

No. 10-2230

**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
Case No. 08-CR-30217
The Honorable Michael J. Reagan

**BRIEF AND REQUIRED SHORT APPENDIX OF
DEFENDANT-APPELLANT LISA LAMB**

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Disclosure Statement

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

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2. Said party is not a corporation

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Jurisdictional Statement

The United States District Court for the Southern District of Illinois had jurisdiction over Appellant Lisa Lamb's federal criminal prosecution pursuant to 18 U.S.C. § 3231 (2006), which states that the "district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States." This jurisdiction was based on a single-count indictment charging Lamb with a violation of 18 U.S.C. § 1512(c)(1) (2006).

Lamb was initially indicted on October 22, 2008. (A.69.)¹ On August 19, 2009, the government filed a superseding indictment, adding a conspiracy count under 21 U.S.C. § 841(a)(1) (2006) and § 841(b)(1)(A) (2006). (A.2.) The government unilaterally dismissed the conspiracy charge on October 5, 2009. (A.74.) Lamb and a co-defendant were tried between October 5, 2009 and October 8, 2009, and the jury convicted Lamb on October 8, 2009. (Doc.127.) The district court sentenced Lamb on May 18, 2010, (A.46), and final judgment was docketed on the same day, (A.61). Lamb filed her timely notice of appeal on May 18, 2010. (Doc.188.)

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 (2006), which grants jurisdiction of "all final decisions of the district courts of the United States" to its courts of appeal, and 18 U.S.C. § 3742 (2006), which provides for review of the sentence imposed.

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

Statement of the Issues

- I. Whether the district court erred in instructing the jury that lawful destruction of contraband is punishable by § 1512(c)(1), a statute only intended to reach corporate fraud.
- II. Whether the defendant's indictment, which specifically charged her with destroying a user-quantity of cocaine base, was either constructively amended or fatally varied by evidence, argument, and instructions that expanded her liability to include her co-defendant's powder cocaine conspiracy.
- III. Whether the evidence was sufficient to convict the defendant for corruptly destroying cocaine base when no witness observed drugs or drug paraphernalia in the defendant's possession, another person with equal access to any drugs was present in the house, and no one informed the defendant that an investigation or official proceeding was underway.
- IV. Whether the district court erred in applying an accessory-after-the-fact cross-reference to the defendant's sentence when the cocaine base she purportedly destroyed was unrelated to her co-defendant's cocaine powder conspiracy.

Statement of the Case

On October 22, 2008, Lisa Lamb was indicted on one count of obstruction-of-justice under 18 U.S.C. § 1512(c)(1). (A.69.) She was arrested November 14, 2008. (Doc.145:1.) Almost one year later, on August 19, 2009, the government filed a superseding indictment, adding a count of aiding and abetting co-defendant Scott Johnson's cocaine conspiracy. (A.2.)

On September 18, 2009, Lamb moved to sever her trial from Johnson's but the district court denied the motion. (A.9.) On October 2, 2009, three days before trial, the government moved to dismiss the drug-conspiracy charge against Lamb and the district court granted this motion with prejudice on October 5, 2009—the first day of trial. (A.74.) After a three-day trial in which the bulk of the evidence pertained to Johnson and his drug dealing, the jury returned a guilty verdict against Lamb for obstruction-of-justice. (Doc.127.) At the close of evidence, Lamb timely moved for acquittal based on insufficiency of the evidence. (Doc.201:106.) The court reserved its ruling under Federal Rule of Criminal Procedure 29(b). (Doc.201:109.) On October 13, 2009, the court denied Lamb's oral motion for acquittal. (Doc.136; Doc.211:2.) Lamb filed a motion to reconsider, as well as a written motion for acquittal based on insufficiency of the evidence on October 15, 2009. (Doc.139; 140.) The court denied Lamb's motion to reconsider and her written motion for acquittal. (A.30.)

The district court sentenced Lamb on May 18, 2010. (A.46.) The court applied a U.S. Sentencing Guidelines Manual § 2X3.1 (2007) cross-reference to the § 2J1.2

obstruction-of-justice guideline, which increased Lamb's base offense level from 14 to 26. (Doc.145:10; Doc.185:1-2; Doc.209:14.) The district court used Johnson's cocaine conspiracy as the underlying offense and, over Lamb's objection, attributed 11 kilograms of cocaine to Lamb as relevant conduct. (Doc.209:13-14.) Lamb's original criminal-history category was II, but that increased to III when the district court applied guideline § 4A1.1(d) on the ground that Lamb was on probation during an earlier part of Johnson's cocaine conspiracy, even though she was no longer on probation when the investigation and arrests actually occurred in April 2008. (Doc.145:13; Doc.185:3.) Without these enhancements, Lamb's sentencing range would have been 18-24 months.² U.S. Sentencing Guidelines Manual ch. 5, pt. A, sentencing table (2009). The court sentenced Lamb to 78 months' imprisonment, 3 years' supervised release, and a \$625.00 fine. (A.46-47.) The district court entered judgment on May 18, 2010, (A.46-47), and Lamb filed her notice of appeal that same day, (Doc.188).

² The reduction in sentence assumes a base offense level of 14 and criminal history category of II. If Lamb had been charged with simple possession of cocaine base, rather than obstruction of that simple possession, her sentencing range would have been much lower still: 4-10 months with a criminal history category II and 6-12 months with a criminal history category III.

Statement of the Facts

Lisa Lamb is the girlfriend of East St. Louis drug dealer Scott Lee Johnson. (Doc.199:110.) This case arises from the Federal Bureau of Investigation (“FBI”) and Drug Enforcement Agency (“DEA”)’s April 4, 2008 surveillance of Johnson’s drug-dealing activity. (Doc.199:137.) The investigation focused on Johnson’s three properties—a business called the Best Fish House, a house located at 8201 State Street, and a house located at 5706 Westmoreland. (Doc.200:117.) Agents first arrived at 5706 Westmoreland around noon and, over the course of the day, they surveilled the house, called and arranged a controlled buy of nine ounces of powder cocaine, and seized cocaine powder from two vehicles that had stopped at the house and then departed. (Doc.199:137-145; 200:183-85.) Agents observed Johnson coming and going at least twice during the day. (A.151.) According to the agents, the first time Johnson arrived he was with Lamb, who entered and ostensibly remained in the house when he departed. (A.151.) The next time, he entered for less than ten minutes, then went back outside, looked up at the sky and spotted the police surveillance plane that had been circling above the house. (A.145-46.) Shortly after, he climbed into his truck and drove down the block to a nearby church parking lot. (A.102.) When FBI agent Nicholas Manns attempted to speak with Johnson and told him to stop, Johnson fled, and a car chase ensued between Johnson and law enforcement agents. (A.102.) The agents ultimately apprehended Johnson shortly thereafter. (Doc.200:122.)

During Johnson’s pursuit and arrest, Agent Manns was carrying all three search warrants for Johnson’s properties. (A.102-03.) Manns searched Johnson, and then

took him first to Best Fish House, then to 5706 Westmoreland, and then to 8201 State Street to execute the warrants on those properties. (Doc.200:127, 136, 139.) While in custody, Johnson told Agent Manns and two other agents that he had received seven kilograms of cocaine on April 3, the night before he was arrested. (A.128.) Johnson did not tell the agents where he received or kept the cocaine or to whom he sold it, but he reiterated that he had already distributed the seven kilograms he had received the day before. (Doc.200:142.) He also confessed that he had distributed another ten to twelve kilograms that he had received over the past two to three weeks. (*Id.*)

Meanwhile, as Manns and other agents were pursuing Johnson, DEA agent Michael Rehg peeled away from the chase and returned to 5706 Westmoreland. (A.103.) The home is located in the Washington Park neighborhood in East St. Louis, Illinois. (A.142.) The neighborhood is a rough one where “you don’t know who is going to be coming to your door.” (A.142.) The door at the Westmoreland house had a screen, an iron gate secured with a padlock, and an interior door with a window that was covered with blinds. (A.103-07.) Interior bars enclosed the rest of the windows. (A.110.)

Agents Rehg and Henson, both in plain clothes, approached the side door of the house, knocked, and demanded entry. (A.103-04.) Neither officer had a copy of a search warrant. (A.102-03.) Both Lisa Lamb and Dave Johnson (hereafter “Dave”), Scott Johnson’s brother, came to the door. (A.107.) Rehg flashed Lamb and Dave his badge, told them he had a warrant to search the house and to let him in.

(A.141-42.) He did not indicate what they were searching for or that they were investigating Johnson's drug activity. (A.108.) Because the iron gate was locked, Rehg could not get into the house. (A.105-06.) Lamb, who had never met or spoken with Rehg before, asked to see a copy of the warrant. (A.108; 143.) Rehg told her he did not have a copy and again demanded entry. (A.108.) Eventually, Rehg stuck both his foot and arm through the iron bars and told Lamb to "open the F'in door." (A.109; 134.) Lamb then tried to close the interior door. (A.109.) Dave ran into the house and out of Rehg's field of vision. (A.109-110.) After a struggle, Lamb finally shut the door. (A.110.)

Rehg and Henson then smashed a "couple" of back windows and "beat on the [side] door pretty hard." (A.106; 110.) They were unable to see into the house or kitchen because the windows were "too tall." (A.132-33.) Rehg did catch a brief glimpse of Lamb through the blinds on the door. (A.112.) He testified that he saw Lamb standing at the kitchen sink, but he was unable to see what Lamb was doing because the basin was out of his line of vision. (A.113; 137.) He also saw her move into other rooms, but acknowledged that he did not concentrate on her other movements because the agents were still trying to enter the house. (A.112.) He was also unable to see Dave, where he was in the house, or what he was doing. (A.113.) Rehg also testified he heard a toilet flushing and a faucet running. (A.112.)

Because they could not enter the house, Rehg called the police and the fire departments. (A.137.) The Fire Department arrived several minutes later and

smashed open the iron gate. (A.137-38.) The agents then entered the house. (A.138.) Rehg found Lamb in the kitchen, forced her to the floor, and handcuffed her. (A.138.) The officers found Dave on the front living room floor, but they let him go without questioning him. (A.140.) Dave was never detained, arrested, or charged. (A.140.)

In the kitchen, Rehg found a wet sink, a running faucet, and a wet pyrex measuring cup. (A.113; 115.) Agents located and seized plastic baggies, scales, and latex gloves from other rooms in the house. (A.119.) Agents found what they described as “residue” on a spoon and in the toilet, but neither of these was tested for cocaine or seized as evidence. (A.119; 123-24; 140-41.) Agent Rehg testified that Lamb told him she had been washing dishes, (A.114), but he did not testify that any residue was found in the sink. None of the seized evidence had Lamb’s fingerprints on it. (Doc.201:37-40.) Agents did not find any used cocaine packaging or wrappers, nor did agents find any powder cocaine. The only drugs found in the house were 71 milligrams of cocaine base on the pyrex cup and trace amounts of cocaine base scraped from two scales. (Doc.201:10-11.)

Six months later, Lisa Lamb was indicted on one count of obstruction-of-justice under 18 U.S.C. § 1512(c)(1). (A.69.) Almost a year after that, the government filed a superseding indictment, adding an aiding-and-abetting count. (A.2.) On September 18, 2009, Lamb moved to sever her trial from Johnson’s because “the majority of evidence to be introduced would pertain to Scott Lee Johnson” and “overwhelming prejudicial testimony” against Johnson would cause prejudicial

“spillover.” (Doc.99.) The district court denied Lamb’s motion, holding that Lamb would not suffer prejudice. (A.9.) On October 2, 2009, three days before trial, the government moved to dismiss the conspiracy charge against Lamb and the district court granted this motion with prejudice on the first day of trial. (A.74.)

Following trial, the district court noted, “[t]he majority, if not all of the testimony which resulted in the ultimate conviction of Miss Lamb came from the testimony of Agent Michael Rehg.” (A.36.) Out of seven agents who testified to the April 4 activities (Agents Lammers, Henson, Rehg, Manns, Parker, Scott, and Kruger), only Rehg and Henson testified to Lamb’s conduct and, of the two, only Rehg testified to the event in detail. (*See* A.103-24; 146-48; 152-58; Doc.200:81-112.) Aside from Rehg’s testimony, Lamb was mentioned only a handful of times, and those instances mostly occurred only as the government attempted to link Lamb to Johnson’s drug activity. Three convicted felons made fleeting references to Lamb as Johnson’s “wife,” but only two of them suggested that she was present “cleaning up the house,” in a car, or opening a door during some drug transactions. (A.90; Doc.199:110.) None of them testified Lamb had ever possessed, sold, or distributed any drugs. (A.96-97; Doc.199:110-11.) The remainder of the conspiracy-related witness testimony discussed the mechanics of Johnson’s cocaine-powder conspiracy. (*See, e.g.*, A.77-100; Doc.199:109.) Similarly, the rest of the agent testimony related to the Johnson investigation. (Doc.199:135-164; 199:169-71; 199:174-82; 200:7-27; 200:50-71; 200:76-81; 200:117-215) (describing the controlled buy, surveillance,

chase, arrest, and guns and money recovered from safes at Johnson's other two properties).

The district court instructed the jury on the elements of § 1512(c)(1) using instructions from *United States v. Matthews*, 505 F.3d 698 (7th Cir. 2007), but did not tell the jury that Lamb must have foreseen an official proceeding to have acted corruptly. (A.16-19.) The court also instructed that Lamb could be convicted for a controlled substance whether it was cocaine base or cocaine, (A.14-15), and denied Lamb's requested instruction that a defendant's mere association with conspirators does not prove participation in the conspiracy, (Doc.126:7; 201:105).

Lamb timely moved for acquittal based on insufficiency of the evidence. (Doc.201:106-7; Doc.139-140.) The district court denied this motion. (A.30.) Specifically, the court reviewed the evidence and concluded:

. . . a rational and reasonable jury looking at the circumstantial evidence could find beyond a reasonable doubt that Mr. Johnson the night before had 7 kilograms of cocaine in his possession somewhere, that it could have been at the Westmoreland address, which was his, that Miss Johnson was destroying that by flushing it down the toilet or by a minimum, trying to clean cooked crack cocaine powder out of the Pyrex dish by washing it down the sink.

(A.42.) The court relied on Rehg's testimony regarding Johnson's statements that he had received seven kilograms of powder cocaine the day before his arrest. (A.42.) The court did not acknowledge, however, Johnson's statement that he had distributed these drugs prior to his arrest (Doc.200:142), nor did the court reference any other evidence that might indicate more than a small amount of cocaine base was present in the house on the evening of April 4th.

The court also focused on Lamb’s “right” to ask for a search warrant, stating, “she had no right to question whether the agents had the warrant or not because she was not an owner or a lessee or a renter such that she would have standing to question the officer’s right to enter the residence.” (A.43.) Furthermore, Rehg testified that agents are not legally required to present a copy of the warrant to enter the house. (A.38.) The court did not address, however, whether Lamb knew she did not have the right to ask for a copy of the warrant or understood agents did not need to show her one to enter the house.

The district court sentenced Lamb on May 18, 2010. (A.46.) The court applied a U.S. Sentencing Guidelines Manual § 2X3.1 cross-reference to the § 2J1.2 obstruction-of-justice guideline, which effectively increased Lamb’s base offense level from 14 to 26. (Doc.145:10; Doc.185:1-2; Doc.209:14.) The district court used Johnson’s powder cocaine conspiracy as the underlying offense and 11 kilograms of cocaine as her relevant conduct. (Doc.145:10.) Lamb objected to this offense-level calculation because the government did not prove at trial she destroyed any cocaine beyond what was found in the pyrex cup and because the government did not prove she was aware of any drug transactions on April 4th at the Westmoreland residence. (Doc.151:2.)

Over Lamb’s objection, the district court raised Lamb’s criminal history category from II to III under guideline § 4A1.1(d), which enhances a defendant’s criminal history points if any part of an offense was committed while a defendant was under a criminal sentence. (Doc.145:13; Doc.185:3; Doc.155:1.) The district court

reasoned that because Johnson's conspiracy lasted from 2005 to 2008 and Lamb was on probation for retail theft until December 2007, she qualified for the enhancement even though she was not a co-conspirator and her alleged obstructionist conduct did not occur until April 2008, almost five months after her probation ended.

(Doc.145:13; 185:3.) Without these enhancements, Lamb's sentencing range would have been 18-24 months. U.S. Sentencing Guidelines Manual ch. 5, pt. A, sentencing table (2009). The court sentenced Lamb to 78 months' imprisonment, 3 years' supervised release, and a \$625.00 fine. (A.46.) This appeal followed.

(Doc.188.)

Summary of the Argument

Lisa Lamb's conviction and sentence should be overturned for four reasons.

First, the government charged Lamb under the wrong statute. Congress drafted 18 U.S.C. § 1512(c)(1) to combat obstruction-of-justice related to corporate misconduct, not narcotics possession. The statute's plain meaning, structure, purpose, and history clearly show that § 1512(c)(1) restricts destruction of records or documents detailing illegal activity—not destruction of contraband itself. Such an interpretation would have the absurd result of criminalizing both possession of narcotics and any attempt to get rid of them and thereby render the statute void for vagueness. Moreover, Lamb's conviction cannot stand because the district court failed to instruct the jury properly on the foreseeability of an official proceeding necessary to render her actions "corrupt."

Second, the government and the district court constructively amended Lamb's indictment by broadening the basis for her conviction and failing to sever her case from Johnson's. Lamb's indictment alleged only the destruction of cocaine base, but the evidence at trial, the government's arguments to the jury, and even the jury instructions themselves focused on Johnson's cocaine powder conspiracy and asked the jury to find Lamb guilty based on conduct unrelated to her narrow charge. At a minimum, a fatal variance occurred that actually prejudiced Lamb's defense.

Third, the government failed to prove each of the elements of § 1512(c)(1) beyond a reasonable doubt. In particular, the government failed to prove that Lamb could have foreseen an official proceeding or acted corruptly in denying plain-clothed men

without a search warrant access to the Westmoreland house. The government also failed to show that Lamb herself destroyed any drugs; the majority of the testimony consisted of unsubstantiated speculation by the arresting agents as to Lamb's activities within the house and inadmissible *ex parte* statements by Johnson.

Finally, Lamb's sentence should be overturned because the district court erroneously treated Johnson's entire cocaine conspiracy as Lamb's relevant conduct, which more than tripled her sentence. This Court should vacate Lamb's conviction and dismiss or, at a minimum, remand for resentencing.

Argument

I. The district court improperly instructed the jury because § 1512(c)(1) was not intended to reach conduct beyond corporate fraud and, even if it were, the instructions in this case did not inform the jury of the required nexus between the obstructive act and the “official proceeding.”

Over defense counsel’s objection, the district court failed to properly instruct the jury on the obstruction-of-justice elements in 18 U.S.C. § 1512(c)(1) (2006).

(Doc.201:89; A.16-19.) The obstruction-of-justice jury instructions were deficient because the district court: (1) failed to properly analyze the statutory language of § 1512(c)(1), including its text, structure, purpose, and history; (2) interpreted the statute in a way that rendered it unconstitutionally vague and in violation of the Rule of Lenity as applied to Lamb; and (3) applied verbatim the jury instructions from this Court’s decision in *United States v. Matthews*, 505 F.3d 698 (7th Cir. 2007), despite the significant legal and factual differences between that case and Lamb’s. Therefore, this Court should vacate Lamb’s obstruction-of-justice conviction.

Challenges to the district court’s jury instructions are reviewed “*de novo* to determine whether they provide fair and accurate summaries of the law.” *United States v. Darif*, 446 F.3d 701, 709 (7th Cir. 2006) (quotations omitted). This Court should reverse a conviction “if an instruction misstates the law and this error misguides the jury so much that one party is prejudiced.” *Id.* at 709 (quotations omitted). An error that effectively eliminates an essential element of a crime is not harmless. *United States v. Perez*, 43 F.3d 1131, 1139 (7th Cir. 1994). Finally, this

Court reviews questions of statutory interpretation *de novo*. *United States v. Powell*, 929 F.2d 1190, 1193 (7th Cir. 1991).

A. Shoehorning the lawful destruction of contraband into a § 1512(c)(1) obstruction-of-justice charge contravenes the plain meaning, purpose, and history of the statute.

The government improperly attempted to criminalize the lawful destruction of contraband. By shoehorning Lamb’s alleged conduct into § 1512(c)(1), the government’s approach violated the plain language, purpose, and legislative history of the statute. Thus, the jury was told that it could convict Lamb for conduct that is not reached by § 1512(c)(1), thereby misstating the law in a way that prejudiced Lamb.

The starting point for statutory interpretation “begins with the language of the statute itself.” *Pittway Corp. v. United States*, 102 F.3d 932, 934 (7th Cir. 1996); *see also Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985). The plain language of § 1512(c)(1) prohibits its extension to the lawful destruction of contraband, and the district court’s failure to instruct the jury of this prohibition constitutes reversible error. In its entirety, § 1512(c)(1) criminalizes an individual’s actions if that person “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.”³ 18 U.S.C. § 1512(c)(1). In Lamb’s case, the government liberally interpreted the phrase “other object” to include “cocaine base.” (A.4.) But shoehorning the destruction of contraband into

³ 18 U.S.C. § 1512(c) was enacted as part of the Sarbanes-Oxley Act of 2002, which was designed to combat corporate fraud. *See* Section I-A, *infra*, for a further discussion.

“other objects” not only violates a plain reading of the text, it also produces unintended and absurd results.

First, by the statute’s own terms, the text only reaches obstructive acts related to “a record, document, or other object.” 18 U.S.C. § 1512(c)(1). Congress’s explicit reference to the terms “record” and “document” indicate that it intended for this statute to exclusively reach corporate fraud. *Ejusdem generis* confirms this reading. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) (applying *ejusdem generis* and stating that “[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.”) (quotations omitted). In § 1512(c)(1), Congress enumerated “record” and “document” and followed those terms with the general phrase “other objects.” Based on *ejusdem generis*, “other objects” must therefore be limited by the definitions of the terms “record” and “document.”

Based on even a passing evaluation of the committee reports and Congressional debate associated with the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, it is abundantly clear that the Bill was largely informed by the wholesale document destruction at Arthur Andersen and Enron. *See* Section I-A, *infra*. Given that history, Congress intended to give “document” and “record” meanings that would only ensnare corporate fraudsters. Even absent that legislative history, the plain meanings of “document” and “record” surely cannot include objects such as “cocaine base.” For example, 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, usually designed to memorialize those events.” *Id.* at 1387. 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.” *Circuit City Stores*, 532 U.S. at 114-115. Therefore, the meaning of “other objects” must include some documentation of a past event or some tangible thing designed to memorialize some other event. Additionally, an “other object” should also have characteristics that permit a person to write or mark on the object. Examples of “other objects” that clearly meet these two definitions include corporate files, papers, diskettes, a computer hard drive, or any other objects used to document or memorialize some other events.

While the definitions of “document” and “record” and the imputed definition of “other objects” provide the government great latitude in the types of items subject to § 1512(c)(1), it is clear that Congress intended objects such as “cocaine base” to be on the outside looking in. Simply put, “cocaine base” is not used to record a past transaction or to memorialize a distant memory. A person cannot mark or record information on “cocaine base.” Thus, “cocaine base” cannot be included in the definition of “other objects.” Based on nothing more than governmental overreaching in its interpretation of § 1512(c)(1), this Court should vacate Lamb’s conviction.

The absurd-results doctrine also militates against such a broad expansion of the text. The doctrine provides that “[w]here the literal reading of a statutory term would ‘compel an odd result,’ we must search for other evidence of congressional intent to lend the term its proper scope.” *Pub. Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 454 (1989) (quoting *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 509 (1989)). *See also United States v. Brown*, 333 U.S. 18, 27 (1948).

Construing the lawful destruction of contraband as an obstruction-of-justice produces an absurd result that forces defendants like Lamb to continue possessing contraband rather than destroying it and abandoning some criminal act. Possession of cocaine base is a federal crime punishable by up to one year in prison. 21 U.S.C. § 844(a) (2006). The government, however, has construed § 1512(c)(1) to criminalize the lawful abandonment of a criminal pursuit. For example, the government’s construction of § 1512(c)(1) would ensnare Lamb if it is assumed that she destroyed a personal-use amount of cocaine base on April 4th, even though she was lawfully entitled to abandon her prior criminal conduct. Additionally, construing Lamb’s actions as obstruction-of-justice also creates gross sentencing inequalities. Specifically, Lamb was sentenced to 78 months by cross-referencing Johnson’s conspiracy. (A.46.) However, Lamb’s sentence would have only been 18-24 months for obstructing her own simple possession and 4-12 months if she had been charged with simply possessing 71 milligrams of cocaine base. *See Section IV, infra*. Thus, the government’s construction of § 1512(c)(1) produces two different absurd and unintended results. The logical construction of the statute, which

avoids this absurd result is to construe “cocaine base” as not an “other object” for purposes of § 1512(c)(1). Such an interpretation is consistent with both the statutory text and Congressional intent and it avoids both absurdities.

In addition to the statute’s plain language, the limited reach of § 1512(c)(1) is further buttressed by the legislative history in which the provision was adopted. Section 1512(c) was enacted as part of the Sarbanes-Oxley Act of 2002. § 1102, 116 Stat. at 807. Broadly speaking, Congress adopted Sarbanes-Oxley in response to the 2001 and 2002 accounting scandals of corporate luminaries such as Enron, WorldCom, Global Crossing, and Adelphia. *See id.* at pmb., 116 Stat. at 745; Jonathan D. Glater, *From Investor Fury, a Legal Bandwagon*, N.Y. Times, Sept. 15, 2002, at C1. The Act’s preamble makes clear that the bill was designed to “protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws. . . .” Sarbanes-Oxley Act pmb., 116 Stat. at 745.

Shortly after Senator Sarbanes introduced his bill, the Senate considered and passed two significant amendments that added criminal provisions to the Act. The first amendment was proposed by Senators Leahy and McCain. *See* S. Rep. No. 107-146 (2002) (originally introduced as Senate Bill 2010). The Leahy-McCain amendment sought to (1) “provide prosecutors with new and better tools to effectively prosecute and punish those who defraud investors”; (2) establish “tools to improve the ability of investigators and regulators to collect and preserve evidence which proves fraud”; and (3) protect “victims’ rights to recover from those who have cheated them.” *Id.* at 11. To avoid ambiguity in his Amendment’s interpretation,

Senator Leahy clarified on the Senate floor that the “Leahy-McCain, et al, amendment makes it very clear that these people are going to face jail terms if they loot the pension funds, if they defraud their investors, if they defraud the people of their own company.” 148 Cong. Rec. S6515, 6534 (daily ed. July 10, 2002) (statement of Sen. Leahy). Senator Durbin added that the Leahy-McCain provisions were enacted in response to Enron and its auditors engaging in wholesale document destruction in the days leading up to an anticipated Securities and Exchange Commission inquiry. *See* 148 Cong. Rec. S6515, 6537 (daily ed. July 10, 2002) (statement of Sen. Durbin). The full Senate passed the Leahy-McCain Amendment and the provisions were later codified in 18 U.S.C. §§ 1519 and 1520.

A second group of criminal provisions was added to the Sarbanes-Oxley Act by Senator Lott. *See* 148 Cong. Rec. S6515, 6542 (daily ed. July 10, 2002) (statement of Sen. Lott). Among other effects, Senator Lott’s Amendment Number 4188 created a new obstruction-of-justice charge that was intended to “enact stronger laws against document shredding.” *Id.* at S6545. The Lott Amendment was eventually adopted by the full Congress and is codified at 18 U.S.C. § 1512(c). The legislative history thus confirms that drugs are beyond § 1512(c)’s purview.

Finally, the Act’s structure is another clue Congress gave to demonstrate the limited intent and scope of the criminal provisions. Specifically, 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.” Pub. L. No. 107-204, § 802, 116 Stat. 745, 800 (2002). 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.” *Id.* at § 1102. Because the structure of the Act so clearly and exclusively envisions obstruction-of-justice liability for corporate fraud, this Court should reject the government’s attempt to extend the provision to include Lamb.

Given the statute’s plain language, history, and structure, the district court’s failure to properly instruct the jury on the limits of § 1512(c)(1) constitutes reversible error.

B. The government’s misapplication of § 1512(c)(1) renders the statute void for vagueness and violates the Rule of Lenity.

Even if this Court finds that “other objects” as used in § 1512(c)(1) includes cocaine base, it should find the language ambiguous enough to render the statute void for vagueness, to invoke the Rule of Lenity, or both. The void-for-vagueness doctrine requires that “a penal statute [must] define the criminal offense [] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [] in a manner that does not encourage arbitrary and discriminatory enforcement.” *Skilling v. United States*, 130 S. Ct. 2896, 2927-28 (2010) (citation omitted). In *Skilling*, the Supreme Court construed the honest-services statute, 18 U.S.C. § 1346 (1988), as only applying to bribe-and-kickback schemes. *Skilling*, 130 S.Ct. at 2931. In narrowly interpreting the statute, the *Skilling* Court relied heavily on the fact that “the honest-services doctrine had its genesis in prosecutions involving bribery allegations.” *Id.*

In the same way that *Skilling* narrowly construed honest-services fraud, this Court should narrowly construe § 1512(c)(1). For Lamb, the prosecution's expansive interpretation of § 1512(c)(1) required her to continue possessing contraband in violation of federal law instead of lawfully destroying the narcotics. At a minimum, such an interpretation leaves individuals such as Lamb unsure of what conduct is prohibited. More fundamentally, this interpretation requires Lamb to act criminally rather than lawfully abandon a prior criminal pursuit. Rather than consent to the government's expansive interpretation, this Court, like *Skilling*, should construe the statute as only reaching the destruction and concealment of documents, records, diskettes, files, and similar objects. Also like *Skilling*, this interpretation is consistent with the genesis of § 1512(c)(1) as an outgrowth of the corporate fraud scandals the Sarbanes-Oxley Act sought to punish. Accordingly, the district court erred in instructing the jury that § 1512(c)(1) was expansive enough to apply to Lamb.

The Rule of Lenity casts further doubt on an expansive reading of § 1512(c)(1). *See United States v. Thompson*, 484 F.3d 877, 881 (7th Cir. 2007) (noting that the Rule of Lenity “insists that ambiguity in criminal legislation be read against the prosecutor, lest the judiciary create, in common-law fashion, offenses that have never received legislative approbation, and about which adequate notice has not been given to those who might be ensnared”). Given the most natural reading of § 1512(c)(1), which is bolstered by proper statutory construction and relevant legislative history, this Court should hold that § 1512(c)(1) does not apply to cocaine

base or other contraband. In doing so, this Court should find that the district court erred in instructing the jury that § 1512(c)(1) applies outside the context of corporate fraud.

C. Even if § 1512(c)(1) could be applied in some drug cases, Lamb’s conviction cannot stand because the jury was not properly instructed that Lamb had to have foreseen an official proceeding in order to have acted “corruptly.”

The jury instructions misstated the law and prejudiced Lamb, because they failed to require the jury to find that Lamb could foresee an official proceeding prior to her alleged obstructive act, an essential element of the statute. Section 1512(c)(1) provides, in pertinent part:

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). To sustain a conviction, this Court requires that the defendant must foresee a grand jury or judicial proceeding prior to performing the obstructive act. *Matthews*, 505 F.3d at 708. Thus, although § 1512 notes 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)(1) (2006), this Court has held that obstructive acts under § 1512(c)(1) must have a nexus—a “relationship in time, causation, or logic with the judicial proceedings,” *Matthews*, 505 F.3d at 708. Stated differently, “before a defendant may be convicted of obstruction under § 1512(c)(1), he must believe that his acts will be likely to affect a pending or foreseeable proceeding.” *Id.* (counseling 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.”) (quoting *Arthur Andersen LLP v. United States*, 544 U.S. 696, 707-08 (2005)).

That § 1512(c)(1) requires something more in the way of intent and foreseeability is evident from Congress’s deliberate choice to limit § 1512(c)(1) to official judicial proceedings, as opposed to mere investigations, which are encompassed in other related obstruction offenses. For example, § 1519 states:

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in 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.

18 U.S.C. § 1519 (2006) (emphasis added). Thus, although § 1512(c)(1) requires the defendant to foresee an “official proceeding,” § 1519 criminalizes the destruction of a “record, document, or tangible object” during an investigation regardless of whether the defendant can foresee an official proceeding. Given the difference between §§ 1512(c)(1) and 1519, this Court should presume that the language and structure Congress chose was deliberate. *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 452 (2002).

In a different factual context, this Court has found that the following set of instructions satisfy the mandates outlined above:

(1) To sustain the charge of obstruction of justice . . . the government must prove the following propositions: First, the defendant attempted to destroy or conceal an object; Second, the defendant acted with the intent to impair the object’s availability for use in an official proceeding; and Third, the defendant acted corruptly.

(2) [A]n official proceeding need not be pending or about to be instituted at the time of the offense.

(3) The term “official proceeding” . . . means the federal grand jury or a proceeding in the United States District Court for the Southern District of Illinois.

(4) “Corruptly” . . . means that the defendant acted with the purpose of wrongfully impeding the due administration of justice.

(A.16-19); *see also Matthews*, 505 F.3d at 704-05. Notably, the *Matthews* Court did not require an explicit foreseeability instruction, but rather concluded that under the facts of that case, “the jury could only convict Matthews if it found that he attempted to conceal the [object] with the intent to prevent its use in the federal grand jury.” *Matthews*, 505 F.3d at 708. Although this factual determination may have obviated the need for an explicit foreseeability instruction in that case, the district court erroneously extended *Matthews* beyond its facts by applying the identical instructions to Lamb’s case over defense counsel’s objection, (A.26).

First, as a legal matter, extending the *Matthews* approach and, specifically the fact that a foreseeability instruction was not required, to other types of crimes means that in many cases the jury will not be fully and properly instructed. For example, absent a foreseeability instruction, a reasonable juror could easily conclude that lawful document destruction pursuant to a lawfully applied document retention policy constitutes obstruction-of-justice even though an “official proceeding [is] not [] pending or about to be instituted” at the time of the destruction. 18 U.S.C. § 1512(f)(1). Alternatively, even the most reasonable juror could conclude that the lawful destruction of contraband, *at any time*, is a criminal offense, because an illegal drug user always runs the risk of an official proceeding

connected to his possession of contraband. Without a limiting foreseeability instruction, the *Matthews* instructions impermissibly expand the temporal dimensions of § 1512(c)(1). Despite the *Matthews* Court's one-sentence conclusion to the contrary, a plain reading of the instructions in no way requires a reasonable juror to find a nexus between the obstructive act and an "official proceeding." Thus, the district court's failure to provide such an instruction was a misstatement of the law and requires reversal.

Second, the district court erred in applying the *Matthews* instructions to Lamb's factually distinguishable case. Even if the *Matthews* instructions are facially valid, the instructions significantly misstate the § 1512(c)(1) intent element as applied to Lamb given the striking differences between the two defendants. For example, the defendant in *Matthews* was the East St. Louis Chief of Police who was convicted of attempted obstruction-of-justice and lying to a grand jury for his role in unlawfully concealing the firearm of a friend who was subject to a separate criminal investigation. *Matthews*, 505 F.3d at 701. The investigation of the crime and subsequent cover-up included officers from the East St. Louis Police Department, the Bureau of Immigration and Enforcement ("ICE"), and the FBI. *Id.* at 703. Importantly, the investigation started on August 7, 2004 and concluded with a grand jury subpoena to Matthews on October 19, 2004. *Id.* at 702-03. Throughout the 11-week investigation, Matthews appeared to have actual knowledge of the investigation into the missing firearm, and he even commented that "the Feds were snooping around." *Id.* at 703. Thus, the Court's affirmation of Matthews's

conviction despite the absence of an explicit foreseeability instruction is appropriate because Matthews had *actual knowledge* of the pending grand jury proceeding. Given Matthews's actual knowledge, the jury had no need for a foreseeability instruction.

In stark contrast, Lisa Lamb had no prior federal convictions, and thus, had no prior experience with a federal grand jury. More importantly, Lamb was not a subject of the DEA's ongoing investigation into Johnson's criminal enterprise, and she was not included as a suspect in the government's probable cause affidavit for a search warrant of Johnson's properties. (Doc.43.) There is a material difference between Matthews's actual knowledge of an official proceeding during an 11-week investigation and the complete lack of knowledge and notice Lamb had when she first opened the door for Agent Rehg on April 4, 2008. This difference is fatal to the *Matthews* instructions as applied to Lamb. Unlike Matthews, Lamb had no advance warning that the search warrant was connected to an official proceeding and thus she had no reason to suspect that she would be subject to an official proceeding when she opened the door to her boyfriend's house. Because Lamb had no actual knowledge of an official proceeding, the district court was required to explicitly instruct the jury to find a nexus between the obstructive act and an "official proceeding."

Not only did the district court misstate the law, but Lamb also endured significant prejudice as a result of the erroneous instructions. The absence of a foreseeability instruction strikes at the heart of the intent element in § 1512(c)(1).

If Lamb could not foresee an official proceeding in connection with her actions, then by definition, she could not have acted “corruptly.” Under *United States v. Perez*, the district court’s misinterpretation of the intent element is anything but harmless. 43 F.3d at 1139.

Because the district court failed to properly instruct the jury as to an essential element and the error resulted in prejudice, Lamb’s conviction must be vacated.

II. The evidence presented at trial and the jury instructions either constructively amended the charges against Lamb or fatally varied the factual allegations contained in the indictment.

In both the initial and superseding indictments, Lamb was specifically charged with destroying cocaine base, not cocaine powder. (A.4; 69.) At her joint trial, however, the evidence introduced by the government dealt almost exclusively with cocaine powder, and the trial court’s instructions invited the jury to consider evidence of both cocaine powder and cocaine base. (A.15; *see also* A.23-24; Doc.212:60.) Both acts, along with an erroneous failure to sever Lamb’s case from Johnson’s, constructively amended Lamb’s indictment or, at a minimum, caused a prejudicial fatal variance. *Stirone v. United States*, 361 U.S. 212, 217 (1960).

Constructive amendment and fatal variance violate a defendant’s rights under the Fifth and Sixth Amendments. The Fifth Amendment guarantees a grand jury indictment before a felony trial, while the Sixth Amendment guarantees a defendant notice of the charges she will face. *See* U.S Const. amend. V, VI. After an indictment has been returned, the charges contained within that indictment cannot be broadened or changed, except by the grand jury itself. *Stirone*, 361 U.S.

at 215-16 (citing *Ex Parte Bain*, 121 US 1 (1887)); *see also United States v. Miller*, 471 U.S. 130, 138 (1985). Reversal is warranted when facts introduced at trial differ materially from the allegations in the indictment, *see United States v. Ratliff-White*, 493 F.3d 812, 820 (7th Cir. 2007) (internal citations omitted), because if the indictment specifies facts that are material to the offense those facts must be proven, not different ones, *United States v. Baker*, 227 F.3d 955, 961 (7th Cir. 2000) (internal citations and quotations omitted); *see also United States v. Leichtnam*, 948 F.2d 370, 374-75, 379-81 (7th Cir. 1991). Indeed, the Supreme Court has stated that expanding the basis for liability is never allowed. *Miller*, 471 U.S. at 139-40.

This Court reviews *de novo* violations of a defendant's constitutionally protected trial rights. *United States v. Trennell*, 290 F.3d 881, 886 (7th Cir. 2002) (internal citations omitted). Lamb objected pretrial to the joinder of her case with Johnson's, because evidence of his cocaine powder conspiracy would spillover and prejudice her defense. (Doc.99:1-2.) Lamb also objected to the jury instructions that broadened the types of objects she was accused of destroying. (A.23-24.)⁴ These actions put the district court on notice of the constitutional concerns at issue in this case and, therefore, this Court should review the question *de novo*.

⁴ Should this Court find that Lamb's objections did not preserve this issue, it should nevertheless review for plain error. *United States v. Duran*, 407 F.3d 828, 843 (7th Cir. 2005) (reviewing for plain error a claim that nonspecific jury instructions broadened the indictment). The broadening of the charges was clear from the indictment and evidence, and Lamb would not have been convicted or sentenced as she was in the absence of these errors.

A. As a threshold matter, the district court erred in denying Lamb’s motion to sever her trial from Johnson’s.

By joining Lisa Lamb’s single charge of destroying a user quantity of cocaine base with Scott Lee Johnson’s alleged multi-national powder cocaine conspiracy, the trial court ensured that the jury would be exposed to highly prejudicial evidence linking her to Johnson’s crimes. It is no surprise, therefore, that many of the problems with this trial stem from the district court’s denial of Lamb’s severance motion. (A.9-12.) This Court reviews a decision to deny a severance motion for an abuse of discretion, and will reverse when the defendant shows the misjoinder caused her actual prejudice by violating a specific trial right. *United States v. Oglesby*, 764 F.2d 1273, 1275 (7th Cir. 1985); *see also Zafiro v. United States*, 506 U.S. 534, 538 (1993) (noting that exposing the jury to inadmissible evidence constitutes “serious risk” that could necessitate severance); Fed. R. Crim. P. 8(b), 14(a). Prejudice can also arise when the failure to sever confuses the jury. *Oglesby*, 764 F.2d at 1276 (noting the central question is whether the jury is able to keep separate, collate, and correctly appraise the evidence). As discussed below, both rationales are present here: (1) Lamb’s constitutional right to a proper grand jury indictment under the Fifth Amendment and her right to notice of the charges against her under the Sixth Amendment were abridged by being forced to go to trial with Johnson; and (2) the jury could only have been confused by the indictment, which alleged one set of facts, and the evidence and instructions, which broadened the basis for Lamb’s conviction.

First, with respect to the constitutional violations, the evidence introduced at trial linked Lamb to Johnson in a way that significantly broadened the culpable conduct at issue beyond the bounds of the indictment. This was only possible, however, at a joint trial because the vast majority of the evidence presented to the jury would have been inadmissible against Lamb alone. Thus, Lamb suffered “actual prejudice” because the joint trial compromised two of her trial rights. *See* Sections II.B. and II.C, *supra*.

Second, the character of the evidence at this joint trial suggests the jury would have been confused and incapable of properly segregating and analyzing the evidence against each defendant. In light of the massive and complex quantity of the evidence, and the gross disparity in evidence introduced against Johnson as opposed to Lamb, even the district court could not separate the evidence against the two. When ruling on Lamb’s Rule 29 motion, the court relied on Johnson’s post-arrest confession that he had purchased several kilograms of cocaine in the days preceding his arrest as evidence that Lamb had destroyed drugs and, thus, obstructed justice. Specifically, the trial court stated: “[Agent Rehg] also indicated that when they interviewed Mr. Johnson, that Mr. Johnson was forthcoming and he indicated to Agent Manns that he had just received 7 kilograms of cocaine the evening before.” (A.42.) Later, the district court concluded that the jury could find Lamb guilty on the basis that:

[w]hen you look at that testimony in the light most favorable to the Government, a rational and reasonable jury looking at the circumstantial evidence could find beyond a reasonable doubt that Mr.

Johnson the night before had 7 kilograms of cocaine in his possession somewhere, that it could have been at the Westmoreland address. . . .

(A.42.) Notably, the district court did not acknowledge agent Nick Manns's testimony that Johnson reported he had already sold that cocaine or placed it on consignment with other dealers. (Doc.200:139-40.)

Regardless, using Johnson's confession against Lamb abridged her confrontation rights. The Supreme Court has emphasized that introducing one defendant's confession against another in a joint trial is improper, even when the jury is instructed to disregard it. *Bruton v. United States*, 391 U.S. 123, 133, 136 (1968) (reversing because the co-defendant's statements were so powerfully incriminating that the attendant prejudice to the defendant could not be overcome with jury instructions); *see also Gray v. Maryland*, 523 U.S. 185 (1998). Johnson's statements clearly implicated Lamb as they purportedly placed in the house the drugs that Lamb was accused of destroying. (See A.42.) If the district court was unable to draw a clear demarcation between the evidence related solely to Johnson and that related to Lamb, then surely the jury would fall prey to the same confusion as well.

B. The trial court and the government constructively amended the charges against Lamb.

When the jurors retired to deliberate at the end of Lamb's trial, they took with them a whole host of evidence unrelated to the limited charges in her indictment. Responsibility for this evidentiary expansion lies with both the government and the trial court. The evidence and jury instructions described a crime different than that

charged in the indictment. This Court should reverse Lamb's conviction on the basis of this constructive amendment.

Constructive amendment occurs either when the government introduces evidence of, or makes arguments regarding, crimes not charged, *Stirone*, 361 U.S. at 219 (holding that the introduction of evidence that the defendant violated the Hobbs Act by interfering with *steel exports* constituted a constructive amendment of his indictment that charged interference with *sand imports*), or when the trial court fails to provide adequate jury instructions, *United States v. Crowder*, 588 F.3d 929, 938 (7th Cir. 2009). Either way, constructive amendments deny the defendant her right to a proper grand jury indictment. *Stirone*, 361 U.S. at 217-18. For this reason, a constructive amendment constitutes a *per se* constitutional violation and is reversible without showing prejudice. *United States v. Kuna*, 760 F.2d 813, 817 (7th Cir. 1985).

The government constructively amended Lamb's indictment in two ways: (1) by offering evidence and making arguments, both of which broadened the nature of the charged § 1512(c)(1) count; and (2) by re-instating, via evidence and argument, the conspiracy charge against Lamb that it had unilaterally dismissed before trial. (*See* Doc.115; A.74.)

First, the government constructively amended Lamb's obstruction-of-justice count under § 1512(c)(1) because it offered evidence intimating that Lamb had destroyed cocaine powder and argued to the jury that it could convict her on this basis. (*See, e.g.*, A.99-100 (Colon-Laboy testifying about cocaine powder deliveries

to Johnson and Lamb); A.161 (government’s closing argument stating that Lamb was on trial because “she attempted to destroy evidence of the drug dealing that was going on at the house at Westmoreland”); A.162 (prosecutor asking the jury to infer Lamb destroyed powder cocaine: “we don’t know what those objects were [that were flushed down the toilet]. We can guess it was probably cocaine or cocaine base. . . .”).)

The first element of § 1512(c)(1) is the destruction of an “object.” Lamb’s indictment identified this object as “cocaine base.” (A.4.) Destruction of cocaine powder was not charged in either the initial or superseding indictment. (See A.69 (original indictment charging attempt to “destroy an object, *cocaine base*” so as to impair its availability in an official proceeding) (emphasis added); A.4 (superseding indictment using same language).) Although essential in its own right, the character of the identified object is central to the remainder of the § 1512(c)(1) analysis. Establishing the defendant’s corrupt intent to destroy an object so as to prevent its use in an official proceeding and the foreseeability of such a proceeding—both essential elements of § 1512(c)(1)—depend upon what object the government alleges was destroyed.

Here, the only relevant “official proceeding” was the government’s investigation and prosecution of Johnson’s drug dealing in *powder* cocaine; there was no evidence, nor did the government allege, that Johnson dealt in crack or cocaine base. (Cf. A.4 (Counts 1 and 2 charging Johnson with conspiracy involving distribution of “a mixture or substance containing a detectable amount of cocaine”).) The

government's fluid definition of "object"—which encompassed both the charged cocaine base as well as non-charged cocaine powder—unfairly expanded the basis on which the jury could find Lamb guilty. *Stirone*, 361 U.S. at 219; *cf. Baker*, 227 F.3d at 961. The government cannot claim that Lamb could have had the requisite corrupt intent to disrupt a proceeding while destroying an object unrelated to that proceeding.

Not only did the government constructively amend Lamb's indictment by expanding the § 1512(c) charge, it also introduced evidence to prove Lamb's complicity in Johnson's drug conspiracy—a separate offense—after voluntarily dismissing that charge in her indictment. (Doc.115; A.74.) Aside from Agent Reh's testimony dealing with the incident at the Westmoreland residence, Lamb was mentioned only a handful of times at trial and in nearly every instance the government's purpose was to explicitly or implicitly tie Lamb to Johnson's conspiracy. (A.78-79 (asking Colon-Laboy whether Lamb would accompany Johnson to pick up cocaine); A.96 (same); A.90-91 (inquiring whether Lamb was present when Colon-Laboy delivered cocaine to Johnson); A.96-97 (same); Doc.199:110-11 (establishing that Lamb was sometimes present in the house when Johnson transacted drug deals, but was uninvolved); A.162 (prosecutor stating Lamb sometimes accompanied Johnson when he picked up cocaine powder and that she "knew what was going on").) By highlighting her relationship with Johnson, as well as eliciting testimony establishing her proximity to Johnson's drug dealing, the government invited the jury to consider Lamb a part of Johnson conspiracy.

Creating this nexus was essential to proving the elements of § 1512(c)(1), but the government had to constructively add an uncharged conspiracy count in order to do it.⁵

Next, the government's initial constructive amendment was exacerbated by the district court, which not only failed to give crucial limiting instructions, but also affirmatively instructed the jury to consider offenses not charged by equating powder with crack cocaine. *See United States v. Willoughby*, 27 F.3d 263, 266 (7th Cir. 1994) (“[Constructive amendment] can also be generated or exacerbated by faulty instructions. . . .”). When specific facts are included in the indictment they become essential elements of the charge and are not mere surplusage; neither the district court nor the government may expand or ignore those conditions at trial. *Leichtnam*, 948 F.2d at 378 (citing *United States v. Weissman*, 899 F.2d 1111 (11th Cir. 1990)). The jury, in turn, must be instructed on the nature of those specific allegations. *Leichtnam*, 948 F.2d at 377.

This Court has reversed on the basis of constructive amendment in a factually similar situation. *Id.* at 381. In *Leichtnam*, the defendant was indicted for knowingly using and carrying a specific firearm: a Mossberg rifle. *Id.* at 374. At trial, however, the government introduced two additional firearms that had been

⁵ A by-product of the constructive amendment was that it allowed the government to shore up its charges against both Lamb and Johnson simultaneously. The government charged Johnson with managing a massive powder cocaine distribution ring, (A.77; 86 (Colon-Laboy stating that between 2004 and 2007 he delivered Johnson 40 to 50 kilograms of powder cocaine a month)), but only actually recovered about 400 grams of powder cocaine from Johnson's customers for use as evidence at trial (Doc.201:8-9). Lamb provided the government with a ready-made explanation as to why more powder cocaine was not seized: because Lamb supposedly destroyed it.

discovered in the defendant's home. *Id.* Although the indictment was limited to a single, specific gun, the jury was instructed that it could convict on a finding that the defendant "intentionally used or carried a firearm." *Id.* This Court reversed, holding that the introduction of the additional guns, combined with the overly broad jury instructions, constructively amended the indictment. *Id.* at 381.

Like *Leichtnam*, Lamb's indictment charged her with an offense related to a specific object: cocaine base. The district court, however, failed to specify that the "object" charged under § 1512(c) was cocaine base. (A.16 (Government Instruction 40 given over defense counsel objection).) Moreover, the court instructed the jury that powder cocaine and cocaine base are interchangeable. (A.14-15 (Government Instructions 32 and 33 stating that it is sufficient that either defendant knew the substance was some kind of prohibited drug and that the distinction between cocaine and cocaine base is irrelevant).) Thus, the district court erred both when it failed to instruct the jury of the narrow indictment and when it affirmatively instructed the jury that it could freely substitute powder cocaine for the cocaine base. These cumulative errors were plain in the record and because a constructive amendment does not require a showing of prejudice, *Ratliff-White*, 493 F.3d at 820, this Court should reverse Lamb's conviction.

C. Lamb's indictment suffered from a fatal variance because the evidence introduced differed materially from the factual allegations in the indictment and this difference prevented Lamb from preparing an adequate defense.

At a minimum, a fatal variance occurred in Lamb's case because the evidence introduced at trial proved facts different from those alleged in the indictment.

Ratliff-White, 493 F.3d at 820. Fatal-variance analysis has two steps; the defendant must show: (1) a material difference between the facts alleged in the indictment and the evidence at trial; and (2) prejudice resulting from that variance. *See id.* A defendant is prejudiced if she is unable to anticipate the evidence introduced against her. U.S. Const. amend. VI (right to notice of charges against defendant); *Ratliff-White*, 493 F.3d at 820. Courts have found this type of prejudicial impact exacerbated when the defendant is tried jointly with another and there exists a “large disparity” of evidence introduced against the two co-defendants. *United States v. McDermott*, 245 F.3d 133, 139 (2d Cir. 2001).

As noted above, the difference between powder cocaine and cocaine base in the context of § 1512(c) is neither “trivial, useless . . . innocuous,” *Stirone*, 361 U.S. at 217, “a simple matter of semantics,” *Leichtnam*, 948 F.2d at 376, nor merely “technical,” *Willoughby*, 27 F.3d at 266. Moreover, this variance abridged Lamb’s substantial trial rights, satisfying the second prong of the test. Expanding the relevant conduct from destruction of cocaine base to destruction of powder cocaine implicates quantitatively and qualitatively different evidence that Lamb could not have foreseen.

Based on the indictment, Lamb expected to defend against a charge of destroying less than a gram of cocaine base. The only evidence of cocaine base in the house was a tenth of a gram (0.122 grams) of residue found on the pyrex cup and scales. (A.117 (pyrex cup with residue); A.122 (two scales with residue); Doc.201:10 (71 milligrams of cocaine base scraped from pyrex); Doc.201:11 (51

milligrams of cocaine base scraped from scales).) At trial, however, the government introduced evidence to try to prove that she destroyed thousands of times as much. (See A.99-100 (Colon-Laboy stating that his last delivery to the Westmoreland house was seven kilograms of powder cocaine in late March 2008); A.128 (Rehg testifying regarding Johnson's statement that he had received seven kilograms of cocaine on April 3).) Lamb simply could not have anticipated such expansive liability.

Not only was the quantity of drugs hugely different, the variance impacted the substance of Lamb's defense as well. Based on the indictment, Lamb had no reason to foresee or prepare a defense for the barrage of cocaine-powder evidence ultimately used against her. Because the government never alleged that Johnson's operation engaged in the distribution of cocaine base, Lamb could have defended against the § 1512(c) charge on the grounds that the cocaine base at issue was unrelated to any alleged official proceedings and that by extension she could not have formed the requisite corrupt intent. *See* Section I, *supra*. The unforeseeability of the government's approach was heightened by the fact that the government had voluntarily dropped its conspiracy charge against Lamb three days before trial. (See Doc.115.) Given both the qualitative and quantitative differences between powder cocaine and cocaine base under the circumstances, Lamb suffered clear prejudice as a result of this variance, and therefore her conviction should be reversed.

III. Lamb could not have acted corruptly within the meaning of § 1512(c)(1), because the evidence was insufficient to prove that Lamb believed her actions would be likely to affect a foreseeable official judicial proceeding.

Lamb's conviction for obstruction-of-justice should be overturned on sufficiency grounds for three reasons: (1) the evidence did not prove that she destroyed or concealed anything; (2) Lamb could not have acted corruptly because the evidence failed to prove that she or a reasonable person under the circumstances would have believed that a valid proceeding was underway; and (3) the evidence did not prove that Lamb contemplated any particular, foreseeable judicial "proceeding." Because Lamb made a timely motion for acquittal at the close of the government's evidence, the standard of review for sufficiency of the evidence in this case is *de novo*. *United States v. Dalhouse*, 534 F.3d 803, 807 (7th Cir. 2008). This Court will overturn the verdict on insufficiency grounds when, viewing the evidence in the light most favorable to the government, no rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *United States v. Morris*, 498 F.3d 634, 637 (7th Cir. 2007). A guilty verdict cannot rest on a jury's speculative inferences. *Piaskowski v. Bett*, 256 F.3d 687, 693 (7th Cir. 2001).

First, the government did not prove beyond a reasonable doubt that Lamb knowingly destroyed any drugs, because the facts at trial established only: (1) that Rehg caught glimpses of the inside of the home through gaps in the shades; (2) that he merely heard a toilet flushing; and (3) that he momentarily could see Lamb in the kitchen near the sink. (A.112.) Significantly, Rehg did not see Lamb destroy any drugs, handle the pyrex cup, or even flush the toilet. Plus, he could not account

for Dave Johnson's whereabouts during the twenty minutes it took for agents to break in. (A.113.) Regardless, toilet flushing does not equal drug destruction; any such finding here would have been pure speculation. Rehg merely saw Lamb standing in the kitchen when the officers finally broke through the door, a fact that did not establish beyond a reasonable doubt that Lamb ever touched the cup. Without some evidence of drugs or even drug paraphernalia in Lamb's possession, her activity moving around the house and standing in the kitchen cannot sustain her conviction.

The government also argued that Lamb destroyed cocaine powder. (A.162.) Putting aside the constructive-amendment and fatal-variance problems associated with this approach, *see* Section II, *supra*, the government's argument also fails as a factual matter. The evidence at trial strongly suggested that Johnson had sold all of the cocaine powder (seven kilograms) that he had obtained. (Doc.200:142.) Johnson told the officers as much when they arrested him. (Doc.200:142.) No powder cocaine was found in the Westmoreland house. Although the government tried to argue that this was because Lamb had destroyed it, the simpler explanation—provided by Johnson but ignored by the government at trial—was that Johnson had sold it. Indeed, no used cocaine packaging was discovered at the Westmoreland house, (A.119-24), and this is not something that could easily have been flushed down a sink or toilet. Nor did the agents recover or test the amorphous "residue" that they claimed to have seen in the toilet. (A.119.) Despite this factual lacuna, both the government and the district court assumed the

presence of powder cocaine in the Westmoreland residence for purposes of Lamb's conviction and subsequent sentence.

Second, the evidence also was insufficient to establish Lamb's corrupt intent, because no reasonable person under the circumstances would have believed that she was obstructing an "investigation" until she knew that the people at her door were acting under color of law. Given the acknowledged dangerousness of the neighborhood, (A.142), Lamb would not have automatically presumed that the plain-clothes men who arrived in an unmarked car were legitimate officials.⁶

Agents Rehg and Henson showed up without warning at Lamb's boyfriend's house and demanded, without a search warrant, to be let in. Badges and hats can be replicated, and both the media and case law are replete with stories of crooked police officers who routinely shake down potential criminals. *See, e.g., United States v. Shamah*, 624 F.3d 449 (7th Cir. 2010) (two officers routinely stole cash and drugs from drug dealers); *United States v. Haynes*, 582 F.3d 686, 692-93 (7th Cir. 2009) (corrupt officers routinely stole drugs and money from dealers and sold the stolen drugs); *United States v. Millet*, 510 F.3d 668, 670 (7th Cir. 2007) (police officer aided attorney in robbing drug dealers of cash and cocaine). *See also* Matthew Walberg & Jeff Coen, *15 Cops Busted in FBI Sting*, Chi. Trib., Dec. 3, 2008, at 29. Neither agent explained to Lamb why they were searching the house or what they were looking for. When Lamb did not comply with their requests, they

⁶ East St. Louis had a crime rate of 14,550.3 serious felonies per 100,000 persons in 2008, as compared to a rate of 3,550.7 per 100,000 for the State of Illinois as a whole. The Ill. Unif. Crime Reporting Program, Crime in Illinois 2008 Annual Uniform Crime Report, Section II-Crime Index Offense/Crime Rate Data 32, 163 (2008), *available at* <http://www.isp.state.il.us/crime/cii2008.cfm>.

accosted her with foul language and, after she shut the door, began smashing windows.

A reasonable person in her shoes would not have believed that these men had a legal right to be in the house without a copy of a search warrant. Although both the government and the district court emphasized that the agents were not *legally* required to have a copy of the warrant before entering, (A.38, 104), that is irrelevant to the real issue in this case—whether Lamb, a person untrained in the law or law enforcement, “corruptly” intended to obstruct an official proceeding and whether she “believed” her acts would affect an official proceeding. She could not have acted corruptly if she did not know if those requesting entry were acting under color of law. Until she was unequivocally put on notice that Rehg and Henson had a right to enter the premises, Lamb reasonably believed she retained autonomy over the house and its contents, including ridding the house of drugs if she so chose. In fact, the evidence suggests Lamb did not believe the agents were acting within legal bounds—she requested a copy of a search warrant and refused to let the agents in when they could not produce one, a completely reasonable request for an average person whose Fourth Amendment know-how likely begins and ends with episodes of “Law and Order.”⁷

Third, as discussed above, *see* Section I, *supra*, to sustain a conviction under § 1512(c)(1), Lamb must have believed that her acts would likely affect a particular

⁷ Section 1512(c)(1) should not apply to drug crimes generally or to the facts of Lamb’s particular case. Section I, *supra*. Should this Court disagree, however, Lamb’s case still should be reversed and remanded for resentencing based on the amounts of crack that she purportedly destroyed.

pending or foreseeable official judicial proceeding. *Matthews*, 505 F.3d at 708 (citing *Arthur Andersen LLP*, 544 U.S. at 707 (requiring contemplation of a particular official proceeding in which documents might be material)). This means that Lamb must have: (1) understood some sort of official judicial proceeding, as opposed to a mere investigation, was likely to occur; and (2) had some idea what that proceeding was targeting. *See, e.g., Matthews*, 505 F.3d at 708 (evidence showed defendant knew substance and target of ICE investigation and hence had “inkling” of related grand jury proceedings, when he took deliberate pains to remove and conceal incriminating gun); *United States v. Black*, 530 F.3d 596, 603 (7th Cir. 2008) (evidence showed that defendant knew frauds were being investigated by a grand jury and the SEC when he removed documents from his office)(vacated and remanded on other grounds).

In contrast to these cases, Lamb first learned of an investigation in the very same moments when she supposedly obstructed the judicial proceeding that ultimately flowed from the investigation. All she knew was that two men were knocking at her boyfriend’s doorstep; she did not know who they were or why they were there, because neither man explained that to her. Neither agent mentioned Johnson, cocaine, or a drug conspiracy to her. Thus, unlike the police-officer defendant in *Matthews*, civilian Lamb had no prior warning an investigation was underway and, as noted earlier, no proof the investigation was even legitimate. Without the barest understanding that the agents were conducting a legitimate investigation and that the target of that investigation was a particular person or

crime, Lamb could not possibly have foreseen or believed that her actions were likely to affect a particular federal grand jury or equivalent official proceeding.

Because the government failed to prove that Lamb destroyed drugs with the corrupt intent to impede the “lawful” administration of justice and a particular and foreseeable official proceeding within the meaning of § 1512(c)(1), this Court should vacate Lamb’s conviction for obstruction-of-justice.

IV. The district court erred when it applied the § 2X3.1 cross-reference to Lamb’s sentence using Johnson’s cocaine conspiracy as the “underlying offense.”

The district court erred in applying the § 2X3.1 cross-reference to Lamb’s sentence, because the evidence was insufficient to support the inference that Lamb intended to obstruct an official proceeding targeting Johnson’s cocaine conspiracy rather than an official proceeding targeting something else, such as Lamb’s mere possession of cocaine base. U.S. Sentencing Guidelines Manual § 2X3.1 (2007).

This Court reviews *de novo* a district court’s application of the Sentencing Guidelines and reviews for clear error its factual findings. *United States v. Bothun*, 424 F.3d 582, 586 (7th Cir. 2005). The standard of review for this case is *de novo* because the district court should not have applied an accessory-after-the-fact cross-reference to an underlying offense of possession, since a defendant cannot be an accessory after the fact to her own crime. *See* § 2X3.1 app. n.1 (“‘underlying offense’ means the offense as to which the defendant is convicted of being an accessory”).

The Sentencing Guidelines require application of the § 2X3.1 accessory-after-the-fact cross-reference to defendants sentenced under § 2J1.2 if the offense involved

“obstructing the investigation or prosecution of a criminal offense” and if the resulting offense level is higher than 14. U.S. Sentencing Guidelines Manual § 2J1.2 (2007). The § 2X3.1 enhancement is linked to the “underlying offense” that the defendant purportedly obstructed. § 2X3.1 app. n.1.

The district court erroneously assumed that the offense underlying Lamb’s obstruction-of-justice conviction was Johnson’s powder cocaine conspiracy rather than simple possession. *See* Section II, *supra* (discussing amendment and variance between indictment and trial). As noted above, however, the facts of the case demonstrate otherwise. *See* Section II, *supra* (government offered no allegations Johnson's conspiracy involved cocaine base); Section III (evidence suggests no cocaine powder was present in Westmoreland). Therefore, the district court assigned a drug type and amount for relevant conduct—11 kilograms of powder cocaine—that differed from the crime charged in the indictment. The result was that Lamb’s base-offense level was increased to 26, rather than the 14 it would have been if her simple possession of a user quantity of crack had served as the underlying offense. U.S. Sentencing Guidelines Manual ch. 5, pt. A, sentencing table (2009). Moreover, had Lamb been charged with possession only, her base-offense level would have been 8; anomalously, the actual crime carries a lesser sentence than the obstruction of the crime. Thus, this Court should vacate Lamb’s sentence and remand to the district court for re-sentencing using the proper underlying offense.

Conclusion

For the foregoing reasons, Appellant respectfully requests that this Court vacate Lamb's conviction and dismiss or, at a minimum, remand for re-sentencing.

Respectfully Submitted,

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The Honorable Michael J. Reagan

**Certificate of Compliance with Federal Rule of Appellate Procedure
32(a)(7)**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b) because this brief contains 12,145 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 12 point Century Schoolbook font with footnotes in 11 point Century Schoolbook font.

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Circuit Rule 31(e) (1) 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 the brief and all of the Appendix items that are available in non-scanned PDF format.

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Proof Of Service

I, the undersigned, counsel for the Defendant-Appellant, Lisa Lamb, hereby certify that on December 3, 2010, two copies of the Brief and Required Short Appendix of Appellant, Lisa Lamb, as well as a digital version containing the brief, were sent by United States mail to the following individuals:

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Circuit Rule 30(d) Statement

I, the undersigned, counsel for the Defendant-Appellant, Lisa Lamb, hereby state that all of the materials required by Circuit Rules 30(a), 30(b), and 30(d) are included in the Appendix to this brief.

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