No. C11-0116-1

IN THE

United States Supreme Court

SAMUEL MILLSTONE,
Petitioner,

v.

UNITED STATES,
Respondent.

Appeal from the U.S. Court of Appeals for the Fourteenth Circuit

BRIEF FOR RESPONDENT

TEAM 73

Counsel for Respondent

QUESTIONS PRESENTED

I. Whether 33 U.S.C. § 1319(c)(1)(A) of the Clean Water Act, in order to protect the public from the toxic water pollution, may lawfully impose criminal liability for a person's failure to exercise reasonable care when knowingly working among dangerous chemicals.

II. Under 18 U.S.C. § 1512(b)(3), does an individual corruptly persuade potential witnesses by urging them to invoke their Fifth Amendment rights for the individual's personal gain?

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The opinion of the U.S. Court of Appeals for the Fourteenth Circuit is unreported.

Millstone v. United States, No. 11-1174 (14th Cir. Oct. 3, 2011).

STATEMENT OF JURISDICTION

The Fourteenth Circuit affirmed the conviction on Oct. 3, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appendix reproduces the text of 18 U.S.C. §§ 1503, 1512 and 1515, as well as 33 U.S.C. § 1319.

STATEMENT OF THE CASE

Petitioner Samuel Millstone was the CEO and President of Sekuritek, a company that offered trained security personnel to different clients. Record at 4. Bigle Chemical Company contracted with Petitioner and Sekuritek Vice-President, Reese Reynolds, for trained security personnel at the Windy River Facility, Bigle Chemical's manufacturing and waste recycling facility. R. at 4-5. Bigle Chemical's CEO obsessed over security at the plant and published two statements in national newspapers about how he was finished with hiring negligent security company's who caused chemical spills. R. at 5. Bigle Chemical's contract was ten times larger than any contract that Sekuritek had handled yet. R. at 5. Though Reynolds expressed his doubt to Petitioner about Sekuritek's ability to train security personnel and buy equipment in such a short time, Petitioner ignored Reynolds's concern and accepted the contract. R. at 5-6. Petitioner was convinced that in spite of the obstacles, this contract would take Sekuritek "to the big time." R. at 6 n.1.

In less than three weeks, Petitioner hired and trained the new security team. R. at 6. On January 27, a new Sekuritek security personnel crashed an SUV into a chemical tank, which started a fire that quickly spread. R. at 7. Thousands of barrels of chemicals spilled into the Winder River for three days. R. at 7. The fires caused 23 deaths and destroyed the local agriculture and fishing industries; most economists estimated the total damage was about $1.25 billion. R. at 7-8.

After the accident, Petitioner called a meeting with Reynolds to discuss the threat of criminal charges against them. R. at 9. In the conversation, Petitioner

angrily scolded Reynolds for wanting to comply with government officials. R. at 9. Petitioner was vehement that he was "not going to jail" because of the accident. R. at 9. He then told Reynolds to "plead the Fifth and shut up" because government officials could not file charges against either if both were silent. R. at 9. Reynolds didn't comply with Millstone's command, and the United States granted Reynolds immunity in exchange for his testimony about Millstone's conduct. R. at 10 n.9.

Millstone was ultimately convicted for the negligent discharge of pollutants in violation of 33 U.S.C. § 1319(c)(1)(A) based on his negligent hiring, training, and supervision of security personnel, as well as his negligent failure to inspect SUVs before use. R. at 10. Millstone was also found guilty of witness tampering under 18 U.S.C. § 1512(b)(3). R. at 10. The Fourteenth Circuit affirmed the convictions of the trial court, finding that the lower court correctly instructed the jury on both the meaning of "negligence" and "corruptly" pertaining to their respective statutory provisions. R. at 15.

On appeal, Millstone disputes two issues. R. at 10. First, he objects to the jury instruction, which stated that negligence in 33 U.S.C. § 1319(c)(1)(A) meant "failure to exercise the standard of care that a reasonably prudent person would have exercised in the same situation." R. at 10. Second, Millstone argues that encouraging a co-defendant to plead the Fifth does not constitute corrupt persuasion under 18 U.S.C. § 1512(b)(3). R. at 10.

SUMMARY OF THE ARGUMENT

Petitioner's conviction under § 1319(c)(1)(A) of the Clean Water Act should be affirmed because the lower court properly instructed the jury on the meaning of negligence in this section of the statute. Because § 1319(c)(1)(A) is a public welfare statute, the lower court correctly instructed the jury that negligence had its plain meaning, and this instruction did not violate due process. The Clean Water Act is a public welfare statute because it regulates harmful and deleterious items and imposes relatively light criminal penalties for the harmful violations it regulates; first-time violators receive misdemeanor punishments of no more than one year for negligent violations and no more than three years for felony violations. *United States v. Wilson*, 133 F.3d 251, 263-64 (4th Cir. 1997); *see also* 33 U.S.C. §§ 1319(c)(1)(A) & 1319(c)(2)(B) (2011).

Because the Clean Water Act is a public welfare statute, courts need only look to the plain language of its words to discern their meaning. *Staples v. United States*, 511 U.S. 600, 606 (1994). Ordinarily, courts cannot look to the plain language of a criminal statute when interpreting its provisions if there is no criminal mens rea specified; however, public welfare statutes do not have criminal mens rea read into them because their purpose is to impose near strict liability. *Id.* The legislative history of the Act and its stated purpose further support interpreting the statute as not requiring a mens rea because its stated goal is for the Act to eliminate all pollution. *See* 33 U.S.C. §§ 1251(a) and 1251(a)(1) (2011).

Imposing criminal liability for ordinary negligence does not violate Petitioner's due process. Public welfare statutes can impose criminal liability for ordinary negligence without violating due process because people are on notice that they are working around dangerous items that are probably subject to stringent requirements, and these people are in the best position to protect the public from the threatened harm. *See also United States v. Balint*, 258 U.S. 250, 252–53 (1922). Here, Petitioner knew he was working with a chemical company that had already suffered two disaster spills in its past, and Petitioner is in a better position to protect the public from a spill because he works around these materials. R. at 5.

Finally, interpreting the Clean Water Act, § 1319(c)(1)(A) will not lead to over-criminalization because judicial discretion in applying the public welfare doctrine to the Clean Water Act and restrictive guidelines for prosecutions under § 1319(c)(1)(A) significantly undercut the possibility of over-criminalization of innocent conduct. *See* Bruce Pasfield, Sarah Babcock, Simple Negligence and Clean Water Act Criminal Liability: A Troublesome Mix, 12 NO. 1 ABA Envtl. Enforcement & Crimes Committee Newsl. 3, 8-9 (2011).

The Fourteenth Circuit properly denied Petitioner's motion for acquittal under 18 U.S.C. § 1512 for three reasons. First, the lower court properly construed "corruptly" to mean motivated by an improper purpose. Second, this construction is consistent with this Court's consciousness-of wrongdoing standard. Third, under this construction, Petitioner was motivated by an improper purpose when he attempted to persuade a potential witness to withhold information from

government officials; he therefore acted "corruptly" within the meaning of § 1512(b)(3).

First, "corruptly" in § 1512(b)(3) means motivated by an improper purpose. Judges construing "corruptly" in § 1503, a parallel provision, have determined that "corruptly" means motivated by an improper purpose based on the plain meaning of the term. *United States v. Cintolo*, 818 F.2d 980, 990-91 (1st Cir. 1987). Though § 1512(b)(3) contains the additional scienter requirement "knowingly," canons of construction dictate that this Court should still construe "corruptly" in § 1512(b)(3) to mean motivated by an improper purpose because: (1) Congress has not rejected the prior settled meaning of "corruptly"; (2) the legislative history of "corruptly persuades" demonstrates that Congress intended this phrase to serve the same purpose as "corruptly" in § 1503; (3) the policy objective of § 1512 points to a broader protection for witnesses, and the broad improper purpose construction fits this description; and (4) the legislative amendments suggest a desire to expand witness protection, thus justifying a broader construction of "corruptly."

Second, this construction is consistent with this Court's consciousness-of-wrongdoing standard. In *Arthur Andersen*, this Court ruled that § 1512(b) must give effect to the scienter knowingly, which is not present in § 1503. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 704. By reading the scienters knowingly and corruptly together, this Court determined that § 1512(b) requires that an individual be conscious of wrongdoing to be culpable. *Id.* at 706. Thus, the scope of § 1512(b) should be narrower than § 1503 because the former has an additional scienter

requirement. *See id.* The improper purpose construction is consistent with this standard because it requires that an individual knowingly persuade someone with an improper purpose. While there may be some overlap between the scope of the two statutes, § 1512(b) is narrower because it does not include accidental persuasion where § 1503 does. Thus, the improper purpose construction gives effect to knowingly, which is consistent with the consciousness-of-wrongdoing standard.

Third, under the improper purpose construction, Petitioner "corruptly persuaded" a potential witness by attempting to personally benefit from another person's Fifth Amendment right. The Fifth Amendment is an inalienable right, meaning it is non-transferable. Therefore, any person who attempts to directly benefit from another's personal right acts with an improper purpose. Because Petitioner acted with an improper purpose, he "corruptly persuaded" a potential witness. Thus, this Court should affirm his conviction under § 1512(b)(3).

STANDARD OF REVIEW

The Fourteenth Circuit interpreted negligence in 18 U.S.C. § 1319(c)(1)(A) to mean ordinary negligence. The court also interpreted "corruptly" in 18 U.S.C. § 1512(b)(3) to mean motivated by an improper purpose. Statutory construction raises a question of law; thus, this Court has de novo review over this issue. *United States v. Horowitz*, 756 F.2d 1400, 1403 (9th Cir. 1985); *United States v. Smith*, 656 F.3d 821, 825 (8th Cir. 2011). Under a de novo standard of review, this Court is not required to defer to the Fourteenth Circuit's statutory constructions of negligence or corruptly. *Horowitz*, 756 F.2d at 1403; *Smith*, 656 F.3d at 825.

The Fourteenth Circuit denied Petitioner's motion for acquittal. This Court should review the denial of a motion for acquittal under a sufficiency of the evidence standard. Fed. R. Crim. P. 29; *see United States v. Smith*, 44 F.3d 1259, 1269-70 (4th Cir. 1995). This standard asks whether the evidence, when viewed in the light most favorable to the Government, was sufficient for a rational trier of fact to have found the essential elements of the crime beyond a reasonable doubt. *United States v. Gullett*, 75 F.3d 941, 947 (4th Cir.1996). Under a sufficiency of the evidence standard of review, this Court must look at the evidence most favorable to the Government and determine whether a rational trier of fact could have found that Petitioner "corruptly persuaded" by asking another to plead the Fifth Amendment. *Id.*

ARGUMENT

I. THIS COURT SHOULD AFFIRM PETITIONER'S CONVICTION UNDER THE CLEAN WATER ACT BECAUSE 18 U.S.C. § 1319(c)(1)(A) LAWFULLY REQUIRES ONLY ORDINARY NEGLIGENCE FOR CRIMINAL LIABILITY.

A culpable mental state has never been an absolute mandate for the imposition of criminal liability. *Staples*, 511 U.S. at 606. While requiring both a culpable mental state and a culpable act is the general rule for criminal liability, exceptions to the scienter requirement have been recognized throughout the history of this country's criminal jurisprudence. *See Staples*, 511 at 605; *see also Morissette v. United States*, 342 U.S. 246, 250 (1952); *see also United States v. Balint*, 258 U.S. 250, 252–53 (1922) (When persons hold a position in which mere negligence could endanger others, such as selling diseased food, policy dictates that the law should punish these persons for mere negligence.). Courts have consistently ruled that public welfare statutes are an exception to the criminal scienter requirement. This exception this allows courts to use the ordinary principles of statutory construction in discerning the meaning of a public welfare statute. *Staples*, 511 U.S. at 606 (1994).

Here, Petitioner wrongfully seeks to avoid punishment for his violation of § 1319(c)(1)(A) of the Clean Water Act. Petitioner asks this Court to excuse his negligent conduct by construing this public welfare statute to impose a heightened mental culpability that § 1319(c)(1)(A) does not require; he argues that criminal negligence, not ordinary negligence, should be the metric for determining guilt. R. at 10. His construction, however, contravenes the underpinnings of the public

welfare doctrine, the provision's plain language, and Congressional intent as evidenced by the statute as a whole. To grant his request would work directly against the Clean Water Act's stated goal to prevent all pollution. 33 U.S.C. §§ 1251(a) and 1251(a)(1) (2011).

The Fourteenth Circuit correctly affirmed the trial court's conviction for three reasons. First, it correctly found that § 1319(c)(1)(A) of the Clean Water Act only requires ordinary negligence for criminal liability. Section 1319(c)(1)(A) of the Clean Water Act is a public welfare statute; thus, courts need look no further than its plain language to determine what mental state, if any, the statute requires. Because § 1319(c)(1)(A) of the Clean Water Act does not require a culpable mens rea, courts should look no further than its plain language. Canons of statutory construction, case law, and public policy support this conclusion. Second, because this section is a public welfare offense, Petitioner's conviction without a criminal mens rea did not violate his due process rights. This Court has repeatedly found that public welfare statutes justifiably impose criminal liability without a criminal mens rea because dealing with dangerous substances places a person on sufficient notice of possible stringent regulations. *See United States v. Balint*, 258 U.S. 250, 252–53 (1922). Finally, this statute does not present a problem of over-criminalization. Courts are not bound to apply the public welfare doctrine to all provisions of a statute, and guidelines for prosecutions of the Clean Water Act indicate that § 1319(c)(1)(A) should only be used in cases of extraordinary harm. *See* Bruce Pasfield, Sarah Babcock, *Simple Negligence and Clean Water Act Criminal*

Liability: A Troublesome Mix, 12 NO. 1 ABA Envtl. Enforcement & Crimes Committee Newsl. 3, 8-9 (2011).

The lower courts correctly applied a public welfare offense analysis to § 1319(c)(1)(A) of the Clean Water Act and rightfully upheld Petitioner's conviction under this federal law. This Court should affirm Petitioner's conviction under the Act for negligently placing the public in danger of toxic water pollution.

A. Section 1319(C)(1)(A) Of The Clean Water Act Imposes Criminal Liability For Ordinary Negligence.

The canons of statutory construction have consistently required that courts first look to the plain meaning of the statute; if the plain meaning is clear, then the court need look no further to discern the statute's meaning. *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992). However, because of common-law precedent requiring a criminal scienter, due process usually requires courts to look beyond the plain meaning of the statute and read in a criminal mens rea if one is not specified. *See United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436-437 (1978). Public welfare statutes, however, are a well-established exception to this practice of reading in a criminal mens rea requirement. *Staples*, 511 U.S. at 606. Section 1319(c)(1)(A), as a public welfare statute, should be interpreted according to its plain language, which imposes criminal liability for ordinary negligence. *United States v. Hanousek*, 176 F.3d 1116, 1120-21 (9th Cir. 1999). The negligent acts in this section are justifiably criminalized and do not implicate due process concerns because of the magnitude of public harm and the relatively minor punishments imposed by the statues. *Balint*, 258 U.S. at 254; *Dotterweich*, 320 U.S. at 280-81.

United States v. Int'l Minerals & Chemical Corp., 402 U.S. 558, 564 (1971). Canons of statutory construction and the Clean Water Act's legislative history support this broad reading of § 1319(c)(1)(A).

1. Section 1319(c)(1)(A) of the Clean Water Act is a public welfare statute.

The components of § 1319(c)(1)(A) fulfill the requirements of a public welfare statute because they regulate dangerous materials and impose a relatively light sentence. *Staples,* 511 U.S. at 607, 616-18. The section at issue is a public welfare statute even though courts have held that related provisions in the Clear Water Act are not public welfare. *See United States v. Ahmad*, 101 F.3d 386, 391 (5th Cir. 1996) (holding that a separate section, § 1319(c)(2)(A)-(B), is not public welfare).

The analysis as to whether § 1319(c)(1)(A) is a public welfare statute is performed independently of other portions of the Act. The Supreme Court has permitted viewing sections of a statute in isolation when determining whether that particular provision is public welfare. *See United States v. Wilson*, 133 F.3d 251, 264 (4th Cir. 1997). This Court has held that some items in one subsection of a statute could be construed as public welfare where other items in the same list were not. *Id.* In *United States v. Freed*, this Court held that hand grenades were sufficiently deleterious to qualify the statute regulating their use as public welfare. *United States v. Freed*, 401 U.S. 601, 609 (1971). Twenty years later, however, this Court held in *Staples v. United States* that the exact same statute was not public welfare in regard to guns. *Staples*, 511 U.S. at 619 (holding that a violation for possession of an unregistered machine gun under the same statute, 26 U.S.C. § 5861(d), was not

a public welfare offense). Thus, in analyzing whether the Clean Water Act is public welfare, this Court only needs to look to the section under which Petitioner was convicted.

i. Section 1319(c)(1)(A) puts the public on sufficient notice by governing the use of dangerous products.

Public welfare offenses must regulate inherently dangerous materials; otherwise, defendants will not have fair notice that they are subjecting themselves to possible criminal prosecution. *See Staples v. United States*, 511 U.S. 600, 607, 114 S. Ct. 1793, 1798, 128 L. Ed. 2d 608 (1994) (As long as a defendant knows that he is dealing with a dangerous device that places him in responsible relation to a public danger, he should be alerted to the probability of strict regulation.). In this case, the Clean Water Act regulates pollutants that are inherently deleterious. *United States v. Wilson*, 133 F.3d 251, 263-64 (4th Cir. 1997). The criminal provisions of the Clean Water Act are designed to protect the public at large from the potentially dire consequences of water pollution. *See* S. Rep. No. 99–50, at 29, (1985). The legislative history of the Clean Water Act records Congress's explicit concern with public health. *See* S.Rep. No. 92–414 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3670–71. And the Clean Water Act specifically authorized research to determine the harmful effects of pollutants on personal health and welfare. *See* 33 U.S.C. § 1254(c).

Multiple circuits have held that various provisions of the Clean Water Act regulate dangerous products that justify deeming them public welfare statutes. To date, four other circuits have concluded that the Clean Water Act includes public

welfare offenses, recognizing that the pollutants were inherently deleterious. *See United States v. Sinskey*, 119 F.3d 712, 716 (8th Cir. 1997) (meat-packing plant wastewater containing ammonia nitrate); *United States v. Hopkins*, 53 F.3d 533, 534 (2d Cir. 1995) (wastewater containing zinc and other toxic chemicals); *United States v. Weitzenhoff*, 35 F.3d 1275, 1284 (9th Cir.1993) (sewage); *United States v. Kelley Technical Coatings, Inc.*, 157 F.3d 432, 439 n.4 (6th Cir. 1998) (hazardous waste).

Not only are the chemical materials in this case dangerous, Petitioner knew their dangerous character—making him the type of criminal actor justifiably punished with a diminished mens rea. *See Staples*, 511 U.S. at 607. Where dangerous products are involved, the probability of regulation is so great that people who are aware they are dealing with them are presumed to be aware of regulations. *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 564 (1971). Here, Petitioner knew he was working with a large chemical company that required extensive security. Since the company was required to patrol the plant's grounds, Petitioner must have known the storage tanks were adjacent to the river and posed a risk of contamination. *See* R. at 5. Further, Bigle's CEO had published two media statements concerning his fear of a spill at the factory, alerting Petitioner to the dangerousness of the chemicals at the factory. R. at 5.

The dissenting opinion in the Fourteenth Circuit case below erroneously argues that because Petitioner did not directly handle the chemicals, the public welfare doctrine should not apply to him. R. at 17. However, the test for public

welfare asks whether the polluter is on sufficient notice that he is engaged in an activity that would pose a risk of pollution to the public, not whether the polluter directly works with the chemicals. *United States v. Hanousek*, 176 F.3d 1116, 1122 (9th Cir. 1999). Here, Petitioner was on notice because he knew the type of business Bigle conducted. *See* R. at 5. The CEO repeatedly emphasized he wanted to avoid another spill. R. at 5. Thus, Petitioner knew he was engaged in an activity that could pose a risk to public safety, and as such, he falls squarely within the parameters of a public welfare analysis.

ii. Section 1319(c)(1)(A) of the Clean Water Act imposes relatively light criminal penalties.

To justify imposing criminal sentences for lower or absent standards of culpability, this Court has required punishments in public welfare statutes to be light. *Staples*, 511 U.S. at 616. Here, Section 1319(c)(1)(A) of the Clean Water Act fits that requirement. First, it only punishes violators with misdemeanor sentences. *See United States v. Weitzenhoff*, 35 F.3d 1275, 1293 (9th Cir. 1993) (Kleinfeld, J., dissenting); *see also* 33 U.S.C. § 1319(c)(1)(A). A first-time violator faces a maximum sentence of one year, and a second-time violator faces a maximum sentence of two years. *See* 33 U.S.C. § 1319(c)(1)(A). Misdemeanors typically are considered relatively light criminal penalties. David A. Barker, Note, *Environmental Crimes, Prosecutorial Discretion, and the Civil/criminal Line*, 88 Va. L. Rev. 1387, 1402 (2002); *see also Staples,* 511 U.S. at 616.

Several circuits have held that a related provision in the Clean Water Act that imposes stiffer penalties than § 1319(c)(1)(A) is a public welfare provision. *See*

United States v. Sinskey, 119 F.3d 712, 716 (8th Cir. 1997); *United States v. Hopkins*, 53 F.3d 533, 534 (2d Cir. 1995); *United States v. Weitzenhoff*, 35 F.3d 1275, 1284 (9th Cir.1993) (sewage); *United States v. Kelley Technical Coatings, Inc*., 157 F.3d 432, 439 n.4 (6th Cir. 1998); *see also* 33 U.S.C. § 1319(c)(2)(B). If one provision imposes a felony conviction with a harsher sentence, and courts deem this sentence light enough to be a public welfare statute, then it logically follows that a misdemeanor with lighter sentence would be a public welfare statute, as well. This Court's case law bears this out: a one-year sentence falls well within the punishments considered light enough for public welfare purposes. *See United States v. Freed*, 401 U.S. 601, 609 (1971) (holding federal firearm provisions with a five-year sentence to be public welfare provisions); *United States v. Balint*, 258 U.S. 250, 254 (1922) (holding a maximum sentence of five years qualified as a public welfare offense); *U.S. v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 564 (1971) (holding a violation of the Explosives Act with a one-year sentence to be a public welfare offense).

The dissent points to *Ahmad* as proof that the Clean Water Act is not a public welfare statute. R. at 17; *See Ahmad*, 101 F.3d 386, 391 (5th Cir. 1996). The Fifth Circuit is the only one, however, to rule that the Clean Water Act is not a public welfare statute. Whit Davis, Comment, *Water Criminals: Misusing Mens Rea and Public Welfare Offense Analysis in Prosecuting Clean Water Act Violations*, 23 Tul. Envtl. L.J. 473, 474 (2010). Moreover, *Ahmad* is distinguishable from this case for two reasons. First, *Ahmad* dealt with a different section of the Clean Water Act

entirely: the "knowing violation" section, 33 U.S.C. § 1319(c)(2)(A)-(B). *See Ahmad*, 101 F.3d 386, 391 (5th Cir. 1996). That section imposes stiffer felony penalties with longer sentences than § 1319(c)(1)(A). *Compare* 33 U.S.C. § 1319(c)(2)(A)-(B) *with* 33 U.S.C. § 1319(c)(1)(A). The provision at issue in this case only imposes misdemeanor sentences. 33 U.S.C. § 1319(c)(1)(2). Second, the length of the prison sentence was not the dispositive factor in *Ahmad*. *See United States v. Ahmad*, 101 F.3d 386, 391 (5th Cir. 1996) (Ahmad was not on sufficient notice that he was dealing with a substance subject to stringent regulations; he believed he was working with water, not gasoline). Thus, even in the lone circuit case holding that the Clean Water Act was not a public welfare statute, the length of imprisonment was not the controlling factor; rather, the lack of notice to Ahmad about the possibility of regulations controlled the Fifth Circuit's decision. *Id*. Unlike the defendant in *Ahmad*, Petitioner knew he was working with dangerous chemicals, so the Fifth Circuit's analysis about whether the public welfare doctrine applies is inapplicable to the facts of this case. *See* R. at 10.

Further, even if all provisions of the Clean Water Act must constitute public welfare for the doctrine to apply, the length of the sentence imposed in § 1319(c)(2)(A)-(B) is consistent with other statutes that also impose relatively small penalties. *See United States v. Freed*, 401 U.S. 601, 609 (1971) (holding federal firearm provisions with a five-year sentence to be public welfare provisions); *Balint*, 258 U.S. at 254 (holding a maximum sentence of five years qualified as a public welfare offense); *International Minerals* (holding a violation of the Explosives Act

with a one-year sentence to be a public welfare offense). Section 1319(c)(2)(A)-(B) imposes felony penalties of up to three years for first-time offenses and up to six years for second-time offenses. 33 U.S.C. § 1319(c)(2)(B). Three and six years fall within and directly around the up to five-year permissible terms for public welfare established in *Freed* and *Balint*. *See Freed*, 401 U.S. at 609; *Balint*, 258 U.S. at 254 (1922).

2. Negligence in § 1319(c)(1)(A) means 'ordinary negligence.'

The starting point in any statutory construction is the plain language of the statute. *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253-254, (1992); *Consumer Prod. Safety Comm'n v. G.T.E. Sylvania, Inc.*, 447 U.S. 102, 108 (1980). When a word is not defined by statute, it is assumed that Congress intended its ordinary meaning. *Smith v. United States*, 508 U.S. 223, 228 (1993); *see also Perrin v. United States*, 444 U.S. 37, 42 (1979). The ordinary meaning of "negligently" is a failure to use such care as a reasonably prudent person would use under similar circumstances—in other words, civil negligence. *United States v. Hanousek*, 176 F.3d 1116, 1120-21 (9th Cir. 1999); *U.S. v. Ortiz*, 427 F.3d 1278, 1283 (10th Cir. 2005); *see Black's Law Dictionary* 1032 (6th ed.1990); *The Random House College Dictionary* 891 (Rev. ed.1980). Thus, the plain language of the statute indicates that Congress intended to impose a civil negligence standard. Section 1319(c)(1)(A) is consistent with this accepted practice of construction.

i. Under the public welfare analysis, courts do not need to look past the plain language of § 1319(c)(1)(A) to discern the meaning of negligence.

Public welfare offenses permit the criminalization of conduct without imposing a criminal mental state, which was typically required under common law. *Staples*, 511 U.S. at 607 n.3. Though courts generally read a criminal mens rea into a statute that lacks one, construing public welfare statutes only requires an examination of plain meaning. *Staples*, 511 U.S. at 606; Whit Davis, Water Criminals: Misusing Mens Rea and Public Welfare Offense Analysis in Prosecuting Clean Water Act Violations, 23 Tul. Envtl. L.J. 473, 478-79 (2010) (When a statute is silent as to a mens rea requirement and a court finds that the statute creates a public welfare offense, then the court will infer that Congress intended not to require a mens rea).

Petitioner argues that this Court must look past the ordinary meaning of negligent and, in effect, insert the word "criminally" before it. R. at 10. But the public welfare doctrine and other federal statutes including the word "negligence" make it clear that criminality is not assumed whenever Congress uses "negligence" in a criminal context. *Staples v. United States*, 511 U.S. 600, 607 n.3 (1994); *U.S. v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 564 (1971). In a federal statute regarding maritime misconduct, for instance, the Fifth Circuit construed "negligence" to mean ordinary negligence, not gross or criminal negligence. *See* 18 U.S.C. § 1115 (1994); *United States v. O'Keefe*, 426 F.3d 274 (5th Cir. 2005); *cf. United States v. Adams*, 376 F.2d 459, n.1 (3d Cir. 1967). Federal sentencing

guidelines for manslaughter refer not to merely "negligent," but to "criminally negligent" acts. U.S. Sentencing Guidelines Manual § 2A1.4 (2007) (Federal sentencing guidelines for environmental crimes are of little help, since they mimic the language in the statute at hand. U.S. Sentencing Guidelines Manual § 2Q1.2 (2010). Even outside of the public welfare context, then, federal laws have not always assumed that negligence in a criminal statute requires a heightened culpability.

ii. The statute as a whole and its legislative history support the conclusion that § 1319(c)(1)(A) imposes criminal liability for ordinary negligence.

The statute as a whole and its legislative history endorse construing "negligence" in § 1319(c)(1)(A) as ordinary negligence. When courts look to the plain language of a statute in order to interpret its meaning, they do more than view words or sub-sections in isolation; they derive meaning from context. *Carpenters Health & Welfare Trust Funds v. Robertson* (In re Rufener Constr.), 53 F.3d 1064, 1067 (9th Cir. 1995). This requires reading the relevant statutory provisions as a whole. *Id.* Additionally, courts consider the overall purpose of the statute to discern a particular provision's meaning. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). The broad sweep of § 1319 militates against a narrow reading of "negligence."

Here, the stated purpose of the Clean Water Act includes the "restoration and maintenance of chemical, physical, and biological integrity of the Nation's water;" to achieve this goal, Congress declared it intended to "eliminate the… discharge of

pollutants into the navigable waters." 33 U.S.C. §§ 1251(a) and 1251(a)(1) (2011). By focusing on elimination of the harm and not culpability of conduct, the statute strongly suggests Congress intended to penalize water pollution regardless of whether a person is intentionally polluting. To require criminal negligence and thus narrow the scope of the criminal penalty runs fundamentally counter to the Clear Water Act's clearly stated, broad purposes. David Drelich, *Restoring the Cornerstone of the Clean Water Act*, 34 Colum. J. Envtl. L. 267, 311 (2009).

The Act's legislative history likewise reflects congressional intent to broaden, not narrow, the scope of the criminal statute. Before 1987, the Clean Water Act had only one set of criminal penalties for "willful or negligent" violations. *See* 33 U.S.C. § 1319(d)(1) (1986). The new amendments divided violations into "knowing" and "negligent." *See* U.S.C. § 1319(c)(1)(A) and § 1319(c)(2)(A). This change from "willful," which generally requires consciousness of bad acts and knowledge of their illegality, to "knowing," which does not tend to require an appreciation of an act's illegality, is significant. *See United States v. Hopkins*, 53 F.3d 533, 539 (2d Cir. 1995); *United States v. Sinskey*, 119 F.3d 712, 716 (8th Cir. 1997); *United States v. Wilson*, 133 F.3d 251, 262 (4th Cir. 1997). This amendment shows Congress intended to step up enforcement of the Clean Water Act and increase the severity of sanctions. *See Wilson*, 133 F.3d at 262.

The petitioner will likely argue that the rule of lenity and canons of statutory construction dictate that courts narrowly construe criminal statutes to give fair notice, but this is a half-truth: Courts only resort to such canons where there is an

ambiguity in a given statute. *Staples v. United States*, 511 U.S. 600, 619 n. 17 (1994). Here, there is none. The rule of lenity requires strict construction only when "a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of statute." *United States v. R.L.C.*, 503 U.S. 291, 293 (1992) (quoting *Moskal v. United States*, 498 U.S. 103, 108 (1990)). Here, the rule of lenity is not applicable because the statute's meaning is clear after applying the canons of construction.

Moreover, the presumption that all criminal statutes must have a mens rea does not overcome express Congressional indications to the contrary. *Cf. U.S. Gypsum Co.,* 438 U.S. at 436-37; *Staples*, 511 U.S. at 605-06 (And, in the case of public welfare statutes, there need not even be any reference to excluding mens rea; silence is construed as implied exclusion.).

iii. Case law supports broadly construing negligence in § 1319(c)(1)(A).

Not only does this interpretation of negligence make sense in light of accepted canons of construction and legislative history, but case law supports it as well. The two circuit cases on point have construed § 1319(c)(1)(A) as requiring only ordinary negligence, and both relied on the plain language of the statute to do so. *See United States v. Hanousek*, 176 F.3d 1116, 1123 (9th Cir. 1999); *United States v. Ortiz*, 427 F.3d 1278, 1283 (10th Cir. 2005). These decisions continue the pattern of construing "negligence" as ordinary negligence in *Adams* and *O'Keefe*. *O'Keefe*, 426 F.3d at 274; *Adams*, 376 F.2d at 459, n.1. Thus, relevant precedent concerning the

appropriate level of negligence to assign is consistent with a plain-language analysis.

B. As A Public Welfare Provision, § 1319(C)(1)(A) Of The Clean Water Act Satisfies Due Process.

Petitioner's next objection is that convicting him of a criminal offense with an ordinary negligence standard deprives him of due process. *See* R. at 10. Traditionally, courts will infer a criminal mens rea even if the statute is silent on the subject. *U.S. Gypsum Co.*, 438 U.S. at 436-37; *see also Morissette v. United States*, 342 U.S. 246, 250 (1952). Petitioner, however, overlooks two important facts in this case. First, the statute is not silent as to mens rea; it includes a negligence requirement. *See* 33 U.S.C. § 1319(c)(1)(A). It is one thing to presume Congress implied a mens rea, and quite another to presume it mislabeled a mens rea.

Second, Petitioner more significantly overlooks the fact that § 1319(c)(1)(A) is a public welfare statute, which this Court has repeatedly found comports with due process. *See Balint*, 258 U.S. at 252–53; *see also Int'l Minerals*, 402 U.S. at 564. This Court has long held that public welfare offenses are perfectly constitutional even if they don't require a criminal mens rea. *Balint*, 258 U.S. at 254; *Dotterweich*, 320 U.S. at 280-81; *Int'l Minerals*, 402 U.S. at 564. This is because public welfare statutes strike a balance between protecting the public from great harm when the public could not reasonably protect themselves, on the one hand, and the rights of criminal defendants who knowingly handle such dangerous materials, on the other. *See Staples*, 511 U.S. at 607. Protecting the public justifies holding people who are civilly negligent to criminal liability if they are "on notice of the dangerousness of

the activity" they were engaged in. *Balint*, 258 U.S. at 252-53. Thus, Congress may constitutionally render criminal conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety. *See Liparota v. United States*, 471 U.S. 419, 433 (1985). As long as these public welfare violations had relatively light punishments, courts found a lack of mens rea acceptable because criminal punishments encouraged greater care. *Balint*, 258 U.S. at 252-53.

Furthermore, this Court has endorsed public welfare statutes that specifically effect an ordinary negligence standard. *See Balint*, 258 U.S. at 252-53 (if his mere negligence could be dangerous to the public, policy may demand a person be held criminally liable) *see also Morissette*, 342 U.S. at 256 (for public welfare statutes, the accused is usually in the best position to prevent the harm through the exercise of reasonable and ordinary care); *Dotterweich*, 320 U.S. at 281 ("In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."); *Staples*, 511 U.S. at 607 n.3 (reiterating that public welfare statutes may dispense with a "mental element").

Lastly, criminal jurisprudence is comfortable linking blame with harm, even if the scope of the harm is not necessarily controlled by the actions of the violator. E.g., Model Penal Code §211.1 (1962) (providing different levels of punishment for assault which causes injury, and assault which causes serious bodily injury, though the intent to assault may be identical); David A. Barker, Note, *Environmental*

Crimes, Prosecutorial Discretion, and the Civil/Criminal Line, 88 Va. L. Rev. 1387, 1424 (2002). Moreover, many courts apply the remedial purpose doctrine to environmental statutes, which requires courts to avoid construing environmental criminal statutes narrowly because they are intended to protect the environment and human health. *E.g., United States v. Self*, 2 F.3d 1071, 1091 (10th Cir. 1993) (reasoning that courts should not construe the Resource Conservation Recovery Act narrowly because it is a public welfare statute); Katherine A. Swanson, Comment, *The Cost of Doing Business: Corporate Vicarious Criminal Liability for the Negligent Discharge of Oil Under the Clean Water Act*, 84 Wash. L. Rev. 555, 564-65 (2009).

C. Section 1319(C)(1)(A) Does Not Pose A Risk Of Over-Criminalization For Imposing Criminal Liability For Ordinary Negligence.

The Fourteenth Circuit's dissent relies on a dissenting opinion from a denial of certiorari from *Hanousek* and *Ahmad*, a Fifth Circuit case, to show that reading § 1319 as a public welfare statute would criminalize too much behavior. R. at 16-17; *See Hanousek v. United States*, 528 U.S. 1102, 1102 (2000). The court in *Ahmad* relies heavily on this "over-criminalization" test espoused as dicta in *Staples*. *See United States v. Ahmad*, 101 F.3d 386, 391 (5th Cir. 1996); *see also Staples*, 511 U.S. at 610 (quoting *Liparota*, 471 U.S. at 426). *Ahmad* held that the "key" in public welfare analysis was whether an absent mens rea would criminalize traditionally legal behavior: "if knowledge is not required as to the nature of the substance discharged, one who honestly and reasonably believes he is discharging water may find himself guilty of a felony if the substance turns out to be something else." *See Ahmad*, 101 F.3d at 391. But this misconstrues the heart of the public welfare

exception, which requires defendants have notice they are dealing with dangerous materials; indeed, this Court has repeatedly emphasized that public welfare offenses do not impose absolute liability and leave room for a mistake-of-fact defense. *United States v. Wilson*, 133 F.3d 251, 264 (4th Cir. 1997) (finding a mistake of fact defense could be used if the defendant mistakenly believed he had a discharge permit.).

The Fourteenth Circuit's dissent incorrectly relies on Justice Thomas's dissent in the denial of *Hanousek's* certiorari for two reasons. First, Thomas's concern that millions of "ordinary" construction workers will be subject to criminal liability conflates "ordinary" business activities (operating construction equipment) with the dangerous substances that put workers on notice. *Hanousek v. United States*, 528 U.S. 1102, 1102 (2000) (Thomas, J., dissenting from denial of certiorari). However, if the workers know they are handling deleterious materials, then they are on notice for public welfare purposes; if they do not, then they have a mistake-of-fact defense. *Wilson*, 133 F.3d at 264. Second, Thomas ignores the implications of the opinion he wrote in *Staples*; when read in conjunction with *Freed*, *Staples* clarifies that the same statue can be public welfare for one provision, but not another. *See United States v. Freed*, 401 U.S. 601, 609 (1971); *see also Staples*, 511 U.S. at 619. Thus, if courts are concerned about over-criminalizing innocuous materials, they do not have to apply the test to pollutants that are not sufficient to put a defendant on notice of regulations.

Further, prosecutorial guidelines for cases against offenders of the Clean Water Act encourage prosecutors to enforce the simple negligence provision only in cases of extraordinary harm. *See* Solow and Sarachan, Criminal Negligence Prosecutions under the Federal Clean Water Act: A Statistical Analysis and an Evaluation of the Impact of Hanousek and Hong, 32 ELR 11153 at 11158 (Oct. 2002). Therefore, § 1319(c)(1)(A) will only be used in extreme circumstances. Bruce Pasfield, Sarah Babcock, Simple Negligence and Clean Water Act Criminal Liability: A Troublesome Mix, 12 NO. 1 ABA Envtl. Enforcement & Crimes Committee Newsl. 3, 8-9 (2011). Here, Petitioner's violation is a case of extraordinary harm and thus falls in the rare category of cases under which policy and precedent have deemed appropriate for prosecutions. R. at 8 (The damage to the state and local economies is still being determined, but most economists put the damage at nearly $1.25 billion). Consequently, reading the Clean Water Act as a public welfare statute does not present a threat of over-criminalization of apparently innocent conduct.

II. THE LOWER COURTS CORRECTLY HELD THAT PETITIONER "CORRUPTLY PERSUADED" A POTENTIAL WITNESS UNDER THE WITNESS-TAMPERING STATUTE, 18 U.S.C. § 1512(B)(3) BECAUSE HE KNOWINGLY PERSUADED WITH AN IMPROPER PURPOSE.

Federal statutes have long prohibited witness tampering to prevent interference with federal prosecutions. Congress enacted 18 U.S.C. § 1503 more than 60 years ago to prohibit individuals from "corruptly" influencing witnesses. *See* 18 U.S.C. § 1503 (1948) (amended 1982). Courts gave this statute a broad sweep by construing "corruptly" to mean motivated by an improper purpose. *See United*

States v. Cintolo, 818 F.2d 980, 990-91 (1st Cir. 1987); *United States v. Rasheed*, 663 F.2d 843, 852 (9th Cir. 1981).

Congress enacted the Victim and Witness Protection Act (VWPA) in 1982 to expand legal protection for witnesses and made 18 U.S.C. § 1512 the exclusive witness-tampering statute. S. Rep. No. 95-797, at 9 (1982) *reprinted in* 1982 U.S.C.C.A.N. 2515, 2515. Congress heavily borrowed language from § 1503. *Id*. Like § 1503, § 1512 requires a mens rea of "corruptly." Unlike § 1503, § 1512 has an additional intent element of "knowingly." Despite this additional element, "corruptly" retains its established meaning requiring improper purpose. *United States v. Kaplan*, 490 F.3d 110, 126 (2d Cir. 2007). This improper purpose construction is consistent with this Court's interpretation of § 1512(b), which compels courts to give effect to the scienter "knowingly" by requiring consciousness of wrongdoing. *See Arthur Andersen, L.L.P. v. United States*, 544 U.S. 696, 705-06 (2005).

Here, the Fourteenth Circuit properly affirmed Petitioner's conviction for "corruptly persuading" a witness for three reasons. First, the canons of construction support construing "corruptly" to mean improper purpose. Second, this construction of "corruptly" is consistent with *Arthur Andersen's* conscious-of-wrongdoing standard. Finally, under this analysis, Petitioner violated the statute when he knowingly attempted to persuade a potential co-defendant to plead the Fifth Amendment for self-serving purposes. *See* R. at 10.

A. "Corruptly" In § 1512(B) Means Motivated By An Improper Purpose.

The development of § 1512 shows that "corruptly" means motivated by an improper purpose. Courts concur that "corruptly" in § 1503, a parallel provision to § 1512, means motivated by an improper purpose, such as acting out of self-interest to personally benefit from the persuasion. *See United States v. Shotts*, 76 F.3d 442, 452 (11th Cir. 1998). These courts have concluded that this interpretation is supported by the plain language of § 1503. *United States v. Cioffi*, 493 F.2d 1111, 1120-21 (2d Cir. 1974) (finding that a defendant who asks another to plead the Fifth to protect defendant from criminal liability acts with an improper motive); *Cintolo*, 818 F.2d at 990-91 (both the plain meaning and case law show that § 1503 criminalizes obstruction of justice with an improper purpose); *United States v. Lazzerini*, 611 F.2d 940, 941 (finding that "corruptly" requires some improper motive such as attempting to tell a juror that a friend on trial is innocent). Thus, judicial authority has firmly established that "corruptly" in § 1503 means motivated by an improper purpose.

Though it is settled that "corruptly" in § 1503 means improper purpose, circuits are split as to what it means in conjunction with "knowingly" in § 1512. *Arthur Andersen*, 544 U.S. at 705. Some courts have construed "corruptly" in § 1512 to mean motivated by an improper purpose, the same as it does in § 1503. *See United States v. Kaplan*, 490 F.3d 110, 126 (2d Cir. 2007); *United States v. Gotti*, 459 F.3d 296, 343 (2d Cir. 2006). Others have held that the added scienter requirement demands the narrow interpretation of inherently wrongful persuasion

so as not to render knowingly a nullity. *See United States v. Doss*, 630 F.3d 1181, 1188 (9th Cir. 2011). Inherently wrongful persuasion generally means encouraging bribery or soliciting perjury. *Id.* Because the canons of construction endorse a broader interpretation of "corruptly," this Court should adopt the improper purpose interpretation.

1. The canons of construction dictate that the construction of "corruptly" in § 1503 should also be applied to § 1512.

i. Corruptly in § 1512 should mean motivated by an improper purpose based on the prior settled meaning of that term in § 1503.

Courts have already established the meaning of "corruptly" in § 1503, and this construction should be applied to the statute at issue. When Congress uses statutory terms with a settled judicial meaning, courts infer Congress meant to use those established meanings unless the statute clearly indicates otherwise. *See Scheidler v. N.O.W. Inc.,* 537 U.S. 393, 402 (2003). Here, courts have established the settled meaning of "corruptly" in § 1503 as motivated by an improper purpose. *See Cintolo*, 818 F.2d at 990-91; *United States v. Rasheed*, 663 F.2d 843, 852 (9th Cir. 1981). If Congress wanted to reject this settled meaning in § 1512, it could have done so—but nothing in the statute points to such an intent. The statute does not define corrupt persuasion, but rather addresses an unrelated enumerated act. *See* 18 U.S.C. § 1505(a)(6) (1996).

Furthermore, Congress relied on the prior settled meaning to define "corruptly" in 18 U.S.C. § (1948) (amended 2004); 18 U.S.C. § 1515(b) (1996). While Petitioner may contend that because Congress also failed to define "corruptly" in 18

U.S.C. § 1512, Congress intended a different definition of corruptly in § 1512. But this argument fails to recognize that Congress only defined "corruptly" in § 1505 to clarify that the term was not unconstitutionally vague. *United States v. Pointdexter*, 951 F.2d 369, 386 (D.C. Cir. 1991) (holding "corruptly" in 1505 is unconstitutionally vague); U.S. Dep't of Justice, United States Attorneys' Criminal Resource Manual 1727 (1997). Because no court has found § 1512 to be unconstitutionally vague, it follows that Congress did not need to define "corruptly" because the improper purpose construction was obvious. *See Thompson*, 76 F.3d at 452. Thus, Congress did not demonstrate a clear intent to change the settled meaning of "corruptly." This Court therefore should infer that Congress meant to use the prior settled meaning.

ii. The legislative history shows "corruptly persuades" in § 1512 is analogous to "corruptly" in § 1503.

Section 1512's legislative history indicates that this Court should adopt the improper purpose construction because this construction will offer similar protections originally available in § 1503. Legislative history includes statements by individual legislators. *Brock v. Pierce Cnty.,* 476 U.S. 253, 263 (1986). These statements, especially those by bill drafters, can provide persuasive evidence of congressional intent when they are consistent with the statutory language. *R.J.R. Nabisco v. U.S.,* 955 F.2d 1457, 1462 (1992); *F.E.A. v. Algonquin S.N.G., Inc.,* 426 U.S. 548, 564 (1976). Former Senator Joe Biden, drafter of the 1988 amendment, wrote that he added "corruptly persuades" into § 1512(b) to provide witnesses the same protections originally available in § 1503. 134 Cong. Rec. 32,701 (1988). As the

bill's drafter, Biden's statement is especially persuasive evidence that "corruptly" in § 1512(b) carries the same meaning in § 1503. *See Brock*, 476 U.S. at 263. Therefore, Biden's statement indicates that corruptly in § 1503 and § 1512 is meant to serve an analogous purpose, so the construction of this term should be analogous as well.

iii. Section 1512's policy objectives support a broad construction of corruptly.

A broad construction is persuasive in light of the pro-witness objective of the VWPA. Courts should look to the statute as a whole and its policy objectives to determine Congressional intent. *United States v. Atl. Research Corp.*, 551 U.S. 128 (2007). Like typical criminal offenses, this VWPA serves the traditional goal of punishing wrongdoers. But unlike typical offenses, it also serves the higher goal of preserving the integrity of judicial administration by protecting witnesses in criminal proceedings. Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (codified as amended at 18 U.S.C. §§ 1500-15 (1988)). The government should be able to prosecute a wide range of witness abuses, not just inherently wrongful conduct such as encouraging bribery or soliciting perjury.

Further, the VWPA's expansive goal of protecting witnesses supports a broad construction of corruptly to mean improper purpose, not a narrow construction that limits enforcement to inherently wrongful acts. *See United States v. Fasolino*, 586 F.2d 939, 941 (2d Cir. 1978). Congress intended § 1512 to be a broad and exclusive remedy for witness tampering and to strengthen existing legal protections for witnesses. S. Rep. No. 95-797, at 9 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2515, 2515; Teresa Anne Pesce, Note, *Defining Witness Tampering Under 18 U.S.C.*

Section 1512, 86 Colum. L. Rev. 1417, 1418 (1986); *United States v. Farrell*, 126 F.3d 484, 492 (3rd Cir. 1997) (Campbell, J., dissenting) (Congress enacted § 1512 to replace and expand witness provisions that were originally in § 1503.). Thus, the improper purpose construction better serves the broad policy objectives of § 1512.

iv. Congressional Acts consistently demonstrate Congress's desire to expand the scope of § 1512.

Moreover, three congressional amendments show Congress's intent to expand witness protection in § 1512. *See Stone v. I.N.S.*, 514 U.S. 386, 397 (1995) (courts may use the language of statutory amendments to determine Congressional intent). First, § 1512 prohibited tampering with "any person" rather than a "witness," which was originally required under § 1503. S. Rep. No. 95-797, at 16 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2515, 2522. This amendment extended protection to potential, not just actual, witnesses. *See id*. Second, Congress included the mens rea of "knowingly" to lower the level of culpability required for a § 1512 offense, thus making it easier to obtain a conviction. *See id.* at 2520. Lastly, in 1988, Congress added corrupt persuasion to the list of proscribed, enumerated acts in § 1512, which originally included only coercive acts. *See* 18 U.S.C. § 1512(b) (2006) (as amended 1988); Pamela E. Hart, *Falling Through the Cracks: The Shortcomings of Victim and Witness Protection Under § 1512 of the Federal Victim and Witness Protection Act*, 43 Val. U. L. Rev. 771, 781 (Winter 2009). Taken together, these changes demonstrate that Congress has repeatedly expanded the protections available to witnesses. These Congressional acts indicate a broad construction of "corruptly"

would better serve Congressional goals; thus, the improper purpose construction is consistent with this intent.

> 2. The improper purpose construction does not implicate the rule of lenity, deprive defendants of notice, or create surplus language in the statute.

Petitioner may contend that this court should narrowly construe "corruptly" to mean inherent wrongfulness because, under the rule of lenity, all ambiguities should be resolved in favor of the defendant. This argument fails because the rule of lenity alone is insufficient to override legislative history and inferences drawn from the statutory scheme. *Russello v. United States*, 464 U.S. 16, 29 (1983) (the rule of lenity is not an overriding consideration of being lenient to wrongdoers); *United States v. Pollen*, 978 F.2d 78, 85 (3d Cir. 1992) (rule of lenity only applies when other canons of construction cannot clarify legislative intent); *Burgess v. United States*, 553 U.S. 124, 135 (2008) (a court should first consult the traditional canons of construction and then apply the rule of lenity only if an ambiguity remains). Here, the prior settled meaning, the legislative history, and policy objectives of § 1512 already clarify the legislative intent regarding "corruptly."

While Petitioner may contend the rule of lenity is necessary to put defendants on notice that witness tampering is a crime, courts have concluded that "corruptly" is sufficient to give notice of the criminal offense. *See e.g.*, *Shotts*, 455 U.S. at 489 ("[C]orrupt is a scienter requirement which provides adequate notice of what conduct is proscribed."). Consequently, the rule of lenity is unnecessary to resolve this ambiguity.

Petitioner may also contend that this Court should narrowly construe "corruptly" because the improper purpose construction will create surplus language in the statute. This argument fails because the improper purpose construction of "corruptly" still gives meaning to every word in 18 U.S.C. § 1512(b)(3). When construing a statute, courts should give meaning to all statutory terms, particularly to those that constitute a criminal offense element. *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994). Petitioner may contend that "corruptly"—the sole mens rea element in § 1503—cannot simply mean improper purpose in § 1512 since "corruptly" is not the sole mens rea element in § 1512. The Fourteenth Circuit's dissent relies on *Farrell*, which incorrectly asserts that the broad "improper purpose" construction creates surplus language. R. at 19. According to *Farrell* , § 1512(b)(3)'s specific intent to "hinder, delay, or prevent communication with law enforcement" *is* the improper purpose. *See Farrell*, 126 F.3d at 490. However, this argument fails because one can hinder, delay, or prevent communication with a law enforcement officer without acting improperly. *See Arthur Andersen*, 544 U.S. at 703 (noting that a mother asking her son to plead the Fifth or an attorney advising his client to remain silent are both examples of preventing communication with law enforcement that are not improper). Consequently, the improper purpose construction does not create surplus language.

Petitioner's narrow construction of "corruptly" is inconsistent with the policy goals of § 1512(b) because this construction only prohibits defendants from engaging in bribery or soliciting perjury. *See Doss*, 630 F.3d at 1187. As courts have shown,

other culpable persuasion exists that does not fall within these two limited acts. *See e.g., Fasolino*, 586 F.2d at 941 (attempting to exploit a personal relationship with a judge to obtain a favorable result for an acquaintance). A narrow construction thus limits the government's ability to protect victims and fails to support the breadth and scope of § 1512(b). *See* Teresa Anne Pesce, Note, *Defining Witness Tampering Under 18 U.S.C. Section 1512*, 86 Colum. L. Rev. 1417, 1426 (1986). Public policy reasons therefore militate against Petitioner's construction because it fails to protect potential and actual witnesses from other culpable persuasion that does not include bribery or soliciting perjury.

B. Construing "Corruptly" In § 1512(B) To Mean Motivated By An Improper Purpose Is Consistent With This Court's Consciousness-Of-Wrongdoing Standard.

1. Knowledge of improper purpose differs from mere improper purpose and gives meaning to all words of the statute.

As this Court noted in *Arthur Andersen*, § 1503 differs from § 1512(b) because, in the latter statute, "knowingly" modifies "corruptly," and any analogy of "corruptly" from § 1503 to § 1512(b) is thus "inexact." *Arthur Andersen LLP*, 544 U.S. at 705 n.9. For this reason, the Court concluded that "motivated by an improper purpose" was insufficient to define the entire general mens rea requirement in § 1512(b) because "knowingly" modified "corruptly persuades." *Arthur Andersen*, 544 U.S. at 705. Accordingly, knowingly and corruptly taken together simply require the defendant to be conscious of his own wrongdoing. *Id.* Since *Arthur Andersen*, two competing views have emerged to interpret this Court's consciousness-of-wrongdoing standard. Petitioner sides with the courts that contend

consciousness of wrongdoing must mean the defendant's persuasion was "inherently wrong or immoral." *See, e.g., Doss*, 630 F.3d at 1188 (inherently wrongful persuasion includes bribery or persuading another to commit perjury); *Farrell*, 126 F.3d at 489. But other courts instead adopted the construction of "corruptly" from § 1503 and concluded the defendant must knowingly persuade with an improper purpose to satisfy the general mens rea requirement of § 1512(b). *See United States v. Kaplan*, 490 F.3d 110, 126 (2d Cir. 2007); *United States v. Gotti*, 459 F.3d 296, 343 (2d Cir. 2006). Thus, defendants violate the statute if they knowingly persuade a potential witness's testimony for their own personal benefit. *See Kaplan*, 490 F.3d at 126; *Gotti*, 459 F.3d at 343; *Thompson*, 76 F.3d at 442.

The second view is the proper construction of "corruptly persuades" in § 1512(b) because it is consistent with the consciousness-of-wrongdoing standard provided by *Arthur Andersen*. This approach alleviates *Arthur Andersen's* concern that courts were disregarding the term "knowingly" in § 1512(b). *Kaplan*, 490 F.3d at 126 (finding that the government can meet the "consciousness of wrongdoing" test by proving the defendant knowingly acted with an improper purpose); *United States v. Cain*, No. 05-CR-231A, 2007 WL 119292 at *6 (W.D.N.Y. Jan. 10, 2007) ("corruptly persuades" means to knowingly act with an improper purpose); *Gotti*, 459 F.3d at 343 (corrupt persuasion means to act with an "improper purpose"). By relying on the precedent from § 1503 and *Arthur Andersen*, courts have retained the improper purpose construction while imposing a separate knowing requirement.

The second view is also consistent with *Arthur Andersen* because § 1512 gives effect to knowingly by proscribing fewer acts than does § 1503. The general mens rea requirement in both statutes will tend to overlap in many instances. However, because of the different constructions in the two statutes, courts may find individuals guilty for accidental communication in § 1503 but not in § 1512. Inadvertent communications can corruptly persuade a witness without the communicator's knowledge. For example, a person could write an email wishing a potential witness would falsely testify in a criminal proceeding. If the potential witness reads the message without the sender's knowledge and is persuaded not to testify, the sender would be liable if there were no "knowing" requirement. But under this exact set of facts, an individual would not be culpable under § 1512 because the sender did not knowingly corruptly persuade. Accidental communication is, of course, not implicated in the present case. But this example demonstrates that the 1512 construction gives effect to the modifier knowingly.

2. The consciousness-of-wrongdoing standard does not require the act of persuasion to be inherently wrongful.

Petitioner may contend that consciousness-of-wrongdoing standard requires inherent wrongdoing because the *Andersen* decision requires the persuasion to be "inherently malign." *Arthur Andersen LLP*, 544 U.S. at 704. But this argument misconstrues the analysis. This Court only discussed inherently malign conduct to distinguish innocent conduct, such as shredding documents without any particular motivation, from culpable conduct, such as shredding documents to hide information from a government investigation. *Id.* Simply shredding documents is an

innocent act, whereas the second case, while involving the same act, is prohibited because the actor is motivated by an improper purpose. *See id.* The Court did not intend to use that language to endorse the "inherent wrongfulness" position. *See id.* In fact, the court specifically left open the question of what constitutes "wrongdoing." *Arthur Andersen LLP*, 544 U.S. at 706 ("The outer limits of [corruptly persuades] need not be explored here . . . ."). Thus, this Court did not already implicitly embrace Petitioner's position.

C. Petitioner Knowingly Acted With An Improper Purpose When He Sought To Protect Himself From Criminal Prosecution By Asking A Potential Co-Defendant To Plead The Fifth Amendment.

Attempting to personally benefit from another person's inalienable right is an improper purpose. Though every witness has a lawful and inalienable right to plead the Fifth Amendment in the face of government interrogation, it is unlawful for an inducer to persuade a witness to plead the Fifth Amendment to protect the inducer from criminal liability. *Cole v. United States*, 329 F.2d 427, 443 (9th Cir. 1964); *see also Cioffi*, 493 F.2d at 1119 (One who corruptly advises a witness to plead the Fifth Amendment obstructs the administration of justice because the lawful behavior of one person cannot be used to protect the criminal behavior of the inducer.); *see also Cortese*, 568 F. Supp. at 129 (Fifth Amendment privilege is personal and a defendant can be liable if he induces another to invoke the privilege for the defendant's own personal benefit).

Courts have used this reasoning both before and after the *Anderson* holding requiring consciousness of wrongdoing. In *United States v. Gotti*, for example, the

defendant told the witness's legal guardian that the witness should plead the Fifth. *See Gotti*, 459 F.3d at 317. The defendant feared that if the witness did not invoke the Fifth Amendment, officers would ask questions that would eventually implicate the defendant. *Id*. In that case, the defendant acted with a self-interested motive to shield himself from criminal prosecution. *See id.* Though the witness had every right to plead the Fifth Amendment, persuading him to do so for the defendant's own personal benefit was unlawful.

In this case, Petitioner knowingly acted with an improper purpose. In an attempt to shield himself from criminal prosecution, Petitioner attempted to persuade Reynolds to plead the Fifth Amendment. Petitioner's criminal conduct took the form of a conversation with Reynolds in which Reynolds said he wanted to cooperate with government officials. R. at 9. In response, Petitioner said he was "not going to jail" and urged Reynolds to plead the Fifth Amendment because Petitioner understood that Reynolds' testimony would implicate him. R. at 9. Petitioner manifested his knowledge that he would be liable if Reynolds spoke to law enforcement by using the pronouns "we" and "us." R. at 9 ("They're talking about treating *us* like criminals . . . . The feds can't do anything if *we* don't talk.") (emphasis added). Under the sufficiency of evidence standard of review, Petitioner was guilty because there was ample evidence under the improper purpose construction. *United States v. Gullett*, 75 F.3d 941, 947 (4th Cir. 1996). Petitioner attempted to persuade Reynolds to withhold information and knew that this persuasion would lead to that result. By attempting to persuade Reynolds,

Petitioner attempted to personally benefit from a potential witness's inalienable right—an act that is deemed improper by numerous courts.

Conclusion

The Fourteenth Circuit correctly affirmed the lower court's conclusion that 33 U.S.C. § 1319(c)(1)(A) imposes criminal liability for ordinary negligence and the Fourteenth Circuit properly denied Petitioner's motion for acquittal under 18 U.S.C. § 1512(b)(3). Thus, this Court should affirm Petitioner's convictions under § 1319 and § 1512(b)(3).

APPENDIX A

33 U.S.C. § 1319(c)(1)

§ 1319. Enforcement

(c) Criminal penalties

(1) Negligent violations
Any person who--

> **(A)** negligently violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or
>
> **(B)** negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works under section 1342 of this title by the Administrator or a State;
> shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

APPENDIX B

33 U.S.C. § 1319(c)(2)

§ 1319. Enforcement

(c) Criminal penalties

(2) Knowing violations
Any person who--

> **(A)** knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or
>
> **(B)** knowingly introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in a permit issued to the treatment works under section 1342 of this title by the Administrator or a State;
> shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, 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 $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

APPENDIX C

18 U.S.C. § 1503

§ 1503. Influencing or injuring officer or juror generally

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

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

> **(1)** in the case of a killing, the punishment provided in sections 1111 and 1112;
>
> **(2)** in the case of an attempted killing, or a case in which the offense was committed against a petit juror and in which a class A or B felony was charged, imprisonment for not more than 20 years, a fine under this title, or both; and
>
> **(3)** in any other case, imprisonment for not more than 10 years, a fine under this title, or both.

APPENDIX D

18 U.S.C. § 1512(b)

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

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

(2) cause or induce any person to--

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

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

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

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

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation1 supervised release,,2 parole, or release pending judicial proceedings;
shall be fined under this title or imprisoned not more than 20 years, or both.

APPENDIX E

18 U.S.C. § 1515(a)(6)

§ 1515. Definitions for certain provisions; general provision

(a) As used in sections 1512 and 1513 of this title and in this section--

> **(6)** the term "corruptly persuades" does not include conduct which would be misleading conduct but for a lack of a state of mind.

APPENDIX F

18 U.S.C. § 1515(b)

§ 1515. Definitions for certain provisions; general provision

(b) As used in section 1505, the term "corruptly" means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.