06-4970-cr

To Be Argued By:
WILLIAM J. NARDINI

==========

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-4970-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

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

CHARLES B. SPADONI,
Defendant-Appellant.

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

==========

BRIEF FOR THE UNITED STATES OF AMERICA

==========

JOHN H. DURHAM
Deputy United States Attorney
District of Connecticut

NORA R. DANNEHY
WILLIAM J. NARDINI
Assistant United States Attorneys

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

STATUTES

RULES

OTHER AUTHORITIES

STATEMENT OF JURISDICTION

The district court (Ellen Bree Burns, J.) had jurisdiction under 18 U.S.C. § 3231. Judgment entered on October 27, 2006. Appendix ("A") 101. Spadoni noticed an appeal on October 25, 2006. A100. This Court has jurisdiction under 28 U.S.C. § 1291.

In a previous interlocutory appeal in 02-1208(L), 02-1212(con), Spadoni and co-defendant McCarthy sought to seal proceedings related to a motion to disqualify McCarthy's counsel, R. Robert Popeo, based on his alleged connection to Spadoni's obstruction charges. On May 7, 2002, this Court dismissed that appeal for lack of jurisdiction.

STATEMENT OF ISSUES

1. Whether there was sufficient evidence that Spadoni intended to influence Connecticut State Treasurer Paul Silvester to make an increased investment of state pension funds with Triumph Capital, by agreeing to give percentage-based "consulting contracts" to two of Silvester's associates, such that Silvester had an obvious incentive to maximize the investment amount.

2. Whether Judge Burns abused her discretion in rejecting Spadoni's claim that the Government withheld exculpatory evidence, where she did not clearly err in finding as a fact that the Government never possessed the evidence in question, and in any event the evidence was not material.

3a. Whether there was sufficient evidence that Spadoni intended to obstruct the grand jury by repeatedly purging computer files that he believed would be called for in a series of forthcoming grand jury subpoenas.

3b. Whether Judge Burns correctly instructed the jury on the *mens rea* of the obstruction charges by directly quoting this Court's articulation of the legal standard.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-4970-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

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

CHARLES B. SPADONI,
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

This case is about a corrupt pay-to-play arrangement between Charles Spadoni, the Vice President and General Counsel of an investment firm named Triumph Capital Group, Inc. ("Triumph"), and Connecticut's State

Treasurer Paul J. Silvester, who unilaterally controlled the investment of billions in state pension funds.

Among other things, Silvester corruptly directed investment funds to pay money to his associates, nominally as "consultants." Triumph – operating largely through Spadoni – did just that, agreeing to pay Silvester's campaign manager and intimate friend Lisa Thiesfield $25,000 through a sham consulting contract; to contribute $100,000 to the Connecticut Republican Party to help Silvester's election campaign; and to award sham consulting contracts to Thiesfield and Christopher Stack (Silvester's bagman) for a total of 1% of the amount of pension funds Silvester would invest with Triumph. Once a grand jury began serving subpoenas on Triumph, Spadoni 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.

Spadoni and others were eventually indicted on various charges stemming from these episodes. After a lengthy trial involving Spadoni and Triumph, the jury found both guilty of racketeering, racketeering conspiracy, bribery, wire fraud that deprived the citizens of Connecticut of the honest services of the State Treasurer, and obstruction of justice. Specifically, the jury found Spadoni guilty of bribery in connection with the $2 million "consultant contracts" for Stack and Thiesfield, finding that Spadoni intended to influence Silvester to make an increased investment of state pension funds with Triumph. The jury acquitted Spadoni 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.

On appeal, Spadoni argues: (1) that there was insufficient evidence to support his bribery convictions, on the ground that Silvester never expressly told Spadoni that he was contemplating a higher investment amount as a result of the $2 million consulting contracts; (2) that the Government withheld exculpatory material by failing to disclose statements contained in handwritten notes prepared by Silvester for his attorneys' use during plea negotiations with the Government, which he surmises "must have" been disclosed to the Government; (3) that there was insufficient evidence to support the obstruction charges, on the theory that it was not illegal for him to destroy evidence that he expected to be covered by forthcoming grand jury subpoenas; and (4) that the jury charge on obstruction was incorrect, on the theory that it misstated the necessary mens rea.

Each claim is meritless, and the convictions should be affirmed.

Statement of the Case

On October 11, 2000, a federal grand jury sitting in Connecticut indicted Spadoni and others. A1.

On January 9, 2001, the grand jury returned a 24-count Superseding Indictment against Spadoni; Triumph Capital Group, Inc.; Frederick McCarthy (who owned and managed Triumph); Lisa Thiesfield; and Ben Andrews (Silvester's 1998 running mate for Secretary of State). A6, A107-49. Spadoni was named in the following charges:

Count 1: Racketeering,
18 U.S.C. § 1962(c)

Racketeering Act 2B: Bribery,
Conn. Gen. Stat. §53a-147

Racketeering Act 4B: Bribery,
Conn. Gen. Stat. §53a-147

Racketeering Act 5: Obstruction of Justice,
18 U.S.C. § 1503

Count 2: Racketeering Conspiracy,
18 U.S.C. § 1962(d)

Count 15: Theft/Bribery Concerning Programs Receiving Federal Funds,
18 U.S.C. §§ 666(a)(2) and 2

Counts 16-17: Mail Fraud/Theft of Honest Services,
18 U.S.C. §§ 1341, 1346, and 2

Count 19: Theft/Bribery Concerning Programs
Receiving Federal Funds,
18 U.S.C. §§ 666(a)(2) and 2

Counts 20-23: Wire Fraud/Theft of Honest Services,
18 U.S.C. §§ 1343, 1346, and 2

Count 24: Obstruction of Justice,
18 U.S.C. § 1503

Counts 15-17 and Racketeering Act 2B concerned campaign-related bribes paid by Triumph to Silvester in exchange for Silvester's decision to invest state pension assets with Triumph. Counts 19-23 and Racketeering Act 4B concerned bribes paid by Triumph after Silvester lost his re-election bid. Count 24 and Racketeering Act 5 dealt with Spadoni's destruction of records to thwart the grand jury.

The case was eventually assigned to the Hon. Ellen Bree Burns. On April 16, 2003, Judge Burns denied a motion to dismiss the obstruction charges. A62; 260 F. Supp.2d 470.

Judge Burns severed the defendants into two groups. The first trial, involving Spadoni and Triumph, began with jury selection on June 11, 2003. A69. On July 2, 2003, Spadoni moved for a judgment of acquittal. A73.

On July 16, 2003, the jury convicted both defendants on Counts 1, 2, and 19-24, and found that the Government had proven Racketeering Acts 4B and 5. The jury acquitted both defendants of Counts 15-17, and found Racketeering Act 2B not proven. A75.[1]

On July 30, 2003, Spadoni moved for a new trial. A76. On June 21, 2005, he filed a supplemental declaration in support. A96. On August 5, 2005, the Government responded. A96. On September 13, 2005, Spadoni filed another declaration. A98.

On September 16, 2005, Judge Burns denied Spadoni's motion for judgment of acquittal or a new trial on the obstruction and other claims. A905-30; 2005 WL 2275938.[2]

On September 7, 2006, Judge Burns denied Spadoni's motion based on his *Brady* claims. A889-904; 2006 WL 2595574.

On October 25, 2006, Spadoni was sentenced to 36 months in prison and a $50,000 fine. A101. Spadoni noticed an appeal that day. A100. Judgment entered on October 27, 2006. A101.

---

[1] Co-defendants Thiesfield and McCarthy pleaded guilty to Counts 18 and 19, respectively. A jury convicted Andrews on all but two counts. His appeal is pending. No. 05-2630-cr.

[2] The court granted an acquittal on the RICO charges, but later reinstated the jury's guilty verdict. 2006 WL 2771642.

The defendant is on bond pending appeal.

STATEMENT OF FACTS

Paul Silvester, formerly the Deputy Treasurer of the State of Connecticut, was appointed Treasurer in 1997 when a vacancy arose. A310. 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 a lawyer named Charles Spadoni, who worked in state finance. A310. In 1997, Silvester helped Spadoni get hired by a Boston investment firm called Triumph Capital Group, Inc., which was run by Frederick McCarthy. A310-11. Triumph was already managing some investments for Connecticut when Silvester came to the Treasury. A308-09. Once Spadoni joined Triumph, he became Silvester's primary contact at the firm. A310-11.

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. A308. Moreover, Silvester decided to run for the Treasurer's seat in his own right in the November 1998 election and needed campaign cash. A311-13. 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. A312-13. Spadoni and Triumph agreed to contribute $100,000 to the party, after Silvester told them it would be "helpful" to him. A313-14. Later, when Silvester lacked money to pay his intimate friend Lisa Thiesfield as a campaign manager A314-17. Spadoni announced 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. A317-18. As a result of these campaign contributions, Silvester was influenced to invest state money with Triumph. A324-25.

Silvester lost the election, A323, and Spadoni immediately approached him to invest funds with Triumph, A323-24. Silvester was inclined to invest an amount along the lines of previous deals – about $150 million. A325. Silvester 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. A325. (Unbeknownst to Spadoni until after the investigation started, Silvester had a corrupt deal with Stack to share fees Stack obtained as a finder through Treasury deals. A330) Spadoni 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. A326. Spadoni and others at Triumph hurried to put together sham "consulting contracts" for Stack and Thiesfield; executed Stack's contract on November 11, 1998 – just a day before Silvester signed off on a $200 million investment with Triumph – and fraudulently postdated the

contracts to make it appear they were entered after Silvester left office the following January. 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. A326. *See infra* Part I.A.

Within months of Silvester leaving office, federal investigators began looking into last-minute investments that Silvester 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. A189-90. After a federal grand jury subpoena was served on a Triumph fund, looking for documents related to the Connecticut investment, Spadoni began to delete computer files to prevent them from being obtained by subsequent grand jury subpoenas. He used a file-erasing program called Destroy-It! which had been recommended by Triumph's outside counsel. Spadoni continued to use Destroy-It! as Triumph employees were called before the grand jury and additional subpoenas were issued. *See infra*, Part III.A.

Spadoni and others were eventually indicted on various charges stemming from these episodes. At a lengthy trial involving Spadoni and Triumph, the Government presented testimony from Silvester, who had pled guilty to a number of racketeering and corruption charges. The Government 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 Spadoni's laptop computer. The jury ultimately found both Spadoni and Triumph guilty of racketeering, racketeering conspiracy, bribery, wire fraud (theft of honest services) and obstruction of justice. A75. Specifically, the jury found Spadoni guilty of bribery in connection with the $2 million sham "consultant contracts" given by Triumph to Stack and Thiesfield, finding that Spadoni intended to influence Silvester to make an increased investment of state pension funds with Triumph. The jury acquitted Spadoni 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.

SUMMARY OF ARGUMENT

1. There was ample evidence that Spadoni intended to influence Silvester to make an increased investment by providing sham consulting contracts to Stack and Thiesfield totalling 1% of the investment. The percentage-based nature of that bribe was obviously intended to induce Silvester to maximize the size of Connecticut's investment, since that would maximize the payout to Silvester's cronies. Indeed, given Silvester's testimony that it had precisely that effect on him, the jury could reasonably infer that Spadoni intended that obvious effect. Arithmetic shows that Spadoni guaranteed a $200 million investment from Silvester by having Stack sign a $1 million "consulting contract" two days before the deal closed.

2. Judge Burns did not abuse her broad discretion by denying Spadoni's new trial motion premised on *Brady/Giglio* claims. The Government undisputedly never possessed notes that Silvester had prepared for his attorneys in connection with his plea negotiations. Further, Judge Burns did not clearly err in finding as a factual matter that Spadoni failed to produce evidence that Silvester (or his attorney) had ever provided the Government with the information contained in his notes in any form *other than* as contained in his interview reports (which he adopted), grand jury testimony, and trial testimony. Never having possessed the notes, the Government could not have suppressed them.

Second, Judge Burns, having presided over this lengthy trial, did not abuse her discretion in concluding that the statements in Silvester's notes did not materially differ from his other statements, such that there was a reasonable probability that they could have altered the outcome of the case. Silvester's story remained unchanged: Spadoni expressed an initial hesitation about Triumph paying Stack and Thiesfield as finders (for legal reasons), but he assured Silvester that Triumph would work with them after he left office – a response that Silvester took as a "yes," and which compelling evidence showed was borne out by later events.

3. There was ample evidence that Spadoni intended to obstruct the grand jury. Silvester testified that Spadoni knew the grand jury had served a subpoena on Triumph in connection with an investigation into the Connecticut investment. There was ample evidence that Spadoni correctly believed more grand jury subpoenas were coming; that he periodically used a program called Destroy-It! to irretrievably delete files from his laptop; and that the timing of his deletions tracked the flow of subpoenas, demonstrating a clear correlation between his obstructive acts and the course of the grand jury investigation.

ARGUMENT

I. The Evidence Was Sufficient To Prove That Spadoni Arranged To Provide Sham Million-Dollar "Consulting" Contracts to Cronies of Treasurer Silvester in Exchange for an Increased Investment of State Pension Funds with Triumph

A. Relevant Facts

The Superseding Indictment charged that Spadoni bribed Silvester, in the first instance, when they agreed to circumvent Connecticut campaign financing laws by (1) contributing $100,000 to the Connecticut Republican Party ("CRP"), knowing this would benefit Silvester's campaign, and (2) giving Lisa Thiesfield a $25,000 "consulting" contract so she could work as Silvester's campaign manager. These allegations formed the basis for the "first bribe" charges, Counts 15-17 and Racketeering Act 2B. A116-17, 136-40. The jury acquitted Spadoni on these charges involving the campaign contributions, which would have required a higher showing that he explicitly asked Silvester for a "specific requested exercise of his official power." A482.

Spadoni was also charged in Counts 19-23 and Racketeering Act 4B with a second bribe relating to Silvester's decision to make an increased investment with Triumph, in consideration for Spadoni's agreement to give Stack and Thiesfield fees totalling 1% of the overall investment. A119-20, 141-43.

Viewed in the light most favorable to the Government, a reasonable jury could have found the following:

Silvester testified that just days after his election defeat, Spadoni telephoned Silvester and suggested that Triumph was interested in doing a deal. A323. Spadoni and Silvester met in Silvester's office. Spadoni explained that Triumph was interested in doing an investment with Connecticut in a leveraged high yield bond fund. Silvester was already influenced to make an investment with Triumph for several reasons, including the fact that Triumph had contributed $100,000 to his campaign through the CRP and a $25,000 contract to Thiesfield. A324, 361. When Silvester made this initial decision to do the deal with Triumph, he intended to make the investment along the lines of the prior Triumph investment –$150 million. A325.

After deciding to invest with Triumph, Silvester asked Spadoni for Triumph to pay a "finder's fee" to Stack and Thiesfield of one point (*i.e.*, one percentage of the total contract). A325. Spadoni said "he would discuss it with people in Boston." A325. Neither Stack nor Thiesfield had actually been "finders" – that is, people who put the deal together. A325. Spadoni later told Silvester that he had discussed the matter and "they did not want to pay the fee as a finder's fee; they wanted to wait until [Silvester] was out of office and then sit down with those folks and work it out at that point." A326. Silvester understood this to mean Triumph was acceding to his request: Once he left office, "they would sit down and work it out on terms similar to the economics that we had discussed." A326.

As a result of Spadoni's assurance regarding the payments to Stack and Thiesfield, he was "influenced" to increase the deal from $150 million to $200 million. A326. Indeed, Triumph's comptroller testified that McCarthy explained in September 1999 that the investment amount originally had been "at some smaller amount and it was bumped up to $200 million." Government Appendix ("GA") 80. According to Silvester, he made the increase so Stack and Thiesfield would get more money, since they were to be paid a percentage of the total investment. A326. Silvester testified how Spadoni built in a multiplier by agreeing to his request. Because Triumph agreed to pay a percentage of the total deal, the bigger the deal, the more money would go to Silvester's associates. A326.

Christopher Stack testified that he received a call from Silvester shortly after the election. A198. Silvester told Stack to expect a call from Spadoni, and later told Stack to call Spadoni. A198-99. The weekend following the election loss (Tuesday, November 4, 1998), "there were a flurry of calls both from Paul and several between [Stack] and Charles Spadoni." A199.

In the first call between Stack and Spadoni, Spadoni said it looked like they would be working together. A199. Stack had never solicited work from Triumph, but Spadoni simply explained that he would be sending a draft "consulting" contract A199. Silvester instructed Stack to review the contract carefully and advised that Thiesfield would be getting an identical contract. A199. The contract was straightforward and "didn't entail a lot of activity on [Stack's] part." A199. Silvester told Stack he

was anxious to get the contract signed. A199. Stack received the draft contract at his home fax. A199. Stack also recalled signing the contract on November 11, 1998 – the Wednesday after the flurry of calls – at law offices in New York. A199-200. After Stack signed the contract, no one at Triumph ever asked him to do anything under the contract, until the federal investigation began. A200.

Records from Triumph confirm that a fax was sent from Triumph to Stack's fax on November 9, 1998 (Monday). A199, GA81. Similarly, evidence seized from Spadoni's computer confirmed that documents named "Stack contract.doc" and "LAT contract.doc" were accessed on November 10, 1998 (Tuesday). A505. And the fact that Stack met Spadoni and McCarthy and others on November 11 (Wednesday), was confirmed by the law firm's receptionist Maryanne Leonard. GA53.

The consulting contract signed by Stack on November 11, 1998, was postdated January 15, 1999, and provided for payment of $1 million over three years. Thiesfield signed an almost identical contract. GA1, 5.

B. Governing Law and Standard of Review

A defendant challenging a conviction on sufficiency grounds "bears a heavy burden." *United States v. Masotto*, 73 F.3d 1233, 1241 (2d Cir. 1996). The Court considers the evidence presented at trial in the light most favorable to the government, crediting every inference that the jury might have drawn in favor of the government. The evidence must be viewed in conjunction, not in isolation,

and its weight and the credibility of the witnesses is a matter for argument to the jury, not a ground for reversal on appeal. The task of choosing among competing, permissible inferences is for the fact-finder, not the reviewing court. *See, e.g., United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003). These principles apply to both direct and circumstantial evidence. *See, e.g., United States v. Griffith*, 284 F.3d 338, 348 (2d Cir. 2000). A witness's direct testimony to a particular fact provides sufficient evidence of that fact for purposes of sufficiency of the evidence review. *See United States v. Jespersen*, 65 F.3d 993, 998 (2d Cir. 1995). "The ultimate question is not whether *we believe* the evidence adduced at trial established defendant's guilt beyond a reasonable doubt, but whether *any rational trier of fact could so find*." *United States v. Payton*, 159 F.3d 49, 56 (2d Cir. 1998) (emphasis in original) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

Because Spadoni moved for a judgment of acquittal below, this Court engages in *de novo* review, applying the same standard that governs a general challenge to the sufficiency of evidence. *See Jackson*, 335 F.3d at 180; *United States v. Thorn,* 317 F.3d 107, 132 (2d Cir. 2003).

C. Discussion

The defendant argues that the evidence was insufficient to show that Spadoni agreed to pay money to Stack and Thiesfield with the intent to influence Silvester's decision to increase the investment amount. The defendant's sufficiency claim boils down to this: Spadoni could not

possibly have intended to influence Silvester's decision because Triumph never requested an "increase," and Silvester never told Spadoni that he had been contemplating a different investment amount. This claim is readily dispatched because it suffers from two flaws.

First, there is no support for Spadoni's suggestion that the Government's obligation to prove an "intent 'to influence' an official act" should be read so narrowly that the Government must also prove that the defendant knew the *precise degree* to which the official would act to enrich himself and the defendants when offered a benefit. The defendant essentially claims that the quid pro quo requirement also mandates a completely detailed meeting of the minds between the bribe-giver and the public official as to the quantum by which the official act will be influenced. There is no requirement that the defendant know the precise degree to which the public official will act to enrich himself and, thereby, also enrich the defendant. Indeed, the defendant is not able to cite a case which supports this claim that the bribe-giver must have a specific agreement as to *by exactly how much* the public official will be influenced. Once Spadoni indicated to Silvester that they would work out payments (which corresponded to a percentage of the investment amount) to Stack and Thiesfield after he left office, it was clear that he and Triumph had given Silvester an obvious incentive to maximize the investment, by whatever amount. Spadoni guaranteed a $200 million investment once Triumph gave Stack a contract for $1 million on November 11, 1998. The efforts to post-date the contracts to a time after Silvester's departure from office

demonstrated Spadoni's consciousness of the illicit nature of the pay-off; and the no-show nature of the jobs demonstrated that the only plausible purpose of the contracts was to influence Silvester's investment decision.

One participant in this illegal transaction – Silvester – directly testified that the influence of the multiplier effect of the percentage-based contracts was clear to him at the time. In light of that evidence, the jury was certainly permitted to infer that the multiplier effect was equally apparent to Spadoni, and that he fully intended it to have its predictable effect on Silvester: to encourage him to maximize the invested amount, to maximize the payout to his cronies. And lest there be any doubt on this score, Silvester acknowledged that the defendants' actions did, in fact, influence him: Because Spadoni agreed to give Silvester's friends a percentage of the deal, Silvester upped the deal by $50 million.

Second, rather than focus on the evidence, Spadoni focuses on the district court's decision denying his motion for a new trial and judgment of acquittal. Spadoni cites a passage in which the court stated that "[r]egardless of whether Spadoni and McCarthy knew of Silvester's intent to increase the investment, they agreed to pay Stack and Thiesfield the equivalent of finder's fees in an attempt to influence Silvester's decision to invest in Triumph Capital . . . ." A917. According to Spadoni, the court "impermissibly confused and conflated" the two-bribe theory outlined in the indictment. The district court's statements are beside the point, because this Court reviews the evidence *de novo*. Still, even if the court's statement

was arguably imprecise, its central observation is indubitably correct: In order to convict Spadoni of the second bribe, the jury needed only to focus on *Spadoni's intent to influence Silvester*, not on whether he knew that Silvester was *in fact* influenced as a result. The nature of the two bribes was sufficiently distinct for the jury to reasonably distinguish between them: the first set of campaign-related bribes were designed to induce Silvester to commit himself to eventually invest state funds with Triumph, whereas the second set of bribes – a 1% payoff which Spadoni and Triumph locked in at $2 million – was clearly aimed at maximizing the state dollars that Silvester would commit to the fund.

II. The District Court Did Not Abuse Its Discretion in Rejecting Spadoni's *Brady* Claims, Because He Did Not Show That the Government Possessed Statements in Handwritten Notes Silvester Had Given His Own Lawyer, or That Those Statements Were Material

A. Relevant Facts

1. Silvester's Interviews, Grand Jury Testimony, and Trial Testimony

Silvester signed a proffer agreement on August 27, 1999, and subsequently met with the Government on many occasions. An FBI interview report dated July 12, 2001, which was disclosed before trial, states that Silvester gave the following information:

Silvester stated after the election, Spadoni approached him and wanted him to do a deal with Triumph before he left office. Silvester was influenced to do another deal with Triumph because of their support during the election. Silvester stated he wanted to view the proposed deal more closely because it was a unique investment, a hybrid bond issue. Silvester stated the collateralized bond concept for Triumph was new and they needed help. Silvester stated they were running out of time. Spadoni was concerned about the timing of the deal. Silvester stated Spadoni was concerned about the perception and wanted the deal done quickly to have it appear the deal was in the works for weeks. Silvester proposed to Spadoni that he would like Stack and Thiesfield to be paid as finders and he thought the conversation may have occurred in his office. Silvester told Spadoni he wanted them to be paid a point, split between the two. Spadoni said he would take it up with McCarthy.

Spadoni related that it was a problem (legal reasons) when Silvester was in office but he would be glad to sit with them after he was out of office. Silvester understood that Spadoni would start the process of hiring Thiesfield and Stack during the negotiations. Silvester expected the contract would be done. Silvester also tried to get Triumph to hire Elisabeth Ward from his office. Silvester said he was influenced to raise the State commitment from $100,000,000 or $150,000,000 to $200,000,000. to

> insure Triumph would honor the agreement to pay Stack and Thiesfield.

A663.

Handwritten notes dated August 29, 1999, of the two case agents – FBI Special Agent Charles Urso and IRS Special Agent Joseph McTague – were likewise disclosed in pretrial discovery. Agent Urso's notes reflect the following about Silvester's conversation with Spadoni about fees: "[c]onversation CS-finder fee take up with FM – problem at time legal reasons not comfortable but when out of office-glad to sit with ok after . . . ." A704. Agent McTague's notes reflect:

> Charlie- I want you to pay a finders fee
> to these people
> we want to work with them after your
> out of office
> Finders fee wouldn't work
> Couldn't give job to Elizabeth Ward
> Trouble with his structure ill advised
> for legal reasons.
> He would work something out with
> Lisa +Stack
> 100 million deal-
> split 1 point between the two of them
> He wanted to buy goodwill-insurance
> policy-he wanted her to get a payday . . .

A715-16.

Silvester's grand jury testimony was also disclosed to the defense:

> . . . . I had asked [Spadoni] to pay a finder's fee to Lisa and to Christopher Stack. He said he would check with Fred McCarthy, came back, said that they would rather sit with them separately after I was out of office and work it with them at that time. I proceeded with the investment, thinking that they would work it out after I was out of office. Sometime later, Charlie Spadoni told me that based on discussions he had had with Fred McCarthy, that Fred McCarthy, he believed, was favorably inclined to proceed, and that everything should go fine after I'm out of office.
>
> Q This second part of the discussion, was that again during the course of the negotiations of the deal?
>
> A No. The second discussion, I think, came up a week or two later where he told me that Fred McCarthy was favorably inclined to do so. The first discussion, he said he was going to sit with them after I was out of office, which I took to mean after I got out of office. Sometime later, maybe a week or so, I don't know, sometime later, he said that everything was going to work out, Fred McCarthy was favorably inclined.

A784-85.

On a number of occasions, the Government provided Silvester a copy of his grand jury testimony and interview reports, which he corrected or amplified as needed. A842-48, 858-61.

At trial, Silvester said he asked Spadoni to pay Stack and Thiesfield one percent of the Connecticut investment as a finder's fee.

> Q Okay. At some point did you have a follow-up conversation with Mr. Spadoni regarding your request that Chris Stack and Lisa Thiesfield be paid?
>
> A Yes.
>
> Q *And what was that conversation?*
>
> *A Well, Charlie came back to me and said that he had discussed it and they did not want to pay the fee as a finder's fee; they wanted to wait until I was out of office and then sit with those folks and work it out at that point.*
>
> . . . .
>
> Q What was your understanding when you had that conversation with Mr. Spadoni of the status of your request that Stack and Thiesfield be paid?

A Well, he said after I was out of office he'd sit with these folks and work it out.

Q And what was your understanding --

A Exactly that, that they would sit and work it out on terms similar to the economics that we had discussed.

Q And as a result of that, were you influenced to do anything?

A Yes.

Q What were you influenced to do?

A I needed to increase the deal.

A326 (emphasis added).

When cross-examination began, Silvester confirmed that his testimony was the "sum and substance of things that were said and that [he] didn't remember the exact words." A337-38. Silvester then reviewed his interview report and re-affirmed the events recounted there. A338. On re-direct, responding to an open-ended question to describe this second conversation with Spadoni, Silvester testified as follows:

The second conversation is when he told me that they would prefer not to do a finder's fee arrangement. They would prefer that I wait – that

> they wait until I was out of office, then they would sit with these folks and work something out.

A364.

The evidence established that Spadoni and Triumph did not wait until after Silvester was out of office to hire Stack and Thiesfield, but rather hastened to do so before Silvester closed the deal on November 12, 1998. *See supra* Part I.A.

2. Spadoni's Post-Trial *Brady* Claims

Two years after trial, Spadoni's counsel filed a declaration in further support of his new trial motion. Counsel had obtained from Silvester a set of notes that Silvester had prepared for his attorneys (Hubert Santos and Hope Seeley) in connection with his plea negotiations in 1999. A591; 599-609. According to Spadoni's counsel, Silvester reported that he had delivered these notes to Santos, who had them typed up verbatim. A591-92; 610-13. Attached to the declaration was an unexecuted affidavit which Spadoni's counsel had prepared for Silvester's signature. Counsel represented that Silvester had edited the affidavit, affirmed its truth, and said that he would testify to those facts if subpoenaed, but had declined to execute the affidavit out of an unspecified concern that it might somehow affect his community confinement status. A592-93.

Spadoni directed the court's attention to the following passage from Silvester's personal notes:

> I told Charlie to pay a finder to Stack and Thiesfield and then I wanted Triumph to hire Elizabeth and Mike MacDonald also. He said he would take it up with Fred. He came back and said they would not pay any finder or offer employment to anyone connected to me in exchange for the deal. Charlie said it would be quid pro quo and he could not advise his boss to agree to it. Charlie said that Fred was sympathetic to the situation of certain staffers and they would be as helpful as possible after I left office but that it would have to be arms length and make sense for Triumph. I said fine. A week or two after the deal closed Charlie indicated to me that he believed Fred was favorably disposed to hire Lisa and Stack as consultants.

A611, 604. Spadoni argued that these were "exculpatory statements" by Silvester, which showed that there had been no "quid pro quo," and hence no bribe. A592-93.

In arguing that this material was in the Government's possession, Spadoni relied on the unexecuted affidavit by Silvester, which represented that after Santos went to the attorney proffer, "he advised me that he had conveyed to the Government the information I provided concerning these various deals," A597, and that during his debriefings, "I told the Government the same information that was included in my handwritten notes and which my attorney had advised them of previously, together with additional information," A598.

The Government responded by arguing that this latest variant of a *Brady* claim failed for a number of reasons. Primarily, the Government argued that it never possessed Silvester's notes, nor had it ever been provided that information in any form other than as memorialized in various interviews, agent notes, and testimony. A629-34. The Government submitted notes taken by Agent Urso at the August 16, 1999, attorney proffer, which reflect that Silvester's attorneys provided the following information:

> Triumph CT. CBO- Nov. 98-
> 200,000.00-PS told CS -told
> pay Stack + Lisa T.-fees-
> CS would not pay finder-
> Employee- MM-EW-
> CS told could pay related to a deal.
> McCarthy sympathetick [sic] to staff-
> arms length needed to make sense-
> wk after deal McCarthy favorably to
> hire Stack/LT as consultants-hired
> before-CS made apt for EW-
> MM had revolving door problem-....

A647. These notes were completely consistent with the information subsequently provided by Silvester in his interview reports, grand jury testimony, and trial testimony. In any event, the statements in Silvester's notes were not materially different from what Silvester had said in all his interviews and testimony. A635-39.

3. The District Court's Ruling

Judge Burns rejected Spadoni's *Brady/Giglio* claims. A889-904.[3] The court found speculative Spadoni's allegation that Silvester's attorney "must have denied" during the proffer session that the Triumph deal involved a bribe. A897-98. The court found that Spadoni's reliance on Silvester's handwritten notes, as well as Silvester's reported statements to Spadoni's counsel, did not support a valid *Brady/Giglio* claim. A898.

First, the court found no evidence that "the Government ever had Silvester's notes or that the Government ever heard verbatim what was in those notes," and so the Government could not have "suppressed" those notes. Indeed, there was "no evidence in the record that Santos's statements reflected anything more than Santos paraphrasing Silvester's notes." A900.

Second, the court held that Agent Urso's notes of the proffer session were

---

[3] The court rejected Spadoni's initial *Brady* claim – now abandoned on appeal – based on his "surmises" that the Government had secretly agreed with Silvester's attorney to omit the value of the Triumph investments when calculating his offense level. A894. The Government refuted this claim with a letter that Silvester's attorney had written to Spadoni's attorney before the motion was filed, and which had not been disclosed to the court, specifically disavowing such claims. A895.

> not materially different from the extensive discovery turned over by the Government prior to trial nor from Silvester's testimony at trial, and therefore there is no reasonable probability that, had the evidence been disclosed to Defendant, the outcome of the trial would have been different.

A901. In "every iteration of the events" by Silvester – including pretrial interviews, grand jury testimony, and now Silvester's handwritten notes – "Spadoni's initial response was to decline Silvester's request to pay finder's fees to Stack and Thiesfield." A901. Notwithstanding this initial refusal, Spadoni "assured Silvester that they would work out the specifics of how Triumph could help Stack and Thiesfield after Silvester was out of office." A902. Judge Burns concluded that, in fact, Spadoni did just that. No evidentiary hearing was warranted, because even if Silvester or Santos had read the notes verbatim, "the Court does not consider such evidence material." A901.

Further, in light of the language in the documents disclosed to Spadoni, the Government argued "properly at trial that Silvester had accepted responsibility" for the Stack and Thiesfield contracts as bribes. In numerous reviews of his testimony and interview reports, Silvester "made no corrections to the sections pertaining to his post-election meetings with Spadoni," which "manifestly refuted" the *Brady/Giglio* claim that Silvester had ever relayed such information to the Government. A903-04.

B. Governing Law and Standard of Review

Motions for new trial under Fed. R. Crim. P. 33 are "not favored" and should be granted "only in the most extraordinary circumstances." *United States v. Diaz*, 176 F.3d 52, 106 (2d Cir. 1999). At bottom, "the test is whether it would be a manifest injustice to let the guilty verdict stand." *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992) (internal quotation marks omitted). "There must be a real concern that an innocent person may have been convicted." *Id.*

In order to obtain a new trial premised on a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, a defendant must show three things: (1) the evidence in question was favorable to the defendant because it was exculpatory or impeaching; (2) the evidence was "suppressed" by the government; and (3) the suppressed evidence was so material that there is a reasonable probability that it would have produced a different verdict. *See Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). A *Brady* violation occurs only where the government suppresses evidence that "could reasonably [have been] taken to put the whole case in such a different light as to undermine confidence in the verdict." *In re United States (United States v. Coppa)*, 267 F.3d 132, 144 (2d Cir. 2001) (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)). "Evidence is not suppressed if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence." *United States v. Zackson*, 6 F.3d 911, 917 (2d Cir. 1993) (internal quotation marks omitted).

This Court reviews denial of a *Brady* motion for abuse of discretion. *United States v. Gil*, 297 F.3d 93, 101 (2d Cir. 2002). With respect to the materiality element of a *Brady* claim, "[a] district judge's ruling is given deference because the judge presided over the trial and is in a better position than an appellate court to determine the probable effect of new evidence." *United States v. Rivas*, 377 F.3d 195, 199 (2d Cir. 2004) (citing *United States v. Gonzalez*, 110 F.3d 936, 943 (2d Cir. 1997)). This Court will "uphold[] findings of fact that were made in the course of deciding the motions unless they are clearly erroneous." *United States v. Stewart*, 433 F.3d 273 (2d Cir. 2006).

C. Discussion

1. The District Court Did Not Clearly Err in Finding as a Factual Matter That the Government Was Never Provided Silvester's Notes, Nor Did Silvester or His Lawyers Provide That Information Other Than as Recorded in the Agents' Notes, in FBI 302s, and in Silvester's Grand Jury Testimony

Judge Burns did not clearly err when she found, as a factual matter, that the Government was never provided Silvester's notes, nor did Silvester or his lawyers provide that information other than as recorded in the agents' notes, FBI 302 interview reports, or Silvester's grand jury testimony. A900.

First, Spadoni never disputed the Government's claim that neither Silvester nor his attorneys ever provided those notes to the Government, in handwritten or typed form.

Second, even in Silvester's unexecuted affidavit, there was no claim that Silvester's lawyer had read these notes verbatim to the Government during the attorney proffer. The unsigned affidavit includes only the generality that Attorney Santos "had conveyed to the Government the *information* I provided concerning these various deals." A597 (emphasis added). In response to the fourth-hand hearsay offered by Spadoni about what his attorney says Silvester says about what Attorney Santos said he said at the proffer, the Government provided Agent Urso's notes from the proffer. A647. These notes did *not* include the statements from Silvester's notes which Spadoni now claims to be exculpatory – namely, the statement that Triumph would not "offer employment to anyone connected to me in exchange for the deal" or that "Charlie said it would be quid pro quo and he could not advise his boss to agree to it." A611. In short, Judge Burns did not clearly err in her factual finding there is "no evidence in the record that Santos's statements reflected anything more than Santos paraphrasing Silvester's notes." A900. *See, e.g., United States v. Gallego*, 191 F.3d 156, 163 (2d Cir. 1999) (affirming, under clear error standard, district court's finding that government was unaware of alleged new evidence), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004).

Third, Silvester's unexecuted affidavit did not allege that Silvester had used the words in his notes during his

Government debriefings. As with the allegation about what Silvester had been told about the attorney proffer, the unsigned affidavit says only that Silvester "told the Government the same *information* that was included in my handwritten notes . . . ." A598 (emphasis added). This vagueness is telling, since Spadoni nowhere claims that Silvester would testify that he provided this information to the Government in any form *other than as set forth in Silvester's 302s and grand jury testimony*. The Government's voluminous Jencks disclosures for Silvester are contained at A650-861, and they include numerous points at which Silvester was asked open-ended questions about the Triumph deal, *e.g.,* A784-85, or was given the opportunity to correct or amplify any of his interview reports, *e.g.,* A842-59. Likewise, Silvester was asked numerous open-ended questions at trial, both on direct and cross-examination, but never used the language found in his handwritten notes. In sum, Spadoni has offered no evidence – not even Silvester's unsigned affidavit – that Silvester must have essentially read his notes verbatim to the Government, and the Government's evidence demonstrates that the opposite is true. In light of this record, Judge Burns's factual finding to this effect was not clearly erroneous.

2. The District Court Did Not Abuse Its Discretion in Concluding That Silvester's Notes Were Not Materially Different from What He Relayed to the Government in Pretrial Interviews, in the Grand Jury, and at Trial, and Therefore Were Not "Material" in the Constitutional Sense

Judge Burns did not abuse her discretion in concluding that even if Silvester's notes had been provided verbatim to the Government, they were not "material" in the sense that there was a reasonable probability that disclosure would have resulted in Spadoni's acquittal. A901-02.

First, the evidentiary record supports the court's conclusion that throughout his interviews, grand jury testimony (and later his trial testimony), Paul Silvester gave consistent information about his conversations with Spadoni, which did not vary materially from the version of events contained in Silvester's handwritten notes (or, for that matter, Agent Urso's proffer notes). The story remained unchanged: Almost immediately after Silvester lost the election in November 1998, Spadoni approached him to quickly do a Triumph deal; Silvester asked that Triumph pay finder fees to Stack and Thiesfield; after checking with Fred McCarthy, Spadoni said Triumph could not pay them as finders while Silvester was in office, but could work out an arrangement once Silvester left office; that Silvester understood Spadoni's response as "yes"; and that Silvester's understanding was proved correct, as Spadoni and McCarthy arranged to have

Stack's contract signed within a matter of days, before Silvester inked the deal, with payments to begin shortly after Silvester left office in January 1999. Because the Government disclosed this information well before trial, Spadoni did not lack any material information.

Contrary to Spadoni's claim on appeal, Judge Burns did not use the consistency of Silvester's statements to conclude that a prior inconsistent version was immaterial. Def. Br. 43-44. Instead, Judge Burns reviewed Silvester's handwritten notes and (unexecuted) affidavit together with Silvester's detailed and consistent accounts to the FBI, the grand jury, and the trial jury to conclude that there were, in fact, *no material inconsistencies* among those documents. The central point of Judge Burns' ruling was that Silvester's notes, at best, indicated some initial hesitation on Spadoni's part when Silvester asked that Stack and Thiesfield be paid as finders. Indeed, in the principal interview report, Silvester described Spadoni's hesitation as involving "legal reasons" relating to giving Stack and Thiesfield contracts while Silvester was still in office. A663; *see also* A704, 715-16.

Judge Burns correctly concluded that the terms in which Spadoni had supposedly expressed his initial hesitation were not material, because the operative fact in the bribery case was that *Spadoni and Triumph overcame that hesitation and acceded to Silvester's request for sham consulting contracts for Stack and Thiesfield*. The court properly relied on compelling evidence that Spadoni and Triumph executed Stack's sham $1 million consulting contract on November 11, 1998, in concluding that there

was no "reasonable probability" of a different trial outcome even if the Government had possessed the statements in Silvester's notes and disclosed them pretrial. Contrary to Spadoni's claim that Judge Burns usurped the jury's role, Def. Br. 43, "[a] district judge's ruling is given deference because the judge presided over the trial and is in a better position than an appellate court to determine the probable effect of new evidence." *Rivas*, 377 F.3d at 199; *see also Stewart,* 433 F.3d at 296 ("the trial court's discretion to decide whether newly discovered evidence warrants a new trial is broad because its vantage point as to the determinative factor – whether newly discovered evidence would have influenced the jury – has been informed by the trial over which it presided"). With her intimate familiarity with this case, Judge Burns was in the best position to compare the quality of the trial evidence against the purportedly "exculpatory" value of the new evidence, and thereby to assess whether the slight variation in wording that appears in Silvester's handwritten notes could have possibly altered the outcome of this trial. *See, e.g., United States v. Brunshtein*, 344 F.3d 91, 101-02 (2d Cir. 2003) (rejecting *Brady* claim partly because even if undisclosed material were exculpatory, Government's trial proof was strong enough to defeat proffered defense).[4]

---

[4] Contrary to Spadoni's contention, Def. Br. 42-43, the Government argued that Spadoni's execution of Stack's contract by November 11 – before Silvester consummated the Triumph deal – was powerful evidence (though not necessary evidence) of his intent to influence Silvester's investment decision.

Finally, Judge Burns did not abuse her broad discretion by declining to hold an evidentiary hearing. When seeking a new trial, a defendant bears the burden of producing evidence that, as a threshold matter, shows at least that material facts are in doubt or dispute. *See United States v. White*, 972 F.2d 16, 20-21 (2d Cir. 1992); *United States v. Colon-Munoz*, 318 F.3d 348, 358-59 (1st Cir. 2003). As noted above, the defense offered only unsupported speculation, and a vague unsigned affidavit in Silvester's name, that the statements in Silvester's notes had ever been provided to the Government – whether in the attorney proffer or by Silvester himself. Judge Burns did not err in finding that Spadoni failed to satisfy his burden in this regard. *See United States v. Sasso*, 59 F.3d 341, 350-51 (2d Cir. 1995) (affirming denial of new trial where perjury claim not factually supported); *Colon-Munoz*, 318 F.3d at 358-59 (affirming denial of *Brady* motion without hearing).

Moreover, once Judge Burns properly found that any differences in phrasing between the statements in Silvester's notes or Agent Urso's proffer notes on the one hand, and the pretrial discovery or trial testimony on the other, were immaterial, there was no reason to hold an evidentiary hearing. *See United States v. Slocum*, 708 F.2d 587, 600 (11th Cir. 1983); *see also Franks v. Delaware*, 438 U.S. 154, 155-56 (1978) (requiring "substantial preliminary showing" of knowing falsity and materiality antecedent to evidentiary hearing in suppression context).

III. The Evidence Was More Than Sufficient To Prove That the Defendant Had the Specific Intent To Obstruct the Grand Jury, and the District Court Properly Instructed the Jury To Determine Whether, in the Defendant's Mind, His Conduct Had the Natural and Probable Effect of Obstructing the Grand Jury

A. Relevant Facts

On May 25, 1999, a grand jury subpoena directed to one of Triumph's funds was served on its Boston office. GA9. The subpoena requested, in relevant part, documents related to the Connecticut investment including records of consultant fees and any dealings with any state employees.

According to Silvester, on the Saturday of Memorial Day weekend 1999, Spadoni told him that Triumph had received that subpoena. A330. Spadoni reported that the grand jury was investigating Silvester. A330. Spadoni said that "they didn't think, based on their consultation with some attorneys in Boston, that the [Stack and Thiesfield] contracts fell under the purview of the subpoena . . . but they anticipated that there'd be additional subpoenas in the future . . . ." A330. In another conversation over Memorial Day weekend, the two discussed computers. Spadoni said that:

> in [Spadoni's] discussions with this attorney in Boston that [Spadoni] had been advised that, you

> know, this particular attorney had been an Assistant U.S. Attorney or U.S. Attorney in the past, said that when the Government starts getting into your business, you know they come in and take your computer, and they're looking for things. And you know, they'll do anything they can to get at you, you know. They can take things that, you know, are not necessarily nefarious and make them look bad. So, it's best if there's nothing – if there's things on your computer that aren't needed for business purposes or the subpoena is not asking for them, then to just get rid of it.

A330-31. Spadoni discussed destruction of computer files and said that "there's a program that you can buy that assists one . . . in doing that," which the lawyer also recommended. A333.[5] Spadoni wanted to know whether Silvester had copies of contracts between Andrews' firm and Silvester's new employer, Park Strategies. (Andrews was to be a conduit for $12,000 in monthly fees from Triumph to Silvester's firm.) A329, 333. Spadoni "wanted that contract to disappear," and asked "if it was on [Silvester's] computer that it not be there anymore," "[o]r if there was a hard copy lying around, [that Silvester] throw it away." A333-34.

On July 13, 1999, Spadoni accepted service of a forthwith subpoena directed to Triumph was served on its Hartford office. The subpoena requested

---

[5] The jury was instructed on, but rejected, an advice-of-counsel defense. A481.2.

> any and all records related to contracts or agreements with, work performed by, and monies provided to Paul Silvester, Lisa Thiesfield, . . . , Christopher Stack, and/or any entities with which these individuals are associated.

GA18.

On July 15, 1999, Spadoni's secretary, Terese Sperry, produced records requested in the July 13 subpoena. GA135. Hard copies of the million-dollar consultant contracts between Triumph, Stack and Thiesfield were produced. The contracts had a typewritten date of January 15, 1999 – well after Silvester signed the $200 million investment. GA1, 5. Sperry was subpoenaed to the grand jury again on December 14, 1999. The primary focus of the December 14 questioning was the computer system in Triumph's Hartford office and Spadoni's use of computers. Sperry left the grand jury a few times during her testimony to speak with her counsel, who was also working with Spadoni. GA133-34.

On December 29, 1999, another grand jury subpoena directed was served on Triumph. This subpoena requested in relevant part all back-up tapes for Triumph computers used by its employees from October 1, 1998, through September 31, 1999. GA19.

Based on analysis of the back-up tapes, on April 11, 2000, a forthwith subpoena was served on Triumph for Spadoni's laptop. GA26.

Finally, the grand jury served Triumph with a subpoena on June 23, 2000, asking for all records – including computerized records – containing any information related to the Connecticut investigation, contracts with Thiesfield and Stack, expense records for Thiesfield, and the personnel file for Spadoni. GA30-31. Triumph produced an affidavit as part of its response, in which a custodian of records represented that a copy of the June 2000 subpoena was forwarded to Spadoni's counsel with a request that any responsive documents or materials be produced, that the custodian was advised that hard copies of the subpoenaed documents were produced to Agent Urso, and that no computer disks were found. GA31.

Special Agent Jeff Rovelli, a trained forensic examiner from the FBI, examined Spadoni's laptop. Agent Rovelli testified that a program named "Destroy-It!" had been installed on the laptop on June 21, 1999 – less than a month after the first subpoena was served – and that the program was designed to "overwrite and permanently delete files which are stored on a computer hard drive." A362. On June 23, 1999, Destroy-It! was run in numerous directories of the laptop, including the "Triumph" and "Fund of Funds" folders. Destroy-It! had also been run on December 28, 1999, approximately two weeks after Spadoni's secretary testified in the grand jury about Triumph's computer system, on two files in a folder named "LAT, LLC" – the name of Lisa Thiesfield's company.

Agent Rovelli also testified that certain data which had been on the laptop before May 31, 1999 – including a

directory named "Silvester" – were no longer there in April 2000. A391-92, 525. A document named "Engagement letter.rtf.doc" had been accessed from the "Silvester" directory as late as May 31, 1999, but both the directory and the document were no longer on the hard drive in April 2000. A392, 525.

As of April 2000, there was a folder on the laptop called "Andrews." Based on his review of journal entries, Agent Rovelli determined that two documents entitled "LAT LLC.doc" and "Engagement Letter.doc" were at one time in the Andrews folder and last accessed on May 31, 1999, but that as of April 2000, those two documents were no longer there. A399-400, 530. Moreover, a document called "Park Strategies Agreement" was last accessed from the Andrews directory on May 25, 1999, but that document was nowhere on the hard drive in April 2000. A402, 530. Using a special forensic utility, Agent Rovelli was able to recover deleted data reflecting part of an engagement letter referencing Triumph, Andrews' company, and one of the principals of Park Strategies. A402-03.

Using another forensic tool, Agent Rovelli was able to determine the properties of documents that had at one time been accessed from the computer. A406. Based on his analysis, Agent Rovelli testified that other documents, named "LAT Contract" and "Stack Contract," had been accessed from the computer as early as November 10, 1998 (before the investment papers were signed), and existed on floppy diskettes as late as December 31, 1999, and May 31, 1999, respectively. A412-15, 507, 527.

Neither file was on the computer when seized, and no floppy diskettes with those files were ever produced.

Agent Rovelli also examined back-up tapes for Triumph's computer network system, produced pursuant to the December 29, 1999, subpoena. The back-up tapes were dated May 18, 1999 (7 days before the first subpoena) and August 27, 1999 (approximately 6 weeks after the July 13 subpoena). As of May 18, under the user "Spadoni, C" was a directory called "Silvester," containing a file called "engagement letter.doc," but that directory was gone by August 27. A371.

Finally, Triumph comptroller Robert Trevisani had a discussion with Spadoni after the investigation began about how computer files can be destroyed. Trevisani suggested that "if we were trying to hide something, we could use a program like CleanSweep," to which Spadoni replied that "[t]he program that you needed would be Destroy-It!" GA88.

B. Governing Law and Standard of Review

Racketeering Act 5 and Count 24 charged Spadoni with obstruction of justice under the omnibus clause of § 1503. That section provides that "Whoever corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede the due administration of justice shall be punished . . . ." The omnibus clause "was intended to ensure that criminals could not circumvent the statute's purpose 'by devising novel and creative schemes that would interfere with the administration of justice but

would nonetheless fall outside the scope of § 1503's specific prohibitions.'" *United States v. Cueto*, 151 F.3d 620, 630 (7th Cir. 1998) (citation omitted).

In order to convict under the omnibus clause, the Government must establish that "(1) there is a pending judicial or grand jury proceeding; (2) the defendant knew or had notice of the proceeding; and (3) the defendant acted with the wrongful intent or improper purpose to influence the grand jury proceeding, whether or not the defendant is successful in doing so – that is, 'that the defendant corruptly intended to impede the administration of that judicial proceeding.'" *United States v. Quattrone,* 441 F.3d 153, 170 (2d Cir. 2006) (citing *United States v. Fassnacht*, 332 F.3d 440,447 (7th Cir. 2003)). In *United States v. Aguilar*, 515 U.S. 593 (1995), the Supreme Court held that in order to prove a violation of the omnibus clause, the Government must establish a nexus between the conduct and the judicial proceeding. "The touchstone for the nexus requirement is an act taken that would have the natural and probable effect of interfering with a judicial or grand jury proceeding that constitutes the administration of justice; that is the act must have a relationship in time, causation, or logic with the judicial proceedings." *Id.* at 599.

The standard of review for evidentiary sufficiency claims appears in Part I.B, *supra*.

This Court "reviews a claim of error in jury instruction *de novo* reversing only where, viewing the charge as a whole, there was a prejudicial error." *United States v.*

Aina-Marshall, 336 F.3d 167, 170 (2d Cir. 2003). There is error only if "a charge either fails to adequately inform the jury of the law, or misleads the jury as to a correct legal standard." *United States v. Doyle*, 130 F.3d 523, 535 (2d Cir. 1997).

C. Discussion

1. The Evidence Was More Than Sufficient To Support a Conviction Under § 1503

a. The Evidence Established That Spadoni Acted Corruptly With Intent To Obstruct the Grand Jury Investigation

Spadoni argues that the evidence was insufficient as a matter of law to support the verdict because the Government failed to establish that he knew that specific documents were under subpoena and destroyed those documents. In so arguing, Spadoni picks and chooses snippets of various cases addressing § 1503 in contexts different from the instant case and ignores that the gist of the crime is the defendant's specific intent or mental state, not the success of the attempt to obstruct.

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 with the grand jury by deleting, overwriting, or failing to produce computer records that were relevant to the grand jury investigation.

Spadoni's own statements were critical evidence in this respect. As noted above, over Memorial Day weekend 1999, Spadoni talked with Silvester about the first subpoena, and said that even if it did not cover Triumph's contracts with Thiesfield and Stack, "they anticipated that there'd be additional subpoenas in the future." A330. Spadoni reported an attorney's advice that he get rid of documents not called for by the subpoena, and his recommendation of a program that would make such files irrecoverable. A330-31, 333-34. Spadoni also suggested that Silvester get rid of contracts between Andrews' firm and Park Strategies. Trevisani confirmed that Spadoni had told him that Destroy-It! was what "you needed" if one were trying to hide destroyed documents. GA88.

Agent Rovelli's forensic analysis revealed that Spadoni had purged computer files with names, at times, and using methods that all indicated a specific intent to thwart the grand jury's ability to obtain files relevant to its developing investigation. For example, the Destroy-It! program was installed on the laptop on June 21, 1999 – less than a month after the first subpoena was served – and run two days later. A372. Moreover, certain data which had been on the laptop before May 31, 1999 (and thus before the Memorial Day conversations) – including a directory named "Silvester" – were no longer there by the time the laptop was obtained by subpoena in April 2000.

A389-91. The evidence showed that the Silvester directory had been accessed as late as May 31, 1999, just days after service of the first subpoena which called for the production of all records regarding any dealings with any state employees. A525. Destroy-It! had also been run on December 28, 1999, on two files in a folder named "LAT, LLC" – the name of Thiesfield's company – just two weeks after Spadoni's secretary had been questioned in the grand jury about Spadoni's computer use. A415-16, 564.

Central to the grand jury investigation was the question of when Triumph had entered into the million-dollar consulting contracts with Stack and Thiesfield. As noted earlier, the paper versions of the contracts that Triumph produced bore a typewritten date of January 15, 1999 – yet the evidence showed this was fraudulent postdating. Forensic analysis showed that documents named "LAT Contract.doc" and "Stack Contract.doc" had been accessed from the computer as early as November 10, 1998, and existed on floppy diskettes as late as December 31, 1999, and May 31, 1999, respectively. Neither file was on the laptop when seized, and no floppy diskettes with those files were ever produced despite specifically being subpoenaed in June 2000. If 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.

In short, the Government produced evidence that Spadoni deleted, destroyed, and failed to produce records that were relevant to the grand jury investigation (and

caused Silvester to do so) and that such conduct had the natural and probable effect of obstructing or impeding the grand jury, and thus violated 18 U.S.C. § 1503.

b. The Defendant Incorrectly Characterizes the Proof Necessary To Establish Specific Intent

Spadoni argues that this evidence is insufficient to state a violation of § 1503 because the evidence failed to establish a "nexus" between the acts of destruction and the judicial proceeding. According to Spadoni, he had to "know that his conduct will impact a grand jury proceeding" and that "destroying documents in the absence of a subpoena seeking the documents was not covered by § 1503." Def. Brief at 58. Spadoni's position boils down to the proposition that in the absence of an allegation that specific documents were under subpoena, it is perfectly lawful to destroy those documents even if the purpose of the destruction was to keep the documents from a grand jury proceeding. In support of this proposition, Spadoni relies on *Aguilar, Schwarz*, and *Quattrone,* as well as isolated remarks of Senators Lott and Hatch in discussing amendments to a different statute.

Spadoni argues that inclusion in the indictment of the phrase "believing that production of records would likely be ordered," renders the charge and evidence at trial legally insufficient under *Aguilar, Schwarz,* and *Quattrone.* Spadoni contends the phrase is tantamount to the situation in *Aguilar* where a defendant uttered a false

statement to an agent who might or might not testify before a grand jury. Spadoni ignores that the *Aguilar* Court looked to whether the agent "acted as an arm of the grand jury," or whether "the grand jury had even summoned the testimony of these particular agents." *Aguilar*, 515 U.S. at 600. Here, unlike the defendants in *Aguilar* and *Schwarz*, Spadoni did not attempt to interfere with a person who had no apparent link to an ongoing grand jury investigation. Rather, the evidence showed that he continually destroyed documents which were not merely within the clear scope of a pending grand jury investigation, but which he (rightly) anticipated would be the subject of a series of subpoenas. A subpoena is a direct command from a grand jury; there is no ambiguity as to whether documents responsive to those commands relate to a grand jury investigation. Actions which are meant to obstruct direct commands from a grand jury are very different from making statements to an agent who might (or might not) indirectly relate that information to the grand jury. In short, there is no intermediary in the present case, as there was in *Aguilar* and *Schwarz*, which might deflect the impact of the defendant's conduct upon the grand jury.

In *Aguilar*, the defendant made false statements to an FBI agent knowing that a grand jury had been convened but without knowing whether the agent would present his statements to the grand jury, and the defendant had not been subpoenaed or otherwise directed to appear before the grand jury. The Supreme Court held that the defendant did not have reasonable notice that his false statement would have "the natural and probable effect" of interfering

with the due administration of justice. *Aguilar*, 515 U.S. at 599 (quotations omitted). Rather, the evidence proved only that the defendant, with knowledge of a grand jury investigation, uttered false statements to an agent. The Supreme Court emphasized that the intent element required that the endeavor have the "natural and probable effect of interfering with the due administration of justice." *Aguilar*, 515 U.S. at 599.

This Court in *Schwarz*, under facts very similar to *Aguilar*, concluded on a post-conviction appeal that the evidence was insufficient to sustain a violation of § 1503 because the Government failed to show the defendant's intent to obstruct the federal grand jury. The Court in *Schwarz* phrased the intent element this way: "the conduct offered to evince that intent must be conduct that is directed at the court or grand jury and that, *in the defendant's mind* has the natural and probable effect of obstructing or interfering with that entity." *Id*. at 108.

This Court's decision in *Quattrone* is instructive because the Court found the evidence sufficient to prove the requisite nexus under § 1503, but reversed the conviction because the court's instructions were incorrect. In *Quattrone*, the Court noted that the following established the requisite intent: the defendant was aware of a grand jury investigation, aware of a subpoena and the general nature of the documents called for under the subpoena, but nevertheless sent an email endorsing a suggestion to follow the company's document retention policy, and, two years later, falsely stated that he was unaware of the regulatory investigation when he sent the

email. Here, as in *Quattrone,* the evidence established that Spadoni was aware of a grand jury investigation, knew that a grand jury subpoena calling for documents relating to Triumph Connecticut-II's relationship with Silvester had been served. In addition, Spadoni knew that more subpoenas were likely yet instructed Silvester to make documents disappear, installed a program called Destroy It!, deleted documents relevant to the investigation, and failed to produce diskettes with relevant information. Further, Spadoni told Triumph's comptroller, Robert Trevisani, that Destroy It! was the program to use if you wanted to hide something. Simply because Spadoni, unlike Quattrone, stayed one step ahead of a particular subpoena does not negate his intent.

c. The Issuance of a Subpoena Is Not a Prerequisite To Establish a Defendant's Intent Corruptly To Obstruct a Grand Jury Proceeding

Finally, the holdings in both *Aguilar* and *Schwarz* do not undermine the long line of cases which provide that the issuance of a subpoena is not necessary to trigger the obstruction of justice statute. *See United States v. Ruggiero*, 934 F.2d 440, 450 (2d Cir. 1991) ("destroying documents in anticipation of a subpoena can constitute obstruction"); *United States v. Gravely*, 840 F.2d 1156, 1160 (4th Cir. 1988) (holding that documents do not have to be under subpoena; it is sufficient if the defendant is aware that the grand jury will likely seek the documents in its investigation); *United States v. Lundwall*, 1 F. Supp.2d

249, 254 (S.D.N.Y. 1998); *United States v. Platt*, No. 85 CR-162, 1985 WL 3244, at *1 (N.D. Ill. Sept. 5, 1985) (no subpoena is necessary); *United States v. Fineman*, 434 F. Supp. 197, 202 (E.D. Pa. 1977), *aff'd*, 571 F.2d 572 (3d Cir. 1978); *United States v. Solow*, 138 F. Supp.812 (S.D.N.Y. 1956); Lent & Williams, *Obstruction of Justice*, 39 Am. Crim. L. Rev. 865, 876 (2002).

Spadoni addresses *Ruggiero* in a footnote and argues that it is inconsistent with *Aguilar* and *Schwarz*. Def. Brief at 51. In fact, *Ruggiero* is consistent with both cases. As in *Schwarz*, the Second Circuit in *Ruggiero* recognized that there must be a nexus between the conduct and the judicial proceeding; that is, the conduct must be directed toward, as in this case, a grand jury. The *Ruggiero* Court stated that to satisfy § 1503, the government must prove not simply that "the defendant knew of" but also that he "sought to influence, impede or obstruct a judicial proceeding." 934 F.2d at 445. And, after correctly stating the law, the Court noted that "destroying documents in anticipation of a subpoena can constitute obstruction." *Id.* at 449.

The Fourth Circuit's decision in *Gravely* is also instructive. The defendant in *Gravely* destroyed a memorandum after: 1) learning about a grand jury investigation; 2) learning of the service of a subpoena on a corporate counterpart; and 3) discussing the nature of the investigation and the need to purge files. The Fourth Circuit correctly noted the elements of a § 1503 violation and that "documents do not have to be under subpoena, it is sufficient if the defendant is aware that the grand jury

will likely seek the document in its investigation." *Gravely*, 840 F.2d at 1160. Nothing in *Aguilar, Schwarz,* or *Quattrone* undermines this rationale.

d. Remarks by Legislators Regarding Amendments to a Related Statute Should Not Control This Court's Interpretation of § 1503

The defendant also relies on isolated remarks by Senators Lott and Hatch in support of the claim that destruction of documents in anticipation of a grand jury subpoena is not covered by § 1503. In response to the events at Enron and Arthur Andersen, Congress enacted the Sarbanes-Oxley Act of 2002. Congress did not amend or even discuss § 1503 but did amend the witness tampering statute, 18 U.S.C. § 1512. Before the relevant amendment, it was a crime to direct someone to alter, destroy or conceal documents in anticipation of an agency or other official proceeding, but not for the person himself to do so.

During the course of a floor debate, Senators Lott and Hatch spoke in favor of an amendment to criminalize the actions of the individual who destroyed documents and made certain far-reaching statements regarding the state of the law. The defendant now asks this Court to rely on these isolated remarks relating to § 1512 in interpreting § 1503, but they cite no authority for the proposition that the statutory language of § 1503 is ambiguous such that resort to legislative history (much less the history of

different statute, which was *later* enacted) is justified. Moreover, "[r]emarks of a single legislator, even the sponsor, are not controlling in analyzing the legislative history." *See Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979); *Garcia v. United States*, 469 U.S. 70, 76 (1984) (eschewing reliance on casual floor debates); *see also In re Olga Coal Company v. Connors*, 159 F.3d 62, 67 (2d Cir. 1998) ("'[i]solated [floor] remarks are entitled to little or no weight' in statutory interpretation.")). Courts have described committee reports as the authoritative source for findings of legislative intent. *See Garcia*, 469 U.S. at 76; *United States v. O'Brien*, 391 U.S. 367, 385 (1968) (referring to committee reports as more authoritative than floor comments). Here, the Committee Report on the bill, H.R. 3763, does not discuss or suggest that the amendments to § 1512 were meant to amend or supplement §1503. *See* H.R. Conf. Rep. No. 107-610, 2002 U.S.C.A.A.N. 542, at 64 (Sarbanes Oxley Act of 2002) (amending § 1512, not § 1503).

Even before the 2002 amendments, there were key differences and purposes between the two statutes such that one cannot rely on floor remarks regarding amendments to § 1512 to interpret § 1503. Section 1503 is the basic obstruction of justice statute and is aimed at protecting the judicial process. As such, in order to establish a violation of § 1503, the government must prove that there was a pending judicial or grand jury proceeding; that the defendant was aware of the proceeding; and that his action be taken with the intent to influence the judicial proceeding, not some ancillary proceeding. On the other hand, § 1512, the witness tampering statute, does not

require that there be a pending proceeding; rather, it criminalizes actions taken with regard to an official proceeding, and for purposes of the statute, an official proceeding need not be pending or about to be instituted. *See* § 1512(e)(1). Furthermore, the official proceedings covered by § 1512 cover more than just judicial proceedings; they also encompass proceedings before federal agencies. Thus, the amendment to § 1512 does not render § 1503's omnibus clause "superfluous" if § 1503 applies to the destruction of documents not yet subpoenaed. Rather, the amendment criminalizes acts beyond that provided for in § 1503. For example, as a result of the recent amendment, an individual who destroys documents even before the commencement of a grand jury proceeding may be charged under the new § 1512(c) but not under § 1503. Likewise, a person who destroys documents that would be used in an administrative proceeding would likewise run afoul of the new § 1512(c) but not § 1503.

Finally, because neither the case law nor the legislative history of the recent amendments to § 1512 suggests that § 1503 is ambiguous as to the destruction of documents "pre-subpoena," such that an indictment must allege that the documents destroyed were under subpoena, the defendant's reliance on the rule of lenity fails. *See* Def. Br. 57. The rule of lenity is "reserved for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to the language and structure, legislative history and motivating policies of the statute." *United States v. Kavoukian*, 315 F.3d 139, 144 (2d Cir. 2002) (quotation marks omitted). "[T]he rule of

lenity applies where there exists a grievous ambiguity in a statute, such that after seizing everything from which aid can be derived, a court can make no more than a guess as to what Congress intended." *Id.* (quotation marks omitted). Here, neither the cases nor the legislative history cast any doubt on the statute's intended scope, and the rule of lenity is inapplicable.

2. The Court Correctly Charged the Jury on Corrupt Intent

According to the defendant, the district court should have charged the jury that the defendant had to "know" that his conduct had the natural and probable effect of obstructing the grand jury and that the portion of the instruction which informed the jury that it must find that "in the defendant's mind, his or its conduct had the natural and probable effect of obstructing or interfering with the grand jury," was erroneous. The argument, however, confuses specific intent that a given result is likely, with the certainty of the conduct's success. Here, the court instructed that

> the obstructing conduct must have some relationship in time, causation or logic to the grand jury proceeding so that it may be said to have the natural and probable effect of interfering with that proceeding.
>
> Thus, to find that the defendant under consideration had the specific intent to obstruct the grand jury, the government must prove that in the

> defendant's mind, his or its conduct had the natural and probable effect of obstructing of interfering with the grand jury proceeding.

A481.2. The court went on to explain, in relevant part, that:

> To act corruptly is to act with the intent to secure an unlawful advantage or benefit either to one's self or another. The word "corruptly" means having the improper motive or purpose of obstructing justice.
>
> Endeavor means any purposeful effort that would have a natural or probable consequence of obstructing, impeding, or interfering with the grand jury. Such conduct is illegal under that statue so long as the defendant acts with intent to obstruct justice and in a manner that is likely to obstruct justice, but is foiled inn some way. It is the endeavor, whether or not successful , that is the gist of the offense. Success of the endeavor is not an element of the offense. To be guilty under this statute the defendant need not actually obstruct justice. All that is required is that the defendant act with intent to obstruct and in a manner that is likely to obstruct.
>
> To satisfy this third element of this statute, you must find that the defendant's obstructing conduct had some relationship in time, causation, or logic to the grand jury proceeding so that it may be said to

> have the natural and probable effect of interfering with that proceeding. In other words, you must find that in the defendant's mind, his or its conduct had the natural and probable effect of obstructing or interfering with the grand jury proceeding. Otherwise lawful actions can constitute obstruction of justice if undertaken with the corrupt intent to accomplish that which the statute forbids.

A481.2.

The district court several times instructed the jury on specific intent and, in fact, used *exactly the words* that this Court described as the "thrust of the Court's opinion in *Aguilar." See Schwartz*, 283 F.2d at 109 ("[T]he conduct offered to evince that intent must be conduct that is directed at the grand jury and that, *in the defendant's mind*, has that natural and probable effect of obstructing or interfering with that entity") (emphasis added). Yet, it is this portion of the instructions, taken verbatim from *Schwartz*, to which the defendant objects. According to the defendant, the instruction allowed a jury to convict him of obstruction because it "permitted the jury to convict the defendant if he merely "believed" or "understood" or was under the "impression" or "hoped" that the grand jury would be obstructed. Def. Brief at 60. According to the defendant, the jury had to find that the defendant "knew" that his conduct would obstruct the grand jury as opposed to having a "belief in his own mind," that the conduct would obstruct the grand jury. However, a charge that the defendant must "know" implies that the grand jury will, to a certainty, be obstructed. Yet the success of the

endeavor, much less actual knowledge of such success, is not necessary to demonstrate obstruction. The law prohibits acts done with a corrupt intent to impede the grand jury regardless of whether the acts are sure to succeed.

The deficiencies in the *Quattrone* jury charge are not present here. In *Quattrone,* the charge on specific intent was deficient because it added a paragraph that diluted the correct legal instruction. There, the jury was charged:

> To establish that the defendant acted with corrupt intent, the government must also prove something called the existence of a nexus between the defendant's conduct, should you find it, and the pending grand jury proceeding. That is to say, the government must prove some relationship in time, causation or logic, between the defendant's actions and the grand jury proceeding so that his action or actions may be said to have the natural and probable effect of interfering with that process. That is nexus.
>
> *I charge that if you find either A, the defendant directed the destruction of documents that were called for by a grand jury subpoena or that [B,] defendant directed the destruction of documents that he had reason to believe were within the scope of the grand jury's investigation, then this nexus requirement will be satisfied.*

441 F.3d at 177.

The Court held that the paragraphs of the charge preceding the highlighted sections accurately described the "nexus" requirement. *Id*. at 178. The first highlighted section, however – *"if you find either A, the defendant directed the destruction of documents that were called for by a grand jury subpoena"* – eviscerated the nexus requirement and created a strict liability crime because it "removed the defendant's specific knowledge of the investigatory proceedings and the subpoenas/document requests from the obstruction equation." *Id*. at 179. Thus, the jury might have convicted Quattrone based only on proof that an investigation called for certain documents and that he ordered the destruction of those documents, without regard to whether he intended obstruct the investigation.

The charge in this case does not suffer from the same deficiency as that in *Quattrone*. The court's charge adequately informed the jury of the law and was not misleading about the correct legal standard. The court did not effectively remove the specific intent requirement; rather, the instructions followed that portion of the instructions deemed correct by the *Quattrone* Court and, in fact, emphasized that the jury must conclude that defendant had the requisite intent to interfere with the grand jury investigation.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: April 27, 2007

Respectfully submitted,

JOHN H. DURHAM
DEPUTY UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

NORA R. DANNEHY
ASSISTANT U.S. ATTORNEY

WILLIAM J. NARDINI
ASSISTANT U.S. ATTORNEY

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 13,896 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes, and this Certification.

WILLIAM J. NARDINI
ASSISTANT U.S. ATTORNEY

ADDENDUM

18 U.S.C. § 666. Theft or bribery concerning programs receiving Federal funds

(a) Whoever, if the circumstance described in subsection (b) of this section exists–

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof–

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that–

(i) is valued at $5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to

influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

(d) As used in this section–

(1) the term "agent" means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative;

(2) the term "government agency" means a subdivision of the executive, legislative, judicial, or other branch of government, including a department,

independent establishment, commission, administration, authority, board, and bureau, and a corporation or other legal entity established, and subject to control, by a government or governments for the execution of a governmental or intergovernmental program;

(3) the term "local" means of or pertaining to a political subdivision within a State;

(4) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(5) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.

18 U.S.C. § 1503. Influencing or injuring officer or juror generally

(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(b) The punishment for an offense under this section is–

(1) in the case of a killing, the punishment provided in sections 1111 and 1112;

(2) in the case of an attempted killing, or a case in which the offense was committed against a petit juror and in which a class A or B felony was charged, imprisonment for not more than 20 years, a fine under this title, or both; and

(3) in any other case, imprisonment for not more than 10 years, a fine under this title, or both.

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Spadoni

Docket Number: 06-4970-cr

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 4/27/2007) and found to be VIRUS FREE.

Louis Bracco
Record Press, Inc.

Dated: April 27, 2007