No._____

IN THE SUPREME COURT OF THE UNITED STATES

DARREN BYLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT

PETITION FOR WRIT OF CERTIORARI

LAW OFFICES KENNETH M. STERN
5850 Canoga Avenue
Fourth Floor
Woodland Hills, Ca. 91367
(818) 710-3824
On appointment by the
Court of Appeal
for the Ninth Circuit

## QUESTIONS PRESENTED

1. Does 33 U.S.C. 407, The Refuse Act, apply to sewage?

2. Does 33 U.S.C., 407, The Refuse Act. require discharges, into the water, to be morE than de minimis.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES



CASELAW



SECONDARY AUTHORITY

No._____

IN THE SUPREME COURT OF THE UNITED STATES

DARREN BYLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT

PETITION FOR WRIT OF CERTIORARI

Petitioner hereby petitions for a Writ of Certiorari to the Supreme Court of the United States to review the Memorandum of the United States Court of Appeals for the Ninth Circuit affirming the District Court's judgment of conviction.

**I. OPINION BELOW.**

On June 20, 2018, the United States Court of Appeals for Ninth Circuit issued its decision finding that petitioner was properly convicted of violating 33 U.S.C.

407, The Refuse Act. The Court found that (1) sewage does constitute refuse, pursuant to The Refuse Act; and, (2) there is no de minimus requirement, as to the amount of refuse that must be dumped, into the water, to constitute a violation of The Refuse Act. (Appendix A.)

## II. JURISDICTIONAL STATEMENT.

Jurisdiction existed, in the District Court, pursuant to 18 U.S.C. 3231, as the Indictment charged petitioner with a crime pursuant to Title 18 and 33, United States Code. The Court of Appeal had jurisdiction, pursuant to 28 U.S.C 1291 and 28 U.S.C. 1294, as an appeal from the United States District Court, District of Alaska.

This court has jurisdiction pursuant to 28 U.S.C. 1254 subdivision (1). Petitioner's Petition for Rehearing/Suggestion for Hearing En Banc was denied on July 26, 2018. (Appendix B.)

## III. CONSTITUTIONAL PROVISIONS, STATUTES AND RULES.

33 U.S.C. 407 provides:

> "It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall

be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: Provided, That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: And provided further, That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful."

## IV. STATEMENT OF THE CASE.

A. Procedural History.

Petitioner was charged, in the Indictment, with one count of violating 33 U.S.C. 407 and one count of violating 18 U.S.C. 1001. Petitioner was found guilty on both counts and sentenced on January 23, 2017. Petitioner was sentenced to probation with various terms and conditions.

On January 20, 2018, the Ninth Circuit filed its Memorandum Decision affirming the District Court Judgment. (Appendix A and C.) On July 26, 2018, the Ninth Circuit denied petitioner's Petition for Rehearing and Suggestion for Hearing En Banc. (Appendix B.)

B. Facts concerning the underlying crime.

The facts upon which petitioner was convicted were as follows. Petitioner owned a boat, the Wild Alaskan, which was anchored in a Kodiak Alaska harbor.

Petitioner operated the Wild Alaskan as a strip club.

The Wild Alaskan was plumbed such that it would discharge sewage, from its toilets, into the harbor, one flush at a time, which was within three miles of the shore. There is no evidence, as found by the jury, as to the amount of sewage discharged, at any one time, or in total. There is no evidence the discharges were anything more than de minimis. That is because the jury rejected petitioner's claims he discharged thousands of gallons at a time, which he indicated he did in a proper manner, either by discharging such more than three miles out to sea or discharging such in a reseptacle designed for such.

Petitioner also provided false information, to the government, regarding the manner and method by which he disposed of the sewage, from the Wild Alaskan. The government's inquiry, regarding such, related to the health of the community and to be sure petitioner was in compliance with disposal requirements.

**V. REASONS FOR GRANTING THE WRIT.**

Petitioner was improperly convicted, pursuant, to 33 U.S.C. 407, of dumping sewage into a harbor. The conviction is invalid; as, the statue, pursuant to which he was convicted, does not make dumping sewage into a harbor a crime. Even assuming arguendo the statute does so, dumping de minimis amounts of sewage, into a harbor, is not a crime, pursuant to said statute.

Whether dumping sewage into a harbor violates The Refuse Act is an important issue; in that, although The Refuse Act is approximately 120 years old,

there has been scant interpretation of such, particularly as to whether sewage discharge, into the water, is a violation of the Act. The Ninth Circuit Opinion conflicts with this Court's decision in *United States* v. *Republic Steel Corp.*, 362 U.S. 482 (1960), and, the District Court decision in *United States* v. *Maplewood Poultry Co.*, 327 F. Supp. 686, 687-688 (Me. 1971).)

Whether The Refuse Act requires more than a de minimus discharge is an important issue; as, there has been scant interpretation of whether discharges, into the water, must be more than de minimis. The Ninth Circuit Opinion conflicts with *United States* v. *Kennebec Log Driving Co.*, 530 F.2d 446, 448 (1st Cir. 1976), *United States* v. *Boyd*, 491 F.2d 1163 (9th Cir. 1973), and, *Hawaii Wildlife Fund* v. *County of Maui*, 881 F. 3d 754, 765 (9th Cir. 2018.)

**VI. ARGUMENT.**

**1. THE REFUSE ACT DOES NOT MAKE IT UNLAWFUL TO DISCHARGE SEWAGE.**

Petitioner correctly asserted, in his appeal, The Refuse Act does not, as interpreted this Court, and other appellate authority, make it unlawful to deposit sewage in navigable water. The Memorandum wrote the following:

> "The Refuse Act broadly prohibits "deposit[ing]" into navigable waters "any refuse matter of any kind or description" "other than that flowing from streets and sewers and passing therefrom in a liquid state." 33 U.S.C. § 407; see also United States v. Standard Oil Co., 384 U.S. 224, 229 (1966) ("More comprehensive language would be difficult to select."). Citing United States v. Republic Steel Corp., 362 U.S. 482, 490–91 (1960), Byler interprets the exception as permitting his dumping of human waste from the Wild Alaskan into the harbor. We disagree.
>
> "The defendant in Republic Steel Corp. operated mills on a riverbank

and deposited "industrial waste containing various solids" into the river to raise the riverbed by several feet. 362 U.S. at 483. The Court rejected the defendant's argument that the exception applied because the industrial waste was deposited through sewers: "Refuse flowing from 'sewers' in a 'liquid state' means to us 'sewage.'" Id. at 490. The Court thus declined "the invitation to broaden the exception," limiting the "sewers" exception to sewage flowing from sewers. Id. Byler's conduct in dumping human waste directly from the Wild Alaskan into the harbor is not permitted under the Refuse Act." (Appendix 1, pp. 2-3.)

33 U.S.C. 407 provides, in pertinent part:

"It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship ... or other floating craft of any kind ... any refuse matter of any kind or description whatever *other than that flowing from streets and sewers and passing therefrom in a liquid state*, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water... " (emphasis added.)

This Court, in *United States* v. *Republic Steel Corp.*, supra, 362 U.S. at pp. 490–491, defined *other than that flowing from streets and sewers and passing therefrom in a liquid state*, as sewage.

"As noted, § 13[1] bans the discharge ... 'any *refuse* matter ... other than that *flowing from streets and sewers and passing therefrom in a liquid state.*' ... *Refuse flowing from 'sewers' in a 'liquid state' means to us 'sewage.'*... We follow the line Congress has drawn and cannot accept the invitation to broaden the exception in § 13 because other matters 'in a liquid state' might logically have been

[1] 33 U.S.C. 407.

treated as favorably as sewage is treated."[2] [3]

When this Court writes of "treated as favorably as sewage", it is stating that sewage is not encompassed, within The Refuse Act; while, industrial wastes, within a liquid state, are so encompassed. Even the dissent notes that sewage is not included in The Refuse Act.

> " ... a nineteenth century Congress, in carving out an exception for liquid sewage, ... " (Id. at p. 508.)

This is not out of context. This Court was interpreting the phrase, determining it meant sewage. The Court intended to, and did, define what that phrase meant, determining it meant sewage. This Court did not limit such definition to sewage actually coming out of a sewer or from the streets.

That sewage is not refuse, within the meaning of The Refuse Act, was settled at the time of trial herein. In addition to *Republic Steel*, this is shown by the decision in *United States* v. *Maplewood Poultry* Co., supra, 327 F. Supp. at pp. 687-688, which ruled such has been long established.

> " It has *long since been authoritatively settled* that *the Act prohibits all discharges* of polluting matter *(other than sewage)* into navigable waters, regardless of its source or continuing nature and irrespective

---

[2] As a practical matter, the occasional discharge of the sewage contained in a single toilet flush could hardly be on a negative health par with sewage flowing into a body of water from the amount that would be coming from a sewer.

[3] *Republic Steel* does not, state, for exclusion, the sewage must actually be coming from streets and sewers.

of its effect upon navigation." ... " (Id. at p. 688.)(emphasis added.)[4]

William H. Rodgers, Jr., Industrial Water Pollution and the Refuse Act: A Second Chance for Water Quality, 119U. Pa. L. Rev. 761, 778 (1971), supports the position that sewage is not excluded from the act. The article, at page 777, acknowledges sewage is excluded from the act.

"3. The Sewage Exception

> The important exclusion from coverage in section 13 of the 1899 Act is that for discharges of refuse "flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water . .. .
>
> "This reservation was explored briefly in *United States v. Republic Steel Corp.*," a case in which the federal government sought to enjoin several steel companies from discharging wastes into the Calumet River without obtaining a permit from the Corps of Engineers. The Court rejected the argument that these discharges were excused by the statute because they had flowed from the companies' sewers into the river in a liquid state.:'" In interpreting the exception, Mr. Justice Douglas cryptically concluded that:
>
> "The materials carried here are 'industrial solids,' as the District Court found. The particles creating the present obstruction were in suspension, not in solution. Articles in suspension, such as organic matter in sewage, may undergo chemical change. Others settle out. All matter in suspension is not saved by the exception clause in § 13. Refuse flowing from 'sewers' in a 'liquid state' means to us 'sewage.' . . .
>
> "The fact that discharges from streets and sewers may contain some articles in suspension that settle out and potentially impair navigability is no reason for us to enlarge the group to include these industrial discharges." ... "

The article goes on to state it was the Legislature's intention to exclude

---

[4] *Maplewood* does not, state, for exclusion, the sewage must actually be coming from streets and sewers.

sewage, as refuse, within the act, noting "The legislative motive for the sewage exception is obscure." (Id. at p. 778.)

**2. THE REFUSE ACT REQUIRES MORE THAN DE MINIMIS DISCHARGES.**

Petitioner correctly asserted, in his appeal, The Refuse Act requires more than a de minimus amount of refuse, discharged, for there to be a violation of The Refuse Act. The Memorandum wrote the following:

> " ... the Refuse Act contains no exception for de minimis deposits. See 33 U.S.C. § 407. the Refuse Act contains no exception for de minimis deposits. See 33 U.S.C. § 407. Second, because Byler failed to raise this argument at trial, he should prevail only if the asserted error was so obvious that the district court should have raised the issue sua sponte. See Molina-Martinez v. United States, 136 S. Ct. 1338, 1343 (2016) ("[T]he error must be plain—that is to say, clear or obvious."). It is not obvious that de minimis discharges are exempted." (Appendix A, p. 3.)

Assuming arguendo, The Refuse Act applies to sewage, the amount of sewage must be something more than a de minimis amount of discharge, for the particular discharge. *United States* v. *Kennebec Log Driving Co.*, supra, 530 F.2d at p. 448 discusses The Refuse Act. *Kennebec* indicates, for there to be a violation of such, any specific discharge, must be more than de minimis. In this regard, *Kennebec*, which was construing The Refuse Act, looked to whether a discharge, to be actionable pursuant to the Clean Water Act, had to be more than de minimis. *Kennebec* wrote:

> "Fn. 3 ... account in United States v. Boyd, 491 F.2d 1163 (9th Cir. 1973), of the legislative history of the 1970 Act suggests what the attitude of Congress might well be when confronted with the task of drafting specific exceptions to a broad-based statutory proscription. The opinion quotes the following remarks for the Senate senior

conferee, Senator Muskie:

> "It was conceivable that de minimis quantities of oil ought not to be subject to the notice provisions and ought not to be subject to the penalty provisions of the law. It was difficult to define these quantities in the statute. 'The definition, we felt, would depend upon more extensive study than we could give, and even if we were in a position to give that kind of study, there were other reasons why such specificity ought not to be included in the law." 491 F.2d at 1167 n. 4." (Ibid)

So, in interpreting *Kennebec,* it is necessary to review *United States* v. *Boyd*, supra, 491 F.2d 1163. That review shows that, as the Clean Water Act requires something more than a de minimis discharge, so too, according to *Kennebec*'s incorporation of *Boyd*, The Refuse Act requires more than a de minimis discharge. *Boyd* wrote:

> "To meet this burden, Boyd argues at the outset that Congress did not intend all oil discharges to be deemed 'harmful', and therefore there is a certain class of de minimis discharges to which the sanctions of subsection 1161(b)(4) do not apply. We agree." (Id. at p. 1167.)

The Ninth Circuit, in *Hawaii Wildlife Fund* v. *County of Maui,* supra, 881 F. 3d at p. 765, held for a violation of The Clean Water Act, there must be more than a de minimis discharge of a violating pollutant. This is despite the fact that The Clean Water Act does not, by its language, require a de minimis amount of discharge. The Clean Water Act is similar to The Refuse Act. The Refuse Act does not specifically, by its language, exclude de minimis discharges. However, The Refuse Act requires a de minimis discharge. The position is supported by the Ninth Circuit's ruling in *Hawaii Wildlife Fund.*

*Hawaii Wildlife Fund* references two statutes, 33 U.S.C. 1311 and 33 U.S.C. 1362, which form the basis of violations of The Clean Water Act. Not only do neither of these statutes, by their words, exempt de minimis discharges; but, they refer to "any" discharges, as violating of The Clean Water Act. Yet, despite such language, *Hawaii Wildlife Fund* requires more than de minimis discharges, for violation of The Clean Water Act.

33 U.S.C. 1311 states:

> " ... the discharge of *any* pollutant by any person shall be unlawful."[5] (emphasis added.)

33 U.S.C. 1362, which provides definitions, pursuant to The Clean Water Act, as relevant, is as follows:

> "(6) 'pollutant' means ... sewage ...sewage sludge ...
>
> (12) The term 'discharge of a pollutant' and the term 'discharge of pollutants' each means (A) *any* addition of any pollutant to navigable waters from any point source, (B) *any* addition of any pollutant to the waters ...
>
> (16) The term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants." (emphasis added.)

As such, the Ninth Circuit has recognized a statute can contain an implied de minimis requirement; although, such a requirement is not specifically written into the statute.

/ / /

---

[5] None of the exceptions apply, to exclude de minimis discharges.

## VII. CONCLUSION.

For the reasons stated herein, it is respectfully submitted that this Court grant the Petitioner Petition for Writ of Certiorari

Dated: August 24, 2018 LAW OFFICES KENNETH M. STERN

BY: _____

KENNETH M. STERN, ATTORNEY FOR PETITIONER BY APPOINTMENT BY THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT.