Exhibit D to Application for Release

Nos. 23-2240 and 23-2517

IN THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/Appellee

V.

ROGER PAUL BRADFORD,

Defendant/Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA

Hon. Rebecca Goodgame Ebinger
No. 4:22-CR-067

BRIEF OF DEFENDANT-APPELLANT ROGER PAUL BRADFORD

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

In a consolidated appeal, Bradford appeals from the order of judgment and conviction imposed following a guilty plea to a single wire fraud conspiracy count, and the denial of three post-sentencing motions. Bradford pleaded guilty to receiving payments from Draghia Contracting ("Draghia") in exchange for Bradford steering a private, commercial construction contract to Draghia. The private company ("Vermeer") for whom Bradford worked averred that it would not have contracted with Draghia had it known of the kickback arrangement. The Government's theory of the case was, in part, that Bradford had conspired with Draghia to wrongfully deprive Vermeer of potentially valuable economic information necessary to make discretionary economic decisions: the awarding of the contract. To be sure, the contract was completed to specification, with Vermeer content with the building and declining to declare any actual loss.

Exactly one week after the district court sentenced Bradford to 20 months' imprisonment and $23,000 in restitution, the U.S. Supreme Court handed down *Ciminelli v. United States*, wherein the Court unanimously invalidated this exact theory of fraud used to prosecute Bradford. Thereafter, Bradford moved to vacate his sentence, withdraw from his guilty plea, and dismiss the indictment as it failed to sufficiently allege an offense against the United States. All motions were denied.

Bradford respectfully requests 15 minutes for oral argument.

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JURISDICTIONAL STATEMENT

The decisions appealed: Bradford appeals from a criminal judgment entered against him in the U.S. District Court for the Southern District of Iowa wherein he was convicted of a single count of conspiracy to commit wire fraud. He was sentenced to 20 months' imprisonment and $23,000 in restitution. This appeal has been assigned docket number 23-2240. Bradford also appeals from an order denying his three post-sentencing motions to withdraw his plea, vacate his sentence and dismiss the indictment. This appeal has been assigned docket number 23-2517. These appeals have been consolidated. Bradford challenges the jurisdiction of the district court to enter any judgments against him, evidentiary and procedural errors in sentencing, and the denial of his post-sentencing motions.

Jurisdiction of the court below: The district court did not have jurisdiction over Bradford's prosecution under 18 U.S.C. § 3231, because the Indictment failed to allege an offense against the laws of the United States.

Jurisdiction of this Court: This Court has jurisdiction over Bradford's consolidated appeals under 28 U.S.C. § 1291, which provides for jurisdiction over a final judgment from a U.S. District Court.

The district court entered judgment on May 4, 2023. Bradford's timely notice of appeal was filed on May 18, 2023, docketed as 23-2240. The district

court subsequently denied three post-sentencing motions on June 7, 2023. Bradford's timely subsequent notice of appeal was filed on June 21, 2023, docketed as 23-2517.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the appellate waiver is enforceable.

1. *Mack v. United States*, 853 F.2d 585 (8th Cir. 1988).
2. *Berger Levee Dist. v. United States*, 128 F.3d 679 (8th Cir. 1997).

II. Whether the Indictment sufficiently alleges a conspiracy to commit wire fraud, and if so, whether the conviction can be sustained.

1. *Ciminelli v. United States*, 143 S. Ct. 1121 (2023).
2. *United States v. Ruzicka*, 988 F.3d 997 (8th Cir. 2021).

III. Whether the District Court erred in declining to order the Government to produce the PSR and A-File of co-conspirator Viorel Draghia.

1. *Brady v. Maryland*, 373 U.S. 83 (1963).
2. *Giglio v. United States*, 405 U.S. 150 (1972).

IV. Whether the District Court Erred by utilizing and finding "intended loss" when calculating the U.S. Sentencing Guidelines.

1. *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).
2. *United States v. Banks*, 55 F.4th 246 (3rd Cir. 2022).
3. *United States v. Kirilyuk*, 29 F.4th 1128 (9th Cir. 2022).
4. *United States v. Riccardi*, 989 F.3d 476 (6th Cir. 2021).

V. Whether the District Court violated Bradford's Fifth Amendment due process and Sixth Amendment notice rights when relying on uncharged conduct at sentencing.

1. *Jones v. United States*, 574 U.S. 948, 949-950 (2014) (Scalia, J., joining dissenting from denial of certiorari, Thomas and Ginsburg, JJ.).
2. *United States v. Bell*, 803 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing en banc).
3. *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014).

VI. Whether the District Court Erred when it denied Bradford's three post-sentencing motions on jurisdictional grounds only.

1. *Wong v. Minn. Dep't of Human Servs.*, 820 F.3d 922 (8th Cir. 2016).
2. *United States v. Silvers*, 90 F.3d 95 (4th Cir. 1996).

VII. Whether the Cumulative Errors in the Indictment and Sentencing Proceedings Denied Bradford Due Process.

1. *United States v. Riddle*, 193 F.3d 995 (8th Cir. 1999).

VIII. Whether, if the Indictment is to be Dismissed, it Must be Dismissed *with Prejudice*.

1. *United States v. Smartlowit*, No. CR-09-2110, 2010 U.S. Dist. LEXIS 28718, 2010 WL 1257668 (E.D. Wash. Mar. 25, 2010).

STATEMENT OF THE CASE

The following facts are drawn, in part, from the Indictment and Pre-sentencing Investigation Report ("PSR"). (R. Docs. 2 & 36).[1] In 2019, Appellant Roger Paul Bradford ("Bradford") was hired by Vermeer Corporation of Pella, Iowa, ("Vermeer"), a manufacturer of industrial agricultural equipment, as its Director of Construction to oversee certain construction projects, most pertinently, the EcoCenter project. The EcoCenter project was intended to rebuild one of Vermeer's manufacturing facilities that had been destroyed by a tornado in 2018.

Bradford had a pre-existing relationship with Viorel Draghia ("Draghia") who owned a construction company. In exchange for payments from Draghia, Bradford steered the contract to perform masonry work on the EcoCenter project and other matters to Draghia.[2] While Bradford had disclosed his pre-existing relationship with Draghia to Vermeer, neither Bradford nor Draghia disclosed the

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

[2] For ease of reference, all contracts awarded to Draghia by Vermeer are referred to collectively as the "EcoCenter project."

existence of the payment agreement. Vermeer claimed that had it known of this relationship, i.e., the "kickback,"[3] it would not have hired Draghia.

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

Importantly, the masonry contract was performed and the services were provided to specification. In fact, Vermeer has publicly represented that it is quite pleased with the EcoCenter.[4] When twice given the opportunity to claim any actual loss or damages, Vermeer declined to do so. (R. Doc. 69 at 22-23)

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

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

("Vermeer Corporation submitted a Victim Impact Statement . . . [but] did not provide a calculation or figure as to the monetary loss Bradford caused Vermeer. . . . [T]he government contacted the Vermeer representative . . . to better understand Vermeer's intentions. . . . Vermeer . . . could not readily calculate the dollar harm caused to it.").

As Draghia was the Government's primary witness against Bradford, and the Government indicated it was going to introduce at sentencing statements made by Draghia, Bradford requested that the district court order the Probation Office to disclose a redacted version of Draghia's PSR in order to determine the extent of Draghia's criminal history and instant offense conduct for purposes of mitigation and impeachment. (R. Doc. 56). The district court declined to order disclosure. (R. Doc. 64). Bradford then moved the district court to order the Government to disclose Draghia's "Alien File" (or "A-File") as Draghia is a foreign national that had not been deported despite a criminal history involving deportable offenses. (R. Doc. 65). Draghia's A-File would have included all his criminal history and other matters pertinent to his eligibility to remain within the United States, which could have been utilized by Bradford for impeachment and mitigation purposes. The district court also declined to order this requested disclosure. (R. Doc. 67).

At sentencing, the Government contended that the loss amount was over $250,000 pointing to alternative, lower bids Vermeer had received on the

EcoCenter project and subtracting them from the approximate $800,000 Vermeer had agree to pay to Draghia for the EcoCenter project. However, neither the Government nor Vermeer ever alleged there was any actual loss to Vermeer. (R. Doc. 69-1 at 22). Rather, the Government proceeded under a theory of intended loss, which Bradford timely objected to.

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

At no time did the Government introduce any evidence as to the validity of those lower bids or the quality and reputation of those contractors. In contrast, Bradford introduced undisputed expert evidence that those lower bids were unrealistic, and that the contract could not be performed for anything less than approximately $740,000. (R. Doc. 75). In fact, Vermeer ultimately paid Draghia only $741,000 for the construction project. Moreover, undermining the finding of any loss, was the fact of a higher bid than even Draghia's.

Relying on the disputed "intended loss" amount, the district court found Bradford's total offense level to be 18 and his Criminal History Category to be I

for an advisory range of 27 to 33 months and imposed a sentence of 20 months. (R. Doc. 78). Prior to sentencing, Bradford made full restitution to Vermeer. (R. Doc. 105).

Just one week after sentencing, the U.S. Supreme Court issued its opinion in *Ciminelli v. United States*, 143 S. Ct. 1121 (2023), unanimously holding that the "the right-to-control theory cannot form the basis for a conviction under the federal fraud statutes." *Ciminelli*, 143 S. Ct. at 1128. Bradford thereafter timely filed his Notice of Appeal. (R. Doc. 84).

On May 18 and 25, 2023, Bradford brought three post-sentencing motions to (1) vacate his sentence due to clear error pursuant to Fed. R. Crim. Proc. 35(a) (R. Doc. 82); to (2) withdraw from his plea agreement *nunc pro tunc* the day before sentencing pursuant to Fed. R. Crim. Proc. 11(d)(2)(B) (R. Doc. 83); and (3) to dismiss the indictment pursuant to Fed. R. Crim. Proc. 12(b)(3)(B) (R. Doc. 92). On June 7, 2023, the district court denied all three motions for lack of jurisdiction since Bradford had already filed his notice of appeal. (R. Doc. 103).

SUMMARY OF ARGUMENTS

This appeal primarily concerns whether the U.S. Supreme Court's recent, unanimous decision in *Ciminelli v. United States*, 143 S. Ct. 1121 (2023), invalidating the "right-to-control" theory of fraud, requires reversal of Bradford's conviction for conspiracy to commit wire fraud in violation of 18 U.S.C. § 1349. That theory holds, in essence, that it is illegal "to deprive a victim of potentially valuable economic information necessary to make discretionary economic decisions." *Id.* at 1123. Withholding the existence of a "kickback" scheme ostensibly deprives a victim of potentially valuable economic information.

As it did under a remarkably similar fact-pattern in *Ciminelli*, the Government here shoehorned Bradford's kickback scheme into the wire fraud statute because there are no federal statutes criminalizing kickbacks involving private commercial contracts. Only kickbacks involving federal government contracts or federally funded healthcare programs such as Medicare are expressly prohibited. *See* 18 U.S.C. § 874; 41 U.S.C. § 8702; 42 U.S.C. § 1320a-7b(b).

The Government readily concedes that it prosecuted Bradford under the right-to-control theory, at least in part. (R. Doc. 95 at 2). That concession alone is fatal to its case in light of *Ciminelli* and requires this Court to not only reverse and vacate Bradford's conviction and sentence but also to remand to the district court with directions to dismiss the indictment *with prejudice*. This appeal therefore also

requires that this Court overrule its prior holding in *United States v. Shyres*, 898 F.2d 647, 652 (8th Cir. 1990) that "the right to control spending constitutes a property right" for purposes of establishing federal fraud.

To be sure, notwithstanding its concession, the Government contends, just as it unsuccessfully did in *Ciminelli*, that another theory of fraud can save Bradford's conviction. However, the Government cannot now constructively amend the indictment by asserting a new *post hoc* theory of the case, and any ambiguities in the Indictment or Plea Agreement must be read in favor of Bradford in any event. Just as the Government's *post hoc* rationalizations failed in *Ciminelli*, so too they fail here, and that should end the matter.

But should this Court nonetheless reach consideration of the Government's purported *post hoc* theory of the case, then it must consider the question whether, absent Vermeer's ignorance of the kickback scheme, there remain sufficient facts to support any alternative theory of traditional fraud. In short, all else being equal, if Vermeer had actually been aware of the kickback scheme, was there still any fraud? Of course not. Moreover, under any theory of fraud, where, as here, the "'victim received the full economic benefit of its bargain,'" *United States v. Ruzicka*, 988 F.3d 997, 1009 (8th Cir. 2021) (quoting *United States v. Binday*, 804 F.3d 558, 570 (2d Cir. 2015)), the conviction still cannot stand. As this Court long has held, to establish federal fraud "the government must prove the existence of a

plan or scheme to defraud. . . . [T]he essence of a scheme is a plan to deceive persons as to ***the substantial identity of the things they are to receive in exchange***." *United States v. Goodman*, 984 F.2d 235, 237 (8th Cir. 1993) (cleaned up; emphasis added). Since the kickback scheme at issue here did not go to the "substantial identity" of the construction contract or its ultimate performance, there was no fraud.

Should this Court affirm the conviction, then anytime a customer merely alleges that had he known of certain facts underlying a transaction he would have made a different economic decision, a *prima facie* case of fraud could be made. But as the Supreme Court itself recognized in *Ciminelli*, if such were the case, then "almost any deceptive act could be criminal." 143 S. Ct. at 1128. "The right-to-control theory thus criminalizes traditionally civil matters and federalizes traditionally state matters." *Id.* This Court should therefore resist the Government's efforts to stretch the federal fraud statutes so far as to become *de facto* insurance policies against buyer's remorse. That is especially so where, as here, there was no misrepresentation or deceit that went to "the substantial identity of the things they are to receive in exchange," *Goodman*, 948 F.2d at 237 (internal quotation marks and citation omitted), namely, the quality of services and timely construction of the EcoCenter project at the price Vermeer agreed to pay. Thus, even in the presence of deception, there is no fraud where there was no deception

as to the nature of the exchange itself, i.e., the quality of the construction services provided. Put simply, as *Ciminelli* teaches, this Court is not in the business of "affirm[ing] federal convictions regulating the ethics (or lack thereof) of . . . contractors." *Ciminelli*, 143 S. Ct. at 1128.

Additionally, this appeal concerns three significant sentencing errors: (1) the district court's failure to order the Government to disclose pertinent *Brady/Giglio* material regarding its key witness against Bradford; (2) the district court's reliance on, and speculative finding of, "intended loss"—a now invalidated measure of harm; and (3) the district court's consideration at sentencing of uncharged conduct in violation of Bradford's Fifth and Sixth Amendment rights. Even if the district court's consideration of uncharged conduct did not violate Bradford's constitutional rights, the evidence of the uncharged conduct, such as it was, did not meet the evidentiary threshold of a preponderance of the evidence.

Finally, Bradford brought three post-sentencing motions seeking relief from his conviction and sentence as a result of *Ciminelli*. The district court denied all three but not on their merits. Rather, the district court believed—wrongly, as it turns out—that it did not have jurisdiction to rule on the merits of these motions. These errors alone warrant at least a remand to the district court to allow it to address the merits of these motions in the first instance.

Should this Court reverse and vacate Bradford's conviction and sentence, then this Court ought also to remand to the district court with directions to dismiss the indictment *with prejudice*. The prohibition against double jeopardy clearly precludes the Government from re-prosecuting Bradford for the alleged fraud. And while the obstruction count was dismissed, Bradford nonetheless was sentenced for that conduct for which he received an obstruction adjustment. Accordingly, as double jeopardy precludes re-prosecution for conduct on which he already has been sentenced, so too must that count be dismissed *with prejudice*.

As Justice Jackson recently observed, "[t]his debacle exemplifies the real and ever-present risk of continuing to have facially overbroad criminal statutes on the books. In its role as prosecutor, the Government often stakes out a maximalist position, only later to concede limits when . . . the Government finds itself on its back foot." *United States v. Hansen*, No. 22-179, 2023 U.S. LEXIS 2638, *70-71, __ S.Ct. __, 2023 WL 4138994 (June 23, 2023) (Jackson, J., dissenting) (citing *Ciminelli* in footnote).

ARGUMENTS

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

A. Standard of Review.

"Whether a valid waiver of appellate rights occurred is a question of law that we will review *de novo*." *United States v. Sisco*, 576 F.3d 791, 795 (8th Cir. 2009).

B. Argument.

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

1. A Challenge to Subject-Matter Jurisdiction May be Made at Any Time the Case is Pending and is not Waivable.

"[A] plea of guilty admits all of the elements of a criminal charge, and waives all challenges to the prosecution either by direct appeal or by collateral attack, except challenges to the court's jurisdiction. In order for a defendant who has pleaded guilty to sustain a challenge to the district court's jurisdiction, he must establish that the face of the indictment failed to charge a federal offense." *Mack v.*

United States, 853 F.2d 585, 586 (8th Cir. 1988) (citation omitted). After all, "[i]t 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). As argued in Part II below, in light of *Ciminelli*, the Indictment did not set forth facts sufficient to allege a conspiracy to commit wire fraud. Accordingly, the district court lacked subject-matter jurisdiction to convict and sentence Bradford.

To be sure, a challenge to subject-matter jurisdiction "may be made at any time while the case is pending." Fed. R. Crim. Proc. 12(b)(2); *Berger Levee Dist. v. United States*, 128 F.3d 679, 680 (8th Cir. 1997) (citation omitted). Thus, the appellate waiver does not bar Bradford from challenging the district court's subject matter jurisdiction even now. *See, e.g.*, *United States v. Izurieta*, 710 F.3d 1176, 1185 (11th Cir. 2013) (*sua sponte* finding that where "the entire indictment did not adequately set forth a violation of criminal law, . . . subject matter jurisdiction does not exist").

2. Enforcement of the Waiver as to Non-Jurisdictional Matters Would be a Miscarriage of Justice.

To the extent Bradford's appeal of his conviction raises non-jurisdictional issues, it 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, i.e., the facts Bradford pleaded guilty to no longer constitute wire fraud, and as such, it was legally impossible for Bradford to have conspired to commit wire fraud.

> What constitutes a "miscarriage of justice" is a matter of some speculation in this circuit. *Sun Bear v. United States*, 644 F.3d 700 (8th Cir. 2011)(en banc). Whatever the outer limits of a "miscarriage of justice" may be, a majority of the Eighth Circuit seems to believe a miscarriage of justice must at least arise to an egregious level, ***such as a sentence in the face of evident proof of actual innocence***.

Walberg v. United States, No. 3:08-cr-106-09, 2011 U.S. Dist. LEXIS 171048, *6 (D.N.D. Sept. 12, 2011); *United States v. Helder*, 452 F.3d 751, 754 (8th Cir. 2006) (legal impossibility refers to those situations in which "the defendant's actions, even if carried out, do not constitute a crime"). In light of *Ciminelli*, as Bradford is actually innocent of the conduct alleged in the indictment and to which he pled guilty to, enforcement of the appellate waiver as to his conviction would constitute a miscarriage of justice.

II. The District Court Did Not Have Subject-Matter Jurisdiction.

A. Standard of Review.

"The issue of whether federal subject matter jurisdiction exists is subject to *de novo* review." *United States v. Hawk*, 127 F.3d 705, 706 (8th Cir. 1997) (citing

Clarinda Home Health v. Shalala, 100 F.3d 526, 528 (8th Cir. 1996)). "In order for a defendant who has pleaded guilty to sustain a challenge to the district court's jurisdiction, he must establish that the face of the indictment failed to charge a federal offense." *Mack*, 853 F.2d at 586 (citation omitted). In light of *Ciminelli*, it was legally impossible for Bradford to have conspired to commit wire fraud as charged in the Indictment. *United States v. Helder*, 452 F.3d 751, 754 (8th Cir. 2006) (observing that legal impossibility refers to those situations in which "the defendant's actions, even if carried out, do not constitute a crime").

B. Arguments.

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

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

As alleged, the fraud was nothing more than the concealment of the kickback, for only the revelation of that "would have ensured that no contracts were awarded to Draghia Contracting." (R. Doc. 2 at 4-5, ¶ 11). In other words, the fraud was in the concealment of information that went to Vermeer's decision to contract with Draghia and not as to Draghia's pricing, qualifications or services ultimately rendered.

Save for the plea, the fact pattern here is essentially identical to the one in *Ciminelli v. United States*, 143 S. Ct. 1121 (2023). There, the CEO of a construction company paid a lobbyist to conspire with a board member for a

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

According to the Supreme Court,

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

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

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

For its part, the Government likely will engage in "profuse citations to the records below" asking this Court to "cherry-pick facts" set forth in the Indictment "and apply them to the elements of a *different* wire fraud theory in the first instance." *Id.* at 1129 (emphasis in original). Such effort was unavailing in the Supreme Court, so too it should be here. The six-page Indictment here sets out

even more clearly and succinctly than the 43-page indictment[5] in *Ciminelli* that the Government's theory of the case was "right-to-control" and only that theory. At their core, both indictments allege that had the victim known of secret agreements to steer contracts to the defendant contractors in exchange for payments, the victims would not have contracted with the defendants. Compare *Ciminelli* Indictment at 2 and 10 ("secretly rig"); 11, 12, 21 and 23 ("secretly tailor"); and 25 ("secretly used") to Bradford Indictment at 4 (R. Doc. 2 at 4) ("Defendant and Viorel Draghia ***concealed*** from the general contractor and Vermeer officials that Defendant stood to benefit in such a fashion from construction contracts awarded to Draghia Contracting.") (Emphasis added).

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

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

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

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

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

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

(E.D.N.Y. May 30, 2023) (defendant charged with "fraudulently represent[ing] that victims would receive personalized letters and ***psychic services*** from renowned psychics in exchange for monetary payments and personal property") (emphasis added); *United States v. Robbins*, 2023 U.S. Dist. LEXIS 103090, *6, 2023 WL 3998457 (D. Me. June 14, 2023) (***falsifying fishing records*** to hide overharvesting and underreporting of fish); *United States v. Bankman-Fried*, No. 22-cr-0673, 2023 U.S. Dist. LEXIS 110546, *3-4, __ F.Supp.3d __, 2023 WL 4194773 (S.D.N.Y. June 29, 2023) (defendant alleged to have "used billions of dollars in ***stolen [investor] funds*** for a variety of purposes, including . . . to fund speculative venture investments; to make charitable contributions; and ***to enrich himself***") (emphasis added; internal quotation marks omitted); *United States v. Pierre*, Nos. 22-cr-19 and 22-cr-20, 2023 U.S. Dist. LEXIS 119742, *29-30 (S.D.N.Y. July 12, 2023) (non-physician owner-operators of various medical clinics ***misrepresented to insurance companies that they were owned and operated by licensed physicians*** licensed in order to be reimbursed for services provided to the insureds).

In contrast to the above cases where *Ciminelli* clearly did not apply because the fraud went to the very nature of the transaction, in *United States v. Nordlicht*, No. 16-cr-00640, 2023 U.S. Dist. LEXIS 119965 (E.D.N.Y. July 12, 2023), *Ciminelli* was successfully invoked resulting in an acquittal on a conspiracy to

commit wire fraud charge. In *Nordlicht*, the defendants were accused of conspiring to defraud the bond holders of Black Elk—an energy company—by secretly purchasing the majority of outstanding bonds in the company, converting those bonds to have priority over all other bonds, then covertly forcing the sale of the energy company's most lucrative assets thereby reaping millions for themselves and family members.[6] The defendants were convicted after trial of, *inter alia*, conspiracy to commit wire fraud. *Id.* at *3. Shortly after *Ciminelli* issued, the defendants moved for judgment of acquittal on the conspiracy to commit wire fraud count.

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

> At most, [defendants] intended to deprive bondholders of the knowledge that conflicted bonds were voting on the indenture amendments. ***Ciminelli* expressly rejected the notion that nondisclosure of a conflict could serve as**

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

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

Id. at *18 (emphasis added).

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

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

> One project that Defendant was overseeing for Vermeer was the construction of the "Vermeer EcoCenter" building in Pella. Defendant and Viorel Draghia worked together to formulate proposals, or "bids", for Draghia Contracting to complete certain work on the Vermeer EcoCenter project. Draghia submitted these proposals to the general

> contractor of the project via email, copying Defendant. At all times Defendant and Draghia knowingly and ***deliberately concealed and failed to disclose their kickback agreement*** to Vermeer employees and officers and the general contractor. ***This concealment was material.*** Specifically, the existence of their kickback agreement was material to the scheme to defraud Vermeer because if Vermeer officials had known about the kickback agreement, Draghia Contracting would not have been awarded a contract for work at Vermeer.

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

Thus, as in *Nordlicht*, there can be no doubt that the Government's sole theory of fraud was that Bradford conspired to commit wire fraud by depriving Vermeer of potentially valuable economic information necessary to make discretionary economic decisions: the precise theory now invalidated by *Ciminelli*. The only "material" fact alleged by the Government was, after all, the secret agreement between Bradford and Draghia. Indeed, the word "material" occurs only five times in the six-page Indictment, a mere two times in the 18-page Plea Agreement, and a single instance in the 38-page Plea Colloquy. In every single instance but one, the word material is used in conjunction with the existence of the secret agreement between Bradford and Draghia; the sole exception occurs at the very beginning of the Indictment where it is contained within a boilerplate prefatory clause: "At times material to this indictment." (R. Doc. 2 at 1).

Removing all doubt that the Government's sole theory of the case was "right-to-control" are the very words of the district court itself when summarizing

Bradford's offense conduct at his sentencing hearing: "defendant's false representations prevented Vermeer from making informed decisions about who they should hire, and ***they lost the opportunity to spend their money as they would if they had complete information***." (R. Doc. 100 at 80:23-81:2) (emphasis added). But for Vermeer lacking "complete information," there simply is no other form of fraud. All that is left is a typical commercial construction contract that was performed to specification with no actual loss resulting.[7]

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

> On April 24, 2018, a federal grand jury returned an indictment charging Scott Randell Whitehead, age 54, and others with defrauding Vermeer Corporation of Pella, Iowa, announced United States Attorney Marc Krickbaum. According to the indictment, Whitehead was Vermeer's maintenance manager. Whitehead is alleged to have approved $3.6 million in invoices for products from two chemical companies, which were never received by Vermeer. Whitehead is also alleged to have received kickbacks from the two chemical companies.[8]

[7] That the Government failed to prove that there was any actual or even intended loss is discussed in detail in Part III below.

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

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

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

Thus, *Ciminelli* also renders the factual basis for Bradford's 18 U.S.C. § 1349 conviction by way of Plea Agreement insufficient, which is to say, Bradford is actually innocent of his offense of conviction and so the district court lacked subject-matter jurisdiction. In sum, while there was concealment of information in the contract negotiation with Vermeer, there was no concealment or

misrepresentation of any kind in what was contracted for, and that makes all the difference. This Court, therefore, should reverse and vacate Bradford's conviction.

III. The District Court Erred by Denying Bradford's Motion to Disclose *Brady/Giglio* Evidence.

A. Standards of Review.

As this is a sentencing issue, the appellate waiver does not apply. This Court reviews *de novo* discovery violations pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). *See Mandacina v. United States*, 328 F.3d 995, 1001 (8th Cir. 2003).

> A defendant establishes a *Brady* violation by demonstrating: 1) that the government suppressed evidence; 2) that the evidence was exculpatory; and 3) that the evidence was material either to guilt or punishment. For *Brady* purposes, evidence is material when a reasonable probability exists that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

United States v. Dittrich, 204 F.3d 819, 822 (8th Cir. 2000) (cleaned up).

Pursuant to *Giglio v. United States*, 405 U.S. 150 (1972), "the government must disclose all material evidence that affects credibility. This type of information is deemed material so as to justify a retrial only if there is a reasonable probability that, had it been disclosed to the defense, the result of the proceeding would have been different. *Giglio* is a corollary to *Brady*, which requires the government to disclose any evidence favorable to the defendant and that is material either to guilt

or to punishment." *United States v. Primm*, 63 F.4th 1186, 1192 (8th Cir. 2023) (cleaned up).

B. Arguments.

Bradford's co-conspirator Draghia is a foreign national. Based on a review of Draghia's grand jury testimony (R. Doc. 56-1 at 1-27) and an FBI 302 (R. Doc. 56-1 at 28-35) memorializing an interview of him, Bradford had a good faith belief that Draghia's PSR and Alien File ("A-File")[9] contained information that could constitute *Brady* and/or *Giglio* material, which was not otherwise publicly available. (R. Doc. 56). In particular, Bradford believed Draghia's PSR and A-File would provide critical information regarding how much Vermeer had actually paid Draghia, and information regarding Draghia's criminal history as well as his legal residential status, all of which were relevant to Draghia's motivation to embellish his testimony surrounding various transactions that he undertook with Bradford. *See id.*

While Draghia claims to be a legal permanent resident, he oddly has not

[9] "The A-File ('A-File') . . . contains information regarding transactions involving an individual as he/she passes through the U.S. immigration and inspection process [including] . . . information regarding the person's country of birth, country of citizenship, and other statements such as their date and manner of entry. . . . and immigration and criminal history." *United States v. Ramos*, No. CR-21-01242-001-TUC-JCH (EJM), 2023 U.S. Dist. LEXIS 60131, *5 n.1, 2023 WL 2787769 (D. Ariz. Apr. 5, 2023) (emphasis added; citations omitted).

been deported for crimes that far preceded the instant offense conduct, specifically, burglary and larceny, which he revealed during his grand jury testimony and FBI interview. (R. Doc. 65 at 3:10-12); *Ahmed v. Barr*, 973 F.3d 922, 926 (8th Cir. 2020) (burglary is deportable offense "for which the term of imprisonment is at least one year"); *Chowdhury v. Holder*, Civil No. 10-2532, 2011 U.S. Dist. LEXIS 18830, 2011 WL 765974 (D. N.J. Feb. 25, 2011) (grand larceny generally a deportable offense). Accordingly, Bradford urged the Court to undertake an in camera review of Draghia's PSR and order its disclosure, or at least those portions the Court deemed to constitute *Brady* or *Giglio* matters. (R. Doc. 56). The district court undertook an *in camera* review of Draghia's PSR, but found that it did not contain any *Brady* or *Giglio* material and so denied the motion. (R. Doc. 64).

Based on further review of Draghia's grand jury testimony, FBI 302, and internet research, Bradford developed a good faith belief that Draghia's "A-File" would also contain information that constituted *Brady* and/or *Giglio* material, and which was not otherwise publicly available. For example, it was discovered that "[o]n June 21, 1993, [appellant Viorel Draghia] . . . pled guilty to grand larceny. . . ." *Draghia v. Commonwealth*, 54 Va. App. 291, 293, 678 S.E.2d 272, 273 (2009). Draghia's appeal pertained to his effort to withdraw from his 15-year-old guilty plea because his grand larceny conviction precluded him from becoming a U.S. citizen and placed him "at risk of being deported." *Id.* at 294.

Neither of these convictions were apparently contained within Draghia's PSR, and Bradford's counsel could not find any public record of Draghia's burglary conviction. Surprisingly, a copy of Draghia's National Crime Information Center ("NCIC") report provided by the Government also did ***not*** contain mention of these prior convictions. According to the Government, "[t] his rap sheet did not show any convictions or arrests for Draghia other than the instant pending federal matter." (R. Doc. 66 at 2, n.1).

Only after Bradford made his *Brady* and *Giglio* demands on the Government did it reveal the existence of a third criminal conviction, which it characterized as a mere "driving misdemeanor" that is "decades-old" (and which Draghia failed to mention to the FBI during its interview of him). (R. Doc. 66 at 4). Even misdemeanors can subject foreign nationals to removal. If, for example, someone entered the United States by way of a visa and was subsequently convicted of a DUI in Virginia, that individual's visa could be revoked resulting in the individual's removal. *See, e.g.*, *De Souza Abreu v. Decker*, 1:09cv789, 2009 U.S. Dist. LEXIS 62912, *2-3 (E.D. Va. July 21, 2009) (visa holder charged with misdemeanor DUI ordered removed from United States).

Since Draghia apparently had at least three prior criminal convictions all of which could have subjected him to removal but were not included in his NCIC rap sheet, *Brady* and *Giglio* compelled disclosure of Draghia's PSR and A-file so that

Bradford could better ascertain the circumstances surrounding these and possibly other convictions for which Draghia normally would have been removed. This Court should therefore vacate Bradford's sentence and remand to the district court for resentencing with directions to order disclosure of Draghia's PSR and A-File.

IV. The District Court Erred by Utilizing Intended Loss at Sentencing.

A. Standards of Review.

As this is a sentencing issue, the appellate waiver does not apply. 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). The district court's application of the Guidelines are reviewed *de novo* and its factual findings for clear error. *United States v. Paz*, 622 F.3d 890, 891 (8th Cir. 2010). 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).

B. Arguments.

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

Violations of 18 U.S.C. § 1349 are sentenced under USSG §2B1.1. The primary specific offense characteristic under that Guideline is "loss." USSG §2B1.1(b)(1). Loss, however, is not defined in the Guideline itself, but rather in the commentary. *See* USSG §2B1.1, comment. (n.3(A)). According to the commentary, "loss is the greater of actual loss or intended loss." *Id.* In turn, "actual loss" is defined as "the reasonably foreseeable pecuniary harm that resulted from the offense," USSG §2B1.1, comment. (n.3(A)(i)), and "intended loss" is defined as "the pecuniary harm that the defendant purposely sought to inflict," USSG §2B1.1, comment. (n.3(A)(ii)). Thus, where actual loss measures the harm that resulted from the offense, *United States v. Waldner*, 580 F.3d 699, 705 (8th Cir. 2009), in contrast, "[i]ntended loss is meant to be a measure of a defendant's culpability," *United States v. Staples*, 410 F.3d 484, 491 (8th Cir. 2005) (citing USSG §2B1.1 comment. (back'd).

Both the PSR and Government calculated loss using intended loss. (R. Doc. 36 at 22, ¶ 56); (R. Doc. 36 at 50). Over Bradford's objection to using intended loss as a method for calculating loss, (R. Doc. 74 at 5:19-9:15), the district court also adopted a theory of intended loss. (R. Doc. 100 at 36:16-17; 28:25-29:1). As Bradford expressly argued to the district court below, intended loss cannot be used

to enhance a defendant's sentence in light of *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019). Thus, it was error for the district court to do so.

As this Court has observed,

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

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

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

suggest an ordinary understanding that 'loss' means 'intended loss.'" *Id.* at 258 (footnote omitted). Accordingly, the *Banks* court held that "[t]he ordinary meaning of 'loss' in the context of § 2B1.1 is 'actual loss.'" *Id.* at 257.[10]

But even if loss was found to be ambiguous after deploying the canons of construction, the agency's interpretation still must be reasonable. *Voigt*, 999 F.3d at 561. Or in the words of *Kisor*, the agency's interpretation must come "within the zone of ambiguity." *Kisor*, 139 S. Ct. at 2416. "But oftentimes the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. So when deciding whether the language is plain, we must read the words in their context and with a view to their place in the overall statutory scheme." *King v. Burwell*, 576 U.S. 473, 486 (2015) (cleaned up).

Reading "loss" within the context of the Guidelines overall, it is clear that

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

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

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

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

> a [Guideline], to create de facto a new [Guideline]." "*Auer* does not, and indeed could not, go that far." *See id*.

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

2. There Was No Loss, Intended or Actual.

In all events, there was no loss, intended or actual.[11] As for actual loss, the victim itself—Vermeer—never offered any evidence that it had suffered any actual loss, despite being given at least two opportunities to do so. (R. Doc. 69-1 at 22). At the sentencing hearing, when asked whether he had "any evidence to present to this Court" that Vermeer "suffered an actual or intended loss from any of these behaviors or conduct of Mr. Bradford," the investigating agent replied "I have no financial calculations to provide the Court today, that's correct." (R. Doc. 100 at 52:2-7).

In its sentencing memorandum, the Government argued, without citation to any authority, that "[a] reasonable means is available to determine the intended loss: comparing the inflated contracts awarded to Draghia for particular projects to

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

other competing bids put in for those same projects." R. Doc. 69-1 at 10. The PSR calculated the bulk of the intended loss amount of $227,028 by reference to a $573,527 bid, which it characterized but also without citation to any authority, as the "lowest ***competitive*** bid." PSR at 8-9, ¶ 29 (emphasis added).

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

In his Declaration, Mr. Woolsey further explained the many factors that go into cost estimating and bidding. According to Mr. Woolsey, a bid of $573,527 simply cannot be considered a credible bid by any stretch. As he stated, "[a] bid of $573,527 would be considered unrealistic and unreasonably low for this project."

(R. Doc. 75 at 2:14-15). Of course, the same holds true for any bid materially less than $742,746. Therefore, there simply is no intended loss notwithstanding the Government and PSR's non-expert conjectures upon which the district court relied.

The district court sentenced Bradford based upon a theory of "intended loss" but found the intended loss attributable to Bradford was at least $150,000 but no more than $250,000. (R. Doc. 100 at 28:8-11). In so doing, it recognized that its finding necessarily was speculative in nature, and nowhere found that the lowest bid was necessarily "the one that best serves" the needs of the client.

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

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

It is quite notable, therefore, that the district court in *Ciminelli* found there to be no loss in that case for essentially the same reasons that the district court

articulated here: to do so required speculation.

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

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

Not only was the district court's finding of loss speculative, but there was, in fact, a higher bid than Draghia's. The construction firm Mortenson, ranked as the 16th largest construction contractor nationwide in 2019,[12] bid $835,696 on the "exterior enclosure" for the EcoCenter project, i.e., the same masonry work that Draghia and others had bid on. (R. Doc. 40 at 12). Thus, using the district court's own methodology, there plainly was no loss. If anything, there was intended savings.

This error, to be sure, was not harmless. If Bradford prevails on his argument that the district court erroneously utilized intended loss in light of *Kisor* and/or its calculation was in error, then, consistent with his Plea Agreement, Bradford's Total Offense Level would drop from 18 to 12, which would result in

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

an advisory range of only 10 to 16 months. While the district court briefly mentioned in passing that it would impose the same 20-month sentence if it had erred in calculating the Guidelines, (R. Doc. 100 at 80:12-13), that would entail imposing an upward departure under the correct calculation of the Guidelines—a very rare occurrence—when the district court initially imposed a very common downward variance.[13] Moreover, such brief comment does not "make[] clear that the judge based the sentence . . . she selected on factors ***independent*** of the Guidelines." *Grimes*, 888 F.3d at 1017 (emphasis added). This error, therefore, clearly was not harmless.

V. The District Court Erred by Relying on Irrelevant, Uncharged Conduct at Sentencing.

A. Standards of Review.

As this is a sentencing issue, the appellate waiver does not apply. The applicable standards of review are set forth in Part IV(A) above.

B. Arguments.

1. The LG and Patriot Conduct was not Relevant Conduct.

[13] 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.

Over Bradford's objection, the PSR contained several allegations involving uncharged conduct, specifically, alleged kickbacks from construction projects involving LG Corporation ("LG") and separately Patriot Construction ("Patriot"). PSR at 10, ¶ 35; *see also id.* at 10, ¶ 37; 12, ¶ 39; 15, ¶ 53; 25, ¶ 75. At the sentencing hearing, the district court expressly considered this uncharged conduct when imposing sentence. "Looking at the facts here and understanding the arguments in regards to the relevance or the appropriate reliance upon the facts from the [Patriot] or from the LG contract[, the] . . . Court does see [them] as part of a pattern of conduct that informs its ultimate understanding of the defendant's criminal conduct." R. Doc. 100 at 26:12-17. Thus, the district court found that "this was not a one-time fraud. He did this years prior. He did this after Vermeer." *Id.* at 71:9-12.

None of this conduct, however, constituted "relevant conduct" and thus should not have been included in the PSR or considered by the Court for any purpose. Relevant conduct, after all, is defined as "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant . . . ***that occurred during the commission of the offense of conviction***." USSG §1B1.3(a)(1) (emphasis added); *see also United States v. Sanders*, No. 3:21CR-80-RGJ, 2022 U.S. Dist. LEXIS 85424, *5-6, 2022 WL 1493858 (W.D. Ky. May 11, 2022) ("[T]he Court considers only the offense

conduct relevant to the charged conduct and does not consider irrelevant conduct (or that conduct relevant only to uncharged crimes).") (Footnote omitted). Accordingly, as the district court erroneously considered irrelevant conduct at sentencing, the Court should reverse the sentence and remand.

2. Consideration of Uncharged Conduct Violated Bradford's Fifth and Sixth Amendment Rights.

Bradford includes this argument in order to preserve the issue.

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

While *United States v. Watts*, 519 U.S. 148 (1997) (per curiam) has repeatedly been cited to uphold the constitutionality of the use of both acquitted conduct and uncharged conduct sentencing, as many have pointed out, "*Watts* . . . presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument." *United States v. Booker*, 543 U.S. 220, 240 n.4 (2005). Thus,

Watts does not preclude this Court from holding that the use of uncharged conduct at sentencing violates Fifth Amendment due process and Sixth Amendment notice.

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

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

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

The Fifth and Sixth Amendments require that each element of a crime be either admitted by the defendant or proved to the jury beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. 99, 104 (2013). Any fact that increases the penalty to which a defendant is exposed constitutes an element of a crime and must be found by a jury, not a judge. *Apprendi v. New Jersey*, 530 U.S. 466, 483 (2000); *Cunningham v. California*, 549 U.S. 270, 281 (2007). The Supreme Court has held

that a substantively unreasonable sentence is illegal and must be set aside. *Gall v. United States*, 552 U.S. 38, 51 (2007). The logical conclusion from this string of cases is "that any fact necessary to prevent a sentence from being substantively unreasonable —thereby exposing the defendant to the longer sentence—is an element that must be either admitted by the defendant or found by the jury. It *may not* be found by a judge." *Jones v. United States*, 574 U.S. 948, 949 (2014) (Scalia, J., with whom Thomas, J. and Ginsberg, J., join, dissenting from denial of certiorari; emphasis in original).

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

As Justice Sotomayor wrote in her statement respecting the denial of certiorari, "many jurists have noted [that] the use of acquitted conduct to increase a defendant's Sentencing Guidelines range and sentence raises important questions that go to the fairness and perceived fairness of the criminal justice system." *McClinton v. United States*, No. 21-1557, 2023 U.S. LEXIS 2796, *2 (May 30,

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

2023) (footnotes omitted; citing *Jones*, 574 U. S. at 949-950 (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of certiorari); *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of reh'g en banc); *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.); *Watts*, 519 U. S. at 170 (Kennedy, J., dissenting)). Likewise, Justice Kavanaugh in his statement respecting denial of certiorari, joined by Justices Gorsuch and Barrett, agreed that "[t]he use of acquitted conduct to alter a defendant's Sentencing Guidelines range raises important questions." *Id.* at *6-7.

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

As *Watts* never reached any of these issues, this Court should find that the use of uncharged conduct at sentencing is unconstitutional, reverse Bradford's

sentence and remand with instructions to resentence based *only* on conduct that "directly underl[ies] the elements."

VI. The District Court Erred when it Denied Bradford's Three Post-Sentencing Motions on Jurisdictional Grounds.

A. Standard of Review.

As these motions involved either jurisdictional or sentencing issues, the appellate waiver does not apply. "Compliance with rules of criminal procedure is reviewed de novo." *United States v. Theimer*, 557 F.3d 576, 577 (8th Cir. 2009) (citation omitted). A district court's wrongful failure to exercise jurisdiction requires remand. *Wong v. Minn. Dep't of Human Servs.*, 820 F.3d 922, 932-933 (8th Cir. 2016) (vacating and remanding where district court's failed to adjudicate certain claims based on "mistaken belief" it lacked jurisdiction).

B. Argument.

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). Bradford first moved the district court to vacate his sentence pursuant to FRCP 35(a) for "clear error." (R. Doc. 82). FRAP 4(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." Bradford next 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. (R. Doc. 83). Finally, Bradford moved to dismiss the 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. (R. Doc. 91). 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."

The district court denied all three motions stating 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 clearly 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 Wong*, 820 F.3d at 932-933; *United States v. Silvers*, 90 F.3d 95, 98 (4th Cir. 1996) (holding that where "district court incorrectly refused to accept jurisdiction" over a Rule 59 motion appellate court could "remand for the district court's consideration" of the motion). Accordingly, this Court should reverse the conviction and sentence and remand for the district court's consideration of these motions on their merits in the first instance.

VII. The Cumulative/Compound Errors in the Indictment and Sentencing Denied Bradford a Constitutionally Fair Sentencing and Due Process.

A. Standard of Review.

As the cumulative errors involved jurisdictional and sentencing issues, the appellate waiver does not apply. This Court "may reverse where the case as a whole presents an image of unfairness that has resulted in the deprivation of a defendant's constitutional rights, even though none of the claimed errors is itself sufficient to require reversal." *United States v. Riddle*, 193 F.3d 995, 998 (8th Cir. 1999). "This court will not reverse based upon the cumulative effect of errors unless there is substantial prejudice to the defendant." *United States v. Anwar*, 428 F.3d 1102, 1115 (8th Cir. 2005) (citation omitted).

B. Argument.

As set forth previously, in light of *Ciminelli*, neither the Indictment nor Plea Agreement set forth sufficient facts to support a violation of law. Additionally, the district court failed to order the disclosure of *Brady* and *Giglio* materials pertaining to Draghia, the primary witness against Bradford, which likely contained both mitigating and impeaching evidence that would have changed the sentencing outcome. At sentencing, the district court erroneously utilized "intended loss" now precluded by *Kisor* and then speculated as to the amount of intended loss. None of this was harmless error. Finally, the district court erroneously denied Bradford's

three post-sentencing motions based on jurisdictional grounds only. This critical mass of errors substantially prejudiced Bradford thus clearly presenting "an image of unfairness resulting in the deprivation of [Bradford's] constitutional rights." *United States v. Baldenegro-Valdez*, 703 F.3d 1117, 1124-25 (8th Cir. 2013). This Court should therefore vacate his conviction.

VIII. Remedies: Vacate Conviction and Sentence, Remand with Instructions to Dismiss Indictment *with Prejudice*.

Should this Court vacate the conviction and sentence, it should remand to the district court with an order directing it to dismiss the Indictment *with prejudice.* The Government may not retry Bradford for the conduct alleged in the Indictment under a different theory of fraud. *See Sanabria v. United States*, 437 U.S. 54, 71-72 (1978) ("acquittal . . . bar[s] any further prosecution for participating in the same [offense conduct] during the same time period [under a different] theory") (cleaned up); *id.* at 72 n.30 ("[t]he Government concedes that it was required to bring all theories of liability in a single trial, and that only a single punishment could be imposed upon conviction on more than one such theory").

As to Count 2, the district court dismissed it pursuant to the parties' Plea Agreement. (R. Docs. 26 & 77). Plea agreements are to be read against the Government. *United States v. Collins*, 25 F.4th 1097, 1101 (8th Cir. 2022). That Count 2 should be dismissed with prejudice is made clear by the Plea Agreement's

statement that "Defendant understands that, even though Count 2 will be dismissed, all relevant conduct including the conduct that supported the charge in Count 2 will be considered by the Court at the time of sentencing." (R. Doc. 26 at 1). Thus, it was the intent of the Plea Agreement that, despite the dismissal, Bradford would still be sentenced for such conduct, as indeed he was given that the obstruction enhancement was applied to him. PSR at 24, ¶ 67.

Accordingly, should this Court vacate the conviction and sentence, it should remand with instructions to the district court to amend its previous dismissal of Count 2 to now be *with prejudice*. *See, e.g., United States v. Smartlowit*, No. CR-09-2110, 2010 U.S. Dist. LEXIS 28718, *7, 2010 WL 1257668 (E.D. Wash. Mar. 25, 2010) ("Reading the prior plea agreements in conjunction with the judgment undermines the Governments assertion that the dismissed counts on the prior indictments were dismissed without prejudice. The only major concession by the government was the dismissal of counts. To interpret that concession as a dismissal without prejudice would eviscerate any real benefit derived by the defendant for entering into the plea agreement. The fact that the judgments fail to state 'with prejudice' does not aid the Government's argument.").

In the alternative, this Court should reverse the district court's denial of Bradford's three post-sentencing motions and remand with instructions to resolve those motions in the first instance. In so doing, this Court should also grant

Bradford bond pending resolution of those motions and any appeal therefrom given that the instant appeal has presented a substantial question.

CONCLUSION

For the foregoing reasons, Bradford respectfully prays that the Court of Appeals reverse and vacate the District Court's judgment and remand the case with instructions to dismiss the Indictment *with prejudice*, and grant any and all other such relief deemed necessary. Alternatively, Bradford respectfully prays that the Court of Appeals reverse the district court's denial of his post-sentencing motions and remand with instructions to address those motions in the first instance and grant him bond pending the resolution of those motions and any appeal therefrom.

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Respectfully submitted this 31st day of July 2023.

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CERTIFICATE OF FILING AND SERVICE

I certify that on July 31, 2023, I electronically filed the foregoing brief and addendum with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users were served by the CM/ECF system. I also certify that after receipt of notice that the brief and addendum are filed, I will serve a paper copy of this brief and addendum on defendant-appellant by mailing him a copy to his place of incarceration. I further certify that after receipt of notice that the brief and addendum are filed, I will transmit 10 paper copies of the brief and addendum to the Clerk of Court via Federal Express and 1 paper copy to the appellee via regular mail as noted below.

Respectfully submitted,

/s/ Guy S. Cook .
Guy S. Cook

FED. R. APP. P. 32(a)(7) AND 8TH CIR. RULE 28A(c) CERTIFICATION

I certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7). The brief uses a proportional-space, 14-point Times New Roman font. Based on a word count under Microsoft Word for Microsoft 365 MSO (Version 2307 Build 16.0.16626.20028) 64-bit, the brief contains 12,979 words, excluding the items listed in Fed. R. App. P. 32(f).

Respectfully submitted,

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