

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

NOS. 10-1762, 10-2230

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

SCOTT JOHNSON and LISA LAMB,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF ILLINOIS

HONORABLE MICHAEL J. REAGAN, JUDGE PRESIDING

DISTRICT COURT No. 08-30217-MJR

BRIEF OF PLAINTIFF-APPELLEE

UNITED STATES OF AMERICA

**STEPHEN R. WIGGINTON
United States Attorney**

**DONALD S. BOYCE
Assistant United States Attorney
Southern District of Illinois
Nine Executive Drive
Fairview Heights, IL 62208
(618) 628-3700**

ANDREW WESTBROOK, Law Intern

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TABLE OF CONTENTS

Table of Contents..... i

Table of Authorities..... ii

Jurisdictional Statement..... 1

Statement of the Issues..... 2

Statement of the Case..... 3

Statement of Facts. 4

Summary of Arguments..... 8

Arguments.

 I. Probable Cause Existed To Search The Property At 5706 Westmoreland
 In Washington Park, Illinois..... 10

 II. The District Court Properly Instructed The Jury Regarding Witness
 Credibility..... 13

 III. The District Court Properly Refused To Grant A Mistrial Based On An
 Inaccuracy In The Prosecutor’s Opening Statement..... 16

 IV. Lamb’s Conduct Violated 18 U.S.C. § 1512(c)(1)..... 19

 V. The Trial Evidence And Jury Instructions Neither Constructively
 Amended The Charge Nor Fatally Varied The Factual Allegations From
 The Indictment.. 25

 VI. The Evidence Was Sufficient To Convict Lamb Of Obstruction Of
 Justice..... 32

 IV. The District Court Properly Applied The § 2X3.1 Cross-Reference.. ... 35

Conclusion..... 39

Certificate of Compliance. 40

Circuit Rule 31(e) Certification 42

Appendix

 Appendix TOC & Certification..... Ai

TABLE OF AUTHORITIES

Cases	Page
<i>Carcieri v. Salazar</i> , 129 S.Ct. 1058, 1063-1064 (2009).	21
<i>Darden v. Wainwright</i> , 477 U.S. 168 (1986).	17
<i>Doherty v. City of Chicago</i> , 75 F.3d 318, 324 (7th Cir. 1996).	37
<i>Gladden v. Frazier</i> , 388 F.2d 777, 779-80 (9th Cir. 1968)	17
<i>Illinois v. Gates</i> , 462 U.S. 213, 238 (1983).	11
<i>Massachusetts v. Upton</i> , 466 U.S. 727, 728 (1984).	10, 13
<i>Rodriguez v. Peters</i> , 63 F.3d 546, 558 (7th Cir. 1995).	18
<i>Russell v. Harms</i> , 397 F.3d 458, 463 (7th Cir. 2005).	11
<i>Skilling v. United States</i> , 130 S.Ct. 2896 (2010).	22
<i>United States v. Abdul</i> , 122 F.3d 477, 479 (7th Cir. 1997).	32
<i>United States v. Abrolaez</i> , 450 F.3d 1283 (11 Cir. 2006).	21
<i>United States v. Aguilar</i> , 515 U.S. 593, 599 (1995).	29
<i>United States v. Akin</i> , 562 F.2d 459, 466 (7th Cir. 1977).	19
<i>United States v. Amerson</i> , 185 F.3d 676, 689 (7th Cir. 1999).	37
<i>United States v. Ashqar</i> , 582 F.3d 819, 823 (7th Cir. 2009).	34
<i>United States v. Bell</i> , 585 F.3d 1045, 1049 (7 th Cir. 2009).	11, 12
<i>United States v. Caliendo</i> , 910 F.2d 429, 438 (7 th Cir. 1990).	27
<i>United States v. Cook</i> , 102 F.3d 249, 252 (7th Cir. 1996).	14
<i>United States v. Cooper</i> , 39 F.3d 167, 173 (7th Cir. 1994).	32
<i>United States v. Dean</i> , 574 F.3d 836, 845 (7th Cir. 2009).	26, 31
<i>United States v. DeSilva</i> , 505 F.3d 711, 715 (7th Cir. 2007).	33
<i>United States v. Dismuke</i> , 593 F.3d 582, 586-587 (7th Cir. 2010).	12

<i>United States v. Galati</i> , 230 F.3d 254, 258 (7th Cir. 2000).....	33
<i>United States v. Gardiner</i> , 463 F.3d 445, 459 (6th Cir. 2006).	17
<i>United States v. Hall</i> , 165 F.3d 1095, 1116 (7th Cir. 1999) (quoting <i>United States v. Mealy</i> , 851 F.2d 890, 902 (7th Cir. 1988)).....	18
<i>United States v. Heath</i> , 447 F.3d 535, 540 (7th Cir. 2006).....	15
<i>United States v. Jordan</i> , 223 F.3d 676 (7th Cir. 2000)	15
<i>United States v. Koerth</i> , 312 F.3d 862, 866 (7 th Cir. 2002).....	11
<i>United States v. Kuna</i> , 760 F.2d 813, 819 (7th Cir.1985).....	31
<i>United States v. Lauderdale</i> , 571 F.3d 657, 660 (7th Cir. 2009).....	17
<i>United States v. Leichtnam</i> , 948 F.2d 370 (7th Cir. 1991).	30
<i>United States v. Leon</i> , 468 U.S. 897 (1984)..	13
<i>United States v. Longstreet</i> , 567 F.3d 911, 924 (7th Cir. 2009).	36
<i>United States v. Lowe</i> , 516 F.3d 580, 585 (7 th Cir. 2008), quoting <i>United States v. Peck</i> , 317 F.3d 754, 756 (7 th Cir. 2003).	13
<i>United States v. Martinez</i> , 301 F.3d 860, 865 (7th Cir. 2002).....	30
<i>United States v. Matthews</i> , 505 F.3d 698 (7th Cir. 2007).....	21, 23, 35
<i>United States v. Moyer</i> , 726 F.Supp.2d 498 (M.D.Pa. 2010).	21
<i>United States v. Myers</i> , 569 F.3d 794, 798 (7th Cir. 2009).....	17
<i>United States v. Olsen</i> , 450 F.3d 655, 677 (7 th Cir. 2006).....	26
<i>United States v. Ortiz</i> , 220 Fed. Appx. 13 (2d Cir. 2007).....	21
<i>United States v. Pierce</i> , 893 F.2d 669, 676 (5th Cir. 1990)	32
<i>United States v. Perez</i> , 612 F.3d 879, 884 (7 th Cir. 2010), citing <i>United States v. Olano</i> , 507 U.S. 725, 734-35 (1993).....	24
<i>United States v. Pless</i> , 982 F.2d 1118, 1124 (7 th Cir. 1992).	11
<i>United States v. Presbitero</i> , 569 F.3d 691, 698 (7th Cir. 2009).	26, 29

<i>United States v. Quintero</i> , 618 F.3d 746, 755 (7th Cir. 2010).....	36
<i>United States v. Ratliff-White</i> , 493 F.3d 812, 820 (7th Cir. 2007)	28
<i>United States v. Serfling</i> , 504 F.3d 672, 677 (7th Cir. 2007).....	18
<i>United States v. Sleet</i> , 54 F.3d 303, 306 (7th Cir. 1995)	11
<i>United States v. Smith</i> , 253 F.3d 95, 98 (7th Cir. 1958).	19
<i>United States v. Tavaréz</i> , 626 F.3d 902, 904 (7th Cir. 2010).	14, 33
<i>United States v. Thompson</i> , 171 Fed. Appx. 823 (11 th Cir. 2206).....	21
<i>United States v. Thompson</i> , 484 F.3d 877, 881 (7th Cir. 2007).....	23
<i>United States v. Trennell</i> , 290 F.3d 881, 888 (7th Cir. 2002).	28
<i>United States v. Turkette</i> , 452 U.S. 576, 581 (1981).....	21
<i>United States v. Useni</i> , 516 F.3d 634, 658 (7th Cir. 2008).	37
<i>United States v. Williams</i> , 553 F.3d 1073, 1080 (7th Cir. 2009).....	33
<i>United States v. Willis</i> , 523 F.3d 762, 771 (7th Cir. 2008).	18
<i>United States v. Ye</i> , 588 F.3d 411, 414 (7th Cir. 2009).....	20, 23, 30

Statutes

18 U.S.C. §922(g)(1).....	3
18 U.S.C. §922(g)(1) and 1512(c)(1).....	1
18 U.S.C. §1512(c)(1).	1,2,3,8,19,20,21,22,23,25,28,29,30,35
18 U.S.C. §3231.....	1
18 U.S.C. §3742.....	1
21 U.S.C. §841(a)(1), 841(b)(1)(A), and 846.	1, 3, 30
28 U.S.C. §1291.....	1

Other

<i>Black’s Law Dictionary</i> (9th ed. 2009).	20
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U.S.S.G. §1B1.3, comment (n.10).....	38
U.S.S.G. § 2X3.1, comment (n.1) (2007).	38

JURISDICTIONAL STATEMENT

Defendants-Appellants' Jurisdictional Statements are not complete and correct.

Defendants were charged by Superseding Indictment in the Southern District of Illinois with violations of Title 18, United States Code, Sections 922(g)(1) and 1512(c)(1), and with violations of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(A), and 846.

Following a jury trial, Defendant Scott Johnson was sentenced on March 30, 2010. The district court entered its Judgment and Commitment Order on March 30, 2010. R 167.¹ It is from this final order of the district court that Defendant Johnson appeals.

Defendant Johnson filed a timely Notice of Appeal on March 30, 2010. R. 170.

Following a jury trial, Defendant Lisa Lamb was sentenced on May 18, 2010. The district court entered its Judgment and Commitment Order on May 18, 2010. R. 186. It is from this final order of the district court that Defendant Lamb appeals.

Defendant Lamb filed a timely Notice of Appeal on May 18, 2010. R. 188.

The district court had jurisdiction over these offenses against the laws of the United States pursuant to Title 18, United States Code, Section 3231.

This Court has appellate jurisdiction pursuant to Title 28, United States Code, Section 1291. Because Defendant Lamb seeks review of her sentence, this Court also has appellate jurisdiction pursuant to Title 18, United States Code, Section 3742.

¹Citation abbreviations contained herein include the following: "R." refers to the district court's Record Document Number; "Tr. II," "Tr. III," and "Tr. IV" refer to the Trial Transcript, volumes II, III, and IV; "S.Tr." refers to the Sentencing Transcript for Defendant-Appellant Lamb; "G.App." refers to the Appendix attached hereto; "L. Br." refers to Defendant-Appellant Lamb's Brief; "J. App." refers to Defendant-Appellant Johnson's Appendix; "L. App." refers to Defendant-Appellant Lamb's Appendix .

STATEMENT OF THE ISSUES

- I. Whether there was probable cause to search the residence at 5706 Westmoreland in Washington Park, Illinois.
- II. Whether the district court properly instructed the jury on witness credibility.
- III. Whether the district court properly denied Johnson's request for a mistrial.
- IV. Whether Lamb's conduct violated 18 U.S.C. §1512(c)(1).
- V. Whether the evidence at trial constructively amended or fatally varied from the charge against Lamb.
- VI. Whether there was sufficient evidence to convict Lamb of obstruction of justice.
- VII. Whether the district court properly applied the cross-reference in Section 3X3.1 of the Guidelines in sentencing Lamb.

STATEMENT OF THE CASE

On August 19, 2009, Defendants-Appellants were charged by Superseding Indictment in the Southern District of Illinois. R. 79. Count 1 charged Defendants-Appellants with Conspiracy to Distribute Cocaine, in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(A), and 846; Count 2 charged Defendant-Appellant Johnson with Distribution of Cocaine, in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(A); Count 3 charged Defendant-Appellant Johnson with being a Felon in Possession of a Firearm, in violation of Title 18, United States Code, Section 922(g)(1); Count 4 charged Defendant-Appellant Lamb with Obstruction of Justice, in violation of Title 18, United States Code, Section 1512(c)(1). R. 79. On October 5, 2009, Count 1 was dismissed as to Defendant-Appellant Lamb. R. 118.

On October 8, 2009, Defendants-Appellants were convicted of the charges following a jury trial. R. 127.

On March 30, 2010, Defendant-Appellant Johnson was sentenced to concurrent sentences of Life in prison on Count 1, 360 months' imprisonment on Count 2, and 120 months' imprisonment on Count 3, and was ordered to pay a fine of \$2,250,000 and a special assessment of \$ 300. R. 164. The Judgment and Commitment Order was entered on March 30, 2010. R. 167.

Defendant-Appellant Johnson filed a timely Notice of Appeal on March 30, 2010. R. 170.

On May 18, 2010, Defendant-Appellant Lamb was sentenced to 78 months' imprisonment, 3 years' supervised release, and ordered to pay of fine of \$625 and a special assessment of \$100. R. 183. The Judgment and Commitment Order was entered on May 18, 2010. R. 186.

Defendant-Appellant Lamb filed a timely Notice of Appeal on May 18, 2010. R. 188.

STATEMENT OF FACTS

In 2006, the Drug Enforcement Administration began an investigation into the cocaine trafficking activities of Scott Johnson in the area of East St. Louis, Illinois. R. 41, Ex. 1, G. App.

1. The investigation lead to the application on April 4, 2008 for a search warrant for the premises at 5706 Westmoreland in Washington Park, Illinois. R. 41, Ex. 1, G. App. 1. The affidavit in support of the search warrant contained a summary of the investigation and information from four confidential sources. R. 41, Ex. 1, G. App. 1. The affidavit stated that the fourth confidential source had provided corroborated information to law enforcement in the past that had lead to arrests.

R. 41, Ex. 1, G. App. 1. The affidavit stated that the confidential source had bought cocaine from Johnson at 5706 Westmoreland four times in the week prior. R. 41, Ex. 1, G. App. 1. The affidavit stated that earlier on April 4, 2008, the informant had bought cocaine from Johnson at 5706 Westmoreland in a controlled purchase. R. 41, Ex. 1, G. App. 1. The affidavit stated that after the controlled purchase, police stopped a car after it left 5706 Westmoreland, and additional cocaine was recovered. R. 41, Ex. 1, G. App. 1.

Later, on April 4, 2008, DEA Agent Michel Rehg went to the door of 5706 Westmoreland to execute the search warrant. Tr. III, 32:15-19. Outside of the door were iron bars that Rehg could not open. Tr. III, 28:24 - 29:2. After Agent Rehg knocked, Lisa Lamb opened the inner door but not the iron bars that covered the door. Tr. III, 32:18-22. Agent Rehg showed Lamb his identification, introduced himself, and told Lamb that he had a search warrant for the residence and that she would have to open the door to let him in. Tr. III, 33:6-10. Lamb asked to see a copy of the warrant, and Rehg explained that he would get one. Tr. III 33:13-17. Rehg told Lamb that she would have to stay in front of the open door where he could see her, both for his safety and so that evidence would not be destroyed. Tr. III, 33:17-24. Rehg asked Lamb to keep the inner door open,

but Lamb slammed the door on him, kicked it, and tried to push it shut. Tr. III, 33:25 - 34:9. Eventually, Lamb shut the door, and agents tried to make entry into the house by breaking the windows. Tr. III, 35:4-15. Agents, uniformed police officers, and firemen attempted to get into the residence for approximately 20 to 30 minutes. Tr. III, 35:21 - 36:10. Firemen cut the frame off the barred door with a gas saw, and agents were able to get inside. Tr. III, 36:11-18.

While they were trying to get inside of the residence, Agent Rehg and Washington Park police officers were yelling to Lamb that they were the police and for her to open the door. Tr. III, 36:19-25. During that time, Agent Rehg heard the toilet flushing and the faucet on the sink running. Tr. III 37:7-9. Agent Rehg saw Lamb standing in front of the sink, and she appeared to be washing dishes. Tr. III, 37:12-14. When Rehg entered the house, Lamb was backing away from the sink, the faucet was running, and the sink was still wet. Tr. III, 38:7-12. Lamb told Rehg that she had been washing dishes. Tr. III, 39:21. On the sink, Agent Rehg found a pyrex measuring cup with crack cocaine residue inside. Tr. III, 42:12-19, 43:4-20.

Johnson filed a motion to suppress evidence seized from 5706 Westmoreland during the execution of the search warrant. R. 38, 39. The district denied Johnson's motion, finding that, "Johnson's contention that the affidavit lacks particularized facts supporting a determination of probable cause to search 5706 Westmoreland simply ignores the actual statements therein." R. 55; J. App. A13.

Lamb filed a motion to sever her case from Johnson's for trial. R. 99. At the time of the motion, Lamb was charged in the conspiracy count of the Superseding Indictment. R. 79. The district court denied Lamb's motion. R. 101; L. App. A11. The district court addressed Lamb's concern about a "spill-over" effect of the evidence against Johnson and cited this Court's precedent holding that a simple disparity of evidence does not independently establish actual prejudice. R.

101; L. App. A11. The district court invited counsel to request that the jury instruction on separate consideration of each defendant and each charge, or another appropriate instruction, be given contemporaneously with any evidence that applied solely to Johnson. R. 101; L. App. A11. After the conspiracy count was dropped against Lamb, she did not renew her motion to sever, and she did not request the separate consideration instruction during the trial testimony. The district court gave the jury the separate consideration instruction after the close of the evidence. R. 126, p. 20; G. App. 7.

At trial, prior to the government's opening statement, the district court instructed the jury on what is and is not evidence. Tr. II, 7:10-16. During her opening statement, the prosecutor stated that, "after a search warrant was served, the Defendant Scott Johnson was arrested and over five kilos of cocaine, total, were recovered. In fact, over 300 grams of cocaine were recovered." Tr. II, 9:22-25. After the opening statement, Johnson's counsel requested a mistrial. Tr. II, 12:8-23. The district court denied Johnson's request, finding that the misstatement was a mistake that would be cleared up by the evidence and that the jury had been properly instructed. Tr. II., 13:25 - 14:11. After the close of evidence the jury was again instructed on what is and is not evidence. R. 126, p. 2, 26; G. App. 5, 6.

When the evidence began, Johnson's co-conspirator testified against him in great detail. Tr. II, 14:23 - 98:8. Evidence was also presented that Johnson had confessed to the investigating agents that he had received and sold seven kilos of cocaine the night before he was arrested and had sold a total of about seventeen kilos of cocaine in the month prior. Tr. III, 53:7-19.

The evidence against Lamb included Agent Rehg's testimony about his attempt to execute the search warrant at 5706 Westmoreland. Tr. III, 32:15 - 43:4-20. Evidence was also presented that Lamb had accompanied Johnson to pick up cocaine, that she had been present when cocaine was

delivered, and that she had been present when Johnson sold cocaine. L. Br.36; L. App. A78-9; A96; A90-91; A96-97.

During the jury instruction conference, Johnson requested that the special caution instruction be given as to two of the government's witnesses, Keith Blake and Forest Flowers, on the theory that they had received a benefit from the government. Tr. IV, 77:10-16. The district court ruled that Blake and Flowers had not received a benefit, however, the district court gave the general credibility instruction and the special caution instruction as to Blake and Flowers on other grounds. Tr. IV, 79:3-19; Tr. IV 81:17 - 82:7; R. 126, p.17-18; G. App. 2, 3, 4. Also at the jury instruction conference, Lamb made a general objection as to the sufficiency of the evidence to convict her of the charged offense. Tr. IV, 85:10 - 89:10; L. App. A22 - A26.

At Lamb's sentencing, the district court applied the cross-reference in Section 3X3.1 of the Guidelines and made a factual finding that "several drug trafficking acts committed by Scott Johnson between 2006 and April 4, 2008 were foreseeable to Miss Lamb and she was either a conduit for the transactions, present during them, or involved in destroying evidence in the instant investigation." S. Tr. 6:2-6. The district court found Lamb's relevant conduct to include 11 kilograms of cocaine and 122 milligrams of cocaine base. S. Tr. 5:23-24. The district court characterized these calculations as "extremely conservative" and noted that a "credible argument could be made that she was responsible for all of the cocaine trafficking of Mr. Johnson, in which case she would likely be looking at a life sentence." S. Tr. 5:24; 6:9-11.

Johnson and Lamb appeal their convictions, and Lamb appeals her sentence.

SUMMARY OF ARGUMENTS

I. The facts contained in the affidavit in support of the search warrant for 5706 Westmoreland in Washington Park, Illinois, showed that there was probable cause to search the premises. Reliable confidential sources provided information that was corroborated, and the facts of the investigation, including a controlled purchase of cocaine from Johnson at the residence shortly before the search warrant, led to a reasonable inference that evidence of a crime would be found there.

II. The district court properly instructed the jury on witness credibility. Johnson asked that the special caution instruction be given as to two of the government's witnesses on the theory that the witnesses had received a benefit from the government because they were not charged with buying cocaine from Johnson. The district court correctly ruled that the witnesses had not received a benefit. The district court gave the general credibility instruction, which addresses bias, and it also gave the special caution instruction on other grounds.

III. The district court properly denied Johnson's request for a mistrial based on a mistake in the prosecutor's opening statement. The mistake was minor, it was corrected in the very next phrase of the opening statement, and the jury was properly instructed on what is and is not evidence. The mistake did not prejudice Johnson.

IV. Lamb's conduct violated 18 U.S.C. §1512(c)(1). The plain language of the statute applies to an attempt to conceal or destroy an "object" and crack cocaine is an "object" under the common understanding of that term. Because the statute is unambiguous, there is no need to consult legislative history in applying it, and the doctrine of void for vagueness and the Rule of Lenity do not apply. Numerous courts have found that the statute applies outside of the context of corporate fraud. An official proceeding was foreseeable to Lamb at the time that she attempted to destroy evidence because she was aware of Johnson's cocaine dealings and law enforcement officers were

at the door attempting to execute a search warrant at the time of the commission of the offense.

V. The trial evidence did not constructively amend or fatally vary from the charge of obstruction of justice against Lamb. In order to prove the elements of the charged offense, the government had to show that Lamb acted “corruptly” and that an official proceeding was foreseeable. The evidence of Lamb’s knowledge of Johnson’s cocaine dealing was offered to prove those aspects of the offense charged against Lamb.

VI. There was sufficient evidence to convict Lamb of obstruction of justice. The evidence showed that Lamb was aware of Johnson’s cocaine dealing, and at the time that Lamb attempted to destroy evidence, law enforcement officers were at the door attempting to execute a search warrant.

VII. The district court properly applied the cross-reference in Section 3X3.1 of the Guidelines in sentencing Lamb. There was sufficient evidence in the record to support the district court’s factual findings that Johnson’s cocaine dealing was foreseeable to Lamb.

ARGUMENTS

I. Probable Cause Existed To Search The Property At 5706 Westmoreland In Washington Park, Illinois.

INTRODUCTION

In Case No. 10-1762, Scott Johnson appeals his conviction. Johnson argues that the affidavit in support of the search warrant for the residence at 5706 Westmoreland in Washington Park, Illinois², which resulted in the seizure of evidence on April 4, 2008, lacked probable cause and that the good faith exception to the exclusionary rule should not apply. Johnson appeals the district court's order denying his motion to suppress evidence based on the same argument. R. 38; R. 39; R. 55, D. App. A8-A13. Johnson's argument fails because the affidavit in support of the search warrant contained information from a reliable informant that was corroborated through a controlled purchase of cocaine from Johnson at the residence shortly before the search warrant. R. 41, Ex. 1, G. App. 1. The magistrate properly found probable cause to issue the search warrant, and the district court properly denied Johnson's motion to suppress.

STANDARD OF REVIEW

When reviewing the affidavit in support of a search warrant and a judge's issuance of the warrant, "the task of a reviewing court is not to conduct a de novo determination of probable cause, but only to determine whether there is substantial evidence in the record to support the magistrate's decision to issue the warrant." *Massachusetts v. Upton*, 466 U.S. 727, 728 (1984). This Court affords great deference to the issuing judge's determination of probable cause and reviews de novo

² In addition to the residence at 5706 Westmoreland, search warrants were also executed in this case at 8201 State Street and at 517 Martin Luther King Drive in East St. Louis, Illinois, but Johnson only challenged the Westmoreland search warrant before the district court. R. 38, 39. To the extent that Johnson's brief may attempt to challenge the State Street or Martin Luther King Drive search warrants, those arguments have been waived. See *United States v. Jaimes-Jaimes*, 406 F.3d 845, 848 (7th Cir. 2005); *United States v. Rezin*, 322 F.3d 443, 446 (7th Cir. 2003).

the district court's legal conclusion that the warrant was supported by probable cause. *United States v. Bell*, 585 F.3d 1045, 1049 (7th Cir. 2009).

ANALYSIS

“No warrants shall issue, but upon probable cause.” U.S. Const. amend IV. A search pursuant to a warrant issued upon probable cause is proper. “The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all of the circumstances set forth in the affidavit before him, including the ‘veracity’ and ‘basis of knowledge’ of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *Illinois v. Gates*, 462 U.S. 213, 238 (1983). “The magistrate to whom the warrant application is directed is entitled to draw reasonable inferences about where evidence is likely to be kept, based on the nature of the evidence and the type of offense, and the magistrate need only conclude that it would be reasonable to seek the evidence in the place indicated in the affidavit.” *United States v. Sleet*, 54 F.3d 303, 306 (7th Cir. 1995) (internal quotations omitted). Doubtful cases are to be resolved in favor of upholding the warrant. *United States v. Pless*, 982 F.2d 1118, 1124 (7th Cir. 1992). Probable cause is supported when an affidavit sets forth sufficient evidence for a reasonably prudent person to believe that a search warrant will uncover evidence of a crime. *Russell v. Harms*, 397 F.3d 458, 463 (7th Cir. 2005).

Where a judge only considered only the supporting affidavit in issuing a search warrant, “the warrant must stand or fall solely on the contents of the affidavit.” *United States v. Koerth*, 312 F.3d 862, 866 (7th Cir. 2002). When an affidavit uses information supplied by an informant, “[s]everal factors inform the analysis, including: (1) the degree of police corroboration of the informant's information; (2) the extent to which the information is based on the informant's personal observations; (3) the amount of detail provided by the informant; (4) the interval of time between

the events reported by the informant and the warrant application; and (5) whether the informant personally appeared before the warrant-issuing judge to present the affidavit or testimony.” *United States v. Dismuke*, 593 F.3d 582, 586-587 (7th Cir. 2010). These factors should be assessed as a whole, and a weakness in one factor does not end the inquiry. *See United States v. Bell*, 585 F.3d 1045, 1049 (7th Cir. 2009).

In this case, the affidavit in support of the search warrant for 5706 Westmoreland stated that authorities had been investigating the drug trafficking activities of Johnson since 2006. R. 41, Ex. 1; G. App. 1, ¶5. The affidavit stated that four different confidential informants had cooperated with investigators and described their knowledge of Johnson’s drug trafficking activities. R. 41, Ex. 1; G. App. 1, ¶¶ 6-23. The affidavit included evidence that Johnson owned the property at 5706 Westmoreland and that he used it as a “stash” house for cocaine. R. 41, Ex. 1; G. App. 1, ¶¶ 8, 11. The affidavit contained information that Confidential Source #4 had purchased cocaine directly from Johnson on four different occasions in the week prior to April 4, 2008. R. 41, Ex. 1; G. App. 1, ¶ 21. The affidavit stated that all four cocaine purchases took place at 5706 Westmoreland. R. 41, Ex. 1; G. App. 1, ¶ 21. The affidavit stated that Confidential Source #4 had provided reliable and corroborated information to law enforcement on numerous prior occasions and that the information had led to numerous prior arrests. R. 41, Ex. 1; G. App. 1, ¶ 20.

The affidavit stated that on April 4, 2008, prior to the application for the search warrant, agents conducted a controlled purchase of cocaine from Johnson at 5706 Westmoreland. R. 41, Ex. 1; G. App. 1, ¶ 23. In the controlled purchase, the agents provided Confidential Source #4 with buy money, watched him go into 5706 Westmoreland, and then watched him return from 5706 Westmoreland with several ounces of a white powder that tested positive for cocaine. R. 41, Ex. 1; G. App. 1, ¶ 23. The affidavit further stated that later on April 4, 2008, members of the surveillance

team observed a car arrive at 5706 Westmoreland. R. 41, Ex. 1; G. App. 1, ¶ 24. The car stayed for a short time, and after it left 5706 Westmoreland, agents stopped the car and recovered four and a half ounces of cocaine from one of the occupants. R. 41, Ex. 1; G. App. 1, ¶ 24.

On December 17, 2008, Johnson filed his motion to suppress evidence and supporting memorandum of law challenging the search of 5706 Westmoreland. R. 38; R. 39. After a hearing, the district court entered its order denying Johnson's motion to suppress. R. 55; D. App. A8-A13. The order noted that, "Johnson's motion does not challenge any of the facts or allegations set forth in the affidavit; he simply argues that the statements therein are insufficient to support a finding of probable cause." R. 55; D. App. A11. The order went on to conclude that, "Johnson's contention that the affidavit lacks particularized facts supporting a determination of probable cause to search 5706 Westmoreland simply ignores the actual statements therein." R. 55; J. App. A13.

Based on the facts described in affidavit in support of the search warrant for 5706 Westmoreland, the magistrate had, "sufficient evidence to induce a reasonably prudent person to believe that a search [would] uncover evidence of a crime." *United States v. Lowe*, 516 F.3d 580, 585 (7th Cir. 2008), quoting *United States v. Peck*, 317 F.3d 754, 756 (7th Cir. 2003). The record in this case contains, "substantial evidence . . . to support the magistrate's decision to issue the warrant." *Upton*, 466 U.S. at 728. Because there was probable cause to support the warrant to search 5706 Westmoreland, district court's denial of Johnson's motion to suppress should be affirmed. In the alternative, the facts of the investigation support a finding that the agents relied in good faith on a facially valid warrant, pursuant to *United States v. Leon*, 468 U.S. 897 (1984).

II. The District Court Properly Instructed The Jury Regarding Witness Credibility.

INTRODUCTION

Johnson argues that the district court should have given Seventh Circuit Pattern Jury Instruction No. 3.13 regarding witnesses requiring special caution as to two of the government's witnesses, Keith Blake and Forest Flowers. Blake and Flowers testified at trial that they had bought cocaine from Johnson during the time of the charged conspiracy. Tr. II, 193:8 - 201:43; Tr. II, 103:11 - 112:12. Blake and Flowers testified that they had not been charged with a crime based on buying cocaine from Johnson, but they had not received any promises in exchange for their testimony. Tr. II, 206:11-25; Tr. II, 115:23 - 116:19. Johnson requested that Pattern Instruction No. 3.13 be given as to Blake and Flowers on the theory that they had received benefits by not having been charged. Tr. IV, 77:10-16. The district court ruled that Blake and Flowers had not received a benefit because they could be charged with a crime in the future. Tr. IV, 79:3-19; Tr. IV 81:17 - 82:7. Nevertheless, the district court gave the general credibility instruction and the special caution instruction as to Blake and Flowers because they had participated in the offense charged against Johnson. R. 126, p.17-18; G. App. 2, 3, 4. Johnson's argument fails because this Court's precedent shows that the special caution instruction was given on the proper grounds, and because Johnson has not demonstrated any prejudice resulting from the district court's decision.

STANDARD OF REVIEW

The standard of review for a district court's decision to decline to give a requested jury instruction is for an abuse of discretion. *United States v. Tavaréz*, 626 F.3d 902, 904 (7th Cir. 2010). This review is deferential to the district court, because it "is best situated to detect and deal with threats of unreliable testimony." *United States v. Cook*, 102 F.3d 249, 252 (7th Cir. 1996). Only

upon finding that the defendant has showed prejudice will the Court of Appeals reverse the decision. *United States v. Heath*, 447 F.3d 535, 540 (7th Cir. 2006).

ANALYSIS

This Court's precedent in *United States v. Jordan*, 223 F.3d 676 (7th Cir. 2000) is controlling on this issue. In *Jordan*, this Court examined a district court's refusal to give the special caution instruction requested here, Pattern Instruction 3.13. The witness in *Jordan* had not negotiated with the government to avoid prosecution, was not given any money or other benefit for testifying, appeared in court pursuant to a subpoena, and was cross-examined by the defense regarding his reasons for testifying. At the conclusion of the trial the district court instructed the jury using the standard witness credibility instruction referring to the possibility of bias. *Jordan*, 223 F.3d at 692. This Court found that the district court properly exercised its discretion in which instructions to give, and the Court affirmed the defendant's conviction. *Id.* at 692, 694.

In this case, Blake and Flowers both testified that in exchange for their testimony they had not received any promises from the government that they would not be prosecuted for buying cocaine from Johnson. Tr. II, 206:11-25; Tr. II, 115:23 - 116:19. Both Blake and Flowers were extensively cross-examined by defense counsel. Tr. II, 202:1 - 207:6; Tr. II, 112:17 - 122:20. At the conclusion of the trial in this case, the district court gave the standard witness credibility instruction referring to the possibility of bias. R. 126, p. 3; G. App. 4. The district court also gave the special caution instruction as to Blake and Flowers because they had participated in the offense charged against Johnson. R. 126, p.17-18; G. App. 2, 3.

Based on *Jordan*, the district court in this case did not abuse its discretion when it ruled that Blake and Flowers had not received a benefit from the government. Further, the district court did give the special caution instruction as to Blake and Flowers because they had participated in the

offense. R. 126, p.17-18; G. App. 2, 3. Johnson has not even attempted to show that the district court's ruling prejudiced him in any way. Any such attempt would be futile because the jury *was instructed* to consider the testimony of Blake and Flowers with caution and great care. Therefore, the district court's ruling should be affirmed on this ground.

III. The District Court Properly Refused To Grant A Mistrial Based On An Inaccuracy In The Prosecutor's Opening Statement.

INTRODUCTION

Johnson argues that the district court erred by not granting him a mistrial based on a misstatement in the prosecutor's opening statement. Prior to the opening statement, the district court instructed the jury that, "[o]pening statements are statements by the lawyers to tell you what their case is about. Their statements, their questions, and their argument at the end of the case is not evidence." Tr. II, 7:10-13. The district court then instructed the jury that the evidence consists of testimony, exhibits, and stipulations. Tr. II, 7:13-16. In her summary of the anticipated evidence, the prosecutor told the jury that, "after a search warrant was served, the Defendant Scott Johnson was arrested and over five kilos of cocaine, total, were recovered. In fact, over 300 grams of cocaine were recovered." Tr. II, 9:22-25. After the opening statement, Johnson's counsel requested a mistrial. Tr. II, 12:8-23. The district court denied Johnson's request, finding that the misstatement was a mistake that would be cleared up by the evidence and that the jury had been properly instructed. Tr. II., 13:25 - 14:11. After the close of evidence the jury was again instructed on what is and is not evidence. R. 126, p. 2, 26; G. App. 5, 6. Johnson's argument fails because the misstatement was minor, it was immediately corrected, the jury was properly instructed, and Johnson was not prejudiced.

STANDARD OF REVIEW

This Court reviews the denial of a motion for mistrial based on a claim of prosecutorial misconduct for an abuse of discretion. *United States v. Lauderdale*, 571 F.3d 657, 660 (7th Cir. 2009). The Court gives the trial judge great deference due to the judge's prime position for "determin[ing] the seriousness of the incident in question, particularly as it relates to what has transpired in the course of the trial." *Id.*

ANALYSIS

When a defendant asserts a claim of prosecutorial misconduct based on improper comments at trial, the reviewing court must make two findings before upholding the claim. First, the comments must be improper. *United States v. Myers*, 569 F.3d 794, 798 (7th Cir. 2009). Second, the comments must have prejudiced the defendant such that he failed to receive a fair trial. *Darden v. Wainwright*, 477 U.S. 168 (1986). In determining prejudice, the court must determine "whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* (internal quotation marks omitted).

Johnson argues that the prosecutor's mention of five kilograms of cocaine was prosecutorial misconduct. This unintentional error, which was immediately corrected, does not meet the standard for misconduct, and therefore the district court properly refused to grant a mistrial. Other courts have determined that misstatements by the government are not improper when the comments were "isolated, accidental and overall insignificant." *United States v. Gardiner*, 463 F.3d 445, 459 (6th Cir. 2006); *see also Gladden v. Frazier*, 388 F.2d 777, 779-80 (9th Cir. 1968) (separating good faith and prejudice in the analysis of misconduct, and finding mention of testimony in opening statement that never materializes at trial good faith). In this case, the misstatement was only mentioned once, and it was corrected in the very next phrase. Therefore, the government's reference to five kilograms

of cocaine in its opening statement was not improper under the test for prosecutorial misconduct.

The effect of the misstatement did not deny Johnson a fair trial. Five factors inform whether a prosecutor's comments have prejudiced a trial: "1) the nature and seriousness of the prosecutorial misconduct, 2) whether the prosecutor's statements were invited by impermissible conduct by defense counsel, 3) whether the trial court instructed the jury to disregard the statements, 4) whether the defense was able to counter the improper statements through rebuttal, and 5) the weight of the evidence against the defendant." *United States v. Willis*, 523 F.3d 762, 771 (7th Cir. 2008).

In this case, the comment was isolated, extremely minor, and was immediately corrected. The comment was not invited by defense counsel, and the district court did not specifically instruct the jury to disregard the statement, but the district court did properly instruct the jury both before and after the statement as to what is and is not evidence. Tr. II, 7:10-16; R. 126, p. 2, 26; G. App. 5, 6. The assumption "that the jury follow[s] the court's cautionary instructions," *United States v. Hall*, 165 F.3d 1095, 1116 (7th Cir. 1999) (quoting *United States v. Mealy*, 851 F.2d 890, 902 (7th Cir. 1988)), strongly weighs in favor of a finding that the prosecutor's statements did not prejudice the jury. The comment was made in the government's opening statement, so Johnson's attorney had the opportunity to address it in his own opening statement, however counsel chose not to make one. Tr. IV, 59:4-6.

Finally, the weight of the evidence against Johnson was strong. Johnson's co-conspirator testified against him in great detail. Tr II, 14:23 - 98:8. Johnson also had confessed to the investigating agents that he had received and sold seven kilos of cocaine the night before he was arrested and had sold a total of about seventeen kilos of cocaine in the month prior. Tr. III, 53:7-19. As the most important factor in the determination of prejudice, see *United States v. Serfling*, 504 F.3d 672, 677 (7th Cir. 2007); *Rodriguez v. Peters*, 63 F.3d 546, 558 (7th Cir. 1995), the weight of

the evidence against Johnson shows that the unintentional misstatement did not result in prejudice. This Court has held that when a prosecutor makes reference to evidence that the government cannot or will not prove at trial, it is the government, not the defendant, that suffers prejudice as a result of the failure of proof. *See United States v. Akin*, 562 F.2d 459, 466 (7th Cir. 1977); *United States v. Smith*, 253 F.3d 95, 98 (7th Cir. 1958). Therefore, the district court did not abuse its discretion when it did not grant Johnson a mistrial.

For all of the foregoing reasons, Johnson's conviction should be affirmed.

IV. Lamb's Conduct Violated 18 U.S.C. § 1512(c)(1).

INTRODUCTION

In Case No. 10-2230, Lisa Lamb appeals her conviction and her sentence. Lamb argues that the district court improperly instructed the jury because her conduct did not constitute obstruction of justice in violation of 18 U.S.C. § 1512(c)(1). Lamb argues that the government charged Lamb under the "wrong statute" because, in her view, 18 U.S.C. § 1512(c)(1) was only intended to apply to corporate fraud. Lamb argues that applying the statute to her case violates the Rule of Lenity and that she could not have acted "corruptly" within the meaning of the statute because she could not have foreseen any official proceeding. Lamb's arguments fail because the plain language of the statute and its subsequent application in this Court and others show that the statute is not confined to corporate fraud. The Rule of Lenity does not apply when a statute is not ambiguous. The possibility of an official proceeding should have been abundantly foreseeable to Lamb because at the time that she was destroying evidence, law enforcement officers were at her door attempting to execute a search warrant.

STANDARD OF REVIEW

Under Rule 30 of the Federal Rules of Criminal Procedure, a party who objects to any portion of the jury instructions or to a failure to give a requested instruction must inform the district court of the specific objection and the grounds for the objection before the jury retires to deliberate. Failure to object in accordance with this rule precludes appellate review, except as permitted under Rule 52(b). Rule 52(b) states the plain error standard of review. When a party fails to inform of the specific grounds for an objection, the review is for plain error. *United States v. Ye*, 588 F.3d 411, 414 (7th Cir. 2009). In this case, Lamb made a general objection to the sufficiency of the evidence, but she did not address the specific grounds raised in her appeal. Tr. IV, 85:10 - 89:10; L. App. A22 - A26. Therefore, the standard of review in this case is for plain error.

ANALYSIS

A. Lamb's conduct violated the plain language of the statute.

18 U.S.C. § 1512(c)(1) states: “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 . . . ” commits a crime. 18 U.S.C. § 1512(c)(1) (2006). Lamb challenges the inclusion of cocaine base within the statutory language “other object.” Lamb argues that the legislative history of the statute shows that it was passed in response to corporate fraud, however, the language at issue is not ambiguous. The word “object” does not raise difficulty in assessing its meaning. Black’s Law Dictionary defines “object” as “[a] person or thing to which thought, feeling, or action is directed.” *Black’s Law Dictionary* (9th ed. 2009). Cocaine base is unquestionably a thing. In this case, Lamb directed action at a thing—cocaine base—by attempting to wash it off of a pyrex dish while police were at the door attempting to execute a search warrant. Thus, cocaine base falls easily within the common understanding of the

term “object.” When the statute involves an unambiguous term, there is no need to consult the legislative history to understand its meaning. *See Carcieri v. Salazar*, 129 S.Ct. 1058, 1063-1064 (2009) (“We must enforce plain and unambiguous statutory language according to its terms.”). Because cocaine base is an “object,” Lamb’s conduct violated the statute.

Additionally, Lamb relies on the rule of *ejusdem generis* to argue that the term “object” should be read to apply only to objects that are similar to records and documents. The rule of *ejusdem generis*, however, “is no more than an aid to construction and comes into play only when there is some uncertainty as to the meaning of a particular clause in a statute. *United States v. Turkette*, 452 U.S. 576, 581 (1981). The rule of *ejusdem generis* does not apply when the plain meaning of statutory language is clear. *Id.* Because the term “object” is not ambiguous, *ejusdem generis* does not apply.

Further, this Court and others have repeatedly affirmed convictions under 18 U.S.C. 1512(c)(1) based on conduct falling well outside the realm of corporate fraud. In *United States v. Matthews*, 505 F.3d 698 (7th Cir. 2007), this Court affirmed a conviction for obstruction of justice under 18 U.S.C. § 1512(c)(1) based on the defendant’s attempt to conceal a firearm. In *United States v. Ortiz*, 220 Fed. Appx. 13 (2d Cir. 2007), the Second Circuit affirmed a conviction under 18 U.S.C. § 1512(c)(1) for concealing a car after a robbery. In *United States v. Thompson*, 171 Fed. Appx. 823 (11th Cir. 2206), the Eleventh Circuit affirmed a conviction under 18 U.S.C. 1512(c)(1) where the defendant directed an accomplice to remove money, a gun, and crack cocaine from a storage locker. In *United States v. Abrolaez*, 450 F.3d 1283 (11 Cir. 2006), the Eleventh Circuit affirmed the a conviction under 18 U.S.C. 1512(c)(1) after the defendant destroyed a cell phone that had been used in drug trafficking. In *United States v. Moyer*, 726 F.Supp.2d 498 (M.D.Pa. 2010), the Middle District of Pennsylvania rejected the defendant’s motion to dismiss a charge of obstruction of justice

under 18 U.S.C. § 1512(c) where the defendant attempted to hide a pair of shoes that had been worn in a racially motivated attack.

These cases show that the application 18 U.S.C. §1512(c)(1) is not limited to cases of corporate fraud. Guns, cars, money, cell phones, shoes, and crack cocaine have little in common with corporate records and documents, but they are all “objects” within the common meaning of that term. They are all also “objects” within the plain meaning of 18 U.S.C. §1512(c)(1). Therefore, Lamb’s argument that the crack cocaine in this case is not an “object” within the meaning of the statute fails. The district court did not commit plain error by instructing the jury on the elements of the statute in this case. R. 126-1, p. 8; L. App. A16.

B. The statute is not void for vagueness, and the Rule of Lenity does not apply because the statute is not ambiguous.

Lamb argues that the application 18 U.S.C. §1512(c)(1) in her case renders the statute void for vagueness and violates the Rule of Lenity. In support of her void-for-vagueness argument, Lamb cites the recent decision in *Skilling v. United States*, 130 S.Ct. 2896 (2010), in which the Supreme Court found the phrase “intangible right of honest services” in the federal mail fraud statute to cover bribery and kickback schemes. *Skilling*, however, has no application in this case because it interprets a completely different phrase in a completely different statute. Even if the phrase “intangible right of honest services” was found to be vague and in need of clarification, the term “object” is not vague. As discussed above, an “object” is a tangible thing, and the Supreme Court’s discussion of the meaning of an intangible right simply does not apply. In this case, the statute unambiguously applies to “objects.” Within the name of the doctrine “void for vagueness” lies the limitation on its use. Without ambiguity as to what conduct is prohibited, the doctrine does not apply.

Lamb argues that the application of 18 U.S.C. §1512(c)(1) in her case was improper because it offends the Rule of Lenity. As with the void for vagueness doctrine, the Rule of Lenity carries the

same requirement of ambiguity before it applies. *See United States v. Thompson*, 484 F.3d 877, 881 (7th Cir. 2007). In the case of § 1512(c)(1) the statute unambiguously prohibits destroying an “object.” As discussed above, an ordinary person would understand that illegal drugs are “objects” within the common meaning of that term. Because the statute is unambiguous, the Rule of Lenity does not apply.

C. Lamb acted “corruptly” because an official proceeding was foreseeable.

Lamb argues that even if 18 U.S.C. §1512(c)(1) applies outside of corporate fraud cases, she nevertheless could not have acted “corruptly” because an official proceeding was not foreseeable. Lamb argues that the district court gave erroneous instructions on the elements of the offense. Lamb specifically argues that the district court erred because it did not give a specific instruction on foreseeability.

Lamb’s argument fails for at least two reasons. First, Lamb did not request a foreseeability instruction, and the district court’s failure to give it was not an error, plain or otherwise. The district court instructed the jury on the law regarding the charge of obstruction of justice against Lamb based on this court’s holding in *Matthews*, supra. The instruction on the elements of the offense was taken directly from *Matthews*, as were the instructions on the terms “official proceeding” and “corruptly.” R. 126-1, p. 8-11; L. App. A16 - A19. Lamb’s counsel made a general objection to the sufficiency of the evidence against her, but neither counsel nor Lamb ever requested the specific instruction on foreseeability that Lamb now argues was essential. Tr. IV, 85:10 - 89:10; L. App. A22 - A26. Because Lamb did not request the foreseeability instruction, the plain error standard applies to the district court’s failure to give it. *Ye*, 588 F.3d at 414. The district court’s decision to use instructions that had already been parsed and approved by this Court hardly amounts to plain error. Likewise, the district court’s failure to instruct on foreseeability when Lamb did not request the instruction was

not plain error.

Lamb's argument also fails because under plain error review, it is her burden to show prejudice. *United States v. Perez*, 612 F.3d 879, 884 (7th Cir. 2010), citing *United States v. Olano*, 507 U.S. 725, 734-35 (1993). Lamb can not show prejudice because even if a foreseeability instruction had been given, there was substantial evidence that an official proceeding was foreseeable.

The evidence in this is that on April 4, 2008, DEA Special Agent Michael Rehg knocked on the door of the residence at 5706 Westmoreland in an attempt to execute a search warrant. Tr. III, 32:15-19. After Agent Rehg knocked, Lisa Lamb opened the inner door but not the iron bars that covered the door. Tr. III, 32:18-22. Agent Rehg showed Lamb his identification, introduced himself, and told Lamb that he had a search warrant for the residence and that she would have to open the door to let him in. Tr. III, 33:6-10. Lamb asked to see a copy of the warrant, and Rehg explained that he would get one. Tr. III 33:13-17. Rehg told Lamb that she would have to stay in front of the open door where he could see her, both for his safety and so that evidence would not be destroyed. Tr. III, 33:17-24. Rehg asked Lamb to keep the inner door open, but Lamb slammed the door on him, kicked it, and tried to push it shut. Tr. III, 33:25 - 34:9. Eventually, Lamb shut the door, and agents tried to make entry into the house by breaking the windows. Tr. III, 35:4-15. Agents, uniformed police officers, and firemen attempted to get into the residence for approximately 20 to 30 minutes. Tr. III, 35:21 - 36:10. Finally, firemen cut the frame off the barred door with a gas saw, and agents were able to get inside. Tr. III, 36:11-18.

While they were trying to get inside of the residence, Agent Rehg and Washington Park police officers were yelling to Lamb that they were the police and for her to open the door. Tr. III, 36:19-25. During that time, Agent Rehg heard the toilet flushing and the faucet on the sink running.

Tr. III 37:7-9. Agent Rehg saw Lamb standing in front of the sink, and she appeared to be washing dishes. Tr. III, 37:12-14. When Rehg entered the house, Lamb was backing away from the sink, the faucet was running, and the sink was still wet. Tr. III, 38:7-12. Lamb told Rehg that she had been washing dishes. Tr. III, 39:21. On the sink, Agent Rehg found a pyrex measuring cup with crack cocaine residue inside. Tr. III, 42:12-19, 43:4-20.

The evidence in this case shows that while Lamb was inside the house committing the offense of conviction, attempting to destroy the crack cocaine in the measuring cup, a DEA Agent, uniformed police officers, and firemen were outside the house attempting to get inside and execute a search warrant. Thus, it should have been readily foreseeable to Lamb that the execution of the search warrant and the seizure of the evidence that she was trying to destroy would likely lead to an official proceeding. Because there was abundant evidence of foreseeability, Lamb can not meet her burden of showing that she was prejudiced by the lack of a specific jury instruction on foreseeability. For all of the foregoing reasons, Lamb's conduct violated 18 U.S.C. §1512(c)(1).

V. The Trial Evidence And Jury Instructions Neither Constructively Amended The Charge Nor Fatally Varied The Factual Allegations From The Indictment.

INTRODUCTION

Lamb argues that the evidence and instructions in this case either constructively amended the charge against her or resulted in a fatal variance from the indictment. There are three parts to Lamb's argument. First, Lamb argues that she was prejudiced by the jury's exposure to the evidence against both Lamb and Johnson in the joint trial. Second, Lamb states that the evidence and jury instructions mentioning cocaine as well as cocaine base, along with evidence of her relationship with Johnson constructively amended the indictment. Third, Lamb cites the difference between cocaine

base and cocaine in arguing that the indictment was fatally varied. Lamb's arguments fail because evidence of her knowledge of Johnson's cocaine dealing was necessary to show that Lamb acted "corruptly" in committing her offense of conviction. The evidence and instructions were clear and proper, and there was no constructive amendment or fatal variance.

STANDARD OF REVIEW

This Court reviews the denial of Lamb's motion to sever for abuse of discretion. *United States v. Olsen*, 450 F.3d 655, 677 (7th Cir. 2006). For a constructive amendment claim, if the defendant fails to timely raise the claim in the trial court, the review is for plain error. *See United States v. Presbitero*, 569 F.3d 691, 698 (7th Cir. 2009). Lamb did not raise an objection on the grounds of constructive amendment of the indictment at the trial level, so review is for plain error in this case. Lamb argues that a timely objection was made, but the record shows that Lamb made a general objection to the sufficiency of the evidence, and she did not address constructive amendment. Tr. IV, 85:10 - 89:10; L. App. A22 - A26. Plain error in a constructive amendment claim exists "if the amendment constitutes a mistake so serious that the defendant probably would have been acquitted had there not been a mistake." *Presbitero*, 569 F.3d at 698. The standard of review for a fatal variance claim is the same as the sufficiency of the evidence standard of review. *See United States v. Dean*, 574 F.3d 836, 845 (7th Cir. 2009). Under this standard, the evidence is viewed in "the light most favorable to the Government," and a conviction will be reversed "only if the record contains no evidence from which a reasonable juror could have found the defendant guilty." *Id.*

A. The district court did not abuse its discretion in denying Lamb's motion to sever.

Lamb's first argument in support of her constructive amendment claim is that the district court erred in denying her motion to sever her case from Johnson's. On August 19, 2009, Johnson

and Lamb were charged in the Superseding Indictment. R. 79. Initially, both Johnson and Lamb were charged in Count 1 with Conspiracy to Distribute Cocaine. R. 79. On September 18, 2009, Lamb filed her motion to sever, in which she argued that the evidence against Johnson might be used against her as well. R. 99. At the time that she filed her motion, Lamb was still charged in the conspiracy count. R. 79.

On September 24, the district court entered its order denying Lamb's motion. R. 101; L. App. A9-12. In the order, the district court noted the presumption in favor of a joint trial for co-conspirators. R. 101; L. App. A10. The district court addressed Lamb's concern about a "spill-over" effect of the evidence against Johnson and cited this Court's precedent holding that a simple disparity of evidence does not independently establish actual prejudice. R. 101; L. App. A11; *citing United States v. Caliendo*, 910 F.2d 429, 438 (7th Cir. 1990). The district court noted that this Court has found the jury instruction to give separate consideration to each defendant and charge to be effective enough to counteract any prejudice from a disparity in evidence. R. 101; L. App. A11. The district court invited counsel to request that the jury instruction, or another appropriate instruction, be given contemporaneously with any evidence that applied solely to Johnson. R. 101; L. App. A11.

On October 2, 2009, the government moved to dismiss the conspiracy count as to Lamb. R. 115. Lamb did not renew her motion to sever after the conspiracy count was dismissed against her. Evidence started in the trial on October 5, 2009. R. 120. During the trial Lamb did not request that the separate consideration instruction be read to the jury during testimony that applied only to Johnson. The district court gave the jury the separate consideration instruction after the close of the evidence. R. 126, p. 20; G. App. 7.

The district court did not abuse its discretion in denying Lamb's motion to sever. At the time of the motion, Lamb and Johnson were charged as co-conspirators, and Lamb did not renew her

motion after the conspiracy charge was dropped against her. The district court relied on this Court's precedent in analyzing the potential for prejudice that might be created by a "spill-over" effect. The district court offered to instruct the jury on separate consideration during evidence that applied only to Johnson, but Lamb did not take the district court up on that offer. The district court gave the separate consideration instruction, and the jury is presumed to have followed it. Therefore, the district court did not abuse its discretion in denying Lamb's motion to sever, and she was not prejudiced.

B. The evidence introduced at trial did not constructively amend the indictment, as the basis for conviction was not broadened and no plain error was committed.

"[T]he Fifth Amendment requires an indictment of a grand jury to guarantee that the allegations in the indictment and the proof at trial match." *United States v. Trennell*, 290 F.3d 881, 888 (7th Cir. 2002) (internal quotation marks omitted). A constructive amendment of an indictment occurs when "the crime charged in the indictment [is] 'materially different or substantially altered at trial, [so that] it is impossible to know whether the grand jury would have indicted for the crime actually proved.'" *United States v. Ratliff-White*, 493 F.3d 812, 820 (7th Cir. 2007) (citations omitted). In this case, Lamb was charged with obstruction of justice in violation of 18 U.S.C. §1512(c)(1). R. 79. The Superseding Indictment specifically alleged that Lamb "did corruptly attempt to conceal and destroy an object, cocaine base, with the intent to impair its availability for use in an official proceeding." R. 79. In order to prove that Lamb acted "corruptly" when she attempted to destroy evidence, the government was required to prove that Lamb acted with the purpose of wrongfully impeding the due administration of justice. R. 126-1, p. 11; L. App. A19. As discussed in Section IV, C, *supra*, in order for Lamb to have acted corruptly, an official proceeding had to be foreseeable.

The proof at trial against Lamb consisted primarily of the testimony of Agent Rehg, which is described in Section IV, C, *supra*. As Lamb notes, she was also mentioned a handful of other times during the trial. L. Br. 36. That additional evidence tended to show that Lamb was aware of Johnson's cocaine dealing activities because she was present when Johnson picked up cocaine, when cocaine was delivered, and when Johnson sold cocaine. L. Br.36; L. App. A78-9; A96; A90-91; A96-97.

All that is required for this Court to affirm Lamb's conviction is a finding that no plain error was committed. *See Presbitero*, 569 F.3d at 698. The district court did not commit plain error in this case because the charging document and jury instructions show that the government did not broaden the charges at trial, and the proof presented at trial applied to the elements of the offense charged. The government was required to prove that Lamb acted "corruptly" – with the purpose of wrongfully impeding the due administration of justice – and an official proceeding had to have been foreseeable. The evidence that Lamb was aware of Johnson's cocaine dealing was offered to help prove that Lamb acted corruptly and that an official proceeding was foreseeable. Without that evidence, Lamb could have argued at trial, as she does on appeal, that her attempt to destroy evidence was done innocently and that no official proceeding was foreseeable.

Lamb argues that the only relevant official proceeding in this case was the government's prosecution of Johnson for selling powder cocaine. However, Lamb only needed to foresee the use of the object she attempted to destroy in an official proceeding. The language of § 1512(c)(1) does not require there to be a specific proceeding. In a prosecution for cocaine dealing, cocaine base, if discovered by DEA agents in a search of the residence of a drug trafficker, has "a relationship in time, causation, or logic with" a criminal prosecution of that drug trafficker. *See United States v. Aguilar*, 515 U.S. 593, 599 (1995). Additionally, this Court has held that "a defendant may be

convicted under § 841(a)(1) even if he does not know the type or quantity of the controlled substance.” *United States v. Martinez*, 301 F.3d 860, 865 (7th Cir. 2002).³ Thus, it was foreseeable that the crack cocaine evidence that Lamb tried to destroy might be evidence in an official proceeding against Johnson for selling cocaine.

In her argument, Lamb relies in part on *United States v. Leichtnam*, 948 F.2d 370 (7th Cir. 1991). In *Leichtnam*, the defendant was charged with possessing a specific firearm, but the government presented evidence that the defendant also possessed two other firearms that were not charged in the indictment. Lamb’s reliance on *Leichtnam* in this case is misplaced because the government’s evidence of Lamb’s knowledge of Johnson’s cocaine dealing was offered specifically to prove an element of the charged offense.

Moreover, the government did not constructively amend the indictment to include a conspiracy charge against Lamb. As Lamb recognizes in her brief, the evidence presented linking Lamb to Johnson’s drug trafficking was necessary to establish the nexus required under § 1512(c)(1), and it did just that. L. Br. 37. The evidence placed Lamb in a position to know of Johnson’s dealings so that an official proceeding was foreseeable when she destroyed the cocaine base. The government did not invite the jury to consider a conspiracy charge against Lamb. It was not a possible basis of conviction for her. *See Leichtnam*, 948 F.2d at 375 (describing constructive amendment repeatedly as a broadening of the basis for conviction).

Because the evidence and the instructions at trial matched the allegations in the superseding

³ Jury Instruction Nos. 32 and 33, which Lamb cites as “affirmatively instruct[ing] the jury to consider offenses not charged by equating powder with crack cocaine,” state that they refer to charges under 18 U.S.C. § 841(a)(1). The instructions do not refer to the charge against Lamb, and were proper under *Martinez*, 301 F.3d at 865. Additionally, Lamb did not object to this instruction at trial, and even if improper this Court “rarely reverse[s] a conviction because of an improper jury instruction to which no objection was offered.” *United States v. Ye*, 588 F.3d 411, 414 (7th Cir. 2009).

indictment, no constructive amendment occurred, and the district court did not commit plain error.

B. There was no fatal variance between the charge against Lamb and the evidence that was presented.

“A variance between allegation and proof is not fatal unless the defendant has been thereby deprived of an adequate opportunity to prepare a defense or has been exposed to a risk of being prosecuted twice for the same offense.” *United States v. Kuna*, 760 F.2d 813, 819 (7th Cir.1985).

“When reviewing [a fatal variance claim, this Court] view[s] the evidence presented at trial and draw[s] all reasonable inferences from that evidence in the light most favorable to the Government. [The Court] shall overturn a conviction only if the record contains no evidence from which a reasonable juror could have found the defendant guilty.” *United States v. Dean*, 574 F.3d 836, 842 (7th Cir. 2009).

The evidence at trial against Lamb consisted primarily of the testimony of Agent Rehg, which is described in Section IV, C, supra. As discussed in Section V, B, supra, there was also some evidence from other witnesses against Lamb. L. Br. 36. That additional evidence tended to show that Lamb was aware of Johnson’s cocaine dealing activities because she was present when Johnson picked up cocaine, when cocaine was delivered, and when Johnson sold cocaine. L. Br.36; L. App. A78-9; A96; A90-91; A96-97.

The evidence from Agent Rehg showed that Lamb refused to allow him to enter the residence to at 5706 Westmoreland after he had identified himself and told Lamb that he had a search warrant. The evidence showed that during the 20 to 30 minutes that it took to gain entry into the house, Agent Rehg heard the toilet flushing and the faucet running on the sink. The evidence showed that Agent Rehg saw Lamb standing near the sink, and she appeared to be washing dishes. The evidence showed that when Agent Rehg finally made it inside, Lamb was backing away from the sink, which

was wet and where the faucet was still running. The evidence showed that Lamb told Rehg that she had been washing dishes. When this evidence is coupled with the evidence that Lamb knew that Johnson was involved in selling cocaine, it suggests that while the police were outside trying to get through the door and execute the search warrant, Lamb was inside attempting to destroy evidence. A reasonable jury, when viewing this evidence favorably to the government, could find that Lamb acted corruptly and that an official proceeding was foreseeable. Therefore any variance between the allegations and proof at trial is not prejudicial.

Lamb's argument the evidence powder cocaine deprived her of an adequate opportunity to prepare a defense simply falls flat. First, "[c]ocaine base is merely an isomer of cocaine." *United States v. Pierce*, 893 F.2d 669, 676 (5th Cir. 1990). It is "usually prepared by processing cocaine hydrochloride and sodium bicarbonate." *United States v. Abdul*, 122 F.3d 477, 479 (7th Cir. 1997). Thus Lamb could reasonably foresee the use of any form of cocaine in an official proceeding related to the illegal drug activity at Westmoreland. Second, after the indictment was filed, Lamb could have foreseen the need of the government to establish that she knew of Johnson's trafficking in cocaine in order to prove the elements of obstruction of justice. That evidence is exactly what the government presented at trial, and what Lamb claims fatally varied the charges in the indictment. Any variance was harmless and did not affect Lamb's protected rights. *See United States v. Cooper*, 39 F.3d 167, 173 (7th Cir. 1994) (considering charges of conspiracy to distribute cocaine where proof at trial showed distribution of crack cocaine); *United States v. Pierce*, 893 F.2d 669, 676 (5th Cir. 1990) (considering charges of possession and conspiring to distribute cocaine where proof at trial showed cocaine base). For all of the reasons above, there was no constructive amendment or no fatal variance.

VI. The Evidence Was Sufficient To Convict Lamb Of Obstruction Of Justice.

INTRODUCTION

Lamb argues that the evidence at trial does not support the jury's decision to convict her of obstruction of justice for three reasons. First, Lamb argues that the evidence failed to show that she destroyed or concealed an object. Second, lamb argues that there was insufficient evidence of her corrupt intent. Third, Lamb asserts that the evidence did not prove that she could foresee an official proceeding. These arguments fail because the evidence presented at trial was sufficient to convince a rational jury of Lamb's guilt beyond a reasonable doubt.

STANDARD OF REVIEW

Review of a sufficiency-of-the-evidence challenge to a conviction begins with a view of the evidence "in the light most favorable to the verdict." *United States v. Williams*, 553 F.3d 1073, 1080 (7th Cir. 2009). This Court "will reverse only if no rational trier of fact could have found [the defendant] guilty of the charges beyond a reasonable doubt." *United States v. DeSilva*, 505 F.3d 711, 715 (7th Cir. 2007). "[It] will neither reweigh the evidence nor second-guess the jury's credibility determinations. It is irrelevant whether [the Court] would have voted to convict on the evidence presented-[it has] no authority to usurp the jury's function as finder of fact." *Tavarez*, 626 F.3d at 906 (citations omitted). Circumstantial evidence may support a conviction just as direct evidence would. *See Williams*, 533 F.3d at 1086 (citing *United States v. Galati*, 230 F.3d 254, 258 (7th Cir. 2000)).

ANALYSIS

A. The circumstantial evidence showed that Lamb attempted to destroy the crack cocaine in the pyrex dish.

"[I]t is well established that a jury's verdict may rest solely upon circumstantial evidence." *United States v. Galati*, 230 F.3d 254, 258 (7th Cir. 2000). The evidence is discussed in Section V,

B, supra. The evidence showed that Lamb refused to allow Agent Rehg to enter the residence to at 5706 Westmoreland after he had identified himself and told Lamb that he had a search warrant. The evidence showed that during the 20 to 30 minutes that it took to gain entry into the house, Agent Rehg heard the toilet flushing and the faucet running on the sink. The evidence showed that Agent Rehg saw Lamb standing near the sink, and she appeared to be washing dishes. The evidence showed that when Agent Rehg finally made it inside, Lamb was backing away from the sink, which was wet and where the faucet was still running. The evidence showed that Lamb told Rehg that she had been washing dishes. When this evidence is coupled with the evidence that Lamb knew that Johnson was involved in selling cocaine, it suggests that while the police were outside trying to get through the door and execute the search warrant, Lamb was inside attempting to destroy evidence. When viewed in the light most favorable to the verdict, the evidence was sufficient to show that Lamb attempted to destroy the crack cocaine in the pyrex dish.

B. The evidence shows that Lamb acted corruptly.

Acting “corruptly” means acting “with the purpose of wrongfully impeding the due administration of justice.” *United States v. Ashqar*, 582 F.3d 819, 823 (7th Cir. 2009). The evidence at trial was sufficient to prove Lamb’s corrupt state of mind. As discussed in Sections IV, C and V, B, supra, the evidence showed that Lamb was aware of Johnson’s cocaine dealing because she had gone with him to pick up cocaine, she had been present when cocaine was delivered, and she had been present when Johnson had sold cocaine. When Agent Rehg identified himself and attempted to execute the search warrant, Lamb slammed the door on him and refused to let him in, even after uniformed police officers and firemen arrived and had to saw the iron door off its frame. While the officers were trying to get inside, Agent Rehg saw Lamb standing in front of the sink, and she appeared to be washing dishes. When Rehg finally got inside lamb stated that she had been washing

dishes.

A rational trier of fact could find the evidence of Lamb's corrupt motive sufficient to convict Lamb beyond a reasonable doubt. Lamb contends that because the area in which the Westmoreland address is located, East St. Louis, is dangerous, she could not presume that plain-clothes agents presenting valid badges were in fact DEA agents.⁴ Nevertheless, there was significant evidence that Lamb knew that Johnson sold cocaine. When Agent Rehg came to the door, she slammed it on him and refused to open it after uniformed officers arrived. Lamb said that while the officers tried for 20 to 30 minutes to get inside, she was doing dishes. There was no evidence presented at trial that Lamb was doing dishes because she wanted the house to look presentable when the police came to search. The evidence of Lamb's knowledge of Johnson's drug dealing coupled with the evidence of her actions when confronted by Agent Rehg was sufficient to prove Lamb's corrupt intent.

C. An Official Proceeding was foreseeable.

A conviction under § 1512(c)(1) requires the jury to find that a defendant "believe[s] that his acts will be likely to affect a pending or foreseeable proceeding." *Matthews*, 505 F.3d at 708.

As discussed in Sections IV, C and V, B, *supra*, the significant evidence of foreseeability was presented at trial. The evidence showed that Lamb knew that Johnson was selling cocaine. The evidence showed that as Lamb was attempting to destroy evidence, law enforcement officers were at the door, attempting to execute a search warrant and seize evidence. When viewed in the light most favorable to the verdict, the evidence shows that the commencement of an official proceeding should have been readily foreseeable to Lamb. For all of these reasons, there was sufficient evidence

⁴ Lamb also refers to a number of cases in this Circuit involving "crooked police officers" in order to negate the foreseeability of an official proceeding. However, all of the cases cited originated in the Northern District of Illinois, so the connection between Lamb's intent and these cases is rather attenuated.

to convict Lamb.

IV. The District Court Properly Applied The § 2X3.1 Cross-Reference.

INTRODUCTION

Lamb argues that the district court should have found the evidence insufficient to conclude that the cross reference applied under § 2X3.1 of the United States Sentencing Guidelines Manual (2007). This argument does not contain adequate support in the appellant’s brief, and therefore Lamb has waived appellate review of this claim. If this Court decides that Lamb’s argument meets the requirements under Rule 28 of the Federal Rules of Appellate Procedure, this claim must fail because the district court did not commit clear error based on the evidence presented at sentencing.

STANDARD OF REVIEW

“[This Court] review[s] *de novo* the district court's application of the [Sentencing] guidelines, and its findings of fact for clear error.” *United States v. Quintero*, 618 F.3d 746, 755 (7th Cir. 2010). This claim concerns the sufficiency of evidence to support the district court’s finding that Lamb obstructed an official proceeding related to Johnson’s cocaine distribution, so a clear error standard applies. Clear error is a “highly deferential standard of review[,] and [this Court] refuse[s] to second-guess the sentencing judge.” *United States v. Longstreet*, 567 F.3d 911, 924 (7th Cir. 2009).

ANALYSIS

- A. Lamb has waived appellate review of the application of § 2X3.1 because her brief fails to meet the requirements of Fed. R. App. P 28(a)(9)(A).**

The Federal Rules of Appellate Procedure require an appellant to include in its brief an argument section, “which must contain . . . appellant's contentions and the reasons for them, with

citations to the authorities and parts of the record on which the appellant relies.” Fed. R. App. P. 28(a)(9)(A). This Court has interpreted this portion of the Rules to require an appellant to support its claim with “appropriate judicial authority and reasoned discussion.” *Doherty v. City of Chicago*, 75 F.3d 318, 324 (7th Cir. 1996); *see also United States v. Useni*, 516 F.3d 634, 658 (7th Cir. 2008); *United States v. Amerson*, 185 F.3d 676, 689 (7th Cir. 1999). Failure to follow this Rule will result in a waiver of the claim, and does not require appellate review. *See Useni*, 516 F.3d at 658.

In her brief, Lamb has claimed that the district court should not have applied the § 2X3.1 cross-reference to Lamb’s sentence. In support of this claim, Lamb merely states in a few sentences that the judge should have found that the underlying offense was “something else, such as Lamb’s mere possession of cocaine base.” L. Br. 47. No judicial authority is cited outside of the standard of review, and in her argument, Lamb broadly refers back to entire sections of the brief, which make different arguments. Much like the appellants in *Amerson* and *Useni*, Lamb “failed to establish the basis for [her] allegation” that there was insufficient evidence. *Amerson*, 185 F.3d at 689. The court in *Useni* considered one of the appellant’s arguments waived where he cited no judicial authority beyond that necessary to establish the standard of review, and listed “three unsupported factual assertions.” *Useni*, 516 F.3d at 658. Since “[i]t is not the role of this court to research and construct the legal arguments open to parties, especially when they are represented by counsel,” *Doherty*, 75 F.3d at 324, Lamb has waived appellate review of this claim.

B. Even if Lamb has not waived appellate review, the district court properly used Johnson’s cocaine conspiracy as the underlying offense when applying § 2X3.1 to her sentence.

In calculating Lamb’s guidelines, the district court properly applied the § 2X3.1 accessory-after-the-fact cross-reference to Lamb’s sentence. Lamb does not contest the application of the cross-reference. Instead, Lamb argues that the district court improperly used Johnson’s cocaine

distribution conspiracy as the underlying offense because the evidence does not support such use. However, Application Note 1 to § 2X3.1 provides that “underlying offense means the offense as to which the defendant is convicted of being an accessory.” U.S.S.G. § 2X3.1, comment (n.1) (2007). That Application Note also references Application Note 10 to §1B1.3 (relevant conduct), which states that 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.” U.S.S.G. §1B1.3, comment (n.10). Lamb was convicted of obstruction of justice in relation to the cocaine trafficking activities of Johnson. Therefore the underlying offense covers obstruction of justice in relation to trafficking the amount of cocaine “that was known, or reasonably should have been known” to Lamb. The evidence in this case shows that Johnson entered into a multi-year-long cocaine conspiracy with Reynaldo Colon-Laboy to transport hundreds of kilograms of cocaine from the Chicago area to the East St. Louis area. Tr. II. 15:1 - 58:21. At trial, the evidence showed that rode Johnson to pick up cocaine, she was present when cocaine was delivered, and she was present when Johnson sold cocaine. Based on the evidence in this case, the district court did not commit clear error in finding the evidence sufficient to conclude that Lamb knew or reasonably should have known that Johnson sold at least 11 kilograms of cocaine during the course of the conspiracy.

For all of the foregoing reasons, Lamb’s conviction and sentence should be affirmed.

CONCLUSION

For the foregoing reasons, the United States prays that this Court affirm Johnson's conviction and Lamb's conviction and sentence.

Respectfully submitted,

STEPHEN R. WIGGINTON
United States Attorney

s/ Donald S. Boyce

DONALD S. BOYCE
Assistant United States Attorney
Nine Executive Drive
Fairview Heights, IL 62208
(618) 628-3700

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION,
TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,345 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 Seventh Circuit Rule 32(b), 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 Corel Word Perfect X4, Program Release 14.0.0.756, in 12-point Times New Roman font.

Respectfully submitted,

STEPHEN R. WIGGINTON
United States Attorney

s/ Donald S. Boyce

DONALD S. BOYCE
Assistant United States Attorney
Nine Executive Drive
Fairview Heights, IL 62208
(618) 628-3700

APPENDIX CERTIFICATION

I certify that all of the materials required by Circuit Rules 30(a) and 30(b) are included in the following appendix.

Respectfully submitted,

STEPHEN R. WIGGINTON
United States Attorney

s/ Donald S. Boyce

DONALD S. BOYCE
Assistant United States Attorney
Nine Executive Drive
Fairview Heights, IL 62208
(618) 628-3700

CIRCUIT RULE 31(e) CERTIFICATION

The undersigned hereby certifies 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.

Respectfully submitted,

STEPHEN R. WIGGINTON
United States Attorney

s/ Donald S. Boyce

DONALD S. BOYCE
Assistant United States Attorney
Nine Executive Drive
Fairview Heights, IL 62208
(618) 628-3700

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

NOS. 10-1762, 10-2230

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

SCOTT JOHNSON and LISA LAMB,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF ILLINOIS

HONORABLE MICHAEL J. REAGAN, JUDGE PRESIDING

DISTRICT COURT No. 08-30217-MJR

APPENDIX OF PLAINTIFF-APPELLEE

UNITED STATES OF AMERICA

**STEPHEN R. WIGGINTON
United States Attorney**

**DONALD S. BOYCE
Assistant United States Attorney
Southern District of Illinois
Nine Executive Drive
Fairview Heights, IL 62208
(618) 628-3700**

ANDREW WESTBROOK, Law Intern

APPENDIX

TABLE OF CONTENTS

Description	Appendix Numbers
Application and Affidavit for Search Warrant.....	1
Special Caution Jury Instruction for Keith Blake.	2
Special Caution Jury Instruction for Forrest Flowers.	3
General Credibility Jury Instruction.....	4
Evidence Jury Instruction.....	5
What Is Not Evidence Jury Instruction.	6
Separate Consideration Jury Instruction.	7

PROOF OF SERVICE

UNITED STATES OF AMERICA,)	COURT OF APPEALS
)	NO. 10-1762, 10-2230
Plaintiff-Appellant ,)	
)	Southern District of Illinois
vs.)	District Court No. 08-30217
)	
SCOTT JOHNSON and LISA LAMB,)	Honorable Michael J. Reagan
)	Judge Presiding
Defendant-Appellee.)	

The undersigned hereby certifies that on March 2, 2011, he/she served two (2) copies of the attached:

BRIEF OF PLAINTIFF-APPELLANT,

and pursuant to Circuit Rule 31(e), supplied a copy on digital media in Corel WordPerfect X4

by placing two (2) copies in a postpaid envelope addressed to the person(s) hereinafter named, at the places(s) and address(es) stated below, which is/are the last known address(es), and by depositing said envelope and contents in the United States Mail.

ADDRESS(ES):

Richard H. Sindel
Sindel, Sindel & Noble, P.C.
8000 Maryland Ave., Suite 350
Suite 350
Clayton, MO 63105

Sarah O. Schrup
Northwestern University School of Law
Bluhm Legal Clinic
357 East Chicago Avenue
Chicago, IL 60611

s/ Jackie Little

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN THE MATTER OF THE SEARCH OF)
A RESIDENCE LOCATED AT 5706)
WESTMORELAND, WASHINGTON)
PARK, ILLINOIS, DESCRIBED AS A)
ONE STORY RESIDENCE WITH GRAY)
SIDING, DETACHED GARAGE , WITH)
THE NUMBER 5706 ATTACHED ON)
THE FRONT OF THE RESIDENCE)
)
)

CASE NUMBER 08-m-3021 D6W

FILED UNDER SEAL

**APPLICATION AND AFFIDAVIT
FOR SEARCH WARRANT**

I, Nicholas J. Manns, being duly sworn depose and say:

I am a Special Agent with the Federal Bureau of Investigation, and have reason to believe
that on the person or on the premises known as:

A RESIDENCE LOCATED AT 5706 WESTMORELAND, WASHINGTON PARK,
ILLINOIS, DESCRIBED AS A ONE STORY RESIDENCE WITH GRAY SIDING,
DETACHED GARAGE , WITH THE NUMBER 5706 ATTACHED ON THE
FRONT OF THE RESIDENCE

in the Southern District of Illinois there is now concealed a certain person or property, namely:

SEE ATTACHED LIST, ENTITLED "ATTACHMENT A"

which is constitutes evidence of the commission of a criminal offense or which is contraband, the
fruits of crime, or things otherwise criminally possessed, or which is designed or intended for use
which is or has been used as the means of committing an offense in violation of Title 21 United
States Code, Section 841(a)(1).

AFFIDAVIT

The facts to support the issuance of a Search Warrant are as follows:

I, Nicholas J. Manns, after being duly sworn, state as follows:

1. I am a Special Agent (SA) with the Federal Bureau of Investigation (FBI) and have been so employed for nearly twelve years, having five years prior Federal law enforcement experience as a Deputy United States Marshal and as such am vested with the authority to investigate violations of Federal laws, including Titles 18 and 21, United States Code. I am currently assigned to the Springfield Division of the FBI, Fairview Heights Resident Agency (FHRA) and has primary investigative responsibilities for crimes occurring in the Southern District of Illinois.

2. The statement contained in this affidavit are based on the investigation of your affiant and Drug Enforcement Administration (DEA) SA Michael Rehg, as well as information derived from the reports and interviews of the law enforcement officers and witnesses named herein.

3. This Affidavit is made in support of a warrant to search for and seize evidence of violations of Title 21, United States Code, to include violations of Sections 841(a)(1), specifically those items set forth in Attachment A of this affidavit, from the residence of Scott Johnson, located at 5706 Westmoreland, Washington Park, Illinois, described as a one story residence with gray siding, detached garage with the number 5706 attached on the front of the residence, in the Southern District of Illinois.

Further, your affiant states as follows:

INVESTIGATION

4. SA Rehg and DEA Agents from the Fairview Heights Resident Office (FHRO) first became aware of Scott Lee JOHNSON in 1994 when he was arrested for the Distribution of Cocaine. JOHNSON later pleaded guilty to Distribution of Cocaine Base in the Southern District of Illinois and was sentenced to 136 months in prison. JOHNSON was released from prison and began his term of supervised release on November 20, 2003. JOHNSON is currently being supervised by the U.S. Probation Office, Southern District of Illinois. His supervised release term ends on November 19, 2011.

5. In 2006, the FBI and Bureau of Alcohol, Tobacco, and Firearms (BATF) conducted an investigation into the cocaine trafficking activities of Byron Blake. From April until June 2006, a Title III intercept authorized by the United States District Court, Southern District of Illinois, was conducted. During the Title III, various telephone conversations between Blake and JOHNSON were intercepted. The conversations indicated that JOHNSON was one of Blake's cocaine sources of supply. The investigation resulted in the arrests of Blake, Ryan Ivory, Carlton Gilmore, and Kevyn Taylor for various violations of Title 21, United States Code, to include Distribution of Cocaine. Blake and Ivory pleaded guilty. Blake received a sentence of 35 years. Ivory received a sentence of 14 years. Gilmore's and Taylor's cases are still pending.

6. Since that time, agents from the FHRO have learned that JOHNSON continues to lead a high-level cocaine trafficking organization that is distributing large amounts of cocaine in the East St. Louis, Illinois area. It was also learned that JOHNSON'S nephew, Marlon LEE is JOHNSON'S, "right hand man," in the cocaine business. A computerized query of the National Crime Information Center (NCIC) indicated that LEE had a prior federal conviction out of Pittsburgh, Pennsylvania for

Possession with Intent to Distribute in excess of 5 kilograms of Cocaine in violation of Title 21 United States Code, section 841(A)(1). LEE was sentenced to 70 months confinement in 2000. LEE was released from prison and began his term of supervised release on January 5, 2004. JOHNSON is currently being supervised by the U.S. Probation Office, Southern District of Illinois. His supervised release term ends on January 4, 2009.

7. JOHNSON is the known owner and manager of "Best Fish House" restaurant located at 517 Martin Luther King Drive, East St. Louis, Illinois. A check of the address revealed that utilities were in the name of the Best Fish House, with Regina JOHNSON typically maintaining the account. Information gathered from multiple confidential sources indicates that the restaurant is used as a "front" for JOHNSON'S cocaine business. Information provided by confidential sources indicates that deliveries of cocaine are being made to the restaurant. Both JOHNSON and LEE are also utilizing the business as a distribution point and a "safe" house where they keep drug money.

8. Information obtained from confidential sources indicated that JOHNSON is currently residing at 8201 State Street, East St. Louis, Illinois. A check of the address revealed that utilities were in the name of Scott JOHNSON. JOHNSON recently remodeled the residence which is believed to have increased the value to at least \$200,000. Several video cameras, believed to contain infrared capabilities for better night time viewing, have been observed on the exterior of the residence. Confidential source information also revealed that JOHNSON owned the residence located at 5706 Westmoreland, Washington Park, Illinois. A check the address revealed that utilities were in the name of Scott JOHNSON. CS information, partially corroborated by DEA surveillance, indicates that JOHNSON is utilizing this residence as a distribution point from which he sells cocaine to customers.

9. In March of 2008, SA Rehg, along with DEA TFO Wade Gummersheimer spoke with a confidential source (CS#1) for the purpose of obtaining information regarding the narcotic related activities of Scott JOHNSON. It should be noted that the information provided by CS#1 has been corroborated by other confidential sources.

10. CS#1 stated that in the summer of 2006, he/she made two (2) cocaine purchases through JOHNSON'S girlfriend, Lisa LAMB. CS#1 told agents he/she asked LAMB if her boyfriend, JOHNSON, would be willing to sell CS#1 kilogram quantities of cocaine. LAMB later told CS#1 that JOHNSON was not comfortable dealing directly with CS#1, but agreed to allow Georgia GIBSON to conduct the cocaine transactions on his behalf. It should be noted that GIBSON is JOHNSON'S employee at the restaurant.

11. According to CS#1, on the first occasion, he/she contacted LAMB and told her that he/she wanted to purchase 3 kilograms of cocaine. LAMB instructed CS#1 to meet with GIBSON at her residence to conduct the cocaine transaction. CS#1 informed agents she took approximately \$90,000 to GIBSON'S residence located at 1254 North 48th Street, Washington Park, Illinois. A check of the address revealed that utilities are in the name of GIBSON. CS#1 handed the money to GIBSON, who then departed the residence, returning in about 10-15 minutes with the cocaine. GIBSON gave the cocaine to CS#1 who departed the residence. It should be noted that GIBSON'S residence is approximately 10 blocks from JOHNSON'S "stash" house located at 5706 Westmoreland.

12. CS#1 indicated that approximately one month later he/she again telephoned LAMB to purchase one kilogram of cocaine. LAMB again instructed him/her to meet with GIBSON at GIBSON'S residence in Washington Park. CS#1 stated that on this occasion, when he/she arrived

at the residence GIBSON was already in possession of the kilogram of cocaine. CS#1 told agents he/she conducted the transaction and departed the residence.

13. It should be noted that the cocaine transactions described by CS#1 were corroborated by an independent confidential source (CS#2). According to CS#2, he/she provided the money which was utilized by CS#1 to purchase cocaine from the JOHNSON organization. CS#2 went on to say that he/she also obtained cocaine from Willie Springer and Alfred Triplett who obtained their cocaine from JOHNSON. CS#2 stated that he/she would give the money to Springer and Triplett and that Triplett would take the money to the restaurant to complete the transaction. CS#2 stated that Triplett was a cab driver and would drive his cab while conducting cocaine transactions. CS#2 stated that he/she purchased kilogram quantities of cocaine from members of JOHNSON'S organization from the summer of 2006 until he/she was incarcerated in the fall of 2007.

14. On April 1, 2008, SA Rehg, TFO Gummersheimer and Supervisory Deputy United States Marshal (SDUSM) Thomas Woods met with a confidential source (CS#3) concerning the narcotic related activities of JOHNSON. CS #3 provided information which was subsequently corroborated by SA Rehg through independent DEA sources. According to CS#3, he/she had been an employee of JOHNSON at the restaurant. CS#3 told agents that JOHNSON and LEE were partners in the restaurant business as well as the drug business. As an employee of JOHNSON, CS#3 stated that he/she worked at the restaurant for the past 2 to 3 years and has been in a position to observe JOHNSON and his activities. CS#3 stated that the "Best Fish House" restaurant is a "front" for JOHNSON and Lee's drug business. CS#3 went on to say that the majority of the people going to and from the restaurant are not "fish" customers. Most of the people coming and going from the restaurant meet with either JOHNSON or LEE. CS#3 said

that JOHNSON and LEE have an office in the basement of the restaurant that it is equipped with a large safe. CS#3 also stated that there is another safe on the main floor behind the register.

CS#3 also indicated that the restaurant is outfitted with high tech video security equipment.

15. CS#3 stated that he/she has seen LEE conduct numerous drug transactions on the street in front of the restaurant and inside the restaurant. CS#3 pointed out that one occasion, approximately one month prior, he she watched LEE complete what he/she believed to be a drug transaction. Following the transaction, LEE took a large sum of cash and placed it in the safe on the main floor.

16. CS#3 also told agents that JOHNSON and LEE were obtaining their drugs from a Hispanic male truck driver that comes to the restaurant approximately twice a month. CS#3 said he/she has been present at the restaurant on numerous occasions when the truck driver arrived. CS#3 stated that if JOHNSON was not at the restaurant at the time of the driver's arrival, he would telephone CS#3 and ask if his "truck driver" was there. CS#3 stated that he was instructed by JOHNSON to take the driver upstairs and get him some food until JOHNSON got to the restaurant.

17. CS#3 pointed out that the driver typically arrived at the restaurant in a tractor trailer just prior to closing time. CS#3 stated that the restaurant would close and the employees would depart the restaurant leaving only the driver, JOHNSON, and sometimes LEE at the restaurant. CS#3 stated that the driver usually parked the tractor trailer across the street from the restaurant upon his arrival. CS#3 indicated that on some occasions, either JOHNSON or LEE would take the driver downstairs to the office. CS#3 stated that on a few instances he/she observed LEE walk up from downstairs and exit the restaurant with the driver carrying a large

bag. CS#3 remembered one time, as LEE and the driver departed the restaurant with a bag, that he/she smelled a very strong odor of cocaine. CS#3 explained to SA Rehg that he/she is familiar with the odor of both cocaine and marijuana and was certain that it was the odor of cocaine.

18. CS#3 stated that he/she has also observed JOHNSON with large sums of money. CS#3 told agents that JOHNSON was walking out of the restaurant one day carrying a large bag. JOHNSON and CS#3 talked about the bag and JOHNSON asked CS#3, "Want to see what is inside?" CS#3 said that JOHNSON opened the bag and it contained stacks of money. JOHNSON told CS#3 that the bag contained approximately \$60,000 and also stated that he was taking it "home." CS#3 knew that JOHNSON was referring to his residence located at 8201 State Street, East St. Louis, Illinois.

19. On the evening of April 3, 2008, CS#3 contacted SA Rehg and advised that earlier in the evening, he/she observed the aforementioned Hispanic truck driver at the Best Fish House. The driver's truck was parked nearby.

20. On April 2, 2008, SA Rehg and SDUSM Woods interviewed another confidential source (CS#4) concerning the narcotic related activities of JOHNSON and LEE. CS#4 provided reliable and corroborated information to SDUSM Woods on numerous prior occasions. Information from CS#4 has lead to numerous prior arrests by federal authorities. According to CS#4, during the past 2-years he/she had purchased multi-ounce quantities of cocaine from LEE numerous times. CS#4 stated that he/she would meet LEE at "Best Fish House" to complete the cocaine transactions.

21. CS#4 went on to say that he/she has also purchased cocaine directly from JOHNSON. CS#4 stated that in the past week, he/she has purchased multi-ounce quantities of

cocaine from JOHNSON on four (4) occasions. CS#4 told agents that all four purchases of cocaine were made from JOHNSON at the residence located at 5706 Westmoreland. CS#4 indicated that he/she would pull in the driveway of the residence and JOHNSON would hand him/her the cocaine through the door of the residence. CS#4 explained that JOHNSON preferred to conduct these transactions in the evening hours opposed to the middle of the day. CS#4 explained to SA Rehg that JOHNSON had told him/her on April 1, 2008, that he was waiting for a large shipment of cocaine to arrive in the near future and that he would call CS#4 as soon as it arrived.

22. On the evening of April 3, 2008, CS#4 contacted SA Rehg and advised that he/she had been contacted by JOHNSON. JOHNSON told CS#4 that the shipment had arrived.

23. On April 4, 2008, SA Rehg, along with DEA and FBI personnel began a surveillance of 5706 Westmoreland, Washington Park, Illinois. In addition, SA Rehg coordinated a controlled purchase of cocaine utilizing CS#4. At some point, JOHNSON was observed by law enforcement arriving at 5706 Westmoreland. JOHNSON then contacted CS#4 and indicated that the cocaine was ready. Thereafter CS#4 was searched by law enforcement, with no money or contraband found. CS#4 was then provided with a quantity of U.S. Currency, or "buy money," with which he/she was to purchase cocaine from JOHNSON. CS#4 then traveled to 5706 Westmoreland and went inside. CS#4 was then observed leaving the residence, after which he/she met with law enforcement and provided them with several ounces of a white powder substance. A subsequent field test revealed a positive indication for the presence of cocaine. CS#4 then advised SA Rehg that he/she went to 5706 Westmoreland and met with JOHNSON who provided him/her with several ounces of cocaine in return for the U.S. Currency

provided by law enforcement.

24. Also on April 4, 2008, members of the surveillance of 5706 Westmoreland observed a car arrive at the residence. The car remained at the residence for a short time and was observed leaving. Thereafter the vehicle was followed and eventually stopped by law enforcement. A subsequent search of one of the occupants of the vehicle revealed one of the occupants to be in possession of four and a half ounces of cocaine.

25. During a separate investigation of JOHNSON, the FBI, Fairview Heights Resident Agency reviewed bank records from the Best Fish House. A review of the bank records indicated that from March 2006 to March 2008, JOHNSON deposited a total of \$513,691 into an account in the name of the Best Fish House. The individuals listed as signors were JOHNSON, Glenda Lee, Regina Johnson, and Marlon LEE.

ILLEGAL DRUGS AND RELATED RECORDS AND PARAPHERNALIA

26. As a result of your affiant's training and experience, your affiant is familiar with how various drugs are used, produced, and/or manufactured and the typical distribution and trafficking methods used by drug users, dealers, distributors, and manufacturers (collectively referred to as drug traffickers). In addition, your affiant is also familiar with the numerous documents and records generated during the distribution, manufacturing, and trafficking of these controlled substances. ~~Your affiant's awareness of these drug trafficking practices, as well as his~~ knowledge of drug use and distribution techniques as set forth in this Affidavit, arise from your affiant's training and involvement in numerous prior drug investigations, as well as information provided to your affiant by other law enforcement officers when relating the results of their own drug investigations.

Based on this training and experience, your affiant knows that:

27. As in this case, illegal drug trafficking is a continuing activity over months and even years. Illegal drug traffickers will repeatedly obtain and distribute controlled substances on a somewhat regular basis, much as any distributor of a legitimate commodity would purchase stock for sale, and similarly such drug traffickers will have an "inventory" which will fluctuate in size depending upon the demand for the product. In the same respect, much as any distributor of a commodity, drug traffickers will also have a cash "inventory," or amount of United States Currency, which will also fluctuate in size depending upon the sale of the product.

28. In addition to controlled substances, it is generally a common practice for drug traffickers to maintain records relating to their drug trafficking activities, even though such documents may be in code. These records are generally kept for a period of time extending beyond the time during which the drug trafficker actually possesses the controlled substances, in order to maintain contact with clients, associates, suppliers, etc., and to ensure future success in the business. In some instances, these drug related notations and records are maintained electronically, for example, on personal computers, computer disks, tapes, electronic organizers/address books, telephone answering /recording machines, telephone beeper/pager equipment, and telephone caller ID boxes. It has been your affiant's experience that many such records will be kept close at hand, often at the drug trafficker's residence or stash house, so that the records are readily accessible in order to facilitate the drug trafficking business.

29. Because drug traffickers in many instances will "front" (that is, sell on consignment) these controlled substances, some form of record-keeping is necessary to keep track of amounts paid and owed. Such records will also be maintained close at hand so as to

readily ascertain current balances. Often drug traffickers keep "pay and owe" records, or ledgers, to show balances due for drugs sold in the past ("pay") and for payments expected ("owe") as to the trafficker's supplier(s). These records are commonly kept for extended periods of time, much the same as a legitimate business might keep records of purchases and suppliers and accounts payable or receivable.

30. Drug traffickers very often place assets in names other than their own, and maintain residences in names other than their own to avoid detection of themselves and/or their assets by law enforcement agencies. Even though those residences and/or assets are in other person's names, the drug dealers continue to use them and exercise dominion and control over them. Drug traffickers will frequently keep and maintain documents indicating ownership or providing descriptions of these assets.

31. During the course of drug related searches, your affiant and other agents have found items of personal property that tend to identify the person(s) in residence, occupancy, control, or ownership of the subject premises. Such identification evidence is typical of the articles people commonly maintain in their residences, such as canceled mail, deeds, leases, rental agreements, photographs, videotapes, personal telephone books, diaries, utility and telephone bills, statements, identification documents, and keys.

32. As in this case, it is also a common practice for drug traffickers to conceal at their residences, offices, garages, storage buildings, automobiles, safety deposit boxes, and/or on their persons, large sums of money (generally United States Currency), either the proceeds from drug sales or monies to be used to purchase controlled substances. Drug traffickers frequently keep on hand quantities of currency in order to maintain and finance their ongoing narcotics business. In

this connection, drug traffickers typically make use of wire transfers, cashiers' checks, and money orders to further their drug enterprises. Evidence of such financial transactions, as well as records relating to income and expenditures of money and wealth in connection with drug trafficking would also typically be kept. It has been your affiant's experience that drug traffickers often keep the large sums of currency close at hand, often at the location in which they reside, to oversee and protect the currency from detection and/or theft.

33. To your affiant's knowledge, cocaine is not manufactured or cultivated within the Southern District of Illinois. As a result, individuals involved in the use, distribution, and trafficking of cocaine and crack cocaine must frequently travel outside of the Southern District of Illinois to obtain the drugs. Consequently, traffickers of cocaine must themselves travel (or pay and arrange for others to travel on their behalf) to or from "source countries," "source states," and "source cities," where large reserves of cocaine are frequently smuggled and stored. Such travel necessarily results in the generation of various travel documents for the traveler, such as airline or bus tickets, boarding passes, travel itineraries, hotel receipts, credit card receipts, maps, telephone records, written directions, or other items detailing routes utilized during these trips.

34. Drug traffickers frequently take, or cause to be taken, photographs and/or videotapes of themselves, their associates, their property, and their product which they will keep under their control over long periods of time.

35. In addition to the aforementioned records, it is also a common practice for drug traffickers to maintain items of value, drug paraphernalia, and items necessary to produce a distributable product. Like drug related records, these items are often kept on a continuous basis for a period of time extending beyond the time which the drug trafficker actually possesses the

controlled substances. This is done to increase efficiency and ensure future success of the drug trafficking business.

36. Drug traffickers often deal/possess weapons, goods, and/or items of value, to include precious metals and jewelry, and exchange drugs for such items. Often, these same items are stolen.

37. Typically, drug traffickers possess firearms and other dangerous weapons to protect their profits, supply of drugs, and persons from competitors and others who might attempt to forcibly take the traffickers' profits and/or supply of drugs.

38. Because drug traffickers occasionally use their own product and because they frequently employ users of the drug to assist them in their drug trafficking activities, paraphernalia for drug use/abuse are often kept by the drug trafficker on a continuous basis and kept close at hand for use whenever needed. This paraphernalia includes various types of pipes, syringes, razor blades, straws or "snorting tubes," rolling papers, etc.

39. Powder drugs such as cocaine are often produced in a high purity form, but rarely consumed by users or distributed by dealers in such high purity form. Rather, such powder drugs, when ultimately consumed by the user, are at a lower purity level. High purity powder drugs are reduced in purity by the addition of diluents such as mannitol, mannite, and vitamin B12. This process is called "cutting" or "stepping on" the drug. Other equipment, such as glassware, scales, sifters, grinders, razor blades, glass panes and mirrors, and the like are typically used in this cutting process. Once the drug has been "cut," a usual practice is to weigh the product and repackage it in smaller quantities in plastic bags, balloons, heat-sealed bags,

and/or other types of containers for redistribution. Scales and occasionally heat sealers are often used in this process.

40. Cocaine base, commonly referred to as crack cocaine, is generally produced by combining cocaine powder, another substance (generally baking soda), and water in some type of container (often glass or metal). The mixture is then heated using a microwave, stove, or some other heat source. The resulting reaction produces crack cocaine. In a number of searches related to crack cocaine investigations, your affiant has found large amounts of baking soda. Your affiant knows that baking soda is maintained on a continuous basis by individuals involved in the production of crack cocaine, so as to more efficiently produce the drug when the cocaine powder is acquired or made available.

41. In an attempt to protect their business, product, and profits from discovery by law enforcement and/or from individuals who would attempt to take, rob, or steal these items, drug traffickers frequently utilize detection devices, such as police scanners, two way radios, motion detectors, video and audio surveillance equipment, etc. These items are also kept and operated on a continuous basis.

42. In a number of searches in prior investigations that your affiant has been involved in, these enumerated types of evidence have typically been recovered from the main residence ~~and in addition, from other structures and areas on the property being searched,~~ for example, other storage lockers/areas, detached closets, containers, automobiles, computers, electronic storage devices, and yard areas associated with the main residence and used in connection with or within the curtilage of said residence, as well as from the persons of occupants or individuals located within.

43. In a substantial number of searches executed in connection with the drug investigations in which your affiant has been involved, or informed of, the items listed in Attachment A have been recovered.

44. Disclosure of the contents of the Application, Affidavit, and Search Warrant could compromise and jeopardize an ongoing investigation and witnesses who have provided information the to Federal Bureau of Investigation.

FURTHER AFFIANT SAYETH NAUGHT

Nicholas J. Manns

Nicholas J. Manns
Special Agent
Federal Bureau of Investigation

A. COURTNEY COX
United States Attorney

Donald S. Boyce

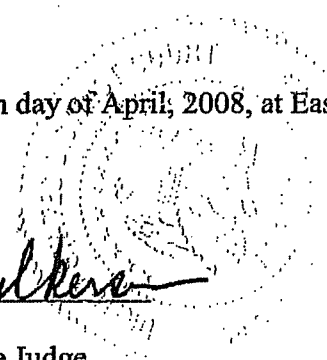
Donald S. Boyce
Assistant United States Attorney

State of Illinois)
) SS.
County of St. Clair)

Sworn to before me, and subscribed in my presence on the 4th day of April, 2008, at East St. Louis, Illinois.

Donald G. Wilkerson

Donald G. Wilkerson
United States Magistrate Judge



ATTACHMENT A

- a) Controlled substances, to wit: cocaine and/or cocaine base.
- b) Paraphernalia for packaging, processing, diluting, weighing, manufacturing, and distributing controlled substances, such as plastic bags, heat sources, scales, funnels, sifters, grinders, glass panes and mirrors, razor blades, heat-sealing devices, filters, and diluents such as mannitol, mannite, and vitamin B12, etc.;
- c) Paraphernalia for the use of controlled substances, such as pipes, syringes, razor blades, straws or "snorting tubes," rolling papers, etc.;
- d) Books, records, receipts, notes, letters, ledgers, and other papers, as well as electronically stored data, related to the use, distribution, or transportation of controlled substances;
- e) Personal books, papers, or electronically stored data (to include data stored on electronic organizers/address books, telephone answering/recording machines, telephone beeper/pager equipment, and telephone caller ID boxes) reflecting names, addresses, telephone numbers, and other contact or identification data relating to the use, distribution, or transportation of controlled substances;
- f) Items of personal property that tend to identify the person(s) in residence, occupancy, control, or ownership of the premises that is the subject of this warrant, including but not limited to canceled mail, deeds, leases, rental agreements, photographs, videotapes, personal telephone, storage building receipts, post office box receipts, books, diaries, utility and telephone bills, statements, identification documents, and keys;
- g) Cash, currency, financial instruments, precious metals, jewelry, and other items of value which were furnished or intended to be furnished in exchange for a controlled substance, or which constitute proceeds of trafficking in a controlled substance, or which were used or intended to be used to facilitate a violation of the Controlled Substances Act;
- h) Records relating to controlled substances income and expenditures of money and wealth, to-wit: money orders, wire transfers, cashiers' checks and receipts, safety deposit box receipts, bank statements, passbooks, checkbooks, and check registers;
- i) Documents indicating travel in interstate and foreign commerce such as maps, written directions, travel itineraries, plane tickets, boarding passes, motel /hotel receipts, passports and visas, credit card receipts, telephone bills, as well as photographs and videotapes taken or produced during the travel;
- ~~j) Photographs and videotapes of the drug traffickers, their associates, their property, and their product;~~
- k) Firearms and other dangerous weapons;
- l) Detection devices, such as police scanners, two way radios, motion detectors, video and audio surveillance equipment, and other devices used for the same purpose; and
- m) Safes, vaults, strong boxes, or any other such items that may contain any of the aforementioned items

You have heard testimony from Keith Blake who stated that he was involved in the commission of the offense as charged against the defendant.

You may give his testimony such weight as you feel it deserves, keeping in mind that it must be considered with caution and great care.

GIVEN REFUSED
NO OBJECTION
OBJECTION BY:
Plaintiff Defendant AS J+L

GOVERNMENT'S SUGGESTED JURY INSTRUCTION NO. 22

3.13 7TH CIRCUIT PATTERN JURY INSTRUCTION

You have heard testimony from Forrest Flowers who stated that he was involved in the commission of the offense as charged against the defendant.

You may give his testimony such weight as you feel it deserves, keeping in mind that it must be considered with caution and great care.

GIVEN REFUSED
NO OBJECTION
OBJECTION BY:
Plaintiff Defendant J+L

GOVERNMENT'S SUGGESTED JURY INSTRUCTION NO. 23

3.13 7TH CIRCUIT PATTERN JURY INSTRUCTION

You are to decide whether the testimony of each of the witnesses is truthful and accurate, in part, in whole, or not at all, as well as what weight, if any, you give to the testimony of each witness. In evaluating the testimony of any witness, you may consider, among other things:

- the witness's age;
- the witness's intelligence;
- the ability and opportunity the witness had to see, hear, or know the things that the witness testified about;

- the witness's memory;
- any interest, bias, or prejudice the witness may have;
- the manner of the witness while testifying; and
- the reasonableness of the witness's testimony in light of all the evidence in the case.

~~GIVEN~~ REFUSED
NO OBJECTION
OBJECTION BY:
Plaintiff Defendant

GOVERNMENT'S SUGGESTED JURY INSTRUCTION NO. 3

1.03 7TH CIRCUIT PATTERN JURY INSTRUCTION

The evidence consists of the testimony of the witnesses, the exhibits admitted in evidence, and stipulations.

A stipulation is an agreement between both sides that certain facts are true.

GIVEN REFUSED
NO OBJECTION
OBJECTION BY:
Plaintiff Defendant

GOVERNMENT'S SUGGESTED JURY INSTRUCTION NO. 2C

1.02 7TH CIRCUIT PATTERN JURY INSTRUCTION

Certain things are not evidence. I will list them for you:

First, anything that you may have seen or heard outside the courtroom is not evidence and must be entirely disregarded. This includes any press, radio, or television reports you may have seen or heard. Such reports are not evidence and your verdict must not be influenced in any way by such publicity.

Second, questions and objections by the lawyers are not evidence. Attorneys have a duty to object when they believe a question is improper. You should not be influenced by any objection or by my ruling on it.

Third, the lawyers' statements to you are not evidence. The purpose of these statements is to discuss the issues and the evidence. If the evidence as you remember it differs from what the lawyers said, your memory is what counts.

~~GIVEN~~ REFUSED
NO OBJECTION
OBJECTION BY:
Plaintiff Defendant

GOVERNMENT'S SUGGESTED JURY INSTRUCTION NO. 6

1.06 7TH CIRCUIT PATTERN JURY INSTRUCTION

Even though the defendants are being tried together, you must give each of them separate consideration. In doing this, you must analyze what the evidence shows about each defendant, leaving out of consideration any evidence that was admitted solely against some other defendant or defendants. Each defendant is entitled to have his/her case decided on the evidence and the law that applies to that defendant.

GIVEN REFUSED
 NO OBJECTION
OBJECTION BY:
Plaintiff Defendant

GOVERNMENT'S SUGGESTED JURY INSTRUCTION NO. 30

4.05 7TH CIRCUIT PATTERN JURY INSTRUCTION