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Abstract

Captain Richard Smith was sailing his charter vessel, *Cimarron*, along with a crew from Camden, Maine to St. John, U.S. Virgin Islands for the winter season. During the voyage, Smith stopped in Beaufort, North Carolina, and picked up David Pontious who would join the crew for the remainder of the journey. Shortly after joining the crew, Pontious began experiencing hallucinations and sickness, culminating in Pontious attacking Smith. After the altercation was broken up, Pontious jumped overboard and drowned. Smith never made an attempt to assist Pontious and waited until the next day to radio for assistance. Upon the *Cimarron*'s arrival in the U.S. Virgin Islands, Smith was arrested and charged under a rarely used statute, 18 U.S.C. § 1115, commonly known as Seaman's Manslaughter. After a trial, Smith's attorney filed a motion for judgment of acquittal, pursuant to Rule 29 of the Federal Rules of Criminal Procedure on the ground that the statute only applies to commercial vessels. Over the Government's objection, the motion was granted. Applying two cannons of statutory interpretation, *ejusdem generis* and *noscitur a sociis*, Smith contended that in order to be convicted under § 1115, the vessel needed to be engaged in commercial activity. This includes carrying passengers or cargo for pay. Accordingly, because the *Cimarron*, was not being paid to transport any passengers or cargo, and no members of the crew were being paid, the Court accepted Smith's argument that the *Cimarron* was not engaged in commercial activity and therefore § 1115 is inapplicable.

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I. INTRODUCTION

When charter boat captain Richard Smith began his annual voyage from Camden, Maine to St. John, U.S. Virgin Islands in the fall of 2015, nothing seemed out of the ordinary.[2] Smith had made this voyage to St. John every year since 2005 where he operated a charter boat business during the winter months.[3] On October 22, 2015, Smith docked his vessel, the S/V *Cimarron*, in Beaufort, North Carolina where David Pontious joined Smith's crew – replacing a crew member.[4] Shortly after joining the crew of the *Cimarron*, Pontious became "seasick and dehydrated," and began hallucinating.[5] In particular, the other crewmembers reported that Pontious believed he had been drugged and kidnapped by the crew of the *Cimarron.*[6] The next day, Pontious reportedly began to hear voices.[7]

On October 25, the *Cimarron* was approximately 300 miles off shore and Pontious' condition had deteriorated substantially.[8] In an apparent attempt to take control of the *Cimarron*, Pontious allegedly attacked Smith, choking the captain.[9] After other crew members intervened in this attack on Smith, Pontious allegedly

2 Lauren Abbate, *Captain of Camden Charter Vessel Charged with Seaman's Manslaughter, Detained in Virgin Islands*, Bangor Daily News (Nov. 20, 2018), https://bangordailynews.com/2018/11/20/news/midcoast/captain-of-camden-charter-vessel-charged-with-seamans-manslaughter-detained-in-virgin-islands/, [https://perma.cc/FR5V-7Y8S].

3 Eric Russell, *Prosecution Lays Out Case Against Camden Charter Boat Captain Charged in 2015 Death*, Portland Press Herald (Dec. 19, 2018), https://www.pressherald.com/2018/12/19/prosecution-lays-out-case-against-camden-sailboat-captain-charged-in-2015-death/?rel=related, [https://perma.cc/J82W-KV9L].

4 Indictment, *United States v. Richard Smith*, No. 3:18-CR-00026-CVG-RM (D. V.I. Jul. 12, 2018), Doc. No. 1; *see also* Russell, *supra* note 2.

5 Indictment, *United States v. Richard Smith*, No. 3:18-CR-00026-CVG-RM (D. V.I. Jul. 12, 2018), Doc. No. 1.

6 Abbate, *supra* note 1.

7 *Id.*

8 *Id.*

9 Eric Russell, *Camden Charter Boat Captain Acquitted in Unusual Manslaughter Case*, Portland Press Herald, (Jan. 9, 2019), https://www.pressherald.com/2019/01/09/camden-charter-boat-acquitted-in-seamans-manslaughter-case/, [https://perma.cc/28KJ-UVJM].

jumped overboard, struck his head on the railing of the *Cimarron*, and never surfaced.[10] It is undisputed that Smith did not make contact with authorities to report the incident until the next day, although Smith maintains that he had attempted to make contact with the United States Coast Guard, but only got static.[11] Upon the *Cimarron*'s arrival in St. John on November 2, 2015, Smith was arrested and charged with violating 18 U.S.C. § 1115, a criminal statute which prohibits what has become to be known as "Seaman's Manslaughter."[12]

After the third day of the jury trial in the U.S. District Court for the Virgin Islands, Smith's attorneys moved for a judgment of acquittal before the case was submitted to the jury for deliberations.[13] The Defendant's motion put forth three arguments: first, the defense argued that the October voyage was not a "commercial voyage," and therefore Smith could not be convicted under 18 U.S.C. § 1115;[14] second, the motion contended there was insufficient evidence presented that Smith was the direct cause of Pontious' death; [15] and finally, the defense argued that Smith did not owe a duty of care to Pontious after Pontious attempted a mutiny.[16] The District Court granted Smith's motion, and Smith was acquitted of Seaman's Manslaughter in the death of David Pontious.[17]

The focus of this case note will be on the first argument presented in Smith's motion for judgment of acquittal – whether or not the voyage in October 2015 was, in fact, a commercial voyage such that Smith cannot be guilty under 18 U.S.C. § 1115. In particular, this Note contends that, despite a strong policy argument to the contrary, the trial judge correctly decided the issue of whether the October voyage constituted a "commercial voyage" within the meaning of 18 U.S.C. § 1115.

[10] *Id.*
[11] Abbate, *supra* note 1.
[12] Russell, *supra* note 8.
[13] Def.'s Mot. J. Acquittal, *United States v. Richard Smith*, No. 3:18-CR-00026-CVG-RM (D. V.I. Jan. 8, 2019) [hereinafter Def. Mot.].
[14] *Id.* at 3.
[15] *Id.* at 8.
[16] *Id.* at 10.
[17] Russell, *supra* note 8.

II. HISTORY OF THE SEAMAN'S MANSLAUGHTER LAWS

18 U.S.C. § 1115 has undergone several changes since its first version was implemented in 1838, primarily dealing with the breadth of jurisdiction of the statute. The first iteration of section1115 came into existence in 1838.[18] Initially, the early version of § 1115 appeared in the comprehensive "Act of July 17" and was entitled "An Act to Provide for the Better Security of the Lives of Passengers on Board Vessels Propelled in Whole or in Part by Steam."[19] The Act was a direct response to the increasing number of deaths that were occurring aboard steamships and "provided for the prosecution of officers or crewmen whose negligence caused the death of any person aboard their vessel."[20]

Following the passage of the 1838 Act, Congress enacted an independent statute in 1871 to promote the safety and "security of Life" aboard steamships.[21] Of note, Section 57 of the Act of 1871 provided a mechanism for addressing the loss of life as a result of the negligence of a person employed on a steamship.[22] In 1874, Congress codified Section 57 of the Act as section 5344 in the Revised Statutes of 1874, and moved it to a chapter "concerning crimes occurring within the maritime and territorial jurisdiction of the United States."[23] Interestingly, unlike other statutes in the same chapter, such as those prohibiting murder, Section 5344 did not contain an express prohibition of "federal jurisdiction over

[18] United States v. Allied Towing Corp., 602 F.2d 612, 614 (4th Cir. 1979); *see also* Allison Fish, *The Potential Application of 18 U.S.C. Sec. 1115 to Offshore Drilling Disasters: A Requiem for the Seaman's Manslaughter Act*, 39 TUL. MAR. L.J. 241, 242 (2014) [hereinafter *Potential Application of 18 U.S.C. S 1115 to Offshore Drilling Disasters*].
[19] United States v. Holmes, 104 F. 884, 885 (C.C.N.D. Ohio 1900).
[20] *Allied Towing Corp.*, 602 F.2d at 614 (citing Act of July 7, 1838, ch. 191, § 2, 5 Stat. 304); *see also* Fish, *Potential Application of 18 U.S.C. S 1115 to Offshore Drilling Disasters* at 242 (noting that there were more than two thousand deaths aboard steamboats prior to the passage of the Act of July 7).
[21] *Allied Towing Corp.*, 602 F.2d at 614.
[22] *Id.*
[23] Fish, *Potential Application of 18 U.S.C. S 1115 to Offshore Drilling Disasters* at 243.

violations occurring on waters within the jurisdiction of any state."[24] This may be evidence of Congress' intent to have a broad statute covering incidents arising anywhere "within the general admiralty and maritime jurisdiction."[25]

The reach of section 5344 was substantially limited in 1909 with the statute's codification in Section 282 of the Criminal Code, which made the statute "subject to the definition of the special maritime and territorial jurisdiction."[26] Therefore, "the law no longer applied to homicides committed on waters within the territorial jurisdiction of any state."[27] This jurisdictional restriction remained in place during the recodification of the criminal code in 1926, but was removed in 1948.[28] In 1948, the modern version of the Seaman's Manslaughter Act was codified as a statute of general application as 18 U.S.C. § 1115.

In its current version, 18 U.S.C. § 1115 reads, in relevant part, as follows:

> Every captain, engineer, pilot, or other person employed on any steamboat or vessel, by whose misconduct, negligence, or inattention to his duties on such vessel the life of any person is destroyed, and every owner, charterer, inspector, or other public officer, through whose fraud, neglect, connivance, misconduct, or violation of law the life of any person is destroyed, shall be fined under this title or imprisoned not more than ten years, or both.[29]

Of note, "[u]nlike the common law definition of manslaughter and the companion statutory definition for general manslaughter . . . Section 1115 only requires the proof of any degree of negligence to meet the culpability threshold."[30] This lower

[24] *Allied Towing Corp*, 602 F.2d at 614.
[25] Fish, *Potential Application of 18 U.S.C. S 1115 to Offshore Drilling Disasters* at 243.
[26] *Allied Towing Corp.*, 602 F.2d at 615.
[27] *Id.*
[28] *Id.*
[29] 18 U.S.C. § 1115 (2016).
[30] United States v. Kaluza, 780 F.3d 647, 657 (5th Cir. 2015).

threshold for culpability was used by Smith's attorneys to argue that the applicability of section 1115 should be limited to commercial vessels.[31]

III. STATUTORY CONSTRUCTION

Courts addressing the application of 18 U.S.C. § 1115 have been clear that the text of the statute is ambiguous.[32] The language of a statute is considered ambiguous when it is "susceptible to more than one reasonable interpretation or more than one accepted meaning."[33] To determine the meaning of ambiguous language in the context of section 1115, courts have typically invoked two canons of interpretation: *ejusdem generis* and *noscitur a sociis*.[34]

Ejusdem generis is used when "general words follow an enumeration of specific terms."[35] In this situation, "the general words are read to apply only to other items like those specifically enumerated."[36] It is important to note that these canons are limited, however. Specifically, "the rule[s] cannot be used to 'obscure and defeat the intent and purpose of Congress' or 'render general words meaningless.'"[37] Furthermore, "[t]he limiting principle of *ejusdem generis* has particular force with respect to criminal statutes, which courts are compelled to construe rigorously in order to protect unsuspecting citizens from being ensnared by ambiguous statutory language."[38] Of particular importance in *Smith* is whether the term "captain" in section 1115 is limited to a captain employed on a commercial vessel.[39] Without this reading, the word "captain" may

31 Def. Mot. at 7.
32 *Kaluza*, 780 F.Supp. at 658.
33 *Id.*
34 *Id.* (using the canons to assess whether an offshore oil rig constitutes a "vessel" which is covered under 18 U.S.C. § 1115); United States v. LaBrecque, 419 F.Supp. 430, 434 (D. N.J. 1976) (invoking the canons when addressing the question of whether the captain of a pleasure vessel may be charged under 18 U.S.C. § 1115).
35 *Kaluza*, 780 F.Supp. at 660–661 (internal quotation omitted).
36 *Id.* at 661 (internal quotation omitted).
37 *Id.* (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142. 163 (2012).
38 *Id.* (quoting *United States v. Insco*, 496 F.2d 204, 206 (5th Cir. 1974)).
39 Def. Mot. at 3.

be applicable to all vessels, not just commercial vessels, and Smith could be held liable.[40]

The other canon, *noscitur a sociis*, "is employed to ascertain the meaning of an ambiguous or doubtful word."[41] To obtain the meaning of the "ambiguous or doubtful word," that word must be read with "reference to other words with which it is associated."[42] Simply put, *noscitur a sociis* requires ambiguous words to be viewed in light of the other words associated with it.

To illustrate, in the case of *Smith*, the canon of *ejusdem generis* is used to determine if the words in the phrase "[e]very captain, engineer, pilot, or other person employed on any steamboat or vessel" in section 1115 are read individually or as a list. In other words, whether the word "captain" is read on its own, or in conjunction with "other person employed on any steamboat or vessel." If "captain" is read on its own, any captain – whether employed on a commercial vessel or not – would be liable under § 1115. However, if read in conjunction with the other words in the list, as *noscitur a sociis* demands, then only those captains employed on commercial vessels would be subject to punishment under section 1115.

IV. *UNITED STATES V. LABRECQUE*

Relying principally on *United States v. LaBrecque*, Smith's counsel argued that the vessel could not meet the definition of a "commercial vessel" for the purposes of 18 U.S.C. § 1115 because of the absence of paying passengers or cargo on the *Cimarron* and the lack of evidence that Smith was "employed" as a captain on the *Cimarron*.[43] The facts of *LaBrecque* are remarkably similar to those of the *Smith* case.

In *LaBrecque*, the defendant, Cyril LaBrecque, was the owner of a sailing schooner, the *Saddie and Edgar*. LaBrecque,

[40] *See generally*, *LaBrecque*, 419 F.Supp. at 434.
[41] *LaBrecque*, 419 F.Supp. at 434.
[42] *Id.*
[43] Def. Mot. at 7.

along with his wife Jessie, had planned a voyage to sail the *Sadie and Edgar* from Connecticut to Florida.[44] Accompanying the LaBrecques on their voyage were the first mate, the LaBrecque's Labrador retriever, and three recent high school graduates, Michael Riker, Paul Sagarino, and Bradford Blakely, who comprised the *Sadie and Edgar's* crew.[45] Similar to the crewmembers in *Smith*, Riker, Sagarino, and Blakely were onboard the vessel as crew but were not paid for their services.[46] Only a relatively small part of the voyage in *LaBrecque*, the stretch from Sandy Hook, Connecticut to Atlantic City, New Jersey, was to take place on the ocean.[47]

Once the *Sadie and Edgar* was on the ocean, it encountered inclement weather and began to take on water.[48] Eventually, the crew found themselves in the water and only a small skiff was available for all five people as well as the Labrador.[49] Sagarino and Blakely were forced to stay in the cold water alongside the skiff for approximately twelve hours while the LaBrecques, Riker, and the Labrador were in the skiff.[50] Sagarino and Blakely died.[51]

Cyril LaBrecque was ultimately charged with one count of Seaman's Manslaughter pursuant to 18 U.S.C. § 1115.[52] Like defense counsel in *Smith*, LaBrecque's attorneys filed a motion for judgment of acquittal on the grounds that section 1115 only applies to commercial vessels; and, since there were no paying passengers or cargo aboard the *Sadie and Edgar*, section 1115 is inapplicable.[53] The *LaBrecque* Court granted the motion.[54] Given the similarities in factual circumstances between *Smith* and *LaBrecque* as well as Smith's reliance on the reasoning presented in *LaBrecque*, the Court's reasoning in *LaBrecque* bears repeating.

[44] *LaBrecque*, 419 F.Supp. at 432.
[45] *Id.* at 431.
[46] *Id.* at 434.
[47] *Id.* at 432.
[48] *Id.* at 433.
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.* at 431.
[53] *Id.* at 434.
[54] *Id.* at 439.

LaBrecque's primary contention was identical to Smith's: "the word 'captain' must be interpreted with reference to the words 'other person employed.'"[55] This reading of "captain," according to LaBrecque, required a finding that section 1115 only applies to "vessels engaged in commercial activity."[56] To assess the validity of LaBrecque's argument, the Court turned to *ejusdem generis* and *noscitur a sociis*.[57] Based off of the construction of the phrase in question, as well as the relevant legislative history, the Court in *LaBrecque* determined that the word "captain" only applies to captains employed on commercial vessels or engaged in commercial activity and, therefore, granted LaBrecque's motion for judgment of acquittal.[58]

V. *HOOPENGARNER V. UNITED STATES*

Although the majority of cases dealing with the issue have concluded that only vessels engaged in commercial activity are covered by 18 U.S.C. § 1115,[59] the 1959 case of *Hoopengarner* came to a different conclusion.[60] *Hoopengarner* presents a stark contrast to *LaBrecque* and may present an alternative to the use of *ejusdem generis* and *noscitur a sociis* for courts deciding issues of applicability for section1115.

In *Hoopengarner*, a cabin cruiser with several individuals onboard was on a fishing trip on Lake St. Clair off the coast of Michigan.[61] Benjamin Hoopengarner, the defendant, was also boating in his speedboat.[62] At approximately 9:00 PM, Hoopengarner's speedboat collided with the cabin cruiser and several individuals were thrown from their vessels – including Mr.

55 *Id.* at 434; *see also* Def. Mot. at 6.
56 *LaBrecque*, 419 F.Supp. at 434.
57 *Id.*
58 *Id.*
59 Def.'s Mot. at 6 (citing *United States v. O'Keefe*, 426 F.3d 274, 279 (5th Cir. 2005); *United States v. Shroder*, 2006 WL 1663663 at *2 (S.D. Ala. June 12, 2006).
60 *Hoopengarner v. United States*, 270 F.2d 465 (6th Cir. 1959).
61 *Hoopengarner*, 270 F.2d at 467.
62 *Id.*

Hoopengarner.[63] Shortly after the collision, other boats on Lake St. Clair made their way toward the site of the collision and attempted to rescue the people thrown into the water.[64] Unfortunately, however, Virginia Ward was struck by a boat coming to her rescue and was killed.[65] Hoopengarner was charged under 18 U.S.C. § 1115 for her death and he was found guilty in the United States District Court for the Eastern District of Michigan.[66] Hoopengarner appealed to the Sixth Circuit.[67]

Hoopengarner raised five issues on appeal: first, the federal charges violated the Double Jeopardy Clause of the Fifth Amendment because he had already been tried by a state court;[68] second, "the Constitution, as well as the Federal Rules of Criminal Procedure, required dismissal of the indictment;"[69] third, lack of jurisdiction by the District Court; fourth, that his conduct "was not the proximate cause of the death of Virginia Ward;"[70] and finally, that the District Court "abused its discretion by failing to suspend the sentence."[71] The third issue raised on appeal is the only issue that presents the potential to support the Government's argument in Smith's case.

Interestingly, Hoopengarner never explicitly raised the argument that 18 U.S.C. § 1115 only applies to commercial vessels.[72] However, in addressing the jurisdictional issue raised by Hoopengarner, the Court concluded that because the vessel was "registered, licensed, and enrolled under the laws of the United States,"[73] courts had jurisdiction to enforce criminal penalties against those operating vessels – regardless of whether the vessel was commercial or not.[74]

63 *Id.*
64 *Id.*
65 *Id.* at 468.
66 *Id.*
67 *Id.*
68 *Id.* at 467.
69 *Id.*
70 *Id.*
71 *Id.*
72 *See generally, id.*
73 *Id.* at 471.
74 *Id.*

Hoopengarner, therefore, greatly expanded the scope of 18 U.S.C. § 1115, even if it did so inadvertently. Nevertheless, Hoopengarner's conviction was upheld and remains the only prosecution to be "leveled regarding a non-commercial voyage."[75] Although *Hoopengarner* did uphold the conviction of Benjamin Hoopengarner under section 1115, the *Hoopengarner Court* was not presented with, and thus did not make any determinations regarding, the issue of the commercial status of Hoopengarner's vessel. Rather, it did so on grounds other than vessel status and thus does not squarely address the issue set forth in *LaBrecque* and *Smith*.

In sum, *Hoopengarner* is the sole case to sustain a conviction of an individual not engaged in commercial activity under section 1115.[76] However, because *Hoopengarner* did not specifically address the issue raised in *LaBrecque* and *Smith*, its support as a counterargument is minimal.[77] In fact, in *LaBrecque*, the Court noted that "[w]hile *Hoopengarner* implicitly sanctioned the prosecution of a pleasure boat owner, it seems to represent an unwarranted (and perhaps unintentional) extension of the statute to cover a type of situation not intended by Congress."[78]

VI. APPLICATION TO *UNITED STATES V. RICHARD SMITH*

The facts of the case against Richard Smith are not in dispute. Richard Smith's vessel, the *Cimarron*, was not engaged in commercial activity for the purposes of section1115 because it was not "carrying passengers or cargo for pay."[79] Pontious was merely receiving free passage aboard the *Cimarron*.[80] Furthermore, as the defense alleged, "there was no evidence to show that Smith was 'employed' as a captain on the *Cimarron* at the time of the incident."[81]

[75] Def.'s Mot. at 6, n. 1.
[76] Def.'s Mot. at 6, n. 1.
[77] *LaBrecque*, 419 F.Supp. at 435.
[78] *Id.*
[79] Def.'s Mot. at 7.
[80] *Id.*
[81] *Id.*

Additionally, an important factual point to note is that the government's expert at trial admitted during his testimony "that the *Cimarron* was not a commercial vessel at the time Pontious jumped overboard."[82] This admission from the government's expert undoubtedly had a substantial negative impact on the government's case. The testimony of the government's expert and the Defense's argument lead to the conclusion that the commercial status of the vessel may change depending on the presence of paying passengers or cargo.[83] In other words, if Pontious had paid to be aboard the *Cimarron*, with all other facts being the same, section 1115 would likely apply.[84] Against this backdrop, the canons of statutory construction outlined above are necessary to determine if, in fact, section 1115 only applies to commercial vessels.[85] If the answer is "yes," then the District Court reached the correct conclusion in granting the Defense's Motion for Judgment of Acquittal – in spite of strong policy arguments to the contrary.

The issue still remains, however, whether or not section 1115 applies solely to commercial vessels. Based on the multiple interpretations of the statute that are present, it is clear, as other courts who have addressed the issue have mentioned, that the statute is ambiguous when it comes to the application of section1115 to noncommercial vessels.[86] Thus, utilizing *ejusdem generis* and *noscitur a sociis* are necessary.

In the case of section 1115, the words "captain," "engineer," and "pilots" are the specific terms and "other persons employed on any steamboat or vessel" are the general terms.[87] Using *ejusdem generis*, the term captain, a specific term, is limited by the general terms, "other persons employed on a vessel." At this point, *noscitur a sociis* can be invoked to ascertain the meaning of the term "captain" with reference to the "other words with which it is

82 *Id.*
83 *Id.*
84 *Id.*
85 *Kaluza*, 780 F.Supp. at 658.
86 *See, e.g., Kaluza*, 780 F.Supp.; *LaBrecque*, 419 F.Supp.
87 *LaBrecque*, 419 F.Supp. at 434; *see also* Fish, *supra* note 17, at 243.

associated, here 'other persons employed.'"[88] Based on the context within which the term "captain" appears in section 1115, as well as the statutory history of section 1115, it is clear that the term "captain" is limited to those "employed" on vessels or steamboats. In fact, an argument could be made that based on legislative intent alone, section 1115 is limited in application to commercial vessels. As noted in *Section I, supra*, Congress enacted the earliest iteration of section 1115 in direct response to a rise in deaths aboard commercial steamboats. This history, taken in conjunction with the canons of interpretation of *ejusdem generis* and *noscitur a sociis*, presents a compelling argument that section 1115 should be limited in its application to captains engaged in commercial activity.

Based on these principles, the District Court reached the correct legal conclusion when it granted the Defendant's Motion for Judgment of Acquittal. At the time that Pontious died, the *Cimarron* was not carrying any passengers or cargo for pay, nor was Smith being paid to perform his duties as captain.[89] Thus, the District Court had no other viable alternative than to grant the Defendant's Motion.

VII. EXPANSION OF § 1115 TO NONCOMMERCIAL VESSELS

Based on the aforementioned principles and legislative history, the Court in *Smith* reached the correct conclusion – application of section 1115 is limited to vessels engaged in commercial activity. The question then becomes: should it be? Regardless of the interpretation of an ambiguous statute, the real-world consequences of not being able to hold captains of noncommercial vessels criminally liable for their negligence thrusts an important policy question to the forefront of the *Smith* case. There are two specific questions related to this. First, whether section 1115 may apply when a vessel has been, or will be, used for commercial purposes, even if not engaged in commercial activity at the time of an individual's death. Second, whether there is a need for Congressional action to expand the reach of section 1115 to expressly include noncommercial vessels.

[88] *LaBrecque*, 419 F.Supp. at 434 (citing Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961)).
[89] Def.'s Mot. at 7.

It is uncontroverted that David Pontious became ill and eventually attacked Richard Smith.[90] However, it is equally clear that when Pontious jumped overboard into the Atlantic Ocean, Richard Smith kept sailing the *Cimarron* to the Virgin Islands and made no attempt to locate Pontious or render effective assistance.[91] This conduct falls beneath the standard set by the manslaughter statute, codified as 18 U.S.C. § 1112,[92] and thus left prosecutors one option for holding Smith criminally liable for the death of David Pontious: Seaman's Manslaughter.[93] Additionally, "the judge's ruling is not subject to appeal and the statute of limitations for a civil lawsuit has expired."[94]

Based on the Defendant's Motion for Judgment of Acquittal, the significant question is whether the individual was engaged in commercial activity *at the time that the individual died* as a result of another's negligence.[95] It has been argued that the lower standard of negligence required for conviction under section1115 is evidence that the statute should only apply to a limited category of vessels and individuals, namely those engaged in commercial activity at the

90 Eric Russell, *Prosecution Lays Out Case Against Camden Charter Boat Captain Charged in 2015 Death*, PORTLAND PRESS HERALD (Dec. 20, 2018), https://www.pressherald.com/2018/12/19/prosecution-lays-out-case-against-camden-sailboat-captain-charged-in-2015-death/, [https://perma.cc/7KHZ-KJFN].
91 *Id.*
92 The statute provides:

> Manslaughter is the killing of a human being without malice. It is of two kinds: Voluntary – upon a sudden quarrel or heat of passion. Involuntary – In the commission of an unlawful act not amount to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death.

93 "Section 1115 requires a lower degree of negligence to be proven to sustain a conviction than its sister statute Title 18 USC § 1112 which incorporated elements of common law manslaughter." Philip H. Hilder & Paul L. Creech, *Seaman's Manslaughter: The Criminalization of Death by Negligence*, 3, https://www.hilderlaw.com/Publications/ (last visited April 13, 2019), [https://perma.cc/R5KY-WBNZ].
94 Russell, *supra* note 8.
95 Def.'s Mot. at 7.

time of an individual's death.[96] Accordingly, if the government wants to prosecute a captain of a noncommercial vessel for manslaughter, it would be required to meet the higher standard set forth by section 1112.[97]

The issue presented by *Smith* is that the *Cimarron* would likely qualify as a commercial vessel in other contexts. For example, if Smith had been hired by an individual as a charter captain, the *Cimarron* would undoubtedly be acting as a commercial vessel and section 1115 would apply. The *Cimarron* is not a traditional "noncommercial" vessel because it was not used for Smith's pleasure.[98] Rather, Smith used the *Cimarron* for commercial purposes by getting paid to transport passengers—he just was not doing so at the time of Pontious' death.[99] Simply put, the gap between sections 1112 and 1115 effectively leave certain "off-duty" commercial vessels immune from criminal liability. And, in this case, there were also no civil repercussions for Smith because Pontious' family did not bring a civil suit within the applicable statute of limitations.

Although prosecutions under section 1115 are on the rise,[100] cases like *Smith* present a compelling reason for the expansion of section 1115. The limited application of section 1115 to commercial vessels stems in part from the fact that their "operators and owners, historically speaking, 'daily have the lives of thousands of helpless humans [sic] beings in their keeping.'"[101] However, "off-duty" charter boat captains like Richard Smith are seemingly relieved of all criminal liability for deaths resulting from their negligence, while still being able to transport numerous passengers as long as they are not paying. As noted previously, in its Motion for Judgment of Acquittal, the defense relied heavily on *LaBrecque*.[102] Yet the vessel in *LaBrecque* was not a charter vessel, but purely a pleasure

96 *Id.* (citing *United States v. O'Keefe*, 426 F.3d 274, 279 (5th Cir. 2005)).
97 Hilder & Creech, *supra* note 87, at 3.
98 Abbate, *supra* note 1.
99 *Id.*
100 Jeanne M. Grasso, *Law and Order: The Emergence of the Seaman's Manslaughter Statute*, 3 Benedict's Maritime Bulletin, 170, 171 (2005).
101 *United States v. O'Keefe*, 426 F.3d 274, 278, n. 1 (5th Cir. 2005).
102 Def.'s Mot. at 6.

vessel.[103] Therefore, while the victims in *LaBrecque* were nonpaying passengers assisting in the journey like those in *Smith*, the vessel in *LaBrecque* would never qualify as a commercial vessel for liability under section 1115.

Based on the reasoning presented by Congress for the Seaman's Manslaughter statutes, owners and operators of charter vessels not operating in their direct commercial capacity should still be subject to liability under section 1115. "Negligence occurs when there is a breach of duty, which is an omission to perform an act or to act in violation of a standard of care that is made to govern and control the manner of the discharge of a duty."[104] In the context of section 1115, the duty is shown by the vessel's status as a commercial, rather than pleasure vessel, because "owners, operators, and inspectors of commercial vessels have [a] unique responsibility or fiduciary duty to those who are killed because of the misconduct or violations of standards of care."[105] When a charter vessel is carrying nonpaying passengers during a voyage from one place of operation to another – as Smith was doing – a vessel's owner or an operator's duty of care does not cease to exist. Not only can the voyage arguably be considered "commercial" in the general sense of the word, but charter boat owners and operators should be considered subject to criminal liability under section 1115 even when the vessel is not being directly operated in its commercial capacity for reasons of public policy.

Therefore, while the *Smith* Court did reach the correct conclusion based on caselaw, section 1115 should be rewritten to include "off-duty" commercial vessels like the *Cimarron* in order to promote accountability for deaths resulting from negligence.

While there is a compelling case to be made for expanding the application of section 1115 to charter and other vessels not directly operating in their commercial capacity, application of section 1115 to strictly pleasure vessels is unsupported by the

[103] *LaBrecque*, 419 F.Supp. at 437.
[104] Hilder & Creech, *supra* note 87, at 3.
[105] *Id.*

legislative intent.[106] Furthermore, aside from the *Hoopengarner* case, there is no caselaw to support the application of section 1115 to strictly pleasure vessels. Individuals who own and operate vessels strictly for pleasure are not subject to the "unique responsibilit[ies] and fiduciary dut[ies]" that their commercial counterparts are.[107] The unique circumstances of a charter boat captain like Smith, or a similarly situated operator of a commercial vessel, is that they are subject to those duties giving rise to liability under section 1115 at any point.

The case for not extending criminal liability for negligence cannot be complete, however, without mentioning the number of fatalities that occur during the operation of pleasure vessels in the United States. According to the United States Coast Guard, there were a total of 2,480 accidents in 2017 resulting from operation of a vessel.[108] There were 1,727 injuries as a result and 295 deaths.[109] The leading cause of fatalities in recreational boating is alcohol use by the operator, followed by "operator inexperience."[110] If section 1115 were to be expanded to include pleasure vessels, there would be criminal liability under the lower negligence standard for the deaths of individuals resulting from causes such as operator inexperience.

Although a seemingly attractive option to combat deaths resulting from the negligent operation of noncommercial pleasure vessels, the legislative intent does not support an expansion of section 1115 to impose liability for these deaths.[111] Therefore, while Congress would possess the power to criminalize these offenses if they occurred within the territorial jurisdiction of the United

106 *See,* Grasso, *supra* note 94, at 170; Fish, *supra* note 17, at 242-44; Hilder & Creech, *supra* note 87, at 1.
107 *O'Keefe*, 426 F.3d at 278, n. 1; *see also* Hilder & Creech, *supra* note 87, at 3.

108 DEPARTMENT OF HOMELAND SECURITY, UNITED STATES COAST GUARD, 2017 Recreational Boating Statistics, 20 (2018), https://www.uscgboating.org/library/accident-statistics/Recreational-Boating-Statistics-2017.pdf, [https://perma.cc/N3WQ-H2J4].
109 *Id.*
110 *Id.*
111 Grasso, *supra* note 94, at 170.

States,[112] this legislation would not fit within the scope of section 1115's original intent.

VIII. CONCLUSION

When Richard Smith embarked on his annual voyage from Camden, Maine to St. John, U.S. Virgin Islands, he was not engaged in commercial activity for the purposes of 18 U.S.C. § 1115, otherwise known as Seaman's Manslaughter. As a result, when David Pontious, who was not paying to be aboard the *Cimarron*, attacked Smith and then ultimately jumped overboard into the Atlantic Ocean, Smith was not subject to liability under section 1115. Judge Curtis Gomez, relying on substantial caselaw, reached the correct conclusion in granting Smith's Motion for Judgment of Acquittal.

While Judge Gomez reached the correct conclusion, Smith's case presents an opportunity for Congress to clarify the scope of § 1115 and to include "off-duty" commercial vessels, such as the *Cimarron* at the time of Pontious' death. This minor expansion would fit within the original intent of Congress when it first enacted section 1115's predecessor, while keeping the scope of the statute narrow enough to justify the lower *mens rea*. The application of § 1115 derives from the higher duty of care that owners and operators of commercial vessels are subject to. For reasons of public policy, this duty should not be washed away simply because an individual was engaged in activity that was only tangentially related to commerce at a specific time. Although section 1115's scope should be expanded to include "off-duty" commercial vessels, it should not include vessels that are strictly pleasure vessels with no commercial purpose. This expansion cannot be supported by Congress' original intent.

[112] Fish, *supra* note 17, at 244, n. 17.