In the

Supreme Court of the United States

ROBERT J. HENDERSON, SUPERINTENDENT, AUBURB CORRECTIONAL FACILITY,

PETITIONER,

V.

BARRY WARREN KIBBE,

RESPONDENT.

No. 75-1906

Washington, D. C.
March 1, 1977

Pages 1 thru 54

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT J. HENDERSON, SUPERINTENDENT, AUBURB CORRECTIONAL FACILITY, Petitioner,	:	
v.	:	No. 75-1906
BARRY WARREN KIBBE, Respondent.	:	

Washington, D. C.,

Tuesday, March 1, 1977.

The above-entitled matter came on for argument at 11:44 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

MRS. LILLIAN ZEISEL COHEN, Assistant Attorney General of New York, New York, New York; on behalf of the Petitioner.

MS. SHEILA GINSBERG, Federal Defender Services Unit, The Legal Aid Society, 509 United States Courthouse, Foley Square, New York, New York 10007; on behalf of the Respondent.

- - -

C O N T E N T S

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 75-1906, Henderson v. Kibbe.

Mrs. Cohen, you may proceed whenever you are ready.

ORAL ARGUMENT OF LILLIAN ZEISEL COHEN, ESQ.,

ON BEHALF OF THE PETITIONER

MRS. COHEN: Thank you. Mr. Chief Justice, and may it please the Court:

The question presented by this case is whether a state court criminal conviction should be set aside as fundamentally unfair because the trial judge did not explain the issue of causation to the jury.

The Court of Appeals for the Second Circuit answered this question in the affirmative "on the limited and singular facts of this case." The court held that in this case the jury may not have been aware that they had to decide the issue of causation and, alternatively, that if the jury was aware of this element the instruction was not detailed enough.

Petitioner belives that the decision below is erroneous: First, because the issue of causation was focused for the jury throughout the trial by the prosecution and by both defense lawyers; second, because the record controverts respondent's assumption that it would have been to his advantage to have had a detailed instruction on the issue of causation; and, third, because the ultimate question that was decided by

the court below and upon which its decision rests, to wit, whether the jury instruction was adequate, was essentially a question of state law and not a matter for habeas corpus review.

Respondent and his co-defendant were convicted of the crime of murder in th second degree under a section of the New York penal law which provides that a person is guilty of murder when under circumstances evincing a depraved indifference to human life he recklessly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person.

A defendant is reckless under New York law when he is aware of and consciously disregards a substantial and unjustifiable risk that a particular result will occur.

The facts in this case are essentially undisputed. On December 30, 1970, in the evening, respondent Kibbe and his co-defendant Roy Krall met a man named George Stafford in a bar in Rochester, New York. At that point, Stafford had already been refused service in the bar because he had had so much to drink. Kibbe and Krall agreed to give Stafford a ride home when Stafford indicated that he was afraid to drive his own car. The defendants later admitted that they had already formed the intent to take the money which Stafford had been flashing in the bar.

First, however, the three men went to two more bars,

one of which refused Stafford service again. Kibbe and Krall then drove Stafford to a rural area outside of Rochester. They took his money. According to the defendants, Stafford lowered his trousers and took off his boots to show them that he had no more money. Stafford's girlfriend testified at the trial, however, that in fact, because of an injury to his leg, he could not remove his right boot. However, Stafford's state of underss is accounted for. The fact is that he was left essentially undressed at the side of a two-lane, unlit road, which was banked on both sides with snow.

Now, the record establishes that it was four degrees outside, so Stafford was not wearing his jacket nor his boots. These were handed to him by respondent Kibbe with the advice that Stafford get inside so that he not freeze to death.

Now, there is -- oh, one essential fact remains and that is that at this point Kibbe and Krall drove off leaving Stafford on the side of the road, having fallen into the snow-bank, and they took with them his eyeglasses. Now, there is no dispute --

QUESTION: Two things, I didn't understand your statement of the facts. What advice did they give him?

MRS. COHEN: They advised him to get inside so that he wouldn't freeze to death.

QUESTION: Inside his clothing or --

MRS. COHEN: No, they advised him to get inside

somewhere. They didn't --

QUESTION: But there wasn't any inside, was there?

MRS. COHEN: Well, this is the point. It is undisputed that there was an open gas station in the area. Krall, in the statement he later gave to the police, said that they left Stafford 75 feet away from this gas station. The prosecution introduced physical evidence to show that in fact Stafford had been left a quarter mile away from the gas station.

QUESTION: The gas station in any event was on the other side of the road?

MRS. COHEN: That is the critical point. And not only was it on the other side of the road, but Kibbe and Krall both acknowledged that they knew this. So when they told him to get inside some place, and they knew that the gas station was on the other side of the road, they realized he had to cross the road.

Moreover, Krall acknowledged -- at least Krall acknowledged that there was in fact at that time on the road traffic going in both directions.

QUESTION: Since I have interrupted you, I didn't understand you, what you told us about falling into a snowbank. Who did that?

MRS. COHEN: Stafford when he left the car fell into a snowbank, which I think is some indication of the drunken condition in which he --

QUESTION: Well, he didn't leave the road very far, did he?

MRS. COHEN: No, he --

QUESTION: So far as anybody knows?

MRS. COHEN: -- apparently he could not leave the road very far because there were snowbanks on both sides of the road. He apparently fell into the snow that is on the side of the road.

QUESTION: But not down the bank, did he --

MRS. COHEN: Not at all.

QUESTION: -- so far as anybody observed?

MRS. COHEN: No, there is no intimation of that in the record. Half an hour later --

QUESTION: What kind of a road was this, a state two-lane road?

MRS. COHEN: I gather it is a county road.

QUESTION: In Monroe County?

MRS. COHEN: Yes. And the main feature from our standpoint that is relevant is that it was a two-lane highway, that there was no artificial lighting overhead.

QUESTION: But I was wondering how much traffic there was on it?

MRS. COHEN: Well, there is testimony on traffic. Although the respondent disputes the amount of traffic, as I say, Krall himself admitted that there were cars going in both

directions at the time that they abandoned Stafford. At the time of the accident, which took place half an hour later, at least three cars converged on that point. And as we point out in the reply brief, the driver of the car which ultimately struck Stafford indicated that passersby, as they came along after the accident, stopped to give him assistance. So that there may not have been heavy rush-hour traffic which might exist, you know, in a major city --

QUESTION: Well, this wasn't the rush-hour, this was, what, eight or nine o'clock at night?

MRS. COHEN: This was 9:30 in the evening. So that it may not have been the rush-hour but, on the other hand, it wasn't in the early morning hours when you would expect that there would be very little traffic on the road. But there is affirmative evidence that cars were passing on the road and there is the admission by Krall himself that there were cars going in both directions when they did abandon him at the side of the road. Half an hour --

QUESTION: Krail is not a party to this lawsuit?

MRS. COHEN: No. Apparently he filed a petition jointly when this was first begun, but I don't know that -- he apparently withdrew.

QUESTION: The record doesn't show?

MRS. COHEN: I don't know the answer, I'm afraid, but he did not pursue it to the Second Circuit.

Half an hour later, after he was abandoned, Stafford was struck by a light pickup truck going ten miles over the speed limit. The accident occurred one-quarter mile away from the gas station. Stafford at the time of the accident was sitting in the middle of the lane on the same side of the highway as he had been abandoned.

QUESTION: Let me getting this in its setting a little bit. This case was tried in the New York state courts, in the trial court?

MRS. COHEN: Yes.

QUESTION: And there was a conviction?

MRS. COHEN: Yes.

QUESTION: Then it was reviewed by the Appellate Division?

MRS. COHEN: Yes.

QUESTION: And they affirmed conviction?

MRS. COHEN: They did.

QUESTION: And then what happened, it went to the Court of Appeals?

MRS. COHEN: Then it went to the Court of Appeals.

QUESTION: And they affirmed the conviction?

MRS. COHEN: They affirmed the conviction.

QUESTION: Then it went to the United States District Judge on habeas corpus, so that is the fourth time around, and he said the trial was fair and there was no problem and pointed

out that no objection had been made at the trial on this issue?

MRS. COHEN: Well, I think ultimately what is critical is that he looked at the alleged error in this case and he felt that it was not a substantial violation and that he was simply being called upon to review jury instructions, that that was not the province of habeas corpus review.

QUESTION: Only on the fifth time it got into the fifth court that the judgment at the trial court was set aside?

MRS. COHEN: Was set aside, and I might add with one dissent, it was not a unanimous decision by the Second Circuit.

Now, from the beginning of this trial, the two lawyers representing Kibbe and Krall attempted to shift responsibility for what happened to the driver of the truck, Michael Blake. They did this in several ways.

First, they cross-examined Michael Blake extensively about the circumstances under which he struck Stafford. They cross-examined the medical examiner to show that there was no chance that death was caused by anything except the impact from the truck. And they also argued this in summation and they argued it very graphically, I think very emotionally. Krall's attorney actually said to the jury that if anyone in this case was depraved and if anyone in this case caused Stafford's death, it was Michael Blake, and interestingly the officials have taken no action against him for his wrongdoing.

At the same time they both pointedly disputed the foreseeability of stafford's death, how they argued could Kibbe and Krall have foreseen when they left this man by the side of the road that along would come this pickup truck driving ten miles an hour over the speed limit and that the driver would not swerve or brake.

QUESTION: Well, was there any question in this case as to the immediate cause of death, i.e. being struck by the automobile --

MRS. COHEN: No, that was firmly established. It was firmly established that the injuries --

QUESTION: No suggestion that he died from poisoning or for injuries received anywhere else?

MRS. COHEN: Nothing extraneous, no. It was clearly established that it was the impact of the truck and it was --

QUESTION: The sole and immediate cause of death?

MRS. COHEN: -- the sole and immediate cause of death.

Now, in short, as the court below itself found, the issue of causation was constantly being placed before the jury by the defense. And I might add, the prosecutor responded in kind, arguing that even though these defendants were not the sole cause of death, even though they were not the immediate cause of death, nevertheless they were responsible and they were the approximate cause of death.

Now, notwithstanding the fact that the theory of the

defense was to deny that Kibbe and Krall had caused the death, neither defense lawyer objected when the trial judge did not define the element of causation for the jury. We believe there are two --

QUESTION: They didn't raise it in the appellate division, either?

MRS. COHEN: No, they did not. And it was the same lawyer at least representing respondent Kibbe who represented him on his direct appeal. The issue was raised in the appellate division by the dissenting judge, and it was answered by the majority there who believed that he was not deprived of a fair trial.

It was first explicitly raised in behalf of these two defendants when the case got to the Court of Appeals. So that they did not take an objection at the time of the charge and, as I indicated, we believe there are two possible explanations for their decision.

The first is that they were satisfied that the issue of causation had been focused for the jury. The second is that they realized that under New York law an explicit charge on causation would have effectively deprived them of the opportunity of arguing to the jury that it was the negligence of the driver that was to blame and in that way attempting to sway the jury away from the responsibility of the defendants.

QUESTION: The prosecutor, on the contrary, emphasized

to a great extent the conduct in leaving the man out on the road and the probability that he would be exposed to great danger?

MRS. COHEN: All of the arguments in this case are very emotional in that sense. You know, the facts are really very dramatic. They are very unusual, but they are very dramatic. The picture of this very helpless man, in a state of undress, left in the freezing weather on the side of the road, without his glasses, this was hammered at constantly, and that was hammered at by the prosecution to show responsibility and it was disputed by the defense who said it simply was not foreseeable.

With respect to counsels' likely satisfaction that the issue was properly before the jury, I point to the statement by counsel for Krall who, even before the charge to the jury, said in summation, you probably have the counts well in kind since we have all gone over it. Now, at that point in the trial, the indictment had been read to the jury by Kibbe's counsel in summation, it had been outlined by the district attorney in his opening, the record indicates that it was read to the jury during the voir dire as each new panel was brought in, thereafter Krall's attorney proceeded to read the indictment to the jury and the judge at the beginning of his charge read the indictment to the jury. The judge also read the provisions of the statute after emphasizing that every

element of the crime had to be proved beyond a reasonable doubt.

And ultimately, while the jury was deliberating, the indictment was given to them so that they could track the charges.

Despite these repeated statements of the law to the jury, and despite the fact that causation was argued so graphically to the jury by both defense counsel, the court below questioned whether the jury was aware that it had to decide the issue of causation. This conclusion, in my opinion, cannot be sustained on the record in this case, and we believe that the explanation for the court's speculation that the jury may not have been aware of this issue which was the focus of the trial, was its failure to make an analysis of this trial as mandated by this Court in Cupp v. Naughten.

In Cupp, this Court specifically reaffirmed what it called the fundamental principle that a single jury instruction may not be evaluated only in the context of the overall charge but in the context of the entire trial.

QUESTION: There is nothing very new about that idea, is there?

MRS. COHEN: No, but the Court used the words "fundamental principle," it took it as given, and in doing so emphasized the relevance of the witnesses' testimony and the relevance of the arguments of counsel.

In the instant case, insofar as this court below acknowledged these factors, they did it in a footnote, considering the fact that this is supposed to be an alternate holding in the case, and they discounted them in much the same way that they discounted the relevance of reading the statute and reading the indictment to the jury. That is, they lifted each of these factors out of the context of the trial and they examined them one by one, and they rejected them, instead of making the overall evaluation which Cupp requires, of whether or not the trial as a whole was fundamentally fair.

Now, respondent attempts to distinguish Cupp on the grounds that the alleged error there was corrected within the confines of the charge itself and there was no recourse to the other events of the trial.

To me this argument highlights the real distinction between Cupp and this case. Cupp involved challenge to an affirmative instruction to the jury. The jury was told there that it should find that the prosecution's witnesses had told the truth unless the presumption of innocence -- excuse me, the presumption of truthfulness was overcome. Therefore, in Cupp it became necessary to determine whether anything in the remainder of the charge offset the impact on the minds of the jury of that directive by the trial judge.

The instant case is quite different. The charge to the jury in the instant case was perfectly adequate as far as

it went, and in fact the court below characterized much of the charge as scrupulous. We believe that because the trial judge did not affirmatively mislead the jury, did not affirmatively say anything to them which had to be erased from their minds --

MR. CHIEF JUSTICE BURGER: We will resuem there at 1:00 o'clock, Mrs. Cohen.

[Whereupon, at 12:00 noon, the Court was recessed until 1:00 o'clock p.m.]

AFTERNOON SESSION - 1:00 O'CLOCK

MR. CHIEF JUSTICE BURGER: Mrs. Cohen, you may continue.

MRS. COHEN: Thank you. Mr. Chief Justice, and may it please the Court:

Before the recess, I was addressing respondent's contention that Cupp v. Naughten was simply a caseinvolving a self-correcting instruction. Petitioner belives that this argument ignores the analysis that was endorsed by the Court in Cupp without, I might add, denying its validity.

In fact, because Cupp involved a challenge to an affirmative instruction to the jury, whereas this case involves an omission, resort to what happened during the remainder of the trial becomes even more germane. Because the trial judge in this case did not affirmatively misadvise the jury or mislead the jury, there was nothing which had to be erased from the minds of the jurors or, as respondent says, neutralized. There was no infection of the rest of the trial, the rest of the trial was prefectly adequate.

Therefore, the question is simply whether the record as a whole shows that the gap in the charge was effectively filled by the events of trial, an approach which is consistent not only with Cupp but which is consistent with the approach used in all habeas corpus review.

In addition to its failure to properly apply Cupp,

the Circuit Court in its evaluation of this state court instruction also failed to credit factors upon which it has relied in its own cases to sustain its own federal convictions in a series of cases, of which the best example is United States v. Papa, in 533 Fed 2d. The court below sustained federal narcotic conspiracy convictions, despite the failure in each of those cases on the part of the trial judge to charge the element of knowledge to the jury. In each instance, the Circuit Court determined that the jury was aware of the missing element because the district judge had read to the jury both the statute and the indictment. In Papa, it was done repeatedly, as it was done in this case. It is clear therefore that by refusing to give due weight to the same factors that it has relied upon in reviewing its own convictions, the court below was effectively holding this state court trial judge to a higher standard than it has held its own district judges.

QUESTION: Well, would you be making the same argument or would the same issue be here or any other if the gentleman had been abandoned with his clothes on at the same spot and he had managed to crawl to the filling station and then he was murdered inside the filling station by some tramps?

MRS. COHEN: Well, again that presupposes some factual --

QUESTION: Perhaps you would never have prosecuted

him. But assume you had, would that kind of an instruction have been adequate to pose the question?

MRS. COHEN: Well, New York law, so far as we have been able to determine, has no standard or valuation of contributory negligence and it certainly does not seem to follow the decision cited by the respondent, the North Carolina decision, which is to the effect that if the victim has found safety and then for reasons of his own abandons it and is then injured or killed, that is not foreseeable. New York does not seem to --

QUESTION: Well, he never found safety apparently because as soon as he got in the filling station he was killed by somebody else. Now, is that -- of course, he never would have been out there and he never would have had to go to the filling station except for the fact that these people abandoned him there.

MRS. COHEN: Well, the question ultimately would have been the same question that it is in this case, and that is was it foreseeable that when they left this man at the side of the road he would then be killed, for example --

QUESTION: That isn't what the instruction said, is it?

MRS. COHEN: The instructions to the jury in this case said --

QUESTION: It mentioned cause all right, but it

didn't talk about foreseeability.

MRS. COHEN: Well --

QUESTION: Are you now suggesting that perhaps the issue really was foreseeability?

MRS. COHEN: The issue was foreseeability throughout the trial.

QUESTION: Well, how did the jury even know that the issue was foreseeability?

MRS. COHEN: they knew that the issue was foreseeability because it was argued to them effectively by all three lawyers in this case, the prosecution and the two defense lawyers --

QUESTION: And then the judge says don't listen to them, I will give you the law?

MRS. COHEN: No, on the contrary. The judge said to them very explicitly, so long as you find a basis for counsels' arguments in the evidence, you may follow counsels' arguments in reaching your conclusion. And I don't believe even in the decisions of the Circuit Court in reviewing its own convictions it has concluded that a single statement by the judge that I am the source of the law effectively wipes out the impact of the other arguments in the case.

QUESTION: So the issue would be the same here if he had been struck by lightning on the side of the road?

MRS. COHEN: The issue would have been foreseeability.

The difference would have been that, as a matter of New York law, I would suggest that that would have been an intervening, a superseding clause and there might have been a different case in that case.

QUESTION: Well, I know, but the instruction that was given to them wouldn't distinguish between any of the three cases, the actual case, the filling station case or the lightning case.

MRS. COHEN: Yes. But, on the other hand, we aren't simply dealing with the facts of this case, and it is our argument in this case that had there been an explicit instruction to the jury in this case on foreseeability, the result would have been that the defense would not have had available to it the negligence that was involved in this case in arguing to the jury that the defendants were not responsible. I think we sort of have to focus on what happened in this particular case. It is possible to conceive of all kinds of hypothetical happenings, but that is not what happened in this case. In this case, there was simply a negligent driver who came along the road. Under New York law, this would have been regarded as within the foreseeable consequences of leaving this man by the side of the road in a helpless condition.

QUESTION: Did this judge give the usually or at least frequently given charge that you are to evaluate things in the light of ordinary human experience?

MRS. COHEN: Well, he certainly instructed them on the need to prove things beyond a reasonable doubt and indicated to them what a reasonable doubt might be. I don't recall that he specifically said that you may rely on your common sense. On the other hand, that was specifically argued to the jury by the district attorney, as a matter of common sense, when you look at what happened in this case, it must be self-evident that these men leaving this victim by the side of the road in his condition would have foreseen as reasonable men that this was a consequence of their actions.

QUESTION: Is it common ground between you and your adversary what the proper instructions would have been had it been given?

MRS. COHEN: Your Honor, until our reply brief there was never any discussion of what New York law was, and that is one of the problems that we have with the opinion below. It was not argued to the Circuit Court. The Circuit Court, in concluding that an instruction on causation might have been helpful, never had recourse to New York law. Instead, it discussed the various decisions from other jurisdictions, many of them very old.

QUESTION: Well, my question is, is it clear what the instructions should have been, had it been given?

MRS. COHEN: In our view, the instruction --

QUESTION: Not in your view. My question is, is it

clear, is New York clear what the instructions should have been if the instructions had been given?

MRS. COHEN: I think yes, and certainly the decision by the Court of Appeals in this particular case reaffirms that the instruction in this case would have been that notwithstanding the fact that the defendants in this case were not the sole or the immediate cause, if it was foreseeable that their conduct would have resulted in the death by vehicle of this victim, then you may convict him -- you may convict him.

QUESTION: Is it different from the ordinary concepts of approximate cause in a tort case in New York?

MRS. COHEN: I don't think it is different in the sense of the standard. It is still a reasonable man standard. But it is just that there is a different degree of negligence that is required and --

QUESTION: Well, this isn't negligence, is it? We are talking about approximate cause.

MRS. COHEN: Well, in this case, these defendants were held to recklessness. The charge to the jury was that you had to find that these men were aware of and consciously disregarded a substantial risk.

QUESTION: What they did caused his death --

MRS. COHEN: That's right.

QUESTION: -- but my question is, is cause the same within the meaning of this statute, the same as the concepts

of approximate cause under New York tort law or different?

MRS. COHEN: In the analysis, I would say yes, but in terms of the degree of culpability required, no. In Kibbe --

QUESTION: Now my question is do you concede what your adversary contends, that the prosecuting attorney in fact gave an erroneous description of cause?

MRS. COHEN: Not at all. We dispute that in the reply brief.

QUESTION: Then it isn't common ground as to what the instructions should have been, is it?

MRS. COHEN: Well, no, I beg to differ on that because the respondent has never argued this case in terms of what New York law was.

QUESTION: Well, you rely a good deal -- you say yes, the trial judge did fail to give any instruction on the meaning of the word "cause" under the statute. But you say all of those blanks were filled in by argument of counsel, among other things, the prosecutor argued at some length. But your adversary says, ah-huh, but he gave the wrong concept of cause, he gave a "but for."

MRS. COHEN: Under New York law, we point out in the reply brief, "but for" certainly enters into the consideration in this case and in every case where causation is involved. It is not the sole element that may be considered, and it was

not --

QUESTION: But the prosecutor told the jury that it was.

MRS. COHEN: No, I don't believe that he did in this case. He did discuss the "but for" element and the respondent has conceded that that is a relevant element. But he did do it in the context of an argument which was essentially a foreseeability argument. In other words, we believe that the respondent essentially lifted that "but for" statement out of the context of the entire trial, not simply out of the context of the summation by the district attorney.

QUESTION: I am not clear about your answer to my first question, which was is it clear what the instruction should have been if it had been given.

MRS. COHEN: I can't --

QUESTION: And if it is clear, then I suppose you and your adversary agree what it would have been.

MRS. COHEN: I cannot point you to a model instruction on causation. I can only point you to the New York decisions which have dealt with the question of causation, and from those I have submitted to the Court what I believe a correct instruction would have been. In my view, the Court of Appeals, when it had this case, reaffirmed that my view --

QUESTION: That is the New York Court of Appeals?

MRS. COHEN: -- the New York Court of Appeals, that

the instruction which we have submitted to this Court in our reply brief is the appropriate instruction.

QUESTION: But there was no instruction?

MRS. COHEN: There was no instruction in this case. On the other hand --

QUESTION: There was none asked for, was there?

MRS. COHEN: There was none asked for, no. And interestingly, counsel did make requests to the court for certain instructions relating to this particular statute but not relating to the element of causation.

QUESTION: Well, would you defend an instruction if the instruction had said now I want to define causation for you? What I mean is "but for" causation in the sense that it is enough causation if but for there having left here he wouldn't have been here?

MRS. COHEN: That would not be. If that were the sole instruction on causation, that would not be an adequate instruction.

QUESTION: What provision of the Constitution would that offend?

MRS. COHEN: I don't think it would offend any.

QUESTION: Well, that is what I ask you. Does it have any constitutional instruction?

MRS. COHEN: The ultimate --

QUESTION: I would think if that were constitutional,

what happened here a fortiori would be --

MRS. COHEN: I don't see that what happened here or the hypothetical that you pose to me raises a question of constitutional law. That is where we ultimately take issue with what the court did below, because in essence the court below said --

QUESTION: Well, what do you understand the court below to have held the constitutional infirmity was in the instruction?

MRS. COHEN: The court below seems to say that because there is some question of whether or not the jury was aware of the element of causation, there was no finding beyond a reasonable doubt by the jury on the issue of causation.

QUESTION: I see.

MRS. COHEN: However, the court below does not state across the board. They certainly do not cite any authority to support what is essentially per se argument.

QUESTION: But is there some constitutional rationale based on lack of fault or lack of intent or anything like that?

MRS. COHEN: I understand them to be reaching out to decide a broad constitutional principle in this case. It seems to me that they are deciding a question of state law, which is what we have been discussing for the last few minutes, and with which I ultimately quarrel with the Second Circuit

about. It seems that if the court finds that the issue of causation was before the jury, then there is no constitutional question remaining with respect to this instruction. Insofar as the court below set aside the conviction for failure to more adequately charge causation, it assumed, as I indicated before, the role of an appellate court, of deciding an issue of state law, and we believe it is significant that neither respondent nor the court below has cited a single case in which a federal court has set aside a state criminal conviction for an alleged error in an instruction to the jury.

QUESTION: Is it possible that the defense carefully and studiously avoided a request for an instruction on causation on the grounds that the less said about causation the better it would be for the defendants?

MRS. COHEN: This is the thrust of our reply brief, because although the law in New York prior to the Kibbe decision in the Court of Appeals was sparse, the Court of Appeals had talked about causation and had made it clear that ordinary negligence which follows the acts of the defendant may not be regarded as an intervening or superseding cause, it would not relieve the defendant of responsibility for his initial conduct.

QUESTION: Mrs. Cohen, before you sit down, would you tell me, because I am a little lost in the papers, where in the papers your understanding of the correct instruction

appears?

MRS. COHEN: We address this in our reply brief.

QUESTION: In your reply brief, you actually set out an instruction which you think is correct?

MRS. COHEN: Which I believe they would have been entitled to and which we believe would have precluded the defense in this case from using the emotional argument to the jury that it was Blake's fault and that he was the one who was responsible.

QUESTION: I take it that your sample instruction on page four of your reply brief was taken verbatim from LaFave & Scott, or have you adapted it?

MRS. COHEN: The discussion of LaFave & Scott on my part I think is gratuitous and was simply engaged in for purposes of showing that --

QUESTION: No, that isn't my question. My question is the matter that is in quotations at the top of page gour, is that lifted verbatim out of LaFave & Scott or --

MRS. COHEN: The hypothetical --

QUESTION: -- is that your adaptation?

MRS. COHEN: No, the hypothetical is verbatim from LaFave & Scott. They use this --

QUESTION: There is a remarkable coincidence then, isn't there?

MRS. COHEN: It is Horn book law. They regard what

happened in this case as wholly foreseeable. They don't regard this as a complicated case of causation at all, and it is our view that there was no complicated instruction on causation that had to be given to the jury in this case.

QUESTION: Mrs. Cohen, I think that Mr. Justice Stewart asked you this, but I didn't hear your answer. What has happened to Krall? Was he convicted?

MRS. COHEN: Yes, he was convicted. The appeal -- both defendants appealed through the New York court system and my understanding is that the initial petition for habeas corpus was filed in behalf of both men and that apparently for some reason Krall did not pursue the petition. He is not involved at this point.

MR. CHIEF JUSTICE BURGER: Very well.

Ms. Ginsberg.

ORAL ARGUMENT OF SHEILA GINSBERG, ESQ.,

ON BEHALF OF THE RESPONDENT

MS. GINSBERG: Mr. Chief Justice, and may it please the Court:

As a presliminary matter, let me say that Mr. Krall did not file a habeas corpus petition with Mr. Kibbe. Mr. Kibbe filed this petition pro se in the District Court in the Northern District of New York after the Second Circuit ruling. It is my understanding that Mr. Krall filed his own pro se petition and that is still pending in the Northern District of

New York.

In petitioner's own analysis of New York law, foreseeability is the key to determining causation. The problem for petitioner in this assertion is that the jury didn't know that. Causation was a bitterly contested issue at trial in this case. The defense contended that Kibbe and Krall had left Stafford on the shoulder of a lightly trafficked road that was two lanes wide, and they had left him no more than 75 feet from an open and lighted gas station. Stafford had been left at that spot, the defense contended, because having seen the lights and the gas station he asked to be let out there.

That the road was lightly trafficked is established by a great deal of evidence in this case. As a preliminary matter, after Blake, the driver of the truck, hit Stafford, he turned around in the north-bound lane and drove south until he reached the body. Now, I submit to this Court that that is hardly the kind of conduct that a driver familiar with the road, as Blake testified he was, would have engaged in if the road was highly trafficked.

Moreover, Kibbe, in his custodial statement, asserted that there were no cars in the vicinity, and Krall, though he did acknowledge that there were cars, said that there were few. What this record shows in fact is that in the forty minutes that transpired here, only four vehicles were on that road --

Kibbe's, Blake's and the two on-coming cars that tried to signal unsuccessfully to Blake to slow down.

Now, there is another factor in this scenario that militates very strongly against the foreseeability of Stafford's injury, and that was Stafford's awareness and desire to go to the gas station.

QUESTION: Do you say that it is not foreseeable that some automobiles would be traveling on that road?

MS. GINSBERG: Well, Your Honor, the requirements of foreseeability in this case are that the defendant be aware of the risk of death by the specific agency that actually inflicted the harm.

QUESTION: Well, if the defendant was driving a car there, why should it not be foreseeable that other people would be driving there, and the road is provided for that purpose?

MS. GINSBERG: Well, that is true, Your Honor, but it was a narrow roadway. Stafford knew of the gas station, asked to get out there. Kibbe, in his experience, knew that the road was not heavily trafficked, it was not, if you will, like trying to get across the New York State Thruway. It was a two-lane country roadway, and I submit that on these facts, and these are the facts that the defense relied on, it was reasonable for Kibbe to expect Stafford to get across the highway to the gas station. It was no more, on the defense

theory, than 75 feet. And Stafford was aware of the station and he merely had to cross two lanes of traffic.

QUESTION: I am very interested in the awareness of a drunken man.

MS. GINSBERG: Well, Your Honor --

QUESTION: You agree that he was good and drunk?

MS. GINSBERG: No, Your Honor, I think that there is some dispute about that. As an initial matter, the defense testimony that he was aware of the gas station --

QUESTION: Well, do you usually see sober people walk around on a public road with no boots and pants on?

MS. GINSBERG: Well, Your Honor, there is --

QUESTION: Is that normal?

MS. GINSBERG: Your Honor, I have to dispute the fact that Stafford did not have his pants on. The testimony was, when he left the car his pants were up. It so happens that the dragging of the truck -- and the testimony of the medical examiner that the body had been dragged -- I think accounts for his state of undress.

QUESTION: Well, is there any contradiction that at least two bars, interested in making money, refused to serve him for the reason that he was drunk?

MS. GINSBERG: No, Your Honor, the record does establish that, but the --

QUESTION: Well, do you consider that the person in

that condition is "aware"?

MS. GINSBERG: Well, Your Honor, I would say that it depends on the individual. The bar may well have chosen not to serve Stafford because he was an obstreperous --

QUESTION: But the record doesn't show that. It said because he was drunk.

MS. GINSBERG: Well, but the record also shows, Your Honor, that the medical examiner --

QUESTION: Are you disputing that he was drunk?

MS. GINSBERG: Excuse me, Your Honor?

QUESTION: Do you dispute that he was drunk?

MS. GINSBERG: I would -- yes, Your Honor -- well, I would dispute that he was so drunk as to be unaware. I don't think that the record shows that. I think that the defense contested that, and I think that there is support in the record for the defense's position. The medical examiner testified that the autopsy showed that Stafford's blood contained .25 percent alcohol. Well, pharmacological textbooks categorize that within the range of moderate drunkenness.

QUESTION: Well, he was drunk?

MS. GINSBERG: Well, beyond that --

QUESTION: You do admit he was drunk?

MS. GINSBERG: He was intoxicated, yes.

QUESTION: And the difference is?

MS. GINSBERG: That at his level of intoxication, he

may well have been aware, and the defense contended that he was, of this avenue of safety.

QUESTION: Ms. Ginsberg, may I interrupt for a moment. What view should we take of the facts? Now, there is a dispute as to whether they were a quarter of a mile from the gas station or 75 feet. I was under the impression that the jury having resolved the issues against your client, that we had to take the facts most favorably to the state's version of the facts and therefore we should assume that it was a quarter of a mile.

MS. GINSBERG: Well, Your Honor --

QUESTION: Do you disagree with that?

MS. GINSBERG: Yes, I do, Your Honor. The problem with that is that the jury was not instructed on causation and we don't know what they considered in reaching their ultimate verdict of guilt. We contend that they did not consider causation.

QUESTION: But why should that affect the normal rule that where there are disputes you presume the jury resolved the disputes in favor of the prevailing side?

MS. GINSBERG: That is the situation in which the jury has been properly and adequately instructed on the facts of the crime -- excuse me, the elements of the crime. The problem here is that the jury didn't know that they had to determine causation. Moreover, they didn't know what that

inquiry would require. They didn't know that they had to consider foreseeability. They didn't know about superseding cause.

QUESTION: Do you agree with your opponent's version of what the proper instruction would have been?

MS. GINSBERG: Well, Your Honor, I agree certainly that foreseeability is one of the essential requirements in a causation instruction.

QUESTION: Then which is the stricter standard, foreseeability or recklessness?

MS. GINSBERG: Foreseeability is a much stricter standard. Foreseeability requires an awareness of a risk of death by a specific -- by the specific agency that --

QUESTION: Well, how specific does that have to be, by a particular truck or by a moving vehicle on the highway?

MS. GINSBERG: By a moving vehicle on the highway. I think that what recklessness requires under New York law is merely a general awareness of a risk of death by any agency whatever. In fact, under the lesser standard of recklessness, respondent --

QUESTION: Well, was there any argument in the case that there was any risk of death other than by vehicle?

MS. GINSBERG: Well, the prosecution contended that leaving him on the side of the road in the middle of the winter left -- exposed him to the risk of death by exposure.

It was asked earlier this morning about Kibbe's suggestion or warning to Stafford to get inside. But I would contend that what he meant by that was to get to the gas station. What that shows is that Kibbe believed that the gas station was accessible and that Stafford knew it was accessible, and Kibbe did not foresee that he would freeze to death. He foresaw that he would get to the gas station and be safe there.

QUESTION: Well, we are not here trying the innocence or guilt of this person or trying to evaluate the merits of this lawsuit, but simply to determine whether the Court of Appeals was correct in holding that it was a constitutional violation for the trial judge not to specifically instruct on the meaning of the word "cause" under the New York statute. That is the issue here, isn't it?

MS. GINSBERG: Exactly. Exactly, Your Honor. We would submit, and I think the Second Circuit found, that due process requires not only that the prosecution prove each and every element of the crime beyond a reasonable doubt but that the finder of fact assess that evidence and find that it is sufficient.

QUESTION: Well, certainly there can be no serious claim that the jury didn't find every element of the crime beyond a reasonable doubt because they were instructed correctly as to the burden of proof of the prosecution beyond a

reasonable doubt and they were given this statute in hipe verba which uses the word "cause." So there can be no serious question but what the jury found beyond a reasonable doubt that your client caused this person's death. Now, the problem is, as the Court of Appeals held, that it was a constitutional violation not to instruct as to the meaning of the word "cause" and that is what the case is about, isn't it?

MS. GINSBERG: Well, what I would say is that in this context on the difficult facts of this case and the complex and intricate problems of causation presented by this case, the failure to explain causation is tantamount to no instruction on causation at all.

QUESTION: Well, now, as a matter of New York law, you are mistaken, aren't you? The New York courts have held against you in this particular case, holding both the Appellate Division and the New York Court of Appeals have held that the instructions were sufficient, as a matter of New York law.

MS. GINSBERG: No, Your Honor, that is not correct. I have to take issue with that.

QUESTION: Well, they affirmed the conviction, didn't they?

MS. GINSBERG: They did affirm the conviction. The appellate division did address the question of sufficiency of the charge, but the Court of Appeals did not.

QUESTION: That is perhaps they didn't think it was

a significant issue at all at that stage.

MS. GINSBERG: No, Your Honor, I don't believe that that was --

QUESTION: Well, you have either presented the issue to the state courts and had it rejected or you haven't exhausted your state remedies.

MS. GINSBERG: Oh, it was presented to the state courts as petitioner concedes --

QUESTION: Then it has been rejected by the state courts?

MS. GINSBERG: Well, it was, yes --

QUESTION: Enough to let you in the federal courts, is that right?

MS. GINSBERG: Exactly, Your Honor. That is certainly so.

QUESTION: What do you have to say about the question I put to your friend that any clarification of causation was carefully avoided by the defense because the less said about causation the better for the defense? Was that a tactic of the defense?

MS. GINSBERG: Absolutely not, Your Honor.

QUESTION: Well, what is there in this record that will suggest to support your answer?

MS. GINSBERG: As a preliminary matter, I would like to say that the Second Circuit specifically found that the

failure to object in this case was an inadvertent failure that counsel, having argued as he did prior to trial and at the close of the state's case that causation had not been established here, it was clearly the defense's position that the state had not sufficiently established foreseeability and the other elements of causation that are required.

Now, I think that it is clear from the defense's contention and indeed from the petitioner's own assessment of New York law that the defendant could not help but have been benefitted by a detailed charge on causation. As a preliminary matter --

QUESTION: What explanation have you for the defense not requesting it?

MS. GINSBERG: Your Honor, I was not of course trial counsel and I cannot from personal first-hand knowledge, but I would say it was just inadvertence.

QUESTION: But having discussed the subject as much as it was discussed and having contemplated it enough to talk about it in extenso in the closing arguments, how can -- isn't it remarkable to suggest that that is an inadvertent oversight?

MS. GINSBERG: Well, Your Honor, I don't think so. I think sometimes in the give and take of the heat of the moment and the concerns that a trial lawyer may have about other things, the failure to object to a particular charge may

well have escaped him.

The important thing now is to look at that charge and to assess it in terms of what New York law would require, and I don't think that there can be any dispute about the gross deficiencies of this charge.

QUESTION: Well, the New York courts have differed with you on that, they have affirmed -- two appellate courts have affirmed this conviction, so you can't really say that New York law requires that any more be done than was done in this case.

MS. GINSBERG: Well --

QUESTION: The New York courts have said that you are wrong about it.

MS. GINSBERG: What I would have to say in answer to that, Your Honor, is that in fact in Kibbe itself, when the court was addressing the question of sufficiency of the evidence on the question of causation, the court specifically held that it was critical to a finding of causation that the injury to Stafford be foreseeable.

Petitioner does not even contend that the judge in this case charged foreseeability. There can be no question that that charge, in answer to Mr. Justice Burger's question, would have helped the petitioner. This in no way, shape or form can be viewed as a deliberate strategic tactic on the part of the defense.

QUESTION: Ms. Ginsberg, can I ask about that. Do you question the adequacy of the charge on intent?

MS. GINSBERG: Your Honor, not in this proceeding, we do not.

QUESTION: Well, then would you not agree that we must accept at least this much of the jury verdict as having established that the defendant had the requisite intent to commit the crime?

MS. GINSBERG: This particular statute under New York law does not, as the Second Circuit noted in a footnote, require intent.

QUESTION: But reckless, it requires an element of recklessness as tantamount to intent.

MS. GINSBERG: Well, yes, but as I pointed out, recklessness does not meet the standard of --

QUESTION: Of foreseeability.

MS. GINSBERG: Exactly.

QUESTION: I understand your point. Now, you said instruction couldn't possibly have hurt your client but the instruction at the top of page four of the reply brief, which I understood you to say would have been correct, first points out the requirement of intent, and then it says: "Here C's act is a matter of coincidence" --C's act would be the truck driver in this case -- "rather than a response to what A has done" -- and A would be the defendant -- "and thus the question

is whether the subsequent events were foreseeable, as they undoubtedly were in the above illustration." Do you think that would have helped your client?

MS. GINSBERG: Your Honor, this is not, as I understand it, the charge that the state relies on. This is a hypothetical taken from LaFave & Scott, and it is inapposite to the facts of our case. First of all, it assumes that the victim was unconscious. The defense, as I have pointed out in answer to Mr. Justice Marshall's questions, fervently contested that he was unconscious and asserted in fact that he was quite aware and capable of getting to the gas station.

In addition, the statute specifically -- the statute referred to in this hypothetical specifically requires that A, the defendant, had the requisite intent to kill. That does not enter into the statute. If it had been established that --

QUESTION: Well, then just so I can try to understand, we don't really know as between you and your opponent what instruction would have been acceptable to both of you? You would not have accepted this instruction because you say it doesn't fit the facts in this case.

MS. GINSBERG: No, it does not. I would -- the defense --

QUESTION: Well, do we know in the papers anywhere what precise instruction you say was constitutional error for

the judge to fail to give on his own?

MS. GINSBERG: Well, Your Honor, we did not draft a model instruction, but it was our position that the instruction had to include within it explanations of superseding cause, independent intervening cause, in that regard --

QUESTION: And if in giving that explanation the judge had made a comment somewhat comparable to the last clause of the one here, that in his judgment this could well be foreseeable within what I have described to you, then that wouldn't have helped you very much? It depends a little bit on just how he framed the instruction, doesn't it?

MS. GINSBERG: No, Your Honor, it does not. We contend that if he had given the jurors the tools with which to make the analysis required on the element of causation, assuming of course that he --

QUESTION: Can you tell me what you think the correct instruction would have been right now?

MS. GINSBERG: That you may not find, if I can phrase it in the negative, that the defendants are guilty or have caused Stafford's death, if you find that Blake's operation of the truck was a superseding cause. If you find that his operation of that truck amounted to negligence as that is defined or recklessness as that is defined, and you determine that Stafford's death is the sole -- is solely the result of Blake's operation of the truck, you must acquit. You must

not convict or you may not convict the defendants here if you find that the injury to Stafford by motor vehicle was not foreseeable to the respondents when they left him on the side of the road. In this regard, you must consider the defense contention that Stafford was left near the gas station at his request, and you must evaluate the testimony or the evidence with that standard in mind.

QUESTION: Thank you.

QUESTION: Do you have any case for that?

MS. GINSBERG: For what, Your Honor?

QUESTION: For that charge?

MS. GINSBERG: Yes, Your Honor, I think that People v. Kane, cited by the petitioners --

QUESTION: What was the charge there?

MS. GINSBERG: Well, I don't know that the Kane case sets forth a charge, but it makes clear that under New York law intervening negligence --

QUESTION: It seems that quite a few of us are interested in just what charge you are talking about. I understand your complaint is that New York, under its law, should have given a charge --

MS. GINSBERG: Yes.

QUESTION: -- and we've got everything but the quote and end quote.

MS. GINSBERG: Well, Your Honor, as I think I have

said, that charge must include directions as to foreseeability and superseding cause, and I don't believe that anything that the petitioners have said here this morning refutes that. They have said in their reply brief and here this morning that foreseeability is the key, and foreseeability is disputed by the defense, but the jury didn't know the significance of that dispute.

QUESTION: Doesn't this bring us around if not full circle, closer to the starting point? This is why objections are called for in the trial of a case. Here we are the sixth court that has dealt with this matter over I don't know how many years. Isn't that the reason why this request for instructions should have been made and why the system can only function if those things are made at the appropriate time?

MS. GINSBERG: Your Honor, I would in candor have to concede that a request would have been helpful. But as the Second Circuit found, the failure to request was inadvertent. All the defense counsel did was to contest causation. In fact, under New York law, there is a requirement for the judge as a preliminary basic matter to charge sufficiently on all the elements of the crime. The judge in this case had an obligation as well, and in light of defense counsel's presentation of the issue of causation repeatly to the judge, he had some obligation as well.

QUESTION: How did the inadvertence run all the way up to the appellate division?

MS. GINSBERG: Well, Your Honor, again I cannot speak to that, but I would point out, as has been pointed out to me, the appellate division did consider this charge on the merits.

QUESTION: If they hadn't, I guess this point never would have gotten here, would it?

MS. GINSBERG: Well, Your Honor --

QUESTION: I mean if we had left it to counsel for the petitioner, he never would have raised it.

MS. GINSBERG: Well, Your Honor --

QUESTION: I mean respondent, he never would have raised it.

MS. GINSBERG: Well, I don't know that that is so. That is a hypothesis and I can't really speak to that.

QUESTION: Where do you locate in the Constitution this requirement to give a foreseeability instruction? Let's suppor the judge had said here -- you note that I used the word "cause," members of the jury, now I really mean it, you must find that the defendant caused the death of the victim, and he didn't say anything more. You would still be here saying that he should have defined cause?

MS. GINSBERG: That's correct, Your Honor.

QUESTION: Not because my Brother Stewart said the

jury didn't find cause in finding him guilty, they must have because he said, really now, you must find causation, and the jury finds him guilty so they found causation. Now, why would you -- where in the Constitution is there a requirement for the judge not only to say now I really I mean it, find cause, where is the requirement that he must define it in terms of foreseeability?

MS. GINSBERG: Well, as I know that Your Honor is aware, that didn't happen in this case. The judge didn't even identify causation.

QUESTION: I know, but you would still be here on the same ground, I am sure you would. Now, where is the provision for foreseeability?

MS. GINSBERG: The Second Circuit found and we assert here that the failure to explain causation precluded the jurors from finding that element beyond a reasonable doubt.

QUESTION: No, the judge said you must find causation and they found causation. It is just that you don't like the way -- you don't like the fact that the jury might not have decided on foreseeability.

MS. GINSBERG: Well, it is not a matter of might, Your Honor, it is an absolute fact, a certainty if you will. Uninstructed --

QUESTION: It was instructed in my example on

causation, and so was this jury on causation.

MS. GINSBERG: Well, Your Honor, but the instruction given or the example given by the prosecutor --

QUESTION: Well, the jury was just left free to find causation the way, I guess they decided what causation meant and they found it.

MS. GINSBERG: Well, Your Honor, it is our position that the judge's failure to identify causation is an issue or to specifically direct that the jury find causation, communicated to the jury the belief that causation was to be assumed. This misconception was fostered, if you will, by the arguments of the prosecutor when he told the jurors basically, using the "but for" test, that they could convict if they found that Stafford would not have died but for the conduct of Kibbe and Krall.

QUESTION: Well, the jury must have agreed with him. They at least found "but for" cause.

MS. GINSBERG: But that is not the test, and that is tantamount to no finding of causation at all.

QUESTION: I don't see where you get that. The jury must have found at least a "but for" cause. Now, is that unconstitutional?

MS. GINSBERG: It is tantamount on these facts to not finding causation at all because --

QUESTION: You keep saying that but I am not sure I

will ever believe it.

MS. GINSBERG: -- uninstructed or, if you will, under the guidance of the prosecutor, the jury --

QUESTION: Well, let's assume the judge had instructed on "but for" cause and said, look, jury, here is what I mean by cause, it means but for, that's all, and then explained what "but for" was, would you be here? I would suppose you would be claiming that the "but for cause" is unconstitutional.

MS. GINSBERG: Well, with the caveat that that is not what happened here, but the judge told the jurors that he alone would instruct on the law and then failed to tell them anything about causation, the use of the "but for" test encouraged the jurors to believe that causation could be assumed so long as thsy found that Kibbe's conduct formed a link, if you will, in the chain of events --

QUESTION: If they hadn't have left him by the road, he probably wouldn't have been run over.

MS. GINSBERG: But, Your Honor, as you pointed out in the course of the petitioner's argument, under this misconception if respondents having left Stafford on the side of the road, if he was subsequently hit by lightning or hit by a crashing plane that ironically crashed on the roadway, Kibbe would be guilty of murder.

QUESTION: And would you say that would be

unconstitutional?

MS. GINSBERG: On the charge that was given in this case, I would say yes.

QUESTION: For what reason?

MS. GINSBERG: Because on this charge the jurors could not have found causation as that --

QUESTION: As the Constitution requires causation to be defined?

MS. GINSBERG: As the Constitution requires that each element of the crime be presented to the jury so that they may make that determination.

QUESTION: Ms. Ginsberg, let me just follow up with one question. Do I correctly state the law of New York when I say that the instruction that should have been given in substance should have said that the causation -- that the chain of causation will be broken if death was caused by an intervening agent unless the intervening agent was foreseeable?

MS. GINSBERG: Yes, Your Honor.

QUESTION: And you don't think it is conceivable that that instruction would have been harmful to your client's presentation of the case? Because isn't it rather clear that it was foreseeable that a truck would have been driving down this highway at this hour of the night?

MS. GINSBERG: Not -- the simple answer to your

question is no, on these facts it would not have in any way hurt the defense, it would not have put them in any worse position than they were without it.

QUESTION: Well, to put it somewhat differently, the instructions are long and they often confuse the jury, as you know. Do you think it is conceivable that the lawyer might have felt that that doesn't really add very much to the charge, putting that in, exercising the question of foreseeability of the fact that a truck driver might be driving down this road at that hour of the night?

MS. GINSBERG: No, Your Honor, because if the defense contentions are accepted, all that Stafford had to do when he was let out of the car was to quickly cross the road where the gas station was there to offer him shelter.

QUESTION: And doesn't that same point go to whether it was reckless and high degree of death, if you assume that he can get up and walk across the road, then they weren't reckless. It seems to me that the jury must have decided that against you.

MS. GINSBERG: Well, Your Honor, as I said earlier is a much lesser standard.

QUESTION: Unless you are assuming that the truck had to come along at the very moment while he was trying to run across the road, which I don't think that is --

MS. GINSBERG: Reckless is a much lesser standard

because it requires only --

QUESTION: Would you not agree that if it was foreseeable, the thing they reasonably expected was that he would get up where they left him off and walk across the road to the gas station, if that was the state of facts and everybody thought was foreseeable, then they really weren't reckless.

MS. GINSBERG: Well, Your Honor, recklessness goes to -- I would say recklessness goes to several of the fact situations or fact hypotheses in this case, and I would submit that the jury might well have found recklessness with regard to the weather conditions, that even --

QUESTION: Well, what if it is cold, if he just has to walk across the street and get in a warm gas station?

MS. GINSBERG: Well, that may well be, Your Honor, but that was a question of fact which the jury --

QUESTION: But you are saying that it is conceivable they could have resolved the factual issue of reckless one way and the factual issue of foreseeability another way?

MS. GINSBERG: Exactly.

QUESTION: That is the heart of your case?

MS. GINSBERG: Exactly.

QUESTION: Even though he was drunk?

MS. GINSBERG: Yes, Your Honor.

QUESTION: Because the record shows that, despite what you said, the expert testified -- does that indicate a

high degree of intoxication, 25 percent -- the answer was a very heavy degree of intoxication. So we read different sections of the record, didn't we?

MS. GINSBERG: Exactly, and it was a question of fact for the jury TO determine.

MR. CHIEF JUSTICE BURGER: Thank you, Ms. Ginsberg. Thank you, Mrs. Cohen. The case is submitted.

[Whereupon, at 1:47 o'clock p.m., the case in the above-entitled matter was submitted.]

- - -