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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 15

MATTHEW KESCHNER,

Appellant.

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PEOPLE,

Respondent,

-against-

No. 16

ARON GOLDMAN,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
June 01, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY

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1 CHIEF JUDGE LIPPMAN: Number 15 and 16.

2 Counsel, would you like any rebuttal time?

3 MS. HELLMAN: One minute, Your Honor,  
4 please.

5 CHIEF JUDGE LIPPMAN: One minute. Sure, go  
6 ahead.

7 MR. HELLMAN: Matthew Hellman on behalf of  
8 appellant Goldman. I'd like to begin with accomplice  
9 liability and then turn to enterprise corruption.  
10 The trial court repeatedly instructed the jury that  
11 it could convict without finding intent. Eliminating  
12 an element of an offense is one of the most  
13 fundamental errors that there could be, and it was  
14 especially prejudicial here because intent was the  
15 critical issue in the case and the evidence of intent  
16 concerning Dr. Goldman was so thin. Now there's no  
17 real dispute that the trial court did eliminate the  
18 element of intent in its instructions - - -

19 JUDGE RIVERA: But don't we have to look at  
20 the whole jury charge?

21 MR. HELLMAN: We do have to look at the  
22 whole jury charge.

23 JUDGE RIVERA: It's - - - it's one word.

24 MR. HELLMAN: Well, it's - - -

25 JUDGE RIVERA: Against many other

1 paragraphs and pages that make it clear that the word  
2 is - - - does not mean what the court said.

3 MR. HELLMAN: Well, - - - well, several  
4 points in response to that, Your Honor.

5 JUDGE RIVERA: Okay.

6 MR. HELLMAN: First, when we're trying to  
7 figure out was the jury likely to be confused,  
8 normally we - - - we'd try to figure out  
9 theoretically might it have been confusing. In this  
10 case of course we know the jury was confused, because  
11 when it received this instruction it asked the judge  
12 explain accomplice liability please. At which point  
13 after defendants' counsel tendered a correct  
14 instruction, the court repeated the error and in fact  
15 in effect doubled-down on it because it did it twice.  
16 First it said to convict you can find either intent  
17 or a bad act and then it said - - - the last words it  
18 gave to the jury on the charge on this point were to  
19 acquit you must find both no intent and no bad act.

20 JUDGE RIVERA: Nobody objected.

21 MR. HELLMAN: There were objections, Your  
22 Honor, actually. We - - - we - - -

23 JUDGE FAHEY: I thought you had Goldman. I  
24 didn't think there was any objection by Goldman.

25 MR. HELLMAN: Well, we joined Keschner's

1 objection on - - - on these points, Your Honor.

2 JUDGE FAHEY: Yeah. I read Keschner's.  
3 I'm not sure - - - I'm not sure you did preserve it.  
4 If you didn't preserve it, then you're into Turner  
5 and those cases.

6 MR. HELLMAN: Well, we can talk about  
7 preservation, but I want to make a couple points  
8 clear, because I think the nature of the error  
9 actually speaks to the prejudice inquiry that we  
10 might want to look at in a case like this. The rule  
11 in New York is, under People v. Kelly, is that when a  
12 jury is given two inconsistent sets of instructions,  
13 one correct, one incorrect, we don't assume that the  
14 jury figured out what the right statement of the law  
15 was. We assume they use the wrong one.

16 And in People v. Martinez - - - in People  
17 v. Martinez the court looked to Kelly and held that a  
18 harmless error analysis is inappropriate,  
19 inappropriate when inconsistent instructions are  
20 given. So this isn't a harmless error case at all.  
21 Under Martinez and under cases that have applied it  
22 like Kims, the rule in New York is when an  
23 inconsistent instruction is given, you assume the  
24 jury did not follow or was not able to divine the  
25 correct statement of law and reversal is required.

1 Now - - -

2 JUDGE READ: Isn't - - - doesn't the whole  
3 thing, though, turn on whether we think the - - -  
4 the, as Judge Rivera said, that the instruction read  
5 as a whole conveys the idea that you need intent and  
6 knowledge both or we don't? I mean doesn't it boil  
7 down to our reading of that and our decision as to  
8 whether or not as a whole it does or doesn't?

9 MR. HELLMAN: That is the question and  
10 under cases like Kelly where there was - - - Kelly  
11 was a case in which the insanity defense was at issue  
12 and the judge said, much like this case, said that  
13 insanity was available - - - or available only if the  
14 defendant could show or the State could show that he  
15 didn't understand the nature and - - - of his acts  
16 and knew they were wrong, and really it should have  
17 been an or standard, so it was an and/or question.

18 And the dissent in that case pointed out  
19 that the judge had actually used the right  
20 formulation other places in the charge and that was  
21 not enough in the Kelly case, and I submit it's not  
22 enough here. And it's particularly - - - that has to  
23 be the - - - the right outcome in a case like this  
24 where the jury expresses confusion on the very  
25 instruction that is at issue and then the court

1 repeats, not just once but twice, the problematic  
2 statement. As Jus - - - Judge Cardozo said, the  
3 force of an and versus an or is hard to avoid, and  
4 this is - - - that was when he was talking about a  
5 probate case. Here we're talking about whether  
6 someone is convicted or not.

7 CHIEF JUDGE LIPPMAN: Why don't you get to  
8 the criminal enterprise issue, counsel?

9 MR. HELLMAN: I'd be happy to. I'd be  
10 happy to. Separate and apart from the accomplice  
11 liability point, there's also an enterprise liability  
12 question in this case. The court below departed from  
13 what other courts, really every other court to have  
14 looked at the question directly, has said on this  
15 subject. The enterprise corruption statute imposes  
16 super added penalties. It punishes the defendant  
17 more than just for what the underlying offenses are.  
18 And when should those super added penalties come into  
19 play? Well, we know from the statute that it  
20 requires not just criminal acts but a criminal  
21 enterprise with a continuity of existence, structure,  
22 and criminal purpose beyond the scope of ingenuity -  
23 - -

24 CHIEF JUDGE LIPPMAN: Why doesn't this case  
25 fit that definition?

1 MR. HELLMAN: This case doesn't fit that  
2 def - - - this definition because there is no  
3 continuous structure here or continuing structure  
4 here. As Justice Schneider said in the Army case - -  
5 -

6 JUDGE STEIN: Hold on. We had - - - we had  
7 doctors, we had runners, we had billing people, we  
8 had - - - you know, we had a pretty good organization  
9 going, not - - - not only once but more than once,  
10 and why - - - why - - - why is that not a criminal  
11 enterprise?

12 MR. HELLMAN: Because the law - - -

13 JUDGE STEIN: And - - - and are you saying  
14 that all - - - all an organization like this has to  
15 do to exempt itself from criminal enterprise  
16 liability is to put one guy at the top and - - - and  
17 have him or her control the whole thing?

18 MR. HELLMAN: No. That - - - that - - - I  
19 - - - I wouldn't put it that way. The reason this  
20 isn't a continuing enterprise is because it all - - -  
21 this case did come all down to Vinarsky. Whatever -  
22 - - whatever was - - -

23 CHIEF JUDGE LIPPMAN: Yeah. Why - - - and  
24 why isn't Vinarsky the key to the continuity here?  
25 Why - - - why isn't?

1 MR. HELLMAN: Well, as Justice Schneider -  
2 - -

3 CHIEF JUDGE LIPPMAN: With all the  
4 different pieces that are continually moving here.

5 MR. HELLMAN: Right. Well, Justice  
6 Schneider found it logical, and we submit that it is,  
7 that you really can't say something's continuing if  
8 it depends just on one person, that that's not a  
9 continuous structure.

10 JUDGE FAHEY: I though the Appellate  
11 Division addressed it and I - - - I think they were  
12 paraphrasing the statute. They talked about  
13 individual incidents, not individual participants.  
14 If I understand correctly, you - - - you would have  
15 the rule be that the People have to prove beyond a  
16 reasonable doubt that the absence of one person would  
17 not eliminate this criminal enterprise. That's what  
18 they'd be required to have proved - - - to prove  
19 under what you're suggesting.

20 MR. HELLMAN: To obtain the heightened  
21 penalties beyond that which are of course available  
22 for the underlying conduct - - - it does say criminal  
23 incidents, Your Honor, but if you're talking about  
24 continuity beyond criminal incidents, the - - - the  
25 logical inference from that is that even if you get

1 rid of Defendants A and B, this thing is still going  
2 to go on. That's - - - that is the - - - the bad  
3 thing that this statute is - - -

4 JUDGE RIVERA: So why isn't it possible if  
5 he's gone, someone steps up, steps up that criminal  
6 corporate ladder, if you will?

7 MR. HELLMAN: Well, that's a question of  
8 proof, and in this case the - - - the - - - there's  
9 nothing on the other side. The State - - - the  
10 People had their chance to suggest that was the case,  
11 prove it really, and there - - - there's nothing on  
12 the other side. Vinarsky is it. He - - - he's the  
13 Alpha and the - - - and the Omega.

14 CHIEF JUDGE LIPPMAN: These two guys are -  
15 - - are functionaries? The other two are  
16 functionaries?

17 MR. HELLMAN: Well, of course, Dr. Goldman  
18 wasn't involved in this at all, is our submission,  
19 but Vinarsky - - - without Vinarsky the whole thing  
20 falls.

21 JUDGE RIVERA: Well, and he - - - he - - -  
22 his name is on the clinic, right? And he's the  
23 doctor - - -

24 MR. HELLMAN: He - - - he's an owner - - -

25 JUDGE RIVERA: - - - who sees patients,



1 ahead. You're challenging us, but go ahead anyway.  
2 We can handle it.

3 MS. SALOMON: First - - -

4 JUDGE RIVERA: Shew - - -

5 MS. SALOMON: - - - with respect, I would  
6 like to take issue with the count of errors here in  
7 the accomplice liability instruction. Whether you  
8 can turn to or not, I will just refer to the appendix  
9 at 22-75 to 76. But I'll just put it this way: The  
10 court gave an - - - gave instructions that were fifty  
11 percent okay and fifty percent not okay. The not  
12 okays were never identified as such, they never were  
13 corrected as such. Let me just note for you the not  
14 okays. The not okays started the whole charge. To  
15 begin, and - - - and it says, "but only if the  
16 evidence shows that the defendant you are considering  
17 had knowledge of the crime and intentionally aided or  
18 assisted the others who were not on trial. We call  
19 this accomplice liability." That's not right. As  
20 you know, it's not right because every single crime  
21 with which my client and Dr. Goldman was charged  
22 required specific intent, not mere knowledge.

23 We then get down to the third or fourth  
24 paragraph where we have, "or he is not guilty because  
25 he had no knowledge, no intent, and did not

1 intentionally engage in any conduct." So there we  
2 have everything that the defendant has to disprove.  
3 He's got to disprove everything, including lack of  
4 knowledge. And it's obviously burden shifting. Then  
5 we end with, and this is in the supplemental charge,  
6 "again to be guilty, it must be proved that he knew,  
7 intended for it, or intentionally engaged in some  
8 conduct." So there the jury's given a choice. Pick  
9 one. Yes, it's interspersed with correct iterations,  
10 but again this court's jurisprudence makes clear that  
11 when you've got a jury that's given right and wrong,  
12 and here we don't have just one misstep, we've got  
13 fifty percent missteps.

14 JUDGE STEIN: What bothers me is when you -  
15 - - you know, when you - - - when you look at those  
16 statements taken out of the - - - the entire charge.  
17 They're - - - they're troublesome, and we're looking  
18 at them and we're looking them - - - at them on the  
19 written page and we're looking at them after the  
20 fact. Here it doesn't appear that anybody - - -  
21 well, certainly the - - - the lawyers or the - - - an  
22 - - - anybody, the judge, caught those ands and ors  
23 when - - - when they were spoken. And - - - and so  
24 do we - - - do we get to question whether there's any  
25 likelihood that the jury did?

1 MS. SALOMON: Well, the jury asked for  
2 reinstruction, and as we know no - - - the - - - the  
3 court - - - if you're asking do we have to have some  
4 knowledge that the jury picked the right one or the  
5 wrong one, I would say no. And in fact, I know Judge  
6 Rivera's opinion in Kims was the most recent one I  
7 think to invoke I think the Martinez and Griffin  
8 doctrine. In other words, when you've got  
9 instructions that are correct and incorrect and you  
10 have evidence that is sufficient to convict on the  
11 incorrect legal theory, that that in itself obviates  
12 - - - that - - - that - - - that constitutes harm.  
13 In other words, we're - - - we can't - - - when a  
14 jury - - - we don't know what - - - which one the  
15 jury picked. Obviously here the jury had, you know,  
16 a half - - - a half - - - you know, fifty-fifty. We  
17 - - - we don't know.

18 JUDGE STEIN: Going to the next step of - -  
19 - of - - -

20 MS. SALOMON: Okay.

21 JUDGE STEIN: - - - what our analysis has  
22 to be.

23 MS. SALOMON: Yeah.

24 JUDGE STEIN: What if we find that this  
25 alleged error - - - well, not alleged, that this

1 error was not preserved?

2 MS. SALOMON: Okay.

3 JUDGE STEIN: And so then we have to look  
4 at whether it was ineffective assistance - - -

5 MS. SALOMON: Right. Right.

6 JUDGE STEIN: - - - not to - - -

7 MS. SALOMON: Correct.

8 JUDGE STEIN: - - - object. And - - - and  
9 then do we look at the - - - the parts - - - you  
10 know, these little words and whether - - - and - - -  
11 and here arguably again, it would be a Turner error.  
12 Is - - - is - - - does this fit within Turner error  
13 not?

14 MS. SALOMON: Yes, it does, Your Honor.

15 JUDGE STEIN: How come is that?

16 MS. SALOMON: This court's cases have made  
17 clear that the charge and jury requests for  
18 information can be, I'll just put it this way, can be  
19 the ballgame. That they can matter, they can  
20 actually direct what the verdict is going to be.

21 JUDGE PIGOTT: The - - - the district  
22 attorney points out a number of area - - -

23 MS. SALOMON: Yeah.

24 JUDGE PIGOTT: - - - areas in the charge  
25 that are perfectly fine and that, I guess the

1 argument is, kind of wash over these minor changes.

2 What's your opinion of that?

3 MS. SALOMON: As - - - as I - - - well, as  
4 I said, I - - - I've - - - I've - - - I've - - - I  
5 think we've articulated fifty-fifty, half okay, half  
6 not okay. The not okay never withdrawn. We also, by  
7 the way, have a judge who at sentencing used  
8 knowledge, which again is not correct. Now on the  
9 Turner question, I think this court has said that the  
10 error really has to - - - if you'll just - - - "the  
11 error here was so egregious and decisive that it  
12 overshadowed and tainted the representation." We  
13 acknowledge, or I acknowledge, because I did make a  
14 full-throated ineffectiveness argument here, that  
15 counsel - - - yes, this was a complicated case.  
16 There were a lot of submissions, but counsel is  
17 tasked - - - counsel is tasked with paying attention  
18 at what is arguably the most critical juncture of a  
19 case. This court has found an attorney ineffective  
20 for not objecting during summation.

21 JUDGE READ: So does that mean - - - does  
22 that mean every time we find that there's a problem  
23 with the instructions it's - - - it's a Turner error  
24 per se?

25 MS. SALOMON: Not - - - not every time that



1 no O'Rama claim here?

2 MS. SALOMON: No, no, no.

3 JUDGE RIVERA: And so the - - - the defense  
4 counsel had an opportunity to look at this and know  
5 what was going on before the court spoke.

6 MS. SALOMON: And he - - - and he had two  
7 chances to get it - - - to get it right.

8 JUDGE PIGOTT: Yeah. But I - - - I'm  
9 looking at one that - - - that, you know, he's either  
10 guilty because he had knowledge of the crime,  
11 intended it that it be committed and did something  
12 intentionally to - - - to direct or assist in its  
13 commission. That seems pretty clear to me.

14 MS. SALOMON: Well, as I said, Your Honor,  
15 I - - - I - - - I agree that some - - - that - - -  
16 that half of them are okay, but the ones - - -

17 JUDGE PIGOTT: I know, but what - - - you -  
18 - - you keep saying well, let's forget those half.

19 MS. SALOMON: Well, no. No, beca - - - no,  
20 I'm not saying forget those halves. I'm saying that  
21 I - - - I - - - they fold into this court's Kelly  
22 jurisprudence and - - - and - - - and Harrison which  
23 is when you have half that are right half that are  
24 wrong and - - - and - - - and ands and ors do matter,  
25 conjunctions matter. Statutes are written with a

1 reason. But - - -

2 JUDGE PIGOTT: Well, I know. But I - - - I  
3 mean the - - -

4 MS. SALOMON: But how is a jury suppo - - -

5 JUDGE FAHEY: But see the thing is - - -

6 MS. SALOMON: Yes.

7 JUDGE FAHEY: - - - you have a strong  
8 argument on the conjunctions. Obviously you - - -  
9 you have a logical argument, but the problem is - - -  
10 is - - - is I think you're trying - - - you're  
11 arguing to us that - - - that this will be a mode of  
12 proceedings error and that we always have to consider  
13 it. That's the only way we get to this.

14 MS. SALOMON: Well, I'm not - - -

15 JUDGE FAHEY: But it wasn't properly  
16 preserved so - - -

17 MS. SALOMON: No, no. I'm not - - - I'm  
18 not arguing mode of proceedings either. I'm saying I  
19 - - - I - - - I - - - I will take on the ineffective  
20 assistance of counsel burden here.

21 JUDGE FAHEY: Um-hum.

22 MS. SALOMON: But I do believe that we need  
23 it. This court looks to the fairness of the  
24 proceedings as a whole, and when you've got  
25 accessorial liability that has been trumpeted as the

1 major issue in the case, and when counsel has two  
2 chances to look at something, he's either got to know  
3 preservation law or else it should be just dispensed  
4 with it - - -

5 CHIEF JUDGE LIPPMAN: Okay, counsel.

6 MS. SALOMON: - - - or pay attention.

7 CHIEF JUDGE LIPPMAN: Okay.

8 MS. SALOMON: Thank you.

9 CHIEF JUDGE LIPPMAN: You'll have your  
10 rebuttal.

11 Counsel?

12 MS. AXELROD: Good afternoon. Sorry. Good  
13 afternoon, Your Honors. My name is Susan Axelrod. I  
14 represent the People in this matter.

15 CHIEF JUDGE LIPPMAN: Start with the  
16 criminal enterprise. Let's hear about that.

17 MS. AXELROD: The short answer is the  
18 statute just doesn't have anywhere in its - - - its  
19 plain language the gloss that the defense is trying  
20 to put on it. The statute says you have to prove  
21 continuity of existence beyond the scope of criminal  
22 incidents. That's all it says. In this particular  
23 case we had an organization that committed thousands,  
24 I believe it was thousands, of these various  
25 insurance frauds. It was a structured organization,

1           it lasted for a number of years, it didn't fold up  
2           with one.

3                       CHIEF JUDGE LIPPMAN:   What about the Vinar

4           - - -

5                       MS. AXELROD:   It kept going.

6                       CHIEF JUDGE LIPPMAN:   - - - Vinarsky issue,  
7           they say that it's - - -

8                       MS. AXELROD:   But again, you have to - - -

9                       CHIEF JUDGE LIPPMAN:   - - - there's no  
10          organization beyond him.

11                      MS. AXELROD:   Well, I don't think they're  
12          saying there's no organization beyond him.  They're  
13          saying if he left the organization, it would not  
14          continue to exist.  And the first answer to that is  
15          again that's not what the statute requires.  The  
16          statute just says given what's in front of us was  
17          there a continuity of exis - - - of existence beyond  
18          this scope of the criminal incidents, not given what  
19          might be happening in two weeks.  So they're - - -

20                      JUDGE RIVERA:   You're saying while they  
21          participated you have this criminal enterprise?

22                      MS. AXELROD:   Exactly.  And as - - -

23                      JUDGE RIVERA:   The fact that it might not  
24          exist tomorrow if - - - if Vinarsky is no longer part  
25          of it is irrelevant - - -

1 MS. AXELROD: Is irrelevant.

2 JUDGE RIVERA: - - - to the analysis?

3 MS. AXELROD: That's - - - the statute  
4 doesn't require us to prove what might have happened  
5 if a particular person left. It only requires us to  
6 prove that what is in front of us is an organization  
7 that has a continuity of existence beyond the scope  
8 of the criminal incidents. The idea being we don't  
9 want to punish ad hoc let's get together for a  
10 moment, commit a robbery, and all go our separate  
11 way. We want to punish the sophisticated  
12 organization that comes together and works and  
13 commits a number of crimes in a structured  
14 environment. Whether or not - - -

15 JUDGE STEIN: Do you think continuity of  
16 existence is what has happened up until this point,  
17 not what may or may not happen in the future?

18 MS. AXELROD: That's exactly right.  
19 Otherwise we'd have to be - - - we'd have to be  
20 proving an unknown. We - - - there's no reason, you  
21 know - - -

22 JUDGE RIVERA: Well, if Vinarsky had left  
23 and had - - - or they had - - - or he had decided I'm  
24 out of this business and they closed shop, would you  
25 have prosecuted him for what had happened in the past

1 assuming you get within the time frame?

2 MS. AXELROD: If - - - if the - - - if the  
3 organization decided we don't want to continue  
4 anymore?

5 JUDGE RIVERA: We've - - - we've ended.  
6 We're not - - - not making the kind of money we want  
7 to.

8 MS. AXELROD: They still were a criminal  
9 organization - - -

10 JUDGE RIVERA: At the time.

11 MS. AXELROD: - - - with the continuity, at  
12 the time that they existed, with the continuity of  
13 existence beyond the scope of the criminal incidents.  
14 So the - - - you know, whether Vinarsky left or not,  
15 what you look at is what they were doing from 2006 or  
16 2002, 2006. I get the - - - the dates a little bit  
17 mixed up.

18 CHIEF JUDGE LIPPMAN: You're - - - you're  
19 flipping it and saying with Vinarsky it is a criminal  
20 ent - - - enterprise whether or not what might happen  
21 later if he wasn't there?

22 MS. AXELROD: That's correct. And because  
23 the court is asking me facts, although I don't  
24 actually think that we were required to prove them, I  
25 just want to point out that in fact Vinarsky held no

1 special skills. He'd been a bookkeeper in another  
2 organization. He saw how it was done. He came over  
3 and did it here. There's no reason to think one of  
4 the bookkeepers here couldn't have run that same  
5 organization. He didn't have the licenses like the  
6 doctors that - - - that nade - - - made him unique.  
7 So this idea that this type of organization couldn't  
8 exist without Vinarsky, I mean that's what they would  
9 like you to - - - they would like you to conclude  
10 that as a factual matter.

11 Our argument is, one, you shouldn't even be  
12 looking that way, but if you're going to go to the  
13 facts, there's no reason to - - - to - - - to draw  
14 the inferences that they're asking you to draw. The  
15 bottom line is we had a structured, sophisticated  
16 organization. The point of the enterprise corruption  
17 statute is to get at those structured, sophisticated  
18 organizations. We used the appropriate statute, we  
19 prove - - - proved the appropriate things, we didn't  
20 prove something that the statute doesn't ask us to  
21 prove, and we - - - we offered sufficient evidence to  
22 sustain the conviction.

23 JUDGE READ: Is this a Turner error? Was  
24 the instruction a Turner error or a failure to  
25 object?

1 MS. AXELROD: It's not a Turner error, but  
2 you know, if - - - if I could, Your Honor, I would  
3 like to turn the court's focus just a little bit and  
4 it - - - as Ms. Salomon is saying, she only gets your  
5 consideration on this if you're willing to - - - to  
6 review an ineffective assistance claim. There has  
7 not been a 440.10 in this case. The defense has just  
8 thrown up their hands and said, you know what, not  
9 preserved, must be ineffective, we - - - now we get  
10 to argue what the error is.

11 JUDGE STEIN: Well, isn't it apparent from  
12 the face of the record? Why would it have to be a  
13 440?

14 MS. AXELROD: Well, there - - - it's not  
15 completely apparent from the face of the record. For  
16 instance, as we argued in our brief, that second  
17 mistake in the supplemental instruction with the or  
18 rather than the and, it's our position that that was  
19 a mistake. So it would be efficacious to allow the  
20 defense attorney to - - - to get up there and say you  
21 know what, I didn't hear it that way either.

22 JUDGE RIVERA: To you it's a typographical  
23 error. So - - -

24 MS. AXELROD: I heard - - - I heard it  
25 correctly. Exactly. The other thing is - - -

1                   JUDGE FAHEY: Oh, but aren't - - - aren't  
2 you saying that if that was an error that would get a  
3 new trial, and I'm sitting there as defense counsel.  
4 I'm going to say let that go. Let that go. Why  
5 would I say anything?

6                   MS. AXELROD: But you - - - then you - - -  
7 you have to say that. I mean the def - - - the  
8 defense, then that's a strategy and our argument  
9 would be that that's not ineffectiveness, that's  
10 cleverness.

11                  JUDGE FAHEY: It may be quite effective  
12 counsel.

13                  MS. AXELROD: Ex - - - exactly.

14                  JUDGE FAHEY: That's - - -

15                  MS. AXELROD: The other thing is these are  
16 not the only ineffective assistance claims that  
17 they're raising in - - - in this brief. They - - -  
18 Mr. Goldman is raising the failure to object to the  
19 enterprise corruption as an ineffectiveness. Mr.  
20 Keschner is, excuse me, raising the failure to object  
21 to some of the opening statements as ineffective.  
22 They're making a general ineffectiveness claim and it  
23 - - -

24                  JUDGE RIVERA: It's not a Turner claim,  
25 you're saying.

1 MS. AXELROD: Well, exactly. They're - - -  
2 they're - - - they're - - - they're mak - - - trying  
3 to make a Turner claim within the one, but they've  
4 actually raised a number, and they're asking this  
5 court just to - - - to waive away preservation by  
6 just making this all ineffectiveness without doing  
7 the thing that this court has said that - - - that  
8 they should be doing, which is doing a 440.10 and  
9 allowing the defense to explain what was on their  
10 mind at the time and also allowing the trial judge to  
11 look and - - - and determine whether or not in fact  
12 there's a prejudice prong here, because that also  
13 happens at the trial level. So while I don't believe  
14 there's a Turner error, I don't think this court  
15 should be looking at any of this, because I don't  
16 believe that the defendants took the steps necessary  
17 to raise these claims properly before this court.  
18 But in - - -

19 JUDGE FAHEY: But - - - but what do you say  
20 ab - - - about the court's error itself in the  
21 charge? Forgetting about the preservation issues and  
22 whether we get into that, because if you're arguing  
23 Turner then you seem to be conceding that these were  
24 - - - these were at least arguably egregious error.

25 MS. AXELROD: Well, we - - - we - - - we've

1           conceded that there were errors made. We - - - we  
2           would not at all concede that they're egregious.  
3           Under this court's jurisprudence in People - - -  
4           especially in People v. Umali, you look at the charge  
5           as a whole, and throughout the charge the court  
6           stressed that the People had to prove intent, the  
7           court read the - - - the accomplice liability statute  
8           - - - and now I just lost my train of thought.

9                         JUDGE FAHEY: It's all right.

10                        MS. AXELROD: The - - - the court - - - and  
11           the fun - - - the - - - the ironic thing is in terms  
12           of stressing the knowledge, that's because they asked  
13           for it. They actually got up and said, look, we want  
14           to make sure that the jury understands it's not just  
15           mere presence - - -

16                        JUDGE RIVERA: But this is - - - I thought  
17           this was a supplemental instruction in response to a  
18           jury note. Have I missed something?

19                        MS. AXELROD: There's two - - - there's  
20           first the main charge, which is the - - -

21                        JUDGE RIVERA: The main charge, yes, I know  
22           that one.

23                        MS. AXELROD: And - - - and that's where  
24           that - - - that first and mistake comes.

25                        JUDGE RIVERA: And first mistake.

1 MS. AXELROD: Then there's the supplemental  
2 charge where the judge repeats the main charge with  
3 its first and mistake.

4 JUDGE RIVERA: Yeah.

5 MS. AXELROD: But then when she's circling  
6 back to what would fix it all by reminding the jury  
7 that in fact the People have to prove all three  
8 prongs, that's when she - - - the transcript  
9 indicates that she used the or, and - - - and again  
10 it's our argument that that's in fact a transcript  
11 error. So there's sort of - - - there are two ands  
12 that shouldn't be there.

13 But when you look at the entire charge as a  
14 whole it was clear to the jury that the burden was  
15 always on the People. She started by saying the  
16 burden was on the People. She said the People had to  
17 prove every single element beyond a reasonable doubt.  
18 When she charged the elements of the crimes, she - -  
19 - when she reminded the jury that we had to prove  
20 beyond a reasonable doubt, she said if you find that  
21 they acted either alone or in concert, you must find  
22 that they had the intent to commit the crime, et  
23 cetera, each time stressing that we had the burden of  
24 proof.

25 In terms of the jury being confused, juries

1 often ask for recharges on - - - on statutes or  
2 elements. They were hearing a lot of testimony, it  
3 was a long trial, they'd been charged on Thursday,  
4 they had spent all day Friday asking for various read  
5 backs. By the end of the day they were now turning  
6 to the statutes, it made sense to say, well, can we  
7 hear this again. I mean this wasn't a confused jury  
8 that kept coming back and going, you know, we don't  
9 understand. I mean on the one hand you said the  
10 People have to prove all three things to convict, but  
11 on the other hand now you're telling us the defense  
12 has to prove all three things to acquit, and we can't  
13 figure out where the middle ground is. There was  
14 none of that. The jury asked once to hear the  
15 accomplice liability charge. They then went back and  
16 deliberated. They asked for further instruction on  
17 other charges.

18 JUDGE RIVERA: So they're going through the  
19 stages.

20 MS. AXELROD: They're going through the  
21 stages. They're looking at the statute. They're  
22 doing what a good jury should do and - - - and  
23 hearing repeatedly that the burden of proof is on the  
24 People, the People have to prove intent, the People  
25 have to prove accomplice liability. While there were

1           those really two unfortunate ands and potentially  
2           that one unfortunate or, it did not leave the jury  
3           confused as to what their duties and responsibilities  
4           were. My time is not up, but unless there are any  
5           questions, I'm happy to - - - to ask the - - -

6                        CHIEF JUDGE LIPPMAN: Thanks. Thanks,  
7           counsel.

8                        MS. AXELROD: I'll just ask the court to  
9           affirm. Thank you.

10                       CHIEF JUDGE LIPPMAN: Appreciate it.  
11           Counsel, rebuttal.

12                       MR. HELLMAN: Thank you, Your Honor. I  
13           think from the People's recitation the one thing  
14           everybody agrees on is that this charge was riddled  
15           with error. I think we're having a hard time  
16           cataloging just how many there were and it's easily  
17           fifty percent, as my colleague points out.

18                       JUDGE PIGOTT: Well, I - - - I - - - I - -  
19           - I'm kind of surprised at that. You say it's  
20           riddled and you can't count them all?

21                       MR. HELLMAN: Yes, Your Honor.

22                       JUDGE PIGOTT: Okay.

23                       MR. HELLMAN: The - - - we have one in the  
24           main charge, two afterwards, and there's a suggestion  
25           that maybe it was a typographical error to explain

1 the last one. But - - -

2 JUDGE PIGOTT: That's three.

3 MR. HELLMAN: That's three. That's three  
4 times the jury was told the wrong thing.

5 JUDGE PIGOTT: But you said riddled and you  
6 can't count them all.

7 MR. HELLMAN: Right.

8 JUDGE PIGOTT: That's the only reason I  
9 asked.

10 MR. HELLMAN: I apologize for the  
11 hyperbole. There were three misstatements that  
12 eliminated the intent element of the offense in this  
13 case. The question now is does that error warrant  
14 reversal. Under Martinez and under Kelly you don't  
15 even do a harmless error analysis in that context.  
16 It simply requires reversal. The question now is if  
17 there was not preservation. I'm happy to talk about  
18 preservation because this is not a case in which  
19 defense counsel sat silent - - -

20 JUDGE FAHEY: Um-hum.

21 MR. HELLMAN: - - - while this charge went  
22 on. What - - -

23 JUDGE FAHEY: You're - - - you're  
24 addressing the point I brought up, was it a strategy.

25 MR. HELLMAN: Yeah, correct. If that was

1 strategy - - -

2 JUDGE FAHEY: If - - - no, go - - - go  
3 ahead.

4 MR. HELLMAN: - - - it was not carried out  
5 well, because what counsel said after providing a  
6 correct charge to the court.

7 JUDGE FAHEY: Um-hum.

8 MR. HELLMAN: What counsel said after  
9 providing a correct charge was that the court's  
10 charge removed the burden from the prosecution of  
11 proving each element. And then when the court went  
12 ahead and gave it anyway, counsel got back up and  
13 said you're not getting the mental culpability for  
14 larceny in the charge. I should get the exact  
15 language here. Accessorial liability is divided.  
16 I've heard it, said the judge. Cut the - - - cut the  
17 - - - that's - - - you've already told me this,  
18 right? Cut - - - cut off, counsel. So that's - - -  
19 that's what's going on here.

20 Now if that wasn't effective - - - that was  
21 not effective to alert the court to the error, that  
22 has to be ineffective assistance of counsel. What  
23 possible tactical judgment could there be to allow  
24 your client to have the intent element omitted from  
25 the charge? This case was not about whether Dr.

1 Goldman worked at the clinic, whether or not he acted  
2 at the clinic. This case was about his intent. I've  
3 already recounted the paucity of the State's evidence  
4 on intent.

5 CHIEF JUDGE LIPPMAN: Okay, counsel.  
6 Thanks.

7 MR. HELLMAN: So therefore we'd ask that at  
8 a minimum this be reversed under ineffective  
9 assistance.

10 CHIEF JUDGE LIPPMAN: Thank you, counsel.

11 MR. HELLMAN: Thank you.

12 CHIEF JUDGE LIPPMAN: Counsel, rebuttal.

13 MS. SALOMON: Until today I - - - I know  
14 that my adversary said - - - noted the absence of a  
15 440, but never articulated any conceivable trial  
16 strategy because there is none. Counsel did make a  
17 protest. It was wrong. Counsel said this charge is  
18 burden shifting, but didn't say what -- it said  
19 places the burden on my client, but what? This  
20 court's jurisprudence is clear. If the judge grants  
21 a request to charge, he put in voluminous request to  
22 charge. He was int - - - intensely interested in  
23 this, but he basically blew it when it mattered most.  
24 The judge said I'm going to grant your charge. When  
25 a judge grants a charge it is then incumbent on



1 MS. SALOMON: Okay. On the - - - on the -  
2 - - on the Ocha (ph.) question, we have argued that  
3 it's - - - it - - - it really - - - we believe that  
4 our gloss on this statute, which is basically sort of  
5 added on to what counsel argued in - - - in - - - in  
6 his motion to dismiss here is that our legislature  
7 doesn't have criminal enterprises of one, unlike - -  
8 - unlike the RICO statute. You just can't have a  
9 one-person enterprise. And basically that's what  
10 this thing became.

11 Vinarsky's own testimony and all the  
12 debriefing, he had I think 100 debriefings by the  
13 prosecution before he testified in this case. With  
14 pride he said no one knows anything but me. No one's  
15 coming after me. He asked about someone who is - - -  
16 oh, isn't he close enough to be your son? He said,  
17 no, my son died. Nobody was taking - - - he - - - he  
18 held these things, I can't pronounce what he calls  
19 them, some Russian name for these special sticks that  
20 had all the information on them. No one else had to  
21 do anything.

22 Yes, there were doctors, but we're talking  
23 about what made this thing a criminal enterprise and  
24 only he did, and the People's proof made that out.  
25 And our legislature obviously has recognized that a

1 one-person enterprise doesn't make the - - - doesn't  
2 pose the danger that - - - that - - - that - - - that  
3 other - - - that enterprises with more than one  
4 person do, and he didn't just run it. He only - - -  
5 only he had everything to run a - - -

6 JUDGE RIVERA: But what - - - what about -  
7 - -

8 MS. SALOMON: I'm sorry. That's okay.

9 JUDGE RIVERA: - - - that - - - that it  
10 exists at the time - - -

11 MS. SALOMON: Yeah.

12 JUDGE RIVERA: - - - you're looking at it  
13 at the time that it exists. So even if he's a  
14 central figure it's at the time that it exists you've  
15 got that continuity.

16 MS. SALOMON: Right. No, but at the time -  
17 - - again, we argued that - - - that - - - that our  
18 interpretation of the statute also allows for an  
19 examination of the - - - of the human beings and not  
20 just incidents. I think it doesn't do violence to  
21 the statute. This court's other cases like Kancharla  
22 or Western Express talked - - - looked at it from a  
23 structure point of view. Yes, this thing had a  
24 structure, but you're allowed I believe to look at  
25 the human beings, and when you have only basically

1           one human being who knows how to do everything, only  
2           he's got all the knowledge of how to make it the  
3           corrupt enterprise, not just the enterprise. No,  
4           he's not a medical doctor, so even within the finite  
5           amount of time that he ran it, it was just his crime.  
6           And now - - -

7                    JUDGE RIVERA: It can't function without  
8           the other people.

9                    MS. SALOMON: Exactly. And that - - -

10                   JUDGE RIVERA: Without the other expertise.

11                   MS. SALOMON: Yes. But - - - but he is the  
12           sine qua non, and so we would say the People are not  
13           bereft of things to try to go after the other people.

14                   JUDGE RIVERA: You're saying he's  
15           irreplaceable?

16                   MS. SALOMON: I'm sorry?

17                   JUDGE RIVERA: You're saying he's  
18           irreplaceable?

19                   MS. SALOMON: Yes, he made himself  
20           irreplaceable.

21                   CHIEF JUDGE LIPPMAN: Okay, counsel.

22                   MS. SALOMON: He declared himself so.

23                   CHIEF JUDGE LIPPMAN: Thanks. Thank you.  
24           Thank all of you.

25                   MS. SALOMON: Thank you.

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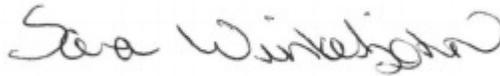
CHIEF JUDGE LIPPMAN: Appreciate it.

(Court is adjourned)

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

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Matthew Keschner, No. 15, and People v. Aron Goldman, No. 16 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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