No. 22-10130

In the United States Court of Appeals for the Fifth Circuit

United States of America,
Plaintiff – Appellee,

v.

Bradley J. Harris,
Defendant – Appellant.

On Appeal from the United States District Court
for the Northern District of Texas, Dallas Division
3:17-CR-103-1
Honorable Chief Judge Barbara M.G. Lynn Presiding

ORIGINAL BRIEF FOR DEFENDANT-APPELLANT BRADLEY J. HARRIS

Walter L. Taylor
State Bar No. 19727030
taylorlawfirmdfw@gmail.com
TAYLOR LAW FIRM
6630 Colleyville Blvd, Suite 100
Colleyville, Texas 76034
Tel: (817) 770-4343
Fax: (682) 292-7406
ATTORNEY OF RECORD FOR DEFENDANT-APPELLANT BRADLEY J. HARRIS

ORAL ARGUMENT REQUESTED

EXHIBIT 3

No. 22-10130

In the United States Court of Appeals for the Fifth Circuit

United States of America,
Plaintiff – Appellee,

v.

Bradley J. Harris,
Defendant – Appellant.

On Appeal from the United States District Court
for the Northern District of Texas, Dallas Division
3:17-CR-103-1
Honorable Chief Judge Barbara M.G. Lynn Presiding

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of FRAP 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

Appellant:

Bradley J. Harris
B.O.P. Reg. No. 55436-177

Attorneys for Appellant:

On Appeal:

Walter L. Taylor
Taylor Law Firm

In the District Court:

Christopher M. Knox
The Knox Firm
Shirley Baccus-Lobel
Law Offices of
Shirley Baccus-Lobel, PC

Jason D. Hawkins – FPD
Federal Public Defender – Dallas
Keith Marcel Rosen
Norton Rose Fulbright US, LLP

Abbe David Lowell
Winston & Strawn, LLP
Asari A. Ariagolu
Norton Rose Fulbright US, LLP

Lea F. Courington
Dykema Cox Smith
Morgan Halboth Scott
Law Firm of Josh Borsellino

Appellee:

The United States of America

Attorneys for Appellee:

On Appeal:

Chad Meacham
United States Attorney

Leigha Amy Simonton
Assistant United States Attorney

Jonathan Bradshaw
Assistant United States Attorney

In the District Court:

Chad E. Meacham
United States Attorney

Carlos Antonio Lopez
U.S. Department of Justice

Dimitri Narciso Rocha
Assistant United States Attorney

Donna S. Max
Assistant United States Attorney

Gail A. Hayworth
Assistant United States Attorney

Jason Michael Meyer
Assistant United States Attorney

Katherine A. Miller
Assistant United States Attorney

Katherine Elizabeth Pfeifle
Assistant United States Attorney

Marty Basu
Assistant United States Attorney

Russell W. Fusco
Assistant United States Attorney

Stephen S. Gilstrap
Assistant United States Attorney

/s/ Walter L. Taylor
Walter L. Taylor
TAYLOR LAW FIRM

ATTORNEY OF RECORD FOR DEFENDANT-APPELLANT

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to FED.R.APP.P 34(a)(1) and FED.R.APP.P 34(a)(2), Defendant-Appellant respectfully requests oral argument. The primary issue in this appeal – whether a criminal defendant who has pled guilty is still entitled to Fifth Amendment and Sixth Amendment due process and a lawyer who will not waive it, and to be sentenced by a trial court who has not engaged in or received "negative" *ex parte* communications about him – is important to the constitutional jurisprudence of this Circuit, and counsel for Defendant-Appellant believes oral argument will significantly aid the Court's decisional process.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

No. 22-10130

In the United States Court of Appeals for the Fifth Circuit

United States of America,
Plaintiff – Appellee,

v.

Bradley J. Harris,
Defendant – Appellant.

On Appeal from the United States District Court
for the Northern District of Texas, Dallas Division
3:17-CR-103-1
Honorable Chief Judge Barbara M.G. Lynn Presiding

ORIGINAL BRIEF FOR DEFENDANT-APPELLANT BRADLEY J. HARRIS

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

ISSUE PRESENTED

At sentencing, the U.S. Constitution's Fifth and Sixth Amendments entitle a defendant to due process and effective assistance of counsel, including the meaningful opportunity to be heard and to rebut information the sentencing judge has received about the defendant. The trial court below received "negative" ex parte communications about Mr. Harris, never disclosed their substance or origin, and waited until the sentencing hearing to disclose their existence. Is Mr. Harris entitled to be resentenced?

STATEMENT OF THE CASE

This is a direct appeal seeking to vacate a Judgment sentencing Defendant-Appellant Harris [ROA.872-878], based on a due process violation – the undisputed fact that the trial court read and heard *ex parte* communications of undisclosed content and by undisclosed speakers prior to sentencing. ROA.2006. Mr. Harris had pled guilty and testified against other defendants who took the government to trial, securing their convictions. ROA.2018. Without his cooperation, "many of the people who were convicted probably wouldn't have been convicted." ROA.2018. The government and Mr. Harris agreed the appropriate sentence for Harris was ten (10) years, but the trial court sentenced Harris to thirteen (13) years and three (3) months.

A) Background on Bradley J. Harris:

Defendant-Appellant Bradley J. Harris was born in 1981 in Miami, Florida. ROA.1131. Mr. Harris moved to Texas with his family in 1985, when

he was four years old, and he has lived in Texas ever since. ROA.95. Mr. Harris attended the University of Texas and graduated with a joint Bachelors and Masters in Business Administration degree in 2004. ROA.95. After graduation, he became a Certified Public Accountant and worked as an auditor in Texas, and later began working in healthcare management. ROA.95. In 2010, Mr. Harris moved to Frisco, TX, where he continued to reside during the litigation below. ROA.95.

In 2012, Mr. Harris co-founded Novus Health Services, Inc. and Optim Health Services, Inc., and worked as the Chief Executive Officer (CEO) of both companies from roughly May 2012 to October 2015. ROA.763. Both companies were Medicare and Medicaid providers of hospice services to beneficiaries in the Northern and Eastern Districts of Texas. ROA.763

B) Indictment and Superseding Indictment:

On or about February 23, 2017, the United States Attorney's Office for the Northern District of Texas filed a sealed Indictment against Mr. Harris and sixteen (16) other Novus principals and employees, charging Harris and others of fifteen (15) counts, including Health Care Fraud, Conspiracy to Commit Health Care Fraud, and Unlawful Distribution of a Controlled Substance under 18 U.S.C. §§ 1347 & 2, 18 U.S.C. § 1349 (18 U.S.C. § 1347), and 21 U.S.C. §§ 841(a)(1), (b)(1)(C) and 18 U.S.C. § 2. ROA.30-60. On or

about August 7, 2019, a Superseding Indictment was returned alleging fifteen (15) counts. Added to the counts of Health Care Fraud, Conspiracy to Commit Health Care Fraud, and Unlawful Distribution of a Controlled Substance was a count of Conspiracy to Obstruct Justice under 18 U.S.C. § 371 [18 U.S.C. § 1505]. ROA.602-627. The later-filed PSR found no evidence that Mr. Harris had obstructed justice. ROA.1149.

C) Harris's Guilty Plea:

On or about March 15, 2021, Mr. Harris and the United States entered into a Plea Agreement, in which Harris pled guilty to two (2) counts – Counts 1 and 4 of the Superseding Indictment (Conspiracy to Commit Health Care Fraud and Health Care Fraud). ROA.1117. Among other terms of the Plea Agreement, the parties agreed the maximum sentence for the two counts combined was 168 months, or fourteen (14) years (the plea maximum), which became binding on the trial court when it accepted Mr. Harris's plea. ROA.1119. Based on Mr. Harris's further cooperation, including valuable trial testimony against his Co-Defendants, the government also further agreed to recommend a downward departure to a sentence of 121 months, or roughly ten (10) years, which it did. ROA.2018.

While Mr. Harris's Plea Agreement did contain waivers of specific appeal rights [ROA.1122], the Plea Agreement did not contain any waiver of

Mr. Harris's constitutional right to due process under the Fifth and Fourteenth Amendments (or the right to appeal a violation of it). ROA.1117-1124. Moreover, the Plea Agreement expressly reserved Mr. Harris's right to bring a direct appeal arguing ineffective assistance of counsel. ROA.1122-1123.

D) The Presentence Investigative Report ("PSR") and Harris's Objections:

A Presentence Investigative Report ("PSR") was prepared by the United States Probation Office (U.S.P.O.) and filed under seal on June 15, 2021. ROA.1129-1168. Mr. Harris filed Objections to the PSR on December 2021. ROA.1169-1192. The government responded to Mr. Harris's Objections on December 16, 2021. ROA.1193-1208. The U.S.P.O. filed an Addendum to the PSR on December 23, 2021. ROA.1210-1219. Harris responded to the Addendum and to the government's response to his Objections on January 6, 2022. ROA.1220-1224.

The result was a series of complex factual issues under the Federal Sentencing Guidelines for the trial court to resolve at sentencing by the preponderance of the evidence standard. Among the factual issues requiring resolution were:

1) Base Offense Level (USSG §2X1.1):

The PSR calculated the base offense level at 6, then added 22 levels for the dollar amount of the fraud (a loss alleged to be greater than $25 million but less than $65 million), plus 2 levels for allegedly affecting 10 or more victims, plus 4 levels for a federal offense involving healthcare fraud of a government healthcare program in excess of $20 million, plus 2 levels for the allegation that the offense involved the conscious risk of death or serious bodily injury, for a total Base Offense Level of 35. ROA.1150-1151.

Mr. Harris hotly disputed these facts, arguing the dollar amount of the fraud was less than $20 million (adding 20, not 22 levels), that the offenses involved fewer than 10 victims (no 2 level enhancement), that the actual loss to a government healthcare program was in excess of $7 million but less than $20 million (so 3, not 4, levels added), and that the financial incentive to keep hospice patients alive as long as possible negated any conscious risk of death or serious bodily injury (so no 2 level enhancement), for a total Base Offense Level computation of 29, not 36. ROA.1187-1190.

2) Victim Related Adjustment (USSG §3A1.1(b)(2)):

The PSR calculated a 2 level increase for "vulnerable victims," and an additional 2 levels alleging the existence of more than 1,700 victims and therefore a large number. ROA.1151. Mr. Harris disputed this fact, arguing

that, because Novus admitted only approximately 2,200 patients, the PSR was essentially claiming 80% of Novus's patients were victims. This number had to be inflated, argued Harris, because approximately 1,067 of Novus's patients – nearly 48% – were discharged for reasons other than death. Plus, the total number of patients the PSR alleged Novus had overmedicated was four (4). Thus, Harris objected to the 2 level enhancement for a "large" number of victims. ROA.1191.

3) Abuse of Position of Public Trust (USSG §3B1.3):

The PSR alleged Mr. Harris had abused a position of public trust, or used a special skill because he was the CEO of a company that received funds from Medicare or Medicaid. ROA.1152. Mr. Harris further argued that under the PSR's theory, every healthcare fraud offense would warrant this enhancement. ROA.1191.

4) Total Offense Level (USSG Ch.5, Pt.A (comment n.2)):

The PSR calculated the total offense level at 46, but under USSG Ch. 5, Pt. A (comment n. 2), the total offense level was capped at 43. ROA.1152. Mr. Harris disputed factually the PSR's determination of total offense level, instead calculating it at 32. ROA.1191.

5) Broader Factual Disputes:

The PSR and Mr. Harris's Objections also left other complex factual disputes for the trial court to resolve at sentencing. A non-exclusive list included Mr. Harris's overall role in the offense (given that he had no medical license and took advice and direction from Novus's Medical Director), as well as Mr. Harris's vehement assertion that, despite rash conclusions drawn by the government and U.S.P.O. from text messages taken out of context (which Mr. Harris admitted were poorly and callously worded), neither Harris nor anyone else at Novus ever acted with the intention to harm anyone or hasten their death. ROA.1130-1168; ROA.1169-1192.

E) The Sentencing Hearing:

Pursuant to Fed.R.Crim.P. 32, the trial court held a sentencing hearing on January 25, 2022, to resolve these complex factual issues. ROA.2003-2034. Mr. Harris, because he had COVID and his Motion for Continuance had been denied, appeared by video conference from his home. ROA.2005. First, the trial court required Mr. Harris to confirm on the record he had "voluntarily and knowingly waived" his right to appear in person. ROA.2005. The trial court then proceeded to inform Mr. Harris (by video conference) and his counsel (who was in the courtroom) of the existence, but not the

identities or substance, of "negative" *ex parte* communications the Court had received about Mr. Harris:

> THE COURT: I want to state that, unusually, ***I have received some negative correspondence about Mr. Harris***. Both of the persons who corresponded with the Court, and one of those did so also by telephone *but I did not speak to that person directly*, have requested confidentiality.

ROA.2006. Although the trial court disclaimed it had not spoken "directly" to the person who provided anonymous information by phone, the court offered no such disclaimer as to the written correspondence from both *ex parte* communicators and presumably read both. ROA.2006.

Keeping secret from the defendant and his counsel not only the identities, but also the subject matter, of the *ex parte* communications, the trial court then claimed it would render sentence without considering any of the "negative" things those people had said about Defendant-Appellant Harris. ROA.2007. No one at the sentencing hearing ever asked, and the trial court never provided answers to, any of the following questions:

> Who were the *ex parte* communicators?
>
> Were they affiliated with the prosecution?
>
> Were they affiliated with the FBI?
>
> Were they affiliated with Medicare, Medicaid, or any other government agency?
>
> Were they patients of Novus?

Were they related to any of Novus's patients?

Were they indicted Co-Defendants seeking to minimize their own roles by inflating Mr. Harris's role?

Were they relatives of Co-Defendants seeking to minimize the roles of relatives by inflating Mr. Harris's role?

What "negative" information about Mr. Harris did they anonymously provide to the trial court?

Did they offer interpretations of the text messages Mr. Harris argued the government took out of context?

Did they provide information regarding Mr. Harris's conduct during pretrial period?

Did they offer opinions about Mr. Harris's character or whether he had changed as a result of this experience?

Did they offer factual information pertaining to the dollar amount of the fraud, which could be relevant to the Base Offense Level calculation?

Did they offer factual information concerning any of Novus's patients or its operation that would have been relevant to victim impact?

Did they offer factual information concerning any of Novus's patients or its operation that would have been relevant to public trust or special skill?

Did they offer factual information concerning any of Novus's patients or its operation that would have been relevant to the intent of Novus employees or representatives regarding hastening the death of patients?

Did they alleged that Mr. Harris was the "driving force" behind this crime?

> Did they allege that, but for Mr. Harris, they or someone they knew would never have been involved in the matter at all?
>
> Did they offer opinions that the public might be susceptible to future crimes by Mr. Harris, if he were not sentenced severely enough?
>
> Did they offer opinions about whether the sentence the government was recommending was less than Mr. Harris deserved?
>
> Who initiated the phone call? The court through staff or the *ex parte* communicator?
>
> Did the trial court initiate the call after reading the written *ex parte* communication?
>
> Was the request for anonymity in writing, and was the trial court following up "indirectly" to ask if the *ex parte* communicator would waive anonymity and/or testify at sentencing?
>
> How recently, prior to the sentencing hearing, had the trial court read the written *ex parte* communication?
>
> How recently, prior to the sentencing hearing, had the trial court spoken "indirectly" with the person who provided *ex parte* information by phone?

Neither of Mr. Harris's trial counsels asked any of these questions in the split second they had to react to the trial court's tardy disclosure. ROA.2007. The sentencing hearing transcript, and the record as a whole are completely devoid of this information, because the trial court did not reveal it. ROA.2003-2034. Mr. Harris was unable to confer privately with his counsel about this sudden and expected revelation, because Mr. Harris was

appearing by video, and the waiver of his right to appear in person had been obtained prior to any disclosure that the trial court had entertained "negative" *ex parte* communications about Harris, of an undisclosed substance and from undisclosed persons. ROA.2005-2006.

As the sentencing hearing proceeded, the trial court "resolved" the complex factual issues by simply overruling all of Harris's legal and factual objections and adopting the PSR in its entirety. ROA.2009. The government made its request for a 5K downward departure to a sentence of 121 months, or roughly 10 years. ROA.2018. In its 18 U.S.C. §3553 recitation, the trial court drew additional conclusions about Mr. Harris personally, including "I am not convinced that you are completely reformed," and "I believe protection of the public from further crimes that you might commit is a factor the court should consider." ROA.2022. "[M]y view is that the recommendation that the Government is making is less than the sentence you deserve." ROA.2024.

The trial court then sentenced Mr. Harris to 159 months, or thirteen (13) years and three (3) months.ROA.2029. Judgment was filed on January 26, 2022. ROA.872-878. Mr. Harris timely filed his Notice of Appeal on February 7, 2022. ROA.879. Mr. Harris alleges on direct appeal that the *ex parte* communications the trial court permitted – from unidentified

individuals, of undisclosed substance, at an unrevealed proximity to his sentencing hearing – violated his constitutional right to due process and effective assistance of counsel at sentencing.

STANDARD OF REVIEW

This Circuit reviews Fifth Amendment due process violation issues *de novo*. *United States v. Brocato*, 4 F.4th 296, 301 (5th Cir. 2021); *United States v. Burns*, 536 F.3d 852, 859 (5th Cir. 2008); *United States v. Williams*, 343 F.3d 423, 439 (5th Cir. 2003).

SUMMARY OF THE ARGUMENT

The Fifth and Fourteenth Amendments of the U.S. Constitution forbid the deprivation of liberty without due process of law. They command fundamental fairness in judicial procedures, including criminal sentencing. While trial judges have broad discretion at sentencing, it is not absolute. They must often weigh conflicting evidence on hotly contested and frequently complex factual issues, evaluate the defendant, and make factual findings. The Supreme Court has held that the sentencing process is a critical stage of a criminal proceeding, where the defendant is entitled to due process, including effective assistance of counsel, as well as a meaningful opportunity to be heard and to rebut information provided to the trial court

about the defendant, such as his role in the offense, his character, or his sentence.

The Code of Judicial Conduct for United States Judges prohibits judges from initiating, permitting, or considering *ex parte* communications, except in four narrow circumstances inapplicable to this case. Court staff members are held to the same standard. When sentencing judges or their staff members engage in or receive undisclosed *ex parte* communications, *ex parte* communications only disclosed for the first time at a sentencing hearing, or *ex parte* communications about which the existence is disclosed but the substance of information provided or by whom it was provided are not revealed, defendants have no meaningful opportunity to evaluate, to investigate, to be heard or to rebut the information. This deprives criminal defendants of due process under the Fifth Amendment, and it necessarily renders even able trial counsel's assistance ineffective, in violation of the Sixth Amendment, as the Supreme Court and several circuits including this Circuit have held.

Some circuits (particularly with constitutional due process at stake) have found ineffective or unreliable a trial court's disclaimer that it did not consider the *ex parte* information in sentencing, even on a full record where the substance of the *ex parte* communications is known and can be evaluated

in light of the whole record. The burden for proving lack of prejudice is on the government, and it is a heavy one. Here, the trial court below kept the information out of the record, depriving this Court of a record that would allow Harris to argue, the government to prove, or this Court to review whether the *ex parte* information received by the trial court was merely duplicative of information already in the PSR or supplied by the defendant or the government, or was something new or unique about him, or whether it was of a nature a trial court could truly disregard. In the interest of not only justice but also the appearance of justice, most courts finding a due process violation because of *ex parte* communications during the sentencing phase – including the Supreme Court and this Circuit – have held that the remedy is to vacate the defendant's sentence, and to remand for resentencing before a redrawn judge. Mr. Harris respectfully asks this Court to do exactly that.

ARGUMENT AND AUTHORITIES

Issue: At sentencing, the U.S. Constitution's Fifth and Sixth Amendments entitle a defendant to due process and effective assistance of counsel, including the meaningful opportunity to be heard and to rebut information the sentencing judge has received about the defendant. The trial court below received "negative" ex parte communications about Mr. Harris, never disclosed their substance or origin, and waited until the sentencing hearing to disclose their existence. Is Mr. Harris entitled to be resentenced?

A) Due process violations are reviewed *de novo*.

This Circuit reviews Fifth Amendment due process violation issues *de novo*. *Brocato*, 4 F.4th at 301; *Burns*, 536 F.3d at 859; *Williams*, 343 F.3d at 439.

B) Criminal defendants are entitled to constitutional due process at the sentencing phase.

The United States Constitution forbids the deprivation of one's liberty without due process of law. *See,* U.S. Const. Amends. V, XIV. This due process requirement, found in both the Fifth and Fourteenth Amendments to the U.S. Constitution, commands "fundamental fairness" in judicial procedures. *See*, *Williams v. Oklahoma*, 358 U.S. 576, 584 (1959). Due process necessarily requires that the defendant be afforded a meaningful opportunity to be heard and to refute any information to be considered at sentencing. *See*, *e.g.*, *Shelton v. United States*, 497 F.2d 156, 159 (5th Cir. 1974) ("adequate" opportunity required); *Matthews v. Eldridge*, 424 U.S. 319, 348-349 (1976) (holding, in administrative deprivation case, that due process requires not just a mere opportunity to be heard; rather, such opportunity must be "meaningful").

While trial judges have broad discretion at sentencing, for nearly five (5) decades the Supreme Court has held that the sentencing process "must

satisfy the requirements of the Due Process Clause." *Gardner v. Florida*, 430 U.S. 349, 358 (1977). "Even though a defendant has no right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel." *Id.* "The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process." *Id.*

Though not identical to this case, the *Gardner* sentencing involved facts similar to the sentencing hearing below. The trial court in *Gardner* entered findings of fact and judgment sentencing Gardner to death. *Gardner,* 430 U.S. at 353. The trial court's ultimate finding was that Gardner's felony "was especially heinous, atrocious or cruel; and that such aggravating circumstances outweighs [sic] the mitigating circumstance, to-wit: none." *Id.* The trial court in *Gardner* indicated its decision was based in part on factual information contained in a pre-sentence investigation, a portion of which was "confidential" and not disclosed to defense counsel. *Id.* Significantly, the *Gardner* trial court did not comment on the contents of the confidential portion, nor did its findings indicate there was anything of special importance in the undisclosed portion, or that there was any reason

other than customary practice for not disclosing the entire report to defense counsel. *Id*.

As the Supreme Court noted, however, *because the trial court did not state on the record the substance of any information* in the confidential portion of the presentence report it might have considered material, "there was, accordingly, *no…opportunity for petitioner's counsel to challenge the accuracy or materiality of any such information*." *Gardner,* 430 U.S. at 356. (Emphasis added). Even if a trial court had good cause to withhold portions of information it reviewed, "it would nevertheless be necessary to make the full report a part of the record to be reviewed on appeal." *Gardner,* 430 U.S. at 360-61. Moreover, the Supreme Court held the failure of Gardner's defense counsel to request access to the full report "cannot justify the submission of a less complete record to the reviewing court than the record on which the trial judge based his decision to sentence petitioner…" *Gardner,* 430 U.S. at 361. "Nor do we regard this omission by counsel as an effective waiver of the constitutional error in the record." *Id*. The Court found there was "no basis for presuming that the defendant himself made a knowing and intelligent waiver, or that counsel could possibly have made a tactical decision not to examine the full report." *Id*.

As a result, the Supreme Court found that Gardner "was denied due process of law when [sentence] was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." *Gardner,* 430 U.S. at 362. Merely remanding to have the secreted portions added to the record for subsequent appellate review "could not correct the error." *Id.* The only suitable remedy for the due process violation underlying Gardner's sentencing was to vacate Gardner's sentence and remand the case with directions for further proceedings at the trial court consistent with the Supreme Court's opinion. *Id.*

C) *Ex parte* communications are prohibited by the Code of Judicial Conduct for United States Judges.

The trial court's disclaimer of reliance on the "negative correspondence" about Harris is insufficient to provide him due process, because the trial court should never have read the correspondence, or once it had, it should have disclosed its substance, given Harris and his lawyer an opportunity to respond, and made it part of the record (even redacting identifies of the speakers, if it found good cause for doing so). "A federal judge should…act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." CODE OF JUDICIAL CONDUCT FOR UNITED STATES JUDGES, CANON 2(A). "A judge should accord to every

person who has a legal interest in a proceeding, and that person's lawyer, the full right to be heard according to law." CODE OF JUDICIAL CONDUCT FOR UNITED STATES JUDGES, CANON 3(A)(4). Further, except for exceptional circumstances inapplicable to this case[1]:

> "[A] judge should not initiate, *permit*, or consider *other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers*. If a judge receives an unauthorized *ex parte* communication bearing on the substance of a matter, *the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested*."

Id. (Emphasis added).

D) This Circuit and several sister circuits have found that *ex parte* communications with a judge violate constitutional due process in the sentencing context; the remedy is to vacate the sentence and remand for resentencing, nearly always before a redrawn judge.

This Circuit has considered both the due process violations *ex parte* communications create, as well as the remedy for them, in *United States v. Huff*, 512 F.2d 66 (5th Cir. 1975). In *Huff*, the appellant attached to his brief an *ex parte* "memorandum" formally addressed to the trial judge from the Assistant United States Attorney on the subject "Billy Ray Huff Government's Sentencing Recommendation…" *Huff*, 512 F.2d at 70. After sentencing, this memorandum had been discovered in the court clerk's file,

[1] The four (4) exceptions – none of which apply to this case – are discussed in fn. 4 below.

where it was an undocketed and apparently inadvertent inclusion. *Id.* The instrument was not a part of the record, nor was it certified on appeal. *Id. Significantly, there was no actual proof that the trial judge received it or considered it*, but the government did not deny submitting it, nor did anyone suggest it had ever been brought to the attention of the defendant or his counsel before or at sentencing. *Id.* More than merely taking note of the *ex parte* communication, this Circuit wrote, "we emphatically disapprove it, as prejudicial and impermissible *ex parte* communication between government counsel and the court." *Id.*

In *Huff*, the government argued the *ex parte* communication was not improper because everything in the memo had also been "dealt with on the record." *Huff*, 512 F.2d at 70. However, since Huff's counsel had access to the substance of the communication and was able to attach it to Huff's brief, this Court was able to determine that "only some of the underling data was in the record; and the memorandum went beyond the data to suggest what conclusions should be drawn." *Id.* Other parts of the memorandum had been taken from a collateral proceeding and were thus not subject to answer by Huff; and some had no basis at all in the record. *Huff*, 512 F.2d at 70-71. Here, of course, this Court can make no such determination, because Harris

was never given access to the substance of "negative" communications made about him to the trial court prior to its pronouncing sentence on him.

This Court discussed the serious and significant violations of Huff's due process rights created by the *ex parte* communication:

> The sentencing is, of course, a critical stage of the proceedings against the accused, at which he is constitutionally entitled to be present and represented by counsel [citing *Mempa v. Rhay*, 389 U.S. 128 (1967)]. While recognizing the limits upon appellate review of the length of sentences, this Court has recognized, "It is our duty to insure that rudimentary notions of fairness are observed in the process at which sentence is determined [citing *United States v. Espinoza*, 481 F.2d 553, 558 (5th Cir. 1973)]...Where the defendant was denied the opportunity to rebut prejudicial pre-sentence material the source of which is not identified or verified by the probation officer, and which is relied upon by the sentencing judge, we have vacated sentence and remanded for resentencing [citing *Shelton*, *supra*; *United States v. Battaglia*, 478 F.2d 854 (5th Cir. 1972)]. And where a pre-sentence memorandum is submitted by the prosecution rather than the probation officer, other Circuits have required disclosure and the opportunity to rebut [citations omitted].

Huff, 512 F.2d at 71. Not only did the *ex parte* memorandum go beyond the record, but "more importantly, the manner of its submission deprived the defendant of his fundamental due process right to hear and rebut" information potentially used against him at sentencing. *Id.* This Court therefore vacated Huff's sentence and remanded "for resentencing by a redrawn judge." *Id.*

The Second Circuit reached the same result on similar facts in *United States v. Rosner*, 485 F.2d 1213 (2d Cir. 1973). In *Rosner*, the sentencing judge received a memorandum from the United States Attorney's office, which the Probation Department did not screen or verify, consisting of sixteen closely typed pages and appendices, outlining alleged "possible misrepresentations, fraudulent conduct, lying, and unethical behavior" on the part of the appellant, involving at least seventeen events, the prosecution stating candidly that "it is impossible to prove all such events." *Rosner*, 485 F.2d at 1229. Rosner's defense counsel saw the memorandum for the first time on the day of sentencing. *Id.* Although counsel had had no time to review or possibly even to absorb seventeen separate incidents previously unfamiliar to him, his request for an adjournment of the sentencing hearing and opportunity to investigate and rebut was denied. *Id.*

As below, the defendant in *Rosner* had able and conscientious counsel. However, the Second Circuit noted that, because Rosner's counsel was deprived of an adequate opportunity to review, investigate, and/or correct any misinformation in the prosecutor's memorandum, "we doubt that his spontaneous comment before sentence was adequate to afford the defendant his due." *Rosner*, 485 F.2d at 1230. Accordingly, the Second Circuit wrote:

> We commend the District Judge for disclosing the United States Attorney's report to defense counsel [citations omitted], but we feel that he should have given counsel sufficient time for useful examination and rebuttal in view of the one-sided and potentially devastating disclosures of asserted bad conduct by the defendant [citations omitted]. *Audi alteram partem*[2] is an ancient principle of justice, not impervious to exception for confidentiality, yet a fair general rule to apply, we think, before a judge finishes the profound soliloquy that precedes a just sentence.

Id. In vacating and remanding for resentencing before a redrawn judge (just as this Court did in *Huff*, *supra*), the Second Circuit noted, "[i]t is difficult for a judge, having once made up his mind, to resentence a defendant, and both for the judge's sake, and the appearance of justice, we remand this case to be redrawn." *Rosner*, 485 F.2d at 1231; *accord*, *United States v. Stein*, 544 F.2d 96, 104 (2d Cir. 1976) (noting "the recognized difficulty which an original sentencing judge may have in rejecting or modifying prior conclusions and the necessity of maintaining the appearance of justice, we direct that the resentencing be conducted by a different judge"); *United States v. Robin*, 545 F.2d 775, 782 (2d Cir. 1976) ("[f]ollowing the preferred practice in such cases, resentencing will be before a different judge").

In *United States v. Wolfson*, 634 F.2d 1217 (9th Cir. 1980), Wolfson's counsel was never shown at the sentencing hearing a copy of the U.S.

---

[2] *Audi alteram partem*; "hear the other side; hear both sides. No man should be condemned unheard." *Your Free Online Legal Dictionary, Featuring Black's Law Dictionary, 2nd Edition*: *https://thelawdictionary.org/?s=audi+alteram+partem*

Attorney's *ex parte* sentencing report, a copy of which was later obtained and included in the record on appeal. *Wolfson*, 634 F.2d at 1221. In reversing and remanding, the Ninth Circuit wrote:

> We hold, in agreement with other circuits that have considered this question, that it is improper for the prosecution to make, or for the court to receive from the prosecution, an *ex parte* communication bearing on the sentence [citations omitted]…. ***[I]t is of the utmost importance not only that justice be done, but that it also appear to be done. A secret communication…to the judge, especially when it…contains not only factual statements but also a recommendation of what the sentence should be, destroys that appearance.*** *We cannot approve it.*

Wolfson, 634 F.2d at 1221-1222. (Emphasis added). The Ninth Circuit vacated and remanded for resentencing, and "[t]o preserve the appearance of justice…we direct that the resentencing shall be by another judge." *Wolfson*, 634 F.2d at 1222.

Other circuits have likewise expressed appreciable concern over the effect of *ex parte* communications on the criminal judicial process. The Sixth Circuit has reversed convictions based on *ex parte* communications, noting that even with no separate showing they violate the Sixth Amendment's right to effective assistance of counsel. *See*, *e.g.*, *United States v. Barnwell*, 477 F.3d 844, 850 (6th Cir. 2007) ("We hold that these *ex parte* communications violated Barnwell's constitutionally prescribed rights to due process, effective assistance of counsel, and trial by an impartial judge and jury.");

United States v. Minsky, 963 F.2d 870, 874 (6th Cir. 1992) ("We hold that the *ex parte* sidebar conference violated Minsky's right to a fair trial and was a Sixth Amendment violation…[T]his violation is sufficient alone to require the granting of a new trial.").

The Tenth Circuit likewise observed that *ex parte* communications "present a very serious and disturbing challenge to the constitutionality of [a defendant's] conviction." *Hess v. Jones*, 681 F.2d 688, 692 (10th Cir. 1982) ("Such claims of prejudicial *ex parte* communication between the trial judge and the prosecution, if accepted, would present a very serious and disturbing challenge to the constitutionality of Jones's convictions, grounded on the constitutional right to a fair trial and the Due Process Clause of the Fourteenth Amendment" [but affirmed trial court's conclusion the argument had not been exhausted in state court].); *see also United States v. Lemon*, 723 F.2d 922, 933 (D.C. Cir. 1983) ("The requirements of due process are not suspended with the pronouncement of guilt but continue to operate in the sentencing process. [citing *Gardner, supra*]. [C]ourts must be concerned not merely when a sentencing judge has relied on demonstrably false information, but "when the sentencing process created a significant *possibility* that misinformation infected the decision.") (Emphasis in original). Although written in the recusal context of a civil case, the following

language from the Seventh Circuit is illustrative of the impartiality and due process issues *ex parte* communications create:

> As for the question whether information secured in chambers can be "personal" knowledge: although [28 U.S.C. § 455] is principally concerned with knowledge that is "extrajudicial" in the sense that the judge acquires it outside a courthouse, the [Supreme Court] rejected the argument that *only* such information can lead to disqualification. ***The point of distinguishing between "personal knowledge" and knowledge gained in a judicial capacity is that information from the latter source enters the record and may be controverted or tested by the tools of the adversary process.*** Knowledge received in other ways, which can be neither accurately stated nor fully tested, is "extrajudicial." (Cleaned up; emphasis added).

Edgar v. K.L., 93 F.3d 256, 259 (7th Cir. 1996) (citing *Liteky v. United States*, 510 U.S. 540, 555-556 (1994).

In the sentencing process below, the trial court could have provided due process by refusing any *ex parte* communications outside the PSR and submissions of the parties. Or, having engaged in the *ex parte* communications, the court could have disclosed the sources and substance of the *ex parte* "negative" communications about Harris, sufficiently far enough in advance of the sentencing hearing to give him time to rebut. Still in the alternative, the trial court could have made factual findings on the record and demonstrated an appropriate legal basis for withholding some information (presumably the sources of the information) but disclosing the

substance (again, with time to rebut). The trial court could also have postponed the sentencing hearing to provide rebuttal time, if disclosing the *ex parte* communications and their substance in advance of the sentencing hearing was not possible.

Instead, the trial court below permitted "negative" *ex parte* communications about Mr. Harris with undisclosed persons, of an undisclosed substance, which appear to have occurred right before sentencing. In so doing, the trial gained information, arguably in a judicial capacity, but nevertheless prevented that information from entering the record and so it could be controverted or tested by the tools of the adversarial process, or reviewed by this Court. This, coupled with the tardy revelation during the sentencing hearing itself, deprived Harris of both his constitutional right to due process and effective assistance of counsel, and created a significant and very real possibility that misinformation infected the decision. This Court should vacate Harris's sentence and remand for resentencing before a redrawn judge.

E) The trial court's disclaimer that it "did not speak to that person directly" (the negative communication made about Harris by phone) does not cure the due process violation, because the court's staff is held to the same standard regarding *ex parte* communications, and because it highlights that the trial court did personally review the written *ex parte* material.

This Court should presume the trial court below *did* review the written *ex parte* material in detail. First, while the trial court noted it "did not speak to that person directly," this disclaimer referred solely to the *ex parte* communicator who anonymously conveyed "negative" information by phone about Harris to the court *ex parte* prior to sentencing. The trial court made no *such disclaimer* about the *written ex parte* communications it received. ROA.2006-2007. Second, the trial court was sufficiently familiar with the undisclosed substance of the written *ex parte* materials to describe it as "negative," and to state with certainty that the court had spoken with one of the written communicators only "indirectly" by phone. ROA.2006-2007. In fairness to Harris, this Court should presume the trial court *both* reviewed the written information, *and* that it engaged in a discussion with court staff about the substance of the phone call – all without disclosing the substance of either the written or oral *ex parte* communications or giving Harris or his counsel an opportunity to respond to it.

Even the trial court's statement that it had not spoken "directly" to that person, however, is ineffective. In the civil context, this Circuit has held that the court's staff is held to the same standard regarding the *ex parte* gathering of information as the court itself. *Kennedy v. Great Atlantic Pacific Tea Co., Inc.*, 551 F.2d 593, 597-598 (5th Cir. 1977) (in a personal injury case, trial court had law clerk personally visit accident site to gather information independently from the evidence presented by the parties, then used information to guide settlement negotiations and the trial; jury verdict for plaintiff reversed). Citing this Circuit's opinion in *Kennedy*, at least two criminal convictions have been reversed based on the conduct of court staff. In *Davis v. United States*, 567 A.2d 36 (D.C. 1989), during a criminal trial regarding a stolen car, the defendant denied having a driver's license or knowing how to drive. *Davis*, 567 A.2d at 38. Over a lunch break, the trial court had his law clerk ask the judge's secretary to make a phone call to determine whether the defendant had a driver's license. *Id.* This uncovered an assumed name, and the trial judge allowed the prosecutor to re-open its cross-examination of the defendant, during which the defendant admitted his previous testimony was untruthful. *Davis*, 567 A.2d at 39. The defendant was convicted of stealing the car. *Id.*

In reversing, the District of Columbia Court of Appeals wrote:

> [W]e have no doubt whatsoever that the judge in this case was impelled by the noblest of motives. Nevertheless, under our system of laws, a judge is not an investigator; the investigative function belongs to the parties and their agents. Laudable goals and lofty purposes cannot be attained when the cost is the loss, or even the appearance of loss, of judicial impartiality. In the classic words of Justice Frankfurter, "justice must satisfy the appearance of justice."(citing *Offutt v. United States*, 348 U.S. 11, 14 (1954).

Davis, 567 A.2d at 42. *See also*, *State v. Kelley*, 192 W.Va. 124, 451 S.E.2d 425, 430-431 (1994) (citing *Kennedy*, conviction overturned when sheriff testifying in criminal case also served as bailiff during criminal trial).

Just as Justice Frankfurter wrote in *Offutt*, this Court can and certainly should ascribe the very best of motives and intentions to the trial court below. *See, e.g.*, *Health Services Acquisition Corp. v. Liljeberg*, 796 F.2d 796, 802 (5th Cir. 1986), *aff'd* 486 U.S. 847 (1988) ("appearance of partiality is no less serious merely "because the judge is pure in heart and incorruptible"). That said, the trial court nevertheless erred by permitting undisclosed individuals to have *ex parte* communications with both the court and court staff regarding Harris, then failing to disclose the substance of such communications and give defense counsel additional time to review and rebut them, resulting in a violation of Harris's right to due process that requires vacating sentence and remanding for resentencing. Nor was the trial

court's disclaimer of reliance on the *ex parte* information during sentencing effective, as discussed more fully below.

F) Even where the substance of *ex parte* information was disclosed and reviewable, some courts of appeals have remained unconvinced by a district court's disclaimer of reliance on such information at sentencing.

In *United States v. Alverson*, 666 F.2d 341 (9th Cir. 1982), prior to a second sentencing hearing, a federal agent with the Bureau of Alcohol, Tobacco and Firearms met with the district judge to discuss Alverson's sentence. *Alverson*, 666 F.2d at 348. Unlike the case below, the substance of the discussions in *Alverson* were actually known and in the record on appeal. The judge's discussion with the ATF agent included the fact that the defendant was a suspect in a homicide investigation. *Id.* This meeting occurred without any notice to defendant and was not known to him until after the second sentencing. *Id.*

Hoping to downplay the obvious due process violation created by the *ex parte* communication, the government in *Alverson* argued that, because the *ex parte* communication did not come from the prosecution, it did not require reversal. *Alverson*, 666 F.2d at 349. The Ninth Circuit responded, "[W]e do not find the difference between these sources significant; the interest of both the prosecutor and the case agent is directly adverse to the interest of the defendant." *Id.* In this case, of course, the omission from the

record of the substance of the *ex parte* communication, as well as the identify of the communicators, prevents this Court from determining exactly what the communicators' interests were, but the trial court did indicate the communications were "negative" about Harris. ROA.2006. The government then argued in *Alverson* that the presentence report contained in substance the same information conveyed to the judge in the *ex parte* communication, so Alverson had not been prejudiced. *Alverson*, 666 F.2d at 349. The Ninth Circuit responded, "we decline to speculate whether this communication had any effect on the judge." *Id.*

Finally, the government in *Alverson* cited a previous case [*Dubrofsky*[3]] in which the Ninth Circuit had not vacated a sentence over a derogatory statement a trial court had heard *ex parte* about the defendant. *Id.* The Ninth Circuit rejected this argument because the *Alverson* trial court had neither explained his refusal to disclose the information nor cited other information on which he had relied. *Id.* The presence of *both* such factors had been crucial to the court's decision in *Dubrofsky*, and their absence in *Alverson* precluded reliance on *Dubrofsky's* rationale. Similarly, the trial court below did cite other material on which it relied (the presentence report). ROA.2007-2010. However, the other necessary *Dubrofsky* factor was

[3] *United States v. Dubrofsky*, 581 F.2d 208 (9th Cir. 1978).

missing. Rather than giving *no* explanation of its refusal to disclose the substance of the communication (as in *Alverson*), the trial court below instead gave a legally insufficient reason – that the persons with whom the court engaged in "negative" communications about Harris wished to provide sentencing information to the trial court, yet remain anonymous ROA.2006. The trial court's "reason" for refusing to disclose the substance of the "negative" *ex parte* communications about Harris was invalid for three reasons. First, it is not one of the exceptions to Canon 3(A)(4) allowing courts to initiate, permit, or consider *ex parte* communications.[4] Second, when someone communicates "negative" information about a defendant to a trial court before sentencing, and the court has listened (enough to know the information is "negative"), the mere desire witnesses may have to communicate substantive information on the merits of sentencing or about the character of a defendant, yet remain anonymous, falls short of the more extreme, legal "good cause," discussed in the other cases above for keeping identities secret while disclosing the substance in full so the defendant has

[4] Canon 3(A)(4) provides four (4) exceptions: (a) when expressly authorized by law; (b) scheduling, administrative or emergency purposes where no substantive information on the merits is communicated; (c) to obtain the advice of an advanced expert, upon written notice to the parties and reasonable opportunity to object and respond; or (d) with the parties' consent, confer separately with the parties to assist in settlement. This record does not contain any factual support for the presence of any of these exceptions.

an opportunity to rebut.[5] Finally, withholding a person's identity is one thing – refusing to disclose the substance of information heard prior to sentencing is quite another.

In conclusion, the *Alverson* court ruled:

> In view of the intervening improper *ex parte* communication with the judge, the appearance of justice is served by referral to another judge for resentencing. In our view, this consideration of fairness outweighs any duplication of effort…Accordingly, we vacate the sentence and remand the case for resentencing by another judge.

Alverson, 666 F.2d at 350.

In *United States v. Reese*, 775 F.2d 1066 (9th Cir. 1985), the government submitted an *ex parte* sentencing report, and Reese's counsel's request to review it was denied. *Reese*, 775 F.2d at 1076. The trial court in *Reese* expressly indicated material submitted by the government that did not involve the offenses for which Reese had been convicted would not be considered when the court imposed sentence. *Id*. Noting first it had "repeatedly held that it is improper for the prosecution to make, or for the

[5] "…in order to protect, for example, an ongoing investigation." *Wolfson*, 634 F.2d at 1222 (citing *Dubrofsky*, 581 F.2d at 214-215. Again, the record does not contain any factual support that this or any other "good cause" existed for the trial court to hear undisclosed "negative" information about Mr. Harris prior to sentencing, without providing him the substance and opportunity to rebut it prior to the complex evidentiary fact-finding the trial court needed to perform in order to sentence him.

court to receive from the prosecution, *ex parte* communications bearing on a sentence,"[6] the Ninth Circuit then wrote:

> We are not convinced, however, that at the time of sentencing the district judge was free of influence from that material. We find it significant that there is no statement in the record suggesting that the district judge did not read the material that was filed with the court. In denying defense counsel's request for access to the second memorandum, the district judge made no statement indicating that he was unaware of its contents. We therefore find it appropriate to presume that the district judge had knowledge of the information contained in the *ex parte* submission.... Under all the circumstances, we cannot say with any certainty that the sentencing judge could avoid being influenced by the *ex parte* submission.... Notwithstanding the district court's conscientious efforts to assure that the sentencing proceedings were conducted in as fair and equitable a manner as possible, we believe the question is sufficiently serious to warrant resentencing.

Reese, 775 F.2d at 1077-1078. Unlike the *Reese* court, which had a full record of the *ex parte* communications before it and still could not trust sentencing judge's disclaimer of reliance, this Court has no information on which to place its confidence. For all these reasons, this Court should vacate Harris's sentence and remand for resentencing before a redrawn judge.

G) Harris need not show any specific error by his trial counsel nor prove the *ex parte* information was relevant; the trial court's tardy disclosure, by itself, violated due process and rendered Harris's counsel ineffective.

[6] *Reese*, 775 F.2d at 1076.

According to the First Circuit, even if a pre-hearing *ex parte* communication is merely a communication that would have been appropriate if it had been made on the record and through lawful channels, its tardy disclosure at a sentencing hearing is – in and of itself – "a substantial impairment of the right to the effective assistance of counsel" to which the Sixth Amendment entitles a defendant at sentencing. *Haller v. Robbins*, 409 F.2d 857, 860 (1st Cir. 1969). In *Haller*, after the defendant's guilty plea on the charge of kidnapping but before his sentencing hearing, the prosecutor reported *ex parte* to the sentencing judge in the absence of defendant or his counsel "a highly detrimental hearsay statement as to the defendant's conduct" – apparently a report by his victim of an episode of sordid behavior alleged to have occurred while she was in his custody. *Haller*, 409 F.2d at 858. The defendant's later habeas corpus proceeding based on the due process violation was dismissed without an evidentiary hearing. *Id.*

On appeal, the First Circuit wrote: "A defendant is entitled to due process at his sentencing. *Haller*, 409 F.2d at 859. "[I]t is improper for the prosecutor to convey information or to discuss any matter relating to the merits of the case or sentence with the judge in the absence of counsel." *Haller*, 409 F.2d at 859. "Not only is it a gross breach of the appearance of

justice when the defendant's principal adversary is given private access to the ear of the court, it is a dangerous procedure." *Haller*, 409 F.2d at 859. "There being…an invasion of a constitutional right, the burden of proving lack of prejudice is on the state, and it is a heavy one." *Haller*, 409 F.2d at 860.

While the tardy disclosure in *Haller* – like the one below – violated due process and denied effective assistance of counsel, the fact that the substance of the *ex parte* communication had eventually been made on the record – unlike below – made for an easier remedy. By reviewing the *ex parte* communication in the record, the First Circuit in *Haller* was able to determine that, had the communication occurred without the due process violation, it would have been an appropriate consideration for the sentencing judge:

> Having in mind that the prosecutor would later be permitted to make the same statement in open court, the presiding judge may well have regarded a premature disclosure as a pardonable informality. It is not.

Haller, 409 F.2d at 860. The First Circuit accordingly vacated the dismissal of Haller' s habeas corpus petition and remanded his case to the district court to hold an evidentiary hearing on the truth or falsehood of the highly prejudicial hearsay statement the sentencing court had heard *ex parte* about Haller before sentencing him. *Haller*, 409 F.2d at 860. In this proceeding, however, the substance of *ex parte* communications the sentencing judge

heard has never been made part of the record. The trial court's having engaged in them without notice to Mr. Harris or an opportunity to rebut their substance deprived Mr. Harris of due process and effective assistance of counsel, because even the best lawyer cannot respond to what he has not seen or heard, and does not know. A woefully incomplete "witching hour" disclosure on the day of sentencing, especially when the defendant and his lawyer are in different places, could not cure it. This Court should therefore follow its own precedent in *Huff*, vacate Harris's sentencing and remand "for sentencing by a redrawn judge." *Huff*, 512 F.2d at 71.

CONCLUSION

For all of the foregoing reasons, Defendant-Appellant Bradley J. Harris respectfully prays that this Court vacate his sentence, and remand to the district court for imposition of a reasonable sentence, before a redrawn judge, according to Constitutional due process consistent with this Court's opinion.

Respectfully submitted,

/s/ Walter L. Taylor
Walter L. Taylor
State Bar No. 19727030
taylorlawfirmdfw@gmail.com
TAYLOR LAW FIRM
6630 Colleyville Blvd, Suite 100
Colleyville, Texas 76034
Tel: (817) 770-4343

Fax: (682) 292-7406
ATTORNEY OF RECORD FOR DEFENDANT-APPELLANT

CERTIFICATE OF SERVICE

I hereby certify by my signature above that a true and correct copy of the foregoing document has this day been served via CM/ECF electronic service, upon the following on this 15th day of August, 2022.

Ms. Leigha Amy Simonton
Assistant U.S. Attorney
leigha.simonton@usdoj.gov

CERTIFICATE OF COMPLIANCE

Pursuant to FED.R.APP.P 32(g), I certify the following:

1. This brief complies with the typeface requirements of FED.R.APP.P 32(a)(5) and the type requirements of FED.R.APP.P 32(a)(6) because:

- this brief has been set in a proportionally spaced typeface using Microsoft Word for Office 365 in Georgia typeface with a 14-point font.

2. This brief complies with the type-volume limitation in FED.R.APP.P 32(a)(7)(B) because:

- this brief contains 8548 words, as determined by the computer software's word-count function, excluding the parts of the brief exempted by FED.R.APP.P 32(f).

/s/ Walter L. Taylor
Walter L. Taylor
TAYLOR LAW FIRM