1994

Adapting the Responsible Corporate Officer Doctrine in Light of United States v. MacDonald & Watson Waste Oil Co.

Jeremy D. Heep

Comment

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In *United States v. MacDonald & Watson Waste Oil Co.*[1] (hereinafter *MacDonald & Watson*), the First Circuit examined the application of the Responsible Corporate Officer (RCO) doctrine to "knowing" environmental crimes.[2] Specifically, the jury convicted the defendant, a corporate officer, of knowingly transporting hazardous waste to a facility without a permit in violation of the Resource Conservation and Recovery Act (RCRA).[3] The prosecution conceded that it had no proof the defendant had actual knowledge of the illegal shipment.[4] Instead, the trial court instructed the jury that it could find the requisite mens rea—knowledge—based on the defendant's status as an RCO.[5] On appeal, the First Circuit reversed the conviction, holding that the RCO instruction circumvented RCRA's "knowing" requirement.[6]

Enforcement of environmental crimes has increased dramatically over the past decade,[7] and federal, state, and local governments have been prosecuting high level corporate officers

1. 933 F.2d 35 (1st Cir. 1991).

2. *Id.* at 50-55. Specifically, the court analyzed the mens rea requirement of the Resource Conservation and Recovery Act § 3008(d)(1), 42 U.S.C. § 6928(d)(1) (1988) [hereinafter RCRA].

3. *MacDonald & Watson*, 933 F.2d at 50. The jury found that the defendant violated 42 U.S.C. § 6928(d)(1).

4. *MacDonald & Watson*, 933 F.2d at 50.

5. *Id.* at 50-51. *See infra* text accompanying note 74.

6. *Id.* at 55.

7. EPA has recently reported its criminal enforcement activity as follows:

for environmental crimes with increasing vigor.[8] Although prosecutors have increasingly turned to the RCO doctrine to facilitate a showing of an accused's mens rea, the scope and breadth of the doctrine remains ambiguous. RCRA's criminal provisions provide an excellent vehicle for analysis of the RCO doctrine.[9]

	FY82	FY83	FY84	FY85	FY86	FY87	FY88	FY89	FY90	FY91	FY92
Referrals to DOJ	20	26	31	40	41	41	59	60	65	81	107
Cases successfully prosecuted	7	12	14	15	26	27	24	43	32	48	61
Defendants charged	14	34	36	40	98	66	97	95	100	104	150
Defendants convicted	11	28	26	40	66	58	50	72	55	82	99
Months sentenced	—	—	6	78	279	456	278	325	745	963	1135
Months served	—	—	6	44	203	100	185	208	222	610	744
Months probation	—	534	552	882	828	1410	1284	1045	1176	1713	2478

ENVTL. PROTECTION AGENCY, ENFORCEMENT ACCOMPLISHMENTS REPORT: FY 1992 Appendix (1993).

8. Between 1983 and 1992, "[e]ighty percent [(451 of 565)] of the individuals prosecuted for environmental crimes were officers and managers of corporations." Barry M. Hartman & Charles A. De Monaco, *The Present Use of the Responsible Corporate Officer Doctrine in the Criminal Enforcement of Environmental Laws*, 23 Envtl. L. Rep. (Envtl. L. Inst.) 10145, 10146, & n.8 (March 1993); *see also* Eva M. Fromm, *Commanding Respect: Criminal Sanctions for Environmental Crimes*, 21 ST. MARY'S L.J. 821, 823 (1990) (giving reasons for rising number of prosecutions for environmental crimes); Karen M. Hansen, *"Knowing" Environmental Crimes*, 16 WM. MITCHELL L. REV. 987, 987 (1990) (discussing importance of understanding "knowingly" requirement in light of increasing prosecutions for environmental crimes); Larry Howell, *Environmental Crimes: The Boom in "Busting" Corporations and Their Responsible Officers*, 16 AM. J. TRIAL ADVOC. 417, 417-19 (1992) (describing increase in prosecutions of corporate officials for environmental crimes); Steven M. Morgan & Allison K. Obermann, *Perils of the Profession: Responsible Corporate Officer Doctrine May Facilitate a Dramatic Increase in Criminal Prosecutions of Environmental Offenders*, 45 SW. L.J. 1199 (1991); James M. Strock, *Environmental Criminal Enforcement Priorities for the 1990s*, 59 GEO. WASH. L. REV. 916, 917-18 (1991) (discussing EPA's increased emphasis on criminal enforcement). Corporations may also face criminal prosecution. *See generally* Hansen, *supra* at 995-97 (describing the "collective knowledge" doctrine as applied to corporate defendants); Alan Zarky, *The Responsible Corporate Officer Doctrine*, 5 Toxics Law Rep. (BNA) 983, 984 (January 9, 1991) (discussing employers' vicarious liability for acts of its employees in environmental cases).

9. *See infra* notes 39-42 and accompanying text (explaining how the RCO doctrine's policy has been infused into the interpretation of "knowingly"). *See* M. Diane Barber, *Fair Warning: The Deterioration of Scienter Under Environmental Criminal Statutes*, 26 LOY. L.A. L. REV. 105 (1992) (arguing against the congressional trend of lowering mens rea requirements for environmental crimes); Kevin L. Colbert, *Considerations of the Scienter Requirement and the Responsible Corporate Officer Doctrine for Knowing Violations of Environmen-*

Resolution of the ambiguity surrounding the doctrine carries tremendous implications for corporate officers across the country, because a violation of RCRA's criminal provisions constitutes a serious felony offense.[10]

The original RCO doctrine allowed juries to convict a corporate official of a strict liability crime when the officer did not participate in or know of the crime, but had a responsible position of authority in relation to the crime. This Comment examines the extent to which courts should modify the original doctrine in light of the ambiguous "knowledge" requirement of RCRA's criminal provisions. Part I focuses on judicial application of the RCO doctrine. Part II describes the First Circuit's decision in *MacDonald & Watson* and its reason for rejecting the trial court's application of the doctrine. Part III concludes that although the First Circuit was technically correct in its refusal to apply the RCO doctrine as articulated in *MacDonald & Watson*, courts should nonetheless adapt the doctrine to encompass RCRA's "knowingly" requirement.

I. THE RCO DOCTRINE AND RCRA'S AMBIGUOUS KNOWLEDGE REQUIREMENT

Federal courts have generally focused on two related issues in interpreting RCRA's criminal provisions: whether the prosecution must establish knowledge as to each element of a RCRA criminal violation, and whether application of an RCO doctrine may serve to establish knowledge of illegal acts. The RCO doctrine and its underlying policies are important in the resolution of both issues.

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tal Statutes, 33 S. TEX. L.J. 699, 701-02 (1992); Todd W. Grant, *The Responsible Relationship Doctrine of* United States v. Park: *A Tool for Prosecution of Corporate Officers Under Federal and State Environmental Laws*, 11 TEMP. ENVTL. L. & TECH. J. 203, 205 (1992); Lisa Ann Harig, *Ignorance Is Not Bliss: Responsible Corporate Officers Convicted of Environmental Crimes and the Federal Sentencing Guidelines*, 42 DUKE L.J. 145, 147 (1992) (stating application of the RCO doctrine to environmental statutes with scienter has resulted in reduced burden of proof); Howell, *supra* note 8, at 440; John F. Seymour, *Civil and Criminal Liability of Corporate Officers Under Federal Environmental Laws*, 20 Env't Rep. (BNA) 337, 341-43 (June 9, 1989). *But see* Hartman & De Monaco, *supra* note 8, at 10151 (stating that the doctrine "does not eliminate, or even speak to, the applicable statutory requirements for knowledge in criminal litigation").

10. A conviction results in a fine of up to $50,000 for each day of violation, up to five years imprisonment, or both. 42 U.S.C. § 6928(d) (1988). Additionally, the court may double the maximum punishment for a second conviction. *Id. See generally* Fromm, *supra* note 8, at 825-28 (explaining penalties contained in RCRA); Morgan & Obermann, *supra* note 8, at 1209-13 (analyzing the provisions in light of the federal sentencing guidelines).

A. THE ORIGINAL RESPONSIBLE CORPORATE OFFICER DOCTRINE

The Supreme Court developed the original RCO doctrine to apply to strict liability statutes protecting the public welfare. The original doctrine provides that a person may incur criminal liability for a corporation's violation of a public welfare statute regardless of whether he or she actually participated in or knew about the criminal conduct, if "(1) the person was an officer of the corporation and not merely an employee; (2) the person was in a responsible position of authority to correct the violation; and (3) the person failed to do so."[11]

The Supreme Court first articulated the RCO Doctrine in *United States v. Dotterweich*,[12] holding that a conviction under the Federal Food, Drug, and Cosmetics Act (FDCA) of 1938[13] required no showing of mens rea.[14] The Court reasoned that by leaving a mens rea requirement out of the FDCA, Congress preferred to place the hardship of criminal prosecution with corporate officers "rather than to throw the hazard on the innocent public who are wholly helpless."[15] The Court reasoned that corporate officers have "at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers."[16]

The specific issue in *Dotterweich* was whether Congress intended "person" to include individuals as well as corporations.[17] In holding that the FDCA covers individual defendants, the Court stated that this type of legislation "dispenses with the conventional requirement for criminal conduct—awareness of

11. This statement synthesizes the doctrine as stated in two Supreme Court cases, United States v. Park, 421 U.S. 658 (1975), and United States v. Dotterweich, 320 U.S. 277 (1943). Other commentators have extensively treated the development of the RCO doctrine, and this Comment does not focus on this point. *See, e.g.*, KATHLEEN F. BRICKEY, 1 CORPORATE CRIMINAL LIABILITY: A TREATISE ON THE CRIMINAL LIABILITY OF CORPORATIONS, THEIR OFFICERS AND AGENTS §§ 5:15-17 (1992); Hansen, *supra* note 8, at 998-1000; Hartman & De Monaco, *supra* note 8, at 10146-48; Morgan & Obermann, *supra* note 8, at 1200-04.

12. 320 U.S. 277 (1943). In *Dotterweich*, the jury convicted the president and general manager of a drug company of the misdemeanor of adulterating and misbranding drugs. *Id.* at 278. Nonetheless, the prosecution had made no claim of the defendant's knowledge or participation in those illegal acts. *Id.* at 279 (Murphy, J., dissenting).

13. 21 U.S.C. §§ 301-392 (Supp. IV 1938).

14. *Dotterweich*, 320 U.S. at 281.

15. *Id.* at 285.

16. *Id.*

17. *Id.* at 279.

some wrongdoing."[18] Specifically, a court may convict "all who . . . have . . . a responsible share in the furtherance of the transaction which the FDCA outlaws."[19]

Three decades later, in *United States v. Park*,[20] the Supreme Court detailed a prima facie RCO case against a corporate officer:

> the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and . . . he failed to do so. The failure thus to fulfill the duty imposed by the interaction of the corporate agent's authority and the statute furnishes a sufficient causal link.[21]

Central to the Supreme Court's reasoning was that the goal of the FDCA is to protect "the health and well-being of the public"[22] and that corporate officers stand "in [a] responsible relation to a public danger."[23] The Court emphasized that in dealing with such public welfare statutes, "the obligation of the courts is to give them effect so long as they do not violate the Constitution."[24]

B. Application of the RCO Doctrine in RCRA Cases

Federal courts have focused a tremendous amount of attention on the ambiguous mens rea requirement of RCRA's criminal

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18. *Id.* at 281.

19. *Id.* at 284.

20. 421 U.S. 658 (1975). In *Park*, the chief executive officer of ACME Markets, Inc., a major national corporation, challenged his misdemeanor conviction for adulterating foods under the FDCA. *Id.* at 666. Specifically, the corporation had not sufficiently protected a food warehouse from rodent infestation even after several warnings for similar offenses. *Id.* at 660. The Court held that the trial court did not err in instructing the jury that it must find that the defendant "had a responsible relation to the situation," and "by virtue of his position . . . had . . . authority and responsibility to deal with the situation." *Id.* at 674 (internal quotes omitted).

21. *Id.* at 673-74. The trial court instructed the jury that it must find "that the individual had a responsible relation to the situation even though he may not have participated personally." *Id.* at 665 n.9. The Supreme Court also specified that a defendant may raise a defense of powerlessness or impossibility. *Id.* at 673; *see also* Brickey, *supra* note 11, § 5:18 (explaining subsequent development of "objective impossibility" defense).

22. *Park*, 421 U.S. at 672.

23. *Id.* at 668 (citing *Dotterweich*, 320 U.S. at 280-81).

24. *Id.* at 673.

provisions.[25] In particular, the first two subsections of § 6928(d) provide for criminal sanctions[26] according to mens rea:

> [a]ny person who—
> (1) knowingly transports or causes to be transported any hazardous waste . . . to a facility which does not have a permit under this subchapter . . . ; [or]
> (2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter—
> (A) without a permit . . .; or
> (B) in knowing violation of any material condition or requirement of such permit;[27]

1. Mens Rea in Each Element of a RCRA Offense

Although the statute employs the term "knowingly,"[28] courts have differed as to which elements of the statute "knowingly" modifies, asking "how far down the sentence the word . . . applies."[29] Courts have demonstrated increasing acceptance of the RCO doctrine in RCRA interpretation by relying on the doctrine's underlying policies to resolve these statutory ambiguities. Because Congress enacted RCRA in order to protect the public health from environmental hazards, courts have conducted statutory analysis differently when examining RCRA than when examining other types of statutes.

The ambiguity in section one of the statute exists because the term "knowingly" could apply to any of the following elements:[30] (1) defendant transported waste to a facility;[31] (2) the

25. *See, e.g.*, United States v. Dean, 969 F.2d 187 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1852 (1993); United States v. Speach, 968 F.2d 795 (9th Cir. 1992); United States v. Hoflin, 880 F.2d 1033 (9th Cir. 1989), *cert. denied*, 493 U.S. 1083 (1990); United States v. Johnson & Towers, Inc., 741 F.2d 662 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985).

26. *See supra* note 10 (explaining the criminal sanctions).

27. 42 U.S.C. § 6928(d)(1988). Part 2 continues: "or (C) in knowing violation of any material condition or requirement of any interim status regulations or standards. *Id.*

28. One commentator has concluded that the mens rea requirement in this statute is only one of "general intent" rather than "specific intent." Andrea M. Fike, *A Mens Rea Analysis for the Criminal Provisions of the Resource Conservation and Recovery Act*, 6 STAN. ENVTL. L.J. 174, 195, 197 (1986-87) (using the term "general intent" to connote awareness of acts rather than of illegality).

29. *Speach*, 968 F.2d at 796. *See also Dean*, 969 F.2d at 190.

30. One commentator has suggested that the provision divides into the following six elements:

> (1) that [defendant is] transporting a material to a facility; (2) that the material is a hazardous waste; (3) that the facility does not have a permit; (4) that the facility is required to have a permit; (5) that regulations require a permit; and (6) that transporting to a facility without a permit is unauthorized or illegal.

waste was hazardous waste;[32] (3) the facility did not have a permit.[33] In addition, courts could interpret the statute to require

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Rebecca S. Webber, *Element Analysis Applied to Environmental Crimes: What Did They Know and When Did They Know It?*, 16 B.C. ENVTL. AFF. L. REV. 53, 84 (1988).

31. Defendant must have "knowingly" transported the waste. *See, e.g.*, United States v. Dean, 969 F.2d 187, 191 (6th Cir. 1992); United States v. Johnson & Towers, Inc., 741 F.2d 662, 668 (3d Cir. 1984) (stating that "knowingly" refers at least to "treating, storing or disposing" and "hazardous waste" in § 6928(d)(2)), *cert. denied*, 469 U.S. 1208 (1985). Similarly, courts have assumed that "knowingly" applies to "transports or causes to be transported" in § 6928(d)(1), probably because the adjective very obviously modifies the first clause. *See, e.g.*, United States v. Speach, 968 F.2d 795, 797 (9th Cir. 1992).

32. In applying "knowingly" to "hazardous waste" the central issue has been whether a defendant must know that a particular substance is hazardous as defined by RCRA. Courts have answered in the negative, requiring only that a defendant know that the material has some potential to be harmful. *See, e.g.*, United States v. Goldsmith, 978 F.2d 643, 645 (11th Cir. 1992) (per curiam) (rejecting notion that defendant had to know chemicals were hazardous according to EPA definition); United States v. Dee, 912 F.2d 741, 745 (4th Cir. 1990) (holding it was harmless error to instruct the jury that defendants "had to know the substances involved were chemicals, without indicating that they also had to know the chemicals were hazardous"), *cert. denied*, 499 U.S. 919 (1991); United States v. Hoflin, 880 F.2d 1033, 1039 (9th Cir. 1989) (upholding a jury instruction requiring that "[d]efendant knew that the chemical wastes had the potential to be harmful to others or to the environment, or in other words, it was not an innocuous substance like water"), *cert. denied*, 493 U.S. 1083 (1990); United States v. Greer, 850 F.2d 1447, 1452 (11th Cir. 1988) (requiring knowledge that the chemical waste may be harmful to humans or the environment). *Cf.* United States v. Sellers, 926 F.2d 410, 416-17 (5th Cir. 1991) (stating there is no requirement that defendant must know substance is harmful).

33. This provision remains controversial, but the courts of appeals deciding this issue have held that the defendant must have known that the facility did not have a permit under section (1). *Speach*, 968 F.2d at 797 (holding that while section (2) does not require a showing of knowledge of the permit status, section (1) does require knowledge as an element of this offense); United States v. Hayes Int'l Corp., 786 F.2d 1499, 1503-04 (11th Cir. 1986) (holding that it would be no defense "to argue ignorance of the permit requirement" under section (1), but that the prosecution must nonetheless prove knowledge of the permit status of a facility). The better result is not to require knowledge of the permit status under section (1) because courts should read this section parallel to section (2) in order to effectuate its purpose, which is to protect human health and the environment. *See Speach*, 968 F.2d at 798 (Rymer, J., dissenting). Some commentators have treated this issue as one and the same under both §§ 6928(d)(1) and 6928(d)(2). For example, two commentators have stated generally that "knowingly" does not modify the permit requirement under § 6928(d)(2)(A). Jane F. Barrett & Veronica M. Clarke, *Perspectives on the Knowledge Requirement of Section 6928(d) of RCRA After* United States v. Dee, 59 GEO. WASH. L. REV. 862, 878 (1991). *See generally* Gary S. Lincenberg, *Lowering Intent Requirements in Environmental Crimes Cases: What You Don't Know* Can *Hurt You*, 7 CRIM. JUST., Summer 1992, at 28, 30-32 (detailing relevant cases).

knowledge that transporting hazardous waste to a non-permitted facility is illegal.[34]

Similarly, the term "knowingly" in section two is ambiguous because it could apply to the following elements:

(1) defendant treated, stored or disposed of waste;[35]
(2) the waste was hazardous;[36]
(3) defendant did not have a permit *or* violated a permit requirement.[37]

In reaction to this ambiguity, courts have turned to the policies of the original RCO doctrine in deciding whether "knowingly" modifies RCRA's permit requirement. For example, some courts have compared RCRA to the FDCA,[38] deeming RCRA a public welfare statute, which Congress enacted to "protect the national health and environment."[39] The Ninth Circuit stated,

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34. Courts have generally resolved that the defendant did not have to know that its conduct was illegal. *See, e.g., Dean*, 969 F.2d at 190 (stating "we see no basis on the face of the statute for concluding that knowledge of the permit requirement is an element of the crime") (defendant ordered the construction of a pit into which drums of hazardous waste were thrown); *Dee*, 912 F.2d at 745; *Hayes*, 786 F.2d at 1503-04 (holding that ignorance of permit requirement is no defense).

The Supreme Court has extensively elaborated on the ignorance of the law principle in the context of regulation of dangerous materials, holding that courts may presume knowledge of the law. United States v. International Minerals & Chem. Corp., 402 U.S. 558, 565 (1971). *See infra* notes 147-150 and accompanying text (discussing holding and reasoning).

35. *See supra* note 31.

36. *See supra* note 32.

37. Two of three circuits addressing this issue have decided that there is no knowledge requirement regarding the permit status. These courts have relied in large part upon simple statutory construction, noting the absence of the word "knowingly" in section (A) as compared with its presence in section (B). United States v. Dean, 969 F.2d 187, 191 (6th Cir. 1992); United States v. Hoflin, 880 F.2d 1033, 1037-38 (9th Cir. 1989) ("Had Congress intended knowledge of the lack of a permit to be an element . . . it easily could have said so."), *cert. denied*, 493 U.S. 1083 (1990). Interestingly, in *Dean*, the defendant told investigators that he thought RCRA "was a bunch of bullshit." 969 F.2d at 190. *But see* United States v. Johnson & Towers, Inc., 741 F.2d 662, 668 (3d Cir. 1984) (stating that either "omission of the word 'knowing' in (A) was inadvertent or . . . 'knowingly' . . . which introduces subsection (2) applies to subsection (A)"), *cert. denied*, 469 U.S. 1208 (1985).

38. *See supra* notes 13-15, 23 and accompanying text (explaining that the Supreme Court created the RCO doctrine in interpreting the FDCA).

39. *Hoflin*, 880 F.2d at 1038 (quoting Wyckoff Co. v. E.P.A., 796 F.2d 1197, 1198 (9th Cir. 1986)). Other courts have deemed RCRA a public welfare statute. *See, e.g.*, United States v. Hayes Int'l Corp., 786 F.2d 1499, 1503 (11th Cir. 1986) (stating that § 6928 "is undeniably a public welfare statute, involving a heavily regulated area with great ramifications for the public health and safety"); *Johnson & Towers, Inc.*, 741 F.2d at 668; *see also*, United States v. Brittain, 931 F.2d 1413, 1419 (10th Cir. 1991) (explaining that the Clean Water

"There can be little question that RCRA's purposes, like those of the [FDCA], . . . touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection."[40] Similarly, in deciding that "knowingly" does not modify the permit requirement in section two, the Sixth Circuit has stated that statutes which protect the public health and safety are "more likely candidates for diminished mens rea requirements."[41]

When analyzing these provisions, courts have found RCRA's statutory language ambiguous and therefore unhelpful.[42] Courts have also concluded that the legislative history of RCRA's criminal provisions provides little guidance in interpreting the knowledge requirement.[43] In fact, Congress specified that "it had 'not sought to define "knowing" for offenses under subsection (d); that process has been left to the courts under general principles.'"[44]

Act, 33 U.S.C. §§ 1251-1387 (1988), a similar statute, is also a public welfare statute). One court has detailed the purpose of RCRA as follows:

> The overriding concern of RCRA is the grave danger to people and the environment from hazardous wastes. Such wastes typically have no value, yet can only be safely disposed of at considerable cost. Millions of tons of hazardous substances are literally dumped on the ground each year; a good many of these can blind, cripple or kill. *See* 1976 U.S.C.C.A.N. 6238, 6241 & 6249. Many of such substances are generated and buried without notice until the damage becomes evident.

Hoflin, 880 F.2d at 1038.

40. *Hoflin*, 880 F.2d at 1038 (citing United States v. Dotterweich, 320 U.S. 277, 280 (1943)); *see also Hayes*, 786 F.2d at 1503.

41. United States v. Dean, 969 F.2d 187, 191-92 (6th Cir. 1992) (citing Liparota v. United States, 471 U.S. 419, 433 (1985)).

42. *E.g.*, United States v. Hayes Int'l Corp., 786 F.2d 1499, 1502 (11th Cir. 1986) ("Congress did not provide any guidance, either in the statute or the legislative history, concerning the meaning of 'knowing' in section 6928(d)."); United States v. Speach, 968 F.2d 795, 796 (9th Cir. 1992) (stating that "statutes such as § 6928(d)(1) are linguistically ambiguous").

43. *See Hayes*, 786 F.2d at 1502.

44. *Id.* (quoting *S. Rep.* No. 172, 96th Cong., 2d Sess. 39 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5019, 5038).

In deciding that RCRA's criminal provisions cover individual defendants, however, the Third Circuit described the evolution of RCRA to demonstrate Congressional intent:

> The original statute made knowing disposal (but not treatment or storage) of such waste without a permit a misdemeanor. . . . Amendments in 1978 and 1980 expanded the criminal provision to cover treatment and storage and made violation of section 6928 a felony. The fact that Congress amended the statute twice to broaden the scope of its substantive provisions and enhance the penalty is a strong indication of Congress' increasing concern about the seriousness of the prohibited conduct.

2. Use of the RCO Doctrine to Prove Knowledge

Although courts have embraced the reasoning of the RCO doctrine in deciding whether "knowingly" modifies specific RCRA elements, few courts have directly addressed the extent to which the RCO doctrine may define "knowingly." Because RCRA is not a strict liability statute, courts cannot apply the RCO doctrine to RCRA in the form originally applied to the FDCA by the Supreme Court.[45] The issue is, thus, whether a court may employ some adaptation of the doctrine to show that a corporate officer knew about the illegal acts of subordinates.[46]

The few courts addressing this issue have disagreed over whether courts may apply any form of the doctrine.[47] On the

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United States v. Johnson & Towers, Inc., 741 F.2d 662, 667 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985). Congress again strengthened the statute in 1984. *See generally* Note, *Lessening the Mens Rea Requirement for Hazardous Waste Violations*, 16 VT. L. REV. 419, 423 (1991) (detailing some 1984 changes).

45. *See supra* notes 15, 23 and accompanying text. *See, e.g.*, Gordon v. United States, 347 U.S. 909, 910 (1954) (per curiam) (reversing judgment because "jury was instructed that the knowledge of petitioners' employees was chargeable to petitioners in determining petitioners' wilfulness"); *see also* Barrett & Clarke, *supra* notes 33, 152, at 883 (stating that the government may not use the doctrine "as a strict liability theory of vicarious culpability"). Additionally, the original doctrine is different because it only applied to misdemeanor violations involving small fines and limited prison sentences. The FDCA could impose a maximum of one year in prison and $1,000. *United States v. Park*, 421 U.S. 658, 666 n.10 (1975). A RCRA criminal offense is much more severe. *See supra* note 10 and accompanying text.

46. Generally, courts determine that a person acts "knowingly" when "he [sic] is aware that it is practically certain that his conduct will cause [a certain] result." MODEL PENAL CODE § 2.02(2)(b)(ii) (Proposed Official Draft 1962). This is the most widely accepted definition of "knowingly." LAFAVE & SCOTT, CRIMINAL LAW § 3.5(b), at 218 (2d ed. 1986). Definitions, however, abound:

> Cases have held that one has knowledge of a given fact when he has the means for obtaining such knowledge, when he has notice of facts which would put one on inquiry as to the existence of the fact, when he has information sufficient to generate a reasonable belief as to that fact, or when the circumstances are such that a reasonable man [sic] would believe that such a fact existed.

LAFAVE & SCOTT, *supra*, § 3.5(b), at 220 (citations omitted). One commentator has stated, "[w]hat constitutes 'knowledge' under RCRA for purposes of criminal liability is probably the most confusing aspect of the Act. The definition of 'knowledge' changes dramatically depending upon how the issue is approached and who makes the interpretation." G. Nelson Smith III, *No Longer Just a Cost of Doing Business: Criminal Liability of Corporate Officials for Violations of the Clean Water Act and the Resource Conservation and Recovery Act*, 53 LA. L. REV. 119, 141 (1992).

47. Commentators have also reached conflicting results. *Compare* Hartman & De Monaco, *supra* note 8, at 10151 (stating that the doctrine has no relation to knowledge requirement, but rather only applies to definition of "person" in statute) *with* Barrett & Clarke, *supra* note 33, at 888 (concluding that

one hand, the Third Circuit stated that knowledge of all the elements of a RCRA offense "may be inferred by the jury as to those individuals who hold the requisite responsible positions with the corporate defendant."[48] Similarly, in the context of the Clean Water Act[49], the Tenth Circuit seemingly embraced the RCO doctrine in stating in dicta that the requisite willfulness or negligence of a corporate officer defendant "would be imputed to him by virtue of his position of responsibility."[50] These courts leave open, however, the question of exactly how courts should apply the doctrine.

Furthermore, some non-environmental cases allow the jury to draw strong inferences of knowledge based on a defendant's position, without specifically addressing the RCO doctrine.[51] For example, the Second Circuit held that a jury could infer knowledge of false advertising claims to the president of a company even though the prosecution did not prove that he directed the false claims himself.[52]

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some version of the doctrine "properly holds those officers criminally liable who have the ultimate responsibility for, and the power to protect, the public health and the environment").

48. United States v. Johnson & Towers, Inc., 741 F.2d 662, 670 (dictum), *cert. denied*, 469 U.S. 1208 (1985). In this case, the corporation pumped hazardous chemicals, such as methylene chloride and trichlorethylene, into a trench which flowed into a tributary of the Delaware River. *Id.* at 664. The court also stated, "our conclusion that 'knowingly' applies to all elements of the offense in section 6298(d)(2)(A) does not impose on the government as difficult a burden as it fears." *Id.* at 669. Similarly, in *United States v. Frezzo Bros., Inc.*, the Third Circuit upheld a responsible corporate officer doctrine instruction based on *Park* and *Dotterweich* in order to show a mens rea level of willfully or negligently under the Clean Water Act, 33 U.S.C. §§ 1311(a), 1319(c). 602 F.2d 1123, 1130 n.11 (3d Cir. 1979); *See* Hartman & De Monaco, *supra* note 8, at 10149 n.51 (reproducing the original *Frezzo* instruction). *But see* Zarky, *supra* note 8 at 990 (stating that defendants in *Frezzo Bros.* never actually challenged the RCO instruction in that case).

49. This case involved the Federal Water Pollution Control Act of 1972 (Clean Water Act), 33 U.S.C. §§ 1311(a), 1319(c)(1) (1988).

50. United States v. Brittain, 931 F.2d 1413, 1419 (10th Cir. 1991).

51. *See, e.g.*, United States v. Cruz-Valdez, 773 F.2d 1541, 1546 (11th Cir. 1985), *cert. denied*, 475 U.S. 1049 (1986); United States v. Andreadis, 366 F.2d 423, 430 (2d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967).

52. *Andreadis*, 366 F.2d at 430. The fraudulent claims in this case involved "Regimen Tablets," a sort of "miracle weight reducing drug." *Id.* at 426-27. The advertising scheme involved newspaper, magazine, radio and television, and included "sponsors," who would claim to have lost a substantial amount of weight. *Id.* at 427. Rather, the jury could infer that his agent, who had knowledge of the false claims, conveyed the information to him. *Id.* at 430 (citing United States v. Press, 336 F.2d 1003, 1009 (2d Cir. 1964); United States v. Lichota, 351 F.2d 81 (6th Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966)).

On the other hand, in *United States v. White*, a federal district court rejected a modern version of the doctrine because it "would allow a conviction without showing the requisite intent."[53] In *White*, the prosecution unsuccessfully attempted to adapt the doctrine in the Bill of Particulars as follows:

> As the responsible corporate officer for environmental safety of PureGro, the defendant Steven Steed had direct responsibility to supervise the handling of hazardous waste by PureGro employees. He is liable for the acts of all other agents and employees of PureGro in handling the hazardous waste at PureGro facilities which he knew of or should have known of.[54]

The court equated this statement of the RCO doctrine with the original doctrine, stating that the Supreme Court developed it in the context of statutes that involve strict liability and require neither mens rea nor actus reus.[55] There is, therefore, no consensus among jurisdictions as to whether courts may employ some form of the RCO doctrine to define RCRA's "knowingly" requirement.

3. Implementation of the Doctrine Through Jury Instructions

Courts may apply the RCO doctrine in the form of a jury instruction,[56] the mechanism which guides the jury in imple-

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In the alternative, the court held that the president had an affirmative duty to insure that the company's claims were true, and "having failed totally to discharge this responsibility in even the slightest measure, [he] should not be permitted to escape the consequences of his inattention." *Id.* at 430 (footnote omitted).

Another federal case has held that a jury may infer that a vessel's crew member has knowledge of illegal drugs if "it would be unreasonable for anyone other than a knowledgeable participant to be present." *Cruz-Valdez*, 773 F.2d at 1546. In this case, the Coast Guard boarded the vessel and found 220 bales of marijuana in the hold. *Id.* at 1544. The defendant claimed that he was an unknowing passenger on board. To convict the defendant of conspiracy to possess and intent to distribute marijuana, the government had to prove "the existence of a conspiracy, [defendant's] knowing participation in it and [defendant's] criminal intent." *Id.*

53. United States v. White, 766 F.Supp. 873, 895 (E.D. Wash. 1991). The court concluded that this theory would allow conviction "under a state of mind requirement other than that specified by Congress." *Id.* Moreover, the court stated, without elaborating, that the RCO doctrine in *Johnson & Towers* was "clearly dicta." *Id.* In *White*, the defendants allegedly loaded hazardous waste materials, Telone III, into a truck and sprayed the material onto a field, thereby violating RCRA's criminal provisions. *Id.* at 877.

54. *Id.* at 894.

55. *Id.* at 894-95.

56. At the close of trial, the judge instructs the jury as to the legal standards it must apply regarding each element that the prosecution must prove. Geoffrey Kramer & Dorean M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Pro-*

menting the law.[57] Courts thus commonly instruct juries regarding judicial doctrines to define the term "knowingly".[58] For example, in *United States v. Dee*, one district court gave the following instructions to the jury:

> [You shall return a guilty verdict] if you find that the government has proved each of the following beyond a reasonable doubt:
>
> First, that each defendant has a responsible relationship to the violation. That is, that it occurred under his area of authority and supervisory responsibility.
>
> That each defendant had the power or the capacity to prevent the violation. That each defendant acted *knowingly* in failing to prevent, detect or correct the violation. And I have told you what you can consider on the question of knowingly.[59]

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ject, 23 U. MICH. J.L. REF. 401, 402 (1990) (concluding that jurors often do not understand jury instructions). Clear and accurate instructions are essential because the closed room jury system provides for few safeguards on the jurors' comprehension. *Id.* at 403; *see also* Zarky, *supra* note 8, at 985 ("Since the precise wording of the instructions tells the jury how to apply the facts to the law, that language can make all the difference between a guilty verdict and an acquittal.").

57. United States v. Park, 421 U.S. 672, 675 (1975) (upholding a jury instruction implementing the original RCO doctrine) (stating that the purpose of a jury instruction is generally to provide "an adequate statement of the law to guide the jury's determination"). *But see* FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTIONS xiv (1991 ed. 1987) [hereinafter MODERN FEDERAL JURY INSTRUCTIONS] (stating, "[i]t is all too easy for the lawyers and judges who engage in the drafting process to forget how much of their vocabulary and language style was acquired in law school").

58. The jury instruction regarding the term "knowingly" widely varies by circuit. For example, the Ninth Circuit typically states:

> An act is done knowingly if the defendant is aware of the act and does not act (or fail to act) through ignorance, mistake or accident. The government is not required to prove that the defendant knew that his/her acts or omissions were unlawful. You may consider the evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

MODERN FEDERAL JURY INSTRUCTIONS, *supra* note 57, § 9-46. Similarly, the Fifth Circuit model instruction states that "knowingly . . . means that the act was done voluntarily and intentionally, not because of mistake or accident." *Id.* § 5-29. In striking contrast, the Sixth Circuit provides no model instruction because it has determined that "the meaning of the term 'knowingly' varies depending on the particular statute in which it appears." *Id.* § 6-42. The Eighth Circuit provides no model instruction, because "in most cases the word 'knowingly' does not need to be defined." *Id.* § 8-223 (citing United States v. Smith, 635 F.2d 716, 719-20 (8th Cir. 1980).

59. Barrett & Clarke, *supra* note 33, at 885 (citing Supplemental Appendix for Brief for Appellee at 521-524 in United States v. Dee, 912 F.2d 741 (4th Cir. 1990)). Commentators examining this application of the RCO doctrine have reached opposite conclusions. *Compare* Zarky, *supra* note 8, at 993 (stating that these instructions eliminate knowledge requirement in favor of a "knowingly fail to know" requirement) *with* Barrett & Clarke, *supra* note 33, at 885

Similarly, courts commonly apply the "willful blindness" doctrine in the form of a jury instruction in order to prove a defendant's knowledge of a particular act. For example, one court stated "you may find that the defendant acted knowingly if you find beyond a reasonable doubt that the defendant was aware of a high probability [of the illegal act] and . . . deliberately avoided learning the truth."[60]

In reviewing the jury instruction, appellate courts must determine whether an instruction has relieved the prosecution of its burden of persuasion[61] by demanding that the jury reach a

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(stating "[i]t is clear that the above instructions did not replace the knowledge requirement under RCRA"). The court further instructed the jury;

> Among the circumstances you may consider in determining the defendant's [sic] knowledge are their positions in the organization, including their responsibilities under the regulations and under applicable policies. Thus you may, but need not, infer that a defendant knew facts which you find that they should have known given their positions in the organization, their relationship to other employees, or any applicable policies or regulation. Again, this is only one factor which you may consider in determining whether the government has established knowledge beyond a reasonable doubt. . . . You should consider the defendant's behavior in light of all the circumstances and instructions which I am giving you in determining whether the government has established beyond a reasonable doubt that the defendants acted knowingly.

Barrett & Clarke, *supra* note 33, at 885 (citing Supplemental Appendix for Brief for Appellee at 521-524 United States v. Dee, 912 F.2d 741 (4th Cir. 1990)). Although the instructions in this case were never challenged, the *Dee* court noted, "As a whole, the instructions 'fairly and adequately state[d] the pertinent legal principles involved.'" 912 F.2d at 746 n.8 (quoting Hogg's Oyster Co. v. United States, 676 F.2d 1015, 1019 (4th Cir. 1982)).

60. MODERN FEDERAL JURY INSTRUCTIONS, *supra* note 57, at 8-224. Similarly, one author suggests, "[t]he element of knowledge may be satisfied by inferences drawn from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to him." HON. EDWARD J. DEVITT & CHARLES B. BLACKMAR, 1 FEDERAL JURY PRACTICE AND INSTRUCTIONS § 14.09 (3d ed. 1977). Many circuits have adopted a "willful blindness" or "deliberate ignorance" instruction. *See, e.g.*, United States v. Bobadille-Lopez, 954 F.2d 519, 523 (9th Cir. 1992) (citing United States v. Jewell, 532 F.2d 697, 698-99 (9th Cir. 1976) (en banc), *cert. denied*, 426 U.S. 951 (1976)), *cert. denied*, 113 S. Ct. 987 (1993); United States v. Miller, 962 F.2d 739, 745 (7th Cir. 1992); United States v. Kershman, 555 F.2d 198, 201 (8th Cir. 1977), *cert. denied*, 434 U.S. 892 (1977). *See generally* Hansen, *supra* note 8, at 990-95.

61. The Constitution requires the prosecution to bear the burden of persuasion in a criminal case. Sandstrom v. Montana, 442 U.S. 510, 518, 520-24 (1979) (striking down an instruction stating that "the law presumes that a person intends the ordinary consequences of his voluntary acts"); County Court of Ulster County v. Allen, 442 U.S. 140, 161-162, n.22 (1979). Similarly, the court must safeguard a defendant's presumption of innocence and the factfinding role of the jury. *Id. See generally* KENNETH S. BROWN ET AL., MCCORMICK ON EVIDENCE, § 349, at 599 (John W. Strong ed., 4th ed. 1992) [hereinafter MCCOR-

particular conclusion.[62] In legal terminology, the reviewing court asks whether an instruction forms a conclusive presumption or a permissive inference.[63] In a conclusive presumption instruction, the judge tells the jury that it *must* find the presumed element once convinced of specified basic facts.[64] Appellate courts rarely uphold such presumptions in criminal cases.[65] In a permissive inference instruction, however, the judge instructs the jury that it *may* find the presumed element based on specified underlying facts, but that it is not required to do so.[66]

MICK ON EVIDENCE] (stating "the trial judge must use caution in charging the jury so as to place no burden whatsoever on the defendant").

62. On review, the court will ask "what a reasonable juror could have understood the charge as meaning." Mills v. Maryland, 486 U.S. 367, 376 (1988) (citing *Sandstrom*, 442 U.S. at 516-17).

63. *See Allen*, 442 U.S. at 140 (1979) (seminal case distinguishing between the two kinds of presumptions); United States v. Hayes Int'l Corp., 786 F.2d 1499, 1504 n.7 (11th Cir. 1986) (stating that "an inference is a conclusion which the law *permits* the jury to draw if it finds a given set of facts; a presumption, on the other hand, is a conclusion which the law directs the jury to draw from the facts"). Generally, a presumption is "a standardized practice, under which certain facts are held to call for uniform treatment with respect to their effect as proof of other facts." MCCORMICK ON EVIDENCE, *supra* note 61, § 342, at 578. *See generally* Stephen Saltzburg, *Burdens of Persuasion in Criminal Cases: Harmonizing the View of the Justices*, 20 AM. CRIM. L. REV. 393, 412-421 (1983); Annotation, *Modern Statutory Instructions Allowing Presumption or Inference of Guilt from Possession of Recently Stolen Property as Defendant's Privilege Against Self-Incrimination*, 88 A.L.R.3d 1178 (1978) (explaining that instructions on presumptions or inferences of guilt regarding stolen property generally withstand constitutional attack that alleges violation of privilege against self-incrimination).

64. *Sandstrom*, 442 U.S. at 517-19; *Allen*, 442 U.S. at 157.

65. *See Allen*, 442 U.S. at 157 (stating that mandatory presumptions are unconstitutional where the underlying facts alone do not support an inference of guilt beyond a reasonable doubt); *see also* United States v. U.S. Gypsum Co., 438 U.S. 422, 446 (1978) (stating "the jury must remain free to consider additional evidence before accepting or rejecting the inference").

66. MCCORMICK ON EVIDENCE, *supra* note 61, § 348, at 599 (emphasis added). In *Allen*, the court upheld a New York statutory presumption that presence of a firearm in an automobile created a presumption that every person in the automobile illegally possessed the firearm. *Allen*, 442 U.S. at 142. In the *Allen* instruction, the court stated, "The presumption or presumptions which I discussed with the jury relative to the drugs or weapons in this case need not be rebutted by affirmative proof or affirmative evidence but may be rebutted by any evidence or lack of evidence in the case." *Id.* at 161 n.20. One commentator stated, "[t]he government may not evade its responsibility to prove guilt of the offense it charges by relying on a judicial comment that goes beyond a fair assessment of the proof actually presented." Saltzburg, *supra* note 63, at 419.

In *Barnes v. United States*, the Supreme Court upheld a common law presumption when the trial judge instructed the jury as follows:

> Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the

A permissive inference is constitutional as long as the inference is not irrational.[67]

II. *UNITED STATES V. MACDONALD & WATSON WASTE OIL CO.*

In *MacDonald & Watson*,[68] the First Circuit held that proof that the defendant was a corporate officer with both control over the illegal transportation and knowledge of similar violations was insufficient to establish knowledge under 42 U.S.C. § 6928(d)(1).[69] The jury convicted Eugene K. D'Allesandro, the

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> inference and find, in light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen. However, you are never required to make this inference.

412 U.S. 837, 840 n.3, 845-46 (1973). *See also* Saltzburg, *supra* note 63, at 419 (stating, "[a]s long as an inference is rational and the judge does not indicate anything other than the permissibility of drawing the inference, a reviewing court is very unlikely to find fault with the trial judge.").

67. The Supreme Court recently stated its analysis of the presumption.

> A mandatory presumption, even though rebuttable, is different from a permissive presumption, which "does not require . . . the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and . . . places no burden on the defendant." A permissive presumption merely allows an inference to be drawn and is constitutional so long as the inference would not be irrational.

Yates v. Evatt, 111 S. Ct. 1884, 1892 n.7 (1991) (holding jury instructions unconstitutional as conclusive presumption and quoting County Court of Ulster County v. Allen, 442 U.S. 140, 157 (1979)) (citations omitted), *overruled by* Estelle v. McGuire, 112 S. Ct. 475, 482 n.4 (1991) (discussing standard of review of jury instructions); *see also* United States v. U.S. Gypsum Co., 438 U.S. 422, 446 (1978) (rejecting a conclusive presumption and stating that the instruction at issue would have been upheld had it been in the form of a permissive inference).

68. 933 F.2d 35 (1st Cir. 1991).

69. *Id.* at 55. The court stated that "[i]n a crime having knowledge as an express element, a mere showing of official responsibility under *Dotterweich* and *Park* is not an adequate substitute for direct or circumstantial proof of knowledge." *Id.*

In addition, the court addressed in dicta the question of knowledge of a facility's permit status under § 6928(d)(1). *Id.* at 47. Specifically, the court questioned "whether 'knowingly' in subsection (d)(1) not only requires knowledge as to the nature of the hazardous waste being transported, but also knowledge of the facility's permit status, i.e. that the facility lacked a proper permit." *Id.* While declining to decide the issue, the First Circuit stated that it agreed "[a]s an initial matter" with the lower court's determination that such knowledge is an essential element of the offense. The court stated "obviously, if a conviction under subsection (d)(1) requires that a defendant know, or be willfully indifferent to, the facility's lack of a proper permit, this would eliminate the danger of convicting some hypothetical transporter who lacked information that the disposal facility was without the proper license." *Id.* at 48.

Although this dicta played a minor role in this opinion, such a sweeping statement has major implications in light of a recent case in which the Ninth

president and general manager of MacDonald & Watson Oil Co., of illegal transportation of hazardous waste to a facility without a permit.[70] Specifically, MacDonald & Watson, a subcontractor, operated a facility under a RCRA permit that authorized the disposal of liquid hazardous waste, but not solid hazardous waste.[71] Nonetheless, the facility accepted toluene-contaminated soil, a solid hazardous waste.[72]

The prosecution conceded in its closing argument that it had "no direct evidence that [the defendant] . . . actually knew" of the hazardous waste shipment.[73] The government argued, however, that D'Allesandro violated the permit requirement because "he was in a position to ensure compliance with RCRA and had failed to do so even after being warned by a consultant on two earlier occasions" of similar illegal shipments.[74] The trial court instructed the jury that it could either find "actual knowledge of the act in question" or that the defendant was an RCO.[75] The court then gave a three-part instruction defining the term "RCO":

> First, it must be shown that the person is an officer of the corporation, not merely an employee.
>
> Second, it must be shown that the officer had direct responsibility for the activities that are alleged to be illegal. Simply being an officer or even the president of a corporation is not enough. The Government must prove that the person had a responsibility to supervise the activities in question.
>
> And the third requirement is that the officer must have known or believed that the illegal activity of the type alleged occurred.[76]

The First Circuit held that this instruction erroneously allowed the jury to find guilt without finding actual knowledge as specified in the statute.[77] The court focused on the third part of

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Circuit reached the same result. United States v. Speach, 968 F.2d 795, 796 (9th Cir. 1992) (holding that the prosecution must prove knowledge of the permit status of a facility under 42 U.S.C. § 6928(d)(1)). *See supra* note 37 and accompanying text (explaining the controversy surrounding this interpretation).

70. 933 F.2d at 39.
71. *Id.*
72. *Id.* at 40.
73. *Id.* at 50.
74. *Id.*
75. *Id.*
76. *Id.* at 50-51.
77. *Id.* at 51. The court stated, however, that the prosecution may use circumstantial evidence to establish knowledge. "We agree with the decisions discussed above that knowledge may be inferred from circumstantial evidence, including position and responsibility of defendants such as corporate officers, as well as information provided to those defendants on prior occasions." *Id.* at 55.

the instruction, interpreting it to mean that the jury need only find that the defendant must have known that similar illegal shipments "had previously occurred,"[78] rather than actual knowledge of the shipments at issue. The court reasoned that although *Dotterweich*[79] and *Park*[80] "reflect what is now clear and well-established law in respect to public welfare statutes and regulations lacking an express knowledge . . . requirement,"[81] the original RCO doctrine as articulated in those cases does not apply to statutes that require knowledge.[82] In addition, the court distinguished *Park* and *Dotterweich* because those cases involved misdemeanors, while a violation of RCRA constitutes a felony carrying more serious consequences.[83] The court labeled the jury instruction as a "conclusive, or 'mandatory' presumption of knowledge of the facts constituting the offense,"[84] for which no precedent exists.[85]

78. *Id.* at 51.

79. *See supra* notes 12-19 and accompanying text.

80. *See supra* notes 20-24 and accompanying text.

81. *MacDonald & Watson*, 933 F.2d at 51-52.

82. *Id.* at 55.

83. The First Circuit stated that application of the doctrine is especially inappropriate "where, as here, the crime is a felony carrying possible imprisonment of five years and, for a second offense, ten." *Id.* at 52.

84. *Id.* at 53.

85. *Id.* at 52 ("[W]e know of no precedent for failing to give effect to a knowledge requirement that Congress has expressly included in a criminal statute."). The court cited several cases for the proposition that there is no precedent supporting a "mandatory" presumption of knowledge. *Id.* at 53 (citing Carella v. California, 491 U.S. 263 (1989) (per curiam); Francis v. Franklin, 471 U.S. 307, 314 (1985); Hill v. Maloney, 927 F.2d 646, 648, 649 n.3 (1st Cir. 1990)). The court distinguished United States v. Johnson & Towers, Inc., 741 F.2d 662, 670 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985), claiming it allowed only an inference of knowledge regarding the law and not regarding knowledge of facts. 933 F.2d at 53-54. *See supra* note 48 (explaining the *Johnson & Towers* holding). The court also stated that United States v. Dee, 912 F.2d 741, 745-46 (4th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991), stands only for the proposition that "knowledge of RCRA's prohibitions may be presumed." 933 F.2d at 53.

The court also distinguished three Supreme Court denials of certiorari that the prosecution relied upon in support of similar jury instructions. First, the court distinguished United States v. Frezzo Brothers, Inc., 602 F.2d 1123 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980), because it involved only willfulness or negligence rather than knowledge. 933 F.2d at 54. In addition, the court distinguished United States v. Cattle King Packing Co., Inc., 793 F.2d 232 (10th Cir.), *cert. denied*, 479 U.S. 985 (1986), because the RCO jury instruction only involved the portion of the offense that did not require intent. 933 F.2d at 54. In *Cattle King Packing*, the court told the jury that it must nonetheless find intent for all of the other counts. *Id.* (citing *Cattle King Packing*, 793 F.2d at 241). Finally, the court distinguished United States v. Andreadis, 366 F.2d 423 (2d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967), because that case only permit-

III. THE CONTINUING VITALITY OF THE RCO DOCTRINE

Case law prior to *MacDonald & Watson* demonstrated a growing trend among the federal courts of appeals to apply some form of the RCO Doctrine when interpreting RCRA's criminal provisions.[86] Despite some commentators' admonitions,[87] however, these courts have not specifically held that the original strict liability version of the RCO doctrine may establish defendant's knowledge of the actual offense.[88] Although courts have suggested such an application of the doctrine,[89] no court of appeals had directly confronted this issue prior to *MacDonald & Watson* so that the time was ripe for the First Circuit to implement the doctrine with full force. Nevertheless, the court refused to allow the doctrine to eviscerate the "knowingly"

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ted an inference of willful blindness based on circumstantial evidence. 933 F.2d at 54. The court concluded that these three cases stand only for the proposition that "knowledge may be inferred from circumstantial evidence, including position and responsibility of defendants such as corporate officers, as well as information provided to those defendants on prior occasions." *Id.* at 55.

86. Courts and commentators have embraced the RCO doctrine in interpreting various provisions of the statute. *See supra* notes 39-42 and accompanying text; *see also* Barrett & Clarke, *supra* note 33, at 881-88 (discussing how RCO doctrine imposes an affirmative duty on corporate officers); Robert I. McMurry & Stephen D. Ramsey, *Environmental Crime: The Use of Criminal Sanctions in Enforcing Environmental Laws*, 19 LOY. L.A. L. REV. 1133, 1153 (1986) (discussing use of RCO doctrine in criminal enforcement actions); Patrick O. Cavanaugh, *Pursuit of the "Responsible Corporate Officer" for Environmental Violations: The First Circuit Throws a Curve*, NAT. RESOURCES & ENV'T, Winter 1992, at 40, 41 (discussing development of RCO doctrine).

87. *See* Cavanaugh, *supra* note 86, at 40 (stating that application of the doctrine signifies that "lack of actual knowledge on the part of the defendant will not necessarily preclude a finding of criminal liability."); Hansen, *supra* note 8, at 1004-11 (arguing that the courts in both *Johnson & Towers* and *Hayes* misapplied the doctrine); McMurry & Ramsey, *supra* note 86, at 1153 (stating, "[a]ctual knowledge of the act is not required"); Morgan & Obermann, *supra* note 8, at 1219 (arguing that increased prosecution discourages disclosure); Keith Onsdorff & James M. Mesnard, *The Responsible Corporate Officer Doctrine in RCRA Criminal Enforcement: What You Don't Know Can Hurt You*, 22 Envtl. L. Rep. (Envtl. L. Inst.) 10099, 10100 (1992) (arguing that federal prosecutors are too aggressive in enforcing RCRA's criminal provisions); Zarky, *supra* note 8, at 984 (stating, "[t]he doctrine could render corporate officers guilty of felonies . . . even if they had no knowledge of the problem and acted responsibly in attempting to keep the corporation in compliance with the law."). *But see* Ronald M. Broudy, Note, *RCRA and the Responsible Corporate Officer Doctrine: Getting Tough on Corporate Offenders by Sidestepping the Mens Rea Requirement*, 80 KY. L.J. 1055, 1065-69 (1991-92) (distinguishing between knowledge of the permit requirement and act of disposing).

88. *See supra* note 53 and accompanying text (explaining that one court has specifically rejected direct application).

89. *See supra* notes 49-51 and accompanying text.

requirement, and therefore began to establish the outer boundaries of the RCO doctrine with respect to "knowing" environmental crimes.

A. THE COURT CORRECTLY DECIDED *MACDONALD & WATSON*

Statutory interpretation and analysis of the RCO doctrine indicate that the court's holding was technically correct. Unlike the permit requirement clause, which trails at the end of the sentence, the clause requiring that a defendant know of the illegal acts which constitute an offense is unambiguous.[90] At the very least, the prosecution must prove that the defendant "knowingly" transported, or caused the transportation of, the hazardous waste.[91] The issue no longer concerns which words "knowingly" modifies, but rather how the prosecution may prove the knowledge itself.[92]

Unfortunately, the statute provides no definition of the term "knowingly."[93] The legislative history seemingly provides equally sparse guidance in leaving the definition to the "general principles of the courts."[94] The history only helps in that it suggests that a court employ some form of the doctrine, as long as it serves to define "knowingly." Courts cannot apply the RCO doctrine to RCRA in the same manner in which the Supreme Court applied it to the FDCA.[95] That statute did not specify any mens

90. *See supra* text accompanying note 30.

91. *See supra* note 31 and accompanying text (explaining that "knowingly" clearly applies to the first clause of § 6928(d)(1)).

92. *See supra* note 46 (explaining many definitions of "knowingly"); *supra* note 58 (explaining various jury instructions on "knowingly").

93. *Compare* 42 U.S.C. § 6903 (1988) (giving no definition for "knowingly") with 42 U.S.C. § 6928(f) (1988) (providing a special definition for the term "knowing" for a "knowing endangerment" violation).

94. *See supra* note 46 and accompanying text. Had Congress wished a more specific definition, it certainly could have defined "knowingly" itself, rather than leave the interpretation to the courts. This is especially true in light of the ongoing controversy over the application of the RCO doctrine. *Compare* Hansen, *supra* note 8, at 1023 (arguing that the RCO doctrine has no application to "knowing" environmental crimes) *with* Barrett & Clarke, *supra* note 33, at 888 (arguing for continued application of the doctrine to "knowing" environmental crimes).

Moreover, Congress has shown its awareness of the doctrine by including express language regarding responsible corporate officers in other statutes. *See, e.g.*, The Clean Water Act, § 309(c)(6), 33 U.S.C. § 1319(c)(6) (1988) ("For the purpose of this subsection, the term 'person' means . . . any responsible corporate officer."); The Clean Air Act, § 113(c)(3), 42 U.S.C. § 7413(c)(6) (1988) ("For the purpose of this subsection, the term 'person' includes . . . any responsible corporate officer.").

95. *See supra* text accompanying note 15.

rea requirement and thus, the Court focused on whether it would be necessary to read a mens rea requirement *into* the statute.[96] In *MacDonald & Watson*, the issue was whether the trial court effectively read the mens rea requirement *out of* the statute.[97]

The *MacDonald & Watson* court correctly focused on the trial court's expression of the RCO doctrine in the form of the three-part jury instruction.[98] The third part of this instruction, allowing for a showing of knowledge of illegal activity "of the type alleged,"[99] did not require the jury to find that defendant knew of the specifically charged illegal activity.[100] Rather, the jury's belief that defendant knew of any similar illegal activity would mandate a finding of knowledge, creating guilt by association. The trial court therefore effectively eliminated the mens rea requirement as to all elements of the statute.

Essential to the First Circuit's holding was that the instruction included no words of discretion and thus constituted a "mandatory presumption".[101] The district court stated, "In order to prove that a person is a responsible corporate officer three things *must* be shown,"[102] making no suggestion that the jury could find the three elements without finding the defendant's actual knowledge. This mandatory presumption did not support an inference of guilt beyond a reasonable doubt and thus unconstitutionally relieved the prosecutor of the burden of persuasion.[103]

Although the court correctly determined that the jury instruction was erroneous,[104] it took the additional step of declar-

96. *See supra* note 14 and accompanying text.
97. *See supra* note 82 and accompanying text.
98. *See supra* text accompanying note 76.
99. *See supra* text accompanying note 76.
100. *See supra* text accompanying note 76.
101. *MacDonald & Watson*, 933 F.2d at 50 (emphasis added).
102. *Id.* at 53. *See supra* notes 63-69 (explaining "conclusive" or "mandatory" presumptions).
103. *See supra* notes 63, 67, and accompanying text (explaining that in a mandatory presumption, underlying facts must support an inference of guilt beyond a reasonable doubt).
104. The court correctly reasoned that there is no precedent for such an instruction employing a conclusive presumption. *See supra* note 85 and accompanying text. *But see* United States v. Brittain, 931 F.2d 1413, 1419 (10th Cir. 1991) (stating in dicta that under the Clean Water Act, "the willfulness or negligence of the actor would be imputed to him by virtue of his position of responsibility.") *Brittain* differs from *MacDonald & Watson* because the Clean Water Act explicitly includes the term "responsible corporate officer." *See* 33 U.S.C. § 1319(c)(3) (1988). Previous RCRA cases have primarily focused on which

ing the error grounds for reversal.[105] Such a conclusion is significant because the evidence against D'Allesandro seems to have been strong enough to hold the error harmless:[106] He was a "'hands-on' manager of [a] relatively small firm;"[107] his subordinates had contracted for and transported the hazardous waste;[108] and he had been warned on two previous occasions that the facility in question had received other shipments of tol-

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terms "knowingly" modified and not whether a court can read "knowingly" out of the statute. *See supra* notes 29-30. The *MacDonald & Watson* court focused on: United States v. Sellers, 926 F.2d 410 (5th Cir. 1991); United States v. Dee, 912 F.2d 741 (4th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991); and United States v. Johnson & Towers, Inc., 741 F.2d 662 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985). *MacDonald & Watson*, 933 F.2d at 53. Similarly, the court distinguished United States v. International Minerals & Chemical Corp., 402 U.S. 558 (1971), because it specifically addressed whether the prosecution had to prove that defendant knew of regulations. *MacDonald & Watson*, 933 F.2d at 53. *See infra* notes 147-150 and accompanying text (explaining the holding of *International Minerals*). Additional cases support this distinction. *See, e.g.*, *Dee*, 912 F.2d at 745 (defendants claimed only that they knew neither that violation of RCRA was a crime nor that the chemicals they managed were hazardous waste); *see also* United States v. Dean, 969 F.2d 187, 190-92 (6th Cir. 1992) (defendant criminally liable despite not knowing of RCRA's permit requirement), *cert. denied*, 113 S. Ct. 1852 (1993); United States v. Hoflin, 880 F.2d 1033, 1036-39 (9th Cir. 1989) (defendant who participated in unauthorized disposal guilty regardless of knowledge about permit), *cert. denied*, 493 U.S. 1083 (1990).

105. *See MacDonald & Watson*, 933 F.2d at 50; *see also* Jackson v. Virginia, 443 U.S. 307, 313-24 (1979) (stating that a reviewing court should uphold a jury verdict where the evidence is sufficient for a reasonable person to find the defendant guilty beyond a reasonable doubt). The Supreme Court has stated, "[a] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." Cupp v. Naughten, 414 U.S. 141, 146-47 (1973) (citing Boyd v. United States, 271 U.S. 104, 107 (1926)).

106. *See* Morgan & Obermann, *supra* note 8, at 1208 (arguing that there was sufficient evidence "to satisfy the knowledge threshold via circumstantial evidence"); *see also* Estelle v. McGuire, 112 S. Ct 475, 482 n.4 (1992) (discussing standard of review for jury instructions); United States v. Loriano, 984 F.2d 1239, 1242 (D.C. Cir. 1993) (discussing harmless error standard).

107. *MacDonald & Watson*, 933 F.2d at 50. The closer a manager is to the work, the greater the inference is of knowledge of occurrences in the business. In the development of the RCO doctrine, United States v. Park, 421 U.S. 658, 674 (1975), made it clear that the new RCO doctrine applies to high-level officers. *See supra* note 20 (explaining that the defendant was the chief executive officer of a major national corporation). This application implicitly extended the doctrine from United States v. Dotterweich, 320 U.S. 277, 278 (1943), where the defendant was the president and general manager of the Buffalo Pharmacal Company, Inc., a much smaller company. The *Dotterweich* Court refused to define the class of employees who stand in responsible relation to the offense. *Id.* at 285. The Court stated, "In such matters the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries must be trusted." *Id.*

108. *MacDonald & Watson*, 933 F.2d at 50.

uene-contaminated material in violation of its permit.[109] Moreover, the court acknowledged that the jury instruction itself "could be read to require actual knowledge" of the shipments.[110] The First Circuit seems, therefore, to have sought a bright line to stop the perceived expansion of the RCO doctrine.[111] Given the likelihood that other courts would have similarly used the doctrine to replace the "knowingly" requirement and therefore legislate in place of Congress,[112] the First Circuit correctly sounded the alarm against such erroneous application. Contrary to the conclusion of recent commentators,[113] however, the court should not have ruled out application of the doctrine in its entirety.[114]

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109. *Id.*

110. *Id.* at 51.

111. Two commentators suggest that the *MacDonald & Watson* court "apparently wished to send an unequivocal message that proof that a defendant is a responsible corporate officer will not suffice to conclusively establish the element of knowledge expressly required under environmental statutes." Morgan & Obermann, *supra* note 8, at 1209. The better explanation is that such proof did not suffice under the RCO doctrine as stated by the *MacDonald & Watson* trial court.

112. Had Congress intended a strict liability statute, it would not have included the word "knowingly" in the statute. *See, e.g.,* the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-392 (1988) (a strict liability statute).

113. One commentator, agreeing that the doctrine did not apply in *MacDonald & Watson*, seems to see no further application of the doctrine and argues that the RCO doctrine should not apply at all to show knowledge of illegal acts. Broudy, *supra* note 87, at 1073. Similarly, other commentators argue that the doctrine only defines the term "person" in environmental statutes, but does not address the mens rea of the statute. *See* Hartman & De Monaco, *supra* note 8, at 10151. This statement is incorrect. Although the issue in *Dotterweich* regarded the definition of person, *see supra* note 17, the fundamental focus of *Park*, the seminal RCO case, was the mens rea of the defendant. United States v. Park, 421 U.S. 668, 670-73 (1975). *See* Zarky, *supra* note 8, at 986. In *Park*, the Court held, "We cannot agree with the Court of Appeals that it was incumbent upon the District Court to instruct the jury that the Government had the burden of establishing 'wrongful action'. . . ." 421 U.S. at 673. The Court proceeded to detail the prima facie case against a corporate officer, *id.* at 673-74, which would have been wholly unnecessary had the doctrine applied only to defining "person." Since *Park*, the courts' special treatment of public welfare statutes and widespread acceptance of the RCO doctrine suggest that the doctrine should not be ignored in "knowing" crimes. *See also* Lincenberg, *supra* note 33, at 28-30 (arguing the RCO doctrine should apply only to misdemeanor offenses).

114. It is arguable that the First Circuit did not reject application of the RCO doctrine to knowing crimes, but rather rejected a particular adaptation of the doctrine. The court did not state that the doctrine can never apply, but only that the particular instruction evaded the knowledge requirement. *MacDonald & Watson*, 933 F.2d at 51.

B. Implementing Congressional Intent Through the RCO Doctrine

Courts should still make use of some form of the RCO doctrine in order to implement congressional intent in RCRA criminal cases. Faced with an ambiguous mens rea requirement in a statute designed to protect the public health, the Supreme Court originally developed the RCO doctrine to allow the conviction of corporate officers despite absence of wrongdoing.[115] The Supreme Court stated in *Park* that Congress has "seen fit to enforce the accountability of responsible corporate agents dealing with products which may affect the health of consumers by penal sanctions cast in rigorous terms, and the obligation of the courts is to give them effect so long as they do not violate the Constitution."[116]

One half century later, Congress similarly enacted RCRA in order to protect the public health[117] and again included an ambiguous mens rea requirement.[118] Once again, prosecutors face the corporate officer problem:

> Although it is often relatively easy to assign knowledge and blame to the low-level employee who dumped or buried hazardous waste, or to prove that a shift foreman or plant manager personally directed the employee's actions, it is much more difficult to climb up the corporate ladder and prove that a corporate executive had knowledge of a RCRA violation. . . . When the environmental violations are the result of corporate decisionmaking or policy, however, prosecution of only low-level employees is not only unfair but also fails to serve the deterrent function that is the goal of environmental enforcement.[119]

One simple and logical means of providing definition in the face of this ambiguity is to adapt the RCO doctrine to incorporate the knowledge requirement,[120] protect the public health, and safeguard defendants' rights.

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115. *See supra* notes 12-25 and accompanying text.

116. 421 U.S. at 673.

117. *See supra* note 40 and accompanying text.

118. *See, e.g.*, *supra* note 46 (explaining many definitions of "knowingly"); *supra* note 58 (explaining various jury instructions on "knowingly").

119. Barrett & Clarke, *supra* note 33, at 883.

120. Although commentators routinely argue that the doctrine does not apply to the definition of "knowledge," *e.g.*, Hartman & De Monaco, *supra* note 8, at 10151, the better result is to modify it to the needs of the statute, and to the public health and welfare. *But see* Alexandra Varney, Comment, *Responsible Corporate Officer Doctrine Does Not Satisfy Required Element of Knowledge Under the Resource Conservation and Recovery Act*—United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35 (1st Cir. 1991), 26 Suffolk U. L. Rev. 895, 900 (1992) (concluding that courts should strike a balance between RCRA's purpose and the knowledge requirement).

Continued application of the RCO doctrine is consistent with congressional intent precisely because Congress specifically left the definition of "knowingly" to the courts.[121] Although some courts consider this statement unhelpful,[122] it nonetheless gives courts license to consider doctrinal interpretations, such as the RCO doctrine, in their analysis. By not defining "knowingly," Congress recognized that the definition is not static, but rather changes according to modern jurisprudence and congressional guidance.[123]

Moreover, Congress has amended RCRA's criminal provisions three times, making sanctions for environmental violations more severe with each change.[124] Congress has therefore signalled its concern regarding the seriousness of RCRA violations.[125] RCRA itself specifies that Congress intended to promote more careful management of planning of hazardous waste disposal and to place adequate controls on hazardous waste management.[126] Allowing a court to provide guidance to juries in complex RCRA cases through the use of the RCO doctrine supports this legislative intent by facilitating appropriate criminal convictions of corporate officers and working as a deterrent to those who can act to protect the environment from RCRA violations.[127] In other words, corporate officers will necessarily take more care in the management of hazardous waste to ensure that their subordinates are not engaged in felony activity.

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121. *See supra* text accompanying note 46; *see also* United States v. Duruss, 393 U.S. 297, 310 (1969) (Harlan, J., concurring in part, dissenting in part) (stating, "Our task is to decide what jury instruction with respect to the definition of 'purpose' comports best with Congress' [sic] intent as revealed by this statutory language and the underlying legislative history.").

122. *See supra* note 42 and accompanying text.

123. *See supra* note 46 (explaining many definitions of "knowingly"); *supra* note 58 (explaining jury instructions on "knowingly"); *see also infra* notes 137-150 and accompanying text (describing Supreme Court cases treating the term).

124. *See supra* note 46.

125. *See supra* note 46.

126. 42 U.S.C. § 6901(b)(2), (b)(5) (1988).

127. *See* STROCK, *supra* note 8, at 916 (stating, "[t]here is no question that criminal enforcement is EPA's most effective deterrent. Unlike a monetary penalty, imprisonment is one cost that an environmental criminal cannot pass on to consumers.") (footnote omitted). Additionally, a recent national survey indicated that district attorneys consider the goal of deterrence more important in prosecuting corporate officers than ordinary street criminals. MICHAEL L. BENSON ET AL., U.S. DEP'T OF JUSTICE, LOCAL PROSECUTORS AND CORPORATE CRIME 5 (Jan. 1993). The survey also concluded that "a notable proportion of prosecutors felt that corporate offenders deserve to be punished," with thirty-five percent ranking retribution as the first or second most important objective in prosecuting corporate officers. *Id.*

Furthermore, several courts have commented that "criminal penalties attached to regulatory statutes intended to protect public health . . . are to be construed to effectuate the regulatory purpose."[128] In enacting RCRA, Congress intended, as it did similarly in enacting the FDCA,[129] to protect the health of the general public in the face of the hazards of modern society.[130] In both statutes Congress treated the problem of the difficulty of convicting corporate officers for their subordinates' illegal activity.[131] The *MacDonald & Watson* court acknowledged that "RCRA is a public welfare statute 'enacted to protect the national health and environment'[132] . . . and to provide 'nationwide protection against the dangers of improper hazardous waste disposal.'"[133]

Moreover, the Supreme Court has embraced the reasoning of the RCO doctrine in other types of cases involving "knowing" crimes[134] in order to implement congressional intent. For example, focusing on the issue of public health, the Supreme Court suggested in *Liparota v. United States*[135] that statutory construction of public welfare statutes differs markedly from that of other criminal statutes.[136] In *Liparota*, the Court rejected the

128. United States v. Johnson & Towers, Inc., 741 F.2d 662, 666 (3d Cir. 1984) (citing United States v. Park, 421 U.S. 658, 672-73 (1975)); Smith v. California, 361 U.S. 147, 152 (1959); United States v. Dotterweich, 320 U.S. 277, 280-81 (1943); United States v. Balint, 258 U.S. 250, 251-52 (1922)). One must also consider, however, a counterbalancing canon, the Rule of Lenity, which states that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." Liparota v. United States, 471 U.S. 419, 427 (1985) (quoting Rewis v. United States, 401 U.S. 808, 812 (1971)).

129. *See supra* text accompanying notes 13-15 (explaining that the Supreme Court created the RCO doctrine in interpreting the FDCA).

130. *See supra* notes 40-41 and text accompanying note 39. Some commentators, however, have argued that "public welfare offense" is a term of art that necessarily does not include a mens rea requirement. Hansen, *supra* note 8, at 988, 1004-11; Hartman & De Monaco, *supra* note 8, at 10147.

131. *See supra* text accompanying notes 118-121.

132. 933 F.2d at 46 (quoting Wyckoff Co. v. E.P.A., 796 F.2d 1197, 1198 (9th Cir. 1986)).

133. *Id.* (quoting H.R. Rep. No. 1491, 94th Cong., 2d Sess. 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6249).

134. United States v. International Minerals, 402 U.S. 558 (1971); Liparota v. United States, 471 U.S. 419, 433 (1985).

135. The defendant in *Liparota*, co-owner of a drug store, purchased food stamps from an undercover government agent at less than face value. *Id.* at 421. The defendant argued that he did not know his acts were unlawful and thus, the statute did not reach his conduct. *Id.* at 422-23.

136. *Id.* at 432-33.

government's contention that the Food Stamp Act[137] is a "public welfare offense" and therefore deserving of more lenient statutory construction.[138] The Court distinguished food stamps from items such as unregistered firearms,[139] hand grenades,[140] and adulterated drugs,[141] thereby acknowledging that courts should interpret statutes regulating such items differently.[142] Because RCRA is undeniably a public welfare statute[143] that regulates inherently dangerous items like firearms and hand grenades,[144] *Liparota* gives courts license to construe RCRA in a way that furthers its public welfare goals.

In *United States v. International Mineral & Chemical Corp.*,[145] involving "knowing" mens rea, the Court gave special treatment to public welfare statutes. The *International Minerals* court rejected defendant's claim that he had no knowledge of a law requiring the listing of hazardous substances on shipping papers.[146] The Court stated that where "dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation."[147] The Court

137. The Food Stamp Act, 7 U.S.C. § 2024(b)(1) (1988), made it a felony to "knowingly use[ ], transfer[ ], . . . or possess[ ] coupons . . . in any manner not authorized" by the act. The Court held that "knowingly" modified every element of the offense, and thus required the prosecution to show that the defendant knew his act was unauthorized. *Liparota*, 471 U.S. at 425.

138. *Id.*

139. *Id.* at 433 (citing United States v. Freed, 401 U.S. 601 (1971)).

140. *Id.* (citing *Freed*, 401 U.S. at 609).

141. *Id.* (citing United States v. Dotterweich, 320 U.S. 277, 284 (1943); United States v. Balint, 258 U.S. 250 (1922)). The *Liparota* court stated: "[t]he distinctions between these cases and the instant case are clear. A food stamp can hardly be compared to a hand grenade [as in *Freed*] . . ., nor can the unauthorized acquisition or possession of food stamps be compared to the selling of adulterated drugs, as in *Dotterweich*." *Id.*

142. The court distinguished the Food Stamp Act from "public welfare offenses," which it defined as those offenses in which "Congress has rendered criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety." *Id.*

143. *See supra* text accompanying notes 39-41.

144. *See* Morgan & Obermann, *supra* note 8, at 1203 (stating, "corporate officials in industries regulated by environmental statutes would be wise to think of themselves as owners of hand grenades, the shrapnel from which can readily pierce the corporate veil").

145. 402 U.S. 558 (1971).

146. *Id.* at 563.

147. *Id.* at 565. Many courts have cited this language in interpreting the term "knowingly" in the context of RCRA. *See, e.g.*, United States v. Dean, 969 F.2d 187, 191 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1852 (1993); United States

thus demonstrated its willingness to construe the mens rea of public welfare statutes differently from other statutes.[148]

C. Suggested Application of the RCO Doctrine

Courts should adapt the RCO doctrine to give effect to both RCRA's "knowingly" requirement and the congressional intent of protecting the public health. Courts could implement this doctrine in the form of a jury instruction.[149] For example, in *MacDonald & Watson*, the trial court could have instructed the jury as follows:

> If you find:
> - first, that the person is an officer of the corporation, not merely an employee;
> - second, that the officer had direct responsibility for the activities that are alleged to be illegal. Simply being an officer or even the president of a corporation is not enough; and
> - third, that the officer had some information regarding this offense, and must have known or believed that the illegal activity of the type alleged occurred; then you *may* find that the defendant had knowl-

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v. Dee, 912 F.2d 741, 745 (4th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991); United States v. Hoflin, 880 F.2d 1033, 1038 (9th Cir. 1989), *cert. denied*, 493 U.S. 1083 (1990); United States v. Hayes Int'l Corp., 786 F.2d 1499, 1502 (1986).

The *International Minerals* Court held that the government need not prove that the defendant knew his act or omission was illegal. *Id.* at 559-563. The Court thus upheld a charge of knowingly failing to show the classification of sulfuric acid and hydrofluosilicic acid on shipping papers. Central to the court's reasoning was "the principle that ignorance of the law is no defense." *Id.* at 563. The Court further stated that "[a] person thinking in good faith that he was shipping distilled water when in fact he was shipping some dangerous acid would not be covered." *Id.* at 563-64.

148. The Court also distinguished regulations of dangerous materials, such as hand grenades, drugs and acids, from those regulating innocuous materials, such as pencils, dental floss and paper clips. *Id.* at 564.

149. Of course, Congress could also write some version of the RCO doctrine into the knowledge requirement, eliminating all ambiguity regarding the doctrine's application. For example, in Minnesota, the criminal code includes within its definition of "knowledge":

> Knowledge of a corporate official may be established under paragraph (a) or by proof that the person is a responsible corporate official. To prove that a person is a responsible corporate official, it must be shown that:
> (1) the person is an official of the corporation, not merely an employee;
> (2) the person has direct control of or supervisory responsibility for the activities related to the alleged violation, but not solely that the person held a certain job or position in a corporation; and
> (3) the person had information regarding the offense for which the defendant is charged that would lead a reasonable and prudent person in the defendant's position to learn of the actual facts.

Minn. Stat. § 609.671 subd. 2(b) (1992).

> edge of the act in question. You are *not required* to draw such a conclusion, and to find the defendant guilty you still must be convinced beyond a reasonable doubt that the defendant had knowledge of the act.[150]

This proposed instruction would safeguard defendants' rights and at the same time provide the necessary guidance to juries to facilitate accurate criminal convictions and protect the public health.[151]

1. Safeguarding RCRA Defendants' Rights

The proposed instruction safeguards defendants' rights in three ways. First, it takes the form of a permissive inference because the court tells the jury that it *may*, but is not required

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150. In their 1993 article, Hartman & De Monaco state that the government has recently requested the following circumstantial evidence jury instruction:

> Among the circumstances you may consider in determining a defendant's knowledge is his position in the corporation, including his responsibilities under the regulations and under any applicable corporate policies and his activities as a corporate executive. Thus, you may infer that the defendant knew certain facts by virtue of his position in the corporation, his relationship to other employees or any applicable corporate policies and other facts and circumstances including information provided to the defendant on prior occasions. If the defendant was an officer of the corporation, you may consider whether the defendant was the corporate officer who had primary and direct responsibility over the activities which gave rise to the violations charged in determining whether he had knowledge of the charged violations.

Supra note 8, at 10153. This Comment's proposed instruction preserves the RCO doctrine and therefore better protects both human health and the environment. It is also shorter, more straightforward and therefore less apt to confuse the jury. One commentator has explained that complex instructions are "indicative of an unwillingness in the law to refine difficult questions." Kramer & Koenig, *supra* note 56, at 407. "It is easier to leave technical and expansive jury instructions in a form that may be incomprehensible to the lay person because legal terminology is not ordinarily grounds for reversal." *Id.* To this effect, the *MacDonald & Watson* instruction regarding circumstantial evidence is preferable: "Whether a Defendant acted knowingly or with knowledge of a particular fact may be inferred from that Defendant's conduct, from that Defendant's familiarity with the subject matter in question or from all of the other facts and circumstances connected with the case." 933 F.2d 35, 52 n.15 (1st Cir. 1991) (also reproducing a standard definition of "knowingly"). *See also* Joseph G. Block & Nancy A. Voisin, *The Responsible Corporate Officer Doctrine—Can You Go to Jail for What You Don't Know?*, 22 ENVT. L. 1347, 1374 (1992) (proposing a simple circumstantial evidence jury instruction).

151. Of course, this instruction is meant to complement existing instructions regarding the word "knowingly." When appropriate, courts should continue to deliver circumstantial evidence and willful blindness instructions, which are largely beyond the scope of this article.

to, accept the inference.[152] The instruction does not require the jury to make the jump from the elements of the instruction to a finding of knowledge.[153] Rather, the jury decides for itself whether to accept this inference in light of all the evidence. The permissive inference form thus removes the conclusive presumption problem of *MacDonald & Watson*.[154]

Second, the proposed instruction requires that the jury find defendant's knowledge "beyond a reasonable doubt thus calling attention to this specific element's importance."[155] The require-

152. Hartman & De Monaco agree that permissive inference instructions are generally valid, but seemingly disagree that courts should employ some form of the RCO doctrine. *Supra* note 8, at 10152.

One commentator has suggested what may be a valid RCO conclusive presumption instruction in which a jury will find knowledge if it finds: "(1) that a RCRA violation occurred within an officer's area of supervision and control; (2) that the officer had the authority or power to prevent or correct the violation; and (3) that the officer knowingly failed to do so." Barrett & Clarke, *supra* note 33, at 884. The author explained that the third factor is "the linchpin" of applying the doctrine:

> For the jury to infer that a corporate officer had knowledge of the violation he is alleged to have committed, the government must establish that the officer was aware of a preexisting violation or potential violation. Failure to act upon the violation he is charged with, despite this prior notice, in conjunction with the first two factors set forth above, satisfies the "knowing" requirement under section 6928(d) of RCRA.

Id. This instruction may be problematic because the requirement that the officer be aware of "a preexisting violation" may be similar to the *MacDonald & Watson* "of the type alleged" problem. *See supra* text accompanying notes 101-102.

153. The instruction Hartman & De Monaco propose seemingly fails to instruct the jury that it is not required to draw any conclusions from the circumstances specified in the instruction. For text of the instruction, see *supra* note 150. This protection of the defendant is essential because juries often do not understand the significance of legal jargon in an instruction. *See* Mills v. Maryland, 486 U.S. 367, 375 (1988) (explaining that on review a court will examine what the jury reasonably understood); *see also* Kramer & Koenig, *supra* note 58 (explaining that jurors tend not to understand complex instructions). *But see* LAFAVE & SCOTT, *supra* note 46, § 2.13(a)(1), at 159-60 (arguing that a permissive inference instruction disadvantages the defendant "by persuading the jury that may convict solely upon proof of the basic fact, a conclusion the jury might not otherwise reach").

154. 933 F.2d at 50; *see also supra* notes 63-69 and accompanying text. In conclusive presumptions, the likelihood of error is great. For example, the four seemingly innocuous words—"of the type alleged"—mandated reversal in *MacDonald & Watson*. *See supra* text accompanying notes 101-102.

155. Although any instruction will probably recognize a "beyond a reasonable doubt" requirement, this instruction specifically addresses the knowledge requirement. *See* MCCORMICK ON EVIDENCE *supra* note 61, § 348(4), at 599 (stating that the court is required to give this part of the instruction). In light of McCormick's suggestions, the judge should also instruct the jury that it must find each of the three elements beyond a reasonable doubt because the pre-

ment that the jury may not convict a defendant solely for being a corporate officer further complements the reasonable doubt requirement regarding knowledge. The judge communicates to the jury in plain terms that it may not hold defendant strictly liable,[156] and the jury must base its conclusion that defendant acted "knowingly" on evidence beyond corporate officer status.

Appellate courts are more likely to uphold this instruction because it is a permissive inference that is rational.[157] Like the *MacDonald & Watson* instruction, this instruction requires that the corporate officer defendant had direct responsibility over the illegal activity and knew of illegal activity "of the type alleged."[158] The proposed instruction further provides that the de-

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sumed fact, knowledge, is an essential element of the offense. *Id.* The Uniform Rules of Evidence provide an example:

> Whenever the existence of a presumed fact . . . is submitted to the jury, the court shall instruct the jury that it may regard the basic facts as sufficient evidence of the presumed fact but is not required to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the court shall instruct the jury that its existence, on all the evidence, must be proved beyond a reasonable doubt.

UNIF. R. EVID. 303(c) (1986).

The emphasis on defendant protection in specifying to the jury that it may reject any inferences and that it must find knowledge beyond a reasonable doubt differs from the instruction proposed by Hartman & De Monaco, which seemingly has neither attribute. For the language of Hartman & De Monaco's proposed instruction, see *supra* note 150. As one commentator has emphasized, "Because every conviction has the potential to stigmatize a defendant in a different way, before the government can claim the right to label the defendant as a certain kind of criminal, it must prove beyond a reasonable doubt that the label fits." Saltzburg, *supra* note 63, at 421; *see also* Cupp v. Naughten, 414 U.S. 141, 147-48 (1973) (giving weight to the trial court's instruction that the jury must find the defendant guilty beyond a reasonable doubt in upholding a "presumption of truthfulness" instruction); United States v. Goldblatt, 813 F.2d 619, 623 (3d Cir. 1987) (upholding an instruction because "[t]he trial court properly informed the jury that the Government bears the burden of establishing each element of the offenses by proof beyond a reasonable doubt.")

156. *See generally* Steven Zipperman, *The Park Doctrine—Application of Strict Criminal Liability to Corporate Individuals for Violations of Environmental Statutes*, 10 UCLA J. ENVTL. L. & POL'Y 123 (1991).

157. *See supra* note 67 and accompanying text (explaining that courts will uphold rational permissive inference instructions on review). Indeed, the inference drawn in the proposed instruction seems more rational than the inference in *Ulster County Court v. Allen*, which arguably "did not fairly reflect what common sense and experience tell us about passengers in automobiles and the possession of handguns." 442 U.S. 140, 173 (1979) (Powell, J., dissenting).

158. *See supra* text accompanying note 76 (reproducing the *MacDonald & Watson* instruction). This *MacDonald & Watson* instruction would probably pass constitutional muster as a permissive inference. Hartman & De Monaco, *supra* note 8, at 10152. For example, the Supreme Court stated in United States v. United States Gypsum Co. that it would have been correct in that case

fendant must have had "some information regarding this offense."[159] This "information" provides a crucial nexus between the specifically charged illegal activity and the illegal activity "of the type alleged." A jury could not, therefore, conclude that defendant knew about this offense merely because defendant knew about a similar violation some years previous.[160] Rather, the prosecution must come forward with some evidence linking defendant to the alleged felony, such as evidence of a phone call to an unpermitted transporter, some statement relating to the shipment, or a receipt bearing defendant's signature reflecting unusually low prices for services rendered.[161]

2. Protecting Public Health & the Environment

The proposed instruction provides important guidance to the jury by letting it know which basic facts the court deems sufficient to infer the requisite mens rea of "knowingly."[162] This guidance facilitates accurate criminal convictions of high level

for the court to have instructed the jury that it *may* infer intent from certain facts, but that it was not required to do so. 438 U.S. 422, 446 (1978). Because the instruction requires knowledge of illegal activity "of the type alleged," this exact version of the RCO doctrine will not apply to every case. This instruction is designed for cases like *MacDonald & Watson* and *United States v. Park*, in which the corporate officer had some warning of past violations, or the prosecution has some other evidence regarding previous similar violations. As in any case, the prosecutors must select their appropriate charge.

159. This part of the proposed instruction draws on the statutory Minnesota RCO doctrine. *See supra* note 149.

160. *See supra* note 78 and accompanying text (explaining this problem in *MacDonald & Watson*).

161. The Eleventh Circuit has stated, "It is common knowledge that properly disposing of wastes is an expensive task, and if someone is willing to take away wastes at an unusual price or under unusual circumstances, then a juror can infer that the transporter knows that the wastes are not being taken to a permit facility." United States v. Hayes Int'l Corp., 786 F.2d 1499, 1504 (11th Cir. 1986).

162. The Supreme Court has stated, "[I]nstructions bearing on the burden of proof, just as those bearing on the weight to be accorded different types of testimony and other familiar subjects of jury instructions, are in one way or another designed to get the jury off dead center and give it some guidance by which to evaluate the frequently confusing and conflicting testimony which it has heard." Cupp v. Naughten, 414 U.S. 141, 148-49 (1973); *see also* United States v. Goldblatt, 813 F.2d 619, 623 (3d Cir. 1987) (stating, "[a] district judge provides the jury with guidance, to enable it to draw the appropriate conclusions from the testimony"); United States v. Holland, 537 F.2d 821, 823 (5th Cir. 1976) (stating that it does not invade the province of the jury to furnish some guidance to jurors's deliberations).

corporate officers.[163] Conversely, by removing the ambiguity from the term "knowingly," this instruction will eliminate inaccurate convictions. Consequently, RCRA will serve to deter corporate officers from engaging in conduct that they know to be illegal and will encourage corporate officers to engage in informed conduct in the operation of their businesses.[164] This reduction in illegal activity and increase in careful management will better protect public health and the environment.

In *MacDonald & Watson*, given the overwhelming evidence against D'Allesandro, the jury likely would have found him guilty based on the proposed instruction.[165] Nevertheless, because the jury would be free to reject any inferences, the door would have remained open to his acquittal.[166]

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163. Similarly, in *People v. Roder*, the California Supreme Court found the following statutory presumption of knowledge of possession of stolen property unconstitutional:

> if [the jury] found (1) that defendant was a dealer in secondhand merchandise, (2) that he had bought or received stolen property, (3) that he bought or received such property under circumstances which should have caused him to make reasonable inquiry that the person from whom the property was bought had the legal right to sell it, and (4) that he did not make such reasonable inquiry, 'then you shall presume that defendant bought or received such property knowing it to have been stolen . . . .

658 P.2d 1302, 1304 (Cal. 1983) (en banc). The California Supreme Court instructed the trial courts to make the statutory mandatory presumption into a permissive inference. 658 P.2d at 1312. The court stated that "a carefully drafted instruction which places the inference in context and does no more than inform the jury that upon the prosecution's proof of the four basic facts it is permitted—but not required—to infer guilty knowledge is fairly innocuous." *Id.*

164. *See, e.g., Roder*, 658 P.2d at 1313 (explaining that two functions of a permissive inference are to guide the jury and to serve as an incentive for potential defendants to engage in informed conduct).

165. *See supra* notes 109-111 and accompanying text (explaining that D'Allesandro was a hands on manager with direct responsibility and had been previously warned of similar violations).

166. For example, it is possible that a jury may have believed that he did not know of the illegal acts. Moreover, a corporate officer who takes special precautions to be aware of the activities of her subordinates will be less likely to face prosecution and conviction because such evidence will necessarily rebut the conclusion that she knew of the specific illegal activity. In the actual *MacDonald & Watson* case, the district court began the retrial of D'Allesandro on January 15, 1992 for shipping hazardous waste to an unpermitted facility. U.S. ENVTL. PROTECTION AGENCY, FY 1993 ENFORCEMENT ACCOMPLISHMENTS REPORT § 3-102 (1993). The court acquitted D'Allesandro at the close of the government's case. *Id.*

CONCLUSION

Corporate officers across the country have grown nervous as federal courts have applied RCO doctrine reasoning to RCRA's criminal provisions.[167] In *MacDonald & Watson*, the First Circuit examined whether the mens rea requirement of RCRA § 6928(d)(1) permits the court to employ some form of the RCO doctrine to establish a corporate officer's knowledge of specific illegal acts. The First Circuit correctly held that the RCO doctrine, as stated by the district court, incorrectly created a mandatory presumption of knowledge of illegal acts. Courts should nonetheless adapt the doctrine to incorporate the "knowingly" requirement and to serve as a guide to juries. By utilizing the suggested permissive inference jury instruction, courts can further the policy of protecting the public health and, at the same time, protect the rights of RCRA defendants.

167. *See, e.g.*, Kenneth A. Hodson & Sarah N. McGiffert, *The Prosecution of Corporations and Corporate Officers for Environmental Crimes: Limiting One's Exposure for Environmental Criminal Liability*, 34 ARIZ. L. REV. 509 (1992); ALAN ZARKY, DEFENDING THE CORPORATION IN CRIMINAL PROSECUTIONS: A LEGAL AND PRACTICAL GUIDE TO THE RESPONSIBLE CORPORATE OFFICER AND COLLECTIVE KNOWLEDGE DOCTRINES (1990).