No. C11-0116-1

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2011

SAMUEL MILLSTONE, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

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

PETITIONER'S BRIEF

Team # 62

Counsel for Petitioner

QUESTIONS PRESENTED

I. When Congress leaves a statutory term undefined, the courts should apply the term's common law meaning. Congress did not define the term "negligence" in the criminal provision of Clean Water Act. Should the common law criminal definition of "negligence" as "gross negligence" apply?

II. Persuading another individual to withhold information from law enforcement pursuant to his or her Fifth Amendment privilege is not corrupt persuasion. Millstone attempted to persuade Reynolds to exercise his Fifth Amendment privilege. Did Millstone engage in corrupt persuasion?

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OPINIONS BELOW

The opinion of the United States District Court is unreported. The Fourteenth Circuit Court of Appeals issued an opinion on October 3, 2011, affirming the district court's judgment in favor of the United States. The Fourteenth Circuit's opinion is set out at pages 11-21 of the record.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on October 3, 2011. (R. 3.) The petition for a writ of certiorari was granted for the case to be heard in the October 2011 term. (R. 2.) The appellate jurisdiction of this Court rests on 28 U.S.C. § 1254(1) (2006).

CONSTITUTIONAL PROVISIONS AND STATUTES

This case involves the interpretation of 33 U.S.C. § 1319(c)(1)(A) (2006) and 18 U.S.C. § 1512(b)(3) (2006). The Appendix contains a copy of both statutory provisions involved.

STATEMENT OF THE CASE

A. Summary of the Facts

Samuel Millstone ("Millstone") was the president and CEO of Sekuritek, a private-security firm created by Millstone and his business partner, Reese Reynolds ("Reynolds"). (R. 4.) Under their business model, Reynolds served as the vice president and handled sales, marketing, and equipment purchases. (R. 4.) Millstone consulted with clients, hired and trained security personnel, and supervised the company's operations. (R. 4.) From its inception in 2004, Sekuritek grew into a premier security company. (R. 4, 5.) In September of 2006, Drayton

Wesley, the CEO of Bigle Chemical Company, contacted Millstone to hire Sekuritek to control security at the Windy River Plant (R. 4, 5.) Wesley was very concerned about security at the new plant because of a security breach at another Bigle plant. (R. 5.)

On November 16, 2006, Sekuritek contracted with Bigle Chemical to provide security for the Windy River Plant, which was Bigle's largest chemical manufacturing and waste recycling facility, at a cost of $8.5 million over ten years. (R. 5.) Under the agreement, Sekuritek had until December 1, 2006, to have security up and running at the site. (R. 5.) To satisfy the contract, Sekuritek hired thirty-five new security guards along with two office workers. (R. 5, 6.) Due to the large size of the Windy River facility, Sekuritek, through Reynolds, purchased a new fleet of custom sport-utility vehicles (SUV). (R. 6.) Additionally, Millstone developed a shortened training seminar for new employees that included three weeks of on-the-job training because of the short amount of time to fulfill the contract. (R. 6.) With all of the hard work and planning, Sekuritek personnel began working at the Windy River facility on time. (R. 6.)

Security at the facility ran smoothly for several weeks, but on January 27, 2007, a new security guard, Josh Atlas ("Atlas"), saw who he believed to be an intruder by one of the storage tanks. (R. 7.) Atlas floored the gas pedal of a Sekuritek SUV to apprehend the intruder. (R. 9.) This action, however, was a breach in Sekuritek policy because according to the personnel handbook, which Atlas was referred to by Millstone during training, a guard is supposed to stop 100

yards away from an apparent emergency and proceed on foot. (R. 8, 9.) Unfortunately, the gas pedal of the SUV stuck and caused the SUV to strike a storage tank that exploded and spilled thousands of barrels of chemicals into the Windy River. (R. 7.) The explosion and chemical spill killed multiple people and caused over a billion dollars of damage to the surrounding community. (R. 7, 8.)

After the tragic accident, with media coverage and intense public outcry, federal investigators began to look into possible criminal charges. (R. 9.) In response to the investigation, Millstone met with Reynolds to discuss their situation. (R. 9.) During the meeting, Reynolds told Millstone that he wanted to tell government agents everything. (R. 9.) Millstone replied, "The feds can't do anything if we don't talk. If they start talking to you, just tell them you plead the Fifth and shut up." (R. 9.)

Following the investigation, the United States brought criminal charges against Millstone for the negligent discharge of pollutants under the Clean Water Act ("CWA") for negligently hiring, training, and supervising personnel along with negligently failing to inspect the SUVs before purchase and use. (R. 10.) The United States also charged Millstone with witness tampering and gave Reynolds immunity for his testimony against Millstone. (R. 10.)

B. Summary of the Proceedings

At trial, the jury found Millstone guilty on both counts, and the district court denied Millstone's motion for a new trial. (R. 10.) Millstone then appealed both counts of his conviction to the United States Court of Appeals for the Fourteenth

Circuit. (R. 10.) On appeal, Millstone argued (1) that the jury instructions given by the district court incorrectly applied the civil negligence standard for a criminal conviction under the CWA and (2) that an individual cannot corruptly persuade another person to withhold information from the government by simply encouraging them to exercise their Fifth Amendment privilege against self-incrimination. (R. 10.) On appeal, the Fourteenth Circuit affirmed Millstone's conviction on both counts. (R. 13, 15.) Following that appeal, Millstone sought a petition for certiorari from this Court, which granted certiorari for the October term of 2011. (R. 2.)

SUMMARY OF THE ARGUMENT

I. The Clean Water Act

The Fourteenth Circuit erred in holding that the civil negligence standard applies to the criminal provision of the Clean Water Act ("CWA"), § 1319(c)(1)(A). To properly ascertain the intent of Congress, statutory interpretation requires both an examination of the plain meaning of the statute and consideration of the common law understanding of undefined terms within the statute. While the lower court disregarded the common law understanding of the term "negligently," nothing in the common law suggests ordinary negligence is the correct standard for § 1319 of the CWA but rather strongly suggest that the statute requires gross or criminal negligence.

Additionally, the CWA is not a public welfare statute. As this Court stated in *Staples v. United States*, a public welfare statute must regulate a dangerous or injurious item and not impose harsh criminal penalties. Here, Millstone provided his employees with common automobiles and trained employees in security techniques. These activities fall short of "dangerous or injurious" by this Court's standards. Even more, § 1319 of the CWA imposes criminal penalties that are far too onerous to find that the statute is a public welfare statute.

The rule of lenity requires that courts adopt statutory interpretations that favor the defendant when Congress has not spoken clearly. The lower court's failure to apply the rule of lenity in construing the term "negligently" led to Millstone's improper conviction for a criminal violation of the CWA. It was the use

of civil, ordinary negligence in the lower court that caused such tremendous error in that court's holding.

II. The Witness Tampering Statute

The Fourteenth Circuit erred when it found that corrupt persuasion includes a non-coercive attempt to persuade a co-conspirator to exercise his Fifth Amendment privilege. As this Court's holding in *Arthur Andersen LLP v. United States* makes clear, "corrupt persuasion" requires that the defendant be conscious of any wrongdoing. This Court specifically noted two examples of non-corrupt persuasion, each of which involves an individual that persuades a witness to exercise the Fifth Amendment privilege against self-incrimination. Therefore, Millstone did not engage in corrupt persuasion when he attempted to persuade Reynolds to exercise his Fifth Amendment privilege.

This Court has often warned against interpreting statutes in a manner that renders key statutory terms superfluous. The "improper purpose" interpretation adopted by some circuits would render the word "corruptly" meaningless because § 1512(b) would prohibit the same conduct even if the word were omitted. Therefore, this Court should interpret § 1512(b) in a way that gives meaning to the most important term in the statute.

Furthermore, the rule of lenity directs this Court to adopt an interpretation that favors the defendant when serious ambiguities exist in the statutory language. Because persuasion is not inherently malign, this Court should narrowly construe the phrase "corruptly persuades" to include only evil acts that

place ordinary citizens on notice of their wrongdoing. Otherwise, defendants such as Millstone will be penalized for merely urging another individual to follow a completely lawful course of action.

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT INSTRUCTED THE JURY THAT ONLY CIVIL NEGLIGENCE IS REQUIRED FOR A CRIMINAL CONVICTION UNDER THE CLEAN WATER ACT.

The Fourteenth Circuit erred when it held that ordinary negligence is sufficient under § 1319(c)(1)(A) of the Clean Water Act ("CWA"). This Court reviews de novo a lower court's determination of the proper jury instruction that the trial court should have used. *Badger v. S. Farm Bureau Life Ins. Co.*, 612 F.3d 1334, 1339 (11th Cir. 2010).

The CWA has become the "most significant federal statute for criminal prosecutions of water polluters." Samara Johnston, *Is Ordinary Negligence Enough to be Criminal? Reconciling* United States v. Hanousek *with the Liability Limitation Provisions of the Oil Pollution Act of 1990*, 12 U.S.F. Mar. L.J. 263, 267 (2000). Section 1311 prohibits the discharge of any pollutant by any person without a permit. 33 U.S.C. § 1311(a) (2006). The CWA further provides that any person who negligently violates § 1311 may be punished with a fine of no less than $2,500 and no more than $25,000 per day of the violation, or by imprisonment for no more than one year, or both. 33 U.S.C. § 1319 (2006). It is the application of the term "negligently" in § 1319 that is at issue before this Court. (R. 2.)

The CWA does not define the term "negligently." To determine the correct interpretation, this Court looks first to the plain meaning of the term. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992). When Congress leaves a statutory term undefined, and the common law has established a definite meaning, this Court presumes that Congress intended to apply the common law definition. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992). Because the common law uses the term "negligently" to mean "gross negligence" for criminal violations, Congress intended that term to carry its ordinary common law meaning in the criminal provision of the CWA.

The Fourteenth Circuit also erred when it found that the CWA is a public welfare statute. (R. 12.) The public welfare doctrine only applies when a statute imposes light penalties and regulates a dangerous item that ordinary citizens know to be potentially harmful to the public. *Liparota v. United States*, 471 U.S. 419, 433 (1985). Because the CWA imposes harsh penalties and regulates a broad range of common commercial products, the CWA is not a public welfare statue.

If the CWA were to impose criminal penalties for ordinary negligence, the statute would raises grave due process concerns. These due process concerns arise from the broad range of activities that could conceivably carry harsh criminal penalties for unwitting individuals. This Court has routinely avoided interpretations that implicate constitutional due process issues. *See*, *e.g.*, *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 762 (1988) (holding that "federal statutes are to be construed so as to avoid serious doubts as to their

constitutionality"). As such, this Court should interpret "negligently" as requiring gross criminal negligence.

Therefore, Congress did not intend for courts to apply civil negligence in the criminal provision of the CWA. Instead, Congress intended courts to apply the criminal meaning of the term "negligently" in the criminal provisions of § 1319. Because the district court erred when it instructed the jury using the civil negligence standard, this Court should reverse and remand for a new trial.

A. The Common Law Requires Gross Negligence Before An Individual Is Convicted of a Crime.

The plain language of the statute is the starting point for interpreting its meaning. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). When the plain language is undefined, courts must construe criminal statutes "in light of the background rules of the common law." *Staples v. United States*, 511 U.S. 600, 616 (1994). The common law required gross negligence before an individual received criminal punishment. *Santillanes v. State*, 849 P.2d 358, 365 (N.M. 1993).

Moreover, this Court has cautioned that the civil and criminal provisions of the same statute must be considered independently. *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 60 (2007) ("The vocabulary of the criminal side of [a statute] is . . . beside the point in construing the civil side."). Thus, the Fourteenth Circuit erred when it construed the criminal meaning of "negligently" by relying on the CWAs civil provisions.

1. Congress intended courts to apply the criminal common law definition of "negligently" when prosecuting criminal violations of the Clean Water Act.

For nearly a century, this Court has followed a long tradition of using the common law definitions of terms when it interprets otherwise undefined statutory language. *See Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 441 (2003); *Kelley v. S. Pac. Co.*, 419 U.S. 318, 322–23 (1974); *Baker v. Tex. & Pac. Ry. Co.*, 359 U.S. 227, 228 (1959); *Robinson v. Balt. & Ohio Ry. Co.*, 237 U.S. 84, 94 (1915). "Congressional silence often reflects an expectation that courts will look to the common law to fill gaps in statutory text, particularly when an undefined term has a settled meaning at common law." *Clackamas Gastroenterology Assocs.*, 538 U.S. at 447. In fact, Congress has legislatively overturned decisions that attempt to exceed the common law's practices. *Darden*, 503 U.S. at 324–25.

At early common law, judges required more culpability than mere civil negligence before criminal sanctions could be imposed on a defendant. 1 Wayne R. LaFave, *Substantive Criminal Law* § 5.4 (2d ed. 2011). By contrast, the civil common law defined "negligence" as "a failure to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstance." *United States v. Ortiz*, 427 F.3d 1278, 1283 (10th Cir. 2005). Such a meaning, however, denotes the *civil* definition of the term and does not convey its common usage as a criminal mens rea requirement or its application in a criminal statute.

This Court has held that civil and criminal definitions must be separated when the Court construes criminal and civil provision of the same statute. *Safeco*

Ins. Co. of Am., 551 U.S. at 60. In *Safeco Insurance Co. of America v. Burr*, this Court addressed two companies' failure to give notice to their insured that the companies had instituted adverse action. *Id.* at 52. The petitioners attempted to derive the proper meaning of "willfully" in the civil provision of the Fair Credit Reporting Act by referencing the mens rea requirement in the criminal provision of statute. *Id.* at 60. Without even addressing the merits of the argument, this Court refused to compare the civil use of the term with the criminal use because of the unique roles that the term plays in different areas of the law. *Id.*

State courts have employed the same logic that this Court applied in *Safeco* to determine that the term "negligence" must mean "gross negligence" in a criminal statute. *See*, *e.g.*, *Santillanes*, 849 P.2d at 365 (interpreting "the mens rea element of negligence . . . to require a showing of criminal negligence instead of ordinary civil negligence"). Moreover, the Model Penal Code confirms that these decisions reached the correct result when they required criminal negligence for criminal punishment. The Model Penal Code finds that a person acts "negligently" if "he should be aware of a substantial and unjustifiable risk . . . [and his failure to perceive it] involves a *gross deviation* from the standard of care." Model Penal Code § 2.02(2)(d) (1962) (emphasis added). As criminal law views "negligently," it already incorporates the heightened culpability that is not included in the civil use of negligence.

2. Other courts have attempted to determine the intent of Congress by impermissibly comparing the civil and criminal provisions of the Clean Water Act.

The Ninth Circuit in *United States v. Hanousek* and the Tenth Circuit in *United States v. Ortiz* erred when they applied the civil definition of "negligently" to the criminal provision of § 1319. 176 F.3d 1116, 1119 (9th Cir. 2002); 427 F.3d at 1283. Both decisions violate the principle that this Court laid down in *Safeco*—the courts should not compare the civil and criminal terms of a statute when interpreting the meaning of the separate provisions. 551 U.S. at 60.

In *Hanousek*, the government charged a railroad operator with the negligent discharging of harmful oil when one of his backhoe operators struck a pipeline and caused it to rupture. 176 F.3d at 1119. The Ninth Circuit found the term "negligently" in § 1319(c)(1)(A) carried its ordinary civil meaning. *Id.* at 1121. The court reasoned that because the civil provision of the CWA included language of "gross negligence," Congress could not have intended the criminal portion to have the same meaning. *Id.* The Ninth Circuit, however, failed to consider the precepts of criminal law and the significance of the term "negligently" as used in the common law.[1] *See United States v. Atl. States. Cast Iron Pipe Co.*, No. 03-852, 2007 WL 2282514, at *14 n. 17 (D.N.J. Aug. 2, 2007) (noting that the reasoning in *Safeco* severely undermines the validity of *Hanousek*).

[1] *Hanousek* predated this Court's decision in *Safeco* by eight years, and therefore, the Ninth Circuit did not have the benefit of *Safeco*'s logic when evaluating the statute. Nonetheless, the conclusion that this Court has rejected the reasoning used in *Hanousek* remains unchanged.

The Tenth Circuit in *United States v. Ortiz* reached the same conclusion as the Ninth Circuit, but relied heavily on the Ninth Circuit's previous opinion. 427 F.3d at 1283. Similarly, as Judge Newman noted in the dissent below, the Fourteenth Circuit erroneously assumed that Congress' purposeful use of "gross negligence" in the civil section of the CWA means ordinary negligence is to be used in the criminal section. (R. 16.)

A more careful analysis reveals that Congress used "gross negligence" to heighten the standard for *civil* violations and penalties. As previously noted, the civil use of negligence only denotes any deviation from the standard of care that a reasonable person would have used. *Ortiz*, 427 F.3d at 1283. Had Congress not used "gross negligence" in the civil provision of § 1319, courts would have likely required only ordinary negligence for a civil violation. Thus, while *Hanousek* and *Ortiz* correctly note that Congress intended a higher standard than simple negligence for civil violations, both cases fail to appreciate that the modifier "gross" is already implicit in the criminal use of the term "negligence." It would be anomalous indeed for Congress to require a lower standard of culpability for criminal imprisonment than it requires for a civil fine. The idea that "an injury can amount to a crime only when inflicted by intention is no provincial or transient notion," which is why criminal negligence requires higher culpability than its civil counterpart. *United States v. Morissette*, 342 U.S. 246, 250 (1952).

B. The Clean Water Act Is Not A Public Welfare Statute Because It Regulates Ordinary Materials and Imposes Harsh Penalties.

The Fourteenth Circuit erred when it held that the CWA is a public welfare statute. (R. 12.) Public welfare statutes must "protect the public from potentially harmful or injurious items" and only criminalize "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. The CWA, however, has the potential to impose criminal liability on a wide array of common industrial practices that may inadvertently result in the discharge of innocuous substances. *United States v. Weitzenhoff*, 35 F.3d 1275, 1298 (9th Cir. 1993) (Kleinfeld, J., dissenting from order denying rehearing en banc).

Furthermore, public welfare statutes should only impose light penalties. *See Staples*, 511 U.S. at 616–18. These statutes, though a limited group, effectively eliminate the mens rea requirements for criminal penalties. *Id.* at 606–07. Courts hesitate to apply the public welfare doctrine because of the serious due process concerns that arise when statutes eliminate or drastically reduce the mens rea required. *See Lambert v. Cal.*, 355 U.S. 225, 243 (1957). Although negligent violations of § 1311 are classified as misdemeanors, the penalty still carries a minimum fine of $2,500 and imposes up to $25,000 per day for continuing violations or a prison term of up to one year. 33 U.S.C. § 1319. Additionally, subsequent violations of the CWA are felonies. *Id.* Thus, the penalties imposed for negligent violation also preclude the CWA from characterization as a public welfare statute.

1. <u>The Clean Water Act does not regulate materials that are obviously dangerous to the public health.</u>

Public welfare statutes must do more than merely regulate a dangerous item. *Staples*, 511 U.S. at 611. "Even dangerous items can, in some cases, be so commonplace and generally available that we would not consider them to alert individuals to the likelihood of strict regulation." *Id.* The CWA regulates a wide variety of activities and substances, some of which are so commonplace that an ordinary citizen would never know that he or she was in relation to the public danger. For example, "pollutants" regulated by the CWA include such common items as hot water, rock, and sand. 33 U.S.C. § 1362(6) (2006). As the dissent in *United States v. Weitzenhoff* noted, even placing silt from a river back into the same river from which it came could conceivably be a violation of the CWA. 35 F.3d at 1298 (Kleinfeld, J., dissenting from order denying rehearing en banc). Therefore, even though the CWA may regulate some dangerous chemicals, it also regulates a wide range of non-dangerous materials and substances.

Even items that are somewhat dangerous may not be dangerous enough to justify the CWA as a public welfare statute. For instance, in *Staples v. United States*, this Court rejected the notion that firearms were so inherently dangerous that gun owners were on notice that they were in "responsible relation to the public danger." 511 U.S. at 611 (holding that a machine-gun owner who did not know he possessed a automatic weapon could not be charged under National Firearms Act). Similarly, in *United States v. Ahmad*, an eight-thousand gallon underground gasoline tank fed the defendant's convenience store and gas station. 101 F.3d 386,

387 (5th Cir. 1996). The defendant pumped the tank to remove water, but he also pumped a significant amount of gasoline into a manhole. *Id.* at 388. In drawing a connection to *Staples*, the Fifth Circuit held that gasoline, while a "potentially harmful or injurious item," is no more dangerous or harmful than machineguns. *Id.*

Millstone's conviction did not require the use of any dangerous or hazardous materials. The government based its charge against Millstone on his alleged negligence in hiring, training, and supervising his employees and failing to inspect ordinary sport-utility vehicles used by those employees. (R. 10.) Neither Millstone nor his employees handled chemicals, worked with industrial equipment, or engaged in any activity that would give reasonable notice of public danger. (R. 17.)

The charge against Millstone suggests that automobiles are "dangerous and injurious." Countless routine commercial activities use automobiles in their day-to-day operations. Automobiles certainly do not pose any greater risk to the public safety than gasoline or machineguns. Because neither Millstone nor his employees handled "dangerous or injurious" materials, they had no reason to believe they stood in relation to a public danger.

2. <u>The Clean Water Act imposes penalties that are too harsh for a public welfare statute.</u>

The second factor that distinguishes public welfare statutes from other criminal statutes is the severity of the penalties imposed. *Staples*, 511 U.S. at 616–18; *Morissette*, 342 U.S. at 256; *see also* Francis Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55, 72 (1933) (noting that the "cardinal principle" of public welfare offenses is that they do not impose harsh penalties). The CWA penalty carries a

minimum fine of $2,500 and imposes up to $25,000 per day for continuing violations or a prison term of up to one year. 33 U.S.C. § 1319(c)(1)(A). "Knowing" violations impose even harsher penalties and lengthier prison terms. 33 U.S.C. § 1319(c)(2). These penalties strongly weigh against any finding that the CWA is a public welfare statute because "such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing." *United States v. Dotterweich*, 320 U.S. 277, 280 (1943).

Historically, courts have only upheld public welfare statutes when the "penalties commonly are relatively small, and conviction does no grave danger to an offender's reputation." *Morissette*, 342 U.S. at 256. The potential penalties under the CWA, whether through negligent or knowing violations, are not small matters and are actually quite serious. In fact, Justice Thomas argued "the seriousness of these penalties counsels against concluding that the CWA can accurately be classified as a public welfare statute." *Hanousek v. United States*, 528 U.S. 1102 (2000) (Thomas, J., dissenting from denial of certiorari). While the penalty presently before the Court is a misdemeanor, § 1319(c)(1)(A) still imposes substantial fines and raises the possibility of imprisonment. Although first violations are misdemeanors, subsequent negligent violations are felonies. 33 § 1319(c)(1)(B). As this Court has stated before, a felony is "as bad a word as you can give to man or thing." *Morissette*, 342 U.S. at 260. Therefore, even negligent violations of the CWA threaten the loss of liberty and the label of a felon.

Furthermore, the CWA would encourage unnecessarily vigorous prosecutions in the wake of accidental discharges. "The anger and emotion" of a community after an accidental spill "can easily create a lynch mob mentality." Bruce Pasfield & Sarah Babcock, *Simple Negligence and Clean Water Act Criminal Liability: A Troublesome Mix*, Envt. Rptr. Update (ABA Envtl. Enforcement & Crimes Comm., Chi., Ill.), March, 2011. Such a reaction encourages prosecutors to "present charges against anyone remotely responsible," and the low bar for negligence creates "grave potential [for] a miscarriage of justice." *Id.*

The public outcry following the spill in this case demonstrates how the public may demonize conduct that is otherwise innocent or accidental. (R. 9.) Millstone faces several thousands of dollars in fines as well as up to one year in prison. (R. 11.) By interpreting the statute incorrectly in finding that a civil standard should apply to a criminal statute, and by finding that the Clean Water Act is a public welfare statute, the Fourteenth Circuit erred in upholding Millstone's conviction.

C. This Court Should Not Apply the Civil Negligence Standard or Find that the Clean Water Act is a Public Welfare Statute Because Such Interpretation Would Create Grave Due Process Concerns.

Out of deference to the prerogatives of Congress, this Court avoids interpretations of federal statutes that raise constitutional concerns. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). In the context of public welfare statutes, this Court has found that strict liability for violations of statutes that regulate commonly found goods may violate the Due Process Clause. *United States v. Int'l Minerals & Chem. Corp.*, 402

U.S. 558, 564 (1971). The CWA raises similar Due Process concerns because the statute imposes harsh penalties for civilly negligent violations.

1. The civil negligence standard raises due process concerns by criminalizing a broad range of innocent conduct.

The CWA has the potential to impose criminal liability on a wide array of common industrial practices that may inadvertently result in the discharge of innocuous substances. *Hanousek*, 528 U.S. at 1102 (Thomas, J., dissenting from denial of certiorari). Some of these regulated substances are so commonplace that an ordinary citizen would never know that he or she stood in relation to a public danger.

Justice Thomas feared precisely this danger concerning the scope of the CWA when he dissented from a denial of certiorari in *Hanousek*. *Id.* at 1102. As Justice Thomas pointed out, "we should be hesitant to expose countless numbers of construction workers and contractors to heightened criminal liability for using ordinary devices to engage in normal industrial operations." *Id.* If the CWA were to apply such a severely diminished standard, then it would expose large numbers of ordinary commercial workers to harsh criminal penalties merely for using the common tools necessary to carry out their occupations. *Id.*

The Fifth Circuit in *Ahmad* shared Justice Thomas' concerns when that court reasoned gasoline was just one ordinary substance that would subject innocent people to convictions under the CWA. 101 F.3d at 388. Allowing such action by the courts in this case, would essentially reduce or diminish the required mens rea for all criminal statutes relating to industrial activities. *Id.* That would effectively

subject large numbers of employees and employers to criminal sanctions unfairly. Additionally, out of concern for the adverse impact of the Fourteenth Circuit's decision, Judge Newman noted in his dissent that "the majority would have this [c]ourt convict even a visitor to Bigle Chemical's plant who negligently forgot to tie his shoes, fell and tripped a switch that discharged chemicals into surrounding waterways of a negligent violation of the CWA." (R. 17.)

This case holds the potential to make the fears expressed by Justices Thomas and other courts a reality for Millstone. Millstone's allegedly negligent conduct arises from his company's use of automobiles and trained employees. (R. 10.) Sekuritek, however, used common means to deliver a routine commercial service—on-site security. Because of the extremely wide array of conduct that falls within the scope of the CWA, the government was able to bring a criminal charge for negligent violation of the CWA based on these circumstances alone. (R. 10.) Such a charge suggests that Justice Thomas's fears were well-founded and that the diminished mens rea for the CWA improperly submits innocent people to criminal charges.

2. The rule of lenity requires that this Court adopt the interpretation of "negligently" that favors the defendant.

The rule of lenity requires that any ambiguity in a criminal statute be construed in favor of the accused. *Liparota*, 471 U.S. at 427. "Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Id.* The

rule of lenity is a "time-honored tool" when the intent of Congress is unclear because criminal penalties carry serious repercussions and the moral condemnation of the community. *United States v. Bass*, 404 U.S. 336, 348 (1971).

In *Liparota v. United States*, this Court addressed whether a violation of the federal act governing food stamp fraud required the defendant to know that he acquired the food stamps in violation of the law. 471 U.S. at 420. The defendant purchased food stamps from an undercover agent several times. *Id.* at 421–22. This Court applied the rule of lenity and held that "certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement." *Id.* at 427. This Court reasoned that any other application of this statute would effectively criminalize behavior of those acting innocently. *Id.* at 429.

This Court should also apply the rule of lenity to the present case. Because § 1319(c)(1)(A) fails to plainly disclose the definition of "negligently," the rule of lenity will avoid criminalizing conduct that Congress never intended to reach. Much like the *Liparota* case, the district court's jury instruction of ordinary negligence in this case effectively criminalizes normal and innocent behavior *See Hanousek*, 528 U.S. at 1102 (Thomas, J., dissenting from denial of certiorari). Here, Millstone was not present when the car accident occurred, nor did he participate in the accident. (R. 7.) The common law standard of gross negligence for criminal charges avoids serious due process concerns by only punishing Millstone for seriously culpable conduct. Conversely, the civil negligence standard threatens to infringe upon

Millstone's constitutional rights. In light of such dangers, this Court should avoid the interpretation that raises such constitutional concerns and apply the rule of lenity to interpret § 1319(c)(1)(A) in Millstone's favor.

Thus, the Fourteenth Circuit erred when it found that Congress only intended civil negligence for criminal penalties under § 1319 of the CWA. This Court should reverse the Fourteenth Circuit and find that the common law meaning of criminal negligence should apply. Because the district failed to instruct the jury on the standard of gross negligence, this Court should remand for a new trial with proper jury instructions.

II. MILLSTONE DID NOT ENGAGE IN CORRUPT PERSUASION WHEN HE ASKED REYNOLDS TO EXERCISE HIS PROTECTED FIFTH AMENDMENT PRIVILEGE.

The Fourteenth Circuit also erred when it equated the word "corruptly" as used in 18 U.S.C. § 1512(b) with the phrase "motivated by an improper purpose." This Court reviews de novo the lower courts' interpretations of statutory provisions. *United States v. Khatami*, 280 F.3d 907, 910 (9th Cir. 2002). Section 1512(b) prohibits four specific categories of conduct directed toward witnesses: (1) intimidation, (2) physical force, (3) threats, and (4) corrupt persuasion. *Id.* at 911. Only the fourth prohibited activity, corrupt persuasion, is at issue in this case. (R. 2.)

Millstone did not engage in corrupt persuasion when he asked Reynolds to assert his Fifth Amendment privilege against self-incrimination. Persuading another individual to withhold information from the government is not a corrupt

activity by itself. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703 (2005). In fact, a prohibition against corrupt persuasion, as opposed to a prohibition against all persuasion, implies that it is possible to persuade someone with the intent to interfere with law enforcement without doing so corruptly. *United States v. Farrell*, 126 F.3d 484, 489 (3d Cir. 1997). In *Arthur Andersen*, this Court noted that persuading another individual to assert a protected privilege, like the Fifth Amendment privilege against self-incrimination, is not culpable as corrupt persuasion. 544 U.S. at 704.

Two Circuit Courts of Appeals, the Second and the Eleventh, have adopted an interpretation of corrupt persuasion that focuses on whether the persuader was "motivated by an improper purpose." *See United States v. Thompson*, 76 F.3d 442, 452 (2d Cir. 1996); *United States v. Shotts*, 145 F.3d 1289, 1300 (11th Cir. 1998). This interpretation, however, is circular in nature and renders the most important term in the statute superfluous. Furthermore, the circuits that continue to follow this interpretation after *Arthur Andersen* fail to appreciate the significance of this Court's jurisprudence concerning corrupt persuasion.

Additionally, given the ambiguity inherent in § 1512(b) and the use of the word "corruptly," this case presents especially compelling circumstances in which to apply the rule of lenity. The rule of lenity strictly construes federal penal statutes to ensure that the law gives fair notice to ordinary citizens of the conduct Congress has prohibited. *Bass*, 404 U.S. at 348. Because persuasion is not inherently malign, courts must limit the language of a statute so that society may be on notice

of what persuasion Congress has prohibited. When serious doubts exist, the issue should be resolved in favor of the defendant.

As such, this Court should reverse the Fourteenth Circuit and find that persuasion to assert the Fifth Amendment privilege against self-incrimination is not corrupt. Consequently, this Court should grant Millstone's Motion for Acquittal and overturn his conviction.

A. Persuading Another Individual to Withhold Information Pursuant to the Fifth Amendment Is Not Corrupt.

In adding the term "corruptly persuades" to § 1512(b), Congress intended to reach not only traditional coercive conduct but also certain categories of non-coercive conduct that was previously not illegal.[2] The most recent decision of this Court to address the language of § 1512(b) is the unanimous opinion of *Arthur Andersen*, 544 U.S. at 703–06. As this Court noted in that case, "'persuasion' . . . is by itself innocuous." *Id.* at 703. Conduct aimed at persuading another person to withhold information from the government "is not inherently malign." *Id.* Because persuasion to withhold information can be an innocent act, Congress expressly included the word "corruptly" to describe the conduct prohibited by the witness tampering statute and to capture only that conduct that is typically "wrongful,

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[2] 18 U.S.C. § 1512 does not define what is meant by the phrase "corruptly persuades." It does note, however, that "the term 'corruptly persuades' does not include conduct which would be misleading conduct but for a lack of state of mind." 18 U.S.C § 1512(b)(6). Every court that has reviewed this additional language in subsection (b)(6) has found it to be unhelpful in determining the true meaning of the term. *See*, *e.g.*, *Farrell*, 126 F.3d at 487.

immoral, depraved, or evil." *Id.* at 705. *Arthur Andersen* also make clear that "corrupt persuasion" requires "consciousness of wrongdoing." *Id.* at 706.

Although preceding this Court's decision in *Arthur Andersen*, the Third Circuit in *United States v. Farrell* similarly recognized that categories of non-corrupt persuasion must exist. 126 F.3d at 489. In *Farrell*, the court pointed out that Congress' inclusion of "corruptly" in the statute "necessarily implies that an individual can persuade another not to disclose information to a law enforcement official with the intent of hindering an investigation without violating the statute." *Id.*

1. **A person who persuades another individual to withhold information pursuant to a constitutional or common-law privilege is not conscious of any wrongdoing.**

Arthur Andersen provides three distinct examples of conduct that is not corrupt, each of which involves persuading a witness to withhold information under a constitutional or common law privilege. 544 U.S. at 703–05. First, this Court noted that a mother who convinces her son to invoke his Fifth Amendment privilege against self-incrimination does not engage in corrupt persuasion. *Id.* at 704. Second, *Arthur Andersen* recognized that an attorney who persuades a client to withhold information from government officials is not corrupt. *Id.* And third, the court held that a wife who convinces her husband not to disclose marital confidences is not corrupt. *Id.*

Two of the three examples offered by this Court expressly involve persuading a witness to withhold information by asserting his or her Fifth Amendment

privilege against self-incrimination. The common element between all three examples cited by this Court in *Arthur Andersen*, however, is that the witness maintains an absolute legal right to withhold information, either constitutionally or by common law.

When a defendant asks another individual to withhold information based on that individual's absolute legal right to do so, the defendant does not act with consciousness of wrongdoing. The Ninth Circuit expounded upon the examples offered by *Arthur Andersen* in the case of *United States v. Doss*, 630 F.3d 1181, 1190 (9th Cir. 2011). *Doss* addressed a husband who urged his wife to assert the martial privilege and refuse to testify in an upcoming trial. *Id.* at 1184. The court, taking note of the specific examples offered in *Arthur Andersen*, reversed the conviction. *Id.* at 1190. Specifically, the court noted "[i]f it is not 'inherently malign' for a spouse to ask her husband to exercise the marital privilege . . . then a defendant could not be shown to act with 'consciousness of wrongdoing.'" *Id.* at 1190. Other courts have echoed the sentiment that corrupt persuasion requires something more culpable than merely persuading to withhold information pursuant to an absolute legal right. *See United States v. Vega*, 184 Fed. Appx. 236, 243 (3d Cir. 2006) ("[T]he defendant must go beyond simple advocacy of a lawful course of action . . . .").

2. <u>Millstone did not engage in corrupt persuasion by asking Reynolds to withhold information pursuant to his Fifth Amendment privilege.</u>

In the case before this Court, Millstone did nothing more than ask his business partner, Reese Reynolds, to assert his Fifth Amendment privilege against

self-incrimination if questioned by federal authorities. (R. 9.) During the course of the federal investigation, Reynolds had indicated to Millstone that he was leaning toward disclosing everything to investigators. (R. 9.) Upon hearing this information Millstone stated: "The feds can't do anything if we don't talk. If they start talking to you, just tell them you plead the Fifth and shut up." (R. 9.) No implication can be taken from these plain statements that Millstone asked Reynolds to do anything other than assert his Fifth Amendment privilege. This is particularly true considering the statements themselves expressly reference the Fifth Amendment privilege that Reynolds possessed. (R. 9.)

Millstone's conduct is strikingly similar to one of the examples in *Arthur Andersen* of conduct that is not inherently malign—a mother that urges her son to assert his Fifth Amendment privilege against self-incrimination. In both the example and this case, the conduct is the same: asking another to assert the Fifth Amendment privilege to withhold information from law enforcement. As *Arthur Andersen* emphasized, "consciousness of wrongdoing" is required by the natural and plain reading of the terms in § 1512. 544 U.S. at 706. Because Millstone did not engage in any inherently malign conduct, he could not have been conscious of his wrongdoing.

Therefore, not all persuasion to withhold information from law enforcement is corrupt. Among the categories of non-corrupt persuasion is urging another individual to assert a legally recognized privilege against disclosure. This Court should hold that persuasion to exercise the Fifth Amendment privilege against self-

incrimination is not corrupt. Because such persuasion is not corrupt, the district court erred in denying Millstone's Motion for Acquittal.

B. Defining the Term "Corruptly Persuades" to Mean "Motivated by an Improper Purpose" Renders the Language Meaningless and Fails to Appreciate This Court's Jurisprudence.

"It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Instead, "courts must give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 364 (2000). This is particularly true when one interpretation proposes to render a key term in a criminal statute meaningless or superfluous. *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

1. The "improper purpose" interpretation of "corruptly" is circular and renders this key statutory element superfluous.

If this Court interprets "corruptly" to mean "motivated by an improper purpose," the pivotal word "corruptly" would be rendered meaningless. *Farrell*, 126 F.3d at 487. The Fifth Amendment, of course, allows a criminal defendant to refuse to disclose information that may incriminate him. U.S. Const. amend. V. Thus, a defendant that urges a witness to exercise the Fifth Amendment privilege and withhold information does so with a purpose to prevent disclosure of information to law enforcement. *Doss*, 630 F.3d at 1189.

Millstone's comments to Reynolds reinforce the fact that his purpose in asking Reynolds to assert the Fifth Amendment was to prevent disclosure of information to federal investigators. (R. 9.) Millstone indicated that he did not

want to go to prison and that Reynolds should just "plead the Fifth and shut up." (R. 9.) These statements demonstrate that Millstone acted only with the purpose to hinder Reynolds' communication to federal investigators.

The statute, however, apart from the word "corruptly," would already prohibit conduct that "persuades . . . with intent to . . . hinder, delay, or prevent [] communication to law enforcement." 18 U.S.C. § 1512(b)(3). Therefore, interpreting "corruptly" to mean "with an improper purpose," with that purpose being to hinder communication to law enforcement, would effectively cause the word to be repetitive of the conduct already prohibited, resulting in a circular construction. *Farrell*, 126 F.3d at 487.

In *United States v. Reeves*, the Fifth Circuit analyzed a criminal tax statute with a strikingly similar textual structure to 18 U.S.C. § 1512(b)(3). 752 F.2d 995 (5th Cir. 1985) (interpreting 26 U.S.C. § 7212 (2006)). The statute at issue in *Reeves* prohibited "'corruptly' endeavor[ing] to obstruct or impede the due administration of the title." *Id.* at 998. The court began by noting that the text of the statute, disregarding the word "corruptly," already prohibited intentional interference with administration of the tax code. *Id.* Thus, interpreting "corruptly" to require an improper motive renders the term redundant because the statute would already prohibited such conduct. *Id.* The court rejected such a circular interpretation. *Id.* at 1001.

Furthermore, the more prominently a statutory word or phrase is placed, the more important it becomes to give that word or phrase meaning. *Duncan*, 533 U.S.

at 174 (holding that the word "State" was too pivotal in the habeas corpus statutory scheme to render superfluous). Without a doubt, "corruptly" plays a critical role in properly determining what conduct Congress meant to prohibit through § 1512. Even the courts that have erroneously adopted the "improper purpose" interpretation of § 1512 have held that the inclusion of the word "corruptly" is all that saves § 1512(b) from being unconstitutionally overbroad. *Thompson*, 76 F.3d at 452.

Like the tax statute at issue in *Reeves*, Congress expressly included the important word "corruptly" to define the conduct prohibited by § 1512(b)(3). It is similarly unlikely that Congress would have intended such a key term to be essentially meaningless and redundant in the statutory scheme.

2. The "improper purpose" interpretation fails to appreciate this Court's jurisprudence on witness tampering or obstruction of justice.

The circuits that have adopted the "improper purpose" interpretation of "corruptly" in § 1512 have done so in close reliance on the interpretation of the word in 18 U.S.C. § 1503 (2006). *See Thompson*, 76 F.3d at 452 (relying on case law interpreting § 1503). These circuits, however, have relied on previous interpretations of § 1503 without critical analysis of the differences between the two statutory provisions or appreciation for the treatment that this Court has given the word "corruptly."

In § 1503, "corruptly" provides the mens rea element of the offense, which would otherwise completely lack a mens rea element. *United States v. Haas*, 583 F.2d 216, 220 (5th Cir. 1978). Conversely, § 1512(b)(3) contains the mens rea

element "knowingly," meaning that the statute is only violated by one who "knowingly . . . corruptly persuades" a witness with the intent to do the actions enumerated. The courts adopting the "improper purpose" definition, however, have relied almost exclusively on an analogy between the use of "corruptly" in § 1503 and its use in § 1512. This is particularly shocking given that this Court rejected the government's attempt to make that same analogy in *Arthur Andersen*. 544 U.S. at 705.

In *Arthur Andersen*, the government relied upon both § 1503 and § 1505, two other obstruction of justice statutes that employ the word "corruptly," and urged that the same interpretation be applied to § 1512(b). *Id.* at 705 n. 9. In rejecting that approach, this Court pointed to the distinct language contained in § 1512 and the use of the term "knowingly" to modify "corruptly persuades." *Id.* Because the language differs in such a meaningful way, *Arthur Andersen* refused to draw an analogy between § 1512 and the other obstruction of justice statutes.

Therefore, this Court should not adopt the "improper purpose" test for two reasons. First, that interpretation would render the most crucial language of the statute superfluous and result in a circular definition of the term "corruptly." Second, this Court has already rejected the approach that the government advocates in this case. Instead, this Court should give the phrase "corruptly persuades" its most natural meaning, which requires consciousness of wrongdoing.

C. The Rule of Lenity Requires that this Court Utilize the Interpretation Most Favorable to the Defendant.

Traditionally, this Court has strictly construed penal statutes, both out of deference to the role of Congress and as a matter of fair notice to the public of what conduct the law prohibits. *United States v. Aguilar*, 515 U.S. 593, 600 (2001). One way that this has been applied is through the rule of lenity. "The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008). The rule of lenity also serves to put the onus of statutory change on the party in the best position to bring necessary changes to fruition—the United States government. *Id.*

1. The rule of lenity should be applied because the term "corruptly persuades" is an ambiguous term in the statutory scheme of § 1512.

The word "corruptly" is certainly an ambiguous term, and its central importance in the meaning of the statute renders the conduct prohibited by § 1512 difficult to discern. Every court to consider the meaning of the term has found it to be ambiguous. *Doss*, 630 F.3d at 1186; *United States v. Baldridge*, 559 F.3d 1126, 1142 (10th Cir. 2009). Even in the context of other statutory provisions, "corruptly" has been found to be ambiguous, so much so that "in the absence of some narrowing gloss, people must 'guess at its meaning and differ as to its application.'" *United States v. Poindexter*, 951 F.2d 369, 378 (D.C. Cir. 1991). In fact, the use of the word in the context of § 1512 may be even more ambiguous than its use in the related statutory provisions. *See* 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) ("The meaning of 'corruptly persuades' under § 1512(b) is, unfortunately, perhaps even less certain than the interpretation of the similar language in §§ 1503 and 1505.").

The ambiguity inherent in § 1512 makes the statute a particularly strong candidate for applying the rule of lenity. This Court has already applied the rule of lenity when faced with the similar case of *Arthur Andersen*, noting the necessity to "exercise[] restraint in assessing the reach of a federal criminal statute." 544 U.S at 703. The rule of lenity has even been applied to the less ambiguous use of the word "corruptly" in § 1503 to remove otherwise innocent conduct from the purview of the statute. *See Aguilar*, 515 U.S. at 600 (affirming the Ninth Circuit in overturning a conviction for obstruction of justice).

2. <u>The rule of lenity should be applied because § 1512 of the witness tampering statute does not prohibit inherently malign conduct.</u>

This Court has a long-standing practice of requiring that criminal statutes provide guidelines for the conduct prohibited with at least some minimal particularity. In *Ratzlaf v. United States*, the Court addressed ambiguities in the Money Laundering Control Act surrounding that statute's use of the term "willfully." 510 U.S. 135, 143 (1994). While noting that some criminals may engage in structuring, this Court found that "currency structuring is not inevitably nefarious." *Id.* at 144. *Ratzlaf* concluded currency structuring was not so inherently evil that a typical citizen would be on notice that structuring was prohibited and construed the statute in the manner most favorable to the defendant. *Id.* at 146.

Ratzlaf stands for the proposition that crimes that are not inherently malign require consciousness of wrongdoing before fair notice can be given to the world of the actions prohibited. Br. for Wash. L. Found. & Chamber of Commerce as Amici Curiae Supporting Petitioner, *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005) (No. 04-368), 2005 WL 435902, at *23. *Arthur Andersen* has already established both that persuasion is not inherently malign and that consciousness of wrongdoing should be required for a violation of the statute. 544 U.S. at 703. The House Judiciary Committee Report notes that bribery of a witness and persuading a witness to provide false testimony are forms of "culpable corrupt persuasion." H.R. Rep. No. 100-169, at 12 (1987). Both bribery of a witness and persuading a witness to provide false testimony are squarely within the categories of conduct in which normal citizens would be conscious of their wrongdoing regardless of whether they had specific knowledge of the statute involved.

By contrast, Millstone did nothing more than urge Reynolds to assert his constitutionally protected Fifth Amendment privilege against self-incrimination—advice that would have actually been statutorily protected if it had come from an attorney. (R. 9.); *see* 18 U.S.C. § 1515(c) (2006) ("This chapter does not prohibit or punish the providing of lawful, bona fide, legal representation services in . . . anticipation an official proceeding."). This is not conduct that is so nefarious that ordinary citizens are given fair notice that the conduct is prohibited by law. To hold otherwise would create the same trap for the unwary citizen that this Court sought to avoid in *Ratzlaf*. The disagreements over the interpretation of "corruptly" are

numerous, and if any hope of having that ambiguity resolved by Congress exists, this Court must place that burden on the party most capable of effecting that change. *Santos*, 553 U.S. at 514. Therefore, this Court should apply the rule of lenity and adopt the interpretation most favorable to Millstone.

The Fourteenth Circuit erred when it held that "corrupt persuasion" includes an attempt to urge another individual to exercise a Fifth Amendment privilege. This Court's decision in *Arthur Andersen* recognizes that non-corrupt forms of persuasion to withhold information from law enforcement exist. The courts that have held otherwise fail to understand the weight of this Court's conclusions in *Arthur Andersen*. Furthermore, the ambiguity inherent in § 1512(b) presents an especially compelling case for this Court to apply the rule of lenity. Because "corrupt persuasion" does not include an attempt to urge another individual to exercise a legally protected privilege, this Court should reverse the Fourteenth Circuit and grant Millstone's Motion for Acquittal.

CONCLUSION

This Court should reverse the Fourteenth Circuit's decision and remand for a new trial with proper jury instructions as to the level of culpability needed to violate the Clean Water Act. Additionally, this Court should grant Millstone's Motion for Acquittal on the witness tampering charge because he did not engage in corrupt persuasion.

APPENDIX

33 U.S.C. § 1319(c)(1)(A)

(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.

(2) Knowing violations

Any person who--

(A) knowingly 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) knowingly 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 a 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 $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, 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 $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

(3) Knowing endangerment

(A) General rule

Any person who knowingly violates section 1311, 1312, 1313, 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 in a permit issued under section 1344 of this title by the Secretary of the Army or by a State, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment of not more than 15 years, or both. A person which is an organization shall, upon conviction of violating this subparagraph, be subject to a fine of not more than $1,000,000. If a conviction of a person 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 fine and imprisonment.

(B) Additional provisions

For the purpose of subparagraph (A) of this paragraph--

(i) in determining whether a defendant who is an individual knew that his conduct placed another person in imminent danger of death or serious bodily injury-

(I) the person is responsible only for actual awareness or actual belief that he possessed; and

(II) knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant;
except that in proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information;

(ii) it is an affirmative defense to prosecution that the conduct charged was consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of--

(I) an occupation, a business, or a profession; or

(II) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent;
and such defense may be established under this subparagraph by a preponderance of the evidence;

(iii) the term “organization” means a legal entity, other than a government, established or organized for any purpose, and such term includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, or any other association of persons; and

(iv) the term “serious bodily injury” means bodily injury which involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(4) False statements

Any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who knowingly falsifies, tampers with, or renders inaccurate any monitoring device or method required to be maintained under this chapter, shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than 2 years, 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 $20,000 per day of violation, or by imprisonment of not more than 4 years, or by both.

(5) Treatment of single operational upset

For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(6) Responsible corporate officer as "person"

For the purpose of this subsection, the term "person" means, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.

(7) Hazardous substance defined

For the purpose of this subsection, the term "hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of this title, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of Title 42, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. § 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of this title, and (E) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15.

18 U.S.C. § 1512(b)

(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.