Case 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 THE RESPONDENT

Team 3
Counsel for Respondent

QUESTIONS PRESENTED

I. Under the Clean Water Act, does an actor behave "negligently" when he fails to exercise the standard of care that a reasonably prudent person would have exercised in the same situation, or does the statute require a higher standard akin to gross negligence, despite the fact that, as a public welfare statute, the Clean Water Act is intended to broaden criminal liability for the discharge of pollutants into our nation's waterways?

II. Under the witness tampering statute, does an actor "corruptly" persuade a potential witness to withhold important information from law enforcement officials by encouraging that witness to invoke their Fifth Amendment right when that actor is motivated by the improper purpose of avoiding his own criminal liability instead of benefitting the right-holder?

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OPINIONS BELOW

The opinion of the United States District Court for the District of New Tejas is unreported. The opinion of the United States Court of Appeals for the Fourteenth Circuit appears in the record at pages 3—21.

STATEMENT OF JURISDICTION

Petitioner's timely filed request for certiorari was granted in an order issued on October 17, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (2006).

STATUTORY PROVISIONS

The relevant statutory provisions in this case are 33 U.S.C. § 1319(c)(1)(A) and 18 U.S.C. § 1512(b)(3) reproduced herein as Appendix A.

STATEMENT OF THE CASE

I. Statement of Facts

Petitioner Samuel Millstone appeals his convictions for criminal violation of the Clean Water Act ("CWA") and for witness tampering. This Court is being asked to interpret the term "negligently" in the CWA, 33 U.S.C. § 1319(c)(1)(A), and the phrase "corruptly persuades" in the federal witness-tampering statute, 18 U.S.C. § 1512(b)(3).

On January 27, 2007, the city of Polis, New Tejas, suffered a devastating explosion at the Bigle Chemical Company plant located near the Windy River. (R. at 7.) Bigle Chemical had built the 270-acre plant to manufacture chemicals and recycle waste material. (R. at 5.) The explosion occurred when an SUV, owned and operated by Sekuritek, a local company providing on-site security, collided with a chemical storage tank. (R. at 8.) The massive explosion ignited other storage units, which also burst into flames. (R. at 7.) A security wall—built by Sekuritek just days before—prevented firefighters from reaching the blaze and allowed the fire to burn unobstructed for three days. (R. at 7.) During these three days, chemicals from the plant continuously spilled into the nearby Windy River. (R. at 7.)

The effects of this explosion were catastrophic. Twenty-three people lost their lives. (R. at 7.) Numerous homes, three national historical buildings, and 50,000 acres of farmland were consumed, totaling more than $450 million in damages. (R. at 7.) The corrosive properties of the concentrated mixture of chemicals (referred to as the "Soup" by national media) ate through the hulls of

commercial shipping barges and local fishing boats. (R. at 8.) It killed all fish and wiped out agriculture in all land five miles downriver from the Windy River facility. (R. at 8.)

The chemical spill crippled the economy of New Tejas. (R. at 7.) The state lost $4.5 million in annual tourism revenue. (R. at 8.) The expense of cleaning up the spill is estimated to cost over $300 million and most economists put the total damage to state and local economies at nearly $1.25 billion. (R. at 8.)

When law enforcement officials learned that the SUV that caused the explosion was owned and operated by Sekuritek, they focused their investigation on the security company and its two executives, Samuel Millstone and Reese Reynolds. (R. at 8.) Millstone, who operated as president and CEO, managed the hiring and training of security personnel and supervised operations at clients' facilities. (R. at 4.) Reynolds held the position of vice president and was responsible for all sales, marketing, and equipment purchases. (R. at 4.)

When Bigle Chemical Company moved its headquarters to Polis in 2006, it was aware of the need for security. (R. at 5.) The *Wall Street Journal* quoted Bigle Chemical's CEO Drayton Wesley as stating, "I will not risk the well being of this company by allowing an intruder or saboteur to cause a spill." (R. at 5.) Bigle Chemical Company contacted Millstone on November 5, 2006, to hire Sekuritek to handle security at the Windy River facility. (R. at 5.) Millstone was informed that the security needed to be online by December, a mere twenty-five days later. (R. at 5.)

The contract with Bigle Chemical Company was ten times greater than the security company's previous largest contract and Reynolds expressed concern to Millstone about the difficulty of preparing for such a large job in such a short period of time. (R. at 5.) Despite these objections, Millstone convinced Reynolds that the contract would take Sekuritek "to the big-time." (R. at. 6.) They scrambled to acquire the necessary equipment and personnel. (R. at 6.) Reynolds was only able to perform a cursory review of SUV vendors, purchasing vehicles from a relatively unproven company. (R. at 6.) Millstone had to hire thirty-five new employees and was forced to hire some without any experience—a practice the company had previously avoided. (R. at 6.) In addition, Millstone had to shorten the formal training course from three weeks to just one week, though new workers were given a few weeks of on the job training and "observation." (R. at 6.) Millstone placed security guards at the Windy River facility just after Thanksgiving, approximately one week after signing the formal contract with Bigle Chemical Company. (R. at 6.)

Investigators learned that one of Sekuritek's newest guards drove the SUV that caused the explosion at the Windy River facility. (R. at 7). When the guard saw what he believed was an intruder—but was in fact a Bigle Chemical safety inspector—he floored the pedal in the SUV and drove rapidly toward the storage tank. (R. at 7.) When the accelerator pedal stuck, the guard leaped from the vehicle, which collided with the storage tank just moments later. (R. at 7.)

Investigators discovered that the guard's actions were a violation of the employee handbook for security staff, which included instructions for handling

emergency situations during vehicle patrol. (R. at 8.) The handbook required all Sekuritek personnel to "leave their vehicle in a stopped and secured position . . . and proceed on foot . . . " when within 100 yards of any suspected security breach. (R. at 8.) Testimony in the district court established that Millstone did not introduce this policy to new employees during his shortened training seminar, but that he merely referred new employees to the handbook. (R. at 9.) Investigation further revealed that the company from which Reynolds purchased the SUVs had a reputation for shoddy workmanship and had experienced problems with the accelerators sticking. (R. at 9.) All government and civilian investigators concluded that Millstone failed to adequately train and supervise his employees. (R. at 9.)

As the media called for criminal charges against the executives of Sekuritek, Millstone scheduled a meeting with Reynolds. (R. at 9.) When Reynolds said that he leaned toward telling the government agents everything, Millstone got angry and scolded:

> 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 United States brought criminal charges against Millstone for his conduct involving the explosion at the Windy River facility.

II. Procedural History

Based on the theory that Millstone had negligently hired, trained, and supervised security personnel, and had negligently failed to adequately inspect the SUVs prior to purchase and use, Millstone was criminally charged with negligent violation of the Clean Water Act, 33 U.S.C. § 1319(c)(1)(A). (R. at 10.) Millstone was also charged with witness tampering under 18 U.S.C. § 1512(b)(3). (R. at 10.) In exchange for his testimony, Reynolds was granted immunity. (R. at 10.)

During trial, the district court judge provided the following jury instruction:

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

(R. at 10.) A jury found Millstone guilty of both charges. (R. at 10.) Millstone motioned for a new trial on the basis that it was an error to instruct the jury that "negligence" under the CWA is identical to civil negligence. (R. at 3.) He also motioned for an acquittal of the witness-tampering conviction on the basis that one cannot be found guilty of persuading a person to withhold information from the government by encouraging that person to exercise a right to do so. (R. at 10.)

The district court denied both of these motions and Millstone appealed to the United States Court of Appeals for the Fourteenth Circuit. (R. at 3.) The circuit court affirmed the decisions of the district court. (R. at 3.)

SUMMARY OF THE ARGUMENT

I. The Clean Water Act

The Fourteenth Circuit's ruling should be affirmed because Millstone acted negligently when he caused the discharge of pollutants into the Windy River. Although the CWA does not expressly define the word "negligence," the rules of statutory construction and an examination of the legislative history demonstrate that Congress intended the word to mean ordinary negligence rather than criminal or gross negligence. Further, the CWA, as a public welfare statute, may criminalize ordinary negligence without violating due process.

The only two prior federal circuit courts to directly address this issue held that the criminal penalty provisions of the CWA require only ordinary negligence. This interpretation of "negligence" best comports with the plain meaning of the term and its ordinary usage in case law. Further, Congress used the term "gross negligence" in § 1321 of the CWA, indicating that if it wished to provide a heightened standard for criminal penalties against the discharge of pollutants, it would have done so expressly.

The legislative intent of Congress, as expressed by the legislative history of the CWA, demonstrates a desire to heighten enforcement efforts against those who pollute the waters of the United States. Prior to the CWA, federal regulation of water pollution had been ineffective. Congress passed the CWA for the purpose of strengthening enforcement and preventing our nation's waters from becoming "little more than sewers of the seas." 117 Cong. Rec. 38,797 (1971). When the CWA was amended in 1987, Congress again expressed intent to strengthen enforcement by

reducing the mens rea element of prohibited acts. The environmental damage that resulted from Millstone's negligence is exactly the type of harm Congress intended to prevent with the CWA.

Moreover, the CWA qualifies as a public welfare statute. As a public welfare statute, the CWA need not require the heightened level of mens rea associated with other criminal offenses. Thus, public welfare statutes may criminalize ordinary negligence. The CWA qualifies as a public welfare statute because it is a statute designed to protect the public as a whole from the dire consequences of water pollution. Consistent with public welfare statutes, the negligent violation of the CWA results in a relatively small punishment of a daily fine, imprisonment of up to one year, or both. Courts have held that an imprisonment term of one or two years is not too large to disqualify a statute as public welfare legislation. Additionally, the CWA does not violate due process because there is a presumption that dangerous waste will be regulated and that any actor involved with such waste will be on sufficient notice.

II. The Witness-Tampering Statute

This Court should affirm the decision of the Fourteenth Circuit because Millstone attempted to corruptly persuade Reynolds from cooperating with the law enforcement investigation into the Windy River facility explosion. The Fourteenth Circuit correctly held that the word "corruptly" in the federal witness-tampering statute means "motivated by an improper purpose." This definition best comports

with general rules of statutory construction, best reflects congressional intent, and makes for sound public policy.

An informed understanding of the role of "motivated by an improper purpose" in the federal witness-tampering statute demonstrates that advising one to use their Fifth Amendment right with the intent to hinder, is improper if it is motivated for the benefit of anyone other than the right-holder. This understanding of the meaning of "corruptly" best fits within this Court's decision in *Arthur Anderson*. Those courts that have incorrectly held that "corruptly" requires something more than an improper purpose have failed to recognize that such persuasion must be done with the motivation of benefiting someone other than the right-holder.

The interpretation of "corruptly" as "motivated by an improper purpose" best reflects the aim of Congress, which intended to prohibit the influencing of potential witnesses. Additionally, it is sound public policy to interpret statutes in a clear and easily understandable manner. A definition of "corruptly" as "motivated by an improper purpose" creates a clear distinction between conduct that is criminal and conduct that is not. Only advice that is wholly innocent and motivated for the benefit of the right-holder is allowed to disrupt the justice system's search for truth.

Even in the event that this Court determines that "corruptly" in the witness-tampering statute requires something more than a non-coercive improper attempt to persuade, Millstone is still criminally liable because his conduct involved coercion. Millstone's position as Reynolds's superior, coupled with his angry

scolding and the threat of criminal action, demonstrates sufficient coercion to find Millstone guilty, even under a heightened standard.

STANDARD OF REVIEW

Whether a jury instruction misstates the elements of a statutory crime, and whether that statute violates a defendant's right to due process are questions of law and is reviewed de novo. *United States v. Carranza*, 289 F.3d 634, 643-44 (9th Cir. 2002); *United States v. Savinovich*, 845 F.2d 834, 838-39 (9th Cir. 1988). Likewise, determination of the proper statutory scope of the witness-tampering statute is a question of law and is reviewed de novo. *See Elder v. Holloway,* 510 U.S. 510, 516 (1994); *Woods v. Stone,* 333 U.S. 472, 482 (1948).

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE DECISION OF THE FOURTEENTH CIRCUIT BECAUSE ORDINARY NEGLIGENCE IS THE APPROPRIATE STANDARD FOR A CONVICTION UNDER THE CLEAN WATER ACT.

This Court should affirm the conviction of Millstone because Congress intends to hold individuals criminally liable when they pollute our nation's waterways by their failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation. The Clean Water Act ("CWA") provides that the "discharge of any pollutant by any person shall be unlawful," unless that discharge is performed in compliance with the statute's permitting program. 33 U.S.C. § 1311(a) (2006). The CWA further establishes criminal penalties under its enforcement section, providing that "any person who negligently violates § 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 by both." 33 U.S.C. § 1319(c)(1)(A) (2006). The CWA, however, fails to define the meaning of "negligent" in the statutory text. *United States v. Hanousek*, 176 F.3d 1116, 1120 (9th Cir. 1999). Millstone contends that the district court erred when it instructed the jury that ordinary negligence was the appropriate standard to find a criminal violation of § 1319(c)(1)(A). (R. at 11.)

The only two federal circuit courts to address this issue directly held that the criminal penalty provision under § 1319(c)(1)(A) requires only ordinary negligence, rather than criminal or gross negligence. *Hanousek*, 176 F.3d at 1121; *United States v. Ortiz*, 427 F.3d 1278, 1283 (10th Cir. 2005). Ordinary negligence is the best interpretation of "negligence" for two reasons. First, an examination of the language of the statute and the congressional record demonstrates that Congress intended an ordinary negligence standard. Second, the CWA, as a public welfare statute, may criminalize ordinary negligence without violating due process.

A. Ordinary negligence is the appropriate interpretation of the term "negligence" in the statute because the interpretation best fits within the rules of statutory interpretation and best reflects the legislative intent of Congress.

Courts take a holistic approach to interpreting statutes, considering provisions of the whole law, its purpose, and its policies. *United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988). Utilizing this approach, an ordinary negligence interpretation is the appropriate interpretation of "negligence." First, the plain meaning of "negligence" and the language of the statute as a whole support such an interpretation. Second, the intent of Congress,

as expressed by the legislative history of the CWA, demonstrates a desire to heighten enforcement efforts against those who pollute the waters of the United States.

1. An ordinary negligence interpretation best fits within the rules of statutory construction because both the ordinary meaning and language used in other subsections of the CWA support such a reading.

An ordinary negligence interpretation best comports with the traditional rules of statutory interpretation. The interpretation of any statute must begin with the plain language of the statute itself. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). If the statutory text contains no definition of the term at issue, courts construe the term in accordance with its ordinary meaning. *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). This fundamental rule of statutory interpretation is based on the belief that legislative purpose is "best expressed by the ordinary meaning of the words used." *Richards v. United States*, 369 U.S. 1, 9 (1962).

The CWA does not define the meaning of "negligence." 33 U.S.C. § 1319. In the absence of a statutory definition, the next appropriate step is to look to the ordinary meaning of the word "negligence." Black's Law Dictionary defines "negligence" as "the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation." *Black's Law Dictionary* 1133 (9th ed. 2009). The definition goes on to provide that "negligence" is also termed "ordinary negligence" or "simple negligence." *Id.* Finally, Black's

Law Dictionary expressly defines the terms "criminal negligence" and "gross negligence" as separate and distinct from "negligence." *Id.* at 1134.

The ordinary meaning of a word can also be determined by examining case law. In its ordinary usage, "negligence" means ordinary negligence. *Hodgson v. Dexter*, 5 U.S. (1 Cranch) 345, 355 (1803) ("negligence means the want of ordinary care"); *Sinclair Prairie Oil Co. v. Thornley*, 127 F.2d 128, 131 (10th Cir. 1942) (negligence means "the failure to do what a person of ordinary prudence and care would do under the circumstances of a particular or given situation . . .").

More specifically, the Ninth Circuit and the Tenth Circuit confronted the exact question at issue here and concluded that "negligence" as used in the criminal penalty provision of the CWA means ordinary negligence. In *United States vs. Hanousek*, an employee of a railway company, while using a backhoe to sweep rocks off a railroad track, struck a pipeline, causing thousands of gallons of oil to flow into a nearby river. 176 F.3d at 1119. In finding the employee's supervisor criminally liable, the Ninth Circuit Court of Appeals held that "negligence" in § 1319(c)(1)(A) of the CWA means ordinary negligence. *Id.* at 1120. The Ninth Circuit reached this conclusion by examining the statutory language of the CWA, particularly emphasizing the plain meaning of the term "negligence" and the use of another negligence standard in a different subsection of the Act. *Id.* at 1120-21.

Similarly, in *United States vs. Ortiz*, the Tenth Circuit held that the operator of a distillation facility was criminally liable for pouring hazardous wastewater into a storm drain that emptied into a nearby river because the term "negligence" in the

CWA meant ordinary negligence. 427 F.3d at 1283. The Tenth Circuit reached this conclusion by focusing solely on the unambiguous, plain meaning of "negligence" as evidenced by the term's ordinary usage in case law. *Id.* at 1282-83. The plain meaning of "negligence," as reflected by its legal definition and prior judicial interpretation, suggests that an ordinary negligence standard is the best interpretation of the word.

Furthermore, if Congress had intended to provide for a heightened standard of negligence, it could have done so expressly, as it did in § 1321(b)(7)(D) of the CWA. When Congress includes specific language in one section of a statute, but omits it in another provision of the same statute, it is presumed that Congress acted intentionally and with purpose in so doing. *Russello v. United States*, 464 U.S. 16, 23 (1983); *see Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 176-77 (1994) (explaining that Congress's use of "aiding and abetting" language in other provisions of criminal acts suggested that Congress's failure to do so in § 10(b) of the Securities Exchange Act of 1934 reflected an intent not to extend such liability).

It is apparent from the language of the CWA that Congress knows how to differentiate between ordinary "negligence" and other heightened levels of negligence. Section 1321(b)(7) of the CWA provides specific civil penalties for parties who discharge oil or hazardous substances into the navigable waters of the United States in violation of § 1321(b)(3). Any violation of that section that results from "gross negligence or willful misconduct" is subject to a civil penalty of not less

than $100,000, and not more than $3,000 per barrel of oil or unit of reportable quantity of hazardous substance discharged. 33 U.S.C. § 1321(b)(7)(D) (2006). The express inclusion of a gross negligence standard in another subsection of the CWA supports the conclusion that Congress knew how to impose such a standard when it chose to do so. The fact that Congress chose not to include any modifying language to the word "negligence" in § 1319 demonstrates that Congress did not intend to require a heightened level of negligence above that of ordinary negligence.

Additionally, Congress is presumed to know of its prior legislation and to establish new laws in view of those already enacted. *United States v. Trident Seafoods Corp.*, 92 F.3d 855, 862 (9th Cir. 1996). Congress passed § 1319 in 1972. 33 U.S.C. § 1319. When it enacted § 1321(b)(7)(D) eighteen years later, it used a "gross negligence" standard for civil penalties. *Id.* § 1321. Congress was aware of the "negligence" standard in § 1319(c)(1)(A) when it adopted § 1321, and adopted a higher standard of "gross negligence" in recognition of its intention to distinguish between two standards.

Moreover, courts will refrain from concluding that different language in two subsections of the same act has the same meaning. *Russello*, 464 U.S. at 23. It would be counterintuitive for a court to conclude that "negligence" under § 1319(c)(1)(A) has the same definition as "gross negligence" in another subsection of the same Act. Millstone urges this Court to interpret "negligence" in the context of § 1319 as criminal negligence. (R. at 11.) He suggests that although Congress expressly used different language in each of the subsections, it intended to proscribe

identical levels of culpability, a conclusion that is inconsistent with conventional rules of statutory construction. *Russello*, 464 U.S. at 23.

The inclusion of a gross negligence standard in a separate subsection of the CWA is significant. While § 1321(b)(7)(D) provides for civil, rather than criminal, penalties, its language is nonetheless important to the statutory construction of § 1319. This is particularly true where, as here, the statute being interpreted is a public welfare statute.

In *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47, 54-56 (2007), consumers brought a civil suit against insurers for willfully failing to provide adverse action notices reflecting negative credit reports in violation of the Fair Credit Reporting Act ("FCRA"). 551 U.S. 47, 54-56 (2007). This Court dismissed as unpersuasive Safeco's argument, which cited the use of similar language in the criminal enforcement provision of the FCRA as evidence that civil willfulness could not include recklessness. *Id.* at 60. Finding the vocabulary of the criminal provision irrelevant in interpreting the civil provision, this Court held that willfulness as used under the FCRA included recklessness. *Id.*

However, unlike the FCRA, which provides reporting guidelines for credit agencies, *id.* at 52, the CWA is a public welfare statute, protecting our nation's waters from the dire effects of pollution. *United States v. Weitzenhoff*, 35 F.3d 1275, 1286 (9th Cir. 1993). As a public welfare statute, the CWA need not require the heightened level of mens rea associated with criminal offenses. *Staples v. United States*, 511 U.S. 600, 606 (1994). In fact, the scienter requirement under the

criminal penalty provision of the CWA can be the equivalent of an ordinary civil negligence standard. *See Morissette v. United States*, 342 U.S. 246, 255 (1952) (acknowledging that public welfare statutes may criminalize ordinary negligence). Therefore, unlike the FCRA in *Safeco*, the vocabulary of the civil side of the CWA is instructive in the interpretation of the criminal side.

Application of the traditional rules of statutory construction supports an ordinary negligence interpretation of the term "negligence" as it is used in § 1319(c)(1)(A) of the CWA.

2. An ordinary negligence interpretation best reflects the congressional intent to strengthen and expand the enforcement actions available against polluters.

Even if this Court finds that the meaning of "negligence" is not settled by an examination of the rules of statutory interpretation, the intent of Congress provides clarity. An ordinary negligence standard best promotes congressional intent. When the language of a statute is ambiguous, the Court may turn to legislative history and congressional intent to assist in statutory interpretation. *See United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543-44 (1940) (stating that there is no rule of law that forbids the use of legislative history, even if the words appear clear on "superficial examination"); *United States v. Great N. Ry. Co.*, 287 U.S. 144, 154-55 (1932) (explaining that courts are at liberty to look to statements of Congress and legislative history when the meaning of a statute is uncertain). In fact, statutory construction often requires consideration of statutory text in the light of the general

objectives Congress sought to achieve. *Wirtz v. Bottle Blowers Ass'n*, 389 U.S. 463, 468 (1968).

The legislative history demonstrates that Congress intended to strengthen the enforcement of federal water pollution regulations when it passed the CWA. Prior to the CWA's original enactment in 1972, the federal government regulated water pollution via the Federal Water Pollution Control Act ("FWPCA"). A major problem with this federal program was that its enforcement was weak. S. Rep. No. 92-414, at 5 (1971). Over the program's twenty-year existence, only one case had ever been prosecuted against a polluter. *Id.* Senator Edmund Muskie, sponsor of the CWA, explained that "spotty" enforcement under the FWPCA was ineffective, allowing polluters to continue damaging the waterways of our nation. 117 Cong. Rec. 1346-47 (1971).

Frustration with this program led to the introduction of the CWA. 117 Cong. Rec. 38,797-802 (1971). The experience under the prior federal program suggested that it was time "to require . . . tougher enforcement." 117 Cong. Rec. 1347 (1971). By strengthening enforcement, the CWA would protect the country's waters from becoming "little more than sewers to the seas." 117 Cong. Rec. 38,797 (1971).

In 1987, Congress considered amendments to the CWA and again voiced its intent to heighten enforcement efforts. *Possible Amendments to the Federal Water Pollution Control Act: Hearing Before the H. Subcomm. on Water Res. of the Comm. on Pub. Works & Transp.*, 98th Cong. (1983). During testimony on the amendments, EPA Administrator William Ruckelshaus expressed a widely-shared

concern that "[t]he Clean Water Act will not work unless enforcement efforts are vigorous and effective." *Id.* Acknowledging this concern, Congress proposed to expand the language in the criminal penalty section of the CWA, thereby strengthening criminal sanctions. *United States v. Hopkins*, 53 F.3d 533, 539 (2d Cir. 1995). Congress sought to heighten sanctions by reducing the mens rea element of the prohibited acts. *Id.* Instead of only criminalizing violations done "willfully or negligently," the amended CWA would provide separate criminal penalties for "knowing" violations and "negligent" violations. *Id.*

Congress expressly addressed this expansion of the enforcement provisions. Initially, Congress acknowledged that stronger and more expansive enforcement was consistent with a national consensus for clean water. 132 Cong. Rec. S16,424-611 (daily ed. Oct. 16, 1986). Surveys indicated that a large majority of the nation either supported the CWA or wanted it strengthened, despite the potential costs of such pollution regulations. *Id.* Strong public support existed for "aggressive enforcement" against environmental misconduct. S. Rep. No. 99-50, at 30 (1985).

Congress also specifically voiced its intent to establish "increased penalties for . . . criminal violations of the law." H.R. Rep. No. 99-1004, at 138 (1986) (Conf. Rep.). A Senate Report explained that under the previous version of the CWA, knowing violations were not criminalized, even though they caused serious environmental harm and millions of dollars of damages. S. Rep. No. 99-50, at 29. Knowing violations, just like willful and negligent violations, created clear potential

for serious risks to the public's health and welfare. *Id.* Expansion of the criminal penalty provisions was necessary to deter these knowing violations. *Id.*

Furthermore, Congress explicitly addressed existing misdemeanor penalties for negligent violations of the CWA. It explained that those criminal penalties were retained to "address those negligent violations which merit lesser punishment." *Id.* Congress therefore provided lesser punishments for these negligent violations than for knowing violations. *Compare* 33 U.S.C. § 1319(c)(1) (establishing a misdemeanor punishment), *with id.* § 1319(c)(2) (establishing a felony punishment).

The environmental damage that resulted from Millstone's negligence is exactly the type of harm Congress intended to prevent. This avoidable incident caused thousands of barrels of corrosive chemicals to flow into the Windy River, destroying fishing boats and commercial shipping barges. (R. at 7-8.) The dangerous chemicals also destroyed five miles of agriculture, killed all the fish living in the area, and ruined their breeding grounds. (R. at 8.) Additionally, the chemical spill caused deadly explosive fires, which spread to the city of Polis and burned for days. (R. at 7.) The total damage is estimated at $1.25 billion, but the event's impact on the lives of the people of New Tejas continues to this day. (R. at 8.) Millstone's failure to follow reasonably prudent procedures in securing the Windy River facility resulted in this extensive damage; the specific type of damage Congress had in mind when it enacted § 1319(c)(1)(A).

This congressional intent, expressed through legislative history, sheds light on the meaning of the criminal penalty provision of the CWA. While the rule of

lenity states that ambiguous criminal statutes should be interpreted in favor of the defendant, *Cleveland v. United States*, 531 U.S. 12, 25 (2000), the rule is not applied expansively. *United States v. Kelley Technical Coatings, Inc.*, 157 F.3d 432, 439 n.3 (6th Cir 1998). In fact, the rule of lenity is entirely inapplicable unless, after all applicable tools of statutory interpretation have been applied, the statute remains grievously ambiguous. *Chapman v. United States*, 500 U.S. 453, 463 (1991). As the analysis of ordinary meaning and legislative intent suggest, that is plainly not the case with the criminal provision of the CWA at issue here.

The legislative history of both the original enactment of the CWA and the 1987 amendments evidences a congressional intent to strengthen enforcement actions and expand the class of violators who could be criminally penalized, all in an attempt to deter environmental violations posing a serious threat to the "integrity of our [n]ation's waters." 33 U.S.C. § 1251(a) (2006). This legislative intent supports a broad reading of "negligence" to criminalize violations committed as a result of ordinary negligence.

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

A public welfare statute is a piece of legislation that dispenses with the mens rea element required of traditional criminal statutes. *Staples*, 511 U.S. at 606. This Court specifically acknowledged the difference between a typical criminal offense and a public welfare offense, explaining that public welfare offenses "depend on no mental element but consist only of forbidden acts or omissions." *Morissette v. United States*, 342 U.S. at 252-53 (1952). A defendant charged under a public

welfare statute, therefore, need not have awareness that his or her conduct is illegal to be found guilty. *United States v. Dotterweich*, 320 U.S. 277, 281 (1943). Courts rely on both the nature of the statute and the particular character of the items regulated in determining whether legislation can be deemed a public welfare statute. *Staples*, 511 U.S. at 607.

The policy of the public welfare doctrine is premised on utilitarian theories. *Morissette*, 342 U.S. at 253-54. The industrial revolution ushered in a host of new dangers to the health, safety, and welfare of the public. *Id.* In order to protect the public as a whole from these increased risks, numerous regulations were enacted which heightened the duties imposed on those in control of particular industries and activities. *Id.* at 254. Under such regulations, Congress dispenses with the mens rea requirement in the interest of the larger good, because unlike traditional criminal offenses, public welfare offenses harm society with or without mens rea. *Dotterweich*, 320 U.S. at 280-81. Regardless of the intent of the violator of such statutes, the injury to the public is the same. *Morissette*, 342 U.S. at 256.

Millstone mistakenly contends that an ordinary negligence interpretation of § 1319(c)(1)(A) would violate his due process. (R. at 12.) An ordinary negligence interpretation of the criminal penalty provision under § 1319(c)(1)(A), however, does not violate due process for two reasons. First, the criminal enforcement provision of the CWA is a public welfare statute. Second, a public welfare statute may subject a person to criminal liability for ordinary negligence without violating due process.

1. **The criminal enforcement provision of the CWA is a public welfare statute because it regulates the discharge of highly dangerous pollutants and imposes a relatively small penalty.**

The criminal penalty provisions of the Clean Water Act constitute public welfare legislation. *United States v. Weitzenhoff*, 35 F.3d at 1286; *Kelley Technical Coatings, Inc.*, 157 F.3d at 439 n.4; *Hopkins*, 53 F.3d at 537-41. In determining whether a policy-focused statute, which omits any mention of intent, is a public welfare statute, the Eighth Circuit set forth a number of factors that courts have considered. *Holdridge v. United States*, 282 F.2d 302, 310 (8th Cir. 1960).

First, courts consider whether the standard imposed is reasonable and whether adherence to such a standard can be "properly expected." *Id.* This Court further explained this factor, stating that a public welfare statute must criminalize "a type of conduct that a reasonable person should know is 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). Accordingly, most public welfare statutes regulate "dangerous or deleterious devices [and] products or obnoxious waste materials." *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971); *see United States v. Freed*, 401 U.S. 601, 607 (1971) (upholding a conviction for possession of unregistered hand grenades, despite defendant's lack of knowledge that the weapons were not registered); *Dotterweich*, 320 U.S. at 280-81 (upholding the conviction of a corporate officer whose company shipped misbranded and adulterated drugs, despite a lack of criminal intent).

Additionally, regulations involving activities affecting public health, safety, and welfare have often been found to constitute public welfare statutes. *Morissette*, 342 U.S. at 254. Because of this, environmental regulations are commonly categorized as public welfare legislation. *See United States v. Kung-Shou Ho*, 311 F.3d 589, 606 (5th Cir. 2002) (holding that the Clean Air Act is public welfare statute); *United States v. Hoflin*, 880 F.2d 1033 (9th Cir. 1989) (holding that the Resource Conservation and Recovery Act is a public welfare statute); *United States v. Corbin Farm Service*, 578 F.2d 259 (9th Cir. 1978) (holding that the Federal Insecticide, Fungicide, and Rodenticide Act is a public welfare statute).

The CWA criminalizes the type of conduct that a reasonable person should know is subject to regulation and may threaten the health and safety of the public. Like other environmental regulations deemed public welfare statutes, Congress enacted the CWA to protect the public as a whole from the dire consequences of water pollution. *Weitzenhoff*, 35 F.3d at 1286. In order to further this purpose, § 1319(c)(1)(A) criminalizes the negligent discharge of pollutants, including toxic materials and other dangerous chemicals. 33 U.S.C. § 1311.

The production and storage of these dangerous chemicals is precisely the type of conduct that should put a reasonable person on notice that he stands in "responsible relation to a public danger." *Dotterweich*, 320 U.S. at 281. Like statutes regulating air pollution, the disposal of hazardous wastes, and the use of pesticides, the improper discharge of chemicals into a waterway can cause serious harm to the public's health and welfare, *Weitzenhoff*, 35 F.3d at 1286, as

exemplified by the great harms caused by the Windy River spill at issue here. (R. at 7-8.) Furthermore, knowledge of such dangers ought to alert such a person to the likelihood that regulation of those chemicals exists. *Dotterweich*, 320 U.S. at 281.

The higher level of risks and dangers attendant with increased industry requires that heightened duties be imposed on those in control of activities that affect public health, safety, or welfare. *Morissette*, 342 U.S. at 254. When a person assumes such responsibilities, that person is in the best position to prevent the risk of harm to the public. *Id.*

As such, it is reasonable to require that a party in control of securing such dangerous chemicals, like Millstone, exercise the standard of care that a reasonably prudent person would exercise in the same situation, for the health and welfare of the general public. Sekuritek was hired by Bigle Chemical's Chairman and CEO Drayton Wesley to handle all the security for the 270-acre Windy River facility. (R. at 5.) Millstone was directly responsible for developing a detailed security plan to meet Bigle Chemical's needs on an expedited timeline and for hiring and training the thirty-five personnel that would secure the expansive chemical plant. (R. at 6.) Furthermore, Millstone himself visited the plant repeatedly to ensure that his personnel were providing the highest level of security. (R. at 6-7.) Millstone's responsibility for the performance of his security personnel placed him in the best position to prevent harm to the public by ensuring that proper training occurred (R. at 6) and that company policies were followed. (R. at 8-9.)

A second factor that courts consider when determining public welfare status is whether the penalty imposed for a violation is relatively small. *Holdridge*, 282 F.2d at 310. The Eighth Circuit has explicitly held that incarceration up to one year is such a "relatively small" penalty. *United States v. Flum*, 518 F.2d 39, 43 (8th Cir. 1975). In fact, modern statutes often punish public welfare offenses with terms of imprisonment. *See e.g.*, *Hoflin*, 880 F.2d at 1036 (up to two years imprisonment for certain violations of the RCRA); *Int'l Minerals*, 402 U.S. at 565 (Stewart, J., dissenting) (up to one year imprisonment for failing to properly identify shipment of corrosive liquids); *Dotterweich*, 320 U.S. at 278 (up to one year imprisonment for shipping misbranded drugs).

Furthermore, although this Court, in *Staples v. United States*, articulated a concern over extending public welfare status to crimes resulting in enhanced penalties, it failed to adopt a definitive rule for the maximum penalty a public welfare statute might impose. 511 U.S. at 618. In *Staples*, the Court found that the National Firearms Act was not a public welfare statute and therefore a conviction for failure to register required knowledge of possession of a regulated automatic weapon rather than a type of gun not subject to regulation. *Id.* at 602. The Court reasoned that while a severe penalty was one factor that weighed against classifying something as a public welfare statute, it did not need to decide whether a public welfare statute could ever impose a felony penalty. *Id.* at 618.

A negligent violation of the CWA may result in a penalty of "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). This penalty cannot be said to be any more severe than other public welfare statutes that regulate hand grenades, corrosive liquids, or hazardous wastes. As such, the penalty for a negligent violation of the CWA is relatively small, a fact which supports the application of the public welfare doctrine to this provision.

Finally, courts examine three additional factors, each of which the criminal penalty provision of the CWA satisfies. *Holdridge*, 282 F.2d at 310. A conviction under § 1319(c)(1) does not "gravely besmirch" because it does not brand a violator a felon or severely damage the offender's reputation in any other way. *See Flum*, 518 F.2d at 43 (holding that a conviction for attempting to board an airplane with a deadly concealed a weapon does not gravely besmirch). Furthermore, the statutory crime created under the CWA was not initially established by the common law. Criminal environmental enforcement regulations are strictly statutorily created. Finally, congressional purpose as evidenced by the legislative history discussed above supports a finding of no mens rea requirement.

The factors traditionally used by courts suggest that the criminal penalty provision of the CWA in § 1319(c)(1)(A) fits the definition of a public welfare statute and therefore, mens rea may be properly omitted as an element of the crime.

2. Public welfare statutes may impose criminal liability for ordinary negligence without violating due process because notice of such regulations is presumed.

The criminal provision of the CWA, as a public welfare statute, does not violate due process by criminalizing ordinary negligence. In 1922, this Court first

established the longstanding principle that public welfare statutes may subject a person to criminal liability for ordinary negligence without violating due process. *United States v. Balint*, 258 U.S. 250, 252-253 (1922). With traditional criminal statutes, due process questions are raised where Congress fails to establish mens rea requirements as to each element of an offense. *Int'l Minerals*, 402 U.S. at 565-66. This is particularly true because deeply rooted in society's understanding of due process is the requirement of notice. *Lambert v. California*, 355 U.S. 225, 228 (1957). Therefore, courts attempt to avoid interpreting statutes in a way that criminalizes a broad range of seemingly innocent conduct. *Staples*, 511 U.S. at 610.

However, under public welfare statutes, due process concerns are not implicated, even though a mens rea is not a required element of the crime. *Balint*, 258 U.S. at 252. Where dangerous products or obnoxious waste materials are involved, the probability of regulation is so substantial that anyone who is aware that he is involved with them "must be presumed to be aware of the regulation." *Int'l Minerals*, 402 U.S. at 565-66. In order to further public policy and stimulate proper care, Congress has the explicit authority to establish criminal statutes that dispense with any mens rea requirement. *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 70 (1910).

In *United States v. International Minerals & Chemical Corp.*, the defendant violated Interstate Commerce Commission regulations when he failed to properly identify his shipment of sulfuric acid as corrosive liquids. 402 U.S. at 559. While the regulation required that the offender have knowledge of the dangerous

materials being shipped, it did not require knowledge of the regulation itself. *Id.* at 560. This Court found that similar to drugs and hand grenades, the shipment of corrosive acids is an activity of such a dangerous nature, that any person who is aware of his or her possession of the chemicals is presumed to be aware of their regulation. *Id.* at 565. This presumption of awareness precluded any due process concerns regarding the omission of a mens rea requirement as to each element of the regulation. *Id.* at 564-65.

Similarly here, Millstone is presumed to be aware of the regulation of chemicals manufactured and stored at the Windy River plant. (R. at 5.) The highly corrosive chemicals at the facility are dangerous and have the potential to cause extreme damage if not properly secured. (R. at 7-8.) In fact, the chemicals have the ability to destroy property, agriculture, and wildlife. (R. at 8.) This fact, coupled with the thousands of barrels of chemicals stored at the plant, increases the risk of harm. (R. at 7.) Millstone's job was to secure these chemicals, a responsibility that required, at a minimum, knowledge of the chemicals he was securing. (R. at 5.) Regardless of whether Millstone was actually aware of the regulations imposed by the CWA, the dangerous nature of the chemicals he was hired to secure imposes a presumption of awareness.

This presumed awareness of regulation extends to parties who do not directly handle dangerous devices or substances, but play a supervisory role in an activity that places him or her in responsible relation to a public danger. *Hanousek*, 176 F.3d at 1122. The responsibilities assumed by such a party places him or her in the

best position to prevent a violation of the law and therefore requires a heightened level of diligence to protect the public. *Morissette*, 342 U.S. at 256.

In *Hanousek*, the defendant, a supervisor of the White Pass and Yukon Railroad, was responsible for every detail pertaining to the safe construction of the railroad. 176 F.3d at 1119. On one project, despite a well-known custom, Hanousek failed to ensure that the pipeline underlying the work site was protected. *Id.* Under Hanousek's supervision, a subcontractor struck an unprotected pipeline while moving rocks with a backhoe. *Id.* at 1120. The pipeline ruptured, sending thousands of gallons of oil into an adjacent river.

The Ninth Circuit reasoned that Hanousek was presumed to be aware of the probability of regulation due to his position as supervisor over such an inherently dangerous activity. *Id.* at 1122. Additionally, Hanousek admitted that he was aware of the location of the pipeline and the potential dangers that any puncture of the pipeline by construction machinery would pose. *Id.* Hanousek's position as supervisor placed him in responsible relation to the danger and as such he should have been alerted to the probability of regulation. Therefore, the court held that his knowledge of the CWA regulation could be presumed.

The facts of this case suggest that Millstone was aware of the dangerous nature of the chemicals he was responsible for securing. Sekuritek was hired for the specific purpose of handling security at Bigle Chemical's manufacturing and waste recycling facilities. (R. at 5.) This involved securing facilities whose daily activities involve dangerous chemical wastes with highly corrosive properties. (R. at 7-8.)

Furthermore, Bigle Chemical's Chairman and CEO voiced his concern about the plant's need for heightened security in order to avoid another chemical spill like the one it had previously experienced. (R. at 5.) Sekuritek's primary role was to provide security measures that would protect the facility from a security breach that may result in a chemical spill. (R. at 5.) Therefore, Millstone, as president and CEO of Sekuritek, should have been on notice of the nature of the materials he was securing and the risk of harm if his security faltered. Furthermore, his role as supervisor of the security personnel placed him in the best position to prevent a violation of the law and as such, established a heightened standard of care.

A defendant's knowledge of a regulation is presumed under public welfare statutes. Therefore, these statutes may impose criminal liability for ordinary negligence without violating due process. For this reason, the Court should affirm Millstone's conviction under § 1319(c)(1)(A) of the CWA.

II. MILLSTONE'S CONVICTION UNDER THE FEDERAL WITNESS-TAMPERING STATUTE SHOULD BE AFFIRMED BECAUSE HIS ACTIONS WERE MOTIVATED BY THE IMPROPER PURPOSE OF HINDERING A FEDERAL INVESTIGATION FOR SELF-GAIN AND WERE COERCIVE.

In the context of the Fifth Amendment, only advice that is wholly innocent and motivated for the benefit of the right-holder should be allowed to disrupt the justice system's search for truth. Although the Fifth Amendment right against self-incrimination is a pillar of our adversarial system, the privilege inherently conflicts with the efficient administration of justice by frustrating certain efforts to discover the truth. *Miranda v. Arizona*, 384 U.S. 436 (1966). For this reason, limits on the

government's ability to collect information should be thoroughly justified. *See Schmerber v. California,* 384 U.S. 757, 763 (1966) (limiting the Fifth Amendment privilege against self-incrimination to testimonial or communicative evidence).

Millstone seeks to establish that his self-interested "advice" for Reynolds to hinder federal investigators by invoking his Fifth Amendment right was non-criminal. However, because Millstone attempted to avoid his own criminal liability by advising Reynolds to withhold information from a government investigation, Millstone was motivated by an improper purpose and his conviction for witness tampering should be affirmed.

The federal witness-tampering statute states in pertinent part, "Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so . . . with intent to . . . hinder, delay, or prevent the communication . . . of information relating to the commission . . . of a Federal offense . . . shall be fined . . . or imprisoned . . . ." 18 U.S.C. § 1512(b)(3) (2006). Section 1512(b) does not provide a clear definition for the term "corruptly" and courts examining the term's meaning have found it ambiguous. *United States v. Baldridge*, 559 F.3d 1126, 1142 (10th Cir. 2009).

As the Fourteenth Circuit noted in its opinion, this ambiguity has led to a split among circuit courts as to § 1512(b)'s precise scope. (R. at 14.) Considering Millstone's motivation for his conduct, the majority sided with the Second and Eleventh Circuits and held that "corruptly" means "motivated by an improper purpose." (R. at 15); *United States v. Gotti*, 459 F.3d 296, 343 (2d Cir. 2006); *United*

States v. Shotts, 145 F.3d 1289, 1300-01 (11th Cir. 1998). Accordingly, the Fourteenth Circuit affirmed Millstone's conviction, finding that the jury could have properly concluded that Millstone encouraged Reynolds to withhold information for an improper, self-interested purpose. (R. at 15.)

The dissent, however, arrived at a different conclusion. (R. at 21.) Judge Newman sided with the Third and Ninth Circuits, finding that the term "corruptly" must mean something more than "motivated by an improper purpose." (R. at 19-21); *United States v. Doss*, 630 F.3d 1181, 1190 (9th Cir. 2011); *United States v. Farrell*, 126 F.3d 484, 488-90 (3d Cir. 1997). Noting that Millstone neither attempted to bribe nor encouraged Reynolds to lie, the dissent found no evidence to justify Millstone's conviction. (R. at 21.)

This Court should affirm Millstone's witness-tampering conviction. The Fourteenth Circuit properly defined § 1512(b)'s "corruptly" as "motivated by an improper purpose" and under that standard, Millstone's self-interested "advice" was improper. Even if this Court finds that "corruptly" requires some additional wrongful conduct, however, the coercive circumstances of Millstone's exchange with Reynolds adequately justify his conviction.

A. Millstone acted "corruptly" because his conduct was motivated by the improper purpose of hindering a federal investigation for self-gain.

The Fourteenth Circuit properly determined that § 1512(b)'s "corruptly" means "motivated by an improper purpose" and affirmed Millstone's conviction. (R. at 15.) The court based its determination on a correct understanding of the term's limiting function. The term "corruptly" distinguishes criminal from non-criminal

conduct intended to hinder a federal investigation based on the motivation of the persuader, and, thus, performs a separate and distinct function.

This understanding comports with the rule of statutory construction that requires all words in a statute be given meaning and is consistent with this Court's jurisprudence prohibiting third-party benefit from personal rights. Moreover, this interpretation best fits within Congress's legislative intent to expand the prohibitions on witness tampering. It best complies with public policy concerns by providing a clear and easily understandable rule, as well as balance between the justice system's compelling need for information and an individual's right against self-incrimination. Thus, under the proper understanding of § 1512(b)'s applicability, Millstone's conviction should be affirmed because his "advice" to Reynolds was motivated by a personal interest in avoiding criminal liability.

1. An interpretation of "corruptly" as "motivated by an improper purpose" best fits within the rules of statutory construction and recognized constitutional jurisprudence.

If possible, every word in a statute should be given meaning and no interpretation should be used that renders a provision invalid or superfluous. *Duncan v. Walker*, 533 U.S. 167, 174 (2001); *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 698 (1995). Despite this maxim of statutory construction, courts have interpreted the term "corruptly" in different ways, leading to a split among circuits.

In 1996, the Second Circuit, in *United States v. Thompson*, 76 F.3d 442, 452 (2d Cir. 1996), determined that § 1512(b)'s "corruptly" meant "motivated by an

improper purpose." That court noted the inclusion of the word "corruptly" in the similar § 1503 and case law defining § 1503's "corruptly" as "motivated by an improper purpose." *Id.* One year later, ignoring the reasoning in *Thompson*, the Third Circuit found, in *United States v. Farrell*, that "corruptly" signified a requirement of "more culpability" than a mere attempt to discourage disclosure with the intent to hinder an investigation. 126 F.3d at 488-90.

The majority in *Farrell*, however, drew a strong dissent, which noted that legislative history and a proper understanding of the term's limiting function demanded a finding consistent with *Thompson*. *Id.* at 492-93 (Campbell, J., dissenting). A year later, citing *Thompson* and the dissent in *Farrell*, the Eleventh Circuit recognized the Third Circuit's error and came to the proper conclusion that § 1512(b)'s "corruptly" means "motivated by an improper purpose." *Shotts*, 145 F.3d at 1300-01.

In 2005, this Court provided a measure of pertinent guidance in *Arthur Andersen L.L.P. v. United States*, 544 U.S. 696, 703-07 (2005). In reversing petitioner's conviction because of inadequate jury instructions, this Court referenced the interplay between § 1512(b)'s elements of "knowingly" and "corruptly." *Id.* at 705-06. When combined, only persons "conscious of wrongdoing" can be said to knowingly, corruptly persuade. *Id.* at 706.

Despite this, courts continued to split on the precise definition of § 1512(b)'s "corruptly" element. In 2006, the Second Circuit reaffirmed *Thompson* and specifically held that one who "advises" another to invoke his Fifth Amendment

privilege for the "improper purpose" of preventing that person from incriminating the advisor has "corruptly persuaded" within the meaning of § 1512(b). *Gotti*, 459 F.3d at 343. The Ninth Circuit, however, sided with *Farrell*, incorrectly holding that "corruptly" requires additional wrongful conduct, such as coercion, intimidation, bribery, or suborning perjury. *Doss*, 630 F.3d at 1190. Contrary to the arguments put forth by *Farrell* and *Doss*, a proper interpretation of § 1512(b)'s "corruptly" is found in the reasoning of *Thompson, Shotts,* and *Gotti*.

An informed understanding of the role of "motivated by an improper purpose" in 1512(b) demonstrates that a Fifth Amendment advisement with the intent to hinder is improper if it is motivated for the benefit of anyone other than the right-holder. Initially, the confusion resulting in the current circuit split can be traced to the absence of a precise meaning given to the term "improper" by case law, along with faulty assumptions drawn in this vacuum. For example, the court in *Thompson* offered no express guidance regarding what constituted an "improper purpose." 76 F.3d at 452. Focusing on this, the Third Circuit incorrectly assumed that what made an "improper purpose" *improper* was simply any intent to hinder a federal investigation. *Farrell*, 126 F.3d at 490. Thus, the Third Circuit mistakenly held that *Thompson*'s interpretation created statutory redundancy. *Id.* Attempting to avoid this perceived redundancy, as the rules of statutory construction demand, that court held that "corruptly" must mean something more than a simple intent to hinder an investigation. *Id.*

Indeed, an understanding of "improper purpose" as a simple intent to hinder an investigation would render *Thompson*'s understanding of "corruptly" as word surplusage, in light of the specific intent requirement in § 1512(b)'s subsections. However, an understanding of "corruptly" as motivated by the improper purpose of benefiting someone other than the right-holder serves an important and distinct limiting function. This understanding limits the reach of § 1512(b) based on the interests motivating the persuader.

A careful reading of case law supports this clarified understanding. In *Shotts*, the Eleventh Circuit affirmed and adopted the reasoning from the dissent in *Farrell*. 145 F.3d at 1300-01. Writing in dissent, Judge Campbell acknowledged the majority's argument that § 1503's "corruptly" had been previously defined as including *any* act done with the purpose of obstructing justice, but noted the inherent flaw in these broad understandings. *Farrell*, 126 F.3d at 493 (Campbell, J., dissenting). To that point, Judge Campbell properly recognized that "not all actions taken with the intent to hinder or obstruct justice necessarily violate § 1503 or § 1512." *Id.* For Judge Campbell and the Eleventh Circuit, interpreting "corruptly" to mean "motivated by an improper purpose" did not create impermissible redundancy, but rather served to distinguish criminal from non-criminal attempts to hinder a federal investigation. *Shotts*, 145 F.3d at 1301; *Farrell*, 126 F.3d at 493.

Three hypothetical scenarios demonstrate the logic of this understanding. First, if a young man is arrested for distribution of narcotics and his mother tells

him to plead the Fifth for his own good, her purpose would not be improper under § 1512(b). Although she intends to hinder investigative efforts, her sole motivation is the best interests of her privilege-holder son.

By contrast, if a young man and his mother are arrested as co-conspirators in a narcotics distribution scheme and the mother tells her son to plead the Fifth, her purpose would be improper because she intends to hinder the investigative efforts, at least in part, for her own benefit. Likewise, if a young man and his friend are arrested as co-conspirators in a narcotics distribution scheme and the young man's mother tells *the friend* to plead the Fifth, her purpose would again be improper because she intends her advice and any subsequent hindrance to benefit her son, not the friend. Accordingly, the addition of "corruptly," as defining the improper motivation of benefitting anyone other than the right-holder, provides a distinct limiting function within the statute and best comports with rules of statutory construction that require giving all words in a statute valid meaning.

Moreover, the Fourteenth Circuit's understanding of "corruptly" is consistent with this Court's holding in *Arthur Andersen*. Like Judge Campbell's dissent in *Farrell*, this Court recognized that not all action taken with the intent to hinder an investigation is criminal. *Arthur Andersen*, 544 U.S. at 703-04. Further, a corrupt persuader under this interpretation can be classified as "conscious of wrongdoing." This is so because a person who advises another to withhold information for the benefit of anyone other than the information-holder is inherently conscious of his wrongdoing. *See United States v. Aguilar*, 515 U.S. 593, 617 (1995) (Scalia, J.,

concurring & dissenting) (noting that ignorance of wrongdoing where one intends to obstruct a proceeding is implausible). The persuader's subjective awareness of his intent to circumvent criminal accountability by suggesting protective actions to another conforms to this Court's holding that "wrongdoing" constitutes "immoral, depraved, or evil" conduct. *Arthur Andersen*, 544 U.S. at 705. As opposed to innocent advisement of rights for the sole benefit of the right-holder, a person who persuades for ulterior motive is "conscious of his wrongdoing."

Viewed in this light, the justification for the holdings in *Farrell* and *Doss* cannot stand. In *Farrell*, the court failed to recognize the prospect of self-interest and couched its analysis in terms of persuasion aimed at a co-conspirator, without requiring that the persuader be a member of the conspiracy. *Farrell*, 126 F.3d at 488. The court noted that "the prototypical situation in which an individual may attempt to persuade a coconspirator to exercise his Fifth Amendment right, [is] that in which an attorney advises his client not to reveal information about [the client's] participation in a conspiracy…." *Id.* The court focused wholly on the self-incrimination aspects that affected a potential *witness* co-conspirator, without reference to the obvious dual-incrimination implications for a *persuader* co-conspirator. *Id.* at 489.

In similar fashion, the Ninth Circuit reaffirmed and extended this mistake. *Doss,* 630 F.3d at 1189-90. That case in part concerned a husband telling his co-conspirator wife to invoke her right to marital privilege. *Id.* at 1184. After adopting *Farrell*'s reasoning, the Ninth Circuit cited this Court's dicta, explaining that a wife

persuading her husband to invoke his right to marital confidence is not inherently malign. *Id.* at 1188 (citing *Arthur Andersen*, 544 U.S. at 704). The court of appeals interpreted this comment to mean that an advisement of marital privilege from one spouse to another, absent some additional wrongful conduct, can never be found malign. *Id.* at 1190. This is incorrect. While a husband's advisement to his wife regarding her rights is not malign, in the abstract, the circumstances in *Doss* presented a different story. *Id.* at 1184. Like *Farrell*, *Doss* failed to recognize the self-interested motivation of the persuader-husband. *Doss*, 630 F.3d at 1190. This fundamental flaw in the analysis renders the holdings in *Farrell* and *Doss* untenable.

Furthermore, an understanding of § 1512(b) that legitimizes Millstone's self-interested advisement of Reynolds's right is inconsistent with this Court's and the federal circuits' constitutional jurisprudence in the area of standing. The circuit courts have long held that defendants lack standing to challenge alleged violations of others' Fifth Amendment rights. *LaFrance v. Bohlinger*, 499 F.2d 29, 34 (1st Cir. 1974); *United States v. Dowdy*, 486 F.2d 1042, 1043 (5th Cir. 1973); *United States v. Pruitt*, 464 F.2d 494, 495 (9th Cir. 1973); *United States v. Schennault*, 429 F.2d 852, 855 (7th Cir. 1970); *United States v. Bruton*, 416 F.2d 310, 312 (8th Cir. 1969). In *United States v. Dowdy*, the defendant objected to the compelled testimony of his bank robbery confederate as violating that witness's Fifth Amendment right. 486 F.2d at 1043. On appeal, the Fifth Circuit rejected the defendant's argument and

held that he lacked standing to assert a violation of the witness's rights because the Fifth Amendment is a personal right and may not be vicariously asserted. *Id.*

This Court has similarly found that the Fifth Amendment right against self-incrimination is a personal right. *United States v. Nobles*, 422 U.S. 225, 233 (1975). In that case, it was noted that the privilege adheres to the person, and not the information that may incriminate him. *Id.* Along similar lines, this Court has adopted a prohibition on the vicarious assertion of personal rights in the context of the Fourth Amendment. *Minnesota v. Carter*, 525 U.S. 83, 88-91 (1998). Thus, an interpretation of § 1512(b) that permits an "advisor" to persuade the invocation of another's Fifth Amendment right for the intended benefit of anyone other than that right-holder is inconsistent with this jurisprudence.

Millstone does not claim a violation of Reynolds's right against self-incrimination, but does seek to establish an interpretation of § 1512(b) that would allow him to attempt to interfere with the justice system through the personal Fifth Amendment right of another. This is analytically similar to a defendant seeking vicarious protection associated with the violation of another's personal rights. Millstone simply seeks to establish his improper intervention earlier in the process. This Court, however, has never held that a defendant has an affirmative right to cajole the personal rights of another in order to escape criminal liability. Thus, the interpretations of "corruptly" espoused in *Thompson, Shotts,* and *Gotti*, present a logical extension of this Court's determination that personal rights are just that, personal.

"Corruptly" under § 1512(b) provides a limiting function that separates innocent from criminal persuasion. An understanding of "motivated by an improper purpose" as the intent to hinder a federal investigation for the benefit of anyone other than the information-holder, best comports with accepted maxims of statutory interpretation and the long judicial history of limiting the benefit of personal rights to the right-holder.

2. An interpretation of "corruptly" as "motivated by an improper purpose" best comports with the intent of Congress.

In interpreting the meaning of a statutory provision, a court may resort to review of legislative history if the language of the statute is unclear. *United States v. Great Northern Ry.*, 287 U.S. 144, 154-55 (1932); *Yi v. Fed. Bureau of Prisons*, 412 F.3d 526, 533 (4th Cir. 2005). All courts considering the meaning of § 1512(b)'s "corruptly" have found the term ambiguous. *Baldridge*, 559 F.3d at 1142. As such, § 1512(b)'s legislative history provides valuable insight into the statute's intended scope. Evidence of Congress's purpose for adding the "corruptly persuades" language, along with case law known to Congress at the time, leads to a conclusion that Congress intended to curtail the improper influencing of witnesses by expanding the applicability of the tampering statute. In this way, Congress sought to limit the ways in which the justice system is hampered in its search for truth. Defining "corruptly" as "motivated by an improper purpose" best comports with this legislative intent.

In 1982, Congress enacted § 1512 as part of the Victim Witness Protection

Act ("VWPA"). Pub. L. No. 97-291, 96 Stat 1248 (1982). While the legislation was in committee, Senator Paul Laxalt commented on its purpose, stating,

> Another troublesome area this bill attempts to clear up is the area of victim/witness intimidation. There is probably no crime [that] is more offensive to the integrity of the criminal justice system than one which seeks to prevent the reporting of another offense, or one which attempts to stop someone from testifying in a court of law. [This bill] deals with this problem by broadening and rewriting the intimidation sections of our Federal criminal law.

128 Cong. Rec. S13,064 (daily ed. Oct. 1, 1982) (statement of Sen. Paul Laxalt). Despite new protections, the original § 1512(b) did not contain language regarding corrupt persuasion.

In 1988, however, Congress enacted the Anti-Drug Abuse Act ("ADAA"), which amended § 1512(b) to include the corrupt persuasion language at issue. Pub.L. No. 100-690, 102 Stat. 4181 (1988). Senator Joseph Biden, one of the lead drafters of the criminal provisions of the legislation, defined the new language stating, "'Corrupt persuasion' of a witness is a non-coercive attempt to induce a witness to become unavailable to testify, or to testify falsely. 134 Cong. Rec. S17,369 (daily ed. Nov. 10, 1988) (statement of Sen. Biden). Senator Biden further stated that the ADAA's purpose was "merely to include in section 1512 the same protection of witnesses from non-coercive influence that was . . . found in section 1503. It . . . would allow such prosecutions . . . to be brought under section 1512 rather than under the catch-all provision of section 1503." *Id.* This language, given the judicial interpretations of § 1503 available to Congress, is key to understanding the intended scope of § 1512(b)'s criminal prohibitions.

Principles of statutory construction teach that Congress is presumed to be aware of judicial interpretations of the law. *Fluor Corp. & Affiliates v. United States*, 126 F.3d 1397, 1404 (Fed. Cir. 1997) (citing *Lorillard v. Pons*, 434 U.S. 575, 589 (1978)). Further, when Congress enacts a new statute incorporating provisions similar to those used in previously interpreted law, it is assumed to have acted with awareness of those judicial interpretations. *Fluor Corp.*, 126 F.3d at 1404. With this presumption in mind, two circuit court cases prove instructive in deciphering the intended application of § 1512(b).

In 1964, the Ninth Circuit, in *Cole v. United States*, 329 F.2d 437, 443 (9th Cir. 1964), affirmed a § 1503 conviction for obstructing justice and held that a person who corruptly advises a witness to plead the Fifth Amendment may be held criminally liable. The court found that the right against self-incrimination is an absolute personal right and truly inalienable, insofar as attempts may be made to transfer it to the benefit of someone else. *Id.* at 440. The court highlighted "advice" from attorney to client, spouse to spouse, and even friend to friend as examples of non-criminal conduct. *Id.* It noted, however, that these circumstances were not immune from criminal liability in all cases, distinguishing "honest, uncorrupted, [and] disinterested" advisements from those with corrupt, self-interested motivation. *Id.*

In *United States v. Cioffi*, 493 F.2d 1111, 1119 (2d Cir. 1974), the Second Circuit, citing *Cole*, clarified and expanded the definition of § 1503's "corruptly" to include advice to plead the Fifth Amendment offered for the purpose of protecting

someone other than the privilege-holder. According to the court, these instances presented "more than 'mere' advice." *Id.* Thus, the defendant's "advice" was given "corruptly" because the he was motivated to protect the interests of his organized-crime boss, not the potential witness. *Id.* Given Congress's express intent to duplicate § 1503's protections in § 1512, prohibiting Fifth Amendment advisements intended for the benefit of the advisor or a third party best effectuates § 1512(b)'s intended legislative scope.

Even assuming that the legislative history cannot be shown to expressly or impliedly demonstrate Congress's specific acceptance of "corruptly" as signifying "motivated by an improper purpose," this definition nevertheless best fits within Congress's generalized intent to prohibit the influencing of potential witnesses. Indeed, the enactment of § 1512 and its amendments thereafter demonstrate a widening of prohibited conduct. A determination that a person may advise a potential witness of his Fifth Amendment right, with a self-interested intent to hinder an investigation, is inconsistent with this general legislative intent.

In light of Congress's presumed awareness of the case law interpreting the scope of § 1503 and Senator Biden's clear statements regarding the addition of "corruptly persuades" to § 1512, an interpretation of "corruptly" as "motivated by an improper purpose"—a motivation for the benefit of one's self or a third party—best comports with the legislative intent of Congress.

3. An interpretation of "corruptly" as "motivated by an improper purpose" is sound public policy because it provides a clear rule and best supports the effective administration of justice.

Where a statute is susceptible to more than one reasonable construction, courts may consider the impact of an interpretation on public policy. *MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co.*, 36 Cal.4th 412, 426 (Cal. 2005); *see Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176, 220-21 (1980) (citing public policy concerns in interpreting the meaning of a patent statute). This Court should affirm the "motivated by an improper purpose" interpretation because it best accounts for the public policy considerations of providing clear, understandable rules and best balances competing interests relating to the administration of justice.

It is sound public policy to interpret statutes in a clear and easily understandable manner. *Aguilar*, 515 U.S. at 600; *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). The Fourteenth Circuit's interpretation of § 1512(b)'s "corruptly" best effectuates this policy. A definition of "corruptly" as "motivated by an improper purpose" creates a clear distinction between conduct that is criminal and conduct that is not. This is so because every persuader who endeavors to interfere with the cooperation of a witness for the benefit of anyone other than that witness is obviously conscious of his or her improper motive. *Aguilar*, 515 U.S. at 617 (Scalia, J., concurring & dissenting). A conscious, improper purpose is, in fact, what motivates the persuader's intent to hinder investigative efforts. Thus, a clear

and easily understandable line is drawn by an interpretation of "corruptly" as "motivated by an improper purpose."

Furthermore, there is a significant public interest in the effective administration of justice. *See Swidler & Berlin v. United States,* 524 U.S. 399, 403 (1998) (noting the justice system's interest in full communication between a lawyer and client). In *United States v. St. Pierre*, 132 F.2d 837, 840 (2d Cir. 1942), Judge Learned Hand commented on the conflict between this public interest and the privilege against self-incrimination, stating, "The result of using this, like any other privilege, is to deprive people of evidence which would be otherwise available; at best a disastrous necessity." In light of this conflict, an interpretation of "corruptly" as "motivated by an improper purpose" best balances these competing interests by providing a workable rule that reasonably limits interference with the administration of justice. Only advice that is wholly innocent and motivated for the benefit of the right-holder should be allowed to disrupt the justice system's search for truth. With respect to improper, self-interested advisements, the public interest in the administration of justice must take precedence.

This Court should accept an interpretation of § 1512(b)'s "corruptly" as "motivated by an improper purpose." Because attempts to hinder federal investigations create a significant strain on the efficient and reliable administration of the justice system, an interpretation that limits this conduct is necessary. Furthermore, this definition complies with accepted rules of statutory construction and restricts an otherwise unprecedented extension of personal rights. Likewise, it

best comports with public policy concerns and Congress's intent to curtail the influencing of witnesses. The privilege against self-incrimination is necessary to provide for fairness and legitimacy in our judicial system, but one must remain cognizant that the privilege inherently frustrates the judicial system's primary function of providing justice. Millstone should be precluded from improperly and intentionally seeking to benefit from the personal rights of another person. Because his motivation was improper, Millstone's conviction should be affirmed.

B. If this Court determines that a violation of § 1512(b)(3) requires more than a "non-coercive improper attempt to persuade," Millstone's conviction is nevertheless appropriate because his conduct involved coercion.

Urging a witness to invoke his or her Fifth Amendment right is necessarily criminal under § 1512(b) of the witness tampering statute if such advice is coercive or involves an attempt to coerce a potential witness. The court in *Farrell* held that a "non-coercive attempt to persuade a coconspirator who enjoys a Fifth Amendment right not to disclose self-incriminating information about the conspiracy" was not prohibited by § 1512(b). 126 F.3d at 488. *Doss* further explained that "absent some other wrongful conduct, such as coercion, intimidation, bribery, [or] suborning perjury," a defendant could not be found liable under § 1512(b) for merely advising another of their rights. 630 F.3d at 1190. Accordingly, if this Court elects to follow the interpretations of § 1512(b) highlighted in *Farrell* and *Doss*, Millstone's conviction remains justified because sufficient evidence exists to demonstrate that Millstone attempted to coerce Reynolds.

A determination of the level of coercive pressure applied by Millstone is based on the language used and the circumstances surrounding the exchange. *See United States v. Segal*, 649 F.2d 599, 603 (8th Cir. 1981) (using a defendant's language and actions to infer intent to interfere with a witness's future communications with law enforcement). Moreover, review of the record for sufficient evidence is conducted in a light most favorable to the conviction. *Doss*, 630 F.3d at 1192; *Segal*, 649 F.2d at 602. Under this standard, an adequate level of coercion exists to sustain Millstone's conviction under the *Farrell-Doss* approach to § 1512(b).

Three factors demonstrate sufficient evidence from which a jury could reasonably find that Millstone attempted to employ coercion in his advisement to Reynolds. First, Millstone explicitly stated that Reynolds faced imminent criminal liability if he did not do as advised. (R. at 9.) At their meeting, Millstone shouted, "they're talking about treating *us* like criminals here. *I'm not going to jail*, Reese . . . . And don't even think about pinning all this on me. Remember, they're looking at *your* stupid gas-guzzlers, too." (R. at 9 (emphasis added).)

Millstone's proclamation implies not only that Reynolds faced a potential share of the criminal punishment for Sekuritek's negligence, but also suggests that Millstone was willing to place the blame on Reynolds to avoid going to jail. (R. at 9.) Logic dictates that a threat of impending criminal sanction applies coercive pressure on a listener because criminal sanction is something that any rational actor would seek to avoid. Millstone's statement was meant to diminish Reynolds ability to make an independent choice and, thus, was attempted coercion.

Second, Millstone's "advisement" came in the coercive context of his employment relationship with Reynolds. To determine whether statements are coercive, courts will examine the relationship between the defendant and the witness. *Doss*, 630 F.3d at 1190. In *Doss,* the defendant, who was charged with multiple counts of sex trafficking, made statements to a potential witness indicating that it would be bad for her to testify against him. *Id.* The court in *Doss* recognized the coercive nature of these statements in light of the prior pimp/prostitute relationship that had existed between the defendant and the witness. *Id.*

Like the relationship between defendant and witness in *Doss*, Millstone's relationship to Reynolds provides a coercive subtext for his statements. Millstone and Reynolds were Sekuritek's only executives, but the record suggests that the two were not equals. (R. at 4.) Millstone was the president and CEO of the company, while Reynolds acted as the vice president. (R. at 4.) Millstone dealt with all security-related issues and client relations, while Reynolds was relegated to many of the administrative tasks. (R. at 4.) This was evidenced when Drayton Wesley of Bigle Chemical Company contacted Millstone directly. (R. at 5.) Similarly, when the Bigle Chemical contract was complete, Millstone, not Reynolds, was the signatory. (R. at 6.) Thus, when Millstone "advised" Reynolds to invoke the Fifth Amendment, he acted in at least a pseudo-superior capacity and, in doing so, applied inherent coercive pressure.

Third, Millstone's "advisement" came in the form of a shouting command. (R. at 9.) Immediately before Millstone's "advisement," Reynolds stated that he

thought the best course of action would be to cooperate with investigators. (R. at 9.) Millstone responded with anger and scolded Reynolds. (R. at 9.) Moreover, Millstone's response pertaining to Reynolds's Fifth Amendment right was not a passive explanation of options, but rather a command. Millstone scolded, "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." (R. at 9.) Millstone's "advice" was intended to leave Reynolds with no contrary options. Common sense informs that an angry, shouting command to invoke the Fifth Amendment is more coercive than a calm advisement of legal options.

These three factors combine to demonstrate the coercive pressure that Millstone intended his "advisement" to carry. Given § 1512(b)'s intended legislative goals of protecting witnesses from influence and providing for a reliable and efficient justice system, it is logical to place Millstone's actions within the realm of prohibited coercive conduct. Millstone's "advisement" was a shouting, angry command for Reynolds to plead the Fifth Amendment. That order was made in the context of Millstone's superior position within the structure of Sekuritek and against a backdrop of potential impending criminal liability.

In light of these factual circumstances, a jury could reasonably find that Millstone's "advisement" constituted an attempt to coerce Reynolds into invoking his personal privilege against self-incrimination. Accordingly, if this Court determines that the *Farrell-Doss* understanding of § 1512(b)'s "corruptly" is

appropriate, Millstone's conviction is supported by the evidence and should be affirmed.

CONCLUSION

As a public welfare statute, the CWA was designed to hold actors criminally liable for any ordinary negligence that resulted in hazardous pollutants spilling into our nation's waterways. Millstone's failure to properly train and supervise his employees at the Windy River facility satisfies such negligence. Additionally, Millstone's attempt to encourage Reynolds to avoid giving information to law enforcement officials by invoking the Fifth Amendment is a violation of the witness-tampering statute because Millstone was motivated by the improper purpose of avoiding his own criminal liability. For these reasons, this Court should affirm the decision of the Fourteenth Circuit and hold that Millstone is guilty of violating the CWA and the federal witness-tampering statute.

Respectfully Submitted,

/s/ Team 3
Counsel for Respondent
United States of America

APPENDIX A

33 U.S.C.A. § 1319(c)

(1) Negligent violations

Any person who--

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

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

18 U.S.C.A. § 1512

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

> **(3)** hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation[1] supervised release,,[2] parole, or release pending judicial proceedings;

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