No. 10-2230

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. Lisa Lamb, Defendant-Appellant.	Appeal from the United States District Court for the Southern District of Illinois, Eastern Division. Case No. 08-CR-30217 Hon. Michael J. Reagan Presiding Judge.

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

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No. 10-2230

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. Lisa Lamb, Defendant-Appellant.	Appeal from the United States District Court for the Southern District of Illinois, Eastern Division. Case No. 08-CR-30217 Hon. Michael J. Reagan, Presiding Judge.

DISCLOSURE STATEMENT

I, the undersigned, counsel for the Defendant-Appellant, Lisa Lamb, furnish the following list in compliance with Fed. R. App. R. 26.1 and Cir. R. 26.1:

1. The full name of every party or amicus the attorney represents in the case:
Lisa Lamb.

2. The names of all law firms whose partners or associates are expected to appear for the party before this Court: Sarah O'Rourke Schrup (attorney of record), John MacIver (law graduate) of the Bluhm Legal Clinic at the Northwestern University School of Law.

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3. Said party is not a corporation.

Attorney's Signature: s/ Sarah O. Schrup Date: September 22, 2011

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes X** **No**

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FEDERAL RULE OF APPELLATE PROCEDURE 35 STATEMENT REGARDING REASONS FOR REHEARING

Rehearing is warranted because the panel decision failed to follow long-established principles of statutory interpretation from the Supreme Court, this Court, and other circuits. *United States v. Turkette*, 452 U.S. 576, 580 (1981) (stating "authoritative administrative constructions should be given the deference to which they are entitled, absurd results are to be avoided and internal inconsistencies in the statute must be dealt with."); *see also Natural Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001); *Almendarez v. Barrett-Fisher Co.*, 762 F.2d 1275, 1278 (5th Cir. 1985); *Sierra Club v. Ind.-Ky. Elec. Corp.*, 716 F.2d 1145, 1151 n.6 (7th Cir. 1983). The panel decision conflicts with the nexus and foreseeability requirements for 18 U.S.C. § 1512(c)(1) articulated by both the Supreme Court and this Court. *See Arthur Andersen LLP v. United States*, 544 U.S. 696, 708 (2005); *see also United States v. Matthews*, 505 F.3d 698, 708 (7th Cir. 2007). The panel further failed to account for the ample evidence of legislative intent that is contrary to its reading of the statute. *Turkette*, 452 U.S. at 580 (requiring courts to confirm whether "a clearly expressed legislative intent to the contrary" overrides otherwise unambiguous statutory language.). Finally, the panel decision espouses an approach that creates unintended charging and sentencing disparities and violates the rule of lenity. *Hughey v. United States*, 495 U.S. 411, 422 (1990).

BACKGROUND

On April 4, 2008, DEA and FBI agents arrived at the home of East St. Louis powder cocaine dealer Scott Lee Johnson. (A.103-04; Doc.199:137, 200:117.)[1] Johnson's girlfriend, Lisa Lamb, answered the officers' knocks and, when they were unable to produce a copy of the search warrant, denied them entry into the home. (A.102-110, 132-37, 141-3; Doc.199:110.) During the twenty-minute delay before the officers could gain access to the home, they saw only glimpses of Lamb and no sign of Johnson's brother who was also inside, but claimed to hear water running and toilets flushing. (A.109-13, 137-8.) When they entered the home they found Lamb in the kitchen near a wet sink. (A.138.) No drugs were found at the residence except for a trace amount of crack cocaine that was recovered from the inside of a Pyrex dish in the kitchen and residue on two scales. (Doc.201:10-11.) Although Lamb was arrested that day, she was not charged with any crime for six months. (A.69.) Then, on October 22, 2008, she was indicted and with charged with obstruction of justice under 18 U.S.C. § 1512(c)(1). *Id*. That section provides:

> Whoever corruptly-- alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding…shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1512(c)(1) (2006). Nearly a year later, the government filed a superseding indictment, charging Lamb with aiding and abetting Johnson's cocaine conspiracy. (A.2.) The government later voluntarily dismissed the aiding-and-abetting count on the eve of trial. (A.74.) After a three-day joint trial that focused heavily on Johnson and only tangentially on Lamb, she was convicted of the obstruction count. (Doc.127.) Lamb appealed, claiming as relevant here that

[1] Citations to documents contained within the initial brief's attached appendix are designated (A. #). Citations to documents not in the appendix are cited to the district court docket number (Doc. #).

§ 1512(c)(1) did not apply to her conduct because a garden-variety drug arrest does not fall within a reasonable construction of that statute. Specifically, she argued that the residual phrase, "record, document, or other object" should be construed narrowly so as not to include the destruction of drugs. (Appellant Br. 16-22.) She further argued that the term "official proceeding" encompasses something more than a mere investigation and requires a temporal nexus to an actual, specific and foreseeable official proceeding. *Id*. at 24-25. Finally, she noted that Congress had enacted other statutes that explicitly covered her conduct: 18 U.S.C. § 2232 and, potentially, 18 U.S.C. § 1519. (Appellant Br. 25; Appellant Reply Br. 8-9; Oral Arg. at 01:16-01:35, available at http://www.ca7.uscourts.gov/tmp/BH1CHDTR.mp3). *See* 18 U.S.C. § 2232(a) (2006)("Whoever, before, during, or after any search for or seizure of property by any person authorized to make such search or seizure, knowingly destroys…disposes of…or otherwise takes any action…for the purpose of preventing or impairing the Government's lawful authority to take such property into its custody or control…shall be fined under this title or imprisoned not more than 5 years, or both."); 18 U.S.C. § 1519 (2006)("Whoever knowingly…destroys…any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States…shall be fined under this title, imprisoned not more than 20 years, or both.").

The panel acknowledged that Lamb raised a "close[]," "difficult" and "interesting" statutory-construction question, but ultimately concluded that § 1512(c)(1) criminalizes the destruction of any object, including contraband, during a mere investigation rather than the "official proceeding" specified within § 1512(c)(1). *United States v. Johnson*, Nos. 10-1762, 10-2230, 2011 WL 3506098 at *5, *8, *10 (7th Cir. Aug. 11, 2011) (holding "§ 1512(c)(1)

criminalizes the alteration, destruction, mutilation, or concealment of any object, including contraband" and "[Lamb's] knowledge of a government investigation is sufficient to sustain the jury's conclusion that Lamb foresaw an official proceeding…").

DISCUSSION

I. The panel fails to apply this Court's and the Supreme Court's long-standing principles of statutory construction and overlooks the obvious ambiguity in 18 U.S.C. § 1512(c)(1).

The panel erred by concluding that the plain language of § 1512(c)(1) is sufficiently clear so that it need not resort to other methods of statutory construction. *United States v. Johnson*, Nos. 10-1762, 10-2230, 2011 WL 3506098 at *7 (7th Cir. Aug. 11, 2011) (citing *United States v. Turkette*, 452 U.S. 576, 581 (1981) (stating that ejusdem generis is "no more than an aid to construction and comes into play only when there is some uncertainty as to the meaning of a particular clause in the statute.")). Second, the panel erred in failing to fully apply *Turkette's* caution that "there is no errorless test for identifying or recognizing 'plain' or 'unambiguous' language," and that "authoritative administrative constructions should be given the deference to which they are entitled, absurd results are to be avoided and internal inconsistencies in the statute must be dealt with." *Turkette*, 452 U.S. at 580 (*citing Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978)). All three pitfalls are present in this case. Third, even if the panel correctly found the language clear, it further erred in failing to then consider whether the ample indicia of contrary legislative intent warranted a different result. *Turkette*, 452 U.S. at 580 (requiring courts to confirm whether "a clearly expressed legislative intent to the contrary" overrides otherwise unambiguous statutory language.). Had the panel employed these principles, it would have concluded that the proper construction of § 1512(c)(1) is one much narrower than

the one it found. Finally, given these uncertainties, the rule of lenity should have been applied in Lamb's favor.

Although the panel ultimately concludes that § 1512(c)(1)'s language is clear and unambiguous, the panel itself relies on tools of construction in its analysis, *Johnson*, 2011 WL 3506098 at *6-7, thus actually confirming that the statute is subject to multiple meanings. Before finding the language clear, the panel first turns to similar language in another provision, §1512(a)(2), other courts' interpretation of that language that extends it beyond white-collar crime, and the statute's enactment history. *Johnson*, 2011 WL 3506098 at *7. This approach is faulty for several reasons. First, that courts have interpreted similar language in the witness-tampering provision broadly does not necessarily mean that Congress intended its later-enacted Sarbanes-Oxley provision to be similarly sweeping. This is particularly true when applying that definition in concert with the remaining language in § 1512(c)(1) and courts' interpretation of it would lead to unintended and absurd results. *See Section* I.B, *infra.* As the Supreme Court has instructed, statutory ambiguity arises from the entire statute, not a single word, or specific clause taken out of context. *See, e.g.*, *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (finding that the "plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole"). Further, as discussed below, *see Section* I.C *infra,* other indicia of legislative intent show that Congress's aim was to combat a particular type of corporate fraud; this contrary legislative intent further fortifies the conclusion that the panel erred in its approach. Third, even if § 1512(c)(1) could be read as encompassing more than corporate fraud, the panel erred in concluding that it encompassed everything, including contraband during a drug bust, and not some fraud-based middle ground.

A. As the panel's analysis shows, § 1512(c)(1)'s plain language does not adequately convey its meaning and the statute is ambiguous for at least three reasons.

First, if "other object" were stretched to its outer limit, then Congress would have had no need to specifically enumerate "record" or "document." *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114 (2001) (holding that the broadest reading of the residual clause would render the specific enumeration superfluous). In other words, the broadest reading of other object ignores the two objects Congress specifically enumerated, which come before the residual clause. Black's Law Dictionary defines "document" as "[s]omething tangible on which words, symbols, or marks are recorded." Black's Law Dictionary 555 (9th ed. 2009). The same dictionary defines "record" as a "documentary account of past events, usu. designed to memorialize those events." Black's Law Dictionary 1387 (9th ed. 2009). Given these two definitions and the dictates of *ejusdem generis*, the phrase "other objects" must be "similar in nature" to the terms "document" and "record." Therefore, the meaning of "other objects" must include some documentation of a past event or some tangible thing designed to memorialize some other event. Here documents and records perform the distinct function of providing extrinsic evidence of a criminal act. Prohibiting the destruction of that extrinsic evidence is consistent with the scheme of both the pre-existing obstruction statute and with the Sarbanes-Oxley amendments to the statute. *See Johnson*, 2011 WL 3506098 at *6 (noting that the phrase "record, document, or other object" was taken from statutory text that preceded the Sarbanes-Oxley amendments). It follows that a reading of "other object" should be limited to objects that provide documentary or recorded extrinsic evidence of a crime.

Second, not only does the panel's decision expand the scope of "other object" beyond its reasonable limits, it also creates another ambiguity by obscuring the line between an ordinary investigation and an official proceeding. Although §1512(f) states that "an official proceeding need not be pending or about to be instituted at the time of the offense," 18 U.S.C § 1512(f) (2006), both the Supreme Court and this Court have held that an official proceeding must be foreseeable and that there must be an explicit nexus between the obstructive act and that proceeding. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 708 (2005); *see also United States v. Matthews*, 505 F.3d 698, 708 (7th Cir. 2007) (holding that an obstructive act must have a "relationship in time, causation, or logic with the judicial proceedings," and suggesting that "[i]t is [] one thing to say that a proceeding 'need not be pending or about to be instituted at the time of the offense,'" and "quite another to say a proceeding need not even be foreseen.") (internal citations omitted).[2] Further, Congress would not have clarified that the actual proceeding need not be pending or about to be instituted if it intended for the term "official proceeding" to encompass any stage of investigation, whether known or unknown. Moreover, given that another provision, § 1519, specifically addresses destruction of evidence with an "intent to impede, obstruct, or influence ***the investigation*** or proper administration of any

[2] The panel's approval of the *Matthews* jury instructions in Lamb's case places this case in direct conflict with both *Matthews* and *Arthur Andersen. Johnson*, 2011 WL 3506098, at *8. To equate the proceedings in *Matthews* where an arrest and seizure of evidence had already occurred with the speculative, undefined future grand jury proceeding in Lamb is wrong. *Compare Matthews*, 505 F.3d at 701-04 *with Johnson*, 2011 WL 3506098, at *3-4. Such a broad interpretation means that a murderer, burglar, or arsonist is always criminally liable for his underlying crime *and* for obstruction of justice to the extent that he attempted to cover-up the just-perpetrated crime. Indeed, any attempt to evade prosecution—even compliance in light of the law's deterrent effect—necessarily envisions a hypothetical grand jury investigation or trial that would at some point exist. To allow the term such a broad application would render a foreseeable and specific official proceeding indistinguishable from any mere investigation.

matter" (emphasis added), it is correct to presume that the different language and structure Congress chose in § 1512(c)(1) was deliberate.

Finally, under the panel's interpretation, an individual currently possessing contraband faces an impossible dilemma where the abandonment of one criminal act is the *actus reus* for another. If that person continues possessing contraband, she is criminally liable for that possession if apprehended. But, if that person destroys the contraband, she is liable for obstruction of justice under § 1512(c)(1). Until the police have executed a seizure and a suspect no longer maintains control over the contraband, the panel's interpretation compels a continuation of criminal activity—possession of contraband. The incongruity of this absurd result at a minimum suggests that the statute is ambiguous with respect to whether object covers contraband.

B. The panel strays from Supreme Court and circuit precedent by failing to credit other credible constructions of similar language and its decision creates or, at a minimum, perpetuates internal inconsistencies and absurdities within § 1512(c)(1).

Although the panel finds the use of similar language in §1512(a)(2) dispositive, *Johnson*, 2011 WL 3506098, at *6-7 (citing Pub. L. 97-291 §4, suggesting that the phrase "record, document, or other object" was taken directly from the original statutory text, and remarking that such repetition "tells us nothing of what Congress intended, or did, in 2002"), it failed to consider other sources and interpretations of similar language. The Sentencing Guidelines promulgated by the United States Sentencing Commission are another persuasive source of legislation. *United States v. Munoz-Cerna*, 47 F.3d 207, 210 (7th Cir. 1995) (noting that "although Congress has chosen to address sentencing policy issues through both statutes and sentencing guidelines, we ought not presume lightly that it intended that these two vehicles of its

legislative will be at odds with each other"); *see also United States v. O'Flanagan*, 339 F.3d 1229, 1235 (10th Cir. 2003) ("We believe this maxim applies with equal force to promulgations from the Sentencing Commission"); *United States v. Holbert*, 285 F.3d 1257, 1259 (10th Cir. 2002) ("We interpret the Sentencing Guidelines as though they were a statute or court rule, with ordinary rules of statutory construction."); *see also Turkette*, 452 U.S. at 580 ("authoritative administrative constructions should be given the deference to which they are entitled"). The obstruction-of-justice sentencing guideline § 2J1.2 sheds light on the meaning of § 1512(c)(1) for three reasons. First, it appears that Congress relied on and incorporated principles of § 2J1.2 in the Sarbanes-Oxley OOJ provisions. U.S. SENTENCING GUIDELINES MANUAL § 2J1.2 (2010). Section 1519 uses identical language contained in § 2J1.2(b)(3) when describing the scope of objects included within its reach—records, documents, and tangible objects. *Compare* 18 U.S.C.§ 1519 and U.S.S.G. § 2J1.2. In addition, the application notes to § 2J1.2 define that phrase as including "records, documents, or tangible objects that are stored on, or that are, magnetic, optical, digital, other electronic, or other storage mediums or devices; and [] wire or electronic communications." U.S. Sentencing Guidelines Manual § 2J1.2 cmt. n.1 (2010). It follows, then, that if the catch-all provision in § 1519[3] has been narrowly defined then the remaining provisions, including § 1512(c)(1), would be similarly limited in scope. The

[3] S. REP. NO. 107-146 at 27 (2002) (recognizing that "section 1519 overlaps with a number of existing obstruction of justice statutes, but we also believe it captures a small category of criminal acts which are not currently covered under existing laws—for example, acts of destruction committed by an individual acting alone and with the intent to obstruct a future criminal investigation. We have voiced our concern that section 1519, and in particular, the phrase 'or proper administration of any matter . . .' could be interpreted more broadly than we intend. In our view, section 1519 should be used to prosecute only those individuals who destroy evidence with the specific intent to impede or obstruct a pending or future criminal investigation, a formal administrative proceeding, or bankruptcy case. It should not cover the destruction of documents in the ordinary course of business, even where the individual may have reason to believe that the documents may tangentially relate to some future matter within the conceivable jurisdiction of an arm of the federal bureaucracy.").

provisions of § 2J1.2 were enacted in 1987. Congress, certainly would have been aware of this limited and idiomatic use of the terms when crafting Sarbanes-Oxley.

Second, the panel failed to consider Turkette's admonition that inconsistent or absurd results are to be avoided. *Turkette*, 452 U.S. at 580; *see also Natural Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001); *Almendarez v. Barrett-Fisher Co.*, 762 F.2d 1275, 1278 (5th Cir. 1985); *Sierra Club v. Ind.-Ky. Elec. Corp.*, 716 F.2d 1145, 1151 n.6 (7th Cir. 1983). For the same reasons that the panel's decision overlooks ambiguities in the statutory language, it also fails to recognize the inconsistencies and absurdities that result from its overly-broad interpretation. As noted above, the panel's interpretation of § 1512(c)(1) renders the terms "record" and "document" mere surplusage and makes § 1519 redundant. *See Section* I.A, *supra.* It also renders the term "official proceeding" inconsistent with prior judicial interpretations of the term. *Id.* (citing *Arthur Andersen*, 544 U.S. at 708 and *Matthews,* 505 F.3d at 708). But the panel's decision creates additional inconsistencies in the charging and sentencing context. Congress has passed a host of obstruction statutes that separately cover very specific conduct. The Sentencing Table ("Appendix A") attached to the United States Sentencing Guidelines ("USSG") identifies approximately twenty-five statutes as encompassing the criminal act of obstruction of justice. U.S. Sentencing Guidelines Manual App. A (2010). With only five exceptions the maximum statutory penalties range from 1-5 years. *See* 18 U.S.C. §§ 1001, 1033, 1512, 1513, and 1519 (2006).

Sentencing for obstruction crimes is handled in Chapter 2, Part J of the Guidelines. . Under USSG § 2J1.2, a defendant's base offense level starts at level 14 and is enhanced by specific offense characteristics such as whether a certain subset of obstructive statutes was violated, whether the conduct involved injury or property damage, or whether the act involved

domestic or international terrorism. When a defendant commits a non-obstruction crime but engages in obstructive conduct during the course of that crime or its investigation or prosecution, another sentencing adjustment applies: § 3C1.1. U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 (2010). Under that guideline, a defendant is subject to a two-level upward adjustment if she "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction." Because § 3C1.1 applies to any underlying criminal conduct it obviously is used much more frequently than the obstruction-specific provisions in § 2J1.2. More serious obstructionist conduct—that which involves actual or threatened bodily harm or jeopardizes the entire judicial proceeding—garners a much higher sentencing range. Those ranges are typically three to four times higher than standard, run-of-the mill obstructionist conduct. However, very skewed sentencing ranges can result from the exact same conduct when prosecutors use § 1512(c)(1) in drug-based crimes in lieu of the more appropriate drug-possession charge, even one that accounts for the defendant's obstructionist conduct in destroying drugs. Specifically, a defendant's sentencing range is effectively tripled at the low end and, if a § 2X3.1 cross-reference is used, a sentence ten to fifteen times higher will routinely result. U.S. SENTENCING GUIDELINES MANUAL § 2X3.1 (2010). These disparities are further proof that Congress did not intend for § 1512(c)(1) to be used as a ready substitute for the crimes contained with Title 21, Chapter 13.

A final, related inconsistency arises with the interplay between § 1512(c)(1) and § 2232. Section 2232 (a) provides:

> Whoever, before, during, or after any search for or seizure of property by any person authorized to make such search or seizure, knowingly destroys, damages, wastes, disposes of, transfers, or otherwise takes any action, or knowingly

> attempts to destroy, damage, waste, dispose of, transfer, or otherwise take any action, for the purpose of preventing or impairing the Government's lawful authority to take such property into its custody or control or to continue holding such property under its lawful custody and control, shall be fined under this title or **imprisoned not more than 5 years**, or both.

18 U.S.C § 2232(a) (2006) (emphasis added). Congress has identified a prohibited activity and expressly stated that that activity cannot be punished by a sentence of more than five years. Here the panel's decision interprets the activity covered in § 1512(c)(1) so broadly that it swallows the prohibitions § 2232. Under the provisions of § 1512(c)(1) the same prohibited activity is punishable by up to twenty years in prison. 18 U.S.C § 1512(c)(1) (2006). This leads to more than just a disparity in sentencing. By simply referencing a different section of the statute, prosecutors and courts are free to ignore a Congressional mandate that such evidence destruction will not be punished by more than five years.

C. The panel erred in failing to credit contrary indicia of legislative intent

The legislative history evinces an intent to limit the reach of §1512(c)(1); the panel erred in disregarding that contrary legislative intent. First, The Act's preamble explicitly states that the bill was designed to: "protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to securities laws . . . ." Sarbanes-Oxley Act pmbl., 116 Stat. 745,745. (2002). The Act's preamble represents the very first words out of Congress's mouth about the purpose and scope of the Act. In this case, the preamble explicitly refers to the limited types of behavior captured by the criminal provisions in Sarbanes-Oxley.

Additionally the short titles contained in the Act inform legislative intent. The obstruction-of-justice provisions codified at §§ 1519 and 1520 were inserted into Title VII of the Act, which carried the short title "Corporate and Criminal Fraud Accountability." Sarbanes-

Oxley Act of 2002, 116 Stat. at 800. Meanwhile, the obstruction-of-justice provision codified at § 1512(c) was inserted into Title XI of the Act, which carried the short title "Corporate Fraud Accountability." So although §§ 1519 and 1520 perhaps cast a wider net beyond corporate fraud into the more general criminal fraud, § 1512(c)(1) was limited to corporate fraud. *Id.* at 807. While the idiomatic terms used in the Act may mirror pre-existing verbiage, the structure, context, title, and express statement in the Act's preamble all suggest that the additional language was meant to capture a specific activity.

Finally, the legislative history reveals that the goals of the legislation were distinctly focused on fraud and, specifically, corporate-fraud[4]: (1) to aid in restoring public trust in our financial markets;[5] (2) to better protect victims of fraud and corporate whistleblowers;[6] (3) to give prosecutors tools to "prosecute those who commit securities fraud"[7] by closing loopholes in existing fraud, obstruction-of-justice and securities law that had allowed these corporate fraudsters to escape liability;[8] (4) to impose serious penalties on those who commit such fraud;[9]

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[4] S. REP. NO. 107-146 at 2 (2002) (Senate Judiciary Committee report describing the bill's purpose was to "provide for criminal prosecution and enhanced penalties of persons who defraud investors in publicly traded securities or alter or destroy evidence in *certain* Federal investigations" (emphasis added).

[5] *Id.* (stating that "t[]his bill would play a crucial role in restoring trust in the financial markets by ensuring that the corporate fraud and greed may be better detected, prevented and prosecuted." *See also id.* at 11 (stating that the "majority of Americans depend on capital markets to invest in the future needs of their families—from their children's college fund to their retirement nest eggs," and that "Congress must act now to restore confidence in the integrity of the public markets . . . .").

[6] *Id.* at 2 (identifying another specific aim as "protect[ing] victims of such fraud"); *see also id.* at 10 (noting that "corporate whistleblowers are left unprotected under current law" yet they are the only people who can testify as to "who knew what, and when. . . ."); *id.* at 6 (finding that this "corporate code of silence not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity." (internal quotations omitted)); *id.* (repeatedly referencing Congress's aim to aid "the regulators, the victims of fraud, and the corporate whistleblowers [who were] faced with daunting challenges to punish the wrongdoers and protect the victims' rights.").

[7] *Id.* at 2.

[8] *Id.* at 6 (noting that "unlike bank fraud, health care fraud, and bankruptcy fraud, there is no specific securities fraud provision in the criminal code to outlaw the breadth of schemes and artifices to defraud

and (5) to ensure that the widespread document destruction that occurred in the wake of the Enron scandal was not repeated.[10] Given these strong legislative statements, the panel should have construed § 1512(c)(1) more narrowly.

D. The panel should have applied the rule of lenity in Lamb's favor

At a minimum, this case warranted the application of the rule of lenity. The panel erred in failing to find the ambiguous language in § 1512(c)(1) and the resulting charging uncertainties and sentencing disparities grounds to overturn Lamb's conviction. *Hughey v. United States*, 495 U.S. 411, 422 (1990).

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investors in publicly traded companies. Currently, . . . prosecutors must rely on generic mail and wire charges that carry maximum penalties of up to only five years imprisonment and require prosecutors to carry the sometimes awkward burden of proving the use of the mail or the interstate wires to carry out the fraud. Alternatively, prosecutors may charge a willful violation of certain specific securities laws or regulations, but such regulations often contain technical legal requirements, and proving willful violations of these complex regulations allows defendants to argue that they did not possess the requisite criminal intent." Finally, Congress recognized that "current federal obstruction of justice statutes relating to document destruction are is [sic] riddled with loopholes and burdensome proof requirements."

[9] *Id.* at 7 (noting that current "federal sentences sufficiently neither punish serious frauds and obstruction of justice nor take into account all aggravating factors that should be considered in order to enhance sentences for the most serious fraud and obstruction of justice cases."); *see also id.* at 12-18 (outlining new criminal penalties and sentencing enhancements).

[10] *Id.* at 4 (noting that "[a]s investors and regulators attempted to ascertain both the extent and cause of their losses, employees from Andersen were allegedly shredding tons of documents, according to the Andersen Indictment. Instead of preserving records relevant and material to the later investigation of Enron or any private action against Enron, Andersen [engaged in] a wholesale destruction of documents . . . ." (internal quotation marks omitted)).

CONCLUSION

For the foregoing reasons, Lamb respectfully requests that this Court grant rehearing or rehearing *en banc* in this case and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a) and 40 and SEVENTH CIRCUIT RULES 32 and 40

1. This petition complies with the type-volume limitation of Fed. R. App. P. 40(b) and Circuit Rule 40 because:

X this petition contains 15 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32 because:

X this petition has been prepared in a proportionally-spaced typeface using Microsoft Word 2007, Version 11.0, in 12-point Times New Roman font with footnotes in 11-point Times New Roman font.

s/ SARAH O. SCHRUP

Dated: September 22, 2011

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CIRCUIT RULE 31(e) CERTIFICATION

I, the undersigned, counsel for the Defendant-Appellant, Lisa Lamb, hereby certify that I have filed electronically, pursuant to Circuit Rule 31(e), versions of this petition in non-scanned PDF format.

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Dated: September 22, 2011

No. 10-2230

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. Lisa Lamb, Defendant-Appellant.	Appeal from the United States District Court for the Southern District of Illinois, Eastern Division. Case No. 08-CR-30217 Hon. Michael J. Reagan, Presiding Judge.

CERTIFICATE OF SERVICE

I certify that I served this petition for rehearing via electronic service under this Court's ECF system on September 22, 2011.

Respectfully submitted,

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