App. No. _____

In the
Supreme Court of the United States of America

Michael L. Binday,
Petitioner,

v.
United States of America,
Respondent.

ON APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S APPLICATION TO EXTEND TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

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To the Honorable Ruth Bader Ginsburg, as Circuit Justice for the United States Court of Appeals for the Second Circuit:

Petitioner Michael Binday respectfully requests that the time to file a Petition for a Writ of Certiorari in this matter be extended for sixty days to and including October 4, 2019. The district court denied Binday's motion to vacate his conviction pursuant to 28 U.S.C. § 2255 on May 23, 2018. Binday moved for a certificate of appealability in the Second Circuit Court of Appeals, which denied the motion on January 15, 2019. Binday then moved for reconsideration and rehearing *en banc* regarding his motion for a certificate of appealability. That motion was denied on May 6, 2019. The mandate issued on May 13, 2019.

Copies of the district court order and the Court of Appeals denial of reconsideration of Binday's motion for a certificate of appealability are attached.

Absent an extension of time, Binday's Petition would be due on August 4, 2019. Petitioner is filing this application at least ten days before that date. *See* S. Ct. R. 13.5. This Court would have jurisdiction over judgment under 28 U.S.C. § 1254(1).

STATUS OF MICHAEL BINDAY

Michael Binday was sentenced to 144 months in prison. He surrendered to the Bureau of Prisons on July 1, 2016.

BASIS FOR THE PETITION FOR A WRIT OF CERTIORARI

Michael Binday was a life insurance broker. He obtained policies from a number of different life insurance companies on behalf of his clients. While Binday did not misrepresent the proposed insured's health, age, and other essential facts necessary for the insurance companies to decide whether to issue a life insurance policy, he did misrepresent the insured's and his intent to sell the policy to others.

Binday was convicted of mail/wire fraud. Instead of proving that the insurers lost money because of Binday's misrepresentation, the government proved the insurers lost a single property interest – namely, their "right to control" the decision whether to sell the policies. In the Second Circuit, the "right to control" property is a property interest when there is the possibility that a proposed transaction (or scheme) could cause "tangible economic harm." Economic harm does not require that the seller lose any profit on the sale, and a defendant may be convicted even if the seller gets his asking price. Economic harm exists when a seller is convinced to sell a product, at full price, to a buyer who lies about how he does business. *United States v. Finazzo*, 850 F.3d 94, 108, 118 n. 18 (2d Cir. 2017).

The right to control theory of property has been accepted as a form of "money or property" for purposes of the mail and wire fraud statutes in the Second Circuit, among others. It has been rejected by the Sixth and Ninth Circuits.

At trial, Binday's trial counsel argued that the insurers lost no money and so Binday could not be guilty of fraud. That was the opposite of the Second Circuit right to control law, and the argument doomed Binday to a conviction.

Then, after trial and before sentencing, Binday's trial counsel made negative comments about Binday to a separate judge chosen to hear trial counsel's motion to withdraw. But trial counsel's negative statements about Binday were disclosed to Binday's trial judge before sentencing, and the trial judge told Binday that he "did something that caused [the second judge] to grant that application [to withdraw], and I will never believe otherwise." (SDNY Doc. 303 at 23.)

Because of trial counsel's errors on the law and his misstatements to the jury, and sentencing counsel's failure to pursue a hearing on the amount of loss allegedly suffered by the insurers, Binday filed a 2255 motion asking the district court to vacate his conviction for ineffective assistance of counsel. The trial judge denied the motion, without a hearing, and declined to issue a certificate of appealability. Binday asked the Second Circuit to issue a COA, but it also declined to do so.

Binday contends that the trial judge erred in (a) applying this Court's precedents regarding effective assistance when a lawyer misapprehends the law, (b) refusing to grant Binday a hearing so he could establish the factual basis for his ineffective assistance claims, and (c) denying him due process by (i) crediting his trial counsel's confidential, pre-sentencing, negative comments about his own client and (ii) misrepresenting and misapprehending the facts in the

record in its opinion denying his 2255 motion. These errors violated Binday's constitutional rights to due process under the Fifth Amendment and to effective assistance of counsel under the Sixth Amendment.

This Court has ruled that a lawyer who does not research whether he can obtain additional funding from a court to hire a good expert has acted unreasonably, *Hinton v. Alabama*, 571 U.S. 263, 274 (2014) ("An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*."). It has also held that "if the [judicial] process loses its character as a confrontation between adversaries, the constitutional guarantee [of effective assistance] is violated." *United States v. Cronic*, 466 U.S. 648, 656–57 (1984). Strategic choices by counsel are only possibly unchallengeable when counsel has made a "*thorough* investigation of law and facts relevant to plausible options," *Strickland v. Washington*, 466 U.S. 668, 690 (1984) (emphasis added). "Adequate preparation … will often include: ... relevant legal research." *United States v. Shepherd*, 880 F.3d 734, 742–43 (5th Cir. 2018) (quoting ABA Standard for Criminal Justice 4-4.6 (4th ed. 2015)).

Lawyers act unreasonably when they adopt arguments that will undoubtedly be refuted by the trial court's jury instructions. When a lawyer does not research or know the law – which is what happened to Binday – then counsel's performance is unreasonable.

When the performance invites conviction, the client has been prejudiced.

In his certiorari petition, Binday will also demonstrate that this is a proper case to consider whether the right to control theory is constitutional because the Court must state the law to determine whether Binday's counsel was unreasonable in defying it.

REASONS FOR GRANTING AN EXTENSION OF TIME

The time to file a Petition for a Writ of Certiorari should be extended for sixty days because Binday is incarcerated and is likely to proceed pro se. Although his prior counsel may provide him with some input, Binday will have to prepare a petition that addresses complex legal issues without the research tools and experience that a lawyer has. He must rely on limited mail and email services that cause significant delays in communicating with people outside of prison.

There will be no prejudice to the government by the delay because Binday is serving the sentence imposed.

CONCLUSION

For the foregoing reasons, the time to file a Petition for a Writ of Certiorari in this matter should be extended sixty days to and including October 4, 2019.

Respectfully submitted,

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