
Docket No. 08-1234

**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2008**

**Ionia Management S.A.,
Petitioner,**

v.

**United States of America,
Respondent.**

**ON THE WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

- I. Did the jury instructions given by the United States Court for the District of Connecticut omitting the requirement of the jury being able to convict Ionia only if it was found that the employees' actions were done with an intent to benefit Ionia and that the employee was required to be in a managerial position constitute error under Supreme Court precedent and statutory law?

- II. Did the United States District Court for the District of Connecticut err when the District Court instructed the jury on corporate criminal liability inconsistently with the general principles of criminal law regarding the burden of proof and the presumption of innocence, and therefore requiring the Court to revisit its holding in *New York Central & Hudson River Railroad Co. v. United States*?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit may be found at Ionia Management S.A. v. United States, 999 F.3d 999 (2d Cir. 2008). The opinion of the United States District Court for the District of Connecticut may be found at United States v. Ionia Management S.A., 526 F. Supp. 2d 319 (D. Conn. 2007).

STANDARD OF REVIEW

Rule 52(b) of the Federal Rules of Criminal Procedure permits a criminal conviction to be overturned on direct appeal for "plain error" in the jury instructions, regardless of whether the defendant failed to object to the erroneous instructions before the jury retired, as required by Rule 30. United States v. Frady, 456 U.S. 152, 153-154 (1982). In reviewing the case for plain error, the Court is to consider the record and charge as whole. United States v. Young, 470 U.S. 1, 16 (1985). Therefore, the Court should conduct a review of the entire record and charge for plain error in the jury instructions.

STATEMENT OF THE CASE

Ionia Management S.A. ("Ionia") is a ship management company that operated and managed the M/T Kriton. United States v. Ionia Management S.A., 526 F. Supp. 2 319, 326 (D.Conn. 2007). The M/T Kriton is an oil tanker used to transport oil and petroleum products. Id. The tanker was equipped with oil pollution prevention equipment. Id. This equipment is used to separate oil waste from water by a machine known as the oily water separator. Id. Use of this equipment allows the tanker to dispose of oily waste while preventing pollution. Id. In connection with the pollution prevention equipment, oil record books were required to be maintained to document the functioning and utilization of this equipment. Id. These record books were available for production upon entry at United States ports. Id.

The pollution prevention equipment was located within the engine room of the tanker. Id. In particular, the engine room crew consisted of Second Engineer Edgardo Mercurio and Chief Engineers Efstratios Tsigonakis and Petros Renieris. Id. The Chief Engineers were in charge of maintaining the oil record books and recording any entries documenting the use of the pollution prevention equipment. Id. On the day at issue, Chief Engineer Tsigonakis instructed Second Engineer Mercurio not to use the oily water separator and pump the oily waste overboard without the use of the pollution prevention equipment. Id. Ionia had in place official company policies that prohibited the nature of the conduct described in the instructions given by Tsigonakis and Mercurio. Id. Mercurio then discussed these instructions with Chief Engineer Renieris who instructed him to continue with the disposal of the waste. Id. Tsigonakis and Mercurio directed the engine room crew to dispose of the waste into the ocean via the bypass hose. Id. The engine room crew then executed the orders given by Tsigonakis and Mercurio and the crew proceeded to dump the oily waste overboard. Id. Upon the M/T Kriton's arrival at the New Haven harbor, the United States Coast Guard boarded the tanker and was presented with the oil record books. Id.

Ionia was charged in a total of eighteen counts, including thirteen counts for violating the Act to Prevent Pollution from Ships under 33 U.S.C. § 1908(a), three counts of falsifying records in violation of 18 U.S.C. § 1519, one count of obstructing justice under 18 U.S.C. § 1505, and one count of conspiracy to commit these offenses under 18 U.S.C. § 371. Id. at 321. The eighteen counts were a consolidation of four separate indictments emerging from the District of Connecticut, the Southern District of Florida, the Eastern District of New York, and the District Court of the Virgin Islands. Id. at 321-22. These four separate indictments were joined and transferred to the District of Connecticut. Id. at 322.

A jury trial was held on September 6, 2007. Id. at 321. The Court's charge to the jury included that Ionia is legally responsible for the acts of its employees under certain circumstances. Id. at 325. The jury was to find the Government had proven beyond a reasonable doubt that the act were acts of omissions of Ionia's agents performed with the scope of their employment. Id. Within the scope of employment means an act that was specifically authorized by Ionia that would be within the scope of the agent's employment. Id. If the act was not specifically authorized, it may still be within the scope of employment if the agent acted for the benefit of Ionia and if the agent's act was within his authority. Id. The court instructed that it was not necessary for the Government to prove Ionia was actually benefitted, only that the agent had the intent Ionia would be. Id. Further, the court instructed the jury that even if the agent was acting within the scope of his employment, the fact that his action was illegal, contrary to the employer's instructions, or against corporate policy will not necessarily relieve the corporation of responsibility but the jury may consider if the agent disobeyed corporate instructions in holding whether the agent intended to benefit the corporation or acted within his authority. Id.

The jury, at the conclusion of the trial, entered a verdict of guilty on all eighteen counts. Id. Ionia then filed two motions: a Motion for Judgment of Acquittal, or in the Alternative, a New Trial, and a Motion for a Judicial Interview of Juror # 2 to investigate potential juror bias. Id. The District Court denied the relief sought by Ionia. Id. at 322. The United States Court of Appeals for the Second Circuit affirmed the ruling of the District Court. Ionia Management S.A. v. United States, 999 F.3d 999 (2d Cir. 2008). Ionia appealed the decision of the Court of Appeals to the Supreme Court of the United States, which granted Certiorari. Order Granting Certiorari, Dec. 12, 2008.

SUMMARY OF THE ARGUMENT

This Court should reverse the Court of Appeal's conviction and remand the case granting Ionia a new trial. The district court's jury instruction on the concepts of corporate criminal liability constituted plain error. A corporation is liable when its agents are acting within the scope of their employment and with an intent to benefit the corporation. Upon examining the district court's jury instruction, one would likely find that if the agent was not specifically authorized to commit the acts, then the conduct was within the agent's authority and thus the corporation is liable. However, the court erred in this instruction as there is no precedent to validate that if the agent is specifically authorized that is all that is needed to find the corporation liable. Further, the district court failed to instruct the jury that the acts were committed by an employee within a managerial capacity.

Additionally, this Court should reverse the district court's jury verdict and remand the case to the district for a new trial because the jury instruction on corporate criminal liability constituted plain error. Plain error is any error that violates substantial rights. By failing to give a proper jury instruction on corporate criminal liability, the district court violated Ionia's rights to due process and a trial by jury under the Fifth and Sixth Amendments to the United States Constitution, respectively. The jury instruction failed to provide instructions consistent with the principles of the burden of persuasion and proof beyond a reasonable doubt. Further, the jury instruction misled and confused the jury thereby preventing the jury from making all the determinations required to enter a conviction. The lack of a jury determination violated Ionia's Sixth Amendment right to a trial by jury. Lastly, this Court should revisit its holding in New York Central & Hudson River Railroad Company v. United States to align the goals of corporate

criminal liability with the principles of criminal law and only punish those who truly commit wrongs and deserve criminal punishment.

ARGUMENT

I. THE DISTRICT COURT ERRED BY FAILING TO PROPERLY INSTRUCT THE JURY ON CORPORATE CRIMINAL LIABILITY BASED UPON SUPREME COURT PRECEDENT AND FEDERAL STATUTORY LAW.

The district court erred in its instructions to the jury by improperly instructing the concepts of corporate criminal liability. According to the Act to Prevent Pollution from Ships (APPS), a person who violates the Act commits a class D felony. 33 U.S.C. § 1908 (2000). Also pursuant to the Act, a “person” includes a public or private corporation. 33 U.S.C. § 1901(a)(8) (2000). The Court erred upon its lack of requiring the jury to find Ionia’s agents were acting both within the scope of their employment *and* with an intent to benefit Ionia. Further, the jury instructions failed to include that the employees of Ionia must be found to be a managerial employees. When an appellant does not challenge jury instructions at the trial level, the appellate court is to review the instructions for plain error. Johnson v. United States, 520 U.S. 461, 466-67 (1997). This court does not treat mistaken jury instructions as a harmless matter. Carella v. California, 491 U.S. 263, 268 (1989) (Scalia, J., concurring). The constitutional right to a jury trial is essential in the way the law should be enforced and justice is served. Id. If the district court’s jury instruction constitutes plain error, reversal and remand for a new trial is required. United States v. Mount, 161 F.3d 675, 678 (11th Cir. 1998).

A. The District Court’s Jury Instructions Permitted the Jury to Convict Ionia Without Finding the Employees Acted with an Intent to Benefit Ionia.

This Court has found that a corporation is liable when its agents are acting within the scope of their employment and those acts are intended to benefit the corporation. America Society of Mechanical Engineers, Inc. v. Hydrolevel Corporation, 456 U.S. 556, 588 (1982).

Consistent with this finding, the Second Circuit has ruled that a corporation is vicariously liable only when the employees who acted criminally did so with an intent to benefit the corporation.

United States v. International Brotherhood Teamsters, 141 F.3d 405, 409 (2d Cir. 1998).

Particularly, when an agent's act is done against specific orders from a principal, such act must be done with an intent to benefit the principal. New York Central & Hudson River Railroad Company v. United States, 212 U.S. 481, 493 (1909). The District Court failed to instruct the jury properly that both elements were necessary to find Ionia criminally liable.

At trial, the District Court heard evidence from four crew members that Ionia had a stringent policy against improperly disposing of oily waste and bilge water and that each employee was trained and sworn to abide by this policy. Ionia Management, S.A., 526 F. Supp. 2d at 323. Clearly, the crew room did not follow company policy when it committed the criminal acts in question, consisting of acts that went directly against the policy. Further, the fact that the employees chose to go against company policy shows the intent to benefit the corporation was lacking. As a matter of public policy, companies instill policies and regulations that they expect their employees to comply with in order for the company to benefit and run according to plan.

The District Court's jury instructions on the concept of agency and corporate criminal liability stated in pertinent part:

You must find that the Government has proven beyond a reasonable doubt that acts attributable to Ionia were acts or omissions of its agents performed "within the scope of their employment" with Ionia as I will now define that term. An act of omission that was specifically authorized by the corporation would be within the scope of the agent's employment. Even if the act or omission was not specifically authorized, it may still be within the scope of the agent's employment if (1) the agent acted for the benefit of the corporation and (2) the agent was acting within his authority. It is not necessary that the Government prove that the corporation was actually benefited, only that the agency intended it would be.

Ionia Management, S.A., 526 F. Supp. 2d at 325.

A layperson hearing these instructions would likely find that if the corporation specifically authorized the conduct, then that conduct was within the agent's employment and thus the corporation is liable. Only if the jury finds that the agent was not specifically authorized, then both the intent to benefit and acting within the agent's authority or scope of employment is to be examined and must be fulfilled to find Ionia liable. However, this is not the true test. As established, this Court has found that both elements are required. There is no precedent stating that if the agent is specifically authorized, that is all that is needed to find the corporation liable. Per se reversal is necessary if a court permits instructions that are contrary to the law. United States v. Milstein, 401 F.3d 53, 65 (2d Cir. 2005). Therefore, the District Court failed in its instruction to the jury to clearly establish that both an intent to benefit Ionia and the act being within the scope of the agent's employment was necessary to find Ionia vicariously liable. Accordingly, a new trial and remand is required.

B. The District Court Failed to Instruct the Jury that for a Corporation to be Criminally Liable the Illegal Action Must Be Committed by a Managerial Employee.

This Court has recently established that a corporation will be held liable for the reckless acts of its employees who are employed in a managerial capacity while acting within the scope of their employment. Exxon Shipping Company v. Grant Baker, 128 S. Ct. 2605, 2614 (2008). A managerial employee is one who supervises other employees and is responsible for and has authority over a particular aspect of the corporation's business. Id. The District Court failed to instruct the jury of the necessity of the agent being employed in a managerial capacity by Ionia, thus requiring a new trial.

A corporation is protected against punitive awards when its agent was not acting as a managerial employee. Cooper Industries, Incorporated v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001). Nearly two centuries ago, this Court established that holding innocent private shipping corporations liable for all illegal conduct performed by its officers and crew would make it nearly impossible to allow the corporations to protect themselves from a loss. The Amiable Nancy, 16 U.S. 546, 558-59 (1818). The Court found that a ship operator was entitled to reimbursement for punitive damages the district court had found it liable for. Id. at 562. Thus, the court found that corporations are obligated to pay compensatory damages for the wrongs committed by the officers and crew but are not bound to pay punitive damages. Id. at 559.

This Court further clarified the scope of which types of agents would specifically bind the corporation to liability in Exxon Shipping Company v. Grant Baker. 128 S. Ct. at 2614. Following a catastrophic oil spill from a tanker off the coast of Alaska, the Court found that the tanker's captain was intoxicated at the time the incident occurred. Id. at 2613. The captain left a difficult navigation course up to an unlicensed third mate, an instruction which was against Exxon's company policies. Id. at 2612. At trial, instructions to the jury were that "a corporation is responsible for the reckless acts of employees acting in a managerial capacity in the scope of their employment." Id. at 2614. The Ninth Circuit upheld that jury instruction explaining corporate liability, and the Supreme Court accepted this definition. Id. This Court was equally divided on the issue of whether employers are liable for punitive damages on behalf of managerial employees, and thus gave deference to the Ninth Circuit's decision finding that a corporation was responsible for those acts committed by managerial employees. Id. at 2616.

While Exxon dealt with punitive damages and tort liability in a major disaster caused by the recklessness of its employee, the prerequisite of a managerial employee committing the illegal act in order for corporate criminal liability to be established must be considered to ensure some degree of corporate protection. Punitive damages and criminal convictions are both meant to punish a corporation that is vicariously liable for the acts of its employees. Further, the purpose of punitive damages punishing the tortfeasor is of a lower degree of punishment than harshly convicting a criminal defendant. As this Court reasoned in The Amiable Nancy, a corporation being liable for every illegal act an employee commits would be detrimental to the corporate economy in the United States. With many companies already having in place strict company policies and managerial employees to administer those policies, large corporations would find it nearly impossible to have every employee in check at all times.

As the District Court failed to instruct the jury that the illegal action must be committed by a managerial company in order to find the corporation vicariously liable, the case should be accordingly remanded and a new trial is in order.

II. THE DISTRICT COURT'S INSTRUCTION ON CORPORATE CRIMINAL LIABILITY IS NOT CONSISTENT WITH GENERAL PRINCIPLES OF CRIMINAL LAW AS PRESCRIBED IN THE FIFTH AND SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION, AND THE U.S. SUPREME COURT SHOULD REVISIT ITS HOLDING IN *NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY V. UNITED STATES*.

The Fifth Amendment to the United States Constitution states that no person shall be deprived of life, liberty, or property without due process of law. U.S. CONST. amend. V. Due process applies not only to civil cases and property rights but also in criminal cases, and the process shall be consistent with fundamental principles of justice and liberty. Ex Parte Estrada, 93 F. Supp. 713, 715 (N.D. Tex. 1950). The United States Constitution further provides that in

all criminal proceedings, the accused shall enjoy the right to a public trial by an impartial jury. U.S. CONST. amend. VI. When an appellant does not challenge jury instructions at the trial level, the appellate court shall review the instructions for plain error. Johnson, 520 U.S. at 466-67. If the district court's jury instruction constitutes plain error, reversal and remand for a new trial is required. Mount, 161 F.3d at 678.

Plain error is error that affects substantial rights of the accused and the fairness, integrity, and reputation of the judicial proceedings. United States v. Goldstein, 442 F.3d 777, 781 (2d Cir. 2006). The district court committed plain error when giving the jury instructions on corporate criminal liability by failing to provide instructions consistent with the principles of proof beyond a reasonable doubt and the principle that the burden of persuasion rests with the government thereby violating Ionia's Fifth Amendment right to due process. Further, the district court committed plain error in giving the jury instructions on corporate criminal liability because the jury instructions misled or confused the jury thereby depriving Ionia of its Sixth Amendment right to a trial by jury. The Court also should revisit its holding in New York Central & Hudson River Railroad Company v. United States to align the principle of corporate criminal liability with the goals of criminal prosecution.

A. The District Court's Jury Instruction Constituted Plain Error by Permitting the Jury to Convict when the Government was not Required to Maintain the Burden of Persuasion and Submit Proof Beyond a Reasonable Doubt in Violation of Ionia's Fifth Amendment Rights.

Due process commands that no person lose his liberty or property unless the government has satisfied the burden of persuasion, and to that end the reasonable doubt standard is an indispensable element of criminal law. In re Winship, 397 U.S. 358, 363-64 (1970). Due process forbids a conviction of a crime without proving the elements of the crime beyond a reasonable doubt. Bunkley v. Florida, 538 U.S. 835, 840 (2003). Due process protects the

accused against a conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which the accused has been charged. Francis v. Franklin, 471 U.S. 307, 313 (1985). Furthermore, due process prohibits a jury charge that relieves the prosecution of the burden of persuasion of proof beyond a reasonable doubt of every essential element of a crime. Francis, 471 U.S. at 314. The jury must be instructed that the crime must be proven beyond a reasonable doubt or otherwise the accused must be acquitted. Wilson v. United States, 232 U.S. 563, 569-70 (1914).

The burden of persuasion consisting of proof beyond a reasonable doubt applies in both federal proceedings as well as state proceedings, and such burden of proof rests on the prosecution. Sullivan v. Louisiana, 508 U.S. 275, 278 (1993). The burden of persuasion standard of proof beyond a reasonable doubt provides concrete substance for the principle of the presumption of innocence in favor of the accused, a presumption that is a bedrock, elementary, and axiomatic principle whose enforcement lies at the foundation of criminal law. In re Winship, 397 U.S. at 363; Coffin v. United States, 156 U.S. 432, 453 (1895).

The trial court's jury instructions run afoul of these due process rights by failing to require proof beyond a reasonable doubt and maintaining the burden of persuasion on the government. Regarding the requirement that the government proves every element beyond a reasonable doubt, the jury gave the jury instruction in pertinent part that the jury was instructed that Ionia, as a corporation, is legally responsible for the acts or omissions of its employees or agents under certain circumstances. Ionia Management, S.A., 526 F. Supp. 2d at 325. The problematic language with this instruction is the phrase "is legally responsible". The due process requirements of the Fifth Amendment prohibit jury instructions that relieve the government of the burden of persuasion. This instruction stating that Ionia "is legally responsible" relieves the

government of its burden of persuasion and proving every element with proof beyond a reasonable doubt.

Even with the caveat “under certain circumstances” at the end of the sentence, the government no longer has to carry its burden in criminal cases. Even if the government is required to prove the “certain circumstances”, the government need not go any further to show liability attaches to the company because the instruction states that Ionia is legally responsible in those certain circumstances. Further, the instruction destroys the bedrock principle of the presumption of innocence. The jury instruction destroys Ionia’s presumption of innocence by dispensing with the burden of persuasion of every element of the crime.

Another jury instruction violates Ionia’s due process rights. In pertinent part, the trial court instructed the jury that the government had to prove beyond a reasonable doubt that acts attributable to Ionia were acts performed within the agent’s scope of employment. Id. Further, the court instructed that acts specifically authorized would be in the scope of employment, or acts not authorized but done on behalf of the corporation and within the agent’s authority may make the act within scope of employment. Id. The trial court lastly stated that if the agent was acting within the scope of employment, the fact that the agent’s act was illegal, contrary to the employer’s instructions, or against the corporation’s policies will not necessarily relieve the corporation of legal responsibility. Id. This series of instructions nullifies the presumption of innocence by relieving the government of its obligation to prove every element of the crime.

This latter combination of instructions, which the trial court read in conjunction with each other, holds Ionia legally responsible for any action of its agents or employees. The instructions state that Ionia is responsible for acts of its agents if authorized, acts not authorized but done for the benefit of the corporation and within the agent’s authority, and illegal or acts contrary to

policy do not fall outside scope of employment. In the simplest terms, Ionia is being held responsible for any act of its agents regardless of the circumstances. The result of these instructions is the government now only needs to establish the agent was an employee of the corporation and the corporation then becomes liable for any acts of the agent. However, actions that are illegal, against the corporation's policies, or contrary to the employer's instructions are acts done outside the scope of employment. Ionia had in place policies specifically prohibiting the actions taken by the crew in the engine room of the M/T Kriton. Criminal law is established to punish wrongdoing. Under these instructions, Ionia is being punished not for what the corporation did wrong, but what a group of rogue employees did wrong.

The instructions therefore negate the presumption of innocence and the government is relieved of its burden of proof. This effect violates Ionia's constitutional rights to due process under the Fifth Amendment to the United States Constitution and therefore constitutes plain error. The conviction should therefore be reversed, the case remanded to the trial court with directions to remedy the instructions, and Ionia should receive a new trial.

B. The District Court's Jury Instruction Constituted Plain Error because the Instruction Misled or Confused the Jury Violating Ionia's Sixth Amendment Right to a Trial by Jury.

The United States Constitution gives the criminal defendant the right to demand the jury find him guilty of all the elements of the crime. United States v. Gaudin, 515 U.S. 506, 511 (1995). Juries are assigned the sole task of truth finding in criminal cases. Carella, 491 U.S. at 265. It is well settled that the defendant is entitled to have the jury properly instructed on the law. Bird v. United States, 180 U.S. 356, 361 (1901). The trial court's judgment may be reversed and the case remanded for a new trial based on an incorrect or misleading jury instruction. Parker Building Services Company Incorporated v. Lightsey, 925 So. 2d 927, 933

(Ala. 2005). Further, a judge may not give jury instructions that may confuse the jury in consideration of the issues of the case. Time Incorporated v. Hill, 385 U.S. 374, 393-96 (1967). To determine whether a jury instruction is confusing, the instruction must be examined to determine if it is understandable by a jury of ordinarily intelligent laypersons. Brickner v. Normandy Osteopathic Hospital Incorporated, 746 S.W.2d 108, 117 (Mo. Ct. App. 1988).

A judge may not give jury instructions that, when applied to the facts, are misleading or well calculated to mislead the jury. Bollenbach v. United States, 326 U.S. 607, 614 (1946). Even if the jury instruction correctly states the law, the instruction cannot be given if it might mislead the jury. Oak Brook Park District v. Oak Brook Development Company, 524 N.E.2d 213, 224 (Ill. App. 2d Dist. 1988). An instruction is misleading where the instruction is subject to two constructions and one construction is erroneous. McGlone v. Superior Trucking Company Incorporated, 363 S.E.2d 736, 745 (W. Va. 1987). A jury instruction is also misleading if it requires further explanation. State v. Douget, 507 So.2d 283, 288 (La. Ct. App. 3d Cir. 1987). Additionally, a jury instruction that implies the existence of facts of which there is no evidence or which have not been proved is misleading. Fuller v. Darnell, 129 So. 915, 916 (Fla. 1930). Furthermore, a jury instruction is misleading because it does not fully inform the jury on the point covered. George v. Las Angeles Railway Company, 58 P. 819, 820-21 (Cal. 1899).

The problem instruction given by the trial court was the instruction describing what acts or omissions were within the scope of employment of the agent and when Ionia is legally responsible for acts of its agents. The trial court first stated that the jury has been instructed that Ionia is legally responsible for the acts or omissions of its agents under certain circumstances. Ionia Management, S.A., 526 F. Supp. 2d at 325. The jury instruction then states that an act or

omission specifically authorized by the corporation would be within the scope of the agent's employment. Id. Then the court goes on to state that even if the act is not authorized, the jury may find the act within the scope of the agent's employment if the agent acted for the benefit of the corporation and the agent acted within his authority. Id. The court then stated that if the agent is within the scope of his employment, the fact that the agent acted against corporate policy, illegally, or contrary to corporate instructions will not necessarily relieve the corporation of liability. Id. This set of instructions both confuses and misleads the jury.

As stated in Hill, a court may not give jury instructions that confuse the jury in consideration of the issues of the case. These instructions confused the jury on what issues to consider in finding Ionia liable for the acts of its agents. First, the court attempts to say in broad strokes that Ionia is responsible for its agent's acts in certain circumstances. Yet, nowhere in the record did the trial court elaborate or clarify what are the "certain circumstances" under which Ionia is to be held responsible. Any ordinarily intelligent layperson would be confused as to what circumstances the trial court is referencing. The trial court then further confused the issue of what the jury must find to hold Ionia responsible by stating that acts or omissions of Ionia's agents done within the scope of the agent's employment are acts attributable to Ionia. The trial court has now confused the issue of what must be proven to hold Ionia responsible by giving multiple grounds for finding criminal liability, yet the trial court made no attempt to instruct the jury whether both "certain circumstances" and acts in the scope of employment must be proven or only one of these theories must be proven. Further, the instructions are misleading under Douget because they require further explanation.

This problem is compounded by the trial court's instructions on the scope of employment. The defining of scope of employment provided several premises upon which the

jury could find the acts of the agent were attributable to Ionia. Acts specifically authorized by the corporation, acts not authorized but done for the benefit of the corporation and under the agent's authority, or even acts that are illegally and against corporate policies are all grounds upon which the jury could render a guilty verdict against Ionia. The scope of employment instructions confuse the ordinarily intelligent layperson because the juror is left to determine if all of these situation must be proven, whether only one must be proven, or if these instructions require the jury to find any act of the agent is attributable to Ionia. The accused has the right to have the jury properly instructed and the jury was not properly instructed here.

These instructions also mislead the jury. Under Oak Brook Park District and Bollenbach the jury may not be given instructions that mislead the jury even if the instructions are a correct statement of the law. Assuming arguendo the instructions are a proper statement of the law, the instructions on acts within the scope of employment misled the jury to believe that any act of the agent is within the scope of his employment. The instruction misleads the jury in this fashion by stating that acts authorized by the corporation, acts unauthorized by the corporation, or even acts that are illegally and against corporate policies may all be acts attributable to Ionia. The instructions misled the jury by making any act of an agent within the scope of employment. The government then need only prove that the employee was an agent of the corporation and committed an act as an agent. This misleads the jury into rendering acts attributable to Ionia when more proof is required by the instructions. The point of the instructions is not fully covered and under George these types of instructions mislead the jury.

The jury instructions making Ionia legally responsible for the acts of its agents confuse and mislead the jury. Ionia, as the criminal defendant, has the right for the jury to determine the facts and is therefore entitled that the jury be properly instructed on the law to properly

determine those facts. Because the instructions are confusing and misleading, Ionia should have the trial court's judgment reversed and the case remanded to the district court for a new trial.

C. The Court should revisit its holding in *New York Central & Hudson River Railroad Company v. United States* to align the goals of corporate criminal liability with the principles of criminal law.

In *New York Central & Hudson River Railroad Company v. United States* the court dealt with a case of rebates on tariff rates to transport goods by the railroad company. 212 U.S. at 489. New York Central and Hudson Railroad agreed to give rebates to shipments that ultimately reduce the price for shipment of goods below the established rate of 23 cents per 100 pounds. Id. These rebates were coordinated by the traffic managers at New York Central. Id. at 490. In examining the issue of corporate liability for the acts of the traffic managers, the court noted that at the common law a corporation could not commit a crime. Id. at 492. The criminal charge in the case stemmed from a statutory provision enacted by Congress, the Elkins Act, that stated a corporation could commit a misdemeanor when the person acting for corporation violated the act. Id. at 491. The Court in this case stated the established civil liability principle that corporations may be held responsible for damages for the acts of its agents within the scope of his employment. Id. at 493. The Court then stated that the Court went only a step further in applying the principle of civil liability by holding the act of the agent exercising his authority may be controlled in the interests of public policy by imputing his act to his employer and imposing penalties upon the corporation. Id. at 494.

The decision in *New York Central & Hudson River Railroad* needs to be revisited as it has been misapplied and does not promote the principle of punishment embedded in criminal law. The federal courts in cases of corporate criminal liability have relied on the *New York Central & Hudson River Railroad* case for the position that these trial courts must apply the rule

of respondent superior and impose corporate criminal liability.¹ Rather, the Court in New York Central & Hudson River Railroad did not state such a broad principle and the circuit courts have mistakenly followed this case. *See* United States v. Beusch, 596 F.2d 871 (9th Cir. 1979); Continental Banking Co. v. United States, 281 F.2d 137 (6th Cir. 1960); United States v. Basic Construction Co., 711 F.2d 570 (4th Cir. 1983). The Court in New York Central & Hudson River Railroad only interpreted whether corporate criminal liability could be imposed by statute and not applicable to every criminal case of employee wrongdoing.² Therefore, the holding from New York Central & Hudson River Railroad has been misapplied.

The Court should revisit New York Central & Hudson River Railroad to align the case with the principle of punishment in criminal law. Criminal law functions to punish those who commit wrongs.³ Criminal punishment therefore should only apply to those deserving of punishment. In the case of corporations, the corporation should not be held liable for acts of its agents when the corporation has done everything in its power to prohibit and prevent such wrongdoing.⁴ Criminal law is also meant to deter criminal activity.⁵ When nothing more can be expected from the corporation, the corporation has satisfied its obligation to follow the criminal law.⁶

Given these principles and the holding in New York Central & Hudson River Railroad, the trial court could so instruct the jury as to hold Ionia responsible for a criminal act it was not legally responsible for and had done everything it could to prevent a violation of the law. Ionia

¹ Andrew Weissman Et Al., Reforming Corporate Criminal Liability to Promote Responsible Corporate Behavior (Oct. 2008), www.instituteforlegalreform.com/get_ilr_doc.php?id=1218.

² Id.

³ John Hasnas, Rethinking Vicarious Criminal Liability: Corporate Culpability for White-Collar Crime, (Aug. 15, 2006), <http://www.heritage.org/Research/LegalIssues/wm1195.cfm>.

⁴ Id.

⁵ Andrew Weissman Et Al., Reforming Corporate Criminal Liability to Promote Responsible Corporate Behavior (Oct. 2008), www.instituteforlegalreform.com/get_ilr_doc.php?id=1218.

⁶ Id.

had a corporate policy in place that directed its employees to use the pollution prevention equipment and document the proper records. However, due to the misapplication and misunderstanding of the reach of New York Central & Hudson River Railroad, Ionia has become liable for acts of any employee regardless of Ionia's corporate prestige and good faith efforts to comply with the law. Ionia is not deserving of punishment in this situation. If anyone is to be held criminally liable, the rogue agents acting contrary to the corporation's policies are the criminally responsible parties. Given this application, New York Central & Hudson River Railroad fails to pursue the goals and principles of criminal law. Therefore, this Court should revisit the holding in this case and provide direction for the lower federal courts to correctly interpret and apply the principle of corporate criminal liability.

CONCLUSION

The district court failed to properly instruct the jury that it must find the criminal acts were committed by an agent while acting within the scope of his employment and with the intent to benefit the corporation. The district court further failed in its instruction by not ordering the agent was a managerial employee. The district court's jury instruction on corporate criminal liability is not consistent with general principles of criminal law because the instruction violates Ionia's Fifth and Sixth Amendment rights. This Court should revisit its holding in New York Central & Hudson River Railroad Company v. United States to align the goals of corporate criminal liability with the principles of criminal law. Petitioner respectfully prays this Court reverse the judgment of the Court of Appeals and remand the case to for a new trial.

Respectfully Submitted,

Team #18
Attorneys for the Defendant