No. C11-0116-1

IN THE

Supreme Court of the United States

SAMUEL MILLSTONE,
Petitioner,

vs.

UNITED STATES of AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

BRIEF FOR PETITIONER

MCNC Brief 33
Counsel for Petitioner

QUESTIONS PRESENTED

I.A. Negligently discharging pollutants in violation of the Clean Water Act, 33 U.S.C. § 1319(c)(1)(A), is a criminal act. The government convicted and plans to incarcerate Samuel Millstone, the Petitioner, using the civil definition of simple negligence rather than the more burdensome criminal definition of gross negligence. This would deprive Mr. Millstone of his freedom without a finding criminal culpability. Is this a violation of Mr. Millstone's due process rights?

I.B. The public welfare doctrine applies to statutes which regulate individuals who have control over items that may pose a danger to the public. Penalties associated with the public welfare doctrine are relatively slight because public welfare statutes eliminate the criminal *mens rea* requirement. Mr. Millstone is facing the severe penalty of incarceration even though, as the CEO of Sekuritek, he was never in control of the regulated chemicals. Is applying the public welfare doctrine to the Clean Water Act, and in turn Mr. Millstone, inappropriate?

II. Corruptly persuading a witness to withhold information from the government in violation of the witness-tampering statute, 18 U.S.C. § 1512(b)(3), is a criminal act. "Corruptly" is typically associated with evil, depraved, or immoral conduct. The government convicted Mr. Millstone of witness tampering for merely encouraging his business partner to invoke his Fifth Amendment right against self-incrimination. Does "corruptly" persuading a witness require more than simply encouraging a potential witness to invoke a pre-existing legal privilege?

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The opinion for the United States Court of Appeals for the Fourteenth Circuit in *Samuel Millstone v. United States of America*, No. 11-1174 (14th Cir. 2011) is found in the record beginning at page three and is currently unreported. The United States Supreme Court granted certiorari on October 17, 2011.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fourteenth Circuit was entered on October 3, 2011. The petition for a writ of certiorari was filed on October 5, 2011. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portions of the Fifth Amendment of the United States Constitution provide, "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law…" U.S. Const. amend. V. (emphasis added). The full text of the Fifth Amendment is set forth in the Appendix.

The relevant portions of the Clean Water Act—including the text of § 1319(c)(1)(A)—are also located in the Appendix.

The text of the Federal Witness Tampering Act 18 U.S.C. § 1512(b)(3) is also included in the Appendix.

STATEMENT OF THE CASE

Samuel Millstone's Community

Samuel Millstone ("Sam") was raised in Polis, New Tejas. *See* R. at 4. Polis is Sam's home. He graduated from high school in Polis, he began his career in Polis, and he eventually started his own company in Polis. R. at 4. Polis gave Sam everything, which is why he spent his whole life protecting and serving it. *See* R. at 4. After high school graduation, Sam became a police officer and served Polis in this capacity for over a decade. R. at 4. After ten years as a law enforcement officer, Sam wanted to do more, both for himself and for Polis, so he enrolled in night classes at the University of New Tejas and worked toward a degree in business. R. at 4. Upon receiving his business degree, Sam left the police force to manage a small chain of local retail stores. R. at 4.

Like most Americans, Sam dreamed of becoming his own boss, so five years into this new career Sam returned to the University of New Tejas and worked towards an M.B.A. degree. *See* R. at 4. In 2003, before he received his M.B.A., Sam became unemployed due to layoffs at his company caused by a corporate merger. R. at 4. This setback motivated Sam to combine all of his life experiences and start his own business in Polis. R. at 4.

Securing Polis with Sekuritek

While unemployed, Sam reached out to his classmate, Reese Reynolds, with the idea of creating a business. R. at 4. Together, the two developed the idea for Sekuritek—a state-of-the-art security company that deployed security personnel

with the latest technology. R. at 4. By 2004, Sekuritek was up and running. R. at 4. Sam took on the role of President and CEO, responsible for the hiring and training of security personnel, supervising security at client locations, and consulting with clients to determine their security needs. R. at 4. Reynolds became Vice President of Sekuritek and was responsible for marketing, sales, and all equipment purchases. R. at 4. Their venture was an immediate success; less than one year after opening, Sekuritek had already earned an amazing reputation as a premier security company. R. at 4. This was due, in no small part, to Sam and Reynolds' teamwork, as their combined skills helped them secure contracts throughout Polis. R. at 4. In fact, by 2005, Sekuritek's revenues were already over $2 million. R. at 4.

Polis, Bigle Chemical, and the Windy River

In 2006, the city of Polis allowed Bigle Chemical Company—which had a history of chemical spills—to relocate its headquarters to Polis. R. at 5. Bigle's CEO, Drayton Wesley, blamed its previous spills on poor security and vowed to put an end to the "shenanigans." R. at 5. Bigle opened the company's largest chemical manufacturing plant, a 270-acre facility, in southern Polis near the Windy River. R. at 5. Having heard of Sekuritek's sterling reputation, Mr. Wesley reached out to Sam on November 5, 2006 to discuss whether Sekuritek would manage security at the new facility. R. at 5.

Sam consulted with his business partner, Reynolds, about the size and scope of the Bigle contract. R. at 5. The contract was worth $8.5 million over a ten-year

period and would allow Sekuritek to hire 37 additional members of the Polis community. R. at 5. Bigle needed security to be ready to go on December 1, 2006. R. at 5. Therefore, it would require Sam and Reynolds to do a lot of work in a short amount of time to meet Bigle's needs. R. at 6. Sam immediately began developing a plan to do just that. R. at 6. After reviewing Sam's plan, Reynolds approved it and on November 16, 2006, Sekuritek entered into a security contract with Bigle Chemical Company. R. at 6.

Reynolds' New Sekuritek SUV Fleet

Shortly after Thanksgiving in 2006, Sekuritek was managing Bigle's security needs at the Windy River site. R. at 6. For the first two months Sekuritek exceeded Bigle's security needs and expectations. R. at 7. There were no security breaches at the complex and Sam made it a point to visit the facility often to ensure Bigle's satisfaction. R. at 7.

In order to properly patrol the 270-acre facility, Reynolds purchased a new fleet of sport-utility vehicles ("SUV") for Sekuritek personnel at the site. R. at 6. Reynolds made the decision to only solicit bids for the fleet of SUVs from new up-and-coming companies, similar to Sekuritek. R. at 6. Reynolds performed a superficial review of the potential vendors, and went with the only one—a relatively unproven company—that could deliver the required vehicles before the New Year. R. at 6. As it turned out, the vendor Reynolds chose had a reputation for "shoddy workmanship." R. at 9. This decision, made by Reynolds, eventually led to the worst environmental disaster in New Tejas' history. *See* R. at 7.

On January 27, 2007 one of Sekuritek's guards, while on his normal patrol, saw a possible intruder near some storage tanks at the facility. R. at 7. In response, the guard put the gas pedal to the floor of his SUV and sped towards the storage tank to investigate. R. at 7. In doing so, the guard ignored both the training Sam provided and disregarded the Sekuritek Employee Handbook which clearly states that: personnel must leave their vehicle in a stopped and secure position upon arriving within 100 yards of any apparent emergency and proceed by foot to investigate further. R. at 7-8. The gas pedal in the SUV stuck to the floor, which wildly accelerated the SUV, causing the guard to lose control of the vehicle. R. at 7. The guard leapt from the SUV moments before it crashed into the storage tank causing a massive explosion that created an ensuing fire. R. at 7. The fire quickly spread to other units on the site creating a chain of explosions. R. at 7. As a result, thousands of barrels of chemicals contained in storage tanks at the Bigle facility spilled into the Windy River. R. at 7.

Finding Someone to Blame

Shortly after the disaster, Bigle Chemical Company abandoned Polis and relocated its headquarters back to the Republic of China. R. at 8. This placed all of Bigle's officers, employees, assets, and holdings outside the jurisdiction of the United States; Bigle essentially became untouchable. R. at 8. The disaster wreaked havoc on the Polis and New Tejas environment and economy. R. at 7. Practically everything five miles downriver of the Bigle Chemical facility was destroyed; from farmland to fishing grounds, even boats and commercial vessels in

the water were destroyed as the corrosive chemicals ate through the hulls of the ships. R. at 8. The total damage has been estimated at $1.25 billion.

With no one else to hold accountable, the local media focused its attention on Sam and Reynolds, as the leaders of Sekuritek. *See* R. at 9. The media demanded the government press criminal charges against them, claiming that the inadequate training of security personnel, the inadvisable purchasing of shoddy SUVs, and the installation of a security wall—which slowed the emergency response—were the causes of the accident. *See* R. at 9. As this media narrative intensified, Sam scheduled a meeting with Reynolds to discuss the situation. R. at 9. From his past experience as a law enforcement officer Sam knew that both he and Reynolds had the right against self-incrimination and could remain silent when questioned by investigators. *See* R. at 1, 9. Sam knew the government had to hold somebody accountable due to the public outcry and understood that Sekuritek would be the easiest scapegoat for investigators. *See* R. at 9. When Reynolds told Sam he was thinking about speaking with government investigators, Sam was shocked and—in an extremely emotional outburst—he attempted to encourage Reynolds to invoke his right to remain silent. *See* R. at 9.

The United States granted Reynolds full immunity in exchange for his testimony and eventually charged Sam for the negligent discharge of pollutants in violation of the Clean Water Act, 33 U.S.C. § 1319(c)(1)(A). R. at 10. The government based this charge on the theory that Sam negligently hired, trained, and supervised the security guards at the Bigle Chemical complex and that he

failed to properly inspect the SUV fleet prior to their purchase and operation. R. at 10. The government also charged Sam with attempted witness tampering under 18 U.S.C. § 1512(b)(3) for encouraging Reynolds to remain silent if confronted by investigators. R. at 10.

Sam was convicted of both charges after a jury trial. R. at 10. Sam's motion to the district court for a new trial was denied so he appealed his conviction to the United States Court of Appeals for the Fourteenth Circuit. R. at 10. His appeal to the Fourteenth Circuit presented two distinct issues: first, Sam objected to the jury instruction from his criminal trial that defined negligence as civil negligence; second, Sam argued that simply encouraging his business partner, Reynolds, to exercise his right to remain silent could not amount to corrupt persuasion. R. at 10. The Fourteenth Circuit, by a 2-1 decision, upheld Sam's conviction on both counts. R. at 15. Samuel Millstone now asks this Court to reverse the lower court's holding on both counts.

SUMMARY OF THE ARGUMENT

This Court should reverse the lower court's decision because it made two major errors when it upheld Mr. Millstone's conviction. First, the lower court erred by failing to recognize that "negligently" in the criminal portion of the CWA must be defined as "criminal negligence." Second, the lower court incorrectly allowed "corruptly" in the federal witness tampering statute to become surplus language, rendering it meaningless. In order to protect Mr. Millstone's due process rights as

well as the pre-existing legal privileges recognized by the judiciary, this Court should overturn the lower court's decision.

First, without express language from Congress to the contrary, the word "negligently" in a criminal statute must refer to criminal negligence. The lower court ignored the plain meaning of "negligently" in the criminal context when it conducted a cursory statutory analysis of the CWA. It relied on the flawed reasoning of the Ninth Circuit in *United States v. Hanousek* when it applied the meaning of a word from the civil side of the statute onto the meaning of the same word in the criminal side of the statute. That application ignored this Court's recent analysis in *Safeco Ins. Co. of Am. v. Burr*. In that case, this Court noted that the meaning of words in the criminal side of a statute could not be used to determine the meaning of words on the civil side of the same statute.

In addition, the lower court overlooked the history and purpose of the public welfare doctrine when it labeled the CWA a public welfare statute. In doing so, the lower court skirted the due process violation it created by defining "negligently" as civil negligence, which would allow the government to incarcerate an individual without proving any criminal culpability. Public welfare statutes dispense with the traditional requirement of *mens rea* when dealing with regulated items that are potentially harmful or dangerous. However, this Court does not allow the public welfare doctrine to apply to statutes that include incarceration as a penalty, especially if the item being regulated has a tradition of lawful usage. The CWA calls for penalties up to one year for the first violation and two years for a

subsequent violation. Furthermore, the item regulated in this case consisted of lawful chemicals, which have a significant commercial purpose. Therefore, this Court should maintain its precedent by reaffirming the narrowness of the public welfare doctrine. As such, Congress must be explicit if it wishes to eliminate the *mens rea* requirement when severe penalties are attached to criminal violations.

Second, the lower court erred by defining the term "corruptly" in the federal witness tampering statute to mean "motivated by an improper purpose" as opposed to "inherently malign." This reading fails to follow basic statutory interpretation principles and creates surplus language within the statute, for two reasons. First, "corruptly" is a word that is normally associated with conduct that is evil, depraved, and immoral. Therefore, corrupt persuasion must be something more than simply asking or encouraging a colleague to invoke his or her pre-existing legal privilege, such as the right to remain silent. In addition, the legislative history of the witness tampering statute suggests that Congress only intended to include a limited amount of persuasive conduct, such as offering financial rewards in exchange for silence, when it added the phrase "corruptly persuades." Accordingly, the application of "inherently malign" to the phrase provides an appropriate limit on the types of conduct which constitute a criminal violation. Second, under the guidance of this Court, it is improper to transplant the meaning of a word from one criminal statute to another criminal statute when the statutes at issue have different elements of intent.

Thus, the lower court's holding must be overturned.

ARGUMENT

I. FINDING A CRIMINAL DEFENDANT GUILTY OF "NEGLIGENCE" USING THE CIVIL LAW STANDARD IS A VIOLATION OF DUE PROCESS.

The concept of guilt is crucial to the administration of justice, which is why in criminal law courts seek to protect those who are "not blameworthy *in mind* from conviction." *Morissette v. United States*, 342 U.S. 246, 252 (1952) (emphasis added). In order for wrongdoing to be criminal, the conduct must be conscious. *Id.* Because criminal consciousness or *mens rea* is so fundamental to criminal law, criminal offenses requiring no *mens rea* have a generally disfavored status in our criminal justice system. *United States v. United States Gypsum Co.*, 438 U.S. 422, 438 (1978).

The Clean Water Act ("CWA") is one of only two federal environmental laws that include the term "negligently" in its criminal provisions. 33 U.S.C. § 1319(c)(1)(A); *see also* 42 U.S.C. § 7413(c)(4). However, Congress did not define the term "negligently" in either of these statutes. *See* 33 U.S.C. § 1319(c)(1)(A); 42 U.S.C. § 7413(c)(4). As a result, this Court is called upon to interpret the meaning of the word. *See BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004). The lower court erred by interpreting "negligently" in the criminal portion of the CWA to mean civil or simple negligence. *See* R. at 11-13. The lower court only performed a cursory analysis of the statutory language and then brushed aside the possible due process violation it created by holding that the CWA is a public welfare statute. *See* R. at 11-13.

As the Petitioner ("Mr. Millstone") will demonstrate, these actions were in error for two reasons. First, a proper statutory interpretation of 33 U.S.C. § 1319(c)(1)(A) ("1319") of the CWA requires the term "negligently" to mean criminal negligence. Second, the CWA is not a public welfare statute, because its criminal penalties are too severe, and even if the CWA is a public welfare statute, strict liability cannot be applied to Mr. Millstone because he was never in control of any dangerous item. As a result, this Court should reverse the decision of the lower court.

A. Under Proper Statutory Interpretation Principles "Negligently" In Section 1319 Of The CWA Means Criminal Negligence.

While the term "negligently" is not specifically defined in 1319 of the CWA, there are two important reasons why this Court should interpret it to mean criminal negligence. First, there are basic historical and common law differences between civil and criminal negligence, which demonstrate that the plain meaning of "negligently" in a criminal statute must mean criminal negligence. *See Black's Law Dictionary*, 1133-1135 (9th ed. 2009); § 2.02. General Requirements of Culpability., Model Penal Code § 2.02. Second, if the plain meaning is ambiguous, the canons of statutory interpretation used by this Court support an interpretation of "negligently" as gross or criminal negligence. *See United States v. Santos*, 553 U.S. 507, 514 (2008); *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 378 (2006); *Clark v. Martinez*, 543 U.S. 371, 385 (2005). By upholding the conviction of Mr. Millstone for criminal negligence under the civil standard, the lower court

allowed the government to circumvent the fundamental differences that exist between criminal and civil law. *See* R. at 11-13.

1. As 1319 is a criminal statute, the plain meaning of "negligently" is criminal negligence.

When there is ambiguity about a word in a statute, this Court engages in statutory interpretation. *See BedRoc*, 541 U.S. at 183. This interpretation typically begins by looking at the plain meaning of the word in the text. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992). In order to determine the plain meaning of "negligently" in the CWA, this Court should explore the definitional and historical differences between criminal and civil negligence to understand how and why they are used differently by the judiciary.

The lower court failed to appropriately recognize the material differences between criminal (or gross) negligence and civil (or simple) negligence when it upheld Mr. Millstone's criminal conviction using the civil definition of negligence. *See* R. at 11-13; *Black's Law Dictionary*, 1133-1135 (9th ed. 2009); § 2.02. General Requirements of Culpability, Model Penal Code § 2.02. The level of negligence leading to criminal liability under the lower court's interpretation is distinct from the level required for all other criminal statutes. *See* R. at 11-13; *Black's Law Dictionary*, 1133-1135 (9th ed. 2009); § 2.02. General Requirements of Culpability, Model Penal Code § 2.02.

Criminal and civil negligence have distinct definitions because they require different degrees of awareness or inattention. *See Deviner v. Electrolux Motor AB*,

844 F.2d 769, 772 (11th Cir. 1988); *Alspaugh v. Diggs*, 77 S.E.2d 362, 364 (Va. 1953); *Hastings v. Flaherty*, 73 N.E. 2d 601, 603 (Mass. 1946). Civil negligence is defined as "the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation." *Black's Law Dictionary*, 1133-1135 (9th ed. 2009). Criminal negligence, on the other hand, is defined as "gross negligence so extreme that it is punishable as a crime." *Id.* The Model Penal Code ("MPC") supports this definition, stating that "criminal negligence involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation." § 2.02. General Requirements of Culpability, Model Penal Code § 2.02(d). The MPC lists four forms of criminal *mens rea* in descending order of culpability: purpose, knowledge, recklessness, and negligence. *Id.* Thus—unlike civil negligence—an individual commits criminal negligence with a criminal state of mind. *Id.*

In addition, criminal negligence and civil negligence have different goals and applications. *See* § 2.02. General Requirements of Culpability, Model Penal Code § 2.02; Restatement (Second) of Torts § 282 (1965). Historically, civil negligence is a tort. Restatement (Second) of Torts § 282 (1965). The main goal of tort law is to make an injured party whole through financial compensation. *Id.* Conversely, the primary goals of criminal penalties are deterrence and retribution. *See Kansas v. Hendricks*, 521 U.S. 346, 361-362 (1997). As a result of these fundamental differences, courts have consistently held that an individual cannot be found guilty of criminal negligence using the lower standard of civil negligence. *See Lopez v.*

Williams, 59 Fed. Appx. 307, 313 (10th Cir. 2003); *Com. v. O'Hanlon*, 539 Pa. 478, 653 A.2d 616 (1995). Courts hold this way because civil negligence does not allow individuals to gauge their conduct in such a way as to avoid prosecution, which in a criminal setting violates due process. *State v. Hamilton*, 388 So. 2d 561, 563-564 (Fla. 1980).

In *Lopez*, the Tenth Circuit invalidated a child abuse conviction that allowed for criminal prosecution based on proof of civil negligence. 59 Fed. Appx. at 313. The court reasoned that such a standard violated due process because in a criminal setting, a conviction for negligence required culpable conduct. *Id.* Similarly, in *Hamilton*, the Supreme Court of Florida reversed the conviction of a defendant pursuant to a state environmental law which created criminal penalties for negligent conduct. 388 So. 2d at 563-564. There, the Florida court held that the negligence portion of the statute imposed an unconstitutional due process violation upon the defendant, because it criminalized simple negligence. *Id.*

However, in direct contravention of the established requirements of criminal negligence, the lower court in this case eliminated any distinction between criminal and civil negligence. *See Lopez*, 59 Fed. Appx. at 313; *Hamilton*, 388 So. 2d at 563-564; R. at 11. At trial, the judge instructed the jury that negligence is "the failure to exercise the standard of care that a reasonably prudent person would have exercised in the same situation." R. at 10. Therefore, as in *Lopez* and *Hamilton*, Mr. Millstone was convicted of civil negligence in a criminal trial in violation of his

due process rights. *See Lopez*, 59 Fed. Appx. at 313; *Hamilton*, 388 So. 2d at 563-564; R. at 10.

By upholding Mr. Millstone's conviction, the lower court ignores the long recognized fundamental differences between criminal and civil negligence. *See Lopez*, 59 Fed. Appx. at 313; *Hamilton*, 388 So. 2d at 563-564; R. at 11. The government alleged that Mr. Millstone was negligent for inadequately training and supervising his security personnel and for failing to sufficiently inspect a fleet of SUVs purchased by his business partner. R. at 11. Because of the lower court's interpretation, the government did not have to prove that Mr. Millstone acted with criminal negligence. R. at 11. This conviction is inappropriate because the government only had to prove simple civil negligence. *See Lopez*, 59 Fed. Appx. at 313; *Hamilton*, 388 So. 2d at 563-564; R at 10.

If this practice is allowed to continue, there is potentially no limit placed upon the government's ability to use regulatory laws to criminalize otherwise non-criminal behavior. For example, under this standard, the government could incarcerate a boat owner for accidentally polluting a lake due to an unintentional leak of oil or gasoline from the boat's engine; or incarcerate a car owner who unknowingly allowed a cleaning product into a nearby waterway while washing his car. This would allow the government to hold innocent individuals strictly liable and incarcerate them for any accidental violations of the CWA.

To prevent governmental abuse, these types of violations should be handled through administrative channels using the CWA's civil penalties, rather than infringing on the liberty interests of citizens and burdening the criminal justice system. *See* 33 U.S.C. § 1319(b). As history and precedent show, criminal (or gross) negligence is the lowest standard of negligence available to the criminal justice system and therefore the plain meaning of "negligently" in 1319, a criminal statute, must be defined as criminal negligence.

2. "Negligently" in Section 1319 of the CWA means criminal negligence according to well developed canons of statutory interpretation.

If this Court finds that the plain meaning of the term "negligently" in 1319 is ambiguous then the tools and principles of statutory interpretation utilized time and again by this Court support an interpretation of criminal negligence. *See Safeco Ins. Co of America v. Burr*, 551 U.S. 47, 60 (2007); *Clark v. Martinez*, 543 U.S. at 385; *Liparota v. United States*, 471 U.S. 419 (1985). The lower court failed to properly apply the canons of statutory interpretation and erred by holding that "negligently" refers to civil negligence. *See* R. at 11. Below, Petitioner will demonstrate that "negligently" in 1319 must mean criminal negligence by properly applying canons of statutory interpretation.

Statutory interpretation is the process in which courts interpret and resolve the meaning of ambiguous words. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Statutory canons provide guidance to courts throughout this process. *See*

United States v. Monsanto, 491 U.S. 600, 611 (1989). There are three relevant canons that help determine the meaning of "negligently" in the CWA. The first canon, *noscitur a sociis*, is the textual canon which literally translates to "a word is known by the company it keeps." *See S.D. Warren*, 547 U.S. at 378. This canon supports the fact that "negligently" in 1319 should be interpreted to mean criminal negligence because the word is used in the criminal portion of the statute. The second canon, the avoidance canon, supports the interpretation of "negligently" in 1319 as criminal negligence, because such an interpretation avoids constitutional issues involving due process. Finally, at a minimum, the rule of lenity—which interprets ambiguous criminal statutes in favor of the defendant—should compel this Court to resolve any ambiguity regarding the term "negligently" in 1319 in favor of Mr. Millstone.

a. *Noscitur a sociis* suggests that the term "negligently" found in 1319 means criminal negligence, because the term is found in the criminal portion of the CWA.

When a statutory term is ambiguous, this Court may invoke *noscitur a sociis* to define a word within a statute by the words and phrases surrounding it, or in other words "by the company it keeps." *S.D. Warren*, 547 U.S. at 378. This canon recognizes that the criminal terms of a statute only share commonality with the other terms located within that portion of the statute. *See Safeco*, 551 U.S. at 60. The lower court misapplied this textual canon when it held that "negligently" in the civil portion of the statute could be used to interpret the meaning of "negligently" in the criminal portion. *See id.*; R. at 13. Words in the criminal portion of a statute do

not keep company with words in the civil portion of the same statute and therefore those meanings cannot be transposed onto one another. *Safeco*, 551 U.S. at 60; *Reeder v. Bd. of Police Comm'rs of Kansas City Mo.*, 800 S.W.2d 5 (Mo. Ct. App. W.D. 1990).

Recently, in *Safeco*, this Court rejected the notion that the civil and criminal sides of a statute share any commonality of terms. 551 U.S. at 60. There, this Court declined to adopt the view that the criminal meaning of the word "willfully" present in the criminal portion of the federal Fair Debt Collection Practices Act could be adopted to interpret the meaning of "willfully" in the civil portion of that same statute. *Id.* This Court stated that "[t]he vocabulary of the criminal side of a statute is *beside the point* in construing the civil side." *Id.* (emphasis added). Additionally, a Missouri appellate court examined a civil statute and determined that criminal and civil statutes could not be intertwined and must be reviewed in their separate spheres. *See Reeder*, 800 S.W.2d at 6.

Thus, this Court and others recognize that criminal terms of a statute cannot be used to interpret civil terms in a statute and vice versa. *See Safeco*, 551 U.S. at 60; *Reeder*, 800 S.W.2d at 6. Unfortunately, in Mr. Millstone's case, the lower court failed to adhere to this principle. *See* R. at 13. Instead, the lower court reasoned that Congress must have intended the term "negligently" in the criminal section of the CWA to mean something less than "criminal negligence" because the civil side of the statute contained the term "gross negligence." *See* 33 U.S.C. § 1321(b)(7)(D); R.

at 11-12. As discussed above, this completely ignores this Court's reasoning in *Safeco*.

Therefore, Mr. Millstone's criminal conviction goes against the principles recognized in *Safeco* and *Reeder*, as the negligence in this case borrowed the definition from the civil side of the CWA. The lower court clearly misapplied *noscitur a sociis* and as such, under the precedent set by this Court in *Safeco*, the word "negligently" in 1319 must be interpreted as gross or criminal negligence.

b. To avoid constitutional issues of due process, the avoidance canon requires "negligently" to mean criminal negligence.

Courts use the avoidance canon to interpret statutes in a way that avoids raising constitutional problems. *Clark v. Martinez*, 543 U.S. at 385. "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *Jones v. United States*, 529 U.S. 848, 857 (2000), (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.,* 213 U.S. 366, 408 (1909)). As applied to the term "negligently" in 1319, the avoidance canon supports an interpretation of criminal negligence because it avoids the due process concerns that arise from depriving Mr. Millstone of his personal liberty for an act of simple civil negligence.

In *Clark*, this Court applied the avoidance canon to hold that undocumented immigrants could not be indefinitely detained where the statute was ambiguous

about the allowable maximum length of detainment time. 543 U.S. at 371. To avoid constitutional issues created by an interpretation which allowed for indefinite detention, this Court held that there must be a limit to such detention. *Id.* Additionally, in *Jones*, this Court used the avoidance canon to steer clear of a statutory interpretation that would have made arson a federal criminal law, because it would have usurped state authority and created federalism issues. *Jones*, 529 U.S. at 357.

In Mr. Millstone's case, this Court should use the avoidance canon to interpret "negligently" in 1319 of the CWA to mean criminal negligence. Like the statutes in *Clark* and *Jones* the term "negligently" in 1319 of the CWA is ambiguous because it is undefined. As a result, there are two possible interpretations of the word "negligently" in the statute: it could mean criminal or civil negligence. The former construction avoids constitutional issues of due process, while the latter creates them. Therefore, this Court should interpret "negligently" in 1319 to mean criminal negligence in order to avoid a violation of Mr. Millstone's due process rights.

c. Alternatively, the rule of lenity resolves the ambiguity of the term "negligently" in favor of the Petitioner.

When courts are interpreting ambiguous criminal statutes, they should use the rule of lenity to resolve the ambiguity in favor of defendants. *See Santos*, 553 U.S. at 514. In other words, if the ambiguity results in a tie, the defendant wins. *Id.* When a court is faced with two ways to interpret an ambiguous *mens rea* term,

the rule of lenity suggests that the meaning with the higher degree of culpability applies. *See Liparota*, 471 U.S. at 419.

In *Santos*, this Court applied the rule of lenity to overturn the defendant's money laundering conviction by using the more defendant-friendly interpretation of the ambiguous statute. *Id.* at 514. Similarly, where the term "knowingly" was undefined in *Liparota*, this Court used the rule of lenity to require that the government prove a higher level of culpability to obtain a conviction. *Id.* at 427.

As such, this Court should use the rule of lenity to hold that the undefined term "negligently" present in 1319 of the CWA requires proof of criminal negligence. As in *Liparota*, where this Court applied a higher level of culpability to an undefined term, here, the *mens rea* for "negligently" should require a higher level of culpability than mere civil negligence because the ambiguity surrounding the term should be resolved in Mr. Millstone's favor. *See id.* at 419. If the government can prosecute and incarcerate Mr. Millstone for civil negligence, it is doing so under the theory that an ambiguous, undefined term in a criminal statute should be interpreted in favor of the government. This does not comport with the rule of lenity, which is meant to protect criminal defendants from prosecution under ambiguous statutes.

The criminal justice system's lowest level of culpability has historically been criminal or gross negligence. § 2.02. General Requirements of Culpability., Model Penal Code § 2.02. It would be a miscarriage of justice to lower this fundamental floor of criminal culpability by allowing the lower court's holding to stand.

B. Because The Clean Water Act Is Not A Public Welfare Statute, Mr. Millstone Cannot Be Convicted of Violating the Clean Water Act Under A Civil Negligence Standard.

For nearly a century, this Court has recognized the public welfare doctrine in cases involving individuals who were convicted of violating certain regulatory statutes. *See United States v. Dotterweich*, 320 U.S. 277, 280 (1943); *United States v. Balint*, 258 U.S. 250, 254 (1922). This doctrine seeks to "protect the public from potentially harmful or injurious items" and criminalizes "a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety." *Liparota*, 471 U.S. at 433.

In general, when the public welfare is at stake, the doctrine is used to lower the criminal intent requirement for an individual in control of a dangerous item. *Id.* Such an individual need not have a "guilty mind" because the dangerous nature of the item puts the individual on notice that the item is regulated. *See id.* In other words, the public welfare doctrine is used to impose strict liability. *See United States v. Freed*, 401 U.S. 601, 611 (1971); *Dotterweich*, 320 U.S. at 280; *Balint*, 258 U.S. at 254. This Court will only recognize the use of the public welfare doctrine in "limited circumstances," *See Staples v. United States*, 511 U.S. 600, 607 (1994); however, several federal circuit courts have broadly applied the public welfare doctrine. *United States v. Hanousek,* 176 F.3d 1116, 1122 (9th Cir. 1999); *United States v. Hopkins*, 53 F.3d 533, 539 (2d Cir. 1995); *United States v. Weitzenhoff,* 35 F.3d 1275, 1286 (9th Cir. 1993). These courts have incorrectly reasoned that the CWA falls within the public welfare doctrine, simply because it is an environmental

statute. *Hanousek,* 176 F.3d 1116, 1122 (9th Cir. 1999); *Hopkins*, 53 F.3d 533, 539 (2d Cir. 1995); *United States v. Weitzenhoff,* 35 F.3d 1275, 1286 (9th Cir. 1993). As a result of these misguided rulings, the government can charge individuals with violations of the CWA and subject them to incarceration even though they have no "guilty mind." *See Hanousek*, 176 F.3d at 1121; *Weitzenhoff* , 35 F.3d at 1286. The Fifth Circuit, on the other hand, correctly held that the CWA does not fall within the public welfare doctrine. *See United States v. Ahmad*, 101 F.3d 386, 391 (5th Cir. 1996).

This Court's jurisprudence demonstrates that the CWA does not fall within the realm of the public welfare doctrine for two reasons. First, the CWA contains incarceration penalties which are too severe for public welfare statutes. Second, even if the CWA were a public welfare statute, strict liability cannot be applied to Mr. Millstone because he was never in control of a dangerous substance.

1. The criminal penalties contained in 1319 are too severe for the CWA to be classified as a public welfare statute.

The CWA is not a public welfare statute because the criminal penalties it contains are too severe and the statute does not fall within the exception recognized by this Court. *See Freed*, 401 U.S. at 611, *Balint*, 258 U.S. at 254. Public welfare statutes essentially create strict liability so that a conviction does not require any criminal culpability. *See Freed*, 401 U.S. at 611, *Balint*, 258 U.S. at 254. To balance the government's lesser burden with the defendant's due process rights, the punishment provided by a public welfare statute must not be too severe. *See*

Morissette, 342 U.S. at 248. In general, this means that public welfare statutes do not contain incarceration penalties. *See Dotterweich*, 320 U.S. at 280, *Ahmad*, 101 F.3d at 391. The only exception is when the regulated item does not have a history of legal usage within American society. *Staples*, 511 U.S. at 611.

a. As a general rule, public welfare statutes do not contain penalties of incarceration.

Justice Thomas stated, "it is a cardinal principle of public welfare offenses that the penalty not be severe." *Hanousek v. United States*, 528 U.S. 1102 (2000) (Thomas, J., dissenting) *cert. denied* (quoting Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55, 72 (1933)). For example, in *Dotterweich*, this Court identified the Food and Drug Act as a public welfare statute. 320 U.S. at 285. In that case, the penalties for unwittingly selling mislabeled and contaminated prescription drugs did not include incarceration, but rather a small fine. *Id.* at 280.

Following this logic, in *Morissette*, this Court held that a particular statute was not a public welfare statute because the penalties were too harsh and would do grave harm to a defendant's reputation. 342 U.S. at 255. As a result, this Court reversed the defendant's conviction because the penalties included incarceration for up to two months. *Id.* at 248. In *United States v. Ahmad*, the Fifth Circuit held that the CWA is not a public welfare statute because it includes incarceration penalties, and used this holding to reverse the conviction of the defendant for a violation of the CWA. 101 F.3d at 393. This Court recently reaffirmed this principle in *Staples* where it was held that the National Firearms Act was not a

public welfare statute in part because the ten-year incarceration penalty was too severe. 511 U.S. at 620.

Similarly, this Court should declare that the CWA is not a public welfare statute because it provides for incarceration as a penalty. *See* 33 U.S.C. §1319(c)(1)(A). A conviction for "negligently" violating the CWA carries a maximum penalty of one year in jail for an initial offense and two years for a repeat offense. *Id.* As with *Dotterweich*, *Staples*, and *Morissette* —the latter of which included a maximum incarceration period of only two months—the CWA's criminal penalties are too severe for it to be considered a public welfare statute. *See Staples*, 511 U.S. at 611; *Morissette*, 342 U.S. at 255; *Dotterweich*, 320 U.S. at 280; 33 U.S.C. § 1319(c)(1)(A). As in *Ahmad*, the severity of these penalties should lead this Court to hold that the CWA is not a public welfare statute. *See Ahmad*, 101 F.3d at 391.

b. The CWA regulates items that have a history of lawful use.

This Court will identify a statute that provides for incarceration penalties as a public welfare statute, *only if* the dangerous item regulated by the statute does not have a history of legal usage. *See Staples*, 511 U.S. at 611; *Freed*, 401 U.S. at 604; *Balint*, 258 U.S. at 254. This reasoning is meant to avoid convictions where doing so would "criminalize a broad range of apparently innocent conduct." *Staples*, 511 U.S. at 617-618.

For example, in *Balint*, this Court held that the Anti-Narcotics Act of 1914 was a public welfare statute, even though the statute provided for a maximum term

of up to five years in prison. 258 U.S. at 250. There, this Court reasoned that the inherent "evil of exposing innocent purchasers to danger from the drug" justified the penalty. *Id.* at 254. Similarly, in *Freed*, this Court held that the National Firearms Act, as applied to grenades, was a public welfare statute and incarceration was an acceptable penalty because the grenades at issue were inherently dangerous and did not have a tradition lawful usage. 401 U.S. at 609.

In *Staples*, this Court held that the amended National Firearms Act, as applied to guns, was not a public welfare statute and reversed the defendant's conviction for possessing machine guns that were unregistered. 511 U.S. at 611. Although the machine guns regulated were inherently dangerous, this Court concluded that because guns have a tradition of legal usage in this country, the public welfare doctrine could not be applied. *Id.*

As with the guns in *Staples,* the chemicals regulated by the CWA in Mr. Millstone's case also have a history of legal usage. *See Staples*, 511 U.S. at 611; R. at 11-13. The lower court ignored this precedent, which has the effect of criminalizing otherwise innocent commercial behavior. *See* R. at 11-13. Unlike the drugs present in *Balint*, or the grenades in *Freed*, the chemicals manufactured by Bigle Chemical have a history of legitimate use. *See Freed*, 401 U.S. at 604; *Balint*, 258 U.S. at 254; R. at 11-13. As a result, the CWA does not fall within the incarceration exception to the public welfare doctrine.

2. Even if the CWA is considered a public welfare statute, the criminal penalties contained in 1319 do not impose strict liability on the Petitioner.

Contrary to the lower court's holding, the CWA does not impose strict liability upon Mr. Millstone. As discussed above, public welfare statutes dispense with conventional *mens rea* requirements. *See supra* Part I.B.1; *Staples*, 511 U.S. at 600. Thus, the public welfare statutes identified by this Court have essentially imposed strict liability, supporting a conviction even though the defendants lacked criminal culpability. *See Freed*, 401 U.S at 604; *Dotterweich*, 320 U.S. at 280; *Balint*, 258 U.S. at 254. But to ensure proper prosecutorial responsibility, this Court has only imposed strict liability on defendants who were in direct control of dangerous materials regulated by the relevant statute. *Freed*, 401 U.S at 604; *Dotterweich*, 320 U.S. at 280; *Balint*, 258 U.S. at 254.

The first public welfare statute identified by this Court was the Harrison Anti-Narcotics Act of 1914. *Balint*, 258 U.S. at 250. In *Balint*, the defendant was a drug prescriber who claimed he did not know the contents of his distribution included narcotics prohibited by the Act. *Id.* at 251. Yet, despite this lack of knowledge, this Court applied strict criminal liability and upheld his conviction because he was dealing with dangerous drugs. *Id.* at 254. Since the defendant had direct control over the dangerous item being regulated, he was responsible for ensuring that his conduct was lawful. *Id.*

In *Dotterweich*, the defendant was another drug prescriber who claimed to lack knowledge that he sold mislabeled and contaminated drugs in violation of the

Food and Drug Act. 320 U.S. at 277. Even though this Court found the defendant's "consciousness of wrongdoing to be totally wanting," his conviction was upheld. *Id.* at 284. Since the defendant was dealing with—and therefore in control of—a dangerous item regulated by the statute, strict criminal liability was justified. *Id.*

In *Freed*, this Court again applied strict liability to uphold the conviction of a defendant pursuant to a public welfare statute. 401 U.S. at 601. There, this Court upheld the conviction of a defendant who possessed unregistered hand grenades in violation of the National Firearms Act, even though the defendant did not know that the grenades were unregistered. *Id.* This Court held that similar to the drugs in *Balint*, the manifest purpose of the National Firearms Act was to require every person dealing with grenades to determine whether they were registered. *Id.* Since the defendant was in control of grenades, which are a dangerous device, the threat of harm allowed the law at issue to be considered a public welfare statute that imposed strict liability. *Id.* This is another example of direct control, as the grenades were in the defendant's personal possession. *Id.*

This precedent demonstrates that strict liability should not be applied to Mr. Millstone, because unlike every other defendant in the cases where this Court has identified a strict liability public welfare statute, Mr. Millstone was not in direct control of the chemicals regulated by the CWA. *See Freed*, 401 U.S. at 603; *Dotterweich,* 320 U.S. at 278; *Balint,* 258 U.S. at 251; R. at 17. Mr. Millstone and his employees never handled the regulated chemicals. R at 17. Rather, Mr. Millstone merely managed security operations at the facility where the chemicals

were located. R. at 17. In this case—unlike the drug distribution in *Balint* and *Dotterweich*, or the possession of grenades in *Freed*—a third party controlled the chemicals in question: the CEO of Bigle Chemical Company, Mr. Drayton Wesley. *Freed*, 401 U.S at 604; *Dotterweich*, 320 U.S. at 280; *Balint*, 258 U.S. at 254; *See* R. at 5.

Mr. Wesley was in charge of Bigle. R. at 4. He owned, operated, and distributed the chemicals at Bigle and he was aware of the inherent risk in controlling the chemicals. R. at 5. The chemicals were located on Bigle property. R. at 5-8. Yet, despite his ownership of these chemicals, he returned to China during the initial portion of the government's investigation, thereby escaping the jurisdiction of the United States. *See* R. at 8. Even though Mr. Millstone is the only party to this case, Mr. Wesley was the one who exercised direct control over the chemicals. R. at 5. Therefore, the only party who could potentially be strictly held for criminal liability has fled the country. R. at 8. Because Mr. Millstone lacked direct control of the chemicals, the public welfare doctrine does not allow the government to convict Mr. Millstone under a theory of strict criminal liability.

For the foregoing reasons, the CWA cannot be considered a public welfare statute because the criminal penalties include incarceration. 33 U.S.C. § 1319(c)(1)(A). However, if this Court finds that the CWA is a public welfare statute, then strict liability should not apply to Mr. Millstone because he was never in control of the chemicals. *See* R. at 5. As a result, the government must demonstrate that Mr. Millstone was criminally negligent. This interpretation

comports with this Court's jurisprudence, and recognizes the fundamental differences between criminal and civil negligence. If this Court affirms Mr. Millstone's conviction, it would send a chilling effect throughout America's business world. CEOs of large and small businesses around this country would be forced to consistently second-guess their actions and decisions out of fear that one small mistake could lead to incarceration. This type of business climate would hamper the American economy.

Therefore, this Court should reverse the decision of the lower court, and remand the decision back to the trial court, with instructions to apply the standards of criminal negligence to 33 U.S.C. § 1319(c)(1)(A) of the Clean Water Act.

II. MERELY ENCOURAGING ANOTHER TO INVOKE A PRE-EXISTING LEGAL PRIVILEGE DOES NOT CONSTITUTE CORRUPT PERSUASION.

The lower court erred in finding that Mr. Millstone violated 18 U.S.C. § 1512(b)(3), the witness tampering statute ("1512"), by applying an inappropriate definition of the phrase "corruptly persuades" to the statute. *See generally Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005); *United States v. Farrell*, 126 F.3d 484 (3d Cir. 1997). Therefore, this Court must overturn that decision by applying the well-developed standards of statutory construction. All courts addressing this issue have found the phrase "corruptly persuades" to be ambiguous. *United States v. Baldridge*, 559 F.3d 1126, 1142 (10th Cir. 2009) *cert. denied*, 129 S. Ct. 2170, 173 L. Ed. 2d 1165 (U.S. 2009). However, in *Arthur Andersen*, this Court indicated that the definition of "corruptly" within 18 U.S.C. § 1503—the general

obstruction of justice statute ("1503"), which originally included witness tampering—was an inappropriate definition to apply to 1512 because the two statutes contained different intent elements. 544 U.S. at 705-706.

Currently, there is a circuit split over the correct meaning of the phrase "corruptly persuades" in 1512. *Compare United States v. Shotts*, 145 F.3d 1289 (11th Cir. 1998) (holding that "corruptly persuades" means "motivated by an improper purpose"), *and United States v. Thompson*, 76 F.3d 442 (2d Cir. 1996) ("motivated by an improper purpose"), *with United States v. Doss*, 630 F.3d 1181 (9th Cir. 2011), *as amended on reh'g in part* (Mar. 15, 2011) (holding that "corruptly persuades" means the defendant's conduct was "inherently malign," not just "motivated by an improper purpose"), *and Farrell*, 126 F.3d at 484 ("inherently malign"). The Second, Eleventh, and now Fourteenth Circuits consider the word "corruptly" to mean "motivated by an improper purpose." *Shotts*, 145 F.3d at 1289; *Thompson*, 76 F.3d at 442; R. at 14. The Third and Ninth Circuits, on the other hand, found "corruptly" to mean something more: "inherently malign." *Doss*, 630 F.3d at 1181; *Farrell*, 126 F.3d at 484. The "inherently malign" interpretation is the proper reading of the statute for two reasons. *See Doss*, 630 F.3d at 1181. First, an analysis of the plain meaning of "corruptly" along with the legislative history of 1512 shows that "inherently malign" conduct is the type of conduct which triggers criminal liability. *Farrell*, 126 F.3d at 490. Second, to avoid rendering a portion of 1512 surplus language, and to remain consistent with this Court's opinion in *Arthur Andersen*, the structure and placement of "corruptly persuades" in 1512 requires

"inherently malign" conduct. 544 U.S. at 705-706. Accordingly, this Court should reverse the lower court's decision by finding that the phrase "corruptly persuades" as used in 1512 requires "inherently malign" conduct.

A. The Lower Court's Opinion Conflicts With The Plain Meaning of "Corruptly" As Well As The Legislative History of 1512.

Mr. Millstone was convicted of witness tampering based on the lower court's misreading of the phrase "corruptly persuades" within 1512. R. at 10. Every court addressing this issue has found the phrase "corruptly persuades" to be ambiguous. *Baldridge*, 559 F.3d at 1142; *see generally Doss*, 630 F.3d at 1181; *Shotts*, 145 F.3d at 1289; *Farrell*, 126 F.3d at 484; *Thompson*, 76 F.3d at 442. To resolve this ambiguity, this Court must first look to the plain meaning of the statute. *Estate of Cowart*, 505 U.S. at 475. If this Court determines that the plain meaning is vague, then this Court should look to the legislative history of 1512 to determine the meaning. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 185 (1978).

1. The plain meaning of "corruptly" within 1512 requires a heightened level of culpability.

The circuit courts are split on the meaning of "corruptly persuades;" however, all of the circuits agree that the phrase is ambiguous. *See generally Doss*, 630 F.3d at 1181; *Shotts*, 145 F.3d at 1289; *Farrell*, 126 F.3d at 484; *Thompson*, 76 F.3d at 442. The relevant portion of 1512 provides:

> (b) Whoever *knowingly* . . . *corruptly persuades* another person, or attempts to do so, or engages in misleading conduct toward another person with intent to –

. . .

> (3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission of a Federal Offense or a violation of conditions of probation, parole, or release pending judicial proceedings;
>
> shall be fined not more than $250,000 or imprisoned not more than ten years, or both.

18 U.S.C §1512(b)(3) (2008) (emphasis added). While 1512 does not define the phrase "corruptly persuades," it explains that "the term corruptly persuades does not include conduct which would be misleading but for a lack of a state of mind." 18 U.S.C. § 1515(a)(6) (1996). This definition suggests that there are limitations to the types of conduct that fall under the statute, but it does little to explain whether an attempt to merely encourage another to exercise his or her Fifth Amendment right would be included within the prohibited conduct. *United States v. Khatami*, 280 F.3d 907, 911 (9th Cir. 2002). Therefore, the phrase "corruptly persuades" in 1512 remains ambiguous and undefined. *Baldridge*, 559 F.3d at 1142. As a result, this Court must engage in statutory interpretation to determine its meaning. *See Estate of Cowart*, 505 U.S. at 475; *Tenn. Valley Auth.*, 437 U.S. at 185.

In order to determine the meaning of an undefined word within a statute, this Court starts by looking at the plain meaning of the word. *Estate of Cowart*, 505 U.S. at 475. The plain meaning of "corrupt" is not clear because it has several different meanings. *Corrupt Definition*, Merriam-webster.com, http://www.merriam-webster.com/dictionary/corrupt (last visited Dec. 1, 2011); *Black's Law Dictionary*

294 (9th ed. 2009). As an adjective, the word "corrupt" means "morally degenerate," "perverted," "characterized by improper conduct (as bribery or the selling of favors)." *Corrupt Definition*, Merriam-webster.com, http://www.merriam-webster.com/dictionary/corrupt (last visited Dec. 1, 2011). As a verb, "corrupt" is defined as "changing a person from good morals to bad morals" or "becoming morally debased." *Id.* Furthermore, Black's Law Dictionary defines corruption as tainted, depraved, perverted, and the "impairment of integrity, virtue, or moral principle," and states that corruption is "the act of doing something with an intent to give some advantage inconsistent with official duty and the rights of others." *Black's Law Dictionary* 294 (9th ed. 2009). Black's Law Dictionary also notes that "corruptly," as used in criminal statutes, indicates a "wrongful desire for pecuniary gain or other advantage." *Id.* Finally, this Court noted in *Arthur Andersen* that "corrupt" and "corruptly" are "normally associated with wrongful, immoral, depraved, or evil" conduct; in other words, "inherently malign" conduct. 544 U.S. at 705.

In 1512, "corruptly" is an adverb. *See* 18 U.S.C. § 1512(b)(3). An adverb modifies verbs, adjectives, other adverbs, prepositions, phrases, clauses, or sentences which express a relationship to the degree, cause, manner, or quality of the modified word. *Adverb Definition*, Merriam-webster.com, http://www.merriam-webster.com/dictionary/adverb (last visited Dec. 1, 2011). In the context of 1512, the adverb "corruptly" modifies the verb "persuades," and is used to described the degree, cause, manner, or quality of persuasion. *Id.*; *See* 18 U.S.C. § 1512(b)(3).

The structure of the phrase indicates that only persuasion which also falls under a category of corrupt conduct is criminal. *See* 18 U.S.C. § 1512(b)(3); *Adverb Definition*, Merriam-webster.com, http://www.merriam-webster.com/dictionary/adverb (last visited Dec. 1, 2011). Conduct that is "morally debased," "perverted," or "depraved" falls in line with conduct that is characterized as "inherently malign" and "corrupt." *See Arthur Andersen*, 544 U.S. at 705. However, conduct that is merely "motivated by an improper purpose" falls outside the definition of corrupt. *See id.*

In *Arthur Andersen*, this Court explicitly stated it is not "inherently malign" for an individual to encourage his or her spouse to withhold marital confidences from the government; nor is it "inherently malign" for a mother to encourage her son to invoke his right against self-incrimination based on a pre-existing legal privilege. *Id.* at 704-705. Furthermore, this Court noted that merely impeding an investigation is not sufficient to constitute corrupt persuasion without some other form of dishonesty. *Id.* at 706.

Similarly, in this case, it was not "inherently malign" for Mr. Millstone to persuade his business partner to exercise a pre-existing legal privilege: the privilege against self-incrimination. R. at 9. Mr. Millstone's actions were not "morally debased" or "depraved" because he did not attempt to persuade his business partner to exercise that right by using the influence of money, or by attempting to persuade his business partner to lie. R. at 9. The plain meaning of "corruptly," as supported by this Court's decision in *Arthur Andersen*, clearly requires "inherently malign"

conduct, such as conduct that is depraved or evil. *See Arthur Andersen*, 544 U.S. at 704-705. Therefore, the decision of the lower court should be overturned.

2. Even if this Court finds the plain meaning ambiguous, the legislative history of 1512 shows that "corruptly persuades" requires "inherently malign" conduct.

Because there are multiple meanings of "corruptly," if this Court finds that the statute remains ambiguous after looking to the plain language, this Court should look to the legislative history of the statute to determine that "corruptly persuades" requires "inherently malign" conduct. *See Tenn. Valley Auth.*, 437 U.S. at 185. The legislative history of 1512 shows that the addition of "corruptly persuades" was meant to add a limited set of circumstances under which an individual could be held criminally liable for persuading a witness to withhold information from the government. *Khatami*, 280 F.3d at 912. However, the addition was not meant to cover all types of persuasive conduct. *Id.*

Before 1982, witness tampering was covered by a general obstruction of justice statute, 1503, which was applicable to people "who corruptly, by threats or force, endeavored to influence, intimidate or impede" a grand juror, witness or court officer. Pub. L. No. 97-291, § 4, 96 Stat. 1248, 1249-1250 (1982); *Doss*, 630 F.3d at 1186. Section 1512 was added in 1982 by the Victim and Witness Protection Act of 1982, and all references to conduct affecting witnesses was removed from 1503. Pub. L. No. 97-291, § 4, 96 Stat. 1248, 1249-1250 (1982); *Doss*, 630 F.3d at 1186.

The specific phrase "corruptly persuades" was not added to 1512 until 1988 as a part of the Anti-Drug Abuse Act of 1988. Pub.L. 100-690, § 7029, 102 Stat. 4181, 4397-98; *Doss*, 630 F.3d at 1187. Before "corruptly persuades" was added, four forms of witness tampering were prohibited. *See generally United States v. Stansfield*, 101 F.3d 909 (3d Cir. 1996). The original four forms included intimidation, physical force, threats, and engaging in misleading conduct to another person – all coercive types of conduct. *Id.* By adding the phrase "corruptly persuades," Congress intended to fill a gap in the statute to reach certain, but not all, non-coercive attempts to tamper with a witness. *Khatami*, 280 F.3d at 912 (reasoning that "corruptly persuades" in 1512 was a reaction to a line of cases holding that non-coercive attempts to persuade did not fall under 1512); *See generally United States v. King*, 762 F.2d 232 (2d Cir. 1985) (holding that a defendant's attempt to offer a witness a bribe in exchange for silence was not a violation of the witness tampering statute because it did not fall within the original four categories enumerated in 1512). While the addition of "corruptly persuades" was meant to broaden the reach of the statute, it was not meant to encompass every type of persuasive conduct directed towards a witness. *Khatami*, 280 F.3d at 913. Therefore, while other types of persuasive conduct may be morally reprehensible, the only types punishable by law are those enumerated in the statute. *United States v. Shively*, 927 F.2d 804, 811 (5th Cir. 1991).

Additionally, a 1987 House Judiciary Committee Report regarding the addition of the phrase "corruptly persuades" provided that culpable conduct under

1512 would include a defendant offering a financial reward to another in exchange for silence, or encouraging an individual to lie to a government official. *Farrell*, 126 F.3d at 488; H.R.Rep. No. 100-169, at 12 (1987). Neither of the examples contemplated by the Committee indicate that an appeal to a government witness to exercise the privilege against self-incrimination alone would violate the statute. *See Farrell*, 126 F.3d at 488; H.R.Rep. No. 100-169, at 12 (1987).

Following Congress' reasoning, the Third Circuit in *Farrell* held that 1512 required "inherently malign" conduct. *Farrell*, 126 F.3d at 490. In that case, Farrell was allegedly involved in a scheme to sell contaminated meat with an associate, Bachetti. *Id.* at 486. Through a series of interactions, Farrell attempted to convince Bachetti to withhold information about the scheme from federal investigators from the United States Department of Agriculture ("USDA"). *Id.* On one occasion, Farrell asked Bachetti whether he gave investigators any information. *Id.* Less than a week after Bachetti informed Farrell that he did not speak with investigators, Farrell told Bachetti that the pair would be okay if they "stuck together." *Id.* Soon thereafter, Bachetti told Farrell that he planned on cooperating with the government. *Id.* Farrell said he was also going to talk to investigators; however, he told Bachetti that he planned to lie to investigators by telling them the meat was for his dogs. *Id.* Farrell told Bachetti to use the dog story as well when talking to federal investigators. *Id.* In addition, Farrell told Bachetti "if you crucify me, I'll have to turn around and crucify you." *Id.* Bachetti interpreted Farrell's statement to mean that if he told USDA investigators about Farrell's involvement

in the scheme, Farrell would tell investigators what he knew about Bachetti's illegal activities. *Id.*

In *Farrell*, the Third Circuit disagreed with the Second Circuit's decision in *Thompson*, by reasoning that the structure of the statute, along with the meaning of the word "corruptly" indicated that the statute required "inherently malign" conduct as opposed to merely conduct "motivated by an improper purpose." *Id.* at 490. The court noted that if the statute required only an "improper purpose," every attempt to persuade a witness to withhold information would be a criminal violation. *Id.* Under the "improper purpose" rationale, encouraging another to exercise a legal privilege to withhold information would then criminalize a parent's statement to a child suggesting that the child plead the Fifth Amendment, or a wife suggesting to her husband that he withhold marital confidences. *Arthur Andersen*, 544 U.S. at 705; *Farrell*, 126 F.3d at 490. The Third Circuit reasoned that this would create an absurd result. *Farrell*, 126 F.3d at 490.

Ultimately, the Third Circuit held that although Farrell attempted to persuade Bachetti to withhold information from the federal government, there was not enough credible evidence to show that Farrell "corruptly" persuaded Bachetti. *Id.* Therefore, the Third Circuit remanded the case to the district court to determine whether Farrell attempted to persuade Bachetti to *lie* to investigators, which, given the facts of the case, was the only way Farrell could be convicted of "corruptly persuading" Bachetti. *Id.* at 491.

In this case, Mr. Millstone's business partner, Reese Reynolds, had an established privilege against providing self-incriminating information to the federal government since, as the Vice President of Sekuritek, he was also within the scope of the government's investigation. *See Farrell*, 126 F.3d at 488-489; R. at 9. Mr. Millstone did not offer his business partner any money, nor did he attempt to persuade Reynolds to lie to investigators. R. at 9. Mr. Millstone's only intent was to remind his business partner that he had a right not to give federal investigators information that would be self-incriminating, and utilizing that right was the best chance for the pair to avoid harsh criminal liability. R. at 9.

While his reminder was a form of persuasion, and would have the implied result of also helping Mr. Millstone avoid prosecution, it was not corrupt as traditionally defined or as predicted by Congress when adding the phrase "corruptly persuades." *See Farrell*, 126 F.3d at 489. His reminder was not depraved, nor was it an attempt to change his business partner's morals from good to bad. *See* R. at 9. Mr. Millstone merely encouraged his business partner to exercise his Fifth Amendment right as one way of easing their difficult situation. R. at 9. This situation is in line with the examples provided by this Court in *Arthur Andersen* and should not fall within the meaning of 1512. 544 U.S. at 704.

B. By Transplanting The Meaning Of "Corruptly" In 1503 To 1512, The Lower Court Impermissibly Rendered The Phrase "Corruptly Persuades" Meaningless.

The term "corruptly" is present in similar criminal statutes; however, the meaning of the term cannot be transplanted from the general obstruction of justice

statute § 1503 to the witness tampering statue § 1512 because the term is not the sole element of intent within 1512. *See* 18 U.S.C. § 1503; 18 U.S.C § 1512. The lower court, along with the Second and Eleventh Circuits, used the meaning of "corruptly" as it is used in 1503 in order to define "corruptly" in 1512. *See Shotts*, 145 F.3d at 1289; *Thompson*, 76 F.3d at 452; R. at 14. However, in 1503 "corruptly" is the *sole element* of intent within the provision. *See Farrell*, 126 F.3d at 490. In contrast, 1512 has more than one element of intent within the statute, meaning that the definition of the term "corruptly" in 1503 does not appropriately fit into 1512. *Id.*

1. The lower court erred by rendering the phrase "corruptly persuades" in 1512 meaningless.

In 1512, the use of the phrase "knowingly . . . corruptly persuades" along with the phrase "with the intent to . . . hinder, delay or prevent the communication of information" to a law enforcement agent suggests the presence of two separate elements of intent. *See Ratzlaf v. United States*, 510 U.S. 135, 140-141 (1994). When two separate elements of intent are present in a statute, each element should be interpreted to have separate meanings, otherwise the words in the statute would be rendered meaningless. *Id.* Because this Court has cautioned against rendering words and phrases in statutes meaningless—especially in the criminal context—this Court should read the phrase "corruptly persuades" to mean "inherently malign" conduct. *Ratzlaf*, 510 U.S. at 140; *Farrell*, 126 F.3d at 487.

In *Ratzlaf*, this Court held that two elements of intent were present in a statute which covered financial reporting laws. 510 U.S. at 152. The statute created a criminal violation for "willfully violating [the statute]. . . for the purpose of evading the reporting requirements" of a financial institution. 31 U.S.C. § 5322 (1992); 31 U.S.C. § 5324 (1992). This Court reasoned that the terms "willfully violating" and "for the purpose of evading the reporting requirements" were two separate elements of intent. *Ratzlaf*, 510 U.S. at 152. In order to avoid surplus language in the statute, this Court read each of the two elements of intent with different meanings. *Id.*

Similarly, the witness tampering statute has two elements of intent: "knowingly . . . corruptly persuading," and the "intent to . . . hinder, delay, or prevent the communication of information" to the government regarding a federal criminal investigation. 18 U.S.C. § 1512(b)(3). The lower court's interpretation, along with the Second and Eleventh Circuit's interpretation, incorrectly defined "corruptly" as "motivated by an improper purpose." *Shotts*, 145 F.3d at 1289; *Thompson*, 76 F.3d at 452; R. at 14. Those courts held that "motivated by an improper purpose" included a defendant's desire to hinder another from communicating with the government in order to avoid implication in a criminal matter. *Shotts*, 145 F.3d at 1289; *Thompson*, 76 F.3d at 452; R. at 20. Under such an interpretation, the statute would 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 . . ." R. at 21. Such a reading would go against the warnings of this Court and cause the term "corruptly" to become meaningless surplus language. *Farrell*, 126 F.3d at 487.

Because this Court does not interpret words in statutes to be meaningless, 1512 cannot be interpreted to mean "motivated by an improper purpose." *See Ratzlaf*, 510 U.S. at 140; *Farrell*, 126 F.3d at 487. As such, the proper interpretation of the statute requires that the defendant's conduct be "inherently malign." *Farrell*, 126 F.3d at 489. Malign is defined as "evil in nature" or "malicious" and requires more than an improper purpose. *Malign Definition*, Merriam-webster.com, http://www.merriam-webster.com/dictionary/malign (last visited Dec. 1, 2011). Malicious is defined by Black's Law Dictionary as "substantially certain to cause injury" and "without just cause or excuse." *Black's Law Dictionary* 800 (9th ed. 2009). Accordingly, by requiring "inherently malign" conduct under 1512, it is possible for a defendant to persuade a witness to withhold information without violating the statute. *Farrell*, 126 F.3d at 489.

As this Court recognized in *Arthur Andersen*, persuading a person to withhold information from the government when the person has an established right to withhold that information is not "inherently malign." 544 U.S. at 704-705. Withholding information that is protected by a legal privilege is not "substantially certain to cause injury," nor is it "without just cause or excuse" because the government can only obtain such information with a waiver of the legal privilege. *Doss*, 630 F.3d at 1189; *Farrell*, 126 F.3d at 489. While these legal protections may

slow investigations, the privilege against self-incrimination has long been valued in our society as a way to protect individuals against governmental abuse and prevent an individual from being convicting "out of his own mouth." *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 77 (1964).

When a pre-existing legal privilege exists for a party, the party is not violating any legal duty by withholding information from the government. *Doss*, 630 F.3d at 1187-1188. Conversely, the Petitioner concedes that it would be a violation of 1512 for a defendant to persuade a witness to withhold information when that witness lacks any legal privilege to do. *Id.* at 1188. "Absent a privilege, society has a right to the information of citizens regarding the commission of a crime." *Id.* Thus, persuading a witness who does not have a pre-existing legal privilege to withhold information may rise to the level of culpability or corruptness within the statute. *Id.*

However, 1512 cannot criminalize encouraging a witness to use his own legal safeguards. *See United States v. Poindexter*, 951 F.2d 369, 383 (D.C. Cir. 1991). If the statute were to criminalize such conduct, then as a logical conclusion, an attorney would no longer be able to advise a client to "plead the Fifth" without being criminally liable for violating 1512. *See Doss*, 630 F.3d at 1189; *Farrell*, 126 F.3d at 489. An attorney can advise clients on legal matters, but cannot advise clients on the means and mechanics of committing a crime and cannot engage in the commission of a crime themselves. *See* Model Code of Prof'l Conduct R. 1.6 cmt. 7, R. 8.4 (1983). Yet, under the lower court's reading of the statute, an attorney who

advises her client to "plead the Fifth" would be corruptly persuading him to "hinder, delay, or prevent" a government investigation. *See Thompson*, 76 F.3d at 442. In such a situation, any attorney who advises her client to invoke his right against self-incrimination would have an improper motive – a motive to hinder the investigation and to win the case for her client. *See id.* According to the Second, Eleventh, and Fourteenth Circuit's interpretation, this would result in the attorney being criminally liable under 1512. *See Shotts*, 145 F.3d at 1289; *Thompson*, 76 F.3d at 442; R. at 14. Such an outcome would have chilling effects on our legal system. As a result, this Court should hold that informing another to invoke his right against self-incrimination does not rise to the level of culpable conduct required under 1512. *Doss*, 630 F.3d at 1189; *Farrell*, 126 F.3d at 488-489; *See Arthur Andersen*, 544 U.S. at 703-704.

2. Arthur Andersen requires this Court to give the term "corruptly" a different meaning in 1512 than in 1503.

The word "corruptly" is found in other criminal statutes, but it is not modified by any other terms within those criminal statutes. *Arthur Andersen*, 544 U.S. at 704. The context of a word impacts its meaning, therefore, it is important to address "corruptly" in context before simply shifting the definition of the word from one criminal statute to another. *See id.* at 704-705.

In *Arthur Andersen*, this Court addressed the intent element of "knowingly corruptly persuades" within 1512. *Id.* at 702. In that analysis, this Court disregarded an attempt to transplant the meaning of "corruptly" from 1503, the

general obstruction of justice statute, into 1512, the witness tampering statute, because in 1503, the term "corruptly" was not modified by "knowingly." *Id.* at 705-706. In 1503, "corruptly" is the only intent element of the statute. *Id.* at 704-705; *Doss*, 630 F.3d at 1189; *Farrell*, 126 F.3d at 490. Without the word "corruptly" in 1503, the section would have no element of culpability at all. *Farrell*, 126 F.3d at 490. In contrast, 1512 requires two levels of intent: knowledge of corrupt persuasion and the intent to hinder communication to law enforcement. *Doss*, 630 F.3d at 1188. In *Arthur Andersen*, while this Court was not directly addressing the phrase "corruptly persuades," it recognized that the element of "knowingly" was already present in 1512, unlike 1503. *Farrell*, 126 F.3d at 489-490.

The Petitioner in *Arthur Andersen*, who served as the auditor for Enron before its collapse, encouraged employees to follow the strict document retention policy in the weeks nearing the exposure of the Enron scandal and the ensuing federal investigation. 544 U.S. at 698. Consequently, many documents sought by federal investigators were destroyed prior to the official investigation. *Id.*

In that case, the government relied on the definition of the word "corruptly" in 1503 to make the argument that the defendant in *Arthur Andersen* "knowingly corruptly persuaded" employees to destroy documents that the government would eventually wish to seek during its investigation. *Id.* at 705-706. However, this Court expressly rejected the application of 1503 to 1512 for the purpose of determining intent, noting that such an application of the definition would be inexact. *Id.* Just like in *Arthur Andersen*, the use of "corruptly" in 1503 is not

sufficiently analogous to justify construing the term identically in 1512. *Farrell*, 126 F.3d at 490. Because 1503 is not sufficiently analogous to 1512, the term "corruptly" in 1512 cannot be read to have the same meaning as the word "corruptly" in 1503. *See Arthur Andersen*, 544 U.S. at 704-705.

In addition, this Court decided *Arthur Andersen* several years after the Second Circuit's decision in *Thompson*, the Third Circuit's decision in *Farrell*, and the Eleventh Circuit's decision in *Shotts*. *See generally Arthur Andersen*, 544 U.S. at 696; *Shotts*, 145 F.3d at 1289; *Farrell*, 126 F.3d at 484; *Thompson*, 76 F.3d at 442. In *Thompson*, the Second Circuit relied on the definition of "corruptly" in 1503 before this Court—in *Arthur Andersen*—expressly pointed out that such an analogy would be inexact. *Arthur Andersen*, 544 U.S. at 705; *Thompson*, 76 F.3d at 452. The Ninth Circuit, in *Doss*, reviewed all of the circuit court positions in conjunction with this Court's decision in *Arthur Andersen* and determined that the definition of "corruptly persuades" required the heightened culpability of "inherently malign" conduct. *Doss*, 630 F.3d at 1189.

In *Doss*, the defendant was accused of and tried for several counts of sex-trafficking children; however, the court declared a mistrial after a minor witness refused to testify. *Id.* at 1184. After the mistrial, a grand jury indicted Doss with several counts of witness tampering, including one count alleging that Doss "corruptly persuaded" his wife to withhold information. *Id.* The government alleged that Doss "corruptly persuaded" his wife to withhold information based on his attempt to persuade her to invoke the spousal privilege. *Id.* The Ninth Circuit

upheld the other counts of witness tampering against Doss, but refused to hold that Doss "corruptly persuaded" his wife to withhold information because she had a pre-existing legal privilege and as such his conduct was not "inherently malign." *Id.* at 1189-1190. To bolster its reasoning, the Ninth Circuit recognized that this Court in *Arthur Andersen* explicitly stated that persuading a spouse to withhold information based on marital privileges is not "inherently malign." 544 U.S. at 704.

In Mr. Millstone's case, his conduct was not "inherently malign" because he merely attempted to persuade Reynolds to exercise his right against self-incrimination, just as Doss merely attempted to persuade his wife to invoke her spousal privilege. *Doss*, 630 F.3d at 1189-1190. Mr. Millstone and Reynolds found themselves in a stressful and precarious situation after the accident at the new Bigle Chemical Company plant. R. at 8. In a heightened emotional state, Mr. Millstone went to his trusted friend and business partner to discuss the situation. R. at 9. During that discussion, Mr. Millstone reminded Reynolds of his right to avoid providing law enforcement with self-incriminating information. R. at 9. His attempt to persuade Reynolds that exercising this constitutionally given right was the best option for the two—who found themselves at the brink of a harsh criminal investigation—was not corrupt because Mr. Millstone in no way tried to persuade Reynolds to lie, accept money in exchange for silence, or do anything else that could be perceived as corrupt, depraved, or evil. R. at 9. Rather, Mr. Millstone simply persuaded his business partner and close friend to exercise his constitutional right. R. at 9. As such, Mr. Millstone did not "corruptly persuade" his business partner to

withhold information from the government and this Court should reverse the decision of the lower court.

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court reverse the judgment of the United States Court of Appeals for the Fourteenth Circuit and appropriately remand the case for further proceedings.

Respectfully Submitted,

Petitioner 33

APPENDIX TABLE OF CONTENTS

CONSTITIONAL PROVISIONS

STATUTES

RESTATEMENTS

MODEL PENAL CODE

The Fifth Amendment of the United States Constitution

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Clean Water Act 33 U.S.C. § 1319

(b) Civil actions

The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

(c) Criminal penalties

(1) Negligent violations

Any person who—

(A) negligently violates section 1311, 1312, 1316, 1317, 1318, 1321 (b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

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. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

Clean Air Act 42 U.S.C. § 7413(c)

(c) Criminal penalties - negligence

(4) Any person who negligently releases into the ambient air any hazardous air pollutant listed pursuant to section 7412 of this title or any extremely hazardous substance listed pursuant to section 11002(a)(2) of this title that is not listed in section 7412 of this title, and who at the time negligently places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under title 18 or by imprisonment for not more than 1 year, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

Obstruction of Justice Statute 18 U.S.C. § 1512(b) - Tampering with a witness, victim, or an informant

(b) Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(1) influence, delay, or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to—

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) 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 or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;

shall be fined under this title or imprisoned not more than 20 years, or both.

Obstruction of Justice Statute 18 U.S.C. §1503 - Influencing or injuring officer or juror generally

(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(b) The punishment for an offense under this section is—

(1) in the case of a killing, the punishment provided in sections 1111 and 1112

(2) in the case of an attempted killing, or a case in which the offense was committed against a petit juror and in which a class A or B felony was charged, imprisonment for not more than 20 years, a fine under this title, or both; and

(3) in any other case, imprisonment for not more than 10 years, a fine under this title, or both.

Restatement (Second) of Torts § 282 Negligence

In the Restatement of this Subject, negligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. It does not include conduct recklessly disregardful of an interest of others.

Model Penal Code § 2.02

(1) Minimum Requirements of Culpability. Except as provided in Section 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.

(2) Kinds of Culpability Defined.

(a) Purposely.

A person acts purposely with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and

(ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

(b) Knowingly.

A person acts knowingly with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and

(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

(c) Recklessly.

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

(d) Negligently.

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.