Docket No. C11-0116-1

In the

SUPREME COURT OF 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 30
Counsel for Respondent

QUESTIONS PRESENTED

I. Can Millstone be found criminally liable for negligently discharging pollutants in violation of the Clean Water Act, 33 U.S.C. § 1319(c)(1)(A), when he failed to exercise the standard of care a reasonably prudent person would have exercised under the same circumstances?

II. Did Millstone "corruptly" persuade Reynolds, in violation of 18 U.S.C. § 1512(b)(3), by telling Reynolds to withhold information by invoking the Fifth Amendment when questioned by federal investigators?

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STATEMENT OF JURISDICTION

The Order of the United States Court of Appeals for the Fourteenth Circuit was entered on October 3, 2011. Petitioners then filed the Petition for Writ of Certiorari, which this Court granted. The jurisdiction of the Fourteenth Circuit was based on 28 U.S.C. § 1291 (2006). This Court has jurisdiction in this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment of the United States Constitution. Additionally, this case involves the following provisions of the Clean Water Act, 33 U.S.C. § 1319(c)(1)(A) (2006), and the witness-tampering statute, 18 U.S.C. § 1512(b)(3). These provisions are set forth, in pertinent part, at Appendix A.

STATEMENT OF THE CASE

Exxon Valdez. The BP Oil Spill. The Soup. Samuel Millstone's actions as President and CEO of Sekuritek have once again brought environmental concerns to the forefront of America's disdain and outrage. Thousands of barrels of chemicals poured into the Windy River in Polis, New Tejas on January 27, 2007. (R. at 7). Twenty-three Americans lost their lives as a direct result of the explosions and resulting fires. (R. at 7). Others lost their homes. (R. at 7). Three national

historical buildings were lost. (R. at 7). The fires alone caused over $450 million in damage and while reports of losses continue to trickle in, most economists estimate the total loss to the state and local economies is nearly $1.25 billion. (R. at 7-8). The "Soup," a concentrated chemical cocktail that now poisons the Windy River and nearby creeks, has crippled commerce, agriculture, and wildlife. (R. at 7-8). The Soup is highly corrosive and has eaten through boats, killed all fish within five miles, and remains a fire hazard. (R. at 8). According to the media, this is yet another example of corporate greed outweighing the corporation's responsibility to the lives and safety of others. (R. at 9).

Millstone and business school classmate Reese Reynolds founded their security company, Sekuritek, in 2004. (R. at 4). Their start-up company had been in business less than two years when Bigle Chemical Company opened a plant in Polis, New Tejas, in September of 2006. (R. at 4-5). Bigle Chemical sought to hire a company to provide security at the facility to avoid any security breaches that could result in a spill. (R. at 5). Bigle Chemical contacted Sekuritek on November 5, 2006 to discuss their available services. (R. at 5). It offered to pay Sekuritek $8.5 million over ten years if Sekuritek could be live and online by December 1, 2006, less than a month later. (R. at 5).

Enticed by the offer, which was almost ten times the size of Sekuritek's previous largest contract, Millstone accepted. (R. at 5). Sekuritek Vice President Reynolds, however, was concerned that Sekuritek could not handle such a large contract in such a short amount of time. (R. at 5). Accepting the contract presented

many challenges to Sekuritek: Millstone and Reynolds had to hire thirty-seven new employees, make a significant investment in new security equipment, and devise a transportation plan necessary to patrol the plant. (R. at 5-6). Sekuritek's modest staff and use of bicycles to patrol their clients' premises were insufficient to effectively patrol such a large plant. (R. at 6).

In order to meet the deadline Bigle Chemical imposed, Millstone began cutting corners. (R. at 6). Instead of hiring only experienced security personnel as he had in the past, Millstone hired a mix of experienced and inexperienced personnel. (R. at 6). Additionally, instead of requiring new hires to pass the company's three-week training course, Millstone spent only one week formally training the new employees, with the remainder of the training consisting of "on the job observation and training." (R. at 6). Many policies, though included in the handbook, were left out of the training, including instructions on how to handle a potential security breach. (R. at 8). Only if employees took the initiative to read their handbook could they discover that proper protocol is to "leave their vehicle in a stopped and secured position to the side of any pathway and proceed on foot" once within 100 yards of a suspected breach. (R. at 8).

While Millstone dealt with the new personnel, he tasked Reynolds with purchasing the equipment needed for the new contract. (R. at 6). When it came time to choose a vendor for Sekuritek's new fleet of custom sport-utility vehicles ("SUVs"), Reynolds quickly reviewed the options and chose an unproven company. (R. at 6). It was the only company that could provide the vehicles in time. (R. at 6).

On January 27, 2007, after just two months on the job, inexperienced and largely untrained security guard Josh Atlas saw what he believed to be an intruder (actually a safety inspector) near the chemical storage tanks at Bigle Chemical. (R. at 7). Atlas floored the accelerator of his SUV and steered toward the tanks to investigate. (R. at 7). At that point, the pedal became stuck and the SUV accelerated beyond Atlas' control. (R. at 7). Atlas jumped out of the vehicle and the SUV crashed into a storage tank, causing the first of many explosions at the plant and spilling thousands of barrels of chemicals into the Windy River. (R. at 7). Due to the rapid spread of the fire and Sekuritek's installation of an obstructive security wall just days earlier, firefighters were unable to fight the fire for three days. (R. at 7).

A federal investigation began immediately to determine the cause of the explosion and chemical spill. (R. at 8). Because the initial explosion was caused by a Sekuritek guard, the investigation quickly focused on Millstone and Reynolds. (R. at 8).

During the investigation, and as media pressures grew, Millstone met with Reynolds to discuss a plan of action. (R. at 9). Reynolds informed Millstone that he wanted to get it over with and tell federal investigators everything they wanted to know. (R. at 9). Millstone angrily scolded Reynolds, stating:

> "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 this on me. Remember, they're looking at your stupid gas-guzzlers, too."

(R. at 9). Reynolds, however, decided to speak to investigators despite Millstone's outburst. (R. at 10).

The United States brought charges against Millstone for the negligent discharge of pollutants in violation of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(c)(1)(A), for negligently hiring, training and supervising security personnel and for negligently failing to inspect the SUVs prior to their purchase and use. (R. at 10). The United States also brought charges against Millstone for witness tampering under 18 U.S.C. § 1512(b)(3). (R. at 10).

A jury found Millstone guilty of both charges. (R. at 10). On appeal, the Fourteenth Circuit Court affirmed, finding no error. (R. at 3).

In affirming the conviction under the CWA, the Fourteenth Circuit found that the term "negligently," as used in § 1319(c)(1)(A), plainly refers to "the failure to exercise the standard of care that a reasonably prudent person would have exercised in the same situation." (R. at 11). The court stated that if Congress had intended something different, it could have expressly used another term, as it did in other sections of the CWA. (R. at 11). The Fourteenth Circuit also found there was no due process violation because § 1319(c)(1)(A) punishes a public welfare offense, allowing Congress to constitutionally dispense with the traditional *mens rea* requirement. (R. at 12).

Affirming Millstone's conviction for witness-tampering, the Fourteenth Circuit agreed with the Second and Eleventh Circuits, finding that "corruptly" means "motivated by an improper purpose." (R. at 15). The court then found that

the jury was reasonable in finding that Millstone was motivated by an improper purpose when he urged Reynolds not to cooperate with investigators in an attempt to avoid his own imprisonment. (R. at 15).

SUMMARY OF THE ARGUMENT

The Fourteenth Circuit correctly found that the term "negligently" as used in § 1319(c)(1)(A) of the CWA imposes an ordinary negligence standard. Using established methods of statutory interpretation, the plain meaning of "negligently" is the failure to exercise the standard of care that a reasonably person would have exercised in the same situation. The context of the term within the CWA as well as the legislative history surrounding its enactment confirm this meaning. Further, imposing an ordinary negligence standard for criminal liability under § 1319(c)(1)(A) does not violate the Due Process Clause because § 1319(c)(1) constitutes a public welfare offense. This is because it regulates dangerous substances, pollutants, such that those who stand in responsible relation to them are assumed to be put on notice of their strict regulation. Therefore, because § 1319(c)(1)(A) punishes a public welfare offense, its imposition of an ordinary negligence standard does not violate the Due Process Clause.

The Fourteenth Circuit also correctly held that Millstone "corruptly" persuaded Reynolds in violation of § 1512(b)(3). Using statutory interpretation methods, the proper definition of "corruptly" is "motivated by an improper purpose." The plain meaning of "corruptly," as well as its context within § 1512(b), and congressional intent at the time of its addition to the statute all confirm this

definition. A defendant attempting to persuade a potential witness to withhold information is "motivated by an improper purpose" when his purpose is to protect himself from criminal liability. The presence or absence of privilege is irrelevant when determining whether a defendant was motivated by an improper purpose. When Millstone attempted to persuade his co-conspirator Reynolds to invoke the Fifth Amendment to hinder the investigation against Millstone, he was motivated by the purpose of avoiding imprisonment for his actions. He therefore acted with an improper purpose and "corruptly" persuaded Reynolds in violation of § 1512(b).

ARGUMENT

I. THE FOURTEENTH CIRCUIT CORRECTLY HELD § 1319(c)(1)(A) OF THE CWA REQUIRES ONLY A SHOWING OF ORDINARY NEGLIGENCE AND THAT THIS STANDARD DOES NOT RESULT IN A DUE PROCESS VIOLATION BECAUSE § 1319(c)(1)(A) PUNISHES A PUBLIC WELFARE OFFENSE.

Congress designed the CWA to eliminate the discharge of pollutants into the navigable waters of the United States. 33 U.S.C. § 1251(1) (2006). To accomplish this goal, the CWA makes unlawful "the discharge of any pollutant by any person," 33 U.S.C. § 1311(a), and imposes criminal sanctions on "[a]ny person who negligently violates section 1311," excepting those complying with other sections of the act. 33 U.S.C. § 1319(c)(1)(A). Before this Court are questions of both statutory interpretation and due process which are reviewed *de novo*. *See McNary v. Haitian Refugee Ctr., Inc.,* 498 U.S. 479, 493 (1991).

As used in § 1319(c)(1)(A), the plain meaning of the term "negligently" imposes an ordinary negligence standard. Thus, when a person discharges pollutants into the nation's waters by failing to exercise the care a reasonably prudent person would have used under similar circumstances, he may be subject to criminal penalties under § 1319(c)(1). Criminalizing ordinary negligence under § 1319(c)(1)(A) does not offend the Due Process Clause of the Fifth Amendment of the U.S. Constitution because the provision punishes a public welfare offense.

Therefore, the Fourteenth Circuit correctly held that § 1319(c)(1)(A) requires only a showing of ordinary negligence and this Court should affirm Millstone's conviction.

A. Using Standard Methods of Statutory Interpretation, § 1319(c)(1)(A) Imposes an Ordinary Negligence Standard.

When interpreting a federal statute, the key function of the Court is to effectuate the intent of the legislature. *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981). When a specific statutory term is not explicitly defined by Congress, the Court assumes Congress expressed its purpose by the ordinary meaning of the words used. *Russello v. United States,* 464 U.S. 16, 21 (1983). Thus, the first step in statutory interpretation is to examine the plain language of the statute to discover its ordinary meaning. *Middlesex Cnty*, 453 U.S. at 13. Only when the plain language is inconclusive does the court look to other aids of statutory interpretation, such as legislative history, to determine congressional intent. *Id.*

The plain meaning of the term "negligently," as used by Congress in § 1319(c)(1)(A) of the CWA, imposes an ordinary negligence standard. The statute's legislative history compels the same conclusion.

1. Standing Alone and in Context of § 1319(c)(1)(A), the Term "Negligently" Requires the Imposition of an Ordinary Negligence Standard

The Court's first step in interpreting a statute is to determine whether the statutory language has a plain and unambiguous meaning. *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002). When the language is clear and is both coherent and consistent within the context of the statutory scheme, the Court's inquiry is complete and must cease. *Robinson v. Shell Oil Co.,* 519 U.S. 337, 340 (1997). Failure to defer to the plain language expression of Congress' intent

infringes upon the legislative powers vested in Congress by Article I, Section I of the U.S. Constitution. *United States v. Albertini*, 472 U.S. 675, 680 (1985).

a. The plain meaning of "negligently" imposes an ordinary negligence standard.

The term "negligently" is not defined for the purposes of § 1319(c)(1)(A), nor is the term modified by a word such as "gross" "culpable," or "willful." As a result, the court should look to the ordinary meaning of the word "negligently" to discern what standard of negligence Congress intended to impose under § 1319(c)(1)(A). *See Smith v. United States*, 508 U.S. 223, 228 (1993).

The plain and unambiguous meaning of the term "negligently" reflects an ordinary negligence standard. *Black's Law Dictionary* defines "negligently" as "[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation." *Black's Law Dictionary* 1135 (9th ed. 2009). Similarly, *Merriam-Webster* defines "negligently" as the "failure to exercise the care that a prudent person usually exercises." *Merriam-Webster's Collegiate Dictionary* 775 (10th ed. 2001). Thus, by its plain meaning, the CWA imposes an ordinary negligence standard. *See United States v. Hanousek,* 176 F.3d 1116, 1120-21 (9th Cir. 1999), *cert. denied,* 528 U.S. 1102 (2000) (defining "negligently" as used in § 1319(c)(1) as "a failure to use such care as a reasonably prudent and careful person would use under similar circumstances."); *United States v. Ortiz*, 427 F.3d 1278, 1283 (10th Cir. 2005) (defining "negligently" as used in § 1319(c)(1) as "a failure to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstance.").

Therefore, because the plain meaning of the term "negligently" imposes an ordinary negligence standard, this Court should apply that meaning to § 1319(c)(1)(A).

b. The absence of any modifier preceding "negligently" indicates Congress intended to apply an ordinary negligence standard.

An examination of § 1319(c)(1)(A) within the context of the CWA, as well as in relation to other criminal provisions, supports a finding that Congress uses modifiers when it wishes to impose a heightened negligence standard. Because § 1319(c)(1)(A) does not include a modifier, it imposes only an ordinary negligence standard.

The Court presumes that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act," its disparate inclusion or exclusion is both intentional and purposeful. *Russello,* 464 U.S. at 23.

Had Congress intended to impose a heightened negligence standard in § 1319(c)(1)(A), it would have done so explicitly through the use of modifiers, just as it did in other sections of the CWA. *Hanousek*, 176 F.3d at 1121. In the CWA's civil penalties provision punishing the illegal discharge of oil, Congress used both the terms "gross negligence" and "willful negligence" to signal it intended to impose a heightened negligence standard. *See* 33 U.S.C. § 1321(b)(7)(D), (f) (2006). It did not, however, use any modifier, such as "gross" or "willful," in front of the term "negligently" in § 1319(c)(1)(A). Thus, this Court should presume that Congress

intentionally chose not to include such terms in § 1319(c)(1)(A) and in doing so, sought to impose only an ordinary negligence standard. *See Hanousek*, 176 F.3d at 1121.

An examination of federal criminal negligence statutes confirms that where Congress wants to use a heightened standard, it does so explicitly by using modifiers such as "gross" or "willful." *See, e.g.*, 7 U.S.C. § 1596(a) (imposing criminal penalties for violation of Federal Seed Act resulting from "gross negligence"); 18 U.S.C. § 492 (requiring forfeiture of counterfeit paraphernalia when individual acts with "willful negligence"). This is especially true when the statute in question criminalizes a public welfare offense. In those statutes, where Congress is silent as to the *mens rea* requirement, the Court presumes that Congress actually intended to dispense with the requirement. *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971).

Federal appellate court interpretations of statutes criminalizing negligent conduct, without the use of a modifier, are sparse; however, the highest courts in several states have interpreted such statutes as imposing an ordinary negligence standard. For example, in *State v. Hazelwood*, the Alaska Supreme Court held that an Alaska environmental statute imposing criminal penalties for "negligently" dumping oil into the waters of the state imposed only an ordinary negligence standard. *State v. Hazelwood*, 946 P.2d 875, 885 (Alaska 1997). The court reasoned that although the term was used in a criminal provision, it nevertheless imposed only an ordinary negligence standard because criminal negligence is

required only when the statute specifically says so (that is, when it includes a modifier). *Id.* at 885. The court cited to a number of different states which similarly applied an ordinary negligence standard in other criminal statutes. *Id.* at 885 n.20 (citing *Commonwealth v. Berggren,* 496 N.E.2d 660, 661 (Mass. 1986); *State v. Johnson,* 364 P.2d 1019, 1019-20 (Utah 1961); *State v. LaBonte,* 144 A.2d 792, 794-95 (Vt. 1958)).

The Court's decision in *Safeco Insurance Co. v. Burr* does not prevent an examination of the civil side of the CWA when interpreting the term "negligently" in § 1319(c)(1)(A). There, the petitioner asked the Court to look to paired modifiers used on criminal side of the Fair Credit Reporting Act to interpret the civil side. *Safeco Ins. Co. v. Burr*, 551 U.S. 47, 60 (2007). The Court refused, reasoning that paired modifiers are often used in criminal statutes to require the government prove "something extra," unlike the civil side where paired modifiers merely give the plaintiff a choice of mental states when proving liability. *Id.* Thus, although the Court in *Safeco* said it was not appropriate to look to the criminal side to interpret the civil side, its explicit reason for doing so was that Congress uses paired modifiers differently on the two sides. *Id.*

Here, however, the Court's reasoning in *Safeco* simply does not apply because the term "negligently," as used in § 1319(c)(1)(A), has no modifier whatsoever. *Safeco* was concerned with paired modifiers, and thus does not prevent this Court from examining the civil side of the CWA to determine how Congress used the term.

As a result, because Congress did not include any modifier before the term "negligently" in § 1319(c)(1)(A), the Court should assume it did so purposefully and apply the plain meaning of the term "negligently," ordinary negligence.

Therefore, because the term "negligently" is clear and unambiguous both on its face and in the context of the CWA, § 1319(c)(1)(A) should be interpreted as imposing an ordinary negligence standard.

2. The Legislative History of the CWA Confirms Congress Intended to Impose an Ordinary Negligence Standard Under § 1319(c)(1)(A).

Where the statutory language and the legislative history clearly indicate a specific purpose of Congress, that purpose must be upheld. *Hudson Distrib., Inc. v. Eli Lilly & Co.*, 377 U.S. 386, 395 (1964).

Although the legislative history concerning the negligence standard imposed by § 1319(c)(1) is minimal, what history does exist demonstrates Congress intended to impose an ordinary negligence standard. Mark A. Ryan, *The Clean Water Act Handbook* 276 n.254 (Am. Bar Ass'n, 3d ed. 2011). In debating an amendment to strengthen the penalty provisions of the CWA, Rep. William Harsha 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. 10,644 (1972). Rep. Harsha thereby specifically recognized that the term "negligently" as used in § 1319(c)(1) means "simple negligence." Knowing Rep. Harsha's interpretation of the statute, Congress rejected the proposed amendment. *Id.* Thus,

the legislative history of § 1319(c)(1) further demonstrates Congress intended to impose an ordinary negligence standard.

Therefore, because the legislative history of § 1319(c)(1)(A) supports the clear and unambiguous meaning of the term "negligently" as imposing an ordinary negligence standard, this Court should apply the plain meaning of the statute.

B. Interpreting the CWA to Include an Ordinary Negligence Standard does not Violate the Due Process Clause Because § 1319(c)(1)(A) Punishes a Public Welfare Offense.

The Supreme Court has long recognized that in the case of criminal regulatory statutes designed to protect the public welfare, the requisite *mens rea* may be diminished or eliminated. *See United States v. Engler*, 806 F.2d 425, 431 (3d Cir. 1986). When a statute punishes a public welfare offense, it may impose an ordinary negligence standard rather than a criminal negligence standard because the *mens rea* can be diminished. *See United States v. Hanousek,* 176 F.3d 1116, 1121 (9th Cir. 1999), *cert. denied,* 528 U.S. 1102 (2000).

To determine whether a statute defines a public welfare offense courts look to whether the substance involved is a "dangerous or deleterious" material that places an individual in "responsible relation to a public danger" on notice that the material is subject to strict regulation. *See Staples v. United States,* 511 U.S. 600, 607, 612 n.6 (1994).

Section 1319(c)(1)(A) constitutes a public welfare offense because it regulates dangerous pollutants such that those who stand in responsible relation to them are

assumed to be put on notice of their strict regulation. Therefore, imposing an ordinary negligence standard does not violate due process.

1. Public Welfare Offenses May Criminalize Ordinary Negligence Without Violating Due Process.

It is "well established" that a public welfare statute may subject a person to criminal liability for his or her ordinary negligence without violating due process. *Hanousek*, 176 F.3d at 1121.

The history of public welfare offenses and policy reasons underlying its development confirm that imposing an ordinary negligence standard does not violate due process. The public welfare doctrine was first developed in the United States in the mid-nineteenth century as a means of punishing offenders of regulatory statutes whose actions could have harmful effects on the general public. *See* Francis B. Sayre, *Public Welfare Offenses,* 33 Colum. L. Rev. 55, 63, 67 (1933). Such regulatory measures are not aimed at punishing offenders but rather are used as a means of communicating that society will not tolerate conduct resulting in harm to public or social interests. Leslie Yalof Garfield, *A More Principled Approach to Criminalizing Negligence: A Prescription for the Legislature*, 65 Tenn. L. Rev. 875, 913-14 (1998); *see also United States v. Balint*, 258 U.S. 250, 252 (1922) ("the emphasis of [public welfare statutes] is evidently upon achievement of some social betterment rather than the punishment of the crimes."). Moreover, English courts simultaneously developed the same doctrine, recognizing that in some cases, the protection of the public interest must be considered ahead of the rights of the individual. Sayre, *supra*, at 67. Today, the "overwhelming majority" of states

permit the criminalization of ordinary negligence. *State v. Hazelwood*, 946 P.2d 875, 884 n.17 (Alaska 1977).

Punishing public welfare offenses using ordinary negligence continues to provide a necessary deterrent to those whose actions endanger society. Garfield, *supra*, at 911. Ordinary negligence simply requires a showing that a defendant failed to use reasonable care under the given circumstances. Samara Johnston, *Is Ordinary Negligence Enough to Be Criminal? Reconciling* United States v. Hanousek *with the Liability Limitation Provisions of the Oil Pollution Act of 1990*, 12 U.S.F. Mar. L.J. 263, 297-98 (2000). Pure accidents that result from otherwise-reasonable conduct, therefore, do not result in criminal liability. *Clean Water Act Oversight: Hearing Before the S. Comm. on Env't & Pub. Works,* 108th Cong. (2003) (statement of Robin Greenwald, Professor, Rutgers School of Law).

Further, the use of an ordinary negligence standard to punish public welfare offenses does not and will not lead to an abuse of the system. This Court has recognized that in determining whether an individual is subject to criminal prosecution for a public welfare offense, we must trust "the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries . . . ." *United States v. Dotterweich*, 320 U.S. 277, 285 (1943).

Prosecutors have not abused this trust when charging defendants under the CWA. A comprehensive statistical analysis revealed that federal prosecutors exercise considerable restraint when bringing charges under the CWA. Steven P. Solow & Ronald A. Sarachan, *Criminal Negligence Prosecutions Under the Federal*

Clean Water Act: A Statistical Analysis and Evaluation of the Impact of Hanousek *and* Hong, 32 Envtl. L. Rep. 11,153 (2002). The EPA pursues criminal investigations of a CWA violation only when there is evidence of both significant harm and culpable conduct. Charles J. Babbitt et al., *Discretion and the Criminalization of Environmental Law*, 15 Duke Envtl. L. & Pol'y F. 1, 19 (2004).

The ordinary negligence standard as a useful bargaining tool for prosecutors. *Clean Water Act Oversight*, *supra*. The availability of this more lenient criminal charge provides an opportunity for compromise in plea negotiations between defense and government lawyers in criminal cases where the government has charged a defendant with knowing violations of the CWA. *Id.*

Therefore, applying an ordinary negligence standard under public welfare statutes does not violate the Due Process Clause.

2. Section 1319(c)(1)(A) Punishes a Public Welfare Offense.

A statute defines a public welfare offense when the substance involved is a "dangerous or deleterious" material such that it places an individual in "responsible relation to a public danger" on notice that the material is subject to strict regulation. *See Staples*, 511 U.S. 600 at 612 n.6. The penalties imposed may also be considered in determining whether a statute punishes a public welfare offense. *Id.* at 616.

a. The pollutants regulated by § 1319(c)(1)(A) are dangerous or deleterious substances.

The Supreme Court has identified a number of dangerous or deleterious products or materials that threaten public safety, including corrosive liquids like

sulfuric acid, hand grenades, and narcotics. *See United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 565-66 (1971) (regulating the shipment of sulfuric acid and other dangerous acids); *United States v. Freed*, 401 U.S. 601, 609-10 (1971) (regulating the ownership of hand grenades); *Balint*, 258 U.S. at 253-54 (regulating the sale of narcotics).

Like these substances, the pollution regulated by the CWA constitutes a dangerous or deleterious substance. *Hanousek*, 176 F.3d at 1121; *see also United States v. Kelley Technical Coatings, Inc.*, 157 F.3d 432, 439 n.4 (6th Cir. 1998); *United States v. Hopkins*, 53 F.3d 533, 541 (2d Cir. 1995); *United States v. Weitzenhoff*, 35 F.3d 1275, 1286 (9th Cir. 1993). The CWA's definition of "pollutant" includes a broad range of hazardous substances, including chemical waste, industrial waste, sewage, and radioactive materials. 33 U.S.C. § 1362(6). The illegal discharge of such pollutants could have "potentially dire consequences" for the health and safety of the community. *See Weitzenhoff*, 35 F.3d at 1286 (citing S.Rep. No. 99-50, 99th Cong., 1st Sess. 29 (1985)). For example, water pollution causes irreversible and cataclysmic harms not only to the environment but also specifically to the human population. Jonathan Simon, *Risk and Reflexivity: What Socio-Legal Studies Adds to the Study of Risk and the Law*, 57 Ala. L. Rev. 119, 133-34 (2005). Many chemical pollutants lead to harmful effects such as cancer and birth defects. Jackson B. Battle & Maxine I. Lipeles, Water Pollution 10 (Anderson Publ'g Co., 3d ed. 1998).

Indeed, the dire consequences of water pollution are clearly illustrated by this case. Because of Millstone's negligence, thousands of barrels of concentrated chemicals were dumped into the Windy River, damaging fishing boats and shipping barges and destroying all agriculture, fish, and fish breeding grounds for five miles downriver. Local water treatment and utilities facilities were shut down due to the fire hazard caused by the chemicals; twenty-three people died from the explosions and fires that resulted. The dangerous effects of the chemical spill on the New Tejas community are exactly the type that the CWA seeks to prevent.

Therefore, "pollution" regulated by § 1319(c)(1)(A) constitutes a dangerous or deleterious substance which threatens public safety.

b. Millstone stands in responsible relation to Bigle's chemicals and therefore is assumed to be aware of their strict regulation.

When a defendant is aware he is dealing with a dangerous or deleterious substance that places him in responsible relation to a public danger, he is presumed alerted to the probability of strict regulation of the substance, even if he does not handle the substance directly. *See Staples,* 511 U.S. at 607; *Hanousek*, 176 F.3d at 1122. An individual stands in "responsible relation to a public danger" when his conduct is of a type that threatens the health or safety of the community. *See Liparota v. United States*, 471 U.S. 419, 432-33 (1985).

A defendant is assumed to be on notice of strict regulation of a substance when he is aware the substance is dangerous and that his conduct could have dangerous consequences for the community. In *United States v. Hanousek*, the

defendant was in charge of overseeing and ensuring the safety of a rock-quarrying project near a high-pressure petroleum pipeline. *Hanousek*, 176 F.3d at 1119. After a contractor punctured the pipeline with a backhoe, the defendant was charged with violating the CWA's criminal negligence provision for failing to properly protect the pipeline. *Id.* Even though the defendant did not work with or handle the petroleum pipeline, the Ninth Circuit reasoned that he should nevertheless have been alerted to the probability of the petroleum's strict regulation because he was both aware the pipeline contained dangerous materials and aware that a puncture in the pipeline would have dangerous consequences for the community. *See id.* at 1122.

Mere awareness of a dangerous object is not always sufficient to provide notice, however, if the regulated substance or device is both common and typically lawful. Therefore, in *Staples v. United States*, the Court created an exception for common and lawful actions such as the mere ownership or possession of a gun. *See Staples*, 511 U.S. at 610-12, 616.

Like the supervisor in *Hanousek*, Millstone was similarly aware that the Bigle Chemical plant housed dangerous materials and that his conduct could have dangerous consequences to the community. Millstone was aware that Bigle Chemical was a plant housing chemicals and that Sekuritek was hired with the purpose of protecting the plant from any security breaches that could cause a chemical spill. Although Millstone was a contractor and did not directly handle Bigle's chemicals, he should nevertheless have been alerted to the probability of

their strict regulation, as in *Hanousek*, because he was aware of their presence and aware that a breach in security could cause a chemical spill. Thus, Millstone knew that his conduct could have a dangerous consequence to the community and he therefore stood in responsible relation to a public danger.

Further, the exception discussed in *Staples* is not applicable here. Bigle's chemicals are not commonplace and dumping them into the Windy River would not otherwise be lawful, so the Court's exception cannot apply here. It would also be inappropriate to use the *Staples* exception to evaluate the employee's use of tools of his own trade, such as the SUV. It is the chemicals that are subject to regulation, not the SUV itself. Therefore, it is irrelevant whether the use of an SUV is lawful or otherwise common in determining whether the *Staples* exception applies.

Thus, because Millstone was aware he was dealing with a dangerous or deleterious substance, the Bigle chemicals, and he was in responsible relation to a public danger because he knew they were dangerous, the Court assumes he was alerted to the probability of strict regulation of the material.

c. <u>The penalties imposed by § 1319(c)(1) do not preclude a finding the provision punishes a public welfare offense.</u>

The severity of penalties imposed may be relevant in determining whether a statute defines a valid public welfare offense. *Staples*, 511 U.S. at 616.

Although public welfare statutes originally involved only light penalties of fines or short jail sentences, modern public welfare statutes have provided for stronger penalties. *Weitzenhoff*, 35 F.3d at 1286 n.7. The Court has upheld as public welfare offense statutes that impose sentences of at least two years

imprisonment. *See Int'l Minerals*, 402 U.S. 558 (ten years); *Freed*, 401 U.S. 601 (five years); *Balint*, 258 U.S. 250 (five years). *But see United States v. Ahmad*, 101 F.3d 386, 391 (5th Cir. 1996) (holding that a knowing violation of the CWA does not constitute a public welfare offense in part due to penalties of three years in prison). Federal appellate courts have also upheld public welfare offenses that are punishable by up to $50,000 per day of a violation. *See Kelley Technical*, 157 F.3d at 435. Under the CWA, even a fine of $50,000 per day of the violation plus three years imprisonment was found to be not so severe as to avoid definition as a public welfare offense. *Weitzenhoff,* 35 F.3d at 1286.

Here, first time offenders face fines ranging from $2,500 to $25,000 per day of the violation and imprisonment for not more than one year. 33 U.S.C. § 1319(c)(1). Repeat offenders face fines of not more than $50,000 per day of the violation and imprisonment of not more than two years. *Id.* Thus, the penalties imposed by § 1319(c)(1) are significantly lighter than those imposed by other public welfare offenses. As a result, these relatively light penalties do not preclude this Court from finding § 1319(c)(1) defines a valid public welfare offense.

Section 1319(c)(1)(A) constitutes a public welfare offense because it regulates dangerous pollutants such that those who stand in responsible relation to them are assumed to be put on notice of their strict regulation. The penalties imposed by the statute do not preclude this finding. Therefore, imposing an ordinary negligence standard does not violate due process and Millstone's conviction should be affirmed.

II. THE FOURTEENTH CIRCUIT CORRECTLY HELD THAT CORRUPT PERSUASION UNDER § 1512(b) INCLUDES A SELF-INTERESTED ATTEMPT TO AVOID PRISON BY TELLING A POTENTIAL WITNESS TO INVOKE THE FIFTH AMENDMENT BECAUSE SUCH CONDUCT IS MOTIVATED BY AN IMPROPER PURPOSE.

Section 1512(b) in Title 18 of the United States Code provides that "[w]hoever knowingly . . . corruptly persuades another person, or attempts to do so . . . with intent to . . . hinder, delay, or prevent the communication to a law enforcement officer . . . regarding the commission or possible commission of a Federal offense" may be imprisoned under the law. 18 U.S.C. § 1512(b)(3) (2006). The issue before the Court is one of statutory interpretation which is reviewed *de novo*. *See McNary v. Haitian Refugee Ctr., Inc.,* 498 U.S. 479, 493 (1991).

As used in § 1512(b), the plain and unambiguous meaning of the term "corruptly" is "motivated by an improper purpose." *See United States v. Shotts*, 145 F.3d 1289, 1301 (11th Cir. 1998); *United States v. Thompson*, 76 F.3d 442, 452 (2d Cir. 1996). Thus, when a defendant tells a potential witness to invoke the Fifth Amendment while motivated by an improper purpose, that action is punishable under § 1512(b). Telling a witness to remain silent to ensure that the witness does not implicate the defendant is an improper purpose. *United States v. Gotti*, 459 F.3d 296, 343 (2d Cir. 2006). Because Millstone told Reynolds to withhold information from federal investigators by invoking the Fifth Amendment, his actions were motivated by an improper purpose.

Therefore, the Fourteenth Circuit correctly held that Millstone acted "corruptly" and this Court should affirm Millstone's conviction.

A. Implementing Standard Methods of Statutory Interpretation, "Corruptly," as Used in § 1512(b), Means "Motivated by an Improper Purpose."

When interpreting statutes, the Court must give effect to the unambiguously expressed intent of Congress. *Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass'n*, 499 U.S. 117, 128 (1991). To determine this intent, the Court first examines the plain language of the statute to discover its ordinary meaning. *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981). Only when the plain language is inconclusive does the court look to other aids of constitutional interpretation, such as legislative history and purpose. *Id.*

1. Standing Alone and in Context of § 1512(b), "Corruptly" Means "Motivated by an Improper Purpose."

Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose. *Park 'N Fly, Inc., v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985). When a term in a statute is not defined, it should be construed "in accordance with its ordinary or natural meaning." *Smith v. United States*, 508 U.S. 223, 228 (1993).

a. The ordinary meaning of "corruptly" is consistent with the definition "motivated by an improper purpose."

"Corruptly persuades" is not a defined term for purposes of § 1512. Section 1515(a) states "corruptly persuades," as used in § 1512, "does not include conduct which would be misleading conduct but for a lack of a state of mind." 18 U.S.C. § 1515(a) (2006). However, nothing in the statute states what conduct *is* included in

"corruptly persuades." When a term is undefined by statute, the Court uses the ordinary meaning of the term, and may consult a dictionary to determine the ordinary meaning. *Muscarello v. United States*, 524 U.S. 125, 128 (1998).

The ordinary meaning of "corruptly" is consistent with the Fourteenth Circuit's definition of "motivated by an improper purpose." This Court briefly examined the definition of "corruptly" as used in § 1512(b) in *Arthur Andersen*, and determined that its dictionary definition "provides a clear answer" to its meaning. *Arthur Andersen LLP v. United States*, 544 U.S. 696, at 705 (2005). The Court explained the term "corrupt" is "normally associated with wrongful, immoral, depraved, or evil" and limited criminality in § 1512(b) to persons conscious of "wrongdoing." *Id.* at 705-06 (citing *Black's Law Dictionary* 371 (8th ed. 2004); *Webster's Third New International Dictionary* 512 (1993); and *American Heritage Dictionary of the English Language* 299-300 (1981)). The doctrine of *stare decisis* has "special force in the area of statutory interpretation" where Congress has the ability to alter the Court's decision. *Hohn v. United States*, 524 U.S. 226, 251 (1998). Therefore, this Court should continue to associate "corrupt" with "wrong" or "wrongdoing" in § 1512. Because an "improper" purpose is one that is wrongful, the Fourteenth Circuit's definition of "corruptly" as "motivated by an improper purpose" is consistent with this Court's jurisprudence.

Other courts were unable to find a "clear answer" for defining "corruptly," despite this Court's ease in doing so. The Third Circuit considered three separate dictionary definitions of the term "corrupt." *United States v. Farrell*, 126 F.3d 484,

488 n.2 (3d Cir. 1997). As a transitive verb, "corrupt" means "to change [someone] from good to bad in morals, manners, or actions." *Id.* As an intransitive verb, "corrupt" means "to become [oneself] morally debased." *Id.* As an adjective, "corrupt" means "morally degenerate and perverted" or "characterized by improper conduct." *Id.* Faced with three definitions, the Third Circuit determined that the meaning of "corrupt" in § 1512(b) was "not apparent from the face of the statute." *Id.* at 488.

However, the Third Circuit failed to consider the part of speech Congress chose for § 1512(b). Congress expressly chose the adverb, "corruptly," as § 1512(b) punishes whoever "*corruptly* persuades another person." 18 U.S.C. § 1512(b). Using basic rules of grammar, adverbs of manner are formed by adding "-ly" to adjectives where the definition of the created adverb is "in an [adjective] way." Carl Bache, *Essentials of Mastering English: A Concise Grammar* 255 (2000). Another way to read "corruptly persuades," then, is "persuades in a corrupt way," where the correct definition of "corruptly" derives from the definition of "corrupt" as an adjective. *See id.*; *see also United States v. Khatami*, 280 F.3d 907, 911 (9th Cir. 2002) (defining "corruptly" as "in a corrupt or depraved manner."). As stated by the Third Circuit, corrupt as an adjective means "in a morally degenerate or depraved manner" or "in a manner characterized by improper conduct." *Farrell*, 126 F.3d at 488 n.2. The plain meaning of "corruptly persuades," then, is "persuades another person in a morally degenerate or depraved manner" or "persuades in a manner characterized by improper conduct." Therefore, taking the Third Circuit's reasoning

to its logical conclusion, the plain meaning of "corruptly" is consistent with a definition of "motivated by an improper purpose."

The Fourteenth Circuit's definition of "corruptly" as "motivated by an improper purpose" is thus consistent with the plain meaning of the term.

b. The presence of "knowingly" does not change "corruptly" to mean something other than "motivated by an improper purpose."

When interpreting the plain meaning of a statutory term, the Court reviews the statute as a whole, "considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). Statutes must be interpreted, if possible, to give each word some operative effect. *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 209 (1997). Words must be examined in context because "a word that appears ambiguous if viewed in isolation may become clear when the word is analyzed in light of the terms that surround it." *Smith*, 508 U.S. at 229.

This Court considered the impact of "knowingly" preceding "corruptly" in § 1512(b) and found that "corruptly" has an important, independent purpose in the statute. *Arthur Andersen*, 544 U.S. at 707. Seeking a plain meaning definition of "knowingly . . . corruptly," the Court, in reviewing a number of dictionaries, associated "knowingly" with "consciousness" and "corruptly" with "wrongdoing." *Id.* at 705. The Court found that "corruptly" is intended to limit "persuades," and without it, the "wrongdoing" aspect of the statute would be missing. *See id.* at 707.

"Corruptly," then, has an independent operative effect as only persons "conscious of wrongdoing" may be found culpable under § 1512(b). *Id.* at 706-07.

The substantial equivalent of the Court's definition of "conscious of wrongdoing" is acting "knowingly" and with an "improper purpose." *United States v. Kaplan*, 490 F.3d 110, 126 (2d. Cir. 2007). The Second Circuit reviewed jury instructions that required the defendant to have acted "corruptly," which it defined as "having an improper purpose," and to have done so "knowingly and with unlawful intent." *Id.* at 125-26. The court found that the instructions conveyed the "substantial equivalent" of this Court's "conscious of wrongdoing" requirement established in *Arthur Andersen*. *Id.* at 126. This requirement was met because the instructions required a culpable *mens rea* of "act[ing] knowingly and with unlawful intent" to establish "consciousness" and a separate showing of "improper purpose" to establish "wrongdoing." *Id.* Therefore, the presence of "knowingly" in § 1512(b) does not strip "corruptly" of its independent operative effect in the statute of requiring the defendant be "motivated by an improper purpose."

Courts diverging from *Arthur Andersen* and the Second Circuit have incorrectly attributed a *mens rea* requirement to the term "corruptly," rendering that term surplusage. For example, the Third Circuit reasoned that "motivated by an improper purpose," the definition of "corruptly" in § 1503, the predecessor to § 1512(b), supplied the intent element for that statute. *Farrell*, 126 F.3d at 490. In § 1512(b), however, the court explained that "knowingly" and specific intent elements are both present, so "corruptly" need not be defined to provide an intent element.

Id. Further, as the specific intent element for § 1512(b)(3) is to "hinder, delay, or prevent the communication to a law enforcement officer . . . of information relating to the commission . . . of Federal offense," the court reasoned that reading "corruptly" as "motivated by an improper purpose," including the improper purpose of hindering an investigation, would render the term surplusage. *Id.*

However, in his strong dissent to the Third Circuit's decision in *Farrell*, Judge Levin Campbell reasoned the term is not surplusage, highlighting the important limiting role that "corruptly" plays in the statute. *Farrell*, 126 F.3d at 493 (Campbell, J., dissenting). Without it, all knowing persuasion could be punishable under the law. *Id.* The purpose of hindering an investigation could be proper (a mother urges her son, in his interest, to invoke his Fifth Amendment right against self-incrimination) or improper (a defendant withholds evidence of tax evasion to avoid supporting certain government programs). *Id.* While hindering an investigation is not itself a criminal act, it is nevertheless culpable conduct under § 1512(b) when motivated by an improper purpose. *Id.* Therefore, "corruptly" is not surplusage but rather has independent operative effect in the statute.

This Court should follow the precedent set by *Arthur Andersen* and the Second Circuit in *Kaplan*, as well as the reasoning in Judge Campbell's dissent, to find the term "corruptly" is not surplusage. "Corruptly" plays an important role in § 1512(b) as it limits criminal liability to exclude persuasion motivated by a legal and proper purpose. Defining "corruptly" as "motivated by an improper purpose" does not create surplusage in the statute, as the Third Circuit in *Farrell* suggests,

because its purpose in context is not to supersede "knowingly," but merely to modify "persuades." The Third Circuit might succeed on its claim of surplusage if "corruptly" were defined as "motivated by *some* purpose." However, "motivated by an *improper* purpose" operates to punish only that persuasion which is wrongful, while "knowingly" acts separately in the statute to provide the *mens rea*. Thus both "knowingly" and "corruptly" have important, independent meanings within § 1512(b).

Therefore, because "knowingly" and "corruptly" each have independent operative effect and have a clear, unambiguous meaning when read in context, § 1512(b) should be enforced as written, where "corruptly" means "motivated by an improper purpose."

2. The History and Purpose of § 1512(b) Further Confirm "Corruptly" Is Defined as "Motivated by an Improper Purpose."

When the plain language of a statute is inconclusive, the court may look to other aids of constitutional interpretation, such as legislative history and purpose. *Middlesex Cnty.*, 453 U.S. at 13.

The history of § 1512(b) and Congress's intent in enacting the statute both confirm that "corruptly" should be defined as "motivated by an improper purpose." *See Farrell*, 126 F.3d at 492 (Campbell, J., dissenting). Before 1982, all witness tampering prosecutions were brought under § 1503. *Id.* That year, Congress enacted the Victim and Witness Protection Act to "replace and expand witness protection provisions" currently in § 1503, adding § 1512 to the U.S. Code with the conspicuous absence of the term "corruptly." *Id.* "Corruptly persuades" was then

added to § 1512(b) in 1988 to "provide the same protection of witnesses from non-coercive influence that was (and is) found in section 1503." 134 Cong. Rec. S17,369 (daily ed. Nov. 10, 1988) (statement of Sen. Biden). While speaking before Congress just prior to passage of the 1988 bill, Senator Biden defined "corrupt persuasion" as "a non-coercive attempt to induce a witness to become unavailable to testify, or to testify falsely." *Id.* The historical progression from § 1503 to § 1512(b) and congressional intent to give the same protections to witnesses under the latter as under the former provides "strong evidence" for a similar construction of "corruptly persuades" in both statutes. *Farrell*, 126 F.3d at 492 (Campbell, J., dissenting).

In *United States v. Thompson*, the Second Circuit considered the statutory origin of § 1512(b) and assigned "corruptly" the same definition it had in § 1503: motivated by an improper purpose. *United States v. Thompson*, 76 F.3d 442, 452 (2d Cir. 1996). The court examined the "parallel provision" of § 1503, where courts had defined "corruptly" as "motivated by an improper purpose." *Id.* (citing *United States v. Fasolino*, 586 F.2d 939, 941 (2d Cir. 1978)). The court reasoned that the use of this definition in § 1512(b) would avoid punishing lawful speech while defining the offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited." *Id.*

Therefore, the history of § 1512(b) and congressional intent at the time of its passage support the clear and unambiguous definition of "corruptly" as "motivated by an improper purpose."

3. The Rule of Lenity Does Not Apply Here.

The rule of lenity does not apply when a statute can be "clarified by either its legislative history or inferences drawn from the overall statutory scheme." *Farrell*, 126 F.3d at 489 (citing *United States v. Pollen*, 978 F.2d 78, 85 (3d Cir. 1992)). It is reserved for cases of "grievous ambiguity." *See Huddleston v. United States*, 415 U.S. 814, 831 (1974). The rule of lenity applies only when, "after seizing everything from which aid can be derived," the court can make "*no more than a guess* as to what Congress intended." *Reno v. Koray*, 515 U.S. 50, 65 (1995) (emphasis added) (citations omitted).

Because the plain meaning and context of §1512(b), its history, and its congressional intent all point to "motivated by an improper purpose" as the correct definition of "corruptly," the rule of lenity does not apply and § 1512(b) should be enforced as written.

Therefore, the plain meaning, context, history, and purpose of § 1512(b) all confirm that "motivated by an improper purpose" is the correct definition of the statutory term "corruptly."

B. Telling a Co-Conspirator to Invoke the Fifth Amendment Violates § 1512(b) When Motivated by the Improper Purpose of Avoiding One's Own Criminal Liability.

A defendant who attempts to persuade a potential witness to invoke his Fifth Amendment privilege for the purpose of avoiding his own criminal liability acts with an improper purpose and, therefore, acts "corruptly" within the meaning of § 1512(b). *United States v. Gotti*, 459 F.3d 296, 343 (2d Cir. 2006).

1. Whether a Witness has a Valid Claim of Privilege is Irrelevant in Determining a Defendant's Culpability Under § 1512.

To find a defendant culpable under § 1512, information "need not be admissible in evidence or free from a claim of privilege." 18 U.S.C. § 1512(f)(2) (2006).

A persuader's purpose cannot become proper merely because the witness has a valid claim of privilege. Section 1512(f)(2) specifically addresses this issue, providing that information "need not be . . . free of a claim of privilege" for corrupt persuasion to occur. *Id.* In other words, the presence or absence of a privilege is irrelevant in determining the culpability of a defendant under § 1512. *See id.* The Fifth Amendment privilege against self-incrimination is highly personal, so although a witness may lawfully invoke his own Fifth Amendment privilege against self-incrimination, one who, with corrupt motive, advises that same witness to invoke the same privilege "can and does obstruct or influence the administration of justice." *United States v. Cioffi*, 493 F.2d 1111, 1119 (2d Cir. 1974) (citing *Cole v. United States*, 329 F.2d 437 (9th Cir. 1964), *cert. denied*, 377 U.S. 954 (1964)). The important inquiry is whether the defendant acted corruptly, not whether the target of such corruption could have legally withheld information of his own volition.

To create an exception to culpability under § 1512 when the witness has a valid privilege, the Court would not only disregard the clear and unambiguous language of § 1512(f)(2), but would also create inconsistencies in the law. Because § 1512(f)(2) applies to § 1512 as a whole, such an exception would necessarily flow to § 1512(a) as well. Were the Court to apply such an exception, murdering or

physically harming a witness with a valid claim of privilege would not be witness tampering. *See* § 1512(a). Even within § 1512(b), such a rule would make it legal to threaten another into silence so long as that witness has a valid claim of privilege. This cannot be the intent of Congress.

The "corruptly persuades" clause of § 1512(b) is not and cannot be excepted from the scope of § 1512(f)(2). The stated purpose of the Act is "[t]o provide *additional* protections and assistance to victims and witnesses in Federal cases." Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248. Creating an exception whereby a witness is not afforded these protections simply because he participated in a conspiracy would go against this stated purpose. A witness involved in a conspiracy should have at least the same protections as any other witness. In fact, *more* protection may be warranted because such a witness is likely the best source of critical information needed by investigators. Therefore, the most logical and most consistent reading of § 1512(f)(2), as expressly stated, is that it applies to the entirety of § 1512, including "corruptly persuades."

Therefore, whether a witness has a valid claim of privilege is irrelevant for purposes of determining a defendant's culpability and the Court should instead focus on the defendant's conduct.

2. <u>One Who Tells a Witness to Remain Silent is Motivated by an Improper Purpose When Seeking to Avoid His Own Criminal Liability.</u>

When a defendant's underlying motive in silencing a witness is to protect himself against criminal liability, that defendant acts with improper purpose under

§ 1512(b). *Gotti*, 459 F.3d at 343.

The Second Circuit reviewed tampering charges against a defendant who "suggested" a potential witness plead the Fifth Amendment so that the defendant could avoid imprisonment. *Id.* The court examined long-standing precedent that "corruptly influencing a witness to invoke the Fifth Amendment privilege" is obstruction of justice. *See id.* (citing *Cioffi*, 493 F.2d at 1118). Because the defendant's underlying motive in suggesting the witness withhold testimony was to avoid being implicated in crimes by that witness, the court found he acted with improper purpose. *Id.* Therefore, the defendant "corruptly" persuaded the witness under § 1512(b) because he was motivated by an improper purpose. *Id.*

In *Arthur Andersen*, this Court explained that although persuasion alone is not "inherently malign," such persuasion can be culpable under § 1512(b) if the persuader's purpose is improper. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 704-06 (2005). The Court then offered a few scenarios where a *proper* purpose may be present, such as a mother seeking to protect her son by telling him about his Fifth Amendment right, a wife persuading her husband not to disclose marital privileges, and an attorney advising a client to withhold certain documents. *Id.* at 704. The Court clarified that the persuasion in these hypotheticals is not "*inherently* malign." *Id.* (emphasis added). However, such persuasion may nevertheless be "corrupt" if the persuader acted wrongfully. *Id.* at 704, 706. For example, it is not "*necessarily* corrupt" for an attorney to persuade a client to withhold documents during an investigation, *id.* at 706 (emphasis added), but an

attorney who persuades a client to withhold documents knowing that they would implicate the attorney in a federal crime would be acting with an improper purpose. *See Gotti*, 459 F.3d at 343.

Some courts incorrectly suggest that "something more" than an improper purpose is required when the witness targeted by the persuasion has a valid claim of privilege. For example, the Ninth Circuit reversed a husband's conviction of witness tampering for persuading his wife to invoke her marital privilege. *United States v. Doss*, 630 F.3d 1181, 1190 (9th Cir. 2011). Believing that his spouse's testimony would implicate him on child molestation charges, the defendant told his wife to refuse to testify. *Id.* at 1184. The court cited *Arthur Andersen* in stating that compelling one's spouse to invoke her marital privilege is not inherently malign, reasoning that "something more" must be required to find the defendant culpable under the statute, such as "coercion, intimidation, bribery, suborning perjury, etc." *See id.* at 1186, 1189-90. Therefore, according to the Ninth Circuit, persuading one's spouse to withhold information about one's crimes would only be "corrupt" if the persuasion were accompanied by a second act such as coercion, intimidation, bribery, or suborning perjury. Similarly, the Third Circuit erroneously held that when a defendant tells his co-conspirator to invoke the Fifth Amendment, something more than non-coercive persuasion, such as bribery or encouraging a witness to lie, is necessary for liability under § 1512(b)(3). *United States v. Farrell*, 126 F.3d 484, 488-89 (3d Cir. 1997).

However, the presence of privilege has no effect on the culpability of the defendant under § 1512(b). First, as stated earlier, § 1512(f)(2) expressly provides that information "need not . . . be free of a claim of privilege" for a defendant to be culpable. 18 U.S.C. § 1512(f)(2).

Additionally, this Court's hypotheticals in *Arthur Andersen* merely acknowledge that privilege can sometimes accompany proper persuasion. *See Arthur Andersen*, 544 U.S. at 704. For example, it would be undoubtedly proper for a mother to educate her son as to his constitutional right against self-incrimination since her purpose, educating and protecting her son, would be proper. *Id.* If, however, the mother persuaded her son to withhold evidence regarding her personal involvement in a crime, such persuasion would be improper. *See id.* at 706. Congress intended for "corruptly persuades" to apply to all improper attempts of tampering with a witness, including non-coercive attempts, and never indicated that "something more" than "corruptly" was required. *See* 18 U.S.C. § 1512(b); 134 Cong. Rec. S17,369 (daily ed. Nov. 10, 1988). Therefore, while persuasion itself is not inherently malign, persuasion motivated by an improper purpose does constitute corrupt persuasion.

Here, Millstone violated § 1512(b) when he attempted to persuade Reynolds to withhold information from investigators because his purpose of avoiding his own criminal liability was improper. Millstone told Reynolds, "I'm not going to jail, Reese. It's time to just shut up about everything. . . . If they start talking to you, just tell them you plead the Fifth and shut up." Millstone clearly expressed his

purpose, avoiding prison, and told Reynolds to impede the ongoing federal investigation to achieve this purpose. Although Reynolds did end up talking to investigators, Millstone's attempt to persuade Reynolds is just as culpable as successful persuasion under the law. *See* 18 U.S.C. § 1512(b).

Millstone's conduct is similar to that in *Gotti* and unlike the mother's conduct in this Court's *Arthur Andersen* hypothetical. Like in *Gotti*, Millstone asked a co-conspirator to remain silent in an effort to save himself from imprisonment. Conversely, Millstone did not act solely in Reynolds' interest when telling Reynolds to withhold information as a mother would do to protect her son. Quite the opposite is true: Millstone told Reynolds to not "even think about pinning all this on me. Remember, they're looking at your stupid gas-guzzlers, too." Millstone implied that if Reynolds chose to speak with federal investigators, he would ensure that Reynolds went to prison as well. This is not at all similar to a mother doing what she can to advance her child's interest. Instead, this is simply a criminal trying to protect himself by convincing a co-conspirator to "shut up."

Therefore, because Millstone was motivated by an improper purpose when he persuaded Reynolds to withhold information, his conviction under § 1512(b)(3) should be affirmed.

CONCLUSION

For the reasons stated above, we respectfully request this Court affirm the decision of the Fourteenth Circuit Court of Appeals on both issues to uphold Millstone's conviction.

Respectfully Submitted,

Team 30,
Counsel for Respondent

APPENDIX

U.S. Const. amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 1512(b)(3) (2006).

(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, 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 (2006).

(c) Criminal penalties

> (1) Negligent violations
>
> Any person who—
>
> > (A) negligently violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State;[]

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