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Produced in association with the Law Center's
Center for Environment, Energy, and Natural Resources
And
Criminal Justice Institute

**IN THE
SUPREME COURT
OF THE UNITED STATES**

No. C11-0116-1

OCTOBER TERM 2011

SAMUEL MILLSTONE, Petitioner

v.

UNITED STATES of AMERICA, Respondent

ORDER GRANTING WRIT OF CERTIORARI

PER CURIAM:

The petition for a writ of certiorari to the United States Court of Appeals for the Fourteenth Circuit is hereby granted.

IT IS ORDERED that the above-captioned matter be set down for argument in the 2011 term of this Court, said argument to be limited to the following issues:

- I. Can a person can be convicted of negligently discharging pollutants in violation of the Clean Water Act, 33 U.S.C. § 1319(c)(1)(A), for failing to exercise the standard of care that a reasonably prudent person would have exercised in the same situation?
- II. Under the witness-tampering statute, 18 U.S.C. § 1512(b)(3), can an individual "corruptly" persuade a potential witness to withhold information by encouraging the potential witness to invoke their 5th amendment right?

**UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT**

SAMUEL MILLSTONE
Appellant

v.

UNITED STATES OF AMERICA
Appellee

| Case No. 11-1174
|
|

Decided October 3, 2011

Before Judges Pitt, Newman, and Davola.

Davola, Circuit Judge, for the Court.

This case requires us to interpret the term “negligently” in the Clean Water Act (“CWA”), 33 U.S.C. § 1319(c)(1)(A), and the phrase “corruptly persuades” in the federal witness-tampering statute, 18 U.S.C. § 1512(b)(3). Appellant Samuel Millstone was convicted of negligently discharging a pollutant without a permit in violation of the CWA, and for corruptly attempting to persuade the vice president at his company to withhold information from federal investigators in violation of the witness-tampering statute. Millstone appeals his convictions, arguing that the court below erred by (1) providing a jury instruction that defined “negligence” under the CWA as identical to ordinary civil “negligence” and (2) denying his Motion for Acquittal on the witness-tampering charge. We find no error and affirm the judgment of the district court.

I. FACTS

A. Samuel Millstone, Reese Reynolds, and Sekuritek

Appellant Samuel Millstone has led a long and successful career. After graduating from Howard High School in the city of Polis, New Tejas, Millstone began working in law enforcement for the Polis Police Department. After ten years, he enrolled in the University of New Tejas to pursue a business degree. Millstone eventually graduated at the top of his class after attending classes in the evening while continuing to work full time during the day. Following graduation, Millstone left his job in law enforcement and managed a small chain of local retail businesses. Millstone oversaw the day-to-day operations and handled everything from accounting to personnel. In 2001, five years into this job, Millstone again enrolled at the University of New Tejas, this time with hopes of earning an M.B.A. degree.

In 2003, prior to finishing his M.B.A., Millstone found himself unemployed due to layoffs caused by a corporate merger involving the chain Millstone managed. Unemployed, Millstone considered ideas for a business that combined his experience in law enforcement with his background in business. He discussed his ideas with fellow student Reese Reynolds, who had a background in marketing and business-to-business sales. The two ultimately developed an idea for a security company that deployed trained security personnel using the latest technology. Aptly enough, Millstone and Reynolds named their venture Sekuritek.

Under Sekuritek's business model, Millstone acted as president and CEO and Reynolds acted as vice president. Millstone's duties included consulting with clients to ascertain security needs, hiring and training security personnel, and supervising operations at clients' locations. Reynolds' duties included all sales, marketing, and equipment purchases.

By 2004, Sekuritek was in business. Millstone and Reynolds proved to be a great team, and the company grew rapidly. By 2005, they secured numerous contracts throughout Polis and

established themselves as a premier security company thanks to their combination of know-how and technological savvy. In 2005, Sekuritek's average contract earned revenues of \$80,000. Total revenues for the year topped \$2 million.

B. Bigle Chemical Company and the Windy River facility

In September 2006, Bigle Chemical Company relocated its headquarters to Polis from the Republic of China and opened its largest chemical plant on the south side of the city near the Windy River. The Windy River facility spanned 270 acres and housed Bigle Chemical's manufacturing and waste recycling facilities. Operations at the Windy River plant required a standing staff of 1,200 people during any given shift. Profits from the Windy River plant alone topped \$2.4 million per day.

Bigle Chemical's Chairman and CEO Drayton Wesley obsessed over security at the new Windy River facility. In fact, prior to the opening of the Windy River facility, the *Wall Street Journal* quoted Wesley as saying, "I'll be damned if we have another security breach like the one at Dover River. I will not risk the well being of this company by allowing an intruder or saboteur to cause a spill." Wesley followed up in the *New York Times* stating, "I am finished with shenanigans caused by poor security. No more shenanigans on my watch!"

Having heard of Sekuritek's reputation, Wesley contacted Millstone on November 5, 2006, to hire Sekuritek to handle security for the Windy River plant. The contract would net Sekuritek \$8.5 million dollars over the next ten years, almost ten times the security company's previous largest contract. Wesley explained that Sekuritek would need to be "live" and "online" at the Windy River facility by December 1, 2006. Millstone excitedly consulted with Reynolds, who initially expressed concern about Sekuritek's ability to handle such a large contract in such a short amount of time. In less than one month, the Bigle Chemical contract required Sekuritek to hire 35 new security guards, one accountant, and one administrative assistant. Additionally,

Sekuritek needed to make significant investments in security equipment, including surveillance gear, uniforms, and taser guns. Also, due to the sheer size of the Windy River plant, Sekuritek needed to devise a transportation plan for its security guards to travel around the plant. The only transportation plan needed by Sekuritek to date included the purchase of a bicycle for the patrol of a grocery store parking lot. Despite these incredible hurdles, Millstone developed a detailed plan to meet Bigle Chemical's security needs, and convinced Reynolds that they should accept the contract.¹ Millstone signed a contract with Bigle Chemical on November 16, 2006.

C. Security at Bigle Chemical, Windy River Facility

Millstone and Reynolds immediately scrambled to meet the needs of the Windy River project. Millstone hired 35 new security personnel. Because of Bigle Chemical's desire to get Sekuritek's staff on the job by December, Millstone developed a shortened seminar to cover the training of new personnel.² While Millstone dealt with personnel issues, Reynolds went about purchasing the necessary equipment for the job, including a new fleet of custom sport-utility vehicles (SUV) for Sekuritek. Due to the time constraints of the Windy River project, Reynolds performed a cursory review of potential vendors and purchased large SUVs from a relatively unproven company³.

Sekuritek personnel began working on-site security for the Bigle Chemical plant just after Thanksgiving in 2006, and for the first couple of months things went very well. Millstone made

¹ Business records recovered from Millstone's computer showed that Millstone believed the Bigle Chemical contract would take Sekuritek "to the big-time."

² Testimony showed that prior to the Bigle Chemical contract Sekuritek employed only experienced security personnel and required the successful completion of a three-week training course. However, to meet the time requirements of the Bigle Chemical contract, Sekuritek employed a mix of experienced and inexperienced personnel and devised a new training program that entailed one week of formal training and three weeks of "on the job observation and training."

³ Reynolds testified that he wanted to award the contract to a new up-and coming company, similar to Sekuritek. However, documents showed that none of the other three vendors contacted by Reynolds could deliver the required vehicles before the New Year.

it a point to visit the site periodically to ensure Sekuritek's services exceeded Bigle Chemical's expectations. A Bigle Chemical security survey issued shortly after the New Year reported zero security breaches.

Unfortunately, the good times did not last. On January 27, 2007, Josh Atlas, one of Sekuritek's newest security guards, checked in for the day shift at the Windy River plant. While Atlas patrolled the facility in his Sekuritek-branded SUV, he believed he saw an intruder near one of the storage tanks nearby.⁴ Atlas floored the pedal in the SUV to get to the tank quickly and investigate, but the pedal stuck, causing the vehicle to accelerate rapidly and out of control. Atlas leaped from the vehicle moments before it veered into one of the storage tanks. The tank burst open with an incredible explosion. The resulting fire rapidly spread to other units on site, causing several more explosions and spilling thousands of barrels of chemicals into the nearby Windy River. Emergency responders were unable to get to the plant quickly due in part to the fire that spread to the surrounding area and in part to a security wall that Sekuritek erected just days before the explosion. In all, firefighters could not reach the blaze for three days. During the three-day delay, chemicals from the plant continued to spill into the Windy River.

The Windy River spill cost the people of Polis, New Tejas greatly. Twenty-three people died in the explosion and resulting fires. Other direct losses from the fires included three national historical buildings, numerous homes, and 50,000 acres of nearby farmland. These fires caused more than \$450 million in damage.

In addition to fire damage, the explosions at the Windy River facility caused a concentrated chemical cocktail (dubbed the "Soup" by national media) to spill into the Windy River and surrounding creeks, crippling the New Tejas economy. The Soup possessed extremely

⁴ Later investigation revealed that the person Atlas thought was an intruder was, in fact, a Bigle Chemical safety inspector.

corrosive properties, and its presence in the water ate through the hulls of local fishing boats and commercial shipping barges. The Soup wiped out agriculture in all land five miles downriver from the Windy River plant. The Soup also killed all fish and destroyed all fish breeding grounds in the five miles downriver from the Windy River plant.⁵ This fact alone cost New Tejas \$4.5 million a year from lost tourism. Today, only 25% of that figure has recovered. Finally, the Soup spill caused a local water treatment and utility facility shut-down due to the fire hazard created by the chemicals in the water. In total, cleanup costs related to the Soup alone are estimated at over \$300 million. The damage to the state and local economies is still being determined, but most economists put the damage at nearly \$1.25 billion.

Federal officials immediately investigated the explosion and cause of the subsequent spill. Following the spill, Bogle Chemical Company relocated its central office back to the Republic of China during the preliminary phase of the investigation.⁶ Once federal officials understood that an SUV driven by a Securitek guard set off the initial explosion, the government focused its interest on Millstone and Reynolds. First, officials discovered that the employee handbook for security staff at Securitek included instructions on how to handle emergency situations when patrolling in a vehicle. Specifically, the handbook stated:

Upon arriving within 100 yards of an apparent emergency requiring aid or suspected security breach, all Securitek personnel are to leave their vehicle in a stopped and secured position to the side of any pathway and proceed on foot to investigate further.⁷

⁵ The United States Department of the Interior has not released its final report on the Soup's impact on non-aquatic life; however, residents are still reporting animal deaths with symptoms common to those that ingested the Soup.

⁶ Incidentally, since all of Bogle Chemical's Officers are citizens of the Republic of China, they could not be extradited back to the United States. Also no employees, assets, or holdings of Bogle Chemical Company are left within the borders of the United States.

⁷ Testimony indicated that Securitek included such a policy to avoid impeding any other first responders such as the Polis Police Department, the Polis Fire Department, or the Polis EMS.

Testimony developed in the district court indicated that Millstone did not specifically introduce this policy to new personnel during the shortened training seminar. Instead, the training seminar merely referred new employees to the handbook.⁸ Second, the investigation revealed that the company from which Sekuritek purchased the SUVs had a reputation for shoddy workmanship and had experienced problems with pedals on their custom vehicles sticking.

Investigators and the media considered the Windy River disaster yet another example of a corporation sacrificing the lives and fortunes of others out of greed. Soon, government and civilian investigators focused on the relationship between the size of Sekuritek's security contract with Bigle Chemical and (1) Sekuritek's abbreviated training procedures, (2) Sekuritek's inadvisable purchase of the SUVs, and (3) Sekuritek's installation of a security wall that prevented an effective emergency response. All involved in the investigation concluded that Millstone failed to adequately conduct a thorough training seminar and that he failed to adequately supervise his employees. Soon the media clamored for criminal charges against Millstone and Reynolds, as the heads of Sekuritek.

As public outcry intensified, Millstone scheduled a meeting with Reynolds to determine the proper course of action regarding the government investigation and possible criminal charges. Reynolds told Millstone that he leaned towards getting it over with and telling the government agents everything. Angrily, Millstone scolded Reynolds stating:

Tell them everything? Are you crazy? Look, they're talking about treating us like criminals here. I'm not going to jail, Reese. It's time to just shut up about everything. The feds can't do anything if we don't talk. If they start talking to you, just tell them you plead the Fifth and shut up. And don't even think about pinning all this on me. Remember, they're looking at your stupid gas-guzzlers, too.

⁸ It is unclear whether Atlas read the Sekuritek handbook prior to the Windy River incident.

Ultimately, the United States brought charges against Millstone for the negligent discharge of pollutants in violation of the CWA, 33 U.S.C. § 1319(c)(1)(A).⁹ The United States based its charges on the theory that Millstone negligently hired, trained and supervised security personnel, and negligently failed to adequately inspect the SUVs prior to purchase and use. According to the United States, Millstone's negligence caused the chemical spill. The United States also brought charges against Millstone for witness tampering under 18 U.S.C. § 1512(b)(3).¹⁰

Following Millstone's trial, the jury found Millstone guilty of both a negligent violation of the CWA and witness tampering. The district court denied Millstone's motion for new trial, and this appeal followed.

The focus of this appeal relates to two separate issues. First, Millstone argues the district court improperly instructed the jury regarding the appropriate standard for a conviction under the CWA. Specifically, Millstone objected to the following instruction to the jury:

The government must prove beyond a reasonable doubt that the discharge of pollutants was the result of Millstone's negligence. "Negligence" means the failure to exercise the standard of care that a reasonably prudent person would have exercised in the same situation.

Second, Millstone appeals the district court's denial of his Motion for Acquittal on the witness-tampering charges. Millstone argues that a defendant cannot be found guilty of corruptly persuading a person to withhold information from the government merely by encouraging that person to exercise a right or privilege to do so.

⁹ The United States granted Reynolds immunity in exchange for his testimony.

¹⁰ The government added this charge when Reynolds relayed the details of Millstone's outburst regarding refusal to speak to government investigators.

II. DISCUSSION

A. Negligence and the Clean Water Act

The CWA provides that “the discharge of any pollutant by any person shall be unlawful,” with the exception of certain discharges in compliance with permits. 33 U.S.C. § 1311(a). The CWA further provides that anyone who “negligently violates section 1311 . . . shall be punished by a fine of not less than \$2,500 nor more than \$25,000 per day of violation, or by imprisonment for not more than 1 year, or by both.” 33 U.S.C. § 1319(c)(1)(A). The term “negligently” is not defined in the statute. Millstone contends that “negligently,” in the context of section 1319(c)(1)(A), refers to criminal negligence—*i.e.*, a gross deviation from the standard of care that a reasonable person would observe in the situation—and, thus, the district court erred when instructing the jury that the government merely had to prove that Millstone acted with ordinary negligence to show a violation of the CWA.

The plain language of the CWA does not support such a contention. In applying the principles of statutory interpretation, we refer to the plain language of the statute with the assumption that legislative intent is expressed by the ordinary meaning of words. The ordinary meaning of “negligence” is “the failure to exercise the standard of care that a reasonably prudent person would have exercised in the same situation.” *Black’s Law Dictionary* 434 (1996). Thus, applying the plain language of the CWA, a person violates the statute if he fails to exercise the standard of care a reasonably prudent person would have exercised in the same situation and, by that failure, causes a discharge of a pollutant.

Had Congress intended the standard in section 1319(c)(1)(A) to be something other than ordinary negligence, Congress could have expressly used another term, as it did in the civil portion of the statute. *See* 33 U.S.C. § 1321(b)(7)(D) (using the terms “gross negligence or willful misconduct”). Where Congress includes particular language in one section of a statute,

but omits it in another section of the same act, it is presumed that Congress acts intentionally and purposely. *Russello v. United States*, 464 U.S. 16, 23 (1983). Therefore, we hold that the term “negligently,” as set forth in section 1319(c)(1)(A), means ordinary negligence—that is, failure to exercise reasonable care.

Millstone argues that such a reading of the statute would violate due process. We disagree. The CWA is a public welfare statute. *United States v. Weitzenhoff*, 35 F.3d 1275, 1286 (9th Cir. 1993). Courts have described public welfare statutes as a type of legislation whereby penalties serve as effective means of regulation, and find that “[s]uch legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing.” *Staples v. United States*, 511 U.S. 600, 606-607 (1994). Public welfare statutes typically regulate potentially harmful or injurious items. *Id.* at 607; see *United States v. Int’l Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971) (“dangerous or deleterious devices or products”). The CWA’s regulation of dangerous pollutants is in keeping with the nature of public welfare statutes as its purpose is to protect the public from the consequences of water pollution.

It is well established that under a public welfare statute a person can be criminally liable for ordinary negligence without violating due process. See *United States v. Hanousek*, 176 F.3d 1116, 1121 (9th Cir. 1999), *cert. denied*, 528 U.S. 1102 (2000). The reasoning is simple: It is not improper to subject a person to in the best position to prevent the kind of harm envisioned by the statute to criminal penalties. “[W]here one deals with others and his mere negligence may be dangerous to them . . . the policy of the law may, in order to stimulate proper care, require the punishment of the negligent person.” *United States v. Balint*, 258 U.S. 250, 252-53 (1922).

Courts have consistently found that allowing a CWA conviction under an ordinary negligence standard does not violate a defendant’s due process. In *United States v. Hanousek*,

176 F.3d 1116 (9th Cir. 1999), *cert. denied*, 528 U.S. 1102 (2000), defendant Hanousek was a supervisor for a company working near a railroad track. Hanousek’s job required him to be responsible for safety and maintenance at the project site. *Id.* at 1119. One evening, a backhoe operator at the site was moving rocks and struck a heating oil pipeline, spilling heating oil into a nearby river. *Id.* Hanousek, as supervisor, was charged with negligently discharging oil in violation of the CWA. *Id.* The district court instructed the jury that the government had to prove “failure to use reasonable care.” *Id.* at 1120. Applying the ordinary negligence standard, the jury convicted Hanousek. *Id.* On appeal, the Ninth Circuit upheld Hanousek’s conviction using similar reasoning to this Court’s, concluding that Congress intended that the CWA impose criminal penalties for ordinary negligence and that given the CWA’s status as a public welfare statute, such a standard did not violate a defendant’s due process. *Id.* at 1121-22. The Tenth Circuit reached the same conclusion in *United States v. Ortiz*, 427 F.3d 1278 (10th Cir. 2005).

In this case, Millstone was convicted of negligently discharging a pollutant in violation of the CWA following the district court’s instruction to the jury to apply a standard of ordinary negligence. The court below did not err in its instruction to the jury.

B. Witness Tampering

Millstone next argues that a person cannot “corruptly” persuade another in violation of the federal witness-tampering statute when he encourages the other to withhold information the other has a right or privilege to withhold. The relevant portion of the statute reads:

Whoever knowingly . . . corruptly persuades another person, or attempts to do so . . . with the intent to . . . hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense . . . shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1512(b)(3).

The circuit courts are split on the meaning of the term “corruptly” in the context of section 1512(b). The Second Circuit interprets “corruptly” in light of similar language in the general obstruction of justice statute, 18 U.S.C. § 1503, which establishes penalties for anyone who “corruptly, or by threats of force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede” certain persons in the discharge of their duties. *United States v. Thompson*, 76 F.3d 442, 452 (2d Cir. 1996). The Second Circuit holds that “corruptly” has the same meaning in both section 1503 and section 1512(b): “motivated by an improper purpose.” *Id.* The Eleventh Circuit, following the Second Circuit’s reasoning in *Thompson*, also held the use of the term “corruptly” in section 1512(b) to mean “motivated by an improper purpose.” *United States v. Shotts*, 145 F.3d 1289, 1301 (11th Cir. 1998).

However, the Third Circuit held that the phrase “does not include a noncoercive attempt to persuade a coconspirator who enjoys a Fifth Amendment right not to disclose self-incriminating information about the conspiracy to refrain, in accordance with that right, from volunteering information to investigators.” *United States v. Farrell*, 126 F.3d 484, 488 (3d Cir. 1997). The Third Circuit disagreed with the *Thompson* court’s use of section 1503 to justify its interpretation, pointing out that in section 1503, the word “corruptly” provides the intent element of the statute, whereas in section 1512(b) the intent element is provided by the term “knowingly.” The court reasoned that reading “corruptly” as it has been interpreted in section 1503 would render the word surplusage in section 1512(b). *Id.* at 490.

We find the reasoning of the Second and Eleventh Circuits persuasive, and hold that a defendant acts “corruptly” when he is motivated by an improper purpose, including the purpose of preventing a coconspirator from implicating him. As the Second Circuit recently noted, “a jury could conclude that [defendant] indeed had an improper purpose in ‘suggesting’ to

[coconspirator] . . . to plead the Fifth Amendment: [defendant] wanted to ensure that [coconspirator] did not implicate him.” *United States v. Gotti*, 459 F.3d 296, 342-43 (2d Cir. 2006).

The dissent cites the Supreme Court decision in *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005) as support for Millstone’s argument that “corruptly” must mean something other than “motivated by an improper purpose.” We find this argument unpersuasive. In *Arthur Andersen*, the Court examined the language of section 1512(b), specifically the element of “knowingly” in combination with the phrase “corruptly persuades,” and concluded that the statute requires some consciousness of wrongdoing on the part of the defendant. *Id.* at 706. However, courts since *Arthur Andersen* have continued to hold that “corruptly” means “motivated by an improper purpose,” and that the improper purpose provides the consciousness of wrongdoing described in *Arthur Andersen*. See *United States v. Kaplan*, 490 F.3d 110, 126 (2d Cir. 2007); *Gotti*, 459 F.3d at 342-43.

In the present case, the jury heard testimony that Millstone told Reynolds, “The feds can’t do anything if we don’t talk. If they start talking to you, just tell them you plead the Fifth and shut up.” From this, the jury as factfinder could properly conclude that Millstone encouraged Reynolds to withhold information, and that his purpose was to prevent Reynolds from implicating him in any wrongdoing. Accordingly, the district court did not err in denying Millstone’s Motion for Acquittal.

III. CONCLUSION

The judgment of the district court is AFFIRMED.

Newman, Circuit Judge, dissenting:

For the reasons discussed below, I respectfully dissent.

I. DISCUSSION

A. The Clean Water Act

The majority, relying largely on the reasoning of the Ninth Circuit in *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999), *cert. denied*, 528 U.S. 1102 (2000), holds that the term “negligently” in 33 U.S.C. § 1319(c)(1)(A) refers to the ordinary standard of care appropriate for civil cases, not criminal cases. The majority provides no reason as to why it would look to the plain language of a *criminal* statute, and apply a *civil* standard. The majority supports its interpretation by looking to section 1321(b)(7)(D), reasoning that because Congress uses the term “gross negligence” in that part of the CWA, the term “negligently” in section 1319(c)(1)(A) must have been intended to mean ordinary negligence. But section 1321(b)(7)(D) provides only for civil penalties, and we should not look to the *civil* side of a statute when interpreting the *criminal* side. *See Safeco Ins. Co. v. Burr*, 551 U.S. 47, 60 (2007) (“[t]he vocabulary of the criminal side of [a statute] is . . . beside the point in construing the civil side”); *see also United States v. Atlantic States Cast Iron Pipe Co.*, No. 03-852 (MLC), 2007 WL 2282514, at n.17 (D.N.J. 2007) (“type of reasoning [used in *Hanousek*] was explicitly rejected in . . . *Safeco Ins. Co. v. Burr* . . . We believe there is good reason to scrutinize carefully that aspect of *Hanousek*, rather than accepting it as controlling”).

The majority brushes aside Millstone’s argument that such a reading of the CWA violates due process by contending that the CWA is a public welfare statute. However, circuit courts finding the CWA to be a public welfare statute construed the public welfare doctrine too broadly. In the dissent from denial of certiorari in the *Hanousek* decision, Justice Thomas, joined by Justice O’Connor, argued that in interpreting the CWA, “it is erroneous to rely, even in small

part, on the notion that the CWA is a public welfare statute.” *Hanousek v. United States*, 528 U.S. 1102, 1102 (2000) (Thomas, J., dissenting from denial of certiorari). In determining whether a statute is a public welfare statute, Justice Thomas noted, courts have looked to whether the statute regulates “some category of dangerous and deleterious devices that will be assumed to alert an individual that he stands in ‘responsible relation to a public danger.’” *Id.* (quoting *Staples v. United States*, 511 U.S. 600, 613 n.6 (1994)). The CWA, while regulating dangerous substances, also imposes criminal liability on persons using standard equipment to engage in a broad range of ordinary industrial activities. Justice Thomas concluded that “[t]his fact strongly militates against concluding that the public welfare doctrine applies.” *Id.* Justice Thomas noted that because of the near strict liability that the public welfare doctrine imposes, courts have traditionally only applied it when the criminal penalties were relatively small. *Id.* The CWA’s penalties include a prison sentence of up to one year for the first negligent violation, and a prison sentence of up to two years for a second violation. *Id.* Knowing violations carry even stiffer penalties. *Id.* This, Justice Thomas argues, suggests that the CWA should not be construed as a public welfare statute. *Id.* Justice Thomas’ position is supported by the Fifth Circuit. *See U.S. v. Ahmad*, 101 F.3d 386, 391 (5th Cir. 1996) (holding that knowing violation of CWA is not public welfare offense).

Here, neither Millstone nor his company handle dangerous regulated chemicals. Millstone and his employees do not work with industrial equipment or engage in manufacturing, construction, or other industrial activities that may clue them in to the regulated nature of their activities or the standard of care they must meet to avoid criminal liability under the CWA. Based on its holding today, the majority would have this Court convict even a visitor to Bigle Chemical’s plant who negligently forgot to tie his shoes, fell and tripped a switch that discharged

chemicals into surrounding waterways of a negligent violation of the CWA. We should take care to avoid construing criminal statutes in a way that would criminalize a broad range of apparently innocent conduct, which is an admonition from the Supreme Court itself. *See Staples v. United States*, 511 U.S. 600, 610 (1994). As previously recognized, we cannot justify “more aggressive overcriminalization without a plain statutory command.” *United States v. Weitzenhoff*, 35 F.3d 1275, 1296 (9th Cir. 1993) (Kleinfeld, J., dissenting). I do not, then, believe we can conclude from Congress’ use of language in the civil portion of the CWA or from the CWA’s dubious status as a public welfare statute that the negligence referred to in section 1319(c)(1)(A) is ordinary civil negligence, or that such an interpretation does not offend due process.

By and through a new trial, the government may be able to prove that the actions of Millstone were criminally negligent. But because the district court’s instructions to the jury allowed them to convict on an ordinary negligence standard, the conviction on the CWA violation should be reversed.

B. Witness Tampering

The majority then turns to Millstone’s appeal from the denial of his Motion for Acquittal on the witness-tampering charge. After examining 18 U.S.C. § 1512(b)(3) and the relevant case law, the majority concludes the word “corruptly” to mean “motivated by an improper purpose.” This holding flies in the face of both Supreme Court precedent and common sense.

As the majority notes, the circuit courts are currently split on the meaning of the term “corruptly” in section 1512(b). The Second and Eleventh Circuits, both basing their reasoning on the presence of similar language in section 1503, hold the term “corruptly” to mean “motivated by an improper purpose.” *United States v. Shotts*, 145 F.3d 1289, 1301 (11th Cir. 1998); *United States v. Thompson*, 76 F.3d 442, 452 (2d Cir. 1996). However, as the Third Circuit states in *United States v. Farrell*, 126 F.3d 484, 488 (3d Cir. 1997), the term “corruptly” must mean

something more. The *Farrell* court noted that the inclusion of the word “corruptly” with “persuades” implies that it is possible to persuade someone to withhold information with the intent of hindering an investigation without violating the statute, and therefore more culpability is required than merely attempting to discourage disclosure. *Id.* at 489. Furthermore, the court distinguished section 1512(b) from section 1503, finding that in section 1503, the word “corruptly” provides the intent element of the statute. *Id.* However, section 1512(b) has the intent elements of “knowingly” and “with the intent to . . . hinder, delay, or prevent communication.” 18 U.S.C. § 1512(b)(3). Therefore, the *Farrell* court correctly noted that reading “corruptly” as “motivated by an improper purpose” in 1512(b) would render the word surplusage. *Farrell*, 126 F.3d at 490. The court concluded that section 1512(b) would certainly criminalize behavior such as bribing someone to withhold information or persuading someone to provide false information, but that “corruptly persuades” does not include “a noncoercive attempt to persuade a coconspirator who enjoys a Fifth Amendment right not to disclose self-incriminating information about the conspiracy to refrain, in accordance with that right, from volunteering information to investigators.” *Id.* at 488.

The reasoning of the Third Circuit in *Farrell* is strongly echoed by the Supreme Court in *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005). In *Arthur Andersen*, Chief Justice Rehnquist, writing for a unanimous court, examined section 1512(b) and the circuit split that had arisen around it. Much like the majority in this case, the government in *Arthur Andersen* relied upon section 1503’s use of the word “corruptly” to argue that the term in section 1512(b) must mean the same thing, *i.e.*, “motivated by an improper purpose.” The Court, however, noted that section 1503 does not contain the modifier “knowingly” as does section 1512(b), making any analogy to the former section inexact. *Id.* at 705 n.9. Based on the intent element of “knowingly”

included in section 1512(b), the Court concluded that to convict under section 1512(b), the government needed to prove the defendant was “conscious of wrongdoing.” *Id.* at 706. The Court also noted that the word “corruptly” must mean something, because persuading someone to withhold information from the government is not inherently malign. *Id.* at 703-704. Of particular interest to this case, the Court gave examples of behavior that is not inherently malign, including “a mother who suggests to her son that he invoke his right against compelled self-incrimination . . . or a wife who persuades her husband not to disclose marital confidences.” *Id.* at 704. Plainly, the Court recognized situations wherein the person being persuaded to withhold information had a right or privilege not to disclose.

Since the *Arthur Andersen* decision, the Ninth Circuit has sided with the Third Circuit’s interpretation of the statute. In *United States v. Doss*, 630 F.3d 1181 (9th Cir. 2011), the court examined the statute and the history of the circuit split, as well as the *Arthur Andersen* decision. Following the reasoning of the Third Circuit in *Farrell* and the Supreme Court’s holding that “corruptly” requires consciousness of wrongdoing, the court held that “corruptly” must mean something more than simply “motivated by an improper purpose,” and that merely asking someone to withhold testimony that may be properly withheld under a privilege is not acting with consciousness of wrongdoing “absent some *other* wrongful conduct, such as coercion, intimidation, bribery, suborning perjury, etc.” *Id.* at 1190.

I believe we should adopt the reasoning of the Third and Ninth Circuits as supported by the Supreme Court. The Second Circuit nonsensically reads “corruptly” in section 1512(b) to mean “motivated by an improper purpose” while defining “improper purpose” to include a defendant’s desire to prevent a coconspirator from communicating with the government so the defendant is not implicated. *See United States v. Gotti*, 459 F.3d 296, 342-43 (2d Cir. 2006). But,

the statute already includes the element of intent to hinder, delay, or prevent communication to a law enforcement official. Thus, as the *Farrell* court noted, the Second Circuit's interpretation makes "corruptly" surplusage. *Farrell*, 126 F.3d, at 409. The Second Circuit's interpretation would have the statute read: Whoever knowingly . . . *with the improper purpose of hindering, delaying, or preventing communication to a law enforcement officer*, persuades another person . . . *with the intent to . . . hinder, delay, or prevent communication to a law enforcement officer . . .* shall be fined under this title or imprisoned not more than 20 years, or both. This cannot be the proper reading of section 1512(b), yet it is the one the majority unfortunately adopts.

In this case, Millstone's angry outburst to Reynolds simply encouraged Reynolds to exercise his Fifth Amendment right to refuse to incriminate himself. There is no evidence that Millstone attempted to bribe Reynolds to do so, or encouraged Reynolds to lie. Thus, under a proper reading of section 1512(b), there was no evidence that Millstone corruptly persuaded Reynolds to withhold information. The court below erred in denying Millstone's Motion for Acquittal.

II. CONCLUSION

The judgment of the trial court should be reversed and remanded for a new trial on the CWA count, and the conviction reversed on the witness tampering count.