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 REPONDENT

Team #31
Counsel for Respondent

QUESTIONS PRESENTED

I. "Negligently" discharging pollutants in violation of the Clean Water Act is a federal misdemeanor. Congress did not define "negligently" as the term is used in the criminal penalty provisions of the Act. The district court instructed the jury to apply a standard of ordinary negligence rather than a heightened criminal-negligence standard as urged by the petitioner. Does an ordinary negligence standard comply with congressional intent and comport with due process?

II. The Federal Witness Tampering Statute punishes one who attempts to persuade a witness to withhold information if such persuasion is motivated by an improper purpose. Courts have recognized that hindering an investigation and protecting one's liberty qualify as improper purposes. The petitioner asked a witness to remain silent out of fear of going to jail. Did he violate the statute?

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The opinion for the United States District Court for the District of New Tejas is unreported. The opinion of the United States Court of Appeals for the Fourteenth Circuit appears in the record at pages 3-21 and is pending publication in the Federal Reporter.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Clean Water Act ("CWA"), 33 U.S.C. § 1311 (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) (2006): reproduced in Appendix "A"

The Federal Witness-Tampering Statute, 18 U.S.C. § 1512(b)(3) (2006)

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

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

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

STATEMENT OF THE CASE

Sekuritek and the Bigle Contract

Sekuritek is a high-tech security company claiming to specialize in deploying "trained" security personnel located in Polis, New Tejas. (R. 4.) Soon after its founding in 2004, Sekuritek underwent rapid growth. (R. 4, 5.) In 2005, after only operating for one year, the company earned over $2 million in revenue, with its contracts averaging approximately $80,000. (R. 5.)

Petitioner and Sekuritek co-founder, Samuel Millstone, serves as Sekuritek's president and CEO. (R. 4.) Among his duties as a corporate officer, Millstone is charged with determining the security needs of clients, hiring and training security personnel, and supervising operation of Sekuritek's contracts. (R. 4.)

Only two years after Sekuritek opened its doors, Bigle Chemical Co. relocated its headquarters from the Republic of China to Polis, New Tejas, and opened an expansive manufacturing and waste recycling facility. (R. 5.) This facility, located on 270 acres near the Windy River, was the company's largest plant. (R. 5.) It staffed twelve-hundred people during any given shift and earned profits topping $2.4 million per day. (R. 5.)

Bigle had a history of chemical spills caused by security breaches, and therefore wanted top-of-the-line security at its new facility. (R. 5.) Bigle CEO Drayton Wesley was determined to hire the best security company available to supervise the new Windy River facility.[1] (R. 5.) In November of 2006, Wesley

[1] Wesley was quoted in the Wall Street Journal as stating that he would 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

discussed with Millstone the possibility of Sekuritek handling Bigle's security. (R. 5.) The discussion resulted in a proposed contract between the two–Sekuritek would provide all security for the Windy River facility in exchange for $8.5 million dollars over a ten-year period. (R. 5.) This amount was almost ten times the size of Sekuritek's largest previous contract. (R. 5.)

Unfortunately, this proposed contract gave Sekuritek less than a month to be "live" and "online" at the Windy River Facility. (R. 5.) Sekuritek would have to hire and train thirty-five new security guards and make a substantial investment in new security equipment. (R. 5.) Further, Sekuritek would need to create and implement a transportation plan sufficient to patrol the Windy River facility's expansive 270 acres. (R. 6.) Prior to the Bigle contract, Sekuritek's only transportation plan had involved the purchase of a single bicycle needed to patrol a grocery-store parking lot. (R. 6.) Despite the numerous obstacles facing Sekuritek and against the advice of Sekuritek's vice-president Reese Reynolds, Millstone accepted the contract. (R. 6.)

Sekuritek's Negligent Preparation

With only fifteen days to prepare, Sekuritek struggled to meet Bigle's demanding security needs and scrapped several standard safety-procedures. (R. 6.) Instead of following Sekuritek's usual policy of only hiring experienced security personnel, Millstone hired 35 security guards, many of whom had zero prior

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spill." (R. 5.) The New York Times also quoted Wesley as saying that he was "finished with shenanigans caused by poor security. No more shenanigans on my watch!" (R. 5.)

experience. (R. 6.) He shortened the standard security-guard training from three weeks to one week. (R. 6 n.7.) The shortened training omitted instructions on certain safety procedures, referring security guards to Sekuritek's handbook instead. (R. 9.) Instead, Millstone implemented a three week period of "on the job" observation and training, despite many of the guards' inexperience. (R. 6 n.7.)

For Bigle's transportation policy, Sekuritek hastily purchased a fleet of custom sport-utility vehicles (SUV) from the only manufacturer that would be able to deliver the vehicles before the new-year. (R. 6.) Despite its prompt service, the SUV manufacturer had a reputation for shoddy workmanship and a history checkered with incidents of accelerator pedals sticking on its custom vehicles. (R. 9.) Nevertheless, Sekuritek relied on this "up and coming" manufacturer to outfit Sekuritek with its new fleet of security vehicles. (R. 6.)

The Windy River Disaster

Sekuritek's excitement over the Bigle contract came to a crashing halt in less than two months. On January 27, 2007, one of Sekuritek's guards mistakenly thought that a Bigle Chemical Co. safety inspector was an intruder. (R. 7.) Rather than following company protocol and proceeding on foot to investigate the suspected security breach,[2] the novice security guard floored the SUV's gas pedal directly towards the "intruder." (R. 7.) The pedal stuck and the SUV accelerated rapidly

[2] Sekuritek's handbook stated that "upon arriving within 100 yards of a . . . suspected security breach, all Sekuritek 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. 8.) It is unknown whether the guard had read the handbook. (R. 9 n.8.)

out of control. (R. 7.) It ultimately collided with one of Bigle's chemical storage tanks, causing a large explosion. (R. 7.)

The initial explosion ignited a fire at the Windy River facility–the fire grew wild and caused several additional explosions. (R. 7.) Due to a "security wall" built by Sekuritek days before the explosion, fire fighters and emergency responders were unable to reach the disaster area for three days. (R. 7.) During the delay, chemicals poured into the Windy River and wreaked ecologic havoc. (R. 7.) The fires and explosions alone caused $450 million in damage. (R. 7.)

The explosions released thousands of barrels of highly toxic chemicals into the Windy River. (R. 7.) The chemicals created a highly corrosive and concentrated chemical cocktail (the "Soup") which contaminated nearby creeks and waterways. (R. 7.) The Soup crippled the surrounding community, completely destroying all of the agriculture, fish, and fish breeding ground five miles downriver from the Windy River facility. (R. 8.) Although the spill's total impact on non-aquatic life has yet to be fully determined, and residents continually report animal deaths with symptoms related to Soup ingestion. (R. 8 n.5.) What is known is that the harsh agricultural impact has cost the New Tejas community $4.5 million annually in lost tourism; only 25% of that figure has been recovered. (R. 8.) To date, the damage caused by the Windy River disaster is estimated at nearly $1.25 billion, with clean up costs alone estimated at over $300 million. (R. 8.)

Witness Tampering

Because the relationship between Sekuritek's contract with Bigle, and "(1) Sekuritek's abbreviated training procedures, (2) Sekuritek's inadvisable purchase of the SUVs, and (3) Sekuritek's installation of a security wall that prevented an effective emergency response," an investigation against Millstone and Reynolds commenced.[3] (R. 9.) Reynolds indicated to Millstone that he planned to come clean fully cooperate the government investigation. (R. 9.) In response, Millstone angrily scolded Reynolds, attempted to persuade Reynolds into invoking his Fifth Amendment Right, and told him to shut up so that they would stay out of jail. (R. 9.) However, despite Millstone's emotional reaction and attempted coercion, Reynolds testified against Millstone in exchange for immunity. (R. 10 n.9.)

Procedural History

The United States brought charges against Millstone, as Sekuritek's responsible corporate officer, for the negligent discharge of pollutants in violation of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1311(a), 1319(c)(1)(A) (2006), and for witness tampering in violation of 18 U.S.C. § 1512(b)(3) (2006). (R. 10.)

The United States alleged that under the CWA, Millstone "negligently hired, trained, and supervised security personnel and negligently failed to adequately inspect the SUVs prior to purchase and use," thus causing the spill. (R. 10.) The trial court instructed the jury to apply an ordinary negligence standard, rather than a heightened criminal-negligence standard. (R. 10.)

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[3] Following the spill, Bigle Chemical Co. relocated back to the Republic of China, and no employees, assets, or holdings are left within the United States.

The jury found Millstone guilty of both charges. (R. 10.) The district court denied Millstone's subsequent Motion for New Trial and Motion for Acquittal. (R. 10.) Millstone appealed to the United States Court of Appeals for the Fourteenth Circuit ("Fourteenth Circuit"). (R. 3.)

The Fourteenth Circuit was faced with two questions of statutory interpretation. Applying precedential principles of statutory construction articulated by this Court, the Fourteenth Circuit determined that Congress intended to impose a simple negligence standard for criminal violations of the CWA. (R. 11.) The Court emphasized that Congress used a "gross" negligence standard in the civil penalty provision of the CWA, but declined to impose a modifier on "negligently" in the Act's criminal provisions. (R. 11-12.)

Regarding the charge of witness tampering, the Fourteenth Circuit examined the prior decisions of the Second Circuit in Thompson and the Eleventh Circuit in Shotts. (R. 14.) These decisions held that the word "corruptly," as used in 18 U.S.C. § 1512(b)(3) has the same meaning as it does when used in 18 U.S.C. § 1503 (2006), the general obstruction of justice statute: "motivated by an improper purpose." (R. 14.) The Fourteenth Circuit, noting that the circuits are currently split on the proper interpretation of § 1512(b), found the reasoning of the Second and Eleventh Circuits persuasive. (R. 14.) In doing so, it rejected the contentions of other circuits that § 1512(b) cannot be violated merely by encouraging others to exercise their Fifth Amendment rights and that the Second and Eleventh Circuits' interpretations of "corruptly" rendered the term superfluous. (R. 14-15.) Applying the "motivated

by an improper purpose" definition, the Fourteenth Circuit affirmed the district court's decision. (R. 15.)

Judge Newman dissented. (R. 16.)

SUMMARY OF THE ARGUMENT

I. The Fourteenth Circuit correctly interpreted 33 U.S.C. § 1319(c)(1)(A) in affirming the district court's imposition of an ordinary-negligence standard. The statute's plain language, as well as its legislative history, support applying an ordinary-negligence standard. And every federal circuit that has interpreted 33 U.S.C. § 1319(c)(1)(A) has imposed such a standard. "Negligent" conduct is not "innocent" conduct. For a person to be convicted under the Act, they must fail to use the care that a reasonably prudent person would have used under similar circumstances. Due to the important environmental concerns underlying the Act, the government should not be required to prove that Millstone was criminally negligent, without an explicit instruction from Congress. Accordingly, the district court's interpretation of the statute and imposition of an ordinary-negligence standard comports with congressional intent.

Moreover, this standard does not violate due process. The Fourteenth Circuit properly classified 33 U.S.C. § 1319(c)(1)(A) as a "public-welfare statute." When Sekuritek caused the Windy River disaster, Millstone, as the responsible corporate officer, was guilty of a public-welfare offense. Public-welfare offenses involve activities that a reasonable person should know are subject to stringent regulation and could seriously threaten the public's health, safety, and welfare. Although

traditional public-welfare offenses eliminate mens rea entirely, they have been upheld as constitutional, due to the underlying social concerns. 33 U.S.C. § 1319(c)(1)(A) is more favorable to a defendant than traditional public-welfare statutes, because the prosecution is required to prove negligence, rather than strict liability. Because this Court has upheld strict-liability public-welfare statutes, this Court should not find that the Clean Water Act, which requires a defendant's negligence, offends the due process clause of the Constitution.

Accordingly, this Court should affirm the Fourteenth Circuit and classify the Clean Water Act as a public-welfare offense.

II. The Fourteenth Circuit was correct in denying Millstone's Motion for Acquittal regarding the witness tampering charge. The federal witness tampering statute, codified at 18 U.S.C. § 1512(b) ("witness-tampering statute"), punishes those who attempt to persuade a witness in order to hinder an investigation. In so doing, the statute focuses upon the purpose of the persuader. If that purpose is improper, i.e., corrupt, the statute is violated.

Millstone's remarks reveal that his sole concern in attempting to persuade Reynolds to not cooperate with government officials was to protect his own liberty. Such a self-serving concern is improper, and violates the statute. The Gotti court recognized as much when it was faced with the precise issue this Court faces today.

The statute's aim is to expound upon the goal of its sister statute, 18 U.S.C. § 1503 ("general obstruction statute"), in that it seeks to protect the free flow of communication in order to ensure justice. The "corruptly persuades" language in

the witness tampering statute was added in order to afford witnesses with heightened protection than that afforded to them under the general obstruction statute. When analyzing the exact issue this Court now faces under the framework of the general obstruction statute, the Cole and Cioffi courts also looked to the purpose of the persuader. Both statutes protect witnesses, and both look to the purpose of the persuader in order to determine culpability.

Witnesses are essential to our justice system. and in keeping with Congress's intent, they must be protected to the fullest extent possible. Accordingly, the Fourteenth Circuit should be affirmed.

STANDARD OF REVIEW

In reviewing questions of statutory interpretation and a lower court's application of that statute, this Court utilizes a de novo standard of review. See United States v. Hanousek, 176 F.3d 1116, 1120 (9th Cir. 1999). Under this standard, courts review the sufficiency of the evidence to determine whether the defendant's conviction was properly supported. United States v. Hertular, 562 F.3d 433, 447 (2d Cir. 2009).

ARGUMENT

I. CANONS OF STATUTORY INTERPRETATION SUPPORT THE LOWER COURTS' INTERPRETATION 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).

Millstone presents to this Court two issues regarding statutory interpretation. The starting point of statutory interpretation is the plain language of the statute itself. Cmty. For Creative Non-Violence v. Reid, 490 U.S. 730, 739

(1989); United States v. Veal, 153 F.3d 1233, 1245 (11th Cir. 1998). A court's overriding objective behind construing the meaning of a statute is effectuating and ascertaining Congress's intent. Larson v. State Personnel Bd., 28 Cal. App. 4th 265, 276 (Cal. App. 1996). In ascertaining such intent, each term is given its plain meaning, but courts may look at the statute as a whole to determine the meaning of a specific term. United States v. Molina-Gazca, 571 F.3d 470, 472 (5th Cir. 2009).

If a statute's plain meaning is unclear, courts may review the statute's legislative history for insight. Veal, 153 F.3d at 1245. Regardless of "however clear the words appear on superficial examination," there is no rule prohibiting courts from consulting the legislative history. United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543-44 (1940). The Court is "at liberty . . . to have recourse in the legislative history of the measure and the statements by those in charge of it during its consideration by Congress." United States v. Great N. Ry., 287 U.S. 144, 154-55 (1932).

Neither statute at issue rises to the level of ambiguity required for application of the rule of lenity. "Some statutory ambiguity" does not "warrant application of [the] rule, for most statutes are ambiguous to some degree." Muscarello v. United States, 524 U.S. 125, 138 (1998). The rule should be applied only in instances of "grevious" ambiguities, Huddleston v. United States, 415 U.S. 814, 831 (1974), and never if doing so "would conflict with the express or implied intent of Congress." Liparota v. United States, 471 U.S. 419, 428 (1985). Here, neither statute contains "grevious" ambiguities warranting application of the rule.

II. THE DISTRICT COURT PROPERLY IMPOSED AN ORDINARY NEGLIGENCE STANDARD UNDER THE CRIMINAL PROVISIONS OF THE CLEAN WATER ACT.

The Fourteenth Circuit properly upheld the district court's jury instruction imposing a standard of ordinary negligence for criminal liability under the Clean Water Act ("CWA"), 33 U.S.C. § 1319(c)(1)(A). The United States Constitution charges Congress with the duty of enacting statutes to protect public welfare and promote long-term sustainability. In the realm of environmental legislation, this task necessarily involves balancing the need for ecological preservation with the demands of a modern industrial economy. Congress's attempts at achieving this balance have not always resulted in crystal-clear legislation. It has thus been left to the courts to ascertain the legislative intent behind each statute.

One such statute, the CWA, has previously faced interpretational challenges and now presents itself for this Court's review. Congress passed the CWA for the purpose of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2006). It prohibits "the discharge of any pollutant by any person," unless the discharge is authorized and complies with a permit. 33 U.S.C. § 1311(a). A person may incur criminal liability for "negligently" or "knowingly" violating the CWA. 33 U.S.C. § 1319 (emphasis added). However, Congress did not define "negligently." This has caused a split among courts and other legal scholars – does "negligently," as used in the CWA,

mandate an ordinary negligence standard or a heightened "gross negligence" standard?

Every federal circuit to interpret 33 U.S.C. § 1319(c)(1)(A) has imposed an ordinary negligence standard. See Hanousek, 176 F.3d at 1120-21; United States v. Ortiz, 427 F.3d 1278, 1282-83 (10th Cir. 2005). The Fourteenth Circuit, relying on the rulings of its sister courts, affirmed the district court's imposition of an ordinary negligence standard for Millstone's negligent violation of the CWA. This Court's grant of certiorari affords it an opportunity to resolve the aforementioned interpretational challenges, as well as a chance to provide a clear and authoritative legal framework of the CWA's negligent standard.

Two primary reasons support imposing an ordinary negligence standard under the criminal provision of the Clean Water Act. First, the plain statutory language, as well as the legislative history, of the CWA indicate that Congress intended to impose an ordinary negligence standard in the Act's criminal provisions. Second, applying an ordinary negligence standard does not violate due process because the CWA is a public-welfare statute. Therefore, this Court should affirm the Fourteenth Circuit.

A. Based Upon The Statutory Language And Its Accompanying Legislative History, The Fourteenth Circuit Correctly Concluded That Congress Intended To Impose An Ordinary Negligence Standard For Criminal Violations Of The Clean Water Act.

Under 33 U.S.C. § 1319(c)(1)(A), a person[4] is guilty of a misdemeanor if his corporation "negligently" discharges pollutants into a navigable waterway. The CWA does not define "negligently." However, upon comparing "negligently" as used in section 1319(c)(1)(A) to other sections that use the term, it is a reasonable inference that Congress intended to impose an ordinary-negligence standard. The limited legislative history regarding Congress's use of "negligently" in section 1319 further supports this conclusion.

1. The Unadorned Use Of The Word "Negligently" In 33 U.S.C. § 1319(c)(1)(A) Suggests That Congress Did Not Intend To Impose A Heightened Standard Of Negligence.

The plain language of the statute supports imposing an ordinary-negligence standard. Courts must infer that if terms have an "accumulated settled meaning . . . under the common law" then Congress meant to use the customary meaning. Cmty. For Creative Non-Violence, 490 U.S. at 739 (quoting NLRB v. Amax Coal Co., 453 U.S. 322, 329 (1979)). The traditional meaning of "negligently" is the "failure to use such care as a reasonably prudent and careful person would under similar circumstances." Hanousek, 176 F.3d 1116, 1120 (quoting Black's Law Dictionary 1032 (6th ed. 1990)).

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[4] The CWA defines the term "person" to include ". . . any responsible corporate officer." 33 U.S.C. § 1319(c)(6) (2006). Under the responsible corporate officer doctrine, a corporate officer who is responsible for the activities of the corporation may be held liable on behalf of the corporation. See United States v. Dotterwich, 320 U.S. 277, 282 (1943). Because Mr. Millstone did not raise on appeal the district court's usage of the responsible corporate officer doctrine, this issue is not currently before this Court.

Courts must presume that Congress says what it means and means what it says. Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992). In the statutory context, "negligence," unadorned, is traditionally interpreted as ordinary negligence. State v. Hazelwood, 946 P.2d 875, 885 (Alaska 1997) (holding that a state law, patterned after the CWA, imposed ordinary, not criminal, negligence); see also State v. Ritchie, 590 So. 2d 1139, 1146 (La. 1991) (concluding that the state negligent homicide statute imposed ordinary negligence "as the term is commonly understood . . . even if criminal penalties are involved"). Accordingly, because Congress used the term "negligently," unadorned, in 33 U.S.C. § 1319(c)(1)(A), this Court should presume that Congress meant to impose the traditional, ordinary-negligence standard, rather than a heightened criminal-negligence standard.

Perhaps more importantly, Congress did not qualify "negligently" in 33 U.S.C. § 1319(c)(1)(A) with language such as "willful," "gross," or "criminal." But Congress did not abstain from qualifying "negligent" in the CWA's entirety. Within the Act, Congress specifically modifies "negligent" at least two other times, clarifying its desire for a stricter negligence standard under certain circumstances. See 33 U.S.C. § 1321(b)(7)(d) (2006) (Congress imposes a standard of "gross negligence" in assessing civil penalties); 33 U.S.C. § 1321(f)(1) (2006) (Congress mandates that if an oil discharge results from "willful negligence, . . . an owner will be liable for the full amount of costs.")

If language is omitted from one section of a statute but appears in another, this Court should presume that the "disparate inclusion or exclusion" was an

intentional and purposeful act of Congress. Russello v. United States, 464 U.S. 16, 23 (1983). Relying on Russello, the Ninth Circuit in Hanousek compared Congress's addition of modifiers to "negligent" in the CWA's civil provisions with its omission of such language in the Act's criminal provisions. Hanousek, 176 F.3d at 1121. Based on the absence of modifiers in the Act's criminal provisions, the court concluded that Congress intended to impose an ordinary negligence standard. Id. The Tenth Circuit adopted this exact logic in Ortiz. 427 F.3d at 1238. Other than the Fourteenth Circuit, the Ninth and Tenth Circuits are the only two federal circuits that have addressed the exact issue before this Court today. Based upon Congress's omission of a paired modifier in the criminal provision, and addition of such language in the Act's civil provisions, both courts found that section 1319(c)(1)(A) imposes an ordinary negligence standard.

The dissent cites a federal district court case for the proposition that this Court has expressly rejected the reasoning used in Hanousek. (R. 16) (relying on United States v. Atl. States Cast Iron Pipe Co., 2007 WL 2282514, at *14 n.17 (D.N.J. 2007 Aug. 7, 2007), and Safeco Ins. Co. v. Burr, 551 U.S. 47, 60 (2007)). But that proposition is misguided. In Safeco, the Court refused to adopt language defined in the criminal provision of the Fair Credit Reporting Act for purposes of interpreting the civil side of that act. 551 U.S. at 60. The Court noted that a word or phrase with a particular meaning, when used in the criminal side of a statute, does not necessarily possess the same meaning as when that word or phrase is used in the civil side of the same statute. Id. (stating that "in the criminal law 'willfully'

typically narrows the otherwise sufficient intent, making the government prove something extra, in contrast to its civil law usage . . .").

The instant case is distinguishable from Safeco. The Fourteenth Circuit never sought to adopt the CWA's civil definition of "negligently" and apply such a meaning to the Act's criminal provision. Rather than spotlighting any differences between the civil and criminal meanings of negligence, the Fourteenth Circuit focused instead on Congress's motivation for using such differentiated language in the CWA's civil and criminal provisions. (R. 11.) In doing so, the Fourteenth Circuit pointed out that where Congress did not see fit to include the same wording in both the criminal and civil sides of the same statute, Congress's inconsistency was intentional. (R. 11.) Thus no further meaning should be affixed to the words or phrases in question other than their accumulated settled meaning. (R. 12.)

Furthermore, this Court acknowledged in Safeco that "paired modifiers" are often found on the criminal side of the law. Id. ("[I]n the criminal law 'willfully' typically narrows the otherwise sufficient intent, making the government prove something extra.") The absence of a paired modifier in section 1319(c)(1)(A), despite common placement in criminal provisions, indicates that Congress intended to impose an ordinary negligence standard–the government is not required to "prove something extra." Id.

2. The Clean Water Act's Legislative History Further Supports Imposing An Ordinary Negligence Standard.

Imposing ordinary negligence garners further support from the CWA's legislative history. In 1987, Congress amended the CWA and imposed harsher criminal penalties. United States v. Sinskey, 19 F.3d 712, 716 (8th Cir. 1997). Prior to the amendment, 33 U.S.C. § 1319 stated that anyone who 'willfully or negligently violated' the Act was subject to penalty. See United States v. Hopkins, 53 F.3d 533, 539 (2d Cir. 1995). Due to a "deep concern for the protection of the health of American people," however, Congress determined that a change in the CWA was needed in order to increase deterrence. S. Rep. No. 92-414 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3670, 1971 WL 11307; United States v. Wilson, 133 F.3d 251, 264 (4th Cir. 1997). This "change" was the 1987 amendment, which divided CWA criminal violations into two separate categories: knowingly and negligently. Id.; see 33 U.S.C. § 1319(c)(1)(A); 33 U.S.C. § 1319(c)(2)(A).

Although the legislative history concerning "negligence" is limited, it is not absent. The only recorded commentary suggests that Congress intended to create a simple negligence standard. James Oesterle, The Clean Water Act Handbook 248 n.184 (Mark A. Ryan, ed., Am. Bar Assoc. 2003) (1994) (during a debate regarding criminal penalties, Representative Harsha stated that adding criminal penalties for violations would be unnecessary because "we can already charge a man for simple negligence, we can charge him with a criminal violation under this bill. . . ." 118 Cong. Rec. 10, 644 (1972)). This statement adds further credence to the district court's inference that Congress, in amending the CWA, intended to impose a standard of ordinary negligence.

In 2003, the United States Senate Committee on Environment and Public Works[5] met during an oversight hearing to discuss the negligence provision for criminal violations under the CWA. Oversight of the Clean Water Act: Hearing Before the Subcomm. On Fisheries, Wildlife, and Water of the Senate Comm. On Env't and Pub. Works, 108th Cong. (2003), available at http://epw.senate.gov/hearing_statements.cfm?id=212587 [hereinafter "Oversight Hearing"]. During discussions, several committee members recognized that intentional or reckless conduct is not required for a conviction under 33 U.S.C. § 1319(c)(1)(A)'s current language. Id. (statement of Sen. James M. Inhofe, Chariman, Comm. on Env't and Pub. Works). The committee further recognized that the CWA "provides criminal penalties, including fines and imprisonment, for simple negligence." Id. The committee even went so far as to suggest that a proposed amendment to the CWA might be desirable for the purpose of implementing a negligence standard higher than that of ordinary negligence.[6] Id. Although these discussions do not bind this Court, they do offer insight into how "negligently" as used in section 1319(c)(1)(A) is viewed by those in Congress charged with the CWA's supervision and most acquainted with the CWA's evolution.

Based on the plain language of the statute, as well as the limited legislative history, it can reasonably be inferred that Congress intended to impose an ordinary

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[5] That Committee is charged with supervising the implementation and effectiveness of the CWA, as well as discussing potential improvements to the CWA.
[6] While suggested, such proposal to date has yet to be formally introduced.

negligence standard under section 1319(c)(1)(A). Therefore, the district court imposed the proper standard in its jury instruction. This Court should affirm.

B. Imposing An Ordinary Negligence Standard For Misdemeanor Violations Of The Clean Water Act Does Not Violate Due Process.

Imposing an ordinary negligence standard for Millstone's negligent violation of the CWA did not violate due process. "Negligent" conduct is not "innocent" conduct. Negligence occurs when a person fails to "use such care as a reasonably prudent and careful person would under similar circumstances." Hanousek, 176 F.3d at 1120. 33 U.S.C. § 1319(c)(1)(A) does not dispense with mens rea completely, rather "negligence" is the mental state required for a criminal offense under the statute. See Liparota, 471 U.S. at 424 n.5 (1985) (classifying negligence as a criminal mental state).

Long ago, this Court overruled the objection that punishing a person for violating the law, when they were ignorant of the law, was "an absence of due process of law." United States v. Balint, 258 U.S. 250, 252 (1922). At common law, "scienter was a necessary element in the indictment and proof of every crime." Balint, 258 U.S. at 251. But in "limited circumstances," Congress imposes strict criminal liability for certain statutory violations, regardless of whether the violator knew his conduct was illegal. Staples v. United States, 511 U.S. 600, 606-07 (1995) (quoting United States v. U.S. Gypsum Co., 438 U.S. 422, 437 (1978)). The term "strict liability," however, is a "misnomer": the mens rea requirement is eliminated so offenders are not required to know the facts making them liable. Id. at 607 n.3.

These limited circumstances are commonly referred to as "public-welfare" statutes. Morissette v. United States, 342 U.S. 246, 255 (1952).

1. The Fourteenth Circuit Properly Classified The Clean Water Act As A "Public-Welfare Statute."

The Clean Water Act is a public-welfare statute: it regulates pollution of the Nation's waters in protection of public health, safety, and welfare. Congress enacts public-welfare statutes in response to societal dangers. Id. at 254. "[A] public-welfare statute may subject a person to criminal liability for his or her ordinary negligence without violating due process." Hanousek, 176 F.3d at 1121.

When a person violates a public-welfare statute, they commit a "public-welfare offense." Morissette, 342 U.S. at 255. No court has ever "undertaken to delineate a precise line or set forth comprehensive criteria to distinguish those crimes that require a mental element from [public-welfare offenses]." Id. at 260. However, public-welfare statutes often share certain characteristics–they regulate "obnoxious waste materials"; escalate the duties of those in control of activities affecting "public health, safety, or welfare"; and repudiate any mens rea, "consist[ing] only of forbidden acts or omissions." Staples, 511 U.S. at 628-29 (Stevens, J., dissenting). They "are [often] in the nature of neglect where the law requires care." Morissette, 342 U.S at 255.

Public-welfare offenses involve conduct that a reasonable person: (1) "should know is subject to stringent public regulation," and (2) "may seriously threaten the community's health or safety." Liparota, 471 U.S. at 433. So long as a defendant

knows that he is dealing with hazardous materials, "'in responsible relation to a public danger[,]' he should be alerted to the probability of strict regulation." Staples, 511 U.S. at 607 (quoting Dotterwich, 320 U.S. at 281).

"The Public-Welfare Offense doctrine modifies the traditional level of intent required at both common law and under conventional methods of statutory construction." Brigid Harrington, A Proposed Narrowing of the Clean Water Act's Criminal Negligence Provisions: It's Only Human?, 32 B.C. Env. Affs. L. Rev. 643, 646-47. Public-welfare offenses "can be premised upon ordinary negligence, or in some instances, even strict liability." Haxforth v. State, 786 P.2d 580, 581-82 (Idaho 1990) (citing Holdridge v. United States, 282 F.2d 302 (8th Cir. 1960)). Abandoning mens rea "is suited to situations where the need for social order outweighs the need for individualized punishment." Hazelwood, 946 P.2d at 881 (citing Francis Bowes Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55, 72, 79-82 (1933)).

The Fourteenth Circuit properly classified the CWA as a "public-welfare statute." (R. 12.) 33 U.S.C. §§ 1311 and 1319(c)(1)(A), the statutes under which Millstone was convicted, regulate "obnoxious waste materials." (R. 10); see United States v. Int'l Minerals and Chem. Corp., 402 U.S. 558, 565 (1971) (holding that where "dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is . . . dealing with them must be presumed to be aware of the regulation"). Although Sekuritek did not handle chemicals directly, as Sekuritek's CEO and

president, Millstone knew that: (1) Bigle Chemical Company operated in a highly regulated industry, and (2) in the event of an accident, Bigle's toxic chemicals would "seriously threaten the community's health and safety." (R. 4, 5); see Morissette, 342 U.S. at 255. One of the sole reasons that Bigle hired Sekuritek was because in the past, Bigle security breaches had caused chemical spills. (R. 5.) Nevertheless, Millstone risked sacrificing safety in order to secure the Bigle Chemical Company contract.

The CWA is an environmental regulation intended to "maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), indicating that the "statute is evidently upon achievement of some social betterment rather than punishment of the crimes as in cases of mala in se." Balint, 258 U.S. at 252. Therefore, because 33 U.S.C. §§ 1311 and 1319(c)(1)(A) regulate "obnoxious waste materials"; legislate activities affecting public health, safety, and welfare; and escalate Millstone's duties as Sekuritek's responsible corporate officer, the statues are public-welfare statues.

The only federal circuit precedent suggesting that the CWA is not a public-welfare statute is United States v. Ahmad. 101 F.3d 386 (5th Cir. 1996). This precedent is misleading. In Ahmad, the Fifth Circuit held that knowingly violating the CWA was not a public-welfare offense and specific intent was required. Id. at 391 (applying the felony "knowingly" provision of 33 U.S.C. § 1319(c)(2)(a) not the misdemeanor "negligently" provision of 33 U.S.C. 1319(c)(1)(A)). However, a federal circuit's prior decision remains authority until overruled by the circuit sitting en

banc or an inconsistent decision from this Court. Cent. Pines Land Co. v. United States, 274 F.3d 881, 893 (5th Cir. 2001).

Ahmad is not even controlling in the Fifth Circuit. Prior to Ahmad, the Fifth Circuit held that because the CWA "penalizes negligent as well as willful violations, . . . there is no constitutional infirmity in not requiring proof of specific intent." United States v. Baytank (Houston), Inc., 934 F.2d 599, 618-19 (5th Cir. 1991) (citing Balint, 258 U.S. at 252) (interpreting the CWA prior to the 1987 amendment). Although Baytank interpreted the pre-amended statute, the Fifth Circuit sitting en banc has neither overruled that decision nor interpreted 33 U.S.C. § 1319(c)(1)(A) since the 1987 amendment. But in Baytank, the Fifth Circuit relied on Balint (the landmark decision establishing the public-welfare doctrine) suggesting that CWA violations do fall within the public-welfare doctrine. Baytank, 934 F.2d at 618-19 (citing Balint, 258 U.S. at 252). Accordingly, not only is Ahmad inapplicable because it regards a separate statutory provision than the one before this Court today, but the controlling view of the Fifth Circuit is that the CWA finds its roots in the public-welfare doctrine. Id.

The CWA satisfies all of the qualifications imposed by this Court for public-welfare statute classification. Like other statutes operating in accord with the public-welfare doctrine, it was intentionally created to protect the public from the negligence of people like Millstone. It is even more stringent than strict-liability public-welfare statutes, because it requires "negligent" conduct for criminal liability. Accordingly, if a strict liability public-welfare staute is constitutional, then

imposing an ordinary negligence standard (a standard higher than strict-liability) should not be deemed to violate due process.

2. The Penalty Provision Of The Clean Water Act Does Not Disqualify It As A Public-Welfare Statute.

Suggesting that the CWA is not a public-welfare statute strictly based on its criminal penalties is incorrect. "Light penalties are not the sine qua non of [public-welfare] offenses." People v. Martin, 211 Cal. App. 3d 699, 714 (Cal. App. 1989). This Court has never held, and "refrained from holding[,] that public-welfare offenses may not be punished as felonies." See United States v. Kelley Technical Coatings, Inc., 157 F.3d 432, 439 (6th Cir. 1998) (citing Staples, 511 U.S. at 613).

On multiple occasions, this Court has declared that violating laws with less-than-light sentences are public-welfare offenses, despite harsh penalties:

- Possessing an unregistered weapon (punishable by a $10,000 fine and/or ten years in prison). United States v. Freed, 401 U.S. 601 (1971).
- Misbranding drugs (punishable by a $1,000 fine and/or one year in prison for the first offense, and a $10,000 fine and three years in prison for subsequent offenses). Dotterwich, 320 U.S. at 277.
- Selling narcotics, even if ignorant of the nature of the drug (punishable by five years in prison). Balint, 258 U.S. at 254.

Despite its criminal penalties, at least four other federal circuits have "concluded that the CWA involves public-welfare offenses." Wilson, 133 F.3d at 264; see United States v. Weitzenhoff, 35 F.3d 1275, 1286 (9th Cir. 1993) ("[T]he

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"); Hopkins, 53 F.3d 533, 540 (2d Cir. 1995) (concluding that based on the legislative history, "Congress meant that section [1319(c)] would be violated if the defendant's acts were proscribed, even if [a] defendant [were] not aware of the proscription."); Sinskey, 119 F.3d at 712 ("knowingly" refers to the act itself and not the illegal nature of the act); see also Hanousek, 176 F.3d at 1122; Ortiz, 427 F.3d at 1283.

Following the other circuits, the Fourteenth Circuit correctly concluded that the CWA is a public-welfare statute. The general consensus among the federal circuits–the CWA is in fact a public-welfare statute–evidences that the Act's criminal penalties should not preclude application of such a classification. Especially since this Court has never held that a light-penalty is the absolute, indispensible element characterizing a public-welfare statute.

Staples does not affect this conclusion. In Staples, the Court "narrow[ly]" held that the National Firearms Act was not a public-welfare offense because "[g]uns in general are not 'deleterious devices or products or obnoxious waste materials.'" 511 U.S. at 610, 619 (quoting Int'l Minerals and Chem. Corp., 402 U.S. at 565). The Court astutely observed that public-welfare statutes typically "regulate potentially harmful or injurious items." Id. at 607. Further, Staples "took pains to contrast the gun laws to other regulatory regimes, specifically those regulations [governing] the handling of 'obnoxious waste materials.'" Weitzenhoff,

35 F.3d at 1285 (citing Staples, 511 U.S. at 607). If anything, Staples "confirmed the continued vitality of those statutes which regulate public welfare offenses." Kelley Technical Coatings, Inc., 157 F.3d at 439.

For three days, in violation of 33 U.S.C. § 1311, Sekuritek discharged harmful, injurious, and obnoxious pollutants into the Windy River and ravaged the New Tejas community. Consequently, Millstone, as the responsible corporate officer, is subject to a minimum fine of $2,500 for each day of the violation and no more than a year in prison. 33 U.S.C. § 1319(c)(1). The penalty, even with the maximum fine of $25,000 per day, is not so egregious as to disqualify it as a public-welfare statute. Especially in light of the penalties accompanying other public-welfare statutes.

Ahmad does not render a contrary conclusion. In Ahmad, the Fifth Circuit held that "[s]erious felonies . . . should not fall within the [public-welfare offense] exception 'absent a clear statement from Congress that mens rea is not required.'" Ahmad, 101 F.3d at 391.[7] This Court is not dealing with a "serious felony"– Millstone was convicted of a misdemeanor under 33 U.S.C. § 1319(c)(1)(A). Although subsequent-offenses of 33 U.S.C. § 1319(c)(1)(A) are punishable as felonies, the statute is intended to deter harmful conduct. Negligence is avoidable conduct. If a person continues to act negligently after a first conviction, they are acting with actual knowledge of potential criminal liability. As a matter of

[7] Ahmad was interpreting the "knowingly" felony provision of the CWA, 33 U.S.C. § 1319(c)(2)(A). 101 F.3d at 391. A statute can be a public-welfare statute in some instances, but require a different mens rea in others. Wilson, 133 F.3d 251 at 264.

deterrence, because negligence is avoidable conduct, increasing penalties for repeat offenders does not violate due process.

Millstone was negligent in his capacity as Sekuritek's CEO; the CWA's moderate criminal penalties do not outweigh the extreme ecologic and economic harm caused by the spill. This Court should affirm the Fourteenth Circuit and classify 33 U.S.C. § 1319(c)(1)(A) as a public-welfare statute.

C. Imposing A Heightened Standard Of Negligence Under The Clean Water Act Will Potentially Permit Negligent Corporate Conduct Without Any Corporate Responsibility.

If this Court finds that a heightened standard of negligence is required for conviction under 33 U.S.C. § 1319(c)(1)(A), this Court will essentially sanction reckless corporate behavior in utter disregard of Congressional efforts to deter polluting the Nation's waters. Congress passed the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In passing the Act, Congress did not intend to sanction reckless corporate disregard at the expense of the public's health, safety, and welfare. Millstone is urging this Court to tip the scales in favor of corporate greed, despite the unadorned standard of liability present in the act: "negligently." 33 U.S.C. § 1319(c)(1)(A). This Court should prevent–not promote–the negligent and reckless behavior of corporate officers like Millstone, and affirm the Fourteenth Circuit.

Imposing an ordinary negligence standard ensures that when corporate polluters inflict large-scale destruction, the damage will be remedied, affected areas will recover, and the community will be restored. It essentially guarantees that

those responsible for polluting the Nation's waters with highly destructive pollutants will suffer appropriate consequences for their injurious actions. See Oversight Hearing (statement of Prof. Robin Greenwald). This standard also avoids corporate resistance from offenders who insist that their spills, although accidents, were merely the result of ordinary negligence.[8] Such a standard is not inequitable, because judicial and prosecutorial discretion is available to avoid unjust results.

To avoid unjustly enriching modern industry at the expense of ecological preservation, this Court should classify 33 U.S.C. § 1319(c)(1)(A) as a public-welfare statute. "[T]he policy of the law may, in order to stimulate proper care, require the punishment of the negligent person." Balint, 258 U.S. at 252-253. The CWA governs activities, which if not exercised with proper care, could cause devastating results. The potentially pernicious consequences resulting from a violation of the CWA, as evidenced by the tragic Windy River disaster, support classifying it as a public-welfare statute. Its regulation of "obnoxious" pollutants further implicates the need. See 33 U.S.C. § 1311; Int'l Mineral and Chem. Corp, 402 U.S. at 565.

Millstone's violations represent an instance where "the need for social order outweighs the need for individualized punishment." Hazelwood, 946 P.2d at 881. Classifying the CWA as a public-welfare statute was not in error. Accordingly, imposing an ordinary negligence standard did not violate due process, because

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[8] It should be noted that corporate offenders still may insist that their causal actions did not rise even to the level of simple negligence, and thus they should not be held liable under a simple negligence standard. Nevertheless, the line of demarcation between the bargaining power of prosecutors or victims and that of corporations must be drawn somewhere, and Congress has seen fit to draw it at the point of simple negligence.

"public-welfare statutes may subject a person to criminal liability for his or her ordinary negligence without violating due process." Hanousek, 176 F.3d at 1121. This Court should affirm the Fourteenth Circuit.

III. THE LOWER COURTS' RULING SHOULD BE AFFIRMED BECAUSE MILLSTONE WAS MOTIVATED BY AN IMPROPER PURPSOSE WHEN HE ATTEMPTED TO PERSUADE A WITNESS.

Millstone was properly convicted for violating 18 U.S.C. § 1512(b)(3) ("witness-tampering statute"). He attempted to persuade a witness to withhold information from a government official and was solely motivated by an improper purpose. The plain meaning of the statute reveals that the term "corruptly" focuses on the intent of the persuader, i.e., whether he had an improper purpose in attempting to persuade a witness. Moreover, the legislative history of the statute supports this construction. Accordingly, his conviction should be affirmed.

A. The Second And Eleventh Circuits Have Properly Interpreted "Corruptly Persuades," As Speaking To A Defendant's Purpose.

Although there is a circuit split regarding the interpretation of the term "corruptly persuades," as used in the federal witness tampering statute, this Court should find that it speaks to a defendant's purpose. See 18 U.S.C. § 1512(b)(3). The witness-tampering statute punishes a person for "corruptly persuad[ing]" a witness, if their intent is to "hinder, delay, or prevent communication to a law enforcement officer . . . of information relating to the commission . . . of a federal offense." 18 U.S.C. § 1512(b)(3) (emphasis added). The statute heightens the level of protection

afforded to witnesses under the general obstruction of justice statute, 18 U.S.C. § 1503 (2006) ("general obstruction statute").

Originally enacted in 1982, the witness-tampering statute's purpose was to provide additional protection to witnesses–more protection than they were already granted in the general obstruction statute. United States v. Doss, 630 F.3d 1181, 1186 (9th Cir. 2011). To the chagrin of Congress, the courts did not interpret the pre-amended version of the statute as punishing non-coercive attempts to persuade a witness to give false information. United States v. King, 762 F.2d 232, 238 (2d Cir. 1985). To rectify this faulty interpretation, Congress amended the statute in 1988, adding the language "corruptly persuades" in order to criminalize non-coercive attempts to persuade a witness. Doss, 630 F.3d at 1187.

That added language, "corruptly persuades," has been the subject of a circuit split in the Courts of Appeals. The Eleventh and Second Circuits have defined the phrase as "persuasion for an improper purpose" and "persuasion for the purpose of obstructing justice." United States v. Shotts, 145 F.3d 1289, 1300 (11th Cir. 1998); United States v. Thompson, 76 F.3d 442, 452 (2d Cir. 1996). These circuits focused on why the defendant attempted to persuade the witness—if he did so with an improper purpose, such as hindering an investigation–rather than what he asked the witness to do. United States v. Cioffi, 493 F.2d 1111, 1119 (2d Cir. 1974). These circuits are correct in focusing on the purpose of the persuader.

Contrarily, the Third and Ninth Circuits have determined that the phrase "corruptly persuades" does not speak to the purpose of the persuader. United

States v. Farrell, 126 F.3d 484, 490 (3d Cir. 1997); Doss, 630 F.3d at 1189. These circuits require something more than "persuasion for an improper purpose," without specifically identifying what "more" is required. Id. They focus on what the defendant asked the witness to do. Id. If what the defendant asked the witness to do was corrupt, such as to commit perjury, the statute is violated; if not, the statute is not violated. Id. These circuits are incorrect in focusing, not on the purpose of the persuader, but on the underlying act of the witness.

B. The Statute's Plain Language Reveals That The Phrase "Corruptly Persuades" Speaks To Whether A Defendant's Purpose Was Improper.

Millstone violated the statute when he attempted to persuade Reynolds because he did so with the improper purposes of hindering communication to government officials and protecting his liberty. A defendant attempts to "corruptly persuade" a witness when his attempt at persuasion is "motivated by an improper purpose." United States v. Gotti, 459 F.3d 296, 343 (2d Cir. 2006) (citing Thompson, 76 F.3d at 452).

The Gotti court addressed the precise issue this Court now faces—can a defendant "corruptly persuade" a potential witness to withhold information by encouraging that witness to invoke his Fifth Amendment right? Gotti, 459 F.3d at 343. In analyzing the witness-tampering statute, the Second Circuit held that attempting to persuade a witness to invoke their Fifth Amendment right not to testify could be a form of "corrupt persuasion" if the persuasion was done for an "improper purpose." Id. That court upheld the defendant's conviction, holding that

there was sufficient evidence to conclude that the defendant's persuasion of the witness was based on an improper purpose—to prevent the witness from implicating the defendant. Id.

The Gotti court largely based its interpretation of "corruptly," meaning "motivated by an improper purpose," on the Second Circuit's reasoning in Thompson. Id. In Thompson, the court was asked to strike down the witness-tampering statute as overly broad and unconstitutionally vague. 76 F.3d at 452. However, the court refused to do so because the statute was limited by the term "corruptly." Id. The court defined the term "corruptly" as "motivated by an improper purpose" based upon the term having the same meaning in the general obstruction of justice statute, 18 U.S.C. § 1503. Id. (citing United States v. Fasolino, 586 F.2d 939, 941 (2d. Cir. 1978); United States v. Rasheed, 663 F.2d 843, 852 (9th Cir. 1981)). In refusing to classify the statute as overly broad, the court reasoned that because the term "corruptly" meant "motivated by an improper purpose," the statute only prohibited persuasion motivated by such a purpose. Id. And the court did not find the statute to be unconstitutionally vague because defendants were aware that only persuasion with an improper purpose could be punished. Id.

In a separate case in which a defendant challenged the constitutionality of 18 U.S.C. § 1512(b), the Eleventh Circuit agreed with the Second Circuit that the statute was neither overbroad nor vague. Shotts, 145 F.3d at 1301. That court echoed the sentiments of the Thompson court, finding "corruptly" to mean with "an

improper purpose." Id. at 1300. With respect to the relationship between the general obstruction statute and the witness-tampering statute, the court stated "[i]t is reasonable to attribute to the 'corruptly persuade' language in [s]ection 1512(b), the same well-established meaning already attributed by the courts to the comparable language in [s]ection 1503(a), i.e., motivated by an improper purpose." Id.

With respect to the instant case, this Court should follow Gotti and find that a defendant violates the federal witness tampering statute when he persuades a witness with an improper purpose. Millstone urged Reynolds to remain silent because Millstone "was not going to jail." (R. 9.) This constitutes an improper purpose. From the context of his remarks to Reynolds, Millstone's only concern was to hinder communication with government officials in order to protect his own liberty. See (R. 9) (wherein Millstone stated, "[t]he 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 was worried that if Reynolds talked to federal officials concerning the Windy River disaster, Millstone's liberty would be jeopardized.

This is the exact type of persuasion that the federal witness tampering statute forbids—persuasion with the improper purpose of hindering communication to government officials. The fact that Millstone was attempting to hinder communication in order to protect his own liberty only makes matters worse.

Any argument that interpreting "corruptly" to mean "motivated by an improper purpose" renders the term superfluous is misplaced. This argument finds

its roots in the Third Circuit's opinion in Farrell. 126 F.3d at 484. That court disapproved of interpreting "corruptly" in the witness-tampering statute the same way the term was interpreted in the general obstruction statute—as "motivated by an improper purpose." Id. at 490. The Farrell court reasoned that "corruptly" provides the intent element of 18 U.S.C. § 1503, which prohibits "corruptly . . . influenc[ing], obstruct[ing], or imped[ing] . . . the due administration of justice . . . ." Id.; 18 U.S.C. § 1503 (2000). Further, that court read the term "knowingly," along with the specific intents expressed in subsections (1) through (3) of the statute, as providing the intent element in 18 U.S.C. § 1512(b). Farrell, 126 F. 3d at 490. Therefore, the Farrell court argued that because the intent element for section 1512(b) was elsewhere provided for in the statute, construing "corruptly" as providing the intent element of the statute "render[ed] the term surplusage . . . ." Id.

This argument is misguided. As the Shotts court noted, in finding this argument unpersuasive, the specific intents forbidden by the witness-tampering statute (preventing or hindering justice) are only forbidden if they are done with an improper, or corrupt, purpose. Shotts, 145 F.3d at 1300-01. The statute does not punish preventing or hindering justice unless those actions are done with an improper purpose, such as staying out of jail. Id.; see Gotti, 459 F.3d at 343 (noting that persuading a witness to invoke his Fifth Amendment right in order to keep from being implicated in a crime is an improper purpose).

The plain language of the witness-tampering statute reveals that the term "corruptly" means "motivated by an improper purpose"; further, such interpretation does not render the term superfluous. Accordingly, Millstone acted "corruptly" when he encouraged Reynolds to invoke his Fifth Amendment right. He was motivated by the improper purpose of avoiding criminal liability. See Gotti, 459 F.3d at 343. In sum, Millstone violated the statute by attempting to persuade a witness in order to hinder the administration of justice and protect his liberty.

C. What Millstone Specifically Asked Of Reynolds Is Irrelevant As Long As His Purpose Was Improper.

The "what" does not matter: only the "why" matters. Whether Millstone violated 18 U.S.C. § 1512(b) turns upon why he attempted to persuade the witness, i.e., did he have an improper purpose in persuading Reynolds. What a defendant attempts to persuade a witness to do (whether it be lie, remain silent for money, or simply to invoke his Fifth Amendment right) is irrelevant. See, e.g., United States v. Khatami, 280 F.3d 907 (9th Cir. 2002) (defendant was convicted after he attempted to persuade a witness to lie in order to protect his liberty); Gotti, 459 F.3d 296 (defendant was convicted after he attempted to persuade a witness to invoke the witness's Fifth Amendment right in order to protect his liberty); Cole v. United States, 329 F.2d 437 (9th Cir. 1964) (same).

In Cole, the Ninth Circuit upheld the conviction of a defendant who attempted to persuade a witness to invoke his Fifth Amendment right. 329 F.2d 437. The defendant argued that even if his purpose was corrupt, he could not be prosecuted for persuading a witness to invoke a constitutional right. Id. The court

disagreed. Although it acknowledged the importance of the Fifth Amendment right at issue, the court did "not think it wise to render a valuable, proper[,] and decent privilege a carte blanche license to be utilized" in a manner to hinder "the due administration of justice." Id. The court concluded that "one who . . . advises[,] with corrupt motive[,] the witness to take [the Fifth], can and does himself obstruct or influence the due administration of justice." Id. at 443 (emphasis added).

In a separate case dealing with the same issue, the Second Circuit reiterated Cole's holding. United States v. Cioffi, 493 F.2d 1111 (2d Cir. 1974). That court noted that "the focus is on the intent or motive of the [defendant]." Id. at 1119. The court expounded, stating that "[t]he lawful behavior of the person invoking the Amendment cannot be used to protect the criminal behavior of the inducer." Id.; see also Thompson, 76 F.3d at 452 (reasoning that the constitutionally protected right to refrain from testifying under the Fifth Amendment belongs to the witness: the Constitution does not protect asking a witness to invoke that right).

These cases all recognize that the witness-tampering statute's use of the term "corruptly" speaks to the defendant's purpose in attempting to persuade the witness. The witness's action is irrelevant. Granted, every witness may take advantage of the Fifth Amendment's protections, but no defendant has a constitutional right to persuade a witness to do so with the purpose of protecting his own liberty. Further, the determination of whether the defendant acted with an improper, corrupt purpose is a question for the jury. That question has been answered in the affirmative in the present case.

Any argument that this Court's decision in Arthur Andersen LLP v. United States, 544 U.S. 696 (2005), advances the view that the term "corruptly" as used in the witness-tampering statute does not speak to the defendant's purpose is incorrect; to the contrary, Arthur Andersen suggests just the opposite.

In Arthur Andersen, this Court held that to violate the witness-tampering statute, the defendant must be "conscious of wrongdoing." 544 U.S. at 706. In reviewing the conviction of an accounting firm for destroying documents, this Court construed the term "knowingly" to mean "consciousness" and the term "corruptly" to mean "wrongfully." Id. at 705-06. Together then, this Court concluded that a defendant must be "conscious of wrongdoing" to violate the statute. Id. As an example of what would not suffice as "conscious of wrongdoing," this Court provided the scenario of a mother suggesting that her son invoke his Fifth Amendment right to refrain from self-incrimination. Id. at 703-04.

As the Second Circuit noted in United States v. Kaplan, Arthur Andersen's requirement that a defendant be "conscious of wrongdoing" is satisfied if the defendant is conscious of his improper purpose. 490 F.3d 110, 125 (2d Cir. 2007). If a defendant is conscious of the fact that his persuasion, if successful, will hinder the administration of justice and protect his liberty, then he is conscious of an improper purpose, and thus conscious of his wrongdoing. Id. In the instant action, the evidence is sufficient to show that the jury could reasonably believe that the defendant was conscious of the fact that if Reynolds did not talk to government officials, the investigation would stall and he would not be implicated.

Moreover, the hypothetical situation posed in Arthur Andersen is not applicable here. That example involved the scenario of a mother suggesting that her son invoke his Fifth Amendment right to refrain from self-incrimination. Arthur Andersen, 544 U.S. at 703-04. There, however, the mother's liberty would not be at stake. The Court made no mention of the mother being involved in the son's criminal activity or possibly being implicated by her son's testimony. Contrarily, in the instant case, this Court is not dealing with a martyred mother trying to save her son. Millstone's only reason for encouraging Reynolds to invoke his Fifth Amendment right was self-serving–he worried that he would be implicated and he wanted to protect his liberty.

Millstone violated 18 U.S.C. § 1512(b) when he, with an improper purpose, attempted to persuade a witness. That he tried to do so by asking the witness to invoke his right to remain silent is of no importance.

D. The Legislative History Of The Statute Supports Defining "Corruptly Persuades" As "Motivated By An Improper Purpose."

In the alternative only, if this Court finds the plain language of the witness tampering statute ambiguous, the legislative history of the statute still supports interpreting the term "corruptly" as "motivated by an improper purpose."

1. Congress's Statements Support Defining "Corruptly Persuades" As "Motivated By An Improper Purpose."

After the witness-tampering statute was originally enacted in 1982, it was interpreted as to not punish non-coercive attempts to persuade a witness. King, 762 F.2d at 238. In response, Congress amended the statute in 1988, adding the

language "corruptly persuades" in order to criminalize non-coercive attempts to persuade a witness. Doss, 630 F.3d at 1187. One of the drafters of the 1988 amendment to the statute was now-Vice President Joe Biden, who stated that the intention of Congress in adding the phrase "corruptly persuades" was "merely to include in section 1512 the same protection of witnesses from noncoercive influence that was (and is) found in section 1503." Shotts, 145 F.3d at 1300. As the Shotts court noted, "[t]he 'motivated by an improper purpose' definition of 'corrupt' in Section 1512(b), then, is correctly informed by Section 1503's long-standing interpretation." Id.

2. The Original Enactment Of The Statute Supports Interpreting "Corruptly" To Mean "Motivated By An Improper Purpose."

An analysis of why the witness-tampering statute was originally enacted sheds additional light on the legislative history of the statute. The statute was enacted to expand the protection of witnesses, and thus the administration of justice, already existent in the general obstruction of justice statute, 18 U.S.C. § 1503. Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 4, 96 Stat 1248. (noting that the statute provides additional support to witnesses in federal cases) (emphasis added). Analyzing the original purpose of the statute affirms that the lower courts, in interpreting the term "corruptly," were correct in focusing on Millstone's purpose behind attempting to persuade the witness—that is to say those courts correctly looked at why Millstone attempted to persuade the witness.

Prior to enacting the witness-tampering statute, 18 U.S.C. §1512, Congress enacted the general obstruction of justice statute, 18 U.S.C. § 1503. In an effort to

protect witnesses, that early statute looked to the intent/motive of the persuader to determine the meaning of "corrupt." Cole, 329 F.2d at 441; Cioffi, 493 F.2d at 1119. Because the phrase "corruptly persuades" was added to the witness-tampering statute solely to comport with the general obstruction statute, it follows that it too should define "corruptly" by looking at the intent/motive of the persuader.

3. When It Enacted The Statute, Congress Was Aware That Courts Were Interpreting "Corruptly" To Mean "Motivated By An Improper Purpose."

When interpreting statutes, federal courts generally "assume Congress knows the law and legislates in light of federal court precedent." Jurado-Gutierrez v. Greene, 190 F.3d 1135, 1146 (10th Cir. 1999). Thus, when Congress added the "corruptly persuades" language to 18 U.S.C. § 1512(b), it was presumably aware that the term "corruptly" had been held to mean "motivated by an improper purpose" in 18 U.S.C. § 1503. Fasolino, 586 F.2d at 941 (interpreting "corruptly" to mean "motivated by an improper purpose" in 18 U.S.C. § 1503); Rasheed, 663 F.2d at 852 (same).

As noted in the above part, Congress enacted 18 U.S.C. § 1512(b) in an effort to expand the protection of witnesses already existent in 18 U.S.C. § 1503. Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 4, 96 Stat 1248. Because Congress was aware of the interpretation of "corruptly" in 18 U.S.C. § 1503 and made no effort to define it differently when inserting it into 18 U.S.C. § 1512(b), the reasonable conclusion is that Congress approved of the term's use and wished for it to remain the same.

4. Congress Explicitly Placed Some Actions Beyond The Reach Of The Statute, But Chose Not To Do So In Regard To The Instant Issue.

When enacting 18 U.S.C. § 1512(b), Congress did not intend to punish all attempts at witness persuasion. For example, 18 U.S.C. § 1515(c) expressly reflects Congress's intent to exclude certain communications from 18 U.S.C. § 1512. Farrell, 126 F.3d at 488 (quoting 18 U.S.C. § 1515(c)) (The statute does "not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding.") Put differently, Congress elected to place the attorney-client relationship above the reach of 18 U.S.C. § 1512(b).

As noted in the above part, Congress is presumed to know the law according to federal court precedent when it legislates. Greene, 190 F.3d at 1146. Accordingly, it is presumed that Congress knew that persuading a witness to invoke their Fifth Amendment right not to testify was punishable under the general obstruction of justice statute, 18 U.S.C. § 1503. See Cole, 329 F.2d at 441; Cioffi, 493 F.2d at 1119. Because Congress enacted the witness-tampering statute, 18 U.S.C. § 1512, to expand the protection already provided in the general statute, 18 U.S.C. § 1503, it necessarily follows that Congress wished for 18 U.S.C. § 1512 to also punish those who attempt to persuade witnesses to invoke their Fifth Amendment right. If Congress wished otherwise, it would have made an exception for the Fifth Amendment right, as it did with the attorney-client privilege.

To the extent that at least one court has found that the rule of lenity tips the balance in favor of the defendant, that ruling is incorrect. See Farrell, 126 F.3d at 489. The rule of lenity suggests construing the statute in a manner that resolves the issue in the defendant's favor when the meaning of the statute cannot be determined through its plain language or legislative history. United States v. Pollen, 978 F.2d 78, 85 (3d Cir. 1992) (emphasis added).

The rule of lenity has no place in the instant action for two reasons. First, the plain language of the statute and the legislative history are to be examined before the rule of lenity may apply. United States v. Boucha, 236 F.3d 768, 774 (6th Cir. 2001). Here, both require defining the term "corruptly" as "motivated by an improper purpose"; thus, the need for the rule of lenity never arises.

Second, even if this Court determines that ambiguity does exist after looking to the text of the statute and its legislative history, that ambiguity does not rise to the level that warrants the application of the rule of lenity. See Muscarello, 524 U.S. at 138 (where this Court noted that "[t]he simple existence of some statutory ambiguity, however, is not sufficient to warrant application of [the] rule [of lenity], for most statutes are ambiguous to some degree"). This Court expounded, explaining that the rule of lenity is a last resort, to be used only if "after seizing everything from which aid can be derived," a court can only guess at Congress's purpose. Id. There is no need for a "last resort" here. The text of the statute and its legislative history prove as much.

An analysis of the plain language of the witness-tampering statute reveals that the term "corruptly" means "motivated by an improper purpose." The legislative history of the statute supports this conclusion. Millstone violated the statute when he attempted to persuade Reynolds with the improper purposes of hindering the investigation and protecting his liberty. Accordingly, the Fourteenth Circuit should be affirmed.

CONCLUSION

For the foregoing reasons, this Court should AFFIRM the decision of the Fourteenth Circuit.

Respectfully submitted,

/s/ #31
Team # 31

APPENDIX "A"
The Clean Water Act

33 U.S.C. § 1319(c)(1)

(c) Criminal penalties

(1) Negligent violations

Any person who—

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

(B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

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