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Brief for Bernard Barker, Appellant: Third Annual Pace National Environmental Moot Court Competition

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No. 90-87

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CHARLES CANNER
and
BERNARD BARKER,
Appellants,
v.
UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court
for the District of New Union

BRIEF FOR BERNARD BARKER, Appellant*

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* The winning briefs published in this issue are reprinted in their original form. No revisions have been made by the editorial staff of the *Pace Environmental Law Review*.

QUESTIONS PRESENTED

I. Did the district court err in finding a violation of RCRA § 3008(d)(3) because Omni's telephone call was not a report used for purposes of compliance with regulations promulgated by the EPA, the facts omitted were not material, appellant Barker lacked the necessary mens rea, and the district court's interpretation of the statutory provision was inconsistent with the statute's plain language and congressional intent?

II. Did the district court err in convicting Barker as a corporate officer where RCRA does not impose the responsible corporate officer doctrine, where Barker did not bear a responsible share of the conduct alleged to have violated RCRA and where compelling policy arguments require limiting the government's discretion to prosecute in this case?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

MISCELLANEOUS

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OPINIONS BELOW

The opinion of the Untied States District Court for the District of New Union is unreported.

STATEMENT OF THE CASE

After a jury trial before the United States District Court for the District of New Union, appellant Bernard Barker and Charles Canner were convicted of violating § 3008(d)(3) of the Resource Conservation and Recovery Act (RCRA). 42 U.S.C. 6928(d)(3) (1983 & Supp. 1990). Their subsequent motions for judgment of acquittal were denied. R.7. Section 3008(d)(3) imposes criminal penalties upon any person who "knowingly omits material information or makes any false material statement or representation in any application, label, manifest, record, report or other document" that must be used to comply with regulations promulgated by the Environmental Protection Agency (EPA) under the Hazardous Waste Manage-

ment Program. Appellants face a fine, imprisonment or both. *Id.*

Barker and Canner were convicted on the basis of a telephone conversation between one of Canner's employees, Mr. Arnold Adams, and an EPA inspector. Mr. Barker is the general manager of Omni Manufacturing's New Union City manufacturing plant. He is sixty-four years old, a veteran, and two years from retirement. He is responsible for running all aspects of Omni's plant. He supervises 400 plant employees and reports directly to Omni president and founder, Mr. Canner. The responsibilities of the Omni plant manager include environmental compliance. R.3. Omni manufactures hypercomputers, and employs 1200 people in the New Union City area. DWE, a hazardous waste as defined under RCRA, is a by-product of Omni's manufacturing activities.

On June 29 and 30, 1989, the EPA regional office in New Union City received several citizen complaints about strong chemical odors emitting from a location outside the Omni plant. R.3. EPA inspector Diane Durden visited the site and found a discolored patch of ground with a strong chemical odor adjacent to the road and near the main gate of the Omni plant. R.2. Inspector Durden took a soil sample and had it tested at the EPA laboratory. The test revealed that the soil was contaminated with DWE. R.3.

Following the determination that the chemical odor and contaminated ground was the result of a release of DWE, Inspector Durden began an investigation into the source of the chemical. On August 2, 1989, Durden wrote a letter to Omni explaining that DWE had been detected outside the gate of the Omni plant and inquiring whether Omni "kn[e]w its source." R.3.

Upon receiving Durden's written inquiry Mr. Barker conferred with Mr. Adams, the Omni Manufacturing facilities manager for the New Union City Plant. R.4. Adams was responsible for all maintenance and waste disposal at Omni. R.2. Adams told Barker that although Omni had serviced one of its trucks for a leak on June 28, 1990, no driver had reported any actual leakage. In addition, Adams told Barker that Omni had shipped DWE to a nearby recycler in late

June. He also said he was unable to determine whether the DWE had been transported in the leaking truck. R.4.

Inspector Durden's written inquiry arrived more than a month after the leaking truck had been serviced and did not include the date the spill occurred. Because other manufacturers transport DWE past the Omni plant, Adams and Barker were unable to determine with any certainty whether Omni was the source of the DWE. R.4. Adams and Barker next discussed what action should be taken in response to Inspector Durden's written inquiry and they concluded that Adams should telephone the EPA. Barker advised Adams to be truthful and to follow the letter of the law. R.4.

On August 9, 1990, Adams spoke with Inspector Durden on the telephone regarding Durden's letter of August 2, 1990. Adams told Durden that Omni did not know the source of the DWE spill and that EPA was welcome to visit the Omni facility. R.4. Following her conversation with Adams, she typed a memorandum of the conversation and placed it in her file. She did not pursue the investigation further.

Inspector Durden later learned that the DWE detected outside the Omni facility had leaked from an Omni truck. On August 16, 1990, New Union City police officer Egger told her that he had seen an Omni truck leaking yellow liquid as it sat stopped at the roadside near the Omni gate on June 26, 1990. R.4.

Based upon the new information given to EPA by officer Egger, Durden called Adams at Omni Manufacturing on August 17, 1990. R.4. Adams told Durden that a truck had been serviced for a leak on or about the date Egger saw the spill. He once again invited Durden to visit Omni Manufacturing for the purpose of investigating the spill. Once the date of the spill was established, Durden and Adams determined that the DWE had originated at the Omni facility. The records showed that Omni had transported DWE on June 26, 1990, and that it was transported in the leaking truck. R.5. Interviews with the service crew confirmed this and the crew reported noticing a yellow residue on the truck's underbody. R.5. With their assistance, Inspector Durden took samples of the residue. It was tested and found to contain traces of DWE. R.5.

At trial, appellants argued that the prosecution had not proven that Omni had made any "false" statements and that section 3008(d)(3) did not apply to Omni's telephone call. Section 3008(d)(3) only applies to written documents used to comply with regulations promulgated under Subchapter III of RCRA. Appellants alternatively argued that if section 3008(d)(3) controls, neither Canner nor Barker possessed the mens rea to sustain a conviction. The district court rejected these arguments and the jury returned a verdict of guilty. R.7. Appellants then motioned for a judgment of acquittal, pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure. On September 14, 1990, their motions were denied and this appeal followed. R.7.

Appellant's appeal raises two issues: first, whether the government proved a violation of section 3008; and second, whether, under the responsible corporate officer doctrine, Mr. Barker should have been held responsible for the actions of Mr. Adams.

SUMMARY OF ARGUMENT

Bernard Barker should not have been found criminally liable for the telephone call made by Arnold Adams because Mr. Adams' conduct did not violate § 3008(d)(3). The government cannot establish three critical elements which must be present in order for Omni's conduct to constitute a violation: one, that Omni filed a "report;" two, that the information in the report was "material;" and three, that the violation was made "knowingly."

The district court erred in finding that Mr. Adam's telephone call was a "report." Congress intended the term "report" to apply only to written documents. Such a report must be used for the purpose of compliance with EPA regulations. EPA regulations refer to three types of report, all written. The telephone call is not such a report.

The district court also erred in finding that the information omitted from the telephone call was "material." A statement is material if it is capable of influencing or affecting a governmental function. Withholding the fact that an Omni

truck had been repaired for a leak an entire month prior to the government's request for information was not intended to, nor should it have, dissuaded the government from pursuing its investigation.

Regarding the third element, the requisite mens rea, the district court erred in finding that the government satisfied this element. Under well settled principles of criminal law, as well as under the Model Penal Code, the district court was required to find that Mr. Barker had "knowledge" that the telephone call was a "report" and that the information omitted was "material." Because Barker did not have the requisite knowledge, because the telephone call was not a report, and because the information omitted from the call was not material, the district court erred in finding that the government had proven a violation of § 3008(d)(3).

This conclusion is supported by the fact that Congress intended the EPA, not corporations like Omni, to perform investigations of any suspected violations of RCRA. In addition, the criminal conviction of Barker does not fulfill the statutory purposes underlying § 3008(d)(3). Therefore, the district court erred in convicting Barker.

In addition, Barker should not have been convicted under the theory that he was responsible for the conduct alleged to have violated § 3008 based upon his position in the corporation. Congress did not intend for the responsible officer doctrine to apply to the criminal liability provisions of RCRA. This is clear from its omission of any language invoking the doctrine. Further, even if the doctrine did apply, the district court applied the incorrect standard. Barker must bear a responsible share of the conduct alleged to have violated the statute. Barker did not bear a responsible share. The district court erroneously convicted him solely because of his position within the corporation.

The criminal sanctions imposed on Mr. Barker far outweigh any potential harm from the alleged violation. The government should limit it prosecutions to those cases where the corporate officer's conduct results in serious harm to the environment. None of the policies underlying RCRA support the conviction of Mr. Barker. There are several significant equita-

ble arguments for overturning his conviction. For these reasons, the judgment of the district court of New Union, denying Mr. Barker's motion for acquittal, should be reversed.

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING A VIOLATION OF RCRA § 3008(d)(3) BECAUSE OMNI'S COMMUNICATION WITH THE EPA WAS NOT A REPORT, THE FACTS OMITTED WERE NOT MATERIAL, APPELLANT BARKER LACKED THE NECESSARY MENS REA, AND THE DISTRICT COURT'S INTERPRETATION OF § 3008(d)(3) IS INCONSISTENT WITH THE STATUTE'S PLAIN LANGUAGE AND CONGRESSIONAL INTENT.

The Resource Conservation and Recovery Act (RCRA) was enacted in 1976, in part to provide a regulatory framework for the disposal of hazardous waste. 42 U.S.C. § 6901 et seq. (1983 & Supp. 1990). The framework chosen by Congress was a manifest system designed to track hazardous waste from its "cradle," point of generation, to its "grave," place of disposal. In order to ensure compliance with RCRA's Hazardous Waste Management Program, Congress included criminal provisions for, among other things, the knowing omission of material information from a report filed for purposes of compliance with regulations promulgated under the program. 42 U.S.C. § 6928(d)(3).

While the overall purpose of RCRA is to protect the environment and public welfare, the purpose of the criminal sanctions is to ensure the integrity of the manifest system, to encourage hazardous waste handlers to cooperate with the EPA when the agency undertakes an investigation, and to deter them from ignoring the statute's requirements in order to gain an economic advantage in the marketplace. See Habicht, *The Federal Perspective on Environmental Criminal Enforcement: How to Remain on the Civil Side*, 17 ELR 10478, 10482 (1987) [hereinafter Habicht, *The Federal Perspective*]. Under the scheme envisioned by Congress, the EPA is responsible for enforcing the program. 42 U.S.C. §§ 6912(c), 6916(e), 6927,

6928. The EPA must prove three elements to establish a violation of 3008(d)(3): (1) it must show that the communication in question is a report used for purposes of compliance with regulations promulgated under the Hazardous Waste Management Program, (2) it must show that omitted information was material, and (3) it must show that the omission was made knowingly.

The district court's decision was premised upon a misinterpretation of the statute. Because appellant challenges the district court's interpretation of RCRA, not its findings of fact, review is plenary. The conclusions of law drawn by the court below "are not shielded by any presumption of correctness." *Universal Minerals, Inc. v. C. A. Hughes & Company*, 669 F.2d 98, 102 (3d Cir. 1981). When the statute is examined closely, it is evident that the district court erred in finding that a violation of RCRA was proven, and its decision, denying appellant Barker's motion for judgment of acquittal, should be reversed.

A. *Omni's Telephone Call to the EPA was not a Report Filed for Purposes of Compliance with Regulations Promulgated by the EPA Under Subchapter III of RCRA.*

The telephone call to the EPA, made on Omni's behalf by Mr. Adams, was not a report for purposes of compliance with regulations promulgated under RCRA's Hazardous Waste Management Program (Subchapter III). The language of 3008(d)(3) clearly indicates Congress's intent to limit its application to written documents. The statute provides criminal sanctions for the omission of a material fact from an "application, label, manifest, record, report, permit, or other document." 42 U.S.C. § 6928(d)(3). Under the canon of statutory construction known as noscitur a sociis, an ambiguity arising from the use of a general term in a statute can be resolved by reference to associated terms. 2A Sutherland, *Statutory Construction*, § 47.16 (4th ed. 1984). When the statute contains a list of terms having a similar meaning, as it does here, the general word, "report," is limited and qualified by the special

word, "document." *Id.* The term "document" clearly implies written material, not oral communication. The provision's other terms, "application," "label," "manifest," "record," and "permit," refer to written documents. When the term "report" is considered in context, and by reference to associated terms, it is clear that Congress intended to limit the application of § 3008(d)(3) to written documents.

Not only must a report be written before it comes under the scope of RCRA's criminal provisions, it must also be made "for purposes of compliance with regulations promulgated by the [EPA]. . . under [Subchapter III]." 42 U.S.C. § 6928(d)(3). The district court blithely overlooked this statutory requirement as "too fine a point," (R. 5), in reaching its decision. It is an elementary rule of construction that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant. . . ." 2A Sutherland, *Statutory Construction*, § 46.06. Nowhere in the district court's opinion is there any reference to a regulation promulgated under Subchapter III.

The documents specifically mentioned in Subchapter III are all part of RCRA's manifest system. The EPA has generated regulations that give industry notice of exactly what information these documents must contain and how they are to be kept. The terms "application" and "permit" are found in § 3005, which creates standards governing owners and operators of hazardous waste disposal sites. 42 U.S.C. § 6925. The terms "manifest," "label," "record," and "report" are all found in §§ 3002 and 3003. 42 U.S.C. §§ 6922, 6923. The term "manifest" is found in §§ 3002(a)(5) and 3003(a)(3). The term "label" is found in § 3002(a)(2). Reference to the term "record" is found in §§ 3002(a)(1) and 3003(a)(1). The regulations that tell industry exactly what information must be included in these documents and how they should be maintained are found in EPA Standards Applicable To Generators Of Hazardous Waste, 40 CFR § 262.10 et seq.(1989).

The term "report" is found in § 3002(a)(6), which calls for submission of reports to the EPA biennially, detailing quantities and nature of hazardous wastes generated and efforts by the generator to reduce the volume and toxicity of its

waste. 42 U.S.C. § 6922. EPA regulations governing such a report are found in Part 262, Subpart D, titled Recordkeeping and Reporting. 40 CFR § 262.40 et seq. These regulations refer to written documents. They detail the type of information the documents must contain and how the documents should be identified. These regulations cover three types of reports, biennial reports, § 262.41, exception reports, § 262.42, and additional reports, § 262.43. The biennial report regulations offer specific guidelines that assist industry in complying with the requirements imposed upon it under § 3002. These regulations are extremely detailed, directing industry to include, among other things, its EPA identification number, the EPA hazardous waste number, and a signed certification. The regulations tell industry when the report must be submitted and how many copies must be sent. Similarly detailed regulations exist for exception and additional reports.

The regulations specifically refer to three types of reports and it is clear that this is what both Congress intended, and the EPA understood, to be the scope of the term "report" as it is used in § 3008(d)(3). Where Congress and an agency have given a term a particular meaning it should always be construed in a manner consistent with that meaning. *Udall v. Tallman*, 380 U.S. 1, 16 (1965). It is clear that the criminal provisions of § 3008 refer to these terms, not generally as the district court believed, but specifically as Congress used them in Subchapter III. Therefore the telephone call does not fall within the scope of RCRA's false statements provision.

The only other reference to report found in the subchapter is in § 3007. There is a presumption that identical words used twice in the same act have the same meaning. *Atlantic Cleaners and Dyers v. United States*, 286 U.S. 427, 433 (1932). Section 3007 does not require a hazardous waste handler to make a report to the EPA. It only requires that they make any report required under § 3002 available to the EPA upon request. The letter from the EPA was not a request for such a report.

This interpretation is consistent with the primary regulatory purpose of the statute, preservation of the record's integrity. RCRA is premised upon the integrity of its manifest sys-

tem. The duty of a hazardous waste generator or transporter is to maintain a record of all the hazardous waste for which it is responsible. The criminal sanctions were provided to deter industry from altering or deleting information from this record. Habicht, *The Federal Perspective*, 17 ELR at 10482. The generator or transporter is to maintain the record and make it available to the EPA upon request. 42 U.S.C. § 6927. Omni's telephone call was not part of the manifest system. The statement was not presented as a summation of all relevant evidence to be found in Omni's files. It was merely a conclusion, drawn by Mr. Adams after reviewing Omni's records, that there was no conclusive evidence establishing Omni's responsibility for the spill. Most importantly, at no time did Omni ever attempt to remove pertinent information from its files or alter any documents. The record was left intact and was available to the EPA for examination. The purpose of the criminal provisions was served and no justification exists for the imposition of criminal penalties.

Under Subchapter III the EPA has promulgated regulations establishing clear guidelines for industry compliance. Where a generator or transporter has failed to observe these clear guidelines the imposition of criminal sanctions is appropriate. However, when, as in the case before the bar, the information request from the EPA contains no guidelines that establish the range of information necessary to satisfy the request, Congress clearly did not intend to make such a determination subject to criminal penalties.

While this issue, exactly what type of communication is subject to the criminal provisions, has not been the subject of litigation under RCRA, it has arisen in the enforcement of a related provision under the Clean Water Act. *United States v. Olin Corp.*, 465 F. Supp. 1120 (W.D.N.Y. 1979). Section 309 of the Clean Water Act imposes criminal sanctions for false statements made in a report filed under the Act. 33 U.S.C. 1319(c)(4) (1986 & Supp. 1990). In *Olin* the corporate defendant was charged with violation of § 309(c)(4) of the Clean Water Act. The court found that Olin could not be charged with violation of the Clean Water Act because it did not have any specific duty to file or maintain the report in question. *Id.*

at 1131. The court ruled that where the defendant had no obligation to file the report and the EPA had not compelled it to file the report the defendant was not subject to the sanctions imposed by § 309(c)(4). "Section [309] only applies when the Administrator finds that a violation of a permit condition or of a particular section of the Act has occurred." *Id.* This holding is consistent with Omni's position that criminal sanctions are only to be imposed where a defendant has failed to comply with the established regulatory guidelines of the Act, or in other words, where EPA has given the defendant notice of what is required.

EPA has not connected Mr. Adams' phone call to any specific section of RCRA. The EPA has not established a specific duty on the part of Omni to file the report. As in *Olin*, no violation of the Act has been proven.

In *Olin*, the corporate defendant was found guilty of violating 18 U.S.C. § 1001. This statute punishes anyone who "knowingly and willfully" makes a false statement to a federal agency. 18 U.S.C. § 1001 (1976 & Supp. 1990). This catchall prohibition would probably cover Omni's telephone call, if it were found to be false. Congress required that the government show a higher mens rea in order to convict a defendant under § 1001 than under RCRA's § 3008. Under § 3008 the government must only show that a defendant acted "knowingly." 42 U.S.C. § 6928(d)(3). This is because § 1001 encompasses communications made to the federal government which are voluntary and where no regulatory guidelines, detailing what is required of the defendant, exist. In *Olin*, the filing of the document was not required and there were no guidelines for compliance. *Olin*, 465 F. Supp. at 1131. The lower mens rea requirement reflects the fact that a hazardous waste handler is subject to extensive regulations which explicitly guide its conduct. This is why Congress included in § 3008 the language, "for purposes of compliance with regulations promulgated by the [EPA]," thereby restricting imposition of criminal penalties to situations in which the defendant ignores clearly established guidelines. Bernard Barker had no guidelines to use in complying with EPA's request for information.

The district court erred in construing Omni's telephone

call as a report because a report must be a written document and must be one of the three types of report described in EPA's regulations. Therefore, the District Court's decision, in which it denied Mr. Barker's motion for judgment of acquittal, should be reversed.

B. *The Information Omitted From Omni's Phone Call to the EPA was not Material.*

In order for there to be a violation of § 3008(d)(3), the information omitted from Omni's phone call to EPA must have been material. 42 U.S.C. § 6928(d)(3). A statement is material if "it is capable of influencing or affecting a governmental function." *Olin Corp.*, 465 F. Supp. at 1132. The district court's determination of materiality is subject to complete review on appeal and is not controlled by the clearly erroneous standard. *United States v. Chandler*, 752 F.2d 1148, 1151 (6th Cir. 1985). When we apply this standard to facts in the instant case it is clear that the information omitted from Omni's phone call was not material and there was no violation of § 3008(d)(3).

The EPA obviously suspected that the source of the DWE was the Omni plant. The spill occurred directly in front of the plant and the substance spilled was a byproduct of Omni's manufacturing process. The information available to Omni at the time was, however, insufficient to support a conclusive determination that the DWE found along the road came from the Omni plant. Had Omni included the fact that an Omni truck had been repaired over a month before the EPA contacted Omni, that information would have at best enabled the EPA to conclude that Omni was the most probable source of the DWE. Omni would have remained the EPA's prime suspect with or without the inclusion of this information in the phone call.

Furthermore, Omni received the EPA's letter on August 2, 1989. The letter gave no indication of when the spill occurred. It was not unreasonable for Omni to conclude that the spill was promptly reported. The fact that one of the trucks was repaired more than a month before the EPA's letter ar-

rived was immaterial. If the EPA had asked Omni if it knew of a DWE spill that occurred sometime in early July, the information about the leaking truck would clearly have been material. The EPA's failure to include the date of the spill in its letter led to Omni's determination that the information omitted was immaterial. The EPA, not Omni, was the party that omitted material information.

Omni's determination of materiality should be viewed in light of the facts available to Omni at the time. The discovery of conclusive evidence linking Omni to the spill several weeks later and outside of Omni's records has the effect of making its decision seem unreasonable. At the time Omni made its decision, it was perfectly reasonable to conclude that the omitted information was immaterial.

Omni's statement to the effect that Omni was unaware of the source of the DWE was not only true, it was not intended, nor could it realistically have been expected to, dissuade the EPA from continuing to consider the Omni plant as its prime suspect. Omni's statement should not have influenced or affected a governmental function. Omni remained the EPA's prime suspect. The EPA indicated in its letter that it was conducting an investigation. This information was available to the EPA at any time, had they attempted to conduct a reasonable investigation.

The district court's determination of materiality is subject to plenary review. *Chandler*, 752 F.2d at 1151. From the circumstances surrounding Omni's decision to omit the information from its phone call, it is evident that information omitted was not material, because it did not influence or affect a governmental function. The district court erred in finding that EPA had proven a violation of RCRA § 3008(d)(3). Therefore the district court's decision, in which it denied Mr. Barker's motion for judgment of acquittal, should be reversed.

C. *The District Court's Conclusion That Mr. Barker Acted Knowingly Is Inconsistent With The Plain Language of RCRA Section 3008(d)(3) And Well Established Principles of Criminal Law.*

The state of mind for all criminal violations under § 3008 is "knowing." A joint conference committee of the 96th Congress reported that "[t]he conferees have not sought to define 'knowing' for offenses under subsection (d); that process has been left to the courts under general principles." House Conference Report No. 96-1444, 96th Cong. 2d sess. reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS, pp. 5019 - 5038, 5028. Therefore any prosecution under RCRA § 3008(d)(3) must be consistent with well established principles of criminal law. Mr. Barker argues that he did not possess the requisite mens rea to sustain a conviction under RCRA § 3008(d). Section 3008(d)(3) imposes criminal penalties only upon a person who "knowingly" omits material information in a "report" or other document filed for purposes of compliance with regulations promulgated under RCRA. Mr. Barker asserts that the term "knowingly" requires that defendants under § 3008(d)(3) must have knowledge that information is "material" and that they must have knowledge that they are submitting a "report" before they may be convicted of omitting "material information" from a "report" within the meaning of § 3008(d)(3). Opinions issued by the United States Supreme Court and United States Circuit Courts of Appeal, as well as the language of the Model Penal Code, support Mr. Barker's construction of the term "knowingly."

Although the Supreme Court has never addressed itself to § 3008(d), it is well settled that "legal terms in a statute are presumed to have been used in their legal sense. . . ." 2A Sutherland, *Statutory Construction*, § 47.30 (4th ed. 1984). The term "knowingly" is a familiar expression of one level of mens rea necessary to sustain a conviction for certain types of criminal conduct. When used in a criminal statute, the meaning of this language is well established.

The Supreme Court has defined what is meant when the term "knowingly" is used in a statute. As the term plainly

suggests, a defendant must act with knowledge that certain relevant factual circumstances exist before he may be found to have acted "knowingly" in a given context.

In the case of *Boyce Motor Lines Inc. v. United States*, the Supreme Court decided whether a statute which proscribed "knowingly" violating regulations under 18 U.S.C. § 834, pertaining to the safe transportation of dangerous articles, was unconstitutionally vague. 342 U.S. 337 (1952). The Court reasoned that the statute "only punishes those who knowingly violate the regulation. This requirement of the presence of culpable intent [i]s a necessary element of the offense. . . [i]t must be shown that petitioner knew that there was a practicable, safer route and yet deliberately took the more dangerous route. . . ." 342 U.S. at 342-243. Thus, the Court construed the term "knowingly" to require that a defendant act with knowledge that certain circumstances existed at the time of the conduct in question, namely, whether there was a safer route by which to transport the hazardous materials regulated under the statute.

United States v. International Minerals & Chemical Corp., 402 U.S. 558 (1971), construed the term "knowingly" in the same manner as *Boyce Motor Lines*. The *International Minerals* Court was called upon to construe the term "knowingly" used in 18 U.S.C. § 834 and determine whether a defendant must act with knowledge of "the facts" rendering his or her activity within the regulations at issue or whether a defendant must know of the "pertinent law" as prerequisite to conviction for "knowingly violat[ing] any such regulation." *Id.* at 559. The Court found that Congress' use of the term "knowingly" explicitly required that a defendant act with knowledge of the relevant facts before he or she may be convicted under the statute. The Court found that "strict liability is not imposed: knowledge of the shipment of the dangerous materials is required." *International Minerals* at 560.

Application of *Boyce Motor Lines* and *International Minerals* to the instant case reveals that the term "knowingly" requires that defendants such as Mr. Barker act with the knowledge that certain circumstances exist before they may be convicted for "knowingly" engaging in conduct pro-

scribed under § 3008(d)(3). Thus, in the case at bar, RCRA § 3008(d)(3) requires that Mr. Barker be proven to have acted with knowledge that omitted information was "material" and that he was filing a "report" to the EPA. 42 U.S.C 6928(d)(3). Because Barker did not have this knowledge, the district court erred in finding him criminally liable.

Unlike Appellee in *International Minerals*, Mr.Barker does not argue that he must be shown to have had knowledge of the pertinent law under which the activities of Omni are regulated, rather, he argues that he did not have knowledge that the information in question was "material" or that he was filing a "report" within the meaning of RCRA § 3008(d)(3). The Model Penal Code is helpful to illustrate and emphasize that Mr Barker's construction of § 3008(d)(3) is correct. The Supreme Court has stated that "the ALI Model Penal Code is one source of guidance upon which the Court has relied to illuminate questions of this type." *United States v. United States Gypsum Co.*, 438 U.S. 422, 444 (1978).

The term "knowingly" is one of four culpable states of mind utilized by the American Law Institute in § 2.02 of the Model Penal Code. The Model Penal Code provides that "a person acts knowingly with respect to a material element of an offense when. . .the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature of or that such circumstances exist. . . ." American Law Institute, Model Penal Code and Commentaries, § 2.02, (1985). The commentaries to § 2.02 state that "[a] person acts 'knowingly' with respect to a result if it is not his conscious objective, yet he is practically certain that his conduct will cause the result." *Id.*

Application of the Model Penal Code to the instant case yields the same result as application of the principles declared by the Supreme Court in *Boyce Motor Lines* and *International Minerals*. In order to support a conviction under RCRA § 3008(d)(3) Mr. Barker must be proven to have had known that the omitted information was "material" and that he was making a "report." Expressed differently, Mr. Barker must have been "practically certain" that his conduct would result in the omission of "material information" from a "report."

Mr. Barker could not have possessed, nor has the Government proved beyond a reasonable doubt, that Mr. Barker had such knowledge or certainty.

Omni received the EPA's written inquiry on August 2. Inspector Durden's letter gave no indication of when the spill occurred. Thus, it was not unreasonable of Omni to conclude that the spill was promptly reported and the fact that one of the trucks was repaired more than a month before the EPA's letter arrived was not material. The EPA's failure to include the approximate date of the spill led Omni to this determination. At the time Omni made its decision it was perfectly reasonable to conclude that the omitted information was not material.

In addition, as is set out above, the term "report" in RCRA § 3008(d)(3) does not include an informal telephone conversation in response to a vague request for information. Mr. Barker did not act with knowledge of the factual circumstances which would render his conduct criminal. The district court ignored this point and based its decision upon a misinterpretation of the statute. The judgment of the District Court should be reversed and Mr. Barker's motion for acquittal granted.

Mr. Barker's construction of § 3008(d)(3) is entirely consistent with existing precedent. Three federal circuits have agreed that the term "knowingly" as used throughout § 3008(d) requires that a defendant act with knowledge that certain relevant circumstances exist before he or she may be convicted under that provision.

In *United States v. Hoflin*, the ninth circuit held that "the government must prove, and the jury must be instructed, that the defendant knew the material being disposed of was hazardous" in order to sustain a conviction under RCRA § 3008(d)(2)(A), 880 F.2d 1033, 1039, (9th Cir. 1989). The third circuit reached a similar conclusion regarding the same provision in the case of *United States v. Johnson & Towers*, 741 F.2d 662 (3d Cir. 1984), cert. denied, 469 U.S. 1208 (1985). Although the reasoning of the *Johnson & Towers* court was expressly rejected by the *Hoflin* court, the decisions agree in construction of the term "knowingly." Like the *Hoflin* court,

the third circuit concluded that "the term 'knowingly' which introduces subsection (A), must also encompass knowledge that the waste material is hazardous." *Johnson & Towers*, 741 F.2d at 668.

In a similar case, the eleventh circuit found under RCRA § 3008(d)(1) that "in this regulatory context a defendant acts 'knowingly' if he willfully fails to determine the permit status of the facility." *United States v. Hayes International Corp.*, 786 F.2d 1499, 1504 (11th Cir. 1986). The *Hayes* court further elaborated that "a defendant acts knowingly if he is aware 'that the result is practically certain to follow from his conduct, whatever his desire may be as to that result.'" *Id. See also, United States v. Bailey*, 444 U.S. 394, 404 (1979), Model Penal Code § 2.02.

The construction of § 3008(d)(3) urged by Mr. Barker is also supported by interpretations of similar provisions of other environmental statutes. *United States v. Corbin Farm Service*, 444 F. Supp. 510 (E.D. Cal. 1978), *aff'd* 576 F.2d 259 (9th Cir. 1978) (The term "knowingly" used in § 1361(b) of the Fungicide, Insecticide and Rodenticide Act requires that knowledge be proved in order to establish a violation), *United States v. Frezzo Bros.*, 546 F. Supp. 713 (E.D. Pa. 1982), *aff'd* 703 F.2d 62 (3d Cir. 1983), *cert. denied*, 464 U.S. 829 (1983) (To sustain a conviction under § 301 of the Clean Water Act is necessary to show that defendants intended to do the acts for which they were convicted). *United States v. Oulette*, 15 ELR 20899 (E.D. Ark. 1977) (The term "knowingly" used in § 309(c)(4) of the Clean Water Act requires that the government prove that the defendant made false statements with knowledge that the statements were indeed false).

The facts of the instant case are insufficient to support a finding that Mr. Barker acted with the necessary level of intent to support a conviction under § 3008(d)(3). Appellant Barker could not have been "practically certain" that the omitted information was "material" within the meaning of § 3008(d)(3). EPA's initial request for information was not sufficiently detailed to provide Barker with the facts necessary to make such a determination. Omni had no basis on which to draw the inferences necessary to conclude that the omitted in-

formation was "material." Appellant challenges the district court's interpretation of "knowing," a conclusion of law, and therefore review is plenary. *Universal Minerals, Inc. v. C. A. Hughes & Company*, 669 F.2d 98 (3d Cir. 1981). The government has not proven beyond a reasonable doubt that Mr. Barker's "knowingly" omitted material information from a "report" filed for purposes of compliance with regulations promulgated under RCRA's Subchapter III.

D. *The District Court Erred In Construing RCRA's Criminal Provisions in a Manner that Fails to Effectuate the Statute's Regulatory Purpose and Frustrates the Intent of Congress.*

Although RCRA is remedial in nature and generally given a liberal construction it is not appropriate to give such a construction to its penal provisions. The appropriate standard for interpreting criminal sanctions contained in a remedial statute is to construe the provisions so as best to effectuate the regulatory purpose of the statute. *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 666 (3d Cir. 1984).

The regulatory purpose of RCRA's criminal provisions is to ensure that adequate records are kept by those who handle hazardous waste, to encourage industry to cooperate with the EPA, and to prevent industry from violating the statute in order to obtain an advantage in the marketplace. Habicht, *The Federal Perspective*, 17 ELR at 10482. The court below failed to refer to any of the criminal sanctions' purposes in finding that a violation occurred. In fact, no such relationship can be established given the facts of this case.

As already noted, Omni made no attempt to alter, or delete information from, the record. The information was available to the EPA at all times. The integrity of the record was never imperiled. In the telephone call, Omni's willingness to cooperate was emphasized and when additional evidence came to light, Omni invited the EPA inspector to the plant to inspect its records and interview Omni's driver and service crew. No attempt was made to influence the investigation in any way. As a matter of fact, Omni employees assisted the inspec-

tor by elevating the truck so she could take samples of the material seen on its underbody. No effort had been made by Omni to remove this physical evidence. Imposing criminal sanctions after receiving such cooperation is unjust. If Mr. Barker is to be held liable for Mr. Adams' telephone call he should also be given credit for the willingness to cooperate Mr. Adams later displayed.

No significant economic advantage was sought by Omni in omitting the information from its telephone call. The cost of cleaning up a spill the size of the one in question is minor when compared with Omni's operating budget.

The action taken by Omni did not threaten the integrity of the manifest system, display a reluctance to cooperate with an EPA investigation, nor was it taken in order to gain an economic advantage in the marketplace. The district court's interpretation of RCRA § 3008, and its subsequent imposition of criminal penalties on Mr. Barker does not serve any of the statute's purposes and may very well discourage Omni and other corporations from cooperating as willingly in the future.

The district court's interpretation of § 3008(d)(3) frustrates legislative intent by imposing a self investigative duty on industry. A statute should not be given an interpretation that leads to absurd results or frustrates legislative intent. *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 486-87 (1868). Congress clearly intended that EPA enforce RCRA's statutory requirements. Congress gave the EPA the money, manpower, and authority to conduct investigations of any suspected violation of RCRA. 42 U.S.C. §§ 6912(c), 6916(e), 6927, 6928. It is clear that Congress intended the EPA to do more than it did here. A vague unartfully framed request for information does not fulfill the EPA's investigative duty. EPA did nothing more than mail out some letters, a full month after the spill was reported, and then "kept a file open." (R.4). The EPA failed to timely instruct the police force on how to report spills and failed to ask the local police if they had any knowledge of the spill, coming upon this information entirely by chance. Finally, the agency failed to take the most obvious step in a reasonable investigation of the reported spill, a preliminary investigation of the records of the plant which pro-

duced the waste product in question, and outside whose door the spill occurred. Instead the agency attempted to foist its statutory duties upon the corporate defendant. The statute cannot support the district court's imposition of this self investigative duty on industry.

The court below erred in interpreting RCRA's criminal provisions broadly without making any inquiry as to RCRA's regulatory purpose. The court stretched the statutory meaning of the terms "knowing," "report," and "material," beyond their limits and ignored the statutory requirement that the report be "for purpose of compliance with regulations." When the statute is read carefully, its regulatory purposes and legislative intent considered, it is clear that there was no violation of RCRA § 3008(d)(3). Therefore the district court's decision, in which it denied Mr. Barker's motion for judgment of acquittal, should be reversed.

II. THE COURT SHOULD HOLD THAT THE DISTRICT COURT ERRED IN FINDING BARKER CRIMINALLY LIABLE WHERE THE RESPONSIBLE CORPORATE OFFICER DOCTRINE DOES NOT APPLY, WHERE BARKER DID NOT BEAR A RESPONSIBLE SHARE OF THE ALLEGED VIOLATION AND WHERE COMPELLING POLICY ARGUMENTS REQUIRE LIMITING THE GOVERNMENT'S PROSECUTORIAL DISCRETION.

As plant manager of Omni, Bernard Barker is responsible for the daily operation of a manufacturing firm which employs four hundred people. Part of Barker's duties include waste disposal. One issue before the court is whether these facts alone are enough to convict Barker for an action, taken by any of those four hundred employees, which violates federal waste disposal law.

Spurred by growing public concern for the environment, the government has responded by significantly increasing the number of criminal prosecutions brought under environmental statutes. These criminal prosecutions are an immediate and effective tool for deterring environmental crime. However,

as with all powerful tools, criminal prosecutions are subject to abuse. The government must be restrained in its ability to prosecute or corporate employees will be convicted for actions which pose little or no threat to the environment and where their responsibility is arguable.

Congress has recognized this fact. So, while popular sentiment might support the imposition of criminal sanctions for seemingly technical violations of federal environmental statutes and regulations, the law provides otherwise. Congress exercised restraint by refusing to incorporate the responsible corporate officer doctrine into RCRA. Under RCRA, the courts must find that a person has done more than accept a position as a corporate officer to convict them of an environmental crime. In addition, the Supreme Court has stated that a jury cannot be instructed to convict a person based solely upon that person's position in a corporation. *United States v. Park*, 421 U.S. 658, 674 (1975). The actions which resulted in the conviction of Bernard Barker were beyond his ability to control or prevent. When viewed objectively, the facts do not support the imposition of criminal sanctions on Mr. Barker.

A. *Congress Limited the Scope of Section 3008 by Narrowing the Definition of "Person" to Exclude the Responsible Corporate Officer Doctrine.*

Among the environmental statutes which include criminal sanctions, RCRA stands apart as the only one which does not specifically incorporate the responsible corporate officer doctrine. 42 U.S.C. § 6903(15). Congress intended to base criminal liability under RCRA on more than a person's position in a corporation. A comparison of RCRA to several environmental statutes highlights this intent. Section 309(c)(6) of the Clean Water Act specifically states that the definition of "person" includes "any responsible corporate officer." 33 U.S.C. § 1319(c)(3). The Clean Air Act includes an identical provision in § 113(c)(3). 42 U.S.C. § 7413(c)(3) (1982 & Supp. 1990). The Federal Insecticide, Fungicide and Rodenticide Act includes language which specifically makes the "acts of officers" subject to its criminal provisions. 7 U.S.C. § 136l(b)(4) (1981

& Supp. 1989).

These acts were passed before RCRA; Congress was aware of these acts and used them as guidance while drafting the language of RCRA. For example, the citizen suit provisions in the Clean Water Act, the Clean Air Act and RCRA are virtually identical. 33 U.S.C. § 1365(a); 42 U.S.C. § 7604; and 42 U.S.C. § 6972. A common method of statutory interpretation is to read similar statutes together or "in pari materia," especially where the statutes were enacted with a common purpose. *See e.g., Lorillard v. Pons*, 434 U.S. 575 (1978). By omitting any provision explicitly incorporating the responsible corporate officer doctrine, Congress expressed its intention to limit criminal liability. *But c.f., Johnson & Towers*, 741 F.2d at 665.

Further, had Congress so desired, it had ample opportunity to amend RCRA to include language incorporating the responsible corporate officer doctrine when it passed the 1984 Hazardous and Solid Waste Act amendments to RCRA. Congress did not expand the scope of the criminal provisions to cover the responsible corporate officer doctrine. Legislative action by amendment of a statute may indicate approval of unaffected portions of the law. 2A Sutherland, *Statutory Construction*, § 49.10. This rule of construction is especially appropriate given the rapid increase in the number of criminal prosecutions of corporate officials during the early 1980's. Congress was aware of this trend and deliberately decided not to impose criminal liability on persons based solely on their position within a corporation.

Therefore, the district court erred in applying the responsible corporate officer doctrine. The standard of criminal liability under § 3008(d)(3) is whether Barker "knowingly" made any false statement. This court should reverse Barker's conviction because it was based upon the wrong standard.

B. *Under the Standard of United States v. Park, Barker can not be Convicted Based Solely Upon His Position in the Corporation.*

Even if the responsible corporate officer doctrine should

be applied, the district court did not correctly apply the doctrine. The most recent decision by the Supreme Court discussing the responsible corporate officer doctrine is *Park*. 421 U.S. 658. In *Park*, the Supreme Court upheld a jury instruction regarding the criminal liability of a corporate president under the Federal Food, Drug and Cosmetic Act (FDCA). They upheld the instructions because the "charge did not permit the jury to find guilt solely on the basis of respondent's position in the corporation." *Id.* at 674. Instead, the judge properly instructed the jury to determine whether the corporate agent bore a "responsible relationship" to or had a "responsible share" of any violations. *Id.* at 672.

The statute in this case sets out an even more stringent standard. RCRA requires proof of knowledge as a requisite element for a conviction. In *Park*, the statute under which the corporate president was convicted did not have such a mens rea requirement. *Id.* at 672. Therefore, in this case, the government should have been required to go even further than the standard set out in *Park*. Although Barker was plant manager, he did not bear a responsible share of any alleged violation by Adams. He had no knowledge of any violations. The district court did not correctly apply this standard and found Barker liable based solely upon his position as a corporate officer. Therefore, this court should reverse the district court's decision.

A district court in Massachusetts faced a similar issue and found that a magistrate had erred in basing a conclusion of guilt on the defendant's position as a chief executive officer. *United States v. New England Grocer's Supply Co.*, 488 F.Supp. 230, 232 (D.Mass 1980). The court admitted to the difficulty of applying the *Park* standard:

> The line drawn by the Court between a conviction based on corporate position alone and one based on a "responsible relationship" to the violation is a fine one, and arguably no wider than a corporate bylaw. Nevertheless, the Court clearly stated that a conviction under [FDCA] could not be based on corporate position alone.

Id. at 234. The court noted the fact that the defendant in that case was "the senior officer with ultimate authority" but stated that this fact alone was not enough to convict without proof beyond a reasonable doubt establishing the defendant's responsible relationship for the violations.

In the case of Barker, the district court was required to apply this admittedly difficult standard. The standard was not made easier by the fact that, under RCRA, the violation must be made "knowingly." Further, Barker's knowledge can not be inferred from his position at Omni. Such an inference would void the requirement that liability can not be based solely upon a person's position in a corporation.

Bernard Barker exercised the necessary degree of care by promptly responding to what appeared to be a routine request for information. He instructed Adams to answer the government's questions truthfully. Adams reported that he had told the government he did not know the source of the spill. Barker had no reason to doubt the truthfulness of Adams' statements. Compare this situation to the one in *Park*, where Park had been given notice of continuing violations even after instructing his subordinate to resolve the problem. *Park*, 421 U.S. at 664, 665. Here, Barker was never given notice that the government was dissatisfied with Adams' response.

In applying the proper standard, the district court should have found that Barker did not have the knowledge necessary for a conviction. In addition, the district court should have found that Barker did not bear a responsible share of the violation. The district court erred in finding Barker liable based solely upon his position as Omni's plant manager.

In its misapplication of *Park*, the district court created a strict liability standard for § 3008(d)(3). Section 3008 does not impose this kind of liability. Congress knows how to create strict liability offenses but did not do so here. When Congress seeks to impose strict liability, it dispenses with the language of mens rea and it does not use terms such as "knowingly." An elementary rule of construction is that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant. . . ." 2A Sutherland, *Statutory Construction*, § 46.06. In

RCRA, congress employed the term "knowingly" to describe the requisite mental state to convict a defendant for a violation of section 3008(d)(3). This language should be given effect. Although strict liability statutes are occasionally employed to control areas of activity which are heavily regulated for the health and welfare of society at large, *See, United States v. Balint*, 258 U.S. 250 (1922), "[w]e start with the familiar proposition that '[t]he existence of a mens rea is the rule, rather than the exception to, the principles of Anglo-American jurisprudence.' " *Dennis v. United States*, 341 U.S. 494, 500 (1951). Because the plain language of section 3008(d)(3) prescribes a mens rea requirement of "knowingly," this section must not be read as creating strict liability.

The district court erred in its application of the *Park* standard by misinterpreting section 3008(d)(3). The drafters of section 3008(d)(3) stated that the provision "provides for criminal penalties for the person who *knowingly*" violates the provision. H. Rep. No. 94-1491, pt. 1, 94th Cong. 2d. sess. reprinted, 1976 U.S. Code Cong. & Admin. News p. 6268 at 6269, (emphasis added). Section 3008(d)(3) simply does not impose strict criminal liability. Thus, the district court erred in finding Barker liable based solely on his position in the corporation.

C. *In Light of Compelling Policy Arguments, the District Court Should Limit the Government's Prosecutorial Discretion Under RCRA.*

This case is an example of the danger inherent in allowing prosecutors too much discretion. The scope of liability urged by the government covers even the most petty, technical violations of RCRA. Under the government's suggested standard, which amounts to strict liability, corporate officers and employees such as Barker are subjected to sanctions disproportionate to their culpability and far in excess of any potential harm to society.

The judiciary needs to place some limitation on the ability of the government to prosecute corporate officials for environmental violations. Prior to this case, the government has

limited prosecutions to the most egregious cases where the public health has been clearly threatened. This case marks a departure from what were reasonable guidelines. This case indicates an immediate need for the courts limit government's prosecutorial discretion

In a Supreme Court decision that was relied upon heavily in *Park*, the Court stated that the question of responsibility of corporate officers must be entrusted to "the good sense of prosecutors, the wise guidance of trial judges and the ultimate judgment of juries." *United States v. Dotterweich*, 320 U.S. 277, 284-85 (1943). This trust is implicit in *Park*'s broad standard of responsibility. Where the prosecutor has abused this trust, the Supreme Court did not intend for a reviewing court to stand idly by, helpless to provide justice. The government abused its discretion and the district court extended the responsible corporate officer doctrine to a manifestly unjust extreme. That this conviction is unjust is apparent given the enormous impact of criminal sanctions when compared to the relatively minor degree of harm caused by the alleged wrongdoing and the lack of any resultant public benefit.

At one time, the Department of Justice relied upon specific prosecutorial guidelines in deciding whether to impose criminal sanctions on corporate officials. A recent legal study sets out four "key factors" prosecutors rely upon when deciding whether to pursue a case: one, evidence of knowledge or intent; two, the harm that flows from a violation; three, the economic gain to the violator; and four, the degree to which to violations were aggravated or repeated. Habicht, *The Federal Perspective*, 17 E.L.R. at 10481. When applied to situations where corporate officials authorize dumping hazardous waste into a ditch, or where they authorized the disposal of hundreds of drums containing hazardous waste at illegal dumpsites, these factors are easily satisfied. *Johnson & Towers*, 741 F.2d at 664; *Hayes*, 786 F.2d at 1501.

These four factors are not satisfied in this case. Any evidence of knowledge or intent to make a fraudulent statement is nebulous at best. This is especially true given the vagueness of EPA's request and the lack of any concrete guidelines for responding. The harm caused by the spill was negligible, very

little waste was spilled. The harm of the alleged violation, false reporting, is even more attenuated. There was no intent to mislead the EPA, in fact, Barker instructed Adams to cooperate in the investigation. Finally, there is no evidence of any economic gain or that the violations were aggravated or repeated. If the government had followed its own guidelines, it never would have brought this case. This court should impose restrictions upon the government's prosecutorial discretion and reverse the decision of the district court.

The government's abuse of discretion becomes readily apparent when comparing the nature of the alleged violation to the consequences of criminal prosecution. Section 3008(d) authorizes two years imprisonment. 42 U.S.C. § 6928(d). Just an indictment alone will "have a devastating personal and professional impact." *United States v. Serubo*, 604 F.2d 807, 817 (3d Cir. 1979). Given this impact, one would expect the government to use criminal sanctions sparingly, punishing only conduct the average person would consider criminal. It is difficult to imagine that the average person would find Barker's conduct criminal.

Given the availability of civil sanctions for this alleged violation, the government should have pursued them instead of imposing straight to criminal sanctions. *United States Gypsum Co.*, 438 U.S. 422, 436. In this case, the government has neglected its duty to prioritize cases and to pursue criminal sanctions in the most egregious situations. In addition, before corporate officials can be found criminally liable criminal the conduct needs to be clearly defined so prosecution is consistent and unaffected by public pressure. Because the government's prosecution of this case is unjustified, this court should reverse Barker's conviction.

Ultimately, the prosecutor's discretion must be informed by the Constitution. Constitutional limitations are implicit in any Supreme Court decision, including its statement in *Dotterweich*, that the responsibility of corporate officers must be entrusted to "the good sense of prosecutors." 320 U.S. at 284-85. Cases such as this strain the limits of this trust, not only for policy reasons, but because the Constitution must be a factor in any criminal prosecution.

The Constitution provides a right against self-incrimination. Constitutional due process forbids criminal prosecutions based on vague and unknowable standards. These constitutional rights are reflected in stringent criminal discovery rules and the strict construction of criminal statutes. Prosecutors should not be allowed to avoid these limitations by issuing what appear to be civil discovery requests and using information so obtained for criminal prosecutions. Such requests come dangerously close to requiring the corporate employees to incriminate themselves.

Where such requests are vague and the standards for responding are impossible to discern, due process demands that any prosecution be limited. In this case, allowing the conviction to stand permits the government to encroach on Constitutionally protected rights. Bernard Barker responded promptly and honestly to the government's request for information. The request did not make the possibility of criminal prosecution apparent. Further, the EPA has yet to develop regulations defining what would constitute an adequate response to such a request. The government abused the discretion granted to it by the Supreme Court and the district court erred by failing to limit this abuse of prosecutorial discretion. Therefore, this should court reverse Barker's conviction.

CONCLUSION

For the foregoing reasons the judgment of the United States District Court for the District of New Union, denying appellant Barker's motion for judgment of acquittal, should be reversed.

Respectfully submitted,

Attorneys for Bernard Barker,
Appellant

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