

11-3757

To Be Argued By:
JOHN H. DURHAM

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 11-3757

UNITED STATES OF AMERICA,
Appellee,

-vs-

CHARLES B. SPADONI,
Defendant-Appellant,

TRIUMPH CAPITAL GROUP, INC.,
FREDERICK W. MCCARTHY, LISA A. THIESFIELD,
BEN F. ANDREWS,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

This is an appeal from a September 2, 2011 resentencing in a criminal case in the District of Connecticut (Ellen B. Burns, J.). Judgement entered on September 15, 2011, A177,¹ and the district court had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. The defendant filed a timely notice of appeal under Fed. R. App. P. 4(b) on September 2, 2011. A182. This Court has jurisdiction over the defendant's appeal of his sentence pursuant to 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

¹ The defendant's appendix is referred to herein as "A." The Government's Appendix is referred to herein as "GA." The Government has submitted the Second Addendum to the Pre-Sentence Report, as well as the Government's May 27, 2004 letter to the Probation Office as part of a sealed appendix, referred to herein as "PSR," but has not submitted the entire Pre-Sentence Report or its other five addenda because they do not appear relevant to this appeal. Should the Court want those documents for any reason, the Government will file them in a supplemental sealed appendix.

Statement of the Issues Presented

1. Did the Government breach its proffer agreement with the defendant by disclosing in a filing with this Court information that arguably undercut its position regarding one aspect of the defendant's *pro se* motion to recall the mandate and thus was not offered against the defendant, but against the Government?
 - A. To the extent that any breach occurred, was it harmless?
 - B. If there was a breach of the proffer agreement that harmed the defendant, is the proper remedy to refer the motion to recall the mandate to a new panel for reconsideration?

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Preliminary Statement

This case began over ten years ago and involved a corrupt pay-to-play arrangement between the defendant, Charles Spadoni, the former Vice President and General Counsel of an investment firm named Triumph Capital Group, Inc. (“Triumph”), and former Connecticut State

Treasurer Paul J. Silvester, who unilaterally controlled the investment of billions of dollars in state pension funds. Spadoni was convicted at trial of obstruction of justice and bribery-related charges involving \$2,000,000 in kickbacks. The district court sentenced him to 36 months' imprisonment at his original sentencing.

On direct appeal, this Court affirmed the defendant's obstruction of justice conviction, but vacated the bribery-related convictions and remanded those charges to the district court for a new trial. Both the Government and the defendant filed petitions for rehearing, and this Court denied the motions.

Some eleven months after the mandate had issued, the defendant filed a *pro se* motion seeking the extraordinary remedy of a recall of the mandate. It is this Court's denial of the *pro se* motion – one in which the defendant accused the Government of intentionally misstating the trial evidence in its brief – that gives rise to the instant appeal. In responding to the defendant's motion and in defending itself against the accusations of fraud, the Government argued that the defendant's motion should be denied because it did not set forth evidence of “grave, unforeseen contingencies” or a miscarriage of justice that warranted the extraordinary relief he was seeking, *see Calderon v. Thompson*, 523 U.S. 538, 550 (1998); and the Government's brief had accurately and fairly summarized the trial evidence. In response to the defendant's argument that there was no trial evidence that he had obstructed justice by destroying certain computer files, the Government argued that the defendant had obstructed

justice both by destroying and overwriting relevant computer files and by failing to produce those files to the grand jury. In advancing this last argument, the Government, believing that it was disclosing information that was helpful to the defendant, included a footnote advising the Court that, during a proffer that occurred prior to the sentencing, the defendant had produced a copy of one of the computer files that, at trial, the Government had alleged he had destroyed. This Court denied the *pro se* motion.

On remand, the defendant filed a motion to dismiss the obstruction of justice conviction. Stripped of its invectives, the defendant's argument below essentially was that the Government breached its proffer agreement with the defendant by using information he had provided pursuant to that agreement in its response to his *pro se* motion to recall the mandate. Further, he argued that the Government could not show that the alleged breach was harmless. Finally, he asserted that the only proper remedy for the alleged breach is dismissal of his obstruction of justice conviction.

The district court denied the motion to dismiss, finding that the Government did not breach the proffer agreement because it did not disclose any information against the defendant. Instead, the court found that the Government was "compelled" to disclose the information to this Court to ensure that there could be no suggestion that the Government was hiding facts that were arguably favorable to the defendant's position.

On appeal, the defendant challenges the district court's denial of his motion to dismiss, claims that the Government breached its proffer agreement in its response to the *pro se* motion to recall the mandate, and maintains that this breach was harmful and should result in the dismissal of the superseding indictment.

For the reasons that follow, this claim has no merit.

Statement of the Case

On January 9, 2001, a federal grand jury returned a 24-count Superseding Indictment against the defendant, Triumph Capital Group, Inc., Frederick McCarthy, Lisa Thiesfield, and Ben Andrews. A20. The defendant was charged with Racketeering (18 U.S.C. § 1962(c)), Racketeering Conspiracy (18 U.S.C. § 1962(d)), Theft/Bribery Concerning Programs Receiving Federal Funds (18 U.S.C. §§ 666(a)(2) and 2), Mail Fraud/Theft of Honest Services (18 U.S.C. §§ 1341, 1346, and 2), Theft/Bribery Concerning Programs Receiving Federal Funds (18 U.S.C. §§ 666(a)(2) and 2), Wire Fraud/Theft of Honest Services (18 U.S.C. §§ 1343, 1346, and 2), and Obstruction of Justice (18 U.S.C. § 1503). GA59-GA101 The district court severed the defendants into two groups.

The first trial, involving the defendant and Triumph, began with jury selection on June 11, 2003. GA1-GA58. On July 16, 2003, the jury convicted both defendants of Racketeering (Count One), Racketeering Conspiracy (Count Two), Bribery Concerning Programs Receiving Federal Funds (Count Nineteen), Mail and Wire Fraud

(Counts Twenty through Twenty-Three) and Obstruction of Justice (Count Twenty-Four). A179. The jury acquitted both defendants of Mail Fraud/Theft of Honest Services (Counts Fifteen through Seventeen). GA42.²

On September 12, 2003, the Government and defendant entered into a written proffer agreement, codifying the parties' understanding about the information to be provided by the defendant and the use of that information. A31-A32. Thereafter, the defendant and his counsel met with the Government. PSR5-PSR6.

On October 25, 2006, the district court sentenced the defendant to 36 months in prison and a \$50,000 fine. A179. The defendant filed a notice of appeal that day. GA46. Judgment entered on October 27, 2006. A179-A181.

On September 25, 2008, this Court issued an opinion in which it rejected the defendant's sufficiency of evidence claims, upheld his conviction for obstruction of justice, and remanded the racketeering, racketeering conspiracy, bribery and wire fraud counts for a new trial. *See United States v. Triumph Capital Group, Inc.*, 544 F.3d 149, 152 (2d Cir. 2008).

² Co-defendants Thiesfield and McCarthy pleaded guilty to Counts 18 and 19, respectively. A jury convicted Andrews on all but two counts. His conviction and sentence were affirmed on appeal. *See United States v. Andrews*, 237 Fed. Appx. 625 (2d Cir. May 25, 2007) (unpublished decision).

On November 10, 2008, the defendant and the Government filed simultaneous petitions for rehearing. This Court denied both petitions on November 21, 2008, and issued its mandate on January 12, 2009. A55, A56.

On December 3, 2009, the defendant filed a *pro se* motion to recall the mandate. A57-A77. On December 15, 2009, the Government filed a detailed response to the defendant's *pro se* motion. A78-A99. On December 18, 2009, this Court denied the motion to recall the mandate. A101.

On remand, the defendant filed, *inter alia*, a motion to dismiss the indictment and memorandum in support. A108-A135. In a written ruling dated June 24, 2011, the district court denied the motion to dismiss. A161-A174. The Government dismissed all of the pending counts against the defendant, and the case moved forward to sentencing on the remaining obstruction of justice count. A177. On September 2, 2011, the district court sentenced the defendant to a term of 24 months' incarceration and 3 years' supervised release on that count. A177. The defendant filed a notice to appeal on that same date. A182-A183.

Immediately after sentence was imposed, the defendant filed a motion for bail on appeal with the district court. GA514-GA515. On October 18, 2011, the court denied the motion in a written ruling, finding that the single issue the defendant intended to raise on appeal was not "a substantial question of law or fact that is likely to result in

the reversal of his conviction or a new trial.” GA540-GA551.

On October 20, 2011, the defendant filed a motion for bail pending appeal with this Court. GA552-GA579. On November 9, 2011, this Court denied the motion. GA604.

The defendant is currently serving the sentence imposed by the district court.

Statement of Facts

A. Conduct underlying the defendant’s conviction

Paul Silvester, formerly the Deputy Treasurer of the State of Connecticut, was appointed Treasurer in 1997 when a vacancy arose. GA241. In Connecticut, the Treasurer had unilateral authority to make investment decisions for billions of dollars in state pension funds, with very little oversight. Federal contributions made up a significant portion of these pension funds.

Silvester was friends with the defendant, who was a lawyer and who worked in state finance. GA241. In 1997, Silvester helped the defendant get hired by a Boston investment firm called Triumph Capital Group, Inc., which was run by Frederick McCarthy. GA241-GA242. Triumph was already managing some investments for Connecticut when Silvester came to the Treasury. GA239-GA240. Once the defendant joined Triumph, he became Silvester’s primary contact at the firm. GA241-GA242.

Upon becoming Treasurer, Silvester developed a need for cash. Due to an oddity of state law, his salary decreased from \$100,000 to \$50,000 when he shifted from Deputy Treasurer to Treasurer. GA239. Moreover, Silvester decided to run for the Treasurer's seat in his own right in the November 1998 election and needed campaign cash. GA242-GA244. State law barred investment firms who did business with the Treasurer's office from contributing to the Treasurer's race, so Silvester solicited contributors to the Connecticut Republican Party, expecting that the party would pass along 70% of what he raised. GA243-GA244.

The defendant and Triumph agreed to contribute \$100,000 to the party, after Silvester told them it would be "helpful" to him. GA244-GA245. Later, when Silvester lacked money to pay his intimate friend Lisa Thiesfield as a campaign manager, GA245-GA248, the defendant advised that Triumph would pay Thiesfield a \$25,000 fee. That sham contract enabled Thiesfield to quit her state job and work full-time on Silvester's campaign. GA245-GA248. As a result of these campaign contributions, Silvester was influenced to invest state money with Triumph. GA255-GA256.

Shortly after Silvester lost the election, GA254, the defendant approached him about investing additional funds with Triumph. GA254-GA255. Silvester was inclined to invest an amount along the lines of previous deals – about \$150 million, GA256, and asked that Triumph pay two of his close associates – Christopher Stack and Thiesfield – as "finders" in the deal, whereby

they would be paid 1% of the amount Connecticut invested with Triumph. GA256. At the time, the defendant did not know that Silvester had a corrupt deal with Stack to share fees Stack obtained as a finder through Treasury deals. GA261 The defendant told Silvester that Triumph could not pay Stack and Thiesfield as finders, but assured him that Triumph would sit down and work out the specifics with Stack and Thiesfield after Silvester left office. GA257. The defendant and others at Triumph hurried to put together sham “consulting contracts” for Stack and Thiesfield and executed Stack’s contract on November 11, 1998, just one day before Silvester signed off on a \$200 million investment with Triumph. GA257. The defendant then fraudulently postdated the contracts to make it appear they were entered after Silvester left office the following January. GA257. Silvester was influenced to increase the investment amount because Stack and Thiesfield were getting a percentage-based fee: the more he invested, the higher their payout. GA257.

Within months of Silvester leaving office, federal investigators began looking into last-minute investments that he had made as a lame duck. Very early in the investigation, Stack approached the Government anonymously and offered to reveal Silvester’s corrupt dealings in exchange for immunity. GA129-GA121. After a federal grand jury subpoena was served on a Triumph fund seeking documents related to the Connecticut investment, the defendant began using a file-erasing software program called “Destroy-It!” on his laptop computer, GA293, a program that had been recommended by Triumph’s outside counsel, GA264, to get rid of

materials Spadoni thought the grand jury might request. GA621. Spadoni continued to use Destroy-It! as Triumph employees were called before the grand jury and additional subpoenas were issued.

B. The defendant's indictment and trial

The defendant and others were eventually named in a multi-count Superseding Indictment charging Racketeering, Racketeering Conspiracy, Bribery, Wire Fraud and Obstruction of Justice. GA59-GA101. At a lengthy trial involving the defendant and Triumph, the Government presented testimony from Silvester, who had pleaded guilty to a number of racketeering and corruption charges. The Government also put on Stack, and a number of other witnesses, and offered three days of testimony from FBI Special Agent Jeff Rovelli, who had forensically recovered a significant amount of evidence – particularly regarding the obstruction charges – from the defendant's laptop computer.

In particular, the evidence presented at trial included, *inter alia*, testimony that almost immediately after Triumph received the first grand jury subpoena, the defendant told Silvester that he anticipated additional subpoenas and discussed the advisability of destroying computer files. GA261-GA262. The defendant also specifically asked Silvester to destroy any copies of a specific contract (related to co-defendant Ben Andrews), whether those copies were hard copies or copies on a computer. GA264-GA265. A subsequent witness (a Triumph colleague) testified that he had suggested the use

of a specific computer program to destroy computer files, and that the defendant had responded to the witness by stating that the program that should be used to destroy computer files was “Destroy-It!” GA621.

The evidence also included testimony about the results of a forensic examination of the defendant’s laptop. This testimony revealed that a program named “Destroy-It!” (a program designed to “overwrite and permanently delete” computer files) had been installed on the laptop and run on two separate occasions in specific directories or files. GA293 . The forensic analysis further revealed that certain files existed on the laptop in May 1999, but were no longer there in April 2000 when the defendant’s laptop was turned over pursuant to subpoena. GA322-GA323, GA459. Similarly, an analysis of the backup tapes for Triumph’s computer network revealed that certain data existed in May 1999, but was no longer there by August 1999 (after subpoenas had been served). GA302. Finally, and as relevant here, the forensic analysis revealed that two documents, the Stack and Thiesfield contracts, had been accessed from the defendant’s laptop as early as November 10, 1998 and existed on floppy diskettes as late as December 31, 1999 and May 31, 1999. GA322-GA323, GA459 . These two documents were not on the computer when seized, and the defendant never produced any floppy diskettes containing these documents.

The jury ultimately found both the defendant and Triumph guilty of racketeering, racketeering conspiracy, bribery, wire fraud (theft of honest services) and obstruction of justice. GA42. Specifically, the jury found

the defendant guilty of bribery in connection with the \$2 million sham “consultant contracts” given by Triumph to Stack and Thiesfield, finding that the defendant had intended to influence Silvester to make an increased investment of state pension funds with Triumph. The jury acquitted the defendant of bribery charges associated with the campaign contributions, which would have required a higher showing of an “explicit” agreement or quid pro quo with Silvester. GA42.

C. The defendant’s proffer agreement

Following the verdict, but before sentencing, the defendant entered into a proffer agreement with the Government. A31-A32. The proffer agreement, dated September 12, 2003, codified the parties’ understanding about the information to be provided by the defendant and the purposes for which that information could be used. First, it provided that “[a]ny statements made by [the defendant] at this meeting will not be offered against him in any federal criminal case brought against [him] in the District of Connecticut, unless [he] breaches this agreement as provided in [paragraph] (7) below.” A31. The agreement also provided, however, that statements and information arising from the proffer sessions will be used for certain purposes, such as developing leads for further investigation. A31. Further, the agreement notified the defendant that his “statements and information at this meeting must be brought to the attention of the district court at the time of sentencing in any federal criminal case brought against [him] in the District of Connecticut,” although it also explained that those

statements “will not be offered by the government, and cannot be considered by the district court, for the purpose of determining [his] applicable sentencing guideline range” A31. In addition, the agreement stated that the defendant’s proffer information could be used to impeach or cross-examine the defendant if he were to offer testimony at a trial that was materially different from the statements made in the proffer, A32, and that the government could use the defendant’s proffer statements in any rebuttal case in a criminal case brought against him in the District of Connecticut. A32.

Operating under the terms of this agreement, the defendant met with the Government in the Fall of 2003. PSR5-PSR6. In the course of these meetings, he discussed his criminal conduct, and as relevant here, provided information about copies of the Thiesfield and Stack contract file documents that had been at issue at trial. Specifically, he told the Government that he had a disk with a copy of the Stack contract on it, but that he did not have the disk with both the Stack and Thiesfield contracts. He provided a copy of the disk with the Stack contract to the FBI. A94, n.3.

The government, operating under the terms of the agreement, provided the defendant’s statements (in the form of FBI interview reports) to the district court via the United States Probation Office as part of the sentencing process, with the express caveat that the information could not be used to calculate the defendant’s guidelines range. PSR6, n.2. Information from the proffer statements was thereafter incorporated into the PSR. PSR7.

D. The defendant's direct appeal

On direct appeal, this Court issued an opinion upholding the defendant's conviction on Count 24 for Obstruction of Justice, but reversed and remanded the remaining counts of conviction for a new trial based on what it determined to be a *Brady* violation regarding the disclosure of an FBI Agent's field notes. *See Triumph Capital Group, Inc.*, 544 F.3d at 165, 172. Both the Government and the defendant filed simultaneous petitions for rehearing. For the defendant's part, he argued that his obstruction of justice conviction should be reversed because there was no evidence that the Thiesfield and Stack contracts had been saved on his hard drive and, therefore, there was no evidence that he had destroyed those documents. A43-A54. The Court denied both petitions on November 21, 2008, and the mandate issued on January 12, 2009. A55.

E. The defendant's *pro se* motion to recall mandate

Some eleven months after the mandate issued, the defendant served the Government with a copy of a *pro se* application he fashioned as "Defendant's Petition For This Court To Withdraw Its Mandate And To Issue A New Judgement That Dismisses The Indictment Because The Government Lawyers Perpetrated A Fraud On This Court." A57-A77. The application was subsequently docketed by the Clerk of Court on December 3, 2009. A40.

In his motion, the defendant referenced his Petition for

Rehearing wherein he had stated that he had sought dismissal of the obstruction count or a new trial on the count “based on this Court’s misapprehension that the Petitioner had destroyed the Stack and Thiesfield contracts from his computer files . . .” A63. In the Petition for Rehearing, the defense had specifically noted that, “in making [] a false factual assumption [about the evidence relating to destruction of the computer file records]: . . . the Court may have been misled, *not by the prosecutor*, but by an inadvertent error in the Appellant’s Brief.” A64 (emphasis added).

In his *pro se* motion to recall the mandate, however, the defendant asserted that “the only possible explanation for this Court’s failure to vacate its decision on the obstruction of justice count is that, instead of reviewing the voluminous record to determine that no such probative evidence [of destruction of computer files] existed in the record, this Court *relied solely* upon one or both of two misrepresentations by . . . the Government’s lawyers, set forth in the Government’s appellate brief that the record contained evidence that proved that the Petitioner had destroyed the Stack and Thiesfield contracts in his computer files.” A65 (emphasis in original). The two alleged misrepresentations that were made in the Government’s 62-page merits brief involved one phrase in the “Preliminary Statement” (“. . . Spadoni *purged* computer files that related directly to the case, *including draft contracts for Stack and Thiesfield* . . .”), A66 (emphasis in original), and one phrase in Part III.C.1.a of its brief entitled “The Evidence Established That Spadoni Acted With Intent to Obstruct the Grand Jury

Investigation” (“... if it were ‘not for the fortuitous ability of the forensic examiner to locate obscure traces of [‘LAT Contract.doc’ and ‘Stack Contract.doc’] on the laptop, *the files’ destruction* would have eliminated these files’ electronic trails entirely”). A65-A66 (emphasis in original).

In its December 15, 2009 response, the Government argued that the defendant’s motion was nothing more than a transparent attempt to have the Court re-consider an issue it had already rejected. A79. Further, although the defendant had recast his claim as fraud by the Government, his argument simply confirmed that some nine years after indictment and six years after trial, the Government and the defendant continued to see the evidence differently. A79, A86-A93. Moreover, the Government pointed out that, even if one were to credit the defendant’s claim that he did not destroy the sham contract files, the only alternative inference from the evidence was that he failed to produce the files in response to a subpoena and was, therefore, still guilty of obstructing justice. A93-A96.

In the course of making this last point, which assumed, for the sake of argument, that there was insufficient evidence that the defendant had destroyed the two contract files, the Government included a footnote in which it described certain information it had learned from the defendant during the proffer interviews. The Government noted that, while it did not believe the defendant’s argument in support of his *pro se* motion to recall the mandate was compelling, there was a factual basis for the

defendant's claim that he had not destroyed at least one copy of the Stack contract file. A94, n.3. Specifically, the Government acknowledged that, at the time it had drafted its appellate brief describing the offense, it had information in its possession that the defendant had not, in fact, "destroyed" or "purged" at least one copy of the Stack contract file. A94, n.3.

The footnote expressly referenced the fact that the defendant had made statements pursuant to a proffer agreement and specifically noted that "[b]ecause the terms of the proffer agreement precluded the government from using Spadoni's statements against him, and because those statements were strictly irrelevant to the issue on appeal (*i.e.*, whether the *trial* evidence was sufficient to support the verdicts), the government did not rely on Spadoni's proffer statements when drafting its brief." A94, n.3. Consistent with the agreement, the Government gave a copy of the defendant's statements to the court through the Probation Officer preparing the PSR in advance of sentencing, and those statements were specifically referenced in the second addendum to the PSR. PSR7.

The footnote in its entirety reads as follows:

Because Spadoni argues that there was insufficient evidence that he *destroyed* the Stack and Thiesfield contracts, he appears to be arguing that the jury would have been obligated to draw the alternative inference, *i.e.*, that they had not been destroyed. Yet such an inference could not possibly support his claim that there was insufficient evidence to support

his conviction for obstruction of justice. Spadoni would be just as guilty of obstruction of justice for failing to produce existing computer files that were called for by grand jury subpoenas, as for destroying those files in anticipation of those subpoenas.

Putting aside the illogic of his argument, it is possible that Spadoni is basing this argument on statements he made to the government, *pursuant to a proffer agreement*, after his trial but before sentencing. During that interval, Spadoni met with the government in an attempt to provide information that would be helpful to the government in its upcoming trial of co-defendant Ben Andrews. (The government ultimately decided not to call Spadoni as a witness in the Andrews trial.) In the course of these meetings, Spadoni stated, *inter alia*, that he had the disk with the Stack contract, but that he did not have the disk that had both the Stack and Thiesfield contracts. He then provided a copy of the disk with the Stack contract to the FBI.

Because the terms of the proffer agreement precluded the government from using Spadoni's statements against him, and because those statements were strictly irrelevant to the issue on appeal (i.e., whether the trial evidence was sufficient to support the verdicts), the government did not rely on Spadoni's proffer statements when drafting its brief. Consistent with the terms of the agreement, however, the

government provided a copy of Spadoni's statements to the district court in advance of sentencing, and those statements were incorporated into the Pre-Sentence Report as an addendum.

To the extent Spadoni's proffer statements are relevant to the instant motion, they did not foreclose the government from suggesting on appeal that the jury was entitled to infer from the trial evidence that Spadoni had destroyed certain computer files. First, although Spadoni's proffer provides some evidence that he did not destroy one copy of the Stack contract, it also suggests that there were multiple copies of the Stack and Thiesfield contracts. Thus, even though Spadoni eventually produced one disk to the government as part of his post-trial proffer, he has never explained how many other copies of those files existed or what happened to them. Accordingly, there remains a reasonable inference that he destroyed other copies of those files. Second, as described more completely in the text, even if Spadoni's post-trial production of one file on a floppy disk could be deemed evidence that he did not destroy that file, Spadoni would still be guilty of obstruction of justice for failing to produce that disk in response to the grand jury subpoena. And of course, information provided by Spadoni in post-trial efforts to cooperate cannot change the inferences that the jury was reasonably entitled to draw from the trial evidence.

A94, n.3 (emphasis added).

On December 18, 2009, the Court denied the motion to recall its mandate. A107.

F. The defendant's motion to dismiss

After the instant matter was returned to the district court, the defendant filed a Motion to Dismiss or for Full Discovery and Evidentiary Hearing. A108-A110, A111-A135. In his motion, the defendant made a number of claims of prosecutorial misconduct, including the instant allegation regarding the purported improper use of proffer information provided by the defendant. A120-A132. As to this allegation, the district court found that, contrary to the defendant's assertion, the Government had not made use of the proffered information *against* the defendant in violation of the proffer agreement. Instead, the Government had used the information against itself in meeting its duty of candor to this Court. A174.

Specifically, the district court characterized the defendant's claim as one seeking dismissal of the indictment as a remedy for the Government's improper use of proffer statements in its opposition to the defendant's motion to recall the mandate. A173. The defendant had argued that "the government, in a footnote, referred to statements Spadoni had made during a proffer session and in so doing violated the government's assurance in the proffer agreement that any statements he made 'would not

be offered against him in any federal criminal case brought against [him] in the District of Connecticut” A173-A174. The district court rejected this argument and held:

Contrary to Spadoni’s claim, the government did not offer Spadoni’s statements against him, but did so to defend against Spadoni’s accusation that the government committed a fraud on the Court of Appeals by making deliberate and deceptive mis-statements in its brief. The circumstances which caused the government to use those statements are fully and accurately set forth in the government’s response to Spadoni’s motion to dismiss and will not be repeated herein. Suffice it to say, the circumstances described by the government make it clear that it was necessary, indeed compelled, to disclose the information that Spadoni had provided in his proffer to correct the record and to avoid any suggestion that the government was attempting to hide certain facts that were potentially unfavorable to it. In these circumstances, it is apparent that the statements were actually used by the government against itself, not against Spadoni, and thus there was no violation of the proffer agreement.

A174.

Summary of the Argument

The defendant's single claim on appeal relates to a narrow issue: whether the Government's alleged breach of a proffer agreement – a breach that purportedly occurred almost one year after this Court's issuance of the mandate and long after the pendency of the trial, sentencing and appeal in this case – requires that the sentence be vacated and the indictment be dismissed with prejudice. The proffer agreement at issue stated that, with some exceptions, the information provided by the defendant would not be offered "against" him. The defendant claims that, in reciting proffer information in one sentence of a footnote in its opposition to the motion to recall the mandate, the Government breached this agreement.

The defendant's position is fundamentally flawed in that its basic premise is wrong. What he refuses to recognize, perhaps intentionally so, is that the one sentence in the Government's response about which he complains was not offered against him. Rather, the Government made reference to the proffer information to insure that it was meeting its duty of candor to this Court.

Specifically, in addressing the defendant's allegation that the Government had misstated the trial evidence in its opposition brief, the Government wanted to make it clear that, at the time it had filed the brief, it knew from the defendant's proffer that he had not destroyed one digital copy of the Stack contract. In the Government's view, this

proffer information did not undermine the accuracy of the Government's recitation of the trial evidence in its opposition brief. But, taken out of context, the proffer information could be used to challenge the Government's position that the trial evidence and the reasonable inferences drawn from that evidence were sufficient to establish that the defendant had destroyed all the materials he had reason to believe were relevant to the grand jury's investigation. Thus, the Government did not offer the proffer information against the defendant and, therefore, did not breach the proffer agreement.

Moreover, even assuming *arguendo* that a breach occurred, in the context of this case, any such breach clearly would be harmless and would not call into question the soundness of this Court's denial of the *pro se* motion to recall its mandate. First, in his *pro se* motion, the defendant utterly failed to establish that he was entitled to the extraordinary relief he was seeking. The Government did not misstate the trial evidence in its opposition brief, and there was more than sufficient evidence on the obstruction of justice count to support the jury's verdict. Second, the Government expressly identified the proffer information as such to this Court, and the information it disclosed in the footnote had already been disclosed both to the district court and this Court as part of the PSR. Third, in the end, the issue of whether the defendant had actually destroyed all copies of the sham consultant contracts is irrelevant because the trial evidence was more than sufficient to show that the defendant had destroyed

copies of these contracts that had been saved on his computer, and, moreover, there is no dispute that the defendant failed to produce records called for under the grand jury's subpoenas and thereby obstructed justice.

Finally, even if a harmful breach of the proffer agreement occurred, the remedy for such breach would not be dismissal of the indictment. Because the alleged breach occurred in the context of the Government's opposition to the defendant's motion to recall this Court's mandate, the appropriate remedy would be to vacate this Court's decision on the motion and refer the motion to a different panel for reconsideration without reference to the proffer information.

ARGUMENT

I. The Government did not breach its proffer agreement with the defendant, and even assuming *arguendo* that such a breach occurred, it was harmless and should not result in the dismissal of the indictment.

A. Relevant facts

The relevant facts are set forth above in the "Statement of Facts."

B. Governing law and standard of review

Pre-trial agreements are interpreted according to principles of contract law. *See, e.g., United States v. Brumer*, 528 F.3d 157, 158 (2d Cir. 2008); *In re Altro*, 180 F.3d 372, 375 (2d Cir. 1999); *United States v. Liranzo*, 944 F.2d 73, 77 (2d Cir. 1991). Thus, when determining whether an agreement such as a proffer agreement has been breached, courts look to the reasonable understanding of the parties as to its terms. *See Brumer*, 528 F.3d at 158 (quoting *United States v. Riera*, 298 F.3d 128, 133 (2d Cir. 2002)).

This Court has held that where the language of the agreement is unambiguous, “the parties’ intent is discerned from the four corners of the contract.” *United States v. Barrow*, 400 F.3d 109, 117-18 (2d Cir. 2005) (citations omitted); *Liranzo*, 944 F.2d at 77. In disputes relating to performance, promises and breaches of proffer agreements, the government should be held “to the most meticulous standards,” *Altro*, 180 F.3d at 375, and any ambiguities will be resolved against it. *See Riera*, 298 F.3d at 133; *United States v. Gregory*, 245 F.3d 160, 165 (2d Cir. 2001).

Whether a district court was correct in its interpretation of the proffer agreement and its conclusion as to whether a breach occurred is determined *de novo* by the court of appeals in accordance with the foregoing principles of contract law. *See Liranzo*, 944 F.2d at 77. When a district

court errs in its decision on issues relating to purported breaches of proffer agreements, even when those errors are of a constitutional nature, they do not, in and of themselves, require reversal of conviction. *See United States v. Oluwanisola*, 605 F.3d 124, 133 (2d Cir. 2010) (citing *United States v. Yakobowicz*, 427 F.3d 144, 153 (2d Cir. 2005)). “While ‘structural defects,’ which affect the framework within which the trial proceeds, are subject to automatic reversal, ‘trial errors’ of the type involved here [a Sixth Amendment violation], which are relatively limited in scope, are subject to harmless error review.” *Id.*, 605 F.3d at 133 (internal citations omitted). The question to be answered under such review is “whether [the Court] can ‘conclude with fair assurance’ that the errors ‘did not substantially influence the jury.’” *United States v. Ivezaj*, 568 F.3d 88, 98 (2d Cir. 2009).” *Id.* at 133-34.

C. Discussion

i. The government did not breach the proffer agreement

The defendant has seized on the government’s reference to a proffer statement in its response to his *pro se* motion to recall the mandate and contends in the instant appeal that this reference breached his proffer agreement and warrants dismissal of the indictment with prejudice. The defendant, however, misreads the proffer agreement and misunderstands the Government’s purpose in describing his comments.

The proffer agreement described specific purposes for which the defendant's proffered statements could, and could not, be used. For example, while it provided that the defendant's statements "would not be offered against him in any federal criminal case" in the District of Connecticut (in the absence of a breach), it also provided that they could be used to develop investigative leads and that they could be used against him "in any rebuttal case" in a trial against him in Connecticut, and in any trial where he was a witness if his testimony is materially different from his statements. A31-A32. The statements could also be used against him in a prosecution for perjury, false statement or obstruction of justice. A32. Similarly, the agreement provided that the defendant's statements "must be brought to the attention of the district court at the time of sentencing," although they were not to be "offered by the government, and [could not] be considered by the district court, for the purpose of determining [the defendant's] applicable sentencing guideline range." A31-A32. In short, the agreement regulated the purposes for which the defendant's statements could be used; it did not provide a blanket protection that the defendant's statements would never be used for any purpose.

Paragraph (4) of the agreement illustrates this principle clearly. That paragraph explained that, at sentencing, the government could use the defendant's statements for some purposes, but not for others. A31. Whereas the Government was required to provide the defendant's statements to the district court for sentencing, those

statements were not to be used “for the purpose of determining [his] applicable sentencing guideline range.” A31. And indeed, that is exactly what happened in this case. In preparation for sentencing, the Government provided the entirety of defendant’s statements to the sentencing judge, with the express caveat that those statements were not to be used to determine his applicable guidelines range. PSR6, n.2. The defendant raised no objection to this submission. The information from the statements were thereafter incorporated into the PSR. PSR7. The defendant was sentenced, with no suggestion (either then or now) that the Government’s disclosure of all of the defendant’s proffer statements breached the proffer agreement in any way. In other words, fully consistent with the proffer agreement, the defendant’s statements were used for a proper purpose that did not violate the agreement.

The same is true for the Government’s disclosure to this Court of one piece of information from the defendant’s proffer. The Government’s statement in its opposition to the motion to recall the mandate that the defendant, in the context of a proffer, had provided a disk containing a copy of one of the pertinent contracts did not breach the proffer agreement because this information was not “offered against” the defendant. In context, the Government offered the information against itself, in satisfaction of its duty of candor to the Court. As the district court stated, “[T]he proffer agreement unambiguously assured Spadoni that the government would not use any of his proffer

statements ‘against him’ in any criminal case. Significantly, it does not assure Spadoni that the government would never mention them or that it would be kept strictly confidential. Rather, the agreement expressly provided that his statements and information could be used against him in a variety of other circumstances.” GA548. *Cf. Liranzo*, 994 F.3d at 77 (“As an initial matter, we note that because the government offered none of Liranzo’s statements in evidence during its case in chief, the government did not violate [the proffer agreement.]”); *United States v. Chiu*, 109 F.3d 624, 626 (9th Cir. 1997) (“The terms of the proffer agreement make clear that the government could use the information gained from the proffer session in almost any way except by offering [the defendant’s] statement as evidence in its case-in-chief.”)

In his motion to recall the mandate, the defendant had accused the Government of committing a fraud on this Court through alleged deliberate and deceptive misstatements in its brief.³ In response to these serious accusations, the Government explained why, based on the record evidence before the Court, the statements in its

³It is noteworthy that the two alleged misrepresentations contained in the government’s 62-page brief were never even raised by the defendant in his reply brief, at oral argument, or in his petition for rehearing, yet they formed the basis for his claim in his *pro se* motion to recall the mandate that the Government had perpetrated a fraud on the Court. A73-A75.

appellate brief were accurate and fair descriptions of the trial record. A86-A93. The Government argued that its brief had fairly and accurately described the trial evidence and that, based on that evidence, the jury was entitled to infer that the defendant had, in fact, destroyed the two computer files relating to the Stack and Thiesfield contracts. A92. In addition, the Government noted that, even if there had been no evidence that the defendant had destroyed the two contract files (as he repeatedly argued in his motion), the only remaining inference (that he failed to produce them in response to a subpoena) would fully support his obstruction conviction. A93-A96.

When the Government filed its response, it believed – as it continues to believe – that the accusations of fraud and deception leveled against it by the defendant were themselves false and misleading. The Government also knew that it had proffer information in its possession which, if taken out of context, could be claimed to support the defendant’s argument. Specifically, whereas the Government’s brief stated, in two isolated phrases, that, according to the trial evidence, the defendant had “destroyed” or “purged” the Stack and Thiesfield contracts, the Government had in its possession, at the time it wrote the brief, information suggesting that the defendant had not, in fact, destroyed *all* copies of the Stack contract.

Although this information did not foreclose the statements made in the Government's brief (which were based on the trial evidence), the Government thought it could be claimed to be inconsistent with those statements. To avoid any suggestion that the Government was attempting to hide potentially unfavorable facts (unfavorable to the Government) from the Court, it revealed those facts to the Court in satisfaction of its duty of candor to the tribunal as well as to avoid new accusations of misconduct by the defendant. In doing so, the Government specifically alerted the Court to the fact that the information being supplied had been obtained pursuant to a proffer agreement and the fact that the terms of the agreement precluded the government from using the defendant's statements against him. A94.

While the defendant appears to belittle the point, *see* Def.'s Br. at 35-36, n.19, the tone of the defendant's filings, both those filed *pro se* and those filed by his various lawyers, make it crystal clear that, if the Government had *not* revealed the information it had learned from the defendant's proffer sessions, the defendant would have claimed to both the district court and this Court that the Government had violated its duty of candor by *not* revealing information in its possession that was arguably inconsistent with the statements in the Government's merits brief.

Whereas the proffer agreement precluded the use of the defendant's statements against him, it did not preclude the

use of the statements against the Government. A fair reading of the Government's opposition to the motion to recall the mandate shows that it was not offering the proffered information against the defendant. Indeed, as the Government noted in its opposition, the post-trial proffer statements were strictly irrelevant to the issue on appeal, *i.e.*, whether the trial evidence was sufficient to support his conviction for obstruction of justice. The defendant's proffered statements were only relevant to his accusations of misconduct against the Government and, in particular, his claim that the Government intentionally misrepresented the record in its merits brief.

As the district court observed in denying the defendant's motion for bail pending appeal, "The government credibly explained that it found it necessary to disclose [the proffer information] because, even though it did not consider Spadoni's [recall] argument compelling, there was some factual basis to it – *i.e.*, the information Spadoni had disclosed in his proffer – that he had not, in fact, destroyed at least one copy of the Stack contract file. Then, in order to avoid any further accusations of misconduct, the government also acknowledged that at the time it drafted its brief stating that the trial evidence showed Spadoni has 'purged' or 'destroyed' the Thiesfield and Stack contract files, it knew, based on Spadoni's proffer, that he had not, in fact, destroyed or purged at least one copy of the Stack contract file." GA549. As the court went on to observe, "Viewing the government's use of Spadoni's proffer statement in this context, the [Second Circuit panel] could not have found that the government used Spadoni's statement *against* him, – *i.e.*, to inculcate or incriminate him. Rather, it was apparent that the government actually

used them against itself in an effort to be completely candid with the court, to correct the record and to avoid any accusation that it was attempting to hide facts that potentially could be unfavorable to it.” GA550. Because the government offered the defendant’s statements against *itself*, and not against the defendant, the court found and “concluded that the government had not breached the proffer agreement and had not engaged in any misconduct that required dismissal of the indictment.” GA550.

In sum, the Government did not breach the proffer agreement in this case by disclosing proffer information in its post-verdict, post-sentencing, post-appeal, post-denial of a petition for rehearing submission to this Court. In responding to the *pro se* motion to recall the mandate that was filed some eleven months after the mandate had issued, the Government disclosed proffer information, not against the defendant, but against itself, in that it viewed this information as marginally helpful to the defendant’s argument that the Government had misstated facts in its brief.

ii. Any breach that did occur was harmless

As set forth above, the Government did not breach the proffer agreement at issue in this matter; however, even assuming *arguendo* that such a breach were to be found, that breach would be subject to harmless error review. This is so even in an instance where, as in *Olunwanisola*, there is specific finding of a violation of a fundamental constitutional right. *See id.*, 605 F.3d at 133. As noted by the district court in denying the defendant’s motion for bail pending appeal, “[C]ontrary to Spadoni’s bald

assertion that the government’s ‘harmful and indeed likely devastating’ disclosure of his proffer statements caused him prejudice, there is nothing in the record to suggest that the court of appeals even considered his proffer statements when it denied his motion to recall the mandate. It is far more likely that his motion was denied because he failed to present any ‘grave, unforeseen contingencies’ or a miscarriage of justice that warranted the extraordinary relief he sought.” GA550.

In this same vein, and as set forth in greater detail below, it is also much more likely that the motion to recall was denied because, as the defendant himself recognized in the *pro se* motion, the issues raised in the petition for rehearing could have been resolved by either granting the relief sought (dismissal of the obstruction of justice conviction), or by “issu[ing] a new opinion using other evidence in the record and adverted to by the Government to support its holding.” A65. And there was, of course, such other evidence. As the defendant conceded in footnote 9 of his *pro se* motion, “The Government recited numerous instances of deletions and overwriting in its brief.” A65.

a. The motion to recall the mandate failed to meet the requirements of *Calderon*.

A Court’s inherent power to recall its mandate is an authority to be exercised sparingly. The Supreme Court has described it as an authority “of last resort, to be held in reserve against grave, unforeseen contingencies.” *Calderon v. Thompson*, 523 U.S. 538, 550 (1998). The sparing exercise of that power protects “the profound

interests in repose attaching to the mandate of a court of appeals.” *Id.* (internal quotation marks omitted). Accordingly, and in light of this “profound interest[] in repose,” this Court has held that it will recall its mandate only in ““extraordinary circumstances.”” *Bottone v. United States*, 350 F.3d 59, 62 (2d Cir. 2003) (quoting *Calderon*, 523 U.S. at 550); *see also British Int’l Ins. Co. Ltd. v. Seguros La Republica, S.A.*, 354 F.3d 120, 123 (2d Cir. 2003); *Sargent v. Columbia Forest Products, Inc.*, 75 F.3d 86, 89 (2d Cir. 1996).

In his motion to recall, the defendant simply failed to demonstrate either “extraordinary circumstances” or “grave, unforeseen contingencies” that warranted recall of the mandate. In this regard, the defendant had filed his petition for rehearing of this Court’s decision on November 10, 2008. In that petition, he had argued that the Court should not have upheld his obstruction of justice conviction because there was no trial evidence that he had destroyed the computer files containing the Thiesfield and Stack contracts. A43-A54. According to his rehearing petition, although the trial evidence showed that those two files existed on floppy disks, there was no evidence that they were ever saved on the hard drive of the defendant’s computer, and, therefore, there was no evidence that the defendant had destroyed them. A46-A48. The defendant repackaged this precise argument in his motion to recall the mandate. A66-A73. Specifically, he argued, once again, that his obstruction conviction should be vacated because there was no evidence that he destroyed the Stack and Thiesfield contracts. A66-A7. Once again, he argued that there was no trial evidence that the two contracts were ever saved on the hard drive of his computer and,

therefore, no evidence that he destroyed those documents. A66-A73. Because this Court rejected the same argument in denying the rehearing petition in November 2008, the recall motion clearly could not be described as presenting “extraordinary circumstances,” much less be considered as a response to “grave, unforeseen contingencies.” *Calderon*, 523 U.S. at 550. Arguments that already have been presented to the Court do not amount to the type of “extraordinary circumstances” or “grave, unforeseen contingencies” that justify disturbing the “profound interests in repose” afforded to the mandate of this Court. *Id.*

Moreover, if the Government’s brief was inaccurate (in the defendant’s eyes), he could have noted the alleged inaccuracies in his reply brief, at oral argument, or in his petition for rehearing. As noted above, he did none of these things. Indeed, the defendant’s rehearing petition specifically claimed that it was his own brief, not the Government’s, that misstated facts about the trial evidence on “destruction” of the files. A46, n.1.

Because the issues raised in the motion to recall the mandate were not raised previously before this Court, despite ample opportunities, their consideration is barred by the law of the case doctrine. “Where ‘an issue was ripe for review at the time of an initial appeal but was nonetheless foregone, it is considered waived and the law of the case doctrine bars . . . an appellate court in a subsequent appeal from reopening such issues.’” *Johnson v. Holder*, 564 F.3d 95, 99 (2d Cir. 2009) (internal quotation marks omitted). The doctrine generally

precludes reconsideration of issues that were raised – or could have been raised – in an earlier stage of the case “‘unless ‘cogent’ and ‘compelling’ reasons militate otherwise.’” *Quintieri*, 306 F.3d at 1225 (quoting *United States v. Tenzer*, 213 F.3d 34, 39 (2d Cir. 2000)). “The major grounds justifying reconsideration are an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.” *Tenzer*, 213 F.3d at 39 (citations and internal quotation marks omitted); *see also Johnson*, 564 F.3d at 99-100. Here, no “cogent” or “compelling” reasons militated in favor of reconsidering this Court’s earlier decision. The defendant pointed to no intervening change in the law, there was no new evidence, and there was no clear error or manifest injustice to correct. Thus, without addressing the underlying merits of the claims in the motion to recall the mandate, the motion itself was properly denied because it did not meet the demanding standard set forth in *Calderon*.

b. The government’s brief fairly and accurately summarized the relevant trial evidence

There is likewise no basis to the underlying claim in the motion to recall that the Government somehow perpetrated a fraud on the Court when it stated, in two places in its 62-page brief, that the defendant had destroyed or purged the computer files containing the Stack and Thiesfield contract files. According to the defendant, these two statements constituted fraud because there was no trial evidence that the Stack and Thiesfield contracts were ever saved on the

hard drive of his computer and, therefore, there was no proof that he destroyed those files. A66-A70.

Contrary to the defendant's allegations, the Government's brief accurately and fairly summarized the trial evidence and the reasonable inferences from that evidence. The fact that the defendant disagrees with that presentation of the evidence is hardly surprising, but his disagreement was not evidence of fraud.

Over the course of six pages, the Government's brief described the evidence supporting the defendant's obstruction conviction. GA635-GA638. This evidence included testimony that almost immediately after Triumph received the first grand jury subpoena, the defendant had conversations with Silvester in which he indicated that he anticipated additional subpoenas and discussed the advisability of destroying computer files. GA638-GA640. The defendant also specifically asked Silvester to destroy any copies of one specific contract (related to codefendant Ben Andrews). GA636. Another witness (a Triumph colleague) testified that the defendant had recommended using the program "Destroy-It!" to destroy computer files. GA640. Finally, a forensic examination of the defendant's laptop, revealed that a program named "Destroy-It!" (a program designed to "overwrite and permanently delete" computer files) had been installed on the laptop and run on two separate occasions in specific directories or files. GA638. The analysis revealed that certain files existed on the laptop in May 1999, but were no longer there in April 2000 when the defendant's laptop was turned over pursuant to subpoena. GA638-GA639. Similarly, an

analysis of the backup tapes for Triumph's computer network revealed that certain data existed in May 1999, but was no longer there by August 1999 (after subpoenas had been served).GA640. The analysis revealed that the Stack and Thiesfield contracts had been accessed from the defendant's laptop as early as November 10, 1998 and existed on floppy diskettes as late as December 31, 1999 and May 31, 1999. GA639. "Neither file was on the computer when seized, and no floppy diskettes with those files were ever produced" by the defendant despite being subpoenaed in June 2000. GA640.

With this factual background, the Government's brief succinctly explained why, in its view, the evidence was more than sufficient to support the defendant's obstruction of justice conviction. Importantly, at the beginning of the discussion section, the government summarized its argument with the following sentence: "Viewing the evidence in the light most favorable to the Government, there was more than sufficient evidence for a reasonable juror to conclude that the defendant corruptly endeavored to obstruct the grand jury, that is, that he acted in a way that had the natural and probable effect of obstructing . . . the grand jury by deleting, overwriting, or failing to produce computer records that were relevant to the grand jury investigation." GA642-GA643.

In the motion to recall, the defendant was upset with the Government's suggestion that he had destroyed the files containing the relevant contracts. In the preliminary statement, the Government had stated that the defendant "purged computer files that related directly to the case,

including draft contracts for Stack and Thiesfield, staying one step ahead of the stream of subpoenas.” GA633. In the brief itself, the Government observed that “[i]f not for the fortuitous ability of the forensic examiner to locate obscure traces of these files on the laptop, the files’ destruction would have eliminated these files’ electronic trails entirely.” GA644. The defendant claimed that there was no evidence that he had destroyed the contract, so that these statements constituted a fraud on this Court. But these statements have to be read in the context of the entire brief.

Throughout the brief, the Government fairly and accurately described the evidence against the defendant, including the facts relating to the Thiesfield and Stack contracts. In each discussion of those contracts, including the two sentences immediately prior to the allegedly “fraudulent” statement, the Government explained (1) that the documents had been accessed from the computer as early as November 10, 1998, (2) that those documents existed on floppy diskettes at a later date, (3) that neither file was on the laptop when it was seized, and (4) that no floppy diskettes with those files were ever produced. GA639-GA640. With this careful description of the raw facts relating to those contracts, it strained credulity to suggest that the Government’s analysis of those facts in the following sentence was somehow designed to defraud the Court.

Second, and more significantly, the jury was reasonably entitled to infer, based on the trial evidence, that the defendant had in fact destroyed the two computer files

relating to the Stack and Thiesfield contracts. On this point, the evidence showed the following: (1) the defendant had conversations about destroying documents that might be called for in a future subpoena; (2) the defendant asked Silvester to destroy all copies of a different contract; (3) the defendant installed and used a computer program to permanently destroy certain files and directories on his computer; (4) certain files and programs existed on his laptop early in the investigation, but were not there when his laptop was obtained by subpoena in April 2000; (5) certain files and directories on the computer network existed on early backup tapes but did not exist on later backup tapes; (6) the Stack and Thiesfield contracts were accessed on the defendant's computer on November 10, 1998 and existed on a floppy diskette in 1999; and (7) the defendant never produced those files, whether on his computer or on a floppy diskette, in response to a grand jury subpoena. From this evidence, it would certainly have been a reasonable inference for the jury to conclude that the defendant had destroyed the files containing the Stack and Thiesfield contracts.

Thus, the Government's brief did not contain any misstatements and did not attempt to defraud the Court. A fair reading of the brief showed that the Government accurately summarized the evidence of obstruction against the defendant. To the extent that summary stated that the defendant had destroyed certain documents, that statement was a fair inference from the trial evidence. *See United States v. Aguilar*, 585 F.3d 652, 656 (2d Cir. 2009) (when considering a challenge to the sufficiency of the evidence,

“a reviewing court must consider the evidence ‘in the light most favorable to the prosecution’ and uphold the conviction if ‘any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt’”) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original)); *United States v. Ware*, 577 F.3d 442, 447 (2d Cir. 2009) (“In reviewing a defendant’s challenge to the sufficiency of the evidence to support his conviction, we must view all of the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government’s favor.”).

Here, it bears note that, even if the Court, in considering the defendant’s motion to recall, were to have credited the defendant’s argument that the trial evidence did not permit a reasonable inference that he had destroyed the Stack and Thiesfield contract files, the evidence was still fully sufficient to show that he obstructed justice by failing to produce those files when requested by subpoena. The inference that the defendant destroyed the Stack and Thiesfield contract files was only one of two possible inferences to be drawn from the trial evidence. The other logical inference – and one that the government repeatedly suggested in its brief – was that the defendant failed to produce those files when they were requested by subpoena. GA640 (noting that floppy diskettes were never produced in response to a subpoena requesting those contract files), GA643 (arguing that the defendant obstructed justice by “deleting, overwriting, or failing to produce computer records” relevant to the investigation), GA644 (“In short, the Government produced evidence that

Spadoni deleted, destroyed, and failed to produce records that were relevant to the grand jury investigation . . .”).

Indeed, the trial evidence for this inference was quite strong: A forensic examination of the defendant's computer showed that he accessed the Stack and Thiesfield contract files in November 1998 and that those documents were stored on floppy disks as late as May 1999 (the Stack contract) and December 1999 (the Thiesfield contract). GA343-GA346, GA441, GA461. On June 23, 2000, the grand jury served Triumph with a subpoena calling for all records (including computerized records) containing any information related to, *inter alia*, contracts with Thiesfield and Stack. GA630-GA631. Finally, as part of Triumph's response to the June 23 subpoena, it produced an affidavit representing that a copy of the subpoena had been forwarded to the defendant's counsel with a request that any responsive documents or materials be produced, that Triumph was advised that hard copies of the subpoenaed documents were produced to the FBI, and that no computer disks were found. GA631. In other words, the evidence showed that Spadoni possessed the contract files on floppy disks in 1999, and yet failed to produce those documents when requested by subpoena. It is difficult to see how this alternative inference, *i.e.*, that he failed to produce the disks instead of destroying them, would help the defendant, because under either scenario the evidence was more than sufficient to support a conviction for obstruction of justice.

Based on the trial evidence, it is reasonable to infer that the defendant either destroyed files containing the Stack and Thiesfield contracts, or he failed to produce them. In

either case, he acted in a way that would have “the natural and probable effect of interfering with” a grand jury investigation. *United States v. Aguilar*, 515 U.S. 593, 599 (1995) (internal quotation marks omitted).

In light of the trial evidence and the inferences to be drawn from it, there is no merit to the argument that a single reference to a proffer statement contained in a footnote of the Government’s response could have influenced this Court in reaching its decision to deny the *pro se* motion to recall the mandate.

iii. The remedy for any harmful breach of the proffer agreement is not dismissal of the indictment, but reconsideration of the motion to recall the mandate by a different panel

The defendant argues that, should the Court conclude that the Government breached the proffer agreement in its response to the motion to recall the mandate and that the breach was not harmless, the proper remedy is to dismiss the indictment as to the defendant. There is no legal or logical support for this argument.

Unlike what might be considered the typical case involving a claimed Government breach of a proffer agreement, this case is different in that the alleged breach occurred before this Court, not the district court, and in the context of a motion to recall a previously-issued mandate, not in the context of a trial or a sentencing. In *Oluwanisola*, for example, this Court concluded that the district court committed harmful error in restricting defense counsel’s opening statement and cross

examination of witnesses based on its reading of the waiver provision of a proffer agreement. *See id.*, 605 F.3d at 133. As a remedy, the Court remanded the case for a new trial. *See id.* at 134. In *United States v. Farmer*, 543 F.3d 363 (7th Cir. 2008), the Seventh Circuit concluded that the Government breached a proffer agreement by disclosing to the probation office proffer information regarding drug quantity, and the PSR improperly relied on that information to reach a higher base offense level. *See id.* at 374-375. As a remedy, the court remanded the case for re-sentencing. *Id.* And in *United States v. Griffin*, 510 F.3d 354 (2nd Cir. 2007), this Court concluded that the Government committed a harmful breach of a plea agreement by failing to recommend acceptance of responsibility. *See id.* at 367. As a remedy, the Court remanded the case to a different district judge to allow for either specific performance of the plea agreement or withdrawal of the guilty plea. *Id.* (“[T]he government’s breach of its commitment is difficult to erase if the case remains before the same judge, because the judge’s decision was based on his assessment of the facts.”) (internal ellipse and quotation marks omitted).

Here, assuming *arguendo*, that a harmful breach of the proffer agreement occurred, the proper remedy, following the logic of *Oluwanisola* and *Farmer* would be to reinstate the prior direct appeal and reconsider the motion to recall the mandate on its merits, without consideration of the proffer information. *Cf. United States v. Pinter*, 971 F.2d 554, 558 (10th Cir. 1992) (holding that proper remedy for breach of cooperation agreement was reinstatement of appeal because the breach occurred during the pendency of the appeal and involved the defendant’s agreement to

withdraw his appeal in exchange for the government's filing of a Rule 35 motion). Moreover, to the extent that the Court is concerned that the panel's consideration of the motion to recall was somehow influenced by the proffer information and that "the government-rung bell cannot be unrung," *Griffin*, 510 F.3d at 367, the motion to recall can be assigned to a different panel.

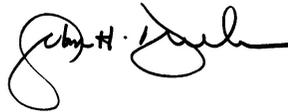
Conclusion

For the foregoing reasons, the defendant's sentence should be affirmed.

Dated: January 9, 2012

Respectfully submitted,

DAVID B. FEIN
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

A handwritten signature in black ink, appearing to read "John H. Durham". The signature is fluid and cursive, with a large initial "J" and "D".

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Certification per Fed. R. App. P. 32(a)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 11,210 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

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