No. 00-1867

In the Supreme Court of the United States

JAMES MING HONG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was properly convicted as a "responsible corporate officer" for misdemeanor violations of the Clean Water Act, see 33 U.S.C. 1319(c)(6), where the evidence demonstrated that he controlled the company, exercised the powers of a corporate officer or director even though he avoided being formally identified as such, and was personally involved in the actions that caused the violations for which he was convicted.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 242 F.3d 528. The opinion of the district court (Pet. App. 14a-34a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2001. The petition for a writ of certiorari was filed on June 5, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 2 of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 860, as amended, Clean Water Act of 1977 (Clean Water Act or CWA), Pub. L. No. 95-217, § 67(c)(2), 91 Stat. 1606, 33 U.S.C. 1319(c), authorizes criminal penalties

against any person who violates, *inter alia*, any requirement imposed in a pretreatment program approved under 33 U.S.C. 1342(a)(3) or (b)(8). For negligent violations, the Clean Water Act provides for punishment by a fine of not less than $2500 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). The CWA generally defines the term "person" to include "an individual, corporation, partnership, association, State, municipality, or political subdivision of a State, or any interstate body." 33 U.S.C. 1362(5). The CWA further provides that for purposes of the criminal penalty provisions of Section 1319(c), "the term 'person' means, in addition to the definition contained in section 1362(5) of [Title 33], any responsible corporate officer." 33 U.S.C. 1319(c)(6).

2. In 1993, petitioner acquired Environmental Restoration Company, Inc. (ERC), a wastewater treatment business located in Richmond, Virginia. ERC received, stored, treated, and disposed of petroleum-contaminated industrial wastewater. ERC was later reorganized into several corporations that successively took over ERC's business; the last such corporation was Avion Environmental Group, Inc. (Avion), which was created in 1995. Petitioner shortly thereafter moved Avion to a new location on Stockton Street that lacked a water treatment system. Pet. App. 3a-4a, 15a.

Petitioner and Robert Kirk, Avion's general manager, traveled to Indiana to investigate the possible purchase of a carbon-filter wastewater treatment system manufactured by No-Char, Inc. No-Char officials told petitioner and Kirk that the treatment system was intended for use only as the final stage of the wastewater treatment process and was not designed for use with completely untreated wastewater. Petitioner was

also informed that subsequent purchases of additional filtration media for the treatment system would be needed to permit continued operation, and that buying the additional media was the principal expense of running the treatment system. Avion nevertheless used the system as the sole means of treating wastewater and did not purchase additional filtration media. C.A. App. 335-336; Pet. App. 4a.

After the company moved to Stockton Street in November 1995, petitioner expressed an interest in buying a stand-alone treatment unit. Petitioner was informed that the system he intended to purchase would be less effective when used without an oil-water separator to reduce contamination levels before treatment in the filter unit. Petitioner nevertheless ordered the system without an oil-water separator, and he put no separator in place. On November 15, 1995, the City of Richmond issued Avion an industrial user permit authorizing and regulating Avion's discharge of treated wastewater into Richmond's wastewater system. In March 1996, Avion received an amended permit that governed its discharges during the period of the offenses involved in this case. The permit mandated proper operation and maintenance of the filter system, and it required that all wastewater transported to Avion be pretreated and discharged through that system. The permit also limited BTEX (benzene, toluene, ethyl benzene, and xylenes) concentrations in Avion's discharges to 2.13 milligrams per liter. C.A. App. 272-276, 1337, 1405-1406, 1425.

Throughout 1996, petitioner tightly limited the company's expenditures. Notwithstanding Kirk's frequent complaints about the lack of funding, petitioner failed to purchase an oil-water separator for Avion, to buy media for the filter system, to install a working flow meter to

monitor the volume of discharges (which was required by Avion's permit), to transport wastewater offsite for proper treatment and disposal, and even to buy a business license. C.A. App. 136, 141, 187, 307, 679, 720-723, 851-853.

With no preliminary treatment by an oil-water separator, the filter system's media were quickly overwhelmed by the highly contaminated wastewater that was run through the system. C.A. App. 124-125, 421. The filters clogged, and the media jelled and became rubberized. *Id.* at 125, 193, 278. At a company meeting in early 1996, an Avion employee told petitioner that the system was a polishing unit, and that it required an oil-water separator to precede it. *Id.* at 270, 273-274. Although petitioner promised employees that more media would be obtained, none were, and by mid-April 1996 it was common knowledge at Avion that the system did not work. *Id.* at 125-126. In May 1996, the Avion employees began to bypass the treatment system, discharging untreated wastewater directly into the Richmond sewer system. Pet. App. 4a. The parties have stipulated that 12 discharges of untreated wastewater occurred between May 17 and December 10, 1996. C.A. App. 1327. Each of those discharges violated the requirement that the company release only treated wastewater, and the three discharges that were sampled and tested—on May 17, May 23-24, and August 26, 1996—violated the BTEX limitation in Avion's permit (one measured 67 times the limit). *Id.* at 1327, 1450.

3. Avion had no board of directors. C.A. App. 639, 718, 810. Petitioner regularly worked on Avion's premises, talking on the telephone and assigning typing projects to the staff, and he was listed on the company's employee telephone directory; Avion employees knew him as the owner of the company. *Id.* at 114-115, 140-

141, 181-182, 287, 291-292, 488, 671, 835. Petitioner received weekly reports on Avion's revenues and expenses, and he controlled Avion's finances. *Id.* at 204, 220, 289, 847, 858.

Petitioner concealed his control of Avion. Robert Kirk was variously identified as the company's general manager, president, vice-president, and chief operating officer. C.A. App. 883-884, 896. Petitioner instructed longtime Avion employee Ron Thompson not to give petitioner's telephone number to debt collectors, on the ground that petitioner was a "secured lender" rather than the owner of the company. *Id.* at 129. Petitioner directed an accountant to prepare unsigned memos from Avion's nonexistent "Board of Directors." *Id.* at 736-739. In April 1998, after an accountant sent petitioner a tax update regarding Avion, petitioner angrily called the accountant and told her that he was not responsible for Avion, that she was leaving a "paper trail" from him to Avion, and that she should dispose of all of her correspondence to petitioner regarding Avion's taxes. *Id.* at 622-624.

4. Petitioner was charged with 13 misdemeanor violations of the Clean Water Act's "pretreatment" provisions. Count One alleged that petitioner, as a "responsible corporate officer," had negligently failed to properly operate and maintain a filter system used to comply with an industrial user permit issued to Avion by the Richmond Division of Wastewater Treatment. Counts Two though Thirteen charged that on specific dates between May and December 1996, petitioner, as a "responsible corporate officer," had violated Avion's permit by negligently causing discharges of untreated wastewater into the Richmond sewer system. Pet. App. 4a-5a, 23a-24a.

The case was tried before a federal magistrate judge, who found petitioner guilty on all counts. See Pet. App. 5a, 19a. The magistrate judge concluded that petitioner was "not an investor who just simply had a lien on the property. This is an investor in the sense that he took an actual active participation in the operation of these entities. And to that extent, I find that he's liable under the law." *Id.* at 37a. The court also found that petitioner "knew what was happening was wrong, he knew that he had not supplied the filtration system that was required." *Ibid.* At sentencing, the magistrate judge "specifically f[ou]nd that [petitioner] had actual knowledge of the violations and indeed, that he was primarily responsible for the discharges and violations of the permit." C.A. App. 1095-1096. The magistrate judge sentenced petitioner to 36 months' imprisonment and imposed a $1.3 million fine ($100,000 on each of the 13 counts of conviction). Pet. App. 5a, 20a.

5. Petitioner appealed his convictions and sentences to the district court pursuant to 18 U.S.C. 3402. The district court affirmed the magistrate judge's findings of guilt, as well as the three-year term of imprisonment, and the $100,000 fine on Count One. Pet. App. 30a-32a. The district court found, *inter alia*, that petitioner was Avion's "sole proprietor" and its "sole owner and director," and it characterized petitioner's crimes as "flagrant, deliberate environmental misdeeds." *Id.* at 15a, 24a. The court rejected petitioner's argument that "because he was never an officially-designated corporate officer of Avion," he could not be held criminally liable as a responsible corporate officer. *Id.* at 22a. The court explained that "[p]ermitting a defendant who functions as a responsible corporate officer to conceal his actual corporate role through creative manipulation of a company's organizational chart encourages vio-

lators to escape CWA liability through fraud." *Ibid.* The court concluded, however, that the maximum total fine on Counts Two through Thirteen was $300,000, and it remanded the case to the magistrate judge for redetermination of the appropriate fine on those counts. *Id.* at 31a.

6. The court of appeals affirmed petitioner's convictions. Pet. App. 1a-13a. Petitioner contended that he was not subject to criminal liability because he was not a "responsible corporate officer" within the meaning of 33 U.S.C. 1319(c)(6). The court of appeals discussed this Court's decisions in *United States* v. *Dotterweich*, 320 U.S. 277 (1943), and *United States* v. *Park*, 421 U.S. 658 (1975), and it concluded that

> the Government was not required to prove that [petitioner] was a formally designated corporate officer of Avion. The gravamen of liability as a responsible corporate officer is not one's corporate title or lack thereof; rather, the pertinent question is whether [petitioner] bore such a relationship to the corporation that it is appropriate to hold him criminally liable for failing to prevent the charged violations of the CWA.

Pet. App. 7a-8a.

Examining the record of petitioner's trial, the court of appeals held that "[a]mple evidence supports the magistrate judge's finding of guilt." Pet. App. 8a. The court observed that "although [petitioner] went to great lengths to avoid being formally associated with Avion, in fact he substantially controlled corporate operations." *Ibid.* The court noted as well that petitioner "was aware, in advance, that the filtration media would quickly be depleted if used as [petitioner] intended," but that petitioner nevertheless "refused to

authorize payment for additional filtration media" even though he controlled Avion's finances. *Ibid.* Finally, the court explained that petitioner "was regularly present at the Avion site, and discharges occurred openly while [petitioner] was present." *Ibid.*[1]

ARGUMENT

Petitioner contends that he was not a "responsible corporate officer" within the meaning of 33 U.S.C. 1319(c)(6) because (1) he has not been formally "designated as a *de jure* officer of the company" (Pet. 19), and (2) he did not have sufficiently direct personal control over the plant conditions that led to the violations at issue here (Pet. 20-21). The court of appeals correctly rejected those arguments, and its decision does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. a. Although the CWA does not define the term "responsible corporate officer," that term appears to have been drawn from cases beginning with this Court's decision in *United States* v. *Dotterweich*, 320 U.S. 277 (1943). In *Dotterweich*, a corporate president was convicted of misdemeanors after the corporation shipped misbranded and adulterated drugs in interstate commerce. *Id.* at 278. The Court rejected the

[1] Petitioner also contended that the three-year prison term violated the Eighth Amendment prohibition against cruel and unusual argument. The court of appeals rejected that argument (see Pet. App. 8a-10a), and petitioner does not renew it here. Petitioner also does not seek review of the court of appeals' determination (see *id.* at 10a-12a), consistent with the position taken in the United States' cross-appeal, reinstating the fine originally imposed by the magistrate of $100,000 per count for Counts Two through Thirteen.

defendant's contention that criminal liability in that context was limited to the corporation itself. *Id.* at 279-285. Observing that "the only way in which a corporation can act is through the individuals who act on its behalf," *id.* at 281, the Court concluded that the corporation's "offense is committed * * * by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws," *id.* at 284.

The Court further addressed the liability of a responsible corporate officer in *United States* v. *Park*, 421 U.S. 658 (1975). In *Park*, the president of a large national food store chain was convicted of several misdemeanors after the corporation allowed adulteration of food that had traveled in interstate commerce. *Id.* at 660-666. In upholding the misdemeanor convictions, this Court observed that in prior cases under the pertinent statute, "the principle had been recognized that a corporate agent, through whose act, default, or omission the corporation committed a crime, was himself guilty individually of that crime." *Id.* at 670. The Court noted that, as construed in *Dotterweich* and its progeny, "the Act imposes [upon responsible corporate agents and employees] not only a positive duty to seek out and remedy violations when they occur but also, and pri-marily, a duty to implement measures that will insure that violations will not occur." *Id.* at 672. The Court further explained:

> The concept of a "responsible relationship" to, or a "responsible share" in, a violation of the Act indeed imports some measure of blameworthiness; but it is equally clear that the Government establishes a prima facie case when it introduces evidence sufficient to warrant a finding by the trier of the facts that the defendant had, by reason of his position in

> the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so.

Id. at 673-674.

b. Nothing in *Dotterweich* or *Park* suggests that formal designation as a *de jure* officer is a necessary condition for criminal liability as a "responsible corporate officer" under Section 1319(c)(6). "The gravamen of liability as a responsible corporate officer is not one's corporate title or lack thereof; rather, the pertinent question is whether the defendant bore such a relationship to the corporation that it is appropriate to hold him criminally liable for failing to prevent the charged violations of the CWA." Pet. App. 7a-8a; see *id.* at 23a (district court concludes that identification of a responsible corporate officer "looks to an individual's authority and actions, not to an individual's specific title or position on an organizational chart"). A contrary approach would simply reward and encourage the sort of obfuscatory behavior in which petitioner engaged, whereby he exercised essentially plenary control over Avion's operations while assiduously attempting to avoid express association with the company. See *id.* at 22a (district court states that "[p]ermitting a defendant who functions as a responsible corporate officer to conceal his actual corporate role through creative manipulation of a company's organizational chart encourages violators to escape CWA liability through fraud").

c. Petitioner contends (Pet. 12, 21) that the court of appeals' decision conflicts with the decisions in *United States* v. *Brittain*, 931 F.2d 1413 (10th Cir. 1991); *United States* v. *Frezzo Bros., Inc.*, 461 F. Supp. 266 (E. D. Pa. 1978), aff'd, 602 F.2d 1123 (3d Cir. 1979), cert.

denied, 444 U.S. 1074 (1980); and *United States* v. *MacDonald & Watson Waste Oil Co.*, 933 F.2d 35 (1st Cir. 1991). He asserts (Pet. 12) that the courts that decided those cases "have held a defendant liable under the responsible corporate officer provision only when the individual was a *de jure* officer of the offending entity." Petitioner's claim of a circuit conflict is without basis.

None of the cases cited by petitioner even addresses the question whether formal designation as a corporate officer is a necessary prerequisite to criminal liability under 33 U.S.C. 1319(c)(6). In *Brittain*, the defendant was convicted not as a responsible corporate officer, but as an "individual" who had through willful or negligent conduct caused a CWA violation to occur. 931 F.2d at 1419-1420 & n.5. Although the court discussed the "responsible corporate officer" provision, see *id.* at 1419, it expressed no view on the question presented here. In *Frezzo Brothers*, the district court and court of appeals rejected the individual defendants' argument that because the indictment referred to their status as corporate officers, the jury charge should have included similar language. See 461 F. Supp. at 272-273; 602 F.2d at 1130 n.11. Neither court discussed the standards governing "responsible corporate officer" liability. *MacDonald & Watson* holds that a defendant cannot be convicted of a felony under the Resource Conservation and Recovery Act simply as a "responsible corporate officer" theory because that statute expressly requires proof of knowledge to support a felony conviction. 933 F.2d at 55. The court explained that "[i]n a crime having knowledge as an express element, a mere showing of official responsibility under *Dotterweich* and *Park* is not an adequate substitute for direct or circumstantial proof of knowledge." *Ibid.* Because petitioner was

convicted of misdemeanor offenses as to which a negligence standard applies, see 33 U.S.C. 1319(c)(1)(A); Pet. App. 6a, and because the CWA expressly defines the term "person" to include a "responsible corporate officer," that holding has no relevance here.

d. The evidence at trial showed that on at least one occasion—Avion's lease of the Stockton Street facility—petitioner held himself out as the "president" of Avion. See Pet. App. 4a, n.1 (noting that petitioner "signed the lease for the Stockton Street facility as Avion's president"); C.A. App. 1469, 1482. Thus, the magistrate judge could reasonably have concluded that petitioner had served as Avion's "president," see *id.* at 960-961, particularly because the only other candidate for that designation, Robert Kirk, could not even issue a check on his own authority. *Id.* at 289. Viewing the evidence in the light most favorable to the government, see *Glasser* v. *United States*, 315 U.S. 60, 80 (1942), petitioner therefore could not prevail in this Court even under his own legal theory.

2. Petitioner contends (Pet. 20-21) that he did not exercise the "responsible share in the furtherance of the transaction which the statute outlaws," *Park*, 421 U.S. at 669 (quoting *Dotterweich*, 320 U.S. at 284), that is required for criminal liability on a "responsible corporate officer" theory. The record at trial squarely refutes that argument. As we explained above, petitioner was informed of the inadequacies of the treatment systems utilized by Avion but did nothing to buy the additional equipment needed to make those systems function properly, even after the failure of those systems had become apparent. Based on that evidence, the magistrate judge found that petitioner "knew what was happening was wrong" and "knew that he had not supplied the filtration system that was required." Pet.

App. 37a. Indeed, so great was petitioner's involvement in the violations at issue that the magistrate judge at sentencing "specifically f[ou]nd that [petitioner] had actual knowledge of the violations and indeed, that he was primarily responsible for the discharges and violations of the permit." C.A. App. 1095-1096. The magistrate judge expressed the view that petitioner "received a huge break by not being prosecuted as a felon," *id.* at 1096, which would have required proof of a knowing violation. Any question as to the correctness of those factual findings would not warrant this Court's review, and in any event petitioner has wholly failed to show that those findings are clearly erroneous.[2]

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[2] Petitioner contends that

> the other courts of appeals that have upheld convictions under Section 1319(c)(6) have followed *Park* and have imposed criminal liability only where the defendant either had direct, personal supervisory responsibility over the specific corporate activities from which the illegal discharges occurred, or obtained actual awareness of possible violations of the CWA in systems subject to his ultimate control and failed to undertake appropriate investigations and corrective actions.

Pet. 22. Whether or not petitioner's formulation accurately states the governing legal standard, the evidence at trial and the magistrate judge's findings make clear that petitioner's own test is satisfied here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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