Docket No. C11-0116-1

IN THE
Supreme Court of the United States

SAMUEL MILLSTONE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR PETITIONER

Team 78

QUESTIONS PRESENTED

1. Whether the Fourteenth Circuit erred when it held that Mr. Millstone should face severe criminal penalties under the Clean Water Act, 33 U.S.C. § 1319(c)(1)(A), for conduct that amounts, at most, to mere ordinary civil negligence.

2. Whether the Fourteenth Circuit erred when it held that Mr. Millstone's attempt to persuade a co-conspirator to invoke his fundamental right against self-incrimination rose to the level of "corrupt" persuasion under the witness-tampering statute, 18 U.S.C. § 1512(b)(3).

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OPINIONS BELOW

The October 3, 2011 decision of the United States Court of Appeals for the Fourteenth Circuit (No. 11-1174) is unreported. It can be found in the Record on pages 3–21. Transcript of Record on Appeal ("R.") at 3–21.

STATEMENT OF JURISDICTION

The United States District Court for the District of New Tejas had original jurisdiction pursuant to 18 U.S.C. § 3231, which provides federal district courts with jurisdiction over "crimes against the United States." Mr. Millstone exercised his right of appeal to the United States Court of Appeals for the Fourteenth Circuit, challenging the District Court's decision pursuant to 18 U.S.C. § 1291. After the Fourteenth Circuit affirmed the District Court, Mr. Millstone petitioned the United States Supreme Court for certiorari. R. at 2. This Court has appellate jurisdiction to review a court of appeals decision by granting a writ of certiorari upon the petition of a party in the case. 28 U.S.C. § 1254. This Court exercised that authority by granting Mr. Millstone's petition. R. at 2.

STATUTORY PROVISIONS INVOLVED

The first issue before this Court is governed by the Clean Water Act, which provides that "[a]ny person who negligently violates [this Act] shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both." 33 U.S.C. § 1319(c)(1)(A).

The second issue before this Court is governed by the Witness-Tampering Statute, which provides in relevant part:

> 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 . . . hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense . . . shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1512(b)(3).

STATEMENT OF THE CASE

Mr. Millstone appeals the Fourteenth Circuit's affirmation of the District Court's use of a jury instruction that defined "negligence" under the Clean Water Act ("CWA") as ordinary civil negligence. In addition, Mr. Millstone challenges the Fourteenth Circuit's affirmation of the District Court's denial of Mr. Millstone's motion for acquittal on his witness-tampering charge. The Fourteenth Circuit affirmed the district court, finding that: (1) the CWA is a public welfare statute, and consequently, that a civil negligence standard for determining liability is appropriate; and (2) "corruptly persuades" under the witness-tampering statute, 18 U.S.C. § 1512(b)(3), means "motivated by an improper purpose."

Mr. Millstone and Sekuritek

Mr. Millstone is a life-long resident of Polis, New Tejas, who spent more than ten years protecting the city as an esteemed officer of the Polis Police Department. R. at 4. Toward the end of his law enforcement career, Mr. Millstone began taking business classes at the University of New Tejas. R. at 4. Mr. Millstone spent several years juggling his academic responsibilities and his full-time job as a law

enforcement officer, and he ultimately graduated at the top of his class with a business degree. R. at 4. He then managed a small chain of retail businesses for five years until being laid off as a result of a large corporate merger. R. at 4. In the face of unemployment, Mr. Millstone founded Sekuritek in 2003 with his classmate from the University of New Tejas, Reese Reynolds. R. at 4.

Sekuritek, a private security company dedicated to maintaining the safety of Polis, trained and supplied security personnel with state-of-the-art equipment. R. at 4. Mr. Millstone, President and CEO, was responsible for client consultation, hiring and training security officers, and supervising on-site operations. R. at 4. Mr. Reynolds, Sekuritek's Vice-President, was responsible for sales and marketing as well as equipment purchases. R. at 4. Sekuritek developed quickly and consistently expanded its client base throughout 2005 and 2006. R. at 5.

Bigle Chemical Company

Bigle Chemical Company ("Bigle") moved its headquarters to Polis from the Republic of China in late 2006. R. at 5. Bigle opened a chemical plant, known as the "Windy River Facility," in southern Polis. R. at 5. The plant spanned 270 acres on the shore of the Windy River. R. at 5. Due to Sekuritek's stellar reputation in the Polis community, Bigle's CEO, Drayton Wesley, contacted Mr. Millstone in the hopes of hiring Sekuritek to handle the company's security. R. at 5. After consulting with Mr. Reynolds, Mr. Millstone agreed to take on the Bigle contract. R. at 5. The contract gave Mr. Millstone and Mr. Reynolds less than one month to implement an effective security system at the facility. R. at 5. Pursuant to the

contract, Sekuritek hired and trained thirty-five new officers, one accountant, and one administrative assistant in order to meet the needs of its new client. R. at 5. Sekuritek also purchased additional surveillance gear, uniforms, and taser guns. Mr. Reynolds was responsible for selecting and purchasing sport-utility vehicles ("SUVs") for transportation around the 270-acre facility. R. at 6. Through Sekuritek's dedication and effort, the Windy River facility was operating at full capacity by December 1, 2006. R. at 6. Mr. Millstone continued to make regular visits to the facility to ensure that Bigle was happy with Sekuritek's services and that the security system was effective. R. at 6–7.

The Spill and Subsequent Investigations

On January 27, 2007, one of Sekuritek's security guards thought he saw an intruder near one of Bigle's storage tanks. R. at 7. He accelerated the SUV in the hopes of reaching the intruder and investigating the situation before the intruder could flee the premises. R. at 7. When he pressed down on the gas pedal, the pedal stuck due to a manufacturing defect and caused the vehicle to accelerate out of control. R. at 7. Unable to regain control, the guard ultimately leapt out of the vehicle in order to save himself. R. at 7. The SUV then collided with one of the storage tanks, causing an explosion, and, ultimately, a chemical spill into the Windy River. R. at 7. The chemical spill, which came to be referred to as the "Soup," has an estimated clean-up cost of $300 million. R. at 8.

Federal investigators initially focused on Bigle until the company relocated back to the Republic of China. R. at 8. Bigle's corporate officers could not be

criminally prosecuted because they are citizens of the Republic of China, and the United States government could not extradite them. R. at 8 n.6. Having no other target, the investigators turned their attention to Mr. Millstone and Mr. Reynolds. R. at 8. The federal investigation uncovered Sekuritek's employee handbook, to which Mr. Millstone referred all new employees during their training seminar. R. at 8–9. The handbook contained a written policy that employees should leave their vehicles in stopped and secured positions at least 100 yards from any apparent emergency before proceeding to investigate. R. at 8. In addition, investigators found that the SUV supplier previously experienced gas-pedal malfunctions. R. at 9.

Sekuritek, the center of the investigation due to Bigle's absence, was criticized for allegedly: (1) providing abbreviated training sessions; (2) purchasing defective SUVs; and (3) installing a security wall that may have hindered firefighters. R. at 9. The media and the public pushed for the filing of criminal charges against Mr. Millstone and Mr. Reynolds, desperate to hold someone responsible for the spill. R. at 9. In the wake of this outcry, Mr. Millstone and Mr. Reynolds met to discuss the allegations. R. at 9. Concerned about the potential criminal charges, Mr. Millstone suggested to Mr. Reynolds that "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. at 9.

Procedural History

The United States charged Mr. Millstone with the negligent discharge of pollutants in violation of § 1319(c)(1)(A) of the CWA and with witness tampering in

violation of 18 U.S.C. § 1512(b)(3) for his suggestion to Mr. Reynolds that they both invoke their Fifth Amendment protection against self-incrimination. R. at 10. In order to convict Mr. Millstone of the CWA violation, the jury had to find that the government proved beyond a reasonable doubt that the discharge of pollutants was the result of Mr. Millstone's negligence. R. at 10. Although § 1319(c)(1)(A) is a criminal provision of the CWA, the judge instructed the jury that the word "negligence" in the statute means "the failure to exercise the standard of care that a reasonably prudent person would have exercised in the same situation," which is the standard for ordinary civil negligence, not criminal negligence. R. at 10. Finding that the government had met its burden of proving mere ordinary negligence, the jury found Mr. Millstone guilty. R. at 10. It also convicted Mr. Millstone of witness tampering. Mr. Millstone moved for a new trial on the CWA charge in light of the district court's improper jury instruction, and moved for acquittal on the witness-tampering charge. R. at 10. The district court denied his motion for a new trial, as well as his motion for acquittal. R. at 10.

The Fourteenth Circuit, in a split decision, affirmed the district court's use of a civil negligence standard in its jury instruction, as well as its denial of Mr. Millstone's Motion for Acquittal. R. at 3. The Fourteenth Circuit found the plain meaning of the word "negligence" in § 1319(c)(1)(A) of the CWA to be ordinary negligence, and that, in light of its conclusion that the CWA is a public welfare statute, dispensing of the traditional mens rea requirement is acceptable. R. at 11–13. As to the witness-tampering charge, the Fourteenth Circuit relied on parallel

language in 18 U.S.C. § 1503 and held that "corruptly" in 18 U.S.C. § 1512(b)(3) means "motivated by an improper purpose." R. at 14.

In dissent, Justice Newman argued that the majority inappropriately referred to the civil portion of the CWA in determining the definition of "negligence" in a criminal provision of the statute. R. at 16. Justice Newman also stated that the public welfare exception does not apply to the CWA, compelling the conclusion that the word "negligence" in § 1319(c)(1)(A) refers to criminal negligence. R. at 16–17. With regard to the witness tampering charge, Justice Newman rejected the majority's reliance on § 1503 and argued that the majority's interpretation was inconsistent with the recent Supreme Court decision, Arthur Andersen LLP v. United States, 544 U.S. 696 (2005). R. at 19. Justice Newman concluded that "corruptly" in § 1512(b)(3) must mean something more than "motivated by an improper purpose," as it requires "consciousness of wrongdoing." R. at 20. This Court granted certiorari to resolve the meaning of "negligently" in § 1319(c)(1)(A) of the CWA and "corruptly persuades" in § 1512(b)(3) of the witness-tampering statute. R. at 2.

SUMMARY OF THE ARGUMENT

The Fourteenth Circuit erred when it upheld the district court's use of an incorrect jury instruction, which defined "negligence" under § 1319(c)(1)(A) of the CWA as ordinary civil negligence instead of criminal negligence. Section 1319(c)(1)(A), which criminalizes negligent violations of the CWA, does not define the term "negligently," while 33 U.S.C. § 1321(b)(7)(D), a civil provision of the CWA,

defines the term "gross negligence." This has led to confusion as to whether § 1319(c)(1)(A) requires more than a finding of ordinary civil negligence to secure conviction; however, given that it is a criminal provision that imposes severe criminal penalties and the public welfare exception to mens rea does not apply, § 1319(c)(1)(A)'s "negligence" standard must refer to criminal negligence.

The Fourteenth Circuit, in mistakenly classifying the CWA as a public welfare statute, determined that those who are merely civilly negligent can be found guilty of violating the CWA. As such, the Fourteenth Circuit inappropriately dispensed of the criminal law's most important safeguard—mens rea. Our criminal justice system proscribes the imposition of harsh criminal punishment without proof of criminal intent, unless the public welfare doctrine applies. The public welfare doctrine, however, is a very narrow exception to the traditional mens rea requirement. Because it imposes strict criminal liability without proof of criminal intent, the public welfare doctrine is intended to encompass only those offenses whose punishments include very small fines or little, if any, prison terms. The CWA is no such statute, as its criminal penalties are too severe and its scope is too broad. Under the Fourteenth Circuit's interpretation of the CWA, merely negligent actors are subjected to the CWA's serious criminal sanctions without proof of any criminal intent. Interpreting the CWA as a public welfare statute criminalizes a wide spectrum of innocent conduct, causing this country's criminal justice system to become morally arbitrary.

When the jury considered Mr. Millstone's conduct, it found that his actions amounted only to ordinary civil negligence, and never reached the question of whether his conduct surpassed the higher standard of criminal negligence as they should have done. Mr. Millstone is entitled to have a jury of his peers determine whether he was criminally negligent before he is convicted under the CWA and subjected to its serious criminal penalties. If Mr. Millstone is deprived of this right, he is unconstitutionally stripped of his due process protections. Accordingly, this Court should remand this matter to the District Court for a new trial, at which the government would be required to prove beyond a reasonable doubt that the chemical spill was the result of Mr. Millstone's *criminal* negligence.

The Fourteenth Circuit also erred when it misinterpreted "corruptly" in the witness-tampering statute, 18 U.S.C. § 1512(b)(3), and consequently affirmed the District Court's holding. An individual violates this statute if he "knowingly corruptly persuades another person, or attempts to do so, with the intent to . . . hinder, delay, or prevent the communication to a law enforcement officer." The Fourteenth Circuit was incorrect in holding that "corruptly persuades" means "motivated by an improper purpose."

Under this Court's well-established framework for statutory interpretation, analyzing the plain language of the statute confirms that "corruptly persuades" cannot mean "motivated by an improper purpose." Specifically, this Court's framework for "dual-intent" statutes dictates that, when a statute includes two intent clauses, one cannot be interpreted to have the same meaning as the other.

Such an interpretation would render the second intent clause superfluous. The witness-tampering statute consists of two intent elements: (1) "knowingly corruptly persuades," and (2) "with the intent to . . . hinder, delay, or prevent . . . communication." Because the latter clause describes the "improper motive," interpreting the "knowingly corruptly persuades" clause to mean "motivated by an improper purpose" is inappropriate. Consequently, the Court should conclude that "corruptly" requires consciousness of wrongdoing.

The statutory analysis should end here, as it is inappropriate to look beyond the plain language of a statute when it resolves any ambiguities. Even if this Court does look beyond the statute's language, however, the legislative history dictates the same result. The rule of lenity also mandates that this Court resolve the issue in Mr. Millstone's favor.

In addition to incorrectly applying this Court's longstanding statutory interpretation rules, the Fourteenth Circuit drew an improper parallel to 18 U.S.C. § 1503 when it concluded that "corruptly" under § 1512 must have the same meaning as "corruptly" in § 1503. Section 1512, unlike § 1503, includes a "knowingly" mens rea element; as such, "corruptly" is the scienter requirement in § 1503. Because the word "corruptly" serves a significantly different purpose in each statute, relying on § 1503 for the definition of "corruptly" in § 1512 is inappropriate. The legislative history confirms that this Court should not draw a parallel between § 1512 and § 1503 because § 1512 was created to criminalize culpable witness tampering and to remove that conduct from the scope of § 1503. As Senator Joseph

Biden stated, the amendment to § 1512, which added the "corruptly persuades" language, was intended to address a "gap in the legislative scheme" in which "promising to pay a witness for giving false testimony," and similar "corrupt" conduct, did not fall within any criminal statute. Consequently, interpreting the legislative history to conclude that Congress intended that § 1512's "corrupt" conduct be the equivalent of that under § 1503 misinterprets Senator Biden's statements.

Furthermore, this Court should not interpret "corruptly" in such a way that holds Mr. Millstone liable for attempting to persuade Mr. Reynolds to invoke his fundamental Fifth Amendment privilege against self-incrimination. Criminalizing Mr. Millstone's conduct abridges the Fifth Amendment and interferes with Mr. Reynolds's ability to "speak in the unfettered exercise of his own will." Accordingly, this Court should remand this matter to the District Court for entry of a judgment of acquittal as to the witness-tampering charges.

ARGUMENT

I. THE FOURTEENTH CIRCUIT ERRED IN HOLDING THAT MERE ORDINARY NEGLIGENCE IS THE PROPER STANDARD FOR DETERMINING CRIMINAL LIABILITY UNDER § 1319(c)(1)(A) OF THE CWA.

In mistakenly classifying the CWA as a public welfare statute, the Fourteenth Circuit dispenses of the mens rea requirement and eliminates criminal intent as a necessary predicate to conviction under § 1319(c)(1)(A) of the CWA. This decision imposes severe criminal penalties upon merely negligent actors. The court ignored longstanding rules of statutory construction in concluding that "negligence"

in the context of a criminal statute that affixes serious criminal sanctions upon its violators refers to nothing more than ordinary civil negligence, thereby depriving such alleged violators of their due process rights. The Fourteenth Circuit inappropriately referred to a civil provision of the CWA to inform its definition of "negligence" in a criminal provision; ignored the longstanding rule of lenity, which requires ambiguities in a criminal statute to be resolved in favor of the defendant; and disposed of the mens rea requirement without a clear expression from Congress that doing so would be appropriate. This Court should not sanction such an unjust interpretation of the CWA.

A. The CWA is not a public welfare statute and thus cannot subject violators to severe criminal penalties without proof of mens rea.

It is completely inappropriate to classify the CWA as a public welfare statute—which entirely dispenses of the mens rea requirement—given its broad scope and imposition of severe criminal sanctions. The mens rea requirement ensures that criminal penalties are not imposed in the absence of criminal intent and bolsters criminal law's most important principle that "wrongdoing must be conscious to be criminal." Morisette v. United States, 342 U.S. 246, 252 (1952). This Court has long insisted that the mens rea requirement is "the rule of, rather than the exception to, the principles of Anglo-American criminal jurisdiction." United States v. United States Gypsum Co., 438 U.S. 422, 436 (1978). As such, the public welfare exception is intended to be extremely narrow in scope and does not typically include within its ambit offenses that carry lengthy prison terms and hefty

fines. Our criminal justice system is built around the notion that such extreme punishment should not be imposed absent proof of a criminal intent.

Indeed, public welfare offenses are recognized only in very "limited circumstances" and are typically confined to those that regulate "potentially harmful or injurious items" that are generally subject to "strict regulation." Staples v. United States, 511 U.S. 600, 606 (1994). Public welfare offenses tend to regulate "dangerous or deleterious products or obnoxious waste materials." United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558, 565 (1971). To determine that a particular statute qualifies as a public welfare statute, a court must find that these substances and products are sufficiently dangerous to "alert an individual that he stands in 'responsible relation to a public danger.'" Staples, 511 U.S. at 613 n.6 (quoting United States v. Dotterweich, 320 U.S. 277, 281 (1943)).

Although provisions of the CWA regulate certain dangerous substances, dangerousness alone is not sufficient to warrant application of the public welfare offense exception: "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." Staples, 511 U.S. at 611. In Staples, the Court held that a statute prohibiting the possession of machine guns did not fall within the scope of the public welfare offense exception—despite the dangerousness of such possession—because of widespread lawful gun ownership in our country. Id. Using Staples as a guidepost, the Fifth Circuit refused to apply the public welfare offense doctrine to the CWA, finding that although gasoline and chemicals are "'potentially

harmful or injurious item[s],' [they] [are] certainly no more so than are machineguns." United States v. Ahmad, 101 F.3d 386, 391 (5th Cir. 1996).

Given its breadth, the CWA pulls within its reach actors, such as Mr. Millstone, who have no interaction with regulated substances whatsoever. The CWA goes so far as to "impose[] criminal liability for persons using standard equipment to engage in a broad range of ordinary industrial and commercial activities." Hanousek v. United States, 528 U.S. 1102, 1102 (2000) (Thomas, J., dissenting from denial of petition for writ of certiorari). This "strongly militates against concluding that the public welfare doctrine applies" to the CWA, as "we should be hesitant to expose countless numbers of [innocuous actors like Mr. Millstone] to heightened criminal liability for using ordinary devices to engage in normal industrial operations." Id. Mr. Millstone was merely responsible for hiring, training, and supervising security personnel. R. at 6. Neither he nor his employees had any direct contact with Bigle's chemicals; they merely patrolled the plant to ensure its security. R. at 6–7. Mr. Millstone was neither aware of the types of chemicals that Bigle stored in its tanks, nor of the laws regulating such chemicals. R. at 6–7. To hold such a removed actor criminally liable without proof of any criminal intent is unjust.

1. The CWA's punishment provisions are too severe to merit the conclusion that it is a public welfare statute.

The seriousness of the penalties that the CWA imposes strongly counsels against classifying it as a public welfare statute. One of the most crucial considerations in determining whether a statute qualifies as a public welfare

statute is the severity of the penalty imposed. Staples, 511 U.S. at 616–18. As such, public welfare offenses tend to be ones whose "penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation." Morisette, 342 U.S. at 256; see also Staples, 511 U.S. at 616, 618 ("[T]he cases that first defined the concept of the public welfare offense almost uniformly involved statutes that provided for only light penalties or short jail sentences. . . . [A] severe penalty is a further factor tending to suggest that Congress did not intend to eliminate a mens rea requirement."); Ahmad, 101 F.3d at 391 ("[P]ublic welfare offenses have virtually always been crimes punishable by relatively light penalties such as fines or short jail sentences, rather than substantial terms of imprisonment.").

Recognizing the severity of the criminal punishment that the CWA imposes, the Fifth Circuit rejected the argument that the CWA is a public welfare statute and refused to impose strict criminal liability upon a merely negligent actor. Ahmad, 101 F.3d at 391 ("The fact that violations of [the CWA] are felonies punishable by years in federal prison confirms . . . that they do not fall within the public welfare offense exception."). Mr. Ahmad was convicted of knowingly discharging gasoline, which qualifies as a pollutant under the CWA, into navigable waters. Id. at 389. Mr. Ahmad appealed his conviction, arguing that he did not "knowingly" discharge gasoline, for although he knew that he was discharging a substance from his market's tanks, he did not know that he was discharging gasoline specifically. Id. On appeal, Mr. Ahmad challenged the district court's jury

instruction, as it did not make clear that "knowingly" attaches to each element of the offense—namely, the element requiring that the discharge be a "pollutant." Id. The Fifth Circuit agreed with Mr. Ahmad, finding that "the phrase 'knowingly violates' . . . should uniformly require knowledge as to each of [the] elements" of the offense. Id. at 390. In so holding, the Fifth Circuit rejected the government's argument that the CWA falls within the public welfare exception to mens rea. Id. at 391. The court stated that although "the CWA certainly does appear to implicate public welfare[,] . . . the public welfare offense is narrow," and does not apply when serious penalties result from conviction. Id. Rather, when offenses carry such severe punishment, "the usual presumption of a mens rea requirement applies." Id.

Section 1319(c)(1)(A) of the CWA imposes far more severe penalties than allowable under the public welfare doctrine. Specifically, it imposes up to a $25,000 fine per day of violation, as well as up to a one-year prison term. 33 U.S.C. § 1319(c)(1)(A). Mr. Millstone faces these harsh punishments for his merely negligent conduct. Mr. Millstone's sole responsibility was overseeing the security personnel who patrolled Bigle's plant; he had no involvement in the handling of Bigle's chemicals. R. at 6. Despite his minimal role and lack of criminal intent, the Fourteenth Circuit's decision subjects Mr. Millstone to § 1319(c)(1)(A)'s egregious criminal sanctions. Imposing such penalties on an individual, particularly where there is no evidence that the individual acted with criminal intent, militates against a finding that the CWA is a public welfare statute.

2. The CWA is too far-reaching in scope to qualify as a public welfare statute.

The CWA is as statute of "tremendous sweep," regulating "[m]uch more ordinary, innocent, productive activity . . . than people not versed in environmental law might imagine." United States v. Weitzenhoff, 35 F.3d 1275, 1293 (9th Cir. 1993) (Kleinfeld, J., dissenting from denial of rehearing en banc). While most statutes permit all conduct except that which they prohibit, the CWA prohibits all regulated conduct except that which it permits. 33 U.S.C. § 1311(a). Further, the CWA imposes criminal penalties on "any person"—not just one versed in environmental law—who acts in violation of the statute. 33 U.S.C. § 1319(c)(1)(A) (emphasis added). The Act does not punish only those who work in the regulated industries and are thus familiar with the law's requirements. Nor does it restrict its regulation to only the most harmful pollutants and toxic materials that most people would know are subject to such regulation.

Instead, the CWA pulls every member of the public within its scope, regulates ordinary products that common people use and interact with on a regular basis, and, as this Court has recognized, defines the waters covered by the statute very broadly. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985). Several of the CWA's definitions of regulated substances and conduct evidence its broad scope. For example, the CWA's definition of "pollutant" is overwhelmingly broad, as it includes gasoline, as demonstrated in Ahmad, as well as "garbage, . . . biological materials, . . . heat, . . . rock, [and] sand . . . ." 33 U.S.C. § 1362(6). Similarly, the term "hazardous substances" includes chlorine and bleach,

which are substances that regular individuals use frequently and without much thought. The CWA does not confine its regulation to those highly trained individuals who regularly interact with exceedingly hazardous and uncommon substances and are thus aware of the laws that regulate their conduct. Instead, the CWA exposes everyone to potential criminal liability for non-compliance.

The tremendous breadth of the CWA means that morally innocent actors who in no way handle regulated chemicals, like Mr. Millstone, can be held criminally liable for mere inadvertence. As Judge Newman points out in his dissent from the Fourteenth Circuit's decision, under the majority's interpretation of the CWA, a mere visitor to Bigle Chemical's plant could be convicted of a negligent violation of the CWA for forgetting to tie his shoes, falling, and tripping a switch that, unbeknownst to him, discharges chemicals into a surrounding waterway. R. at 18 (Newman, J., dissenting). In the same token, a person fishing in waters regulated by the CWA who accidentally spills fuel into the surrounding water while trying to fill the boat's gas tank is guilty of violating the statute and faces large fines and even imprisonment. Similarly, one who causes a car accident that results in gasoline or motor oil spilling into nearby waters could be prosecuted for a federal crime under the CWA for merely negligent conduct. This Court should not permit such an expansive interpretation of the CWA, as it criminalizes a broad range of innocent conduct, and holds actors who are understandably unaware that their conduct is even regulated by the CWA criminally liable for their mere inadvertence.

Mr. Millstone, the owner of a security company that is in no way involved in the business of handling "pollutants" regulated by the CWA, is morally blameless. Neither he nor his company had any involvement with such chemicals and thus had no reason to believe that his business activity was in any way regulated by the CWA or that he could be held criminally liable under it. R. at 6–7. Sekuritek employees were responsible for patrolling the Bigle plant and ensuring its security, and Mr. Millstone was responsible for supervising the security personnel. R. at 6–7. It is therefore completely unfounded to assume that the nature of Mr. Millstone's business activity was so "dangerous and deleterious" as to "alert [him] that he stands in 'responsible relation to a public danger,'" and thus justify subjecting him to severe criminal sanctions without proof of any criminal intent. Staples, 511 U.S. at 613 n.6.

B. Rules of statutory construction dictate that the undefined "negligence" standard in § 1319(c)(1)(A) of the CWA must be one of criminal negligence.

The Fourteenth Circuit employed faulty reasoning in concluding that "negligence" in the context of a criminal provision should mean ordinary negligence. It inappropriately referred to the civil side of the CWA for guidance, failed to consider the rule of lenity, and mistakenly presumed that Congress's silence as to a criminal-intent requirement eliminated such a requirement from the statute. Rules of statutory construction, however, dictate that such a conclusion is incorrect and that "negligence" in § 1319(c)(1)(A) must refer to a standard of criminal negligence.

In reliance on the Ninth Circuit's reasoning in United States v. Hanousek, 176 F. 3d 1116, (9th Cir. 1999), cert. denied, 528 U.S. 1102 (2000), the Fourteenth Circuit mistakenly looked to the civil side of the CWA for guidance when it confronted the undefined term of "negligence" in one of the CWA's criminal provisions. This Court, however, rejected such reasoning in Safeco Ins. Co. v. Burr, 51 U.S. 47 (2007), stating that "[t]he vocabulary of the criminal side of [a statute] is . . . beside the point in construing the civil side." Id. at 60. See United States v. Atlantic States Cast Iron Pipe Co., No. 03-852, 2007 WL 2282514, at *14 n.17 (D.N.J. Aug. 2, 2007) (stating that this form of statutory construction employed by the Hanousek court was "explicitly rejected" by this Court in Safeco, and as such, there is "good reason to scrutinize carefully [this] aspect of Hanousek"). It is simply inappropriate to look to the civil side of a statute when interpreting the criminal side. The fact that, in a civil provision, the CWA uses the term "gross negligence" does not preclude the interpretation that "negligence" in a criminal provision of the same Act requires a finding of more than ordinary civil negligence to warrant conviction.

The rule of lenity also dictates that the ambiguity created by Congress's failure to define "negligently" in §1319(c)(1)(A) of the CWA be resolved in Mr. Millstone's favor, and thus that it be interpreted as requiring a heightened standard of grossly deviant, criminal conduct, rather than ordinary civil negligence. "The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them," which "vindicates the fundamental principle that no

citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed." United States v. Santos, 553 U.S. 507, 514 (2008). See also Liparota v. United States, 471 U.S. 419, 427 (1985) (stating that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," which "ensures that criminal statutes will provide fair warning concerning conduct rendered illegal"). Further, courts must construe statutes so as to avoid unreasonable results, particularly the criminalizing of a broad range of seemingly innocuous conduct, which is exactly the result of interpreting § 1319(c)(1)(A) of the CWA as not requiring proof of criminal intent. United States v. X-Citement Video, 513 U.S. 64, 69–71 (1994).

In Morrisette, this Court held that Congress's failure to expressly require criminal intent in a criminal statute does not warrant the presumption that no criminal intent is required. 342 U.S. at 250. This holding limits the public welfare offense doctrine. "Serious felonies . . . should not fall within the exception 'absent a clear statement from Congress that mens rea is not required.'" Ahmad, 101 F.3d at 391 (quoting Staples, 511 U.S. at 618). Otherwise, we "would sweep out of all federal crime, except when expressly preserved, the ancient requirement of a culpable state of mind." Morisette, 342 U.S. at 250. The inference that congressional silence with respect to criminal intent eliminates the mens rea requirement from a criminal statute is entirely inappropriate and unjust, particularly when conduct amounting to—at most—ordinary civil negligence is punishable by severe criminal penalties. It is not for the courts to make such an

assumption and thus dispense of the criminal law's most inherent and important element: "[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, the legislatures and not the courts should define criminal activity." United States v. Bass, 404 U.S. 336, 348 (1971) (emphasis added).

Following the same principle, states that have confronted the undefined term of "negligence" in a criminal statute have used the mens rea requirement to interpret its meaning: "We interpret the mens rea element of negligence . . . to require a showing of criminal negligence instead of ordinary negligence. . . . We do not find the absence of definition of negligence in the statute indicative of legislative intent." Santillanes v. State, 849 P.2d 358, 365 (N.M. 1993); Accord State v. Ritchie, 590 So.2d 1139, 1149 (La. 1991) (holding that a negligent homicide statute that did not include the word "criminally" before "negligent" nonetheless required a finding of criminal negligence to support conviction since "the Legislature did not specifically express an intent to depart from [the] well-established pattern" of only convicting for criminal negligence); State v. Grover, 437 N.W.2d 60, 63 (Minn. 1989) (stating that "absent a clear legislative declaration that a showing of ordinary negligence, in the civil sense, is sufficient evidence of a crime, we will interpret any criminal negligence statute as requiring a showing that the actor's conduct" rose to the level of criminal negligence).

Congress did not expressly eliminate a criminal intent requirement from §1319(c)(1)(A) of the CWA; it is therefore inappropriate for the courts to construe

the CWA in such a way as to hold morally innocent people criminally liable for innocuous and unintentional conduct. Given that § 1319(c)(1)(A) is one of the CWA's criminal provisions, "negligence" must be, in the interests of justice, interpreted to mean criminal, rather than ordinary, negligence.

C. Eliminating the mens rea requirement from § 1319(c)(1)(A), a criminal provision of the CWA, violates due process.

This Court has recognized that due process places limits on the legislature's ability to eliminate a mens rea requirement from a crime's definition. Lambert v. California, 355 U.S. 225, 243 (1957). "Engrained in our concept of due process is the requirement of notice," which is especially important "where a person, wholly passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case." Id. Due process places constraints upon severe penalties being imposed for crimes that lack a mens rea requirement: "[I]n a system that generally requires a vicious will to establish a crime, . . . imposing severe punishments for offenses that require no mens rea would seem incongruous." Staples, 511 U.S. at 617. If this Court were to permit criminal sanctions for conduct amounting to nothing more than ordinary civil negligence, it would condone the imposition of a "rigorous form of strict liability" upon a well-intentioned person who engaged in wholly innocuous conduct, which this Court has classified as improper. Id. at 607 n.3.

The mens rea requirement is an important safeguard against subjecting innocuous actors to severe criminal penalties. Mens rea ensures that "law-abiding, well-intentioned citizens" are not subjected to potentially lengthy prison sentences

or crippling fines. Id. at 615. In the absence of an intent requirement, our system would "criminalize a broad range of apparently innocent conduct," which is antithetical to our concept of a free society and undercuts the long-standing principle of American jurisprudence that it is better to let the guilty go free than unfairly punish the innocent. Liparota, 471 U.S. at 426.

Although this Court has carved an exception to the mens rea requirement for public welfare offenses, it is a very narrow exception that should not be expanded to encompass crimes beyond those that are punishable only by small fines and little or no jail time. "[B]lurring [] the border between tort and crime" will undoubtedly "result in injustice, and ultimately weaken the efficacy of the criminal law as an instrument of social control." 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). When the criminal law begins to punish the morally blameless, imprisonment and other criminal sanctions cease to deter wrongdoing and our justice system becomes morally arbitrary. See Weitzenhoff, 35 F.3d at 1293 (Kleinfield, J., dissenting on denial of rehearing en banc) ("We undermine the foundation of criminal law when we so vitiate the requirement of a criminal state of knowledge and intention as to make felons of the morally innocent."). For this reason, due process requires proof of criminal intent except in very rare circumstances.

In conclusion, Mr. Millstone's due process rights were violated when he was convicted of violating § 1319(c)(1)(A) of the CWA upon a finding that his ordinary

civil negligence resulted in a chemical spill. Due process proscribes the elimination of the mens rea requirement, except when justifiable under the public welfare exception. Given that the public welfare exception does not apply to the CWA, Mr. Millstone is entitled to have a jury find his conduct criminally negligent before he is convicted of a federal crime and subjected to harsh criminal penalties. Accordingly, this Court should remand this matter for a new trial and require the government to prove Mr. Millstone's *criminal* negligence beyond a reasonable doubt before convicting him.

II. PERSUADING A POTENTIAL WITNESS TO INVOKE HIS FUNDAMENTAL FIFTH AMENDMENT RIGHTS CANNOT CONSTITUTE "CORRUPT" PERSUASION UNDER THE WITNESS-TAMPERING STATUTE, 18 U.S.C. § 1512(b)(3).

The Fourteenth Circuit's interpretation of "corruptly persuades" does not withstand this Court's mandated framework for interpreting the plain language of a statute. Established rules of statutory interpretation dictate that one clause in a statute may not be interpreted to have the same meaning as another clause in the statute because such an interpretation would render that clause superfluous. This Court has specifically applied this rule to statutes with two elements of intent. Because 18 U.S.C. § 1512(b)(3) already includes a clause which demonstrates an improper motive, interpreting "corruptly persuades" to mean "motivated by an improper purpose" is inappropriate.

In addition, the legislative history supports a finding that "corrupt" persuasion must mean more than "motivated by an improper purpose" because the House Judiciary Report enumerated specific examples of "corrupt" conduct, which

all include an affirmative act of dishonesty. Encouraging someone to invoke a fundamental right does not include the requisite level of dishonest conduct. If this Court determines that there are any ambiguities in the statute after analyzing the plain language and the legislative history, which there are not, the rule of lenity requires a finding for Mr. Millstone.

This Court should also reverse the Fourteenth Circuit's holding because that court's reliance on 18 U.S.C. § 1503 is misplaced. The Fourteenth Circuit held that "corruptly" under § 1512 mirrors that in § 1503—an inappropriate conclusion in light of § 1512's independent scienter requirement. Finally, punishing Mr. Millstone for persuading his co-conspirator to invoke a fundamental privilege is contrary to the underlying purpose and importance of the Fifth Amendment to the United States Constitution. As such, this Court should reverse the Fourteenth Circuit and remand this matter for an entry of a judgment of acquittal.

A. Under this Court's longstanding principles of statutory construction, the Fourteenth Circuit misinterpreted the "corruptly persuades" clause of the Witness-Tampering Statute.

This Court's established rules of statutory interpretation require that courts first look to the plain language of the statute without reference to legislative history or other supportive guidance. Salinas v. United States, 522 U.S. 52, 57–58 (1997); see also United States v. Smith, 171 F.3d 617, 620 (8th Cir. 1999) ("Only if the statute is ambiguous do we look to the legislative history to determine Congress's intent."). In doing so, the Court must interpret the statute in such a way that effectuates every provision. See Salinas, 522 U.S. at 58. Here, application of this

Court's rule against superfluities renders the Fourteenth Circuit's analysis improper, because it interpreted "corruptly persuades" to have the same meaning as the statute's second intent clause.

Even if this Court looks beyond the plain language, it should nevertheless reach the same result. Legislative history reveals that the 1988 amendment to § 1512 added the language "corruptly persuades" in order to resolve a circuit split regarding the statute's scope. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7029(a), 102 Stat. 4181. Therefore, any interpretation that renders "corruptly persuades" superfluous is inconsistent with congressional intent. Any remaining ambiguities—namely, the proper interpretation of the "corruptly persuades" clause—must be construed in favor of the defendant, as mandated by the rule of lenity. See Hughey v. United States, 495 U.S. 411, 422 (1990).

1. The Fourteenth Circuit's interpretation violates the Rule against Superfluities.

A foundational rule of statutory interpretation is the rule against superfluities, which "instructs courts to interpret a statute to effectuate all [of] its provisions, so that no part is rendered superfluous." Hibbs v. Winn, 542 U.S. 88, 102 (2004). The Supreme Court has warned that, particularly with regard to statutory terms that "describe an element of a criminal offense," courts must be sure that they give meaning to all of the terms in the statute. Ratzlaf v. United States, 510 U.S. 135, 141 (1994). Here, the Fourteenth Circuit, relying on both the Second and Eleventh Circuits, held that "a defendant acts 'corruptly' when he is motivated by an improper purpose." R. at 14. This interpretation fails to give

meaning to the word "corruptly" and, as a result, cannot be the proper reading of the witness-tampering statute.

As this Court stated in Arthur Andersen, LLP v. United States, "persuasion is by itself innocuous." 544 U.S. 696, 703 (2005). As a result, not all persuasion is criminalized under this statute—only that which rises to the level of corruption. While this Court did not define "corrupt" persuasion under § 1512 in Arthur Andersen, it specifically stated that "'persuading' a person 'with intent to . . . cause' that person to 'withhold' testimony . . . from a Government proceeding or Government official is not inherently malign." Id. at 703–04. Thus, this Court emphasized that the word "corrupt" delineates the type of conduct that falls within this statute. See id.

The Fourteenth Circuit's interpretation is contrary to this established precedent because it interprets "corruptly persuades" in such a way that renders that provision unnecessary. The relevant portion of the statute states that "Whoever knowingly . . . corruptly persuades another . . . with intent to hinder, delay, or prevent the communication to a law enforcement officer or judge . . . shall be fined . . . or imprisoned." 18 U.S.C. § 1512(b)(3). The "intent" provision encompasses the improper purpose motivating the action, specifically, the improper purpose of hindering, delaying, or otherwise preventing communications with law enforcement. To hold, as the Fourteenth Circuit did, that the "corruptly persuades" provision means "motivated by an improper purpose" effectively negates the need for this provision entirely. Simply put, the statute would read: Whoever knowingly,

and *motivated by an improper purpose*, persuades another, *with an improper motive*, violates this statute.

This Court in Arthur Andersen declared that not all persuasion is corrupt. 544 U.S. at 703. Because not all persuasion will fall within the statute, this Court must interpret "corrupt" in such a way that distinguishes between culpable and inculpable conduct. To the contrary, the Fourteenth Circuit interpreted "corruptly" in such a way that renders the term mere surplusage.

Other Circuit Courts have correctly rejected the Fourteenth Circuit's reasoning. The Third Circuit appropriately read "the inclusion of 'corruptly' in § 1512(b) as necessarily implying 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." United States v. Farrell, 126 F.3d 484, 489 (3d Cir. 1997). In conducting this analysis, the Third Circuit concluded that § 1512(b) did not encompass a defendant's attempt to persuade a co-conspirator to refrain from providing incriminating evidence to invoke that right. Id. Likewise, the Ninth Circuit noted post-Arthur Andersen that the Second and Eleventh Circuits—now joined by the Fourteenth Circuit—interpret "corruptly persuades" so as to effectively render "corruptly" unnecessary language. United States v. Doss, 630 F.3d 1181, 1189 (9th Cir. 2011).

The Fourteenth Circuit's interpretation is also inconsistent with this Court's established principles of statutory interpretation, as it failed to conduct this Court's "dual-intent analysis" established in Ratzlaf v. United States. 510 U.S. 135, 141

(1994). In Ratzlaf, this Court demonstrated the appropriate methodology for a statutory interpretation analysis in a criminal statute with two intent elements. See id. In that case, this Court interpreted "willfully" within 31 U.S.C. § 5324. Specifically, under 31 U.S.C. § 5324, an individual must "willfully" violate the anti-structuring statute, which prohibits breaking down a single cash transaction into multiple transactions, "for the purpose of evading the reporting requirements" of a financial institution. Ratzlaf, 510 U.S. at 139 (citing 31 U.S.C. § 5324). The Supreme Court held that interpreting "willfully" to mean the same thing that the "purpose" clause already articulated would render that term mere surplusage. Ratzlaf, 510 U.S. at 144. This Court in Ratzlaf emphasized that such an outcome must be avoided. See id.

In applying the Ratzlaf dual-intent analysis to § 1512, this Court must reject the Second, Eleventh, and Fourteenth Circuits' view that "corruptly persuades" means "motivated by an improper purpose." If "corruptly" means "motivated by an improper purpose," a defendant violates § 1512(b)(3) if he knowingly, while motivated by an improper purpose, persuades another person with an improper purpose. As an example, if a defendant who attempts to persuade a co-conspirator to invoke his fundamental Fifth Amendment right against self-incrimination falls into this statute, then he is guilty because he knowingly, while motivated to keep his co-conspirator from testifying, persuaded his co-conspirator not to testify. This interpretation of the "corruptly persuades" clause is both tautological and entirely

inconsistent with this Court's prior rulings. Therefore, "corruptly persuades" must mean more than simply "motivated by an improper purpose."

This Court stated that "'corrupt' and 'corruptly' are normally associated with wrongful, immoral, depraved, or evil." Arthur Andersen, 544 U.S. at 705. In addition, this Court clarified that persuading a person "with the intent to . . . cause" that person to "withhold" testimony is "not inherently malign." Id. at 703–04. To illustrate that point, this Court provided examples that would not constitute "corrupt" persuasion, stating, "Consider, for instance, a mother who suggests to her son that he invoke his right against compelled self-incrimination, or a wife who persuades her husband not to disclose marital confidences." Id. at 704. As another example, this Court referred to Upjohn Co. v. United States, 449 U.S. 383 (1981), where an attorney was justified in withholding documents from the IRS that were protected by the attorney-client privilege "even though he surely intended that his client keep those documents out of the IRS's hands." Id. The common thread is that the individual being persuaded has a right to withhold the relevant information. These examples lack the "immoral, depraved, or evil" element that a "corrupt" label necessarily entails.

Here, Mr. Millstone merely told Mr. Reynolds, "The feds can't do anything if we don't talk. If they start talking to you, just tell them you plead the Fifth and shut up." R. at 9. There is nothing "immoral, depraved, or evil" about this action. In addition, like this Court's examples of conduct that are not within this statute's reach, Mr. Reynolds had every right to withhold information.

Culpable conduct includes bribery and persuading someone to lie. See H.R. Rep. No. 100-169, at 12. Mr. Millstone's conduct does not reach that type of "immoral" level. Consequently, persuading a co-conspirator to invoke his fundamental Fifth Amendment right against self-incrimination falls outside of § 1512(b)(3)'s "corruptly persuades" clause.

2. The legislative history supports a finding that "corruptly persuades" must mean more than "motivated by an improper purpose."

An analysis of the legislative history of § 1512 also requires this Court to determine that "corruptly persuades" must mean more than "motivated by an improper purpose." In discussing the 1988 amendment, which added the "corruptly persuades" clause to the witness-tampering statute, the House Judiciary Committee noted that § 1512(b), pre-amendment, did not criminalize non-coercive conduct outside of the definition of "misleading conduct." H.R. Rep. No. 100-169, at 12 (1987). Post-amendment, therefore, it was "intended that culpable conduct that is not coercive or 'misleading conduct' be prosecuted under 18 U.S.C. § 1512(b)," and not under the catchall provision of 18 U.S.C. § 1503. The report provides United States v. King, 762 F.2d 232, 236–37 (2d Cir. 1985), as an example of "culpable corrupt persuasion," H.R. Rep. No. 100-169, at 12 & n.25, where the defendant offered a financial award for a co-conspirator's silence and attempted to persuade the co-conspirator to lie.

This House Judiciary Committee Report evinces that the purpose of amending § 1512 to include the "corruptly persuades" clause was to criminalize

culpable corrupt persuasion. By enumerating specific conduct that meets this standard, the House Judiciary Committee intended that not all persuasion would be criminal. By providing examples, including bribery and persuasion to provide false testimony, the House Judiciary Committee dictated the type of conduct that would constitute "corrupt" persuasion—namely, that which entails additional dishonest conduct beyond a mere improper motive. Consequently, the legislative history dictates that Congress did not intend for § 1512 to encompass an individual, such as Mr. Millstone, who persuades a co-conspirator to invoke a fundamental right.

3. The Fourteenth Circuit's interpretation violates the Rule of Lenity.

The plain language of § 1512 dictates that there is no ambiguity, and the rule against superfluities explicitly rejects the Fourteenth Circuit's holding. However, should the court find that there is ambiguity, the rule of lenity also demands that this Court resolve this issue in favor of Mr. Millstone. Hughey v. United States, 495 U.S. 411, 422 (1990). This Court established that statutory interpretation "demands resolution of ambiguities in criminal statutes in favor of the defendant." Id. "Under the rule [of lenity], when ambiguity in a criminal statute cannot be clarified by either its legislative history or inferences drawn from the overall statutory scheme, the ambiguity is resolved in favor of the defendant." United States v. Pollen, 978 F.2d 78, 85 (3d Cir. 1992) (citing Rewis v. United States, 401 U.S. 808, 812 (1971)). In applying this rule, the most plausible reading of § 1512 is that urging another to invoke his or her Fifth Amendment right does not constitute "corrupt" persuasion. As the Third Circuit Court of Appeals noted in United States

v. Farrell, even if this was not the most reasonable interpretation, it is nevertheless "a permissible one and . . . the rule of lenity requires its adoption." Farrell, 126 F.3d at 489.

B. The Fourteenth Circuit's reliance on 18 U.S.C. § 1503 is misplaced because, unlike in § 1512, "corruptly" supplies the only scienter requirement.

The Fourteenth Circuit also erred in its decision by inappropriately relying on § 1503 case law in interpreting the "corruptly persuades" clause. When this Court attempted to interpret "corruptly persuades" in Arthur Andersen, it stated that "[t]he parties have pointed us to two other obstruction provisions, 18 U.S.C. §§ 1503 and 1505, which contain the word 'corruptly.' But these provisions lack the modifier 'knowingly,' making any analogy inexact." 544 U.S. at 705 n.9. Finding that "corruptly" under § 1503 means "motivated by an improper purpose" is "appropriate given the structure of the statute, which broadly prohibits 'corruptly . . . influencing, obstructing or impeding, or endeavoring to influence, obstruct or impede, the due administration of justice.'" Farrell, 126 F.3d at 490. This interpretation of "corruptly" under § 1503 is necessary because otherwise, the criminal statute would lack a mens rea element. Section 1512(b), however, includes the mens rea of "knowingly," and thus it does not require the same interpretation as is appropriate in § 1503. As mentioned, this Court determined the proper analysis for a dual-intent criminal statute in Ratzlaf. Because § 1503 does not have two mens rea elements, it is not subject to the same statutory interpretation framework.

Consequently, drawing a parallel between an interpretation of "corruptly" in § 1503 and that in § 1512 is inapt.

Because this Court properly rejected any analogy between the meaning of "corruptly" under § 1512(b)(3) and that under § 1503 in Arthur Andersen, further analysis is unwarranted. It is worth noting, however, that this parallel—namely, reliance on § 1503 in interpreting §1512(b)(3)'s use of "corruptly"—was the sole basis for the Second and Eleventh Circuits' decisions. In United States v. Thompson, the Court of Appeals for the Second Circuit concluded—without analysis—that "corruptly persuades" under § 1512 means "motivated by an improper purpose." 76 F.3d 442, 452 (2d Cir. 1996). In support of this conclusion, the court cited United States v. Fasolino, 586 F.2d 939, 941 (2d Cir. 1978), a case which considered the language in 18 U.S.C. § 1503 prior to the enactment of § 1512. The court stated, "we have interpreted the term 'corruptly,' as it appears in § 1503, to mean motivated by an improper purpose. We interpret § 1512(b)'s use of that term in the same way." Thompson, 76 F.3d at 452.

Continuing this improper parallel, the Eleventh Circuit, in United States v. Shotts, drew the same conclusion. 145 F.3d 1289 (11th Cir. 1998). Relying on Thompson, the Court of Appeals for the Eleventh Circuit quoted statements of Senator Joseph Biden, one of the drafters of the 1988 amendment to § 1512, who stated that the intention of the 1988 amendment was "merely to include in section 1512 the same protection of the witnesses from non-coercive influence that was (and is) found in section 1503." Shotts, 145 F.3d at 1300 (quoting 134 Cong. Rec. S17,360

(1988)). The Eleventh Circuit relied on Senator Biden's statements out of context, as the 1988 amendment was intended to fill the "gap" where certain conduct was not yet criminalized under any statute.

During the Congressional debate, Senator Biden explained that the amendment to § 1512 was intended to address a "gap in the legislative scheme" in which "promising to pay a witness for giving false testimony," and similar "corrupt" conduct, did not fall within any criminal statute. 134 Cong. Rec. S17,360-2 (1988). To that end, Senator Biden explained that the Victim and Witness Protection Act ("VWPA") deleted all references to witnesses in § 1503 because it created § 1512 to address witness tampering. Senator Biden explained that conduct related to the treatment of witnesses which had been criminalized under § 1503 before enactment of the VWPA should not be criminalized now under § 1503's catch-all provision that prohibits "'corruptly endeavoring' to impede the due administration of justice." Rather, the 1988 Amendment modifies § 1512 to include "wrongful, immoral, depraved, or evil" persuasion that now falls within the newly added "corruptly persuades" clause. See Arthur Andersen, 544 U.S. at 705. Finding that the 1988 Amendment instructs courts to take the definition of "corruptly" from § 1503 and apply it to § 1512 is inappropriate and takes Senator Biden's congressional record statements out of context.

C. Holding that persuasion of a potential witness to invoke his Fifth Amendment rights satisfies the corruption requirement of § 1512(b)(3) undermines the importance of the fundamental privilege against self-incrimination.

The Fourteenth Circuit's interpretation of "corruptly persuades" is inconsistent with the Fifth Amendment of the United States Constitution. The fundamental protection of the Fifth Amendment has been labeled "an important advance in the development of our liberty—'one of the great landmarks in man's struggle to make himself civilized.'" Ullmann v. United States, 350 U.S. 422, 426 (1956). "It reflects many of our fundamental values and most noble aspirations," including our "unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt" and "our preference for an accusatorial rather than an inquisitorial system of criminal justice." Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964).

Referring to the Fifth Amendment's protection against self-incrimination, this Court stated that "[l]egislation cannot abridge a constitutional privilege." Murphy, 378 U.S. at 78. Interpreting the "corruptly persuades" clause of the witness-tampering statute to criminalize an individual who tells a co-conspirator that they should both invoke their fundamental rights is an impermissible abridgment of the Fifth Amendment.

When clarifying the application of this essential protection, this Court stated that the "privilege against self-incrimination is fulfilled only when the person is guaranteed the right to remain silent unless he chooses to speak in the unfettered

exercise of his own will." Miranda v. Arizona, 384 U.S. 436, 460 (1966) (citing Malloy v. Hogan, 378 U.S. 1, 8 (1964)). Forbidding others, even co-conspirators, from informing an individual of his rights and any implications of waiving those rights eliminates the individual's ability to "speak in the unfettered exercise of his own will." Miranda, 384 U.S. at 460 (citing Malloy, 378 U.S. at 8). To uphold the basic protections of the Fifth Amendment, "corruptly persuades" cannot encompass an individual who persuades another to invoke a fundamental right. Punishing Mr. Millstone for telling Mr. Reynolds to "plead the Fifth," a course of action entirely within Mr. Reynolds's rights, contradicts the core doctrine of the Fifth Amendment.

In conclusion, because the Fourteenth Circuit's interpretation of 18 U.S.C. § 1512(b)(3) is inconsistent with longstanding rules of statutory interpretation, "corruptly" cannot mean "motivated by an improper purpose." In addition, reliance on § 1503 is unsupported and inappropriate, particularly since the courts that draw this parallel do so with little analysis. The Fifth Amendment's underlying principles dictate that persuading an individual to invoke those rights cannot be criminalized. Accordingly, this Court should remand this matter to the District Court and direct it to enter a judgment of acquittal as to the witness-tampering charge.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court reverse the Fourteenth Circuit and remand this matter to the District Court for a

new trial as to the CWA charges and entry of a judgment of acquittal as to the witness-tampering charges.

Respectfully Submitted,

Team 78
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