No. C11-0116-01

IN THE

Supreme Court of the United States

OCTOBER TERM 2011

SAMUEL MILLSTONE,
Petitioner,

v.

UNITED STATES of AMERICA,
Respondent.

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

RESPONDENT'S BRIEF ON THE MERITS

Team 24
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JURISDICTIONAL STATEMENT

The court of appeals entered its judgment October 3, 2011. R. at 3. The petition for writ of certiorari was granted October 17, 2011. R. at 2. The appellate jurisdiction of this Court rests upon 28 U.S.C. § 1254(1) (2006). The subject-matter jurisdiction of this Court rests upon 28 U.S.C. § 1331 (2006).

STATEMENT OF THE ISSUES

I. Whether 33 U.S.C. § 1319(c)(1)(A) of the Clean Water Act is a public welfare statute that would only require an ordinary negligence standard, and therefore no mens rea requirement, for conviction.

II. Whether "corruptly persuades" in 18 U.S.C. § 1512(b) is satisfied when an individual under criminal investigation for a toxic spill of chemicals into a nearby river a person urges another to invoke their Fifth Amendment right.

STATEMENT OF THE CASE

The United States brought charges against Samuel Millstone in the United States District Court for violating 33 U.S.C. § 1319(c)(1)(A) for the negligent discharge of chemicals into United States waterways. R. at 10. In addition, the United States brought charges against Millstone for violating 18 U.S.C. § 1512(b)(3) after Millstone tampered with a witness. R. at 10. A jury trial commenced and the jury found Millstone guilty under both statutes. R. at 10. Millstone motioned for a

new trial, which the district court denied. R. at 10. Millstone also motioned for acquittal from the § 1512(b)(3) charge, which the district court denied. R. at 3, 10.

The United State Court of Appeals for the Fourteenth Circuit affirmed the decisions of the district court. R. at 15. The court reasoned that the Clean Water Act called for an ordinary negligence standard and therefore, the jury instructions issued at the trial were proper. R. at 13. Furthermore, Millstone's due process rights were not violated because the Clean Water Act is a public welfare statute. R. at 12. As the Clean Water Act is a public welfare statute, Millstone can be held criminally liable under an ordinary negligence standard. R. at 12. The court also upheld the district court's denial of Millstone's Motion for Acquittal because the court interpreted corruptly persuades in § 1512(b)(3) to mean motivated by an improper purpose. R. at 14-15. Because a reasonable factfinder could find Millstone corruptly persuaded a witness on the facts presented the court did not overturn the trial court ruling. R. at 14-15.

This Court granted Millstone's petition for writ of certiorari to consider (1) whether the ordinary negligence standard is the appropriate standard to apply under the Clean Water Act, 33 U.S.C. § 1319(c)(1)(A) and (2) whether an individual can corruptly persuade a witness when they encourage the witness to invoke his fifth amendment right. R. at 2.

STATEMENT OF THE FACTS

Samuel Millstone and his company, Sekuritek, were hired by Bigle Chemical Company for one purpose, to prevent a saboteur from causing a spill at the Windy

River facility. R. at 5. The Chairman and CEO of Bigle Chemical, Drayton Wesley, never realized that the chemical spill Sekuritek was hired to prevent, would actually come at the hands of a negligently trained Sekuritek employee. R. at 7.

Sekuritek was founded in 2004 by Millstone and his partner Reese Reynolds. R. at 4. Millstone acted as the CEO and president while Reynolds acted as the Vice President. R. at 4. The company was quite successful, and by 2005 Sekuritek's total revenues exceeded $2 million. R. at 5. The average Sekuritek contract brought in $80,000 of revenue. R. at 5. Millstone met with the clients and ascertained the security needs of each individual customer. R. at 4. He also oversaw the hiring and training of all security personnel as well as the actual security operations at the clients' locations. R. at 4. The training of the security personnel traditionally included a three week training course, taught by Millstone. R. at 6 n. 2. Reynolds dealt with the business aspect of Sekuritek, dealing with all sales, marketing, and equipment purchases. R at 6 n. 2.

Sekuritek developed a glowing reputation in Polis, New Tejas. R. at 5. This reputation caught the attention of Drayton Wesley who approached Sekuritek on November 5, 2006 about potentially securing Bigle Chemical's new Windy River facility in Polis. R. at 5. Wesley believed top notch security was necessary for the successful operation of Bigle Chemical's plant. R. at 5. He was quoted by the *Wall Street Journal* as stating, "'I'll be damned if we have another security breach like the one at Dover River. I will not risk the well being of this company by allowing an intruder or saboteur to cause a spill,'" and was further quoted by the *New York*

Times as exclaiming, "'I am finished with shenanigans caused by poor security. No more shenanigans on my watch!'" R. at 5.

Despite the rapid success Sekuritek was experiencing, Millstone wanted to take Sekuritek "to the big time." R. at 6 n.1. He believed the way to accomplish this feat was to get the security contract from Bigle Chemical. R. at 5. The Bigle Chemical contract ensured Sekuritek $8.5 million over the next ten years, making it ten times larger than any of Sekuritek's previous contracts. R. at 5. The catch was that Sekuritek needed to be in place at Bigle Chemical's Windy River facility by December 1, 2006, less than a month after Wesley approached Millstone. R. at 5. Reynolds was doubtful that Sekuritek could meet the demands of Bigle Chemical in this short time frame, but Millstone would not be deterred and a contract was signed. R. at 5.

The Bigle Chemical contract required Sekuritek to hire and train thirty-five new guards, an account, and an administrative assistant. R. at 5. Sekuritek also needed to upgrade equipment, including surveillance gear, uniforms, taser guns, as well as purchase a fleet of sport utility vehicles (SUV). R. at 6. Reynolds purchased the SUVs from a company which had a reputation for shoddy workmanship and had previously had problems with the pedals sticking to the floor of its SUVs. R. at 6, 9. To help with security, Sekuritek erected a wall around the Windy River facility to keep out intruders. R. at 7. Once Millstone hired the thirty-five new guards, he faced a rapidly approaching deadline with which to train the guards, so he shortened the normal training seminar. R. at 7. In addition to the training seminar

Sekuritek provided all security staff a handbook which included a section on how to handle emergency situations when the staff is patrolling in a vehicle. R. at 8. The handbook stated that "upon arriving within 100 yards of a…suspected security breach, all Sekuritek personnel are to leave their vehicle in a stopped and secured position to the side of any pathway and proceed on foot to investigate further." R. at 8. Millstone never pointed out this policy in the abridged training seminar. R. at 9.

Sekuritek operations ran smoothly at the Windy River facility for almost two months but on January 27, 2007 disaster struck the plant. R. at 6-7. One of the thirty-five new guards, Josh Atlas, was on duty on January 27, 2007. R. at 7. Atlas was patrolling the plant when he thought he saw an intruder lurking around a chemical storage tank. R. at 7. Atlas spurred into action, flooring the pedal of the SUV to get to the tank as fast as possible. R. at 7. But when Atlas floored the pedal, it stuck and the vehicle accelerated out of control. R. at 7. The SUV sped into one of the chemical storage tanks, which caused the tank to "burst open with an incredible explosion." R. at 7. The fire caused by the explosion spread to other storage tanks, which in turn caused more explosions. R. at 7. All of the explosions led to thousands of barrels of chemicals spilling into the Windy River. R. at 7. The wall Sekuritek erected to keep out intruders prevented the good-guys (the firefighters) from reaching the blaze for three days. R. at 7. Because the firefighters could not reach the blaze, the chemicals continued to spill into the Windy River. R. at 7.

The explosions caused a "concentrated chemical cocktail (dubbed the 'Soup' by national media) to spill into the Windy River and surrounding creeks." R. at 7. The components in the Soup were corrosive and ate away at any boat it came into contact with, including local and commercial barges. R. at 8. The Soup also killed all fish and fish breeding grounds in the five mile downriver span from the Windy River facility. R. at 8. In addition, a local water treatment plant was forced to shut down because of the fire hazard the chemicals in the Soup created in the water. R. at 8. The estimated damage to the residents and the state and local governments of New Tejas is approximately $1.25 billion. R. at 8.

Federal officials started investigating the explosions and chemical spill at the Windy River facility. R. at 8. The investigation narrowed in on the size of the contract between Bigle Chemical and Sekuritek, the condensed training seminar, the imprudent purchase of the SUVs, and the installation of the security wall. R. at 9. As investigators zeroed in on Sekuritek, Millstone started to become nervous. R. at 9. He arranged a meeting with Reynolds to discuss the possible criminal charges they might both be facing. R. at 9. Reynolds wanted to cooperate with the investigation and tell the officials everything, but Millstone did not agree. R. at 9. When Reynolds suggested cooperating Millstone scolded him and stated:

> "[t]ell them everything? Are you crazy? Look, they're talking about treating us like criminals here. I'm not going to jail, Reese [Reynolds]. It's time to just shut up about everything. 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. And don't even think about pinning all this on me. Remember, they're looking at your stupid gas-guzzlers, too."

R. at 9. Despite Millstone's implied threats and urging, Reynolds decided to cooperate with the investigation. R. at 10 n. 9. Reynolds was granted immunity and provided the testimony the government needed to prosecute Millstone. R. at 10 n 9.

SUMMARY OF ARGUMENT

This case involves the statutory interpretation of two United States Code provisions, 33 U.S.C. § 1319(c)(1)(A) and 18 U.S.C. § 1512(b)(3). The district court and the court of appeals correctly interpreted these statutory provisions. This Court should affirm the decision of the United State Court of Appeals for the Fourteenth Circuit and uphold Millstone's convictions under § 1319(c)(1)(A) and § 1512(b)(3).

I.

Congress intended to create, and in fact created, an ordinary negligence standard in 33 U.S.C. § 1319(c)(1)(A), and no element of mens rea is required to punish an individual under § 1319(c)(1)(A). When interpreting a statute a court must look to the plain meaning of the language, and if there is no ambiguity in the language it must apply the statute according to its plain meaning. *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004). Public welfare statutes are strict liability statutes and do not require the government to prove an element of mens rea. *Staples v. United States*, 511 U.S. 600, 606 (1994). These statutes are designed to protect the public from deleterious devices and products or obnoxious

waste materials. *Id.* at 610. Due to the hazardous nature of obnoxious waste materials anyone dealing with these materials is presumed to be aware of all regulations. *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 588, 559 (1971). A term of imprisonment does not invalidate a public welfare statute. *Staples*, 511 U.S. at 618.

33 U.S.C. § 1319(c)(1)(A) states "any person who negligently violates § 1311." Clean Water Act 33 U.S.C. § 1319(c)(1)(A) (2006). There are no terms to describe negligently such as willful or gross. Negligently has a defined meaning as conduct falling below the reasonable standard of care. BLACK'S LAW DICTIONARY (8th ed. 2007). Therefore, the plain meaning of § 1319(c)(1)(A) must be: any person who does not follow a reasonable standard of care and thereby violates § 1311 is liable. Furthermore, the chemicals located at the Windy River facility were the hazardous obnoxious waste materials described in *Int'l Minerals*. Millstone was aware of the need to protect the public from a potential chemical spill as Sekuritek's job was to prevent intruders and saboteurs from causing a chemical spill. As such, Millstone must be presumed to be aware that the chemicals were regulated, and his due process rights are not violated when he is held strictly liable under § 1319(c)(1)(A) for violating § 1311.

Because the plain meaning of § 1319(c)(1)(A) calls for an ordinary negligence standard and § 1319(c)(1)(A) is a public welfare statute, this Court should affirm the decision of the Fourteenth Circuit.

II

A violation of 18 U.S.C. § 1512(b)(3) occurs when an individual corruptly persuades a witness to plead the Fifth. The Fifth Amendment guarantees that, "no person…shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. This right is guaranteed in an individual capacity. *Cole v. United States*, 329 F.2d 437, 439 (9th Cir. 1964). There is not a guarantee in the United States Constitution that protects someone who corruptly persuades another to plead the Fifth. *Id.* An individual corruptly persuades a witness under 18 U.S.C. § 1512(b)(3) when the persuader is motivated by an improper purpose. *United States v. Fasolino*, 586 F.2d 939, 941 (2d Cir. 1978). The motivated by an improper purpose standard was established when the witness tampering provision was included in 18 U.S.C. § 1503. *Id.* Legislative history shows that the Congressional intent was for § 1503 case law to extend § 1512. 134 CONG. REC. S17360 (daily ed. Nov. 10, 1988). If an individual has mal intent and acts with an improper purpose when he tells a witness to plead the Fifth he has corruptly persuaded the witness and is subject to the penalties in § 1512(b)(3).

The pressure of a criminal investigation weighed heavily on Millstone. He feared criminal prosecution. Attempting to protect himself, Millstone told Reynolds to plead the Fifth and to shut up if any investigators approached him. This action violated § 1512(b)(3) because Millstone was motivated by the improper purpose of self preservation. If Millstone had instructed Reynolds to plead the Fifth as an outside observer, with no stake in whether Reynolds pled the Fifth, Millstone could

not be prosecuted under § 1512(b)(3). However, Millstone was involved in the action. The fact that Reynolds was granted immunity when he cooperated with the government shows that pleading the Fifth was not in his interest.

Because an individual can be punished under § 1512(b)(3) for corruptly persuading a witness to plead the Fifth, this Court should affirm the trial court's denial of Millstone's Motion for Acquittal.

STANDARD OF REVIEW

Statutory interpretations are issues of law and are therefore reviewed *de novo*. *See, e.g., United States v. Hanousek*, 176 F.3d 1116, 1120 (9th Cir. 1999).

ARGUMENT

I. THE UNITED STATES CONGRESS INTENDED FOR 33 U.S.C. § 1319(C)(1)(A) TO USE A CIVIL STANDARD OF NEGLIGENCE

A. The Plain Language of 33 U.S.C. § 1319 Indicates Civil Negligence is the Correct Standard

This Court has stated, "the preeminent cannon of statutory interpretation requires us to presume that [the] legislature says in a statute what it means and means in a statute what it says." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004). If there is no ambiguity then the inquiry into the statutory interpretation begins and ends with the plain meaning of the text. *Id.* A plain language reading of the statutory language in 33 U.S.C. § 1319 (c)(1)(A) shows that Congress intended conviction of a person for negligently discharging pollutants in violation of the Clean Water Act. The statute states: "any person who negligently

violates § 1311 … of this title … 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." Clean Water Act 33 U.S.C. § 1319 (2006). The term "negligently" precedes the word "violates" in the statute.

Negligence is a term of art and has a defined meaning. This Court has stated, "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning at the time Congress enacted the statute." *Id.* BLACK'S LAW DICTIONARY (8th ed. 2007) defines negligence as: "the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm." Therefore, looking at the plain language of the statute, "negligently" means an individual who fails to exercise the standard of care that a reasonable person violates § 1311 is culpable under § 1319(c)(1)(A) and subject to the punishments set forth in the statute.

The argument that an ambiguity exists in the standard in the statute is unfounded. Congress did not include the words "gross" or "criminal" before "negligence" in § 1319(c)(1)(A), nor did it do so in its counterpart, § 1319(c)(1)(B). Instead, Congress chose to forgo the use of either word, showing a clear decision that the standard was ordinary negligence. In addition, Petitioner's argument that Congress does not know how to differentiate between different types of negligence is baseless. In the same chapter of the United States Code, Congress speaks to

violations of the law using gross negligence or willful conduct. *See, e.g.,* 33 U.S.C. § 1321(b)(7)(D) ("[i]n any case in which a violation of paragraph (3) was the result of gross negligence or willful misconduct of a person described in subparagraph (A), the person shall be subject to a civil penalty…."). The Court must assume Congress intended different meanings if it "uses certain language in one part of the statute and different language in another." *DePierre v. United States*, 131 S.Ct. 2225, 2234 (2011). As there is no ambiguity in the statutory language, the inquiry must end with the plain language of the statute. Therefore, an ordinary standard of negligence must be used for § 1319(c)(1)(A).

The United States Court of Appeals for the Ninth Circuit has conducted the same plain language inquiry and determined that civil negligence is the correct standard for § 1319(c)(1)(A). *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999); *United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1993). In *Hanousek*, the court pointed out that "negligently" is not defined anywhere in the CWA. 176 F.3d at 1120. First, the Ninth Circuit engaged first in a plain language reading of the statute, "with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.' . . . The ordinary meaning of 'negligently' is a failure to use such care as a reasonably prudent and careful person would use under similar circumstances." *Id.* The Ninth Circuit concluded that based on the plain language of § 1319(c)(1)(A) that, "Congress intended that a person who acts with ordinary negligence…be subject to criminal penalties." *Id.* at 1121.

In *Weitzenhoff*, the Ninth Circuit looked to the legislative history of the Clean Water Act to determine the meaning of "negligently":

> In 1987, Congress substantially amended the CWA, elevating the penalties for violations of the Act. Increased penalties were considered necessary to deter would be polluters. . . . Because [Congress] speak[s] in terms of 'causing' a violation, the congressional explanations of the new penalty provisions strongly suggest that criminal sanctions are to be imposed on an individual who knowingly engages in conduct that results in a permit violation, regardless of whether the polluter is cognizant of the requirements or even the existence of the permit.

35 F.3d at 1283-84. In reviewing the legislative history, the Ninth Circuit found that Congress, did not intend to require knowledge that a permit was necessary in order for a violation of the CWA to occur. Instead, Congress' intent to regulate waterway pollution called for an easier to prove ordinary negligence standard.

Both the plain statutory language and the legislative history indicate that Congress wanted a strict liability standard for those committing ordinary negligence. Consequently, in the instant case, the district court judge in Millstone's trial correctly instructed the jury under an ordinary negligence standard. R. at 10. The jury instructions stated, "[t]he 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. This instruction employed the correct standard of ordinary negligence of § 1319(c)(1)(A).

Therefore, the trial court and the Fourteenth Circuit Court of Appeals decision should be affirmed under a plain language reading of § 1319(c)(1)(A).

B. 33 U.S.C. § 1319(c)(1)(A) is a Public Welfare Statute and Due Process is Satisfied Even If There is No Element of Mens Rea

The Clean Water Act is a public welfare statute and therefore does not require a mens rea element be satisfied for conviction. A public welfare statute imposes, "a form of strict criminal liability through statutes that do not require the defendant to know the facts that make his conduct illegal." *Staples v. United States*, 511 U.S. 600, 606 (1994). Furthermore, this Court has looked to the nature of the statute and what is being regulated to determine if a Congressional omission "concerning the mental element of the offense should be interpreted as dispensing with conventional mens rea requirements." *Id.* at 607.

This Court analyzed the case law and explained what constitutes a public welfare statute in *Staples.* Petitioner relies on the fact that the Court did not find a public welfare statute in *Staples* to argue that the Clean Water Act is not a public welfare statute. However, by applying the public welfare statute guidelines set out in *Staples* to § 1319 (c)(1)(A), it is clear that the legislature created a public welfare statute in the Clean Water Act. The statute in question in *Staples* was the National Firearms Act which imposed strict registration requirements on machineguns. *Id.* at 602. A machinegun under the statute included any fully automatic weapon and applied to semiautomatic weapons that had been altered to fully automatic weapons. *Id.* This Court refused to interpret this provision of the National Firearms Act as public welfare legislation because, "guns are not 'deleterious

devices or products or obnoxious waste materials'… that put their owners on notice that they stand in responsible relation to a public danger." *Id.* at 610. This Court further stated, "because guns falling outside those categories traditionally have been widely accepted as lawful possessions, their destructive potential…cannot be said to put gun owners sufficiently on notice of the likelihood of regulation to justify interpreting [the Act] as not requiring proof of knowledge of a weapon's characteristics." *Id.* at 612.

A person found guilty under the Act in *Staples* faced up to ten years in prison, a factor which prompted the Court to state, "a severe penalty is a further factor tending to suggest that Congress did not intend to eliminate a mens rea requirement." *Id.* at 618. However, the Court did not adopt a bright line rule and pointed out that the potential punishment was only a factor to consider when deciding whether a statute was in fact a public welfare statute. *Id.*; *see United States v. Int'l Minerals & Chem. Corp.,* 402 U.S. 558, 559 (1971) (determining 18 U.S.C. § 834 was a public welfare statute even though a violator was subject to fines and a term of imprisonment); *United States v. Freed*, 401 U.S. 601, 609 (1971) (upholding public welfare statute containing potential imprisonment for possession of hand grenades since "premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act."); *see also United States v. Balint*, 258 U.S. 250, 254 (1922) (public welfare statute contained potential imprisonment for the sale of narcotics).

Agency regulations that outlined the standard of care for handling and treatment of dangerous liquid chemicals were addressed by this Court in *United States v. Int'l Minerals & Chem. Corp*. The statute at issue in *Int'l Minerals* was 18 U.S.C. § 834(a) which provided the Interstate Commerce Commission (ICC) with the power to promulgate regulations for the safe transportation of corrosive liquids. 402 U.S. at 559. One regulation required any person shipping hazardous material to describe the article being shipped on the shipping paper, using the terminology prescribed in the statute. *Id.* The Court held the statute to be a public welfare statute and a mens rea element was not required because "where…dangerous or deleterious devices of products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation." *Id.* at 565.

The statute in the instant case, § 1319(c)(1)(A), is distinguishable from the statute in *Staples*. First, it is undeniable that dispensing dangerous chemicals into waterways is unacceptable behavior. The dangerous chemicals produced at the Windy River plant are "obnoxious waste materials" and the public is on notice that these chemicals are "dangerous or deleterious." In the instant case, Millstone's company Sekuritek was hired by Bigle Chemical to provide security to prevent someone from causing a chemical spill. R. at 6. Millstone was on notice that his company was hired prevent a disastrous chemical spill once Drayton Wesley, the Chairman of Bigle Chemical stated, "'I will not risk the well being of this company

by allowing an intruder or saboteur to cause a spill ... I am finished with shenanigans caused by poor security.'" R. at 5. In the instant case, since the chemicals manufactured at the Windy River Facility are dangerous and obnoxious and it should therefore be presumed that Millstone was aware the chemicals were subject to the regulations in § 1311(a), and the consequences outlined in § 1319(c)(1)(A). Millstone's failure to exercise reasonable care in the supervision and training of the guards working around the hazardous chemicals produced at Windy River plant makes him liable. Second, the punishment Millstone faces under § 1319(c)(1)(A) is not nearly as severe as the punishment in *Staples*. Instead of a ten-year sentence in *Staples*, Millstone faces a fine and not more than one year imprisonment. This Court has upheld public welfare statutes where a term of imprisonment was possible.

Judge Newman's dissent from the decision of the Fourteenth Circuit focused on the fact that neither Millstone, nor any of his employees, actually has contact with the dangerous chemicals and as such, they have no idea of the regulations that are placed on these chemicals. R. at 17. However, the lack of contact does not mean that Millstone and his employees are ignorant that dangerous chemicals are subjected to regulation. Millstone knew of the intense security Bigle Chemical required for the Windy River Facility because of his contract and conversations with officers of the company. Millstone hired an additional thirty-five personnel and purchased new SUVs to meet the demands of guarding the facility. R. at 6. Since Millstone knew the need for high security was to prevent an intruder from causing

a chemical spill, Millstone was aware that the chemicals were extremely dangerous and therefore likely to be regulated.

Additionally, the hypothetical offered in Judge Newman's dissent from the opinion of the court below of a visitor being held liable for a violation § 1319(c)(1)(A), after tripping a switch and discharging chemicals into waterways is far-fetched. R. at 17. A visitor would not know that the Windy River Facility contains dangerous chemicals. A visitor would also be unaware of the stringent security measures implemented to prevent a spill of chemicals into the waterways. In the instant case, Millstone knew both of these facts. Therefore, the policy concern that any John Doe could be held liable under § 1319(c)(1)(A) is unwarranted and should not be a reason to prevent the finding that this provision is public welfare legislation.

C. The Court Should Harmonize the Split in the Circuit Courts to Conform with the Civil Negligence Standard Intended by Congress.

There is a circuit split as to whether the Clean Water Act is a public welfare statute, requiring no element of mens rea, and thereby creating a civil negligence standard. The division has arisen in regards to different subsections of the Act. The Ninth and Tenth Circuits held § 1319(c)(1)(A) is a public welfare statute and no mens rea element is required for a conviction. *United States v. Hanousek* 176 F.3d 1116 (9th Cir. 1999); *United States v. Ortiz*, 427 F.3d 1278 (10th Cir. 2005). In contrast, the Fifth Circuit held § 1319(c)(2)(A) is not a public welfare statute and due process is violated without the presence of a mens rea requirement in the statute. *United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1996). The Ninth and Tenth Circuit Courts have evaluated the Clean Water Act, specifically §

1319(c)(1)(A), and held it is public welfare legislation and no mens rea element is required for a conviction. This Court should adopt the holding of the Ninth and Tenth Circuits in regards to § 1319(c)(1)(A).

First, the Ninth Circuit decided that the entirety of the Clean Water Act was a public welfare statute in *United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1993). In *Weitzenhoff*, Defendant managed a city sewage treatment plant which treated approximately four million gallons of wastewater a day, removing solids and pollutants, so the water could be safely discharged into the ocean. *Id.* at 1281. The waste that was not safe to discharge into the ocean was pumped to holding tanks or hauled to another treatment plant. *Id.* at 1282. After the plant ceased hauling the waste to another plant, a buildup of waste at the defendant's plant prompted him to instruct employees to pump the waste directly into the ocean. *Id.* Over the course of the year, 436,000 pounds of waste were discharged into the ocean. *Id.* The defendant was found guilty for six violations of the Clean Water Act and sentenced to twenty-one months imprisonment. *Id.* The Ninth Circuit held, "the criminal provisions of the CWA are clearly designed to protect the public at large from the potentially dire consequences of water pollution, and as such fall within the category or public welfare legislation. . . . the government did not need to prove that Weitzenhoff. . . knew that [his] acts violated the permit or the CWA." *Id.* at 1286.

Six years later in *United States v. Hanousek*, the Ninth Circuit reaffirmed that the Clean Water Act, specifically § 1319(c)(1)(A), was public welfare legislation. The defendant in *Hanousek* was convicted under § 1319(c)(1)(A) for negligently

discharging oil into navigable water. 176 F.3d at 1118. The defendant supervised a rock quarrying project around a railroad track which ran alongside a high-pressured petroleum products pipeline. *Id.* at 1119. One night while the defendant's work crew was removing rocks that had fallen onto the track, a backhoe bucket of a worker struck the pipeline and caused a rupture in the pipeline. *Id.* Anywhere from 1,000 to 5,000 gallons of oil were discharged into the Skagway River. *Id.*

The trial court instructed the jury that, "the government was required to prove only that [the defendant] acted negligently, which the district court defined as 'the failure to use reasonable care.'" *Id.* The defendant was sentenced to six months of imprisonment and a $5,000 fine. *Id.* at 1120. In upholding the lower court's decision, the Ninth Circuit relied on *Staples* and stated, "in the context of a public welfare statute, 'as long as a defendant knows he is dealing with a dangerous device of a character that places him in 'responsible relation to a public danger,' he should be altered to the probability of strict regulation.'" *Id.* at 1122. The court held, in light of the fact that the CWA is public welfare legislation, "[s]ection 1319(c)(1)(A) does not violate due process by permitting criminal penalties for ordinary negligent conduct." *Id.*

The Tenth Circuit followed the *Hanousek* decision in *United States v. Ortiz*, 427 F.3d 1278, 1279 (10th Cir. 2005). Defendant Ortiz worked as operation manager at a propylene glycol distillation facility. *Id.* The process of distilling propylene leads to a large amount of industrial wastewater which must be disposed

of properly. *Id.* The company did not retain a permit to dispose of the waste water and eventually the discharged waste found its way into the Colorado River via the storm drain system. *Id.* at 1279-80. The inspectors believed the wastewater was being flushed down the facilities' toilets. *Id.* The trial court granted a motion of acquittal stating, "the defendant could not be guilty on th[e] [negligent] discharge in the absence of his knowledge that using the toilet would result in the discharge to the river." *Id.* at 1281. The Tenth Circuit reversed the ruling of the district court and reinstated Ortiz's conviction for, "negligently discharging a pollutant in violation of the CWA, 33 U.S.C. §§ 1311(a) and 1319(c)(1)(A)." *Id.* In reversing the lower court's incorrect misapplication of the statute, the Tenth Circuit looked to the Ninth Circuit's interpretation of § 1319(c)(1)(A) in *Hanousek* and followed it. *Id.* at 1283.

In contrast, when evaluating a different provision of the Clean Water Act, the Fifth Circuit decided that 33 U.S.C. § 1319(c)(2)(A) of the Clean Water Act is not public welfare legislation. *United States v. Ahmad*, 101 F.3d 386, 387 (5th Cir. 1996). In *Ahmad*, the defendant was charged under § 1319(c)(2)(A) after he emptied a tank of gasoline at his gas station by pumping the gas into the street. *Id.* at 386-87. Some of the gasoline entered the town's sewer system and flowed into a creek. *Id.* The rest of the gasoline ended up in the sewer sanitation system and led to the evacuation of the sanitation plant and surrounding neighborhoods until the threat of explosion could be assessed. *Id.* Defendant Ahmad argued that the jury must be instructed that the mens rea element of knowledge was required as to each element

of the offense, while the government asserted that it was only required to prove that the defendant knew what he was doing and that what he was doing violated the statute. *Id.*

The *Ahmad* court sided with the defendant, determining it to be "eminently sensible that the phrase 'knowingly violates' in § 1319(c)(2)(A)… should uniformly require knowledge as to each of those elements rather than only one or two" when referring to other offenses under § 1319. *Id.* at 390. The court did not agree with the concept that certain elements should be treated differently, especially since "neither the parties nor the case law seems able to prove" which is the correct interpretation. *Id.* The Fifth Circuit was unwilling to extend the public welfare doctrine to the facts in *Ahmad* because the facts were similar to those in *Staples*. *Id.* at 391. Gasoline, like a gun, can be dangerous, but it is also a normal lawful substance that the general public has access to on a regular basis. *Id.* Also, the penalty is higher since a person found guilty of § 1319(c)(2)(A) may be sentenced to up to three years imprisonment, two years longer than a § 1319(c)(1)(A) violation.

The holding in *Ahmad* and the Fifth Circuit's interpretation of § 1319(c)(2)(A) are distinguishable from the facts in this case and the proper interpretation of § 1319(c)(1)(A). On the facts, *Ahmad* dealt with the use of gasoline, a common household product used by the majority of adult Americans. In contrast, the chemicals at the Windy River Facility are highly uncommon and are not used by the general public. R. at 5. The purpose of implementing substantial security features at a chemical plant is to protect the general public from the deleterious effects of

these chemicals by preventing an intruder from spilling the chemicals. As to the interpretation of the statute, the holding in *Ahmad* that § 1319(c)(2)(A) requires a finding of a "knowing" mens rea does not mean that § 1319(c)(1)(A) also requires the same mens rea. Furthermore, the policy reasons to require a mens rea element in § 1319(c)(2)(A) are not evident in § 1319(c)(1)(A). The punishment for a conviction under § 1319(c)(1)(A) is far less severe. The purpose of § 1319(c)(1)(A) is to encourage general compliance with environmental regulations, not to punish individuals, a principle which is in line with other public welfare statutes.

Petitioner points to Justice Thomas' dissent to the denial certiorari in *Hanousek* to support his argument that this Court would not hold § 1319(c)(1)(A) to be a public welfare statute. In his dissent, Justice Thomas focused on the circuit split between the Fifth and Ninth Circuits based on the holdings from *Weitzenhoff* and *Ahmad*. 518 U.S. 1102 (2000). However, Justice Thomas' dissent centered on the fact that the entirety of the Clean Water Act has been declared a public welfare statute, instead of specifically analyzing § 1319(c)(1)(A). *Id.*[1]

In the instant case, Millstone's circumstances mirror those of the defendant in *Hanousek*. Like Hanousek, Millstone acted in a supervisory capacity for the security services his company provided at the time of the spill, and was not involved in the production or disposition of harmful chemicals. R. at 6. In both *Hanousek* and the instant case, it was an employee of the defendants who was directly responsible for causing the spill. Hanousek and Millstone were convicted under §

[1] A denial of certiorari "is not a disposition on the merits of the question," and does not express an opinion on the facts below. *Office of the President v. Office of the Independent Council*, 528 U.S. 996 (1998). That being said, a dissenting opinion of the denial should also not be looked at to decide the merits of the case.

1319(c)(1)(A) for a violation of § 1311(a). R. at 10. Considering the facts of *Hanousek* so closely align with the circumstances of the instant case, and the same public welfare statute is involved, this Court should uphold the Fourteenth Circuit's decision and affirm Millstone's conviction.

In conclusion, this Court should adopt the position established by the Ninth and Tenth Circuits that § 1319(c)(1)(A) does not require mens rea since it is a public welfare statute. First, Congress intended for § §1319(c)(1)(A) to be a public welfare statute since the purpose of this regulation is to deter polluters and keep the waterways of the United State clean—a benefit for all residents of the country. The negligence based criminal charges, "represent a careful balancing between the rights of a defendant and the need of the public to be protected from certain conduct that may have serious adverse consequences on human health and the environment." Joseph J. Lisa, *Negligence Based Environmental Crimes: Failing to Exercise Due Care Can be Criminal* 18 VILL. ENVT'L L.J. 1 (2007). The strict liability faced under § 1319(c)(1)(A) is necessary to protect the waters of the United States for future generations. This Court should uphold Millstone's conviction and affirm the decision of the Fourteenth Circuit.

II. UNDER THE WITNESS-TAMPERING STATUTE, 18 U.S.C. § 1512(B)(3), MILLSTONE CORRUPTLY PERSUADED REYNOLDS WHEN HE ENCOURAGED REYNOLDS TO INVOKE HIS FIFTH AMENDMENT RIGHT

The Fifth Amendment guarantees that, "no person…shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. However, that right is guaranteed solely to an individual. There is not a guarantee in the

United States Constitution that protects an individual who corruptly persuades another to plead the Fifth. An individual corruptly persuades a witness under 18 U.S.C. § 1512 (b)(3) when the persuader is motivated by an improper purpose. This standard was established when the witness tampering provision was still included in 18 U.S.C. § 1503. After the enactment of § 1512, courts have looked to their prior interpretation of cases involving § 1503 to interpret the proper course of action to apply § 1512. As the provision in § 1503 mirrors the provision in § 1512, the motivated by an improper purpose standard established in § 1503 case law must be extended to § 1512. Therefore, since Millstone's urging of Reynolds to invoke the Fifth was motivated by his improper purpose to hinder the criminal investigation of the chemical spill at the Windy River facility, his conviction under § 1512 should be upheld.

A. The Phrase "Corruptly Persuades" is Defined as Motivated by an Improper Purpose.

An individual may corruptly persuade a potential witness under § 1512 when he encourages a potential witness to invoke her Fifth Amendment right if he is motivated by an improper purpose in encouraging the witness. The statute which governs witness tampering is 18 U.S.C. § 1512(b)(3) and it states: "[w]hoever knowingly uses intimidation, threatens or corruptly persuades another person, or attempts to do so. . .with intent to. . .hinder, delay, or prevent the. . .pending judicial proceedings. . .shall be fined under this title or imprisoned not more than 20 years, or both." Tampering with a Witness, Victim, or Informant, 18 U.S.C. § 1512 (2006).

This Court must first determine what the phrase "corruptly persuades" means within the context of the statute. When a court engages in statutory interpretation it first looks to the plain meaning of the language. *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004). Respondent contends that the plain meaning of corruptly is the most accurate interpretation of the phrase and should be followed by this Court. MERRIAM-WEBSTER DICTIONARY (11th ed. 2008) defines "corruptly" as "morally degenerate and perverted, characterized by improper conduct." If this is the plain meaning of corruptly, then this Court should simply insert this definition into the statute and apply the statute with that meaning.

There is a circuit split as to whether the phrase "corruptly persuades" in § 1512 is ambiguous. The Third Circuit in *United States v. Farrell*, 126 F.3d 484, 487 (3d Cir. 1997) held that the exact meaning of "corruptly persuades" in § 1512(b) is ambiguous. If this Court agrees with the *Farrell* court, and finds that corruptly persuades is ambiguous within the confines of § 1512(b), then this Court should look to the statutory construction and legislative history of the phrase "corruptly persuades" to decide the parameters and definition of the phrase. *United States v. Plesha*, 352 U.S. 202, 203 (1952).

1. Legislative History and Statutory Construction Indicates that the Meaning of "Corruptly Persuades" in 18 U.S.C. § 1512 and 18 U.S.C. § 1503 is Analogous

Based on the statutory construction and legislative history of the enactment of § 1512, it is evident that the case law interpreting "corruptly persuades" in § 1503 controls interpretation of § 1512. This is necessary because prior to the enactment

of § 1512, the witness tampering provision was included in § 1503, the juror tampering statute. The key language of § 1503 entitled "Influence or Injuring Officer, Juror or Witness Generally" stated:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Influence or Injuring Officer, Juror or Witness, 18 U.S.C. § 1503 (1980). With the enactment of the Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (1982), Congress removed the witness tampering provisions from § 1503 and created a new, and more detailed, witness protection statute in 18 U.S.C. § 1512. 134 CONG. REC. S17360 (daily ed. Nov. 10, 1988). The original version of the Victim and Witness Protection Act did not include the phrase "corruptly persuades" in § 1512. *Id.* The Second Circuit pointed out the omission in *United States v. King*, 762 F.2d 232, 238 (2d Cir. 1985), when it stated that the absence of "corruptly persuades" meant that § 1512 could not be interpreted as analogous to § 1503. *Id.*

In 1988, Congress amended § 1512 to include the current wording of "corruptly persuades," correcting the omission as highlighted in *King*. *Id.* Senator Biden, Chairman of the Senate Judiciary Committee, composed an analysis of the 1988 changes to § 1512 to express the intent of the drafters with regards to the addition of the phrase "corruptly persuades." 134 CONG. REC. S17360 (daily ed. Nov. 10, 1988). The Senator stated that the inclusion of corrupt persuasion is

"merely to include in § 1512 the same protection of witness from non-coercive influence that was (and is) found in § 1503." *Id.* Clearly, the legislative intent was for § 1512 to mirror § 1503. *See generally*, Tina M. Riley, *Tampering with Witness Tampering: Resolving the Quandary Surrounding 18 U.S.C. § 1503, 1512*, 77 WASH. U. L.Q. 249, 265-66 (1999) (presenting an overview of Congressional intent in resolving the ambiguities in applying § 1512).

2. As § 1503 is analogous to § 1512, the Motivated by an Improper Purpose Standard of "Corruptly Persuades" in § 1503 Case Law Must be Extended to § 1512

When considering that the legislative intent behind the addition of "corruptly persuades" in § 1512 was to provide the same protection for witnesses that was afforded to witnesses under § 1503, this Court should look to case law decided under § 1503 that interpreted the meaning of "corruptly persuades" and apply the cases analogously to § 1512. Before the creation of § 1512, several Circuit Courts interpreted the phrase "corruptly" in § 1503 as meaning motivated by an improper purpose. *See United States v. Cintolo*, 818 F.2d 980 (1st Cir. 1987); *United States v. Fasolino*, 586 F.2d 939 (2d Cir. 1978); *United States v. Cioffi*, 493 F.2d 1111 (2d Cir. 1974); *Knight v. United States*, 310 F.2d 305 (5th Cir. 1962); *Martin v. United States*, 166 F.2d 76 (4th Cir. 1948).

A person "corruptly persuades" another under § 1503 if the first person is motivated by an improper purpose. The Second Circuit in *United States v. Cioffi*, explained that under § 1503, an *endeavor* to obstruct, interfere, or impede a witness is corrupt. 493 F.2d at 1118-19 (emphasis added). In a later case the Second

Circuit stated, "[w]hether the endeavor was "corrupt" was a question for the jury, under proper instructions emphasizing that the endeavor had to be 'motivated by an improper purpose.'" *United States v. Fasolino*, 586 F.2d at 941 (quoting *Knight v. United States*, 310 F.2d 305, 307-08 (5th Cir. 1962).

The First Circuit also found that improper motive was sufficient to corruptly persuade, "[i]f reasonable jurors could conclude, from the circumstances of the conversation[s], that the defendant had sought. . .to influence improperly a [witness], the offense was complete." *United States v. Cintolo*, 818 F.2d at 991. The Fourth Circuit affirmed a jury instruction that stated, "you are instructed that the term 'corruptly' means for an improper motive." *Martin v. United States*, 166 F.2d 76, 79 (4th Cir. 1948). This Court should accept the § 1503 statutory interpretation of "corruptly persuades" that defines corruptly persuades as motivated by an improper purpose and extend that interpretation to § 1512.

Both the Second and Eleventh Circuit courts have applied the interpretation and standard of "corruptly persuades" as "motivated by an improper purpose" established in § 1503 case law to cases involving § 1512. *United States v. Thompson*, 76 F.3d 442, 452 (2d Cir. 1996); *United States v. Shotts*, 145 F.3d 1289, 1291 (11th Cir. 1998). In *Thompson*, the Second Circuit looked to the language of § 1503 and its previous decision in *Fasolino* to define "corruptly persuades" as motivated by an improper purpose within the contours of § 1512. 76 F.3d at 452. The court previously held that § 1503 was not constitutionally vague and extended this holding to § 1512 because the two provisions are analogous. *Id.* at 452. The

reason neither § 1503 nor § 1512 were constitutionally vague was because the prohibition against corrupt acts "is clearly limited to constitutionally unprotected and purportedly illicit activity . . . by targeting only such persuasion as is corrupt § 1512(b) does not proscribe lawful or constitutionally protected speech and is not overbroad." *Id.*

In *Shotts*, the Eleventh Circuit rejected a claim by a defendant that his conviction under § 1512(b) must be reversed "because the corruptly persuade language of § 1512(b) is unconstitutionally vague and overbroad." *Id.* The court cited *Thompson* to uphold § 1512(b) stating, "corrupt as used in § of 1512(b) is neither unconstitutionally overbroad or vague." *Id.* at 1300. Most importantly, the court turned to the language in § 1503 to find the meaning of corruptly persuades to be motivated by an improper purpose. *Id.* The court stated, "it is reasonable to attribute to the corruptly persuade language in § 1512(b), the same well-established meaning already attributed by the courts to the comparable language in § 1503(a), i.e., motivated by an improper purpose." *Id.* at 1301.

Only the Third Circuit has required more than an improper purpose. In *United States v. Farrell*, 126 F.3d 484, 489 (3d Cir. 1977) the court did not hold "the use of corruptly in § 1503 sufficiently analogous to its use in § 1512(b)'s corruptly persuades clause to justify construing the terms identically." *Id.* Succinctly, the court stated that, "more culpability is required for a statutory violation than that involved in the act of attempting to discourage disclosure in order to hinder an investigation." *Id.* at 489. The court elaborated that the requirement of extra

culpability in § 1512 (b) was necessary because unlike § 1503, § 1512 already had an intent component. *Id.* at 490. To avoid surplusage in the statute, the court held that "corruptly" must have a stronger meaning than improper purpose because the general intent element was already satisfied. *Id.*[2] The Third Circuit did not look extensively at or rely on the legislative history that added in the "corruptly persuades" language. *Id.* The court looked solely at a report from the House Judiciary Committee and disregarded Senator Biden's comments regarding the addition of corruptly persuades to § 1512(b). *Id.*

The dissent to the majority's decision in *Farrell* is consistent with the holding of *Thompson*. The dissent analyzed the history and construction of § 1512(b) and considered Senator Biden's comments concerning the addition of "corruptly persuades" to the statute. *Id.* at 492. The dissent contended that "interpreting corruptly to mean motivated by an improper purpose does not create statutory redundancy." *Id.* at 493. Instead of creating redundancy, the dissent argued that the term corruptly adds a nuance and important dimension to § 1512. *Id.* Furthermore, the dissent posited, "the term 'corruptly' can play an important role in limiting the reach of the statutes. For example, a mother urging her son, in his own interest, to claim his Fifth Amendment right to remain silent would hardly be acting corruptly, that is, with an improper purpose." *Id.* The determination that "corruptly" functions as an addition to "knowingly" prompted the dissent to agree with the Second Circuit's decision in *Thompson*. *Id.*

[2] Contrary to what the Third Circuit stated about this Court's requirement that the lower courts must avoid surplusage at all costs, this Court has stated, "our preference for avoiding surplusage constructions is not absolute." *Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004).

3. *Arthur Andersen* Does Not Alter the Definition of "Corruptly Persuades" in § 1512

Petitioner and the dissenting opinion below rely on this Court's decision in *Arthur Andersen L.L.P v. United States*, 544 U.S. 696 (2005) to claim that "corruptly" in § 1512 (b) is requires more than "motivated by an improper purpose." R. at 15. However, such a reading of *Arthur Andersen* is improper as the interpretation of "corruptly" was not at issue in that case. *Arthur Andersen L.L.P v. United States*, 544 U.S. 696 (2005).

In *Arthur Andersen*, a jury found defendant corporation, Arthur Andersen, guilty of violating § 1512(b)(2)(A) and (B). *Id.* at 698. The Court of Appeals for the Fifth Circuit affirmed the decision, holding that the "jury instructions properly conveyed the meaning of corruptly persuades. . .and that the jury need not find any consciousness of wrongdoing." *Id.* Arthur Andersen was Enron's auditor prior to charges being filed against Enron. *Id.* Arthur Andersen instructed Enron employees "to destroy documents pursuant to its document retention policy." *Id.* This was not an attempt to destroy relevant evidence because the employees were acting under a defined company policy and had not yet been served for documents by the federal government. *Id.* Enron employees were urged to comply with the document retention policy because if documents were destroyed under the normal policy, no wrongdoing occurred and "whatever was there that might have been of interest to somebody is gone and irretrievable." *Id.* at 699.

This Court overturned the decision of the Fifth Circuit for several reasons. First, this Court did not approve of convicting a party for corruptly persuading

another when that person was committing a seemingly innocuous act, such as following a company document retention policy. *Id.* at 704. This Court held, "[s]ection 1512(b) punishes not just corruptly persuading another, but *knowingly* corruptly persuading another." *Id.* (emphasis in original). The holding did not discuss what "corruptly" meant, but instead limited criminality to persuaders conscious of their wrongdoing. *Id.* at 706. Since Arthur Andersen encouraged employees to destroy documents under a defined document retention policy, the government did not prove that Arthur Andersen knowingly, corruptly persuaded the employees. *Id.* Secondly, this Court disagreed with the district court's failure to require the government to show any nexus between the persuasion to destroy the documents and the actual litigation. *Id.* at 706. Chief Justice Rehnquist reasoned that "a knowingly corrupt persuader cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material." *Id.* at 708.

Since *Arthur Andersen* dealt with the element of knowledge and not the definition of "corruptly persuades," this case is of little help to the facts present here. In the instant case, Millstone had the prerequisite knowledge that he was corruptly persuading Reynolds to not cooperate with the investigation at Windy River Chemical Plaint. R. at 9. Millstone threatened and scolded Reynolds in the interest of his own self-preservation when he exclaimed:

> "[t]ell them everything? Are you crazy? Look, they're talking about treating us like criminals here. I'm not

> going to jail, Reese [Reynolds]. It's time to just shut up about everything. 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. And don't even think about pinning all this on me."

R. at 9. This statement shows that Millstone was aware of his precarious legal position in the events leading up to the prosecution and acted knowingly when he told Reynolds to "shut up." Even if this Court wishes to adopt a standard which requires a nexus between the comment and pending litigation, there is a sufficient nexus between Millstone's statement to Reynolds and the particular official proceeding. Millstone refers directly to the likely criminal charges being brought against himself and Reynolds for the spill. R. at 9.

B. An Individual's Actions may Corruptly Persuade a Witness to Plead the Fifth

Once it is established that corruptly persuades is defined as motivated by an improper purpose, as the cases interpreting § 1503 are analogous to § 1512, this Court must determine whether an individual can corruptly persuade another by urging him to invoke his Fifth Amendment right. Relying on case law from the Ninth, Second, and First Circuits, Respondent argues that when a conspirator motivated by self interest, instructs his co-conspirator to plead the Fifth, the conspirator is motivated by an improper purpose and therefore has corruptly persuaded his co-conspirator under § 1512(b). Applying this reasoning to the instant case, Millstone, motivated by an improper purpose, acting in his own self interest, tried to convince Reynolds to plead the Fifth. Therefore, the jury finding that Millstone is guilty under § 1512(b) must be upheld by this Court.

C. The Intent of the Person Persuading Another to Plead the Fifth Ultimately Decides Whether the Action was Motivated by an Improper Purpose

When an individual is motivated by an improper purpose and persuades another to invoke his Fifth Amendment right that individual is guilty of corruptly persuading a witness under § 1512. The Ninth Circuit in *Cole v. United States*, 329 F.2d 437, 439 (9th Cir. 1964) analyzed whether an individual could be convicted under § 1503 for trying to persuade another to plead the Fifth. *Id.* at 439. The defendant was convicted for corruptly endeavoring to influence testimony that another person, presented to a grand jury. *Id.* The defendant suggested to his friend that in order to avoid a situation of perjury, the friend should "claim his constitutional privilege against self incrimination." *Id.* The friend followed the defendant's advice and pleaded the Fifth at the grand jury. However, the same friend later became an informant and told the government of the advice he received from the defendant. *Id.*

The defendant unsuccessfully argued three points regarding the impossibility of convicting someone for telling another to plead the Fifth. *Id.* The court rejected the defendant's third argument. *Id.* This argument stated that since pleading the Fifth is a constitutional right, "it cannot be a crime for one to advise or persuade him to do that which is lawful and his absolute right, and because of that fact, [it] is not a corrupt or otherwise wrongful obstruction of the due administration of justice." *Id.* The Ninth Circuit disagreed and explained, "many acts which are not in themselves unlawful, and which do not make the actor a criminal, may make

another a criminal who see that the innocent act is accomplished for a corrupt purpose, or by threat or by force." *Id.* at 439-40. The court further reasoned, "[i]t is the witness' privilege which our inspired Constitution protects and which any person in our court may invoke. . .not someone else's privilege to capture by force or threat or bribe." *Id.* at 440. Additionally, the court distinguished advice to plead the Fifth given by an attorney, doctor, priest, spouse, or an honest friend to another:

> The advice by the attorney relates to and is an exercise of the client's right; not the attorney's – the advice by the priest relates to and is an exercise of the penitent's right, not the priest's. Even the husband and wife's confidential privilege rests upon the theory the two are one in the eyes of the law.

Id. The defendant's conviction under § 1503 was upheld by the court. *Id.*

The Second Circuit also addressed in *United States v. Cioffi*, 493 F.2d 1111 (2d Cir. 1974), whether corruptly persuading someone to plead the Fifth was a violation of § 1503. The defendant had a conversation with a witness trying to convince the witness to "'take the Fifth' and say nothing.'" *Id.* at 1116. The defendant argued that the act of giving advice to someone to plead the Fifth cannot be made a crime. *Id.* at 1119. However, the Second Circuit court held the district court jury was properly instructed "that a verdict of guilty might be based on intimidation by threats or by corruptly endeavoring to influence the witness. . .to give false testimony or by corruptly influencing him to invoke the Fifth Amendment." *Id.* at 1118. The court further reasoned that, "the focus is on the intent or motive of the party charge as an inducer. . . [t]he lawful behavior of the

person invoking the Amendment cannot be used to protect the criminal behavior of the inducer." *Id.* at 1119.

If the § 1503 case law is extended to § 1512, even a lawyer is not beyond the reach of § 1512 if the lawyer corruptly persuades a client to plead the Fifth. The First Circuit court in *United States v. Cintolo*, tackled the question of whether a lawyer corruptly persuading a witness to plead the Fifth was a violation of § 1503. *United States v. Cintolo*, 818 F.2d 980, 987 (1st Cir. 1987). Defendant Cintolo was a criminal defense attorney in Massachusetts and was convicted for conspiracy to obstruct justice under § 1503 after his client appeared before a grand jury, read a statement prepared by Cintolo, and then refused to testify. *Id.* The court stated, "[n]otwithstanding the immunity which has been conferred, the refusal was predicated on fifth amendment grounds." *Id.* at 988. The court explained that the correct application of § 1503 "requires, in a very real sense, that the factfinder discern-by direct evidence or from inference the motive which led an individual to perform particular actions." *Id.* at 991. Even if an action is lawful in itself, it can "cross the line of legality if (i) employed with a corrupt motive, (ii) to hinder the due administration of justice, so long as (iii) the means have the capacity to obstruct." *Id.* at 992. The court found nothing in the case law to exempt lawyers from the bounds of § 1503, and public policy interests required that the attorney-client privilege not be used to promote or shield illegitimate acts. *Id.* at 993. The court held that lawyers were not entitled to special exception from § 1503 and upheld Cintolo's conviction under § 1503. *Id.* at 996.

Congressional intent was to have § 1512 governed by the § 1503 case law. Emerging from the cases discussed above is the concept that the intent of the person persuading another to plead the Fifth ultimately decides whether the action was motivated by an improper purpose and is, therefore, corrupt under § 1512. Those motivated by an improper motive will be held liable under § 1512.

Millstone and Reynolds were business partners. Business partners do not enjoy a special relationship like attorney-client, doctor-patient, priest-penitent, or spouses, as posited by the Ninth Circuit in *Cole*. As the media coverage and criminal investigation increased against Sekuritek, Millstone began to crack under the pressure, while Reynolds prepared to tell the government agents everything. R. at 9. This outraged Millstone. R. at 9. Millstone scolded Reynolds and said, "[t]he 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. Reynolds was ultimately granted immunity by the government, a more favorable position than having charges brought against him under 33 U.S.C. § 1319(c)(1)(A). R. at 10 n. 9. Millstone's intent when he instructed Reynolds to plead the Fifth was similar to the defendant in *Cioffi*, he was trying to protect his own interests instead of giving Reynolds sound advice.

The once lawful action of telling Reynolds to take advantage of his constitutional right to plead the Fifth became unlawful once Millstone intended to protect himself over Reynolds' best interest. The actions taken by Millstone were more devious than the actions in *Cole* where the Ninth Circuit court upheld a

conviction for corruptly persuading another to plead the Fifth. Millstone knew the ramifications of the charges he was facing and he wanted to protect himself; he was not looking out for Reynolds' best interest. Since Millstone was motivated by an improper purpose when he told Reynolds to plead the Fifth, Millstone's conviction under 18 U.S.C. § 1512 (b) must be upheld by this Court.

CONCLUSION

For the reasons stated above, the Respondent respectfully requests that this Court affirm the decision of the Fourteenth Circuit Court of Appeals.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT