No. C11-0116-1

In the Supreme Court of the United States

SAMUEL MILLSTONE,

PETITIONER

v.

UNITED STATES OF AMERICA,

RESPONDENT

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

BRIEF FOR THE PETITIONER

TEAM No. 85

Counsel for Petitioner

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STATUTORY PROVISIONS

33 U.S.C. § 1319. Enforcement

(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;

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.

18 U.S.C. § 1512. Tampering with a witness, victim, or an informant

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

(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.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourteenth Circuit is reported at *Millstone v. United States*, No. 11-1174 (2011). The opinion is reproduced in the Record and references to that Record are cited as "(R. at ___.)"

STATEMENT OF THE CASE

This case arises from an unfortunate accident at a Polis, New Tejas, chemical plant and the ensuing federal investigation. Petitioner Samuel Millstone is the president and CEO of Sekuritek, a Polis, New Tejas-based company providing on-site security personnel services. (R. at 4.) Millstone began working for the Polis Police Department after high school. (R. at 4.) Ten years later, he enrolled in university to earn a business degree, and graduated at the top of his class despite simultaneously maintaining a full time job. (R. at 4.) After earning his degree, Millstone left the Polis Police Department to manage a chain of small businesses. (R. at 4.) In 2001, Millstone again enrolled in university, this time to pursue an M.B.A. degree. (R. at 4.) It was at university that Millstone met Reese Reynolds, also a student pursuing an M.B.A. (R. at 4). The two classmates began to discuss potential business ventures. (R. at 4.) Seeking to combine Millstone's experience in law enforcement and Reynolds' background in business-to-business sales, they developed an idea for a security company. (R. at 4.) Together, Millstone and Reynolds formed Sekuritek. (R. at 4.)

As Sekuritek's president and CEO, Millstone consulted with clients to determine their security needs, hired and trained personnel, and supervised on-site

operations at the clients' locations. (R. at 4.) Reynolds, Sekuritek's vice president, managed the company's sales, marketing, and equipment purchases. (R. at 4.) Despite being a new company, Sekuritek quickly made a name for itself after first providing security services in 2004. (R. at 4.) By 2005, Millstone and Reynolds's venture was on its feet, with Sekuritek's average contracts earning revenues of $80,000, and totaling $2 million in yearly revenue. (R. at 5.)

In 2006, Bigle Chemical Company ("Bigle") hired Sekuritek to manage security at its Windy River plant. (R. at 5.) Earlier that year, Bigle had moved from the Republic of China to Polis, opening its new facility by the Windy River. (R. at 5.) The Windy River facility, spanning 270 acres, housed Bigle's manufacturing and waste recycling facilities. (R. at 5.) The facility was staffed by 1,200 people and made $2.4 million in profits per day. (R. at 5.) Bigle's Chairman and CEO Drayton Wesley was "obsessed over security" at the Windy River facility. (R. at 5.) Millstone was thrilled when Wesley, having heard of Sekuritek's reputation, offered to hire the new company. (R. at 5.) While the contract was almost ten times as large as Sekuritek's previous largest contract, the yearly cost to Bigle of hiring Sekuritek was less than 0.10% of the Windy River plant's yearly profits. See (R. at 5.)

In order to carry out its contract with Bigle, Sekuritek hired 35 new security guards and other administrative staff. (R. at 5.) Sekuritek also made investments in new security equipment and devised a transportation plan for its security guards patrolling the plant. (R. at 6.) In addition, Reynolds purchases a new fleet of

custom sport-utility vehicles in order to meet the needs of the Bigle contract. (R. at 6.) Millstone signed the contract with Bigle on November 16, 2006, (R. at 5), and was expected to begin staffing by December 1, 2006, (R. at 6.)

The newly hired security personnel underwent a week long formal training program and three weeks of on-site training. (R. at 6.) Sekuritek personnel began working on-site at the Windy River facility after Thanksgiving in 2006. (R. at 6.) In addition to providing security personnel, Sekuritek also built a security wall around the perimeter of the facility. (R. at 7.) No security-related incidents occurred during the first few months of the contract. (R. at 6.) A Bigle security survey issued after the New Year reported no security breaches. (R. at 7.)

On January 27, 2007, Josh Atlas, a Sekuritek security guard working at the Windy River plan when his vehicle malfunctioned while on a security patrol. (R. at 7.) Believing he saw an intruder, Atlas drove closer to investigate. (R. at 7.) While the employee handbook specified that security personnel were to stop their vehicle upon arriving within 100 yards of an emergency, there is no indication how far Atlas was from the perceived intrusion. (R. at 8.) However, the vehicle malfunctioned, and Atlas was barely able to exit the vehicle before it collided with a storage tank. (R. at 7.) The tank burst, and a fire spread to other units of the Windy River plant. (R. at 7.) Firefighters were not able to extinguish the fire for three days, during which chemicals from the plant spilled into the Windy River. (R. at 7.) Twenty-three people died in the explosion and resulting fires, which resulted in approximately $450 million in damages. (R. at 7.)

In the wake of the accident and resulting federal investigation, Bigle quickly relocated its central office back to the Republic of China, from where its officers could not be extradited back to the United States. (R. at 8.) In addition to relocating its officers, Bigle removed all of its assets, employees and holdings from the United States. (R. at 8.) Lacking the ability to investigate Bigle officers and employees, the federal officials then focused their investigations on Millstone and Reynolds. (R. at 8.)

The investigation into the Windy River facility accident was met with a firestorm of media attention and scrutiny. (R. at 9.) The media clamored for criminal charges against Millstone and Reynolds, the only remaining targets after Bigle's withdrawal from United States jurisdiction. (R. at 9.) Millstone and Reynolds met to discuss what they planned on doing during the course of the investigation should criminal charges eventually be filed. (R. at 9.) Reynolds told Millstone that he was considering "getting [the investigation] over with" by "telling the government everything." (R. at 9.) Rightly fearful that he and Reynolds might be "treat[ed] like criminals," especially given the media pressure on the federal investigators to hold anyone responsible for the horrific accident, Millstone told Reynolds that "[t]he Feds can't do anything if we don't talk." (R. at 9.) Perhaps recalling his experience in law enforcement, Millstone urged Reynolds to "just tell them you plead the Fifth." (R. at 9.) He also reminded Reynolds that as business partners, they were in this together, as the conduct of both individuals was under scrutiny. (R. at 9.)

Reynolds was granted immunity in exchange for his testimony against Millstone, who was charged with the negligent discharge of pollutants in violation of the Clean Water Act, 33 U.S.C. § 1319(c)(1)(A) ("CWA"). (R. at 10.) The government theorized that Millstone was negligent in hiring and training Sekuritek personnel, and that he negligently failed to inspect the SUVs prior to Reynolds' having purchased them. (R. at 10.) The United States also brought charges against Millstone for witness tampering under 18 U.S.C. § 1512(b)(3) after Reynolds revealed that Millstone had told him to assert his Fifth Amendment privilege during the federal investigation. (R. at 10.)

After a jury trial, Millstone was found guilty of both charges. (R. at 10.) He appealed the district court's denial of his motion for a new trial and its denial of his Motion for Acquittal on the witness tampering charge in the Fourteenth Circuit. On appeal to the Fourteenth Circuit, Millstone raised two issues. (R. at 10.) First, Millstone argued that the jury instruction was inappropriate with regard to the standard of conviction under the CWA. (R. at 10.) Millstone objected to the following instruction:

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

(R. at 10) Second, Millstone argued that encouraging an individual to exercise a constitutionally protected privilege was not a basis for a guilty finding premised on "corrupt" persuasion. (R. at 10.)

Applying the public welfare doctrine to the CWA, the Fourteenth Circuit held that ordinary negligence supported Millstone's conviction under the CWA. (R. at 13.) The Fourteenth Circuit eschewed this Court's holding in *Arthur Anderson LLP v. United States*, which held that the "knowingly . . . corruptly persuade" language in § 1512(b) required more than persuasion "motivated by an improper purpose" such as impeding a federal investigation, and embraced the Second Circuit's earlier reasoning that "motivated by [such] an improper purpose" would be sufficient for conviction under § 1512(b)(3). (R. at 15.); *see also Arthur Anderson LLP v. United States*, 544 U.S. 696, 706 (2005). Accordingly, the Fourteenth Circuit found that the district court did not err in denying Millstone's Motion for Acquittal on that charge. (R. at 15.) This Court granted Millstone's petition for writ of certiorari in October, 2011. (R. at 2.) Millstone argues that his conviction should be overturned because the lower courts incorrectly interpreted 33 U.S.C. § 1319(c)(1)(A) and 18 U.S.C. § 1512(b)(3).

SUMMARY OF ARGUMENT

1. The purpose of the Clean Water Act ("CWA") is clear – it imposes criminal penalties on individuals who unlawfully discharge pollutants. Section 1319 is a criminal statute and it must be read in light of this overall purpose. *United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) ("Statutory construction . . . is a holistic endeavor"). Because Millstone did not act with the requisite criminal intent, he is not liable for violating the CWA.

Section 1319(c)(1)(A) prohibits the negligent discharge of pollutants in violation of one of the listed substantive provisions of the CWA. The penalties under this section range from a $2,500 to $25,000 per day of violation or up to one year of imprisonment, or both. § 1319(c)(1)(A). While some courts have determined that the CWA is a public welfare statute, and civil negligence is sufficient to attach liability, this interpretation cuts across core values of criminal jurisprudence, which require some showing of criminal intent.[1] *See United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436-37 (1978) (Saying that the existence *mens rea* as an element to a crime is a firmly embedded requirement in Anglo-American criminal jurisprudence).

Interpreting the CWA within the narrow public welfare doctrine would encompass a broad range of innocent conduct, lead to absurd results, and provide no notice to a defendant that his conduct could lead to harsh criminal penalties. As a consequence, the government must prove that Millstone acted with the requisite *mens rea* as to each substantive element of the statute. Moreover, because the CWA imposes criminal liability, the government must show that Millstone acted with criminal negligence. Finally, even if the term negligence in the CWA is open to differing interpretations, the rule of lenity, demands a resolution in Millstone's favor. *See United States v. Granderson*, 511 U.S. 39, 54 (1994).

Millstone did not act with criminal negligence in his role as CEO and president of Sekuritek. He provided adequate training to the employees at the Bigle cite, and followed reasonable procedures in procuring equipment for Sekuritek

[1] For an analysis of the circuit split on whether the CWA is a public welfare statute, see page 11, infra.

personnel, including patrol vehicles for the site. (R. at 6.) Because Millstone's actions do not constitute a gross deviation from the standard of care that a reasonable person would observe in the situation, the Fourteenth Circuit's ruling should be reversed.

2. The lower court's ruling on the witness tampering count should be reversed because Millstone did not act "corruptly" by encouraging Reynolds to invoke his Fifth Amendment privilege against self-incrimination.

The Fourteenth Circuit's interpretation of 18 U.S.C. § 1512(b)(3) is inconsistent with both the statute's plain meaning and Supreme Court precedent. Accepted principles of statutory interpretation require that each statutory term defining an offense be given full effect. *See generally Ratzlaf v. United States*, 510 U.S. 135 (1994). While courts have found § 1512(b)(3) ambiguous, this Court has held that to "knowingly . . . corruptly persuade" requires more than persuasion with an improper purpose. *See Arthur Anderson*, 544 U.S. at 703-04. Requiring only persuasion motivated by an improper purpose would potentially criminalize any suggestion an individual invoke his Fifth Amendment privilege if the person encouraging such a course of action did so with the intent to delay an investigation. Because not all such communications are inherently corrupt, absent evidence of additional corrupt behavior, they should be excluded § 1512(b)(3)'s reach.

Requiring that a defendant employ corrupt means of persuasion, or that he encourage an individual to provide false information to federal officials, is consistent with the plain meaning of the statute. In addition, this is precisely the

type of behavior that Congress intended to criminalize when it enacted, and later modified, § 1512(b). Finally, the rule of lenity requires that any statutory ambiguity be resolved in favor of the defendant in order to provide fair warning of what conduct is criminalized. *See Crandon v. United States*, 494 U.S. 152 (1990).

As targets of the investigation, both Millstone and Reynolds are entitled to exercise their Fifth Amendment privilege and withhold testimony from the government that might incriminate them. As Millstone did not employ corrupt means or encourage Reynolds to lie to investigators, his persuasion was not "corrupt" within the meaning of § 1512(b)(3). In addition, as the statutory language is ambiguous, any question as to whether § 1512(b)(3) proscribes encouraging a friend to invoke his Fifth Amendment privilege must be resolved in Millstone's favor. *See Hughey v. United States*, 495 U.S. 411, 422 (1990). Accordingly, the lower court's judgment should be reversed.

ARGUMENT

This case comes before this Court on appeal from the Fourteenth Circuit and concerns the two questions of statutory interpretation. This court reviews questions of statutory interpretation *de novo*. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 236 (1991) ("When *de novo* review is compelled, no form of appellate deference is acceptable.").

I. MILLSTONE DID NOT VIOLATE 33 U.S.C. §1319(c)(1)(A) OF THE CLEAN WATER ACT BECAUSE HE WAS NOT CRIMINALLY NEGLIGENT.

A. The Clean Water Act Should Not Be Construed As A Public Welfare Statute Because Such A Construction Would Impose Liability On Too Broad A Sphere Of Innocent Activity.

The Fourteenth Circuit incorrectly determined that the CWA is a public welfare statute. See (R. at 12.) However, such a construction would extend liability to a sphere of actors who would have no notice that their actions were subject to extensive regulation. As the CWA is not a public welfare statute, a showing of *mens rea* is required as to each substantive element. *See Staples v. United States*, 511 U.S. 600, 608 (1994) (holding that the National Firearms Act was not public welfare statute and *mens rea* is required unless there is a clear statement from Congress to the contrary). Because the Fourteenth Circuit failed to require the requisite level of mens rea, its decision should be reversed.

"The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *U.S. Gypsum*, 438 U.S. at 436. Indeed, it is a firmly embedded principle in the common law that some *mens rea* is required for criminal liability. *See Staples*, 511 U.S. at 605 (citing *U.S. Gypsum*, 438 U.S. at 436-37). Courts generally disfavor offenses requiring no *mens rea*, *Staples*, 511 U.S. at 606, recognizing the validity of such offenses only in limited circumstances, *U.S. Gypsum*, 438 U.S. at 437. Because dispensing with *mens rea* could "criminalize a broad range of apparently innocent conduct," courts have been careful to avoid construing criminal statutes in this manner. *Staples*, 511 U.S. at 610 (quoting *Liparota v. United States*, 471 U.S. 419, 426 (1985)). As a

result, the Supreme Court has suggested that "some indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime." *Staples*, 511 U.S. at 607.

Recent cases involving purported CWA violations have divided the Circuit Courts of Appeals due to differing opinions as to whether the CWA is a public welfare statute. *Compare United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1996) (holding that the CWA is not a public welfare statute); *United States v. Wilson*, 133 F.3d 251, 264 (4th Cir. 1997) (holding that the government must prove the defendant's knowledge as to each essential element of the substantive offense under the CWA); *with United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999) (holding that the CWA is a public welfare statute and it may impose criminal penalties for ordinary negligence); *United States v. Sinskey*, 119 F.3d 712, 716 (8th Cir. 1997) (holding that the CWA was a public welfare statute because it dealt with "obnoxious waste materials"); *United States v. Hopkins*, 53 F.3d 533 (2d Cir. 1995) (holding that the CWA would be violated "if the defendant's acts were proscribed, even if the defendant was not aware of the proscription).

Despite this inconsistency in the lower courts, this Court has elucidated the circumstances under which it is acceptable to construe a statutory violation as a public welfare offense. *See Staples*, 511 U.S. 600 (1994) (interpreting *mens rea* in the National Firearms Act). First, public welfare offenses involve the regulation of items of such a harmful or injurious nature that an individual will be on notice that strict regulation of any activities concerning these items is possible. *See id.* at 607.

Second, public welfare offenses generally impose light penalties such as fines or short jail sentences, indicating that harsh penalties should not be imposed on individuals who have not acted with criminal intent. *Id.* at 616.

i. Millstone was not on notice that his role as the provider of security services at a chemical plant would subject him to strict regulation for the discharge of pollutants under the CWA.

Millstone was not in a position to know that he would be potentially liable for a violation of the CWA as the president and CEO of a company providing security services. Public welfare offenses typically involve statutes that "regulate potentially harmful or injurious items." *Staples*, 511 U.S. at 600. In these instances, a defendant must know that he is dealing with a dangerous device of a character that places him "in responsible relation to a public danger." *United States v. Dotterweich*, 320 U.S. 277, 281 (1943). Yet the potential danger posed by the regulated item or activity is not dispositive; courts must look to the nature of the statute and the particular character of the regulated items in order to determine if the *mens rea* requirements should be abandoned. *Staples*, 511 U.S. at 607. The *Staples* court noted that some items, including guns, are so commonplace and generally available that individuals would not be alerted to the likelihood of strict regulation. *Id.* at 611.

The key distinction in these situations is whether imposing strict regulation would enact "criminal sanctions on a class of persons whose mental state – ignorance of the characteristics [of the material in their possession] – makes their actions entirely innocent. *Id.* at 614. Millstone was president and CEO of a

company that provided on-site security services to a variety of clients, including Bigle. (R. at 4.) As such, his professional knowledge and expertise did not include fluency with the complex regulatory mechanisms of the CWA. See (R. at 5.) To impose this regulatory regime on an individual ignorant of its requirements simply because of his relationship with a company that does have knowledge of that regime would overly expand the scope of the CWA.

In addition to considering the nature of the statute and the character of the regulated items or activities, this Court should consider the relationship between the individual and the potentially harmful or injurious item in question. *Dotterweich*, 320 U.S. at 281. Because the crux of this inquiry is whether an individual is on notice as to the possibility of strict regulation, that individual must stand in responsible relation to a public danger. *Id.* In other words, his position of responsibility puts him in the best position to internalize the risk of a violation, and provides an incentive for him to take necessary precautions to ensure that his conduct does not come within the ambit of a violation.

In *United States v. Ahmad*, the Fifth Circuit applied this criterion in the CWA context, holding that the defendant could not be charged with a "knowing" violation under 33 U.S.C. § 1319(c)(2)(A) unless this level of *mens rea* applied to every element of the crime. 101 F.3d at 391. In that case, the government alleged that the defendant knowingly discharged gasoline into a manhole and through the sanitary sewer system, and indicted him for three violations of the CWA. *Id.* at 387-88. The defendant contended that he thought he had intended to discharge water

into the sewer system, not gasoline, as he was trying to remove water from a gasoline tank. *Id.* at 388. The Fifth Circuit noted that the "key to the public welfare offense analysis is whether 'dispensing with *mens rea* would require the defendant to have knowledge only of traditionally lawful conduct.'" *Id.* at 391 (quoting *Staples*, 511 U.S. at 618). The Court reasoned that dispensing with knowledge as to the nature of the substance discharged could mean that an individual would be guilty of a CWA violation for "honestly and reasonably believ[ing] he is discharging water." *Ahmad*, 101 F.3d at 391.

Imposing strict regulation under the public welfare doctrine for CWA offenses would expose other individuals to the possibility of harsh punishment when their mental state would make their actions "entirely innocent." *See Staples*, 511 U.S. at 614. For example, a security guard who accidently falls and triggers machinery that causes a discharge of pollutants could be negligent of a public welfare offense under the Fourteenth Circuit's interpretation, even though his actions were innocent. While companies such as Bigle themselves might be on notice as to strict regulation based on the nature of its business activities, a public welfare doctrine interpretation of the CWA would impose liability on any sub-contractors or entities performing discrete tasks unrelated to the regulated activities. As Justice Thomas has noted, this Court 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." *Hanousek v. United States*, 528 U.S. 1102 (2000) (Thomas, J., dissenting from denial of certiorari). Such

a broad liability framework does not further the underlying rationale of the public welfare doctrine, as such "construction workers and contractors" are not in a responsible relation to best control the potential harm posed by the regulated materials or activities.

Justice Thomas' dissent from denial of certiorari is directly applicable to this case. In *Hanousek*, the Ninth Circuit held that an off-duty roadmaster could be found guilty under the criminal provisions of the CWA when an independent contractor accidentally ruptured a pipeline while clearing fallen rocks. 176 F.3d at 1119, 1121. The Ninth Circuit determined that the CWA was a public welfare statute, and Hanousek could be guilty of a negligent violation without a showing of *mens rea*. *Id.* The court incorrectly broadened the public welfare doctrine beyond its intended scope. Under *Hanousek*, any contractor or construction worker, no matter his relation to the dangerous device, could be guilty under the CWA if an accident occurred causing a discharge of a pollutant. *See id.* at 1121. This liability can even be extended to individuals based on the conduct of third parties, as was the case in *Hanousek*. The holding in *Hanousek* effectively abandons this Court's notice requirement and offends the due process rights of defendants like Millstone. *See Dotterweich*, 320 U.S. at 281 (A public welfare statute must put the individual on notice that they are in a responsible position to a public danger).

Justice Thomas correctly analyzed the deleterious effects of the Ninth Circuit's analysis in his dissent from a denial of certiorari. *See Hanousek*, 528 U.S. 1101 (2000). He determined the CWA could not be construed as a public welfare

statute because such an interpretation would impose criminal liability on a broad range of individuals engaging in ordinary industrial and commercial activities. *Id.* While he acknowledged that the CWA regulates dangerous substances, the dangerous character of the materials was not dispositive. *Id.* As was the case with firearms in *Staples*, some of the regulated substances were so commonplace and generally available that the CWA should not fall within the public welfare doctrine. *Id.*; *See Staples*, 511 U.S. at 611. In *Staples*, Thomas noted that there was an established tradition of lawful gun ownership by private individuals, and guns were not necessarily deleterious devices that would suggest to its owner that probability of strict regulation. *Id.* at 610-11.

The Fourteenth Circuit failed to consider Millstone's relationship to the chemicals at Bigle, and incorrectly determined that the character of the materials was dispositive in creating strict regulation in line with the public welfare doctrine. See (R. at 11-13.) The Court held that the CWA's regulation of dangerous pollutants is in line with the purpose of public welfare statutes — protecting the public from water pollution. (R. at 12.) Yet Millstone was not in a position to know of the possibility of strict regulation, nor was he in the best position to prevent the kind of harm envisioned by the CWA. See (R. at 4.) Millstone was the CEO of a security firm. (R. at 4.) He provided security services for a number of different companies, and gained the reputation as the premier security company in Polis because of the firm's "know-how and technological savvy." (R. at 5.) Sekuritek's duty at the Windy River plant was to prevent security breaches, not to supervise its

activities concerning regulated chemicals. See (R. at 6.) It would be unreasonable to presume that Millstone would be aware of the complex regulatory scheme under the CWA, as his business did not directly concern any of the regulated activities or permit requirements, and just because he was in a contractual relationship to provide services to a regulated entity would not provide him with such notice.

Here, Millstone engaged in entirely innocent conduct. Millstone's duties included training the hired security personnel, (R. at 4.), and the guards working at the Windy River plant received such training, (R. at 6.) Millstone never directly handled dangerous or deleterious devices or products or obnoxious waste materials, and none of the security-related activities involved such materials. See (R. at 6.); *see also United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971) (holding that an individual is presumed to be aware of regulations when dangerous or deleterious devices or products or obnoxious waste materials are being handled). Yet under the Fourteenth Circuit's rationale, any negligent act on the part of Millstone or his employees, no matter how minor, could result in a harsh criminal penalty if that act led to a discharge of a pollutant into nearby waterways. This broad application of a narrow doctrine would deter individuals like Millstone from ever working in an industrial or commercial sector where they could potentially be exposed to criminal liability.

ii. The harsh penalties imposed by the CWA foreclose the possibility of an interpretation that it is a public welfare statute.

The CWA should not be interpreted as a public welfare statute because it provides for severe penalties and the potential for a felony conviction for even negligent violations. *See* § 1319(c)(1)(A). A statute's penalty provisions inform the determination of whether a statute should be interpreted under the public welfare doctrine, and whether dispensing with a *mens rea* is appropriate. *See Staples*, 511 U.S. at 616-18. "In 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. *Id.* at 616-17. With public welfare offenses, "the penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation." *Id.* at 617-18. This is particularly relevant when a felony conviction is possible, since being labeled a "felon" is perhaps the worst thing that can happen to a person's reputation. *See id.* at 618. This Court has avoided construing a statute providing for felony convictions as dispensing with *mens rea* unless Congress has spoken clearly on the issue. *Id.*

The Fifth Circuit correctly noted that the penalties attached to the CWA preclude the application of the public welfare doctrine. *See Ahmad*, 101 F.3d at 391 ("The fact that violations . . . are felonies punishable by years in federal prison confirms our view that they do not fall within the public welfare offense exception.") As Congress did not clearly express that *mens rea* should be dispensed with, the Court refused to apply the public welfare exception. *Id.* In contrast, the Ninth Circuit ignored this consideration in its ruling in *Hanousek, see* 176 F.3d at 1122, and in *United States v. Weitzenhoff,* 35 F.3d 1286 (9th Cir. 1993), noting that some

public welfare statutes provided for harsher penalties than the CWA. *See United States v. Freed*, 401 U.S. 601, 609-10 (1971) (providing for five-year imprisonment for the possession of an unregistered grenade). However, the statute in *Freed* can be distinguished from this case, as a grenade is a device dangerous enough to merit dispensing with *mens rea*. *See Freed*, 401 U.S. at 609 ("[O]ne would hardly be surprised to learn that possession of hand grenades is not an innocent act."). In contrast, the CWA can also be applied to devices and activities that are not *per se* dangerous.

The Fourteenth Circuit did not consider the CWA's harsh penalties in its decision, *see* (R. at 11-13), such as a fine up to $25,000 per day of violation and imprisonment for up to one year, § 1319(c)(1)(A). In addition, a second negligent offense could lead to a $50,000 for each day of violation and imprisonment of up to 2 years. *Id.* Thus, a two-time offender could be a convicted felon without the government having to prove more than ordinary civil negligence. Beyond the legal and civil ramifications of being a convicted felon, such an individual would bear the stigma of a felony conviction within his community. *See Morrisette v. United States*, 342 U.S. 246, 260 (1952) ("[T]he infamy is that of a felony, which, says Maitland, is ' . . . as bad a word as you can give to man or thing.'") (citation omitted). Such harsh punishment contradicts the purposes of the public welfare doctrine. *See Staples*, 511 U.S. at 607.

B. Because The CWA Is Not A Public Welfare Statute, Requiring Only Civil Negligence Would Violate Due Process.

Since the CWA should not be interpreted as a public welfare statute, requiring only civil negligence instead of criminal culpability would violate due process. The CWA does not define negligence; therefore, the meaning of the term must be viewed within its context. *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) ("[T]he meaning of statutory language, plain or not, depends on context."). Section 1391(c)(1)(A) imposes criminal liability for negligent violations and therefore requires some level of *criminal* culpability. It would be incongruous to require only civil negligence for a criminal offense under this statute. *See Safeco Ins. Co. v. Burr*, 551 U.S. 47, 60 (2007) ("[t]he vocabulary of the criminal side of [a statute] is . . . beside the point in construing the civil side").

Requiring criminal intent comports with this Court's modes of statutory construction. "The existence of *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Dennis v. United States*, 341 U.S. 494, 500 (1951). Indeed, a hallmark of criminal law is that "wrongdoing must be conscious to be criminal," ensuring that only the "blameworthy in mind" will be punished. *Morissette*, 342 U.S. at 252. Misinterpreting the CWA to require only ordinary negligence would have the potential to "criminalize a broad range of apparently innocent conduct." *Liparota*, 471 U.S. at 426.

While this Court has never considered whether the term negligence in a criminal statute should be interpreted as "ordinary" negligence or "criminal" negligence, the Model Penal Code ("MPC") is instructive. Under the MPC, a person acts negligently when:

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

Model Penal Code § 2.02. This Court has previously relied on the MPC's interpretation of *mens rea* requirements. *U.S. Gypsum*, 438 U.S. at 444 ("the ALI Model Penal Code is one source of guidance upon which the Court has relied to illuminate questions of this type").

The lower courts incorrectly held that ordinary negligence was sufficient for a violation under § 1319(c)(1)(A). The Fourteenth Circuit relied on BLACK'S LAW DICTIONARY, which defined negligence as "the failure to exercise the standard of care that a reasonably prudent person would have exercised in the same situation." (R. at 11.) (citing BLACK'S LAW DICTIONARY at 434 (1996)). Yet this fails to take the context of the CWA into account. *See King*, 502 U.S. at 221. The CWA is a complex regulatory scheme that attaches criminal and civil liability for a variety of acts. In 33 U.S.C. § 1321(b)(7)(A), Congress imposed civil liability for the discharge of oil or a hazardous substance, including a civil penalty for a violation that was the result of "gross negligence or willful misconduct." Yet this additional level of culpability is one piece in a statutory scheme that is distinct and independent from criminal CWA violations. While the Fourteenth Circuit concluded that when Congress uses a term in one section of a statute and omits it in another it is intentional, such a presumption is misplaced here. See (R. at 12) (citing *Russello v. United States*, 464

U.S. 16, 23 (1983)). If both sections dealt with criminal violations, the presumption of congressional intent would be valid. However the civil and criminal sections of the CWA are so different in purpose and scope that a comparison is futile.

Allowing a conviction for ordinary negligence does nothing to deter future violations. With ordinary negligence, an individual is punished for a failure to foresee a negative outcome of one's actions. *See e.g. Gallick v. Baltimore & O.R. Co.*, 372 U.S. 108, 117 (1963) ("reasonable foreseeability of harm is an essential ingredient of Federal Employers' Liability Act negligence"). In contrast, criminal negligence encourages an individual to act with a heightened level of care and responsibility. Because criminal negligence represents a gross deviation from an ordinary standard of care, that individual is consciously disregarding a substantial and unjustifiable risk. MPC § 2.02. Punishing individuals for such a gross deviation deters unwarranted risky decision-making.

The government contends that Millstone was negligent in two respects: first, in hiring and training Sekuritek personnel; and second, in failing to inspect the vehicles before purchase. (R. at 10.) Even if Millstone deviated from the standard of care a reasonably prudent person would have exercised in a similar situation, his actions do not evince a gross deviation from that standard of care. Absent evidence suggesting otherwise, categorically concluding that the one-week training seminar was grossly inadequate is erroneous. Indeed, the absence of security breaches at Bigle for the first two months suggest that the Sekuritek personell were adequately trained. See (R. at 6-7.) Moreover, a cursory review of vehicle vendors does not

suggest that Millstone failed to adequately select appropriate vehicles for the job. These actions do not equate to a substantial and unjustifiable risk.

It was simply unforeseeable that the precise course of actions – a vehicle malfunction coupled with limited emergency access to the source of the discharge – would lead to the tragedy at the Windy River plant. A perfect storm of circumstances aligned and happened to result in a chemical spill. (R. at 7.) This series of events included several key acts over which Millstone had no control, including actions by Atlas and the vehicle manufacturer. See (R. at 3.) Millstone acted in such a manner as to mitigate risk so as to ensure safety in Sekuritek's operations at the Windy River facility. See (R. at 6.) Millstone applied his professional discretion in accepting the Bigle contract. He developed a training program that he determined was sufficient to prepare his employees for their duties, and to provide the services sought out by Bigle. (R. at 6.) In addition, Millstone knew this contract would be significant for Sekuritek, and sought to protect his company and its reputation. He did not disregard a substantial and unjustifiable risk that this type of accident would occur, and consequently is not liable for a violation under the CWA.

C. The CWA Is Ambiguous, Thereby Offending The Rule Of Lenity And Requiring An Interpretation In Favor of Millstone.

Even if reasonable minds could differ on the interpretation of "negligence" in §1391(c)(1)(A), the rule of lenity requires that any ambiguity be resolved in Millstone's favor. *See Staples*, 511 U.S. at 640. Lenity is reserved for situations in

which a reasonable doubt exists regarding a statute's intended scope. *Moskal v. United States*, 498 U.S. 103, 108 (1990). In criminal law, the rule of lenity is a vital protection because it guarantees fair notice to defendants of "what the law intends to do if a certain line is passed." *McBoyle v. United States*, 283 U.S. 25, 27 (1931).

The Fourteenth Circuit's interpretation of negligence does not provide fair notice of what violates the CWA. See (R. at 11.) It relied on BLACK'S LAW DICTIONARY'S definition of negligence and nothing else, concluding that based on this definition, the statute's plain meaning is clear. (R. at 11.) Yet this interpretation ignores the context in which negligence applies. Section 1319 is a criminal statute, and should be interpreted in this context. Under the Fourteenth Circuit's rationale, someone would be criminally liable for something as innocuous as accidently falling and triggering a mechanism that discharges pollutants into a drain pipe. This would impose an unexpected burden on defendants unaware of what conduct would be subject to criminal liability. It would not provide a fair warning or clear lines of what conduct constitutes a criminal violation. *McBoyle*, 238 U.S. at 27. Applying ordinary civil negligence to § 1391 does not create clear lines, nor does it provide fair warning. In contrast, applying the criminal standard of negligence provides a clear line and fair warning of what conduct constitutes a negligent violation of §1319. Only an individual who disregards a substantial and unjustifiable risk would be subject to criminal liability. The rule of lenity requires that this Court resolve this ambiguity in Millstone's favor. *See United States v. Wiltberger*, 18 U.S. 76 (1820).

II. THE DISTRICT COURT ERRED IN DENYING MILLSTONE'S MOTION FOR ACQUITTAL BECAUSE MILLSTONE DID NOT ACT "CORRUPTLY" BY ENCOURAGING REYNOLDS TO INVOKE HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

A. The District Court's Interpretation Of 18 U.S.C. § 1512(b)(3) Is Inconsistent With The Statute's Plain Meaning And Supreme Court Precedent.

The Fifth Amendment of the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. An individual can assert his Fifth Amendment privilege "in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory," and the Supreme Court "has been zealous to safeguard the values that underlie the privilege." *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972). After Bigle Chemical Company executives fled United States jurisdiction and the media's call for criminal charges following the accident intensified, Millstone met with Reynolds to discuss their proposed course of action regarding the federal investigation into their potential liability as Sekuritek officers. (R. at 9.) At this meeting, Millstone urged Reynolds to "plead the Fifth," as the investigation also comprised Reynolds' purchase of the SUVs. (R. at 9.) As encouraging an individual to invoke his constitutionally privilege against self-incrimination is not inherently corrupt, Millstone did not violate § 1512(b)(3) and the district court erred in denying his Motion for Acquittal.

Accepted principles of statutory interpretation should guide this court's determination of the meaning of "knowingly . . . corruptly persuades" in § 1512(b)(3). The statute punishes anyone who "knowingly uses intimidation,

threatens, or corruptly persuades another person . . . with intent to . . . hinder, delay, or prevent" the communication of information concerning federal crimes to law enforcement officials. Every court that has examined the meaning of "corruptly persuades" in this context have found the phrase to be ambiguous. *United States v. Doss*, 630 F.3d 1181, 1186 (9th Cir. 2011). However, it is a well established principle that statutory terms, especially those relating to the definition of the criminal offense, should not be treated as surplusage. *Ratzlaf*, 510 U.S. at 140-41 (holding that to establish the defendant "willfully violated" a law making it illegal to structure a transaction for the purpose of evading a reporting requirement, the government had to prove that the defendant knew of the reporting requirement and had the specific intent to disobey the law). Therefore, "corruptly persuades" must be interpreted in the context of the terms that surround it: "knowingly" and the specific "intent to . . . hinder, delay or prevent" communication with law enforcement officials.

Congress did not specifically define the phrase "corruptly persuades" in the context of § 1512(b)(3). While § 1515(a)(6) notes that it "does not include conduct which would be misleading conduct but for a lack of state of mind," this definition is not particularly helpful. As a result of this ambiguity, circuits have diverged in their interpretation of the "knowingly . . . corruptly persuades" language. *Compare United States v. Thompson*, 76 F.3d 442 (2d Cir. 1996) *and United States v. Shotts*, 145 F.3d 1289 (11th Cir. 1998) (defining "corrupt" as motivated by an improper purpose) *with United States v. Farrell*, 126 F.3d 484 (3d Cir. 1997) *and Doss*, 630

F.3d 1181 (holding that the inclusion of corruptly necessarily implies that one can persuade another to withhold information from law enforcement officials with the intent of impeding an investigation without violating the statute).

The statute provides the *mens rea* "knowingly" followed by a list of acts, including to "corruptly persuade[]." In *Arthur Anderson*, the Supreme Court rejected the government's assertion that the term "knowingly" would not apply to "corruptly persuades," as such a construction would contravene the "statute as written." 544 U.S. at 705; *see also Liparota*, 471 U.S. at 424 ("The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute."). While *Arthur Anderson* concerned the specific intent of withholding or altering documents, *see* 18 U.S.C. § 1512(b)(2)(A) and (B), its reasoning concerning the interpretation of "knowingly . . . corruptly persuades" is equally applicable to this case and helps resolve the circuit split.

In addition to declining to apply *Arthur Anderson,* the Fourteenth Circuit incorrectly adopted the Second Circuit's reasoning in *Thompson,* which engrafted the meaning of "corruptly" as interpreted in 18 U.S.C. § 1503 onto § 1512(b), holding that to "corruptly persuade" was to persuade "motivated by an improper purpose." *See* (R. at 12.); *see also Thompson,* 76 F.3d at 452. However, contrary to § 1512(b), which punishes anyone who "knowingly . . . corruptly persuades," "corruptly" is the only *mens rea* provided in § 1503. Therefore, as the Supreme Court noted in *Arthur Anderson*, any analogy between the two provisions would be at best "inexact." 544

U.S. at 705, n. 9. The Third Circuit's analysis in *Farrell* picks up on this distinction, noting that the inclusion of "knowing" paired with the specific conduct specified in § 1512(b)(1)-(3) expressly enunciates a list of "improper purposes" to which § 1512(b) can be applied. 126 F.3d at 490. Therefore, construing "corruptly" to merely mean "motivated by an improper purpose," as the Second Circuit held in *Thompson*, would render the term surplusage, in contravention of the principles of statutory construction adopted in *Ratzlaf*, 510 U.S. at 141. *Farrell*, 126 F.3d at 490.

The plain meaning of "knowingly" and "corruptly" reinforces the Third Circuit's reasoning in *Farrell*. "Knowledge" is usually associated with "awareness, understanding, or consciousness." *Arthur Anderson*, 544 U.S. at 705 (citing BLACK'S LAW DICTIONARY at 888 (8th ed. 2004)). The adjective "corrupt" is defined as "morally unsound or debased". *Webster's New World Dictionary*, 3d College Edition, 313 (1988). The verb "corrupt" means "to render morally unsound" or "to induce to act dishonestly". *The Oxford English Dictionary,* 2d Ed. Vol. III, 972-73 (1989). Therefore, "corruptly" in § 1512(b)(3) may modify persuades, requiring persuasion through corrupt means, or persuasion of an individual to engage in some corrupt conduct. *Farrell*, 126 F.3d at 488, n. 2.

Joining these meanings, the plain reading of "knowingly . . . corruptly persuades" tracks the Supreme Court's analysis in *Arthur Anderson*: only one "conscious of wrongdoing can be said to 'knowingly . . . corruptly persuade.'" 544 U.S. at 706. The Second Circuit contends that "targeting only such [corrupt] persuasion" . . . does not proscribe lawful or constitutionally protected speech."

Thompson, 76 F.3d at 452. However, as the Fifth Amendment privilege is attaches to the individual who asserts it, it is unclear if the Second Circuit's interpretation would, for example, impose criminal penalties on "a mother who suggests to her son that he invoke his right against compelled self-incrimination" with the intent to delay a federal proceeding or investigation. *See Arthur Anderson*, 544 U.S. at 704. Even if the court were to allow such an exchange between a mother and son, there is no substantive difference between such a communication, with the requisite intent, and a similar one between two adult friends, or business partners. The Third Circuit's interpretation of § 1512(b)(3) more clearly excludes such persuasion from the statute's purview. *See Farrell*, 126 F.3d at 488 (recognizing that certain relationships, such as that between an attorney and client, are not the only situations leading to "noncoercive persuasion to withhold information . . . fall[ing] outside the purview of § 1512(b)(3)"). Merely asking someone to withhold information that he is constitutionally entitled to withhold does not convey a consciousness of wrongdoing "absent some *other* wrongful conduct, such as coercion, intimidation, bribery, [or] suborning perjury." *Doss*, 630 F.3d at 1190.

The Third Circuit's interpretation of § 1512(b)(3) clearly criminalizes an attempt to bribe someone to withhold information and an attempt to persuade someone to provide false information or to lie to law enforcement officials, as such methods or intended results would fall within its definition of "corrupt" persuasion. *Farrell*, 126 F.3d at 484. Other circuits have affirmed the view that encouraging a witness to testify falsely is corrupt persuasion within the meaning of § 1512(b)(3).

United States v. Morrison, 98 F.3d 619, 630 (D.C. Cir. 1996); *see also United States v. Baldridge*, 559 F.3d 1126, 1142 (10th Cir. 2009). Indeed, applying the Third Circuit's reasoning to the facts of *Thompson* would likely lead to a similar conviction, as the defendant in that case encouraged a witness to lie about the extent of their drug-related interactions. *See Thompson*, 76 F.3d at 447; *but see Shotts*, 145 F.3d at 1301 (noting that while the defendant contended that his testimony that the witness would not be "bothered" if she did not disclose information to federal officials, the jury could reasonably conclude after hearing the witness's testimony that this comment was an attempt to frighten her). Therefore, the Third Circuit's interpretation both includes the type of conduct concerning other circuits while more explicitly excluding innocent persuasion with the intent of obstructing an investigation.

Here, Millstone did not employ bribery or other corrupt methods by telling Reynolds to "plead the Fifth." See (R. at 9.) Nor did he encourage Reynolds to violate a legal duty or tell him to lie to investigators. See (R. at 9.) Reynolds's purchase of the SUV's was a focus of the investigation concerning Sekuriek's liability for the Windy River accident. (R. at 9.) As a focus of the investigation, Reynolds could exercise his Fifth Amendment privilege not to provide self-incriminating information to investigators. Therefore, absent evidence indicating that Millstone employed corrupt methods or encouraged Reynolds to provide false information to investigators, his attempt to persuade Reynolds to exercise his constitutional privilege is merely innocent persuasion, and does not fall within the

purview of § 1512(b)(3).

Upholding Millstone's conviction would criminalize one friend's suggestion to another that he engage in constitutionally protected activity. In *Shotts*, the Eleventh Circuit struggled with this blurry line between impermissible and allowable encouragement that another invoke the Fifth Amendment privilege. 145 F.3d at 1301. The jury was instructed that to convict, they had to find that the defendant acted "knowingly and dishonestly with the specific intent to subvert or undermine the integrity" of an investigation. *Id.* Even though the *Shotts* court purported to adopt the Second Circuit's definition of "corruptly" as "motivated by an improper purpose," *id.* at 1300, the jury instruction conveys more – both "dishonesty" and a specific intent of "undermining" or "subverting" an investigation, *id.* at 1301. Such an instruction suggests that absent the finding that the defendant "attempt[ed] to frighten" the witness, i.e. employ corrupt methods, such action would not be prohibited. *Id.* In a later case, the court found corrupt persuasion by implicitly inferring a threat from the mob structure in which the "suggestion" to invoke the Fifth Amendment occurred – "the hierarchical structure of the Gambino Family." *United States v. Gotti*, 459 F.3d 296, 343 (2d Cir. 2006).

Here, there is no implication that Millstone exercised such power over Reynolds such that his suggestion that Reynolds invoke his Fifth Amendment privilege could be interpreted as a threat. See (R. at 9.) Even if Millstone exhibited anger, according to the lower court's characterization, anger, without more, should not assume to be such threatening behavior between two equally situated adults

that it would entail witness tampering within the meaning of § 1512(b)(3). See (R. at 9.) The men had been students together and had no relationship beyond their business venture. (R. at 4.) Therefore, a conversation between two similarly situated targets of an investigation should not be criminalized just because one encouraged the other to invoke a constitutionally protected privilege absent some showing of corrupt methods or that one encouraged the other to provide false information to federal officials. That Millstone might inadvertently benefit from Reynolds' silence does not *per se* mean that his persuasion was corrupt. The language of § 1512(b)(3) does not on its face suggest that though Millstone and Reynolds could both individually invoke their Fifth Amendment privilege against self-incrimination, that any conversation between them concerning one's desire to do so could be criminalized. Accordingly, the District Court's dismissal of Millstone's Motion for Acquittal on the § 1512(b)(3) charge should be reversed.

B. The Third Circuit's Interpretation Of § 1512(b)(3) Affirms Congressional Intent And Purpose.

Requiring the government to demonstrate that Millstone employed corrupt methods in persuading Reynolds to invoke his Fifth Amendment right or that he persuaded Reynolds to act corruptly is not contrary to Congress's intent and purpose in enacting § 1512(b). As first codified in 1982 as part of the Victim and Witness Protection Act, Pub. L. No. 97-291, 96 Stat. 1249, § 1512 did not contain the "corruptly persuades" language. *See United States v. Khatami*, 280 F.3d 907, 912 (9th Cir. 2002) (discussing the legislative history of § 1512(b)). Considering this version of the statute, the Second Circuit held that as written, it did not prohibit a

"nonmisleading, nonthreatening, nonintimidating attempt to have a person give false information to the government," and noted that Congress would have to enact legislation to "close the gap" if it wished such conduct to be proscribed. *United States v. King*, 762 F.2d 232, 238 (2d Cir. 1985).

In 1988, Congress amended § 1512(b) to prohibit attempts to "corruptly persuade" someone to engage in certain enumerated activities. Anti Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181. In a Report discussing the amendment adding the "corruptly persuades" language, the House Judiciary Committee noted that in changing the language, Congress "intended that culpable conduct that is not coercive" could be prosecuted under the new statute. *Farrell*, 126 F.3d at 488 (citing H.R. Rep. No. 100-169, at 12 (1987)). As examples, the Report cited cases involving "a defendant who both offered to reward financially a coconspirator's silence and attempted to persuade a coconspirator to lie to law enforcement officials about the defendant's involvement in the conspiracy. *Id.* (citing H.R. Rep. No. 100-169, at 12 & n. 25).

The Third Circuit's interpretation of corrupt persuasion in § 1512(b) encompasses such non-coercive witness tampering, such as "brib[ing] someone to *withhold* information and attempting to *persuade* someone to provide *false* information to federal investigators." *Farrell*, 126 F.3d at 488. Indeed, even if the Third Circuit's interpretation of § 1512(b) were adopted, the conduct prosecuted in cases like *Thompson*, 76 F.3d at 447, where the defendant encouraged his co-

conspirator in a drug distribution ring to lie to investigators about the frequency with which he purchased drugs from the defendant would fall within its ambit.

Here, there is no evidence that Millstone either bribed Reynolds or encouraged him to provide false information to the federal investigators. See (R. at 6.) Millstone merely encouraged Reynolds to exercise his constitutional right not to incriminate himself, especially since Reynolds' purchase of the SUV's was also a subject of the federal investigation. (R. at 6.) Therefore, requiring the jury to find that Millstone used such corrupt means as bribery, or that he knowingly persuaded Reynolds to violate a legal duty or lie to law enforcement officials would comply with the intended reach of the statute, while insulating innocent modes of persuasion meant to simply hinder or delay an investigation.

C. The Rule of Lenity Compels a Narrow Construction of § 1512(b)(3).

While requiring consciousness of wrongdoing gives full effect to § 1512(b)(3)'s terms and is consistent with Congress's purpose, even if the court still found the "motivated by an improper purpose" line of cases plausible, the rule of lenity requires that the ambiguity be resolved in Millstone's favor. The rule of lenity demands that ambiguities in criminal statutes be resolved in favor of the defendant. *Hughey*, 495 U.S. at 422. The rule serves to ensure both that there is fair warning as to the boundaries of criminal conduct and that courts do not usurp the legislature's role in defining criminal liability. *Crandon*, 494 U.S. at 158. If "corruptly" were interpreted to mean "motivated by an improper purpose," as the Second Circuit suggests in *Thompson*, 76 F.3d at 452, Millstone would lack notice as

to what conduct was proscribed: whether the prohibition would include only those acts listed in parts (1)-(3) of the statute, or more. *See Farrell*, 126 F.3d at 490. In contrast, "limiting criminality to persuaders conscious of their wrongdoing sensibly allows § 1512(b) to reach only those with the level of 'culpability . . . we usually require in order to impose criminal liability.'" *Arthur Anderson*, 544 U.S. at 706 (quoting *United States v. Aguilar*, 515 U.S. 593, 602 (1995)).

As targets of the investigation, both Millstone and Reynolds are entitled to exercise their Fifth Amendment privilege and withhold testimony from the government that might incriminate them. As written, § 1512(b)(3) does not provide notice that any conversation between them in which one encourages the other to exercise this right might be criminalized merely because one coconspirator might incidentally benefit from the other's silence. Requiring corrupt means, such as bribing someone to withhold information, or an indication that Millstone intended by his persuasion that Reynolds himself act corruptly and provide false information to investigators, properly limits the reach of the statute. Absent such facts in this case, the District Court erred in dismissing Millstone's Motion for Acquittal.

CONCLUSION

Because Millstone did not act with criminal negligence in violation of the CWA, and neither employed corrupt methods in encouraging Reynolds to invoke his Fifth Amendment privilege nor encouraged him to provide false information to federal investigators, the Fourteenth Circuit should be reversed.