

No. C11-0116-1

In the
SUPREME COURT OF THE UNITED STATES
October Term, 2011

Samuel Millstone,
Petitioner,

v.

The United States of America,
Respondent.

*On Writ of Certiorari to the
United States Court of Appeals for the Fourteenth Circuit*

Brief for Petitioner

QUESTIONS PRESENTED

- I. Under 33 U.S.C. § 1319(c)(1)(A) of the Clean Water Act, does Samuel Millstone's guilt for negligently discharging a pollutant without a permit depend on whether he grossly deviated from the standard of care that a reasonable person would observe in the situation?

- II. Did the Fourteenth Circuit err when it convicted Samuel Millstone under 18 U.S.C. § 1512(b)(3) for "corruptly" persuading a witness when Millstone merely requested that Reese Reynolds invoke his Fifth Amendment right?

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STATEMENT OF JURISDICTION

The Fourteenth Circuit affirmed the conviction on October 3, 2011. The jurisdiction of this Court is invoked under § 1254(1).

OPINIONS AND ORDERS BELOW

The opinion of the District Court does not appear in the record. The opinion of the United States Court of Appeals for the Fourteenth Circuit appears in the record at pages 3-21. The Order granting certiorari by the Supreme Court of the United States is set forth in the record on page 2.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the criminal negligence provision of the Clean Water Act, 13 U.S.C. § 1319(c)(1)(A), and the federal witness tampering statute, 18 U.S.C. § 1512(b)(3). The Fifth Amendment is also relevant to the issue regarding witness tampering. The texts of these constitutional and statutory provisions are set forth in the Appendix.

STATEMENT OF THE CASE

I. Factual Background

This case arises from the chemical spill that occurred at Bigle Chemical's Windy River plant on January 27, 2007, for which Samuel Millstone was later charged and convicted for violation of the Clean Water Act, 33 U.S.C. § 1319(c)(1)(A), and the witness tampering statute, 18 U.S.C. § 1512(b). (R. at 7, 10.) On November 16, 2006, Bigle Chemical, a Chinese corporation, hired Millstone's company, Securitek, as the security company for its Windy River plant near Polis, New Tejas. (R. at 5-6.)

Securitek's Preparation to Provide Security Services to Bigle Chemical: In order to accommodate the security needs of the Windy River plant within the time constraints imposed by Bigle Chemical, Millstone and his business partner, Reese Reynolds, acquired new security equipment and hired additional security personnel. (R. at 5-6.) Millstone restructured Securitek's training course, requiring all new Securitek personnel to complete a one-week training course in addition to three weeks of "on the job observation and training." (R. at 6.) All employees received an employee handbook, which expressly instructed the employees on how to respond to emergency situations in a patrolling vehicle without delaying other emergency responders. (R. at 8.) In order for the security personnel to efficiently patrol Windy River, Reynolds acquired custom SUVs from an up-and-coming company that was able to meet the time constraints. (R. at 6.)

The Windy River Spill: The Windy River spill occurred when a security vehicle crashed into a chemical storage tank, causing a series of explosions. (R. at 7.) Prior to the accident, the Securitek employee spotted a possible intruder during his routine patrol and approached the storage tanks to quickly investigate. (R. at 7.) Immediately before the crash, the acceleration pedal became stuck and the vehicle's speed rapidly increased, causing the Securitek driver to lose control of the vehicle. (R. at 7.) Extensive damages occurred as a result of the crash, which prompted the government to investigate the events leading up to the crash.¹ (R. at 7-8.) Bigle Chemical moved its main office, employees, Officers, assets, and holdings back to

¹ Reports estimate that damages accounting for direct losses and the economic

China immediately following the Windy River incident. (R. at 8.) Because the federal officials could no longer reach Bigle Chemical, federal officials focused their investigation on the co-owners of Securitek, Millstone and Reynolds. (R. at 8.)

Investigation Regarding the Windy River Spill: Federal officials were concerned about the training and supervision of the Securitek employees by Millstone and Reynolds. (R. at 8.) After investigating Securitek's training procedures and security protocol, federal officials determined that Millstone did not adequately train and supervise the new Bigle Chemical security personnel. (R. at 8-9.)

Witness Tampering Charge Against Millstone: In response to the federal officials' findings and the intensifying public outcry, Millstone scheduled a meeting with Reynolds to discuss a defense strategy. (R. at 9.) During this conversation, Reynolds told Millstone that he would rather end the ordeal quickly and cooperate with the government officials instead of trying to prevent criminal charges. (R. at 9.) Millstone criticized Reynolds's idea, reminding Reynolds that both of them would likely be convicted if Reynolds did not employ a defense strategy. (R. at 9.) Millstone fervently advised Reynolds not to speak with the federal officials and to "plead the Fifth." (R. at 9.) Despite this advice, Reynolds agreed to testify at trial against Millstone in exchange for immunity, and the government brought charges against Millstone. (R. at 10.)

II. Procedural History

The United States charged Millstone for the negligent discharge of pollutants in violation of the Clean Water Act (CWA), 33 U.S.C. § 1319(c)(1)(A), and for

witness tampering in violation of 18 U.S.C. § 1512(b)(3). (R. at 10.) With regard to the negligence charge, the United States alleged that Millstone's negligence in the hiring, training, and supervision of the employees along with his failure to inspect the SUVs caused the spill. (R. at 10.) The United States based its witness tampering charge on Millstone's advice to Reynolds that he "plead the Fifth." (R. at 9-10.)

At the district court level, the jury convicted Millstone on both counts. (R. at 10.) Millstone filed a motion for a new trial for the CWA charge, arguing that the jury convicted him based on improper jury instructions regarding the standard of negligence. (R. at 10.) He also filed a motion for acquittal based on the witness tampering charges, arguing that a reasonable jury could not convict him of witness tampering if he merely encouraged someone to exercise a right to withhold information. (R. at 10.) The district court denied both motions. (R. at 10.)

The appellate court affirmed the district court's decision, holding that the jury was properly instructed to convict Millstone for violating § 1319(c)(1)(A) under a civil negligence standard and that Millstone was properly convicted for violating § 1512(b)(3) because he "corruptly" persuaded Reynolds to withhold information. (R. at 10.) Accordingly, Millstone filed a petition for writ of certiorari, which this Court granted. (R. at 10, 15.)

SUMMARY OF ARGUMENT

I. This Court should grant Millstone's Motion for New Trial because the jury was instructed to criminally convict Millstone for violating § 1319(c)(1)(A) based on the ordinary negligence standard instead of the gross criminal negligence standard. The jury's conviction based on civil negligence is improper because it does not

account for the appropriate level of culpability necessary for criminal conduct. The Fourteenth Circuit claimed that the CWA's classification as a public welfare statute justified the civil negligence standard; however, the CWA is not a public welfare statute. Although the CWA regulates dangerous materials, it is not a public welfare statute because its penalties are severe and an individual could not be expected to know the full extent of its regulations. Because the CWA is not a public welfare statute and because ordinary negligence does not address the appropriate *mens rea*, Millstone's conviction based on the ordinary negligence standard violates his right to due process. By applying the ordinary negligence standard, the lower court violated Millstone's right to due process by seriously punishing him without determining whether he was aware of any wrongdoing.

Even though the lower court supported the use of civil negligence based on the plain meaning of negligence, ordinary negligence is not in accordance with the criminal context of § 1319(c)(1)(A). Additional canons of statutory construction further support the application of the gross negligence standard. Applying the gross negligence standard upholds the common law principle requiring analysis of the accused's "awareness of wrongdoing." Moreover, it does not raise due process concerns, and it avoids the unreasonable result of criminalizing innocent conduct. The rule of lenity supports the gross negligence standard because this standard protects the defendant from regulations and punishments stricter than those clearly required under § 1319(c)(1)(A).

Policy reasons also support the application of the gross negligence standard. Applying the civil negligence standard blurs the line between tort and crime thus placing a legal risk on ordinary people who are indirectly linked to environmental protection issues. This risk discourages individuals and corporations from engaging in important environmental protection activity. In order to clarify the blurred line between tort and crime, to prevent the criminalization of innocent conduct, and to reduce the risk of unexpected and unjustified criminal liability, this Court should apply the gross criminal negligence standard to § 1319(c)(1)(A).

II. This Court should grant Millstone’s Motion for Acquittal because a jury could not reasonably convict Millstone for corruptly persuading Reynolds to withhold information from the government under the proper interpretation of “corruptly.” The proper interpretation requires wrongdoing in addition to withholding information from the government. The Fourteenth Circuit erred when it instructed the jury that “corruptly” meant “motivated by an improper purpose,” and that withholding information from the government was an “improper purpose.” This explanation allowed the jury to wrongfully convict Millstone for witness tampering when Millstone only encouraged Reynolds to exercise his Fifth Amendment privilege against self-incrimination.

Although a circuit split exists regarding the meaning of “corruptly,” this Court’s decision in *Arthur Andersen, LLP v. United States* established binding precedent when it construed “corruptly” to require the accused be “conscious of wrongdoing” instead of “motivated by an improper purpose.” “Consciousness of

wrongdoing” requires wrongdoing in addition to persuading another to withhold information. The conversation between Millstone and Reynolds in which Millstone encouraged Reynolds to “plead the Fifth” is not evidence of additional wrongdoing because Millstone was neither trying to bribe Reynolds nor persuade him to provide false information.

The rule of lenity, which requires courts to construe ambiguities narrowly and in favor of the defendant, also supports the “consciousness of wrongdoing” standard established by *Arthur Andersen*. By narrowly construing “corruptly” to require “consciousness of wrongdoing,” this Court construed the statutory ambiguities in favor of the defendant, protecting him from being punished for mere persuasion when no additional wrongdoing occurred.

Additionally, the ordinary meaning of “corrupt” and the legislative history of § 1512(b)(3) support a narrow construction of “corruptly” that requires additional evidence of wrongdoing because both indicate that mere persuasion to withhold information is not wrongful.

Further, a broad construction of “corruptly” as “motivated by an improper purpose,” results in bad policy. This broad construction criminalizes any act that results in withholding information from government officials. In so doing, it also violates one’s fundamental Fifth Amendment privilege, which protects one’s right to withhold information from the government. By criminalizing behavior protected by the Fifth Amendment, numerous prosecutions would result in direct violation of the Fifth Amendment and the privilege it provides. Moreover, a broad construction

negatively impacts the economy by imposing an unjustifiably large risk of criminal conviction upon business partners, such as Millstone and Reynolds.

Because Millstone's actions were still lawful under the narrower construction requiring "consciousness of wrongdoing," a reasonable jury could not have found Millstone's conduct to be "knowingly corrupt" under § 1512(b)(3). Therefore, this Court should grant Millstone's Motion for Acquittal and reverse his conviction.

ARGUMENT

I. **THIS COURT SHOULD GRANT MILLSTONE'S MOTION FOR NEW TRIAL BECAUSE THE JURY WRONGFULLY CONVICTED HIM UNDER ORDINARY NEGLIGENCE INSTEAD OF GROSS CRIMINAL NEGLIGENCE.**

This Court should grant Millstone's Motion for New Trial because the jury based his criminal conviction for violation of 33 U.S.C. § 1319(c)(1)(A) on the ordinary civil negligence standard instead of the gross criminal negligence standard. (R. at 11-12); 33 U.S.C. § 1319(c)(1)(A) (2000). Section 1311 of the Clean Water Act (CWA) criminalizes the discharge of any pollutant that is outside the scope of certain permits, while § 1319(c)(1)(A) details the punishments for anyone who "negligently violates section 1311." 33 U.S.C. § 1311(a) (2000). Because the term "negligently" is undefined within this provision, it is not clear whether the negligence standard in § 1319(c)(1)(A) is ordinary civil negligence or gross criminal negligence. The distinction between ordinary and criminal negligence is important because ordinary negligence is commonly understood as the "failure to use reasonable care," whereas criminal negligence requires a "gross deviation from conduct of a reasonable

person.” See *United States v. Hanousek*, 176 F.3d 1116, 1120-21 (9th Cir. 1999), *cert denied*, 528 U.S.1102 (2000).

Although some circuits have applied the ordinary negligence standard to § 1319(c)(1)(A), no binding precedent requiring this interpretation exists. See *id.* at 1121. Moreover, looking to additional circumstances and factors beyond the unclear statutory language, ordinary negligence is not an adequate basis to criminally convict an individual under § 1319(c)(1)(A).

This Court should not base negligence under § 1319(c)(1)(A) on the ordinary civil negligence standard for the following reasons: (1) the CWA is not a public welfare statute; (2) application of the ordinary negligence standard violates Millstone’s right to due process; (3) canons of statutory construction support the gross negligence standard; (4) the ordinary negligence standard does not fit into the criminal context of § 1319(c); and (5) the ordinary negligence standard undermines criminal law and environmental protection by blurring the distinctions between tort and crime.

A. This Court should review a motion for new trial under an abuse of discretion standard but should review *de novo* the statutory meaning of negligence because it is an issue of law.

Generally, courts consider a trial court’s denial of a motion for new trial under an abuse of discretion standard. See, e.g., *United States v. Morgan*, 113 F.3d 85, 89 (7th Cir. 1997); *United States v. Ahmad*, 101 F.3d 386, 390 (5th Cir. 1996). Within this consideration, however, courts should review *de novo* issues of law, such as questions of statutory construction and interpretation. See *United States v. Maloney*, 71 F.3d 645, 652–53 (7th Cir. 1995), *cert. denied* 117 S. Ct. 295 (1996);

United States v. Weitzenhoff, 35 F.3d 1275, 1283 (9th Cir. 1993) (citing *United States v. Richison*, 901 F.2d 778, 780 (9th Cir. 1990)). While greater deference is given to the trial court under an abuse of discretion review, less deference if any is given to the trial court under a *de novo* review. *See Maloney*, 71 F.3d at 652 (deferring to the trial court under an abuse of discretion standard); *see also Salve Regina Coll. v. Russell*, 499 U.S. 225, 226 (1991) (“When *de novo* review is compelled, no form of appellate deference is acceptable.”).

This Court should review Millstone’s Motion for New Trial under an abuse of discretion standard because his motion was based on an improper jury charge regarding the definition of negligence; however, because the definition of “negligently” in the jury charge presents a question of law, this Court should review the meaning of negligence under § 1319(c)(1)(A) *de novo* and should not defer to the trial court’s interpretation of “negligence.” *See Ahmad*, 101 F.3d at 390 (reviewing the denial of a motion for new trial based on an improper jury charge under the abuse of discretion standard); *see also Weitzenhoff*, 35 F.3d at 1283 (reviewing questions of law *de novo*). Based on this review, “negligently” should be analyzed under the gross criminal negligence standard instead of the ordinary civil negligence standard.

B. The CWA is not a public welfare statute because its provisions are too broad to place an individual on notice of a responsibility to prevent public danger and its policies are too severe.

Millstone’s *mens rea*, or awareness of wrongdoing, should be considered under the gross criminal negligence standard because the CWA is not a public

welfare statute. The public welfare doctrine is a narrow exception to the rule that all criminal offenses require *mens rea* analysis. *See Staples v. United States*, 511 U.S. 610, 616 (1994). This Court has upheld public welfare classification when an offense regulates particularly blameful conduct that an individual would expect to be strictly regulated. *Id.* Courts apply the public welfare doctrine when a statute criminalizes acts that cause widespread injury and impose light penalties. *Id.* Thus, to determine if a statute should be classified as a public welfare statute, courts look to the character of the offense and the penalties imposed for violations. *See id.* at 606.

i. The CWA is not a public welfare statute because its provisions are so broad that an individual could not foresee strict regulations against discharging pollutants without a permit.

With regard to character, public welfare classification could be appropriate when the statute regulates “dangerous or deleterious devices or products or obnoxious waste materials,” because the “probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation.” *United States v. Int’l Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971); *see Staples*, 511 U.S. at 606-11 (holding that the public risk of machine guns was not so great that an ordinary person would expect strict regulation); *United States v. Balint*, 258 U.S. 250, 253-54 (1922) (holding that a statute criminalizing the possession of narcotics was a public welfare statute because narcotics are dangerous and an individual would reasonably expect narcotics to be strictly regulated); *United States v. Freed*, 401 U.S. 601, 612-16

(1971) (holding that a statute criminalizing the possession of hand grenades was a public welfare statute because hand grenades are dangerous and an individual would reasonably expect hand grenades to be strictly regulated).

Although a statute's regulation of a "dangerous" device or product is certainly a good indication that it should be a public welfare statute, this is not a determinative factor. *See Staples*, 511 U.S. at 606. For example, this Court held in *United States v. Staples* that a statute prohibiting the possession of a machine gun was outside the scope of public welfare even though machine guns are dangerous and could cause harm. *See id.* According to *Staples*, danger alone cannot justify classification as a public welfare statute because dangerous items do not always implicate criminal behavior. *See id.* at 611.

Rather, the more relevant factor is whether the omission of *mens rea* analysis in construing a particular statute would "criminalize a broad range of apparently innocent conduct."² *See Staples*, 511 U.S. at 610 (quoting *Liparota v. United States*,

² Justice Thomas dissented from the denial of writ in *United States v. Hanousek* because of his concern regarding the broad application of the public welfare doctrine. 528 U.S. 1102, 1102 (2000) (Thomas, J., dissenting). He urged the court to grant writ in order to clarify when the public welfare doctrine should be applied. *Id.* He does not think that the determinative factor for public welfare application should be whether the public risk associated with an item would cause an individual to expect strict regulation:

But we have never held that any statute can be described as creating a public welfare offense so long as the statute regulates conduct that is known to be subject to extensive regulation and that may involve a risk to the community.... I presume that in today's heavily regulated society, any person engaged in industry is aware that his activities are the object of sweeping regulation and that an industrial accident could threaten health or safety.

Id.

471 U.S. 419, 426 (1985)). In order to avoid criminalizing a broad range of innocent conduct, this Court in *Staples* held that the individual must be aware that possessing the gun was unlawful. *Id.* at 610-11. Further, although many regulations regarding gun ownership exist, because of the long history of lawful possession of guns by private individuals, an individual could not expect possessing the gun to be unlawful. *Id.* at 610-11.

The Fifth Circuit in *United States v. Ahmad* relied on *Staples* to hold that the CWA should not be classified as a public welfare statute and that *mens rea* must be analyzed for convictions under the CWA. *Ahmad*, 101 F.3d at 390-91. In *Ahmad*, an individual mistakenly discharged gasoline, which he thought was water, into a river and was charged with a knowing violation of the CWA. *See id.* at 392. Although the gasoline from the accidental discharge was a “potentially harmful or injurious item,” the Fifth Circuit found that its potential harm did not exceed that associated with a machine gun. *See id.* at 391. Thus, an individual could not expect strict regulation based on the public risk associated with the gasoline when he thought it was water and application of the public welfare doctrine in this situation would criminalize innocent conduct.

Decisions that have classified the CWA as a public welfare statute justify this classification because of the potential harm caused by discharged pollutants. *See, e.g., Hanousek*, 176 F.3d at 1116-20; *Wietzenhoff*, 35 F.3d at 1286 (classifying the CWA as a public welfare statute because its provisions were “clearly designed to protect the public at large from the potentially dire consequences of water

pollution”). Such decisions conflict with the narrow application and purpose behind the public welfare doctrine. *See Staples*, 511 U.S. at 606. As Justice Thomas noted in his dissenting opinion in *Hanousek*, the broad regulatory nature of the CWA does not justify the elimination of *mens rea* analysis and, thus, should not compel its classification as a public welfare statute. *See Hanousek*, 528 U.S. at 1102. Due to the breadth of the CWA provisions that encompass “usually licit and blameless conduct,” not only is it impossible to expect laymen to distinguish between all lawful and unlawful discharges, but also people who use standard equipment “to engage in a broad range of ordinary industrial and commercial activities,” could be criminally liable for innocent conduct. *See id.*

Millstone’s criminal conviction demonstrates the Fourteenth Circuit’s overly broad application of the public welfare doctrine. (R. at 15.) Although the Fourteenth Circuit criminally convicted Millstone for the negligent discharge of a pollutant, this conviction criminalized innocent conduct, a consequence which this Court in *Staples* listed as a reason not to apply the public welfare doctrine. *See Staples*, 511 U.S. at 610-11. Moreover, the CWA provisions are so broad that Millstone could not know which substances are regulated and which are not. *See id.*; *see also Ahmad*, 101 F.3d at 390-91. Neither Millstone nor his employees could be expected to know the standard of care necessary to avoid criminal liability under the CWA because Millstone and his employees are not in the business of handling dangerous, regulated chemicals nor do they engage in “manufacturing, construction or other industrial activities” that would familiarize them with the conduct necessary to

avoid criminal liability under the CWA. (R. at 17.) Because the conviction criminalized innocent conduct and because the CWA provisions are too broad for Millstone to expect strict regulations, this Court should not classify the CWA as a public welfare statute.

ii. The CWA is not a public welfare statute because its penalties are severe.

Additionally, the penalties imposed for CWA violations are too severe to justify public welfare classification. This Court in *Staples* and the Fifth Circuit in *Ahmad* refused to classify the respective statutes as public welfare because the penalties imposed for these violations were too severe to omit *mens rea* analysis. *See Staples*, 511 U.S. at 607, 618 (holding that substantial terms of imprisonment—as opposed to fines or short jail sentences—are too serious for public welfare crimes); *Ahmad*, 101 F.3d at 391. This Court in *Morissette v. United States* required that public welfare penalties remain “relatively small” and do “no grave damage to an offender’s reputation.” 342 U.S. 246, 256 (1952). According to the Fifth Circuit in *Ahmad*, because the CWA was not a public welfare statute, *mens rea* analysis was necessary and applied to each element of the crime except for “purely jurisdictional elements.” *Ahmad*, 101 F.3d at 392.

Circuit courts that have classified the CWA as a public welfare statute have ignored the heavy penalties imposed upon people who violate the CWA. *See, e.g., Hanousek*, 528 U.S. at 1103; *Weitzenhoff*, 35 F.3d at 1281. For the first violation regarding negligent conduct, a violator could be fined up to \$25,000 per day of

violation and imprisoned up to one year, and a second violation imposes a maximum penalty of \$50,000 per day of violation and up to three years imprisonment. *See* § 1319 (c)(1)(B); *Hanousek*, 528 U.S. at 1102. Such penalties could significantly damage the offender’s reputation and are more severe than the small fines and short jail sentences that are characteristic of public welfare statutes. *See Staples*, 511 U.S. at 607; *Morissette*, 342 U.S. at 256.

Based on these implications, its regulatory nature, and the severity of CWA penalties, the narrow public welfare exception does not apply to the CWA. This Court should uphold the narrow application of the public welfare doctrine and not classify the CWA as a public welfare statute. *See Staples*, 511 U.S. at 607; *Morissette*, 342 U.S. at 256; *Ahmad*, 101 F.3d at 391. Although the Windy River spill resulted in harm, such harm does not determine public welfare classification. *See Staples*, 511 U.S. at 607; *Ahmad*, 101 F.3d at 391. The ordinary civil negligence standard is improper because this standard subjected Millstone to criminal liability without consideration of his “awareness of wrongdoing.” (R. at 7-8); *see also Staples*, 511 U.S. at 611 (citing *Liparota*, 471 U.S. at 426).

The risk for criminal liability is particularly relevant in situations similar to Millstone’s in which he was not the one who acted, but rather, it was his security guard who had been trained specifically for emergency situations. (R. at 7-8); *see also Staples*, 511 U.S. at 611 (citing *Liparota*, 471 U.S. at 426).

C. The ordinary civil negligence standard violates Millstone’s right to due process because it does not sufficiently address Millstone’s *mens rea*.

Application of the civil negligence standard results in the abuse of Millstone’s right to due process because it does not adequately consider Millstone’s “awareness of wrongdoing” with regard to the Windy River accident. Due process places an important limitation on a court’s ability to eliminate the *mens rea* analysis from criminal convictions. *See, e.g., Lambert v. California*, 355 U.S. 225, 226-29 (1957) (holding that a woman’s conviction for failure to register as a felon without proof of *mens rea* violated her right to due process); *see also Staples*, 510 U.S. at 607 (recognizing that the public welfare doctrine offers a narrow exception to *mens rea* analysis for criminal convictions). Generally, courts must consider *mens rea* for criminal convictions. *See, e.g., Morissette*, 342 U.S. at 250 (common law requires *mens rea* analysis for criminal convictions); *United States v. Wuff*, 758 F.2d 1121, 1125 (6th Cir. 1985) (holding that the Migratory Bird Treatment Act violated a defendant’s due process because it defined a felony without requiring *mens rea* analysis).

Despite this broad requirement for *mens rea* analysis in criminal convictions, the omission of *mens rea* in certain circumstances will not violate the accused’s right to due process. *See Staples*, 511 U.S. at 607; *Holdridge v. United States*, 282 F.2d 302, 310 (8th Cir. 1960). Specifically, the elimination of *mens rea* analysis for public welfare statutes does not violate the accused’s right to due process because these statutes impose minimal penalties and regulate conduct that presents great public risk. *See, e.g., Staples*, 511 U.S. at 607; *see also Holdridge*, 282 F.2d at 310

(detailing the circumstances when omission of *mens rea* will not violate the accused's right to due process).

If a court improperly classifies a statute as a public welfare offense, however, *mens rea* analysis will be wrongfully omitted. *See, e.g., Staples*, 511 U.S. at 607; *see also Holdridge*, 282 F.2d at 310. The Eighth Circuit in *United States v. Holdridge*, noted that if a statute expressly includes *mens rea*, omission of *mens rea* analysis infringes upon the accused's right to due process. *See, e.g., Holdridge*, 282 F.2d at 310. Risk for due process violations are particularly grave should a court justify the simple negligence standard for the CWA under the public welfare doctrine. *See generally* Bruce Pasfield & Sarah Babcock, *Simple Negligence and Clean Water Act Criminal Liability: A Troublesome Mix*, 12 No. 1 ABA Env'tl. Enforcement & Crimes Committee Newsl. 3, 10-11 (March 2011) (detailing the due process implications that arise when civil negligence is applied to the CWA).

Under the public welfare doctrine, the ordinary negligence standard applied to the CWA provisions is very close to a strict liability standard because it imposes severe punishment without determining whether that person was aware of any wrongdoing or whether an individual knew such conduct was unlawful.³ *See Hanousek*, 528 U.S. at 1102; *see also* Pasfield & Babcock, *supra* at 10-11. Because

³ Although the Model Penal Code lists "negligence" under a category of *mens rea*, ordinary civil negligence does not adequately address the necessary awareness of wrongdoing for a criminal conviction that imposes severe penalties. *See* Model Penal Code 2.01(d) (1984); *see also Staples*, 511 U.S. at 607 (noting that knowledge of the danger associated with an item and its strict regulation is necessary for application of the public welfare doctrine).

the ordinary civil negligence standard does not adequately address the *mens rea* expressly included in § 1319(c)(1)(A), application of the ordinary civil negligence standard to § 1319(c)(1)(A) raises due process concerns. *See Staples*, 511 U.S. at 607; *Holdridge*, 282 F.2d at 310. To adequately address *mens rea*, and, thus, avoid violations of due process, this Court should apply the gross criminal negligence standard to determine guilt under § 1319(c)(1)(A).

Due process concerns also arise regarding the definition of “pollutant” under 33 U.S.C. § 1311. Because the CWA’s definition of “pollutant” is so extensive, laymen would not be on notice as to which substances are pollutants. *See Pasfield & Babcock*, *supra* at 10-11. Therefore, under civil negligence, an individual could be held criminally liable and subjected to severe penalties even without proving that the individual was aware that a specific discharged substance was a “pollutant” under the CWA. *See id.* The definition of civil negligence, itself, also raises questions regarding its application to the CWA.

Ordinary civil negligence, which is generally defined as “failure to use reasonable care,” raises the question of whether the standard should be the reasonable care of someone in a heavily regulated industry or someone doing ordinary work. *See Hanousek*, 176 F.3d at 1120; *see also Pasfield & Babcock*, *supra* at 10-11. Bruce Pasfield and Sarah Babcock note that the cause-in-fact and proximate cause issues that arise when oil spills involve multiple operators, do not reasonably fit into the criminal provisions of the CWA. *See Pasfield & Babcock*, *supra* at 10-11.

Moreover, because civil common law theories govern civil negligence, this civil standard is inadequate to determine guilt or innocence in a criminal context. *See id.* Application of civil negligence in situations where multiple people contributed to an oil spill does not adequately protect against due process violations because a court could impose severe penalties on anybody remotely responsible for the accident even if that individual did not discharge the substance. *See id.*

The ordinary civil negligence standard violates Millstone's right to due process specifically because Millstone was not aware of any wrongdoing in relation to the Windy River spill. (R. at 7-10.) In fact, Millstone was not directly responsible for the accident; he was connected to the accident because the Securitek patrol vehicle crashed while a Securitek employee investigated a potential security breach. (R. at 7.) The gross criminal negligence standard better protects Millstone's right to due process because it gives adequate consideration to Millstone's awareness of wrongdoing. *See Hanousek*, 528 U.S. at 1102; *Pasfield & Babcock*, *supra* at 10-11. Therefore, analysis under gross negligence is imperative to avoid due process violations.

D. The ordinary civil negligence standard is improper based on canons of statutory construction and the criminal context of § 1319(c).

Although the standard of negligence under § 1319(c)(1)(A) is not expressly defined, the criminal context of the CWA and additional canons of statutory construction support the interpretation of gross criminal negligence instead of ordinary civil negligence. This Court in *King v. St. Vincent's Hospital* emphasized the importance of context when construing statutory language. 502 U.S. 215, 221

(1991) (“[T]he meaning of statutory language, plain or not, depends on context.”). This Court has recognized in *Safeco Insurance Company v. Burr*, that where the statutory structure contains both civil and criminal penalties, it is appropriate to impose civil negligence to civil penalties and to require more culpable conduct for criminal penalties. 551 U.S. 47, 60 (2007). The Ninth Circuit in *Hanousek* stated that ordinary civil negligence is proper because this interpretation follows the plain meaning of “negligence.” *Hanousek*, 176 F.3d at 1121-22. Ordinary civil negligence, however, is not in accordance with the criminal context of the criminal penalties of § 1319(c)(1)(A). *See King*, 502 U.S. at 221; *Burr*, 551 U.S. at 60.

Although this Court has never interpreted the meaning of negligence in a criminal context, several state courts have applied a gross criminal negligence standard when a statute includes an undefined use of negligence in a criminal provision. *See, e.g., Santillanes v. State*, 849 P.2d 358, 365 (N.M. 1993); *State v. Ritchie*, 590 So.2d 1139, 1149 (La. 1991); *State v. Grover*, 437 N.W.2d 60, 63 (Minn. 1989). These decisions interpreted the *mens rea* element of negligence “to require a showing of criminal negligence instead of ordinary civil negligence.” *Santillanes*, 849 P.2d at 365; *Ritchie*, 590 So.2d at 1149; *Grover*, 437 N.W.2d at 63. These decisions also note that the absence of an express definition of criminal negligence does not necessarily indicate a legislative intent for the courts to apply ordinary civil negligence to criminal provisions. *Santillanes*, 849 P.2d at 365; *Ritchie*, 590 So.2d at 1149; *Grover*, 437 N.W.2d at 63.

The Fourteenth Circuit erred in its use of negligence as a “failure to exercise the standard of care [of] a reasonably prudent person,” because this definition is derived from civil cases and does not distinguish between civil and criminal contexts. (R. at 11.) (quoting *Black’s Law Dictionary* 434 (1996)). The Fourteenth Circuit should have applied the gross criminal negligence standard to determine whether Millstone “grossly deviated from the standard of care” because this adheres to the criminal context of the CWA. *See King*, 502 U.S. at 221; *Burr*, 551 U.S. at 60.

Other canons of statutory construction also support the construction of “negligently” in § 1319(c)(1)(A) to require analysis under gross criminal negligence. *See Staples*, 511 U.S. at 605 (common law principles should guide statutory construction); *United States v. United States Gypsum Co.*, 438 U.S. 422, 442 (1978) (holding that when the structure of a statute has both civil and criminal provisions, civil standards should apply to civil provisions and criminal standards should apply to criminal provisions); *United States v. X-Citement Videos*, 513 U.S. 64, 69-71 (1994) (construing statutory language should avoid unreasonable results); *Liparota*, 471 U.S. at 427 (applying the rule of lenity to construe ambiguous statutes in favor of the accused); *Concrete Pipe and Prod. of Cal., Inc. v. Constr. Laborers Pension Trust for So. Cal.*, 508 U.S. 602, 609 (1993) (construing statutory language should avoid substantial constitutional issues).

First, common law principles should guide statutory construction. The common law principle that criminal convictions require analysis of the accused’s “awareness of wrongdoing” as noted by this Court in *Staples* supports the gross

criminal negligence standard because this standard gives appropriate awareness of wrongdoing for criminal convictions. *See Staples*, 511 U.S. at 605. Additionally, if there are two possible meanings of specific statutory language, the meaning that avoids unreasonable results should prevail. *See X-Citement Videos*, 513 U.S. at 69-71. Based on this principle, the gross criminal negligence interpretation would avoid the unreasonable result of broadly criminalizing seemingly innocent conduct because individuals would only be convicted if their conduct “grossly deviated” from that of a reasonable person and individuals would not be penalized for conduct that an ordinary person would consider lawful. *See id.*

Further, the rule of lenity resolves the ambiguities in “negligently” in favor of the gross criminal negligence standard. The rule of lenity requires that courts construe ambiguities in statutory language to protect the defendant from the imposition of higher punishment. *See, e.g., Liparota*, 471 U.S. at 427 (applying the rule of lenity to construe ambiguous statutes in favor of the accused); *United States v. Bass*, 404 U.S. 336, 347-50 (“fair warning should be given to the world in language the common world will understand, of what the law intends to do if a certain line is passed”); *Scheidler v. Nat’l Org. for Women, Inc.*, 437 U.S. 393, 408-09 (2003); *McNally v. United States*, 483 U.S. 350, 359-60 (1987) (“when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.”).

This Court in *Scheidler v. National Organization of Women, Inc.* found that a harsher reading of a statute is only justified when there is clear and definite language that supports such a reading. *Scheidler*, 537 U.S. at 408-09. The rule of lenity supports the gross criminal negligence standard because the ordinary civil negligence standard encompasses a wider range of conduct. *See Liparota*, 471 U.S. at 427; *Scheidler*, 537 U.S. at 408-09. The gross criminal standard, however, is a stricter standard that protects defendants from convictions resulting from behavior that does not grossly deviate from that of an ordinary person. *See Liparota*, 471 U.S. at 427; *Scheidler*, 537 U.S. at 408-09.

Lastly, because statutory construction should avoid substantial questions of constitutionality, applying gross criminal negligence to § 1319(c)(1)(A) would reduce the risk of due process violations that arise when simple negligence is applied to the criminal provisions of the CWA. *Concrete Pipe and Prod. of Cal., Inc.*, 508 U.S. at 609. Based on these principles of statutory construction and the criminal context of § 1319(c), this Court should interpret “negligently” in § 1319(c)(1)(A) to mean a gross criminal negligence standard and not an ordinary civil negligence standard.

E. The ordinary civil negligence standard undermines principles of criminal law because it blurs the line between tort and crime.

Application of a civil ordinary negligence standard to criminally convict an individual blurs the line between tort and crime thus weakening the purpose of criminal law, which is to maintain social control. *See generally* John C. Coffee, *Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B. U. L. Rev. 193, 193 (1991) (“[B]lurring of the

border between tort and crime predictably will result in injustice, and ultimately weaken the efficacy of the criminal law as an instrument of social control.”).

Applying civil negligence to the criminal negligence provisions of the CWA vitiates the general requirement for evidence of criminal intent and thus criminalizes innocent behavior. *See id.*; *see also Weitzenhoff*, 35 F.3d at 1298 (discussing the negative implications for imposing civil negligence on a “knowing” discharge of a pollutant under § 1319(c)(1)(2) of the CWA).

Ordinary civil negligence as applied to § 1319(c)(1)(A), would set such a low threshold for criminal conduct that ordinary lay people indirectly involved with environmental issues would be subject to an unjustifiably great legal risk of criminal liability. *See, e.g., Hanousek*, 510 U.S. at 1102. Justice Thomas dissented from the denial of writ in *Hanousek* in part because ordinary lay people would also be subject to a huge risk of criminal liability. *See id.* He noted that ordinary lay people could not be expected to distinguish between lawful and unlawful discharge into waters. *See id.*

Moreover, the dissent in *Weitzenhoff* also noted that application of the civil negligence standard to a criminal provision sets such a low threshold for criminal conduct that individuals indirectly involved in environmental protection in a corporate capacity are subject to an unjustifiably great legal risk of criminal liability. *See Weitzenhoff*, 35 F.3d at 1298. This risk discourages individuals, such as Millstone and Reynolds, from serving in this capacity and, thus, undermines environmental protection. *See id.* Although Millstone and Reynolds were not aware

of the extensive provisions governing the material for which they provided security services, both are significantly less likely to enter into contracts that involve issues of environmental protection. (R. at 7-10.) The risk of liability imposed upon Millstone and Reynolds is also evidence of the risk placed upon ordinary lay people who are indirectly linked to environmental protection issues. (R. at 10, 15.)

In this case, the ordinary civil negligence standard allowed the jury to criminally convict Millstone for the actions of his employee that indirectly caused the Windy River spill. (R. at 7-8.) Millstone and his employees are subject to this risk even though they are not in the normal business of handling dangerous, regulated chemicals and did not engage in industrial activities that would apprise them of the standard of care required by the CWA. (R. at 5-6.) In order to clarify the blurred line between tort and crime, to prevent the criminalization of innocent conduct, and to reduce the risk of unexpected and unjustified criminal liability, this Court should apply the gross criminal negligence standard to § 1319(c)(1)(A).

II. THIS COURT SHOULD GRANT MILLSTONE'S MOTION FOR ACQUITTAL BECAUSE A REASONABLE JURY COULD NOT CONVICT MILLSTONE UNLESS THERE WAS EVIDENCE OF WRONGDOING IN ADDITION TO MOTIVATION BY AN IMPROPER PURPOSE.

The Fourteenth Circuit erred by failing to grant Millstone's Motion for Acquittal because Reynolds had the legal option to exercise his Fifth Amendment privilege against self-incrimination aside from any encouragement to do so from Millstone. (R. at 15); U.S. Const. amend. V.; *see also United States v. Doss*, 630 F.3d 1181, 1190 (9th Cir. 2011), *as amended on reh'g in part* (Mar. 15, 2011) (holding that a

husband's request that his wife exercise spousal immunity was not corrupt and constituted innocent persuasion). Millstone's act of merely requesting that Reynolds exercise his Fifth Amendment right constitutes innocent persuasion without additional evidence of wrongdoing. (R. at 9); *see Doss*, 630 F.3d at 1190. The lower court reached its erroneous decision by broadly misconstruing the meaning of "corruptly" in 18 U.S.C. § 1512(b)(3) as "motivated by an improper purpose" and that withholding information from the government was an "improper purpose." (R. at 14-15); 18 U.S.C. § 1512(b)(3) (2000). A circuit split exists regarding the meaning of "corruptly," however, persuasive authority supports the narrow construction of "corruptly" to require wrongdoing in addition to an improper purpose. (R. at 14.)

A. This Court should review Millstone's Motion for Acquittal under a *de novo* standard.

A court reviews motions for acquittal and issues of statutory construction *de novo* because these issues present questions of law. *See, e.g., United States v. Bert*, 292 F.3d 649, 651-52 (9th Cir. 2002); *United States v. Lazcano-Villalobos*, 175 F.3d 838, 842-43 (10th Cir. 1999); *United States v. Anderson*, 326 F.3d 1319, 1326 (11th Cir. 2003). Under the *de novo* standard, a court need not defer to the lower court's opinion. *See Salve Regina Coll. v. Russell*, 499 U.S. 225, 226 (1991) ("When *de novo* review is compelled, no form of appellate deference is acceptable.").

Although a court in deciding a motion for acquittal must consider the sufficiency of the evidence "in the light most favorable to the government to determine 'whether any rational trier of fact could have found essential elements of the crime beyond a reasonable doubt,'" this Court does not have to defer to the lower

court's decision when reviewing the meaning of "corruptly persuade" within § 1512(b)(3). *Doss*, 630 F.3d at 1190 (quoting *United States v. Khutami*, 280 F.3d 907, 910 (2002)); see *Russell*, 499 U.S. at 226. Thus, this Court should review *de novo* the meaning of "corruptly" to decide Millstone's Motion for Acquittal. See *Russell*, 499 U.S. at 226; *Bert*, 292 F.3d at 651-52.

B. *Arthur Andersen, LLP v. United States* established binding precedent, properly construing "corruptly" to require the accused be "conscious of wrongdoing" instead of merely "motivated by an improper purpose."

Millstone was not guilty of witness tampering because he was advising Reynolds to exercise his Fifth Amendment right against self-incrimination and, thus, was not "conscious of any wrongdoing" in hindering the government's investigation. This Court's decision in *Arthur Andersen, LLP v. United States*, resolves the circuit split regarding the meaning of "corruptly" in § 1512(b)(3) by narrowly construing the term to require a defendant be "conscious of wrongdoing" instead of "motivated by an improper purpose." 544 U.S. 696, 703-06 (2005); see also *United States v. Shotts*, 145 F.3d 1289, 1301 (11th Cir. 1998) (construing "corruptly" as "motivated by an improper purpose"). This Court justified the "consciousness of wrongdoing" interpretation because it gives meaning to the intent element of "knowingly" under § 1512(b) and because it recognizes that mere persuasion to withhold information from the government is not "inherently malign." *Id.* at 703-05.

This Court in *Arthur Andersen* considered other interpretations of "knowingly...corruptly" that did not require "consciousness of wrongdoing" flawed

because such interpretations fail to separate the *mens rea* requirement for “knowingly” from the meaning of “corruptly.” *Id.* at 705-06. The Second and Eleventh Circuits justified the omission of “knowingly” under the “motivated by an improper purpose” interpretation of § 1512(b)(3) based on the statutory language of § 1503. *Id.* at 705-07, f.9; 18 U.S.C. § 1503 (2000). Unlike § 1503, which does not include an express intent element, § 1512(b) includes the express intent element “knowingly,” which modifies the term “corruptly.” *Arthur Andersen*, 544 U.S. at 705-07. This difference demonstrates why an analogy between the two statutes is inaccurate. *Id.*

Moreover, this Court determined that the failure to separate the *mens rea* requirement for “knowingly” from the meaning of “corruptly” results in statutory surplusage, which courts consistently avoid, particularly when such language involves an element of the offense. *See id.* at 704-06. Surplusage results under this construction because the possible guilty acts under § 1512 are all improper if done knowingly. *See id.* The “consciousness of wrongdoing” interpretation prevents statutory surplusage because it properly separates the element of “knowingly” and “corruptly” and requires evidence of wrongdoing in addition to an improper purpose. *See id.* at 702-09. Additionally, this Court found that preventing information from reaching the government was not inherently unlawful. *Id.* at 703-04, 706-07. Specifically, this Court recognized that asking someone to invoke the Fifth Amendment right against self-incrimination is not wrongful when an individual possesses a separate legal right to do so. *Id.* at 703-04. Thus, in order to corruptly

persuade an individual to prevent information from reaching the government, evidence of wrongdoing in addition to persuasion must exist. *See id.* at 706-07.

The Third and Ninth Circuits also require evidence of wrongdoing in addition to persuasion. *See United States v. Farrell*, 126 F.3d 484, 488 (3d Cir. 1997); *Doss*, 630 F.3d at 1190. The Third Circuit in *United States v. Farrell* justified an additional showing of culpability because the term “corruptly” modifies “persuades,” thus indicating that merely persuading someone to hinder an investigation does not violate the statute. *Farrell*, 126 F.3d at 488. The *Farrell* court specifically recognized that non-coercively persuading a coconspirator to exercise his Fifth Amendment right to withhold information from investigators is not corrupt. *See id.* Similarly, the Ninth Circuit in *United States v. Doss* found that non-coercively persuading a coconspirator to exercise his Fifth Amendment right was not corrupt and that a person who merely persuaded another was not “conscious of wrongdoing.” *Doss*, 630 F.3d at 1190-91. These decisions contrast lawful, non-coercive persuasion with persuasion in circumstances that evidence additional wrongdoing, such as encouraging an individual to provide false information or bribing the individual to hinder a governmental investigation. *See id.; Farrell*, 126 F.3d at 484. This evidence of additional wrongdoing proves the persuasion was done in a corrupt manner.

Millstone did not “corruptly persuade” Reynolds to exercise his Fifth Amendment privilege against self-incrimination because Millstone non-coercively attempted to persuade Reynolds, and, thus, Millstone was not “conscious of

wrongdoing.” (R. at 15.) In addition to the non-coercive nature of the conversation, there was no additional evidence of wrongdoing because Millstone was not trying to bribe Reynolds nor persuade him to provide false information. (R. at 15.) This Court in *Arthur Andersen*, the Third Circuit in *Farrell*, and the Ninth Circuit in *Doss* all recognize the lawful and innocent nature of the persuasion evident in the conversation between Millstone and Reynolds. (R. at 9); *see Arthur Andersen*, 544 U.S. at 703-04; *Doss*, 630 F.3d at 1191; *Farrell*, 126 F.3d at 484. Because there was no additional evidence of wrongdoing regarding this conversation, this Court should grant Millstone’s Motion for Acquittal and reverse his conviction. *See Arthur Andersen*, 544 U.S. at 702-09; *see Doss*, 630 F.3d at 1191; *Farrell*, 126 F.3d at 484.

C. The rule of lenity resolves the ambiguous meaning of “corruptly” in favor of a narrow construction that requires wrongdoing in addition to an “improper motive.”

The rule of lenity resolves the meaning of “corruptly,” by construing ambiguities narrowly and in favor of the defendant, thus supporting the interpretation that “corruptly” requires wrongdoing in addition to an “improper motive.” This Court consistently applies the rule of lenity when interpreting statutory language where the “text, structure, and history of the statute leave reasonable doubt about the statute’s intended scope.” *Moskal v. United States*, 498 U.S. 103, 108 (1990); *see also United States v. Granderson*, 511 U.S. 39, 54 (1994) (“where text, structure, and history fail to establish that the Government’s position is unambiguously correct—we apply the rule of lenity.”); *United States v. Bass*, 404

U.S. 336, 347 (1971) (“ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity”) (quotations omitted).

The rule of lenity favors defendants because it “resolve[s] doubts in the enforcement of a penal code against the imposition of a higher punishment.” *Bell v. United States*, 349 U.S. 81, 83 (1955); *see also Ladner v. United States*, 358 U.S. 169, 178 (1958) (“[T]he Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended”); *United States v. Lacher*, 134 U.S. 624, 628 (1890) (“before a man can be punished, his case must be plainly and unmistakably within the statute”); *Bass*, 404 U.S. at 348. Specifically, as this Court noted in *McNally v. United States*, “when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.” 483 U.S. 350, 359-60 (1987); *see also Scheidler v. Nat’l Org. for Women, Inc.*, 537 U.S. 393, 408-09 (2003) (holding that an interpretation that results in harsher punishment is justified only if the statute contained “clear and definite language” providing for such punishment).

The rule of lenity is an important tool for statutory construction because it prevents arbitrary and unfair standards of criminal punishments; deters prosecutors from improperly expanding criminal statutes to include conduct not expressly criminalized in the statute; provides notice to the public regarding what conduct is criminal; and ensures legislative supremacy. *See United States v.*

Kozminksi, 487 U.S. 931, 951-52 (1988) (rule of lenity prevents arbitrary and unfair decisions); *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (rule of lenity provides adequate notice of which conduct is criminal); *Bass*, 404 U.S. at 347-49 (rule of lenity provides adequate notice of criminal conduct and ensures legislative supremacy); *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 105-06 (1820) (rule of lenity guarantees legislative supremacy in establishing criminal law).

A circuit split regarding the meaning of statutory language is evidence of ambiguous language and, thus, the rule of lenity applies to circuit splits regarding statutory meaning, particularly where both sides acknowledge inherent ambiguities. *See generally* Gary G. Grindler & Jason A. Jones, *Please Step Away from the Shredder and the “Delete” Key: §§ 802 and 1002 of the Sarbanes-Oxley Act*, 41 Am. Crim. L. Rev. 67, 74 (2004) (explaining that a circuit split demonstrates ambiguities in statutory language); *see also Granderson*, 511 U.S. at 54 (citing *Bass*, 404 U.S. at 347).

The rule of lenity should apply to this Court’s construction of “corruptly” because the circuit split regarding the meaning of “corruptly” is evidence of ambiguous statutory language. *See United States v. Thompson*, 76 F.3d 442, 452 (2d Cir. 1996) (holding that “corruptly” means “motivated by an improper purpose”); *Farrell*, 126 F.3d at 484 (holding that “corruptly” must mean more than “motivated by an improper purpose”). Under the rule of lenity, this Court must adopt the “consciousness of wrongdoing” standard, the narrowest view in favor of Millstone

that requires evidence of wrongdoing in addition to persuading someone to hinder information. *See McNally*, 483 U.S. at 359-60; *Scheidler*, 537 U.S. at 408-09.

The rule of lenity does not support the interpretation the jury used to convict Millstone, which required evidence that Millstone was “motivated by an improper purpose.” Rather, the rule of lenity supports the “consciousness of wrongdoing” interpretation, which requires evidence of additional wrongdoing. *Granderson*, 511 U.S. at 54 (“we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor”) (citing *Bass*, 404 U.S. at 347-49); *Arthur Andersen*, 544 U.S. at 703-07. Based on the “consciousness of wrongdoing” interpretation, a jury could not convict Millstone because there was no evidence of additional wrongdoing in Millstone’s request that Reynolds “plead the Fifth.” (R. at 9); *Arthur Andersen*, 544 U.S. at 703-07. Therefore, this Court should grant Millstone’s Motion for Acquittal and reverse his conviction.

D. The legislative history of 18 U.S.C. § 1512(b)(3) and the common understanding of “corrupt” support the narrow construction of “corruptly” to mean more than “motivated by an improper purpose.”

The legislative history of § 1512(b)(3) and the common understanding of “corrupt” support a narrow construction of “corruptly” and imply that mere persuasion is not wrongful. The circuit split presents two differing interpretations of “corruptly”.⁴ *Compare Thompson*, 76 F.3d at 452 (“motivated by an improper

⁴ Additional case law from different circuits addressed this issue. *See United States v. Gotti*, 459 F.3d 296, 342-43 (2d Cir. 2006); *United States v. Shotts*, 145 F.3d 1289, 1301 (11th Cir. 1998) (motivation by an improper purpose); *Doss*, 630 F.3d at 1190-91 (“consciousness of wrongdoing” interpretation). The petitioner’s brief in *Arthur Andersen* details the importance of distinguishing between the transitive and

purpose”) *with Farrell*, 126 F.3d at 488 (requiring something more than “motivated by improper purpose”). The Second and Eleventh Circuits apply an intransitive interpretation of corruptly while this Court, the Third Circuit, and the Ninth Circuit apply a transitive interpretation of “corruptly.” *See American Heritage Dictionary* 423 (3d ed. 1992) (two definitions of corrupt: Transitive verb: to destroy or subvert the honesty or integrity of; Intransitive verb: “To become corrupt”); *see also Oxford English Dictionary* 974 (2d ed 1989) (“corruptly” may mean either “by means of corrupt or bribery,” i.e., by means of corrupting another, or simply acting “[i]n a corrupt or depraved manner”); *see also* Brief for Petitioner, *supra* at 25.

An intransitive interpretation of “corruptly” under § 1512(b)(3) criminalizes persuasion if it hinders the investigative process; whereas, a transitive interpretation of “corruptly” under § 1512(b)(3) recognizes that “corruptly” modifies “persuade,” criminalizing persuasion only if it corrupts the witness or encourages them to break the law. *See American Heritage Dictionary, supra* at 423; *Oxford English Dictionary, supra* at 974; *see* Brief for Petitioner, *supra* at 25, f.27.

Both the common understanding of corrupt and its meaning in criminal law support this transitive reading of “corruptly.” *Webster’s Dictionary* defines corrupt generally as “depraved, [or] evil,” specifically characterized by “debased political morality...bribery, the selling of political favors, or other improper political or legal transactions.” *Webster’s Third New International Dictionary* 512 (1986).

Specifically within the criminal law context, a corrupt criminal act is “done with an

intransitive meaning of corrupt. *See* Brief for Petitioner at 25, f.27, *Arthur Andersen, LLP v. United States*, 544 U.S. 696 (2005) (No. 04-368), 2005 WL 429977.

intent to give some advantage inconsistent with the official duty and the rights of others.” *United States v. Aguilar*, 515 U.S. 593, 616 (1995) (Scalia, J., dissenting in part, concurring in part) (quoting *United States v. Ogle*, 613 F.2d 233, 238 (10th Cir.) (1979), *cert. denied* 449 U.S. 825 (1980)); *see also* Brief for Petitioner, *supra* at 25, f.29. Under these two meanings of “corrupt,” persuasion is unlawful only when it employs unlawful means.

The legislative history of § 1512(b), which was initially enacted under the Victim and Witness Protection Act, also supports the transitive interpretation of “corruptly” because the purpose of the enactment and the subsequent amendments is to prevent witness intimidation and to ensure that the provision does not criminalize lawful conduct. Pub. L. No. 97-291, 96 Stat. 1248, 1249 (1982). The broad obstruction of justice provision included in the original 1982 Witness Protection Act criminalized a person merely acting on the motive to obstruct information as opposed to criminalizing a specific way in which the person attempted to obstruct information. *See* Pub. L. No. 97-291 at 1249; S. 2420, 97th Cong., § 1512(a)(3), 128 Cong. Rec. S3856 (daily ed. Apr. 22, 1982); *see also United States v. King*, 762 F.2d 232, 237 (2d Cir. 1985) (noting that the defendant would be guilty if he “tried to persuade [a witness] to lie to mislead the government”). As Senator Heinz explained, this provision was eventually deleted from the final bill because it was “beyond the scope of the witness protection measure.” 128 Cong. Rec. 26,810 (1982).

In 1988, Congress added “corruptly persuades” to the list of prohibited conduct under § 1512(b). 134 Cong. Rec. S17, 369 (daily ed. Nov. 10, 1988). Senator Biden explained that corrupt persuasion would “include preparing false testimony for [a] witness, or offering a witness money in return for false testimony.” *Id.* He also explained that this amendment addressed confusion over what methods of persuasion could be prosecuted under § 1512(b). *Id.*

Up until this point, some circuit courts allowed prosecution for corrupting a witness through means other than those specifically listed in § 1512(b), and the Second Circuit decided that it could not even prosecute non-coercive, non-misleading methods of witness tampering, which included clearly wrongful acts such as bribing a witness to lie, under § 1512(b). *Id.*; *see, e.g., United States v. Hernandez*, 730 F.2d 895, 898-99 (2d Cir. 1984) (holding that prosecution for witness tampering was only proper under § 1512(b) and that § 1512 only criminalized violence, coercion, and deception); *see* Brief for Petitioner, *supra* at 33. Thus, adding “corruptly persuades” to § 1512(b) focuses on the way in which the persuasion was accomplished and does not suggest that merely persuading someone to withhold information is unlawful. 134 Cong. Rec. S17, 369.

Both the amendment that added “corruptly persuade” to § 1512(b) and the common understanding of “corrupt” emphasize acts of wrongdoing in addition to persuasion, which is also the focus of the “consciousness of wrongdoing” interpretation. *See id.*; *Arthur Andersen*, 544 U.S. at 703-07; *American Heritage Dictionary*, *supra* at 423. Therefore, the legislative history and the meaning of

“corruptly” both support the narrow construction of “corruptly” in § 1512(b) as “conscious of wrongdoing.”

E. Broadly construing “corruptly” as “motivated by an improper purpose” criminalizes innocent conduct and negatively impacts the economy and individuals.

The “consciousness of wrongdoing” interpretation, which requires additional evidence of wrongdoing, is proper because it does not create bad public policy. Interpreting “corruptly” to require the defendant be “motivated by improper purpose” is not sufficiently narrow and, thus, infringes upon fundamental Fifth Amendment rights and adversely impacts the economy. These areas of negative impact all reveal the underlying problem with broad construction, which results in the criminalization of lawful conduct because it criminalizes mere persuasion and not the method of persuasion. *See Arthur Andersen*, 544 U.S. at 703-07.

i. Construing “corruptly” as “motivated by improper purpose” violates the fundamental Fifth Amendment privilege against self-incrimination and unjustifiably expands prosecutorial power.

This Court in *Arthur Andersen*, the Third Circuit in *Farrell*, and the Ninth Circuit in *Doss* all specifically recognized that the “motivated by improper purpose” interpretation of “corruptly” would wrongfully criminalize the act of exercising one’s fundamental Fifth Amendment privilege against self-incrimination. U.S Const. amend. V; *see Arthur Andersen*, 544 U.S. at 703-07; *Farrell*, 126 F.3d at 488-90; *Doss*, 630 F.3d at 1190. According to these decisions, persuasion would only exceed Fifth Amendment protection if additional evidence of wrongdoing was also evident,

such as bribing or persuading an individual to provide false information. *See, e.g., Arthur Andersen*, 544 U.S. at 703-04.

If the act of encouraging another to exercise Fifth Amendment rights was unlawful as required by the “motivated by improper purpose” interpretation, not only would this requirement criminalize the discussion of vital trial strategy between business partners like Millstone and Reynolds, it would also criminalize a mother’s ability to advise her son not to volunteer information to the police. (R. at 9, 20); *see also Arthur Andersen*, 544 U.S. at 703-04; *see* Brief for Petitioner, *supra* at 24. Moreover, an attorney would not be able to lawfully advise her client to refrain from providing additional information beyond the police questions. *See* Brief for Petitioner, *supra* at 24. Such results are unreasonable and clearly violate fundamental Fifth Amendment rights.

A broad construction of “corruptly” also enables more prosecutions for persons who exercise their fundamental Fifth Amendment right, because the very act of pleading the Fifth Amendment on one’s own accord withholds information from the government. U.S. Const. amend. V. Reynolds possessed this right against self-incrimination under the Fifth Amendment because he was the subject of a governmental investigation. (R. at 7-8); U.S. Const. amend. V. Had Millstone never mentioned pleading the Fifth, but Reynolds exercised the right on his own accord—the State would not have a witness tampering claim against Millstone. Therefore, prosecuting Millstone for simply advising and encouraging Reynolds to exercise a right he already possessed is wrong. Millstone’s conviction by the lower courts

unnecessarily infringed upon Reynolds's rights protected under the Fifth Amendment and criminalized the discussion between Millstone and Reynolds regarding Reynolds's constitutional rights. (R. at 7-10); U.S. Const. amend. V.

ii. Construing "corruptly" as "motivated by an improper purpose" negatively impacts the economy.

The broad interpretation that "corruptly" means "motivated by an improper purpose" negatively impacts the economy by imposing too great a criminal risk upon employers and employees who will have to take great care to ensure that lawful behavior does not impede an investigation. *See* Brief for Petitioner, *supra* at 41. Specifically, business partners should not have to worry about being prosecuted for a lawful discussion of possible legal defense strategies when faced with imminent prosecution. *See id.*

Under a broad construction of "corruptly," employers could not advise their employees to adhere to a lawful document retention policy because this would be criminal behavior that would impede government investigation. *See Arthur Andersen*, 544 U.S. at 703-07; *see* Brief for Petitioner, *supra* at 41. Space limitations and storage costs are just two of the more immediate burdens a company will face if it cannot implement a lawful document retention policy. *See* Brief for Petitioner, *supra* at 41. This Court in *Arthur Andersen* found such a situation particularly problematic and, thus, narrowly construed "corruptly," to establish the "consciousness of wrongdoing" interpretation, which required additional evidence of wrongdoing. *See Arthur Andersen*, 544 U.S. at 703-04.

By prohibiting business partners, such as Millstone and Reynolds, from discussing possible legal defense strategies, the likelihood of criminal conviction for these individuals increases. (R. at 4, 9-10.) Criminal conviction would deprive Millstone or Reynolds or both of control over the company, which also threatens the company's survival. Such risk would interfere with economic growth of what would otherwise be healthy and strong companies.

Adhering to the narrow construction of “corruptly” as supported by this Court in *Arthur Andersen*, the rule of lenity, and the meaning of “corruptly” in both a legal and ordinary context avoids these damaging consequences. *See Arthur Andersen*, 544 U.S. at 703-04 (“consciousness of wrongdoing” interpretation); *McNally*, 483 U.S. at 359-60 (rule of lenity supports narrow construction in favor of defendants); *Aguilar*, 515 U.S. at 616 (noting the meaning of corrupt within the criminal law context); *American Heritage Dictionary*, *supra* at 423. Requiring evidence of wrongdoing in addition to the intent to impede the flow of information to the government is proper because it clearly distinguishes what behavior is unlawful from what behavior is lawful; it does not impose unnecessary burdens on companies or individuals; and it protects constitutional privileges and rights.

By criminalizing Millstone's lawful behavior, the Fourteenth Circuit ignored *Arthur Andersen*'s binding precedent and applied an inappropriate interpretation of “corruptly.” (R. at 14-15, 18-20); *see Arthur Andersen*, 544 U.S. at 703-04. The Fourteenth Circuit erred in failing to require the government prove that Millstone was “conscious of wrongdoing” when he encouraged Reynolds to exercise his Fifth

Amendment privilege. *See Arthur Andersen*, 544 U.S. at 703-04. Even though Millstone fervently urged Reynolds to “plead the Fifth,” Millstone was not “conscious of wrongdoing” because he did not engage in any unlawful behavior and no evidence of additional wrongdoing existed. (R. at 9-10, 15); *see Doss*, 630 F.3d at 1190. A reasonable jury could not find Millstone’s conduct to be “knowingly corrupt” under § 1512(b)(3) because Millstone’s actions were still lawful under the narrower construction requiring “consciousness of wrongdoing,” and, thus, this Court should reverse Millstone’s conviction for witness tampering.

CONCLUSION

For the foregoing reasons, petitioner, Samuel Millstone, respectfully requests that this Court reverse the decision of the Fourteenth Circuit and grant petitioner’s Motion for New Trial and Motion for Acquittal, thus remanding the first issue regarding violation of § 1319(c)(1)(A) and reversing petitioner’s conviction for violation of § 1512(b)(3).

Respectfully Submitted,

Team 55

Counsel for Petitioner

APPENDIX

Constitutional and Statutory Provisions

Amendment V 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.

33 U.S.C. § 1311(a)

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342 and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C § 1319(c)(1)(A)

Any person who—negligently violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328 or 1345 of this title, or 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.

18 U.S.C. § 1512(b)(3)

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...

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information related 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.