CORPORATE CRIMINAL LIABILITY ISSUES

by
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I. Introduction

A. Dealing with the media.

B. Dealing with your client.

II. State criminal sanctions involving corporations

A. Can be prosecuted by State and Federal government; no double jeopardy.

B. General Criminal Statutes:

1. T.C.A.§ 39-11-404. *Corporate Liability*. (a) A corporation commits an offense when:

> (1) The conduct constituting the offense consists of an intentional failure to discharge specific duty imposed upon corporations by criminal law;
>
> (2) The conduct constituting the offense is engaged in, authorized, commanded or knowingly tolerated by the board of directors or by a high managerial agent acting within the scope of the agent's employment on behalf of the corporation; or
>
> (3) The conduct constituting the offense is engaged in by an agent of the corporation and:
>
> > (A) The offense is a misdemeanor; or
> > (B) The offense is one defined by statute which indicates a legislative intent to impose such criminal liability on a corporation.

(b) The following definitions apply in this part, unless the context requires otherwise:

(1) "Agent" means any officer, director, servant or employee of the corporation or any other person authorized to act on behalf of the corporation; and

(2) "High managerial agent" means an officer of a corporation or any other agent of a corporation who has duties or such responsibility that the agent's conduct reasonably may be inferred to represent the policy of the corporation.

2. T.C.A.§ 39-11-405. *Individual Liability for Corporate Conduct.* A person is criminally liable for conduct constituting an offense which the person performs or causes to be performed in the name of or on behalf of an corporation to the same extent as if the conduct were performed in the person's own name or behalf.

3. T.C.A.§ 39-11-406. *Affirmative Defense to Criminal Responsibility of a Corporation.*

(a) It is an affirmative defense to prosecution of a corporation under § 39-11-404(a)(1) or (3) or § 39-11-405 which must be proven by a preponderance of the evidence that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission.

(b) Subsection(a) does not apply if it is plainly inconsistent with the legislative purpose expressed in the law defining the particular offense.

C. Specific State Statutes of Concern

1. T.C.A. § 39-12-201 Racketeer Influenced and Corrupt Organization Act. (RICO).

2. T.C.A. § 39-14-120 Issuing a false financial statement.

3. T.C.A. § 39-14-127 Deceptive Business Practices (false advertisements, weights, and commodities)

4. T.C.A. § 39-14-133 False of fraudulent insurance claims (punished as theft, up to 8-30 years)

5. T.C.A.§ 39-14-138 Theft of Trade Secrets (punished as theft)

6. T.C.A.§ 39-14-601 Computer Offenses

7. T.C.A. § 39-16-102 Bribery of Public Servant (Class C felony)

8. T.C.A. § 39-16-107 Bribing a witness

9. T.C.A. § 39-16-503 *Tampering with or Fabricating Evidence*. (a) It is unlawful for any person, knowing that an investigation or official proceeding is pending or in progress, to:

(1) Alter, destroy, or conceal any record, document or thing with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding; or

(2) Make, present, or use any record, document or thing with knowledge of its falsity and with intent to affect the course or outcome of the investigation or official proceeding.

(b) A violation of this section is a Class C felony. (applies to civil discovery, see *State v. Forbes*, 918 S.W.2d 431 (Tenn. Crim. App. 1995)

10. T.C.A. § 39-16-507 *Coercion of Witness* (Class D)

11. T.C.A. § 39-16-604 *Compounding*. (a) It is unlawful for any person to solicit, accept or agree to accept any benefit in consideration of refraining from reporting to a law enforcement officer the commission or suspected commission of an offense.

(b) It is unlawful for a complaining witness to solicit, accept or agree to accept any benefit in consideration of abstaining from, discontinuing or delaying prosecution of another for an offense.

(c) It is a defense to prosecution under this section that the benefit was solicited or accepted by the victim and did not exceed an amount reasonably believed by the victim to be due as restitution or indemnification for loss caused by an offense.

(d) A violation of this section with the respect to an offense classified as a misdemeanor is a Class E felony.

D. Punishments under State law

1. T.C.A. § 40-35-113 *Mitigating factors*

a. Assistance to authorities in uncovering offenses committed by others.

b. Assistance to authorities in locating or recovering any property.

2. T.C.A.§ 40-35-114 *Enhancement factors*

a. Defendant was leader in the crime.

b. Offense involved more than one victim.

3. T.C.A. § 40-35-111 *Fines for Corporations*

$350,000 for Class A felony
$300,000 for Class B felony
$250,000 for Class C felony
$125,000 for Class D felony
$50,000 for Class E felony

E. Defenses

1. Advice of counsel is no defense in Tennessee. *Hunter v. State*, 12 S.W.2d 361(1928).

2. Withdrawal and renunciation are affirmative defenses to criminal attempt, solicitation, or conspiracy. T.C.A. § 39-12-104.

III. Federal criminal sanctions involving corporations

A. The nature of criminal liability for corporations.

1. Because a corporation may only act through agents or employees the knowledge and purpose of the agents or employees may be attributed to the corporation. *New York Central Railroad v. United States*, 212 U.S. 481 (1909).

2. The government must establish beyond a reasonable doubt that the agent acted within the scope of his or her employment with the specific intent to benefit the corporation in order to hold the corporation liable for the acts of the employees. *United States v. Growers*, 964 F.Supp. 486 (D.D.C. 1997).

3. Generally if the employee has actual or apparent authority with which he or she engages in the activity then the employee is said to be acting within the scope of his or her employment.

4. Usually if there is reasonable belief by another party that the employee is acting with apparent authority then it is a fact question as to whether the employee is acting with the actual authority of the corporation.

5. Under Tennessee law liability of the corporation depends on the status of the employee within the corporation as has been noted earlier. However, for criminal purposes under federal jurisdiction there is some question as to whether lower level employees may bind the action of the corporation. See specifically, *In re Hellenic* 252 F.3d 391 (6th Cir. 2001) which held that high managerial officials may bind the corporation but there is a split of authority with respect to the action of lower level employees. Decisions in such cases should be based on the scope of the employee's responsibility rather than the official's title within the company.

6. Criminal liability may attach even if there is a policy in the company to reduce crime or there is a policy in the corporation to explicitly prohibit the behavior although there may be reduction of penalty for corporate policy against a particular act. This reduced penalty, however, does not prevent a finding of criminal liability. See *United States v. Hilton Hotels Corporation*, 467 F.2nd 1000 (9th Circuit 1972).

B. Corporate liability requires employee to benefit company by his or her acts.

1. An act to benefit the corporation is sufficient even if the corporation does not receive an actual benefit. In *United States v. Portac*, 869 F.2d 1288 (9th 1989).

2. A corporation can attempt to avoid criminal liability by finding that the employee violated a fiduciary responsibility to the corporation.

3. The corporation may also argue that the employee acted contrary to the interest of the corporation such as where the corporation was actually harmed by the employee who, for example, defrauds the corporation for his or her own benefit or that of a third person.

C. Shared criminal intent.

1. While the action of the employee can be "imputed" to the corporation there are alternative methods of proving this intent.

2. Conspiracy doctrines allow for employees and third persons to fine a corporation for purposes of criminal liability.

3. Criminal intent of the corporation may survive the merger or desolving of the corporation where the employees are identical or similar.

4. Liability of a successor may depend on state corporate law. See *United States v. Tolizzi*, 500 F.2d 856 (9th Circuit 1974).

5. Willful blindness theory.

a. In crimes requiring "knowledge" a corporation may not defend upon the proposition that it took no action to investigate potential criminal activity.

7. Collective knowledge theory.

a. Even if no single employee is at fault courts may impute to a corporation the total knowledge of all or some of the employees to find criminal liability.

D. Mental State in obstructing justice.

U.S. v. Arthur Andersen, 374 F.3d 281 (5th Cir. 2004) cert. GRANTED January 7, 2005 (portions of opinion and briefs in the US SP CT. appear in the Appendix)

Discussion

Arthur Andersen was one of the world's "Big Five" auditing firms This case arises from Andersen's response to anticipated and actual government investigations into the accounting practices of its client, Enron Corporation. In order to limit scrutiny by the Securities and Exchange Commission (SEC) of Andersen's conduct in connection with Enron's improper accounting practices, Andersen instructed its employees to undertake an unprecedented campaign of document destruction. Following a jury trial in the United States District Court for the Southern District of Texas, Andersen was convicted on one count of corruptly persuading persons with the intent to cause them to withhold documents from, or alter documents for, an official proceeding, in violation of 18 U.S.C. 1512(b)(2)(A) and (B).This is called the "corrupt persuasion" prong of 18 U.S.C. § 1512(b)(2)(A) & (B). It provides:

Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to ... cause or induce any person to (A) ... withhold a record, document, or other object, from an official proceeding; [or] (B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding ... shall be fined under this title or imprisoned not more than ten years, or both.

In this case, the jury charge read in relevant part:

To "persuade" is to engage in any non-coercive attempt to induce another person to engage in certain conduct. The word "corruptly" means having an improper purpose. An improper purpose, for this case, is an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding.

WHAT FOLLOWS IS A SUMMARY OF DEFENSE ARGUMENT IN THE SP CT

It is plain as day that the Government did not charge Andersen with obstruction of justice for discarding documents during the relevant time period because no official proceeding of the SEC was pending. This Court has held for more than a century that "a person lacking knowledge of a pending proceeding necessarily lack[s] the evil intent to obstruct." United States v. Aguilar, 515 U.S. 593, 599 (1995) (citing Pettibone v. United States, 148 U.S. 197, 207 (1893)).

The United States attempted to evade that settled law by instead charging Andersen with "witness tampering," on the remarkable theory that although it was perfectly lawful for Andersen to have a document retention policy that preserved only the final audit work papers, and perfectly lawful for Andersen's employees and professionals to follow that policy, it was somehow a serious felony for Andersen's in-house attorney and supervisors to remind its employees of the policy. The Government also argued that Nancy Temple's proposed edits to David Duncan's draft memorandum constituted criminal "witness tampering," because in its hindsight view the SEC would have wanted to see Duncan's first draft. It invoked 18 U.S.C. § 1512, which criminalizes killing, intimidating, threatening, and "knowingly ... corruptly persuad[ing]" any person with the intent to make evidence unavailable to an official proceeding. Its theory, accepted by the courts below, was that all persuasion is "knowingly ... corrupt[]" and criminal if it is motivated in part by a desire to impede the fact-finding ability of a potential future government proceeding, even if the speaker does nothing more than politely urge the listener to engage in lawful conduct. That interpretation is seriously flawed.

First, the Government's basic premise is simply wrong. There is nothing inherently "corrupt" or wrongful about an intent to impede future government fact-finding within the bounds of the law. Americans regularly engage in a wide range of conduct designed in part to influence or limit the information that reaches government proceedings; that is one of the reasons that our legal system is frequently described as "adversary." Some cases decided under 18 U.S.C. § 1503 have permitted a presumption that acts specifically intended to interfere with the fact-finding of a pending judicial proceeding are inherently "corrupt." But that is not settled law even under § 1503, and outside that unique context this Court has recognized that there is nothing "obviously evil" or "inevitably nefarious" about acting "for the specific purpose of depriving the Government of ... information" that it has sought to obtain. Ratzlaf v. United States, 510 U.S. 135, 144-46 (1994). Extending a presumption of that nature to the federal agency context "would undoubtedly criminalize some innocent behavior" and violate both Due Process fair warning principles and the First Amendment.

Second, it would be an extremely poor reading of this statute. The word "corruptly" can have either a transitive meaning (by means of "corrupting" another person) or an intransitive one (motivated by a "corrupt" purpose). The only argument for an intransitive reading in § 1512 is the flawed analogy to § 1503. "Corruptly persuades" appears in § 1512

in a list of unlawful means, not purposes. It is thus more naturally read to prohibit only persuasion that "corrupts" the listener by inducing her to accept a bribe or otherwise break the law. That is clearly more consistent with the obvious purpose of the statute, which is otherwise directed at killing, coercing, intimidating or harassing witnesses. And § 1512 separately requires a specific intent to make documents or testimony unavailable to an official proceeding; defining "corruptly" as another purpose requirement thus makes little sense, and defining it as a purpose to impede an agency's fact-finding ability renders it superfluous. The Government's reading also produces a line between criminal and non-criminal behavior that is so arbitrary and absurd that it cannot be what Congress intended. And even if "corruptly" is given an intransitive meaning, the purpose that violates § 1512 must then include some consciousness of wrongdoing. Persuasion is not "knowingly ... corrupt[]" if the speaker sincerely believes that it is not wrongful.

Third, like the traditional obstruction statutes, § 1512 applies only when the defendant specifically intended to make documents or testimony unavailable to a particular official proceeding, defined as a judicial proceeding, "a proceeding before the Congress," or "a proceeding before a Federal Government agency which is authorized by law." 18 U.S.C. § 1515(a)(1). Interference with the fact-finding ability of law enforcement or preliminary agency investigations is not sufficient. Neither is an abstract desire not to retain documents because they might be relevant to some possible future proceeding. As this Court recognized in Aguilar, identifying true "corrupt" interference with an official proceeding thus requires careful attention to the "nexus" between the defendant's conduct and the proceeding alleged to have been obstructed. The instructions given here eliminated that nexus requirement.

Finally, even if these questions were close, the rule of lenity requires that all ambiguities must be resolved in defendants' favor. The doctrine of constitutional doubt also forbids an interpretation of vague statutory language that would criminalize a broad range of innocent conduct, including constitutionally protected speech, without fair warning. A Senate Report on the Sarbanes-Oxley law, portions of which were passed because Congress recognized that Andersen's conduct was not clearly criminal under existing law, noted that "in the current Andersen case, prosecutors have been forced to use the 'witness tampering' statute ... and to proceed under the legal fiction that the defendants are being prosecuted for telling other people to shred documents, not simply for destroying evidence themselves." Lenity and fair warning principles forbid criminal prosecutions based on "legal fictions." Whether particular conduct is criminal should never be debatable, or a surprise. The theory of this prosecution criminalized conduct commonly understood to be lawful, including the document retention policies in place at almost every American corporation or professional firm of any size. And the jury may well have rested its verdict on an email from Nancy Temple which "offered such common legal advice that the chairman of the American Corporate Counsel Association wrote in a letter to his members: 'Who amongst us has not thought: There but for the grace of God go I.' " [FN23]

FN23. Dana E. Hill, Note, Anticipatory Obstruction of Justice: Pre-emptive Document Destruction Under The Sarbanes-Oxley Anti-Shredding Statute, 18 U.S.C. § 1519, 89 Cornell L. Rev. 1519, 1552 (2004).

None of these errors could be harmless. There is no evidence that any of the partners involved used unlawful means of persuasion, urged anyone else to break the law, or believed that their conduct was wrongful. And the record also requires the conclusion that they did not believe that an SEC subpoena was probable at the time the acts of persuasion occurred. Indeed, there is no reason to assume that a jury that deliberated for ten days and declared itself deadlocked - despite a guilty plea for the same conduct entered by David Duncan - would have convicted if the instructions had been different in any material way.
This is not a case about big business or being tough on crime; it is about the right to conduct one's life and business in a manner understood to be lawful, and to receive fair warning when that law is changed. No one at Andersen had the "evil-meaning mind" necessary to justify criminal punishment. This conviction was secured by creative lawyering on the part of government prosecutors, at the expense of sound statutory interpretation, fair warning principles, and the basic goals and values of the criminal law. It did a great injustice to the tens of thousands of Andersen partners and employees who were permanently harmed by the firm's destruction. And it raises a cloud of doubt about routine advice that Americans give to colleagues, clients, family, and friends about how to protect their own interests within the bounds of the law. It must be reversed.

D. Federal Sentencing Guidelines.

1. Significant alteration in federal sentencing guidelines in light of *Booker v. United States*, 125 S.Ct. 738 (2005), which held that the federal sentencing guidelines are only "advisory."

2. Organizational sentencing guidelines under federal code. An organization is a "person other than an individual." Sentencing Guidelines Section 8A1.1, commentary.

3. The guidelines create incentives for corporations to prevent or report violations of the law. Corporations can mitigate the imposition of fines and other sanctions by designing effective compliance programs.

4. Sanctions include a specific remedy for any harm caused by the corporation including restitution, remedial measures and community service.

5. Sanctions can include a term of probation up to five years.

6. Sanctions may include fines. Fines are based on a fine table, or the gain to the corporation from the offense.

7. Fines may be modified by the involvement of high level officers in the corporation, recent history of similar conduct, violation of probation and obstruction of justice.

8. Fines can be decreased by internal programs which prevent and detect internal violations of the law.

9. Fines may also be decreased by self-reporting, cooperating with the investigation and acceptance of responsibility.

10. Departures are permitted based on factors not considered by the Sentencing Guideline Manual.

IV. Procedural Issues

A. The Grand Jury

1. Standard of Review for Grand Jury Error (because of harmless error rule almost impossible except for racial or sexual juror selection issues)

2. Prosecutorial Misconduct

B. Document Production (much more limited discovery in criminal cases)

1. Fifth Amendment Aspects of Document Production

2. Act of Production Doctrine

3. Collective Entity Doctrine (Corporations have no Fifth Amendment protection)

4. Required Records Exception (even individuals must turn over records which are required for record keeping purposes such as a doctor's prescriptions)

5. Immunity (limited use and transactional immunity) (watch out for derivative use immunity violations)

6. Computer Records as Evidence

V. The Lawyer's Nightmare: Parallel Civil & Criminal Litigation

A. Standards for Parallel Discovery

1. Internal Revenue Service (civil summons; must have issued summons before criminal)

2. Other Government Agencies (fewer restrictions)

B. Stays and Protective Orders

1. For the Benefit of Private Parties (no automatic stayed because of pending criminal charges).

2. For the Benefit of the Government (more apt to get civil stay to ward off disclosure in the criminal case) (also depends on who is moving party in civil case)

C. Disclosure of Grand Jury Materials

1. Matters Occurring Before the Grand Jury

2. Preliminary to or in Connection with a Judicial Proceeding

3. Balancing Test and Particularized Need

D. Constitutional and Procedural Considerations

1. Fifth Amendment- Double Jeopardy

2. Fifth Amendment- Self-Incrimination

3. Fifth Amendment- Due Process

4. Sixth Amendment- Right to counsel

5. Eighth Amendment- Excessive Fines Clause

6. Collateral Estoppel Issues

APPENDIX

U.S. v. Arthur Andersen, 374 F.3d 281 (5th Cir. 2004) cert. GRANTED January 7, 2005 Portions of opinion and briefs in the US SP CT.

Fifth Circuit Opinion

Andersen was convicted of obstructing justice under what has come to be known as the "corrupt persuasion" prong of 18 U.S.C. § 1512(b)(2)(A) & (B). It provides:

Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to ... cause or induce any person to (A) ... withhold a record, document, or other object, from an official proceeding; [or] (B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding ... shall be fined under this title or imprisoned not more than ten years, or both.

In this case, the charge read in relevant part:

To "persuade" is to engage in any non-coercive attempt to induce another person to engage in certain conduct. The word "corruptly" means having an improper purpose. An improper purpose, for this case, is an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding.

Andersen's principal argument is that the district court's definition of the term "corruptly" in § 1512(b)(2) renders the term superfluous. Andersen argues that, since § 1512(b)(2) explicitly requires that the accused act with the intent to withhold materials from an official proceeding, the term "corruptly" has no meaning under the district court's definition. Andersen urges that "corruptly persuades" requires more than an intent to withhold documents. Andersen contends that the term should be read to require either proof that the person persuaded violated an independent duty or that the person engaged in inherently culpable conduct, such as bribery.

The government challenges Andersen's basic contention that the term "corruptly" would have no independent meaning if defined as "an improper purpose." The government relies on the term's plain meaning, its definition in closely related statutes, the statute's structure, and legislative history. Specifically, the government notes that courts have routinely defined the term "corruptly" in companion statutes like §§ 1503 and 1505 [FN14] to require "an improper purpose." [FN15] In United States v. Reeves, for example, we defined the term to be an intent to "secur[e] improper benefits or advantages for one's self or for others." [FN16] The majority of circuits interpreting the term as used in § 1512(b) have reached a similar result, defining "corruptly" in terms of improper purpose despite the dim light it casts upon its meaning, its circularity aside. [FN17]

FN14. 18 U.S.C. § 1505 criminalizes, in relevant part, anyone who "corruptly ... influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or ... being had by either House, or any committee of either House or any joint committee of the Congress."

FN15. See United States v. Haas, 583 F.2d 216, 220 (5th Cir.1978) (defining “corruptly” as “for an improper purpose” or “an evil or wicked purpose”); United States v. Partin, 552 F.2d 621, 641-42 (5th Cir.1977).

FN16. 752 F.2d 995, 1002 (5th Cir.1985) (interpreting “corruptly endeavor” as related to obstructing the due administration of the tax laws).

FN17. United States v. Shotts, 145 F.3d 1289, 1300-01 (11th Cir.1998) (“It is reasonable to attribute to the 'corruptly persuade' language in Section 1512(b), the same well-established meaning already attributed by the courts to the comparable language in Section 1503(a), i.e., motivated by an improper purpose. We are unwilling to follow the Third Circuit's lead in imposing a requirement for an additional level of culpability on Section 1512(b) in the absence of any indication that Congress so intended and in the face of persuasive evidence that it did not.”); United States v. Thompson, 76 F.3d 442, 452 (2d Cir.1996) (finding § 1512(b) not to be unconstitutionally overbroad or vague because “Section 1512(b) does not prohibit all persuasion but only that which is 'corrupt[],' “ and “[t]he inclusion of the qualifying term 'corrupt[]' means that the government must prove that the defendant's attempts to persuade were motivated by an improper purpose”); see also United States v. Khatami, 280 F.3d 907, 911-12 (9th Cir.2002) (“Synthesizing these various definitions of 'corrupt' and 'persuade,' we note the statute strongly suggests that one who attempts to 'corruptly persuade' another is, given the pejorative plain meaning of the root adjective 'corrupt,' motivated by an inappropriate or improper purpose to convince another to engage in a course of behavior--such as impeding an ongoing criminal investigation.”). But see United States v. Farrell, 126 F.3d 484, 490 (3d Cir.1997) (“[B]ecause the 'improper purposes' that justify the application of § 1512(b) are already expressly described in the statute, construing 'corruptly' to mean merely 'for an improper purpose' (including those described in the statute) renders the term surplusage, a result that we have been admonished to avoid.”).

We find Andersen's surplusage argument unpersuasive. Andersen's argument relies heavily on the Third Circuit's decision in United States v. Farrell. [FN18] In Farrell, a divided panel concluded that the term “corruptly persuades” in § 1512(b) did not proscribe “a noncoercive attempt to persuade a coconspirator who enjoys a Fifth Amendment right not to disclose self-incriminating information ... from volunteering information to investigators.” [FN19] In reaching its decision, the court specifically rejected the notion that the term could mean “persuades with the intent to hinder communication to law enforcement,” concluding that such a definition “would render the word 'corruptly' meaningless.” [FN20] The panel also dismissed the relevance of court decisions interpreting the term “corruptly” in companion statutes like § 1503. [FN21] Although these decisions had routinely defined the term to mean “with an improper purpose,” the court found these decisions unpersuasive because of the differences between § 1512 and § 1503.

Unlike § 1512(b), § 1503 does not include any mens rea element except the term "corruptly." Section 1512(b), by contrast, expressly requires a specific intent to withhold documents from investigators. With this in mind, Andersen asserts that a definition which makes sense in § 1503 becomes surplusage when applied to § 1512(b). [FN23]

FN21. 18 U.S.C. § 1503(a) provides, in relevant part, that "[w]hoever ... corruptly ... influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b)."

The Third Circuit, however, did not define the term "corruptly" to require the violation of an independent legal duty, as Andersen claims. [FN24] Rather, it held the converse, that encouraging another to exercise a constitutional right is not corrupt. [FN25] The Farrell court specifically declined to define the term in any detail or to give substantive content to the term. Rather, the decision can fairly be read more narrowly: that a person who persuades someone to invoke his Fifth Amendment right does not violate the statute.

FN24. Id. at 488 ("[W]e are hesitant to define in more abstract terms the boundaries of the conduct punishable under the somewhat ambiguous 'corruptly persuades' clause. However, we do not think it necessary to provide such a definition here because we are similarly confident that the 'culpable conduct' that violates § 1512(b)(3)'s 'corruptly persuades' clause does not include a noncoercive attempt to persuade a coconspirator who enjoys a Fifth Amendment right not to disclose self-incriminating information about the conspiracy to refrain, in accordance with that right, from volunteering information to investigators.").

Andersen is incorrect, moreover, in its contention that the court's definition of "corruptly" rendered the term superfluous. The court defined "corruptly" to mean "an intent to subvert, undermine or impede the fact-finding ability of an official proceeding." Andersen contends that "corruptly" has no independent meaning under this definition because § 1512(b) already separately requires an intent to impede the fact-finding ability of an official proceeding. Section 1512(b), however, requires an "intent to impair the ... integrity or availability [of an object] for use in an official proceeding"; it does not focus on undermining an agency's fact-finding ability. In short, as defined by the court, "corruptly" was not a mirror of § 1512(b)'s intent requirement.

This point becomes more apparent when the charge is read in full. The district court instructed that "[a]n improper purpose, for this case, is an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding," including "subvert" and "undermine" as urged by Andersen. [FN26] Acting with an intent to "subvert, undermine, or impede" an investigation narrowed the reach of the statute, insisting upon a degree of culpability beyond an intent to prevent a document from being available at a later proceeding. A routine document retention policy, for example, evidences an intent to prevent a document from being available in any proceeding. But it does not alone evidence an intent to "subvert, undermine, or impede" an official proceeding. In narrowing the statute's potential reach, the district judge rejected the government's argument that the jury should be charged on the bare

bones of the statute and shaped the charge to the facts of the case. It also gave meaning to "corruptly persuades." "Subvert" means "to overturn or overthrow from the foundation, ruin" or "to pervert or corrupt by an undermining of morals, allegiance, or faith." The most relevant definition of "undermine" is "to subvert or weaken insidiously or secretly." Impede means "to interfere with or get in the way of," to "hold up." Each of these terms implies a degree of personal culpability beyond a mere intent to make documents unavailable.

FN26. The limiting words "for this case" were included at Andersen's urging. The word "impede" was requested by the government and included over the objection of Andersen. The legislative history of § 1512(b), explored by the dissent in Farrell, further persuades us that the district court's charge was correct Section 1512(b) was enacted to replace and expand the witness protection provisions incorporated in § 1503. As initially drafted, § 1512(b) did not bar noncoercive conduct performed with an intent to hide information from investigators; one could violate the statute only through intimidation, use of physical force, threats, or misleading conduct. Congress added the term "corruptly persuades" in 1988 to "include in section 1512 the same protection of witnesses from non-coercive influence that was (and is) found in section 1503." Congress knew that courts had uniformly defined "corruptly" in § 1503 as "motivated by an improper purpose," and it is logical to give the word "corruptly" in § 1512 the same meaning that it has in § 1503. At the very least, this legislative history--and its clear intent to criminalize non-coercive conduct--deflates Andersen's "structural" argument that § 1512 targets certain means used to obstruct justice and not just motive. [FN28]

FN28. Andersen argued that the structure of the statute required the definition of "corruptly persuades" to be based on the means of persuasion used rather than the persuader's motive or intent. It points out that, before the statute was amended to include "corrupt persuasion," the statute criminalized only certain behaviors--namely, the use of intimidation or physical force, threats, and misleading conduct. Andersen argued that it would be anomalous to construe the term "corruptly persuades" differently; it must also be interpreted to require similarly culpable actions.

We are persuaded that defining "corruptly" as "motivated by an improper purpose" comports easily with the legislative history. Congress intended that § 1512(b) have the same substantive scope as former § 1503. Since § 1503 proscribed conduct undertaken "with an improper purpose," § 1512(b) should also do so.

Andersen requested that the jury be instructed that the only way corrupt persuasion may be found is by an improper method or a violation of an independent legal duty. We find no court that has come to this conclusion. Andersen bases its argument on Farrell, but Andersen's description of the holding is an incomplete statement of the Third Circuit's viewpoint. Farrell made clear that a violation of an independent legal duty is sufficient to prove corrupt persuasion, and it refused to define "corruptly persuade" as acting with an improper purpose, but it did not hold that violating an independent legal duty or persuading by an improper

method was the only way to establish a § 1512(b) violation. [FN29] The statute itself has no such requirement.

FN29. Farrell, 126 F.3d at 488-90 (explaining that it was “hesitant to define in more abstract terms the boundaries of the conduct punishable under the somewhat ambiguous 'corruptly persuades' clause,” and finding it unnecessary to do so because the conduct at issue--“a noncoercive attempt to persuade a coconspirator who enjoys a Fifth Amendment right not to disclose self-incriminating information about the conspiracy to refrain, in accordance with that right, from volunteering information to investigators”--could not satisfy the statute).

Andersen, moreover, gives no explanation why “improper purpose” should require unlawful conduct. Under the caselaw, “corruptly” requires an improper purpose, not improper means, [FN30] and Andersen offers no explanation why “improper purpose “ should require “improper means.” Indeed, the means used would seem to be relevant only to the extent that they shed light on whether the purpose was improper. Moreover, the only examples of “unlawful conduct” that Andersen gives are bribery and counseling a witness to lie. The statute would have little independent reach, however, if it could be violated only through bribery or suborning perjury because such conduct is to a large extent criminalized in other provisions of the criminal code. [FN31] Yet Andersen offers no other examples of “culpable” or “unlawful” conduct sufficient, under its test, to trigger the statute. We cannot lightly conclude that Congress intended for the statute to do only work already done by the criminal code.

U.S. v. Arthur Andersen, 374 F.3d 281 (5th Cir. 2004) cert. GRANTED January 7, 2005

GOVERNMENT’S BRIEF in SP CT

STATEMENT

This case arises from the response of petitioner, then one of the world's “Big Five” auditing firms, to anticipated and actual government investigations into the accounting practices of its client, Enron Corporation. In order to limit scrutiny by the Securities and Exchange Commission (SEC) of petitioner's conduct in connection with Enron's improper accounting practices, petitioner instructed its employees to undertake an unprecedented campaign of document destruction. Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on one count of corruptly persuading persons with the intent to cause them to withhold documents from, or alter documents for, an official proceeding, in violation of 18 U.S.C. 1512(b)(2)(A) and (B). [FN1] The court of appeals affirmed.

FN1. In 2002, Congress amended 18 U.S.C. 1512(b) in respects not relevant to this litigation. All references to Section 1512(b) in this brief are to the 2000 version.

1. Enron was one of the nation's largest companies and one of petitioner's largest clients. Petitioner's "Enron engagement team" consisted of more than 100 accountants, and petitioner billed Enron approximately $58 million in the year 2000. Enron employed highly aggressive accounting practices, and petitioner treated Enron as a "high-risk" client. Petitioner nevertheless had an unusually close relationship with Enron. David Duncan, the Andersen partner who led the Enron engagement team, was known as a strong "client advocate," and petitioner bent over backward to accommodate Enron. Pet. App. 3a; Tr. 796-804, 819-823, 940-942, 1173, 1687, 1739-1742, 1847-1848, 3270, 5357, 5529-5532, 5536-5547; GX 304A.

On August 14, 2001, Enron chief executive officer Jeffrey Skilling unexpectedly resigned, leading to widespread speculation about financial problems at Enron and further *2 depressing the already declining value of Enron's stock. Within days of Skilling's resignation, Sherron Watkins, a senior Enron accountant who had previously worked for petitioner, warned Kenneth Lay, Enron's newly reappointed CEO, that Enron could "implode in a wave of accounting scandals." Watkins simultaneously conveyed her warnings to petitioner, and they were discussed by Duncan, in-house counsel, and senior management. On August 28, an article in the Wall Street Journal suggested improprieties at Enron, and the SEC opened an informal investigation. Pet. App. 4a; Tr. 655-664, 1807-1817, 2804; GXs 821A, 828B.

In September 2001, high-level Andersen personnel learned of serious accounting problems at Enron and began to anticipate an SEC investigation and civil litigation. Specifically, they discovered that the Enron engagement team had approved the use of an improper accounting technique for four "Raptors," special-purpose entities that Enron had used to engage in "off-balance-sheet" activities. To conceal the fact that some of the Raptors had suffered severe losses, the Enron engagement team had allowed Enron to aggregate the four Raptors for accounting purposes. Petitioner's own accounting experts had deemed that technique a "black-and-white" violation of GAAP. While examining that issue, moreover, high-level Andersen personnel learned that Enron and petitioner had made a separate $1.2 billion accounting error in Enron's favor, which would require, at a minimum, that Enron reduce its outstanding shareholder equity by that amount in an upcoming SEC filing. Pet. App. 3a-4a, 6a; Tr. 942-952, 970-971, 1773-1781, 1833-1840, 5413-5414, 5572, 5578.

Petitioner had particular reason to be concerned about the prospect of an SEC investigation. In June 2001, petitioner had agreed to pay a record $7 million fine to settle an SEC action arising from its audit work for Waste Management, Inc. As part of that settlement, the SEC censured petitioner, and petitioner was enjoined from committing any future *3 violations of the securities laws. As a result, petitioner was effectively on probation with the SEC. See 17 C.F.R. 201.102(e)(1)(ii) and (iv) (allowing SEC to disbar accountants for "repeated instances of unreasonable conduct"). In July, the SEC had filed an amended complaint against, among others, the lead Andersen partner on an audit for Sunbeam Corporation, contending that Sunbeam's financial statements were materially false or misleading. In connection with that complaint (as it had in the Waste Management investigation), the SEC had issued a formal subpoena to petitioner for records relating to the audit. In light of the Waste Management and Sunbeam investigations, petitioner was anxious to avoid any further sanction or censure.

In late September 2001, petitioner began to prepare for Enron-related legal action, including SEC document requests. By that time, Duncan had already concluded that the SEC might issue such requests. Petitioner assembled an Enron crisis-response group, composed of high-level partners and in-house counsel. By September 28, the group was convening almost daily. On October 8, petitioner retained the law firm of Davis Polk & Wardwell to represent it in any Enron-related litigation. J.A. 161-162; Pet. App. 4a; Tr. 4182-4183, 4519-4522.

Nancy Temple was an Andersen in-house lawyer with responsibility for Enron-related matters. On October 9, Temple discussed Enron with other in-house counsel. In her notes from the meeting, Temple acknowledged that "some SEC investigation" was "highly probable"; that, even if petitioner's accounting experts were able to develop an alternative methodology for the Raptors, there was a "reasonable possibility [that the Raptors issue] will force a restatement" of Enron's previously filed financial statements; and that, absent an alternative methodology, there would be a "restatement and probability of charge of violating [the injunction] *4 in Waste Management." On October 12, Temple entered the Enron matter in the computer system that petitioner used to track its open legal matters. In doing so, she designated the matter as a "government/regulatory investigation." J.A. 93, 125-132; Pet. App. 5a. [FN2]

FN2. Petitioner believed that an SEC request for its documents would be "likely" even if the SEC did not ultimately conclude that Enron would have to restate its earnings (or income). Temple knew, from studying the Waste Management and Sunbeam matters, that the SEC might request documents from petitioner before a restatement was filed. And although Andersen partner John Riley claimed to have believed that the SEC would subpoena petitioner's records only if Enron restated its earnings, and not its assets (or balance sheet), that claim was substantially impeached by his testimony during the Sunbeam matter, in which he acknowledged knowing from the first sign of adverse publicity that petitioner was going to have a problem with an SEC investigation. Riley also acknowledged that he was unaware of critical facts bearing on the likelihood of an SEC proceeding relating to Enron. Finally, there is no evidence that Temple, Duncan, or the SEC shared Riley's view. In fact, an SEC official testified that any restatement by a large public company would result in a formal SEC investigation "almost without fail," and another SEC official testified that the SEC intended to seek information from petitioner even before any restatement occurred.

Concerned about the record that the SEC and other litigants would uncover, petitioner decided to purge material from its files under the guise of enforcing its document retention policy. That policy required petitioner to maintain a single central engagement file of its working papers, which contained "only that information which [was] relevant to supporting [petitioner's] work." All other paper and electronic documents (including drafts, handwritten notes, and e-mails) were to be destroyed when they were "no longer useful to the engagement." J.A. 45, 47, 58. The policy, however, provided that, "in cases of threatened litigation, no related information will be destroyed." J.A. 44. The policy further specified that "related information should not be destroyed" (J.A. 65) whenever, in the *5 words of a separate policy incorporated by reference, "professional practice litigation against [petitioner]

or any of its personnel has been commenced, has been threatened or is judged likely to occur, or when governmental or professional investigations that may have involved [petitioner] or any of its personnel have been commenced or are judged likely." J.A. 29-30. [FN3] Many Andersen employees were unaware of the details of the document policy. Actual compliance with the policy was spotty, and the Enron engagement team was notoriously lax in that respect.

FN3. In an official memo explaining the document policy, circulated to all Andersen personnel, petitioner stated that, "if there is a current expectation that *** access [to the working papers] will be sought [by an external source]," and "if working papers are still in the process of being assembled," then "all extraneous materials should be preserved." GX 1023M. At all relevant times, the Enron working papers had not yet been assembled. Tr. 1881-1882, 3335.

Notwithstanding the facts that (1) petitioner had retained outside counsel; (2) Temple had concluded that "some SEC investigation" was "highly probable"; (3) Temple had designated the Enron matter as a "government/regulatory investigation"; and (4) petitioner's work for Enron was ongoing, Temple and others embarked on a campaign to encourage Andersen employees to destroy Enron-related documents, under the guise of complying with the document policy. On October 10, Michael Odom, practice director for petitioner's Houston office, urged an audience of Andersen personnel (including members of the Enron engagement team) to comply with the policy. Odom explained that, "if [a document is] destroyed in the course of the normal policy and litigation is filed the next day, that's great. *** [W]e've followed our own policy, and whatever there was that might have been of interest to somebody is gone and irretrievable." Odom later admitted that his remarks were prompted by a conference call with the Enron crisis-response group. Shortly before *6 the meeting, Odom himself deleted an unusual volume of electronic documents. For her part, Temple e-mailed Odom on October 12 - after she had learned that the Enron engagement team had not been following the document policy, and just minutes after designating the Enron matter as a "government/regulatory investigation." In the e-mail, which Odom forwarded to Duncan, Temple suggested that Odom "remind[] the engagement team of our documentation and retention policy," and added that compliance "will be helpful." In the days that followed, Enron's predicament worsened. On October 16, Enron issued a press release announcing that it was taking a $1.01 billion charge to its current earnings. [FN4] In a conference call with analysts later that day, Lay announced that Enron was also reducing its outstanding shareholder equity by approximately $1.2 billion. Those announcements triggered another wave of negative publicity. On October 17, the SEC notified Enron by letter of its investigation and requested certain information and documents. The SEC separately told Enron that its investigation was a "high-priority matter" and "very serious." On October 19, Enron forwarded a copy of the SEC's letter to petitioner..

FN4. In the press release, Enron characterized the charge to earnings as "non-recurring," even though petitioner had informed Enron that it believed that the term was misleading. When

Enron refused to alter the press release, Temple requested that an internal Andersen memo regarding the press release be revised to delete any reference to petitioner's belief that the press release was “misleading.”

In the wake of the SEC letter, Temple and others redoubled their efforts to purge Enron-related material from petitioner's files. On October 19, Temple sent an e-mail attaching the policy to a member of petitioner's internal team of *7 accounting experts, thereby causing team members to delete hundreds of Enron-related e-mails. On the morning of Saturday, October 20, the Enron crisis-response group convened by telephone to discuss the SEC letter. During that conference call, Temple twice instructed the members of the group to “[m]ake sure to follow the [document] policy.”On October 23, in a conference call with analysts, Enron CEO Lay declined to answer certain questions because of “potential lawsuits, as well as the SEC inquiry.” By that date, Duncan had concluded that the $1.2 billion error would require a restatement. After the October 23 conference call, Duncan met with other partners on the Enron engagement team and explained that they should ensure that team members were in compliance with the document policy. Duncan took that step in light of “[t]he continued escalating events surrounding Enron,” including “the filing of lawsuits and the SEC inquiry.” Duncan then called an “URGENT” and “mandatory” meeting for all members of the Enron engagement team, in which he distributed copies of the document policy and ordered compliance with it. As Duncan later acknowledged, “certainly the threat of potential civil litigation or SEC questions *** were [sic] on our mind.”

Partners then fanned out and held smaller meetings with their supervisees, discussing the SEC investigation and confirming the need for compliance with the policy. Members of the Enron engagement team were instructed to make document destruction a priority, despite the mounting pressure they faced in dealing with Enron's underlying accounting problems. One Andersen partner told a manager that it was important to clean up the files because “we may be subpoenaed,” and an Andersen employee said in an e-mail to other employees that the order to destroy documents “came from the partner group and is considered VERY important.” Similar instructions went out to other Andersen offices that *8 dealt with Enron matters, though at least one supervisor in another office refused to comply. That supervisor later explained his reaction as follows: “[I]f you think there is going to be some requirement to produce these documents, then don't destroy anything. For God's sake, just don't do that.”

Following management's instructions, the Enron engagement team destroyed documents at an unprecedented clip. In fact, because the onsite shredder was operating at full capacity, additional documents had to be shipped to another office for shredding. A chart showing the quantity of shipped documents dramatically illustrates the massive spike in document destruction that coincided with notification of the SEC inquiry. J.A. 133. In addition to destroying paper documents, the Enron engagement team deleted tens of thousands of e-mails and other electronic documents - at least three times as many as normal. J.A. 133; Tr. 1897, 3239, 3896, 3951-3955, 3990, 4171-4175, 5035-5036, 5766-5767.

During the period from October 19 to November 9, it became increasingly clear that the SEC would issue a subpoena to petitioner. In considering the possibility of calling in petitioner's in-house forensic accountants to assist the Enron engagement team, Temple noted that doing so was "not unusual" and "[w]ill help with SEC and jury." On October 26, petitioner's second-ranking partner, in a covering e-mail to a New York Times article on the SEC investigation, stated: "[T]he problems are just beginning and we will be in the cross hairs. The marketplace is going to keep the pressure on this and is going to force the SEC to be tough." On October 30, the SEC opened a formal investigation and sent a follow-up letter to Enron, signed by two top SEC officials, expressing "serious concerns about recent revelations regarding limited partnership transactions at Enron" and requesting certain public disclosures. Petitioner became *9 aware of the formal investigation by the following day. Meanwhile, petitioner discovered two more major accounting problems - one involving suspected fraud by Enron relating to another special-purpose entity named "Chewco," and the other involving a large accounting error by petitioner itself. Numerous civil lawsuits were filed against Enron, and petitioner received a subpoena for Enron-related documents in connection with one of those suits. Notwithstanding all of those developments, petitioner continued to shred Enron-related documents. And it did so even though both Duncan and Temple were warned of the dangers of destroying those documents. On October 26, Andersen partner John Riley heard the sound of a shredder and confronted Duncan, warning him that "this wouldn't be the best time in the world for you guys to be shredding a bunch of stuff." Duncan agreed that the "worst-case scenario" in a "situation like this" would be "people *** destroying a lot of documents," but took no action. On October 31, Andersen partner David Stulb saw Duncan looking at a document that used the phrase "smoking gun" in reference to Watkins's initial warnings about Enron's accounting scandals. After reading the "smoking gun" reference aloud and stating, "[w]e don't need this," Duncan started to destroy the document. Stulb warned Duncan of the need to retain "all of this information" because of the "strong likelihood" that the SEC, among others, would be interested. Stulb later informed Temple that Duncan needed guidance on document retention. Temple promised to take care of the matter, but did nothing. J.A. 170-171, 175-177; Tr. 5900-5901.

On November 8 (the deadline for responding to the SEC's October 30 letter), Enron announced that it would issue a comprehensive restatement of its earnings and assets. That same day, the SEC served petitioner and Enron with subpoenas. *10 On November 9, Duncan's secretary sent an e-mail to the Enron engagement team entitled "No More Shredding," which stated: "Per Dave - No more shredding. *** We have been officially served for our documents." On December 2, Enron filed for bankruptcy. In January 2002, petitioner announced that it would fire Duncan and suspend other partners on the Enron engagement team.

2. On March 7, 2002, petitioner was indicted in the United States District Court for the Southern District of Texas on one count of corruptly persuading persons with the intent to cause them to withhold documents from, or alter documents for, an official proceeding, in

violation of 18 U.S.C. 1512(b)(2)(A) and (B). J.A. 134-140. [FN5] Duncan subsequently pleaded guilty to one count of the same offense. Tr. 1666.

FN5. Petitioner does not dispute, and well-established law provides, that a partnership may be held criminally liable for the acts of an agent or employee acting within the scope of his agency or employment, provided that the agent or employee was acting at least in part with the intent to benefit the partnership. See, e.g., United States v. A&P Trucking Co., 358 U.S. 121, 126-127 (1958).

At the close of trial, the government requested a jury instruction defining the statutory term "corruptly" as "having an improper purpose," and further specifying that, "[i]n order to establish that [petitioner] acted corruptly, it is not necessary for the government to prove that [petitioner] knew its conduct violated the criminal law." R. 284. The government also sought to define an "official proceeding" as "a proceeding before a federal court, judge, or agency," and to specify that "[a]n official proceeding includes all of the steps and stages in the agency's performance by an agency of its governmental functions *** both formal and informal." R. 279-280.

Petitioner requested an instruction stating that "[a] person persuades another person 'corruptly' only if he or she (1) uses an improper method, such as bribery or other unlawful means, to induce that person to act; or (2) persuades the other person to do something that they would not have had a lawful right to do had they been acting on their own." R. 146. Petitioner also requested an instruction stating that "[a]n otherwise innocent act of persuasion is not 'corrupt' if it is undertaken with a genuine belief that the persuasion is not improper or unlawful, even if its purpose is to make information unavailable to an official proceeding." R. 145. In addition, petitioner asked the court to specify that "the 'official proceeding' must be one that is ongoing or has been scheduled to be commenced in the future," R. 148, and that "an informal inquiry conducted by SEC staff *** is not an 'official proceeding,' " R. 147.

The district court rejected petitioner's proposed instructions. Pet. App. 36a-45a. The court noted that the term "corruptly" was also used in the general obstruction-of-justice statute, 18 U.S.C. 1503, and had been defined in that statute to mean "with an improper purpose." Pet. App. 37a. The court concluded that "the same meaning must be applied to 'corruptly' in § 1512." Id. at 38a. The court observed that case law from other circuits supported the "improper purpose interpretation of § 1512." Ibid. The court also concluded that "specific knowledge of the law is not required under § 1512(b)." Id. at 42a. Finally, the court reasoned that "a 'proceeding' is not restricted to formal adjudicative process," id. at 43a, and rejected petitioner's contention that an "official proceeding" must be ongoing or scheduled at the time of the document destruction, id. at 44a.

The court subsequently instructed the jury that "[t]he word 'corruptly' means having an improper purpose." J.A. 212. Borrowing from (and slightly modifying) the Fifth Circuit's model jury instructions for Section 1503, the court then elaborated on that definition, stating that "[a]n improper *12 purpose for this case is an intent to subvert, undermine, or impede the

fact-finding ability of an official proceeding." Ibid. The court also informed the jury that "it is not necessary for the Government to prove that [petitioner] knew that its conduct violated the criminal law." J.A. 213. The court defined an "official proceeding" as "a proceeding before a federal court, judge, or agency" and specified that "[a] proceeding *** includes all of the steps and stages in the agency's performance of its governmental functions *** both formal and informal." J.A. 211. The court added that "it is not necessary for the Government to prove that an official proceeding was pending or even about to be initiated at the time the obstructive conduct occurred." J.A. 213. The jury found petitioner guilty.

3. The court of appeals affirmed.

a. The court of appeals held that the jury instructions correctly defined the statutory term "corruptly." The court of appeals noted that courts interpreting the term "corruptly" in other obstruction-of-justice statutes had defined it to require an improper purpose, and that a majority of circuits interpreting the term "corruptly" in Section 1512(b) had defined it in similar terms. Id. at 19a. The court of appeals also reasoned that the district court correctly rejected petitioner's proposed instructions on the definition of "corruptly." Id. at 23a-25a, 28a-29a. In upholding the rejection of petitioner's proposed instruction that "the only way corrupt persuasion may be found is by an improper method or a violation of an independent legal duty," the court of appeals noted that no other court had endorsed that approach. Id. at 23a. The court of appeals added that "[petitioner] *** gives no explanation why 'improper purpose' should require unlawful conduct" or "improper means." Id. at 24a. Instead, the court observed, "the means used would seem to be relevant only to the extent that they shed light on whether the purpose was improper." Ibid. The court reasoned that "[t]he statute would *13 have little independent reach *** if it could be violated only through bribery or suborning perjury because such conduct is to a large extent criminalized in other provisions of the criminal code." Ibid. The court likewise rejected petitioner's contention that the jury should have been instructed that "corruptly" requires knowledge of wrongdoing, noting that "[t]he general rule *** is that ignorance of the law is no defense." Id. at 29a. The court reasoned that, "[w]hen Congress wishes to avoid the general rule, it usually does so by requiring that a defendant act willfully or with specific intent to violate the law." Ibid.

b. The court of appeals also held that the jury instructions correctly defined the phrase "official proceeding." Pet. App. 25a-28a. Like the district court, the court of appeals rejected petitioner's contention that an "official proceeding" must be ongoing or scheduled at the time the document destruction occurred. Id. at 26a. The court reasoned that such a reading "defie[d]" the statutory provision that specifies that an official proceeding need not be pending or about to be instituted at the time of the offense. Ibid. (citing 18 U.S.C. 1512(e)(1) (2000)). The court also rejected petitioner's related contention that a defendant must "ha[ve] in mind a particular proceeding that it sought to obstruct" at the time the document destruction occurred. Id. at 26a-27a. The court again observed that this requirement "ignores the statutory language, which does not require a defendant to know that the proceeding is pending or about to be initiated." Id. at 27a. To the extent that the failure to impose such a requirement could criminalize the conduct of innocent defendants, the court reasoned that

"[t]hat case is not before us," but added that "[t]he answer *** may lie with the sound application of the elements of corrupt purpose and intent." Ibid.

SUMMARY OF ARGUMENT

Petitioner was validly convicted of corruptly persuading its employees with the intent to cause them to withhold documents from, or alter documents for, an official proceeding, in violation of 18 U.S.C. 1512(b)(2)(A) and (B). Petitioner portrays its document-destruction campaign, in the face of a looming SEC investigation, as wholly legitimate conduct (Br. 20-24) - as if American corporations routinely find it proper to instruct their employees to lay waste to vast troves of documents when a government investigation is viewed as highly probable. Nothing could be farther from the truth. Petitioner was not charged with having a document destruction policy as such. As the court of appeals recognized, "[t]here is nothing improper about following a document retention policy when there is no threat of an official investigation." Pet. App. 25a. But when, after realizing that a government investigation is bearing down on it, a company seizes on a dormant or widely ignored document policy and uses it as a pretext to destroy evidence of its own or its client's potential misconduct, it is altogether another matter. No responsible entity would engage in such conduct; petitioner's own document policy prohibited it. Petitioner's elaborate claims notwithstanding, its conduct represents a serious departure from well-established principles in the criminal law, and its conviction under Section 1512(b) should be affirmed.

I. The lower courts correctly defined the term "corruptly" in Section 1512(b) as "having an improper purpose" "to subvert, undermine, or impede the fact-finding ability of an official proceeding." The lower courts' definition is consistent with the purpose-based definition long given to the identical term in the general obstruction-of-justice statute, 18 U.S.C. 1503, on which Section 1512 was based; in other obstruction-of-justice statutes; and in other federal criminal statutes more generally. That definition does not render the *15 term "corruptly" superfluous. Nor does it criminalize conduct that is not inherently wrongful, because it has long been understood that it is improper to destroy documents when litigation is anticipated for the purpose of frustrating the truthseeking process.

Petitioner's novel alternative definitions of the term "corruptly" - which would require either "proof of improper means of persuasion or inducement to unlawful acts," or "proof of consciousness of wrongdoing" - should be rejected. The former definition cannot be reconciled with the text of the statute; would give the term "corruptly" a different meaning in Section 1512(b) than in other obstruction-of-justice statutes; and would criminalize little, if any, conduct that is not already criminalized by other provisions. The latter definition contravenes the established principle that ignorance of the law is no defense, and no exception to that principle is warranted here.

Neither the rule of lenity, the doctrine of constitutional doubt, nor constitutional principles of fair warning justify petitioner's alternative definitions of "corruptly." The rule of lenity and the doctrine of constitutional doubt are both inapplicable here, because the term "corruptly" is not ambiguous. Petitioner identifies no serious constitutional concerns arising from the lower

courts' construction of the statute, and petitioner had fair warning that its conduct was unlawful.

II. The district court correctly instructed the jury on the definition of the phrase "official proceeding." Petitioner first contends that the district court should have instructed the jury that the government was required to prove that petitioner believed that an official proceeding was likely to occur in the near future. Petitioner did not request such an instruction, and the failure to give it was not plainly erroneous. Although petitioner did request an instruction that the government was required to show that petitioner intended to obstruct some particular proceeding, the statute cannot *16 be interpreted to require such a showing when no proceeding had yet been instituted, and petitioner was not prejudiced by the failure to provide any such instruction because the evidence left no doubt that the SEC's Enron investigation was the "proceeding" at issue.

Finally, petitioner contends that the district court erroneously instructed the jury that an informal SEC proceeding could constitute an "official proceeding." Petitioner waived that claim by failing to preserve it in the court of appeals. Even assuming that petitioner properly preserved that argument, petitioner's contention lacks merit. The statute authorizing the SEC to conduct investigations treats all investigations as proceedings, and courts have consistently considered agency investigations, even preliminary ones, to be "proceedings" for purposes of a companion statute, 18 U.S.C. 1505. And because an intent to obstruct an informal investigation necessarily implies an ultimate intent to obstruct a formal investigation, any instructional error by the district court was harmless.

DEFENSE BRIEF IN SUPREME COURT

STATEMENT OF THE CASE

This case arises out of the conviction of Arthur Andersen LLP ("Andersen") for witness tampering. The Fifth Circuit affirmed the conviction, on the theory that Andersen engaged in "corrupt[] persua[sion]" in violation of 18 U.S.C. § 1512(b) (2000) when it encouraged employees to comply with the firm's standard document retention policy in the month before the SEC initiated a formal investigation into Enron Corporation. Pet. App. 2a-7a, 25a. That policy required Andersen employees to prepare and retain final work papers that fully and accurately document their audit conclusions, and then to discard unnecessary drafts and notes. Andersen employees who compiled the Enron work papers did not seek to excise damaging facts or to conceal knowledge of a crime, and they genuinely believed that compliance with the policy prior to initiation of an SEC proceeding and receipt of a subpoena was lawful and proper.

For more than a century, it had been settled law that destruction of documents prior to the initiation of judicial or agency proceedings is not obstruction of justice. The Government accordingly sought to circumvent the limits on the crime of obstruction by indicting Andersen for "witness tampering" under 18 U.S.C. § 1512, which prohibits attempts to "kill," "threaten[]," or "corruptly persuade[]" potential witnesses. In the Government's view, it was

perfectly lawful for Andersen's employees to comply with the document retention policy themselves, whatever their motive might be, prior to the start of a proceeding. But it was criminal "corrupt[] persua[sion]" to urge others to comply with the policy if the request was even partially motivated by an intent to "impede the fact-finding ability" of some possible future investigation. The Fifth Circuit agreed. That expansive and illogical interpretation of the statutory language criminalizes common conduct undertaken without any consciousness of wrongdoing. This Court should reverse the conviction and remand with instructions to enter a judgment of acquittal. Arthur Andersen did not commit a crime.

Proceedings In The District Court

1. Andersen was indicted on March 7, 2002, in the Southern District of Texas. JA 134. [FN1] The indictment charged a single count of witness tampering, alleging that between October 10 and November 9, 2001, Andersen "corruptly persuade[d]" its employees to destroy documents with the intent to impair their availability in an "official proceeding[]," in violation of 18 U.S.C. § 1512(b)(2) (2000). JA 139. [FN2] Andersen objected to the jury instructions concerning two key elements of the offense. First, the court instructed the jury that the phrase "knowingly ... corruptly persuades" means any persuasion even partially motivated by an "improper purpose" to "subvert, undermine, or impede the fact-finding ability of an official proceeding" even if "Andersen honestly and sincerely believed that its *3 conduct was lawful." JA 212-13. Andersen repeatedly objected, and requested a standard instruction defining "corruptly" to require proof of improper means of persuasion or inducement to unlawful acts, and at the very least consciousness of wrongdoing. See R. 146, 431, 440, 912, 917; Tr. 4316. At every turn, however, the Government opposed any wording that might permit the jury to consider whether Andersen possessed anything resembling traditional mens rea - presumably because it could not possibly prove that Andersen used wrongful means or asked employees to engage in unlawful acts. [FN3]

FN2. The statute authorized ten years imprisonment if the defendant "knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to ... cause or induce any person to ... alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding." 18 U.S.C. § 1512(b)(2)(B) (2000).

FN3. The Fifth Circuit Pattern Jury Instruction for Section 1503, which the Court relied upon when endorsing the Government's requested instruction (R. 917), defined corruptly as "knowingly and dishonestly, with the specific intent to subvert or undermine the integrity of the court proceeding." See Fifth Circuit Pattern Jury Instruction 2.67 (2001) (emphasis added). The Government insisted on significant departures from the pattern instruction: excluding "dishonestly," and adding "impede" to the phrase "subvert or undermine." Tr.

4316-19, 6310-16. Andersen requested "dishonestly" and objected to "impede" (Tr. 4316-17; 6311-12), but the Court sided with the Government. JA 212.

Second, the district court instructed the jury that the term "official proceeding" included the SEC's performance of any "investigative functions" whether "formal [or] informal," (JA 211) and told them that an "official proceeding" includes a "proceeding or [an] investigation." JA 213 (emphasis added). Andersen objected because both the obstruction statute and the SEC's own regulations define official proceeding in a way that excludes informal investigations conducted by the staff - who have no power to subpoena documents or compel testimony until a formal investigation is begun by a vote of the Commission. JA 144; R. 426-29; Tr. 571, 574-75. In addition, Andersen proposed instructions designed to require the jury to find a close nexus between an employee's reminder to follow the document retention policy and a future SEC proceeding. JA 143; R. 424-26, 938-39; Tr. 4339-45. The district court instead instructed the jury that the Government did not have to prove that the "corrupt persuader" had any *4 particular proceeding in mind or knew that a future proceeding or subpoena was likely. The jury was told: "The Government need only prove that Andersen acted corruptly and with the intent to withhold an object or impair an object's availability for use in an official proceeding, that is, a regulatory proceeding or investigation whether or not that proceeding had begun or whether or not a subpoena had been served." JA 213 (emphasis added). [FN4]

FN4. The Government even objected to Andersen's request for an instruction that the proceeding had to relate to Enron, and again the Court sided with the government. R. 1122, 1142; Tr. 6296-99.

The jury regarded the case against Andersen as close and difficult. It deliberated for seven full days, repeatedly sought guidance from the court, and then declared itself deadlocked. Tr. 6695; R. 208-18. The court delivered an Allen charge (Tr. 6813-16) and after three more days of deliberation, the jury returned a guilty verdict. Pet. App. 2a. Andersen moved for a judgment of acquittal, on substantially the same grounds as presented herein (R. 1370-79), which the district court denied. R. 1449-52.

Evidence at Trial

Andersen was responsible for auditing Enron's publicly filed financial statements. On November 8, 2001, Enron announced a restatement of its income for preceding periods. Tr. 4583. Later that day, the SEC disclosed to Andersen that it had begun a formal investigation of Enron and issued a subpoena seeking access to Andersen's records. The Government contended at trial that certain Andersen partners had engaged in unlawful witness tampering by "corruptly persuad[ing]" employees to comply with the firm's document retention policy through communications made between October 10 and October 26, 2001. [FN5] It also asserted post-trial that an in-house lawyer "corruptly persuade[d]" a colleague to "alter" a document by *5 suggesting edits to his draft memorandum. JA 215-16.

FN5. Although the indictment period reached to November 8, the last act of "corrupt persuasion" identified by the Government in either the closing statements or their briefs to the Fifth Circuit occurred within a few days after October 23. See Tr. 6434.

The Fifth Circuit's opinion summarizes evidence that the jury might have relied upon to conclude that one of these Andersen partners (the "corrupt persuaders") requested compliance with the document retention policy, at least in part, for the purpose of "imped[ing] the fact-finding ability" of a future SEC proceeding. The record demonstrates, however, that Andersen must be acquitted if the jury should have also been required to find solicitation of unlawful acts, persuasion through improper means, consciousness of wrongdoing, or knowledge that an SEC subpoena was probable at the time of the relevant conduct. The central evidence germane to those issues follows.

1. As noted above it was not obstruction of justice for any individual employees to discard documents themselves during this period. And the jury could not have found that Andersen employees asked coworkers to violate the law by concealing criminal activity at Enron. Although some Andersen employees regarded Enron's financial reporting as "aggressive" (Tr. 1119, 5530), they uniformly testified that they did not know until after the alleged acts of corrupt persuasion that Enron had engaged in criminal conduct. See, e.g., Tr. 866-67, 1228, 1315-16, 1330-31, 2021-23, 3287-88.

That testimony is corroborated by the Government's own allegations concerning Enron's collapse. The Government has never charged Andersen (or any Andersen partner) with any violation of the securities laws in connection with Enron. It has instead filed a series of indictments against Enron executives charging that they lied to the public and to Andersen. See, e.g., Superseding Indictment, United States v. Causey, Skilling, and Lay, No. H-04-25 (S-2), at ¶ 5 (S.D. Tex. Jul. 7, 2004). Enron executives employed "secret oral side-deals, back-dated documents, disguised debt, material omissions, and outright false statements," and made "false statements to auditors."

Within days of discovering one of these "secret ... side-deals" concerning a special purpose entity named "Chewco," Andersen directed Enron to restate its earnings and issue a press release. Tr. 5924-32, 6131-33.

2. There was also substantial evidence that Andersen employees did not know that an SEC proceeding seeking Andersen documents was probable at the time they requested compliance with the policy. First, Andersen employees were aware that the SEC was likely to request information from Enron during the fall of 2001 but they did not expect the SEC to initiate proceedings against Andersen, or to seek access to Andersen's audit files, unless Enron had to restate its earnings. JA 158-89; Tr. 1445-49, 5896, 6087. The accuracy of this expectation was borne out by events.

FN7. Andersen did not expect the SEC to seek access to its records if Enron merely had to restate its balance sheet (JA 204-05), an event of far less significance to investors than an income restatement.

SEC staff in Fort Worth began an undisclosed “matter under inquiry” (“MUI”) concerning Enron in August of 2001 based on a Wall Street Journal article. As part of this inquiry, the SEC sent a letter to Enron on October 17, seeking voluntary disclosure of information concerning transactions between Enron and related parties. See JA 103-06. Andersen first learned of this SEC inquiry when Enron forwarded Andersen a copy of the letter on October 19. Pet. App. 6a. [FN8] The SEC's request for information was not directed to Andersen, and there was no evidence that Andersen discarded documents Enron needed to respond to this informal inquiry. [FN9]

FN8. An SEC witness testified that the MUI concerned Enron, not Andersen (Tr. 567-69), and that “[m]ore than half” of the SEC's informal inquiries “are closed without becoming a formal investigation” authorized by the Commission. Tr. 518.

FN9. The securities laws and regulations did not require Andersen to maintain any documents prior to the receipt of the subpoena. Tr. 563-64, 582. The SEC later promulgated Rule 2-06 of Regulation S-X pursuant to Section 802 of the Sarbanes-Oxley Act to regulate auditor document retention. See 148 Cong. Rec. S7419 (daily ed. July 26, 2002).

On October 30, the SEC commenced a formal investigation of Enron and sent a second letter to Enron identifying disclosures that it believed “Enron should provide to the public,” but the letter did not request production of documents from Enron or Andersen. JA 122. Nor did it give Andersen any reason to expect a request for its documents. The SEC did not contact Andersen or request access to its records until Enron restated its income on November 8 as an outgrowth of the Chewco revelations. GX 1108C; Tr. 4583. As the SEC official handling the MUI explained at trial, he had not requested information from Andersen prior to that date because the SEC only needed information from the auditor in the event of a restatement. Tr. 783-84.

Second, Andersen did not become aware of the facts that precipitated Enron's income restatement, and thus the SEC's subpoena, until the first week in November. Commencing in September of 2001, a team of Andersen partners that included David Duncan, the lead engagement partner for Enron, was evaluating potential problems with Enron's financial statements. Pet. App. 4a; Tr. 4543. Until the last few days of October, the consultation team's central concern was Enron's use of a particular accounting methodology to measure potential impairment of notes received from entities known as the Raptors. Tr. 1353-55, 2307, 4535-38, 4577; Pet. App. 3a-4a. Andersen recognized that the impairment issue had the potential to require an income restatement, but employees testified without exception that

they could not predict the outcome because it depended on the results of calculations using alternative methodologies. Tr. 959, 1794, 4580, 5424-25. Once a permissible methodology was applied, the Raptors' impairment issue turned out to be a “non-event” because no restatement was necessary. Tr. 4529-30, 5645-46. Duncan testified that he was fairly sure that the Raptors issue would not require a restatement more than a week before he requested compliance with the policy. Tr. 1794-95.

*8 Very late in October, however, Andersen began to discern other potential problems. Tr. 2031, 2056, 1934. On November 2, 2001, Andersen received documents from Enron's counsel which established that Enron had concealed from Andersen secret side-deals concerning Chewco. Tr. 6148-49. Andersen completed its evaluation of this issue on November 5; concluded that a restatement was necessary; and required Enron to file a form 8-K announcing that restatement. Tr. 5918-25. [FN10] A jury accordingly could have found that Andersen did not believe that an SEC subpoena was probable until at least a week after the acts at issue.

Proceedings On Appeal

The Fifth Circuit concluded that the district court properly interpreted the elements of the offense.

The Fifth Circuit held that “corruptly” should be defined “in terms of improper purpose despite the dim light it casts upon its meaning, its circularity aside.” Pet. App. 19a. The Court was “unwilling to follow the Third Circuit's lead in *16 imposing a requirement for an additional level of culpability on Section 1512(b).” Id. at n.17. The Court also reasoned that consciousness of wrongdoing is irrelevant to a finding of “corrupt[] persua [sion]” because “knowledge of one's violation is not an element of § 1512(b)(2).” Pet. App. 29a.

The Fifth Circuit also rejected Andersen's challenge to the “official proceeding” instructions. It recognized that it had previously described the nexus mandated by § 1512 to require proof of an “ 'intent to affect ... some particular federal proceeding that is ongoing or is scheduled to be commenced in the future.' “ Pet. App. 26a (quoting United States v. Shively, 927 F.2d 804, 812-13 (5th Cir.), cert. denied, 501 U.S. 1209 (1991)). It nevertheless characterized that statement as “dicta” (id.), and found it sufficient that this case was “tried on the theory” that Andersen intended to impede “a proceeding of the SEC.” Id. at 27a-28a. The Court did not address Andersen's further argument that the instructions erroneously defined an “official proceeding” to include informal SEC investigations, except to acknowledge that “[p]ossible proceedings” only “became a reality on November 8, 2001” when Andersen received a subpoena. Pet. App. 5a.

SUMMARY OF ARGUMENT

It is plain as day that the Government did not charge Andersen with obstruction of justice for discarding documents during the relevant time period because no official proceeding of the SEC was pending. This Court has held for more than a century that “a person lacking knowledge of a pending proceeding necessarily lack[s] the evil intent to

obstruct." United States v. Aguilar, 515 U.S. 593, 599 (1995) (citing Pettibone v. United States, 148 U.S. 197, 207 (1893)).

The United States attempted to evade that settled law by instead charging Andersen with "witness tampering," on the remarkable theory that although it was perfectly lawful for Andersen to have a document retention policy that preserved only the final audit work papers, and perfectly lawful for Andersen's employees and professionals to follow *17 that policy, it was somehow a serious felony for Andersen's in-house attorney and supervisors to remind its employees of the policy. The Government also argued that Nancy Temple's proposed edits to David Duncan's draft memorandum constituted criminal "witness tampering," because in its hindsight view the SEC would have wanted to see Duncan's first draft. It invoked 18 U.S.C. § 1512, which criminalizes killing, intimidating, threatening, and "knowingly ... corruptly persuad[ing]" any person with the intent to make evidence unavailable to an official proceeding. Its theory, accepted by the courts below, was that all persuasion is "knowingly ... corrupt[]" and criminal if it is motivated in part by a desire to impede the fact-finding ability of a potential future government proceeding, even if the speaker does nothing more than politely urge the listener to engage in lawful conduct. That interpretation is seriously flawed.

First, the Government's basic premise is simply wrong. There is nothing inherently "corrupt" or wrongful about an intent to impede future government fact-finding within the bounds of the law. Americans regularly engage in a wide range of conduct designed in part to influence or limit the information that reaches government proceedings; that is one of the reasons that our legal system is frequently described as "adversary." Some cases decided under 18 U.S.C. § 1503 have permitted a presumption that acts specifically intended to interfere with the fact-finding of a pending judicial proceeding are inherently "corrupt." But that is not settled law even under § 1503, and outside that unique context this Court has recognized that there is nothing "obviously evil" or "inevitably nefarious" about acting "for the specific purpose of depriving the Government of ... information" that it has sought to obtain. Ratzlaf v. United States, 510 U.S. 135, 144-46 (1994). Extending a presumption of that nature to the federal agency context "would undoubtedly criminalize some innocent behavior" and violate both Due Process fair warning principles and the First Amendment. United States v. North, 910 F.2d 843, 882 *18 (D.C. Cir.), modified on other grounds, 920 F.2d 940 (D.C. Cir. 1990), cert. denied, 500 U.S. 941 (1991).

Second, it would be an extremely poor reading of this statute. The word "corruptly" can have either a transitive meaning (by means of "corrupting" another person) or an intransitive one (motivated by a "corrupt" purpose). The only argument for an intransitive reading in § 1512 is the flawed analogy to § 1503. "Corruptly persuades" appears in § 1512 in a list of unlawful means, not purposes. It is thus more naturally read to prohibit only persuasion that "corrupts" the listener by inducing her to accept a bribe or otherwise break the law. That is clearly more consistent with the obvious purpose of the statute, which is otherwise directed at killing, coercing, intimidating or harassing witnesses. And § 1512 separately requires a specific intent to make documents or testimony unavailable to an official proceeding; defining "corruptly" as another purpose requirement thus makes little sense, and defining it as a purpose to impede an agency's fact-finding ability renders it superfluous. The Government's reading also produces a

line between criminal and non-criminal behavior that is so arbitrary and absurd that it cannot be what Congress intended. And even if "corruptly" is given an intransitive meaning, the purpose that violates § 1512 must then include some consciousness of wrongdoing. Persuasion is not "knowingly ... corrupt[]" if the speaker sincerely believes that it is not wrongful.

Third, like the traditional obstruction statutes, § 1512 applies only when the defendant specifically intended to make documents or testimony unavailable to a particular official proceeding, defined as a judicial proceeding, "a proceeding before the Congress," or "a proceeding before a Federal Government agency which is authorized by law." 18 U.S.C. § 1515(a)(1). Interference with the fact-finding ability of law enforcement or preliminary agency investigations is not sufficient. Neither is an abstract desire not to retain documents because they might be relevant to some possible future proceeding. As this Court recognized in Aguilar, identifying true "corrupt" interference with an official proceeding thus requires careful attention to the "nexus" between the defendant's conduct and the proceeding alleged to have been obstructed. The instructions given here eliminated that nexus requirement.

Finally, even if these questions were close, the rule of lenity requires that all ambiguities must be resolved in defendants' favor. The doctrine of constitutional doubt also forbids an interpretation of vague statutory language that would criminalize a broad range of innocent conduct, including constitutionally protected speech, without fair warning. A Senate Report on the Sarbanes-Oxley law, portions of which were passed because Congress recognized that Andersen's conduct was not clearly criminal under existing law, noted that "in the current Andersen case, prosecutors have been forced to use the 'witness tampering' statute ... and to proceed under the legal fiction that the defendants are being prosecuted for telling other people to shred documents, not simply for destroying evidence themselves." [FN22] Lenity and fair warning principles forbid criminal prosecutions based on "legal fictions." Whether particular conduct is criminal should never be debatable, or a surprise. The theory of this prosecution criminalized conduct commonly understood to be lawful, including the document retention policies in place at almost every American corporation or professional firm of any size. And the jury may well have rested its verdict on an email from Nancy Temple which "offered such common legal advice that the chairman of the American Corporate Counsel Association wrote in a letter to his members: 'Who amongst us has not thought: There but for the grace of God go I.' " [FN23]

FN23. Dana E. Hill, Note, Anticipatory Obstruction of Justice: Pre-emptive Document Destruction Under The Sarbanes-Oxley Anti-Shredding Statute, 18 U.S.C. § 1519, 89 Cornell L. Rev. 1519, 1552 (2004).

None of these errors could be harmless. There is no evidence that any of the partners involved used unlawful *20 means of persuasion, urged anyone else to break the law, or believed that their conduct was wrongful. And the record also requires the conclusion that they did not believe that an SEC subpoena was probable at the time the acts of persuasion occurred. Indeed, there is no reason to assume that a jury that deliberated for ten days and

declared itself deadlocked - despite a guilty plea for the same conduct entered by David Duncan - would have convicted if the instructions had been different in any material way.

This is not a case about big business or being tough on crime; it is about the right to conduct one's life and business in a manner understood to be lawful, and to receive fair warning when that law is changed. No one at Andersen had the “evil-meaning mind” necessary to justify criminal punishment. This conviction was secured by creative lawyering on the part of government prosecutors, at the expense of sound statutory interpretation, fair warning principles, and the basic goals and values of the criminal law. It did a great injustice to the tens of thousands of Andersen partners and employees who were permanently harmed by the firm's destruction. And it raises a cloud of doubt about routine advice that Americans give to colleagues, clients, family, and friends about how to protect their own interests within the bounds of the law. It must be reversed.