No.

IN THE

Supreme Court of the United States

OCTOBER TERM 2013

JOHN L. YATES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

QUESTION 1: In the wake of the criminal charges filed against Enron's corporate officers, Congress passed the Sarbanes-Oxley Act of 2002. Known as the "anti-shredding provision" of the Act, 18 U.S.C. § 1519 makes it a crime for anyone who "knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, ***or tangible object*** with the intent to impede or obstruct an investigation. 18 U.S.C. § 1519 (emphasis supplied). John L. Yates, a commercial fisherman, was charged and convicted under this anti-shredding criminal statute for destroying purportedly undersized, harvested fish from the Gulf of Mexico after a federally-deputized officer had issued him a civil citation and instructed him to bring them back to port.

This petition presents the important question of whether the reach of section 1519 extends to the destruction of anything meeting the dictionary definition of "tangible objects," or instead is limited to the destruction of tangible objects related to record-keeping as follows:

> Whether Mr. Yates was deprived of fair notice that destruction of fish would fall within the purview of 18 U.S.C. § 1519, where the term "tangible object" is ambiguous and undefined in the statute, and unlike the nouns accompanying "tangible object" in section 1519, possesses no record-keeing, documentary, or informational content or purpose?

QUESTION 2:

Whether the Eleventh Circuit's affirmance of the district court's wholesale preclusion of Dr. Richard Cody from testifying at trial as either an expert or lay witness in the defense's case-in-chief as a drastic sanction for the defense's inadvertent failure to include Dr. Cody on the defense's trial witness list violated Mr. Yates's Fifth and Sixth Amendment rights to due process, compulsory process for obtaining witnesses in his favor, and to present a complete defense, even though even though Dr. Cody: (1) was listed as an expert witness on the government's trial witness list; (2) testified for the government in a *Daubert*[1] hearing on the morning that the jury trial commenced; and, (3) was under a defense subpoena for trial?

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[1] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner John L. Yates respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit. *See United States v. Yates*, No. 11-16093, 2013 WL 4400426 (11th Cir. Aug. 16, 2013) (attached as Appendix A).

OPINION BELOW

The Eleventh Circuit Court of Appeals affirmed Mr. Yates's conviction on August 16, 2013, on the grounds set forth in this petition. *See* App. A.

JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over this criminal case, pursuant to 18 U.S.C. § 3231. An appeal from that court's final judgment proceeded for review by the Eleventh Circuit Court of Appeals,

in accordance with 28 U.S.C. § 1291 and 18 U.S.C. § 3742. The Eleventh Circuit affirmed the district court judgment on August 16, 2013. *See* App. A. This Court's jurisdiction is invoked by the timely filing of this Petition for Writ of Certiorari within the prescribed 90 days from the date the final judgment was rendered. *See* 28 U.S.C. § 1254(1); S. Ct. R. 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

The Sixth Amendment to the U.S. Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

The Fourteenth Amendment to the U.S. Constitution provides in pertinent part:

> . . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .

Section 1519 of Title 18, United States Code, provides:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

STATEMENT OF THE CASE

John Yates, a commercial fisherman, received a civil fishing citation from the Florida Fish and Wildlife Commission (FWC) (whose officers were deputized as federal agents), for allegedly having on board 72 undersized red grouper fish. It was subsequently alleged that, before returning to port, Mr. Yates ordered that the purportedly undersized fish be thrown overboard because, upon return from the fishing trip, FWC officers only found 69 undersized fish. From the FWC officer's initial contact with Mr. Yates on his fishing vessel in the Gulf of Mexico, Mr. Yates contended that fish were *not* "undersized" because the FWC officer did not measure the fish in accordance with federal law, which requires that the fish be measured in a manner which creates the "greatest overall length." Specifically, 50 C.F.R. § 622.2 requires that fish be measured with their mouths open or closed, and their tails squeezed or not squeezed, whichever results in the "greatest overall length." 50 C.F.R. § 622.2, 50 C.F.R., Part 622, App'x C (Figure 2).[2]

Years after the issuance of the civil fishing citation, Mr. Yates was charged with, and found guilty of, counts one and two of a three-count indictment.[3] Specifically, count one charged that Mr. Yates "did knowingly dispose of and throw overboard and

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[2] At trial, the FWC officer testified that he did not measure the fish to obtain the greatest overall length, as required by federal law. He testified that he instead measured them "the greatest practical way."

[3] Mr. Yates was also charged with–but acquitted of–willfully making "a materially false, fictitious, and fraudulent statement" to Federal agents, in violation of 18 U.S.C. § 1001(a)(2).

attempt to dispose of and throw overboard undersized fish, for the purpose of preventing and impairing the Government's lawful authority to take such property into its custody and control," in violation of 18 U.S.C. §§ 2232(a) and 2. Count two charged that Mr. Yates "did knowingly destroy, conceal, and cover up 'undersized fish' with the intent 'to impede, obstruct, and influence the investigation and proper administration of the catching of red grouper under the legal minimum size limit,' in violation of 18 U.S.C. §§ 1519 and 2."

The central theory of Mr. Yates's defense at trial was that the fish that he harvested from the Gulf of Mexico were not "undersized," as alleged and charged in the indictment, because they were not measured by FWC officers in accordance with federal law, which provided that fish be measured in a manner to produce the greatest overall length. Had the fish been measured according to federal law, he contended at trial, they would have measured within the legal limits.

At trial, the defense called an expert witness, William Ward, during its case-in-chief, who testified that the red grouper were not measured in accordance with federal law and, had the red grouper been measured pursuant to federal law, they would have measured larger. On cross-examination and during its closing arguments, the government vehemently attacked Mr. Ward's credibility, arguing to the jury that he should not be believed because he had an "axe to grind" with the government due to fines he had previously received during his tenure as manager of a fish wholesale warehouse. In an attempt to rehabilitate Mr. Ward's testimony that red grouper measure larger with their mouths open and were thus not "undersized," as charged in

the indictment, Mr. Yates sought to call in his case-in-chief the government's expert, Dr. Richard Cody, who had previously testified for the government at a *Daubert* hearing on the morning that the jury trial commenced and who was also under defense subpoena to testify at trial.[4]

The government objected to Mr. Yates calling Dr. Cody (its own listed expert witness) during his case-in-chief, and requested that the district court exclude Dr. Cody from testifying in the defense's case-in-chief because Dr. Cody was not placed on the *defense's* trial witness list. The district court agreed with the government and, as a sanction for the failure to disclose Dr. Cody on the defense's witness list, precluded Dr. Cody from testifying as either an expert *or* lay witness.

At the conclusion of both the government's case-in-chief and of all evidence, the defense moved for judgments of acquittal as to both counts one and two. First, Mr. Yates moved for acquittal as to count two, arguing that 18 U.S.C. § 1519 is "a records-keeping statute aimed solely at destruction of records and documents, and could not be applied to a situation, as here, where it was fish which were destroyed." The district court initially questioned whether fish were within the meaning of "tangible object" as follows:

> Isn't there a Latin phrase-I'm not good at remembering it–in terms of construction of a statute . . . that you take a look at the line of words, and you interpret the words consistently. So if you're talking about

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[4] At the *Daubert* hearing, Dr. Cody had testified that red grouper indeed measure larger with their mouths open, as opposed to mouths closed, which is how the Florida FWC officer had improperly measured them.

> documents, and records, tangible objects are tangible objects in the nature of a document or record, as opposed to a fish.
>
> . . . [I]f you look at the title for at least a clue as to what congress meant, it talks about destruction, alteration, or falsification of records in federal investigations. It might be a stretch to say throwing away a fish is a falsification of a record.

In a written opinion, however, the district court reasoned that section 1519's inclusion of the "independent term" "tangible object" within its text indicates that the statute was not intended to apply merely to a "'record' or 'document.'" App. B at 2. The district court concluded:

> Given the nature of the matters within the jurisdiction of the government agency involved in this case, and the broad language of § 1519, the Court finds that a reasonable jury could determine that a person who throws or causes to be thrown fish overboard in the circumstances of this case is in violation of § 1519.

App. B at 1. Mr. Yates was subsequently adjudicated guilty and is now serving a term of supervised release. On appeal to the Eleventh Circuit, Mr. Yates argued that 18 U.S.C. § 1519, which prohibits obstruction of justice in connection with the destruction, alteration, or falsification of "any document, record, or tangible object," did not apply to the alleged destruction of fish for which he was charged.

The Eleventh Circuit, in affirming the judgment of the district court, disagreed as follows:

> . . . [U]ndefined words in a statute–such as "tangible object" in this instance–are given their ordinary or natural meaning. *Smith v. United States*, 508 U.S. 223, 228, 113 S. Ct. 2050, 2054 (1993). In keeping with those principles, we conclude "tangible object," as § 1519 uses that term, unambiguously applies to fish. See BLACK'S LAW DICTIONARY 1592 (9th ed. 2009) (defining "tangible" as "[h]aving or possessing physical form"); see also *United States v. Sullivan*, 578 F.2d 121, 124 (5th Cir. 1978)

(noting that cocaine is a "tangible object" subject to examination and inspection under Rule 16(a) of the Rules of Criminal Procedure).

App. A at 4.

REASONS FOR GRANTING THE WRIT

QUESTION 1: **Congress's avowed purpose for 18 U.S.C. § 1519 is to prohibit the destruction, alteration, and falsification of records, documents, and similar items with record-keeping, documentary, or informational uses. The Eleventh Circuit, in holding incorrectly that the statute extends to entities such as "fish," deprived Mr. Yates of fair notice as to the conduct prohibited by the statute.**

This petition presents an important question needing resolution by this Court. The use of the term "tangible object" in section 1519 is so vague and ambiguous that the statute fails to give individuals constitutionally required fair notice of its prohibited conduct. Further, as interpreted by the Eleventh Circuit, section 1519 is overbroad, indeed limitless, in its reach. Mr. Yates contends that section 1519, enacted as part of the "anti-shredding provision" of the Sarbanes-Oxley Act of 2002, was never intended to prohibit the destruction of non-documentary, non-informational items such as fish and thus did not apply to his alleged destruction of fish.

In *Connally v. General Const Co.*, this Court restated the principle, grounded in the Fifth, Sixth, and Fourteenth Amendments, that criminal statutes be worded explicitly enough to provide "fair notice" of the behavior they proscribe:

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must

> necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

269 U.S. 385, 391 (citations omitted).

Here, Mr. Yates, a commercial fisherman, was convicted of one count of destroying an aggregate *of three* purportedly undersized red grouper (fish) in violation of 18 U.S.C. § 1519. Congress could not have meant for the destruction of fish to fall under section 1519. Section 1519, entitled "Destruction, alteration, or falsification of *records* in Federal investigations and bankruptcy," was enacted into law as part of the Sarbanes-Oxley Act of 2002 and provides criminal sanctions against anyone who

> knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, ***or tangible object*** with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case . . . .

18 U.S.C. § 1519 (emphasis supplied).

Mr. Yates contended on appeal to the United States Court of Appeals for the Eleventh Circuit that the district court erred in denying his motion for judgment of acquittal as to the charge of violating section 1519, arguing that the term "tangible object" as used in the statute only applies to records, documents, or tangible items that relate to record-keeping and does not apply to fish. Indeed, no reasonable reading of section 1519 put Mr. Yates on notice that his alleged destruction of fish would have violated section 1519.

The Eleventh Circuit, however, disagreed. Noting that "undefined words in a statute . . . are given their ordinary or natural meaning," and consulting *Black's Law Dictionary* for the definition of "tangible," the court ruled that "'tangible object, as § 1519 uses that term, unambiguously applies to fish." App. A at 3-4. Finding the term "tangible object" not to be ambiguous, the Eleventh Circuit further reasoned that there was no basis for applying the Rule of Lenity and interpreting section 1519 in Mr. Yates's favor. *Id.*

The Eleventh Circuit's opinion devoted just a single paragraph in ruling that the term "tangible object" in section 1519 is used "unambiguously" and therefore can be applied to "fish." In so doing, the court cited three legal authorities to set forth the uncontroversial principle that, in statutory construction, inquiries must start by examining the "plain meaning" of the text.[5] In finding the term unambiguous, the court pointedly warned against further inquiry into the statute as follows, "When the text of a statute is plain, . . . we need not concern ourselves with contrary intent or purpose revealed by the legislative history." App. A at 10 (citing *United States v. Carrell*, 252 F.3d 1193, 1198 (11th Cir. 2001)). As specific authority for holding that

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[5] *United States v. Carrell*, 252 F.3d 1193, 1198 (11th Cir. 2001); *United States v. Hunt*, 526 F.3d 739, 744 (11th Cir. 2008); *Smith v. United States*, 508 U.S. 223, 228 (1993). App. A at 4. Although not discussed by the Eleventh Circuit, *Hunt* also has some substantive relevance: The defendant Hunt, convicted of violating section1519 for falsifying a police report, argued that he was denied fair notice of the charge against him because his conduct was "not the type contemplated by Congress when it passed the statute." *Hunt* at 743. The court brushed aside Hunt's attempt to invoke the statute's legislative history, stating, "Section 1519 covered Hunt's behavior; the context of [the statute's] passage is of no moment." *Id.* at 744. The construction of "tangible object" was not an issue in *Hunt*.

"tangible object" covers non-informational items such as fish, the court cited only a Fifth Circuit drug-conspiracy decision, issued some 14 years *prior to* the existence of section 1519, in which the defendant moved to inspect seized cocaine pursuant to Fed. R. Crim. P. 16(a)(1)(E), which mentions "tangible objects." *Id.* (*citing United States v. Sullivan*, 578 F.2d 121, 124 (5th Cir. 1978)). The facts of *Sullivan* are unclear and its relevance is tenuous.

Lacking any persuasive judicial authority for its interpretation of "tangible object," the Eleventh Circuit might have engaged in a serious effort to construe the statutory text in question but chose not to do so. Instead, the court performed only a perfunctory inquiry centering on a dictionary's definition of the word "tangible."

The court began by stating two well accepted principles: (1) that "the plain meaning of the statute controls unless the language is ambiguous or leads to absurd results," and (2) that "undefined words in a statute–such as 'tangible object' in this instance–are given their ordinary or natural meaning." App. A at 4 (citations omitted). The court then simply consulted *Black's Law Dictionary* for the definition of "tangible." Finding the word defined as "[h]aving or possessing physical form," the Eleventh Circuit ended the inquiry and ruled that "tangible object" "unambiguously applies to fish." *Id.* In failing to see any vagueness or ambiguity in the term "tangible object," the Eleventh Circuit ignored an important legal problem posed by the statute–that of the statute's proper scope–and abrogated its responsibility to conduct a serious examination of the statute's text to determine its scope.

A. **The Eleventh Circuit, in ruling that the vague and ambiguous term "tangible object" in section 1519 covers contraband items such as "fish," did not conduct a diligent inquiry into the plain meaning of the statute, which was intended by Congress to prohibit tampering with items having a record-keeping, documentary, or informational use.**

Mr. Yates agrees that statutory construction–including determining questions of vagueness and ambiguity–must begin with the "plain language" of the text, and that words should be given their "ordinary and natural meaning." He points out, however, that the "ordinary and natural meaning" of an isolated term, as found in a dictionary's definition, is not necessarily "plain" in the context of a criminal statute. As this Court has recognized countless times, "the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). "'Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used. . . .'" *Shell Oil Co. v. Iowa Dept. of Revenue*, 488 U.S. 19, 25 (1988) (quoting *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941)). This Court has so instructed as follows:

> The definition of words in isolation . . . is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.

Dolan v. United States Postal Service, 546 U.S. 481, 486 (2006).

Jurisprudence abounds with cases in which a word or phrase whose dictionary definition is facially "plain," turns out to be vague or ambiguous as used within a given statute. For example, in *Zuni Public School Dist. v. Dept. of Education*, 550 U.S. 81 (2007), this Court encountered a statutory term ("percentile") whose literal meaning–as found in several dictionaries–was absolutely clear, butyet was troublesomely ambiguous as used in the statute. As this Court concluded, "[A]mbiguity, is a creature not [just] of definitional possibiliti es but [also] of statutory context. . . . [M]eaning–*or ambiguity*–of certain words or phrases may only become evident when placed in context." 550 U.S. at 98-99 (citations omitted; brackets and emphasis in original). *See also Brown v. Gardner*, 513 U.S. 115, 118 (1994) ("Ambiguity is a creature not of definitional possibilities but of statutory context.").

This, Mr. Yates argues, is the difficulty with understanding the intended meaning of "tangible object" as used in section 1519: The ambiguity of the term–which is not evident from its bare dictionary definition–"only become[s] evident when placed in context." *Zuni Public School Dist.*, 550 U.S. at 98. The Eleventh Circuit never conducted that analysis. A dictionary can *define* "tangible," but the *definition* of a term is not the same as its *referent*, *i.e.*, the thing to which the term refers in context. Mr. Yates submits that "tangible object" in section 1519 is vague and ambiguous on its face, and therefore fails to provide fair notice as to the scope of the statute, unless construed in a manner consistent with the statute as a whole. Had the Eleventh Circuit considered "tangible object" in its overall statutory context, its vagueness and ambiguity would have been evident, and the court would have made a proper inquiry

into its proper meaning, perhaps guided by one or more of the many "canons" commonly used for the purpose.

The canon *noscitur a sociis* ("it is known from its associates"), perhaps the most familiar canon of statutory construction, stands for the common-sense principle that vague or ambiguous terms usually share some common meaning with their surrounding language. *See United States v. Williams*, 553 U.S. 285, 294 (2008) (explaining that "a word is given more precise content by the neighboring words with which it is associated"). "The maxim noscitur a sociis . . . is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961).

Section 1519, entitled "Destruction, alteration, or falsification **of records** in Federal investigations and bankruptcy," penalizes anyone who:

> . . . knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any **record, document**, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States. . .

18 U.S.C. § 1519 (emphasis supplied). Considering the statute's textual elements in the light of *noscitur a sociis*, it is evident that the statute is concerned only with records, documents, and items which are somehow similar or related to documents and record-keeping modalities.

The statute's title, in its entirety, applies *exclusively* to records (whether paper or electronic).[6] Not only is the word *records* specified to be the subject of the statute, the overall context of the title makes clear that the words *destruction, alteration,* and *falsification* can be understood only as applying to records and the like. *See Brotherhood of R. R. Trainmen v. Baltimore & O. R.,* 331 U.S. 519, 528-29 (1947) (noting that for "interpretive purposes," the title of a statute and the heading of a section "are of use only when they shed light on some ambiguous word or phrase"); *cf. I.N.S. v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("[W]e have stated that the title of a statute or section can aid in resolving ambiguity in the legislation's text.").

Within the body of the statute, the key "objects" in the statute are, indisputably, the nouns *record* (repeating the word *records* as used in the title) and *document.* Of the verbs listed, two (*conceals* and *covers up*) could arguably apply *both* to informational and other items (whether paper or electronic), while *mutilates* unambiguously applies to documents.[7] *Alters*, *destroys*, and *falsifies* as used in section

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[6] Significantly, the title was given to section 1519 in its original enactment by Congress and is not a later addition. The Eleventh Circuit has recognized, "where section subtitle was not added by publisher or codifier, but was part of act as written and passed by Congress, subtitle was an indication of congressional intent by a clerk or editor." *United States v. Castro*, 837 F.2d 441, 442 n.1 (11th Cir. 1988).

[7] *"mutilate,* v. 1. *trans.* To render (a thing, esp. a book or other document) imperfect by cutting out or excising a part; to charge or destroy part of the content or meaning of." *Oxford English Dictionary*, http://www.oed.com. The second sense given to *mutilate* has to do with living beings: "To deprive (a person or animal) of the use of a limb or bodily organ, by dismemberment or otherwise . . ." The third sense of *mutilate* is purely figurative: "to cut back or curtail so as to render ineffectual; to

1519 necessarily refer *only* to records and similar entities, because these terms are referenced (in their nominalized form) in the statute's title, where no ambiguity exists. Significantly, the verb phrase *makes a false entry in* has no possible object or application *except* to a record or document of some kind.[8]

A further canon of statutory construction, *ejusdem generis* ("of the same kind"), also supports Mr. Yates's interpretation of "tangible object" in section 1519. This canon "'limits general terms [that] follow specific ones to matters similar to those specified.'" *CSX Transp., Inc. v. Alabama Dept. of Revenue*, 131 S. Ct. 1101, 1113 (2011) (quoting *Gooch v. United States*, 297 U.S. 124, 128 (1936)). That is, the maxim of *ejusdem generis* instructs that "[w]here general words follow specific words in a statutory enumeration, the general words are to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) (internal quotation and citation omitted). Therefore, when "several items in a list share an attribute," *ejusdem generis* "counsels in favor of interpreting the other items as possessing that attribute as well." *Beecham v. United States*, 511 U.S. 368, 371 (1994). This principle is particularly applicable to general catchall clauses at the end of a statutory list. Those catchall clauses should not be read as opportunities to insert substantially different items into the statute, but

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impose brutal or ruinous change on."

[8] *See, e.g.*, 18 U.S,C. § 1005, which prohibits "*mak[ing] any false entry. . . in* any book, report, or statement of such bank, company, branch, agency or organization with intent to injure or defraud . . ." (emphasis supplied).

instead, they should be read "as bringing within a statute categories similar to those specifically enumerated." *Federal Mar. Comm'n v. Seatrain Line, Inc.*, 411 U.S. 726, 734 (1973).

The operative text in section 1519 is "any *record, document, or tangible object.*" Consistent with the principle of *ejusdem generis* (as well as grammatical parallelism and common sense), the more general final catchall-like term (*tangible object)* is informed by the specific terms it follows (*record, document).* Both *record* and *document* share a common meaning having to do with the recording or documentation of information, whether on paper or electronically. The meaning of the less specific (more general) term *tangible object*, therefore, must be *"of the same kind"* as *records and documents.*

The canon *expressio unius est exclusio alterius* also provides some guidance.[9] While section 1519 specifies "any record, document, or tangible object" as its subject matter, the statute nowhere includes *evidence, property, contraband* or similar terms, which would perhaps be expected had Congress intended section 1519 to cover the same conduct that is targeted in 18 U.S.C. § 2232(a) (under which Mr. Yates was also convicted). Section 2232(a), prohibiting the "Destruction or removal of *property* to prevent seizure," appropriately covers contraband and other items subject to seizure (usually for use as evidence), whereas section 1519–motivated by the white-collar

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[9] "The express mention of one thing excludes all others"; *i.e.*, items not listed in a statute are assumed not to be covered by the statute. *Marx v. General Revenue Corp.*, 133 S. Ct. 1166, 1181 (2013).

criminality concerns of Sarbanes-Oxley--applies specifically to records, documents and related informational items.

Given the vagueness (or ambiguity) of *tangible object* in the context of section 1519, Mr. Yates does not presume to know the precise meaning of the term. It is indisputable, however, that the term must have as its referent, something that shares significant qualities with "record" and "document"–in all likelihood, computer drives and other digital media. To insist on a broader interpretation is to add to the term's existing vagueness and create an offense element where none was intended by Congress.

B. Section 1519's legislative history and statutory context show that Congress's avowed purpose in enacting the statute was to prohibit the destruction, alteration, and falsification of records, documents, and "tangible objects," which are record-keeping modalities.

As this Court has stated, "Federal crimes . . . 'are solely creatures of statute.' *Liparota v. United States*, 471 U.S. 419, 424 (1985), ... Accordingly, when assessing the reach of a federal criminal statute, we must pay close heed to language, legislative history, and purpose in order strictly to determine the scope of the conduct the enactment forbids." *Dowling v. United States*, 473 U.S. 207, 213 (1985) (citation omitted). "'The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *Robinson v. Shell Oil Co.*, 519 U.S. 337, 34 (1997) (quoting *United States v. Ron Pair Enterprises*, 489 U.S. 235, 240 (1989)).

As previously noted, section 1519 was enacted as part of the Sarbanes-Oxley Act of 2002, also known as the Public Company Accounting Reform and Investor Protection Act and the Corporate and Auditing Accountability and Responsibility Act. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002). Congress's avowed purpose in enacting Sarbanes-Oxley is stated clearly in the Act's descriptive subtitle, which reads, "An Act to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes."[10] *Id.*

As the title of Sarbanes-Oxley indicates, the Act was a sweeping reform effort by Congress to address white-collar fraud and misconduct of the type associated with a number of high-profile corporate accounting scandals such as those involving the collapses of Enron Corporation and WorldCom. Section 1519, encompassed within Sarbanes-Oxley as a new "anti shredding provision," is one of two subsections which constitute Section 802 of Title VIII of the Act. Title VIII is entitled the "Corporate and Criminal Fraud Accountability Act of 2002." *Id.* at 800.

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[10] "[W]e have stated that the title of a statute or section can aid in resolving an ambiguity in the legislation's text. *See Mead Corp. v. Tilley,* 490 U.S. 714, 723 (1989); *FTC v. Mandel Bros., Inc.,* 359 U.S. 385, 388-89 (1959). cf. *Chamber of Commerce v. Whiting*, 131 S. Ct. 1986 (2011). *See also Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) ("We also note that 'the title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute.").

Section 802, in which 18 U.S.C. § 1519 was placed, is entitled "Criminal Penalties for Altering Documents" and is one of seven substantive sections in Title VIII aimed at addressing criminal corporate securities fraud. *Id.*

Codified within section 802 of the Act, 18 U.S.C. § 1519 is paired with a related penal subsection, 18 U.S.C. § 1520, entitled "Destruction of corporate audit records." *Id.* 18 U.S.C. § 1520 directs the Securities and Exchange Commission to promulgate rules for the retention of documents and records (including electronic records) and penalizes accountants for willfully failing to preserve "workpapers" of audits conducted for issuers of regulated securities. *Id.* Nothing in Title VIII of Sarbanes-Oxley suggests a concern for anything unrelated to records, documents, or other informational entities.

It is also instructive to consult the pre-enactment "legislative history" material for Title VIII, which was placed into the Congressional Record on July 26, 2002. *See* 148 Cong. Rec. S7418-01, S7418 (daily ed. July 26, 2002). This material was entitled "Section-By-Section Analysis and Discussion of the Corporate and Criminal Fraud Accountability Act (Title VIII of H.R. 2673)." *Id.* The "Analysis" states of Section 802:

> This section provides two new criminal statutes which would clarify and plug holes in the current criminal laws relating to the destruction or fabrication of evidence and the preservation of financial and audit records.
>
> First, this section would create a new 20-year felony [i.e., § 1519] which could be effectively used in a wide array of cases where a person destroys or creates evidence with the intent to obstruct an investigation or matter that is, as a factual matter, within the jurisdiction of any federal agency or any bankruptcy. . . .

Id. In isolation, the reference to "evidence" is rather broad and sheds little light–either favorable or unfavorable to Mr. Yates – on the meaning of scope of section 1519. However, the meaning of "evidence"–and thus the intended meaning of "tangible object" – in section 1519 – is made clear in the succeeding "Discussion" section:

> Section 802 creates two new felonies to clarify and close loopholes in the existing criminal laws relating to the destruction or fabrication of evidence and the preservation of financial and audit records. First, it creates a new ***general anti shredding provision***, 18 U.S.C. [§] 1519, with a 10-year [sic] maximum prison sentence. Currently provisions governing the destruction or fabrication of evidence are a patchwork that have been interpreted, often very narrowly, by federal courts. For instance, certain current provisions make it a crime to persuade another person to ***destroy documents***, but not a crime to actually ***destroy the same documents*** yourself. . . .

Id. at S7419 (emphasis supplied). The Discussion further states that the Act is meant to "apply broadly to any acts to destroy or fabricate physical evidence,"[11] but subsequently reveals the meaning of "evidence," in explaining, the statute "could also be used to prosecute a person who actually destroys ***the records*** himself in addition to one who persuades another to do so." *Id.* (emphasis supplied). The Discussion concludes, "*The intent of the provision* [i.e., § 1519] *is simple; people should not be destroying, altering, or falsifying* ***documents*** *to obstruct any government function.*" *Id.* (emphasis supplied).

To summarize, the overall context and Congressional intent for section 1519 could not be more explicit: (1) The statute was created as part of Sarbanes-Oxley, an

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[11] "Physical evidence" is broad in scope but is used here in the context of "[d]estroying or falsifying documents" and clearly refers to records and documents. *Id.* at 4.

act avowedly intended by Congress "[t]o protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws . . .." Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002); (2) The statute was placed within a title of Sarbanes-Oxley entitled "Corporate and Criminal Fraud Accountability," *id.*; (3) The statute forms part of Section 802, which is titled "Criminal Penalties for Altering Documents," and is paired with a prohibition against the "Destruction of corporate audit records," *id.*; (4) The statute, as enacted by Congress, was specifically titled "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy," *see* 18 U.S.C. § 1519; and (5). The legislative history shows that section 1519 was intended by Congress to be a "general anti shredding provision" prohibiting people from "destroying, altering, or falsifying documents." 148 Cong. Rec. at S7419.[12] For the Eleventh Circuit to interpret section 1519 as applying to the destruction of non-documentary, non-record, non-informational objects such as "fish" negates the statute's plain text, history, and Congress's intent as well.

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[12] At a minimum, the ambiguous nature of section 1519's language, should have triggered the rule of lenity, which requires that the statute be strictly construed and applied only to clearly covered conduct, not to the conduct charged in this case. *See United States v. Lanier*, 520 U.S. 259, 266 (1997). "This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected punishment that is not clearly prescribed." *United States v. Santos*, 553 U.S. 507, 514 (2008) (collecting cases).

C. **Mr. Yates was deprived of the right of fair warning because the Eleventh Circuit's construction, operating with *ex post facto* effect, unexpectedly and unfairly broadened the statute subsequent to Mr. Yates's alleged offense.**

In *United States v. Lanier*, 520 U.S. 259 (1997), this Court identified "three related manifestations of the fair warning requirement." *Id.* at 266. One manifestation "bars enforcement of 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning . . . .'" *Id.* (citations omitted). The second manifestation requires courts to apply the "rule of lenity" in cases of statutory ambiguity. *Id.* Finally, this Court held that an unexpected, retroactive judicial construction of a statute could constitute a due process violation with the effect of an *ex post facto* law:

> [D]ue process bars courts from applying a *novel construction* of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope. In each of these guises, the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear *at the relevant time* that the defendant's conduct was criminal.

Id. (internal quotation and citation omitted, emphasis supplied).

In *Bouie v. City of Columbia*, 378 U.S. 347 (1964), this Court noted that even when statutory language is seemingly "narrow and precise," a novel judicial construction can have an unconstitutional *ex post facto* impact:

> [A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law," . . . [which is defined as] one 'that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action,'

> or 'that aggravates a crime, or makes it greater than it was, when committed. . . . If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that [a court] is barred by the Due Process Clause from achieving precisely the same result by judicial construction. . . . [The fundamental principle is] that the 'required criminal law must have existed when the conduct in issue occurred.' . . . If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect.

Id. at 353-54 (citations omitted).[13]

Mr. Yates contends that at the time of his alleged offense, section 1519 did not give him fair notice of "what the law intend[ed] to do if a certain line [was] passed.[14] Only later, by the Eleventh Circuit's expansion of section 1519 to cover the destruction of objects of any and every conceivable kind, was his conduct criminalized by the statute.[15]

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[13] This Court noted in *Bouie*, "While such a construction is of course valid for the future, it may not be applied retroactively, any more than a legislative enactment may be, to impose criminal penalties for conduct committed at a time when it was not fairly stated to be criminal." 378 U.S. at 362.

[14] This Court has observed, "Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle v. United States*, 283 U.S. 25, 27 (1931).

[15] Mr. Yates's situation parallels that of the petitioners in *Bouie*: the petitioners (civil rights demonstrators) had notice that their conduct was in "breach of the peace," but they could not know they would be charged with the more serious "criminal trespass," based on a retroactive judicial broadening of the trespass statute by the South Carolina Supreme Court.

The retroactive nature of the Eleventh Circuit's holding (supporting a ruling by the district court) is clear. No other Court of Appeals had ruled on the proper construction of "tangible object" in section 1519. As noted above, the Eleventh Circuit cited as authority only a Fifth Circuit decision which involved a Federal Rule of Criminal Procedure–not section 1519 or any other statute–and which was unpersuasive on other grounds. App A. at 10 (citing *Sullivan*, 578 F.2d at 124). [16] The authorities cited by the government in the case below are similarly inapposite. They are either non-precedential district court rulings on trial motions or cases in which the reach of section 1519's "tangible object" was not raised or addressed,[17] or cases involving statutes other than section 1519.

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[16] *United States v. Sullivan*, 578 F.2d 121, 124 (5th Cir. 1978).

[17] *United States v. Perez*, 603 F.3d 44 (D.C. Cir 2010) (destruction of cocaine); *United States v. Atlantic States Cast Iron Pipe Co.*, 612 F. Supp.2d 453 (D .N.J. (2009) (destruction of pipe in OSHA violation); *United States v. Russell*, 639 F. Supp.2d 266 (D. Conn. 2007) (destruction of computer containing child pornography); *United States v. Giuseppe Bottighlieri Shipping Co.*, 2012 WL 1899844 (S.D. Ala. 2012) (falsification of vessel's oil record book and removal of illegal pipe); *United States v. Wortman*, 488 F.3d 752 (7th Cir. 2007) (destruction of computer CD containing child pornography); *United States v. Vosburgh*, 602 F.3d 512 (3rd Cir. 2010) (destruction of computer drive and thumb drive containing child pornography).

D. **The proper construction of "tangible object" in section 1519 is an important question of federal law because the statute–with its harsh 20-year maximum penalty–is subject to arbitrary use by prosecutors in cases unrelated to the types of criminal conduct which are targeted by the statute.**

One of the constitutional objections to "vague laws" recognized by this Court is the risk of "arbitrary and discriminatory enforcement." *Grayned, v. City of Rockford,* 408 U.S. 104, 108-109 (1972). This Court has directed that:

> [L]aws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Id.; see also F.C.C. v. Fox Television Stations, 132 S. Ct. 2307, 2317 (2012) ("[P]recision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.").

> Although the [void-for-vagueness] doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine "is not actual notice, but the other principal element of the doctrine–the requirement that a legislature establish minimal guidelines to govern law enforcement." . . . Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."

Kolender v. Lawson, 461 U.S. 352, 357-358 (1983) (quoting *Smith v. Goguen*, 415 U.S. 566, 574-575 (1974)); *see also United States v. Reese*, 92 U.S. 214, 221 (1875) ("It would certainly be dangerous if the legislature could set a net large enough to catch all

possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.").

A statute whose meaning is not stated with precision fails to provide minimal guidance to prosecutors and lends itself to opportunistic and arbitrary prosecution. This is particularly true of statutes such as section 1519, which carry extremely harsh penalties. Mr. Yates, whom the government prosecuted criminally for a thoughtless "obstructive" act following a minor civil fishing infraction, was duly charged under the appropriate statute: section 2232(a) (Destruction or removal of property to prevent seizure). However, because the maximum prison term permitted under section 2232(a) is only five years, the government "shopped" for an additional, more severe charging statute. Section 1519 was opportune, since it permits a maximum penalty of 20 years in prison.[18] No matter that section 1519 was intended by Congress as an anti-shredding statute targeting the destruction of records, documents, and the like, it contains one piece of language–"tangible object"–that is so vague, ambiguous, and unspecific, it can be made to cover a truly boundless range of subject matter having little to do with Congress's intent for the statute. If the Eleventh Circuit's holding is left to stand, section 1519 will continue to allow prosecutors to "pursue their personal

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[18] Most comparable obstruction-of-justice statutes carry a lesser maximum penalty. In addition to 18 U.S.C. § 2232, *see* 18 U.S.C. § 1505 (Obstruction of proceedings before departments, agencies, and committees - five year statutory maximum); 18 U.S.C. § 1506 (Theft or alteration of record or process - five year statutory maximum) five years; 18 U.S.C. § 1511 (Obstruction of State or local law enforcement [in illegal gambling matter] - five year statutory maximum).

predilections" and "facilitat[e] opportunistic and arbitrary prosecutions." *Skilling v. United States*, 130 S. Ct. 2896, 2928 (2010).

QUESTION 2: **This Court needs to clarify whether a district court's wholesale denial of a criminal defendant's request to call a government witness, either as an expert or lay witness, in the defense's case-in-chief as a sanction for the defense's inadvertent failure to include the government's witness on the defense's witness list violates the Fifth and Sixth Amendment rights' to due process, compulsory process for obtaining witnesses in his favor, and to present a complete defense.**

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). "It is surely true that a defendant must be afforded the opportunity to present a defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1985); *cf. Specht v. Patterson*, 386 U.S. 605, 610 (1967) ("Due process ... requires that [the defendant] . . . have an opportunity to be heard ... and to offer evidence of his own."). This Court has explained as follows:

> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard.

Crane, 476 U.S. at 690 (internal quotation marks and citations omitted). And, the "most obvious component of a defendant's Fifth and Sixth Amendment right to present

evidence in his favor is to present evidence that has a direct bearing on a formal element of the charged offense." *United States v. Hurn*, 368 F.3d 1359, 1363-65 (11th Cir. 2004) (citing *Washington v. Texas*, 388 U.S. 14, 23 (1967) ("[T]he petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness ... whose testimony would have been relevant and material to the defense.")).

Here, the indictment charged Mr. Yates on the theory that he disposed of, or destroyed, "undersized" fish. The central theory of Mr. Yates's defense was that the fish that he harvested from the Gulf of Mexico were not "undersized," as alleged and charged in the indictment, because they were not measured by the FWC officers in accordance with federal law, which provided that fish be measured in a manner to produce the greatest overall length. Had the fish been measured according to federal law, he contended, they would have measured larger than was indicated by the improper measurement technique utilized by the Florida Fish and Wildlife (FWC) officer.

At trial, the defense called an expert witness, William Ward, who testified that the red grouper were *not* measured in accordance with federal law and, had the red grouper been measured pursuant to federal law, they would have measured larger. The government vehemently attacked Mr. Ward's testimony, suggesting that he had an "axe to grind" with the government due to fines he had previously received during his tenure operating a fish wholesale warehouse. In an attempt to rehabilitate Mr. Ward's testimony that red grouper measure larger with their mouths open, the defense

sought to call the government's expert, Dr. Richard Cody, who had previously testified at a *Daubert* hearing in Mr. Yates's case the morning that the jury trial commenced, and who was under defense subpoena to testify at trial (but was not called by the government at trial in its case-in-chief).

At the *Daubert* hearing, Dr. Cody testified that red grouper indeed measure larger with their mouths open, as opposed to mouths closed, which is how the FWC officer had improperly measured them. The government objected to Mr. Yates calling Dr. Cody during the defense's case-in-chief, and requested that the district court exclude the government's own witness from testifying in the defense's case-in-chief because Dr. Cody was not placed *on the defense's witness list.* The district court agreed with the government and, as a sanction for the failure to disclose Dr. Cody on the defense's witness list, precluded Dr. Cody from testifying as either an expert *or* lay witness.

Mr. Yates was convicted of: (count one) knowingly disposing of and throwing overboard and attempting to dispose of and throw overboard *"undersized* fish," for the purpose of "preventing and impairing the Government's lawful authority to take such property into its custody and control," in violation of 18 U.S.C. § 2232(a); and (count 2) knowingly destroying, concealing, and covering up "undersized fish" with the intent "to impede, obstruct, and influence the investigation and proper administration of the catching of red grouper under the legal minimum size limit," in violation of 18 U.S.C. § 1519.

The Eleventh Circuit ruled that the district court did not abuse its discretion in excluding Dr. Cody's expert testimony as a sanction for "untimely disclosure" pursuant to Federal Rule of Criminal Procedure 16(b)(1)(C), because Yates . . . "failed to show the preclusion prejudiced his rights to present a defense." The Eleventh Circuit reasoned that Mr. Ward "offered the same testimony Yates hoped to elicit from Dr. Cody." App. A at 12. Next, the Eleventh Circuit summarily concluded that "our review of the record shows Dr. Cody's testimony would have been less favorable to Yates than that of Mr. Ward." App. A at 11-12. And, third, the Eleventh Circuit ruled that "Yates's inability to offer Dr. Cody's testimony to rehabilitate Dr. Ward's credibility does not amount to prejudice of his substantial rights." *Id.*

If the Eleventh Circuit decision stands, a district court's decision to undercut a defendant's constitutional rights to due process and to the compulsory process to present witnesses in its favor will be undisturbed simply if a reviewing court of appeals, in its judgment, notes that it does not believe that the testimony of a government witness as either an expert or fact witness would be helpful to the defense, even though the sole witness to testify as to a fact was discredited by the government. That is not what the Constitution requires. This Court has made it pellucidly clear that criminal defense attorneys are given great latitude to make tactical decisions. *Harrington v. Richter*, 131 S. Ct. 770, 788-89 (2011) (quoting *Strickland v. Washington*, 466 U.S. 668 689 (1984) ("There are, however, 'countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.' Rare are the situations

in which the "wide latitude counsel must have in making tactical decisions" will be limited to any one technique or approach.").

Part and parcel with that maxim, is that the defense may have tactical reasons why it chooses to call a witness. *Richter*, 131 S. Ct. at 788-89 ("Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both."). This Court's precedent is devoid of any cases permitting a trial court to exclude the witness from testifying as a sanction for an inadvertent, technical violation of a discovery order. Here, the exclusion of Dr. Cody's testimony as an expert *or* fact witness left Mr. Yates with only Mr. Ward's discredited expert testimony that red grouper measure longer with their mouths open than with their mouths closed. It cannot be disputed that there would have been no surprise for the government to have *its own witness to testify*. Knowing that the district court precluded the defense from calling Dr. Cody to testify during the defense's case-in-chief, the government aggressively attacked the credibility of Mr. Ward, suggesting to the jury that because Mr. Ward had an "axe to grind" with the government, his testimony should not be credited. Mr. Yates was left with no other means to attack the government's contentions. The exclusion of Dr. Cody's testimony was a prejudicial abuse of discretion that requires a new trial.

To determine, as the Eleventh Circuit opined, that testimony from a government witness would not have been helpful flies in the face of the facts of this case and in the

face of established Fifth and Sixth Amendment law from this Court. This Court's review of this case is crucially important, as there now exists a published Court of Appeals decision holding that an unintentional, technical noncompliance with a discovery order, for whatever reason, gives a trial court the discretion to order wholesale preclusion of the defense calling a witness in its case-in-chief, so long as a Court of Appeals speculates, in its *post hac* review of the record, it would not have been helpful to the defense.

CONCLUSION

As to Question One, because: (1) the vagueness of the term "tangible object" in section 1519 deprives individuals of fair notice as to the conduct prohibited under the statute; (2) the statute's vagueness and ambiguity permit arbitrary prosecutions; and, (3) the scope of the statute remains unsettled more than a decade after its enactment, further review is warranted by this Court.

As to Question Two, because the Court of Appeals, for a technical violation of a discovery order, infringed on Petitioner's rights to due process, compulsory process for obtaining witnesses in his favor, and to present a complete defense, further review of the opinion below is warranted. Petitioner Yates therefore respectfully requests that this Court grant his petition for a writ of certiorari.

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APPENDICES

APPENDIX A: Decision of the U.S. Court of Appeals for the Eleventh Circuit

APPENDIX B: Decision of the District Court

APPENDIX C: 50 C.F.R. § 622.2 (Oct. 1, 2006)

APPENDIX D: 50 C.F.R. Part 622, App'x C (Oct. 1, 2006)

APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 11-16093

D. C. Docket No. 2:10-cr-00066-JES-SPC-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN L. YATES,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(August 16, 2013)

Before DUBINA, JORDAN and BALDOCK,* Circuit Judges.

DUBINA, Circuit Judge:

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* Honorable Bobby R. Baldock, United States Circuit Judge for the Tenth Circuit, sitting by designation.

Appellant John L. Yates ("Yates") appeals his convictions for violating 18 U.S.C. §§ 1519 and 2232(a), which arose out of his harvesting undersized red grouper[1] in federal waters in the Gulf of Mexico. After reviewing the record, reading the parties' briefs, and having the benefit of oral argument, we affirm Yates's convictions.

I.

On August 17, 2007, Yates and his crew prepared the *Miss Katie*, a fishing vessel, for a fishing trip into federal waters in the Gulf of Mexico. On August 23, 2007, John Jones ("Officer Jones"), a field officer with the Florida Fish and Wildlife Conservation Commission, who was deputized by the National Marine Fisheries Service ("Fisheries Service") to enforce federal fisheries laws, was on an offshore patrol with fellow officers when he encountered the *Miss Katie*. Officer Jones noticed the *Miss Katie* was actively engaged in a commercial harvest using longline fishing gear, so he approached and boarded the *Miss Katie* to inspect for gear, fishery, and boating-safety compliance.

While on board, Officer Jones noticed three red grouper that appeared to be less than 20 inches in length, the minimum size limit for red grouper at that time.[2]

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[1] This opinion uses the terms "red grouper," "grouper," and "fish" interchangeably.

[2] In 2007, federal regulations required that harvested red grouper be a minimum of 20 inches in length. 50 C.F.R. § 622.37(d)(2)(ii) (2007). Total overall length was to be determined

As a result, Officer Jones decided to measure Yates's fish to determine whether they were of legal size. Officer Jones separated grouper that appeared to be less than 20 inches so he could measure them. He measured the fish with their mouths closed and their tails pinched. Officer Jones gave Yates the benefit of the doubt on the fish that measured close to 20 inches but separated the fish that were clearly under the legal limit and placed those fish in wooden crates. In total, Officer Jones determined that 72 grouper clearly measured less than 20 inches. Officer Jones then placed the wooden crates in the *Miss Katie*'s fish box and issued Yates a citation for the undersized fish. Officer Jones instructed Yates not to disturb the undersized fish and informed Yates that the Fisheries Service would seize the fish upon the *Miss Katie*'s return to port.

Contrary to Officer Jones's directions, Yates instructed his crew to throw the undersized fish overboard. Thomas Lemons ("Lemons"), one of the crewmembers, testified that he complied with Yates's directive. At Yates's prompting, the crew then took other red grouper and placed them in the wooden crates that had held the undersized fish. After the switch was completed, Yates

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by measuring the fish with its mouth open or closed and its tail squeezed or not squeezed, to give the overall greatest length. *See id.* § 622.2 ("Total length . . . means the straight-line distance from the tip of the snout to the tip of the tail (caudal fin), excluding any caudal filament, while the fish is lying on its side. The mouth of the fish may be closed and/or the tail may be squeezed together to give the greatest overall measurement.").

instructed Lemons to tell any law enforcement officers who asked that the fish in the wooden crates were the same fish that Officer Jones had determined were undersized.

After the *Miss Katie* returned to port, Fisheries Service special agent James Kejonen ("Agent Kejonen") traveled to Cortez, Florida to meet Yates and investigate the report of undersized grouper. On August 27, 2007, Officer Jones was called in to re-measure the fish, which he did in the same manner as before—mouths closed and tails pinched. Sixty-nine fish measured less than 20 inches. Officer Jones noticed that, although some of Yates's undersized red grouper had previously measured as short as 18 to 19 inches, none of the grouper unloaded at the dock were that short. In fact, at sea, most of Yates's grouper had measured between 19 and 19 1/2 inches, but at the dock, the majority of the grouper measured close to 20 inches. Due to Officer Jones's suspicion that the undersized fish measured on August 27 were not the same fish he had measured on August 23, federal agents interviewed Lemons, who eventually divulged the crew's nefarious conduct.

At trial, Yates disputed whether the red grouper thrown overboard were actually undersized because Officer Jones had only measured the fish with their mouths closed, not open. In other words, Yates argued it was possible that, had the

fish been measured with their mouths open, they would have measured legal size. The day before trial, the district court held a *Daubert*[3] hearing to evaluate the qualifications of the two grouper-measuring experts proffered by the parties. The government offered Dr. Richard Cody ("Dr. Cody"), a research administrator with the Fish and Wildlife Research Institute, as a potential expert witness. Dr. Cody was prepared to testify that, on average, a grouper measured three to four millimeters longer when its mouth was open versus when its mouth was closed. Yates did not object to that contention, but he did object to other portions of Dr. Cody's testimony. The district court took Dr. Cody's testimony under advisement but did not decide whether he could testify as an expert on measuring grouper. The district court also ruled that Yates's expert, William Ward ("Mr. Ward"), research director for the Gulf Fishermen's Association, could offer testimony about a grouper's measurement with an open mouth as opposed to a closed mouth and about fish shrinkage when placed on ice.

Ultimately, the government did not call Dr. Cody as a witness in its case-in-chief. After the government rested, Yates's counsel announced for the first time that he planned to call Dr. Cody as his first witness to testify about the length of grouper with an open mouth versus a closed mouth. The government objected.

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[3] *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 113 S.Ct. 2786 (1993).

The district court sustained the government's objection, ruling that Yates was precluded from calling Dr. Cody in his case-in-chief because Yates had failed to properly notify the government of his intention to call Dr. Cody as an expert witness, as required by Federal Rule of Criminal Procedure 16. After the district court had made its ruling, Yates called as his first witness Mr. Ward, who testified that fish can shrink on ice and that grouper measure longer with their mouths open than with their mouths closed. On cross-examination, the government questioned Mr. Ward about his own state and federal fishing violations.

At the conclusion of the government's case-in-chief, and at the close of all the evidence, Yates moved for judgment of acquittal on all counts. The district court denied both motions. After a four-day trial, the jury found Yates guilty of (1) knowingly disposing of undersized fish in order to prevent the government from taking lawful custody and control of them, in violation of 18 U.S.C. § 2232(a) (Count I); and (2) destroying or concealing a "tangible object with the intent to impede, obstruct, or influence" the government's investigation into harvesting undersized grouper, in violation of 18 U.S.C. § 1519 (Count II). The district court sentenced Yates to 30 days' imprisonment, followed by 36 months' supervised release. Yates timely appealed his convictions.

II.

Yates presents three issues on appeal. First, Yates argues the district court erred in denying his motion for judgment of acquittal on Counts I and II, because the government failed to present sufficient evidence to prove the fish thrown overboard were undersized. Second, Yates argues the district court erred as a matter of law in denying his motion for judgment of acquittal on Count II, because the term "tangible object" as used in 18 U.S.C. § 1519 does not apply to fish. Alternatively, Yates argues the statute is ambiguous and the rule of lenity should apply. Finally, Yates argues the district court abused its discretion by precluding him from calling Dr. Cody during his case-in-chief.

III.

"We review *de novo* a district court's denial of a motion for judgment of acquittal on sufficiency of evidence grounds." *United States v. Pena*, 684 F.3d 1137, 1152 (11th Cir. 2012). "In reviewing the sufficiency of the evidence, we look at the record in the light most favorable to the verdict and draw all reasonable inferences and resolve all questions of credibility in its favor." *United States v. White*, 663 F.3d 1207, 1213 (11th Cir. 2011) (internal quotation marks omitted). We review questions of statutory interpretation *de novo*. *United States v. Aldrich*, 566 F.3d 976, 978 n.2 (11th Cir. 2009). Finally, we review the district court's

discovery rulings for abuse of discretion. *Reese v. Herbert*, 527 F.3d 1253, 1262 n.13 (11th Cir. 2008).

IV.

A. Sufficient evidence was presented at trial for the jury to conclude the fish thrown overboard were undersized.[4]

Yates contends that Officer Jones's failure to measure the fish with their mouths open—as opposed to only measuring them with their mouths closed—creates speculation as to whether the fish would have measured undersized with their mouths open. As such, he argues there was not sufficient evidence for the jury to conclude the fish thrown overboard were undersized. We disagree.

First, the testimonial evidence given by Officer Jones, Agent Kejonen, and Mr. Ward conflicts as to whether measuring a fish with its mouth open, as opposed to closed, makes a difference in the fish's overall length. The jury was free to weigh the conflicting evidence and decide whether opening or closing a fish's

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[4] While the size of the fish thrown overboard is not an essential element under either 18 U.S.C. § 1519 or § 2232(a), the prosecution failed to object to the district court's charge to the jury regarding the process for determining whether a fish is undersized. Accordingly, establishing that the fish were "undersized" became necessary for conviction pursuant to the "law of the case" doctrine. *See United States v. Spletzer*, 535 F.2d 950, 954 (5th Cir. 1976).[5] Thus, in addressing Yates's argument that the district court should have granted his motion for judgment of acquittal as to Counts I and II, the inquiry is whether sufficient evidence was presented at trial to support the jury's finding that the fish thrown overboard were undersized.

[5] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

mouth made a large difference, a small difference, or no difference at all in the fish's measurement. *See United States v. Prince*, 883 F.2d 953, 959 n.3 (11th Cir. 1989) ("Weighing the credibility of witnesses . . . is within the province of the jury, and the jury is free to believe or disbelieve any part or all of the testimony of a witness."). Further, Officer Jones testified that while he was on board the *Miss Katie*, Yates scolded his crew for keeping undersized fish and stated, "Look at this fish, it's only 19 inches. How could you miss this one?" [R. 141 at 93.] Similarly, Agent Kejonen testified that, on the dock, Yates admitted to having at least "a few" undersized fish on his boat when Officer Jones measured them days earlier. [*Id.* at 184.] Moreover, that Yates directed his crew to throw the fish overboard creates an inference that he—as an experienced commercial fisherman—believed the fish to be undersized. In sum, a "rational trier of fact could have found . . . beyond a reasonable doubt" that the fish thrown into the Gulf were shorter than the legal limit. *See United States v. Mintmire*, 507 F.3d 1273, 1289 (11th Cir. 2007). Accordingly, we conclude from the record that sufficient evidence was presented at trial for the jury to convict Yates of Counts I and II.

B. A fish is a "tangible object" within the meaning of 18 U.S.C. § 1519.

Yates contends the district court erred in denying his motion for judgment of acquittal as to Count II because the term "tangible object" as used in 18 U.S.C.

§ 1519 "only applies to records, documents, or tangible items that relate to recordkeeping" and "does not apply to . . . fish." [Appellant's Br. at 36.]

"In statutory construction, the plain meaning of the statute controls unless the language is ambiguous or leads to absurd results." *United States v. Carrell*, 252 F.3d 1193, 1198 (11th Cir. 2001) (internal quotation marks omitted). "When the text of a statute is plain, . . . we need not concern ourselves with contrary intent or purpose revealed by the legislative history." *United States v. Hunt*, 526 F.3d 739, 744 (11th Cir. 2008). Further, undefined words in a statute—such as "tangible object" in this instance—are given their ordinary or natural meaning. *Smith v. United States*, 508 U.S. 223, 228, 113 S. Ct. 2050, 2054 (1993). In keeping with those principles, we conclude "tangible object," as § 1519 uses that term, unambiguously applies to fish. *See* BLACK'S LAW DICTIONARY 1592 (9th ed. 2009) (defining "tangible" as "[h]aving or possessing physical form"); *see also United States v. Sullivan*, 578 F.2d 121, 124 (5th Cir. 1978) (noting that cocaine is a "tangible object" subject to examination and inspection under Rule 16(a) of the Rules of Criminal Procedure). Because the statute is unambiguous, we also conclude the rule of lenity does not apply here.

C. Yates's right to present a defense was not prejudiced by the district court's ruling that disallowed Yates from calling Dr. Cody during his case-in-chief.

Because Yates waited until the close of the government's case-in-chief to disclose Dr. Cody as an expert witness, the disclosure was untimely under Federal Rule of Criminal Procedure 16(b)(1)(C). As a sanction for this untimely disclosure, the district court did not allow Dr. Cody to testify during Yates's case-in-chief. Yates does not dispute that he did not give proper notice to the government pursuant to Rule 16(b)(1)(C). Instead, Yates argues that the district court should have used a lesser sanction to address his late disclosure, and that the district court's outright preclusion of Dr. Cody's testimony at trial infringed on Yates's constitutional right to present a defense. According to Yates, Dr. Cody would have reinforced his expert Mr. Ward's testimony that red grouper measure longer with their mouths open than with their mouths closed. Yates also contends Dr. Cody's corroboration of Mr. Ward's testimony would have countered the government's attempt to discredit Mr. Ward.

"Relief for violations of discovery rules lies within the discretion of the trial court[.]" *United States v. Petrie*, 302 F.3d 1280, 1289 (11th Cir. 2002). To warrant reversal of the court's discretion on appeal, "a defendant must show prejudice to his substantial rights." *Id.* While the right of the accused to present a defense is a substantial right, that right is not boundless. *See Taylor v. Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646, 653 (1988).

It is unnecessary for us to determine whether the district court properly exercised its discretion in precluding Dr. Cody from testifying at trial, because we conclude Yates has failed to show the preclusion prejudiced his right to present a defense. As Yates conceded in his brief, his expert Mr. Ward offered the same testimony Yates hoped to elicit from Dr. Cody. Indeed, our review of the record shows Dr. Cody's testimony would have been less favorable to Yates than that of Mr. Ward. Moreover, under the circumstances presented here, Yates's inability to offer Dr. Cody's testimony to rehabilitate Dr. Ward's credibility does not amount to prejudice of his substantial rights.

V.

For the above stated reasons, we affirm Yates's convictions.

AFFIRMED.

APPENDIX B

Not Reported in F.Supp.2d, 2011 WL 3444093 (M.D.Fla.)

(Cite as: 2011 WL 3444093 (M.D.Fla.))

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Only the Westlaw citation is currently available.

United States District Court, M.D. Florida,

Fort Myers Division.

UNITED STATES of America

v.

John L. **YATES**.

No. 2:10–cr–66–FtM–29SPC.

Aug. 8, 2011.

Jeffrey Michelland, U.S. Attorney's Office, Ft. Myers, FL, for United States of America.

OPINION AND ORDER

JOHN E. **STEELE**, District Judge.

***1** This matter comes before the Court on defendant's motion for judgment of acquittal at the end of the government's case-in-chief on day three of the jury trial. (Doc. # 99.) The Court took the motion under advisement pursuant to Fed.R.Crim.P. 29(b) as to Count Two of the Indictment. (*Id.*) For the reasons set forth below, the motion is denied.

Count Two of the Indictment (Doc. # 3) charges that on or about August 24, 2007, defendant "did knowingly destroy, conceal, and cover up undersized fish with the intent to impede, obstruct, and influence the investigation and proper administration of the catching of red grouper under the legal minimum size limit, a matter within the jurisdiction of the National Marine Fisheries Service, an agency of the United States," in violation of 18 U.S.C. §§ 1519 and 2. Defendant's motion of judgment of acquittal asserted that this statute is a records-keeping statute aimed solely at destruction of records and documents, and could not be applied to a situation, as here, where it was fish which were destroyed.

Title 18 U.S.C. § 1519 provides in relevant part that "[w]hoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or **tangible** object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States ..., shall be" in violation of the statute. As pertinent to this case, § 1519 penalizes one who "knowingly ... destroys, conceals, [or] covers up, ... any record, document, or **tangible** object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States." 18 U.S.C. § 1519. The Eleventh Circuit has stated that while § 1519 was passed as part of the Sarbanes–Oxley Act, which was targeted at corporate fraud and executive malfeasance, the broad language of § 1519 is not limited to corporate fraud cases, and "Congress is free to pass laws with language covering areas well beyond the particular crisis *du jour* that

initially prompted legislative action." *United States v. Hunt*, 526 F.3d 739, 744 (11th Cir.2008). Courts have construed the "**tangible** object" provision to be an independent term which is not simply redundant of "record" or "document." *United States v. Atl. States Cast Iron Pipe Co.*, 612 F.Supp.2d 453, 539–40 (D.N.J.2009); *United States v. Russell*, 639 F.Supp.2d 226, 238 (D.Conn.2007) (citing cases), overruled on other grounds by, *United States v. Gray*, 642 F.3d 371, 378 n. 5 (2d Cir.2011). Given the nature of the matters within the jurisdiction of the government agency involved in this case, and the broad language of § 1519, the Court finds that a reasonable jury could determine that a person who throws or causes to be thrown fish overboard in the circumstances of this case is in violation of § 1519.

***2** Accordingly, it is now

ORDERED:

Defendant's motion for judgment of acquittal under Fed.R.Crim.P. 29 made at the conclusion of the government's case in chief as to Count Two is **DENIED.**

DONE AND ORDERED.

M.D.Fla.,2011.

U.S. v. Yates
Not Reported in F.Supp.2d, 2011 WL 3444093 (M.D.Fla.)
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APPENDIX C

PART 622—FISHERIES OF THE CARIBBEAN, GULF, AND SOUTH ATLANTIC

Subpart A—General Provisions

Subpart B—Effort Limitations

Subpart C—Management Measures

AUTHORITY: 16 U.S.C. 1801 *et seq.*

SOURCE: 61 FR 34934, July 3, 1996, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 622 appear at 70 FR 73389, Dec. 12, 2005.

Subpart A—General Provisions

§ 622.1 Purpose and scope.

(a) The purpose of this part is to implement the FMPs prepared under the Magnuson Act by the CFMC, GMFMC, and/or SAFMC listed in Table 1 of this section.

(b) This part governs conservation and management of species included in the FMPs in or from the Caribbean, Gulf, Mid-Atlantic, South Atlantic, or Atlantic EEZ, as indicated in Table 1 of this section. For the FMPs noted in the following table, conservation and management extends to adjoining state waters for the purposes of data collection and monitoring.

TABLE 1—FMPS IMPLEMENTED UNDER PART 622

FMP title	Responsible fishery management council(s)	Geographical area
Atlantic Coast Red Drum FMP	SAFMC	Mid-Atlantic and South Atlantic.
FMP for Coastal Migratory Pelagic Resources	GMFMC/SAFMC	Gulf,[1] Mid-Atlantic[1,2] and South Atlantic.[1,3]
FMP for Coral and Coral Reefs of the Gulf of Mexico	GMFMC	Gulf.
FMP for Coral, Coral Reefs, and Live/Hard Bottom Habitats of the South Atlantic Region.	SAFMC	South Atlantic.
FMP for Corals and Reef Associated Plants and Invertebrates of Puerto Rico and the U.S. Virgin Islands.	CFMC	Caribbean.
FMP for the Dolphin and Wahoo Fishery off the Atlantic States	SAFMC	Atlantic.
FMP for the Golden Crab Fishery of the South Atlantic Region	SAFMC	South Atlantic
FMP for Queen Conch Resources of Puerto Rico and the U.S. Virgin Islands.	CFMC	Caribbean.
FMP for Pelagic Sargassum Habitat of the South Atlantic Region	SAFMC	South Atlantic
FMP for the Red Drum Fishery of the Gulf of Mexico	GMFMC	Gulf.[1]
FMP for the Reef Fish Fishery of Puerto Rico and the U.S. Virgin Islands.	CFMC	Caribbean.

(3) White shrimp, *Litopenaeus setiferus.*

Penaeid shrimp trawler means any vessel that is equipped with one or more trawl nets whose on-board or landed catch of penaeid shrimp is more than 1 percent, by weight, of all fish comprising its on-board or landed catch.

Powerhead means any device with an explosive charge, usually attached to a speargun, spear, pole, or stick, that fires a projectile upon contact.

Processor means a person who processes fish or fish products, or parts thereof, for commercial use or consumption.

Purchase means the act or activity of buying, trading, or bartering, or attempting to buy, trade, or barter.

Red drum, also called redfish, means *Sciaenops ocellatus,* or a part thereof.

Red snapper means *Lutjanus campechanus,* or a part thereof, one of the Gulf reef fish species.

Regional Administrator (RA), for the purposes of this part, means the Administrator, Southeast Region, NMFS, 9721 Executive Center Drive N., St. Petersburg, FL 33702, or a designee.

Rod and reel means a rod and reel unit that is not attached to a vessel, or, if attached, is readily removable, from which a line and attached hook(s) are deployed. The line is payed out from and retrieved on the reel manually, electrically, or hydraulically.

Run-around gillnet means a gillnet, other than a long gillnet, that, when used, encloses an area of water.

SAFMC means the South Atlantic Fishery Management Council.

Sale or *sell* means the act or activity of transferring property for money or credit, trading, or bartering, or attempting to so transfer, trade, or barter.

Science and Research Director (SRD), for the purposes of this part, means the Science and Research Director, Southeast Fisheries Science Center, NMFS (see Table 1 of §600.502 of this chapter).

Sea bass pot means a trap has six rectangular sides and does not exceed 25 inches (63.5 cm) in height, width, or depth.

Shrimp means one or more of the following species, or a part thereof:

(1) Brown shrimp, *Farfantepenaeus aztecus.*

(2) White shrimp, *Litopenaeus setiferus.*

(3) Pink shrimp, *Farfantepenaeus duorarum.*

(4) Royal red shrimp, *Hymenopenaeus robustus.*

(5) Rock shrimp, *Sicyonia brevirostris.*

(6) Seabob shrimp, *Xiphopenaeus kroyeri.*

Shrimp trawler means any vessel that is equipped with one or more trawl nets whose on-board or landed catch of shrimp is more than 1 percent, by weight, of all fish comprising its on-board or landed catch.

SMZ means special management zone.

South Atlantic means the Atlantic Ocean off the Atlantic coastal states from the boundary between the MAFMC and the SAFMC, as specified in §600.105(b) of this chapter, to the line of demarcation between the Atlantic Ocean and the Gulf of Mexico, as specified in §600.105(c) of this chapter.

South Atlantic snapper-grouper means one or more of the species, or a part thereof, listed in Table 4 in Appendix A of this part.

Stab net means a gillnet, other than a long gillnet, or trammel net whose weight line sinks to the bottom and submerges the float line.

Total length (TL), for the purposes of this part, means the straight-line distance from the tip of the snout to the tip of the tail (caudal fin), excluding any caudal filament, while the fish is lying on its side. The mouth of the fish may be closed and/or the tail may be squeezed together to give the greatest overall measurement. (See Figure 2 in Appendix C of this part.)

Toxic chemical means any substance, other than an allowable chemical, that, when introduced into the water, can stun, immobilize, or take marine life.

Trammel net means two or more panels of netting, suspended vertically in the water by a common float line and a common weight line, with one panel having a larger mesh size than the other(s), to entrap fish in a pocket of netting.

Trip means a fishing trip, regardless of number of days duration, that begins with departure from a dock, berth,

APPENDIX D

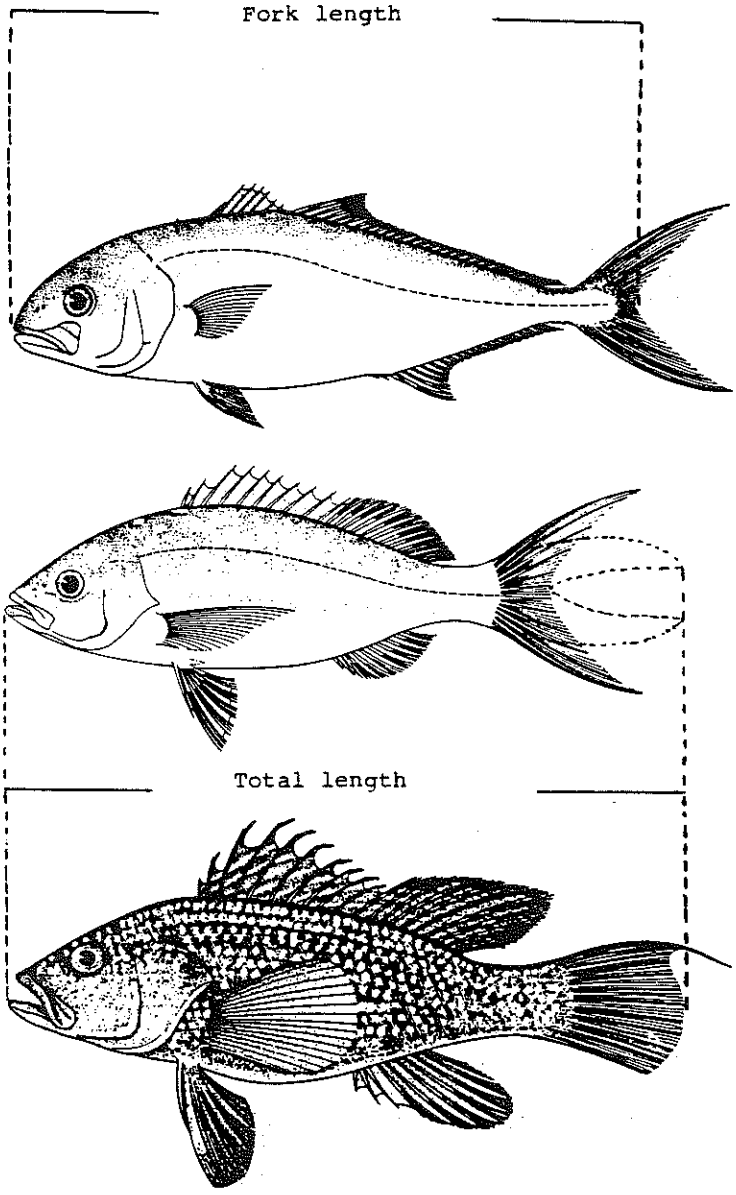

FIGURE 2 OF APPENDIX C TO PART 622—ILLUSTRATION OF LENGTH MEASUREMENTS

[61 FR 34934, July 3, 1996, as amended at 64 FR 3630, Jan. 25, 1999]

APPENDIX D TO PART 622—SPECIFICATIONS FOR CERTIFIED BRDS

A. *Extended Funnel.*