Case No. C11-0116-1

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2011

SAMUEL MILLSTONE,

Petitioner,

v.

UNITED STATES of AMERICA,

Respondent.

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

BRIEF FOR RESPONDENT

Team 98
Attorneys for Respondent

QUESTIONS PRESENTED

I. Whether a person who fails to exercise the standard of care that a reasonably prudent person would have exercised in the same situation violates 33 U.S.C. § 1319(c)(1)(A).

II. Whether, under 18 U.S.C. § 1512(b)(3), a person can "corruptly" persuade a witness to withhold information by attempting to coerce the witness to plead the Fifth Amendment.

TABLE OF CONTENTS

Table of Authorities

United States Supreme Court Cases

United States Court of Appeal Cases

Other Cases

Constitutional Provisions

Statutory Provisions

Secondary Sources

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourteenth Circuit appears at page three of the record and is pending publication. *Samuel Millstone v. United States of America*, ____ F.3d ____ (14th Cir. 2010), cert. granted, ____ U.S. ____ (2011). The Record below does not provide the opinion of the United States District Court.

CONSTITUTIONAL OR STATUTORY PROVISIONS

The following constitutional and statutory provisions are set forth, in relevant part, in Appendix A: Fifth Amendment of the U.S. Constitution; 33 U.S.C. § 1311(a); 33 U.S.C. § 1319(c)(1)(A); 33 U.S.C. § 1321(b)(7)(D); 18 U.S.C. § 1503; 18 U.S.C. § 1512(b)(3).

STATEMENT OF THE CASE

A. SUMMARY OF THE FACTS

Samuel Millstone (Petitioner) and Reese Reynolds (Reynolds) developed the security company, Sekuritek, which trained and deployed security personnel. R. at 4. Petitioner acted as President and Chief Operating Officer, and Reynolds acted as Vice President. R. at 4. Petitioner's responsibilities included ascertaining the security needs of clients, hiring and training security personnel, and supervising operations. R. at 4. Prior to establishing Sekuritek, Petitioner had a worked in law enforcement for over a decade. R. at 4. Reynolds, whose previous professional background involved marketing and sales, oversaw all marketing, sales, and equipment purchases.

R. at 4. Sekuritek grew rapidly and established itself as a premier security company after only one year of operation. R. at 4-5. In 2005 alone, Sekuritek earned $2 million and its average contract earned $80,000. R. at 5.

In November 2006, Drayton Wesley (Wesley), CEO of Bingle Chemical Company (Chemical Company), contacted Petitioner to handle security for a new plant on Windy River. R. at. 5. Wesley was concerned with security at the plant and told the Wall Street Journal, "I'll be damned if we have another security breach like the one at Dover River. I will not risk the well being of this company by allowing an intruder or saboteur to cause a spill." R. at 5. Additionally, Wesley told the New York Times, "I am finished with shenanigans caused by poor security. No more shenanigans on my watch!" R. at 5. Based on Sekuritek's stellar reputation, Wesley offered Petitioner a ten-year, $8.5 million contract. R. at 5. In less than one month, the contract required Sekuritek to hire thirty-five new security guards, make significant investments in security equipment, and devise a transportation plan for the guards to travel around the plant. R. at 5-6. Prior to this contract, the only transportation plan Sekuritek had developed involved the purchase of a bicycle for a grocery store security guard. R. at 6. Reynolds voiced concerns about Sekuritek's ability to handle such a large contract, but Petitioner ignored those concerns, and instead focused on the potential of the contract to take them "to the big time." R. at 5-6 n. 1. Despite the overwhelming set of

tasks and Reynolds's misgivings about the contract, Petitioner convinced Reynolds to sign the contract on November 16, 2006. R. at 6.

Petitioner hired thirty-five security personnel, some of whom were inexperienced. R. 6 n. 2. Normally, Sekuritek only hired experienced security personnel and required the completion of a three-week training course. R. 6 n. 2. However, due to the time constraints associated with the Chemical Company contract, the inexperienced personnel only completed a shortened, one-week, training seminar. R. 6.

Reynolds purchased the necessary transportation equipment, and signed a contract for the SUVs with a new and unproven company. R. at 6. Reynolds testified he wanted to give the contract to a new up-and-coming company, like his own. R. at 6 n. 3. However, no other vendors could meet the time constraints of the contract. R. at 6 n. 3.

Sekuritek began working at the plant after Thanksgiving 2006. R. at 6. The first seven weeks of the contract went smoothly, and a security survey issued at the beginning of January reported zero security breaches. R. at 7. However, on January 27, 2007, a major spill occurred at the plant. R. at 7. While on patrol, one of the newest security guards, Josh Atlas (Atlas), thought he saw an intruder on the premises. R. at 7. He floored the gas pedal of the SUV to get to the tank quickly, but the pedal stuck to the floorboard. R. at 7. The vehicle accelerated rapidly, and Atlas lost control. R. at 7. Atlas jumped from the SUV moments before it veered into one of the storage tanks.

R. at 7. The tank exploded, and the resulting fire caused several other explosions and spilled thousands of barrels of chemicals into the nearby river. R. at 7. A security wall erected by Sekuritek prevented the first responders from reaching the plant for three days. R. at 7. During those three days, chemicals from the plant spilled into the river and surrounding creeks and created a concentrated chemical cocktail (the Soup). R. at 7.

After the spill, the Chemical Company relocated back to China. R. at 8. Because the Chemical Company's officers were Chinese citizens, extradition proved impossible. R. at 8. Additionally, no employees, assets, or holdings of the Chemical Company were left within the borders of the United States. R. at 8 n. 6.

Investigators discovered that Atlas's SUV caused the initial explosion. R. at 8. At that point, investigators began focusing on Petitioner and Reynolds. R. at 8. The investigators discovered Sekuritek's employee handbook, which stated that all "personnel are to leave their vehicle in a stopped and secured position to the side of any pathway and proceed on foot to investigate further." R. at 8. The purpose of this policy was to avoid impeding any other first responders. R. at 8, n. 7. However, Petitioner did not introduce this policy to the new personnel during the shortened training seminar, instead choosing to refer employees to the handbook. R. at 9. It is unclear whether Atlas read the handbook prior to the incident. R. at 9.

Later, the investigators discovered the SUV manufacturer had a reputation for shoddy workmanship, and the pedal-sticking problem had occurred with other vehicles. R. at 9. Additionally, the investigators concluded Petitioner failed to adequately conduct a thorough training seminar and supervise his employees. R. at 9.

During the investigation, Petitioner scheduled a meeting with Reynolds to determine the proper course of action. R. at 9. Reynolds told Petitioner he sought to inform the government agents of "everything." R. at 9. Angry with Reynolds, Petitioner scolded,

> "Tell them everything? Are you crazy? Look, they're talking about treating us like criminals here. I'm not going to jail, [Reynolds]. It's time to just shut up about everything. The feds can't do anything if we don't talk. If they start talking to you, just tell them you plead the Fifth and shut up. And don't even think about pinning all this on me. Remember, they're looking at your stupid gas-guzzlers, too."

R. at 9.

The spill caused tremendous financial damage. R. at 7. The explosions and resulting fires caused massive devastation including twenty-three deaths, the destruction of historic buildings, homes, and 50,000 acres of nearby farmland. In total, the spill caused more than $450 million in destruction damages. R. at 8.

Additionally, the Soup's presence in the river and surrounding creeks did immense damage to the New Tejas economy. R. at 8. The Soup ate through the hulls of local fishing boats and commercial shipping barges, and wiped out all agriculture, fish, and fish breeding grounds located within five

miles downriver from the plant. R. at 7-8. Residents reported animal deaths with symptoms common to those that ingested the Soup. R. at 8 n. 5. Additionally, the Soup forced a local water treatment and utility facility to shut down because the chemicals in the water created a fire hazard. R. at 8. The economic cost of the Soup was staggering—$4.5 million in lost tourism and $300 million for clean-up costs. R. at 8. Economists estimated the total negative impact to New Tejas was nearly $1.25 billion. R. at 8.

B. PROCEDURAL HISTORY

The United States brought charges against Petitioner for the negligent discharge of pollutants in violation of the Clean Water Act (CWA), 33 U.S.C. § 1319(c)(1)(A). The charges alleged that Petitioner negligently hired, trained, and supervised security personnel, and negligently failed to adequately inspect the SUVs prior to purchase and use. R. at 10.

The United States also brought charges against Petitioner for witness tampering under 18 U.S.C. § 1512(b)(3). R. at 10. The United States granted Reynolds immunity in exchange for his testimony. R. at 10 n. 9.

After a jury trial, Petitioner was found guilty of both negligent violation of the CWA and witness tampering. R. at 10. The District Court denied Petitioner's motion for a new trial, and Petitioner filed for appeal. R. at 10. On appeal, the Fourteenth Circuit affirmed the district court. R. at 15.

SUMMARY OF THE ARGUMENT

As to issue one, 33 U.S.C. § 1319(c)(1)(A) holds criminally responsible any person who "negligently discharg[es] pollutants" into the Nation's waterways. The ordinary meaning of "negligently" should be applied to § 1319(c)(1)(A) for three reasons. First, the plain language of the statute provides for the application of the ordinary meaning. In § 1319(c)(1)(A), "negligently" stands alone without qualification, whereas other section of the statute explicitly provide for a heightened negligence standard.

Second, legislative history reveals Congress intended to define "negligently" with an ordinary meaning. Congress knew "negligently" would proscribe ordinary negligence before the section was enacted, and Congress specifically provided separate felony provisions for non-negligent violations.

Third, § 1319(c)(1)(A) fulfills all three characteristics of a public welfare statute, and as such, an ordinary definition of negligence applies to "negligently." First, § 1319(c)(1)(A) regulates water pollution, a type of hazardous waste, which the United States has recognized is a danger to public health and safety. Second, the penalties for a violation of § 1319(c)(1)(A) are relatively minor. A large fine or a year in prison is a much smaller punishment than those prescribed for willful violations in other sections. Finally, § 1319(c)(1)(A) does not impose an intent element on a violator, and public welfare statutes traditionally have no standard for culpability. Furthermore, the lack of a standard of culpability does not

violate due process because the dangerous nature of water pollution provides inherent notice to those handling the waste that regulations are in place. The lack of a standard of culpability in the statute is further evidence of § 1319(c)(1)(A)'s status as a public welfare statute. Therefore, the ordinary definition of negligence applies to § 1319(c)(1)(A).

Statutory interpretation and § 1319(c)(1)(A)'s status as a public welfare statute require that the ordinary meaning of "negligently" should apply to the section. Petitioner's failure to exercise the standard of care that a reasonably prudent person would have exercised in the same situation resulted in extraordinary damage to New Tejas.

As to issue two, Petitioner's efforts to conceal his negligent actions violated 18 U.S.C. § 1512(b)(3). Petitioner "corruptly" persuaded a potential witness to withhold information when he advised the witness to plead the Fifth Amendment, not to benefit the witness, but with the intention of benefiting himself. The Second and Eleventh Circuits have construed "corruptly persuades" as acting with an "improper purpose." The plain language, legislative history, and accompanying sections of the witness tampering statute show Congress intended "improper purpose" to define "corruptly persuades." However, the Third and Ninth Circuits have interpreted "corruptly persuades" to require more culpability than an "improper purpose" based on this Court's decision regarding an accompanying section of the statute. Regardless of which interpretation this

Court applies, Petitioner violated § 1512(b)(3) because the coercive force exerted on Reynolds violated both standards of culpability.

ARGUMENT

I. Whether a person who fails to exercise the standard of care that a reasonably prudent person would have exercised in the same situation violates 33 U.S.C. § 1319(c)(1)(A).

Petitioner's negligent actions resulted in the massive discharge of pollutants into the Windy River in violation of 33 U.S.C. § 1319(c)(1)(A) of the CWA. The purpose of the CWA is to "restore and maintain the chemical, physical, and biological integrity of our Nation's waters." 33 U.S.C. § 1251(a) (2006). To accomplish this purpose, 33 U.S.C. § 1319(c)(1)(A), in conjunction with 33 U.S.C. § 1311(a), holds "[a]ny person who negligently" discharges pollutants into the Nation's waterways criminally responsible. The negligence provision of § 1319(c)(1)(A) represents a "careful balancing between the rights of a defendant and the need of the public to be protected from certain conduct that may have serious adverse consequences on human health and the environment." Joseph J. Lisa, *Negligence-Based Environmental Crimes: Failing to Exercise Due Care Can Be Criminal*, 18 VILL. ENVTL. L. J. 1, 43 (2007). To uphold this balance, courts have held violators of § 1319(c)(1)(A) criminally responsible for ordinary negligence.

Petitioner's negligent actions violated § 1319(c)(1)(A). "[N]egligently" in § 1319(c)(1)(A) is defined as ordinary negligence for three reasons. First, the plain language of the statute provides for the ordinary definition of

negligence rather than a heightened negligence standard. Second, the legislative history of the statute shows Congress intended to punish individuals who were ordinarily negligent. Third, § 1319(c)(1)(A) is a public welfare statute[1] and its status as such requires the use of the ordinary meaning of negligence. This Court reviews a question of statutory construction de novo. *United States v. Booker*, 543 U.S. 220, 259 (2005). Based on this standard, this Court should hold that ordinary negligence is the standard for criminal culpability under § 1319(c)(1)(A).

A. The plain language of the statute shows the applicability of the ordinary definition of negligence.

The plain language of the statute provides for the ordinary definition of negligence, and this Court should construe the statute accordingly. Negligence is commonly defined as "[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation." *Black's Law Dictionary* 1056 (7th ed. 1999). Because the language of the statute fails to modify "negligently," the ordinary meaning of negligence is the standard for violations of § 1319(c)(1)(A).

Courts use statutory interpretation to determine the meaning of a particular word or phrase in a statute. Statutory interpretation begins with the plain language of the statute. *Duncan v. Walker*, 533 U.S. 167, 172 (2001). When confronted with clear language, the Court's duty is simply to

[1] Because the issue before the Court is limited to section 1319(c)(1)(A) rather than the CWA as a whole, Respondent limits its public welfare statute argument accordingly.

enforce the statute Congress drafted. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). To determine the meaning of "negligently" in the context of § 1319(c)(1)(A), courts must "start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." *United States v. Ortiz*, 427 F.3d 1278, 1282-83 (10th Cir. 2005) (citing *Russello v. United States*, 464 U.S. 16, 21 (1983)). Negligence is commonly defined as "[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation." *Black's Law Dictionary* 1056 (7th ed. 1999). The Ninth Circuit adopted this meaning of negligence in *United States v. Hanousek*. 176 F.3d 1116, 1120-21 (9th Cir. 1999). The *Hanousek* court found that *Black's Law Dictionary* and *Random House College Dictionary* provided that "negligence" is defined as "a failure to use such care as a reasonably prudent and careful person would use under similar circumstances." *Id.*

Although the language of § 1319(c)(1)(A) is seemingly unambiguous, this Court can find further evidence of the meaning of "negligently" by examining other sections of the statute. *See Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 545-46 (2002) (finding words of a statute must be read in context and with a view of their place in the overall statutory scheme); *United States v. Lewis*, 67 F.3d 225, 228-29 (9th Cir. 1995) ("Particular phrases must be construed in light of the overall purpose and structure of the whole statutory scheme."). A term that appears in multiple places in a

statutory text is generally read the same way each time it appears. *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994). In *Hanousek*, the court also looked to other sections of the CWA to determine the contextual usage of the word "negligence." 176 F.3d at 1121. 33 U.S.C. § 1321(b)(7)(D), an accompanying section of the CWA, requires "gross negligence," rather than § 1319(c)(1)(A)'s ordinary "negligence." *Id.* The court concluded "if Congress intended to prescribe a heightened negligence standard, it could have done so explicitly, as it did in 33 U.S.C. § 1321(b)(7)(D)." *Id.* Thus, the statutory context surrounding 1319(c)(1)(A) indicates that Congress intended ordinary negligence to govern a violation in that section. *Id.*; *Ortiz*, 427 F.3d at 1283 (holding that under the statute's plain language, an individual violates the CWA by failing to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstance); *State v. Hazelwood*, 946 P.2d 875, 885 (Alaska 1997) (holding a state law modeled after the CWA imposes an ordinary negligence standard because "unadorned, this word [negligence] is commonly understood to mean negligence, not criminal or gross negligence.").

This Court should adopt the Ninth and Tenth Circuit's interpretation of negligence in § 1319(c)(1)(A). The plain language of the statute requires this Court give negligence its ordinary definition. Additionally, an examination of the language of the CWA as a whole compels the conclusion that Congress intended the ordinary meaning of negligence to apply. The

CWA provides a heightened negligence standard in another section, and if Congress sought a heightened standard for this section of the statute, Congress would have explicitly provided one. The lack of a modifier to "negligence" in § 1391(c)(1)(A) is further evidence of Congress's intent to impose a civil negligence standard. This Court should not attribute words to Congress that it has not written.

B. Section 1319(c)(1)(A)'s legislative history illustrates Congress's intent to use the ordinary definition of negligence.

As is evidenced by the legislative history of § 1319(c)(1)(A), Congress intended for an ordinary definition of negligence to apply to violations of the section. It is well settled that the legislative history of a statute is a useful guide to the intent of Congress. *Cnty. of Wash. v. Gunther*, 452 U.S. 161, 182 (1981) (Rehnquist, J., dissenting). When Congress amended the CWA in 1977, the legislators did not provide for a heightened negligence standard even with the explicit knowledge that the wording of the statute only requires ordinary negligence. Brief of Appellee at 20, *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999) (No. 97-30185) (1998 WL 34078917). Further, the legislative history of other CWA amendments shows Congress intended to punish ordinarily negligent violators. *United States v. Wilson*, 133 F.3d 251, 262 (4th Cir. 1997). The legislative history of the section provides further evidence that the ordinary meaning of negligence should be applied to § 1319(c)(1)(A).

Statements by individual legislators should not be given controlling effect, but if the statement is consistent with the statutory language and other legislative history, the statements provide evidence of Congress's intent. *See Brock v. Pierce Cnty.*, 476 U.S. 253, 263 (1986). During the 1972 congressional debates considering a proposal to expand the scope of the penalty provisions in § 1319(c)(1), Representative William H. Harsha stated, "I would like to call to the attention of my colleagues the fact that in this legislation we already can charge a man for simple negligence, we can charge him with a criminal violation under this bill for simple negligence." Brief of Appellee at 20, *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999) (No. 97-30185) (1998 WL 34078917). Despite Representative Harsha's statement, no change was made to the language of § 1319(c)(1)(A). Congress's failure to change the language of the section, after being informed of the consequences of the language, shows congressional intent to proscribe ordinary negligence.

Additionally, the legislative history of other amendments to the CWA provide further evidence of Congress's intent for the application of the ordinary meaning of negligence to § 1319(c)(1)(A). The 1987 amendments to the CWA intended to increase the impact of sanctions by creating a separate felony provision for deliberate activity. *United States v. Wilson*, 133 F.3d 251, 262 (4th Cir. 1997). Before the amendment, the CWA imposed a single set of criminal penalties for "willful or negligent" violations. *Id.* After the amendments, the penalties for negligent violations became misdemeanors

and the punishments for knowing violations were converted to felonies. *Id.* Congress sought this change because the previous CWA regulations only applied to knowing discharges of pollution, and Congress decided that water pollution control was a high priority for the government. *Id.* Thus, congressional intent must have been to allow a penalty for merely negligent violations.

Representative Harsha's statement provided notice to Congress about the lessened culpability required for § 1319(c)(1)(A). Because no changes were made to the section, Congress must have intended for ordinary negligence to apply to § 1319(c)(1)(A). Additionally, Congress's decision to separate negligent from knowing violations shows Congress intended different standards of culpability to apply to the different sections of the CWA. The legislative history of § 1319(c)(1)(A) and the CWA provides further evidence of congressional intent to utilize an ordinary meaning of negligence in § 1319(c)(1)(A).

C. Section 1319(c)(1)(A) is a public welfare statute.

Violations of § 1319(c)(1)(A) are public welfare offenses, and as such, the civil definition of negligence applies. Public welfare offenses are defined by the following characteristics: (1) the regulation of dangerous or deleterious devices or products or obnoxious waste materials, *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971); (2) small penalties, *Staples v. United States*, 511 U.S. 600, 618 (1994); and (3) consisting only of

forbidden acts or omissions with no required mental element,[2] *Morissette v. United States*, 342 U.S. 246, 254 (1952). All three characteristics are present in § 1319(c)(1)(A). First, the section regulates a type of obnoxious waste materials, i.e., pollution. Second, the penalties for the violation of § 1319(c)(1)(A) are small. Third, relevant provisions of the CWA require little or no mental element. Because § 1319(c)(1)(A) satisfies all the criteria, it is a public welfare statute, and the civil definition of negligence must apply.

1. Section 1319(c)(1)(A) is a public welfare statute because it regulates harmful waste.

Section 1319(c)(1)(A) protects the public from harmful or injurious items and is properly classified as a public welfare statute. The section regulates obnoxious waste materials—the discharge of pollutants into our waterways. Section 1319(c)(1)(A) is clearly designed to protect the public at large from the potentially dire consequences of water pollution. *United States v. Weitzenhoff*, 35 F.3d 1275, 1286 (9th Cir. 1994) (footnote omitted). Thus, § 1319(c)(1)(A) is a public welfare statute.

Courts have found that statutes regulating the sale of narcotics, the transportation of acids, the ownership of grenades, and the discharge of pollutants to be public welfare statutes that regulate harmful or injurious

[2] While this Court has not specifically delineated "comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not" (Morisette v. United States, 342 U.S. 246, 248 (1952)) these three characteristics are commonly found throughout public welfare statutes.

items. *United States v. Balint*, 258 U.S. 250, 251 (1922) (holding an Act governing the sale of narcotics was a regulation of dangerous materials); *Int'l Minerals*, 402 U.S. at 564-65 (1971) (finding a statute regulating the shipment of types of acid regulated a dangerous substance); *United States v. Freed*, 401 U.S. 601, 612 (1971) (holding that a statute prohibiting possession of hand grenades was a public welfare statute); *contra Liparota v. United States*, 471 U.S. 419, 433 (1985) (holding a statute regulating the unauthorized sale of food stamps is not a public welfare statute); *Staples,* 511 U.S. at 610-11 (1994) (holding a statute regulating the ownership of machine guns is not a public welfare statute). The Ninth Circuit in *United States v. Weitzenhoff* concluded the CWA is a public welfare statute. 35 F.3d at 1286. The *Weitzenhoff* court compared the CWA to other public welfare statutes and found, "the improper and excessive discharge of sewage causes cholera, hepatitis, and other serious illnesses, and can have serious repercussions for public health and welfare." *Id.* Furthermore, the court held that the criminal provisions of the CWA are "clearly designed to protect the public at large from the potentially dire consequences of water pollution, and as such fall within the category of public welfare legislation." *Id.*; *see also Hanousek*, 176 F.3d at 1121 (stating the criminal provisions of the CWA constitute public welfare legislation); *contra United States v. Ahmad*, 101 F.3d 386, 391 (5th Cir. 1996) (holding the CWA is not a public welfare statute).

This Court, like the courts in *Hanousek* and *Weitzenhoff*, should find that § 1319(c)(1)(A) is a public welfare statute because it regulates dangerous or obnoxious waste materials that can have serious repercussions on the Nation's health. Here, the fires caused by the Windy River spill resulted in absolute devastation. Twenty-three people died, and historical buildings, numerous homes, and 50,000 acres of nearby farmland were destroyed. Petitioner's negligence resulted in a total cost to the state and local economies of nearly $1.25 billion. The extraordinary damage caused by Petitioner's negligence adversely affected the public welfare of the citizens of New Tejas. The disastrous effect the spill had on New Tejas and the uncontested applicability of § 1319(c)(1)(A) show that the section is properly classified as a public welfare statute.

2. Section 1319(c)(1)(A) is a public welfare statute because the penalties imposed for violations are not excessive.

Section 1319(c)(1)(A) is a public welfare statute because violators are not punished by substantial terms of imprisonment. Section 1319(c)(1)(A) provides that first-time negligent violators are 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 one year, or by both. 33 U.S.C. § 1319(c)(1)(A) (2006). A second-time negligent violator is punished by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than two years, or both. 33 U.S.C. § 1319(c)(1)(A) (2006). Because neither of these punishments

involve relatively substantial terms of imprisonment, § 1319(c)(1)(A) is a public welfare statute.

Traditionally, public welfare statutes have provided for only light penalties such as fines or short jail sentences. *Staples*, 511 U.S. at 616. This Court in *Staples* found that punishing a public welfare offense as a felony is "simply incompatible with the theory of the public welfare offense." *Id.* at 618; *see United States v. United States Gypsum Co.*, 438 U.S. 422, 442 (1978) (noting that because an individual violation of the Sherman Trust Act was a felony punishable by three years in prison and a fine of up to $100,000, the Act should not be construed as creating an intent-less crime). However, this Court refrained from holding that public welfare offenses may not be punished as felonies. *Id.* at 618.

Modern public welfare statutes punish violators with larger terms of imprisonment. *Weitzenhoff*, 35 F.3d at 1286 n. 7; *see Int'l Minerals*, 402 U.S. at 560 (ten years imprisonment if death or bodily injury results from violation); *Freed*, 401 U.S. at 609-10 (five years imprisonment for possession of unregistered grenade). In *Weitzenhoff*, the Ninth Circuit found that *all* criminal provisions of the CWA are public welfare statutes even though violations of § 1319(c)(2) are punishable as felonies. 35 F.3d at 1284 (emphasis added). However, the Fifth Circuit held that because violations of § 1319(c)(2)(A) are felonies punishable by years in prison, they do not fall within the public welfare doctrine. *Ahmad*, 101 F.3d at 391; *see also United*

States v. Hanousek, 176 F.3d 1116 (9th Cir. 1999), *cert. denied*, 528 U.S. 1102 (2000) (Thomas, C., dissenting) (finding the CWA, as a whole, is not a public welfare statute).

Violations of § 1319(c)(1)(A) are not felonies. The fines imposed by the section are comparatively high, but the term of imprisonment is two years or less, which is less than other violations of public welfare statutes. Because the punishments for a violation of § 1319(c)(1)(A) are not severe, this provides further evidence of the applicability of the public welfare doctrine to the section.

3. Section 1319(c)(1)(A) is a public welfare statute because it requires no intentional mental element, and the ordinary negligence standard does not violate due process.

Because § 1319(c)(1)(A) requires no scienter element, it is a public welfare statute, and the usage of the ordinary definition of negligence does not violate due process. The lack of an intent requirement in public welfare statutes dates back to the Industrial Revolution. In 1866, a quarry owner was held liable for his workers dumping refuse into a river, in spite of his plea that he played no active part in the management of the business and knew nothing about the dumping involved. *Regina v. Stephens*, [1866] 1 L.R. Q.B. 702 at 703 (Eng.). Like the quarry owner, Petitioner should be punished for his negligent supervision of his employees. Although it was not Petitioner's goal for the security guards to dump pollutants into the Windy River, Petitioner's intent-less actions are punishable because § 1319(c)(1)(A)

is a public welfare statute, and public welfare statutes do not require intent. Further, Petitioner's conviction based on the ordinary meaning of negligence does not violate due process because § 1319(c)(1)(A) is a public welfare statute.

a. Section 1319(c)(1)(A) is a public welfare statute because there is no standard for culpability.

Congress did not include a mens rea element for violations of § 1319(c)(1)(A). Historically, the general rule of common law was that scienter was a necessary element in the indictment and proof of every crime. *Balint*, 258 U.S. at 251. However, this rule has since been modified, and now mens rea is a question of legislative intent to be construed by the courts. *Id.* at 252. If Congress intended a statute to be a public welfare statute, mens rea is not required. *Ortiz,* 427 F.3d at 1283. Congress's omission of a scienter requirement provides further evidence the CWA is a public welfare statute.[3]

Generally, public welfare statutes do not impose an intent requirement on violators. However, even under the public welfare doctrine, true or strict

[3] Because section 1319(c)(1)(A) is a public welfare statute, which clearly provides for an intent-less standard, the rule of lenity does not apply. *Chapman v. United States*, 500 U.S. 453, 463 (1991). The background rule of the common law favoring mens rea and the substantial body of precedent this Court developed construing statutes that do not specify a mental element provide considerable support that the section is not subject to the rule of lenity. *See Staples*, 511 U.S. at 619 n. 17. Additionally, applying the rule of lenity would conflict with the "implied or expressed intent of Congress," which is to hold negligent individuals criminally responsible. *Liparota*, 471 U.S. at 427.

liability does not generally follow. *Wilson*, 133 F.3d at 263 (citing to *Int'l Minerals*, 402 U.S. at 563-54 (the government did not have to prove the defendant knew of the regulation, however, the government would have to prove the defendant knew of the operative facts which were the essential elements of the regulatory violation.)). In *Shevlin-Carpenter Co. v. Minn.*, this Court held that in the punishment of particular acts, the legislature may, in the maintenance of public policy, provide "that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance." 218 U.S. 57, 69 (1910). Thus, while strict liability is not required for public welfare statutes, a violator cannot plead ignorance of the law as a defense.

Furthermore, while intent is not required, the courts assume violators know that the substances or products are dangerous and subject to regulation. *Liparota*, 471 U.S. at 433. Public welfare statutes render criminal "a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety." *Id.*; *see also Staples*, 511 U.S. at 634 (Stevens, J., dissenting) ("an overriding public interest in health or safety may outweigh the risk of punishing an intent-less individual" when a person is dealing with dangerous products, which he or she should know is regulated). The accused is usually in a position to prevent the disaster with no more care than society might reasonably expect and no more exertion than it might reasonably exact

from one who assumed his responsibilities. *United States v. Dotterweich*, 320 U.S. 277, 281 (1943). The threat to public welfare posed by the regulated items carries with it inherent notice that allows Congress to dispense with the conventional requirement for awareness of criminal conduct. *Id.*

This Court and others have identified numerous public welfare statutes that dispensed with an intent requirement. *See Balint*, 258 U.S. at 251 (holding the Anti-Narcotics Act regulated the sale of narcotics, dangerous substances, without requiring the seller to know the drug was illegal); *Int'l Minerals*, 402 U.S. at 564 (holding a statute regulating the shipment of types of acid, dangerous substances, could hold persons liable for violating the statute even if they did not intend to do so because the nature of the substances provided awareness of regulation); *Freed*, 401 U.S. at 609 (holding that a statute prohibiting possession of hand grenades was a public welfare statute, which did not require intent because "one would hardly be surprised to learn that possession of hand grenades is not an innocent act because grenades are highly dangerous offensive weapons"). The Fifth Circuit has held the CWA is not a public welfare statute. *Ahmad*, 101 F.3d at 389-90 (5th Cir. 1997). However, the court was examining § 1319(c)(2)(A), which states "any person who knowingly violates . . . [§] 1311(a)" commits a felony. *Id.* The court found that because the mens rea element was included in that particular section of the statute, the CWA was not a public welfare statute. *Id.* at 391.

The Ninth Circuit has held the CWA is a public welfare statute and § 1319(c)(1)(a) is public welfare regulation. *Hanousek*, 176 F.3d at 1122. In *Hanousek*, the defendant knew that a high-pressure petroleum pipeline ran near the surface where he was working, and he knew that there was a possibility that heavy machinery could puncture the pipeline. *Id.* The court found the defendant's knowledge of the dangerous circumstances surrounding his work was enough to alert him to the probability of strict regulation. *Id.* Thus, the court held ordinary negligence applied to violations of § 1319(c)(1)(A). *Id; see also Ortiz,* 427 F.3d at 1283 (finding the CWA does not require proof that a defendant knows that a discharge would enter United States water; § 1319(c)(1)(A) imposes no knowledge requirement and only requires that the defendant acted negligently).

Section 1319(c)(1)(A) is a public welfare statute because it requires no mens rea. Intent is not required because an overriding public interest exists in the health and safety of United States citizens. This inherent interest makes it reasonable to presume Petitioner knew or should have known chemical plants are subject to regulation. Petitioner must have known he was signing a security contract with a chemical company due to the company's moniker, Bingle Chemical Company. The dangerous character of the chemicals at the facility provided Petitioner with sufficient notice of the probability of regulation. Furthermore, even if Petitioner did not intentionally cause the violation, he was in a position to prevent it.

Petitioner's failure to exercise the standard of care that a reasonably prudent person would have exercised in the same situation is punishable under § 1319(c)(1)(A).

b. The lack of a mens rea requirement in § 1319(c)(1)(A) does not violate due process.

Applying an ordinary negligence definition to the term "negligently" used in § 1319(c)(1)(A) does not violate due process because the dangerous nature of the substances being regulated provides sufficient notice. The Due Process Clause provides that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. Intent is usually required in a criminal statute to avoid violating the Due Process Clause. However, the obviously dangerous nature of water pollution provides notice to those handling the waste that regulations are in place. Thus, there is no violation of due process when a violator is prosecuted for ordinary negligence.

This Court has repeatedly held that Congress's dispensation of a mens rea requirement for public welfare statutes does not violate due process. In *International Minerals*, this Court held knowledge of the regulation was not required because "[w]here, here as in *Balint*, dangerous or deleterious devices or products or obnoxious waste material are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation." 402 U.S. at 565. This Court rejected a knowledge requirement for statutes

regulating dangerous substances but upheld a general intent requirement for other criminal statutes when it stated that, if "pencils, dental floss, or paper clips" were being regulated, a mens rea would be required for each element of the offense. *Id.* at 564-65; *see also Freed*, 401 U.S. at 609 (holding "one would hardly be surprised to learn that possession of hand grenades is not an innocent act," and the dangerous nature of these weapons provided notice of regulation); *contra Staples*, 511 U.S. at 614-16 (holding knowledge of the prohibited act was required for prosecutions under the National Firearm Act because if intent was not required innocent conduct would be criminalized). The danger of the items regulated by public welfare statutes provides warning of regulation. *Freed*, 401 U.S. at 609. This warning serves as notice, and as such, due process is not violated. *Id.*

The Ninth Circuit has held that defining "negligently" in § 1319(c)(1)(A) as ordinary negligence does not violate due process. *Hanousek*, 176 F.3d at 1121. The Court stated, "It is well established that a public welfare statute may subject a person to criminal liability for his or her ordinary negligence without violating due process." *Id.* The court applied this Court's prior holdings in *Balint*, *Staples*, and *Dotterweich* to the CWA and concluded the use of ordinary negligence in § 1319(c)(1)(A) does not violate due process.

Section 1319(c)(1)(A) is a public welfare statute, and finding a person violated the statute because of ordinarily negligent behavior does not violate

due process. The public welfare statute cases are analogous to this case because Congress decided the possible injustice of punishing someone who acted unintentionally but negligently does not outweigh the evil caused by the negligent pollution of our Nation's waterways. Additionally, this Court should adopt the reasoning that knowledge of a statute is not necessary to violate that statute. Dangerous water pollution is not "pencils, dental floss, or paper clips." An individual who works in and around hazardous waste and whose negligent actions subsequently result in that waste discharging into waterways must know there is regulation prohibiting such activity.

In this case, the Petitioner failed to exercise the standard of care a reasonably prudent person would exercise in the same circumstances. Petitioner knew he was employing inexperienced men for security at a chemical factory. Additionally, Petitioner knew he did not have the experience to design a security plan for the facility. The only other plan devised by Petitioner involved one bicycle and a grocery store. Finally, Petitioner accepted a contract that required massive personnel hiring and equipment purchases in less than a month. Because of these self-imposed time constraints, Petitioner failed to train his personnel properly, failed to oversee their work, and failed to purchase proper equipment. Further, Petitioner knew that the vehicles utilized at this chemical facility were manufactured quickly and were not adequately field tested prior to deployment. Petitioner did not exercise the standard of care a reasonably

prudent person would exercise when working around dangerous chemicals. Petitioner's unintentional actions are punishable by § 1319(c)(1)(A), and his punishment is not violative of due process.

II. Whether, under 18 U.S.C. § 1512(b)(3), a person can "corruptly persuade" a witness to withhold information by attempting to coerce the witness to plead Fifth Amendment.

Petitioner "corruptly persuade[d]" a witness to withhold information when he advised Reynolds to plead the Fifth Amendment, not to benefit the witness, but with the intention of benefiting himself. 18 U.S.C. § 1512(b)(3) states,

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

The principle debate surrounding this statute is the meaning of the phrase, "corruptly persuades." *See United States v. Doss* , 630 F.3d 1181, 1186 (9th Cir. 2011). This Court reviews matters of statutory interpretation under a de novo standard of review. *Booker*, 543 U.S. at 259. All courts considering the issue have found this phrase to be ambiguous.[4] *Doss*, 630

[4] Contrary to the Third Circuit's finding in *Farrell*, the rule of lenity does not apply in this case because the term "corruptly persuades," while ambiguous on its face, can be clarified by section 1512(b)(3)'s legislative history and overall statutory scheme. *See United States v. Pollen*, 978 F.2d 78, 85 (3d Cir. 1992).

F.3d at 1186; *see also United States v. Baldridge*, 559 F.3d 1126, 1142 (10th Cir. 2009) (citing to *United States v. Khatami*, 280 F.3d 907, 912 (9th Cir. 2002)). Circuit courts are divided over the meaning of "corrupt persuasion." The Second and Eleventh Circuits have construed "corruptly persuades" as acting with an "improper purpose." *See United States v. Thompson*, 76 F.3d 442 (2d Cir. 1996); *United States v. Shotts*, 145 F.3d 1289 (11th Cir. 1998).[5] The Third and Ninth Circuits have interpreted "corruptly persuades" to require more culpability than an "improper purpose." *See United States v. Farrell*, 126 F.3d 484 (3d Cir. 1997); *United States v. Doss*, 630 F.3d 1181 (9th Cir. 2011). However, both interpretations compel the same conclusion: Petitioner's actions violated § 1512(b)(3). Petitioner coerced Reynolds to obstruct justice by pleading the Fifth Amendment. Any invocation of the Fifth Amendment that resulted was not voluntary, and as such, was invalid. The coercive force exerted on Reynolds violated both standards of culpability put forth by the circuit courts.

A. When Petitioner attempted to coerce Reynolds into pleading the Fifth Amendment, he acted with an "improper purpose," and violated § 1512(b)(3).

Petitioner "corruptly persuaded" Reynolds under the standard set forth by the Second and Eleventh Circuits because he acted with an "improper

[5] These courts have found that the phrase "corruptly persuades" defined as motivated by an improper purpose ensures section 1512(b)(3) is not overbroad or void for vagueness. *Thompson*, 76 F.3d at 452; *Shotts*, 145 F.3d at 1300.

purpose" when he attempted to coerce Reynolds to invoke the Fifth Amendment. The Eleventh and Second Circuits correctly applied the meaning of "corrupt persuasion" as shown by the plain language, legislative history, and accompanying sections of the statute. Petitioner's statement to Reynolds was made with an "improper purpose" and, thus violated § 1512(b)(3).

1. Section 1512(b)(3)'s plain language, history, and the accompanying sections of the statute support defining "corruptly persuades" as acting with an "improper purpose."

Using the principles of statutory interpretation, "corruptly persuades" is defined as acting with an improper purpose. The plain language, legislative history, and the accompanying sections of the statute show that Congress intended for "corruptly persuades" to be defined as motivated by an "improper purpose." Petitioner's action in persuading Reynolds to plead the Fifth Amendment was motivated by the "improper purpose" of protecting himself, rather than Reynolds, from criminal charges.

a. The plain language of § 1512(b)(3) shows "corruptly persuades" should be defined as acting with an "improper purpose."

The plain language of § 1512(b)(3) clearly provides that "corruptly persuades" should be defined as acting with an "improper purpose." Webster's Collegiate Dictionary defines "corrupt" as morally degenerate and perverted and characterized by bribery or other improper conduct. *Webster's New Collegiate Dictionary* 253 (8th ed. 1979). Based on the ordinary

definition of the word, "corruptly persuades" is defined as a person who, acting with an improper purpose, persuades another to obstruct justice.

The plain language of § 1512(b)(3) provides that "corruptly persuades" is defined as motivated by an "improper purpose." In construing a statutory phrase, the Court begins by considering the ordinary understanding of the phrase, absent an indication Congress intended the phrase to be defined otherwise. *Carey v. Saffold*, 536 U.S. 214, 219 (2002). "Corrupt" is defined as "morally degenerate" and "characterized by improper conduct." *Farrell*, 126 F.3d at 488 n. 2 (citing to *Webster's New Collegiate Dictionary* 294 (9th ed. 1985)). Additionally, there is no indication Congress intended "corruptly persuades" to mean anything other than the ordinary meaning. Thus, "corruptly persuades" is defined as acting with an "improper" or "morally degenerate" purpose to persuade another to obstruct justice.

In *Farrell*, the Third Circuit found that because "corrupt" has more than one definition, the plain language of the statute is not indicative of congressional intent. *Farrell*, 126 F.3d at 488. The *Farrell* court found that "'corruptly' may modify 'persuades' to require persuasion through some corrupt means, persuasion of someone to engage in some corrupt conduct, and/or persuasion characterized by some 'morally debased' purpose." *Id.* at 488 n. 2. Because of the various meanings of "corrupt," the *Farrell* court determined the meaning of the statute could not be gleaned from the plain language. *Id.* at 488.

However, each of the definitions cited by *Farrell* amount to the same result, a violation of § 1512(b)(3). Additionally, the positioning of "corruptly" before "persuades" indicates that "corruptly" is an adjective modifying "persuades." Therefore, the only definition that is applicable is persuasion characterized by some morally debased or improper purpose. The plain language of the § 1512(b)(3) requires a person to act with an "improper purpose" while persuading another to obstruct justice.

b. The legislative history of § 1512(b)(3) shows that Congress intended "corruptly persuades" to describe a person motivated by an "improper purpose."

The history of § 1512(b)(3) supports defining "corruptly persuades" as acting with an "improper purpose." Congress's knowledge of the other provisions of the witness tampering statute as well as statements by members of Congress provide evidence of congressional intent. The legislative history of § 1512(b)(3) shows that Congress intended "corruptly persuades" to be defined as at acting with an "improper purpose."

Prior to 1982, federal witness tampering was exclusively covered by 18 U.S.C. § 1503, a general obstruction of justice provision. *Doss*, 630 F.3d at 1186. In 1982, § 1512 was added, albeit without the phrase "corruptly persuades," to provide additional protection to federal witnesses. *Id.* The Second Circuit in *United States v. King*, held that § 1512 did not criminalize "nonmisleading, nonthreatening, nonintimidating" attempts to have a person give false information to the government. 762 F.2d 232, 238 (2d Cir. 1985).

Subsequent to *King*, Congress amended § 1512 and added the "corruptly persuades" language to address the provision's failure to criminalize "nonmisleading, nonthreatening, nonintimidating" actions. *Id.* at 1187 (citing Anti-Drug Abuse Act of 1988, Pub.L. No. 100-690 U.S.C.C.A.N. 1988 (102 Stat. 4181)). Senator Biden stated the intent of the amendment was "merely to include in § 1512 the same protection of witnesses from non-coercive influence that was (and is) found in [§] 1503." *Farrell*, 126 F.3d at 492 (Campbell, T., dissenting). The history of the statute is evidence the legislature intended "corruptly persuades" to mean "motivated by an improper purpose." *See Farrell*, 126 F.3d at 492 (Campbell, T., dissenting) (finding Senator Biden's statement of including the protections of 1503 in 1512 as evidence that Congress would have known that courts were construing "corruptly" in § 1503 to mean "motivated by an improper purpose"); *Shotts,* 145 F.3d at 1300 (holding the "motivated by an improper purpose" definition of "corrupt" in § 1512(b) is correctly informed by § 1503's long-standing interpretation).

However, the Third and Ninth Circuits have ignored the tenets of statutory interpretation and have imbued "corruptly persuades" with a meaning unsupported by the history of the statute. The Third and Ninth Circuits examined the House Report of § 1512(b)(3), which gives two examples of types of actions that would violate the statute. *See Farrell*, 126 F.3d at 488 and *Doss*, 630 F.3d at 1187. The two examples of "culpable

corrupt persuasion" are if a defendant (1) offered to financially reward a co-conspirator's silence or (2) attempted to persuade a co-conspirator to lie to law enforcement about the defendant's involvement in the conspiracy. *Id.* The courts found that both of these examples required greater culpable conduct than that described by "motivated by an improper purpose" because they proscribed actions easy to characterize as inherently wrong. *Farrell*, 126 F.3d at 488; *Doss*, 630 F.3d at 1187.

The legislative history of § 1512(b)(3) shows that Congress intended "corruptly persuades" to be interpreted as acting with an "improper purpose." When Congress added the term "corruptly persuades" into § 1512(b)(3), it did so knowing courts had been interpreting the term as "motivated by an improper purpose" in parallel § 1503. Additionally, as Senator Biden expressed, Congress's intent was to extend the protections afforded by § 1503 to § 1512. One of those safeguards was prohibiting a person from unlawfully obstructing justice while acting with an "improper purpose." Furthermore, the examples cited by the House Report do not show that Congress required greater culpability than an "improper purpose." Nothing in the House Report indicates that the two examples are exclusive of all others. The examples simply illustrate two instances that satisfy "improper purpose." The two examples are easily identifiable as wrongful conduct. However, conduct that is motivated by an "improper purpose" also is easily identified as wrongful conduct. Additionally, if Congress intended only those two actions to be

violative of the section, § 1512(b)(3) would specifically prohibit only those actions. Coercing another to "plead the Fifth" for the coercing party's benefit is just as "corrupt" conduct as attempting to bribe a witness to stay silent.

c. The accompanying sections of the statute support defining "corruptly persuades" as acting with an "improper purpose."

The sections surrounding § 1512(b)(3) encourage the adoption of acting with an "improper purpose" as the definition of "corruptly persuades." Courts have defined "corruptly persuades" in 18 U.S.C. § 1503 as motivated by an "improper purpose." *See United States v. Rasheed*, 663 F.2d 843, 852 (9th Cir. 1981). Because parallel provisions of the statute define "corruptly persuades" as acting with an "improper purpose," the identical language in § 1512(b)(3) should be construed the same.

18 U.S.C. § 1503 broadly proscribes obstruction of justice and applies to persons who "corruptly, or by threats or force, or by any threatening letter or communication, endeavor[ed] to influence, intimidate, or impede any grand juror, witness, or court officer." *Doss*, 630 F.3d at 1186 (citing 18 U.S.C. § 1503). In *United States v. Thompson*, the Second Circuit examined § 1503 because of its status as a "parallel provision" in the statute. 76 F.3d at 452. The court looked at prior cases defining the term "corrupt" when referencing § 1503. *Id.*; *see also United States v. Jeter*, 775 F.2d 670, 679 (6th Cir. 1985) (holding the prohibition against corrupt acts "is clearly limited to . . . constitutionally unprotected and purportedly illicit activity"). The court

found ample support for defining "corrupt" in § 1503 as "improper purpose." *Thompson*, 76 F.3d 442, 452 (2d Cir. 1996). Because a term appearing several places in statutory text is generally read the same way each time it appears, "corruptly" in § 1512(b)(3) should be read as acting with an improper purpose since it has been interpreted with that meaning in an accompanying section. *See Ratzlaf*, 510 U.S. at 143.

The Third and Ninth Circuits wrongly interpreted the accompanying sections of the statute. In *Farrell*, a divided panel rejected the *Thompson* court's interpretation of "corruptly persuades" finding instead that the term requires greater culpability than "improper purpose." 126 F.3d at 488; *see also Doss*, 630 F.3d at 1189. The courts based this decision on an interpretation of § 1512(b)(3) in which "corruptly" provides the mens rea for the prohibited acts. *Farrell,* 126 F.3d at 488*; Doss*, 630 F.3d at 1189; *see Arthur Andersen v. United States*, 544 U.S. 696, 705-06 (2005) (rejecting any analogy between § 1512(b) and §§ 1503 and 1505 because "knowingly" is not found in §§ 1503 and 1505). The Third Circuit feared that construing 'corruptly' to mean 'for an improper purpose' render[ed] the term surplusage." *Farrell*, 126 F.3d at 488. The Third Circuit found that "corruptly" is rendered meaningless under the *Thompson* court's interpretation because the statute already required a mens rea, specifically the intent to hinder an investigation or proceeding. *Id.* at 487.

Courts should give repeating terms in the same overarching statute the same meaning. Here, the "corruptly" used in § 1512's "corruptly persuades" should be imbued with the same meaning as "corruptly" in § 1503. The Third Circuit's fear that defining "corrupt" as "motivated by an improper purpose" would add another scienter element to the statute is unfounded. Section 1512(b)(3)'s requirement that a defendant behave knowingly does not render "corruptly" surplusage. "Corruptly" defines the type of prohibited conduct. Substituting "corruptly" with "an improper purpose," does not cause the statute to become nonsensical. Instead, § 1512(b)(3) would read "whoever knowingly, with an improper purpose, persuades another person . . ." The use of this language provides that non-coercive behavior can be held liable under the statute if a defendant, motivated by an improper purpose, knowingly intends for his actions to cause another to obstruct justice. The Third and Ninth Circuit's fears are without merit. Thus, both the history of the section as well as accompanying sections of the statute require that "corruptly persuades" in § 1512 is interpreted as "persuade with an improper purpose."

2. Petitioner's attempt to coerce Reynolds into pleading the Fifth Amendment was driven by an "improper purpose," and thus violated § 1512(b)(3).

Petitioner "corrupt[ly] persua[ded]" Reynolds under the standard set by the Second and Eleventh Circuits because he acted with an "improper purpose" when he attempted to coerce Reynolds to invoke his Fifth

Amendment right. Petitioner's purpose in encouraging Reynolds to invoke the right was not so Reynolds would be free from incriminating himself in a criminal prosecution. Rather, Petitioner's "improper purpose" was to obstruct justice by encourage the witness to conceal information that would incriminate the Petitioner. Petitioner's statement to Reynolds was made with an "improper purpose" and, thus, was violative of § 1512(b)(3).

Asking a witness to lie to investigators is persuasion with an "improper purpose" and violative of § 1512(b)(3). In *Thompson*, when the defendant discovered he was under investigation, he told one of his buyers to tell investigators he had only purchased marijuana from the defendant "a couple times," despite the fact the buyer had purchased marijuana from him twenty times. 76 F.3d at 447. The court held the defendant's actions were motivated by an "improper purpose," and thus violated § 1512(b)(3).

Telling a witness "not to say anything," when motivated by an "improper purpose" violates § 1512(b)(3). In *United States v. Shotts,* the defendant told his secretary "not to say anything and she wasn't going to be bothered" in the investigation of the defendant's criminal activities involving a member of the bench. 145 F.3d at 1301. The court held that while the evidence was not overwhelming, the jury could reasonably have inferred that the defendant was motivated by an improper purpose, keeping information from the authorities, when he was attempting persuade his secretary not to talk to the FBI. *Id.* at 1301.

"Corruptly persuading" a witness to invoke the marital privilege can be violative of § 1512(b)(3). In *United States v. Craft*, the defendant repeatedly told his wife not to talk to investigators. 478 F.3d 899, 901 (8th Cir. 2007). The wife testified that defendant told her that if she "crossed him," she could get hurt, and she would regret it. *Id.* The defendant claimed his conversation was protected by spousal privilege, and he was merely informing her not to speak to authorities pursuant to that privilege. *Id.* The court held that the jury's decision to discredit the defendant was not unreasonable and upheld his conviction for witness tampering despite the existence of a legal privilege. *Id.*

Persuading a witness to invoke a constitutional privilege can be motivated by an improper purpose and violate § 1512(b)(3). In *United States v. Gotti,* the court found there was sufficient evidence upon which a jury could conclude that the defendant had an improper purpose in "suggesting" to the conspirator (via a command to his stepfather over whom he had authority under the hierarchical structure of the Gambino family) to plead the Fifth. 459 F.3d 296, 343 (2d Cir. 2006). The defendant wanted to ensure the coconspirator did not implicate him. *Id.* This was an improper purpose under § 1512(b)(3). *Id; see also United States v. Reeves*, 61 M.J. 108, 110 (Ct. Apps. Armed Forces 2005) (holding that one who advises, with a corrupt motive, that a witness exercise a constitutional right or privilege may obstruct justice).

Coercing another to plead the Fifth Amendment in contravention of the invoker's best interests is an improper use of the Fifth Amendment. The Fifth Amendment provides that "no person shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Fifth Amendment's protections adhere to the individual, not the information that may incriminate that individual. *Andresen v. Maryland*, 427 U.S. 463, 473 (1976). When an individual seeking to protect his own interests compels another to invoke the Fifth Amendment, this is an improper use of the Fifth Amendment.

This Court should adopt the reasoning of the Second and Eleventh Circuits. Like the defendant in *Thompson*, Petitioner's attempt to persuade Reynolds to hide relevant information from the authorities was motivated by an improper purpose. Though Petitioner cloaked his persuasion with a comment about pleading the Fifth, his intention was not to give sound legal advice. Rather, Petitioner intended Reynolds to "shut up" so Petitioner did not go to jail. Petitioner's behavior, while seemingly as innocuous as that of the defendant in *Shotts*, was also improper. Petitioner's statement that "it's time to shut up about everything," was similar to the defendant's statements in *Shotts*, "not to say anything and she wasn't going to be bothered." Additionally, similar to the defendant in *Gotti*, Petitioner had an improper purpose in "suggesting" to the conspirator to plead the Fifth. The defendant in *Gotti* received the "advice" from a Gambino family member with authority,

and here, the Petitioner, the President and Chief Operating Officer of Sekuritek, accompanied his "advice" to his employee with the statement, "And don't even think about pinning all this on me. Remember, they're looking at your stupid gas-guzzlers, too." The influence of a corporate superior brought an overtly coercive element to the conversation between Petitioner and Reynolds. Moreover, like in *Craft*, Petitioner is seeking shelter behind a well-established legal privilege. Petitioner wanted Reynolds to use the Fifth Amendment to protect Petitioner's interest. Rather than using the Fifth Amendment as the shield it is intended to be, Petitioner is using the privilege as a sword in furtherance of his own goals.

B. Even if this Court determines § 1512(b)(3) requires a higher level of culpability than "improper purpose," Petitioner's actions rise to that level of culpable conduct.

If this Court finds the interpretation of "corruptly persuades" provided by the Third and Ninth Circuits to be correct, Petitioner is still violative of the statute. This interpretation of "corruptly persuades" requires a higher level of culpability than the interpretation provided by the Second and Eleventh Circuits. Under this interpretation, a defendant must act with a "consciousness of wrongdoing." *Doss*, 630 F.3d at 1189. Additionally, a defendant must be coercing an individual to violate a legal duty in order to violate § 1512(b)(3). *United States v. Davis*, 183 F.3d 231, 249 (3d Cir. 1999). Petitioner's actions qualify as a violation under this heightened standard of culpability. Petitioner encouraged Reynolds to perform an act that would

violate a legal duty not to obstruct justice. Thus, Petitioner was not acting in Reynolds's best legal interests. This is a violation of the standard set forth by the Third and Ninth Circuits.

Attempting to bribe someone to withhold information and attempting to persuade someone to provide false information to federal investigators constitutes "corrupt persuasion" punishable under § 1512(b)(3). *Farrell*, 126 F.3d at 487. However, in *Farrell*, the Third Circuit reasoned that a noncoercive attempt to persuade a coconspirator to plead their Fifth Amendment right not to disclose self-incriminating information is not a violation of § 1512(b)(3) because "more culpability is required for a statutory violation than that involved in the act of attempting to discourage disclosure in order to hinder an investigation." *Id.* at 488-89; *see also United States v. Silas*, 2003 WL 22871889 *2 (3d Cir. 2003) (holding defendant's advice to the coconspirator regarding his right to an attorney and to avoid incriminating himself alone would not make him guilty of witness tampering); *United States v. Isaac*, 2008 WL 3919353, *8 (E.D. Pa. 2008) (holding that instructing a witness to exercise his or her Fifth Amendment right to remain silent without more does not rise to the level of "corrupt persuasion" because the defendant did not ask the coconspirator to do anything improper or unlawful).

The Ninth Circuit based its heightened level of culpability on the *Farrell* decision and this Court's decision in *Arthur Andersen LLP v. United*

States. *Doss*, 630 F.3d at 1189. In *Andersen*, this Court examined the interplay of "knowingly" with "corruptly persuades" in 18 U.S.C. §§ 1512(b)(2)(A) and (B). 544 U.S. at 704-05. "Knowingly," the Court explained, is associated with "awareness, understanding or consciousness," and "corruptly" is associated with "wrongful, immoral, depraved, or evil"; together they require "conscious[ness] of wrongdoing." *Id.* at 705-06. This "consciousness of wrongdoing" standard was applied to § 1512(b)(3) in *Doss*. 630 F.3d at 1189. In *Doss*, the defendant argued there was nothing "corrupt" about persuading his wife to exercise her marital privilege not to testify. *Id*. The court held that if it is not "inherently malign" for a spouse to ask her husband to exercise the marital privilege (even with the intent to cause that person to withhold testimony), then a defendant could not be shown to act with "consciousness of wrongdoing" merely by asking a spouse to withhold testimony absent some other wrongful conduct. *Id.* at 1190.

Additionally, the Third Circuit adopted the reasoning of the D.C. Circuit court decision, *United States v. Poindexter*, 951 F.2d, 369 (D.C. Cir. 1991). *Davis*, 183 F.3d at 249. In *Poindexter*, the court determined that corrupt persuasion is "'corrupting' another person by influencing him to violate his legal duty," and that § 1505 was aimed at a person who influences another person to violate a legal duty. 951 F.2d at 379. The Third Circuit in *United States v. Davis* applied the *Poindexter* court's findings to § 1512(b)(3). 183 F.3d at 249. In *Davis*, the court held that the defendant's urging of

another to "do something" about one of the witnesses was sufficient evidence that the defendant urged another to violate his legal duty not to kill a witness. *Id.* at 250.

Even if this Court rejects the reasoning of the Second and Eleventh Circuits, Petitioner's actions still violate the statute as interpreted by the Third and Ninth Circuits. Petitioner's actions had the requisite additional layer of culpability. While a "participant in a conspiracy clearly has a right under the Fifth Amendment not to provide law enforcement officials with information about the conspiracy that will incriminate him," *Farrell* at 488-89, Petitioner is not advising Reynolds about the protections of the Fifth Amendment, he is intimidating him with the reminder, "Remember they're looking at your stupid gas-guzzlers, too." Petitioner's warning to Reynolds not to incriminate himself is not, by itself, "inherently malign;" however, Petitioner showed a "consciousness of wrongdoing" when he attempted to coerce Reynolds not to speak with the authorities by threatening to expose potential damaging information. Additionally, Petitioner stands as Reynolds's superior within the Sekuritek organization. Words from the President of a company directed against a subordinate carry an inherently coercive element that is improper when influencing a potential federal witness.

Finally, the Third and Ninth Circuit's interpretation of "corruptly persuades" requires that the defendant persuade the witness to violate a

legal duty. Here, Petitioner's actions resulted in the violation of a legal duty, the duty not to obstruct justice. Additionally, the courts fail to consider that encouraging a potential witness to plead the Fifth Amendment may be a course of action not in the witness's best legal interests. Here, it may have been in Reynolds's best legal interest to speak with the investigators to reduce or eliminate his personal liability. Thus, encouraging Reynolds to act in a manner that may cause harm to his legal interests is a violation of the standard set by the Ninth and Third Circuits.

CONCLUSION

This Court should affirm the decisions of the Fourteenth Circuit and hold Petitioner negligently discharged pollutants into the Windy River in violation of § 1319(c)(1)(A), and Petitioner attempted to "corruptly persuade" Reynolds to plead the Fifth Amendment in violation of § 1512(b)(3).

APPENDIX A: CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. V

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

33 U.S.C. § 1311(a) (2006)

(a) Illegality of pollutant discharges except in compliance with law

> Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1319(c)(1)(A) (2006)

(c) Criminal penalties

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

33 U.S.C. § 1321(b)(7)(D) (2006)

> (b) Congressional declaration of policy against discharges of oil or hazardous substances; designation of hazardous substances; study of higher standard of care incentives and report to Congress; liability; penalties; civil actions: penalty limitations, separate offenses,

jurisdiction, mitigation of damages and costs, recovery of removal costs, alternative remedies, and withholding clearance of vessels

(7) Civil penalty action

(D) Gross negligence

In any case in which a violation of paragraph (3) was the result of gross negligence or willful misconduct of a person described in subparagraph (A), the person shall be subject to a civil penalty of not less than $100,000, and not more than $3,000 per barrel of oil or unit of reportable quantity of hazardous substance discharged.

18 U.S.C.A. § 1503 (2006)

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

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

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

(2) in the case of an attempted killing, or a case in which the offense was committed against a petit juror and in which a class

A or B felony was charged, imprisonment for not more than 20 years, a fine under this title, or both; and

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

18 U.S.C. § 1512 (2006)

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

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

(2) cause or induce any person to--

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

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

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

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

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

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