**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

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| UNITED STATES OF AMERICA, | : | |
| Appellee, | : | **No. 17-2698** |
| v. | : | (On appeal from judgment of conviction and sentence |
| DMITRIJ HARDER, | : | in **No. 2:15-cr-001-01** |
| Appellant. | : | (E.D.Pa.) (Diamond, J.)) |

# APPELLANT HARDER'S PETITION FOR PANEL REHEARING

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# PETITION FOR REHEARING

Pursuant to Fed.R.App.P. 40(a), appellant Dmitrij Harder petitions this Court for panel rehearing**.** On November 8, 2018, this Court (per Siler, J. (CA6), with Vanaskie and McKee, JJ.) filed a non-precedential opinion affirming Harder's sentence. *United States v. Harder*, — Fed.Appx. —, 2018 WL 5877238 (hereinafter "WL"). Appellant Harder was convicted, based on his plea of guilty, on a single count under the Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. § 78dd-2. The opinion rejects each of appellant's arguments that the district court (Diamond, J.) failed to give meaningful consideration to his two principal arguments for a lower sentence. The panel's stated rationale for each of its rulings represents a misapprehension of the basis for appellant Harder's arguments. [1]

## REASONS FOR REHEARING

The opening and reply briefs filed on behalf of appellant Dmitrij Harder show in detail that the district court denied him a fair hearing at sentencing by preventing his counsel from making legitimate arguments in mitigation of punishment and by refusing to recognize potentially valid grounds for imposing a lesser sentence. The panel's stated reasons for rejecting these arguments are not responsive to the points advanced in appellant Harder's briefs. On

[1] A copy of the panel decision, as released in slip opinion form, is attached to this Petition, pursuant to LAR 40.1(a).

rehearing, the judgment of sentence must be vacated and the case remanded for further proceedings.

**1. The panel opinion does not address appellant's argument that the sentencing court denied a fair hearing by preventing counsel from arguing for mitigation, and then in refusing to consider mitigation of offense seriousness.**

One of appellant Harder's principal arguments for a sentence below that suggested by the Guidelines was that the surrounding factual circumstances of the crime to which he pleaded guilty placed it in a lower echelon of offense seriousness. In rejecting this argument, the district court committed two related errors: refusing to allow defense counsel a fair opportunity to be heard, and rejecting out of hand the entire concept of mitigation of an admitted offense based on the absence of loss or the existence of benefit. The former is a denial of due process, and the latter a legal error under the governing statute. The panel decision does not even mention the first of these points, and as to the latter, fundamentally misstates appellant's argument. For either or both of these reasons, rehearing should be granted.

a. *Denial of opportunity for counsel to speak*. Appellant's first point on appeal is that the district court violated Fed.R.Crim.P. 32(i), as interpreted in *United States v. Nappi*, 243 F.3d 758, 766 (3d Cir. 2001) , and in other cases (as well as by other Circuits), by repeatedly interrupting and deflecting counsel's argument on behalf of the defendant at sentencing. AOB 17–20. This Rule expressly guarantees the defendant a "right to comment, through counsel, 'upon

matters relating to the appropriate sentence.' As we have indicated, the Rule protects the defendant's right to an opportunity—a meaningful opportunity—to comment on information relating to the federal sentence about to be imposed." *Nappi*, 243 F.3d at 766. The record of sentencing shows dramatically the devastating impact of the lower court's conduct of the hearing and how it deprived Mr. Harder of this critical due process right.

In the space of five transcript pages (3App. 201–05a), Judge Diamond interrupted Attorney LaCheen ten different times as he tried to advance the defense argument on offense seriousness.[2] These judicial interjections were not designed to challenge or test the argument, as might occur at oral argument of an appeal, but rather were designed to cut off and shut down counsel's line of argument entirely, and in fact Judge Diamond succeeded in doing so.

Rather than address appellant Harder's first point on either a factual or legal basis, the panel opinion mentions[3] but then does not address it. For this reason alone, rehearing by the panel should be granted.

b. *Refusal to entertain mitigation of offense severity*. What Judge Diamond repeatedly interrupted counsel at sentencing to say is that, in his view,

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[2] *See* transcript (page:line) 20:23, 21:1, 21:10, 21:21, 22:6, 22:19, 22:23, 23:8, 23:12, 24:8 (sealed volume 3 of appendix, at 201a–205a).

[3] "First, Harder argues that the district judge interrupted and prevented defense counsel from fully arguing that Harder was less culpable because his bribery did not cause a loss to any victim but rather resulted in 'exceptionally positive economic results.'" WL *2. Nowhere in the panel's opinion is there any discussion of the procedural issue that the panel here correctly acknowledges Mr. Harder "argues" "first."

a Foreign Corrupt Practices Act violation cannot be mitigated in severity by either the defendant's being extorted by the corrupt foreign official, by a defendant's lack of intent to cause harm or loss, by the fact that no such loss occurred, or by any actual social good that may result from the project that is facilitated by the paying of the unlawful bribe. AOB 23–24. Typical of those statements is this: "Whether money was made or lost surely has nothing to do with whether or not the thing was foul from the beginning, because your client paid the money." 3App. 203a. When counsel attempted to argue what should have been the uncontroversial notion that with "any offense … there is a spectrum, there is a broad range of culpability," 3App. 204a, the court responded, "I'm sorry. I really think you're not helping your client." *Id*. When counsel tried to point out again the actual facts of the case, Judge Diamond cut him off, stating, "We're talking about your client bribing a British banking official." 3App. 205a. Counsel had never suggested otherwise, of course, but only that some bribery offenses deserve less punishment than others.

What the district court appeared to be saying was that counsel's contentions, although factually uncontested, did not *even potentially* constitute grounds for offense mitigation. If so, this defied 18 U.S.C. § 3553(a)(1) , requiring that the court consider the "nature *and circumstances* of the offense" (emphasis added). A judge who rejects the very notion of aggravated and mitigated offenses, considering only the "nature" and not the "circumstances" of the offense, necessarily abuses his or her discretion at sentencing in a most

fundamental manner. Yet that is what the record reveals the sentencing court did. If so, this was legal error, the appellant has contended, *see* AOB 20–26, but the panel never engages with that argument.

Instead, the opinion wrongly asserts that "Essentially, Harder contends that the district court erred because it disagreed with him." WL *3. Appellant made no such frivolous argument. Never did appellant advance that contention, nor is the panel's assertion a fair characterization of his position. Appellant's argument is also fully consistent with *Kimbrough v. United States,* 552 U.S. 85, 101–02 (2007), which held that sentencing judges may, in the exercise of their discretion, disagree with the considered views of Congress and the Sentencing Commission as a matter of policy. While a judge could not properly rule, as Judge Diamond seemed to, that the severity of illegal conduct categorically cannot be mitigated by an absence of "loss," or by the existence of collateral benefit, he might conceivably have tried to explain why he felt there was no mitigation in the particular circumstances of this case. The record shows he never did so.

But even if the record can be read either way – either as an exercise of sentencing discretion or as a ruling that certain factors cannot, by their nature, constitute grounds for mitigation of punishment – then Mr. Harder is entitled to a remand for resentencing. Under this Court's settled precedent governing the review of sentencing, a genuine ambiguity in the record as to whether the court believed it lacked legal authority to moderate a sentence on a certain ground, or

whether it simply chose in the considered exercise of its discretion not to do so, requires a remand for resentencing. *United States v. Evans*, 49 F.3d 109, 111–12 (3d Cir. 1995); *United States v. Mummert*, 34 F.3d 201, 205 (3d Cir. 1994). Here, at best, Judge Diamond's remarks are capable of either interpretation.

As then-Judge Alito wrote in *Mummert*, the leading case on this point:

> [I]n cases such as this, where the record does not make clear whether the district court's denial of departure was based on legal or discretionary grounds, we believe that the appropriate course of action is to vacate the sentence and remand for the district court to clarify the basis for its ruling.

34 F.3d at 205). While the Court there was addressing a "departure" decision, the same should logically be true where the basis for denying a variance (discretion or legal validity) is ambiguous, and the difference would determine this Court's standard of review. Indeed, after *United States v. Booker*, 543 U.S. 220 (2005), this Court explained that it would continue to apply the *Mummert* rule. See *United States v. Jackson*, 467 F.3d 834, 838–39 (3d Cir. 2006).

Appellant advanced this line of authority in his Reply Brief, but the panel opinion does not acknowledge or address it. Accordingly, because the panel's stated view of the record at best may be correct (but is not clearly so), rehearing should be granted. The judgment must be vacated, and Mr. Harder should be resentenced.

**2. The panel opinion does not address appellant's argument that the court imposed an unreasonable sentence by failing to give meaningful consideration to the need to avoid unwarranted disparity.**

The appellant's opening and reply briefs show that under the precedent of this Court, the district court's conclusory dismissal of Mr. Harder's detailed and specific disparity-based argument for a downward variance constituted an abuse of discretion. The panel opinion does not address those arguments or cite those precedents. Instead, it relies on Judge Diamond's formulaic recitation that he had "considered the need to avoid unwarranted sentencing disparities." WL *3. That response disregards every argument actually made on appeal.

The district court's decision constituted a failure to give "*meaningful* consideration" to the factor mandated under 18 U.S.C. § 3553(a)(6), that is, "the need to avoid "unwarranted sentence disparities." *United States v. Merced*, 603 F.3d 203, 222 (3d Cir. 2010) (emphasis added) (vacating and remanding for failure to consider (a)(6) factor, *inter alia*), quoting *United States v. Grier*, 475 F.3d 556, 571–72 (3d Cir. 2007) (en banc), and discussing and quoting *United States v. Goff*, 501 F.3d 250, 261 (3d Cir. 2007). This Court recognized in *Merced* that "discussion of [§ 3553(a)(6)] should have been undertaken with *particular care*," to avoid the risk of disparity in sentence "'based on little, if anything, more than [a defendant's] luck' in assignment of judge." 603 F.3d at 223 (emphasis added), quoting *Goff*. The sentence imposed upon Mr. Harder was some four times the national average and 140% of the punishment given by a different judge to his more culpable co-defendant. On this record, the court's

rejection of unwarranted disparity as a basis for variance did not reflect the required "particular care." Nor does the panel attempt to show that it did.

The sentencing court's "rote recitation of § 3553(a)(6)," as cited in the panel opinion, does not make up for Judge Diamond's unreasoned rejection of Mr. Harder's argument at sentencing. See *United States v. Begin*, 696 F.3d 405, 414 (3d Cir. 2012) (vacating sentence due to failure to analyze disparity factor where court merely stated that it took into account the need to avoid unwarranted disparities). The court's reassurance that it was "acutely aware of the need to avoid unwarranted sentencing disparities," 3App. 225a, is no substitute for demonstrating that awareness by explaining why Mr. Harder's sentence, in the court's view, should be so much harsher than others' for the same offense. Yet that is all that the panel points to. Appellant has not claimed (despite the panel's assertion, WL *3) that Judge Diamond utterly "ignor[ed]" the disparity argument; our contention is that he failed to address it meaningfully, as required by this Court's precedent.

The opinion instead notes a minor part of Mr. Harder's disparity argument, on which he never separately relied, that is, the comparison between his own sentence and that of the banker who solicited the bribe, Ryjenko, and who was prosecuted in Great Britain. WL *3, citing *United States v. Hart*, 273 F.3d 363 (3d Cir. 2001). See also *United States v. Parker*, 462 F.3d 273 (3d Cir. 2006) . At sentencing, Mr. Harder properly addressed the facts allowing a comparison of his case with that of Ryjenko, *see* AOB 28–29, which the district

court accepted as accurate without ever addressing why Mr. Harder deserved a harsher penalty.[4] This contrasts starkly with what occurred in *Parker* or *Hart*. See *Parker*, 462 F.3d at 278 (sentencing court explained different sentences for co-defendants based on who had cooperated and on extent to prior record); *Hart*, 273 F.3d at 276–78 (holding, pre-*Booker*), that this Court had no "jurisdiction" to review discretionary failure to grant departure equivalent to that given by different judge to co-conspirators). Here, the district court said nothing to explain his treatment of Mr. Harder relative to the punishment imposed on Ryjenko. This contributed to the court's error under 18 U.S.C. § 3553(a)(6), but it was not the heart of that error.

The presentation that Mr. Harder made in support of a variance to avoid disparity was not centered on Ryjenko's case. The panel suggests that Judge Diamond could disregard the thorough and detailed defense presentation, because that "Harder's FCPA survey chart did not indicate the nature and extent of each defendant's cooperation or role in the [sixty other] offenses [prosecuted in the last ten years]." WL *3. But the defense offering was as thorough, accurate and informative as any defendant could be expected to make. Mr. Harder commissioned a study by an academic expert on the Federal Corrupt

[4] Contrary to the panel opinion, the government did not "correctly argue[]" that Mr. Harder's sentence was "one year less than the sentence imposed on" the co-defendant. WL *3. To the contrary, it was undisputed that the banker's British sentence of "six years" meant three years' imprisonment. 3App. 212a–14a. Hence, apples-to-apples, Mr. Harder's five-year non-parolable federal sentence was in truth much harsher, not "less."

Practices Act of all cases prosecuted under that statute, throughout the nation, in the last decade. *See* Dft. Sent. Exh. H (2Appx. 74a–80a), *discussed at* AOB 27–28. Further information about the most harshly punished 14 of those 61 cases (the few that received a sentence of more than two years) – all that could be gleaned from public sources – was attached to appellant's brief and discussed even further there. Given that other, unrelated defendants' Pre-Sentence Investigation Reports and sealed 5K motions are not available for public analysis, nor in most cases are the parties' sentencing memoranda or the sentencing transcript, the panel's basis for rejecting the disparity argument advanced by Mr. Harder sets a bar that no defendant ever could vault. It would essentially write subsection 3553(a)(6) out of the statute by making it unenforceable.

The panel focuses on the fact that Mr. Harder's sentence fell within the Guidelines range. It suggests that the Guidelines serve to "provide certainty and fairness." WL *3. This may be so for some offenses, but the unchallenged statistics provided by the defense show the opposite in FCPA cases. Despite irrefutable proof that the FCPA represents an offense category in which the Guidelines are widely rejected by the federal judiciary (81% of all cases below the range, compared with about 48% in cases generally, with the latter including all the 5K "cooperation" cases), the panel points only to the Guidelines. Third Circuit precedent prohibits that approach. See *United States v. Tomko*, 562 F.3d 558, 575 (3d Cir. 2009) (en banc) (rejecting appellate

presumption of reasonableness for within-Guideline sentences); *United States v. Cooper*, 437 F.3d 324, 331–32 (3d Cir. 2006) (same).

No fair review of the chart of all FCPA cases nationally, as presented by the defense in this case, could support the panel's suggestion that it merely "reflected a lack of general consensus on the appropriate sentences for FCPA violators." WL *3. What it shows is that judges impose probation in a remarkable 33% of all cases, compared with just 7% receiving probation in federal cases generally. Only a handful involve substantial terms of imprisonment. The average sentence over many years was an undisputed 13 months, and very few drew terms of more than 24 months. The amount Mr. Harder paid in bribes was significant, but by no means at the highest end of all the cases, and in any event the chart shows that the amount paid (or benefit received) does not correlate overall with the severity of sentences in this area. Mr. Harder's punishment was more than four times the average without his case being a notable outlier in seriousness, by any measure.

The record of this case establishes that the district court did not give meaningful consideration to Mr. Harder's disparity argument, and for that reason (among others) imposed an unreasonable sentence. The panel decision does not address the arguments advanced by the appellant and disregards Circuit precedent. Rehearing should be granted, the judgment of sentence should then be vacated and remanded for resentencing.

## CONCLUSION

For the foregoing reasons, the original panel should grant rehearing.

Respectfully submitted,

Dated: November 20, 2018

By: *s/Peter Goldberger*

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## CERTIFICATE OF WORD-COUNT COMPLIANCE

I certify, pursuant to Fed.R.App.P. 32(g), that the foregoing Petition complies with the length limitation of Fed.R.App.P. 35(b)(2)(A), in that it contains fewer than 3900 words, that is, no more than 2889 words, including footnotes, according to the word-counting function of my word-processing system.

__/s/ *Peter Goldberger*____

## CERTIFICATE OF SERVICE

On November 20, 2018, I served a copy of the foregoing Petition on counsel for the appellee, the United States, via ECF filing, addressed to:

Michelle Morgan, Esq.
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*s/Peter Goldberger*