**DOCKET NO: _____**

**SUPREME COURT OF THE UNITED STATES**

**DEAN REYNOLDS,**

**Petitioner,**

**vs.**

**UNITED STATES OF AMERICA,**

**Respondent.**

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**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

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# MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

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**MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS***

NOW COMES Defendant-Petitioner, DEAN REYNOLDS , by and through his attorney, RICHARD D. KORN, and respectfully moves this Honorable Court, pursuant to Rule 39 of the Rules of the Supreme Court of the United States, for leave to file the attached Petition for a Writ of Certiorari without prepayment of costs, and to proceed *in forma pauperis*, and in support of this motion states as follows:

1. Defendant-Petitioner is indigent and was represented in the United States District Court for the Eastern District of Michigan and in the United States Court of Appeals for the Sixth Circuit by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A.

2. Except as noted above, Counsel is unaware of Defendant-Petitioner having sought leave to proceed *in forma pauperis* in any other court.

Wherefore, Petitioner respectfully moves this Honorable Court to grant leave to file the attached Petition for a Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis*.

Dated: 10-03-20

Respectfully submitted,

_____
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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

### QUESTION I

**IS DEFENDANT'S SENTENCE PROCEDURALLY UNREASONABLE BECAUSE THE DISTRICT COURT INCORRECTLY SCORED THE SENTENCING GUIDELINES, ERRONEOUSLY CALCULATING THE PROFIT TO BE OBTAINED UNDER A CONTRACT THE GOVERNMENTAL ENTITY HAD THE OPTION OF OPTING OUT OF, AND IMPROPERLY ENHANCING THE SENTENCING GUIDELINES FOR OBSTRUCTION OF JUSTICE BASED ON UNRELIABLE AND INSUFFICIENT TESTIMONY, AND SHOULD THE MATTER BE REMANDED TO THE DISTRICT COURT FOR RESENTENCING?**

### QUESTION II

**IS DEFENDANT'S SENTENCE PROCEDURALLY UNREASONABLE BECAUSE THE DISTRICT COURT DID NOT PROPERLY CONSIDER THE NEED TO AVOID UNWARRANTED SENTENCE DISPARITIES AMONG DEFENDANTS WITH SIMILAR RECORDS WHO HAVE BEEN FOUND GUILTY OF SIMILAR CONDUCT, RESULTING IN A SENTENCE THAT IS SUBSTANTIVELY UNREASONABLE FOR BEING EXCESSIVE AND GREATER THAN NECESSARY TO EFFECTUATE THE PURPOSES SET FORTH IN THE SENTENCING STATUTE, 18 U.S.C. § 3553, AND SHOULD THE MATTER BE REMANDED TO THE DISTRICT COURT FOR RESENTENCING?**

## QUESTION III

**IS DEFENDANT'S SENTENCE SO DISPROPORTIONATELY SEVERE COMPARED TO THE SENTENCES IMPOSED ON THE CO-DEFENDANTS IN THIS CASE AS TO GIVE RISE TO A PRESUMPTION OF VINDICTIVENESS FOR DEFENDANT EXERCISING HIS CONSTITUTIONAL RIGHTS NOT TO BE COMPELLED TO BE A WITNESS AGAINST HIMSELF AND TO PROCEED TO TRIAL BY JURY, AND SHOULD THIS MATTER BE REMANDED FOR RESENTENCING BEFORE A DIFFERENT JUDGE?**

## LIST OF ALL PROCEEDINGS IN FEDERAL TRIAL AND APPELLATE COURTS RELATED TO THE CASE

**United States District Court for the Eastern District of Michigan:**

United States of America v. Dean Reynolds

Docket No. 16-20732

Honorable Robert H. Cleland

Jury Trial: Commenced June 13, 2018, Verdict Returned June 21, 2018

Sentencing Hearing: Conducted February 6, 2019 and February 12, 2019

Judgment in a Criminal Case Entered February 12, 2019

Notice of Appeal Filed February 12, 2019

**United States Court of Appeals for the Sixth Circuit:**

United States of America v. Dean Reynolds

Docket No. 19-1146

Opinion and Judgment Entered May 7, 2020

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I. Initial Garbage Collection Contract - Entered into November 17, 2010.

J. First Extension of Garbage Collection Contract - Entered into April 1, 2014

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## CITATIONS OF LOWER COURT OPINIONS AND ORDERS

On May 7, 2020, the United States Court of Appeals for the Sixth Circuit issued an unpublished opinion, Docket No. 19-1146, 813 Fed. Appx. 185 (6th Cir. 2020), affirming the Judgment of Conviction and Sentence entered by the Honorable Robert H. Cleland, of the United States District Court for the Eastern District of Michigan, on February 12, 2019 (Judgment in a Criminal Case, ECF No. 283, Pages 1-8, Page ID Nos. 3957-3964). The Opinion of the United States Court of Appeals for the Sixth Circuit and the Judgment in a Criminal Case entered in the United States District Court for the Eastern District of Michigan are attached as part of the Appendix to this Petition.

## BASIS FOR JURISDICTION IN THIS COURT

The Judgment of the United States Court of Appeals for the Sixth Circuit, which Petitioner is requesting be reviewed, was entered in this matter on May 7, 2020. This Petition for a Writ of Certiorari is being filed within 150 days of that date as required by the Order Regarding Filing Deadlines entered by the United States Supreme Court on March 19, 2020. The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS, RULES, AND STATUTES INVOLVED IN THE CASE SET OUT VERBATIM

## UNITED STATES CONSTITUTION

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

## FEDERAL STATUTES

18 U.S.C. § 666

(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.

**United States Sentencing Guidelines**

U.S.S.G. § 2C1.1

(a) Base Offense Level:

(1) 14, if the defendant was a public official; or
(2) 12, otherwise.

(b) Specific Offense Characteristics

(1) If the offense involved more than one bribe or extortion, increase by 2 levels.

(2) If the value of the payment, the benefit received or to be received in return for the payment, the value of anything obtained or to be obtained by a public official or others acting with a public official, or the loss to the government from the offense, whichever is greatest, exceeded $6,500, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

(3) If the offense involved an elected public official or any public official in a high-level decision-making or sensitive position, increase by 4 levels. If the resulting offense level is less than level 18, increase to level 18.

(4) If the defendant was a public official who facilitated (A) entry into the United States for a person, a vehicle, or cargo; (B) the obtaining of a passport or a document relating to naturalization, citizenship, legal entry, or legal resident status; or (C) the obtaining of a government identification document, increase by 2 levels.

Application Note 2:

More than One Bribe or Extortion.
Subsection (b)(1) provides an adjustment for offenses involving more than one incident of either bribery or extortion. Related payments that, in essence, constitute a single incident of bribery or extortion (e.g., a number of installment payments for a single action) are to be treated as a single bribe or extortion, even if charged in separate counts.

In a case involving more than one incident of bribery or extortion, the applicable amounts under subsection (b)(2) (i.e., the greatest of the value of the payment, the benefit received or to be received, the value of anything obtained or to be obtained by a public official or others acting with a public official, or the loss to the government) are determined separately for each incident and then added together.

Application Note 3:

Application of Subsection (b)(2)
"Loss", for purposes of subsection (b)(2), shall be determined in accordance with Application Note 3 of the Commentary to § 2B1.1 (Theft, Property Destruction, and Fraud). The value of "the benefit received or to be received" means the net value of such benefit. Examples: (A) A government employee, in return for a $500 bribe, reduces the price of a piece of surplus property offered for sale by the government from $10,000 to $2,000; the value of the benefit received is $8,000. (B) A $150,000 contract on which $20,000 profit was made was awarded in return for a bribe; the value of the benefit received is $20,000. Do not deduct the value of the bribe itself

in computing the value of the benefit received or to be received. In the preceding examples, therefore, the value of the benefit received would be the same regardless of the value of the bribe.

U.S.S.G. § 2B1.1:

> (b) Specific Offense Characteristics
>
> (1) If the loss exceeded $6,500, increase the offense level as follows:
>
> Loss (apply the greatest) Increase in Level
>
> (A) $6,500 or less.....no increase
> (B) More than $6,500.....add 2
> (C) More than $15,000.....add 4
> (D) More than $40,000.....add 6
> (E) More than $95,000.....add 8
> (F) More than $150,000.....add 10
> (G) More than $250,000.....add 12
> (H) More than $550,000.....add 14
> (I) More than $1,500,000.....add 16
> (J) More than $3,500,000.....add 18
> (K) More than $9,500,000.....add 20
> (L) More than $25,000,000.....add 22
> (M) More than $65,000,000.....add 24
> (N) More than $150,000,000.....add 26
> (O) More than $250,000,000.....add 28
> (P) More than $550,000,000.....add 30

The relevant loss provisions of Application Note 3 of the Commentary to U.S.S.G. § 2B1.1 (cross-referenced above) are:

> 3. Loss Under Subsection (b)(1). - This application note applies to the determination of loss under subsection (b)(1).
>
> (A) General Rule. - Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.
>
> (i) Actual Loss. - "Actual loss" means the reasonably foreseeable pecuniary harm that resulted from the offense.

(ii) Intended Loss. - “Intended loss” (I) means the pecuniary harm that the defendant purposely sought to inflict; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

(iii) Pecuniary Harm. - “Pecuniary harm” means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.

(iv) Reasonably Foreseeable Pecuniary Harm. - For purposes of this guideline, “reasonably foreseeable pecuniary harm” means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.

## STATEMENT OF THE CASE SETTING OUT THE FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED

### THE BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

Defendant was charged in a Tenth Superseding Indictment with four counts of Conspiracy to Commit Bribery Concerning Programs Receiving Federal Funds, 18 U.S.C. §§ 371 and 666(a), and ten counts of Bribery Concerning Programs Receiving Federal Funds, 18 U.S.C. § 666(a) [Tenth Superseding Indictment, ECF No. 158, Pages 1-19, Page ID Nos. 1110-1128]. A jury trial was commenced on June 13, 2018 before the Honorable Robert H. Cleland of the United States District Court for the Eastern District of Michigan, and on June 21, 2018 the jury returned a verdict of guilty on all counts. A sentencing hearing was conducted in court on February 6, 2019, and a continued sentencing hearing was conducted electronically on February 12, 2019. Defendant-Appellant was sentenced to 17 years in prison and the Judgment in a Criminal Case was entered on February 12, 2019. A notice of appeal was timely filed with the United States Court of Appeals for the Sixth Circuit on February 12, 2019.

Defendant-Appellant was charged with offenses against the laws of the United States, and the United States District Court had original jurisdiction pursuant to 18 U.S.C. § 3231. Jurisdiction was bestowed upon the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1291, 18 U.S.C. § 3742, and Rule 4(b) of the Federal Rules of Appellate Procedure. The sentence was pronounced on

February 6, 2019, and the Judgment in a Criminal case was filed on February 12, 2019 (Judgment in a Criminal Case, ECF No. 283, Pgs. 1-8, Page ID Nos. 3957-3964). The Notice of Appeal was timely filed on February 12, 2019 (Notice of Appeal, ECF No. 281, Pgs. 1, Page ID No. 3955). The United States Court of Appeals for the Sixth Circuit filed a Judgment and Opinion in this matter on May 7, 2020, 813 Fed. Appx. 185 (6th Cir. 2020).

## FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED

Defendant was charged in a Superseding Indictment with four Counts of Conspiracy to Commit Bribery Concerning Programs Receiving Federal Funds and ten Counts of Bribery Concerning Programs Receiving Federal Funds. Defendant proceeded to trial by jury and was found guilty on all Counts. Defendant was an elected Clinton Township trustee who was found guilty of accepting bribes in connection with a series of garbage collection contracts approved by the Clinton Township board. Although Defendant had no criminal record, Defendant was sentenced to 17 years in prison. Defendant's convictions and sentence were affirmed on appeal by the United States Court of Appeals for the Sixth Circuit.

Defendant is requesting this Honorable Court to review three issues in connection with the harsh sentence imposed in his case. It is Defendant's position that the district court incorrectly scored the sentencing guidelines by basing the loss amount on the entire ten year length of the garbage collection contract when, under the terms of the contract, the Township had the option of terminating the contract anytime after two years. The Township, aware of the alleged bribery, had not chosen to opt out of the contract because the terms of the contract were, and still are, so favorable to the Township. This issue involving the scoring of the sentencing guidelines in the context of a service contract that allows the governmental entity to opt out of the contract after a certain period of time would constitute a novel issue that has not yet been decided by this Honorable Court. In addition, the district court relied

on unreliable and insufficient evidence to erroneously enhance the sentencing guidelines for obstruction of justice.

It is also Defendant's position that the trial court made no attempt to comply with the statutory mandate of 18 U.S.C. § 3553(a)(6) to consider the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct. Instead the district court focused solely on the most extreme cases from around the country that the Government could compile involving government officials convicted of not just bribery, but racketeering, extortion, money laundering, mail fraud, and other offenses more serious than the bribery convictions of Defendant. This myopic reliance on "similar" cases, that were in no way similar to the circumstances underlying Defendant's offenses, led to the imposition of an unreasonably extreme and harsh sentence. The failure of the district court to comply with the statutory mandate to consider the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct resulted in a sentence that is substantively unreasonable for being excessive and greater than necessary to effectuate the purposes set forth in the sentencing statute, 18 U.S.C. § 3553(a).

The third issue Defendant is asking this Honorable Court to review involves the egregious disparity between the sentence imposed on Defendant and the sentences imposed on the myriad co-defendants who pled guilty in this matter as opposed to proceeding to trial. The circumstances for each co-defendant were different, and some cooperated with the government, but the disparity between the sentences imposed on

all those who pled guilty (66 months or less) and the 17 year sentence imposed on Defendant is so great as to give rise to the presumption that Defendant was punished for exercising his right to remain silent and proceed to trial by jury, in violation of his rights under the Fifth and Sixth Amendments to the United States Constitution, and his right to due process of law under the Fifth Amendment to the United States Constitution. Defendant's sentences should be vacated, and this matter should be remanded to the district court for sentencing before a different judge.

## ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

## ARGUMENT I

**DEFENDANT'S SENTENCE IS PROCEDURALLY UNREASONABLE BECAUSE THE DISTRICT COURT INCORRECTLY SCORED THE SENTENCING GUIDELINES, ERRONEOUSLY CALCULATING THE PROFIT TO BE OBTAINED UNDER A CONTRACT THE GOVERNMENTAL ENTITY HAD THE OPTION OF OPTING OUT OF, AND IMPROPERLY ENHANCING THE SENTENCING GUIDELINES FOR OBSTRUCTION OF JUSTICE BASED ON UNRELIABLE AND INSUFFICIENT TESTIMONY, AND THE MATTER SHOULD BE REMANDED TO THE DISTRICT COURT FOR RESENTENCING**.

REASON FOR GRANTING WRIT OF CERTIORARI

Defendant's Petition for a Writ of Certiorari should be granted with respect to this issue because the United States Court of Appeals for the Sixth Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power, and because the United States Court of Appeals for the Sixth Circuit decided an important question of federal law that has not been, but should be, settled by this Court. The United States Court of Appeals for the Sixth Circuit sanctioned the lower court's calculation of the sentencing guidelines which relied on the profits that could be obtained over the ten year life of an entire garbage collection contract notwithstanding the fact that the governmental entity had the option of withdrawing from the contract after two years. In addition, the United States Court of Appeals for

the Sixth Circuit upheld the district court's enhancement of the sentencing guidelines for obstruction of justice notwithstanding the fact that the district court's determination was based on unreliable evidence that was insufficient to meet the preponderance of the evidence standard required for such an enhancement.

## ARGUMENT

### Erroneous Loss Enhancement Attributed to Defendant Under Rizzo Environmental Services Contracts

The provision of the United States Sentencing Guidelines applicable to calculating the correct guideline range for convictions of conspiracy to commit bribery and the substantive offense of bribery is U.S.S.G. § 2C1.1. Application Notes 2 and 3 of the Commentary to U.S.S.G. § 2C1.1 set forth additional instructions relevant to calculating the correct guidelines for these offenses. In accordance with the cross-reference to U.S.S.G. § 2B1.1 contained in § 2C1.1(b)(2) and Application Note 3, the determining factor in calculating the offense level enhancement that should apply to a particular defendant is predicated on the amount of loss associated with that individual as defined by the guidelines.

In the case at bar, the district court improperly calculated the benefit received or to be received by Rizzo Environmental Services in return for the unlawful payments accepted by Defendant. The district court relied on two profit and loss sheets, from 2015 and 2016, of Rizzo Environmental Services (currently owned by Green for Life, Inc., a Canadian corporation that purchased the company from Kinderhook, LLC, a private equity firm, and Rizzo Environmental Services just weeks

before the Complaint was filed in this matter on October 12, 2016 ) to extrapolate the benefit received or to be received over the ten year period of the Second Contract Extension.

There were actually three contracts entered into between Rizzo Environmental Services and Clinton Township regarding garbage collection during the years 2010 to 2016. The initial contract approved by the Clinton Township board covered garbage collection services for the Township from December 1, 2010 through March 31, 2014 (Trial T., Vol. III, ECF No. 264, Page 31-32, Page ID No. 3338-3339). This contract was replaced by the First Contract Extension that covered the period of April 1, 2014 through November 30, 2018. The First Contract Extension was approved by the Township board on March 10, 2014 with a 4-3 vote (Trial T., Vol. III, ECF No. 264, Pages 37-38, Page ID Nos. 3344-3345). The First Contract Extension was superceded by the Second Contract Extension that went into effect on April 1, 2016 and ran through March 31, 2026, and was unanimously approved by the Township board with a vote of 7-0 (Trial T., Vol. III, ECF No. 264, Pages 41-42, Page ID Nos. 3348-3349). The Second Contract Extension, however, contained a termination provision that allowed the Township to opt out of the contract for any reason, without cause, on December 31, 2018:

> After December 31, 2018, the Township will have the right to cancel the remainder of the Contract, including the extensions, without cause, upon providing at least 120-day written notice to Contractor.

In effect, the Second Contract Extension constituted two separate contracts. One contract obligated Clinton Township from April 1, 2016 through December 31, 2018. The other contract, commencing January 1, 2019 and running through March 31, 2026, obligates Clinton Township if and only if the Township board decides not to cancel the contract. Anytime on or subsequent to January 1, 2019, the Township board has the discretion to cancel the contract for any reason whatsoever by giving 120 days notice to the contractor. On January 1, 2019, Defendant was already convicted and incarcerated and had no input on the decision whether to terminate or continue the contract with Rizzo Environmental Services or its successor. Any benefits that accrued to the successor contractor subsequent to January 1, 2019 were pursuant to the intervening decision of the Clinton Township board not to terminate the contract and should not be attributable to Defendant as a benefit received or to be received as result of his criminal actions. It was error, therefore, for the district court to consider the benefit to be received under the second contract extension from January 1, 2019 through March 31, 2026 in calculating the guideline range because there was an insufficient nexus between Defendant's criminal conduct and the benefit to be received. The government bears the burden of establishing by a preponderance of the evidence the applicability of an enhancement under the guidelines. *United States v. Shanklin*, 924 F.3d 905 (6th Cir. 2019).

The resolution of this issue involves a mixed question of law and fact: the legal question involves an interpretation of the guideline section referring to "the benefit received or to be received in return for the payment" in the context of a service

contract that contains an unconditional opt out clause that was and still is available to the governmental entity, and the factual question involves the actual numerical calculation of the benefit received or to be received based on the evidence presented during the trial and sentencing hearing. As such, the applicable standard of review is *de novo*. *Id*.

It is manifest under the circumstances of this case, that Defendant should not be held accountable for the benefit received or to be received under the Second Contract Extension after January 1, 2019 because there is an insufficient nexus between his criminal conduct and the benefit received or to be received. As of January 1, 2019, the Township board had and still has the unconditional and unbridled discretion to terminate the contract and cease all future payments. The decision of the board not to exercise that discretion constitutes an intervening event that breaks the nexus between Defendant's criminal conduct and the benefit to be received under the contract. The Clinton Township board, cognizant of the fact that the terms of the Second Contract Extension were extremely favorable to the Township and probably could not have been obtained on a rebid of the contract, decided not to terminate the Second Contract Extension. As of the date of the filing of this Petition for Writ of Certiorari, Petitioner does not believe that the Clinton Township board has taken any steps to opt out of the contract or to void any of its terms.

A couple of weeks prior to the filing of the Complaint in this matter on October 12, 2016, Rizzo Environmental Services was sold to Green For Life, Inc. Therefore, after December 31, 2018, the Township was dealing with a different vendor under

different circumstances. The Township had an absolute right under the contract to withdraw from the agreement and rebid its garbage collection services with any company who was interested in providing such services, including Green For Life, Inc. The Township's independent and unfettered exercise of its discretion not to pursue this option severed any connection between Defendant's criminal conduct and the benefit received or to be received under the Second Contract Extension.

U.S.S.G. § 2C1.1(b)(2) states that the district court should consider "the loss to the government from the offense" in calculating the offense level if it is greater than the other factors set forth in the subsection. With respect to any loss to Clinton Township from the offense, the decision of the Township board not to exercise its right to terminate the contract is conclusive evidence that the Township suffered no loss as a result of Defendant's criminal conduct. At a meeting of the Clinton Township Board held on January 14, 2019, all the board members agreed with the recommendation of John "Jack" Dolan, the Clinton Township attorney, that the rates incorporated into the ten year Rizzo Second Contract Extension approved by the board by a 7-0 vote and eligible for rebid as of December 31, 2018, are so favorable to the township that in "no way, shape, or form" should they give notice to the current waste hauler who purchased the Rizzo contract (Green for Life) that the township intends to rebid the contract, as such notice would immediately void the contract. The Township attorney advised the board that it could request the Refuse Committee to review the contract terms and compare them to other similarly situated municipalities, which the board did, but that it should not at this point in time do anything that would

jeopardize the current contract. All board members agreed with and adopted the recommendation of the township attorney.

In light of the positions of the various board members and the Township attorney, it is not even arguable that Clinton Township suffered financial harm as a result of the Defendant's criminal actions. In fact, Brian Girard, the assistant superintendent for the Clinton Township Department of Public Works, testified for the Government at trial that the rates contained in the initial contract entered into with Rizzo Environmental Services in 2010 were so favorable to Clinton Township that the Township saved about $1,000,000.00 over what the Township had been paying to the previous contractor, and that the collection service provided by Rizzo Environmental Services was "terrific" (Trial T., Vol. III, ECF No. 264, Pages 162-163, Page ID Nos. 3469-3470). The district court's scoring of the sentencing guideline range was erroneous, and the matter should be remanded back to the district court for resentencing.

Obstruction of Justice Enhancement

In its objections to the presentence report, the Government requested a two level enhancement to Defendant's offense level on the basis that he attempted to obstruct justice after being served with the complaint in this matter. Defendant objected to the Government's request for such an enhancement in his Response to Government's Objections to Presentence Report and in his argument at sentencing. The burden is on the Government to prove by a preponderance of the evidence that a guideline enhancement should apply. *United States v. Shanklin, supra*.

The only evidence presented at trial or at the sentencing hearing regarding Defendant's alleged acts of obstruction of justice was the testimony of Angela Selva. The testimony of Angela Selva standing alone without any corroboration was insufficient for the district court to find by a preponderance of evidence that Defendant obstructed or impeded, or attempted to obstruct or impede, the administration of justice. Obstruction of justice was not an element of any of the charged offenses, and there is no way of knowing whether the jury believed any of Selva's testimony regarding the destruction of evidence. It is very possible that the jury did not give any credence to this part of Selva's testimony, and without some form of corroboration, Selva's testimony alone is not sufficient to meet the Government's burden.

The absence of corroboration is especially significant under the circumstances of this case, because Angela Selva testified that he suffered from diabetic neuropathy, and that this condition had a serious impact on his ability to remember things (Trial T. Vol. II, ECF No. 249, Pages. 144-145, Page ID Nos. 2861-2862):

> Q. Now, Mr. Selva, do you have any long-term medical conditions?
>
> A. Yes.
> Q. And what's that?
>
> A. Right now, I've been diagnosed with diabetic neuropathy.
>
> Q. Do you have diabetes?
>
> A. Yes.

> Q. And what is diabetic neuropathy? Is that a condition related to your diabetes?
>
> A. Yes. Basically it's attacking my autonomic system. Basically the organs that function without you think -- without, you know, the heart, the lung. And it's also attacking my cognitive ability, working memory, it's short-term memory and also long-term memory.
>
> Q. Are there things you do to assist yourself in dealing with the memory issues relating to your neuropathy?
>
> A. Basically, short-term memory, I have to write things down. Long-term memory, I, as long as I review things, I can retrieve. And with the long-term memory, it's about being able to, difficulty in retrieving things, as long as I review things. I was tested recently, neuro psyche testing. And if these events had taken place in the last -- in the last year, I would not have been able to testify. But because they took place in 2013, to 2014, 2015, I am able to testify, because I can retrieve these memories. And when I can't remember, I just tell you.

Angela Selva testified that he would be able to remember incidents that happened in 2013, 2014, or 2015, providing that he had an opportunity to "review things". However, he testified that he would not be able to testify to incidents that happened more recently. The conversation in question regarding the destruction of evidence allegedly took place in October 2106, almost one year outside the scope of his memory capabilities. Moreover, Angela Selva testified that Defendant's attorney or someone from his office called him a couple of days after the conversation supposedly took place and advised him not to destroy or remove any evidence (Trial T., Vol. II, ECF 249, Pages. 147-148, Page ID Nos. 2864-2865). The inference from

this telephone is that Defendant's attorney was expressing the wishes of his client that evidence should not be destroyed or removed.

In response to Defendant's explanation at sentencing regarding the inference of this telephone call between Angela Selva and Defendant's attorney, the district court speculated a different scenario (Sentencing T. 2/6/19, ECF 285, Pages 7-8, Page ID Nos. 3974-3975):

> MR. KORN: Well, this incident took place in October, allegedly, in October of 2016, which is way beyond what Mr. Selva says his memory covers. So it would be my position, you have uncorroborated testimony of someone who says I am suffering from a form of dementia, I really can't remember things that happened after 2015, and this happened in 2016.
>
> And then the other thing is, and this is not coming from the defendant, Mr. Selva himself testified that Mr. Reynolds' attorney, he believes it was Mr. Reynolds' attorney or somebody from his office called him, like the very next day, and said do not destroy any evidence. The only inference from that is that the attorney is doing what his client asked him to do. So it would be my position that the Government, not only has the Government not met its burden with respect to obstruction of justice, but the evidence goes in the opposite direction, that Mr. Selva was confused, he was wrong based on the, based on the phone call that he got from Mr. Reynolds' attorney or somebody from his office. It seems to me the import of the testimony at trial is that Mr. Reynolds did not want him to destroy the evidence. So I would ask the Court to deny the request by the Government for a two-point enhancement for obstruction of justice.
>
> THE COURT: Isn't it equally likely that the defendant told his attorney that he had made that call to Selva and said ditch the evidence, and the attorney said whoa, wait a minute, I'm going to try to undo that before he, before he destroys incriminating evidence?

> MR. KORN: You know, Judge --
>
> THE COURT: And that's the source of the phone call?
>
> MR. KORN: I mean, that is, that is an explanation, but we don't know if that's the case.

The district's court speculation as to the meaning to be accorded the telephone call between Angela Selva and Defendant's attorney was not sufficient to constitute proof by a preponderance of the evidence that Defendant had obstructed justice. Notwithstanding, the district court held that Defendant's offense level should be increased by two levels for obstruction of justice (Sentencing T. 2/6/19, ECF 285, Pages 13-14, Page ID Nos. 3980-3981):

> THE COURT: I heard Selva's testimony. I was favorably impressed with it. I believe the jury was as well. He was cogent, he was spontaneous, and not hesitant in his answers, and he, when he said he did not remember a fact, he spoke up and affirmatively made that known.
>
> These were facts, though, they occurred in October, not the preceding year when he had, according to his recollection, a better recall of events back in the pre-2016, was it? Back in '15 and '14 and '13. I'm not sure about the years, but as Mr. Korn does correctly point out that the event that he spoke of with respect to destruction of evidence was about a year beyond when Selva had, himself, said he was more reliably able to retrieve memories. But the fundamental thing that I recall is, as the transcript reveals, he said when I, I can't remember, I will just tell you. And he did.
>
> But the point is that with respect to this destruction of evidence matter, he did remember. And he said he remembered, and he gave details, and he told the jury how it happened and when it happened and, at least approximately. And what Mr. Reynolds had asked him to do, and the actions he took in pursuit of those requests.

> So the Government's point is well taken and the obstruction points are to be added. And that effects the guideline range by elevating it two levels. And the range, unless there's a deviation from anything that the defendant may present, would stand at this point at 235 to 293.

The district court's subjective opinion that it was impressed with the testimony of Angela Selva does not negate the fact that Angela Selva was testifying to something that he himself admitted was outside the scope of his recollection. The testimony of Angela Selva, without anything more, was insufficient to constitute proof by a preponderance of the evidence that Defendant had obstructed justice and that his offense level should be increased by two points under U.S.S.G. § 3C1.1. The district court's incorrect scoring of Defendant's guidelines rendered his sentence procedurally unreasonable, and this matter should be remanded back to the district court for resentencing.

## ARGUMENT II

**DEFENDANT'S SENTENCE IS PROCEDURALLY UNREASONABLE BECAUSE THE DISTRICT COURT DID NOT PROPERLY CONSIDER THE NEED TO AVOID UNWARRANTED SENTENCE DISPARITIES AMONG DEFENDANTS WITH SIMILAR RECORDS WHO HAVE BEEN FOUND GUILTY OF SIMILAR CONDUCT, RESULTING IN A SENTENCE THAT IS SUBSTANTIVELY UNREASONABLE FOR BEING EXCESSIVE AND GREATER THAN NECESSARY TO EFFECTUATE THE PURPOSES SET FORTH IN THE SENTENCING STATUTE, 18 U.S.C. § 3553, AND THE MATTER SHOULD BE REMANDED TO THE DISTRICT COURT FOR RESENTENCING**.

REASON FOR GRANTING WRIT OF CERTIORARI

Defendant's Petition for a Writ of Certiorari should be granted with respect to this issue because the United States Court of Appeals for the Sixth Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power, and because the United States Court of Appeals for the Sixth Circuit decided an important question of federal law that has not been, but should be, settled by this Court. The district court failed to comply with its statutory mandate to consider the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. Instead the district court focused on the most egregious and extreme cases from around the country involving offenses much more serious than those of which Defendant was convicted and imposed a sentence that was so excessive and greater than necessary to effectuate the purposes

set forth in the sentencing statute that this Honorable Court should exercise its supervisory powers and remand this case back to the district court for resentencing. The egregious sentence and methodology of the district court was erroneously sanctioned by the United States Appeals Court for the Sixth Circuit.

## ARGUMENT

18 U.S.C. § 3553(a)(6) mandates that the district court, in determining the particular sentence to be imposed, shall consider the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct. When the district court sentences a defendant to within (or below) a properly scored guideline sentencing range, a challenge to the sentence based on the failure of the district court to consider the need to avoid unwarranted sentence disparities is generally not available. *Gall v. United States*, 552 U.S. 38, 54 (2007). In the case at bar, however, the district court incorrectly scored the guidelines, so Defendant's sentence can be challenged on the basis that the district court failed to properly consider the need for the sentence imposed to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct. The failure of the district court to comply with this statutory mandate, focusing instead solely on the most extreme and egregious corruption cases from around the nation, resulted in a sentence that is not only procedurally unreasonable but substantively unreasonable for being excessive and greater than necessary to effectuate the purposes set forth in the sentencing statute, 18 U.S.C. § 3553(a).

The need to avoid unwarranted sentence disparities concerns national disparities between defendants with similar criminal histories convicted of similar criminal conduct. The district may but is not required to consider sentence disparities between co-defendants. *United States v. Conatser*, 514 F.3d 508, 521(6th Cir. 2008), *cert. denied Marlowe v. United States,* 555 U.S. 963 (2008). The district court made it very clear during the sentencing hearing that it simply does not consider national average sentences in fashioning a defendant's sentence.

Although the there is no information as to the circumstances underlying a particular sentence, there is valuable information contained within the national average sentences promulgated by the sentencing commission that would assist a district court to avoid unwarranted sentence disparities when fashioning an appropriate sentence. The national averages promulgated by the Sentencing Commission encompass all circumstances and all defendants: defendants who plead guilty, defendants who proceed to trial, defendants who cooperate, defendants who choose not to cooperate, defendants who commit serious bribery offenses, defendants who commit less serious bribery offense, defendants who obstruct justice, defendants who do not obstruct justice, defendants who have substantial criminal records, and defendants who have no criminal records. The averages themselves are not a touchstone that would reveal the appropriate sentence in any particular case, but they give the district court some idea of what would constitute an extreme and egregious sentence, and what sentence would fall within the penumbra of the national norm. In the five years from 2013 to 2017 (the most recent year for which United States

Sentencing Commissions statistics had been published at the time of sentencing), the national average federal sentence of defendants convicted of bribery was 29.80 months.

If the district court does not consider national averages at all, and only considers the most extreme and egregious cases that the Government could muster up, which is what occurred in the case at bar, how can the district court make any attempt to comply with the statutory mandate to "to consider the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct." It cannot and did not in the case at bar.

The evidence was overwhelming that Defendant committed the crimes of conspiracy to commit bribery and bribery. Over several years he accepted bribes from various individuals in connection with his position as township trustee. He was not, however, charged or convicted of racketeering, mail fraud, wire fraud, extortion, or other aggravating offenses that are often present in the most extreme public corruption cases. Not withstanding the facts of this case, the Government submitted a sentencing memorandum in which it cited the most extreme and egregious public corruption cases it could find in support of its argument that Defendant should receive a sentence of between 235 months and 293 months. This is significant because the district court made it very clear during the sentencing hearing that it considered these extreme and inapposite cases "exemplary" and "instructive" (Sentencing T. 2/6/19, ECF 285, Pages 48-49, Page ID Nos. 4015-4016).

It is clear from the cases considered and referred to by the district court as "exemplary cases", that the district court's disproportionate reliance on those cases resulted in a substantively unreasonable sentence that violated the mandate of 18 U.S.C. § 3553(a) to impose a sentence that shall be sufficient but not greater than necessary to effectuate the purposes set forth in the sentencing statute. The cases expressly relied upon by the district court to arrive at the sentence imposed in this matter involved extreme circumstances that are simply not applicable to Defendant's situation. In order to comprehend the unjust severity of Defendant's sentence, it is important to understand the prodigious factual differences between these cases and Defendant's situation.

**James C. Dimora and Frank P. Russo**: Northern District of Ohio, Docket No. 10-00387, *United States v. Dimora*, 750 F.3d 619 (6th Cir. 2013), *cert. denied* 135 S.Ct. 223 (2014). James C. Dimora was a Cuyahoga County commissioner who conspired with Frank P. Russo, the county auditor, to hand out public jobs, influence Cleveland decision-makers, and steer public contracts to favored individuals in return for one hundred bribes worth more than $250,000.00. Dimora was convicted of one count of RICO Conspiracy, three counts of Mail Fraud, 7 counts of Hobbs Act Conspiracy, nine counts of Hobbs Act offenses, two counts of Conspiracy to Commit Bribery, four counts of Bribery, one count of Obstruction of Justice, one count of Falsifying Records, and one count of Filing a False Tax Return. Frank P. Russo pled guilty to eight counts of Hobbs Act Conspiracy, two counts of Bribery Conspiracy, three counts of Mail Fraud Conspiracy, two counts of Tampering with a Witness, one

count of Mail Fraud, and five counts of Filing False Tax Returns. James C. Dimora received a sentence of 336 months, while Frank P. Russo received a sentence of 262 months.

In comparison, Defendant was not even accused of RICO violations, mail fraud, or Hobbs Act offenses. It is manifest from the evidence presented at trial that Defendant accepted bribes, but there was no evidence that Defendant did or had the ability to steer contracts to certain individuals or influence the vote of any township official. And there was no evidence that Defendant's vote had any bearing on the ratification of the Second Contract Extension, as that extension was approved by the Clinton Township board with a vote of 7-0.

**Mark Ciavarella and Michael Conahan**: Middle District of Pennsylvania, Docket No. 09-00272, *United States v. Ciavarella*, 716 F.3d 705 (3rd Cir. 2013) *cert. denied* 571 U.S. 1239 (2014), *cert. petition pending* on § 2255 petition). The facts of that case are so egregious compared to the circumstances of this case that even the suggestion that it should be considered in fashioning an appropriate sentence in this case is preposterous. Mark Ciavarella was convicted of one count of Racketeering, one count of Conspiracy to Commit Racketeering, four counts of Mail Fraud, two counts of Conspiracy to Commit Money Laundering, and four counts of Tax Evasion, and his guidelines were life. Michael Conahan pled guilty to one count of Conspiracy to Commit Racketeering. Mark Ciavarella and Michael Conahan were judges who conspired to incarcerate juvenile offenders in private detention facilities in which they had a financial interest. Many of those juveniles did not need to be incarcerated and

would have been eligible to participate in less restrictive rehabilitative programs. Mark Ciavarella and Michael Conahan conspired together to separate young children from their loving families and place them in juvenile detention centers so they could make millions of dollars in kickbacks from the owners of the private detention facilities. That kind of heartless corruption should have had no bearing on the sentencing decision that needed to be made in the case at bar. Mark A. Ciavarella received a sentence of 336 months, Michael T. Conahan 210 months.

**Jonathon Woods**: Western District of Arkansas, Docket No. 17-50010, a state senator who drafted appropriation bills and used his influence in the legislature to allocate Arkansas's Government Improvement Fund moneys to companies that would pay him and his associates kickbacks. He was convicted of one count of Conspiracy to Commit Mail and Wire Fraud, 12 counts of Wire Fraud, one count of Mail Fraud, and one count of Money Laundering. Jonathon Woods was sentenced to 220 months and ordered to pay $1,621,500.00 in restitution. In contrast, there was no evidence that Defendant influenced any township official who voted on the Rizzo contracts, and there was no evidence that his actions financially harmed the township.

**Donald W. Hill**: Northern District of Texas - Dallas Division, Docket No. 07-00289, *United States v. Hill*, 725 F.3d 471 (5th Cir. 2013) *cert. denied* 572 U.S. 1003 (2014). Donald W. Hill was an elected member of the Dallas City Council who was not only convicted of one count of Conspiracy to Commit Bribery and two counts of Bribery, but one count of Conspiracy to Commit Extortion, one count of Extortion by a Public Official, and one count of Money Laundering. The convictions arouse out

of Donald W. Hill extorting money from private developers who were attempting to obtain public financing for housing developments. Hill not only received kickbacks from the developers, but he pressured the developers to involve non-profit organizations in their projects which also paid kickbacks back to Hill. The losses to the City totaled about $4,800,000.00, and Hill was sentenced to a prison sentence of 216 months and ordered to pay $112,500.00 in restitution. In contrast, there is no evidence that Defendant's actions resulted in any financial harm to the township, and he was not charged with Extortion nor Money Laundering.

**Jonathan Bolar**: Eastern District of Louisiana, Case No. 09-00138, *United States v. Bolar*, 483 Fed.Appx 876 (5th Cir. 2012) *cert denied* 568 U.S. 1110 (2013), which the court mentioned as being a "very instructive case in terms of his activity." The district court's comparison to the case at bar was clearly not warranted. Jonathon Bolar was a Louisiana city councilman who engaged in schemes to extort money from business owners who needed permits and other approval documents from the city in connection with their various projects. One businessman testified that Bolar not only extorted money from him in order to obtain the requisite building permit but required him to use Bolar's construction company to do the renovation work. Another witness, a city bus driver and long-time friend of Bolar whose home was damaged during Hurricane Katrina, testified that Bolar convinced her to pay him $12,500.00 to supply the wood to rebuild her home and then never supplied the wood. Bolar was convicted of three counts of extortion, two counts of wire fraud, four counts of Failing to File a Tax Return, and five counts of Structuring Financial Transactions to Evade

Reporting Requirements. He was not charged with any acts of Bribery. Jonathan Bolar was sentenced to 204 months, the same sentence that was imposed on Defendant in the case at bar. Obviously, the district court found this case "very instructive".

**Larry P. Langford**: Northen District of Alabama, Case No. 08-00245, *United States v. Langford*, 647 F.3d 1309 (11th Cir. 2011) *cert. denied* 565 U.S. 1169 [2012]) as another case that should be considered in fashioning an appropriate sentence in the case at bar. Once again, the facts of Langford's case are so different from those in Defendant's case as to negate any meaningful comparison. Langford was a elected member of the Jefferson County, Alabama, Commission, and as President of that body received more than $240,000.00 in cash, clothing, and jewelry, from an investment firm to ensure that the investment firm was awarded a series of profitable contracts with Jefferson County. As President of the Jefferson County Commission, Langford had the authority to select the investment firm that would handle several of the County's financial transactions, and he selected the firm that had agreed to pay him kickbacks. Langford was convicted of Conspiracy to Commit Bribery, Bribery, Mail Fraud, Wire Fraud, Money Laundering, and Tax Fraud. Langford was sentenced to a term of imprisonment of 15 years.

Defendant, unlike Langford, was not convicted or even charged with Mail Fraud, Wire Fraud, Money Laundering, or Tax Fraud. Moreover, there was no evidence that Defendant's actions resulted in the ratification of the Second Contract Extension, as the vote on the Second Contract Extension to the Rizzo Environmental

Services contract was 7-0. Rizzo was a responsible contractor who submitted the lowest bid, and ratification was assured by township policy.

**Rod R. Blagojevich**: Northern District of Illinois, Case No. 08-00888, *United States v. Blagojevich*, 854 F.3d 918 (7th Cir. 2017) *cert. denied* 138 S.Ct. 1545 (2018), the Governor of Illinois who was convicted of attempting to sell an appointment to the United States Senate. The magnitude of Blagojevich's actions are so far beyond the severity of Defendant's criminal acts as to make any comparison invalid. Blagojevich was convicted of 13 federal offenses, including Wire Fraud and Extortion, Conspiracy to Solicit Bribes and False Statements. Blagojevich received a sentence of 14 years. Defendant received a sentence of 17 years. The fact that Defendant received a sentence of imprisonment that was three years longer than Blagojevich demonstrates the substantive unreasonableness of Defendant's sentence..

The sentence that was imposed in this matter is unlawful because in lieu of the circumstances of this case it is greater than necessary to effectuate the purposes set forth in the sentencing statue, 18 U.S.C. § 3553(a). A sentence is substantively unreasonable if the district court selects the sentence arbitrarily, bases the sentence on impermissible factors, fails to consider pertinent § 3553(a) factors, or gives an unreasonable amount of weight to any pertinent factor. *United States v. Callahan, supra* 626. In the case at bar, a sentence of imprisonment of 17 years is so extreme as to constitute an arbitrarily harsh and severe sentence. The district court gave an unreasonable amount of weight to the sentences rendered in extreme and egregious cases not applicable to the circumstances underlying Defendant's conviction.

Based on the evidence presented at trial, it cannot be gainsaid that Defendant committed several acts of conspiracy to commit bribery and bribery. But it is also clear that Defendant's actions caused no financial harm to the township. In fact, the township is still so pleased with the financial provisions contained within the Rizzo Environmental Services Second Contract Extension that the Clinton Township board refuses to exercise their discretion to opt out of the contract. Defendant's guideline range was fueled by the profit made by Rizzo Environmental Services. However, in fashioning an appropriate sentence under the circumstances of this case, what difference does it make if Rizzo Environmental Services made a profit or not? What difference does it make in assessing Defendant's degree of culpability if Rizzo was a good businessman who knew how to run a profitable business or if he was a profligate who wasted corporate proceeds on expensive, unnecessary business expenditures? The United States Supreme Court has held in no uncertain terms that it is error for the district court to presume that a sentence within the guideline range would be an appropriate sentence. *Nelson v. United States*, 555 U.S. 350. Defendant has no prior criminal record and was not charged or convicted of any other aggravated offenses, such as Racketeering or Extortion. A sentence of 17 years in prison under the circumstances of this case shocks the conscience and sends a chilling message to present and future defendants that they need to think twice before proceeding to trial. The sentence imposed on Defendant in this case was procedurally and substantively unreasonable. The sentence should be vacated and the matter remanded to the district for resentencing.

## ARGUMENT III

**DEFENDANT'S SENTENCE IS SO DISPROPORTIONATELY SEVERE COMPARED TO THE SENTENCES IMPOSED ON THE CO-DEFENDANTS IN THIS CASE AS TO GIVE RISE TO A PRESUMPTION OF VINDICTIVENESS FOR DEFENDANT EXERCISING HIS CONSTITUTIONAL RIGHTS NOT TO BE COMPELLED TO BE A WITNESS AGAINST HIMSELF AND TO PROCEED TO TRIAL BY JURY, AND THIS MATTER SHOULD BE REMANDED FOR RESENTENCING BEFORE A DIFFERENT JUDGE.**

REASON FOR GRANTING WRIT OF CERTIORARI

Defendant's Petition for a Writ of Certiorari should be granted with respect to this issue because the United States Court of Appeals for the Sixth Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power, and because the United States Court of Appeals for the Sixth Circuit decided an important question of federal law that has not been, but should be, settled by this Court. Defendant refused to admit guilt in this matter, instead proceeding to a trial by jury, and his excessive and extreme sentence was based in part on his exercising his constitutional rights. The harsh and excessive sentence violated Defendant's rights to not be compelled to be a witness against himself, to proceed to trial by jury, and to due process of law, guaranteed by the Fifth and Sixth Amendments to the United States Constitution.

## ARGUMENT

Defendant has a constitutional right under the Fifth Amendment to the United States Constitution to not be compelled in a criminal case to be a witness against himself, and a constitutional right under the Sixth Amendment to the United States Constitution to a speedy and public jury trial. In the case at bar, Defendant exercised those constitutional rights and received a sentence that is so disproportionate to the sentences his co-defendants received as to give rise to a presumption of vindictiveness that the severity of his sentence was in part the result of his exercising those constitutional rights.

There were ten defendants in this case and all pled guilty but Defendant. Of all the co-defendants indicted in this matter, Charles B. Rizzo received the most severe sentence, a term of imprisonment of 66 months. The circumstances for each co-defendant were different, and some co-defendants cooperated with the government, but the disparity between the sentences imposed on all those who pled guilty (66 months or less) and the 17 year sentence imposed on Defendant is so great as to give rise to the presumption that Defendant was punished for exercising his right to remain silent and proceed to trial, in violation of his right to due process of law under the Fifth Amendment to the United States Constitution. *North Carolina v. Pierce*, 395 U.S. 711 (1969). In the case at bar, the discrepancy between sentences is so great as to create a "reasonable likelihood" that the severity of Defendant's sentence was the result of actual vindictiveness. *Alabama v. Smith*, 490 U.S. 794, 799 (1989). In explaining its reasons for imposing Defendant's harsh prison sentence, the district

court focused on Defendant's astoundingly remorseless behavior and denial of guilt (Sentencing T. 2/6/19, ECF 285, Pages 44, 46, Page ID Nos. 4011, 4013):

> I took particular note of Mr. Selva's testimony from reflecting on things from years earlier. Mr. Selva said, among other things, when he was at, "he" being Mr. Reynolds, "when he was at Chrysler, they did the same thing, him and his dad. He talked about getting envelopes, money, and distributing it." And the testimony went on and was redirected. It was a bit of a side light, but it certainly caught my attention, and was at least an indication, not something to be scored or taken formally into account in determining a sentence here, it's uncharged conduct, but what it amounts to is a, is a perhaps small window on the history of the defendant that may be in some part an explanation as to how he came to this shameless and astoundingly remorseless behavior, exemplified in the testimony, the wiretaps, the videos and the documentary evidence that was all displayed to the jury, and of course, on display to the Court at the same time...
>
> Given Mr. Reynolds' almost nearly astounding level of denial, I say denial in the psychological sense, not in the legal pleading sense, leads me to think that he's somehow persuaded himself that he didn't do anything wrong.

The severe sentence imposed on Defendant was based in part based on his refusal to admit guilt and his decision to proceed to a trial by jury. The harsh and excessive sentence violated Defendant's rights to not be compelled to be a witness against himself, to proceed to trial by jury, and to due process of law, guaranteed by the Fifth and Sixth Amendments to the United States Constitution. This matter should be remanded for resentencing before a different judge.

WHEREFORE, Petitioner respectfully moves this Honorable Court to grant his Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Dated: 10-03-20

Respectfully submitted,

_____

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**UNITED STATES**

**SUPREME COURT**

**UNITED STATES OF AMERICA,**

**Plaintiff-Appellee,**

**DOCKET NO:**

**vs.**

**DEAN REYNOLDS,**

**Defendant-Petitioner.**

_____/

**CERTIFICATE OF COMPLIANCE**

RICHARD D. KORN, Attorney for Defendant-Petitioner, certifies and states that Defendant-Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, excluding the sections set forth in Rule 33.1(d) of the Supreme Court Rules, contains 34 pages and, therefore, complies with the page limitation of Rule 33.2(b) of the Supreme Court Rules.

Dated: 10-03-20

Respectfully submitted,

_____

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**UNITED STATES**

**SUPREME COURT**

**UNITED STATES OF AMERICA,**

**Plaintiff-Appellee,**

**vs.**

**DEAN REYNOLDS,**

**Defendant-Petitioner.**

**DOCKET NO:**

_____/

**CERTIFICATE OF SERVICE**

I hereby certify that on October 3, 2020, all parties required to be served under the Supreme Court Rules have been served, and that I served the foregoing document electronically on the below listed persons who consented to such service, and by sending said document through the United States Postal Service by first class mail, with postage prepaid, to those who have not consented to electronic service:

R. Michael Bullotta
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(Consented to Electronic Service)

Solicitor General of the United States
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Dated: 10-03-20

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