No. 23A-____

IN THE

Supreme Court of the United States

ROGER PAUL BRADFORD,

Applicant,

– v. –

UNITED STATES OF AMERICA,

Respondent.

On Application from the United States Court of Appeals for the Eighth Circuit

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APPLICATION TO JUSTICE KAVANAUGH FOR RELEASE AND BAIL PENDING APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

APPLICATION IN SUPPORT OF RELEASE AND BAIL PENDING APPEAL ON BEHALF OF ROGER PAUL BRADFORD 1

STATEMENT OF FACTS 3

ARGUMENTS 7

I. Bradford's Appellate Waiver is Limited to his Conviction and Does Not Apply to Challenges to Subject-Matter Jurisdiction. 7

II. In light of *Ciminelli*, the District Court Did Not Have Subject-Matter Jurisdiction to Sentence Mr. Bradford. 8

III. The District Court Erred by Utilizing Intended Loss at Sentencing, and the Error was not Harmless. 20

A. It was Procedural Error for the District Court to Defer to the Guidelines' Commentary. 20

B. There Was No Loss, Intended or Actual. 24

IV. The District Court Erred by Relying on Irrelevant, Uncharged Conduct at Sentencing, and the Error was not Harmless. 28

V. Reasons for Granting this Application. 32

CONCLUSION 34

TABLE OF AUTHORITIES

Cases

Alleyne v. United States, 570 U.S. 99 (2013) 29
Apprendi v. New Jersey, 530 U.S. 466 (2000) 30
Berger Levee Dist. v. United States, 128 F.3d 679 (8th Cir. 1997) 8
Brussell v. United States, 396 U.S. 1229 (1969) (Marshall, J., in chambers) 33
Chambers v. Mississippi, 405 U.S. 1205 (1972) (Powell, J., in chambers) 33
Chambers v. Mississippi, 410 U.S. 284 (1973) 33
Ciminelli v. United States, 143 S. Ct. 1121 (2023) ..... passim
Cunningham v. California, 549 U.S. 270 (2007) 30
Curcio v. United States, 354 U.S. 118 (1957) 33
Farr v. Pitchess, 409 U.S. 1243 (1973) (Douglas, J., in chambers) 33
Gall v. United States, 552 U.S. 38 (2007) 30
Harris v. United States, 404 U.S. 1232 (1971) (Douglas, J., in chambers) 32, 33
Hung v. United States, 439 U.S. 1326 (1978) (Brennan, J., in chambers) 32
In re Lewis, 418 U.S. 1301 (1974) (Douglas, J., in chambers) 33
King v. Burwell, 576 U.S. 473 (2015) 23
Kisor v. Wilkie, 139 S. Ct. 2400 (2019) 21
Leigh v. United States, 82 S. Ct. 994 (1962) (Warren, C.J., in chambers) 33
McClinton v. United States, No. 21-1557, 2023 U.S. LEXIS 2796 (May 30, 2023) ... 3, 31
McCormick v. United States, 500 U. S. 257 (1991) 19
McDonnell v. United States, 579 U.S. 550 (2016) 33
Mecom v. United States, 434 U.S. 1340 (1977) (Powell, J., in chambers) 32
Sellers v. United States, 89 S. Ct. 36 (1968) (Black, J., in chambers) 33
Truong Dinh Hung v. United States, 439 U.S. 1326 (1978) (Brennan, J., in chambers) 33
United States v. Alford, No. 3:21-cr-052, 2022 U.S. Dist. LEXIS 149494 (N.D. Fla. Aug. 20, 2022) 24
United States v. Bankman-Fried, No. 22-cr-0673, 2023 U.S. Dist. LEXIS 110546, __ F.Supp.3d __, 2023 WL 4194773 (S.D.N.Y. June 29, 2023) 15
United States v. Bell, 808 F.3d 926 (D.C. Cir. 2015) 3
United States v. Booker, 543 U.S. 220 (2005) 29
United States v. Didion Milling, Inc., No. 22-cr-55, 2023 U.S. Dist. LEXIS 83312, 2023 WL 3372636 (W.D. Wisc. May 11, 2023) 13
United States v. Golestan, No. 2:19-441, 2023 U.S. Dist. LEXIS 85954 (D.S.D. May 15, 2023) 14
United States v. Goodman, 984 F.2d 235 (8th Cir. 1993) 13
United States v. Izurieta, 710 F.3d 1176 (11th Cir. 2013) 8
United States v. Jesenik, 3:20-cr-228, 2023 U.S. Dist. LEXIS 85080, 2023 WL 3455638 (D. Or. May 15, 2023) 14
United States v. Kelerchian, 937 F.3d 895 (7th Cir. 2019) 13

United States v. Nordlicht, No. 16-cr-00640, 2023 U.S. Dist. LEXIS 119965 (E.D.N.Y. July 12, 2023) 15
United States v. Pierre, Nos. 22-cr-19 and 22-cr-20, 2023 U.S. Dist. LEXIS 119742 (S.D.N.Y. July 12, 2023) 15
United States v. Powell, 761 F.2d 1227 (8th Cir. 1985) 2
United States v. Robbins, 2023 U.S. Dist. LEXIS 103090, 2023 WL 3998457 (D. Me. June 14, 2023) 15
United States v. Runner, No. 18-CR-0578, 2023 U.S. Dist. LEXIS 93864, 2023 WL 3727532 (E.D.N.Y. May 30, 2023) 14
United States v. Shellef, 507 F.3d 82 (2d Cir. 2007) 13
United States v. Staples, 410 F.3d 484 (8th Cir. 2005) 21, 23
United States v. Waldner, 580 F.3d 699 (8th Cir. 2009) 21, 23
United States v. Watts, 519 U.S. 148 (1997) (per curiam) 28, 30
United States v. Whitehead, 4:18-cr-00079 (S.D. Iowa Apr. 24, 2018) 19
United States v. You, No. 22-5442, 2023 U.S. App. LEXIS 17495 (6th Cir. July 11, 2023) 22
Voigt v. Coyote Creek Mining Co., 999 F.3d 555 (8th Cir. 2021) 21, 22
Wells Fargo & Co. v. United States, 957 F.3d 840 (8th Cir. 2020) 21

Statutes

18 U.S.C. § 1349 ..... 4, 19, 20
18 U.S.C. § 1512 4
18 U.S.C. § 3143 2

Sentencing Guidelines

USSG §2B1.1 ..... 20, 22, 23, 27

Other Authorities

Engineering News Record, *ENR 2019 Top 400 Contractors*, May 2019 27
U.S. Attorney's Ofc, Eastern District of New York, Press Release, "Platinum Partners' Founder and CIO Mark Nordlicht and Co-CIO David Levy Convicted of Defrauding Bondholders in a Multi-Million Dollar Scheme," July 9, 2019 15
U.S. Attorney's Ofc, Southern Dist. of Iowa, Press Release, *Former Vermeer Employee, and Others, Charged with Fraud* (Apr. 25, 2018) 19
U.S. Sentencing Comm'n, *2022 Sourcebook of Federal Sentencing Statistics* 27
United States v. Ciminelli, 1:16-cr-00776, Second Superseding Indictment Doc. 319-2 (S.D.N.Y. filed Sept. 9. 2017) 12
United States v. Ciminelli, No. 1:16-cr-00776-VEC, Sentencing Trans., (S.D.N.Y. Dec. 12, 2018) 26
United States v. McClinton, No. 21-1557, Br. for Gov't, 2022 U.S. S. CT. BRIEFS LEXIS 3499, *19 (filed Oct. 28, 2022) 31
Vermeer, *A look inside Vermeer's Plant 7 facility*, Sept. 16, 2021 4

APPLICATION IN SUPPORT OF RELEASE AND BAIL PENDING APPEAL ON BEHALF OF ROGER PAUL BRADFORD

To the Honorable Brett M. Kavanaugh, Associate Justice of the United States and Circuit Justice for the Eighth Circuit:

Roger Paul Bradford respectfully submits this Application to your Honor as Circuit Justice for the Eighth Circuit Court of Appeals, pursuant to Supreme Court Rule 22 subd. 5, seeking release and bail and a stay of sentence pending his appeal in the United States Circuit Court for the Eighth Circuit and the final disposition any subsequent petition to this Court for a writ of *certiorari*. This Application follows Mr. Bradford's conviction by way of plea agreement upon a single count of Conspiracy to Commit Wire Fraud and sentence of 20 months. Mr. Bradford began serving his sentence on June 8, 2023, and remains incarcerated at FCI Petersburg's satellite camp.

This Application is made following the Eighth Circuit's June 2, 2023, summary denial of Mr. Bradford's emergency motion for bail pending appeal; the June 8, 2023, summary denial of his motion for panel reconsideration; and the July 17, 2023, summary denial of his motion for *en banc* reconsideration. The Eighth Circuit did not provide any explanation for the summary denials.

Mr. Bradford filed his opening brief in the Eighth Circuit on July 31, 2023.[1]

[1] The U.S. District Court for the Southern District of Iowa's denial of Mr. Bradford's Motion for Bond Pending Appeal is attached as Application A. The Eighth Circuit's panel denials of his motions for bond in that court are attached as Application Exhibit B. Mr. Bradford's Petition for *En Banc* Reconsideration and denial thereof is attached as Application Exhibit C. Mr. Bradford's Brief on Appeal, which provides a more detailed exploration of the issues, including issues not otherwise set forth herein, is attached as Application Exhibit D.

THE ONLY ISSUE PERTINENT TO RELEASE AND BAIL IN THIS CASE IS WHETHER THE APPEAL PRESENTS A "SUBSTANTIAL ISSUE"

Release and bail pending appeal should be granted where the defendant is not likely to flee and does not pose a danger to any person or the community, and the appeal raises "a substantial issue of law or fact likely to result in" reversal or a new trial. *See* 18 U.S.C. § 3143(b). As the Government agrees that Mr. Bradford is neither a flight risk, nor a danger to the community, (R. Doc. 95 at 5), the only issue for your Honor to resolve is whether Mr. Bradford's appeal raises a substantial question of law or fact that will likely result in reversal or a reduced sentence if the issues are decided in his favor. *United States v. Powell*, 761 F.2d 1227, 1233 (8th Cir. 1985).

First among the substantial issues Mr. Bradford has raised on appeal is whether his conviction for conspiracy to commit wire fraud can stand in light of the holding and the remarkably similar facts of *Ciminelli v. United States*, 143 S. Ct. 1121 (2023). This is especially the case where, as here, the Government has conceded it prosecuted Mr. Bradford under the right-to-control theory, at least in part. (R. Doc. 95 at 5). Second, whether the District Court erred by utilizing "intended loss" when calculating the U.S. Sentencing Guidelines in contravention of *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). And finally, whether the District Court violated Mr. Bradford's Fifth Amendment due process and Sixth Amendment notice rights when enhancing his sentence based on uncharged conduct. As your Honor has observed, "[a]llowing judges to rely on acquitted or *uncharged conduct*

to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial." *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of reh'g en banc) (emphasis added); *see also McClinton v. United States*, No. 21-1557, 2023 U.S. LEXIS 2796, *2 (May 30, 2023) (Kavanaugh, J., statement respecting denial of *certiorari*) ("The use of acquitted conduct to alter a defendant's Sentencing Guidelines range raises important questions.").

STATEMENT OF FACTS

The following facts are drawn, in part, from the Indictment and Pre-sentencing Investigation Report ("PSR"). (R. Docs. 2 & 36).[2] In 2019, Appellant Roger Paul Bradford ("Bradford") was hired by Vermeer Corporation of Pella, Iowa, ("Vermeer"), a manufacturer of industrial agricultural equipment, as its Director of Construction to oversee certain construction projects, most pertinently, the EcoCenter project. The EcoCenter project was intended to rebuild one of Vermeer's manufacturing facilities that had been destroyed by a tornado in 2018.

Bradford had a pre-existing relationship with Viorel Draghia ("Draghia") who owned a construction company. In exchange for payments from Draghia, Bradford steered the contract to perform masonry work on the EcoCenter project and other matters to Draghia.[3] While Bradford had disclosed his pre-existing relationship

[2] "R. Doc." refers to the district court clerk's record, followed by docket entry and page number. The district court docket numbers of other cases will follow the same format but include the defendant's name, e.g., "*Ciminelli* R. Doc." "PSR" refers to the presentence investigation report, followed by the page number of the originating document and paragraph number, where noted.

[3] For ease of reference, all contracts awarded to Draghia by Vermeer are referred to

with Draghia to Vermeer, neither Bradford nor Draghia disclosed the existence of the payment agreement. Vermeer claimed that had it known of this relationship, i.e., the "kickback,"[4] it would not have hired Draghia.

Once the kickback agreement came to light, the Government indicted Bradford on one count of conspiracy to commit wire fraud in violation of 18 U.S.C. § 1349 and one count of attempted obstruction of an official proceeding in violation of 18 U.S.C. § 1512(c)(2). (R. Doc. 2). Bradford thereafter entered a Plea Agreement with the Government wherein he agreed to plead to the wire fraud count in exchange for the government dismissing the obstruction count. For purposes of sentencing only, Bradford agreed that the "loss" amount was greater than $15,000 but not greater than $40,000 to account for the $23,000 kickback he had received from Draghia. (R. Doc. 26 at 8-9).

Importantly, the masonry contract was performed, and the services were provided to specification. In fact, Vermeer has publicly represented that it is quite pleased with the EcoCenter.[5] When twice given the opportunity to claim any actual loss or damages, Vermeer declined to do so. (R. Doc. 69 at 22-23) ("Vermeer Corporation submitted a Victim Impact Statement . . . [but] did not provide a

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collectively as the "EcoCenter project."

[4] Under federal law, kickbacks are not illegal except in two well-defined instances not applicable here: health care fraud, and government contracts. *See* 18 U.S.C. § 874; 41 U.S.C. § 8702; 42 U.S.C. § 1320a-7b(b). The term "kickback," therefore, is used solely for ease of reference to the secret agreement and should not be read to concede a violation of federal law.

[5] *See* Vermeer, *A look inside Vermeer's Plant 7 facility*, Sept. 16, 2021, https://www.youtube.com/watch?v=Xy0YVVmRJss&t=18s.

calculation or figure as to the monetary loss Bradford caused Vermeer. . . . [T]he government contacted the Vermeer representative . . . to better understand Vermeer's intentions. . . . Vermeer . . . could not readily calculate the dollar harm caused to it.").

At sentencing, the Government contended that the loss amount was over $250,000 pointing to alternative, lower bids Vermeer had received on the EcoCenter project and subtracting them from the approximate $800,000 Vermeer had agree to pay to Draghia for the EcoCenter project. However, neither the Government nor Vermeer ever alleged there was any actual loss to Vermeer. (R. Doc. 69-1 at 22). Rather, the Government proceeded under a theory of intended loss, which Bradford timely objected to.

On May 4, 2023, the district court sentenced Bradford to 20 months' imprisonment and $23,000 in restitution. During the sentencing hearing, over Bradford's objections, the district court utilized a theory of intended loss despite recognizing the "vagaries" of bidding and contracting in the construction industry. (R. Doc. 100 at 35). The district court ultimately found intended loss to be greater than $150,000 but less than $250,000.

At no time did the Government introduce any evidence as to the validity of those lower bids or the quality and reputation of those contractors. In contrast, Bradford introduced undisputed expert evidence that those lower bids were unrealistic, and that the contract could not be performed for anything less than approximately $740,000. (R. Doc. 75). In fact, Vermeer ultimately paid Draghia

only $741,000 for the construction project. Moreover, undermining the finding of any loss was the fact of a higher bid than even Draghia's.

Relying on the disputed "intended loss" amount, the district court found Bradford's total offense level to be 18 and his Criminal History Category to be I for an advisory range of 27 to 33 months and imposed a sentence of 20 months. (R. Doc. 78). Prior to sentencing, Bradford made full restitution to Vermeer. (R. Doc. 105).

Just one week after sentencing, the U.S. Supreme Court issued its opinion in *Ciminelli v. United States*, 143 S. Ct. 1121 (2023), unanimously holding that the "the right-to-control theory cannot form the basis for a conviction under the federal fraud statutes." *Ciminelli*, 143 S. Ct. at 1128.

On May 18, 2023, Mr. Bradford timely filed his Notice of Appeal (R. Doc. 84).

On May 24, 2023, Mr. Bradford filed a motion for release on bond pending appeal. (R. Doc. 91). On May 30, 2023, the Government filed its opposition to release. The very next day, and without having waited for Mr. Bradford to file a reply as provided by Southern District of Iowa Local Rule 7(g), the district court denied the motion. (R. Doc. 97). According to the district court, "[t]he Government resists, arguing Bradford's appeal will likely be dismissed because he waived challenging his conviction. Alternatively, the Government asserts Bradford does not meet the standard for release pending appeal because his 'anticipated *Ciminelli*-based appeal argument does not raise a 'close question.' For the reasons stated in the Government's resistance, the Court denies Bradford's motion." *Id.* (citations

omitted) (attached as Application Exhibit A).

On June 1, 2023, Mr. Bradford moved the Eighth Circuit for bond pending appeal on an emergency basis (Exhibit B), which was summarily denied on June 2, 2023.

On June 5, 2023, Mr. Bradford moved the Eighth Circuit for panel reconsideration of its denial of bond pending appeal on a non-emergency basis (Exhibit B), which was summarily denied on June 8, 2023.

On June 8, 2023, Bradford reported to the Bureau of Prisons for service of his 20-month term of imprisonment.

On June 23, 2023, Mr. Bradford moved the Eighth Circuit for *en banc* reconsideration (Exhibit C), which was summarily denied on July 17, 2023.

Mr. Bradford remains incarcerated as of the instant Application.

ARGUMENTS

The Eighth Circuit should have granted Mr. Bradford's motion to be released on bond pending his appeal because (1) all agree he is neither a flight risk nor a danger to the community, (R. Doc. 95 at 5), (2) this Court's decision in *Ciminelli* invalidated his conviction, and (3) the district court otherwise committed significant procedural and prejudicial errors at sentencing likely to result in reversal or "a reduced sentence to a term of imprisonment less than the . . . expected duration of the appeal process." 18 U.S.C. § 3143(b)(1)(B)(iv).

I. Bradford's Appellate Waiver is Limited to his Conviction and Does Not Apply to Challenges to Subject-Matter Jurisdiction.

The Government likely will invoke Mr. Bradford's appellate waiver as to his

conviction, which is set forth in his Plea Agreement. (R. Doc. 26). To be sure, Bradford expressly "preserve[d] the right to appeal any sentence imposed by the Court." (R. Doc. 26 at 14, ¶ 26). Thus, the waiver does not preclude the appeal of his sentence. With respect to Bradford's conviction, the waiver is unenforceable as to questions of subject-matter jurisdiction. As to non-jurisdictional questions, enforcement of the waiver would constitute a miscarriage of justice.

"[A] plea of guilty admits all of the elements of a criminal charge, and waives all challenges to the prosecution either by direct appeal or by collateral attack, except challenges to the court's jurisdiction. In order for a defendant who has pleaded guilty to sustain a challenge to the district court's jurisdiction, he must establish that the face of the indictment failed to charge a federal offense." *Mack v. United States*, 853 F.2d 585, 586 (8th Cir. 1988) (citation omitted). A challenge to subject-matter jurisdiction "may be made at any time while the case is pending." Fed. R. Crim. Proc. 12(b)(2); *Berger Levee Dist. v. United States*, 128 F.3d 679, 680 (8th Cir. 1997) (citation omitted). Thus, the appellate waiver does not bar Bradford from challenging the district court's subject matter jurisdiction even now by challenging the facial sufficiency of the indictment. *See, e.g.*, *United States v. Izurieta*, 710 F.3d 1176, 1185 (11th Cir. 2013) (*sua sponte* finding that where "the entire indictment did not adequately set forth a violation of criminal law, . . . subject matter jurisdiction does not exist").

II. In light of *Ciminelli*, the District Court Did Not Have Subject-Matter Jurisdiction to Sentence Mr. Bradford.

In pertinent part, the Indictment charged Mr. Bradford with "a scheme and

artifice to defraud and to obtain money by means of materially false and fraudulent pretenses and representations and ***by concealing material facts***." (R. Doc. 2 at 2, ¶ 7) (emphasis added). The Indictment further alleged that the purpose of the conspiracy was to "generate unlawful monies for each other by together undertaking ***to get contracts for construction*** at Vermeer Corporation awarded to Draghia Contracting so that Viorel Draghia would make money from those contracts and would then, in turn, provide kickbacks to Defendant." (R. Doc. 2 at 3, ¶ 8(i)) (emphasis added). "If Vermeer officials had been informed of the kickback agreement, they would have ensured that no contracts were awarded to Draghia Contracting." (R. Doc. 2 at 4-5, ¶ 11).

Notably, the Indictment nowhere alleges that had Vermeer been aware of lower bids for the EcoCenter project, it would have awarded the contract to those contractors. Indeed, the Indictment admits that Vermeer was in fact aware of lower bids "for substantially less money" but nonetheless ultimately awarded Draghia the contract. (R. Doc. 2 at 4, ¶ 11). Moreover, nowhere does the Indictment allege that Draghia was not qualified to perform on the contract, or that either he or Bradford misrepresented Draghia's qualifications. Likewise, nowhere does the Indictment allege that the services ultimately performed by Draghia were not to specification, otherwise incomplete, or not performed at all. Simply put, nowhere does the Indictment allege that Vermeer did not get what it paid for, i.e., that there was fraud in that which was bargained for.

As alleged, the "fraud," such as it was, was nothing more than the

concealment of the kickback, for only the revelation of that "would have ensured that no contracts were awarded to Draghia Contracting." (R. Doc. 2 at 4-5, ¶ 11). In other words, the fraud was in the concealment of information that went to Vermeer's decision to contract with Draghia and not as to Draghia's pricing, qualifications or services ultimately rendered.

Save for the plea, the fact pattern here is essentially identical to the one in *Ciminelli v. United States*, 143 S. Ct. 1121 (2023). There, the CEO of a construction company paid a lobbyist to conspire with a board member for a nonprofit overseeing development projects in upstate New York. The lobbyist and board member steered a massive $750 million construction contract to the construction company. *Id.* at 1125. Of course, all of this was hidden from the nonprofit's board. Once the scheme was uncovered, several members of the conspiracy were charged with wire fraud and, as here, conspiracy to commit wire fraud. *See id.* The Government's theory of the case was "right-to-control," i.e., that it could "establish wire fraud by showing that the defendant schemed to deprive a victim of potentially valuable economic information necessary to make discretionary economic decisions." *Id.* at 1125. The valuable economic information was, of course, the fact of the secret payment. On May 11, 2023, This Court, in a unanimous decision, found the right-to-control theory unavailing and so reversed and remanded to the Second Circuit. *Id.* at 1129.

According to the Supreme Court,

> the right-to-control theory vastly expands federal jurisdiction without statutory authorization. Because the theory treats mere information as the protected interest, almost any deceptive act could be criminal. The

> theory thus makes a federal crime of an almost limitless variety of deceptive actions traditionally left to state contract and tort law. . . . The right-to-control theory thus criminalizes traditionally civil matters and federalizes traditionally state matters. In sum, the wire fraud statute reaches only traditional property interests. The right to valuable economic information needed to make discretionary economic decisions is not a traditional property interest. Accordingly, the right-to-control theory cannot form the basis for a conviction under the federal fraud statutes.

Ciminelli, 215 L. Ed. 2d at 302-303.

As the Government conceded in *Ciminelli* so too does it concede here that it prosecuted Mr. Bradford under the now invalidated "right-to-control" theory, at least in part. (R. Doc. 93 at 2) ("Bradford's conviction is not ***solely*** based on the so-called 'right-to-control' theory of wire fraud.") (Emphasis added). Again, nowhere in the Indictment is it alleged that Bradford materially misrepresented the ability of Draghia to perform on the contract. Likewise, the Government has never argued that the contract ultimately performed by Draghia was incomplete or substandard. Indeed, as the Probation Office recognized, "this is not an offense w[h]ere the money was taken and no services were provided in return." (R. Doc. 36 at 40, ¶ 152). Rather, Bradford and Draghia's scheme was nothing more than a "scheme[] to deprive a victim of potentially valuable economic information necessary to make [a] discretionary economic decision[]." *Ciminelli*, 143 S. Ct. at 1124.

For its part, the Government likely will engage in "profuse citations to the records below" asking the Eighth Circuit to "cherry-pick facts" set forth in the

Indictment and elsewhere "and apply them to the elements of a *different* wire fraud theory in the first instance." *Id.* at 1129 (emphasis in original). Such effort was unavailing in the Supreme Court, so too it should be before the Eighth Circuit.

The six-page Indictment in this case sets out even more clearly and succinctly than the 43-page indictment[6] in *Ciminelli* that the Government's theory of the case was "right-to-control" and only that theory. At their core, both indictments allege that had the victim known of secret agreements to steer contracts to the defendant contractors in exchange for payments, the victims would not have contracted with the defendants. Compare *Ciminelli* Indictment at 2 and 10 ("secretly rig"); 11, 12, 21 and 23 ("secretly tailor"); and 25 ("secretly used") to Bradford Indictment at 4 (R. Doc. 2 at 4) ("Defendant and Viorel Draghia ***concealed*** from the general contractor and Vermeer officials that Defendant stood to benefit in such a fashion from construction contracts awarded to Draghia Contracting.") (Emphasis added).

In both indictments, it was solely the deprivation of information that constituted the fraud. As in Bradford's Indictment, so too were there no allegations in the *Ciminelli* Indictment that the contractor misrepresented its qualifications or misrepresented its ability to perform to specification. And that is consistent with what the Eighth Circuit has long held: to establish federal fraud "the government must prove the existence of a plan or scheme to defraud. . . . [T]he essence of a scheme is a plan to deceive persons as to *the substantial identity of the things they*

[6] *United States v. Ciminelli*, 1:16-cr-00776, Second Superseding Indictment (R. Doc. 319-2) (S.D.N.Y. filed Sept. 9. 2017) (hereinafter "*Ciminelli* Indictment").

are to receive in exchange." *United States v. Goodman*, 984 F.2d 235, 237 (8th Cir. 1993) (cleaned up; emphasize added). Or, as the Second and Seventh Circuits have explained, there is "'a fine line between schemes that do no more than cause their victims to enter into transactions they would otherwise avoid—which do not violate the mail or wire fraud statutes—and schemes that depend for their completion on a misrepresentation of an essential element of the bargain—which do violate the mail and wire fraud statutes.'" *United States v. Kelerchian*, 937 F.3d 895, 912 (7th Cir. 2019) (quoting *United States v. Shellef*, 507 F.3d 82, 108 (2d Cir. 2007)).

As it turns out, several post-*Ciminelli* cases denying various motions attacking indictments and convictions actually help illustrate how Mr. Bradford's scheme fits squarely within *Ciminelli*, *Goodman*, and *Kelerchian*, i.e., how Mr. Bradford's fraud was nothing more than the withholding of information, and not "a misrepresentation of an essential element of the bargain." For example, in *United States v. Didion Milling, Inc.*, No. 22-cr-55, 2023 U.S. Dist. LEXIS 83312, 2023 WL 3372636 (W.D. Wisc. May 11, 2023), the Government charged the defendants with, *inter alia*, conspiracy to deceive food safety auditors about their sanitation practices so that the auditors would certify the safety of the defendants' milled corn. *Id.* at *14. The defendants moved to dismiss these counts of the indictment arguing that because the end customers got what they paid for at the agreed upon price, there was no fraud. *Id.* In denying the defendants' motion to dismiss these counts, the district court observed that "*Ciminelli* reinforces the principle that interference with the abstract right to control one's property is not actionable as wire fraud. But

nothing in *Ciminelli* undermines the court's conclusion here that a ***false certification*** about the origin or quality of a good sold could support a wire fraud claim." *Id.* at *16 n.1 (emphasis added). Thus, *Didion Milling* illustrates the principle set forth in *Goodman*, i.e., that the fraud must go to "the substantial identity of the things they are to receive in exchange." *Goodman*, 984 F.2d at 237. And when it does, then *Ciminelli* does not apply.

Ciminelli likewise was easily distinguished in the following cases because the fraud clearly went to the substantial identity of the bargain in each case. *See United States v. Jesenik*, 3:20-cr-228, 2023 U.S. Dist. LEXIS 85080, *5-6, 2023 WL 3455638 (D. Or. May 15, 2023) ("all three defendants are charged with a scheme to obtain investors' money through ***material misrepresentations and misleading half-truths about . . . the intended uses of investors' funds*** and the financial health of Aequitas"); *United States v. Golestan*, No. 2:19-441, 2023 U.S. Dist. LEXIS 85954, *2 (D.S.D. May 15, 2023) (defendants "were indicted on twenty counts of wire fraud associated with the ***use of fictitious names*** to procure valuable IP addresses from the American Registry for Internet Numbers (ARIN) that they could have not obtained in their own names") (emphasis added); *United States v. Runner*, No. 18-CR-0578, 2023 U.S. Dist. LEXIS 93864, *1, 2023 W 3727532 (E.D.N.Y. May 30, 2023) (defendant charged with "fraudulently represent[ing] that victims would receive personalized letters and ***psychic services*** from renowned psychics in exchange for monetary payments and personal property") (emphasis added); *United States v. Robbins*, 2023 U.S. Dist. LEXIS 103090, *6, 2023 WL 3998457 (D. Me.

June 14, 2023) (***falsifying fishing records*** to hide overharvesting and underreporting of fish); *United States v. Bankman-Fried*, No. 22-cr-0673, 2023 U.S. Dist. LEXIS 110546, *3-4, __ F.Supp.3d __, 2023 WL 4194773 (S.D.N.Y. June 29, 2023) (defendant alleged to have "used billions of dollars in ***stolen [investor] funds*** for a variety of purposes, including . . . to fund speculative venture investments; to make charitable contributions; and ***to enrich himself***") (emphasis added; internal quotation marks omitted); *United States v. Pierre*, Nos. 22-cr-19 and 22-cr-20, 2023 U.S. Dist. LEXIS 119742, *29-30 (S.D.N.Y. July 12, 2023) (non-physician owner-operators of various medical clinics ***misrepresented to insurance companies that they were owned and operated by licensed physicians*** licensed in order to be reimbursed for services provided to the insureds).

In contrast to the above cases where *Ciminelli* clearly did not apply because the fraud went to the very nature of the transaction, in *United States v. Nordlicht*, No. 16-cr-00640, 2023 U.S. Dist. LEXIS 119965 (E.D.N.Y. July 12, 2023), *Ciminelli* was successfully invoked resulting in an acquittal on a conspiracy to commit wire fraud charge. In *Nordlicht*, the defendants were accused of conspiring to defraud the bond holders of Black Elk—an energy company—by secretly purchasing the majority of outstanding bonds in the company, converting those bonds to have priority over all other bonds, then covertly forcing the sale of the energy company's most lucrative assets thereby reaping millions for themselves and family members.[7]

[7] These facts are derived from the Government's press release about the conviction. *See* U.S. Attorney's Ofc, Eastern District of New York, Press Release, "Platinum Partners' Founder and CIO Mark Nordlicht and Co-CIO David Levy Convicted of Defrauding Bondholders in a Multi-Million Dollar Scheme," July 9, 2019, available at https://www.justice.gov/usao-edny/pr/platinum-partners-

The defendants were convicted after trial of, *inter alia*, conspiracy to commit wire fraud. *Id.* at *3. Shortly after *Ciminelli* issued, the defendants moved for judgment of acquittal on the conspiracy to commit wire fraud count.

In granting the motion, the district court first observed that "[t]he Government tries to rescue the wire fraud convictions by arguing . . . that defendants misled bondholders in order to deprive them of their 'contractual protections, priority claim to Black Elk's assets, and their security interest in Black Elk's assets." *Id.* at *17. The district court was not buying any of it.

> At most, [defendants] intended to deprive bondholders of the knowledge that conflicted bonds were voting on the indenture amendments. ***Ciminelli*** **expressly rejected the notion that nondisclosure of a conflict could serve as the basis for a wire fraud conviction.** Specifically, the Supreme Court pointed to *United States v. Viloski*, 557 F. App'x 28 (2d Cir. 2014) — a Second Circuit case affirming a wire fraud conviction based on an undisclosed conflict of interest — as an example of how the Second Circuit had 'vastly expand[ed] federal jurisdiction without statutory authorization' by making 'a federal crime of an almost limitless variety of deceptive actions.' *Ciminelli*, 143 S. Ct. at 1128 (citing *Viloski*). Because **no reasonable jury could find that defendants intended to defraud bondholders of anything other than 'potentially valuable economic information,'** *Ciminelli*, 143 S. Ct. at 1127, Nordlicht and Levys Rule 29 motion for a judgment of acquittal is granted as to their convictions for conspiracy to commit wire fraud.

Id. at *18 (emphasis added).

That "non-disclosure of a conflict" is ***exactly*** what happened here, and

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founder-and-cio-mark-nordlicht-and-co-cio-david-levy-convicted.

nothing more. While "[t]he parties [may] quibble about whether the Government presented a 'right-to-control' theory" in the Indictment, *id.* at *16, no reasonable jurist could read the Indictment to assert that Bradford and Draghia intended to defraud Vermeer "of anything other than 'potentially valuables economic information.'" *Id.* (quoting *Ciminelli*, 143 S. Ct. at 1127).

Reference to the factual basis of the Plea Agreement confirms this reading of the Indictment, as it clearly sets out the Government's theory of the case:

> One project that Defendant was overseeing for Vermeer was the construction of the "Vermeer EcoCenter" building in Pella. Defendant and Viorel Draghia worked together to formulate proposals, or "bids", for Draghia Contracting to complete certain work on the Vermeer EcoCenter project. Draghia submitted these proposals to the general contractor of the project via email, copying Defendant. At all times Defendant and Draghia ***knowingly and deliberately concealed and failed to disclose their kickback agreement*** to Vermeer employees and officers and the general contractor. ***This concealment was material.*** Specifically, the existence of their kickback agreement was material to the scheme to defraud Vermeer because if Vermeer officials had known about the kickback agreement, Draghia Contracting would not have been awarded a contract for work at Vermeer.

(R. Doc. 26 at 4; emphasis added).

Thus, as in *Nordlicht*, there can be no doubt that the Government's sole theory of fraud was that Bradford conspired to commit wire fraud by depriving Vermeer of potentially valuable economic information necessary to make discretionary economic decisions: the precise theory now invalidated by *Ciminelli*. The only "material" fact alleged by the Government was, after all, the secret agreement between Bradford and Draghia. Indeed, the word "material" occurs only

five times in the six-page Indictment, a mere two times in the 18-page Plea Agreement, and a single instance in the 38-page Plea Colloquy. In every single instance but one, the word material is used in conjunction with the existence of the secret agreement between Bradford and Draghia; the sole exception occurs at the very beginning of the Indictment where it is contained within a boilerplate prefatory clause: "At times material to this indictment." (R. Doc. 2 at 1).

Removing all doubt that the Government's sole theory of the case was "right-to-control" are the very words of the district court itself when summarizing Bradford's offense conduct at his sentencing hearing: "defendant's false representations prevented Vermeer from making informed decisions about who they should hire, and ***they lost the opportunity to spend their money as they would if they had complete information***." (R. Doc. 100 at 80:23-81:2) (emphasis added). But for Vermeer lacking "complete information," there simply is no other form of fraud. All that is left is a typical commercial construction contract that was performed to specification with no actual loss resulting, as discussed in more detail below.

A previous federal fraud case also involving Vermeer helps distinguish Bradford's conduct from traditional property fraud. According to a press release from the U.S. Attorney's Office for the Southern District of Iowa,

> On April 24, 2018, a federal grand jury returned an indictment charging Scott Randell Whitehead, age 54, and others with defrauding Vermeer Corporation of Pella, Iowa, announced United States Attorney Marc Krickbaum. According to the indictment, Whitehead was Vermeer's maintenance manager. Whitehead is alleged to have

> approved $3.6 million in invoices for products from two chemical companies, which were never received by Vermeer. Whitehead is also alleged to have received kickbacks from the two chemical companies.[8]

Obviously, approving payment on invoices for products one knows will never be received goes to the very nature of the bargain and clearly constitutes wire fraud. While kickbacks were alleged, nowhere in the multi-count indictment was there any allegation that a material fact of the fraud was the concealment of the kickbacks. *See United States v. Whitehead*, 4:18-cr-00079 (S.D. Iowa Apr. 24, 2018) (R. Doc. 2). In stark contrast, in Bradford's case, that is the ***only*** material fact—the concealment of the kickbacks. To state the obvious, unlike in *Whitehead*, in this case, Vermeer actually received what it paid for.

Even if the Government could cobble together another theory of fraud that it prosecuted Bradford under at this late date, it cannot disinfect the conviction of the "right-to-control" stain that it concedes was at least one of its theories. In that regard, "[a]ppellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury." *McCormick v. United States*, 500 U. S. 257, 270-271, n. 8 (1991) (as quoted in *Ciminelli*, 143 S. Ct. at 1129). Or, as in this case, the judge.

Thus, *Ciminelli* also renders the factual basis for Mr. Bradford's 18 U.S.C. § 1349 conviction by way of Plea Agreement insufficient, which is to say, Bradford is

[8] U.S. Attorney's Ofc, Southern Dist. of Iowa, Press Release, *Former Vermeer Employee, and Others, Charged with Fraud* (Apr. 25, 2018), https://www.justice.gov/usao-sdia/pr/former-vermeer-employee-and-others-charged-fraud.

actually innocent of his offense of conviction and so the district court lacked subject-matter jurisdiction. In sum, while there was concealment of information in the contract negotiation with Vermeer, there was no concealment or misrepresentation of any kind in what was contracted for, and that makes all the difference. This clearly presents a close question such that your Honor should grant the Application and release Mr. Bradford pending his appeal and the resolution of any writ of *certiorari* he may subsequently seek. Indeed, the day after the Supreme Court granted *certiorari* in *Ciminelli* on June 30, 2022, *Ciminelli v. United States*, No. 21-1170 (U.S.), the district court in that case ordered the immediate release of all defendants to bond. *United States v. Percocco, et al.*, 1:16-cr-776 (S.D.N.Y. July 1, 2022) (R. Doc. 1044) (granting motion for release on bail as to all defendants).

III. The District Court Erred by Utilizing Intended Loss at Sentencing, and the Error was not Harmless.

A. It was Procedural Error for the District Court to Defer to the Guidelines' Commentary.

Violations of 18 U.S.C. § 1349 are sentenced under USSG §2B1.1. The primary specific offense characteristic under that Guideline is "loss." USSG §2B1.1(b)(1). Loss, however, is not defined in the Guideline itself, but rather in the commentary. *See* USSG §2B1.1, comment. (n.3(A)). According to the commentary, "loss is the greater of actual loss or intended loss." *Id.* In turn, "actual loss" is defined as "the reasonably foreseeable pecuniary harm that resulted from the offense," USSG §2B1.1, comment. (n.3(A)(i)), and "intended loss" is defined as "the pecuniary harm that the defendant purposely sought to inflict," USSG §2B1.1,

comment. (n.3(A)(ii)). Thus, where actual loss measures the harm that resulted from the offense, *United States v. Waldner*, 580 F.3d 699, 705 (8th Cir. 2009), in contrast, "[i]ntended loss is meant to be a measure of a defendant's culpability," *United States v. Staples*, 410 F.3d 484, 491 (8th Cir. 2005) (citing USSG §2B1.1 comment. (back'd)).

Both the PSR and Government calculated loss using intended loss. (R. Doc. 36 at 22, ¶ 56); (R. Doc. 36 at 50). Over Bradford's objection to using intended loss as a method for calculating loss, (R. Doc. 74 at 5:19-9:15), the district court also adopted a theory of intended loss. (R. Doc. 100 at 36:16-17; 28:25-29:1). As Bradford expressly argued to the district court below, intended loss cannot be used to enhance a defendant's sentence in light of *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019). Thus, it was error for the district court to do so.

As the Eighth Circuit has observed,

> *Kisor* instructs that deference to [agency] guidance is appropriate where "(1) the regulation [is] genuinely ambiguous; (2) the agency's interpretation of the regulation [is] reasonable; (3) the interpretation [is] the agency's authoritative or official position; (4) the interpretation . . . in some way implicate[s] the agency's substantive expertise; and (5) the interpretation . . . reflect[s] fair and considered judgment."

Voigt v. Coyote Creek Mining Co., 999 F.3d 555, 561 (8th Cir. 2021) (quoting *Wells Fargo & Co. v. United States*, 957 F.3d 840, 855 (8th Cir. 2020) (Grasz, J., dissenting in part) (citing *Kisor*, 139 S. Ct. at 2415-18)). If agency guidance fails any one of these five *Kisor* criteria, then this Court "has no business deferring to any other reading, no matter how much the agency insists it would make more sense.

Deference in that circumstance would permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation." *Kisor*, 139 S. Ct. at 2415 (internal quotation marks and citation omitted).

Applying the canons of construction as required by *Kisor*'s first step, the U.S. Court of Appeals for the Third Circuit correctly held that the term "loss" is not ambiguous "in the context of U.S.S.G. § 2B1.1." *United States v. Banks*, 55 F.4th 246, 262 (3d Cir. 2022). "Our review of common dictionary definitions of 'loss' point to an ordinary meaning of 'actual loss.' None of these definitions suggest an ordinary understanding that 'loss' means 'intended loss.'" *Id.* at 258 (footnote omitted). Accordingly, the *Banks* court held that "[t]he ordinary meaning of 'loss' in the context of § 2B1.1 is 'actual loss.'" *Id.* at 257.[9]

But even if loss was found to be ambiguous after deploying the canons of construction, the agency's interpretation still must be reasonable. *Voigt*, 999 F.3d at 561. Or in the words of *Kisor*, the agency's interpretation must come "within the zone of ambiguity." *Kisor*, 139 S. Ct. at 2416. "But oftentimes the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. So when deciding whether the language is plain, we must read the words in

[9] To be sure, the only other federal court of appeal to address the issue on *de novo* review recently found, after "canvassing several dictionaries," that loss was ambiguous. *United States v. You*, No. 22-5442, 2023 U.S. App. LEXIS 17495, *37 (6th Cir. July 11, 2023). Rather than explaining its finding of genuine ambiguity, the Sixth Circuit skipped ahead in its muddled application of *Kisor* to the "commentary's structure, history, and purpose," *id.* at * 38, to find resort to Commentary permissible. Ultimately, the *You* court simply believes that, as a matter of policy, utilizing intended loss is justified: "For someone like You, who was arrested before causing actual loss, including losses that she intended is a reasonable way to gauge her culpability." *Id.* at *39. Reasonable or not is wholly beside the point. *You* failed to meaningfully engage in the *Kisor* analysis to determine whether "loss" was, in fact, genuinely ambiguous.

their context and with a view to their place in the overall statutory scheme." *King v. Burwell*, 576 U.S. 473, 486 (2015) (cleaned up).

Reading "loss" within the context of the Guidelines overall, it is clear that "intended loss" does not fall within the zone of ambiguity, i.e., it is not a reasonable interpretation of "loss." Again, unlike actual loss, which measures the harm that resulted from the offense, *see Waldner*, 580 F.3d at 705, "[i]ntended loss is meant to be a measure of a defendant's culpability." *Staples*, 410 F.3d at 491. As intended loss utilizes a different metric (culpability rather than harm) to measure something wholly distinct (the offender rather than the offense conduct), it necessarily resides in an entirely different interpretative zone than actual loss. It is not two sides of the same coin, but sides of coins from entirely different currencies.

As the U.S. District Court for the Northern District of Florida summarized:

> [I]t is clear that the Guidelines commentary defining "loss" to include "intended loss" is not due *Auer* deference. Section 2B1.1 is driven by "the amount of loss caused by the defendant's offense," which plainly means, as explained above, the economic, emotional and/or physical harm that actually occurred. ***"Loss" cannot mean harm that never materialized.*** Yet the Guidelines commentary broadens the term "loss" to include harm of precisely that nature by inserting "intended loss" into its definition. See U.S.S.G. § 2B1.1 at cmt. n.3(A)(ii). In doing so, the commentary does not "illuminate the meaning of 'loss,' but modifies it." And the modification is so far afield from any contextual zones of ambiguity inherent in the ordinary meaning of the word "loss" that the commentary is rendered plainly inconsistent with the text of § 2B1.1(b)(1). The Government has identified nothing in the structure, history or purpose of this guideline that supports such an expansive view of the term "loss." "Deference in [this] circumstance would permit the [Sentencing Commission], under the guise of interpreting a [Guideline], to create de facto a new

> [Guideline]." "*Auer* does not, and indeed could not, go that far." *See id.*

United States v. Alford, No. 3:21-cr-052, 2022 U.S. Dist. LEXIS 149494, *8-9 (N.D. Fla. Aug. 20, 2022) (citations omitted; emphasis added). Thus, it was procedural and prejudicial error for the district court here to utilize intended loss.

B. There Was No Loss, Intended or Actual.

In all events, there was no loss, intended or actual.[10] As for actual loss, the victim itself—Vermeer—never offered any evidence that it had suffered any actual loss, despite being given at least two opportunities to do so. (R. Doc. 69-1 at 22). At the sentencing hearing, when asked whether he had "any evidence to present to this Court" that Vermeer "suffered an actual or intended loss from any of these behaviors or conduct of Mr. Bradford," the investigating agent replied: "I have no financial calculations to provide the Court today, that's correct." (R. Doc. 100 at 52:2-7).

In its sentencing memorandum, the Government argued, without citation to any authority, that "[a] reasonable means is available to determine the intended loss: comparing the inflated contracts awarded to Draghia for particular projects to other competing bids put in for those same projects." R. Doc. 69-1 at 10. The PSR calculated the bulk of the intended loss amount of $227,028 by reference to a $573,527 bid, which it characterized but also without citation to any authority, as

[10] For purposes of sentencing only, Bradford stipulated in his Plea Agreement that loss was at least $15,000 but no more than $40,000. (R. Doc. 26 at 9). This amount reflected the $23,000 Bradford had received from Draghia for the EcoCenter project. (R. Doc. 74-4 at 2).

the "lowest ***competitive*** bid." PSR at 8-9, ¶ 29 (emphasis added).

In stark contrast, Mr. Bradford retained the expert services of Rory Woolsey, MBA, CEP, a "nationally known . . . expert[] in construction cost estimating with over 50 years of experience" who "possess[es] a Bachelor of Science degree in Civil/Structural Engineering and an MBA with an emphasis in construction project management" to independently estimate the value of the EcoCenter project. (R. Doc. 75 at 1:11-13). Mr. Woolsey reviewed several architectural drawings that were used for bidding on the EcoCenter project as well as "[m]ultiple digital images of the completed project." (R. Doc. 75 at 1:19-26). According to Mr. Woolsey's expert assessment, "the probable cost to perform the Vermeer Project was $742,746." (R. Doc. 75 at 1:28). The Government at no time challenged Mr. Woolsey's qualifications or offered any evidence to contradict or undermine his expert opinion.

In his Declaration, Mr. Woolsey further explained the many factors that go into cost estimating and bidding. According to Mr. Woolsey, a bid of $573,527 simply cannot be considered a credible bid by any stretch. As he stated, "[a] bid of $573,527 would be considered unrealistic and unreasonably low for this project." (R. Doc. 75 at 2:14-15). Of course, the same holds true for any bid materially less than $742,746. Therefore, there simply is no intended loss notwithstanding the Government and PSR's non-expert conjectures upon which the district court relied.

The district court sentenced Mr. Bradford based upon a theory of "intended loss" but found the intended loss attributable to Mr. Bradford was at least $150,000 but no more than $250,000. (R. Doc. 100 at 28:8-11). In so doing, it recognized that

its finding necessarily was speculative in nature, and nowhere found that the lowest bid was necessarily "the one that best serves" the needs of Vermeer.

> ***The idea that it's speculation that there was a loss to Vermeer inures to your client a benefit that is consistent with the vagaries of the construction industry generally.*** Construction litigation abounds, and it abounds because of the fact that sometimes people contract for matters, and then they can't do it for that amount. Sometimes people contract for the matters, and they do a poor job. That results in litigation. The underlying facts in a legitimately bidded construction project are that the company has the ability to weigh multiple bids and to pick the one that best serves their needs.

(R. Doc. 100 at 35:8-17) (emphasis added). Perhaps most troubling, despite recognizing the inherent "vagaries of the construction industry," the district court summarily dismissed the expert's report out of hand without giving any reason other than it simply conflicted with the lower bids. (R. Doc. 100 at 35:1-7).

It is quite notable, therefore, that the district court in *Ciminelli* found there to be no loss in that case for essentially the same reasons that the district court articulated here: to do so required speculation.

> Given the amount of variance that exists in construction fees, the data points that exist in the record leave the Court unable to make a determination of pecuniary loss without engaging in pure speculation, which I cannot do. For all these reasons I find the loss enhancement in 2B1.1(b) does not apply. So it's plus zero.

United States v. Ciminelli, No. 1:16-cr-00776-VEC, Sentencing Trans., (S.D.N.Y. Dec. 12, 2018) (R. Doc. 948 at 16:18-23).

Not only was the district court's finding of loss speculative, but there was, in

fact, a higher bid than Draghia's. The construction firm Mortenson, ranked as the 16th largest construction contractor nationwide in 2019,[11] bid $835,696 on the "exterior enclosure" for the EcoCenter project, i.e., the same masonry work that Draghia and others had bid on. (R. Doc. 40 at 12). Thus, using the district court's own methodology, there plainly was no loss. If anything, there was intended savings.

This error, to be sure, was not harmless. If Bradford prevails on his argument that the district court erroneously utilized intended loss in light of *Kisor* and/or its calculation was in error, then, consistent with his Plea Agreement, Bradford's Total Offense Level would drop from 18 to 12, which would result in an advisory range of only 10 to 16 months. While the district court briefly mentioned in passing that it would impose the same 20-month sentence if it had erred in calculating the Guidelines, (R. Doc. 100 at 80:12-13), that would entail imposing an upward departure under the correct calculation of the Guidelines—a very rare occurrence—when the district court initially imposed a very common downward variance.[12] Moreover, such a brief comment does not "make[] clear that the judge based the sentence . . . she selected on factors ***independent*** of the Guidelines." *Grimes*, 888 F.3d at 1017 (emphasis added). This error, therefore, clearly was not

[11] *See* Engineering News Record, *ENR 2019 Top 400 Contractors*, May 2019, at https://www.enr.com/toplists/2019-Top-400-Contractors1.

[12] In fiscal year 2022, there were 5,206 offenders sentenced under USSG §2B1.1 with 2,175 (42%) receiving a downward variance, 2,086 (40%) sentenced within the advisory sentencing range, but only 61 (0.1%) receiving a sentence above the range. *See* U.S. Sentencing Comm'n, *2022 Sourcebook of Federal Sentencing Statistics* tbl. 32, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2022/Table32.pdf.

harmless. This issue clearly presents a close question such that your Honor should grant the Application and release Mr. Bradford pending his appeal and the resolution of any writ of *certiorari* he may subsequently seek.

IV. The District Court Erred by Relying on Irrelevant, Uncharged Conduct at Sentencing, and the Error was not Harmless.

At sentencing, the district court expressly relied on uncharged conduct regarding two separate, independent projects that Mr. Bradford had worked on. The LG project was performed prior to his work for Vermeer and the Patriot project—referenced as Aberdeen at sentencing—was performed after Vermeer. (R. Doc. 100 at 11:13-12:22). The Government had alleged that Mr. Bradford also was paid kickbacks on those projects although it never charged Mr. Bradford for such alleged conduct. The district court expressly considered this conduct "as part of a pattern of conduct that informs its ultimate understanding of the defendant's criminal conduct." (R. Doc. 100 at 26:15-17).

Even if the LG and Patriot conduct constituted relevant conduct and there was a preponderance of the evidence to support the same, the district court's consideration of said conduct violated Bradford's Fifth Amendment right to due process and Sixth Amendment right to be tried in the district in which "the crime shall have been committed" and "to be informed of the nature and cause of the accusation." Both the LG and Patriot conduct occurred outside the Southern District of Iowa and most pertinently, was not charged. The district court's consideration of uncharged conduct was therefore unconstitutional.

While *United States v. Watts*, 519 U.S. 148 (1997) (per curiam) has repeatedly

been cited to uphold the constitutionality of the use of both acquitted conduct and uncharged conduct sentencing, as many have pointed out, "*Watts* . . . presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument." *United States v. Booker*, 543 U.S. 220, 240 n.4 (2005). Thus, *Watts* does not preclude this Court from holding that the use of uncharged conduct at sentencing violates Fifth Amendment due process and Sixth Amendment notice.

Notably, three of the seven Justices in the majority in *Watts* have since denounced its unchecked expansion. As the late Justice Scalia stated, joined by Justice Thomas and the late Justice Ginsburg, observed

> any fact that increases the penalty to which a defendant is exposed constitutes an element of a crime . . . and must be found by a jury, not a judge. . . . For years, however, we have refrained from saying so. . . . [T]he Courts of Appeals have uniformly taken our continuing silence to suggest that the Constitution does permit otherwise unreasonable sentences supported by judicial factfinding, so long as they are within the statutory range. This has gone on long enough. . . . We should grant certiorari to put an end to the unbroken string of cases disregarding the Sixth Amendment—or to eliminate the Sixth Amendment difficulty by acknowledging that all sentences below the statutory maximum are substantively reasonable.

Jones v. United States, 574 U.S. 948, 949-950 (2014) (Scalia, J., joining dissenting from denial of certiorari, Thomas and Ginsburg, JJ.).

The Fifth and Sixth Amendments require that each element of a crime be either admitted by the defendant or proved to the jury beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. 99, 104 (2013). Any fact that increases the

penalty to which a defendant is exposed constitutes an element of a crime and must be found by a jury, not a judge. *Apprendi v. New Jersey*, 530 U.S. 466, 483 (2000); *Cunningham v. California*, 549 U.S. 270, 281 (2007). The Supreme Court has held that a substantively unreasonable sentence is illegal and must be set aside. *Gall v. United States*, 552 U.S. 38, 51 (2007). The logical conclusion from this string of cases is "that any fact necessary to prevent a sentence from being substantively unreasonable —thereby exposing the defendant to the longer sentence—is an element that must be either admitted by the defendant or found by the jury. It *may not* be found by a judge." *Jones v. United States*, 574 U.S. 948, 949 (2014) (Scalia, J., with whom Thomas, J. and Ginsberg, J., join, dissenting from denial of certiorari; emphasis in original).

This past term, the U.S. Supreme Court held over a dozen petitions for *certiorari*—some for over a year—all pertaining to the constitutionality of acquitted conduct sentencing as upheld in *Watts*.[13] On its last day of the term, the Court denied *certiorari* to all these petitions.[14] However, several Justices, including your Honor, filed statements regarding the denial of *certiorari*.

As Justice Sotomayor wrote in her statement respecting the denial of certiorari, "many jurists have noted [that] the use of acquitted conduct to increase a defendant's Sentencing Guidelines range and sentence raises important questions

[13] *United States v. McClinton*, No. 21-1557, filed on June 10, 2022, was the lead petition.

[14] There currently is at least one active petition for a writ of certiorari before the Supreme Court regarding acquitted conduct sentencing, which has been distributed for conference on September 26, 2023. *See Robinson v. United States,* No. 22-1195.

that go to the fairness and perceived fairness of the criminal justice system." *McClinton v. United States*, No. 21-1557, 2023 U.S. LEXIS 2796, *2 (May 30, 2023) (footnotes omitted; citing *Jones*, 574 U. S. at 949-950 (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of certiorari); *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of reh'g en banc); *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.); *Watts*, 519 U. S. at 170 (Kennedy, J., dissenting)). Likewise, in your Honor's statement respecting denial of certiorari, joined by Justices Gorsuch and Barrett, you agreed that "[t]he use of acquitted conduct to alter a defendant's Sentencing Guidelines range raises important questions." *Id.* at *6-7.

For his part, Justice Alito also recognized in his statement respecting denial of certiorari that "there is no relevant difference for these purposes between acquitted conduct and ***uncharged conduct***." *Id.* at *8 n.* (emphasis added). Indeed, the Government itself recognized in its brief in opposition to certiorari in *McClinton*, that since "an individual is equally 'presumed innocent' when he is never charged with a crime in the first place[, t]he logical implication . . . therefore preclude[s] a sentencing court from relying on any conduct not directly underlying the elements of the offense on which the defendant is being sentenced." *United States v. McClinton*, No. 21-1557, Br. for Gov't, 2022 U.S. S. CT. BRIEFS LEXIS 3499, *19 (filed Oct. 28, 2022). To be sure, this is a point it has previously and consistently asserted. *See United States v. Asaro*, No. 19-107, Br. for Gov't, 2019 U.S. S. CT. BRIEFS LEXIS 6411, *18 (filed Nov. 12, 2019) (stating that it is

"logical[ly] inconsisten[t]" to argue that acquitted conduct sentencing violates the Constitution but the use of uncharged conduct does not); *United States v. Robinson*, No. 22-1472, Br. for Gov't at 27 (7th Cir. filed Dec. 7, 2022) (same).

As *Watts* never reached any of these issues, and for the reasons many of your fellow Justices and lower court judges have long articulated, it is clear that the use of uncharged conduct at sentencing presents an exceedingly close question. Accordingly, your Honor should grant the Application and release Mr. Bradford pending his appeal and the resolution of any writ of *certiorari* he may subsequently seek.

V. Reasons for Granting this Application.

Mr. Bradford is neither a flight risk nor a danger to the community, (R. Doc. 95 at 5), and presents substantial appellate issues entitling him to release and bail pending appeal. While Circuit Justices accord "'great deference'" to decisions of the lower courts with respect to bail, *Mecom v. United States*, 434 U.S. 1340, 1341 (1977) (Powell, J., in chambers) (quoting *Harris v. United States*, 404 U.S. 1232, 1232 (1971) (Douglas, J., in chambers)), there are limits to this deference and Circuit Justices considering a bail application have "a responsibility to make an independent determination on the merits" of such an application. *Id.* at 1340, 1341 (1977). *See also Hung v. United States*, 439 U.S. 1326, 1328 (1978) (Brennan, J., in chambers) (noting that, although great deference must be given to decisions of district courts in denying bail, "[a] Circuit Justice has a nondelegable responsibility to make an independent determination on the merits of the [bail]

application") (citation omitted); *Harris v. United States,* 404 U.S. 1232, 1232 (1971) (Douglas, J., in chambers) (same); *Sellers v. United States*, 89 S. Ct. 36 (1968) (Black, J., in chambers) (same); *Leigh v. United States*, 82 S. Ct. 994 (1962) (Warren, C.J., in chambers) (same).

The Supreme Court has granted bail relief to an applicant even after his appeal was heard and denied. *McDonnell v. United States*, 579 U.S. 550 (2016) (granting application 15A218 for release on bail). Grants of bail pending direct appeal by Circuit Justices include the following: *Truong Dinh Hung v. United States*, 439 U.S. 1326, 1327 (1978) (Brennan, J., in chambers); *In re Lewis*, 418 U.S. 1301, 1301 (1974) (Douglas, J., in chambers) (noting that the applicant's case raised "[s]ubstantial First Amendment claims"); *Farr v. Pitchess*, 409 U.S. 1243 (1973) (Douglas, J., in chambers) (granting application for release pending appeal of reporter's petition for habeas corpus regarding his imprisonment for civil contempt because issue presented was "a new one not covered by our prior decisions"); *Brussell v. United States*, 396 U.S. 1229, 1230 (1969) (Marshall, J., in chambers) (explaining that the application for bail, which followed the applicant's incarceration for civil contempt, raised "serious questions" under *Curcio v. United States*, 354 U.S. 118 (1957), about a corporate custodian's personal right "not to testify" concerning the location of corporate records); *Chambers v. Mississippi*, 405 U.S. 1205 (1972) (Powell, J., in chambers) (granting bail pending appeal before the Court set aside the applicant's conviction in *Chambers v. Mississippi*, 410 U.S. 284 (1973)).

In sum, because (1) Mr. Bradford is neither a flight risk nor a danger to the community, (2) he presents several substantial issues for review on appeal, (3) this appeal will be fully briefed in the Eighth Circuit within the next month, and (4) there exists grave concern that Mr. Bradford was wrongly denied bail where even the Government has conceded it prosecuted him under the now-invalidated right-to-control theory, at least in part, we respectfully pray that your Honor grant the instant Application and order that Mr. Bradford be released forthwith from custody, continue his conditions of bail as set forth prior to his remand, and stay his sentence in all respects pending his appeal to the Eighth Circuit, and the resolution of any petition for a writ certiorari filed thereafter.

CONCLUSION

For the foregoing reasons, Mr. Bradford respectfully requests that your Honor grant his application for release under the previously terms of bond imposed by the district court and stay his sentence pending the disposition of his appeal to the Eighth Circuit and the disposition of *certiorari* in this Court should a writ be sought.

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Dated: August __, 2023

Respectfully submitted,

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