UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	Case No: 3:13-CR-030-L
	§	Hon. Sam A. Lindsay
BARRETT LANCASTER BROWN	§	

MOTION TO DISMISS THE INDICTMENT

Defendant BARRETT LANCASTER BROWN files this motion to dismiss the indictment, or in the alternative elect between multiplicitous counts. In support thereof, he would show the Court the following:

INTRODUCTION

The Indictment is fatally flawed for several reasons. As POINT I illustrates, the alleged act—placement of an object *within* the scope of a search warrant—cannot constitute "concealment" within the meaning of the charging statutes. Nor can it be used to demonstrate that Mr. Brown acted with culpable state of mind to interfere with justice. Moreover, as illustrated in POINT II, Count 1 must be understood to require a corrupt mens rea. Otherwise, this provision is unconstitutionally vague and overbroad and the charge must be dismissed. In addition, as illustrated in POINT III, §1512's applicability is limited to witness tampering; it is not meant to be a catch-all obstruction of justice crime and does not encompass the charged conduct. Finally, in the alternative to dismissal, the Court should compel the government to elect between multiplicitous counts, as discussed in POINT IV.

FACTS

Mr. Brown is charged in a two count indictment with placing "two laptop computers within KM's residence in the Northern District of Texas, prior to execution of a search warrant on KM's premises." Indictment at 1. Count 1 charges a violation of 18 U.S.C. §1519. Count 2 charges a violation of 18 U.S.C. §1512(c)(1).

KM subsequently pled guilty to a misdemeanor violation of 18 U.S.C. 1501. According to the Factual Resume in that case, two FBI agents visited KM's residence at 6:30 AM on March 6, 2012. *See* Factual Resume (hereinafter "FR"), 13-CR-00110-N Dkt. 4 at 2. They notified Mr. Brown that they had just executed a search warrant at his residence. *Id.* They asked Mr. Brown if he would voluntarily produce the laptops. *Id.* According to the Factual Resume, KM and Mr. Brown then agreed to "hide and conceal" the laptop computers. *Id.* Between the hours of 6:30AM and 1:55PM, "KM placed two laptops belonging to Barrett Brown in the back of a lower corner cabinet in the kitchen in an attempt [to] prevent them from being located and seized by the FBI." According to the Factual Resume, the FBI agents arrived at approximately 1:55PM. They found the laptops shortly thereafter.

Nearly a year later, Mr. Brown was charged with two counts of obstruction of justice. Count One charges a violation of §1519 for "concealing two laptop computers [..] prior to the execution of a search warrant." Section 1519 provides up to 20 years imprisonment for:

> Whoever knowingly . . . conceals . . . any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States

18 U.S.C. §1519.

Similarly, Count Two charges a violation of §1512(c)(1) for "corruptly conceal[ing] [..] two laptop computers, with the intent to impair the integrity and availability for use in an official

proceeding specifically related to the search warrants" Section 1512(c)(1) provides up to 20 years imprisonment for:

> Whoever corruptly . . . 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

18 U.S.C. §1512(c)(1).

ARGUMENT

POINT I

COUNTS 1 AND 2 SHOULD BE DISMISSED FOR FAILURE TO ALLEGE FACTS SUFFICIENT TO SUPPORT AN OFFENSE

This case presents an issue of first impression for the Court—whether placement of an object within the scope of a search warrant can, as a matter of law, constitute concealment in violation of §1519 or §1512. Mr. Brown respectfully submits that the act of placing an item *within the scope of a search warrant* cannot constitute obstruction of justice, particularly when the item is found. This is because the act (1) does not have the probable consequence of obstructing justice, (2) cannot be used to demonstrate that the defendant acted with a culpable state of mind, (3) is not in violation of *any* duty to preserve or produce records, and (4) renders other terms superfluous in the statutory scheme.

A. The Act of Placing an Item *Within The Scope Of a Search Warrant* Cannot Have the Probable Consequence of Obstructing Justice by Concealment, Especially when the Item is Found.

As a threshold matter, the charging statutes do not require criminal liability for any act done with intent to obstruct justice. *United States v. Aguilar*, 515 U.S. 593, 602 (1995) (rejecting view that "any act, done with intent to 'obstruct . . . the due administration of justice' is sufficient to impose criminal liability," even while grand jury sitting). In *Aguilar*, the Court found that

making a false statement to an investigating agent was not encompassed by the catch-all obstruction statute, §1503, because it was not likely to obstruct justice.

Instead, violating conduct must have the *probable consequence* of obstructing justice. *Id. See United States v. Mix*, 2013 WL 5588317 (E.D. La. Oct. 10, 2013)("before a defendant may be convicted of obstruction under § 1512(c)(1), he must believe that his acts will be likely to affect a pending or foreseeable proceeding")(quoting *United States v. Matthews*, 505 F.3d 698 (7th Cir.2007)).

In *United States v. Aguilar*, the Supreme Court confronted this issue with an obstruction statute that encompassed a broader *actus reus*. Specifically, §1503 criminalized the "endeavor" to corruptly influence the due administration of justice. The Court read the statute to give endeavor an expansive meaning, giving §1503 a catch-all purpose for imposing criminal liability in cases where a person attempts but fails to obstruct justice.

> Our reading of the statute gives the term "endeavor" a useful function to fulfill: It makes conduct punishable where the defendant acts with an intent to obstruct justice, and in a manner that is likely to obstruct justice, but is foiled in some way.

Id. at 610; *see also United States v. Richardson*, 676 F.3d 491, 502-03 (5th Cir. 2012);

As the Court stated in *United States v. Russell*, "The word of the section is 'endeavor,' and by using it the section got rid of the technicalities which might be urged as besetting the word 'attempt,' and it describes *any effort or essay* to accomplish the evil purpose that the section was enacted to prevent." *United States v. Russell,* 255 U.S. 138, 143 (1921) (emphasis added). Still, despite this expansive language, the Supreme Court found that §1503 did not require criminal liability for acts that were not "likely to obstruct justice" even if done with the intent to obstruct.

Here, a blanket allegation of intent to obstruct is not sufficient to carry the Indictment. The government must allege an act that, at minimum, has the *probable consequence* of obstructing justice. Notably the two laptops allegedly "concealed" by the defendant were found, *within the scope of the search*, during the standard execution of the search warrant. This fact alone means that Mr. Brown's alleged act had no possibility of interfering with justice. Indeed, the agents were able to find the items sought with no alleged hurdle.

Nor should the location where an item was placed matter to the Court's determination as to whether an act had the "probable consequence" of obstructing justice. Here, for instance, KM placed the laptop in the back of the kitchen cabinet. Would it have made any difference if she had placed the items in the living room closet?—a drawer in the bedroom?—a cabinet in the bathroom? None of these locations are "traditional" places to keep a laptop. But that should not matter, because any test that relies on such information is flawed, and risks arbitrary. enforcement).

As such, any item found within the scope of the search cannot be deemed "concealed" per the statute. Any contrary rule or holding would require, for instance, the court to decide whether the placement of an item inside *a home* is "concealment," where the item was obtainable as a matter of law (because it was found), where nothing was destroyed, and where the agents executing the search did not appear to have to perform any extra tasks than those required to execute the warrant. By contrast, *removing an item* from the scope of the search is obstruction. *See e.g.* §1506.

B. The Indictment Fails to Allege Facts that Demonstrate the Defendant Acted with Culpable State of Mind to Interfere with Justice.

For related reasons, the case law clearly requires that the act alleged demonstrate that the defendant acted with a culpable state of mind to interfere with justice. *See United States v.*

McKibbons, 656 F.3d 707 (7th Cir. 2011) ("The intent element is important here (under §1512(c)) because the word 'corruptly' is what serves to separate criminal and innocent acts of obstruction."). "Without a showing of a willful, corrupt mens rea, the government cannot meet its burden." *Id.*

As discussed above and as the Supreme Court observed in *Arthur Andersen*, it is not necessarily a crime to withhold documents from a government proceeding, even with the intent to impede government fact-facting. *United States v. Matthews*, 505 F.3d 698 (7th Cir. 2007) (citing *Arthur v. Andersen LLP v. United States*, 544 U.S. 696 (2005)). If the intent to impede a proceeding were corrupt *per se*, an attorney who advises his client to assert the right to remain silent, or who persuades his client to withhold documents under a valid claim of privilege would be guilty of obstruction. *Id.* Under certain circumstances, a defendant is privileged to obstruct the prosecution of a crime: such privilege flows from the defendant's enjoyment of a legal right—such as the right to avoid self-incrimination or the right to protect journalistic sources. *Id*. As concerns obstruction of justice charges, facts demonstrating a *corrupt* mens rea are essential to the charge and must be included in the indictment, therefore, because they make the difference between innocent and criminal obstruction.

Accordingly, in order to charge the defendant with a criminal act of obstruction, the government must set forth facts supporting the charge.[1] As demonstrated above, placing materials *within the scope of the search* cannot constitute obstruction because the act is not likely

[1] A grand jury indictment is not an instrument that deals simply in abstract legal theory. Rather, it is an instrument of practical function—to ensure that there are sufficient *facts* constituting a crime alleged against a defendant to warrant a trial. Undoubtedly the language of a statute may be used in the general description of an offence, but it must be accompanied with a statement of the facts and circumstances. *See, e.g., United States v. Curtis*, 506 F.2d 985, 990 (10th Cir. 1974) (an indictment must contain specific factual allegations of the nature or character or any scheme or artifice to defraud, and it is not sufficient in this regard to merely plead the statutory language).

to succeed and because Mr. Brown had no duty to disclose the location of the sought after items. Notably, the two laptops allegedly "concealed" by the Mr. Brown were found, within the scope of the search, during execution of the search warrant, without any apparent obstruction to justice. The indictment provides no facts upon which to conclude that the items were concealed within the meaning of the statute, or that any such concealment was other than innocent.

C. The Indictment alleged no duty that Mr. Brown violated.

An obstruction of justice has traditionally required that a defendant have acted with culpable intent relative to a known duty to preserve records. *See, e.g., McRae*, 702 F.3d at 838 ("knowing wrongdoing or evil intent . . . is a fixture of obstruction of justice") (citing *Arthur Andersen, LLP v. United States*, 544 U.S. 696, 705-6 (2005)). Indeed, the Supreme Court has been wary of statutes criminalizing acts that are actually obstructive, though not corruptly done. *See Arthur Andersen*, 544 U.S. at 703-4; *United States v. Aguilar*, 515 U.S. 593, 602 (1995) (rejecting view that "any act, done with intent to 'obstruct . . . the due administration of justice' is sufficient to impose criminal liability," even while grand jury sitting).

Here, under the facts alleged in the Indictment, Mr. Brown violated no duty. To the contrary, under the allegations of the indictment, Mr. Brown and KM behaved exactly as they were supposed to. They allowed the agents onto the premises when a warrant was shown, and did not physically or threateningly impede the investigation in any way. Nor did Mr. Brown fabricate facts in an effort to prevent the administration of justice.

Dwellers of a home do not have *any* duty or obligation to place their items in "traditional" or "easy to access" places subsequent to the execution of a search warrant. Nor did

Mr. Brown have *any* duty to produce documents.[2] Nor do individuals have a duty to refrain from placing items inside their homes because it might make locating the item difficult for law enforcement in the event a warrant is executed. By charging Mr. Brown with concealment for the placement of items *within the scope* of the search warrant, the government unconstitutionally imposes a duty on persons not under subpoena to produce objects sought by the government.

D. The Indictment renders other terms superfluous in the statutory scheme.

In this case, Counts 1 and 2 appear to charge substantive crimes. However, because the laptops were found by the authorities, the allegations of obstruction (by concealment) were at best, attempts, or "endeavors" to obstruct. *See supra.* I.A.

Here, obstruction of justice was avoided: the officers searching KM's home found the laptops they were purportedly seeking. Thus, in order for the Indictment to survive, this Court would have to construe the terms conceal, impede and obstruct as equivocal to "endeavors" of the same under 1503. Doing so would render the term "endeavor" superfluous, which should be avoided as a matter of statutory construction. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (refusing to adopt statutory construction that would render statutory language "insignificant.") In addition, such a construction would render the charging statutes unconstitutionally vague on their face and as applied to Mr. Brown.

POINT II

COUNT 1 MUST BE UNDERSTOOD TO REQUIRE A CORRUPT MENS REA; OTHERWISE, THIS PROVISION IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD, AND THE CHARGE MUST BE DIMISSED.

Although §1519 does not, on its face, include the word "corruptly," as §1512(c)(1) does, courts have indicated that §1519 nonetheless requires a showing of an "obstructive" or "corrupt"

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[2] By contrast, had Mr. Brown been served with a subpoena (as is Dept. of Justice policy for procuring documents from journalists) he would have had a duty to produce.

mens rea. *See, e.g., United States v. McRae*, 702 F.3d 806 (5th Cir. 2012) ("At least one other circuit to consider the meaning of this language has suggested that there is 'no dispute' that criminal liability under 1519 requires some corrupt intent.") (*citing United States v. Kernell*, 667 F.3d 746, 754 (6th Cir. 2012)); *see also United States v. Moyer*, 726 F.Supp.2d 498, 506 (M.D.Pa. 2010) ("[The language of the statute] imposes upon the §1519 defendant the same sinister mentality which "corruptly" requires of a §1512(b)(2) defendant"); *United States v. Stevens*, 771 F.Supp.2d 556, 561 (D.Md. 2011) (quoting Moyer).

Moreover, obstruction of justice has traditionally required that a defendant have acted with culpable intent relative to a known duty to preserve records. *See, e.g., McRae*, 702 F.3d at 838 ("knowing wrongdoing or evil intent . . . is a fixture of obstruction of justice") (citing *Arthur Andersen, LLP v. United States*, 544 U.S. 696, 705-6 (2005)). Indeed, the Supreme Court has been wary of statutes criminalizing acts that are actually obstructive, though not corruptly done. *See Arthur Andersen*, 544 U.S. at 703-4; *United States v. Aguilar*, 515 U.S. 593, 602 (1995) (rejecting view that "any act, done with intent to 'obstruct . . . the due administration of justice' is sufficient to impose criminal liability," even while grand jury sitting).

This is because sometimes obstruction of justice is (and ought to be) permitted: some actions, such as routine document destruction, are not necessarily improper: this is also true, in some instances, even though the act is intended to "impede" or "influence" a matter within federal jurisdiction, such as is the case with regard to the assertion of a privilege not to produce documents or testify. If §1519 were read not to require a corrupt *men rea*, it might criminalize a number of innocent acts (*e.g.*, a witness who assumes a new identity as part of a protection program and thereby makes "false entries" on paperwork).

Even destroying contraband may sometimes be appropriate. *See, e.g.*, 18 U.S.C. §2252A(d)(2)(A) (providing an affirmative defense to a child pornography offense for person who took reasonable steps to destroy illegal images). On the other hand, when a defendant acted with "consciousness of wrongdoing" (*i.e.*, corruptly) in concealing material, his conduct is not innocent. *See, e.g.*, *United States v. Mann*, 701 F.3d 274 (8th Cir. 2012).

With regard to 18 U.S.C. 1512, courts have held that the scienter requirement ("corruptly") ameliorates this ambiguity. *See, e.g., United States v. Thompson*, 76 F.3d 442 (2d Cir. 1996) ("The inclusion of the qualifying term 'corrupt[]' means that the government must prove that defendant's attempts to persuade were motivated by an improper purpose [. . .] A prohibition against corrupt acts is clearly limited to Constitutionally unprotected and purportedly illicit activity. By targeting only [conduct] that is 'corrupt[],' §1512(b) does not proscribe lawful or constitutionally protected speech and is not overbroad [nor] unduly vague.") (internal citations omitted). *See also United States v. Farrell*, 126 F.3d 484 (3rd Cir. 1997) (inclusion of the corrupt requirement means that culpability is required and saves §1512(b) from criminalizing protected communication) (holding that non-coercive attempt to persuade co-conspirator to exercise his 5th Amendment right not to disclose self-incriminating information about conspiracy was not criminal obstruction of justice); *United States v. Doss*, 630 F.3d 1191 (9th Cir. 2011) (finding that it is not "inherently malign" for a spouse to ask her husband to exercise the marital privilege, even though made with the intent to cause that person to withhold testimony, absent some other wrongful conduct, such as coercion, intimidation, bribery, suborning perjury, etc.).

Without the requirement of a corrupt mens rea, §1519 would leave it to the policemen, prosecutors, and juries' unbridled discretion to determine which actions to criminalize. Moreover, innocent or otherwise non-criminal conduct could violate §1519. Indeed, it is difficult

to imagine an item that is not somehow within the jurisdiction of a federal department or agency, given the web of civil and criminal rules and regulations governing most aspects of modern American life. Accordingly, without a corrupt requirement, §1519 is too vague to provide constitutionally sufficient notice of what it prohibits. U.S. Const. amend. V; *United States v. Reese*, 92 U.S. 214, 221 (1876) (providing legislature cannot "set a net large enough to catch all possible offenders," then let courts "step inside and say who could be rightfully detained" because "[t]his would, to some extent, substitute the judicial for the legislative department of the government").

There are two ways in which statutes may be void for vagueness: 1) a statute is impermissibly vague if it fails to provide a person of ordinary intelligence fair notice of what is prohibited, or 2) impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc basis, with the attendant dangers of arbitrary and discriminatory application. *See, e.g., Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010); *United States v. Williams*, 533 U.S. 285 (2008); *Smith v. Goguen*, 415 U.S. 566 (1974); *Grayned v. City of Rockford*, 408 U.S. 104 (1972). Without inclusion of the requirement of a corrupt *mens rea*, as has traditionally been required for obstruction of justice crimes, §1519 fails on both accounts. Moreover, as a criminal statute, the relative importance of fair notice and fair enforcement required of §1519 are given heightened consideration where, as here, the statute as issue imposes criminal, as opposed to civil, penalties. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982). Accordingly, in the event that the Court does not hold that §1519 requires a corrupt *mens rea*, this charge should be dismissed, and the statutory provision must be deemed as overbroad and/or impermissibly vague.

POINT III

COUNT 2 SHOULD BE DISMISSED BECAUSE
§1512 IS NOT MEANT TO APPLY TO A CASE OF THIS NATURE

§1512(c)(1) was aimed at preventing corporations from destroying records relevant to federal securities investigations and not intended to be an omninbus dragnet for a wide assortment of other non-fraud crimes. The statutory context and history of the provision further limit its applicability to forms of witness tampering and make plain that Congress's intention was not to create a catch-all obstruction of justice crime, which is provided elsewhere. In applying §1512(c)(1) to this case, the government strips the provision from its statutory context, and gives the statute a more expansive meaning than Congress intended. This is evidenced by the language of the statute, the Act's preamble, its related sections and legislative history.

"Although in interpretation of statutory language reference should first be made to the plain and literal meaning of the words, the overriding duty of a court is to give effect to the intent of the legislature." *United States v. Scrimgeor*, 636 F.2d 1019 (5th Cir.1981). Moreover, it is a basic principle of statutory construction that a "federal criminal statute should be construed narrowly in order to encompass only that conduct that Congress so intended to criminalize." *Id; United States v. Yeatts*, 639 F.2d 1186 (5th Cir.1981).

A. Plain Language.

The plain language of 1512(c)(1) supports a finding that section (c) must be understood to concern witness tampering. Congress was clearly concerned in this section with protecting witnesses and victims and the severity of the conduct discussed and of the sentences at stake necessarily implies such a limited intended application. Indeed, the title for §1512 explicitly delineates its subject as: "Tampering with a witness, victim, or an informant."

In addition, section (c) is nestled between sections (a) which address "whoever kills or attempts to kill . . . or uses physical force or the threat of physical force against a person," section

(b) which addresses "whoever knowingly uses intimidation, threatens, or corruptly persuades another person," and section (d) which addresses "whoever intentionally harasses another person."

Here, because the government does not allege that the defendant engaged in witness tampering; as such, the charge is misplaced.

B. Legislative history.

The legislative history prior to the adoption of §1512(c)(1) with the passage of the Sarbanes-Oxley Act of 2002 also supports this finding. When §1512 was first enacted in 1982, it was a general statute addressing witness tampering and intimidation. It criminalized any use of intimidation or physical force (or its threat) "to cause or induce any person to withhold testimony, or withhold a record, document, or other object from an official proceeding [or] alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding." Pub.L. 97-291, §4. The statue has been modified numerous times since then, but has always continued to prohibit intimidating or "corruptly persuading" a witness.

Section 1512(c)(1) was enacted as part of the Sarbanes-Oxley Act of 2002. This Act was passed in response to the 2001 and 2002 accounting scandals involving corporate luminaries such as Enron, WorldCom, Global Crossing, and Adelphia, and the Congressional record is replete with references to the need for greater accountability against corporate fraud. *See, e.g.,* Senate Report 107-146 (noting that a shortcoming in current law that has been exposed by the Enron matter, which this legislation aims to ameliorate, is that there is no specific "securities fraud" provision in the criminal code). Notably, the Act's preamble explicitly states that the bill was designated to "protect investors by improving the accuracy and reliability of corporate

disclosures made pursuant to securities laws." Moreover, §1512(c)(1) falls within a section of the Sarbanes-Oxley Act that is short-titled "Corporate Fraud Accountability." 116 Stat. 745; compare §1519 (included in the section short-titled "Corporate *and Criminal* Fraud Accounability"). Accordingly, with regard to §1512(c)(1), Congress clearly intended this provision as a means to combat corporate fraud and not as a means to criminalize the type of garden-variety misconduct alleged here.

Moreover, even if §1512(c)(1) were meant to apply beyond white-collar, fraud, and witness tampering, it is clear that this provision was not meant to be the catch-all provision that the government here construes it to be. Indeed, as discussed below, §1519, which was also enacted at the same time, provides broad cover for general acts to obstruct justice. *See also* Senate Report 107-146 (referring to 18 U.S.C. 1512 as the "witness tampering" statute and lamenting the misuse of this section under the "legal fiction that defendants are being prosecuted for telling other people to shred documents, not simply destroying evidence themselves" and explaining that the new felony created by 18 U.S.C. 1519 would resolve this problem by allowing prosecution of a person "who actually destroys the records themselves in addition to one who persuades another to do so"). In addition, both §1503, discussed above, and §1501, under which KM plead to a Misdemeanor for the same conduct, encompass the alleged conduct more accurately.

Accordingly the charge brought under §1512(c)(1) should be dismissed because it is a misapplication of the Sarbanes-Oxley Act.

POINT IV.

THE GOVERNMENT MUST ELECT BETWEEN MULTIPLICITOUS COUNTS

Counts One and Two are multiplicitous because they charge the same criminal offense in law and fact. The danger of a multiplicitous indictment is that it may violate double jeopardy by resulting in multiple sentences or punishments for a single offense, or that it may prejudice the defendants by causing the jury to convict on a given count solely on the strength of evidence on the counts remaining.

Here, it does not matter whether the prolix nature of the indictment in this case results from ignorance of the rules of proper pleading, or from the fact that objectives other than clarity were the governing consideration in drafting the charges in this prosecution. In either case, the remedy must be the same: the government must elect a single, clearly stated charge as the basis for each offense or suffer dismissal.

A. The Applicable Law and Principles Governing the Multiplicity of Charges Arising from Two Separate Statutes.

An indictment suffers from multiplicity if a single offense is charged in several counts. *United States v. Jones*, 733 F.3d 574 (5th Cir. 2013); *United States v. Brechtel*, 997 F.2d 1108 (5th Cir. 1993). A multiplicitous indictment violates the Double Jeopardy Clause of the Fifth Amendment because it subjects a person to punishment for a single crime more than once. *United States v. Dixon*, 509 U.S. 688, 696, (1993). A defendant may be convicted only once for each offense, as the rule against multiplicity protects against multiple convictions for the same offense, not just against the imposition of multiple sentences for the same offense. *Ball v. United States*, 470 U.S. 856 (1985).

In the Fifth Circuit, courts apply the *Blockburger* test to making a determination of multiplicity, barring “a clear indication of legislative intent to permit cumulative punishment for one offense under two separate statutes.” *United States v. Ogba*, 526 F.3d 214, 233 (5th Cir. 2008). Under *Blockburger:*

> where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Id. (quoting *Blockburger v. United States,* 284 U.S. 299 (1932)*)*.

The elements subject to the *Blockburger* inquiry must be determined by reference to those the prosecution needs to prove for the charges to which jeopardy attaches, not by reference to the statutes in the abstract. *See Id.,* 526 F.3d at 234. In *Ogna*, the Fifth Circuit overturned a conviction for illegal remuneration and healthcare fraud despite the fact that "[o]n their face, the statutes each require proof of an additional fact that the other does not." *Id.* at 234; *see also*, *Dixon,* 509 U.S. at 698 (contempt conviction barred a subsequent prosecution of predicate offense); *Harris v. Oklahoma*, 433 U.S. 682, 682-83 (1977) (felony murder conviction resulting from a killing during the commission of robbery barred a subsequent robbery prosecution despite the fact that the elements of robbery were not necessarily included in every felony murder); *Chacko* 169 F.3d 140, 145-6 (2d Cir. 1999) (comparing elements of 18 U.S.C. §1014 and §1344 as-charged).

Thus, in applying the *Blockburger* test, the Court "must look to the proof required for each necessary element of each offense in the case," *Ogba*, 526 F.3d at 234, asking "not only whether each statute required proof of an additional fact that the other did not," but "looking specifically to the necessary elements to be proved under the statutes as charged" *Id.* (citing Whalen at 694)(finding plain error by lower Court). For instance, if one offense, among many possibilities, serves in a particular case as the predicate for a greater offense, the defendant cannot be prosecuted or punished twice for both offenses. *See Ogba* 526 F.3d 234 ("a conviction for illegal remuneration is a lesser included offense of healthcare fraud"); *Dixon*, 509 U.S. at 698

("[h]ere, as in *Harris,* the underlying substantive criminal offense is 'a species of lesser-included offense'").

B. Counts One and Two are Multiplicitous.

Counts One and Two are Multiplicitous because they charge the same criminal offense in law and fact. The offenses fail the *Blockurger* test on the face of the charging statutes, and as applied to the defendant in the indictment. Moreover, there is no "clear indication" of legislative intent to permit cumulative punishment for one offense under the charge statutes.

1. Count One does not require proof of a fact that Count Two does not.

Count One charges a violation of §1519 for "concealing two laptop computers [..] prior to the execution of a search warrant." Section 1519 provides up to 20 years imprisonment for:

> Whoever knowingly . . . conceals . . . any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States

Similarly, Count Two charges a violation of §1512(c)(1) for "corruptly conceal[ing] [..] two laptop computers, with the intent to impair the integrity and availability for use in an official proceeding specifically related to the search warrants" Section 1512(c)(1) provides up to 20 years imprisonment for:

> Whoever corruptly . . . 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

There are two key differences between these two statutory provisions. First, §1512(c)(1) criminalizes "corrupt" concealment; whereas §1519 criminalizes "knowing" concealment. Second, §1512(c)(1) requires the intent to obstruct an "official proceeding," whereas §1519

requires the intent to obstruct the proper administration of "any matter within the jurisdiction of the United States."

Notably, §1519 does not contain any element that is not found in §1512(c)(1). At least insofar as these provisions are construed by the government, violation of the narrower provision (§1512(c)(1)) would necessarily entail violation of the broader provision (§1519). Thus, any defendant who acts corruptly must certainly also act knowingly. Moreover, an official proceeding undoubtedly constitutes a matter within the jurisdiction of the United States. Accordingly, charging the defendant under both §§ 1519 and 1512(c)(1) is multiplicitous, and the government should be required to elect between the two counts.

2. Counts One and Two require identical proof as applied to this case.

While the starting point is an analysis of the text of the two statutes, the rigid "look-only-at-the-statue" approach is inappropriate in some cases where one of the statutes covers a broad range of conduct. *Mathis*, 1997 WL683648 at 8; *see also Whalen v. United States*, 445 U.S. 684, 694 (1980) (finding that charges of rape and felony murder were multiplicitous, even though felony murder statute, on its face, did not necessarily require proof of rape); *Rogers*, 898 F.Supp. 219, 222 (S.D.N.Y. 1995). In particular, courts will examine the facts alleged in the indictment when there is "no realistic likelihood of violating the narrow provision . . . without also violating the broad provision." *Mathis*, 1997 WL 683648 at 8. Accordingly, the elements subject to the *Blockburger* inquiry must be determined by reference to those the prosecution needs to prove for the charges to which jeopardy attaches, not by reference to the statues in the abstract. *See, e.g., United States v. Dixon*, 509 U.S. 688, 698 (1993), *Harris v. Oklahoma*, 433 U.S. 682, 682-83 (1977), *United States v. Chacko*, 169F.3d 140, 145 (2d Cir. 1999); *see also United States v. Chiaradio*, 684 F.3d 265 (1st Cir. 2012) ("While other cases, on different facts, might

appropriately give rise to multiple possession charges under section 2252(a)(4)(B), the facts of this case do not support such an outcome.")

In this case, it is plain that the exact same facts are charged with respect to both counts of the indictment. Both counts allege that defendant, aided and abetted by KM, concealed two laptop computers in order to obstruct official proceedings related to the search warrants issued on March 5, 2012. The same facts support both the *actus rea* and the *mens rea* in both counts. Moreover, there is no reasonable possibility of the defendant being found to have violated §1512(c)(1) without also being found to have violated §1519, as charged in the indictment. Accordingly, the government should be required to elect between the two counts.

3. The legislative history supports the presumption that Congress did not intend to impose cumulative punishment for violation of 1512(c)(1) and 1519.

There is no "clear indication" of legislative intent to permit cumulative punishment for one offense under the charge statutes. To the contrary, the legislative history suggests that Congress did not intend to impose cumulative punishment for violation of 1512(c)(1) and 1519 charged in the same indictment and based on the same set of operative facts. Indeed, as stated in the Senate Report: "We recognize that section 1519 overlaps with a number of existing obstruction of justice statutes, but we also believe it captures *a small category of criminal acts which are not currently covered under existing laws*." *See* Senate Report 107-146 (noting that new felonies were created in order "to clarify and plug holes in the existing criminal laws" and lamenting the fact that current "guidelines provide little assistance in differentiating between different types of obstruction" and that "prosecutors have been forced to [mis]use the 'witness tampering' statute, 18 U.S.C. 1512, and proceed under the legal fiction that defendants are being prosecuted for telling other people to shred documents"); *see also* Senate Report 107-146 (noting that §1519 was intended to create "a new general anti-shredding provision," which would

provide liability not otherwise covered by the "patchwork" of "often very narrowly" interpreted provisions governing the destruction of evidence); *id.* ("We have voiced our concern that section 1519, in particular, . . . could be interpreted more broadly than we intend."); *see also* Statement by the President upon Signing HR 3763 into Law (July 30, 3002) (warning that "[s]everal provisions of the Act require careful construction by the executive branch as it faithfully executes the Act").

There is not a scintilla of legislative history that suggests that the two schemes were intended to impose concurrent punishments, despite the clear legislative interplay between §1519 and §1512. Accordingly, the government should be required to elect between Counts One and Two.

C. The Multiplicitous Counts Create Inherent Jeopardy to the Defendant.

Mr. Brown will suffer "jeopardy" not only as a consequence of any sentence that may be imposed (if he is convicted), but also by any conviction for an offense. In *Ball v. United States,* 470 U.S. 856, 861 (1985), the Supreme Court pointed out that:

> [f]or purposes of applying the *Blockburger* test in this setting as a means of ascertaining congressional intent, "punishment" must be the equivalent of a criminal conviction and not simply the imposition of sentence. Congress could not have intended to allow two convictions for the same conduct, even if sentenced under only one.

Ball, 470 U.S. at 861.

Accordingly, in the Fifth Circuit a multiplicitous indictment poses several dangers to the defendant. "The chief danger raised by a multiplicitous indictment is the possibility that the defendant will receive more than one sentence for a single offense." *Jones*, 733 at 584. In addition, multiplicity poses the danger of "creating an adverse psychological effect on the jury by suggesting that several crimes have been committed and allowing the possibility of a compromise verdict." *United States v. Radley*, 659 F.Supp.2d 803 (S.D. Tex. 2009). As stated

by this Court, "[o]nce the impression of enhanced criminal activity is conveyed to the jury, the risk increases that the jury will be diverted from a careful analysis of the conduct at issue, and will reach a compromise verdict or assume the defendant is guilty." *United States v. Smallwood*, 2011 WL 2784434 (N.D. Tex. 2011); *United States v. Simpson*, 2011 WL 2880885 (N.D. Tex. 2011).

As explained by Justice Stevens in his concurring opinion in *Ball v. United States*:

> [w]hen multiple charges are brought, the defendant is 'put in jeopardy' as to each charge. To retain his freedom, the defendant must obtain an acquittal on all charges
>
> [...]
>
> The prosecution's ability to bring multiple charges increases the risk that the defendant will be convicted on one or more of those charges. The very fact that a defendant has been arrested, charged, and brought to trial on several charges may suggest to the jury that he must be guilty of at least one of those crimes
>
> [...]
>
> The submission of two charges rather than one gives the prosecution 'the advantage of offering the jury a choice—a situation which is apt to induce a doubtful jury to find the defendant guilty of the less serious offense rather than to continue the debate as to his innocence.'

470 U.S. at 868 (quoting *Cichos v. Indiana,* 385 U.S. 76 [1966]) (Fortas, J., dissenting from dismissal of certiorari).

Accordingly, where an indictment charges a single crime in multiple counts, the defendant can petition the Court to require the prosecution to elect one of the counts and to dismiss the other. *Id., see also United States v. Odutayo*, 406 F.3d 386 (5th Cir. 2005) ("The [double jeopardy] clause is meant to protect against both multiple prosecutions and . . . multiple punishments"); *Black v. Thaler*, 2010 WL 1996893 (N.D. Tex 2010) (same).

In this case, the government does not allege that the defendant engaged in multiple instances of "concealment," but rather merely charges the exact same alleged conduct in two counts. The defendant is, thereby, put in jeopardy twice for the same alleged offense, and the Court should require the government to elect between its multiplicitous counts.

CONCLUSION

For the foregoing reasons, the Court should dismiss the Indictment in its entirety, or in the alternative, compel the government to elect between multiplicitous counts.

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CERTIFICATE OF SERVICE

I certify that today, March 3, 2014, I filed the instant motion using the Northern District of Texas's electronic filing system (ECF) which will send a notice of filing to all counsel of record.

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