

No. _____

In the

Supreme Court of the United States

GUSTAVO PLACANCIA-ROSENDY,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT,

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit**

PETITION FOR A WRIT OF CERTIORARI

LANE ANDREW HAYGOOD
** COUNSEL OF RECORD*
BAILEY & GALYEN
3800 E. 42ND STREET, SUITE 110
ODESSA, TEXAS 79762
432.803.5800
LHAYGOOD@GALYEN.COM

QUESTION PRESENTED

A defendant who pleads guilty will face a presentence investigation report, the results of which will guide the District Court in affixing sentence. A routine part of these examinations is to provide the district court will all “relevant conduct” of the defendant. But what must a defendant do when the Government alleges, as a part of that relevant conduct, a crime that the defendant has not been committed? Because the Fifth Circuit did not analyze the appropriate standard of proof the Government must meet before it may claim that a defendant is “falsely denying” uncharged “relevant conduct,” Mr. Placancia-Rosendo faced an improper denial of his acceptance of responsibility points, and this Court should act to prevent an illegal sentence based on a denial of due process.

PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption.

DIRECTLY RELATED PROCEEDINGS

1. *United States v. Gustavo Placancia-Rosendo*,
No. 4:20-CR-00181-DC (W.D. Tex.)
2. *United States v. Gustavo Placancia-Rosendo*, No. 20-50919 (5th Cir.)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Gustavo Placancia-Rosendo asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion in this case was not selected for publication. It can be found at 855 Fed.Appx. 233 (5th Cir. 2020) and is reprinted in the Appendix to this Petition. There is no opinion from the district court.

JURISDICTION

The Fifth Circuit issued its judgment on August 10, 2021. This Court has jurisdiction to review the Fifth Circuit's final decision under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case does not involve any statutory provisions.

STATEMENT

On May 29, 2020, Gustavo Placancia-Rosendo pleaded guilty to the offense of transporting an alien for commercial advantage or private financial gain, in violation of 8 U.S. C. § 1324 (ROA.23). There was a written plea agreement (ROA.47, ROA.72, ROA-108-18).

At the sentencing hearing, held on October 19, 2020, the Hon. Judge David Counts, presiding over the Western District of Texas – Pecos Division, Mr. Rosendo's counsel objected to paragraphs 21 and 30 of the Presentence Investigation Report, arguing that the Government lacked sufficient information to reject Mr. Rosendo's acceptance of responsibility (ROA.98-99). The district court, relying on nothing more

than the government's assertions, overruled these objections (ROA.100). As a result, Mr. Rosendo's base offense level placed him outside the possibility of probation (ROA.103). The trial court ultimately sentenced Mr. Rosendo to a term of confinement of 21 months, with a period of supervised release lasting three years (ROA.60-61).

The factual basis of the plea agreement, to which Mr. Rosendo admitted, states that on or about March 3, 2020, agents with the United States Border Patrol observed a vehicle flash its lights on a highway south of Van Horn, Texas, which is in the Pecos Division of the Western District of Texas (ROA.110). Acting on a suspicion allegedly borne of their experience, agents stopped the vehicle and found Mr. Rosendo to be the driver (ROA.110-11). Within the vehicle, agents found nine individuals, and only Mr. Rosendo was a United States citizen (ROA.110). While the undocumented persons were being processed at the Van Horn Border Patrol station, Mr. Rosendo received, and waived, his rights and spoke to officers (ROA.110-11). He admitted that he knew his passengers did not have legal status to be in the United States; he further stated his intent was to transport some of them back to his residence in California to work at his landscaping business (ROA.110-11). Mr. Rosendo consented to a search of his phone, which further confirmed that he had been in contact with a co-defendant regarding the location of the men he picked up (ROA.111).

Rosendo admitted "that he, aided and abetted by others, transported or attempted to transport illegal aliens, who he knew were illegally in the U.S., and furthered their illegal status by guiding or driving them further north into the interior of the U.S."

(ROA.111). What Rosendo did not admit was that he had, in times past, transported other illegal aliens.

In Rosendo's PSR, specifically paragraph 21, the United States Probation Office alleged that Rosendo was "not truthful in admitting any relevant conduct for which [he] is accountable" (ROA.166). The Probation Officer charged that Rosendo "falsely denied being involved in any previous alien smuggling ventures to agents" and that Homeland Security agents had "information that [Rosendo] had previously been involved in another alien smuggling venture" and were "able to corroborate the information with the statements made by the cooperating defendant and phone records" (ROA.166). Who exactly the cooperating defendant was and what phone records were reviewed was never made a part of the record (ROA.166). As a result of this paragraph, the United States Probation Office failed to include the two-point reduction for acceptance of responsibility (ROA.167) and the one-point additional reduction for a timely-entered plea of guilty under United States Sentencing Guideline § 5K3.1 (ROA.116).

Mr. Rosendo's trial counsel, Mr. Chris Fostel, objected to paragraphs 21 and 30 of the PSR, arguing that the plea agreement did not require Mr. Rosendo to admit to "any previous unalleged criminal activity" and that the evidence was insufficient to support a finding that Mr. Rosendo engaged in the conduct described in paragraph 21 (ROA.194-95). Specifically, Mr. Fostel argued that the Government had not sought any indictment for the charges; the Government relied upon a statement by an alleged co-conspirator, and, absent corroborating evidence, any such allegation that Mr. Rosendo had engaged in

other relevant conduct did not meet the standard of proof required at sentencing (ROA.195).

At the sentencing hearing, the District Court heard these objections (ROA.99). Mr. Fostel argued that Mr. Rosendo should be entitled to his acceptance of responsibility points under the plea agreement because Mr. Rosendo had complied with the terms of that plea agreement (ROA.99-100). When prompted, the Government did not respond by introducing evidence in support of this contention, but relied on a statement by the prosecutor that:

“That’s my understanding Judge, from HIS as well as the other cooperating defendant. That was our understanding. So we’re going to object to Mr. Fostel’s argument understanding, I guess, the policy recommendations. But at the same time, you know, people admit and acceptance of responsibility for their crimes. He has not. So I think the guidelines are appropriate in this case. I think probation’s calculations are accurate in this case, Your Honor. That’s where we stand.”

(ROA.100). The District Court, hearing this argument, stated that it would “rely up on that as well as the response of the U.S. Probation Officer” and that there were “multiple sources that the government believes [Rosendo] has not truthfully admitted the conduct and -- or he’s at least falsely denying additional role in the conduct that he would otherwise be accountable for” (ROA.100). So noting, the District Court overruled the objection.

The response by the United States Probation Office alluded to by the District Court is no more enlightening as to the source of their dispute with Mr. Rosendo’s truthfulness

than the judge's sentencing colloquy. There, the Probation Officer stated that “[Rosendo’s] cell phone messages show him asking for a payment of \$2,500.00 that he has not yet received” (ROA.175). The Probation Officer also stated that an unidentified “cooperating defendant” told agents, also unidentified, that Rosendo had “previously picked up five illegal aliens, including himself, along Interstate 10 near Van Horn, Texas, in February 2019” (ROA.175). No other information as to this alleged incident that any other information was forthcoming.

REASONS TO GRANT THE PETITION

1. THE FIFTH CIRCUIT’S DECISION RELIES ON NOTHING MORE THAN THE GOVERNMENT’S SAY-SO THAT IT HAD SUFFICIENT EVIDENCE OF MR. ROSENDO’S PAST “RELEVANT CONDUCT.”

The Fifth Circuit, in reaching its decision, found that Mr. Rosendo’s appellate waiver was specifically enforceable because he “failed to fulfill his obligation under the plea agreement to be completely truthful with the Government concerning all of his unlawful activity” (Tab 1, page 2). However, with due respect to the Fifth Circuit, this statement does not analyze or examine the substance of Mr. Rosendo’s argument on appeal, which was that the evidence to support this conclusion is insufficient. Absent such analysis, the *ipse dixit* of the Court of Appeals works a miscarriage of justice by accepting at face value a conclusion unsupported by the evidence. To do so, this Court must review the Fifth Circuit’s law on “relevant conduct.”

1.1. THE STANDARD FOR RELEVANT CONDUCT IN CONDUCTING PRESENTENCE INVESTIGATIONS IS DIFFICULT AS-IS; THE DIFFICULT IS UNFAIRLY COMPOUNDED WHEN A DEFENDANT IS FACED WITH A FALSE ACCUSATION OF OTHER CRIMINAL CONDUCT.

“Relevant conduct” is notoriously difficult to define.¹ The quoted definition arises from U.S.S.G. § 1B1.3, which sets forth the factors to use in determining the applicable Guidelines range. In *United States v. Yerena-Magana*², this Court considered a defendant’s argument that his prior bad act of illegal entry into the United States should be considered “relevant conduct” for his plea of guilty to possession of marijuana with intent to distribute while illegally in the United States.³ This perplexing request was because “relevant conduct” when properly so considered prohibits the use of a prior conviction as a part of a defendant’s criminal history score.⁴ Nevertheless, when Mr. Yerena-Magana asked this Court to consider his earlier illegal entry as a part of his criminal conduct for purposes of “relevant conduct,” this Court declined, stating that there was “no evidence in the record that Yerena-Magana intended to commit the drug offense for which he was sentenced at the time he illegally entered the United States.”⁵ This Court found the “nexus between the illegal entry . . . and the drug offense . . . too

¹ See *United States v. Booker*, 543 U.S. 220, 254-55 (2005) (“How could a judge expect a jury to work with the Guidelines’ definitions of, say, ‘relevant conduct’ which includes ‘all acts and omissions committed, aided, abetted, counseled, commanded, inducted, procured, or willfully caused by the defendant?’”).

² 478 F.3d 683 (5th Cir. 2007).

³ *Yerena-Magana*, 478 F.3d at 686-87.

⁴ *Id.*, citing U.S.S.G. § 4A1.1 and § 4A1.2.

⁵ *Yerena-Magana*, 478 F.3d at 689..

attenuated to constitute ‘preparation for that offense.’”⁶ Here, the Government wishes to have the opposite be true; that alleged prior conduct which bears no relation to the instant offense should be considered “relevant conduct” because of its alleged similarity to the charged offense, though the Government did not provide any evidence that Mr. Rosendo was actually guilty of the uncharged conduct, or even that it occurred, absent hearsay and speculation with which the prosecutor was not even personally familiar. To find that such conduct is “relevant conduct” under U.S.S.G. § 3E1.1 stretches the definition; this Court’s usual definition of “relevant conduct” falls into categories such as where the uncharged “relevant conduct” was a part of the same course of conduct or common scheme.⁷

As such, “relevant conduct” may not be used in separate contexts, such as for computation of criminal history and for additional offense conduct for which the defendant is criminally culpable.⁸

**1.2. NOT EVERY DENIAL IS FALSE, AND THERE MUST BE
SOME STANDARD TO DIFFERENTIATE FALSE DENIALS
FROM JUSTIFIABLE PROTESTATIONS OF INNOCENCE.**

The application notes to U.S.S.G. § 3E1.1 stated that “a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). Only a defendant who “falsely denies” or

⁶ *Id.*

⁷ See *Witte v. United States*, 515 U.S. 389, 404 (1995).

⁸ *Id.* at 405.

“frivolously contests” relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility.⁹

This Court has held that a defendant, at sentencing, may challenge the Government’s determination of additional, unindicted “relevant conduct” without committing a false denial.¹⁰ There, this Court found that that Ms. Santos’s objection regarding the “proof concerning a factual determination with which she had not been indicted” was an appropriate contest and not a false denial.¹¹

Within the Government’s response to the objections to the PSR, the United States Probation Office stated that Mr. Rosendo repeatedly denied being involved in any previous alien smuggling operations (ROA.192). But the question is – was that denial **false?**

Wrapped up within this question is the notion of how, exactly a criminal defendant must satisfactorily refute allegations that are uncharged and for which there has been no discovery and no advance notice.

Ordinarily, the Fifth Circuit places the burden on the defendant to show that the PSR is inaccurate, and in the absence of rebuttal evidence, the sentencing court may properly rely upon the PSR.¹² But given the vagueness of the information in this case, Mr. Rosendo

⁹ See U.S.S.G. § 3E1.1, cmt. 1A.

¹⁰ *United States v. Santos*, 537 Fed.Appx. 369, 375 (5th Cir. 2013) (“There may be some cases in which a defendant’s challenge of the sufficiency of the evidence is a frivolous contest or a false denial of the facts of the relevant conduct, but this is not one of those cases.”).

¹¹ *Id.* at 375.

¹² *United States v. Ollison*, 555 F3d 152, 164 (5th Cir. 2009).

could not have introduced such rebuttal evidence. Without knowing the identity of the alleged co-defendant, Mr. Rosendo could not have impeached that co-defendant. Without knowing the factual allegations of the 2019 alleged smuggling, Mr. Rosendo could not have introduced evidence of alibi or summoned witnesses to testify as to his conduct. Without having access to alleged phone records, Mr. Rosendo could not have explained their context or challenged their content. In short, the Government placed Mr. Rosendo between Scylla and Charybdis: admit “relevant conduct” for which he was not culpable, and face a potential sentencing enhancement, or appropriately deny that he was culpable for that conduct and forfeit his acceptance of responsibility points.

Mr. Fostel noted the difficulty during his argument before the sentencing court. He stated that this was a matter of “due process” and that absent such process, this amounted to the sovereign “mov[ing] the goalpost as they saw fit.”¹³ Mr. Fostel correctly noted that Mr. Rosendo admitted his responsibility for the charged offense; he did not attempt to deny or minimize his role in the offense. Mr. Rosendo was not charged with any offense arising out of any 2019 conduct. Nor did the Government offer any substantive evidence of this conduct. The trial court stated that it “look[ed like] the government had some information; the prosecutor responded that such was his “understanding,” implying that the prosecutor himself had not seen the information and could not even vouch for its authenticity or applicability. The sentencing court, in finding that Mr. Rosendo entered a false denial, stated that there were “multiple sources” on which the court was basing this determination, but does not expound on what those sources are.¹⁴

¹³ (ROA.99).

¹⁴ (ROA.100).

Only the response by the United States Probation Officer contains any further factual information. There, the Government states that the unnamed “cooperating defendant” was able to provide “specific names of the subjects in the February 2019 alien smuggling venture,” but the names are not included in the response.¹⁵ The Government further charges that “satellite tower subpoenas” confirmed Mr. Rosendo’s route, including a flight from California to Denver, picking up an SUV in Denver, and driving to Van Horn, Texas.¹⁶ However, this response does not contain the cell phone data, plane ticket, or any indication that Mr. Rosendo met with any illegal aliens in Van Horn, Texas. Even presuming that the Government could prove that was Mr. Rosendo’s route of travel, there is nothing sinister about travel from California to Denver to Texas. If agents had such information, it should have been incumbent upon the Government to produce the agents at sentencing to testify to, authenticate, and admit such evidence and testimony as would permit the district court to conclude that Mr. Rosendo **was falsely denying** his involvement in this alleged enterprise. To hold otherwise would be to effectively dispense with the foundational requirement for Sec. 3E1.1 and broaden the definition of “relevant conduct” to which a defendant must affirmatively admit to an entire confessional booth’s worth of pre-offense misconduct. Such cannot be the law; such a requirement is onerous and improperly shifts the burden to the defendant to prove that he has not committed offenses that are supported by little more than hearsay and rumor.

¹⁵ (ROA.176).

¹⁶ (ROA.176).

1.3. ABSENT REVIEW BY THIS COURT, CRIMINAL DEFENDANTS WILL BE FORCED TO REBUT PHANTOM CHARGES WITHOUT ADEQUATE CONSTITUTIONAL SAFEGUARDS.

Although reviewing courts should defer to the District Court's factual findings, those findings must be based on some evidence in the record. And in this case, that evidence is lacking. To hold that Mr. Rosendo was required to produce evidence disproving such vague allegations is improper burden-shifting and violated his rights to due process under the Fifth and Fourteenth Amendments of the United States Constitution. Because the Fifth Circuit did not analyze this argument, it falls to the Supreme Court of the United States to vindicate the abused rights of the criminally accused. To permit the Fifth Circuit's opinion to stand in this case would leave many similarly-situated defendants around the country in the unenviable position of trying to refute phantom charges from the Star Chamber, without witnesses against the defendant, without discovery, without confrontation, or even without a clearly-defined standard of proof of than whether the sentencing judge was satisfied with the explanations given by agents of the government.

CONCLUSION

Petitioner asks that this Court grant the petition and set the case for a decision on the merits.

Respectfully submitted,



LANE A. HAYGOOD
BAILEY & GALYEN
3800 E. 42ND STREET
SUITE 110
ODESSA, TEXAS 79762
LHAYGOOD@GALYEN.COM
432.803.5800

OCTOBER 25, 2021

APPENDIX

Fifth Circuit Opinion Tab 1

Judgment & Mandate..... Tab 2

TAB 1 - FIFTH CIRCUIT OPINION

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

August 10, 2021

No. 20-50919
Summary Calendar

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

GUSTAVO PLACANCIA-ROSENDO,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 4:20-CR-181-2

Before WIENER, DENNIS, and HAYNES, *Circuit Judges.*

PER CURIAM:*

Gustavo Placancia-Rosendo pleaded guilty to one count of unlawfully transporting aliens for commercial advantage or financial gain, and he was sentenced to serve 21 months in prison and a three-year term of supervised release. Now, he argues that the Government breached the plea agreement,

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

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thus releasing him from its appellate waiver clause, by failing to ensure that he received a sentencing adjustment for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1 and that the district court erred by not granting him this credit.

The Government's alleged breach of a plea agreement may be raised on direct appeal despite an appeal waiver, and the issue whether a breach occurred is a legal one that is reviewed *de novo*. *United States v. Purser*, 747 F.3d 284, 289-90 & n.11 (5th Cir. 2014). However, where, as here, the defendant fails to object to the Government's alleged breach of the plea agreement and does not move to withdraw his guilty plea on grounds that the Government broke its sentencing promises, review is for plain error. *United States v. Hinojosa*, 749 F.3d 407, 413 (5th Cir. 2014). Under this standard, one must show a clear or obvious error that affected his substantial rights, and this court will exercise its discretion to correct a plain error only if it "seriously affects the fairness, integrity[,] or public reputation of judicial proceedings." *Puckett v. United States*, 556 U.S. 129, 135 (2009) (internal quotation marks and citation omitted). Placancia-Rosendo has not met this standard.

The record shows that Placancia-Rosendo failed to fulfill his obligation under the plea agreement to be completely truthful with the Government concerning all of his unlawful activity. This freed the Government of its obligations under the agreement, and there was no breach. Because there was no breach, Placancia-Rosendo will be held to the bargain he struck, which included a waiver of his appellate rights. This waiver is enforceable because the record shows that it was knowing and voluntary. *See United States v. Bond*, 414 F.3d 542, 544 (5th Cir. 2005); *United States v. McKinney*, 406 F.3d 744, 746 n.2 (5th Cir. 2005). Additionally, the plain language of the agreement shows that it bars Placancia-Rosendo's challenge

No. 20-50919

to the denial of the § 3E1.1 adjustment, as the waiver precludes all sentencing claims. The judgment of the district court is AFFIRMED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

August 10, 2021

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 20-50919 USA v. Placancia-Rosendo
USDC No. 4:20-CR-181-2

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and 5th Cir. R. 35, 39, and 41 govern costs, rehearings, and mandates. **5th Cir. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and 5th Cir. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5th Cir. R. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk



By: Nancy F. Dolly, Deputy Clerk

Enclosure(s)

Mr. Richard Louis Durbin Jr.

Mr. Joseph H. Gay Jr.

Mr. Lane Andrew Haygood

TAB 2 - JUDGMENT & MANDATE

United States Court of Appeals
for the Fifth Circuit

No. 20-50919
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

August 10, 2021

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

GUSTAVO PLACANCIA-ROSENDO,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 4:20-CR-181-2

Before WIENER, DENNIS, and HAYNES, *Circuit Judges.*

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.



Certified as a true copy and issued
as the mandate on Sep 01, 2021

Attest: *Lyle W. Cayce*
Clerk, U.S. Court of Appeals, Fifth Circuit

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

**LYLE W. CAYCE
CLERK**

**TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130**

September 01, 2021

Ms. Jeannette Clack
Western District of Texas, Pecos
United States District Court
410 S. Cedar Street
U. S. Post Office & Courthouse
Room 203
Pecos, TX 79772-0000

No. 20-50919 USA v. Placancia-Rosendo
USDC No. 4:20-CR-181-2

Dear Ms. Clack,

Enclosed is a copy of the judgment issued as the mandate and a copy of the court's opinion.

Sincerely,

LYLE W. CAYCE, Clerk

Lisa E. Ferrara

By: *Lisa E. Ferrara*, Deputy Clerk
504-310-7675

CC:

Mr. Richard Louis Durbin Jr.
Mr. Joseph H. Gay Jr.
Mr. Lane Andrew Haygood