No. C11-0116-1

In The

Supreme Court of the United States

October Term 2011

SAMUEL MILLSTONE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR RESPONDENT

Team # 26
Counsel for Respondent

QUESTIONS PRESENTED

I. Under 33 U.S.C. § 1319(c)(1)(A) of the Clean Water Act, can an individual be convicted of a negligent violation for failing to exercise the standard of care that a reasonably prudent person would have exercised when the statute's plain meaning and Congress' intent indicate such a standard and that standard does not violate that individual's due process rights?

II. Under the witness-tampering statute, 18 U.S.C. § 1512(b)(3), can an individual "corruptly" persuade a potential witness to withhold information by encouraging the potential witness to invoke his Fifth Amendment right, when that individual desires to exploit the witness' right for their own benefit?

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The opinion of the United States District Court is unreported. The unreported opinion of the United States Court of Appeals for the Fourteenth Circuit appears in the Record at pages 3-21.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The Fourteenth Circuit entered judgment on October 3, 2011. Petitioners timely filed petitions and this Court granted certiorari in the October Term, 2011.

STATUTORY PROVISIONS INVOLVED

This case involves section 1319(c)(1)(A) of the Federal Water Pollution Control Act, commonly known as the Clean Water Act ("CWA"), 33 U.S.C. § 1319(c)(1)(A). This case also involves sections 1512 of the Victim Witness Protection Act ("VWPA"), 18 U.S.C. § 1512 and section 1503 of the obstruction of justice statute, 18 U.S.C. § 1503. These provisions and other relevant portions of the CWA and VWRA are reproduced in the appendix to this brief.

STATEMENT OF THE CASE

I. Facts of the Case

On January 27, 2007, disaster struck the state of New Tejas. A Sekuritek security guard lost control of a sport-utility vehicle ("SUV") which slammed into a

chemical storage tank at the Bigle Chemical Windy River plant in Polis, New Tejas. This collusion caused a fire-blast that destroyed $450 million worth of buildings, homes, and farmland and claimed twenty-three lives. (R. at 7.) Over the next three days, thousands of barrels of chemicals spilled into the nearby Windy River, killing animals and plants, destroying property, and causing an estimated $1.25 billion in damage to the state and local economies—a loss from which New Tejas has yet to fully recover. (R. at 7-8.) The public immediately sought answers to explain how such a catastrophe occurred. (R. at 9.)

A. Millstone and Sekuritek

Samuel Millstone, the president and CEO of Sekuritek, started his career working for the Polis Police Department. (R. at 4.) After serving ten years as a police officer, Millstone enrolled in the University of New Tejas to pursue a business degree. (R. at 4.) Upon graduating from the University of New Tejas, Millstone left his job in law enforcement to manage a small chain of a local retail business. (R. at 4.) Five years later, in 2001, Millstone again enrolled at the University of New Tejas, this time in pursuit of an M.B.A. (R. at 4.) In 2003, prior to finishing his M.B.A., Millstone was laid off from his job due to a corporate merger. (R. at 4.)

After losing his job, Millstone discussed with a fellow classmate, Reese Reynolds, the idea of forming a company that would combine Millstone's experience in law enforcement and his background in business. (R. at 4.) Millstone and Reynolds developed an idea for a security company that merged modern technology with trained security personnel. (R. at 4.) This idea developed into Sekuritek. (R.

at 4.) Millstone acted as President and CEO, in charge of working with clients to determine their security requirements, hiring and training security guards, and overseeing operations at the clients' locations. (R. at 4.) Reynolds acted as Vice President, with duties such as sales, marketing and equipment purchases. (R. at 4.)

Due to their growing reputation of technological know-how, Millstone and Reynolds quickly secured contracts throughout Polis and earned average revenues of $80,000 per contract. (R. at 4-5.) In 2005, this amounted to net revenues exceeding $2 million. (R. at 5.)

B. Bigle Chemical and the Windy River Facility

In September 2006, Bigle Chemical Company relocated its headquarters from the Republic of China to Polis. (R. at 5.) Bigle Chemical opened its largest chemical plant on the south side of the city, near the Windy River. (R. at 5.) The facility spanned 270 acres and required a standing staff of 1,200 people during any given shift. (R. at 5.) Profits from the Windy River plant topped $2.4 million per day. (R. at 5.)

Bigle Chemical's chairman and CEO, Drayton Wesley, expressed great concern about security at the Windy River facility. (R. at 5.) The *Wall Street Journal* and *New York Times* both quoted Wesley discussing the need to prevent a security breach or the possibility of an intruder or saboteur causing a spill. (R. at 5.) Knowing Sekuritek's reputation, Wesley contacted Millstone on November 5, 2006 to discuss a contract for security services at the Windy River plant. (R. at 5.) Wesley explained the contract would net Sekuritek $8.5 million over the next ten

years, almost ten times the company's previous largest contract, but Sekuritek would need to be "live" and "online" at the plant by December 1, 2006. (R. at 5.) This would only give Sekuritek a short window in which to hire and train thirty-five new security guards, one accountant and one administrative assistant. (R. at 5.) Sekuritek also needed to purchase additional equipment, including several vehicles for the security guards to travel around the Windy River plant. (R. at 6.) The only previous transportation needed by Sekuritek was a bicycle to patrol a grocery store parking lot. (R. at 6.)

Millstone believed the contract would take Sekuritek "to the big-time" and expressed his excitement to Reynolds. (R. at 6 n. 1.) Reynolds initially expressed concern about Sekuritek's ability to meet the demands of such a large contract, given the time constraints. (R. at 5.) Nonetheless, Millstone developed a detailed plan to meet Bigle's security needs, and convinced Reynolds to accept the contract. (R. at 6.) On November 16, 2006, Millstone signed a contract with Bigle Chemical. (R. at 6.)

Millstone and Reynolds clambered to meet the conditions of the contract. (R. at 6.) Although Sekuritek previously only hired experienced guards, Millstone hired a mix of experienced and inexperienced personnel for the Windy River plant. (R. at 6 n. 2.) Further, Sekuritek previously required that all new security personnel successfully complete a three-week training course; however, to meet the time requirements of the new project, Millstone developed a shortened seminar and

training program that consisted of one week of formal training and three weeks of "on the job observation and training." (R. at 6 n. 2.)

While Millstone hired and trained the security personnel, Reynolds obtained the equipment needed. (R. at 6.) Among this equipment was a new fleet of custom SUVs, which Reynolds purchased from an unproven company. (R. at 6.) Reynolds claimed he chose the vendor because it, like Sekuritek, was an emerging company. (R. at 6 n. 3.) Yet no other venders could meet the required timeline. (R. at 6 n. 3.)

Security personnel began working on-site at the Windy River plant shortly after Thanksgiving 2006. (R. at 6.) Millstone visited the site periodically to ensure that Sekuritek was meeting Bigle's needs and a Bigle survey conducted at the beginning of January showed no security breaches. (R. at 7.) Things appeared to be going smoothly until the end of January, when disaster struck. (R. at 7.)

C. The Accident at the Windy River Plant

On January 27, 2007, Josh Atlas, a new security guard, was patrolling the Windy River plant. (R. at 7.) He saw what he believed to be an intruder near one of the storage tanks (although later investigation revealed the "intruder" was actually a Bigle Chemical safety inspector). (R. at 7.) Atlas floored the pedal of his Sekuritek SUV to quickly reach the tank and investigate. (R. at 7.) Unfortunately, the pedal of the SUV stuck. (R. at 7.) The vehicle began to accelerate rapidly and Atlas started to lose control. (R. at 7.) He jumped out of the vehicle just before it collided with one of the chemical storage tanks. (R. at 7.) The crash caused the tank to explode and burst into flames. (R. at 7.) The fire quickly spread to nearby

tanks and caused numerous other explosions, resulting in thousands of barrels of chemicals spilling into the nearby Windy River. (R. at 7.)

Days before the accident, Sekuritek erected a security wall around the plant. (R. at 7.) This wall, combined with the fires spreading to surrounding areas, prohibited emergency responders from accessing the plant to control the fires. (R. at 7.) In total, it took Polis Fire Department three days to reach and control the blaze, during which time chemicals continued to pollute the Windy River. (R. at 7.)

The explosions and resultant fires took a great toll on the people of Polis. (R. at 7.) Beyond the twenty-three lives lost, the fires also destroyed three national historic buildings, numerous homes, and 50,000 acres of nearby farmland. (R. at 7.) In total, the damage from the fires alone cost over $450 million. (R. at 7.)

The chemical spill also caused severe damage to the Polis area. (R. at 7.) The explosions caused a "concentrated chemical cocktail," dubbed the "Soup," to spill into the Windy River and surrounding creeks. (R. at 7.) The Soup severely corroded the hulls of local fishing boats and commercial shipping barges. (R. at 8.) In addition, it wiped out agriculture, killed all fish and destroyed all fish breeding grounds in the area five miles downriver from the plant. (R. at 8.) The presence of chemicals in the water also created a fire hazard which caused a local water treatment and utility facility to shut down. (R. at 8.) The full impact of the Soup is still unknown, but residents continue to report animal deaths from symptoms common to those of ingesting the Soup. (R. at 8 n. 5.) New Tejas experienced $4.5 million a year in lost tourism revenue because of the Soup and has only recovered

twenty-five percent of that figure to date. (R. at 8.) The clean-up costs from the Soup are estimated to be over $300 million, and the total damage from the disaster to the state and local economies is estimated at almost $1.25 billion. (R. at 8.)

D. The Investigation

Federal officials immediately investigated the cause of the January 27th disaster. (R. at 8.) As soon as investigators discovered that the Sekuritek SUV set off the initial explosion, they focused the investigation on Millstone and Reynolds. (R. at 8.) Officials discovered the Sekuritek employee handbook, which includes an instruction to security personnel to leave vehicles stopped and secured 100 yards from a suspected security breach and to proceed on foot to investigate. (R. at 8.) Millstone did not specifically cover this policy with the new security guards during the abbreviated training. (R. at 9.) He instead only referred them to Sekuritek's handbook. (R. at 9.) The investigators also discovered the company that supplied the SUVs to Sekuritek had a reputation for substandard manufacturing, developed in part because of its history of pedals sticking in its custom vehicles. (R. at 9.)

The government investigation eventually focused on Millstone's shortened training seminar, Reynolds' imprudent purchase of the SUVs, and Sekuritek's construction of the security wall, which prevented an immediate emergency response. (R. at 9.) Everyone involved in the investigation concluded that Millstone failed to adequately train and supervise the security personnel. (R. at 9.) The media called for criminal charges against Millstone and Reynolds as the President and Vice President of Sekuritek. (R. at 9.)

In response, Millstone set up a meeting with Reynolds to determine their course of action. (R. at 9.) Reynolds told Millstone he was considering "getting it over with" and telling the government investigators the whole story. (R. at 9.) Millstone became angry and admonished Reynolds, saying:

> Tell them everything? Are you crazy? Look, they're talking about treating us like criminals here. I'm not going to jail, Reese. 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.)

Ultimately, the government charged Millstone with negligent discharge of pollutants in violation of the Clean Water Act ("CWA").[1] (R. at 10.) The government asserted that Millstone negligently hired, trained and supervised the security personnel and negligently failed to inspect the SUVs. (R. at 10.) The government claimed this negligence caused the chemical spill. (R. at 10.) The government also charged Millstone with a violation of the witness-tampering statute based on his discussion with Reynolds when Millstone told Reynolds to "plead the Fifth and shut up." (R. at 10.)

II. Procedural History

Following the trial, a jury found Millstone guilty of both a negligent violation of the CWA and witness tampering. (R. at 10.) Millstone made a motion for a new trial, which the district court denied. (R. at 10.) On appeal to the Fourteenth Circuit, Millstone argued that the district court made two errors. First, he argued

[1] Reynolds was given immunity in exchange for his testimony against Millstone. (R. at 10 n. 9).

the district court's jury instruction that "'[n]egligence' means the failure to exercise the standard of care that a reasonably prudent person would have exercised in the same situation" was improper under the CWA. (R. at 10.) He instead asserted that the jury should have been instructed on a criminal standard of gross negligence. (R. at 11.) Second, Millstone appealed the district court's denial of his Motion for Acquittal on the witness-tampering charge. (R. at 10.) He argued that "a defendant cannot be found guilty of corruptly persuading a person to withhold information from the government by encouraging that person to exercise a right or privilege to do so." (R. at 10.) The court of appeals found no error and affirmed the judgment of the district court. (R. at 3.)

SUMMARY OF THE ARGUMENT

This case presents issues threatening the public welfare and the ability of the government to protect its witnesses. Petitioner attempts to skirt both environmental regulations and the obstruction of justice statutes based on erroneous interpretations of the Clean Water Act ("CWA") and the Victim and Witness Protection Act ("VWPA"). Therefore, this court should affirm the holding of the Fourteenth Circuit on both counts.

I.

The first issue concerns whether an individual can be criminally convicted for "negligently" discharging pollutants in violation of the CWA by failing to exercise the standard of care that a reasonably prudent person would have exercised in the same situation. Specifically, the Court must interpret the word "negligently" within

the context of section 1319 of the CWA, 33 U.S.C. § 1319(c)(1)(A), and determine whether an ordinary negligence standard comports with an individual's due process rights.

While Congress did not expressly define "negligently" within section 1319(c)(1)(A), the term relates to ordinary negligence, or failure to act as a reasonably prudent person would act, because the plain language and congressional intent yield such an interpretation. Furthermore, since Congress provided for "gross negligence" violations elsewhere in the statute, and ordinary negligence better advances the ultimate objective of the CWA by holding potential violators to the utmost standard of care, an ordinary negligence interpretation is appropriate.

A conviction for ordinary negligence under section 1319(c)(1)(A) adheres to Fourth Amendment due process rights. Although traditional common law crimes require an awareness of wrongdoing for liability, certain regulations that aim to protect the public welfare from serious risks subject violators to a heightened standard of care under ordinary negligence. In an area of law where civil sanctions can fall short of preventing harmful conduct, the narrowly-applied public welfare doctrine serves to justify the punishment of individuals who stand in responsible relation to dangerous materials, where mere negligence can cause great harm. The CWA is a public welfare statute because it conforms to these principles without imposing harsh penalties; thus, a standard of ordinary negligence under section 1319(c)(1)(A) does not violate an individual's right to due process.

Congress intended section 1319(c)(1)(A) to contain an ordinary negligence standard because the interests of protecting the public from significant harm outweigh the interests of individuals who may be criminalized for innocent conduct in violation of the CWA. Nevertheless, Congress affords protection to wholly innocent individuals by giving the Environmental Protection Agency ("EPA") the authority to enforce the CWA through administrative, civil, or criminal channels. Consequently, the EPA has a proven history of criminally prosecuting only those who acted with high culpability and caused significant environmental harm. Hence, while a standard of ordinary negligence encourages individuals to use the utmost care when handling potentially dangerous substances, entirely innocent conduct remains shielded from criminal liability.

II.

The second issue concerns whether an individual can "corruptly" persuade a co-conspirator to invoke his Fifth Amendment right in violation of the VWPA, 18 U.S.C. § 1512(b)(3). In this case, the Court must interpret the word "corruptly." Based on the general principles of statutory construction, the word "corruptly" means "with an improper purpose."

The plain meaning of "corruptly" in section 1512 is "with an improper purpose." This improper purpose is defined as "with a wrongful design to acquire some pecuniary or other advantage." Combining "persuades" and "corruptly," section 1512 prohibits actions "motivated by an inappropriate or improper purpose

to convince another to engage in a course of behavior—such as impeding an ongoing criminal investigation."

Congress intended for "corruptly" in section 1512 to be interpreted the same way as it was under section 1503, the original obstruction of justice statute. Congress added the phrase "corruptly persuades" to section 1512 in 1988, "merely to include in section 1512 the same protection of witnesses from non-coercive influence that was (and is) found in section 1503." Lower courts support this interpretation.

One of the purposes of section 1512 is "to enhance and protect the necessary role of crime victims and witnesses in the criminal justice process." Therefore, section 1512 provides greater protections than section 1503 had previously provided. Circuit courts formerly held defendants liable under section 1503 for corruptly attempting to persuade a witness to invoke his Fifth Amendment right. This interpretation should be extended to section 1512 because the Fifth Amendment privilege is a personal one and defendants should not be allowed to exploit it for their benefit.

Millstone's conduct violates the "corruptly persuades" language of section 1512 because the statutory interpretation, congressional intent and case precedent indicate that "corruptly" means "for an improper purpose." Millstone's attempt to encourage Reynolds to exercise his personal right to plead the Fifth Amendment was not for Reynolds' own benefit. Rather, Millstone had an improper purpose of wanting to secure an advantage for himself by exploiting Reynolds' rights. Therefore, Millstone violated 18 U.S.C. § 1512(b)(3) and was rightly convicted.

ARGUMENT

This case deals with issues of statutory interpretation, both of the Clean Water Act ("CWA"), and of the Victim and Witness Protection Act ("VWPA"). Questions of statutory interpretation are reviewed *de novo*. *United States v. Ahmad*, 101 F. 3d 386, 389 (5th Cir. 1997). Statutory interpretation begins with the assumption that Congress expresses its purpose in the ordinary, plain meaning of the words used. *Russello v. United States*, 464 U.S. 16, 21 (1983). When looking to the plain language, courts must look beyond just the words or sub-sections in isolation, and instead derive meaning from the context of the relevant statutory provisions as a whole. *United States v. Hanousek*, 176 F.3d 1116, 1120 (9th Cir. 1999), cert. denied 528 U.S. 1102 (2000). Words and phrases must be construed in light of the overall purpose of the statute. *Id.* Courts determine the purpose of a statute by looking at the legislative history and congressional intent. *United States v. Weitzenhoff*, 33 F.3d 1275, 1283 (9th Cir. 1994).

I. UNDER 33 U.S.C. § 1319(c)(1)(A), THE STANDARD FOR NEGLIGENCE IS THE FAILURE TO ACT AS A REASONABLY PRUDENT PERSON WOULD ACT BECAUSE SUCH AN INTERPRETATION CONFORMS WITH THE LANGUAGE AND PURPOSE OF THE STATUTE AND UPHOLDS DUE PROCESS RIGHTS

The CWA was enacted to "restore and maintain" the integrity of the waters of the United States. 33 U.S.C. § 1251(a). To that end, section 1311 of the Act prohibits the unlawful discharge of a pollutant into navigable waters. 33 U.S.C. § 1311(a). Section 1319(c) of the CWA addresses the criminal sanctions for the various types of violations. 33 U.S.C. § 1319(c). The first issue in this case is

whether the criminal penalty for "negligent" violations refers to ordinary negligence[2]—based on a standard of care that a reasonably prudent person would exercise—or to gross negligence, which involves gross deviation from the standard of care. The language at issue states, "[a]ny person who negligently violates section 1311 . . . 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 both." 33 U.S.C. § 1319(c)(1)(A). The rules of statutory construction strongly indicate that the proper standard for a violation of section 1319(c)(1)(A) is ordinary negligence. This standard does not violate due process because the CWA is a public welfare statute. Therefore the Fourteenth Circuit properly upheld Millstone's conviction based on an ordinary negligence standard.

A. Ordinary negligence is the only proper interpretation of "negligently" in 33 U.S.C. § 1319(c)(1)(A) based on the statute's plain language and congressional intent.

The CWA does not explicitly define the word "negligence" as used in section 1319(c)(1)(A). However, "applying straightforward principles of statutory interpretation" results in a determination that ordinary negligence is the proper standard under the statute. *United States v. Ortiz*, 427 F.3d 1278, 1282 (10th Cir. 2005). Both the plain language of the CWA and the legislative history behind its enactment support this reading.

[2] Ordinary negligence is also referred to as simple negligence.

1. The plain language of 33 U.S.C. § 1319(c)(1)(A) imputes a standard of ordinary negligence.

When interpreting statutory terms in the absence of explicit definitions, courts should first assume that the legislative purpose behind the statute is expressed through the plain meaning of the words used. *Russello*, 464 U.S. at 21. When words have a common law meaning, it is assumed that Congress intended courts to apply that common law understanding to their interpretation. *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 69 (2007). Therefore, when determining the meaning of the word "negligently" in section 1319(c)(1)(A), it should be assumed that the purpose of the statute is expressed through the common law, plain meaning of the word.

Using this assumption, several courts have determined that the meaning of "negligent" within section 1319(c)(1)(A) of the CWA is ordinary negligence. The Ninth Circuit in *Hanousek* looked to *Black's Law Dictionary* to determine that the plain meaning of "'negligently' is a failure to use such care as a reasonably prudent and careful person would use under similar circumstances." *Hanousek*, 176 F.3d at 1120. The court also looked at the context of "negligently" within section 1319(c)(1)(A) and concluded from the plain language, "Congress intended that a person who acts with ordinary negligence in violation of [the CWA] may be subject to criminal penalties." *Id.* at 1121. The Tenth Circuit in *Ortiz* agreed that the plain language of section 1319(c)(1)(A) criminalizes ordinary negligence. *Ortiz*, 427 F.3d at 1279.

Therefore, using the plain meaning of the word "negligently," the government only had to prove that Millstone failed to exercise reasonable care. All the evidence indicates that Millstone did, in fact, fail to exercise the degree of care that was reasonable under the circumstances. First, he did not exercise reasonable care in hiring and training new guards. (R. at 6 n. 2.) Millstone previously had only hired experienced guards, but in his haste to prepare Sekuritek to take the Bigle Chemical contract, he began hiring inexperienced guards as well. (R. at 6 n. 2.) Further, he did not properly train the guards he hired. (R. at 6.) He had previously given guards an extensive, three-week training course. (R. at 6 n. 2.) However, with the newly hired guards, he substituted a shortened training seminar, which did not even cover all the procedures required by the Sekuritek manual, such as how a guard should handle an emergency situation. (R. at 8-9.) Second, Millstone failed to inspect the newly purchased Sekuritek SUVs to ensure that they were functioning properly. (R. at 10.) Finally, Millstone built a "security wall" around the plant just days before the accident. (R. at 7.) Due to the dangerous nature of the chemicals used at the plant, constructing a wall is neither reasonable nor prudent. In the event of any accident or security breach, such a wall could impede first responders from accessing the plant, in violation of Sekuritek's own policies. (R. at 8 n. 7.)

All these facts combined show that Millstone was negligent in his preparation and handling of the security at the Windy River plant. A reasonably prudent person in the same situation, aware of the danger posed by the chemicals at the

plant, would have exercised a higher degree of care to ensure that the security staff did not cause any sort of accident at the plant, and that Sekuritek did not impede any potential emergency response. Therefore, the Fourteenth Circuit properly affirmed Millstone's conviction according to the plain meaning of the word "negligently" in the statute.

2. An ordinary negligence standard better supports the congressional intent and the overarching objective of the CWA than a gross negligence standard.

Congressional intent in enacting the CWA indicates that Congress intended to criminalize ordinary negligence. During debates over the passage of the CWA, congressional representatives voiced their intention that section 1319(c)(1)(A) use an ordinary negligence standard. While considering a proposal to amend the CWA's penalty provisions, Representative Harsha, opposing the amendment, stated, "I would like to call to the attention of my colleagues the fact that in this legislation we already can charge a man for simple negligence, we can charge him with a criminal violation under this bill for simple negligence." 118 CONG. REC. 10644 (1972). This shows that Representative Harsha believed that the CWA, specifically section 1319(c)(1)(A), allowed criminal sanctions for simple negligence. That standard, not a higher one, should be applied to section 1319(c)(1)(A).

Subsequent actions by Congress regarding the CWA also indicate that it intended to criminalize ordinary negligence. In 1990, Congress amended the CWA to add the phrase "gross negligence" to section 1321(b)(7)(D). Oil Pollution Control Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (1990). In doing so, Congress

explicitly prescribed a heightened level of negligence to that section of the CWA. *See* 33 U.S.C. § 1321(b)(7)(D). A well-established cannon of statutory interpretation states, "'where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello*, 464 U.S. at 23, quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972). Because Congress did not specifically require a higher negligence standard in section 1319(c)(1)(A), as it did in section 1321(b)(7)(D), it is presumed that section 1319(c)(1)(A) only requires a showing of ordinary negligence. If Congress had also intended section 1319(c)(1)(A) to require a heightened level of negligence, it would have used the "gross negligence" language in that portion of the statute as well.

Congress added the phrase "gross negligence" in section 1321(b)(7)(D) after the initial enactment of the CWA, providing further evidence of congressional intent. When drafting statutes, "Congress is presumed to have known of its former legislation and to have passed new laws in view of the provisions of the legislation already enacted." *Hanousek*, 176 F.3d at 1121. Consequently, the courts should presume that Congress knew section 1319(c)(1)(A) prohibited ordinary negligence when it passed section 1321(b)(7)(D). The presence of the phrase "gross negligence" in section 1321(b)(7)(D), combined with the other elements of Congress' intent, strongly indicates that Congress meant to proscribe ordinary negligence, not any higher standard in section 1319(c)(1)(A).

Furthermore, a standard of ordinary negligence better supports the overarching goals of the CWA than a higher standard of gross negligence. Section 1251(a) expresses the congressional objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," to be accomplished in part by prohibiting "the discharge of toxic pollutants in toxic amounts." 33 U.S.C. § 1251(a). To ensure the effective implementation of this objective, individuals who may cause such harmful discharges must be subject to a more stringent standard of conduct than ordinary individuals. In 1989, Representative Gejdenson voiced his support for holding shippers of oil liable for spills under an ordinary, as opposed to gross, standard of negligence: "We ought to . . . send[] a message across the globe that what we demand is the highest standard . . . that guarantees the least possibility of spoiling our natural waterways and bays . . . ." Oil Pollution Prevention, Response, Liability, And Compensation Act Of 1989, 135 CONG. REC. H8157-03, H8159, 1989 WL 188506, 6. Representative Gejdenson stated eloquently, "[w]e are not talking about somebody carrying rose petals across a clover field. We are talking about ships that are carrying hazardous chemicals . . . that can destroy some of the basic waterways they travel on." *Id.* at 5. The CWA, much like this 1989 legislation, demands a strict standard of care to guarantee the utmost protection of United States waters. A gross negligence standard in section 1319(c)(1)(A) fails to advance this goal, therefore ordinary negligence is the only appropriate standard.

B. An ordinary negligence standard does not violate due process because the CWA is a public welfare statute.

Millstone argues that a standard of ordinary negligence for a criminal conviction violates due process. Traditionally, criminal statutes require an awareness of wrongdoing. Ordinary negligence usually does not meet this standard of criminal liability. However, public welfare statutes dispense with the conventional requirement of awareness. *United States v. Dotterweich*, 320 U.S. 277, 281 (1943). A public welfare statute places a higher burden of care on someone "standing in responsible relation to a public danger." *Id.* Due to the larger good at stake, such statutes can provide criminal penalties for ordinary negligence without violating due process. *Hanousek*, 176 F.3d at 1122.

Public welfare offenses are those which regulate "dangerous or deleterious devices or products or obnoxious waste materials." *Weitzenhoff*, 33 F.3d at 1286. Criminal charges resulting from a public welfare offense are intended to protect the public at large from the potentially dangerous consequences the statute is designed to guard against. *Id.* Public welfare statutes are typically those which regulate actions a reasonable person should know are "subject to stringent public regulation and may seriously threaten the community's health or safety." *Liparota v. United States*, 471 U.S. 419, 433 (1985).

Under public welfare statutes, as long as a defendant knows he is dealing with a dangerous device or substance, he need not know the specific facts that make his conduct illegal; therefore, no proof of *mens rea* is needed to establish an offense. *Id.* at 606. Most circuits that have examined the issue have determined that the

CWA qualifies as a public welfare statute.[3] *See e.g., United States v. Kelley Technical Coatings, Inc.*, 157 F.3d 432 (6th Cir. 1998); *Hanousek*, 176 F.3d 1116.

1. The CWA is a public welfare statute because it punishes violators who stand in responsible relation to substances that pose a great danger to the public.

No bright line rule exists to determine which crimes are public welfare offenses and which are not. *Morissette v. United States*, 342 U.S. 246, 260 (1952). However, this Court has examined the applicability of the public welfare doctrine in several cases, and provided some guidelines. *See, e.g. United States v. Balint*, 258 U.S. 250 (1922); *Dotterweich*, 320 U.S. 277; *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558 (1971); *United States v. Freed*, 401 U.S. 601 (1971). The CWA fits within these guidelines and should therefore be considered a public welfare statute.

This Court provided one of the initial applications of the public welfare doctrine in *Balint*. *Balint*, 258 U.S. 250 (1922). In that case, the Court determined that under the Narcotic Act, a defendant could be charged with unlawfully selling regulated drugs without a proper form issued by the Commissioner of Internal Revenue. *Id.* at 250. The defendant claimed he did not know the drugs were sold unlawfully. *Id.* However, the Court determined that the defendant need not be aware that the statute prohibited the drugs he was selling. *Id.* at 254. The Court reasoned that the purpose of the statute was to minimize the spread of addiction, and therefore, "Congress weighed the possible injustice of subjecting an innocent

[3] The Fifth Circuit, addressing a "knowing" violation under section 1319(c)(2), did not acknowledge the CWA as a public welfare statute. *Ahmad*, 101 F.3d at 391.

seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided." *Id.* at 254. The Court further determined that public welfare statutes apply to ordinary negligent conduct because, "where one deals with others and his mere negligence may be dangerous to them . . . the policy of the law may, in order to stimulate proper care, require punishment of the negligent person though he be ignorant of the noxious character of what he sells." *Id.* at 252-53.

The reasoning of the Court in *Balint* is applicable to the CWA. The purpose of the CWA is to minimize the pollution of United States waters. 33 U.S.C. § 1251(a). In order to protect the public from the dangerous discharge of "toxic pollutants in toxic amounts," Congress decided to subject potentially innocent people to criminal penalties for violating the statute. *Id.* Under the reasoning in *Balint*, the CWA can punish ordinary negligence in order to stimulate proper care. *Balint*, 258 U.S. at 253. In this case, Millstone knew or should have known that the Windy River plant housed dangerous chemicals. Bigle's CEO spoke publicly about the need for good security to prevent a spill or security breach. (R. at 5.) These statements should have alerted Millstone to the dangerous nature of the chemicals at the plant. Additionally, Millstone's role as supervisor of security placed him in responsible relation to these chemicals.

The Court again examined public welfare offenses in *Dotterweich* and upheld the conviction of a defendant for shipping adulterated drugs. *Dotterweich*, 320 U.S. at 277. The Court determined that because the defendant knew he was shipping

drugs, which inherently pose a risk of harm to the public, he did not need specific knowledge of the regulations. *Id.* at 281. Using similar reasoning to that in *Balint*, the Court stated the burden should fall on those in the best position to protect consumers, rather than the "innocent public who are wholly helpless." *Id.* at 285.

Additionally, in *International Minerals*, the Court presumed that anyone in responsible relation to "dangerous or deleterious devices or products or obnoxious waste materials," is aware of the high probability of regulation of such substances. 402 U.S. at 565. Using this logic, the Court determined that the defendant did not need to know of the specific regulations on shipping hazardous material to violate the statute. *Id.* at 560. This same reasoning was again applied to the possession of hand grenades in *Freed*, where the Court determined that the regulation on hand grenades was in the interest of public safety. 401 U.S. at 608.

Similarly, the CWA regulates substances posing danger to the public if discharged into United States waters in toxic amounts. People who work with and around these substances are in the best position to protect the public from danger and therefore are held to a higher standard of care, regardless of whether they know of the regulations. Consequently, Millstone should be held responsible for the public harm caused by the accident at the Windy River plant because he was in the best position to prevent it. He knew or should have known of the danger the chemicals posed and the high probability of their regulation. Therefore, he can be held responsible under an ordinary negligence standard of care.

Conversely, statutes held not to regulate public welfare offenses further define the boundaries of the public welfare doctrine. In *Liparota*, the Court overturned a defendant's conviction for unlawfully acquiring and possessing food stamps. *Liparota*, 471 U.S. at 433. The Court found that punishing people in violation of the statute, without requiring the government prove knowledge, would "criminalize a broad range of apparently innocent conduct." *Id.* at 426. It distinguished the statute at issue from public welfare statutes, which provide that "a reasonable person should know [the activity] is subject to stringent public regulation and may seriously threaten the community's health or safety." *Id.* at 433. The Court added that food stamps cannot reasonably be compared with possession of hand grenades or the sale of adulterated drugs. *Id.*; *see Freed*, 401 U.S. 601; *Dotterweich*, 320 U.S. 277.

The CWA more closely conforms to the statutes at issue in *Balint*, *Freed*, and *Dotterweich*, which regulate potential public harms, than the statute at issue in *Liparota*. Violations of the CWA can and do impact the health and safety of many innocent civilians, similar to the unauthorized sale of drugs in both *Balint* and *Dotterweich*, and the possession of hand grenades in *Freed*. On the other hand, in *Liparota*, the illegal possession of food stamps did not have the same potential to cause significant harm to the general public, so the risk of criminalizing innocent conduct was greater. The CWA, however, poses little risk of criminalizing innocent conduct. Because of the dangerous nature of the regulated substances, the greater

potential for harm to the public and the low risk of criminalizing innocent conduct, the CWA is a public welfare statute.

2. The public welfare doctrine applies to the CWA despite the doctrine's limited application.

Courts narrowly apply the public welfare doctrine to regulations that protect the public from materials posing great risk of harm in order to avoid criminalizing "a broad range of apparently innocent conduct." *Staples*, 511 U.S. at 601. In *Staples*, the Court looked at the applicability of the public welfare doctrine to the possession of firearms. 511 U.S. at 605. It held that the mere ownership of guns does not alert the owner to heightened regulations due to the long tradition of gun ownership in the United States. *Id.* at 610. Further, the statute at issue not only required a defendant to know he was dealing with a gun, but also to know the specific characteristics of that gun which would make it a statutory "firearm." *Id.* at 609. The Court determined that eliminating this knowledge requirement would punish a broad range of innocent gun owners, therefore the statute does not fit within the narrow principles of the public welfare doctrine. *Id.* at 610.

In his dissent from the denial of certiorari in *Hanousek v. United States*, Justice Thomas also expressed concern about designating the CWA as a public welfare statute for fear it would subject an individual engaged in "a broad range of industrial and commercial activities" to criminal sanctions. *Hanousek v. United States*, 528 U.S. 1102, 1102 (2000) (Thomas, J., dissenting from denial of certiorari) [hereinafter *Hanousek*, cert. denied]. He was "hesitant to expose countless numbers of construction workers and contractors to heightened criminal liability for using

ordinary devices to engage in normal industrial operations." *Id.* Contrary to Justice Thomas' concerns, however, the CWA does not hold all "construction workers and contractors" engaged in "normal industrial operations" to a heightened criminal standard. It holds only those construction workers and contractors in responsible relation to dangerous substances to a heightened standard of care. For example, in *Hanousek*, the defendant contractor knew the construction work he managed was being conducted in an area near an oil pipeline, which put him in responsible relation to a potentially dangerous substance, yet he negligently failed to take standard precautions to protect the pipeline. *Hanousek*, 176 F.3d at 1119. Similarly, Millstone knew his guards patrolled a dangerous chemical plant and were therefore not engaged in "normal industrial operations." As the person responsible for these activities, his conduct is appropriately regulated by a standard of ordinary negligence.

Courts further limit the public welfare doctrine to only those statutes that provide for light penalties, "such as fines or short jail sentences." *Staples*, 511 U.S. at 616. The statute at issue in *Staples*, for example, allowed for a maximum ten-year prison term. *Id.* at 605. The Court held that the statute was not a public welfare offense, in part because of the "harsh penalty" it imposed. *Id.* at 616.

In his *Hanousek* dissent, Justice Thomas cited to the "seriousness" of the penalties under section 1319(c)(1)(A) as a basis for his concern in applying the public welfare doctrine to the CWA. *Hanousek*, cert. denied, 528 U.S. at 1102. However, section 1319(c)(1)(A) provides only misdemeanor penalties for a first

violation. 33 U.S.C. § 1319(c)(1)(A). Violation of the statute is punishable by "a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both." 33 U.S.C. § 1319(c)(1)(A). Felonies are crimes punishable by *more than one year* in prison. 18 U.S.C. § 3559. The punishment under section 1319(c)(1)(A) does not rise to the level of a felony, and is therefore not comparable to the type of "harsh penalty" the Court was concerned with in *Staples*. Although the statute allows for more severe penalties for subsequent violations of the CWA, this should not factor into the determination of whether the CWA is a public welfare statute. 33 U.S.C. § 1319(c)(1)(A). Public welfare statutes eliminate the *mens rea* requirement of awareness that regulations exist. *Staples*, 511 U.S. at 606. However, even if the defendant had previously been unaware of the existence of regulations, he would be put on notice of these regulations after a first offense. That notice would establish the existence of the defendant's *mens rea* as to the regulations for any subsequent violation.

Consequently, subjecting Millstone to misdemeanor penalties for his ordinary negligent conduct while in responsible relation to a public danger comports with the standards of public welfare statutes and does not violate due process.

C. EPA discretion shields innocent conduct from criminal liability by prosecuting only those who act with high culpability and cause severe damage in violation of 33 U.S.C. § 1319(c)(1)(A).

Judge Newman dissented in the Fourteenth Circuit, fearing the majority's holding would "convict even a visitor to Bigle Chemical's plant who negligently forgot to tie his shoes, fell and tripped a switch that discharged chemicals into

surrounding waterways of a negligent violation of the CWA." (R. at 17-18.) However, Congress gave the Environmental Protection Agency ("EPA") discretion under the CWA to impose various sanctions through administrative, civil and criminal channels. 33 U.S.C. § 1319.

To help guide EPA employees in determining which violations of the CWA warrant criminal sanctions, the Director of the Office of Criminal Enforcement wrote a memorandum in 1994. Earl E. Devaney, Director, Office of Criminal Enforcement, Memorandum: The Exercise of Investigative Discretion, Jan. 12, 1994. The Memorandum first recognized that the congressional intent underlying the criminal sanctions was to "target the most significant and egregious violators." *Id.* at 1-2. The Director then laid out a two-part case selection process which examines the significance of the environmental harm and the culpability of the conduct. *Id.* at 3-4. By using these criteria, the EPA will only bring criminal prosecutions for serious violations with high levels of culpability, while using the other enforcement options available for the "less flagrant violations with lesser environmental consequences." *Id.* at 5.

Cases amounting to criminal charges for violations of the CWA illustrate the EPA's adherence to this policy—only bringing criminal charges when there is culpable conduct and significant harm. In *Hanousek*, for example, the defendant was responsible for supervising a road quarrying project alongside a high-pressure petroleum pipeline. *Hanousek*, 176 F.3d at 1119. His culpable conduct began when he failed to follow standard procedures to protect the pipeline during the project.

Id. However, his culpability did not end there. After the accident, which released between 1,000 and 5,000 gallons of heating oil into the Skagway River, Hanousek took very little remedial action. Brief for the United States as Appellee at 9, United States v. Hanousek, 176 F.3d 1116 (9th Cir. 1999) (No. 97-30185), 1998 WL 34078917. To avoid detection, he sent workers to clean up the spill at night and prohibited the use of radio communication. *Id.* at 10. Nonetheless, the Coast Guard discovered the spill, yet Hanousek continued to mislead investigators in an attempt to cover-up the full extent of the damage. *Id.* This conduct, coupled with the extent of the spill, led the EPA to pursue criminal penalties instead of utilizing a less severe enforcement option.

The facts of the present case are very similar. Millstone's negligent preparation of his staff and equipment resulted in the accident at the plant. (R. at 10.) However, Millstone's culpability does not end there. Instead of admitting his involvement and accepting the consequences of his actions, Millstone, like Hanousek, attempted to hide his culpability from investigators. He attempted to persuade Reynolds to "just shut up" and not talk to investigators so that the "feds" would not be able to "do anything" to him. (R. at 9.) This conduct, coupled with the extent of the harm—billions of dollars in damage and twenty-three lives lost—demonstrates that Millstone was properly charged with a criminal violation.

Applying the EPA's selection criteria, a visitor to the Windy River plant "who negligently forgot to tie his shoes" would likely not face criminal sanctions. (R. at 17.) Even if the visitor caused significant environmental harm, his conduct would

not meet the requisite standard of culpability. This same logic does not apply to Millstone. In this case, Millstone's negligence caused significant environmental harm and reached a high level of culpability when combined with his conduct following the New Tejas disaster. Thus, while a visitor to the plant would be protected from criminal sanctions, Millstone was properly prosecuted with criminal sanctions under an ordinary negligence standard from section 1319(c)(1)(A).

II. UNDER 18 U.S.C. § 1512(b)(3), AN INDIVIDUAL CAN "CORRUPTLY" PERSUADE A POTENTIAL WITNESS TO WITHHOLD INFORMATION BY ENCOURAGING THE WITNESS TO INVOKE THE FIFTH AMENDMENT WHEN THE PERSUASION IS MOTIVATED BY A PURPOSE OTHER THAN THE WITNESS' PERSONAL RIGHT TO REMAIN SILENT

The Fourteenth Circuit correctly held that Millstone is guilty under 18 U.S.C. § 1512(b)(3) for corruptly persuading Reynolds to withhold information from the government by encouraging him to exercise his Fifth Amendment privilege. The language at issue in 18 U.S.C. § 1512(b)(3) states:

> Whoever knowingly . . . corruptly persuades another person, or attempts to do so . . . with intent to . . . hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense . . . shall be fined under this title or imprisoned not more than 20 years, or both. 18 U.S.C. § 1512(b)(3).

The meaning of "corruptly" must first be established in order to determine if the "corruptly persuades" language in section 1512 prohibits an individual from persuading a potential witness to withhold information by encouraging him to invoke his Fifth Amendment right.

Prior to the enactment of section 1512, witness tampering was covered by 18 U.S.C. § 1503. *United States v. Farrell*, 125 F.3d 484, 492 (3d Cir. 1997) (Campbell, J., dissenting). The pertinent language of that statute stated,"[w]hoever . . . corruptly or by threats of force . . . 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." 18 U.S.C. § 1503 (Supp. V 1981). Section 1503 applied to all witness-tampering charges, as well as other attempts to obstruct justice. *Farrell*, 126 F.3d at 492 (Campbell, J., dissenting). However, in 1982, when Congress enacted section 1512, it removed all mention of witnesses from section 1503. *Id.* Congress amended section 1512 in 1988, adding the phrase "corruptly persuades," to ensure the statute criminalized non-coercive witness tampering. 18 U.S.C. § 1512.

Since the 1988 amendment, courts have disagreed over exactly what behaviors section 1512 prohibits. *See United States v. Thompson*, 76 F.3d 442 (2d Cir. 1996); *but see United States v. Farrell*, 126 F.3d 484 (3d Cir. 1997). The Third Circuit has limited its interpretation of "corruptly persuades" to bribing or blackmailing a witness to lie to investigators or testify falsely. *Farrell*, 126 F.3d 484. The Second and Eleventh Circuits, however, adopted a broader meaning of "corruptly," which looks to the perpetrator's own bad motivation or improper purpose. *See Thompson*, 76 F.3d 442; *United States v. Shotts*, 145 F.3d 1289 (11th Cir. 1998).

In *Arthur Andersen*, the Supreme Court attempted to resolve this split. That decision, however, does not provide clear guidance on how to interpret "corruptly." In that case, the Court specifically examined the element of "knowingly" in combination with the phrase "corruptly persuades." *Arthur Andersen v. United States*, 544 U.S. 696, 705-06 (2005). The Court looked at the meanings of "knowingly" and "corrupt" and found that "only persons conscious of wrongdoing" can "knowingly . . . corruptly persuade." *Id.* at 706. However, the holding did not specifically delineate the limits of section 1512, continuing the uncertainty among the circuits. Consequently, *Arthur Andersen* did not resolve the circuit split and needs clarification.

In light of the plain meaning of the statute, the legislative history of section 1512, and the reasoning from the lower courts, "corruptly" in section 1512 means "with an improper purpose." Further, this "improper purpose" standard includes an attempt to persuade a witness to invoke his Fifth Amendment right for the defendant's own benefit.

A. The term "corruptly" in 18 U.S.C. § 1512(b)(3) means "with an improper purpose" because the plain language of the statute, congressional intent and case law each support such an interpretation.

The plain language of the words "corruptly persuades" indicates that "improper purpose" is the correct standard. Further, the legislative history of section 1512(b)(3) demonstrates that Congress intended the statute to punish behavior motivated by an improper purpose. Finally, several circuits have examined the use of the word "corruptly" in both sections 1503 and 1512(b)(3) and

determined that it includes acts motivated by the improper or wrongful design to gain some pecuniary or other advantage.

1. A plain language interpretation of 18 U.S.C. § 1512(b)(3) reveals that "corruptly" means "with an improper purpose."

Numerous courts have determined the type of conduct section 1512(b)(3) prohibits by looking to the plain meaning of the word "corruptly." For example, in *Thompson*, the Second Circuit reviewed a jury instruction issued by the district court to determine if the lower court properly instructed the jury about the meaning of "corruptly" in section 1512(b)(3). *Thompson*, 76 F.3d at 453. The court upheld the instruction, which defined "corruptly" as "deliberately for the purpose of improperly influencing, or obstructing, or interfering with the administration of justice." *Id.* In this case, Millstone's actions were deliberate. After learning that Reynolds was planning on "coming clean" to investigators, Millstone deliberately told him not to, instead urging him to invoke his Fifth Amendment right. (R. at 9.) Millstone's actions had the purpose of improperly influencing Reynolds to withhold information with the goal of obstructing or interfering with the government's investigation of the accident.

Courts have also looked at the meaning of "corruptly" in section 1503. The Ninth Circuit in *United States v. Rasheed* looked to *Black's Law Dictionary*, which defines "corruptly" as "with a wrongful design to acquire some pecuniary or other advantage." *United States v. Rasheed*, 663 F.2d 843, 852 (9th Cir. 1981). Based on this definition and the use of the word "corruptly" in the statute, the court

determined that not all violations of section 1503 require the use of threats or intimidation. *Rasheed*, 663 F.2d at 852. The court added that, because of the presence of the word "corruptly" in the obstruction of justice statute, Congress intended it to prohibit all methods of corruptly obstructing justice. *Id.* Although the Ninth Circuit looked at the use of the word "corruptly" in section 1503, it reached its decision prior to the enactment of section 1512(b)(3). Therefore, at the time of the decision, section 1503 criminalized the same conduct that is now prosecuted under section 1512(b)(3). The court's interpretation of "corruptly" in the prior statute is thus relevant to the interpretation in section 1512(b)(3). Applying this definition to section 1512(b)(3) generally, and to this case specifically, Millstone's conduct fits within the definition of "corrupt." His wrongful design to acquire an advantage in the proceedings by withholding information from investigators prompted his attempt to persuade Reynolds.

The Ninth Circuit in *United States v. Khatami* looked beyond the definition of "corruptly," and also examined the "persuades" aspect of section 1512(b)(3). *United States v. Khatami*, 280 F.3d 907, 911 (9th Cir. 2002). The court found that persuades, in the context of section 1512(b)(3) means "'to coax,' 'to plead with,' or 'to induce one by argument, entreaty, or expostulation.'" *Id.* (citations omitted). Combining the word "persuades" with "corruptly," the Ninth Circuit determined that section 1512(b)(3) means "motivated by an inappropriate or improper purpose to convince another to engage in a course of behavior—such as impeding an ongoing criminal investigation." *Id.* Millstone's behavior fits into this definition because his

conversation with Reynolds was an attempt to "coax" or "plead with" him to invoke his Fifth Amendment privilege. Millstone's improper desire to impede the ongoing criminal investigation motivated his attempt to convince Reynolds to "shut up."

The Court in *Arthur Andersen* further examined the language of section 1512(b)(3) by looking at the "knowingly" aspect of the statute. The Court stated, "'knowledge' and 'knowingly' are normally associated with awareness, understanding and consciousness," adding, "'corrupt' and 'corruptly' are normally associated with wrongful, immoral, depraved, or evil." *Arthur Andersen*, 544 U.S. at 705. Combining these two definitions, the Court determined "only persons conscious of wrongdoing can be said to 'knowingly . . . corruptly persuade.'" *Id.* at 706. The Court supported this definition because it limits criminal responsibility to "persuaders conscious of their wrongdoing," and meets the level of culpability ordinarily required to find criminal liability. *Id.* Using this definition, the Court examined the jury instructions given by the lower court. *Id.* The instructions provided that "'even if [petitioner] honestly and sincerely believed that its conduct was lawful, you may find [petitioner] guilty.'" *Id.* (alteration in original). The Court held that these instructions failed to "convey the requisite consciousness of wrongdoing." *Id.* Additionally, the instructions allowed the jury to "convict if it found petitioner intended to 'subvert, undermine, or impede' governmental factfinding." *Id.* The Court also struck down this instruction because the word "impede" has a broader connotation than "subvert" or "undermine" and includes

non-corrupt actions. *Id.* at 707. Therefore, the instruction given did not convey the requisite level of culpable conduct. *Id.*

Synthesizing these various holdings provides a working definition of "knowingly . . . corruptly persuades" in the context of section 1512(b)(3): a knowing, corrupt persuader is someone who, with a consciousness of wrongdoing, is motivated by an improper purpose—such as a wrongful design to acquire some pecuniary or other advantage—to convince another to engage in a course of behavior, such as impeding an ongoing criminal investigation.

Under this definition, Millstone's actions violate the "corruptly persuades" language of section 1512(b)(3). He was conscious that his actions were wrong. His words "I'm not going to jail" demonstrate that he knew the investigation could lead to his arrest and prosecution. (R. at 9.) He possessed the wrongful design to acquire the advantage of keeping himself out of jail by limiting the information given to investigators. Millstone's statement, "[i]t's time to just shut up about everything. The feds can't do anything if we don't talk," clearly exemplifies his improper purpose. (R. at 9.) This conversation, in the context of pending criminal charges, fits squarely with the plain language meaning of a knowing, corrupt persuader.

2. Congress intends for the interpretation of "corruptly" in 18 U.S.C. § 1512(b)(3) to coincide with its meaning in 18 U.S.C. § 1503.

In 1982, Congress enacted the Victim and Witness Protection Act ("VWPA"), which includes 18 U.S.C. § 1512(b)(3), to expand the protections of the original

obstruction of justice statute, specifically 18 U.S.C. § 1503. *Farrell*, 126 F.3d at 492 (Campbell, J., dissenting). Congress expressed concerns that the protections provided in section 1503 did not adequately protect victims and witnesses from the various forms of witness tampering. 128 CONG. REC. 26,348 (1982). The Senate Judiciary Committee stated, "[t]he purpose [of section 1512] is to strengthen existing legal protections for victims and witnesses of federal crimes," adding, "[s]ection 1512 . . . lowers the threshold of seriousness for commission of an intimidation offense and increases the penalties." S. REP. NO. 97-532, at 9 (1982).

The Senate Report also cited testimony from the American Bar Association, which suggested that "sometimes innocent acts, such as telephoning a victim to say hello, coming to his home, or even driving a motorcycle by, may be extremely effective in preventing a victim or witness from testifying." *Id.* at 14. The Report added that the existing obstruction of justice statutes did not cover this type of behavior, saying, "the committee believes a clear and straightforward prohibition of such activity will increase prosecutions of such cases, where warranted." *Id.* at 15.

This desire by the Senate to prohibit even "innocent" acts, such as driving a motorcycle past someone's house, demonstrates that it intended to punish any kind of attempt to obstruct justice. Millstone's attempt to persuade Reynolds to withhold information from investigators is the type of conduct the Senate wished to prohibit in section 1512(b)(3). Millstone did much more than drive past Reynolds' house—he actively encouraged him not to speak with investigators. (R. at 9.)

In 1988, Congress amended section 1512(b)(3) to include the prohibition of "corruptly persuading" witnesses. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7029(c), 102 Stat. 4181, 4398 (codified as amended at 18 U.S.C. § 1512). Senator Biden, a leader in drafting the criminal provisions of the amendments, indicated Congress' intent to have the "corruptly persuades" language added to section 1512(b)(3), so that it would cover the same conduct that had previously been covered by section 1503. Senator Biden stated the amendment was intended "merely to include in section 1512(b)(3) the same protection of witnesses from non-coercive influence that was (and is) found in section 1503." 124 Cong. Rec. S17300 (daily ed. Oct. 21, 1988) (statement of Senator Biden). Biden added that, "'corrupt persuasion' . . . is a non-coercive attempt to induce a witness to become unavailable to testify, or to testify falsely . . . . Before enactment of the VWPA, such witness tampering was prohibited under 18 U.S.C. 1503, the general obstruction of justice statute which made it a crime to influence or intimidate any witness . . . ." *Id.* These comments demonstrate that Congress intended section 1512(b)(3) to proscribe the same conduct prohibited by section 1503.

Prior to the addition of "corruptly persuades" to section 1512(b)(3), courts had consistently interpreted "corruptly" in section 1503 to mean "motivated by an improper purpose." *Farrell*, 126 F.3d at 492 (Campbell, J., dissenting). Congress was aware of this interpretation at the time of the 1988 amendment to section 1512(b)(3). *Id.* As Judge Campbell found in his dissent in *Farrell*, "Senator Biden's statement, coupled with the fact that the witness-tampering provision of § 1512

evolved from § 1503, is strong evidence that Congress intended 'corruptly persuade' in § 1512 to be construed in much the same manner as courts have construed similar phraseology in §1503." *Id.*

Some courts declined to interpret "corruptly" the same way in section 1512(b)(3) as in section 1503, thereby limiting the protections provided by section 1512. *See e.g., Farrell*, 126 F.3d at 490. This interpretation ignores Congress' intent and the legislative history of the statute. Further, Congress made several findings about the need for protection of victims and witnesses when it enacted section 1512(b)(3). Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 2420, 96 Stat. 1248. Based on these findings, one of the purposes of the statute is "to enhance and protect the necessary role of crime victims and witnesses in the criminal justice process." *Id.* That Congress wanted to "enhance" the protections of witnesses means it intended section 1512 to provide greater protections than section 1503 previously provided, not fewer.

Therefore, the "corruptly" language in section 1512(b)(3) means "motivated by an improper purpose," as defined in section 1503. This meaning meets Congress' goals of providing witnesses greater protections against tampering and punishes individuals such as Millstone who improperly persuade potential witnesses to invoke their Fifth Amendment privilege.

3. Lower courts interpret "corruptly" in 18 U.S.C. § 1512(b)(3) as "with an improper purpose" because a more limited definition does not comport with the plain language of the statute or with Congress' intent to expand the protections granted to victims and witnesses.

Examining the language in section 1512(b)(3), both on its own and in relation to section 1503, the majority of circuits hold that, in light of the plain language and legislative intent of the statute, the word "corruptly" means "with an improper purpose."

a. Lower courts interpret the word "corruptly" in 18 U.S.C. § 1512(b)(3) to mean the same as the word "corruptly" in 18 U.S.C. § 1503 because both sections historically punish the same behavior.

The Second Circuit in *Thompson* was one of the first courts to examine the meaning of "corrupt" within section 1512(b)(3). *Thompson*, 76 F.3d 442. After reaffirming its interpretation of "corruptly" in section 1503 as "motivated by an improper purpose," the court added, "[w]e interpret § 1512(b)'s use of that term in the same way." *Id.* at 452. The Third Circuit, however, declined to adopt this interpretation. *Farrell*, 126 F.3d at 490. The court determined that section 1512's legislative history provided little assistance in interpreting "corruptly." *Id.* at 488. Further, the court found that the use of "corruptly" in section 1503 is not sufficiently similar to its use in section 1512(b)(3) to render the terms identical. *Id.* at 490. The Third Circuit failed to provide an exact definition of "corruptly," but discussed that both "attempting to bribe someone to withhold information and attempting to persuade someone to provide false information to federal

investigators" fall under the "corrupt persuasion" prohibited by section 1512(b)(3). *Id.* at 488. However, the court refused to extend culpability to non-coercive attempts to persuade a co-conspirator to plead the Fifth Amendment. *Id.*

After discussing the reasoning and holdings of both the Second and Third Circuits, the Eleventh Circuit stated, "we believe that the Second Circuit and the dissent in Farrell have the better reasoned position on this issue." *Shotts*, 145 F.3d at 1301. The court based this decision on the "well-established meaning" of "corruptly" in section 1503—that is, "motivated by an improper purpose." *Id.* The court declined to impose "a requirement for an additional level of culpability on section 1512(b)," as the Third Circuit had, "in the absence of any indication that Congress so intended and in the face of persuasive evidence that it did not." *Id.*

b. Interpreting the word "corruptly" in 18 U.S.C. § 1512(b)(3) to mean "with an improper purpose" is not redundant because its inclusion ensures that only the culpable conduct Congress intended to prohibit is punished.

Judge Newman's dissent in the Fourteenth Circuit expressed concern that the Second Circuit's interpretation of the statute produces a "surplusage." (R. at 19.) The dissent claims that an application of the Second Circuit's meaning to the statute would read, "whoever knowingly . . . with the improper purpose of hindering, delaying, or preventing communication to a law enforcement officer, persuades another person . . . with the intent to . . . hinder, delay, or prevent communication to a law enforcement officer . . ." (R. at 21.) However, this definition is inaccurate. As previously defined, "improper purpose" means "a wrongful design to acquire some pecuniary or other advantage." *Rasheed*, 663 F.2d at 852. Using

this definition, the statute reads, "whoever knowingly . . . with a wrongful design to acquire some pecuniary or other advantage, persuades another person . . . with the intent to…hinder, delay, or prevent communication to a law enforcement officer . . ." This reading of the statute does not produce surplusage. Therefore, using the "improper purpose" standard for "corruptly" is not redundant.

Nonetheless, this Court in *Arthur Andersen* indicated that the interpretation of "corruptly" in section 1512(b)(3) is not identical to the interpretation of "corruptly" in section 1503. *Arthur Andersen*, 544 U.S. at 705 n. 9. The Court noted that any analogy between the two statutes is "inexact" because section 1503 does not include the modifier "knowingly." *Id.* However, while the inclusion of the word "knowingly" is important in the statute, it is, as the Court stated, merely a "modifier." The use of the word "knowingly" does not change the meaning of the word "corruptly," it only ensures that the accused has a "'consciousness' that the conduct in question is wrongful." *Quattrone*, 441 F.3d at 176.

Further, not only does interpreting "corruptly" as "improper purpose" avoid surplusage, this interpretation is necessary to ensure that only the culpable conduct Congress intended to prohibit is punished. Without the presence of the word "corruptly," the statute prohibits all types of persuasion. The dissent brought up the example, used by the Court in *Arthur Andersen*, of a mother persuading her son to invoke the Fifth Amendment. (R. at 20.) Without the word "corruptly" in the statute, this conduct could be punished. However, Millstone's persuasion differs from that of a mother persuading her son, as Millstone had the improper purpose of

benefitting himself and not Reynolds. The mother's persuasion is for the son's benefit, not her own, and therefore her purpose is not improper. On the other hand, with the Third Circuit's meaning of "corruptly," culpable conduct goes unpunished. If, for example, the mother was a co-conspirator with her son, and used her influence to persuade him in order to protect herself, then her purpose would be improper, and she would be culpable. The Third Circuit's limitation of "corruptly," to include only bribery or blackmail, does not address this type of behavior, and as a result, still allows for some forms of witness tampering that Congress intended to be prohibited by section 1512(b)(3).

B. The phrase "with an improper purpose" includes non-coercive attempts to persuade a witness to invoke his Fifth Amendment right and is prohibited under 18 U.S.C. § 1512(b)(3) just as it was prohibited under 18 U.S.C. § 1503.

Prior to the enactment of section 1512, the circuit courts that considered the issue agreed that "corruptly" in section 1503 punishes individuals who, "with an improper purpose," attempt to persuade a witness to invoke his Fifth Amendment right. Some courts adopted the standard from section 1503 in section1512(b)(3) and that standard should be the universally applied.

1. Courts used 18 U.S.C. § 1503 to prohibit an individual from persuading a witness to invoke the Fifth Amendment when the persuasion was motivated by with a purpose other than the witness' personal right to remain silent.

Courts used the "corruptly" language in section 1503 to prosecute defendants who encouraged others do to acts which were not necessarily illegal in themselves, but which became an obstruction of justice when accomplished for a corrupt

purpose. *Cole v. United States*, 329 F.2d 437, 439-40 (9th Cir. 1964). The Ninth Circuit in *Cole* determined that the right to invoke the Fifth Amendment is a personal one, which cannot be transferred to benefit someone else. *Id.* at 440. Further, even if a witness violates no duty to claim the Fifth Amendment, the person who advises another to take it with a corrupt motive obstructs justice. *Id.* at 443. The Ninth Circuit limited its holding, saying that someone does not obstruct justice by offering "honest, uncorrupt, disinterested advice." *Id.* at 440.

The Second Circuit, prior to the enactment of section 1512, agreed that an individual violated section 1503 by corruptly influencing another to plead the Fifth Amendment. *United States v. Cioffi*, 493 F.2d 1111, 1118 (2d Cir. 1974). In *Cioffi*, the court upheld a jury instruction which stated "a verdict of guilty might be based on . . . corruptly endeavoring to influence the witness . . . to invoke the Fifth Amendment." *Id.* at 1118. The Middle District of Pennsylvania agreed with the courts in *Cole* and *Cioffi*, stating, "the Fifth Amendment privilege is a personal one and that if a co-conspirator can be shown by bribes, threats, or *corrupt motive* to have induced his ally to invoke the privilege, the co-conspirator may be prosecuted for his role." *United States v. Cortese*, 568 F. Supp. 119, 129 (M.D. Penn. 1983) (emphasis added). The court added, "the focus is on the intent or motive of the party charged as an inducer." *Id.* Similarly, in this case, Millstone's motive is dispositive. He intended to persuade Reynolds to exercise Reynolds' personal right for Millstone's own benefit. Millstone attempted to exploit Reynolds' Fifth

Amendment right in order to obstruct the government investigation of the accident for his own personal gain.

Given that section 1512 was enacted to prohibit the same behavior that was previously prosecuted under section 1503, those who attempt to corruptly persuade others to invoke the Fifth Amendment should be punished under section 1512(b)(3). It is illogical that Congress, in enacting a similar statute intended to expand witness protections, would eliminate some of the protections available under the original statute. Nothing changed in the meaning of the word "corruptly" to justify punishing certain "corrupt" behavior under one statute, while refusing to punish the same behavior under the new, more "expansive" statute.

2. 18 U.S.C. § 1512(b)(3), like 18 U.S.C. § 1503, can be used to prevent individuals with an improper purpose from persuading a witness to invoke his Fifth Amendment protection.

Several courts have extended section 1503's prohibition on influencing another to invoke his Fifth Amendment right to section 1512(b)(3). For example, in *United States v. Gotti*, the Second Circuit applied its earlier section 1503 decisions to section 1512(b)(3), stating, "the Obstruction of Justice Act can be violated by corruptly influencing a witness to invoke the Fifth Amendment privilege." *United States v. Gotti*, 459 F.3d 296, 343 (2d Cir. 2006). The court found the defendant guilty of witness tampering for "suggesting" that the witness plead the Fifth Amendment to ensure the defendant was not implicated. *Id.*

The Fifth Circuit endorsed a similar reading of "corruptly" in section 1512(b)(3) when looking at the marital privilege. *See United States v. Pofahl*, 990

F.2d 1456 (5th Cir. 1993). The court upheld a defendant's sentence enhancement based on an obstruction of justice charge under section 1512(b)(3). *Id.* at 1482. The defendant in *Pofahl* wrote a letter to her husband, a co-conspirator, urging him to invoke the marital privilege and stop providing incriminating evidence about her to the authorities. *Id.* at 1481. The court concluded section 1512(b)(3) prohibited this behavior. *Id.* at 1482. The marital privilege is similar to the Fifth Amendment protection. It is a personal right that the witness may invoke for his own benefit. A co-conspirator may not exploit that right for his own benefit.

The Third Circuit in *Farrell*, however, held that section 1512(b)(3) "does not involve a noncoercive attempt to persuade a coconspirator who enjoys a Fifth Amendment right not to disclose self-incriminating information about the conspiracy to refrain, in accordance with that right, from volunteering information to investigators." *Farrell*, 126 F.3d at 488. In a strong dissent, Judge Campbell, stated a witness can choose on his own to invoke the Fifth Amendment to protect himself, but added that, "nothing in this principle implies that [the defendant] is constitutionally entitled to try to persuade [the witness] to take the Fifth Amendment in order to protect [the defendant] himself." *Farrell*, 126 F.3d at 493 (Campbell, J., dissenting). Judge Campbell cited favorably to *Cole*, *Cortese*, and *Cioffi*, agreeing that a person is guilty of violating section 1512(b)(3) by corruptly persuading another to invoke the Fifth Amendment. *Id.* at 494. He added, "such self-interested behavior constitutes corrupt persuasion because it is 'motivated by

an improper purpose,' i.e. a purpose different from [the witness]'s personal constitutional right to remain silent." *Id.*

These cases demonstrate that Millstone's conduct is prohibited by section 1512(b)(3). Millstone advised Reynolds to invoke his Fifth Amendment right, not out of disinterested advice, but rather due to a corrupt motive. Millstone knew that investigators were looking at him and Reynolds and that criminal charges would likely be brought against them. (R. at 9.) Further, he stated "[t]he feds can't do anything to us if we don't talk." (R. at 9.) This language demonstrates Millstone knew about the federal investigation and believed Reynolds' cooperation with the investigators would likely lead to conviction. He thus attempted to persuade Reynolds against talking to the authorities for his own benefit. (R. at 9.)

The statutory interpretation, congressional intent, and long precedent of cases demonstrate that Millstone's conduct fits the "corruptly persuades" standard of section 1512(b)(3). Millstone's attempt to encourage Reynolds to exercise Reynolds' personal right to plead the Fifth Amendment was not for Reynolds' own benefit. Rather, Millstone had the improper purpose of wanting to secure an advantage for himself by exploiting Reynolds' right. Therefore, he was correctly convicted under 18 U.S.C. § 1512(b)(3).

CONCLUSION

For all of the reasons stated above, this Court should AFFIRM the holding of the United States Court of Appeals for the Fourteenth Circuit in all respects.

Respectfully submitted,

Attorneys for the Respondent

APPENDIX

18 U.S.C. § 1503

(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(b) The punishment for an offense under this section is--

(1) in the case of a killing, the punishment provided in sections 1111 and 1112;

(2) in the case of an attempted killing, or a case in which the offense was committed against a petit juror and in which a class A or B felony was charged, imprisonment for not more than 20 years, a fine under this title, or both; and

(3) in any other case, imprisonment for not more than 10 years, a fine under this title, or both.

18 U.S.C. § 1512(b)

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

(1) influence, delay, or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to--

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation supervised release, parole, or release pending judicial proceedings;

shall be fined under this title or imprisoned not more than 20 years, or both.

33 U.S.C. § 1319(c)(1)

(c) Criminal penalties
(1) Negligent violations

Any person who--

(A) negligently violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.