Juror # 26 informed the court that he might have "an ethical conflict of interest" stemming from his knowledge of "many of the state troopers and other people" appearing on the witness list. Prospective Juror #135 told the court that the witness who had driven one of the vehicles involved in the accident was a friend of his, and that the witness, who the juror described as having been traumatized by the accident, had told the juror about it at a social gathering. Byy denying defense counsel's challenges for cause to these two jurors, the court deprived appellant of his constitutional and statutory rights to due process and an impartial jury. U.S. Const., Amends. VI, XIV; N.Y. Const., Art. 1, §§ 2, 6; C.P.L. §270.20(1)(b), (2). As counsel exercised peremptory challenges to remove both jurors, exhausted his

challenges, and was unable to peremptorily challenge the last seated juror, this Court must reverse Mr. Munise's conviction and order a new trial.

"Nothing is more basic to the criminal process than the right of the accused to a trial by an impartial jury." *People v. Branch*, 46 N.Y.2d 645, 652 (1979); *see People v. Arnold*, 96 N.Y.2d 358, 362 (2001). To secure that right, C.P.L. § 270.20(1)(b) provides that a party may challenge a prospective juror for cause if he "'has a state of mind that is likely to preclude him from rendering an impartial verdict based upon the evidence adduced at trial.'" *Arnold*, 96 N.Y.2d at 362 (quoting C.P.L. §270.20(1)(b)).

One ground for challenging a prospective juror for cause is that he has a "preexisting relationship with a potential witness that 'is likely to preclude [the prospective juror] from rendering an impartial verdict.'" *People v. Furey*, 18 N.Y.3d 284, 287 (2011) (quoting C.P.L. § 270.20(1)(c)). A prospective juror with such an "implied bias" must be excluded from the juror "regardless of whether the prospective juror declares that the relationship will not affect her ability to be fair and impartial." *Furey*, 18 N.Y.3d at 287; *Branch*, 46 N.Y.2d at 650; *People v. Rentz*, 67 N.Y.2d 829,

831 (1986). An expurgatory oath cannot cure implied bias resulting from a close relationship because the risk of bias is too great. *Furey*, 18 N.Y.3d at 287; *Branch*, 46 N.Y.2d at 651. "The frequency of contact and nature of the parties' relationship are to be considered in determining whether disqualification is necessary." *Furey*, 18 N.Y.2d at 287; *People v. Scott*, 16 N.Y.3d 589, 595 (2011).

Here, Juror #26, as a 911 dispatcher and member of the fire department and emergency management department in Schoharie County, he knew many of the troopers, and others, who would testify at the trial. He identified those relationships as being significant enough to possibly create "an ethical conflict of interest." Juror #135 informed the court not only that he was a friend of Robert Crews, the driver of the red pickup who would testify at trial, but that Mr. Crews had already told him about the accident at a time so shortly after it had occurred that he remained "traumatized" by it.

The court, apparently under the mistaken impression that the implied bias arising out of these relationships could be cured by eliciting expurgatory oaths from the jurors, took pains to do so, and both

prospective jurors assured the court that they could remain impartial despite their relationships with witnesses in Mr. Munise's trial. Since the court was clearly incorrect about that, the only question is whether the relationships that either juror disclosed was, or were, sufficiently close to have created implied bias.

The Court of Appeals in *Furey,* 18 N.Y.3d at 279, went a long way toward answering that question in this case. The Court recognized that "a prospective juror who worked with a trial prosecutor in prior cases and had direct and personal contact with him was subject to removal for cause," citing *Branch*, 46 N.Y.2d at 651, while "a prospective juror who had relatives in law enforcement — but no personal or social relationships with any of the testifying police officers — was not per se excludable for cause," citing *People v. Provenzano*, 50 N.Y.2d 420, 425 (1980). Under this precedent, the *Furey* Court concluded that a prospective juror's personal and professional relationships with two police witnesses whom she saw every month, and her being acquainted with five other police witnesses and an assistant district attorney witness, necessitated her

removal for cause despite her unequivocal assurances of impartiality. 18 N.Y.3d at 279.

While Juror #26 did not indicate how well he knew the many troopers on the witness list, it was well enough to cause him to indicate a possible ethical conflict of interest. He also apparently knew them well enough that, initially, he was unable to guarantee that he would not respect their testimony more than other witnesses. Only after significant reflection over the lunch break did he report that he could treat the testimony of all witnesses the same. Juror #26's working relationships with many of the People's witnesses resulted in an implied bias necessitating his exclusion from Mr. Munise's jury.

* * *

In addressing defense counsel's challenges of Jurors #26 and #135, the court below would have done well to heed the message first articulated by the Court of Appeals in *People v. Culhane*, 33 N.Y.2d 90, 108 n. 3 (1973), reiterated in *Branch*, 46 N.Y.2d at 651-52, and reinforced by *People v. Blyden*, 55 N.Y.2d 73, 78 (1982) (internal citations omitted) as follows:

> [T]he trial court should lean toward disqualifying a prospective juror of dubious impartiality, rather

> than testing the bounds of discretion by permitting such a juror to serve. It is precisely for this reason that so many veniremen are made available for jury service. Even if through such caution, the court errs and removes an impartial juror, the worst the court will have done . . . is to have replaced one impartial juror with another impartial juror.

By failing to grant the defense challenges to Jurors #26 and #135, the court improperly exceeded its "bounds of discretion." *Blyden*, 55 N.Y.2d at 78.

Because defense counsel used a peremptory challenges to remove both prospective jurors from the jury (A-95, A-121), and exhausted all of his peremptory challenges prior to the selection of the final juror (A-122), he satisfied the statutory exhaustion requirements of C.P.L. § 270.20(2) and fully preserved the issue for appeal. *See People v. Harris*, 19 N.Y.3d 679, 685-86 (2012); *Culhane,* 33 N.Y.2d at 97. This Court should therefore reverse appellant's conviction and remand for a new trial. *People v. Wright*, 30 N.Y.3d 933, 934 (2017).

POINT III

THE NEEDLESS ADMISSION OF DISTURBING PHOTOGRAPHS OF THE DECEASED TAKEN DURING HIS AUTOPSY, THE ONLY PURPOSE FOR WHICH COULD HAVE BEEN TO PREJUDICE THE JURY AGAINST APPELLANT, VIOLATED HIS DUE PROCESS RIGHT TO A FAIR TRIAL.

There was absolutely no question that Trooper VanNostrand was killed in a violent three-vehicle collision. Photographs of his mangled car and expert testimony concerning the crash left no doubt. There simply was no need for the admission of disturbing graphic, close-up photographs showing the condition of Trooper VanNostrand's body and of the inside of his skull. Because the prejudice of those photographs far outweighed any probative value they might have had, their admission violated Mr. Munise's due process right to a fair trial. U.S. Const., Amend. XIV; N.Y. Const., Art. I, § 6.

Photographs of the deceased "are likely to arouse the passions and resentment of the jury" and therefore should not be admitted "unless they tend to prove or disprove some material fact in issue." *People v. Stevens*, 76 N.Y.2d 833, 835 (1990). They may also be admissible to "illustrate or

elucidate other relevant evidence, or to corroborate or disprove some other evidence offered." *People v. Pobliner*, 32 N.Y.2d 356, 369 (1973); *accord People v. Wood*, 79 N.Y.2d 958, 960 (1992). Such photographs should be excluded, however, if they are irrelevant to any material issue and their "sole purpose is to arouse the emotions of the jury and to prejudice the defendant." *Pobliner*, 32 N.Y.2d at 370; *Wood*, 79 N.Y.2d at 960.

Whether to admit such photographs is generally within the trial court's discretion, but it should consider if other evidence is available, and balance the probative value of the photographs against the prejudice they may cause the defendant. *See Stevens*, 76 N.Y.2d at 835. If illustration or corroboration of other evidence is not necessary, admission of gruesome photographs constitutes an "improvident[]" exercise of discretion. *See People v. Chambers*, 18 A.D.3d 571, 573 (2d Dept. 2005); *People v. Flores*, 5 A.D.3d 502, 503 (2d Dept. 2004). Here, the court's decision to admit the autopsy photographs graphically depicting the trooper's injuries was an improvident exercise of discretion that must have had a dramatic emotional affect on the jury and, therefore, violated due process.

The prosecutor claimed that these autopsy photographs were all necessary to "assist the pathologist during his testimony in explaining the nature of the injuries sustained by the victim" and to explain "the amounht of force required to cause such injuries" (A-46. A-47). But the medical examiner was able to fully describe the injuries and opine about the amount of force necessary to cause them. The photographs themselves added nothing to the People's proof, particularly since the photographs – although extremely prejudicial in that the accident rendered the areas photographed barely recognizable as being human – were not of self-evident value the way entrance and exit wounds from a gunshot would be. The jury was at the mercy of the expert to describe what the photograph showed and, therefore, the photographs were of very little, if any, probative value as corroboration of that testimony. *See People v. Blake*, 139 A.D.2d 110, 116 (1st Dept. 1988) (post-mortem photographs more prejudicial than probative where medical testimony "adequately described the state of the decedent's body and the cause of death").

The cases the prosecutor cited in his motion actually demonstrate that the autopsy photographs were not admissible. In *People v. Wright*,

38 A.D.3d 1004, 1005 (3d Dept. 2007), the autopsy photographs showed the severity of the wound, which was relevant to prove intent. Likewise, in *People v. McNeil*, 273 A.D.2d 608 (3d Dept. 2000), the autopsy photographs showed the location of entry and exit gunshot wounds which, again, were relevant to prove intent. Here intent was irrelevant.

The prosecutor's summation revealed just how little probative value the medical examiner's testimony was, much less the photographs, because the prosecutor mentioned neither. Instead, he relied on the obvious value of the mangled Nissan to show how much force had been involved in the accident. Those photographs were more than enough proof of force; he had no need to even mention the autopsy photographs. It is thus clear that the purpose of introducing the autopsy photographs was solely for the purpose of arousing the emotions of the jury and thereby prejudice Mr. Munise. *Pobliner*, 32 N.Y.2d at 370; *People v. Donohue*, 229 A.D.2d 396, 398 (2d Dept. 1996).

That the prosecutor pared down the number of photographs he sought to introduce was irrelevant to whether the photographs he did introduce had sufficient evidentiary value to be admitted. The defense did

not dispute the violent nature of the collisions or question the cause of death. Because the autopsy photographs simply were unnecessary to prove any aspect of the crime with which Mr. Munise was charged, and the prosecutor never used them for any such purpose, their admission was error.

Finally, the prosecutor urged the court to admit the photographs because the People would have no appellate recourse after acquittal, the way Mr. Munise would have upon conviction (A-48). That argument, which was based on a 1937 decision by the Court of Appeals concerning questions of law, was not clearly applicable to the trial court's application of law to the facts of this case. In any event, the argument should inform this Court's determination as to whether the trial court's decision to admit the photographs was error.

The court's improvident admission of the autopsy photographs was far from harmless. The case was already infected by the inherent prejudice of the fact that the deceased was a New York State Trooper, a respected officer who served the community as a first responder. As was demonstrated in Point I above, the proof of criminal negligence was far

from overwhelming, and the jury asked the court to explain the law of criminally negligent homicide three times. Accordingly, it cannot be said that the prejudice of the admission of the photographs had no affect on the outcome of the trial and this Court should reverse Mr. Munise's conviction and order a new trial.

POINT IV

APPELLANT'S SENTENCE SHOULD BE REDUCED BECAUSE HE WAS A FIRST FELONY OFFENDER WHO WAS NOT INTOXICATED AND ENGAGED IN NO AFFIRMATIVELY DANGEROUS CONDUCT WHEN HIS INATTENTION TO THE ROAD CAUSED THE FATAL ACCIDENT

As both expert witnesses testified, Mr. Munise was concededly inattentive to the road when the truck he was driving hit Trooper VanNostand's car as he was about to turn left going to work. The defense expert testified, however, that this alone would have been unlikely to cause the fatality. Rather, it was the unfortunate timing of Mr. Crews's oncoming pickup reaching the spot of that collision at that very moment, resulting in the second collision, that caused the trooper's death. Mr.

Munise was not traveling at excessive speed and engaged in no affirmatively dangerous conduct. *See* Point I, *ante*.

Under those circumstances, Mr. Munise's sentence of 1 to 3 years in prison, which was in the upper range of available sentences, was excessive. This Court has reduced similar criminally negligent homicide sentences, even in cases in which the defendant *did* engage in affirmatively dangerous conduct. For example, in *People v. Whiting*, 89 A.D. 2d 694, 695 (3d Dept. 1982), the Court reduced the sentence of a 19-year old who became intoxicated *and* drove excessively fast before losing control of his car and killing two people, one of whom was 7 years old. The court noted that the defendant had an unblemished record and had secured permanent employment, and that confinement for rehabilitation was unnecessary. It reduced the defendant's sentence from 1 1/3 to 4 years, to 60 days in jail with probation. *Id.* Mr. Munise has a similarly clean record and an established history of gainful employment but was not intoxicated and was not driving at excessive speed.

Likewise, in *People v. Jensen*, 111 A.D.2d 986, 987 (3d Dept. 1985), the 19-year old defendant, a first-time offender, engaged in a night of

alcohol and drug abuse before getting into an automobile accident that killed a 16-year old. After the accident, the defendant checked herself into a rehabilitation program where her progress was excellent. Although the defendant agreed to the maximum sentence when she pleaded guilty, this Court found no deterrent benefit to the sentence imposed, reducing it to time served and continued participation in rehabilitation. Here, Mr. Munise had already successfully rehabilitated himself from his drug addiction. Again, unlike the defendant in Jensen, Mr. Munise was not intoxicated.

By comparison, this Court found a sentence of 1 to 3 years in prison appropriate when defendant was intoxicated and, riding his motorcycle too fast around a curve lost control and crashed, killing his wife who was his passenger. *People v. McDonald*, 277 A.D.2d 672, 675 (3d Dept. 1996). The court noted that his coordination was impaired and that he had a previous driving while impaired conviction that had resulted in a 3-year license suspension. *Id.* Here, not only was Mr. Munise not intoxicated, he had no history of driving while impaired.

Accordingly, this Court should exercise its broad plenary power to reduce a defendant's sentence in the interest of justice without deference to the sentencing court, *People v. Delgado*, 80 N.Y.2d 780, 783 (1992), and modify his judgment by reducing his sentence to time served.

CONCLUSION

For the reasons stated in Point I, this Court is urged to reverse appellant's conviction and dismiss the indictment; for the reasons stated in Point II and III, this Court is urged to reverse appellant's conviction and order a new trial; for the reasons stated in Point IV, the Court should reduce appellant's sentence.

Dated: December 2022

Respectfully submitted,

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