

Exhibit A to Application for Release

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF IOWA

1
2
3 UNITED STATES OF AMERICA,
4 Plaintiff,
5 v.
6 ROGER PAUL BRADFORD,
7 Defendant.

CASE NO. 4:22-CR-067

MOTION FOR BOND PENDING APPEAL

8
9 COMES NOW, Defendant ROGER PAUL BRADFORD, by and through undersigned counsel
10 pursuant to 18 U.S.C. § 3143(b), and hereby moves this honorable Court for bond pending appeal
11 having timely filed his Notice of Appeal on May 18, 2023. Mr. Bradford, convicted of a non-violent
12 economic offense that did not result in any identifiable loss to the victim, and who has already disgorged
13 his gain making full restitution, has for the past year consistently and in good faith complied with this
14 Court’s conditions of bond. At sentencing, this Court further allowed Mr. Bradford to remain out on
15 bond—notably at the suggestion of the Probation Office and without objection from the Government—
16 so that he may self-surrender to the BOP to begin service of his sentence. These facts, and others, all
17 provide clear and convincing evidence that Mr. Bradford is neither a flight risk nor a danger to the
18 community.

19 Mr. Bradford’s appeal, moreover, is not for the purpose of delay and raises a substantial question
20 of law or fact likely to result in reversal. On appeal, Mr. Bradford will raise *inter alia* the substantial
21 question of whether he is factually innocent of conspiracy to commit wire fraud in light of the United
22 States Supreme Court’s recent unanimous opinion in *Ciminelli v. United States*, __ U.S. __, No. 21-
23 1170, 2023 U.S. LEXIS 1888 (May 11, 2023). To be sure, United States Supreme Court decisions in
24 criminal cases apply to all cases pending on direct review. *See United States v. Hollingshed*, 940 F.3d
25 410, 415 (8th Cir. 2019) (citing *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6, 328 (1987)).

26 Accordingly, this Court should grant the instant motion and allow Mr. Bradford to remain out on
27 bond pending the outcome of his appeal.

28 The undersigned has consulted with the Government on this motion and the Government

1 opposes bond pending appeal.

2 In further support, Mr. Bradford states as follows:

3 **I. RELEVANT PROCEDURAL HISTORY**

4 On May 18, 2022, Mr. Bradford was indicted on one count of conspiracy to commit wire fraud
5 and one count of attempted obstruction of an official proceeding. (Doc. 2).

6 On October 7, 2022, pursuant to a Plea Agreement, (Doc. 26), Mr. Bradford pleaded guilty to a
7 single count of conspiracy to commit wire fraud in violation of 18 U.S.C. § 1349. (Doc. 31). This Court
8 subsequently dismissed the obstruction charge at the Government’s request. (Doc. 77).

9 On May 4, 2023, this Court imposed on Mr. Bradford a sentence of 20 months imprisonment,
10 three years supervised release and restitution of \$23,000. (Doc. 78). This Court also permitted him to
11 remain out on bond to self-surrender to the BOP to begin serving his sentence.¹

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

13 **II. ARGUMENT**

14 *A. Mr. Bradford’s Appellate Waiver is Only to his Conviction and is Otherwise Unenforceable*

15 To the extent relevant to the Court’s consideration of the instant motion, Mr. Bradford notes that
16 while he waived his right to appeal his conviction, he expressly “preserve[d] the right to appeal any
17 sentence imposed by the Court.” (Doc. 26 at 14, ¶ 26). Thus, there is no impediment for him to appeal
18 the sentence imposed. Furthermore, Mr. Bradford’s waiver of his right to appeal his conviction is
19 unenforceable inasmuch as enforcement would constitute a miscarriage of justice. *See United States v.*
20 *Andis*, 333 F.3d 886, 890 (8th Cir. 2003) (en banc) (“we will not enforce a[n appellate] waiver where to
21 do so would result in a miscarriage of justice”). Enforcement would be a miscarriage of justice because,
22 in light of *Ciminelli*, Mr. Bradford is actually innocent of conspiracy to commit wire fraud. Thus, Mr.
23 Bradford’s waiver of his right to appeal his conviction will not preclude his appeal of the same.

24 *B. Mr. Bradford Qualifies for Bond Pending Appeal*

25 Pursuant to 18 U.S.C. § 3143(b), a defendant must make two separate showings to qualify for
26 bond pending appeal. First, the defendant must establish by clear and convincing evidence that he does
27

28 ¹ There is pending a motion to extend Mr. Bradford’s surrender date. (Doc. 90). Of course, if the instant motion is granted, any extension to surrender will become moot.

1 not present a flight risk or a risk of danger to the safety of any other person or the community. 18 U.S.C.
2 § 3143(b)(1)(A). Second, the defendant must demonstrate that the appeal is not for delay and raises a
3 substantial question of law or fact “likely to result” in reversal, a new trial, a reduced sentence, or a
4 similarly favorable result. 18 U.S.C. § 3143(b)(1)(B); *United States v. Powell*, 761 F.2d 1227, 1233 (8th
5 Cir. 1985).

6 In determining whether a defendant presents either an unreasonable flight risk or a danger to the
7 community, courts are instructed to consider the following factors: (1) the nature and circumstances of
8 the offense (including whether the offense involves narcotics); (2) the weight of the Government’s
9 evidence; (3) the defendant’s history and characteristics including prior attendance at court appearances;
10 and (4) the nature and seriousness of the danger that would be posed by defendant’s release. *See* 18
11 U.S.C. § 3142(g).

12 With respect to demonstrating that an appeal raises a substantial question, a defendant is not
13 required to demonstrate that he will win the appeal, instead, he need only establish that “a close
14 question” exists. *See United States v. Marshall*, 78 F.3d 365, 366 (8th Cir. 1996). To show that there is a
15 close question, the defendant must show “that reasonable judges could differ” on a question “so integral
16 to the merits of the conviction that it is more probable than not that reversal or a new trial will occur if
17 the question is decided in the defendant’s favor.” *Powell*, 761 F.2d at 1234. “If the judicial officer makes
18 such findings, such judicial officer ***shall*** order the release of the person.” 18 U.S.C. § 3143(b) (emphasis
19 added).

20 1. Mr. Bradford Does Not Present a Flight Risk or Danger to the Community.

21 With respect to the first, third and fourth factors for this Court to consider, Mr. Bradford, a
22 defendant with zero criminal history points, was convicted of a non-violent economic offense that did
23 not result in any identifiable loss to the victim. Nonetheless, as this Court is aware, Mr. Bradford
24 disgorged the proceeds he obtained from his conduct to the victim in full restitution.

25 Moreover, for the past year Mr. Bradford has consistently and in good faith complied with this
26 Court’s conditions of bond pending his sentencing in this matter. *See* Release Status Report to Court
27 (Doc. 76) (“Since his release, the defendant has remained in compliance with his conditions of
28 release.”). Indeed, the Government itself requested that Mr. Bradford initially be released on bond with

1 conditions. (Doc. 3). He dutifully made all appearances, traveling from his home state of Virginia to
2 Iowa when ordered. Without objection from the Government and at the recommendation of the
3 Probation Office, (Doc. 76) (“the Probation Office respectfully recommends the defendant remain on
4 pretrial release with conditions, and be allowed to self-surrender if a custodial sentence is ordered”), this
5 Court further allowed Mr. Bradford to remain out on bond after sentencing so that he could self-
6 surrender to the BOP to begin service of his sentence.

7 With respect to the second factor—the weight of the Government’s evidence—as discussed
8 below, in light of a recent Supreme Court case, Mr. Bradford is actually innocent of the conduct he
9 pleaded guilty to. In other words, the Government’s evidence is, as a matter of law, insufficient to
10 support his conviction and sentence.

11 2. Mr. Bradford Will Raise a Substantial Question on Appeal: He is Actually Innocent

12 This is a case about the alleged theft of the right to control discretionary economic decisions
13 rather than the actual theft of monies or traditional property interests from the alleged victim. Indeed,
14 this case consists of a similar, if not a nearly identical fact pattern, as in *Ciminelli v. United States*, ___
15 U.S. ___, No. 21-1170, 2023 U.S. LEXIS 1888 (May 11, 2023). In *Ciminelli*, the defendant paid a
16 lobbyist \$100,000 to \$180,000 a year in order to help his company obtain state-funded contracts. *See id.*
17 at *7. With respect to a particularly large state project, the defendant worked with the lobbyist and
18 others to ensure that the defendant’s construction company was the only entity qualified to be awarded a
19 contract on this project by tailoring the state’s request for proposal to the unique aspects of the
20 defendant’s construction company. *See id.* This scheme “effectively guaranteed” that the defendant
21 would win, and in fact did win, the “marquee \$750 million” construction project. *Id.* at *7-8.

22 Once this scheme was uncovered, the Government indicted the defendant, the lobbyist and others
23 on several counts of “wire fraud in violation of 18 U.S.C. § 1343 and conspiracy to commit wire fraud in
24 violation of § 1349.” *Id.* at *8. The Government proceeded under the “‘right to control’ theory, under
25 which the Government can establish wire fraud by showing that the defendant schemed to deprive a
26 victim of potentially valuable economic information necessary to make discretionary economic
27 decisions.” *Id.*

28 The U.S. Supreme Court unanimously rejected “the right-to-control theory of wire fraud [a]s a

1 valid basis for liability under 18 U.S.C. § 1343.” *Id.* at *10. According to the Court:

2 the right-to-control theory vastly expands federal jurisdiction without
 3 statutory authorization. Because the theory treats mere information as the
 4 protected interest, almost any deceptive act could be criminal. The theory
 5 thus makes a federal crime of an almost limitless variety of deceptive
 6 actions traditionally left to state contract and tort law. . . . The right-to-
 7 control theory thus criminalizes traditionally civil matters and federalizes
 8 traditionally state matters. In sum, the wire fraud statute reaches only
 9 traditional property interests. The right to valuable economic information
 10 needed to make discretionary economic decisions is not a traditional
 11 property interest. Accordingly, the right-to-control theory cannot form the
 12 basis for a conviction under the federal fraud statutes.

13 *Id.* at *14-15.

14 Nowhere in the Indictment is it alleged that Mr. Bradford materially misrepresented the ability of
 15 co-defendant Draghia to perform on the contract. Likewise, the Government never has argued that the
 16 contract ultimately performed by Draghia was incomplete or substandard. Rather, the Indictment merely
 17 alleges that the reasons Mr. Bradford wanted Draghia Contracting to be awarded the contract were
 18 “material misrepresentations because . . . Defendant omitted and concealed that **a material reason that**
 19 **Defendant wanted Draghia Contracting to be selected was so that Defendant would receive a**
 20 **monetary kickback from Viorel Draghia.”** (Doc. 2 at 4) (emphasis added). “Had Defendant and
 21 Viorel Draghia informed the general contractor of their kickback agreement, the general contractor
 22 would have informed Vermeer . . . [who then] would have ensured that no contracts were awarded to
 23 Draghia contracting.” (Doc. 2 at 4-5). This scheme, then, was nothing more than a “scheme[] to
 24 deprive a victim of potentially valuable economic information necessary to make [a] discretionary
 25 economic decision[.]” *Ciminelli, supra* at *8.

26 This precise scheme between Messrs. Bradford and Draghia is more specifically set forth in the
 27 factual basis of Mr. Bradford’s Plea Agreement:

28 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.

(Doc. 26 at 4; emphasis added). Thus, the Government’s theory of fraud—essentially indistinguishable from the one in *Ciminelli*—was that Mr. Bradford had misrepresented to Vermeer that Mr. Bradford was being paid by Mr. Draghia out of Mr. Draghia’s funds to help Mr. Draghia obtain a contract with Vermeer. In other words, the Government alleged that Mr. Bradford conspired to commit wire fraud by depriving Vermeer of potentially valuable economic information necessary to make discretionary economic decisions: the precise theory the United States Supreme Court has now unanimously held is no longer “a valid basis for liability under 18 U.S.C. § 1343” and § 1349. *Ciminelli, supra* at *6 (“[T]he federal fraud statutes criminalize only schemes to deprive people of traditional property interests. Because ‘potentially valuable economic information’ ‘necessary to make discretionary economic decisions’ is not a traditional property interest, we now hold that **the right-to-control theory is not a valid basis for liability under §1343.**”) (Emphasis added).

Just as Mr. Draghia paid Mr. Bradford kickbacks to land the Vermeer project, the defendant in *Ciminelli* paid a lobbyist to obtain a construction contract. Had either Vermeer or the victim in *Ciminelli* known of such arrangements, neither would have awarded contracts to the respective defendants. In both instances, the Government believed such conduct constituted conspiracy to commit wire fraud. As the Court has now held in *Ciminelli*, the Government in both instances was wrong.

Thus, *Ciminelli* has rendered the factual basis for Mr. Bradford’s 18 U.S.C. § 1349 conviction insufficient, which is to say, Mr. Bradford is actually innocent of his offense of conviction. Should the U.S. Court of Appeals for the Eighth Circuit agree, then it likely will reverse Mr. Bradford’s conviction. Accordingly, bond pending appeal should be granted. *See, e.g., United States v. Scruggs*, No. 3:09-CR-00002, 2012 U.S. Dist. LEXIS 167139, *8, 2012 WL 5923194 (N.D. Miss. Nov. 26, 2012) (“The Petitioner maintains he is ‘actually innocent’ of the crime to which he pled guilty, honest services fraud, because his conduct did not constitute a paradigmatic bribe or kickback as defined by *Skilling, supra*. The Court further finds that if the Petitioner’s substantial question is decided in his favor on appeal, the result would likely be reversal of his conviction. Accordingly, the Petitioner’s motion for bail pending appeal is GRANTED.”).

This is especially the case where Mr. Bradford—an innocent man—would likely serve nearly, if

1 not all, his entire term of incarceration prior to the resolution of his appeal if he is not permitted bail
 2 during its pendency. With a sentence of 20 months, Mr. Bradford would receive three months' Good
 3 Conduct Time credit, *see* 18 U.S.C. § 3624(b), and would be transferred to home confinement at least
 4 two months prior to the end of his sentence, *see* 18 U.S.C. § 3624(c)(2), resulting in effective custodial
 5 term of just 15 months. However, with additional First Step Act credits for successful completion of
 6 recidivism reduction programming, Mr. Bradford could reduce his time in custody by at least an
 7 additional six months, *see* 18 U.S.C. § 3624(g), for **a total time in custody of only nine months.**
 8 During fiscal year 2022, the *median* time it took to resolve 741 criminal appeals in the Eighth Circuit
 9 from the filing of a Notice of Appeal to issuance of the Last Opinion or Final Order was 7.6 months.²
 10 Meaning half of the appeals took longer than 7.6 months to resolve.

11 As a non-violent, "Aging Offender"³ who poses no flight risk or danger to the community, and
 12 who raises perhaps the ultimate substantial question—his actual innocence, Mr. Bradford should not be
 13 required to serve any time, let alone risk serving all his time, prior to having his appeal resolved by the
 14 U.S. Court of Appeals for the Eighth Circuit on such a substantial question.

15 III. CONCLUSION

16 **WHEREFORE**, in light of the above, Mr. Bradford respectfully prays that this honorable Court
 17 grant the instant motion and, consistent with the imperative of 18 U.S.C. § 3143(b), permit him to
 18 remain out on bond during the pendency of his appeal.

19 Dated: May 24, 2023

GREFE & SYDNEY, P.L.C.

21 /s/ Guy R. Cook
 22 Guy R. Cook
 23 GREFE & SYDNEY, P.L.C.
 24 500 East Court Avenue
 25 Suite 200 P.O Box 10434
 Des Moines, Iowa 50306
 Telephone: 515.245.4452

26 ² *See* U.S. Courts, *Judicial Business—U.S. Courts of Appeals* tbl. B-4A (Sept. 30, 2022),
 27 <https://www.uscourts.gov/statistics/table/b-4a/judicial-business/2022/09/30>.

28 ³ The Bureau of Prisons considers offenders aged 50 or over to be "Aging Offenders." *See* BOP,
 Program Statement—Management of Aging Offenders, No. 5241.01, Apr. 14, 2022,
https://www.bop.gov/policy/progstat/5241_001.pdf. Mr. Bradford is 57 years old.

Email: gcook@grefesidney.com

Attorney for Defendant
ROGER PAUL BRADFORD

LAW OFFICES OF DOUG PASSON

/s/ Doug Passon

Doug Passon
LAW OFFICES OF DOUG PASSON
P.O. Box 4425
Scottsdale, AZ 85261
Telephone: 480.448.0086
Email: doug@dougpassonlaw.com

Attorney for Defendant
ROGER PAUL BRADFORD

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2023, the foregoing MOTION FOR BOND PENDING APPEAL was filed electronically and a copy was served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/Guy R. Cook
GUY R. COOK

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA,)	
)	4:22-cr-00067
)	
v.)	
)	GOVERNMENT’S RESISTANCE TO
ROGER PAUL BRADFORD)	MOTION FOR CONTINUED RELEASE
also known as, Paul Bradford,)	PENDING APPEAL
)	
Defendant.)	

INTRODUCTION 1

LAW & ARGUMENT..... 3

A. Bradford waived this challenge to his conviction. Accordingly, his appeal will likely be dismissed..... 5

B. Even assuming a court set aside the appellate waiver, Bradford’s appeal does not raise a “close question” or “a question that could go either way.” The *Ciminelli* decision clearly does not undermine Bradford’s conviction for Conspiracy to Commit Wire Fraud. The Indictment and factual basis for the plea clearly support that Vermeer Corporation was defrauded of traditional property rights..... 8

CONCLUSION 13

INTRODUCTION

Bradford was indicted in May 2022 for Conspiracy to Commit Wire Fraud (Count 1) and Attempted Obstruction of an Official Proceeding (Count 2). (R. Doc. 2.) Bradford conspired with Viorel Draghia to execute a scheme and artifice to defraud and obtain money from Vermeer Corporation in 2019. Bradford’s attempted obstruction count was based on an hour-long audio recording of Bradford imploring his co-conspirator to lie to the FBI about the scheme and to not cooperate with investigators against him.

Bradford signed a written plea agreement. (R. Doc. 26.) He pled guilty to Count 1. The government agreed to dismiss Count 2. A lengthy factual basis for the plea was included in the written agreement. Magistrate Judge Bremer conducted a plea hearing on October 7, 2022. (R. Doc. 31; R. Doc. 89, Plea Transcript “PT”.)

On May 4, 2023, this Court sentenced Bradford to a 20-month term of prison. (R. Doc. 77.) Judgment was entered that same day. (R. Doc. 78.)

On May 11, 2023, the U.S. Supreme Court filed an opinion in *Ciminelli v. United States*, 598 U.S. ---, 2023 WL 3356526.

On May 15, Bradford was notified that he was to report to a BOP facility in Virginia on June 8 to begin serving his sentence. (R. Doc. 90-1.)

On May 18, 2023, Bradford filed two other pending motions. (R. Docs. 82, 83.) Both his motion to withdraw plea of guilty and motion to vacate sentence are based on the premise that the *Ciminelli* decision places Bradford’s case outside of the purview of the federal wire fraud statute. This premise is mistaken. The *Ciminelli* decision does not undermine Bradford’s conviction. Bradford’s conviction is not solely based on the so-called “right-to-control” theory of wire fraud that had been endorsed by the Second Circuit. Rather, Bradford’s conviction is rooted in his defrauding Vermeer of a traditional property interest: contracts and money. Money was undoubtedly an object of Bradford’s scheme, and he and his co-conspirator obtained it from Vermeer. Bradford admits as much.

On May 24, 2023, Bradford filed the instant motion seeking that this Court grant him continued release pending appeal. (R. Doc. 91.) This motion, like his others

(R. Docs. 82, 83), are based on Bradford's incorrect premise that the *Ciminelli* decision places Bradford's case outside of the purview of the federal wire fraud statute. Bradford's contends, in light of *Ciminelli*, his appeal will raise a substantial question of law or fact likely to result in reversal of Bradford's fraud conviction.

But because *Ciminelli* does not impact Bradford's particular case, his anticipated appeal premised on *Ciminelli* is unlikely to result in reversal of Bradford's conviction. And, independently of *Ciminelli*, Bradford's appeal is likely to be dismissed because he waived exactly this sort of appellate issue.

Accordingly, the Court should deny Bradford's motion for continued release pending appeal.

LAW & ARGUMENT

Title 18 U.S.C. § 1343(b)(1) governs Bradford's request. As applicable to Bradford's motion, the statute says that Bradford should be detained "unless [this Court] finds:

- (A) by clear and convincing evidence that [Bradford] is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c) of this title; and
- (B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in—
 - (i) reversal,
 - (ii) an order for a new trial,

- (iii) a sentence that does not include a term of imprisonment, or
- (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.”

Stated another way, for fraud crimes, in order for the Court to order Bradford released during the pendency of his appeal, Bradford must show (and this Court find) “(A) by clear and convincing evidence that [Bradford] is unlikely to flee or pose a danger to others, *and* (B) that his appeal “raises a substantial question of law or fact” that is likely to result in reversal, new trial, or reduction to a sentence that would be served before disposition of the appeal.” *United States v. Marshall*, 78 F.3d 365, 366 (8th Cir. 1996) (emphasis added).

Bradford must show two things. First, Bradford must “show that the question presented by the appeal is substantial, in the sense that it is a close question or one that could go either way. It is not sufficient to show simply that reasonable judges could differ (presumably every judge who writes a dissenting opinion is still “reasonable”) or that the issue is fairly debatable or not frivolous. On the other hand, [Bradford] does not have to show that it is likely [Bradford] will prevail on the issue on appeal.” *United States v. Powell*, 761 F.2d 1227, 1233-34 (8th Cir. 1985). If Bradford makes that first showing, he “must then show that the substantial question [Bradford] seeks to present is so integral to the merits of the conviction that it is more

probable than not that reversal . . . will occur if the question is decided in [Bradford's] favor.” *Id.* at 1234.

The government does not believe that Bradford poses a flight risk or a danger to others if he were released or continued on release.

But an appeal by Bradford challenging his conviction by arguing that the *Ciminelli* decision places Bradford's case outside of the purview of the federal wire fraud statute does not present a “close question” or, in other words, a question “that could go either way”. That, coupled with the procedural history of this case, causes the government heightened concern that the appeal is for the purpose of delay.

A. Bradford waived this challenge to his conviction. Accordingly, his appeal will likely be dismissed.

Merits aside, Bradford's attempt to appeal his conviction will likely be dismissed. Bradford waived “any and all rights to appeal [his] conviction, including a waiver of all motions, defenses and objections which [he] could assert to the charge, or to the Court's entry of judgment against [him].” (R. Doc. 26, (hereafter “Plea Agmt.”) at ¶ 26.) The parties preserved the right to appeal any sentence imposed. (*Id.*)

The general rule is that a defendant is allowed to waive appellate rights. *See, e.g., United States v. Aronja-Inda*, 422 F.3d 734 (8th Cir. 2005). “[I]n order to establish that the defendant's appeal is barred by his waiver, the government must establish: (1) that the appeal is within the scope of the waiver, (2) that the defendant entered into the waiver knowingly and voluntarily, and (3) that dismissing the appeal

based on the defendant's waiver would not result in a miscarriage of justice." *Id.* at 737.

First, any appeal by Bradford attacking his conviction by contending he is not actually guilty or that his conviction is deficient falls squarely within the scope of the appellate waiver. Both parties, however, are free to appeal the substantive reasonableness of the sentence imposed or argue procedural sentencing error occurred. It is utter nonsense for Bradford to suggest he would be appealing his "sentence" when he appeals claiming he is actually innocent and did not commit a federal crime. That argument renders meaningless the word "conviction" in the appellate waiver. Words have meaning. These words are not ambiguous. They should be given their plain meaning.¹ Bradford simply wants to back out of the agreement he made because he believes it no longer suits him. Presumably he thought the agreement was in his best interests when he signed it. That is what the parties bargained for. If the government sought to back out of the plea agreement in a fashion that did not inure to Bradford's benefit, he would surely be furious and ask that the government be ordered to specifically perform under the contract. The government abides by the agreements it makes. So should Bradford. An appeal issue based on *Ciminelli* is within the scope of the appeal waiver.

¹ Sentence means "the punishment so imposed" by a court or judge in a criminal proceeding. A "formal[] pronounce[ment] by a court or judge in a criminal proceeding" "specifying the punishment to be inflicted upon the convict." *Sentence*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/sentence> (last visited May 25, 2023). "Conviction" means "the act or process of finding a person guilty of a crime especially in a court of law." *Conviction*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/conviction> (last visited May 25, 2023).

Second, Bradford entered into the waiver knowingly and voluntarily. He had the advice of incredibly experienced federal criminal counsel. Bradford signed the agreement voluntarily after having read all of it and discussed it with his attorney. (Plea Agmt. ¶ 32.) His attorney discussed the plea agreement in its entirety with Bradford and attested that Bradford entered the agreement voluntarily and with full knowledge. (*Id.* at ¶ 33.) Beyond the agreement itself, the court carefully examined Bradford specifically about the contours of his appellate waiver in open court to ensure he understood it. Bradford understood the appeal waiver. (R. Doc. 89 at p. 22.)

Third, dismissing Bradford's *Ciminelli* appeal based on defendant's waiver would not result in a miscarriage of justice. "[T]he miscarriage of justice exception is a very narrow exception to the general rule that waivers of appellate rights are enforceable." *United States v. Blue Coat*, 340 F.3d 539, 542 (8th Cir. 2003). At its core, Bradford's argument is that the change in the law via *Ciminelli* warrants setting aside the appellate waiver—in other words, that a miscarriage of justice would occur if Bradford could not try to benefit from the Supreme Court's ruling. Setting aside the fact that *Ciminelli* does not, in fact, help Bradford, such an argument for setting aside Bradford's appellate waiver is unpersuasive. "Time and again, appellate courts have enforced appellate waivers even after the law has changed. . . . Indeed, if [Bradford] were correct, and a change in law voided an appellate waiver, then a waiver would mean little. The law often changes. A favorable change in the law after

a plea is simply one of the risks that accompanies plea agreements.” *United States v. Cooney*, 875 F.3d 414, 416 (8th Cir. 2017) (citations and quotations omitted).

B. Even assuming a court set aside the appellate waiver, Bradford’s appeal does not raise a “close question” or “a question that could go either way.” The *Ciminelli* decision clearly does not undermine Bradford’s conviction for Conspiracy to Commit Wire Fraud. The Indictment and factual basis for the plea clearly support that Vermeer Corporation was defrauded of traditional property rights.

Bradford’s anticipated *Ciminelli*-based appeal argument does not raise a “close question”. As such, Bradford falls short of his burden to show he should remain on release pending his appeal.

In *Ciminelli*, the Supreme Court tossed aside the Second Circuit’s “right-to-control” theory of wire fraud. Under that now-defunct theory, the government—without anything more—“[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.” *Ciminelli*, at *3. Stated another way, that theory held “the property interests protected by the wire fraud statute include the interest of a victim in controlling his or her own assets.” *Id.* at *4. The right-to-control theory impermissibly expanded the reach of federal fraud statutes “[b]ecause the theory treats mere information as the protected interest, [the result of which is] almost any deceptive act could be criminal.” *Id.* at *5. The Supreme Court said that more is required. *Ciminelli*’s core holding is: the wire fraud statutes “criminalize only schemes to deprive people of traditional property interests.” *Id.* at *2. “[I]ntangible interests unconnected to traditional property rights” alone do not suffice. *Id.* at *4.

Critically, the government in *Ciminelli*, rested *solely* on the right-to-control theory in its indictment and at trial. *Id.* at *3. The jury instructions provided to the jury were based on the right-to-control theory and allowed the jury to find the defendant had defrauded the victim if the victim was deprived of potentially valuable economic information that it would consider valuable in deciding how to use its assets—without anything more. In other words, the jury instructions defined that “intangible information” was “property.” *Id.* at *3.

In sum, the Supreme Court reversed *Ciminelli*’s conviction because “valuable economic information” instead of “money or property” was the alleged object of the scheme—that is, the “property” that *Ciminelli* and his conspirators sought to deprive the victim of was *only* information. That was how the jury was instructed and that was the sole theory upon which the government relied. The Court specifically noted that the government in *Ciminelli* did not allege that the objects of the scheme included the construction contracts or the proceeds flowing from the contracts. *Id.* at *3 n.1.

In Bradford’s case the object of the scheme was not to solely deprive Vermeer Corporation of “information”. The gravamen of the scheme—both as alleged and as admitted in the plea—was to deprive Vermeer Corporation of money itself. Bradford and his co-conspirator sought to obtain money from Vermeer. They did that by obtaining Vermeer contracts via means of materially false pretenses, representations, and material omissions. Valuable contracts and money are

traditional property interests. Schemes to defraud others of traditional property interests remain subject to the criminal wire fraud statutes.

The Indictment and plea materials make abundantly clear that an object of the scheme was to obtain contracts and money from Vermeer. To be sure, one of the means by which the conspirators sought their object (money) was by depriving Vermeer of important information. But the object was money. Traditional property interests (money and contracts) are repeatedly alleged in the Indictment to be objects of Bradford's scheme.

- Bradford and Draghia “did knowingly execute and attempt to execute 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 (hereafter “Indictment”) at ¶ 7.)
- It was a purpose of the conspiracy to “generate unlawful monies for each other by 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.” (Indictment at ¶ 8.)
- Bradford “urged, and ultimately directed, the general contractor to award masonry contracts” to Draghia for construction work at Vermeer. He did that despite knowing competitors “offered to do the work for substantially less money than Draghia Contracting.” He facilitated the awarding of the primary contract to Draghia by means including material misrepresentations and concealment of material facts. (Indictment at ¶ 11.)
- The conspirators were “awarded a contract” for Vermeer construction work and “additional work on Vermeer projects was awarded” later during the scheme. The conspirators “received payments for work completed.” (Indictment at ¶12.) Vermeer’s money flowed into both Draghia and Bradford’s pockets. (Indictment at ¶ 11, 12.)

Traditional property interests (money and contracts) are repeatedly referenced in the plea materials as an object of Bradford's scheme. A few examples:

- Bradford would “direct construction contracts at Vermeer” to his conspirator “who would then pay monetary kickbacks” to Bradford. (R. Doc. 26 (hereafter “Plea Agmt.”) at ¶ 7(e).)
- Bradford directed a Vermeer construction contract to Draghia despite being advised that two competing companies had submitted bids that were lower. The contract was awarded to Draghia. Bradford accomplished that via misrepresentation and omissions. (Plea Agmt. at ¶7(g).) Additional construction work at Vermeer was awarded to Draghia later in 2019. (Plea Agmt. at ¶7(h).)
- “Draghia received payments for work completed” under the Vermeer construction contracts. (Plea Agmt. at ¶7(i).) Co-conspirator Draghia paid some of the moneys received from Vermeer contracts to Bradford. (Plea Agmt. at ¶7(j).)
- Bradford agreed with Draghia that Bradford would direct construction contracts at Vermeer to Draghia. And that Draghia would pay Bradford some money in a kickback, so he would take some money from the Vermeer contracts and give it back to Bradford in exchange for having received the contract. (R. Doc. 89 (hereafter “Plea Transcript”) at 26, lines 12-20.)
- “[B]ecause Mr. Draghia got some of these contracts and agreed to give you money back, the kickbacks, that was how Vermeer got defrauded; correct?” Bradford replied: “That’s correct, Your Honor.” (Plea Transcript at 27, lines 17-21.)
- “[S]o your private arrangement with Mr. Draghia was material in that it made a difference to Vermeer in how much the project cost; correct?” Bradford replied: “Yes, Your Honor.” (Plea Transcript at 27, lines 22-25; p. 28, line 1.)
- “Because if Vermeer had known about this private arrangement where you got part of the money or a kickback payment from Draghia Contracting, then Draghia Contracting would not have been awarded these contracts to work with Vermeer; correct?” Bradford replied: “That’s correct, Your Honor.” (Plea Transcript at 28, lines 2-7.)

- “In fact, you in your role as Vermeer’s director of construction were the person who could award the contract, and the general contractor on the Eco Center in May of 2019 told you that he received two lower [bids], but you instructed the general contractor to go ahead and use Mr. Draghia regardless of the fact that his bid was significantly higher; is that correct?” Bradford replied: “That’s correct, Your Honor.” (Plea Transcript at 28, lines 8-16.)
- “So there was a significant amount that Mr. Draghia was able to profit from based on the information you provided and based on your influence over the general contractor; correct?” Bradford replied: “That’s correct, Your Honor.” (Plea Transcript at 29, lines 4-8.)
- “And so the money Mr. Draghia received or his contracting company was all part of this fraud committed against Vermeer; correct?” Bradford replied: “Correct, Your Honor.” (Plea Transcript at 30, lines 1-4.)
- “And then during the summer and fall in 2019, while these contracts were being received by Mr. Draghia and the work was being done, he paid money back to you or kickbacks to you based on this Vermeer construction work that had been awarded to him. Is that true?” Bradford replied: “That’s true, Your Honor.” (Plea Transcript at 30, lines 11-17.)
- “And you did not tell the general contractor for Vermeer about this side payment agreement which was influencing the amount Mr. Draghia or his company was getting paid for the Vermeer work; correct?” Bradford replied: “That’s correct, Your Honor.” (Plea Transcript at 31, lines 6-10.)

There is no doubt that the object of Bradford’s fraud was traditional property interests—money and contracts. That much is clear from the Indictment and Bradford’s sworn plea admissions. Bradford is as guilty now as he was before the *Ciminelli* decision. Accordingly, Bradford’s *Ciminelli*-based appeal does not present the “close question” necessary for Bradford to remain on release pending appeal.

CONCLUSION

This Court should deny Bradford's motion. He should not remain on release pending appeal.

Respectfully submitted,

Richard D. Westphal
United States Attorney

By: /s/Adam J. Kerndt
Adam J. Kerndt
Assistant United States Attorney
U.S. Courthouse Annex, Suite 286
110 East Court Avenue
Des Moines, Iowa 50309
Tel: (515) 473-9300
Fax: (515) 473-9292
Email: Adam.Kerndt@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2023, I electronically filed the foregoing with the Clerk of Court using the CM ECF system. I hereby certify that a copy of this document was served on the parties or attorneys of record by:

U.S. Mail Fax Hand Delivery

ECF/Electronic filing Other means

UNITED STATES ATTORNEY

By: /s/Janna Colvin, Paralegal Specialist

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROGER PAUL BRADFORD,

Defendant.

No. 4:22-cr-00067-RGE-HCA

**ORDER RE: DEFENDANT'S
MOTION FOR BOND
PENDING APPEAL**

Defendant Roger Paul Bradford moves the Court “for bond pending appeal.” Def.’s Mot. Bond Pending Appeal, ECF No. 91. The Government resists. Gov’t’s Resist. Def.’s Mot. Bond Pending Appeal, ECF No. 95.

The Court sentenced Bradford to 20 months of imprisonment, allowing him to self report. J. Crim. Case 2, ECF No. 78. Bradford appealed, asserting he “is actually innocent of conspiracy to commit wire fraud.” ECF No. 91 at 2; *see also* Notice of Appeal, ECF No. 84. Bradford argues his appeal will “likely . . . result in reversal” and, therefore, “should not be required to serve any time, let alone risk serving all his time, prior to having his appeal resolved by the U.S. Court of Appeals for the Eighth Circuit.” ECF No. 91 at 7.

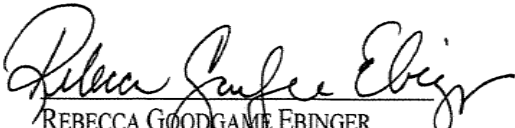
The Government resists, arguing Bradford’s appeal will likely be dismissed because he waived challenging his conviction. ECF No. 95 at 5. Alternatively, the Government asserts Bradford does not meet the standard for release pending appeal because his “anticipated *Ciminelli*-based appeal argument does not raise a ‘close question.’” *Id.* at 8.

For the reasons stated in the Government’s resistance, the Court denies Bradford’s motion.

IT IS ORDERED that Defendant Roger Paul Bradford’s Motion for Bond Pending Appeal, ECF No. 91, is **DENIED**. Bradford shall report to the Bureau of Prisons as previously ordered.

IT IS SO ORDERED.

Dated this 31st day of May, 2023.


REBECCA GOODGAME EBINGER
UNITED STATES DISTRICT JUDGE