

Exhibit C to Application for Release

IN THE UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

ROGER PAUL BRADFORD,

Appellant.

CASE NO. 23-2240

**MOTION FOR RECONSIDERATION
EN BANC OF MOTION
FOR BOND PENDING APPEAL**

COMES NOW, Defendant ROGER PAUL BRADFORD, by and through undersigned counsel pursuant FRAP 35(b), 8th Cir. R. 35A, and 18 U.S.C. § 3143(b)(1), and hereby petitions this honorable Court, for *en banc* reconsideration of the panel’s denial of his Emergency Motion for Bond Pending Appeal.¹ The Government concedes that Appellant Roger Paul Bradford (“Bradford”) is neither a flight risk nor a danger to the community. Bradford raises substantial questions of law and fact of **first impression** in this Circuit based on very recent U.S. Supreme Court precedent, which have been preserved below. Bradford also raises questions of law that have arisen since the June 1, 2023, filing of his original motion for bond. Resolution in his favor will result in either a reversal of his conviction or a reduction of his sentence to a term less than the duration of the

¹ As Bradford is now in custody, the emergency nature is moot.

appeal process. Accordingly, Bradford prays that this honorable Court grant the instant motion for the reasons set forth as follows.

PERTINENT PROCEDURAL HISTORY

On May 4, 2023, the district court sentenced Bradford to 20 months imprisonment.

On May 11, 2023, the U.S. Supreme Court issued its unanimous decision in *United States v. Ciminelli*, 143 S. Ct. 1121 (2023).

On May 18, 2023, Bradford filed a motion to vacate his sentence (R. Doc. 82),² a motion to withdraw his guilty plea (R. Doc. 83), and timely filed his Notice of Appeal (R. Doc. 84).

On May 24, 2023, Bradford moved the district court for bond pending appeal. (R. Doc. 91).

On May 25, 2023, Bradford moved to dismiss the indictment. (R. Doc. 92).

On May 31, 2023, the district court denied his motion for bond. (R. Doc. 97). A copy of both the denial and the Judgment in a Criminal Case (R. Doc. 78) are attached hereto.

On June 1, 2023, Bradford moved for bond pending appeal in this Court on an emergency basis. This Court denied the motion on June 2, 2023.

² R. Doc. refers to the docket number in the same matter below.

On June 5, 2023, Bradford moved this Court for reconsideration of its denial of bond pending appeal.

On June 7, 2023, the district court denied *on jurisdictional grounds* Bradford's three post-sentencing motions.³ (R. Doc. 103).

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

Also on June 8, 2023, this Court denied the motion for reconsideration of bond pending appeal.

On June 21, 2023, Bradford filed a subsequent notice of appeal in the district court as to the June 7, 2023, denial of his three post-sentencing motions. (R. Doc. 106).

INTRODUCTION

Bradford's appeal concerns three substantial questions, all of which are issues of first impression and exceptional importance, and all of which were preserved below and present close questions. First, whether the U.S. Supreme Court's May 4, 2023, decision in *Ciminelli v. United States*, 143 S. Ct. 1121 (2023) invalidates Bradford's conviction by way of a plea of guilty to conspiracy to commit wire fraud in violation of 18 U.S.C. § 1349. Importantly, the Government **concedes** that it prosecuted Bradford under the "right-to-control" theory now

³ Those are, collectively, R. Docs. 83, 84 & 92.

invalidated by *Ciminelli* but contends that another theory of traditional fraud can save the conviction. (R. Doc. 95 at 2). Thus, this Court will have to consider the question whether, absent the *Ciminelli* facts, there remain sufficient facts to support the Government’s purported alternative theory of fraud.

Second, whether a district court may properly utilize “intended loss” when calculating the Sentencing Guidelines in light of *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). A growing number of courts have held that *Kisor* precludes deference to Guidelines’ commentary where the Guidelines’ language is unambiguous. At least two Circuit Courts of Appeals have expressly held that *Kisor* precludes the use of “intended loss” when calculating the Guidelines inasmuch as “loss” is an unambiguous term. A reversal will result in a reduction to Bradford’s sentence that would be served before disposition of the appeal.

Third, whether the district court committed reversible error in declining to exercise jurisdiction over Bradford’s three post-sentencing motions seeking to vacate his sentence, withdraw from his guilty plea and dismiss the indictment in light of *Ciminelli*.

BACKGROUND

The following facts are drawn, in part, from the Indictment. (R. Doc. 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 long-term pre-existing relationship with Viorel Draghia ("Draghia") who owned a construction company and was very experienced with undertaking large-scale construction projects. Bradford steered the EcoCenter project to Draghia. Bradford disclosed that Draghia was a longtime friend and colleague and that he has worked with him in the past. However, neither Bradford nor Draghia disclosed the financial relationship the two had to Vermeer. Vermeer did not assert that they suffered any monetary loss. Instead, it claimed that had they known of this relationship, it would not have hired Draghia.

Some time after the 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 obstruction of justice pursuant to 18 U.S.C. § 1512(c)(2). (R. Doc. 2). Bradford thereafter entered a Plea Agreement with the Government wherein he agreed to plead guilty to the conspiracy count in exchange for the government dismissing the obstruction count. (R. Doc. 26). 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 he had received from

Draghia.

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 paid to Draghia. However, the Government never alleged that there was any actual loss to Vermeer. Indeed, Vermeer itself has never alleged any actual loss. (R. Doc. 69-1 at 22). Rather, the Government proceeded under a theory of intended loss, a now discredited measure of loss in several Circuits in light of *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). Bradford timely objected to the use of intended loss below, so this issue will also be squarely before this Court and appears to be one of first impression as well.

On May 4, 2023, Judge Ebinger sentenced Bradford to 20 months' imprisonment and restitution of \$23,000. The district court also utilized a theory of intended loss but, recognizing the "vagaries" of bidding and contracting in the construction industry, (R. Doc. 100 at 35), found intended loss to be between \$150,000 and \$250,000. Notably, 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 approximate \$800,000 Draghia bid on the project was reasonable. (R. Doc. 75). Again, at no time has Vermeer alleged it

suffered any actual loss. Indeed, Vermeer itself now publicly touts its “new and improved EcoCenter.”⁴

Relying on the disputed “intended loss” amount, Judge Ebinger 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.

Just one week after sentencing, the Supreme Court issued its opinion in *Ciminelli* holding that “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 303. Bradford thereafter timely filed his Notice of Appeal. (R. Doc. 84).

The fact pattern in the instant matter is identical to the one in *Ciminelli*, with the exception of the fact that Bradford entered a plea and *Ciminelli* went to trial. There the CEO of a contracting company paid what the Government alleged were bribes to a lobbyist to work with a board member for a non-profit to steer a

⁴ Vermeer, Press Release, “The New and Improved Eco Center Opens on the Mile,” Apr. 22, 2020, <https://www.vermeer.com/na/news/vermeer-opens-eco-center-on-earth-day>.

massive \$750 million construction contract to the contracting company, all unbeknownst to the non-profit. *Ciminelli*, 215 L. Ed. 2d at 296. 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 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 299. A unanimous Supreme Court found that theory unavailing. *Id.* at 303.

LAW

Pursuant to 18 U.S.C. § 3143(b), a defendant must make two separate showings to qualify for bond pending appeal. First, the defendant must establish by clear and convincing evidence that he does not present a flight risk or a risk of danger to the safety of any other person or the community. 18 U.S.C. § 3143(b)(1)(A). Second, the defendant must demonstrate that the appeal is not for delay and raises a substantial question of law or fact “likely to result” in reversal, a new trial, a reduced sentence, or a similarly favorable result. 18 U.S.C. § 3143(b)(1)(B); *United States v. Powell*, 761 F.2d 1227, 1233 (8th Cir. 1985).

As the Government agrees that Bradford is neither a flight risk, nor danger to the community, (R. Doc. 95 at 5), the only issue for this Court to resolve is whether Bradford’s appeal raises a substantial question of law or fact that will

likely result in reversal or a reduced sentence. With respect to demonstrating that an appeal raises a substantial question, a defendant is not required to demonstrate that he will win the appeal, instead, he need only establish that “a close question” exists. *See United States v. Marshall*, 78 F.3d 365, 366 (8th Cir. 1996). To show that there is a close question, the appellant 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.” *Powell*, 761 F.2d at 1233-1234. However, “the defendant does not have to show that it is likely or probable that he or she will prevail on the issue on appeal.” *Id.* at 1234. “In deciding whether this part of the burden has been satisfied, the court or judge to whom application for bail is made must assume that the substantial question presented will go the other way on appeal and then assess the impact of such assumed error on the conviction.” *Id.* “If the judicial officer makes such findings, such judicial officer **shall** order the release of the person.” 18 U.S.C. § 3143(b) (emphasis added).

Bradford’s appeal is not for the purpose of delay and raises substantial questions of law and fact that are issues of first impression for this Circuit, and which will likely result in reversal if resolved in Bradford’s favor. On appeal, Bradford will raise *inter alia* the substantial question of whether he is actually innocent of conspiracy to commit wire fraud in light of *Ciminelli*, and whether it was error for the district court to utilize intended loss when calculating his total

offense level under the Sentencing Guidelines. Bradford will also raise the issue of whether it was reversible error for the district court to decline to exercise jurisdiction over his post-sentencing motions.

ARGUMENT

A. Bradford's Appellate Waiver is Only to his Conviction and is Otherwise Unenforceable

It is anticipated the Government will invoke Bradford's appellate waiver as to his conviction set forth in his Plea Agreement. (R. Doc. 26). To be sure, while Bradford waived his right to appeal his conviction, he expressly "preserve[d] the right to appeal any sentence imposed by the Court." (Doc. 26 at 14, ¶ 26). Thus, there is no impediment for him to appeal the sentence imposed, which itself raises a substantial question discussed below.

With respect to Bradford's waiver of his right to appeal his conviction, the waiver is unenforceable as enforcement would constitute a miscarriage of justice. *See United States v. Andis*, 333 F.3d 886, 890 (8th Cir. 2003) (en banc) ("we will not enforce a[n appellate] waiver where to do so would result in a miscarriage of justice"). Enforcement would be a miscarriage of justice because, in light of *Ciminelli*, Bradford is actually innocent of conspiracy to commit wire fraud: the facts he pleaded guilty to no longer constitute conspiracy to commit wire fraud. Thus, Bradford's waiver of his right to appeal his conviction will not preclude his appeal of the same.

Separately and additionally, as Bradford pleaded guilty to facts that no longer constitute conspiracy to commit wire fraud, the district court did not have subject matter jurisdiction to convict and sentence him. After all, “federal courts are courts of limited jurisdiction, and . . . there are no common-law offenses against the United States. The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence. It is axiomatic that statutes creating and defining crimes cannot be extended by intendment, and that **no act, however wrongful, can be punished under such a statute unless clearly within its terms.**” *Keeble v. United States*, 412 U.S. 205, 215, (1973) (emphasis added; internal quotation marks and citations omitted). Indeed, this expansion of federal jurisdiction through the use of the wire fraud statute over “almost limitless variety of deceptive actions” very much concerned the Court. *Ciminelli*, 215 L. Ed. 2d at 302. The facts Bradford pleaded guilty to—essentially indistinguishable from those in *Ciminelli*—clearly no longer fit within the terms of 18 U.S.C. § 1349. In short, the facts pled to do not provide for subject matter jurisdiction because they do not constitute the crime alleged.

Finally, a challenge to jurisdiction “may be made at any time while the case is pending.” Fed. R. Crim. Proc. 12(b)(2). Pertinently, whether a court has **subject matter jurisdiction is not waivable**. See *Berger Levee Dist. v. United States*, 128

F.3d 679, 680 (8th Cir. 1997) (“Although the jurisdictional issue was not raised before the District Court, the question of a court’s jurisdiction over an action is non-waivable and may be raised at any point in the litigation.”) (Citation omitted). Thus, any waivers do not bar Bradford from challenging the district court’s jurisdiction on his appeal, which alone raises a substantial question in light of *Ciminelli*. See, e.g., *United States v. Izurieta*, 710 F.3d 1176, (11th Cir. 2013) (*sua sponte* finding under a prior iteration of Fed. R. Crim. Proc. 12(b)(2) that “the entire indictment did not adequately set forth a violation of criminal law, and subject matter jurisdiction does not exist”).

B. Bradford Raises Substantive Questions of First Impression

1. Does *Ciminelli* Invalidate a Conviction Based in Whole or in Part on the Right-to-Control Theory?

According to the U.S. 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.

The Government concedes that it prosecuted 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). 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. Rather, the Indictment alleges that the reasons Bradford wanted Draghia Contracting to be awarded the contract were “**material misrepresentations** because . . . Defendant omitted and concealed that a material reason that Defendant wanted Draghia Contracting to be selected was so that Defendant would receive a monetary kickback from Viorel Draghia.” (R. Doc. 2 at 4). “Had Defendant and Viorel Draghia informed the general contractor of their kickback agreement, the general contractor would have informed Vermeer . . . [who then] would have ensured that no contracts were awarded to Draghia contracting.” (R. Doc. 2 at 4-5). This scheme, then, was nothing more than a “scheme[] to deprive a victim of potentially valuable economic information necessary to make [a] discretionary economic decision[].” *Ciminelli*, *supra* at *8.

The precise “scheme” between Bradford and Draghia is more specifically

set forth in the factual basis of Bradford's Plea Agreement:

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, the Government's theory of fraud—essentially indistinguishable from the one in *Ciminelli*—was that Bradford had misrepresented to Vermeer that Bradford was being paid by Draghia to help Draghia obtain a contract with Vermeer. In other words, the Government alleged that 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 Draghia paid 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.

For its part, the Government will likely provide this Court with “profuse citations to the records . . . cherry-pick[ing] facts . . . charged on the right-to-control theory and apply[ing] them to the elements of a *different* wire fraud theory.” *Ciminelli*, 215 L. Ed. 2d at 303 (emphasis in original). Such cherry-picking did not work for the Government in *Ciminelli*, it should not work for the Government now. The only “material” fact alleged by the Government was, after all, the secret agreement between ’ Bradford and Draghia. 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.” Removing all doubt as to the exclusive materiality of the secret agreement are the 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). But for Vermeer lacking “complete information,” there 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.

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 an integral part of its theory. 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*, 215 L. Ed. 2d at 303).

Thus, *Ciminelli* has rendered the factual basis for Bradford’s 18 U.S.C. § 1349 conviction insufficient, which is to say, Bradford is actually innocent of his

offense of conviction. Should this Court agree, then it likely will reverse 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.").

2. Intended Loss is Precluded by *Kisor*

This Court "review[s] a district court's sentence in two steps: first we review for significant procedural error; and second, if there is no significant procedural error, we review for substantive reasonableness." *United States v. O'Connor*, 567 F.3d 395, 397 (8th Cir. 2009) (citations omitted). "Procedural errors include failing to calculate (or improperly calculating) the Guidelines range." *United States v. Godfrey*, 863 F.3d 1088, 1094 (8th Cir. 2017). Such errors are harmless only if "a district court's detailed explanation for the sentence imposed makes clear that the judge based the sentence he or she selected on factors **independent** of the Guidelines." *United States v. Grimes*, 888 F.3d 1012, 1017 (8th Cir. 2018)

(emphasis added).

Here, the district court sentenced Bradford based upon “intended loss.”

THE COURT: . . . is the Government’s position that that 150,000-dollar difference roughly is not a loss to Vermeer in terms of opportunity costs to pay for things with that money or use of that money for other purposes or anything else? **Is it simply relying upon intended loss?**

KERNDT: **Primarily it is. . . .**

(R. Doc. 100 at 23:12-17) (emphasis added).

As several Circuit Courts of Appeals have held in light of *Kisor*, district courts may no longer utilize intended loss when calculating the Guidelines as resort to the Guidelines commentary—wherein loss is defined as the greater of actual or intended loss—is only permitted if the term “loss” is ambiguous, and it is not. *See, e.g., United States v. Banks*, 55 F.4th 246, 257 (3rd Cir. 2022) (“The ordinary meaning of ‘loss’ in the context of § 2B1.1 is ‘actual loss.’”); *United States v. Riccardi*, 989 F.3d 476, 487 (6th Cir. 2021) (“if the Commission seeks to keep individuals behind bars for longer periods of time based on this type of ‘fictional’ loss amount, this substantive policy decision belongs in the guidelines, not in the commentary”); *see also United States v. Kirilyuk*, 29 F.4th 1128, 1139 (9th Cir. 2022) (holding that because the application note “contorts the meaning of ‘loss’ . . . it is not binding”).

If Bradford prevails on his argument that the Court erroneously utilized

intended loss in light of *Kisor*, then, consistent with his Plea Agreement, his Total Offense Level would drop from 18 to 12, which would result in an advisory range of only 10 to 16 months. But as that range is in Zone C, the Guidelines require a term of imprisonment of only five months. USSG § 5C1.1(d)(2). While the district court mentioned in passing that it would impose the same 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 downward variance—a far more common occurrence.⁵ This error, therefore, clearly was not harmless.

In all events, Bradford will likely serve his entire term of incarceration prior to the resolution of this appeal if he is not granted bail during its pendency. Indeed, even with his sentence of 20 months, Bradford would likely serve just nine months.⁶ During fiscal year 2022, the median time it took to resolve 741 criminal

⁵ 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>.

⁶ Bradford would receive three months’ Good Conduct Time credit, see 18 U.S.C. § 3624(b), and would be transferred to home confinement at least two months prior to the end of his sentence, see 18 U.S.C. § 3624(c)(2), resulting in

appeals in the Eighth Circuit from the filing of a Notice of Appeal to issuance of the Last Opinion or Final Order was 7.6 months.⁷ Meaning half of the criminal appeals took longer than 7.6 months to resolve. Thus, this substantial question of first impression is “likely to result in . . . 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).

3. The Post-Sentencing Motions

Subsequent to sentencing, Bradford brought three motions, each arguing that *Ciminelli* had invalidated his conviction and each asking for an indicative ruling pursuant to FRCP 37(a). In R. Doc. 82, Bradford moved the district court to vacate his sentence pursuant to FRCP 35(a) for “clear error.” FRAP (b)(5) expressly provides that the filing of a FRCP 35(a) motion “does not divest a district court of jurisdiction to correct a sentence.” In R. Doc. 83, Bradford moved to withdraw his guilty plea pursuant to FRCP 11(d)(2)(B) *nunc pro tunc* to May 3, 2023, the day before his sentencing. Finally, in R. Doc. 91, Bradford moved to dismiss the

effective custodial term of just 15 months. However, with additional First Step Act credits for successful completion of recidivism reduction programming, Bradford could reduce his time in custody by at least an additional six months, see 18 U.S.C. § 3624(g), for a total time in custody of only nine months.

⁷ See U.S. Courts, *Judicial Business—U.S. Courts of Appeals* tbl. B-4A (Sept. 30, 2022), <https://www.uscourts.gov/statistics/table/b-4a/judicial-business/2022/09/30>.

indictment pursuant to FRCP 12(b)(3)(B) on the ground that the facts alleged failed to state an offense and therefore the district court was without subject matter jurisdiction. FRCP 12(b)(2) expressly provides that “[a] motion that the court lacks jurisdiction may be made at any time while the case is pending.”

On June 7, 2023, the district court denied all three motions, but not on their merits. Rather, the district court held that “Bradford’s appeal divests this Court of jurisdiction to entertain his motions. . . . Thus, the Court denies Bradford’s motions for lack of jurisdiction.” (R. Doc. 103 at 2). As the Rules expressly provide, however, the district court had jurisdiction to rule on the merits of these motions. And even if it did not, FRCP 37(a) expressly provides that district courts may make indicative rulings during the pendency of an appeal. The district court’s failure to exercise its jurisdiction unquestionably constitutes reversible error. *See United States v. Silvers*, 90 F.3d 95, (4th Cir. 1996) (holding that “district court incorrectly refused to accept jurisdiction” over a Rule 59 motion and noting that “we could decline to take jurisdiction over this case and instead remand for the district court’s consideration of Silvers’ Rule 59 motion” but declining to do so in that case where “the underlying issues are ripe for our resolution”).

CONCLUSION

WHEREFORE, in light of the above, Bradford respectfully prays that this honorable Court grant the instant motion and, consistent with the imperative of 18

U.S.C. § 3143(b), release him to remain out on bond during the pendency of his appeal.

Dated: June 23, 2023

GREFE & SIDNEY, P.L.C.

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CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2023, the foregoing MOTION FOR RECONSIDERATION *EN BANC* of MOTION FOR BOND PENDING APPEAL was filed electronically. 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

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT,
TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS**

I hereby certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because this motion contains 5,192 words. I further certify that this motion complies with the typeface requirements of Fed. R. App. P. 27(1)(E) and 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word, in 14-point Times New Roman font.

/s/Guy R. Cook
GUY R. COOK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA

v.

ROGER PAUL BRADFORD
(a/k/a Paul Bradford)

JUDGMENT IN A CRIMINAL CASE

Case Number: 4:22-cr-00067-001

USM Number: 04859-510

Guy R. Cook
Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) Count One of the Indictment filed on May 18, 2022.

pleaded nolo contendere to count(s) _____
which was accepted by the court.

was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u> ?	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § 1349	Conspiracy to Commit Wire Fraud	10/29/2019	One

See additional count(s) on page 2

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____

Count(s) Two is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

May 4, 2023
Date of Entry of Judgment


Signature of Judge

Rebecca Goodgame Ebinger, U.S. District Judge
Name of Judge Title of Judge

May 4, 2023
Date

DEFENDANT: ROGER PAUL BRADFORD (a/k/a Paul Bradford)
CASE NUMBER: 4:22-cr-00067-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

20 months as to Count One of the Indictment filed on May 18, 2022.

The court makes the following recommendations to the Bureau of Prisons:

The defendant be designated to FCI Petersburg to facilitate family visitation, if commensurate with his security and classification needs.

The defendant is remanded to the custody of the United States Marshal.

The defendant is remanded to the custody of the United States Marshal for surrender to the ICE detainer.

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before _____ on _____

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____

DEPUTY UNITED STATES MARSHAL

DEFENDANT: ROGER PAUL BRADFORD (a/k/a Paul Bradford)

CASE NUMBER: 4:22-cr-00067-001

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

Three years as to Count One of the Indictment filed on May 18, 2022.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: ROGER PAUL BRADFORD (a/k/a Paul Bradford)
CASE NUMBER: 4:22-cr-00067-001

Judgment Page: 4 of 7

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: ROGER PAUL BRADFORD (a/k/a Paul Bradford)
CASE NUMBER: 4:22-cr-00067-001

SPECIAL CONDITIONS OF SUPERVISION

You must pay restitution in the amount specified by this judgment.

You must obtain prior written approval from the U.S. Probation Office before entering into any form of self-employment.

You must submit to a mental health evaluation. If treatment is recommended, you must participate in an approved treatment program and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment and/or compliance with a medication regimen. You will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third-party payment.

You will submit to a search of your person, property, residence, adjacent structures, office, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), and other electronic communications or data storage devices or media, conducted by a U.S. Probation Officer. Failure to submit to a search may be grounds for revocation. You must warn any other residents or occupants that the premises and/or vehicle may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that you have violated a condition of your release and/or that the area(s) or item(s) to be searched contain evidence of this violation or contain contraband. Any search must be conducted at a reasonable time and in a reasonable manner. This condition may be invoked with or without the assistance of law enforcement, including the U.S. Marshals Service.

You must participate in a cognitive behavioral treatment program, which may include journaling and other curriculum requirements, as directed by the U.S. Probation Officer.

You must promptly notify any employer of this wire fraud conviction.

You must perform 25 hours of unpaid community service at a non-profit agency as directed and monitored by the U.S. Probation Officer.

DEFENDANT: ROGER PAUL BRADFORD (a/k/a Paul Bradford)
 CASE NUMBER: 4:22-cr-00067-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

- Pursuant to 18 U.S.C. § 3573, upon the motion of the government, the Court hereby remits the defendant's Special Penalty Assessment; the fee is waived and no payment is required.

	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
TOTALS	\$ 100.00	\$23,000.00	\$ 0.00	\$ 0.00	\$ 0.00

- The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

- The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss***</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
Vermeer 1210 East Vermeer Road Pella, Iowa 50219		\$23,000.00	
TOTALS		\$23,000.00	

- Restitution amount ordered pursuant to plea agreement \$ _____
- The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- The court determined that the defendant does not have the ability to pay interest and it is ordered that:
 - the interest requirement is waived for the fine restitution.
 - the interest requirement for the fine restitution is modified as follows:

*Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
 ** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
 *** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 18, 1994, but before April 23, 1996.

DEFENDANT: ROGER PAUL BRADFORD (a/k/a Paul Bradford)
 CASE NUMBER: 4:22-cr-00067-001

SCHEDULE OF PAYMENTS

Having assessed the defendant’s ability to pay, payment of the total criminal monetary penalties is due as follows:

- A Lump sum payment of \$ 23,100.00 due immediately, balance due
 - not later than _____, or
 - in accordance C, D, E, or F below; or
- B Payment to begin immediately (may be combined with C, D, or F below); or
- C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant’s ability to pay at that time; or
- F Special instructions regarding the payment of criminal monetary penalties:
 All criminal monetary payments are to be made to:
 Clerk’s Office, United States District Court, P.O. Box 9344, Des Moines, IA 50306-9344.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons’ Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Case Number Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate
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- The defendant shall pay the cost of prosecution.
- The defendant shall pay the following court cost(s):
- The defendant shall forfeit the defendant’s interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVT A assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

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.

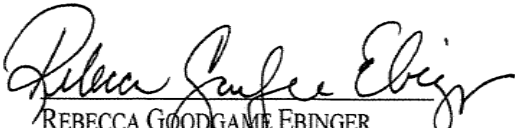
The Government resists, arguing Bradford’s appeal will likely be dismissed because he waived challenging his conviction. ECF No. 95 at 5. Alternatively, the Government asserts Bradford does not meet the standard for release pending appeal because his “anticipated *Ciminelli*-based appeal argument does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

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 23-2240

United States of America

Appellee

v.

Roger Paul Bradford, also known as Paul Bradford

Appellant

Appeal from U.S. District Court for the Southern District of Iowa - Central
(4:22-cr-00067-RGE-1)

ORDER

The motion for en banc reconsideration of the judge orders dated June 5, 2023 and June 8, 2023, is denied.

July 17, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans