No. C11-0116-1

In The

Supreme Court of the United States

SAMUEL MILLSTONE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourteenth Circuit

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BRIEF FOR RESPONDENT

Team #22
Counsel for Respondent

QUESTIONS PRESENTED

1. Can a person be convicted of negligently discharging pollutants in violation of the Clean Water Act, 33 U.S.C. § 1319(c)(1)(A), for failing to exercise the standard of care that a reasonably prudent person would have exercised in similar circumstances?

2. Under the witness-tampering statute, 18 U.S.C. § 1512(b)(3), can an individual "corruptly" persuade a potential witness to withhold information from law enforcement by invoking his Fifth Amendment right against self-incrimination?

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The opinion of the United States District Court for the District of New Tejas, denied Petitioner's motion for a new trial and upheld convictions of negligent violations of the Clean Water Act, 33 U.S.C. § 1319(c)(1)(A), and the federal witness-tampering statute, 18 U.S.C. § 1512(b)(3). The District Court opinion is unreported. On October 3, 2011, the United States Court of Appeals for the Fourteenth Circuit (*Millstone*, slip op. at 3-15), affirmed the conviction of Petitioner's violations of the Clean Water Act, and the witness-tampering statute. The opinion is also unreported, but available at *Millstone v. United States of America*, No. 11-1174 (14th Cir. Oct. 3, 2011).

STATEMENT OF JURISDICTION

This Court's jurisdiction falls under 28 U.S.C. § 1254. This section grants the United States Supreme Court jurisdiction to review any case from any United States Court of Appeals by writ of certiorari granted upon any party. This appeal arises from the United States Court of Appeals for the Fourteenth Circuit. The honorable Judge Davola entered judgment on October 3, 2011, and affirmed the District Court's order upholding Petitioner's convictions under the Clean Water Act and witness-tampering statute. This Court granted certiorari to review the ruling of the Court of Appeals. Accordingly, under 28 U.S.C. § 1254, this Court has jurisdiction over this appeal.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> 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 offense 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.

U.S. Const. amend. V.

STATEMENT OF THE CASE

Petitioner Samuel Millstone ("Petitioner") is the founder and owner of Sekuritek, a security firm, in Polis, New Tejas. (*Millstone*, slip op. at 4.). Sekuritek's business model is built upon providing companies with highly-trained security personnel using the latest technology to serve each company's individual needs. (*Id.*). Petitioner is the acting president and CEO of Sekuritek, and his partner, Reese Reynolds ("Reynolds") is currently the vice president of the firm. (*Id.*).

Petitioner is experienced in both law enforcement and business operations. He has an undergraduate business degree and a Masters of Business Administration from the University of New Tejas. (*Id.*). He is a former member of the Polis Police Department with over ten years of experience in law enforcement, and he also managed a small chain of local retail businesses for five years before losing his job in 2003 due to corporate layoffs. (*Id.*).

Petitioner and Reynolds met in business school, and while there, they developed the idea for Sekuritek which would allow them to combine Millstone's experience in law enforcement and business with Reynolds' experience in marketing and sales. (*Id.*). As president and CEO of Sekuritek, Petitioner's duties include consulting with clients to ascertain security needs, hiring and training security personnel, and supervising operations at clients' locations. (*Id.*). Reynolds is in charge of all sales, marketing, and equipment purchases. (*Id.* at 4.). Sekuritek's total revenue in 2005 was just above $2 million, with an average contract amount of approximately $80,000. (*Id.* at 5.).

In September 2006, the Bigle Chemical Company ("Bigle") relocated its headquarters from China to Polis, where it opened its largest chemical plant near the Windy River. (*Id.*). The enormous Windy River Facility, which spanned 270 acres, housed manufacturing and waste recycling facilities and required a staff of 1,200 persons per shift. (*Id.*). Bigle's Chairman and CEO, Drayton Wesley ("Wesley"), contacted Petitioner on November 5, 2006 to hire Sekuritek to provide security to the Windy River Facility. (*Id.*). The contract was to net Sekuritek $8.5 million over a ten year period, almost ten times Sekuritek's previous largest contract. (*Id.*). Despite Wesley's demands that Sekuritek would need to be "live" and "online" at the Windy River Facility by December 1, 2006, and Reynolds' apprehension about handling such a large contract in a short amount of time, Petitioner signed the contract with Bigle on November 16, 2006. (*Id.*). Petitioner

was convinced that such a large contract and the anticipated financial gains would make Sekuritek a "big-time" firm. (*Id.* at n.1.).

In just two weeks, Sekuritek was responsible for hiring thirty-five new security guards, one accountant, and one administrative assistant. (*Id.* at 5.). The contract also called for Sekuritek to make significant investments in security equipment, including surveillance gear, uniforms, and taser guns. (*Id.* at 5-6.). Due to the size of the Windy River Facility, a transportation plan was also needed, but until then, Sekuritek's experience with providing a security transportation plan was limited to the purchase of a bicycle patrol for a grocery store parking lot. (*Id.* at 6.).

Scrambling to meet the needs of the Windy River Facility, Petitioner developed a "shortened security seminar" to train the thirty-five new staff members, and Reynolds began searching for a new fleet of sport-utility vehicles. (*Id.*). Before the Bigle contract, Sekuritek employed only experienced security personnel who had completed an intensive three-week training course. (*Id.* at n. 2.). Due to the time constraints, however, Petitioner's newly devised shortened seminar required that the new hires spend only one week in formal training and three weeks of "on the job observation and training." (*Id.*). Reynolds, also struggling to meet the impending deadline, performed only a cursory review of potential car vendors. He settled on an unproven company because it was the only vendor that could deliver the fleet of SUVs in time. (*Id.* at 6 & n.3.).

Two months after Sekuritek began its operations at the Windy River Facility, one of Sekuritek's newest security guards, mistook a Bigle safety inspector for an

intruder near the storage tank area. (*Id.* at 7.). In an attempt to investigate further, the security guard immediately floored the gas pedal in his SUV, and the pedal stuck, causing the vehicle to accelerate out of control and eventually collide with a chemical storage tank. (*Id.*). The resulting fire spread rapidly across the Windy River Facility, causing several explosions and spilling thousands of barrels of chemicals into the Windy River. (*Id.*). Due to the fires and a security wall built by Sekuritek, firefighters and emergency responders could not reach the blaze for three days. (*Id.*).

The Windy River chemical spill devastated the people and city of New Tejas. Twenty-three people died in the explosions and fires; three national historical buildings, numerous homes, and 50,000 acres in nearby farmland were destroyed; and the fires caused more than $450 million in damage. (*Id.*). Furthermore, the chemical concentrate that spilled into the Windy River ate through the hulls of local fishing boats and commercial shipping barges, wiped out all agricultural lands fives miles downriver, killed all fish and destroyed all fish breeding grounds five miles downriver, and caused a local water treatment and utility facility to shut down due to the fire hazard created by the chemicals in the water. (*Id.* at 8.). The resulting damage to the economy was even more staggering. Tourism declined, accounting for a $4.5 million per year loss for New Tejas and cleanup costs exceeded $300 million. The total damage was estimated at $1.25 billion. (*Id.*).

Although Sekuritek's employee handbook provided instructions on how to handle suspected security breaches, the evidence showed that Petitioner did not

introduce this policy to the new personnel and only generally referred the new hires to the handbook. (*Id.* at 8-9.). The evidence also revealed that the SUV vendor that Sekuritek chose to supply the fleet of SUVs had a reputation for poor workmanship and a history of pedal problems. (*Id.*). Moreover, Petitioner could not provide an explanation as to why Sekuritek had erected the security wall, which prevented an effective emergency response. (*Id.*). Nervous about the intensifying government investigation and media coverage, Petitioner and Reynolds met to discuss the proper course of action. (*Id.*). When Reynolds told Petitioner that he would inform authorities about their involvement in the events leading up to the spill, Petitioner angrily replied, "It's time to just shut up about everything." (*Id.*). Petitioner warned Reynolds "about pinning all this on [him]," and pushed Reynolds toward pleading "the Fifth" instead of cooperating with the investigators. (*Id.*).

Despite Petitioner's attempts to conceal the facts behind Sekuritek's operations at the Windy River Facility, Reynolds agreed to give testimony. (*Id.* at 10.). Petitioner was subsequently tried and convicted of negligently hiring, training, and supervising personnel; negligently failing to inspect the SUVs prior to their purchase and use; and witness tampering in violation of 18 U.S.C. § 1512(b)(3). (*Id.*). On appeal, the Fourteenth Circuit affirmed the District Court's conviction of Petitioner. First, the Court held Petitioner negligently discharged a pollutant in violation of § 1319(c)(1)(A) of the Clean Water Act ("CWA"), following the District Court's instruction to the jury to apply a standard of ordinary negligence. (*Id.* at 13.). Second, the Court held Petitioner improperly encouraged Reynolds to withhold

information, and that his purpose was to prevent being implicated in any wrongdoing. (*Id.* at 15.).

SUMMARY OF THE ARGUMENT

The Court should affirm Petitioner's conviction for violations of the CWA and federal witness-tampering laws. Congress enacted the CWA to prevent the discharge of pollutants into the Nation's water supply. Under § 1319(c)(1)(A) of the CWA, anyone who negligently discharges a pollutant or violates a discharge permit is held criminally liable. "Negligently" refers to the ordinary negligence standard because such an interpretation accords with the plain language doctrine and Congressional intent. A heightened negligence standard, e.g. "gross negligence," fails under both. Here, Petitioner was convicted of violating § 1319(c)(1)(A) under the ordinary negligence standard; failing to exercise the appropriate standard of care in the circumstances.

Furthermore, the CWA is a public welfare statute. The public welfare doctrine applies to statutes which omit or reduce traditional *mens rea* elements from criminal laws, in order to protect the public from highly dangerous items. Although reducing traditional *mens rea* elements, public welfare statutes accord with due process because anyone dealing with such dangerous items should be put on notice of their regulated nature.

In this case, the CWA was enacted to eliminate all water pollution and deter all polluters. In order to carry out its purpose, Congress chose to not only punish knowing violations, but negligent violations as well, which do not require proof of an

intentional act. Congress did so because pollutants regulated by the CWA are so dangerous that anyone dealing with them should be aware of their regulated nature. Additionally, the legislative history of the CWA, which has resulted in consistently broader application and enforcement of the CWA, supports the ordinary negligence standard. Punishing ordinary negligence provides sufficient deterrence and, therefore, helps to eliminate water pollution. Thus, Petitioner was convicted under the proper standard.

Petitioner was also properly convicted of attempting to "corruptly persuade" a potential witness in violation of 18 U.S.C. § 1512(b)(3). The term "corruptly" is defined as "motivated by an improper purpose" to obstruct justice in 18 U.S.C. §§ 1503(a) and 1505, two statutes that govern conduct very similar to that in § 1512(b)(3). Absent a compelling reason, a statutory term is presumed to have the same meaning where it appears in closely related statutes, which means "corruptly" is presumed to mean "motivated by an improper purpose. This presumption is confirmed by the legislative history of § 1512, which illustrates that Congress intended to include the same protections in § 1512 that existed in § 1503.

The rule of lenity and alleged statutory redundancy are not compelling reasons to interpret the statute otherwise. The rule of lenity is inapplicable in light of the adequate guidance provided by the presence of the term "corruptly" in similar statutes and by Congressional intent. "Motivated by an improper purpose" does not create statutory redundancy by repeating the intent element of the statute, but modifies the kind of intent required to violate the statute.

Contrary to a recent case from the Ninth Circuit, the Supreme Court's opinion in *Arthur Andersen* does not preclude defining "corruptly" to require an improper purpose. The Court's decision is carefully worded so as to leave undefined the "outer limits" of the requirement that a defendant have some consciousness of wrongdoing to violate the statute. Rather, as recent decisions from the Second Circuit suggest, "motivated by an improper purpose" conveys the substantive equivalent of "consciousness of wrongdoing."

Petitioner was motivated by an improper purpose when he attempted to persuade Reynolds from communicating incriminating information to law enforcement officers. An improper purpose exists when a wrongdoer attempts to avoid being implicated in criminal wrongdoing because society has a greater interest in information relating to the commission of a crime than a wrongdoer has in the privilege of a potential witness. Therefore, wrongdoer acts with an improper purpose when he induces another to invoke his Fifth Amendment rights and withhold incriminating information from law enforcement. Based on Petitioner's statements to Reynolds made in the context of an intensive investigation into his management of Sekuritek, a reasonable jury could have concluded that Petitioner was attempting to avoid being implicated in criminal wrongdoing.

ARGUMENT

I. PETITIONER WAS PROPERLY CONVICTED OF VIOLATING THE CWA BECAUSE HE FAILED TO EXERCISE THE STANDARD OF CARE OF A REASONABLY PRUDENT PERSON IN SIMILAR CIRCUMSTNACES.

The CWA prohibits "the discharge of any pollutant by any person" whether knowingly or negligently done. 33 U.S.C. §§ 1311(a), 1319(a)-(c). The term "negligently," as used in the CWA, refers to ordinary negligence or the failure to "exercise the standard of care that a reasonably prudent person would have exercised in the same situation" (*Millstone*, slip op. at 11.), because that interpretation comports with the plain language of the statute. Due process is not violated by such an interpretation because the CWA is a public welfare statute. Additionally, the legislative history of the act supports the ordinary negligence standard. Therefore, the Court should affirm the circuit court's holding that negligence is properly interpreted as the failure to exercise the standard of care of a reasonably prudent person.

A. "Negligently" refers to ordinary negligence because such an interpretation is consistent with the plain language of the Statute and Congressional intent.

The CWA does not define "negligently." 33 U.S.C. §§ 1251-1387 (2006). Therefore, the Court must look to the plain language of the statute to define the term. *See, e.g., Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). "In such a case, absence of contrary direction [of the language] may be taken as satisfaction with widely accepted definitions, not as a departure from them." *Morissette v. United States*, 342 U.S. 246, 263 (1952). Hence, the ordinary meaning governs. *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242

(1989). Only if application of the ordinary meaning reaches a result contrary to Congress' intent, will the court seek an alternative definition. *See id.* This fundamental maxim of statutory construction has been relied upon in both civil and criminal contexts, *United States v. Wiltberger*, 18 U.S. 76, 95-96 (1820), because courts presume that Congress is aware of courts' "basic rules of statutory construction," *McNary v. Haitian Refugee Center*, 498 U.S. 479, 496 (1991). In *Wiltberger*, Chief Justice Marshall provided a succinct explanation of the doctrine, as it was applied to a federal criminal statute:

> [P]enal laws . . . are not to be construed so strictly as to defeat the obvious intention of the legislature . . . . The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest.

18 U.S. 76, 95-96 (1820) (interpreting statute criminalizing manslaughter committed "on the high seas" as inapplicable to foreign rivers).

i. <u>The plain meaning of "negligently" is consistent with the ordinary negligence standard.</u>

The text of the CWA states that anyone who "negligently violates section 1311 . . . or any permit condition . . . of this title . . . [and thereby causes pollutants to enter the navigable waters of the United States] shall be punished . . . ." 33 U.S.C. § 1319(c)(1)(A). Because federal crimes are created solely by statute, "the definition of the elements of a criminal offense is entrusted to the legislature . . . ." *Staples v. United* States, 511 U.S. 600, 604-05 (1994) (quoting *Liporata v. United States*, 471 U.S. 419 (1985)). Where, as here, the relevant term is left undefined in the statute, the court must adopt the meaning that "harmonizes with the context"

and promotes the policy and objectives of the legislature. *See United States v. Hartwell*, 73 U.S. 385, 395-96 (1868). In most cases, such an analysis starts and stops at the common meaning of the text. *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989).

When looking for the common meaning of the text of a statute, a court first looks to the dictionary. *See S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 376 (2006) (utilizing dictionary for meaning of "discharge" in CWA); *Rapanos v. United States*, 547 U.S. 715, 716 (2006) (utilizing dictionary for meaning of "navigable waters" in CWA); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661 (2007) (utilizing dictionary for meaning of "shall" in CWA). In fact, since 1785, this Court has used dictionaries in over 1,000 cases, in order to construe the plain language of statutes.[1]

Negligence refers to "culpable carelessness" or the "failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation . . . ." Black's Law Dictionary 1133-35 (9th ed., 2009); *see also Hodgson v. Dexter*, 5 U.S. 345, 355 (1803) ("negligence means the want of ordinary care"). Alternatively stated, negligence is the "failure to use reasonable care, resulting in damage or injury to another." New Oxford American Dictionary 1173 (3rd ed., 2010). It is "*doing* what a person of ordinary prudence would *not* have done under

[1] *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437 (1994) (arguing for greater care in the use of dictionaries). As of November 2011, LEXISNEXIS listed 1,005 Supreme Court cases that mention the words "dictionary" or "dictionaries." When *Looking It Up* was published in 1994, LEXIS returned 664 Supreme Court cases. 107 Harv. L. Rev. 1437, n.2 (1994). The first instance of this Court's use of a dictionary was in 1785. *Id.* (citing *Respublica v. Steele*, 2 U.S. (2 Dall.) 92 (1785)).

the same or similar circumstances." Modern Dictionary for the Legal Profession 659 (4th ed., 2008) (emphasis added).

In *United States v. O'Keefe*, the court applied the plain language doctrine to a federal homicide statute. 426 F.3d 274, 279 (5th Cir. 2005). The statute made it a crime, punishable by up to 10 years in prison, for any steamboat employee to commit an act with "misconduct, negligence or inattention," which results in the death of another person. 18 U.S.C.A. § 1115. Although the statute allowed for severe sentences, the plain meaning of negligence was applied because "nothing in the statute's terms suggest[ed] that the words [of the statute] were meant to imply gross negligence" or any other heightened culpability requirement. *O'Keefe*, 426 F.3d at 279 (upholding conviction for negligent homicide and sentence of 1 year imprisonment followed by 3 years supervised release).

Similar to the federal criminal statute in *O'Keefe* that criminalized ordinary negligence, the text of the CWA provides that negligence requires only proof of defendant's failure to exercise a reasonable standard of care. *See United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999); *United States v. Ortiz*, 427 F.3d 1278 (10th Cir. 2005); *United States v. Frezzo Bros.*, 461 F. Supp. 266 (E.D. Pa. 1978), *aff'd* 602 F.2d 1123 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980); *see also United States v. Atlantic States Cast Iron Pipe Co.*, 2007 WL 2282514, *13-14 (D.N.J. Aug. 2, 2007) (expressly declining to apply a heightened negligence

standard). Although *O'Keefe* related to a federal homicide statute, the application of the plain language doctrine to federal environmental crimes should be no different.[2]

In *Frezzo Bros.*, one of the first federal environmental criminal cases, the Third Circuit affirmed a person's conviction for negligently violating the CWA, which was based on an ordinary negligence instruction: "[criminal] negligence is the doing of some act which a reasonably prudent person would not do." Steven P. Solow & Ronald A. Sarachan, *Criminal Negligence Prosecutions Under the Federal Clean Water Act*, 32 ELR 11153, 11159 (Oct. 2002) (quoting jury instructions from *Frezzo Bros.*, 461 F. Supp. at 266). Other circuits have followed the same line of reasoning. *See Ortiz*, 427 F.3d 1278; *Hanousek*, 176 F.3d 1116.

Here, perhaps the jury was persuaded by the fact that Petitioner ignored Reynolds' concerns over Sekuritek's ability to handle the Bigle contract. (*Millstone*, slip op. at 5-6.). Alternatively, the jury might have disapproved of Sekuritek's hiring of 35 new security personnel, while it simultaneously reduced the length of the employee-training program by nearly 70%. (*Id.*) But regardless of which facts convinced the jury of Petitioner's negligence, the Fourteenth Circuit followed a long line of precedent and applied the plain language of the statute to construe § 1319(c)(1)(A) to require proof that Petitioner failed to exercise the standard of care that would have been exercised by a reasonable person in a similar situation. The

[2] *Compare O'Keefe*, 426 F.3d at 279 (ordinary negligence sufficient for violation of federal homicide statute), *with Hanousek*, 176 F.3d 1116 (ordinary negligence sufficient for violation of CWA); *Ortiz* (ordinary negligence sufficient for violation of CWA).

jury had no doubt as to culpability, and this Court should likewise have no doubt as to the applicability of the ordinary negligence standard.

ii. Ordinary negligence is consistent with Congressional intent in enacting the CWA.

Applying the ordinary negligence standard to the CWA is perfectly consistent with Congress' express intent of prohibiting "the discharge of *any pollutant* by *any person*." 33 U.S.C. § 1311(a) (emphasis added); *see also Hanousek*, 176 F.3d at 1121, *cert. denied*, 528 U.S. 1102 (2000) (holding the ordinary negligence standard for violations of the CWA is consistent with Congress' intent). Concerns that the ordinary negligence standard will lead to a significant increase in prosecutions is unfounded. *See* David E. Roth, et al., *The Criminalization of Negligence Under the Clean Water Act*, 23 CRIM. JUSTICE NO. 4 (Winter 2009). In fact, the "very restrained use of the CWA negligence provision" led to only 86 prosecutions from 1987 to 1997, which was less than 7% of all environmental prosecutions.[3]

Prior to 1987, the criminal provision of the CWA comprised of one set of penalties for "willful or negligent" violations. *United States v. Wilson*, 133 F.3d 251, 262 (4th Cir. 1997). In 1987, however, the phrase "willful or negligent" was amended and separated, in order to strengthen criminal sanctions and provide more deterrence. *See United States v. Sinskey*, 119 F.3d 712, 716 (citing H.R. Conf. Rep. No. 99-1004 at 138 (1986) and S.Rep. No. 99-50 at 29-30 (1985)). The term "willfully" was changed to "knowingly," and "negligently" was kept as a standalone

[3] *See* Steven P. Solow & Ronald A. Sarachan, *Criminal Negligence Prosecutions Under the Federal Clean Water Act*, 32 ELR 11153, 11155-56 (Oct. 2002). Reliable data on the total number of environmental prosecutions does not exist after 1997. *Id.* at 11156. However, criminal negligence prosecutions from 1987 to 2000 totals mere 117 cases, which is an average of less than 9 per year. *Id.*

subsection, Congress' intended result. *Wilson*, 133 F.3d at 262. This had the desired effect of reducing the culpability standards and increasing the impact of sanctions for CWA violations. *Id.* Knowing violations were made felonies, and negligent violations remained misdemeanors. *Id.* Over the next 25 years, Congress remained silent while a number of cases interpreted "negligently" under the ordinary negligence standard. *See, e.g., Hanousek*, 176 F.3d 1116. Congress' subsequent silence and inaction implies their approval of such an interpretation. *See generally Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) (deferring to legislature due to "indications that congressional inaction has not been inadvertent").

By punishing negligent conduct, the statute deters individuals from acting without reasonable care in circumstances where pollution is possible. *See generally Hanousek*, 176 F.3d 1116 (holding Congress intended to subject ordinary negligence to criminal penalties). Deterring negligent pollution will further the Congressional objective of eliminating "the discharge of any pollutant by any person." § 1311(a). Therefore, the ordinary negligence standard should be affirmed.

B. "Negligently" refers to ordinary negligence because the CWA is a public welfare statute.

The CWA is a public welfare statute because its purpose is to prevent dangerous substances from entering the water supply, where those dangerous substances are such that anyone dealing with them should be aware of their regulated nature.[4] *See United States v. Freed*, 401 U.S. 601, 609 (1971). Thus, the

[4] S. REP. 95-370, 10, 1977 U.S.C.C.A.N. 4326, 4336, 1977 WL 16152, 9 (recommending passage of the 1977 Amendments to the Clean Water Act because "[t]here is no question that the systematic destruction of the Nation's wetlands is causing serious, permanent ecological damage. The wetlands

CWA eliminates the need to apply a gross negligence standard. *See United States v. Hanousek*, 176 F.3d at 1121.

At one time, the common law treated *mens rea*, as a necessary element of all crimes. *United States v. Balint*, 258 U.S. 250, 251-52 (1922). The belief was that in order for a conviction to comply with due process, the defendant must have acted intentionally. Therefore, in cases where common law crimes (e.g. "burglary") were codified without a *mens rea* element, courts inferred the previously existing *mens rea* element from the common law, avoiding due process issues. *Id.* However, that principle has long since been overruled when interpreting federal criminal laws because federal crimes are often created entirely by statute. *See id*. Therefore, such statutes are not bound by common law *mens rea* requirements. *See Staples*, 511 U.S. at 604-05.

Currently, when a federal statute does not include a *mens rea* element, the court is left to decide whether Congress intended to include or exclude it. *See Morissette v. United States*, 342 U.S. 246, 262 (1952) (holding absence of express mens rea element in federal larceny statute did not eliminate intent requirement because larceny is not a statutorily created crime). This is especially true where the statute creates a criminal offense which did not exist in the common law because the only interpretive guidance the court has is the act itself. *Id*. With the growth in

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and bays, estuaries and deltas are the Nation's most biologically active areas. They represent a principal source of food supply.")

federal criminal laws, courts have devised a method of deciding whether to include or exclude *mens rea*; the public welfare doctrine.

The public welfare doctrine applies to statutes which omit or reduce typical *mens rea* requirements for criminal sanctions, *Balint*, 258 U.S. at 252-53, because the defendant regulated by a public welfare statute is generally in the best position to prevent any harm to the public by merely exercising reasonable care, *Morissette*, 342 U.S. at 256. The items and materials that are subject to regulation under public welfare statutes pose such a threat of harm to the public that the possibility of harm created by violations can lead to criminal liability. *See id.* Proving actual injury from a violation is not required for a conviction. *See id.* at 255-56. A statute is deemed public welfare legislation where one of its purposes is the protection of the public from dangerous items, the very nature of which should cause those who deal with them to be fully aware of their regulated nature. *See Staples*, 511 U.S. at 607.

i. The CWA is a public welfare statute because the purpose of the CWA is to protect the Nation's water supply from dangerous chemicals.

The public welfare doctrine applies to statutes designed to protect the public from harmful substances. *See id.* (holding machinegun regulation is not a public welfare statute). Even statutes with a mere incidental purpose of protecting the public may be deemed public welfare legislation. *See Balint*, 258 U.S. at 250. Where one of the goals of a statute is to require every person dealing with the regulated substance to ensure that his actions conform to the law, a failure to ensure conformance, or ignorance of the law, will subject the person to penalties. *See id.* at

254. Where one's "negligence may be dangerous to [others], as in selling diseased food or poison, the policy of the law may, in order to stimulate proper care, require the punishment of the negligent person . . . ." *Id.* at 252-53 (citing *Hobbs v. Winchester Corp.*, 2 K. B. Div. 471, 483 (1910)).

In *Balint*, this Court held the Narcotic Act to be public welfare legislation, even though the primary purpose of the Act was related to taxing. Chief Justice Taft, writing for the majority, explained that, although "minimizing the spread of addiction to the use of poisonous and demoralizing drugs" was only an incidental purpose, by excluding a *mens rea* element, Congress intended to place the burden on everyone dealing with drugs to ensure compliance with the law. *Balint*, 258 U.S. at 253-54. Any potential injustice related to punishing an innocent seller was outweighed by the danger of exposing innocent purchasers to unlawful drugs. *Id.*; *see also United States v. Dotterweich*, 320 U.S. 277, 284-85 (1943) (holding hardship to innocent shipper of misbranded drugs was outweighed by hazard to helpless public).

The CWA requires negligence and not gross negligence, *Ortiz*, 427 F.3d at 1282-83, because the objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), by eliminating water pollution, *Weitzenhoff*, 35 F.3d at 1286 (holding that the CWA is "clearly designed to protect the public at large from the potentially dire consequences of water pollution"); *see also United States v. Saint Bernard Parish*, 589 F. Supp. 617, 619 (E.D. La. 1984) (holding fault and intent irrelevant to liability under the CWA).

Congress, in carrying-out the objectives of the CWA, declared the elimination of water pollution a "national goal."[5] The term "pollutant" refers to a broad range of materials, including "*chemical wastes*, biological materials, . . . heat, wrecked or discarded equipment, rock, sand, . . . and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6) (2006) (emphasis added).

In *Balint*, the Court recognized that Congress omitted a *mens rea* element in the Narcotic Act in order to minimize the spread of poisonous drugs. Similarly, this Court should recognize the CWA's intent to eliminate the spread of "chemical wastes" into America's water supply through its punishment of negligent acts. The nature of the chemical waste that was discharged from the Bigle plant is precisely the type of substance being targeted for elimination under the CWA.

Additionally, Congress, in enacting the CWA, placed the burden on all persons dealing with dangerous chemicals to ensure that they act in compliance with all laws. *See Weitzenhoff*, 35 F.3d at 1286. Congress decided that the potential injustice of holding persons criminally liable under an ordinary negligence standard was outweighed by the potential harm to the water supply by toxic chemicals. *See id.*

ii. The CWA is a public welfare statute because individuals dealing with pollutants should be aware of their regulated nature.

The public welfare doctrine allows for near-strict liability enforcement of criminal statutes, *see Staples*, 511 U.S. at 607, because persons dealing with

[5] 33 U.S.C. § 1251(a)(1). Congress also declared, *inter alia*, "that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters . . . ." 33 U.S.C. § 1251(a)(6).

"dangerous or deleterious devices or products or obnoxious waste materials . . ." should be aware of their regulated nature, *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971). If an individual is aware of an item's danger, and thus its regulated nature, there is no violation of that individual's due process rights by imposing criminal penalties for negligence. *Balint*, 258 U.S. at 252 (holding where a person is ignorant of the facts that make his actions unlawful, his due process rights are not violated when he is punished for his statutory violations) (citing *Shevlin-Carpenter Co. v. Minnesota*, 218 U. S. 57, 69-70 (1910))).

Industrial chemicals, such as dangerous acids, drugs, and hand grenades, are just a few examples of the items that are of such a dangerous, deleterious, or obnoxious nature that the law will automatically presume that anyone dealing with them is aware of the applicable regulations. *See Int'l Minerals & Chem. Corp.*, 402 U.S. at 564-65. Less dangerous items, such as pencils or paper clips, may also be regulated, but they would not meet the standard of hazard required under the public welfare doctrine. *See id.* (not requiring *mens rea* for such harmless products would likely raise due process problems).

In *International Minerals & Chemical Corp.*, the Court applied the public welfare doctrine to the federal regulation of dangerous chemical shipments. *See id.* at 565. Following the public welfare line of cases, the Court held that the government need only prove that the defendant knowingly acted, not that he was aware that he was violating the law. *See id.* In that case, the shipment of sulfuric acid was of such a dangerous nature that the defendant, knowing he was in

possession of sulfuric acid, was presumed to know the applicable laws regulating its shipment. *See id.*

The CWA fits neatly into the public welfare doctrine because it is designed to protect the public from the hazard caused by water pollution. *See, e.g.*, *United States v. Hopkins*, 53 F.3d 533, 538 (2d. Cir. 1995) (holding that the CWA is public welfare legislation); *Ortiz*, 427 F.3d at 1282-83 (holding that the CWA is public welfare legislation); *Hanousek*, 176 F.3d at 1121 (holding that the CWA is public welfare legislation); *Weitzenhoff*, 35 F.3d at 1286 (holding that the CWA is public welfare legislation). *But see United States v. Ahmad*, 101 F.3d 386, 391 (5th Cir. 1996) (holding that the CWA is not public welfare legislation).

Unlike a knowing violation, requiring proof that the defendant knew he was dealing with dangerous substances *United States v. Wilson*, 133 F.3d 251, 262 (4th Cir. 1997), the negligence requirement in § 1319(c)(1)(A), by its very nature, makes it unnecessary to prove that the defendant had knowledge of the dangerous substances. *See Hanousek*, 176 F.3d at 1121. Negligence is not designed to punish a defendant's guilty intent, only his or her failure to exercise reasonable care in the given circumstances. *See id.*

The chemicals being manufactured at the Bigle Chemical Plant were like the chemicals deemed dangerous in *International Minerals & Chemical Corp*. Like sulfuric and other dangerous acids, the chemicals at the Bigle plant were dangerous, deleterious, and obnoxious. Wesley made it publically known that security was an integral part of the company's overall strategy for avoiding toxic

spills. (i.e. *Millstone*, slip op. at 5, "I will not risk the well-being [sic] of this company by allowing an intruder or saboteur to cause a spill."). There were a number of "safety inspectors" located on the plant, in order to ensure safety. The sheer size of the plant and need for an enormous security team should have put Petitioner on notice that Bigle was producing highly dangerous chemicals. (*Id.* at 5-6.). Based on the mass destruction caused by the spill, it is clear that Bigle was producing highly dangerous chemicals. Given the circumstances, the jury determined, beyond a reasonable doubt, that Millstone failed to exercise reasonable care.

C. The history of the CWA reflects Congressional intent to criminalize ordinary negligence.

Since the late 1800s, Congress has made an effort to eliminate water pollution. *See* Truxtun Hare, *Reluctant Soldiers: The Criminal Liability of Corporate Officers for Negligent Violations of the Clean Water Act*, 138 U. PA. L. REV. 935, 941 (Jan. 1990). Its first attempt was through the Rivers and Harbors Act of 1899 ("Refuse Act"), which applies strict liability to anyone who dumps "any refuse matter of any kind . . ." into the water. 33 U.S.C. § 407. Congress then passed the Federal Water Pollution Control Act of 1948.[6] Unfortunately, prosecutors were not vigorously prosecuting all offenders. *See* Hare, 138 U. PA. L. REV. at 945. In 1972, the lack of sufficient criminal penalties, *inter alia*, led Congress to enact sweeping changes to the original CWA. *Id.* at 946. Congress knew "that without

[6] The first major Amendment to the Clean Water Act of 1948 was passed in 1961. *Digest of Federal Resource Laws of Interest to the U.S. Fish and Wildlife Service*, U.S. FISH AND WILDLIFE SERVICE, www.fws.gov/laws/lawsdigest/fwatrpo.html (last visited Nov. 18, 2011) [hereinafter *Digest*]. The Act was subsequently amended in 1966, 1970, 1972, 1977, and 1987. *Id.*

strict enforcement and meaningful deterrents, water pollution control laws will have no real effect." *Id.* (quoting 118 Cong. Rec. 33,716 (1972) (statement of Sen. Bayh)). To increase enforcement, the 1972 Amendments established criminal penalties for "willful or negligent" conduct by up to one year in jail. *Id.* Additional amendments in 1977 expanded the act by involving various federal agencies. *See Digest*, *supra* note 6. Then, in 1987, further amendments went significantly further in deterring pollution by making negligent violations a stand-alone violation. *See Sinskey*, 119 F.3d at 716; *Wilson*, 133 F.3d at 262. The progressively broader and more robust criminal penalties Congress enacted under the CWA confirm that Congress' intent was to deter and punish all causes of water pollution – whether by intentional acts or mere negligence. *See Sinskey*, 119 F.3d at 716. Therefore, this Court should affirm the district and circuit court's interpretation of negligence under the CWA. When it comes to protecting America's water supply, ordinary negligence is negligence enough.

II. PETITIONER WAS PROPERLY CONVICTED OF VIOLATING 18 U.S.C. § 1512(B)(3) BY ATTEMPTING TO CORRUPTLY PERSUADE REYNOLDS TO WITHOLD INFORMATION RELATING TO PETITIONER'S VIOLATION OF THE CWA FROM FEDERAL INVESTIGATORS.

A. The Fourteenth Circuit correctly interpreted the term "corruptly" as "motivated by an improper purpose."

i. The term "corruptly" is defined similarly in statutes closely related to 18 U.S.C. §1512(b).

The Fourteenth Circuit's definition of "corruptly" in 18 U.S.C. § 1512(b) is consistent with the established definition of that term in parallel statutes. In 1831, Congress enacted the first general obstruction-of-justice statute, now codified as 18

U.S.C. § 1503(a). *See* Act of Mar. 2, 1831, ch. 99 § 2, 4 Stat. 487. The so-called "omnibus clause" of § 1503 punishes any person who "corruptly…influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice." 18 U.S.C. §1503(a). While lower courts have not interpreted the term "corruptly" identically, they have consistently construed the term "corruptly" in § 1503 to require an improper purpose to obstruct justice.[7] Drawing upon these cases, model jury instructions for § 1503 also define the term "corruptly" to require an improper purpose to avoid being implicated in wrongdoing. *See*, *e.g.*, 2A KEVIN F. O'MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS: CRIMINAL § 48.04, at 456 (5th ed. 2000) (defining "corruptly" as "deliberately and for the purpose of improperly influencing, obstructing, or interfering with the administration of justice"); 2 LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS: CRIMINAL ¶ 46.01, at 46-6 (2004) (defining "corruptly" as "simply having the improper motive or purpose of obstructing justice").

The term "corruptly" also appears in 18 U.S.C. § 1505, which imposes criminal liability on anyone who "corruptly…influences, obstructs, or impedes or endeavors to influence, obstruct or impede" Congressional or administrative fact-finding. 18 U.S.C. § 1505. Lower courts have consistently construed the term "corruptly" in §1505 to have the same meaning as it does in § 1503, namely to have

[7] *See*, *e.g.*, *United States v. Machi*, 811 F.2d 991, 996 (7th Cir. 1987) (upholding instruction that "corruptly" means acting with "purpose of obstructing justice"); *United States v. Jeter*, 775 F.2d 670, 679 (6th Cir. 1985) (holing that violating the § 1503 requires specific intent of purpose to obstruct), *cert. denied*, 475 U.S. 1142 (1986); *United States v. Rasheed*, 663 F.2d 843, 852 (9th Cir. 1981)(holding that "corruptly" means "done with the purpose of obstructing justice"), *cert. denied*, 454 U.S. 1157 (1982).

an improper purpose to obstruct justice.[8] When the United States Circuit for the District of Columbia found that the term "corruptly" rendered § 1505 unconstitutionally vague on an as-applied basis[9], Congress amended the statute to define "corruptly" to mean "acting with an improper purpose, personally or by influencing another." 18 U.S.C. § 1515(b).

When, in a new statute, Congress uses a term that has been given consistent meaning in closely related statutes, Congress is presumed to have intended to use the same definition of the term in the new statute, absent an affirmative indication to the contrary. *See Salinas v. United States*, 522 U.S. 52, 63 (1997); *Morissette*, 342 U.S. at 263. In addition, when a term appears in several places of a statutory text, it "is generally read the same way each time it appears." *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994). Since both §1503 and §1505 were enacted long before §1512, the term "corruptly" in §1512 is presumed to have the same meaning as it does in these other statutes: motivated by an improper purpose.

ii. <u>The legislative history of 18 U.S.C. § 1512(b)(3) demonstrates that the term "corruptly" should be defined in the same way as it is in 18 U.S.C. § 1503.</u>

In addition to the so-called "omnibus clause," § 1503 previously contained a witness tampering clause imposing criminal liability on anyone who "corruptly endeavors to influence, intimidate, or impede any witness" in a federal judicial

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[8] *See*, *e.g.*, *United States v. Abrams*, 427 F.2d 86, 90 (2d Cir. 1970) (upholding jury instruction defining "corruptly" as "with improper motive, a bad and evil purpose"), *cert. denied*, 400 U.S. 832 (1970); *United States v. Laurins*, 857 F.2d 529, 536-37 (9th Cir. 1988) (holding that the intent element for both section 1503 and 1505 required the defendant to act with the purpose of obstructing justice).

[9] *United States v. Poindexter*, 951 F.2d 369, 379 (D.C. Cir. 1991), *cert. denied*, 506 U.S. 1021 (1992).

proceeding. Act of Mar. 2, 1831, ch. 99 § 2, 4 Stat. 487. In 1982, Congress deleted the witness tampering clause from §1503 and re-codified it in newly enacted § 1512, while leaving the omnibus clause of § 1503 intact. *See* Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 4(a), 96 Stat. 1248.

Re-codifying the witness tampering clause of § 1503 into § 1512 created a split among circuit courts as to whether witness tampering could still be prosecuted under § 1503.[10] Circuit courts ruling that witness tampering could be prosecuted under § 1503 noted that ruling otherwise would create a statutory gap not intended by Congress. Since non-coercive, non-deceptive witness tampering was not prohibited in § 1512, Congress would have effectively decriminalized such activity when it was attempting to increase the protection of witnesses, if § 1503 did not apply. *See United States v. Lester*, 749 F.2d 1288, 1292 (9th Cir. 1984) (holding that § 1503 continued to apply to all forms of non-coercive witness tampering after the enactment of § 1512); *United States v. Wesley*, 748 F.2d, 962, 964 (5th Cir. 1984) (finding that the language of § 1512 did not address "urging and advising" a witness not to testify).

In response to the confusion, Congress amended § 1512 to include a prohibition of non-coercive witness tampering. The amendment in 1988 changed the language in § 1512(b) from "or threatens another person" to "threatens or corruptly persuades another person," adding non-coercive witness tampering to the other

[10] *Compare United States v. Hernandez*, 730 F.2d 895, 898 (2d Cir. 1984) (holding that § 1512 was the exclusive means of prosecuting witness tampering) *with United States Wesley*, 748 F.2d, 962, 964 (5th Cir. 1984) (holding that Congress did not foreclose prosecution of witness tampering offenses under §1503's omnibus provision by enacting §1512).

forms of witness tampering already proscribed by the statute. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7029(a) and (c), 102 Stat. 4397, 4398. Adding clarity to the new language, then ranking minority member of the Senate Judiciary Committee Senator Biden, stated that the "corruptly persuades" language was included in § 1512 to guarantee "the same protection of witnesses from non-coercive influence that was, and is, found in section § 1503." 134 Cong. Rec. 32,701 (1988) (Statement of Sen. Biden). Finally, the House Report discussing the 1988 amendment was clear that the intent of the new amendment was that "culpable conduct that is not coercive or 'misleading conduct' be prosecuted under 18 U.S.C. § 1512(b), rather than under the residual clause of 18 U.S.C. § 1503." H.R. Rep. No. 100-169, at 12 (1987). In short, there is nothing in the history of § 1512(b) to suggest that Congress intended to impose a requirement for an additional level of culpability beyond that which existed in § 1503.

iii. Interpreting "corruptly" to mean "motivated by an improper purpose" does not violate the rule of lenity or create statutory redundancy.

Defining "corruptly" to mean being "motivated by an improper purpose" does not violate the rule of lenity. "The rule of lenity applies only if, after seizing everything from which aid can be derived," the Court can make "no more than a guess as to what Congress intended" in enacting the statute. *United States v. Wells*, 519 U.S. 482, 499 (1997) (quotation omitted). As sections (A)(i)-(ii) above indicate, the rule of lenity is inapplicable to the interpretation of § 1512 because the

construction of "corruptly" in parallel statutes and the legislative history of § 1512 provide ample guidance to interpret the statute.

Contrary to the holdings of the Third and Ninth Circuits, interpreting "corruptly" to mean "motivated by an improper purpose" does not duplicate the intent element already present in § 1512. *See United States v. Farrell*, 126 F.3d 484, 490 (3d Cir. 1997); *United States v. Doss*, 630 F.3d 1181, 1189-90 (9th Cir. 2011). Both circuits have held that the phrase "motivated by an improper purpose" means only "intent to impede or hinder an investigation," *Id.* Since "intent to impede or hinder an investigation" already appears in the latter portion of § 1512(b)(3), both circuits concluded that interpreting "corruptly" as "motivated by an improper purpose" creates statutory redundancy by repeating the intent element.[11] *Id.*

The view of the Third and Ninth Circuits overlooks that 18 U.S.C. § 1512(b)(3) does not punish all actions done with an intent to impede an investigation. As the Supreme Court explicitly held in *Andersen*, an intent to impede an investigation is not an inherently criminal act. *Andersen LLP v. United States*, 544 U.S. 696, 706 (2005) (holding that an attorney instructing his client to invoke attorney-client privilege rather than hand over documents to the Internal Revenue Service was not inherently criminal) (citing *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1991)). In cases where the intent to impede is not inherently criminal, the term "corruptly" modifies the intent element to prevent the statute

[11] Both decisions rely on *Ratzlaf v. United States*, which creates a presumption against construing a statutory term to be redundant or meaningless. 510 U.S. at 141. The presumption applies with special force when the term describes an element of a criminal offense. *Id.*

from punishing innocent conduct. Thus, the term "corruptly" ensures that an intent to impede an investigation is culpable only when the intent itself is "motivated by an improper purpose."

B. Petitioner's conviction is consistent with the Supreme Court's decision in *Arthur Andersen* .

In 2005, the Supreme Court addressed the proper construction of phrase "corruptly persuades" in § 1512(b). *See Arthur Andersen LLP*, 544 U.S. 696. Circuit courts were split over whether "corruptly" should be constructed transitively to prohibit only illegal means of persuasion, or intransitively to prohibit persuasion motivated by an improper purpose.[12] The Supreme Court attempted to resolve the split by granting certiorari. *Id.* at 702.

Andersen presented the issue of whether a manager at Arthur Andersen could violate §§ 1512(b)1-2 by directing employees, in response to a probable investigation, to shred documents pursuant to the company's lawful document retention policy. *Id.* at 700-02. The lower courts had found no error in a jury instruction that permitted a finding of guilt "even if [Arthur Andersen] honestly and sincerely believed that its conduct was lawful." *Id.* at 706, citing App. JA-213.

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[12] Circuit courts adopted two approaches to defining "corruptly persuades." *See Current Circuit Splits*, 7 SETON HALL CIR. REV. 377, 391 (2011); David Cylkowski & Ryan Thornton, *Obstruction of Justice*, 48 AM. CRIM. L. REV. 955, 982-83 (Spring 2011). The first approach defined corruptly to have a transitive construction. In *United States v. Farrell*, 126 F.3d 484, 487-88 (3d Cir. 1997), the Third Circuit found that inducing a person not to speak with authorities was not criminal unless the means used to induce silence were illegal, such as bribery or intimidation. The D.C. Circuit adopted a similar construction. *United States v. Poindexter*, 951, F.2d 369, 385 (D.C. Cir. 1991) (describing the transitive interpretation of "corrupt" as reaching "the core behavior to which [18 U.S.C. § 1505] may be constitutionally be applied."). In contrast, both the Second and Eleventh Circuits constructed "corruptly" intransitively to require "motivation by an improper purpose." *See United States v. Schotts*, 145 F.3d 1289, 1300-01 (11th Cir. 1998), *cert. denied*, 525 U.S. 1177 (1999); *United States v. Thompson*, 76 F.3d 442, 452-53 (2d Cir. 1996).

The Supreme Court reversed, holding that the "knowingly…corruptly persuades" language in § 1512(b) required a defendant to have "consciousness of wrongdoing," invalidating the jury instructions that had "diluted the meaning of 'corruptly' so that it covered innocent conduct." *Id.* at 706, citing App. JA-212. In reaching its conclusion, the Court declined to refer to § 1503 or § 1505 to guide its interpretation of the term "corruptly," holding that the presence of the term "knowingly" in § 1512(b) rendered any analogy to these other statutes imperfect. *Id.* at 706.

i. The *Andersen* Court did not decide whether acting "motivated by an "improper purpose" was a proper formulation of the term "corruptly."

The Court's "consciousness of wrongdoing" interpretation of "corruptly" is consistent with Petitioner's conviction. The Court's ruling was narrowly drawn to invalidate the jury instructions at issue without adjudicating on the possible interpretations of "corruptly" that had split the circuits below. [13] In explaining its decision, the *Andersen* Court explicitly declined to explore "the outer limits" of the "consciousness of wrongdoing" requirement it had announced. *Id.* at 706. The Court noted that it need not outline the contours of consciousness of wrongdoing because the trial court's instructions permitted the jury to find guilt without *any* consciousness of wrongdoing on the part of the defendant, and therefore improperly allowed the jury to punish innocent conduct. *Id.*

[13] *Required Elements*, 119 Harv. L. Rev. 404, 409 (2005).

Indeed, while the Court recognized the circuit split regarding the "improper purpose" interpretation of corruptly, the issue is not mentioned anywhere in the opinion. *Id.* at 702. The omission is even more striking since both parties in *Andersen* submitted considerable briefing on the issue of interpreting § 1512(b) intransitively so as to require an "improper purpose." Brief for Petitioner at 27-28, *Arthur Andersen LLP*, 544 U.S. 696 (No. 04-368); Brief for the United States at 17-21, *Arthur Andersen LLP*, 544 U.S. 696 (No. 04-368). Finally, following the Court's decision in *Andersen*, circuit courts have persisted in using the "improper purpose" construction of § 1512(b).[14]

Additionally, that the *Andersen* Court found § 1503 and § 1505 to be imperfectly analogous to § 1512(b) does not mean the Court held that the statutes provided no guidance for the interpretation of § 1512(b). The Court did not rule that the statutes were irrelevant, but found the jury instructions invalid by applying the simple dictionary definition of the words "corruptly persuades." *Arthur Andersen LLP*, 544 U.S. at 706. The Court did not need to determine the precise weight the statutes should have in interpreting § 1512(b), because the jury instructions could be struck down on simpler, incontrovertible grounds. Given the extreme nature of the instructions at issue in *Andersen*, the Court's decision to resolve the case on easier grounds does not preclude using § 1503 and § 1505 to resolve the issues raised on the facts of this case.

[14] *See United States v. Gotti*, 459 F.3d 296, 343 (2d Cir. 2006); *United States v. Kaplan*, 490 F.3d 110, 125-26 (2d Cir. 2007); *But see United States v. Doss*, 630 F.3d 1181, 1189 (9th Cir. 2011) (holding that *Andersen* precludes courts from using the "improper purpose" construction of "corruptly.")

ii. "Motivated by an improper purpose" is the substantive equivalent of "consciousness of wrongdoing."

Courts since *Andersen* have held that "motivated by an improper purpose" communicates the necessary "consciousness of wrongdoing" required by *Andersen*. In *United States v. Kaplan*, the Second Circuit upheld a conviction under § 1512 when the jury was instructed to find the defendant guilty if the defendant had "an improper purpose," for doing so, which included "an intent to subvert or undermine the fact-finding ability of an official proceeding." 490 F.3d 110, 125-26 (2d Cir. 2007). The court determined that this instruction conveyed the "substantial equivalent" of Andersen's holding and affirmed the lower court. *Id.* at 126.

The context of the other prohibited acts in § 1512 supports the interpretation of the Second Circuit. In addition to corrupt persuasion, § 1512(b) prohibits intimidation, threatening, and engaging in misleading conduct. 18 U.S.C. § 1512(b). Each of these acts presupposes both consciousness of wrongdoing, and being motivated by the purpose of avoiding being implicated in wrongdoing. For example, one cannot threaten a person to invoke a privilege apart from consciousness of wrongdoing, or apart from a purpose to avoid being implicated in criminal wrongdoing. The same is true of the other prohibited acts listed in the statute. Since each of the acts surrounding corrupt persuasion presuppose consciousness of wrongdoing and being motivated by an improper purpose, it is unlikely that corrupt persuasion does not.

C. Petitioner was motivated by an improper purpose in attempting to persuade Reynolds to withhold incriminating information from law enforcement.

i. The public's interest in information relating to a crime is greater than a wrongdoer's interest in protecting a third-party's Fifth Amendment.

Acting with an improper purpose may encompass inducing a witness to exercise a privilege. While invoking the privilege is not itself wrong, the inducement is subject to criminal liability in cases in where the public has a greater interest in the information regarding a crime than a wrongdoer has in a speaker's privilege.

This doctrine has been held true in the context of coconspirators attempting to avoid prosecution. In *United States v. Gotti*, the Second Circuit Court of Appeals upheld the conviction of a defendant who directed an associate to exercise his Fifth Amendment right so that the defendant would not be implicated in embezzling. 459 F.3d 296, 343 (2d Cir. 2006). The Second Circuit relied on previous precedent in *United States v. Cioffi*, 493 F.2d 1111, 1118 (affirming the conviction of the originator of an illegal loan who instructed a potential witness to exercise his Fifth Amendment right rather than testify to the transaction). The Eleventh Circuit reached the same conclusion on different facts. When an attorney directed his secretary not to speak to law enforcement regarding bribing a judge, the court upheld the conviction for corruptly persuading a witness because the attorney was motivated by an improper purpose. *United States v. Schotts*, 145 F.3d 1289, 1300-01 (11th Cir. 1998), *cert. denied*, 525 U.S. 1177 (1999).

ii. Petitioner encouraged Reynolds to invoke his Fifth Amendment privilege so that Petitioner would not be implicated in violating the CWA.

Petitioner directed Reynolds not to speak with federal authorities about the chemical spill: "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." (*Millstone*, slip op. at 9.). That Petitioner did so with the intent to avoid being implicated in criminal wrongdoing is clear from other statements in the same conversation and the context surrounding them. Petitioner told Reynolds, "I'm not going to jail, Reese. It's time to just shut up about everything," and "[D]on't even think about pinning all this on me. Remember, they're looking at your stupid gas-guzzlers, too." (*Id.* at 9.). That Petitioner knew he was the subject of a federal investigation regarding the spilled chemicals also supports the conclusion that Petitioner was not informing Reynolds of his constitutional rights in the abstract, but attempting to avoid criminal liability. (*Id.* at 9.).

CONCLUSION

For these reasons, the Court should affirm the Fourteenth Circuit's October 3, 2011 Opinion and Order.

CERTIFICATE OF SERVICE

We hereby certify that on this date, the 5th of December, 2011, a copy of the foregoing Brief for Respondent, the United States of America, was served upon Petitioner, Samuel Millstone, electronically.

/s/ Team #22
Team #22
Counsel for Respondent