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-MJR
The Honorable Judge Michael J. Reagan

REPLY BRIEF OF DEFENDANT-APPELLANT LISA LAMB

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Argument

The government unreasonably expanded the charging statute, stretched the indictment's charges, and exaggerated the inferences and links between Lamb's knowledge of her boyfriend's powder cocaine conspiracy and her purported destruction of crack. First, the government advocates for a boundless definition of "object" under a Sarbanes-Oxley obstruction-of-justice statute, even when doing so leads to absurd results. Second, the government defends its decision to introduce against Lamb evidence of Johnson's distribution of cocaine powder and instructions conflating powder with crack, even though these distinct objects cannot substitute interchangeably under the obstruction-of-justice statute. Third, the evidence was insufficient to prove Lamb guilty beyond a reasonable doubt. Finally, after conceding that the substance charged in the indictment was only crack, the government nonetheless insists that Lamb's sentence must reflect all of Johnson's powder cocaine. Consequently, this Court should reverse Lamb's conviction or, at a minimum, remand for resentencing based solely on the crack.

I. Lamb's conviction must be reversed because cocaine base is not an "object" under § 1512(c)(1).

The district court committed reversible error when it failed to properly instruct the jury that cocaine base is not an "object" for purposes of the Sarbanes-Oxley obstruction-of-justice statute. 18

U.S.C. § 1512(c)(1) (2006). As a threshold matter, this Court should review the question *de novo* because defense counsel below adequately objected to the jury instructions. (A.16-19 (objecting to jury instructions 40, 42, and 43); A.24 (objecting that "there was nothing ever really established by the Government [indicating that Lamb] attempt[ed] to destroy or conceal an object"); A.27 (objecting to the *United States v. Matthews*, 505 F.3d 698 (7th Cir. 2007), definition of corruptly as overly broad).) Defense counsel's objections notified the district court of the problems within the obstruction-of-justice instructions. *See, e.g.*, *United States v. O'Neill*, 116 F.3d 245, 247 (7th Cir. 1997) (holding defense counsel's objection was preserved and finding that the defendant "was not required to adhere to any 'formalities of language and style' to preserve his objection on the record") (citation omitted).

Even if this Court finds that Lamb's objections did not preserve the issue, it should nevertheless find plain error. *United States v. Duran*, 407 F.3d 828, 843 (7th Cir. 2005). This Court will reverse when "the error was (1) clear and uncontroverted at the time of appeal and (2) affected substantial rights." *United States v. Fernandez*, 282 F.3d 500, 509 (7th Cir. 2002). Here, the district court's error in applying § 1512(c)(1) to conduct not covered by the statute is unmistakably

clear. Sections I.A. and I.B., *infra*. Moreover, Lamb suffered obvious prejudice as illustrated by her conviction and prison term.

A. The government's unrestrained expansion of a § 1512(c)(1) "object" produces an absurd result and contravenes the statute's plain meaning.

Crack, an object that itself is illegal to possess, cannot be an "object" for purposes of § 1512(c)(1). Otherwise, no one could ever abandon his or her possession of contraband without fear of facing a federal obstruction-of-justice charge. For example, a prescription painkiller addict who destroys his personal stash before entering rehabilitation would unwittingly expose himself to the government's version of § 1512(c)(1) for obstructing an official proceeding related to his illegal possession of narcotics. The government's brief completely ignores the absurdity of this interpretation.

Instead, the government unconvincingly urges this Court to focus solely on the definition of "object"—a term it claims is unambiguous. (Appellee Br. 20.) Statutory ambiguity, however, arises from the *entire statute*, not a single word. *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"). Here, ambiguity arises for at least two reasons. First, the absurd result the government's interpretation creates *is* the

ambiguity that requires judicial interpretation of § 1512(c)(1). As the Supreme Court has instructed, "absurd results are to be avoided." *United States v. Turkette*, 452 U.S. 576, 580 (1981). *See also Matter of Udell*, 18 F.3d 403, 411-12 (7th Cir. 1994) (Flaum, J., concurring).

Second, interpreting the residual clause "other object" to encompass an unbounded universe of potential items renders the enumerated § 1512(c)(1) terms "record" and "document" superfluous. The Supreme Court in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114 (2001), came to this exact result in interpreting § 1 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 (2006) (providing that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce"). The *Circuit City* Court found that "there would be no need for Congress to use the phrases 'seamen' and 'railroad employees' if those same classes of workers were subsumed within the meaning of the . . . residual clause." 532 U.S. at 114. *See also Duncan v. Walker*, 533 U.S. 167, 174 (2001) (finding the Court must give independent meaning to each word in a statutory scheme) (citations omitted). Similarly, if Congress intended for the term "object" to be as broad as the government suggests, it had no reason to specifically enumerate the terms "record" and "document."

Given these two ambiguities in § 1512(c)(1), this Court should apply *ejusdem generis* to interpret "object" as embracing the terms "record" and "document." As discussed in the opening brief, "object" should thus be interpreted to mean an item used to document or memorialize a past event. (Appellant Br. 17-18.) A wide variety of objects still meets this definition including files, papers, computers, diskettes, and cell phones.

The Supreme Court approvingly used *ejusdem generis* in interpreting § 1 of the FAA, and its analysis is instructive here. *Circuit City Stores, Inc.*, 532 U.S. at 114-15. Like § 1512(c)(1), the FAA uses a residual clause after a specific enumeration of two terms. But unlike the government's refusal to look beyond the term "object" in the instant case, the *Circuit City* Court applied *ejusdem generis* to the otherwise easily defined term "commerce" to conclude that the meaning of § 1 commerce is limited by the preceding enumeration of specific classes of workers. *Id.* at 115 (finding "the residual clause should be read to give effect to the terms 'seamen' and 'railroad employees,' and should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it."). Like *Circuit City*, this Court should use *ejusdem generis* to resolve the ambiguity in § 1512(c)(1) and hold that contraband is not an object for purposes of this statute.

The cases on which the government relies do not bolster its argument that "object" in § 1512(c)(1) applies to virtually everything. (Appellee Br. 21.) As an initial matter, none of the cases addressed the precise issue raised here: the proper scope of the term "object." None of them engaged in any meaningful statutory analysis or construction and none considered the purpose of the "object" element or its related legislative history. The government also overlooks the fact that the clear majority of cases in which § 1512(c)(1) has been applied have been precisely the type of fraud and document-destruction cases for which the statute was enacted.[1]

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[1] Since its adoption in 2002, there have been only twenty-seven cases that address § 1512(c)(1) violations. Of those twenty-seven, seventeen cases concerned corporate fraud, fraud, or document alteration or destruction. *United States v. Jahedi*, 681 F. Supp. 2d 430 (S.D.N.Y. 2009); *United States v. Black*, 625 F.3d 386 (7th Cir. 2010); *United States v. Butler*, 351 F. Supp. 2d 121 (S.D.N.Y. 2004); *United States v. Simpson*, No. 3:09-CR-249-D(06), 2011 WL 195676 (N.D. Tex. Jan. 20, 2011); *United States v. Townsend*, 630 F.3d 1003 (11th Cir. 2011); *United States v. Hakimian*, No. CR-09-0021 DLJ, 2010 WL 2673407 (N.D. Cal. July 1, 2010); *United States v. Dooley*, 578 F.3d 582 (7th Cir. 2009); *United States v. Coren*, No. 07-CR-265 (ENV), 2009 WL 2579260 (E.D.N.Y. Aug. 20, 2009); *United States v. Fumo*, No. 06-319, 2009 WL 1688482 (E.D. Pa. June 17, 2009); *United States v. Garrett*, No. 4:08CR00703 ERW, 2009 WL 1086974 (E.D. Mo. Apr. 22, 2009); *United States v. Greene*, 305 F. App'x 59 (4th Cir. 2008); *United States v. Jefferson*, 546 F.3d 300 (4th Cir. 2008); *United States v. Ramos*, 537 F.3d 439 (5th Cir. 2008); *United States v. White*, 256 F. App'x 333 (11th Cir. 2007); *United States v. Castellar*, 242 F. App'x 773 (2d Cir. 2007); *United States v. Russell*, 639 F. Supp. 2d 226 (D. Conn. 2007); *United States v. Arbolaez*, 450 F.3d 1283 (11th Cir. 2006).

Of the ten remaining cases, prosecutors brought § 1512(c)(1) charges based on an expansive definition of object including a car, firearms, tools, shoes, and in only two cases, contraband. Notably, eight of the ten cases concerned obstruction of justice *after* an investigation was well underway. *United States v. Matthews*, 505 F.3d 698 (7th Cir. 2007); *United States v. Ortiz*, 220 F. App'x 13 (2d Cir. 2007); *United States v. Fernandes*, 391 F. App'x 547 (7th

Ignoring that the clear majority of prosecutors and courts have properly construed the scope of § 1512(c)(1) as cabined by its language, structure, and purpose, the government here instead cherry-picks a smattering of inapposite, non-binding cases to bolster its expansive approach to § 1512(c)(1). (*See, e.g.*, Appellee Br. 21-22 (citing to two non-precedential opinions from other circuits, a published Eleventh Circuit opinion that supports Lamb's definition of "object," a district court opinion from Pennsylvania, and this Court's decision in *United States v. Matthews*).)

The only Seventh Circuit authority that the government cites is *Matthews*, a case that is easily distinguishable from Lamb's. (Appellant Br. 26-28.) At a minimum, the *Matthews* Court never faced the critical question of whether prosecutors could shoehorn contraband into the definition of "other object." Without the benefit of the parties' briefs addressing this issue, the government is merely speculating that *Matthews* controls the outcome in this case.

Moreover, the "object" in *Matthews* differs from this case because the *Matthews's* object was connected to a longstanding, eleven-week

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Cir. 2010); *Dolbin v. United States*, No. 1:03-cr-00118, 2010 WL 1904528 (M.D. Pa. May 11, 2010); *United States v. Green*, No. 5:06CR-19-R, 2008 WL 4000870 (W.D. Ky. Aug. 26, 2008); *United States v. Thompson*, 237 F. App'x 575 (11th Cir. 2007); *United States v. Makham*, No. CR. 03-30069-AA, 2005 WL 3533263 (D. Ore. Dec. 23, 2005); *United States v. Moyer*, 726 F. Supp. 2d 498 (M.D. Pa. 2010). It was impossible to determine the nature and length of investigation for the other two cases. *United States v. Cain*, No. 05-CR-360A(Sr), 2007 WL 1385726 (W.D.N.Y. May 9, 2007); *United States v. Wilkins*, No. 05-40007-01-RDR, 2005 WL 1799203 (D. Kan. June 17, 2005).

investigation into the East St. Louis Police Chief's attempt to conceal seized evidence of a friend's crime.[2] 505 F.3d at 702-03. Lamb's attenuated connection to a potential official proceeding is different than Police Chief Matthews's actual, beforehand knowledge of an official proceeding arising from his friend's criminal conduct. Unlike Police Chief Matthews, Lamb's knowledge of the investigation arose simultaneously with her supposed obstruction of some nebulous future "official proceeding." (A.161.)

The government fails to refute Appellant's point in her opening brief that Congress created two statutes to distinguish between obstructing an official proceeding and obstructing an investigation. Section 1512(c)(1) is designed to ensnare those defendants who destroy objects with a view towards an official proceeding. Alternatively, 18 U.S.C. § 1519 (2006) criminalizes the destruction of a "record, document, or tangible object" in an attempt to influence an *investigation*. This Court should presume that the differences in language and structure between these two statutes was deliberate, *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 452 (2002), and hold that the crack is not an object under § 1512(c)(1).

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[2] Like *Matthews*, seven of the nine other § 1512(c)(1) cases, *see* n.1, *supra*, that broadly construe the term "object" address items that were concealed or destroyed after a long-standing investigation or an actual arrest. *See, e.g.*, *Ortiz*, 220 F. App'x at 17 (defendant called his girlfriend from jail just before trial, asking her to hide the defendant's vehicle); *Thompson*, 171 F. App'x at 826 (defendant called a woman from jail, asking her to conceal a suitcase containing money, a firearm, and narcotics).

B. This Court should narrowly construe § 1512(c)(1) to avoid rendering the statute void for vagueness and violating the Rule of Lenity.

The absurdity and subsequent ambiguity created by the phrase "other object" renders § 1512(c)(1) void for vagueness and violates the Rule of Lenity. Consequently, this Court should narrowly construe the statute to ensure ordinary people can understand the prohibited activities. *See Skilling v. United States*, 130 S. Ct. 2896, 2929 (2010) (stating the long-held practice that courts should consider a limiting construction of a statute "before striking a federal statute as impermissibly vague").

The government's assertion that *Skilling* "has no application in this case because it interprets a completely different phrase in a completely different statute," (Appellee Br. 22), misses the purpose of reasoning by analogy. Despite the government's refusal to compare the principles of the honest-services doctrine to § 1512(c)(1), the similarities are otherwise clear. To begin, *Skilling* recognized that the expansion of the honest-services doctrine beyond its initial core of bribe-and-kickback schemes led to disarray and ambiguity. *Skilling*, 130 S. Ct. at 2929. Like the honest-services doctrine, § 1512(c)(1) was enacted as a statute aimed at corporate actors who fraudulently altered, destroyed, or mutilated records, documents, or other objects. *See, e.g.*, The Sarbanes-Oxley Act of 2002, pmbl., 116 Stat. at 745 (stating the

Act is designed to "protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws. . . ."). As the government recognizes, just four short years after adoption, prosecutors began expanding the scope of "object." (*See* Appellee Br. 21.) Also like *Skilling*, and as the government does not dispute, the broadest interpretation of § 1512(c)(1) offends the void-for-vagueness doctrine because it requires Lamb to continue possessing contraband instead of lawfully abandoning a prior criminal pursuit. (Appellant Br. 23.) This interpretation leaves potential defendants with neither appropriate notice of the prohibited conduct, nor any means to comply with the law.

The expansion of § 1512(c)(1) has already begun, but before courts broadly embrace the absurdity of including contraband as an "object," this Court should narrowly construe the scope of "other object" as only reaching the destruction and concealment of files, papers, computers, diskettes, cell phones, and other similar objects.

II. The government unreasonably construes the object element under § 1512(c)(1) in order to justify the expansion of the charges at trial.

Even if this Court finds that § 1512(c)(1) encompasses drugs, Lamb's conviction still must be overturned based on constructive amendment and fatal variance. The government fails to acknowledge the factual and logical gap between an obstruction charge limited to

crack and evidence of a conspiracy limited to powder. The constructive amendment and fatal variance in this case arose precisely because the government introduced powder evidence against Lamb, urged the jury to infer that she had destroyed powder, and offered instructions that told the jurors to equate powder and crack when her indictment was limited to crack.

For the reasons stated in Lamb's opening brief, this Court should review these questions *de novo*. (Appellant Br. 30 (noting this court reviews violations of constitutionally protected rights *de novo* and describing the objection preserving this issue at trial).[3] But even if this Court were to review for plain error, Lamb's conviction still requires reversal because the differences were plain between the obstruction charge in the indictment, which was limited to crack, and the evidence and instructions, which used crack and powder interchangeably as to Lamb. Moreover, these errors were extremely prejudicial because they denied Lamb her right to adequately present her defense or have the merits of the case properly considered by the

[3] The standard of review for unpreserved constructive amendment and fatal variance objections is plain error. *United States v. Duran*, 407 F.3d 828, 843 (7th Cir. 2005) (constructive amendment); *United States v. Haynes*, 582 F.3d 686, 698 (7th Cir. 2009) (fatal variance). The government contends in its brief that the standard of review for fatal variance is analogous to sufficiency of the evidence but this standard has only been used in certain conspiracy variance appeals. (Appellee Br. 26 (citing *United States v. Dean*, 574 F.3d 836, 842 (7th Cir. 2009) (noting that the defendant did not challenge the existence of the relevant conspiracy, but rather argued for the court to reweigh the evidence of his involvement).)

jury; indeed, such errors are often subject to *per se* reversal. *See United States v. Perez,* 43 F.3d 1131, 1139-40 (7th Cir 1994) (finding failures in instructing the jury particularly prejudicial and "makes reversal the usual outcome in such circumstances."); *United States v. Kerley,* 838 F.2d 932, 938 (7th Cir. 1988) (noting how defective jury instructions can functionally deny a defendant his right to a jury). Finally, these errors affect the integrity of the judicial proceedings because they strike at the very heart of our collective notions of due process. *See Johnson v. Zerbst,* 304 U.S. 458, 462 (1938) (noting that if the accused's right to prepare a defense is lost "justice will not still be done.") (internal citations omitted).

A. The discrepancies between the indictment and the evidence, arguments, and jury instructions constituted either a constructive amendment or a fatal variance.

(1) *Lisa Lamb was specifically charged with destroying crack, which is an object separate and distinct from cocaine powder.*

Obstruction of justice under § 1512(c)(1) requires the government to identify not only a specific object but also link it to a certain "official proceeding." *Matthews,* 505 F.3d at 708 (stating "a knowingly . . . corrupt [defendant] must believe that his actions are likely to affect *a particular* existing or foreseeable official proceeding.") (emphasis added) (citing *United States v. Kaplan*, 490 F.3d 110, 125 (2d Cir. 2007). Without such specificity, the government could not prove a

defendant's intent to obstruct. 18 U.S.C. § 1512(c)(1) (criminalizing conduct that "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. . . .") (emphasis added).

Lamb's indictment identified cocaine base as the "object" she destroyed and the government sought to prove that she obstructed the official proceeding related to Johnson's drug conspiracy. (A.4; A.161.) The government's trial evidence, argument, and instructions, however, all attributed Johnson's powder to Lamb, in direct contradiction to the indictment. Likewise, none of its evidence, argument, or instructions attributed crack to Johnson's conspiracy.[4] This gap in proof and use of improper proof against Lamb resulted in a constructive amendment or fatal variance.

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[4] The user quantity of crack discovered at 5706 Westmoreland is completely unrelated to Johnson's cocaine powder distribution conspiracy. (Doc.201:10-11 (noting that only 71 milligrams of cocaine base were discovered in the pyrex); *see also* 21 U.S.C. § 844(a) (2006) (criminalizing possession of cocaine base); *c.f.* 21 U.S.C. § 841 (2006) (criminalizing distribution of controlled substances). At trial, not a single witness presented evidence that the conspiracy involved cocaine base. No one testified he ever purchased cocaine base from Johnson. (*Cf.* Doc.199:103 (Forrest Flowers testifying he purchased "powder cocaine" from Johnson).) No one testified he sold cocaine base to Johnson. (*Cf.* Doc.199:26-27 (Reynaldo Colon-Laboy testifying he sold Johnson cocaine).) No one testified that he had ever seen Johnson distribute crack to others. (*Cf.* Doc.200:17-19 (Agent Rehg testifying about the cocaine sold by Johnson to confidential informants).) This distinct lack of evidence is reflected in the government's choice to charge Johnson with distribution of "cocaine" rather than possession of "cocaine base" as the object of the conspiracy. (*See* A.69 (initial indictment); A.4 (superseding indictment).)

In an attempt to circumvent this error, the government now argues on appeal that powder and crack are interchangeable and that the powder evidence was relevant to establishing Lamb's intent. (Appellee Br. 29.) But the authority on which it relies does not apply to § 1512(c)(1) obstruction charges. Moreover, given the absent link between the user quantity of crack attributed to Lamb and Johnson's powder-only conspiracy, the array of powder evidence simply could not establish Lamb's intent under the crime as charged in the indictment.

First, the government cites several cases for the proposition that cocaine base and cocaine powder are generally interchangeable. (*See* Appellee Br. 29-30 (citing *United States v. Martinez,* 301 F.3d 860 (7th Cir. 2002)); 32 (citing *United States v. Pierce,* 893 F.2d 669 (5th Cir. 1990), *United States v. Abdul,* 122 F.3d 477 (7th Cir. 1997), *United States v. Cooper,* 39 F.3d 167 (7th Cir. 1994).) But each of these cases involved the application of the drug-distribution statute, 21 U.S.C. § 841. Section 841 does not require specificity of drug type as an element of the offense. 21 U.S.C. § 841 (stating "it shall be unlawful for any person to knowingly or intentionally . . . manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or possess, *a controlled substance*. . . .") (emphasis added). As noted above, however, under § 1512(c)(1), identifying the specific

object and specific proceeding is critical to establishing a defendant's requisite intent under the statute.

In fact, this Court has specifically recognized in other contexts that crack and cocaine powder are not interchangeable. *United States v. Johnson,* 324 F.3d 875, 879 (7th Cir. 2003) (holding that there are sufficient differences between distribution of powder cocaine and crack such that the two do not form part of the same course of conduct); *United States v. Sumner,* 265 F.3d 532, 540-41 (7th Cir. 2001) (same). In both *Johnson* and *Sumner* this Court overturned sentences that equated charged cocaine powder distribution with uncharged crack offenses, relying in part on the fact that these are two separate drugs. *See Johnson,* 324 F.3d at 879 ("[T]he fact that the two drug transactions involved different types of drugs undercuts even [a] superficial similarity."); *Sumner,* 265 F.3d at 541 ("[T]he uncharged conduct involved a different drug than the offense of conviction. . . .") In *Johnson* the court went further, acknowledging the difference between conspiracy-level distribution amounts and user amounts of the two drugs rendered them even more distinct. *Johnson,* 324 F.3d at 880 (noting that a large scale cocaine powder conspiracy could not be equated with an individual crack sale). The elements of the relevant crimes dictate what conduct may be aggregated into a single offense. *See id.* at 879-80. The object element in § 1512(c)(1) is defined

narrowly because it is tethered to the defendant's intent; changing the object changes the offense. Therefore, for the same reason it could not equate a conspiracy charge with a distribution charge, the government's proposed aggregation of crack and powder simply cannot occur. *Id.*

Second, the government argues that even if the substances are not interchangeable, the cocaine powder evidence was nevertheless admissible as proof of Lamb's corrupt intent. (Appellee Br. 30.) Essentially, the government contends that it needed to prove her knowledge of Johnson's drug dealing to prove that Lamb was trying to cover up illegal activity when she supposedly washed the Pyrex dish. Putting aside the fact, discussed below at Section II.A.(2), *infra,* that this argument does not account for the additional evidence and argument claiming that she actually destroyed powder by flushing it down the toilet—itself a separate constructive amendment of the crack-only indictment—the government's argument otherwise fails. Washing minute amounts of crack from a dish does not establish intent to obstruct a powder conspiracy "proceeding." At most it might be relevant to an intent to obstruct a simple possession charge. *See* 21 U.S.C. § 844. But at trial there was no testimony whatsoever establishing to whom the crack belonged. Given that Johnson, Dave Johnson, and Lamb were all in the house just prior to the agents'

arrival, it is not clear whose crack it was. (A.107-08; A.151; *see* Doc.212:57-58 (jury instruction on possession) ("Possession of an object is the ability to control it. Possession may exist even when a person is not in physical contact with the object. . . .").) Regardless, Lamb's knowledge of Scott Johnson's conspiracy is completely irrelevant to establishing her corrupt intent to possess and dispose of crack. The government implicitly asks this Court to overlook its failure to even offer evidence, let alone prove, how and why crack played a role in Johnson's conspiracy.

(2) *The evidence, the prosecutor's argument to the jury, and the jury instructions further contributed to the constructive amendment.*

Not only do the patent differences and logical inconsistencies between the wording of the indictment and the government's theory at trial evince an amendment or variance, specific evidence, arguments, and jury instructions exacerbated this error. During the trial the government made arguments and attempted to draw out testimony to show Lamb destroyed powder cocaine. (A.112 (Agent Rehg testifying that he heard the toilet flush); A.119 (Rehg testifying he found unidentified "residue" in the toilet); A.162 (the government arguing that Lamb flushed cocaine powder down the toilet).) The government seized on Rehg's toilet-flushing testimony during closing arguments and encouraged the jury to find that Lamb was flushing powder

cocaine, a plain departure from the wording of indictment. (A.162 ("Folks, we can only guess all of the stuff that Lamb flushed down the toilet and down the sink and all of that . . . . We can guess it was probably cocaine or cocaine base, crack. . . .").)

Compounding this amendment, the judge instructed the jury to equate crack and cocaine powder when considering the object element under § 1512(c)(1), even though destruction of powder was not charged in the indictment. (Doc.212:10; A.14-15 (jury instructions 32 and 33).) Although the government now contends on appeal that these jury instructions did not apply to Lamb (Appellee Br. 30 n.3), the record shows precisely the opposite. Instructions 32 and 33 instructed the jury that they were free to equate cocaine base with cocaine powder. (*See* A.14-15.) The jury was told expressly that instructions 32 and 33 applied to both defendants. (Doc.212:9-10 ("You are instructed that cocaine base, commonly referred to as crack cocaine, and cocaine, are controlled substances. It is sufficient that a defendant knew that the substance was some kind of prohibited drug. It does not matter whether a defendant knew that the substance was cocaine base or cocaine.).) Moreover, given that no evidence of crack was introduced against Johnson, the instructions could logically only apply to Lamb. (*See* A.64; A.4 (initial and superseding indictments).) The record therefore plainly shows that the evidence, argument, and jury

instructions all contributed to the constructive amendment of Lamb's indictment.

III. Lamb's "knowledge" of her boyfriend's cocaine powder conspiracy was not sufficient evidence to establish her corrupt intent or ability to foresee an official proceeding.

The evidence was insufficient to prove (1) Lamb's corrupt intent and (2) that Lamb could foresee a particular official proceeding. Lamb's "knowledge" of Johnson's powder conspiracy proves nothing about Lamb's intent or her ability to foresee an official proceeding when she purportedly destroyed crack, particularly given the absence of a connection between the powder distribution and crack. (Appellee Br. 34-35.) Any suggested link is purely speculative. *See* Section II.A.1. *supra* (discussing absence of a link between the powder and crack and this Court's recognition that cocaine powder and crack are not interchangeable). A guilty verdict cannot rest on a jury's speculative inferences. *Piaskowski v. Bett*, 256 F.3d 687, 693 (7th Cir. 2001).

Rather, Lamb did not act corruptly, because given the dangerousness of her neighborhood, the notorious corruption of the East St. Louis police,[5] the officers' plain clothes, the lack of a physical

[5] Although the government went to the trouble to observe that each of the police-corruption cases that Appellant cited originated in the Northern District, it seems that the Southern District is not immune to similar troubles. *See, e.g.,* Jim Suhr, *Prosecutor: Evidence Again Stolen from East St. Louis Police Department,* Associated Press, Mar. 8, 2006, *available at* http://www.policeone.com/csi-forensics/articles/125967-Prosecutor-Evidence-

warrant, and the aggressive behavior of the officers during and after Lamb's interaction with them, (A.109; A.134 (cussing at Lamb); A.106; A.110 (smashing windows)), a reasonable person in Lamb's shoes would not have believed the officers had a legal right to enter the premises. Absent a belief the officers were acting under color of law, Lamb reasonably believed she retained autonomy over the house and its contents, including washing the dishes and ridding the house of drugs if she so chose. Thus, any activity on Lamb's part was not conducted "corruptly."

Moreover, Lamb could not have foreseen a particular official proceeding when she knew neither the substance nor target of the officers' investigation. Although a proceeding need not be pending, it must be both a foreseeable and a particular proceeding. *Matthews*, 505 F.3d at 708 (citing *Arthur Andersen, LLP v. United States*, 544 U.S 696, 707 (2005) (requiring contemplation of a particular official proceeding in which documents might be material)). In *United States v. Fernandes*, 391 F App'x. 547 (7th Cir. 2010), *United States v. Black*, 625 F.3d 386 (7th Cir. 2010), and *Matthews*, 505 F.3d at 708, each applying § 1512(c)(1), all of the defendants had some foreknowledge of the substance and target of related grand jury or criminal investigations and therefore had a particular official proceeding in

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again-stolen-from-East-St-Louis-Police-Department/; *see also Matthews*, 505 F.3d at 702-03.

mind when they acted. In contrast, Lamb first caught wind of an investigation on her doorstep with facts casting doubt that the investigation was legitimate and no explanation as to who or what the investigation was targeting. (A.108.) She could not have foreseen a particular proceeding with no foreknowledge of the content of the investigation.

The government itself notes, "[w]ithout [evidence that Lamb knew about Johnson's powder conspiracy], Lamb could have argued . . . that her attempt to destroy evidence was done innocently and that no official proceeding was foreseeable." (Appellee Br. 29.) Because the government failed to show how evidence of Lamb's knowledge of powder was connected to her activity with crack, its attempt to impute corrupt intent and an ability to foresee an official proceeding based on that knowledge fails. Therefore, this Court should vacate Lamb's conviction for obstruction of justice.

IV. The district court erred when it used Johnson's cocaine powder conspiracy as the underlying offense for Lamb's sentencing.

The district court misapplied the Sentencing Guidelines, and so this Court should vacate Lamb's sentence and remand for resentencing. This court reviews *de novo* both a district court's legal interpretation

and application of the Sentencing Guidelines.[6] *United States. v. Lang*, 537 F.3d 718, 719 (7th Cir. 2008). Here, the district court wrongly applied the § 2X3.1 enhancement to Lamb's case because, as noted in the opening brief, Lamb cannot be an accessory-after-the-fact to her own possession. (Appellant Br. 46.) But even if this Court were to apply the clear-error standard of review, Lamb's sentence still must be vacated because the district court improperly used Johnson's cocaine powder conspiracy as the underlying offense of conviction in the face of a complete dearth of evidence connecting the crack found in the house to the powder distribution.

As noted above, the law treats cocaine and cocaine base as separate drugs and separate offenses. *Johnson*, 324 F.3d at 879 (crack cocaine and powder cocaine are different types of drugs); 21 U.S.C. § 841(b)(1)(A)(ii-iii) (2006); 21 U.S.C. § 841(b)(1)(B)(ii-iii) (2006) (different mandatory minimums for cocaine and cocaine base). Activity involving one drug is not automatically relevant to activity involving another, even for purposes of flexible relevant-conduct determinations. *Johnson*, 324 F.3d at 879-80 ("[I]t is not enough that the two offenses both involve drug transactions. Rather, there must be more

[6] The government's waiver argument is meritless. Lamb properly supported her sentencing argument with legal authority when she cited the relevant Sentencing Guidelines and Application Notes and applied the facts of her case to the text of both, which is all this Court requires. *Correa v. White*, 518 F.3d 516, 518 (7th Cir. 2008).

commonality to create a substantial connection between the two offenses . . . the fact that the two drug transactions involved different types of drugs undercuts even this superficial similarity."); *United States v. Ortiz*, 613 F.3d 550, 558-59 (5th Cir. 2010) (marijuana and cocaine found in same house at same time not sufficiently connected to be part of same course of conduct for relevant conduct determination).

The underlying offense sets the starting point for relevant conduct. The government must establish the connection between the one type of drug involved in the offense of conviction and the other type of drug involved in the purported underlying offense before it can be used as relevant conduct at sentencing. Thus, at a minimum, the evidence in this case must show some substantial connection establishing the crack was part of the same course of conduct as the cocaine powder conspiracy in order for the conspiracy to apply as the underlying offense. No such connection was established in this case: (1) no cocaine powder was found in the house, only crack; (2) no packaging was discovered suggesting cocaine powder had been removed and flushed down the toilet or sink; (3) Johnson made voluntary statements to the police that he had sold all of his recent shipments of cocaine powder; and (4) no evidence suggested Johnson's cocaine powder distribution scheme ever included crack. (A.119-24; Doc.200:142; Doc.201:10-11.)

With no evidence connecting the crack Lamb purportedly destroyed to Johnson's distribution conspiracy, the only "underlying offense" the evidence might support is possession of the crack itself—Lamb's own possession, Johnson's possession, Johnson's brother Dave's possession, or someone else's possession of the crack. With an underlying offense of possession, the relevant conduct is limited to the minimal amount of crack found in the house because no evidence suggests other conduct relevant to possession of crack. United States Sentencing Guidelines § 1B1.3 n. 10 ("In the case of . . . accessory after the fact, the conduct for which the defendant is accountable includes all conduct relevant to determining the offense level for the underlying offense that was known, or reasonably should have been known, by the defendant.") Thus, the district court erred when it used Johnson's powder conspiracy as the underlying offense and on that basis expanded Lamb's relevant conduct from a minimal amount of crack residue to eleven kilograms of cocaine powder.

Conclusion

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

Respectfully Submitted,

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Certificate of Service

I, the undersigned, counsel for Lisa Lamb hereby certify that I served two copies of this reply brief and one digital copy of the brief by placing them in an envelope with sufficient postage affixed and directed to the persons named below at the addresses indicated, and depositing those envelopes in the United States mail box located at 375 East Chicago Ave., Chicago, Illinois on March 16, 2011.

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No. 10-2230

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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-MJR The Honorable Judge Michael J. Reagan

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Certificate of Compliance with Circuit Rule 31(e)

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

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Certificate of Compliance with Fed. R. App. P. 32(a)(7)

I, the undersigned, counsel for the Appellant, Lisa Lamb, hereby certify that this brief conforms to the rules contained in Fed. R. App. P. 32(a)(7) for a brief produced with a proportionally spaced font. The length of this brief is 5,761 words.

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