IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-13194-J

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

Versus

MAURICE FAYNE,

Defendant-Appellant.

A DIRECT APPEAL OF A CRIMINAL CASE
FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

INITIAL BRIEF

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus APPEAL NO. 21-13194-J

MAURICE FAYNE,

Defendant - Appellant.
_____/

CERTIFICATE OF INTERESTED PERSONS

AND CORPORATE DISCLOSURE STATEMENT

Counsel hereby certifies that the following may have an interest in the outcome of this appeal:

Anand, Justin S. – United States Magistrate Judge;

Baverman, Alan J. – United States Magistrate Judge;

Brown, Michael J. – Assistant United States Attorney, counsel for Appellee;

Cambre, Megan Elizabeth – Former Attorney for Co-Defendant Daniel Jay;

Campbell, Mark A. – Attorney for Co-Defendant Mark Sargent;

Cohen, Mark H. – United States District Judge, Northern District of Georgia;

Erskine, Kurt R. – United States Attorney;

Fayne, Maurice – Defendant/ Appellant;

Finlayson, L. Burton – Attorney for Co-Defendant Daniel Jay;

Ghali, Kamal – Former attorney for Co-Defendant Daniel Jay;

Huschka, Ryan – United States Attorney, Counsel for Appellee;

Jay, Daniel Eric – Co-Defendant;

Jeffrey, Mark R. – Former Attorney for Defendant/Appellant;

Jumes, Steven Todd – Attorney for Co-Defendant Michael Sargent;

Lake, Anthony C. – Attorney for Co-Defendant Michael Sargent;

Larkins, John K., III – United States Magistrate Judge;

Malloy, Bernita – Assistant United States Attorney, Counsel for Appellee;

Michaels, Sandra Louise – Former Attorney for Co-Defendant Michael Sargent;

Miller, Tanya F. – Former Attorney for Defendant/Appellant;

Nations, Radka – Assistant United States Attorney, Counsel for Appellee;

Phillips, John Russell – Assistant United States Attorney, Counsel for Appellee;

Sargent, Mark T. – Co-Defendant;

Sargent, Michael D. – Co-Defendant;

Smith Durrett, Saraliene – Former Attorney for Defendant/Appellant;

Vineyard, Russell G. – United States Magistrate Judge;

Wade, Caitlyn Virginia – Former attorney for Defendant/ Appellant;

Walker, Linda T. – United States Magistrate Judge

Webster, Leigh Ann – Attorney for Defendant/Appellant

No publicly-traded company or corporation has an interest in the outcome of this appeal or case.

Dated: this 8th day of February, 2022.

/s/ Leigh Ann Webster
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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 34(a), F.R.A.P., the Defendant-Appellant requests oral argument because it would significantly aid in the decisional process.

STATEMENT OF TYPE SIZE AND STYLE

Pursuant to 11th Cir. R. 28-2(d), counsel for Appellant hereby certifies that the size and style of type used in this brief is Book Antiqua 14 PT.

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STATEMENT OF JURISDICTION

The Eleventh Circuit Court of Appeals has jurisdiction to consider this case pursuant to 28 U.S.C. § 1291 and Federal Rule of Appellate Procedure 4. This case involves a direct appeal of a criminal conviction and sentence imposed in the United States District Court for the Northern District of Georgia, Atlanta Division.

STATEMENT OF THE ISSUES

I. This Court should vacate and remand Mr. Fayne's sentence because the government breached its plea agreement with Mr. Fayne, resulting in a higher sentence than the government was required to request under the plea agreement.

STATEMENT OF THE CASE

I. Course of Proceedings

In a second superseding indictment, Mr. Fayne was charged with (1) conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349 (Count 1); (2) three counts of wire fraud, in violation of 18 U.S.C. § 1343 (Count 2-4); (3) bank fraud, in violation of 18 U.S.C. § 1344 (Count 5); (4) false statement to a financial institution insured by the FDIC, in violation of 18 U.S.C. § 1014 (Count 6); (5) ten counts of concealment money laundering, in violation of 18 U.S.C. § 1956(a)(1)(B)(i) (Counts 7-16); (6) three counts of transactional money laundering, in violation of 18 U.S.C. § 1957 (Counts 17-19); and (7) aggravated identity theft, in violation of 18 U.S.C. § 1028A(a)(1) (Count 20). (Doc. 96). Pursuant to a written plea agreement, Mr. Fayne pled guilty to Counts 1 through 6. (Doc. 186-1; Doc. 202). Mr. Fayne was sentenced to 210 months in custody on September 14, 2021. (Doc. 231). Mr. Fayne's counsel moved to withdraw, (doc. 232), and after that motion was granted, undersigned counsel was appointed to represent him in this appeal, (docs. 233, 234).

II. Statement of the Facts

a. Indictment

The second superseding indictment against Mr. Fayne charged him with crimes related to two distinct, but related schemes. Specifically, Counts 1-4 and Count 20 related to an alleged Ponzi scheme involving Mr. Fayne's trucking company, Flame Trucking, Inc., while Counts 5-19 charged Mr. Fayne with crimes related to a Payroll Protection Program ("PPP") loan for the same company. (*See* Doc. 96).

b. Bond Revocation

Mr. Fayne was initially released on bond, at which time he proceeded *pro se*. (Docs. 8, 39, 40). Mr. Fayne was ordered not to contact any witnesses in the case, (doc. 144 at 23-24), and the probation officer eventually moved to revoke his bond on the basis that he had contacted a victim related to the Ponzi scheme, (*see* doc. 125; doc. 145 at 4-6). At the hearing, Mr. Fayne indicated that the alleged victim was suing him in a civil case, and that the case was not related to the allegations against him.[1] (Doc. 145 at 17-20). At

[1] Initially, Mr. Fayne was arrested in relation to the PPP loan, (doc. 1), and the charges related to the Ponzi scheme were added later, (doc. 17).

that hearing, the magistrate judge ordered Mr. Fayne detained until his case was resolved. (Doc. 126).

c. Plea Agreement and Hearing

Pursuant to a written plea agreement, Mr. Fayne entered a plea to Counts 1 (conspiracy to commit wire fraud), 2-4 (wire fraud), 5 (bank fraud), and 6 (false statement to a financial institution). (Doc. 186-1). The plea agreement contained joint recommendations on how the guidelines should apply, including the following:

U.S.S.G. Section	Description	Offense Level
§ 2B1.1(a)(1)	Base offense level	7
§ 2B1.1(b)(1)(J)	Loss amount between $3,500,000 and $9,500,000	+18
§ 2B1.1(b)(2)(A)	10+ victims with financial hardship	+2
§ 2B1.1(b)(10)	Relocating scheme to avoid detection; or sophisticated means	+2
§ 2B1.1(b)(17)(A))	More than $1,000,000 from financial institution	+2
§ 3B1.1(a)	Organizer or leader	+4
§ 3C1.1	Obstruction of Justice	+2

(*Id.* at 5-6).

The government stated in the agreement that, based on the information it knew at the time, the government did not believe any other sentencing enhancements applied. (*Id.* at 6). The government agreed that it would recommend a three-level reduction for acceptance of responsibility, unless Mr. Fayne engaged in behavior "after entering this Plea Agreement"

that was inconsistent with accepting responsibility. (*Id.* at 6-7). The plea agreement then provided that the government would agree to recommend that Mr. Fayne receive a 151-month sentence, "[u]nless the Defendant engages in conduct inconsistent with accepting responsibility, as described more fully in the 'Acceptance of Responsibility' paragraph above." (*Id.* at 8).

The plea agreement also contained a limited waiver of appeal, which applied unless the district court departed or varied above the guideline range as calculated by the court.[2] (*Id.* at 16). The plea agreement excepted ineffective assistance of counsel claims, and it also allowed Mr. Fayne to appeal if the government appealed. (*Id.*).

At the plea hearing, the district court conducted the standard plea colloquy, pursuant to Federal Rule of Criminal Procedure 11. (Doc. 202 at 2-42). Relevant here, the government described the same guideline recommendations enumerated in the chart above, as well as the agreement that the government would recommend a sentence of 151 months, provided that Mr. Fayne did not engage in any conduct inconsistent with acceptance of responsibility. (*Id.* at 12-15).

[2] This appeal can proceed because a claim that the government breached the plea agreement is excepted from the appeal waiver. *See United States v. Hunter*, 835 F.3d 1320, 1324 (11th Cir. 2016).

The government described the factual basis for the plea. (*Id.* at 25-34). Briefly, those facts are that, although Mr. Fayne portrayed himself as the owner of a successful trucking company, that business was not actually profitable. (*Id.* at 25). Instead, it was the subject of various tax liens and civil suits. (*Id.*). Mr. Fayne, along with his three codefendants, sought investors for the trucking company, with the promises of returning profits. (*Id.* at 26). Mr. Fayne and his codefendants provided false information and/or documents to potential investors to encourage them to invest, including by claiming that the company was on the verge of a multi-million dollar contract with Walmart. (*Id.* at 26-27, 30-31). They made misrepresentations about being in contact with a Walmart executive, M.B., when they knew that there was no deal involving Walmart and no contact with M.B. (*Id.* at 27-29). Some investors were told that the deal was with Amazon or UPS, even though no such deal existed. (*Id.* at 30). They returned some limited profits to some investors to suggest that the company was making a profit. (*Id.* at 30-31).

The government also described how Mr. Fayne obtained a PPP loan for the same company by providing false information. (*Id.* at 32-34). Mr. Fayne used the money for personal expenses, including child support and

luxury goods. (*Id.* at 33-34). Mr. Fayne did not dispute any of the facts in the government's description of facts. (*Id.* at 34-35). The court found that there was a factual basis for the plea and accepted Mr. Fayne's guilty plea. (*Id.* at 36, 42-43).

d. Sentencing

The probation officer calculated Mr. Fayne's guideline range consistent with the plea agreement:

U.S.S.G. Section	Description	Offense Level
§ 2B1.1(a)(1)	Base offense level	7
§ 2B1.1(b)(1)(J)	Loss amount between $3,500,000 and $9,500,000	+18
§ 2B1.1(b)(2)(A)	10+ victims with financial hardship	+2
§ 2B1.1(b)(10)	Relocating scheme to avoid detection; or sophisticated means	+2
§ 2B1.1(b)(17)(A))	More than $1,000,000 from financial institution	+2
§ 3B1.1(a)	Organizer or leader	+4
§ 3C1.1	Obstruction of Justice	+2
	Subtotal	37
§ 3E1.1	Acceptance of Responsibility	-3
	Total	**34**

(Presentence Investigation Report ("PSI") ¶¶ 115-127).

The obstruction of justice enhancement was premised on Mr. Fayne's messages to the victim, but the government submitted "clarifications" to argue that it was appropriate in light of Mr. Fayne's *pro se* statements made during the bond revocation hearing. (PSI ¶ 122).

The probation officer determined that Mr. Fayne had eight criminal history points, resulting in a criminal history category of IV. (PSI ¶ 137). The PSI assigned points for convictions from Arkansas, where Mr. Fayne is from. (PSI ¶¶ 131-134). They included charges of battery from 2001, forgery from 2002 and 2003, domestic battery from 2011, and defrauding secured creditors from 2014. (*Id.*).

With a total offense level of 34 and a criminal history category of IV, Mr. Fayne's guideline range was 210 to 262 months. (PSI at 36). Although Mr. Fayne initially objected to a criminal history calculation issue, the probation officer agreed with him and made that change prior to the sentencing hearing, which did not affect the criminal history category. (PSI Addendum; Doc. 246 at 3). Mr. Fayne did not raise any other guideline calculation errors. (*See* PSI Addendum; Doc. 246 at 3, 10-11).

At the sentencing hearing, the district court reviewed the guidelines before asking the parties to address the 18 U.S.C. § 3553(a) factors. (Doc. 246 at 3-11). Relevant here, the government argued as follows:

> First of all, your Honor, let me say that the government honors its commitment in the plea agreement to recommend that the defendant be sentenced to a term of imprisonment of 151 months. That will be my recommendation. So nothing I'm going to say changes that.
>
> However, there are some things that I want to bring to the Court's attention that I think should be highlighted, because the defendant is asking for a sentence that's even lower than that.
>
> And as the Court just noted, the actual guideline calculations have a low-end recommendation of 210 months. So what the government is recommending is already substantially below the low end of the guidelines.
>
> The reason the government did that is because during the plea negotiation phase of this case, the government was not aware of the defendant's extensive criminal history. Not because we didn't look, not because we didn't try to find out, but because when we looked, it was not available to us.
>
> So we operated on the assumption that the defendant was going to be in Criminal History Category I. That's on us. We did not know that he was going to be in a much higher criminal history category.
>
> So to request a sentence that's even lower than what we have already agreed to recommend to the Court, even though the Court is not bound by it, we believe the Court should not follow the defendant's recommendation and request on that front.

(*Id.* at 11-12).

The government then emphasized Mr. Fayne's criminal history again and emphasized the facts leading to the obstruction of justice enhancement

that Mr. Fayne had agreed to in his plea agreement. (*Id.* at 12-13). The government discussed several of the luxury good purchases that Mr. Fayne had made, including the ones listed in the second superseding indictment. (*Id.* at 16-17). The government asserted that the "outrageous and wasteful use of taxpayer money is something that is – and because it happened during this pandemic, that's not reflected in the guidelines, it is not reflected in the 151 months." (*Id.* at 17). The government told the district court that it was "standing by the 151-month recommendation, but we certainly are asking this Court not to go any lower than that." (*Id.*). Referencing the conduct leading to the obstruction enhancement, the government added, "And especially because he has already had an opportunity to tell the truth to the Court and he opted not to do that." (*Id.* at 18).

In response, Mr. Fayne indicated his sincere desire to take responsibility for his actions and to accept his punishment. (*Id.* at 18-19). Mr. Fayne emphasized that he had agreed to every single enhancement that applied because of his desire to accept responsibility. (*Id.* at 19). Mr. Fayne emphasized his desire for his children to escape the cycle of incarceration, as well as the fact that he had only previously served approximately nine months in custody for his prior convictions. (*Id.* at 19-21). Mr. Fayne also

addressed the public nature of the punishment, in light of his prior television appearances. (*Id.* at 21).

After two victims spoke, (*id*. at 23-39), the district court imposed a sentence of 210 months, the low end of the guideline range, (*id*. at 39). The court ordered Mr. Fayne to make restitution of $4,465,865.55. (*Id.* at 39-40). In imposing sentence, the court emphasized the conduct, noting that Mr. Fayne had stolen from the poor to help himself look rich. (*Id.* at 43-44). The court stated:

> And when you think about the amount and the time that this went on, how can I not give him a guideline sentence? And it's not like I'm giving him over guideline sentence. This is a low end guideline sentence.
>
> **Honestly, when I saw what the government's recommendation was after I read the presentence report, I was kind of flabbergasted that they were going so low, that they were doing such a low variance. And now I understand the reason was they didn't understand his criminal history.**

(*Id.* at 46 (emphasis added)).

The district court noted that it had given higher sentences, and concluded in part by saying that Mr. Fayne had "earned" the sentence. (*Id.* at 47). The district court stated that it may have been the "worst case of continual fraud" that it had seen since taken the bench. (*Id.* at 46-47).

STANDARDS OF REVIEW

This Court reviews all arguments raised for the first time on appeal for plain error. *United States v. Rodriguez*, 398 F.3d 1291, 1298 (11th Cir. 2005). This Court will reverse under a plain-error standard when (1) an error has occurred; (2) the error was plain; (3) the error affected substantial rights; and (4) the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id*.

SUMMARY OF THE ARGUMENT

This Court should vacate Mr. Fayne's sentence and remand for resentencing in front of a different judge, at which time the government will be required to specifically perform the promises that it made in the plea agreement to induce Mr. Fayne to give up his rights and plead guilty. In the plea agreement, the government agreed to recommend that Mr. Fayne receive a 151-month sentence, and under this Court's binding precedent, that recommendation had to be meaningful—not just mere lip service to the recommendation. Yet, at sentencing, the government failed to make any meaningful argument why a 151-month sentence was appropriate. Instead, the government informed the district court that it only made that recommendation because it had miscalculated Mr. Fayne's criminal history category, before then emphasizing the seriousness of the fraud. Mr. Fayne did not get the benefit of the bargain that he made. This error was plain, and it affected Mr. Fayne's substantial rights. Accordingly, this Court should vacate and remand Mr. Fayne's sentence.

ARGUMENT AND CITATIONS OF AUTHORITY

I. This Court should vacate and remand Mr. Fayne's sentence because the government breached its plea agreement with Mr. Fayne, resulting in a higher sentence than the government was required to request under the plea agreement.

Traditional contract principles govern the interpretation of plea agreements. *United States v. Puentes-Hurtado*, 794 F.3d 1278, 1284 (11th Cir. 2015). When there are ambiguities, the plea agreement must be construed against the government. *United States v. Copeland*, 381 F.3d 1101, 1105-06 (11th Cir. 2004). "The rationale for this approach to interpretation is that a plea agreement must be construed in light of the fact that it constitutes a waiver of substantial constitutional rights requiring that the defendant be adequately warned of the consequences of the plea." *Id.* at 1106 (quotation omitted). "Because plea bargaining requires defendants to waive fundamental constitutional rights, we hold prosecutors engaging in plea bargaining to the most meticulous standards of both promise and performance." *United States v. Hunter*, 835 F.3d 1320, 1330-31 (11th Cir. 2016).

"A material promise by the government, which induces a defendant to plead guilty, binds the government to that promise." *Id.* at 1324 (quotation omitted); *Santobello v. New York*, 404 U.S. 257, 262 (1971) ("[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so

that it can be said to be part of the inducement or consideration, such promise must be fulfilled."). Therefore, the government breaches the plea agreement if it fails to perform the promises on which the plea was based. *Hunter*, 835 F.3d at 1324.

Whether the government is in breach is assessed "according to the defendant's reasonable understanding at the time he entered his plea." *Id.* (quotation omitted). An objective standard is used to determine whether the government's actions are inconsistent with the defendant's understanding of the plea agreement, and this Court is not to read the agreement in a hyper-technical or rigidly literal manner. *Id.* If the government is allowed to act in a way inconsistent with Mr. Fayne's reasonable understanding of the plea agreement, he cannot be said to have been aware of the consequences of the plea. *United States v. Rewis*, 969 F.2d 985, 988 (11th Cir. 1992).

The Fifth Circuit has held, in a case binding on this Court, that the benefit of a government recommendation is a "forceful and intelligent recommendation" for the benefit bargained for in the plea agreement. *United States v. Grandinetti*, 564 F.2d 723, 727 (5th Cir. 1977) (reversing where the government "was not only an unpersuasive advocate for the plea agreement, but, in effect, argued against it"). This Court has rejected half-

hearted recommendations in the years since *Grandinetti*. For example, in *United States v. Taylor*, 77 F.3d 368, 370-72 (11th Cir. 1996), the government agreed to recommend a ten-year sentence, but then advocated for guideline enhancements that required a sentence longer than ten years. While the government technically recommended the ten-year sentence, this Court held that this "recommendation, which merely paid 'lip service' to the agreement, is insufficient to rectify the breach committed when the government advocated a position requiring a longer sentence than it had agreed to recommend." *Taylor*, 77 F.3d at 371 (*citing United States v. Canada*, 960 F.2d 263, 269-70 (1st Cir. 1992), for the proposition that the government's "overall conduct must be reasonably consistent" with its recommendation).

This Court has emphasized the importance of holding the government to its obligations:

> In closing we note that, for better or worse, plea bargains have become an essential part of our criminal justice system. It is in the best interests of the government, as well as the system as a whole, that defendants be able to count on the government keeping the promises it makes in order to secure guilty pleas. Those broader interests, as well as each individual defendant's interest in receiving the benefit of his bargain, require that courts stand ready and willing to hold the government to its promises.

Taylor, 77 F.3d at 372. This Court should do so here.

a. The government paid mere lip service to the recommendation contained in the plea agreement, while effectively arguing against its own recommendation.

Here, the government breached its agreement with Mr. Fayne by paying mere lip service to its obligation to recommend that he be sentenced to 151 months in prison. Although the government acknowledged the recommendation, the government repeatedly told the court that it was making the recommendation that it was required to make under the plea agreement before immediately discounting its own recommendation. Moreover, the government failed to meaningfully argue for that sentence—or to take *any* steps to even suggest to the court that the sentence was appropriate. Because Mr. Fayne had "every right to expect that in exchange for his guilty plea[,] the government would strongly recommend the agreed to sentence," and because the government utterly failed to do so, the government breached the plea agreement. *See Grandinetti*, 564 F.2d at 726.

i. The government emphasis that it did not know about Mr. Fayne's "extensive criminal history" at the time of his plea constituted a breach of the plea agreement.

The government almost immediately told the court that it was required to make the 151-month recommendation, but that it only agreed to make that recommendation because it did not know about Mr. Fayne's

"extensive criminal history" at the time it entered into the plea agreement. (Doc. 246 at 12). By explaining that it had failed to get the correct information about Mr. Fayne's criminal history, the government immediately gave the district court grounds to discount its 151-month recommendation. Critically, there was nothing in the plea agreement that allowed the government to negate its 151-month recommendation if it found out additional information about his criminal history.

This Court has held that the government is bound to make the recommendation contained in the plea agreement even where subsequent information changes the application of the guidelines. In *United States v. Johnson*, 132 F.3d 628, 630 (11th Cir. 1998), the government learned of information that supported a much higher drug quantity than that agreed to in the plea agreement. This Court held that the government breached the plea agreement by "abandon[ing] the agreement he made . . . and became an enthusiastic advocate for a 'fact' at odds with the 'fact' to which he had stipulated." *Johnson*, 132 F.3d at 631.

The First Circuit faced a similar situation in *United States v. Clark*, 55 F.3d 9, 12 (1st Cir. 1995). There, the government had previously agreed not to oppose a reduction for acceptance of responsibility, but then argued to the

court that it had learned information sufficient to oppose the reduction, including the defendant's alleged obstruction of justice. *Clark*, 55 F.3d at 12. The First Circuit noted that, "[b]y stating that it was unaware of the alleged obstruction at the time it entered into the plea agreement, the government indicated that it would not have made this plea agreement had it known what it knows now." *Id.* at 13. This constituted a breach. *Id.* at 13.

Here, the government was not relieved of its obligations in the plea agreement merely because it subsequently found out additional information. It is unclear how or why the government could not find Mr. Fayne's criminal history prior to entering into the plea agreement, but it is important to note that the government was on notice that Mr. Fayne had some sort of criminal history prior to entering into the plea agreement because it noted in the indictment that he used some of the funds to pay restitution. (*See* Doc. 96 at 12). It is not Mr. Fayne's fault that the government could not find publicly available records to confirm his criminal history—including the records that the probation officer apparently found without a problem. (*See* PSR ¶¶ 130- 134, 141-144). The fact that the government did not do so prior to entering into the plea agreement cannot be held against Mr. Fayne, who entered into the plea agreement with the expectation that

the government would meaningfully recommend 151 as the appropriate sentence.

Moreover, the plea agreement only allowed the government to fail to recommend 151 months if Mr. Fayne engaged in conduct inconsistent with the acceptance of responsibility. (Doc. 186-1 at 7-8). Therefore, the government was not relieved of its obligations simply because the government found out subsequent information. If the government wanted to be able to change its recommendation based on additional information, it should have included that in the same provision that said it would not be required to make that recommendation unless Mr. Fayne engaged in conduct inconsistent with the acceptance of responsibility.

Without an express provision in the plea agreement, there is no basis on which the defendant "reasonably should have understood that the government could opt out of" its obligations. *Hunter*, 835 F.3d at 1326. Facing a similar issue in *Copeland*, this Court noted that "the agreement suffers not from ambiguity in the usual sense but from the omission of language to specifically address Copeland's situation." *Copeland*, 381 F.3d at 1107. The Court continued, "the government neglected to include any language in the plea agreement to reflect its alleged intention, and without

additional information, we cannot simply fill the gap left by the government with the language it should have included." *Id.* at 1109. This Court should not allow the government to escape its obligations based on an issue that was not provided for in the plea agreement.

ii. The government breached the plea agreement by plainly suggesting to the court that a higher sentence was appropriate.

The government's subsequent arguments just exacerbated the problem. Indeed, the government made explicit arguments that the 151 months did not fully encompass the nature of the fraud, emphasizing that the "outrageous and wasteful use of taxpayer money . . . [is] not reflected in the guidelines, is not reflected in the 151 months." (Doc. 246 at 17). Therefore, the only arguments that the government did make supported a higher sentence than the one that Mr. Fayne bargained for in his plea agreement. *See Taylor*, 77 F.3d at 370 ("It was entirely reasonable for Taylor to understand the government's promise to recommend a ten-year sentence as including a promise not to advocate" for a longer sentence.).

The government's comments that it was "standing by the 151-month recommendation" amounted to mere lip service for that recommendation. (*See* Doc. 246 at 11-12, 17-18). The government failed to provide even one

argument to suggest that a below guideline range sentence was appropriate here. Notably, "*Santobello* prohibits not only explicit repudiation of the government's assurances, but must in the interests of fairness be read to forbid end-runs around them." *Canada*, 960 F.2d at 269 (quotation omitted).

Courts across the country have held that the government breaches the plea agreement, even where the government states its intention to comply with the plea agreement. *See, e.g.*, *United States v. Vaval*, 404 F.3d 144, 153 (2d Cir. 2005) ("Such statements do not, however, insulate the government against a finding of breach."); *United States v. Diaz-Jiminez*, 622 F.3d 692, 696-97 (7th Cir. 2010) (government cannot fulfill its obligation to recommend a sentence by sending "mixed" messages); *United States v. Cachucha*, 484 F.3d 1266, 1270-71 (10th Cir. 2007) (the government must pay more than lip service to the plea agreement); *United States v. Gonczy*, 357 F.3d 50, 54 (1st Cir. 2004) (paying lip service violated spirit of agreement to recommend low-end sentence); *United States v. Moscahlaidis*, 868 F.2d 1357, 1361-63 (3d Cir. 1989) (government's statements offering opinions regarding defendant's character violated plea agreement promise to take no position on whether custodial sentence should be imposed, despite provision allowing the government to provide information relevant to sentencing).

After explaining how it had miscalculated Mr. Fayne's criminal history, the government repeatedly emphasized the extensive nature of the crime. The government noted that it had never used a PowerPoint presentation in any other uncontested sentencing hearing, but used it in this case to demonstrate how Mr. Fayne used the proceeds of the fraud. (Doc. Doc. 216 at 15-17). It defies logic that the government would take an extraordinary step that it had never done in another case if it wanted the district court to take seriously its 151-month recommendation. Instead, it was clear from this example and from the forcefulness of the government's argument about the "outrageous" nature of the fraud that it did not believe that the court should sentence Mr. Fayne to 151 months. "In short, only a stubbornly literal mind would refuse to regard the Government's commentary as communicating" a recommendation for a sentence greater than the 151 months contemplate by the plea agreement. *United States v. Hodge*, 412 F.3d 479, 487 (3d Cir. 2005) (quotation omitted).

Both times that the government stated to the court that it was "honor[ing]" its commitment under the plea agreement, it immediately followed that up by emphasizing something bad about Mr. Fayne. The first time, the government first explained how it had failed to calculate Mr.

Fayne's criminal history category correctly before turning to the conduct that led to the obstruction of justice enhancement, calling it "bold," "outrageous," and "blatant." (*Id.* at 11-13). The second time, the government stated that it was "standing by" its recommendation before doing the same: it immediately told the court that Mr. Fayne "has already had an opportunity to tell the truth to the Court and he opted not to do that." (*Id.* at 17-18). By immediately discounting its recommendation, the government "was not only an unpersuasive advocate for the plea agreement, but, in effect, argued against it." *Grandinetti*, 564 F.2d at 727; *United States v. Has No Horses*, 261 F.3d 744, 750 (8th Cir. 2001) (government breaches its bargain with the defendant if it purports to make the promised recommendation while "winking at the district court" to impliedly request a different outcome").

The government's comments about the obstruction of justice and his lying to a judge referenced Mr. Fayne's *pro se* statements to the magistrate judge at the bond revocation hearing. (*See* Doc. 251 at 15-23). However, that hearing was on December 20, 2020, and Mr. Fayne entered his guilty plea on May 11, 2021. (Docs. 145, 202). Therefore, the bond revocation hearing took place on almost five months prior to the date that he entered the guilty plea in which he accepted responsibility, and approximately nine months prior

to the date of sentencing. The government was therefore well aware of Mr. Fayne's comments at the bond hearing at the time that he entered into the plea agreement. This Court has already said that information known to the government prior to the plea agreement cannot justify any decision to not comply with its obligations in the plea agreement. *See Hunter*, 835 F.3d at 1326 ("Such a practice would render the government's promise to recommend the reduction illusory and defy a defendant's reasonable understanding of the plea agreement."). Therefore, the government could not rely on this conduct to impliedly urge the court to go above the 151 months.

Moreover, according to the plea agreement, the government was only relieved of its agreement to recommend the 151 months if Mr. Fayne engaged in behavior inconsistent with acceptance of responsibility *after* the entry of his guilty plea. (Doc. 186-1 at 7-8). Because Mr. Fayne's *pro se* statements that gave rise to the obstruction of justice enhancement took place well before his plea agreement and because Mr. Fayne plainly accepted responsibility for his actions by entering his guilty plea—and by not challenging any of the enhancements—those statements did not give the

government a basis for failing to fulfill its obligations under the plea agreement.

iii. The fact that Mr. Fayne requested a 120-month sentence did not relieve the government of its obligation to request 151 months.

The government couched its argument as a response to Mr. Fayne's request for a 120-month sentence. However, as noted above, the only basis that would allow the government to escape its obligation to recommend 151 months in prison was if Mr. Fayne engaged in conduct inconsistent with acceptance of responsibility. (Doc. 186-1 at 8). Nothing in the plea agreement required Mr. Fayne to ask for a 151-month sentence. (*See id.* ("the Government agrees to recommend that the Defendant be sentenced to 151 months of imprisonment.")). Therefore, the plea agreement only bound the government to ask for that sentence, not Mr. Fayne.[3] Consequently, the fact that Mr. Fayne requested a 120-month sentence did not excuse the government from its obligation to forcefully and intelligently argue that a 151-month sentence was appropriate. And even if it did, the government cannot unilaterally decide that Mr. Fayne breached the plea agreement.

[3] In counsel's experience, when the plea agreement binds the government but not the defendant, it is almost always the case that the defendant will ask for a lower sentence than that requested by the government.

United States v. Castaneda, 162 F.3d 832, 836 (5th Cir. 1998) ("[D]ue process prevents the government from making this determination and nullifying the agreement unilaterally.").

Mr. Fayne did not get the benefit of his agreement here. In the plea agreement, Mr. Fayne agreed to every single enhancement that applied, and he waived his right to appeal his conviction and sentence. He did not bargain for a lower loss amount, for example. The primary benefit that Mr. Fayne got from his plea agreement was the government's recommendation—that it would recommend to the district court that he receive a 151-month sentence. *Hunter*, 835 F.3d at 1325; *United States v. Rewis*, 969 F.2d 985, 988 (11th Cir. 1992) (instructing reviewing courts to consider the plea agreement against the background of the plea negotiations). Mr. Fayne "waived his substantial right to have the government prove each charge against him beyond a reasonable doubt before a jury of his peers as part of the consideration for the government's promise to recommend" 151 months. *Hunter*, 835 F.3d at 1325. Because the government's "overall conduct" was fundamentally inconsistent with the 151-month recommendation, it deprived Mr. Fayne of the most compelling benefit of the plea agreement. *See Canada*, 960 F.2d at 269.

By both failing to argue that a below-guideline range sentence was appropriate and by essentially telling the district court that it would not have made that recommendation if it had known about Mr. Fayne's "extensive criminal history," the government utterly failed to live up to its promise to forcefully and intelligently recommend that Mr. Fayne receive a 151-month sentence. This constituted a breach of the plea agreement.

b. The government's breach of the plea agreement rises to the level of plain error.

Because Mr. Fayne's counsel did not object at the time of sentencing, this issue will be reviewed for plain error. As argued above, Mr. Fayne has shown that there is error, and that error is plain after, *inter alia*, *Santobello*, *Hunter*, *Taylor*, *Johnson*, and *Grandinetti*. Therefore, the question that remains is whether Mr. Fayne has shown that it affected his substantial rights.[4] Here,

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[4] Where the issue has been preserved, "automatic reversal is warranted." *Hunter*, 835 F.3d at 1328-29 (quotation omitted). It is irrelevant whether the conduct had any impact on the actual sentence imposed.

> [T]he sentence must nevertheless be vacated if the agreement was not kept because the defendant offers his plea not in exchange for the actual sentence or impact on the judge, but for the prosecutor's statements in court. If these statements are not adequate (as opposed to successful), then the agreement has not been fulfilled."

Grandinetti, 564 F.2d at 726. "Under *Santobello*, [this Court is] not concerned with whether the district court was influenced by the government's recommendation (or lack thereof); instead, [its] focus is on the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty." *Hunter*, 835 F.3d at 1329-30 (quotation omitted). This is because of the need to establish

the district court expressly referenced the reason that the government provided to discount its recommendation—that it did not fully understand Mr. Fayne's criminal history when it entered into the plea agreement—when the court imposed sentence. (Doc. 246 at 46). The court's remarks echoed the government's references to the "outrageous" nature of the fraud.

Even acknowledging the seriousness of the offense, the fact remains that, if the government had meaningfully advocated for the 151 months as it promised Mr. Fayne that it would do by virtue of entering into the plea agreement, it is likely that the court would have sentenced him in accordance with the plea agreement, or at least somewhere lower than the 210-month sentence that he received. There is a nearly five year difference between what the government was supposed to recommended and what Mr. Fayne received, and the court may have sentenced Mr. Fayne may have sentenced Mr. Fayne to something in between the two.

Mr. Fayne acknowledges the court's comments, but emphasizes that the government **never** made a single argument about why a below-range sentence was appropriate in this case, and it **only** argued for how serious the

"trust between defendants and prosecutors" in order to "sustain plea bargaining—an essential and highly desirable part of the criminal process." *Id.* at 1329 (quotation omitted).

offense conduct was. If the government had not given the district court justification to utterly ignore its recommendation, the likely result is that the district court would have imposed a sentence at least close to that recommended by the parties. The government's breach of the plea agreement therefore affected his substantial rights.

Mr. Fayne can—and has—met the first three prongs of the plain-error analysis. Therefore, the only question that remains is whether the error "seriously affects the fairness, integrity, or public reputation of the judicial proceedings." *See Rodriguez*, 398 F.3d at 1298. The Supreme Court has instructed that, once the first three conditions of plain-error analysis have been met, "the court of appeals should exercise its discretion to correct the forfeited error." *Rosales-Mireles v. United States*, 138 S.Ct. 1897, 1905 (2018); *see also United States v. Bankston*, 945 F.3d 1316, 1318 (11th Cir. 2019). Accordingly, this Court should exercise its discretion to grant relief to Mr. Fayne in this case.

c. This Court should remand this case for resentencing in front of a different district court judge.

There are two remedies available when a plea agreement is breached: (1) resentencing according to the terms of the agreement before a different judge, or (2) withdrawal of the guilty plea. *Hunter*, 835 F.3d at 1329. In this

Court, withdrawal of the plea is less favored. *Id.* This Court considers the preference of the defendant in deciding which remedy is appropriate. *See id.* Mr. Fayne does not wish to withdraw his guilty plea, and therefore requests that this Court remand for resentencing according to the terms of the agreement in front of a different judge.

CONCLUSION

For the reasons articulated above, this Court should vacate Mr. Fayne's sentence and remand for further proceedings.

Dated: This 8th day of February, 2022.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief contains 6,196 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief was filed by uploading it with the Eleventh Circuit's Electronic Filing System which will automatically serve opposing counsel with the Brief.

Dated: This 8th day of February, 2022.

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