No. _____

In The

Supreme Court of the United States

MICHAEL BINDAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In mail and wire fraud cases, the government does not have to prove a victim actually lost money or property, but it does have to prove a scheme designed to "obtain money or property."

The Second and Third Circuits, however, only require prosecutors to prove a victim has been deprived of a property right: a single strand in the bundle of property rights called the "right to control" property. A person is deprived of his right to control when he is deprived of information that may help him make an informed economic decision.

Michael Binday was convicted under this lighter version of fraud. As broker for life insurance purchasers, he deprived insurance companies of just one piece of information that they thought was important: whether his clients intended to re-sell the policies to investors.

Binday suffered two constitutional injuries at trial. First, he was prosecuted under the right to control theory of property, which is unconstitutionally vague. Second, his lawyer was ineffective because he argued facts and law contrary to established Second Circuit right to control precedents. His wrongheaded arguments led directly to Binday's conviction.

The questions presented are as follows:

1. Is a trial lawyer constitutionally ineffective when he embraces a legal argument directly contrary to existing circuit law?

QUESTIONS PRESENTED—Continued

2. Is the strand of property rights known as the "right to control property" sufficiently "property" within the meaning of the fraud statutes given that this Court rejected the suggestion in *Cleveland*, *Skilling* and *Sekhar*?

* * *

This Court recently granted certiorari in *Kelly v. United States*, No. 18-1059, which raises the legality of the right to control theory.

Binday challenged the government's ability to invoke the right to control theory shortly before his trial, and he challenged the theory in his petition for en banc review by the Second Circuit and in his petition for certiorari, which was denied. *Binday v. United* States, No. 15-1140. Pet.App.24-25.

Kelly will address the legitimacy of the right to control theory. Binday may thus raise the issue in this petition because it will be "squarely presented and fully briefed. It is an important, recurring issue and is properly raised in another petition for certiorari. . . ." *See Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980).

A GVR is appropriate here because Binday's conviction was premised solely on the right to control theory. The Court's modification or rejection of that theory in *Kelly* will undoubtedly lead the lower courts to redetermine the viability of Binday's conviction. *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (GVR appropriate where intervening developments would lead lower courts to reject prior decision and resolve the litigation).

PARTIES TO THE PROCEEDING

Petitioner Michael Binday was a defendant in the district court and an appellant in the Second Circuit. The respondent is the United States of America.

RELATED CASES

United States v. Binday, 12 CR. 152 (CM), U.S. District Court for the Southern District of New York. Judgment entered Oct. 1, 2018.

United States v. Binday, 804 F.3d 558 (2d Cir. 2015), *cert. denied*, No. 15-1140, 136 S.Ct. 2487, ___ U.S. ___, June 20, 2016.

Binday v. United States, No. 12 CR. 152 (CM), 2018 WL 2731269 (S.D.N.Y. May 23, 2018), *certificate of appealability denied*, No. 18-2143, 2019 WL 302079 (2d Cir. Jan. 15, 2019).

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Michael Binday raises two compatible, though slightly incongruous, constitutional claims.

On the one hand, his trial lawyer botched the elements of fraud in Binday's right to control fraud case: the lawyer claimed the government failed to prove the victims lost or could have lost money. But in a right to control case, the government does not have to prove either a loss or an intended loss; it has to prove only that a defendant's deceptive statements deprived a victim of a single piece of information potentially relevant to making an economic decision. The jury instructions neutralized counsel's contentions and led to Binday's conviction.

On the other hand, Binday never should have been tried on the right to control theory. The theory is just a more expansive version of the now-rejected "undisclosed self-dealing" prong of honest services law, and it is unconstitutionally vague and overbroad.

OPINION BELOW

The district court's decision is at *Binday v. United States*, 1:12-cr-00152-CM, Doc. 448, and is reproduced at Pet.App.3-23.

JURISDICTION

The district court issued its opinion on May 23, 2018 and denied Binday a certificate of appealability. The Second Circuit denied Binday a certificate of appealability and issued its mandate on May 13, 2019. Pet.App.1-2.

This Court granted Binday's request to extend the date to file his petition for a writ of certiorari to October 4, 2019.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

BAIL/DETENTION STATUS

Binday was sentenced to 144 months in prison and over $37 million in restitution. He is currently incarcerated at FCI Otisville, and his scheduled release date is December 13, 2026.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions (18 U.S.C. §§ 1341, 1343 and 371) are at Pet.App.26-28.

STATEMENT OF THE CASE

A. Overview

Michael Binday, an insurance broker, obtained life insurance policies for clients, falsely telling the insurers that his clients did not intend to sell the policies. (Upon sale, life insurance policies are called "stranger owned life insurance" or "STOLI" policies.) In truth, Binday intended to help the insureds sell the policies to investors, who then paid the premiums on the policies.

While insurers cannot impede an insured from selling his life insurance policy to anyone else, insurers may refuse to sell life insurance to individuals who admit they plan to sell the policies. Insurers thus ask in the insurance application whether the proposed insured intends to sell the policy. Binday's counsel admitted at trial that Binday's clients falsely represented they had no intent to re-sell their policies issued in response to the applications. The applications asked the question because insurers objected to STOLI policies for "social" and "non-economic" reasons, though they had "characteristics" that could reduce their ultimate profitability. *United States v. Binday*, 804 F.3d 558, 572 n.14 (2d Cir. 2015).

Binday was convicted of federal fraud charges—and sentenced to an extraordinary term of 12 years in prison—for giving false answers to those insurance application questions.

B. Trial Proceedings

1. The Government Changed its Property Theory Shortly Before Trial

One month before trial (after motions to dismiss had been considered and denied), the government filed *in limine* motions. It announced it would rely on the right to control theory to prove property. The defense objected, noting that its trial subpoenas produced evidence "demonstrating unambiguously that the Insurers' issuance of STOLI policies did not cause them any economic harm, unequivocally rebutting the government's theory of mail and wire fraud." Doc. 233 at 8. Rather than dismiss the indictment, the government changed its theory of property and pursued the easier path to victory.

Under the right to control theory, the government does not have to prove "the victim's loss of money or property supplied the defendant's gain, with one the mirror image of the other." *Skilling v. United States*, 561 U.S. 358, 400 (2010). Rather, it has to prove simply that the victim was deprived of its "right to material information," which would have enabled it to "negotiate[] a better deal for itself if it had not been deceived." *United States v. Finazzo*, 850 F.3d 94, 109 (2d Cir. 2017) (internal quotation marks omitted).

For Binday, this meant the government did not have to prove that the STOLI policies did or might create higher pay-outs by the insurers, but only that Binday's misrepresentation about his clients' intent to sell the polices "were relevant to the insurers' economic

decision-making because they believed that the STOLI policies differed economically from non-STOLI policies." *Binday*, 804 F.3d at 574.

Trial counsel argued that the government's very late change to the right to control theory was a constructive amendment of the indictment. He also argued that there were "fundamental issues regarding the viability of the government's newly embraced 'right to control' theory in light of the Supreme Court's decision in [*Skilling*], which limited the government's ability to pursue fraud charges based on the deprivation of 'intangible rights.'" He noted that he had "not had an appropriate opportunity to address in the absence of a proper indictment and the chance to move to dismiss—whether the government's newly articulated theory alleges a violation of the mail and wire fraud statutes as a matter of law." Doc. 233 at 29 n.9.

The district court rejected Binday's constructive amendment claim, but did not address *Skilling*'s impact on the right to control theory. Doc. 243 at 6-11. It explained that a person who lies or omits information during contract negotiations can be convicted of fraud if the government proves that "the victims did not get what they bargained for (rather than exactly what they paid for), such that there was a discrepancy between the benefits reasonably anticipated and actual benefits received." Doc. 243 at 8-9 (discussing *United States v. Regent Office Supply Co*., 421 F.2d 1174, 1182 (2d Cir. 1970); *United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987); *United States v. Shellef*, 507 F.3d 82, 109 (2d Cir. 2007)).

Regent, *Starr*, and *Shellef* are so-called "no sale" cases: situations where the defendant tricks the victim into selling something with false statements about something unessential to the sale negotiation. In *Regent*, the court explained that a "no sale" case can be fraud, "[w]here the false representations are directed to the quality, adequacy or price of the goods themselves" because "the fraudulent intent is apparent" and "the victim is made to bargain without facts obviously essential in deciding whether to enter the bargain." Similarly, in *Starr*, the court held the false statement "must affect the very nature of the bargain itself." The court in *Shellef* admitted there was "a fine line" between "schemes" (or contract negotiations) that can land one party in prison and those that cannot, and the fine line is whether the defendant lied about an "essential element of the bargain." *Shellef*, 507 F.3d at 108.

2. The Parties' Opening Statements Focused on Loss

In its opening statement at trial, the government stated its right to control theory succinctly: "Defendants tricked life insurance companies into issuing these policies by lying to them." 19:23-24. But the government then dragged in a claim that Binday lied to obtain money—his commissions—contending that Binday lied so he "could make big money on commissions, lots and lots of money," thus suggesting the insurers suffered financial harm because they paid commissions on the STOLI policies. 20:1-2.

Binday's trial counsel took the government's bait and argued incorrectly that the jury should acquit because the purported victims lost no money as a result of Binday's scheme. Thus, in his opening statement, he said:

- The scheme was only an "investment vehicle" designed to "make money, not lose money." 33:1-3
- "[I]f no one has suffered economic harm, then [the defendants] are innocent." 33:5-10.
- "No one involved in this investment plan suffered any tangible economic harm." 34:16-17.
- "It is important to know that there was no economic harm to the person whose life was insured, the senior citizens." 38:21-22.
- "Why are we here if the insurance companies aren't suffering any tangible economic harm. . . .?" 39:21-22.
- "[W]e will show that the insurance companies actually received the benefits that they anticipated because they bargained for an enforceable and transferable life insurance contract. . . . " 40:22-25.
- "[Y]ou will not see that the insurance companies suffered any tangible economic harm, period. If they did not suffer any tangible economic harm, there cannot be a scheme to defraud, and any lies that may have occurred on the applications simply do not constitute a crime." 44:14-18.

- "I am being as direct and as up-front as I started this opening statement with you, . . . the insurance companies . . . suffered no financial harm by taking in this business." 46:20-25.

3. The Trial Judge Corrected Defense Counsel

After counsel's last point, the trial judge told defense counsel that the government "doesn't have to prove economic harm even though it does," except "you[,] and the government and I, which are on the same page, have different definitions of what economic harm is. . . . I will tell the jury the fact you didn't lose money doesn't mean you haven't suffered economic harm." 47:17-18; 24-25. The court told counsel that "tangible economic harm" is "something different entirely" from "financial harm." 48:3-4. When the court said that "financial and tangible are not synonymous," Binday's counsel responded, "We differ on that." 48:6-8.

This confusing exchange presaged more confusion to come.

4. The Summations Reiterated the Parties' Disputes Over Losses

In its summation, the government paraphrased the right to control theory, arguing that the misrepresentations caused the insurers to issue "policies they wouldn't otherwise have issued because they were bad for business. They didn't make economic sense."

1430:20-21. It then added that Binday earned "huge commissions" (1430:23), asserting that Binday "carried out a massive scheme to defraud life insurance companies . . . for the money. . . . [Binday] did this all for [his] own economic gain, to make the massive commissions [he] got every time a policy issued, to trick the insurance companies into issuing these policies and paying those commissions." 1432-33.

In his closing, Binday's counsel argued that the insurers were not economically harmed by the scheme at least thirteen times, with contentions such as the following:

- The government failed to prove that the "insurers suffered an economic harm" because the defense showed that the "insurance companies actually received the benefits that they anticipated . . . , they got exactly what they bargained for." 1437:5-11.
- The insurers "got [the premiums] and they got the money and they kept the money." 1438:16.
- The insurers "did better than they expected. There was less potential economic harm than they expected." 1445:8.
- "No one involved in this investment plan suffered any economic harm. In reality, there are no victims. . . . [T]he insurance companies, who say they didn't want to issue these policies, nevertheless got extremely high premiums from them." 1446:4-9.

- "[Y]ou saw all sorts of arguments that the defendants made a lot of money in commissions, no question about it, but so did the insurance companies. They did not suffer at all economically from this alleged scheme to defraud." 1462:6-9.

See also 1437-45 (the insurers lost no money); 1440:16-17 (premiums from lapsed policies were a "windfall" and thus the insurers "can't reasonably expect extra money"); 1442:8-9 (third party financing provided money to insurers); 1443:4 (sales of policies "were worth it to" the insurers); 1447:8-10 ("the insurance companies didn't suffer any economic harm from these defendants"); 1450:25 (the alleged lies "did not have an economic harm to the insurance companies"); 1451:1-2 ("[N]ot only did the insurance companies suffer no harm, they were not deceived in the slightest"); 1462:14-16 (the insurers "raise the price [of STOLI policies], they keep getting STOLI, STOLI, STOLI, they make more money"); 1465:22-23 ("It is important to know that there was no economic harm to the person whose life was insured.").

In its rebuttal summation, the government reinforced Binday's "no loss" argument, claiming that the insurers "would have priced these policies a whole lot differently. They would have priced them a lot higher," if they knew the policies would be sold to investors.

Ten pages of the government's rebuttal summation focused on the insurers' lost money. 1511-22. The prosecutor paraphrased the defense argument ("So the insurance companies weren't harmed by this because

they re-priced to account for STOLI?") and then responded that, without a truthful disclosure of the insureds' intent to sell, the insurers were "foiled."

In his parting words to the jury, the prosecutor said that this case was all about "a mountain of lies told to make a lot of money." 1542:10-16.

5. Binday's Motion For An Acquittal

In his motion for an acquittal, Binday's counsel argued to the court that the insurer witness testimony "simply proved that there was no tangible economic harm. . . ." He went on: "That means that as far as a tangible economic impact, that [the insurer] acknowledged there was no economic impact." And, there "wasn't a witness that said we suffered any tangible economic harm here. They said the opposite. They didn't want the STOLI policies, there is no question about that, but there was no economic harm offered, no dollars and cents on a balance sheet and no tangible economic harm." 1220:23-1221:2.

Trial counsel's arguments missed the mark under controlling Second Circuit precedent. Under that case law, the only question in a right to control case is whether the defendant tricked the seller into selling by failing to provide information potentially important to the seller's decision to sell. It doesn't matter if the object of the sale is the Mona Lisa or a used car; the size of the broker's commission and the seller's overall

profits are irrelevant. Yet Binday's counsel spent a majority of his time arguing these irrelevant points.[1]

6. The Jury Instruction

The district court instructed the jury that an actual or potential economic loss by the insurers was irrelevant.

> [A] person can also be deprived of money or property when he is deprived of the ability to make an informed economic decision about what to do with his money or property. We referred to that as being deprived of the right to control money or property.

The court explained that the "right to control" property satisfies the "obtain property" element of fraud when the false statement can possibly result in "economic harm to the victim." Confusingly, however, it went on to state that economic harm "is not limited to a loss on the company's bottom line." Pet.App.30-31.

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[1] Ironically, even though a loss is irrelevant to a conviction, Binday was sentenced for causing a multi-million dollar loss calculated on the potential death payments of the policies he obtained. *See Binday*, 804 F.3d at 595 ("the government submitted memoranda calculating" the loss). He was convicted without any jury finding of loss, but sentenced as though he stole over $38 million.

The loss amount was part of the Guidelines calculation that are merely advisory, but the loss calculation was the primary factor justifying Binday's draconian sentence. That is precisely the sort of sentence that undermines the Sixth Amendment right to a jury trial. *See Hester v. United States*, 139 S. Ct 509 (2019) (Gorsuch, J., dissenting from denial of certiorari).

Given the government's arguments that the insurers lost money—namely, through the commissions paid to Binday—the trial judge could have refused to give the right to control instruction. If she had done so, then the question would have been whether commissions may satisfy the money or property element. Courts (including this one in *McNally*) regularly reject salary as a form of "money or property."[2]

The jury returned a verdict finding Binday guilty of mail and wire fraud. Binday unsuccessfully appealed.

C. Habeas Proceedings

Following his direct appeal, Binday moved to vacate his conviction pursuant to 28 U.S.C. § 2255 because his trial counsel provided ineffective assistance.

The district court denied Binday's motion. It reasoned that counsel's "no actual loss" argument was not

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[2] A defendant's increased salary or bonuses are not "money or property." Skilling's high salary and bonuses were not evidence sufficient to prove fraud.

Justice Stevens' dissent in *McNally* suggested that self-dealing while receiving compensation satisfies the mail and wire fraud statutes because "when a person is being paid a salary for his loyal services, any breach of that loyalty would appear to carry with it some loss of money to the employer—who is not getting what he paid for." *United States v. McNally*, 483 U.S. 350, 377 (1987) (Stevens, J., dissenting). The majority did not adopt that theory. *See United States v. Ratcliff*, 488 F.3d 639, 643-44 (5th Cir. 2007) (concealing campaign finance violations in order to win election as parish president and earn the president's salary did not allege a scheme to defraud the parish of money).

the "gravamen" of Binday's defense because Binday's counsel also contended that the insurers' purported knowledge of what was going on proved Binday's lack of intent to defraud and proved Binday's false statements were not material.

The court's reasoning was a non sequitur. Even if Binday's trial counsel properly understood and argued the intent and materiality elements, he clearly misstated the right to control theory. Getting "two out of three" elements right, and one wrong, is not effective assistance when the one wrong element played such a determinant role in the parties' jury arguments and was then contradicted by the jury instructions. *See generally*, *Yates v. United States*, 354 U.S. 298, 312 (1957) (a "verdict [must] be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected"); *Skilling*, 561 U.S. at 414 (discussing *Yates* error).

In any event, trial counsel did not properly argue the intent element. He did not focus on Binday's lack of intent to deprive the insurers of valuable information given the hairbreadth difference between STOLI policies and the life settlement market (the marketplace of properly re-sold policies). Rather, he focused on the insurers' contradictory behavior regarding re-sold policies as proof that STOLI policies did not trigger economic harm. *See* 33:2 (Binday intended the insureds to make money); 33:11-16 (Binday lacked the intent to inflict "economic harm" on the insurers); 39:15-16 (Binday "intended . . . a win-win situation for the insured and for the insurance companies"); 1436:18-19

(arguing Binday "intended to have everyone involved in the investment make money"); 1440:25-1444:3 (no economic difference between life settlement and STOLI); 1447:20-21 ("And to have a scheme to defraud, you need to intend economic harm"); 1449:5-6 (no economic harm was intended); 1466:12 ("It was intended . . . as a win-win situation for the insured person").

These contentions did not reflect an understanding of Second Circuit law that an intent to deprive someone of valuable information proves an intent to defraud. An intent to make money for everyone is no defense, since the judge instructed the jury that economic harm "is not limited to a loss on the bottom line." *See Binday*, 804 F.3d at 587 ("[w]hether or not Binday *intended* for the insurers to lose money, he sought to induce insurers to issue policies based on fraudulent information, . . . which is itself a harm to insurers") (emphasis in original); *United States v. Rossomando*, 144 F.3d 197, 202 (2d Cir. 1998) ("it is no defense that [the defendant] believed 'no ultimate harm' would result from his scheme").

Counsel also did not argue that the information Binday withheld did not have independent (material) value. Rather, he tied his lack of materiality contention into the lack of any actual economic harm suffered by the insurers. 1437:15-1445. He said a lie is not material unless it is intended to deceive, 1445:24-25, but then fell back on the "no economic harm" argument. 1446 et seq.

REASONS FOR GRANTING THE PETITION

POINT ONE

BINDAY'S TRIAL COUNSEL MISSTATED THE PROPERTY ELEMENT OF FRAUD AND HIS ARGUMENTS PREJUDICED BINDAY

This Court has held that "a criminal defendant's Sixth Amendment right to counsel is violated if his trial attorney's performance falls below an objective standard of reasonableness and if there is a reasonable probability that the result of the trial would have been different absent the deficient act or omission." *Hinton v. Alabama*, 571 U.S. 263, 264 (2014).

Misunderstanding fundamental points of law—especially related to an element of the offense—is a classic example of ineffective assistance. 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* [*v. Washington*, 466 U.S. 668 (1984)]." *Id*. at 274.

1. Trial Counsel's Performance Fell Below An Objective Standard Of Reasonableness

Binday's trial counsel clearly misstated and ignored the law. He argued a point that was contrary to the Second Circuit's right to control theory of property. He nevertheless plunged ahead—perhaps goaded by the prosecution's decision to argue that Binday's commissions represented a money loss to the insurers—

and argued over and over that the government failed to prove harm and, to the contrary, the insurers made money from Binday's alleged scheme.

In the ordinary mirror-image fraud case, the government need not prove an actual loss; it only must prove that the scheme contemplated a loss of money or property by the victims.[3] It must prove, in other words, that the defendant sought to obtain some money or property from the victim through misrepresentations. In a right to control case, by contrast, the government does not even have to prove a contemplated loss; it need only prove that the defendant's lie could affect the victim's economic analysis of the deal.[4]

Trial counsel got it wrong on both theories. He argued repeatedly that the insurers were not harmed and that Binday made money for all involved.

2. Binday Was Prejudiced By His Counsel's Performance

Trial counsel's reliance on an improper legal and factual argument undermines confidence in the outcome of the case. *See Strickland*, 466 U.S. at 694. Even

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[3] *See United States v. Novak*, 443 F.3d 150, 156 (2d Cir. 2006) ("While [the mail fraud] language does not require the government to prove that the victims of the fraud were *actually* injured, the government must at a minimum prove that defendants contemplated some actual harm or injury to their victims.").

[4] *United States v. Wallach*, 935 F.2d 445, 461 (2d Cir. 1991) ("[A]pplication of the [right to control theory] is predicated on a showing that some person or entity has been deprived of *potentially* valuable economic information.") (emphasis added).

if counsel correctly argued that Binday lacked an intent to defraud and that Binday's false statements were not material, as the district court believed, those arguments could not compensate for the misguided argument that the insurers did not lose money because of Binday's conduct.

The prejudice from counsel's failure is apparent when his arguments are compared to the jury instructions. The district court instructed the jury that it should convict when the government presents evidence that the seller was deprived of information that would enable him to make "an informed economic decision about what to do with his money or property." An actual or contemplated financial loss was completely irrelevant. And yet Binday's counsel clung to the inapplicable arguments that there was no loss, or even an anticipated loss, to the insurers.

The path to an acquittal is more difficult in a right to control case because the government can prove the intent, property, and materiality elements with a single lie: when the government proves a victim was deprived of information potentially valuable to his decision whether to sell an asset, it has proved the

property element (*Wallach*[5]), the intent element (*Regent Office Supply Co.*[6]), and materiality (*Viloski*[7]).

Thus, the only argument available to Binday's counsel under Second Circuit law was that Binday did not deprive the insurers of potentially valuable information, but his attorney conceded that Binday *did* deprive the insurers of information *they thought was valuable*. That was the opposite of what he should have argued.

Binday's path was made more difficult when prosecutors infused the right to control arguments with emotional claims about how much money Binday earned from commissions. Trial counsel focused on those emotional claims while ignoring permissible arguments. Having failed to navigate correctly the right to control rules, and admitting that Binday lied on insurance applications, Binday's trial counsel doomed Binday to a conviction.

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[5] "The 'right to control' has been recognized as a *property interest* . . . [and means] some person or entity has been *deprived of potentially valuable economic information*." *Wallach*, 935 F.2d at 462-63 (emphasis added).

[6] "Where the false representations are directed to the quality, adequacy or price of the goods themselves, the *fraudulent intent* is apparent because the victim is made to *bargain without facts obviously essential* in deciding whether to enter the bargain." *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1182 (2d Cir. 1970) (emphasis added).

[7] " '[T]o be material, *the information withheld* either must be of some independent value or must bear on the ultimate value of the transaction.' " *United States v. Viloski*, 557 F. App'x 28, 34 (2d Cir. 2014) (emphasis added) (citation omitted).

3. Trial Counsel Failed to Preserve Binday's Objection to the Right to Control Theory

To the extent Binday's counsel did not raise his objection to the right to control theory by way of a motion to dismiss, and that failure hurt Binday's ability to challenge the theory, that too is a Sixth Amendment violation. "Effective trial counsel preserves claims to be considered on appeal, and in federal habeas proceedings." *Martinez v. Ryan*, 566 U.S. 1, 12 (2012) (citations omitted).

Especially since trial counsel's factual arguments involved a rejection of the right to control doctrine, it was incumbent on counsel to raise *legal* challenges to that doctrine. The doctrine has always been controversial, and it has been rejected by other circuits, so competent counsel would have raised an objection.

The Ninth Circuit had rejected the right to control theory in *United States v. Bruchhausen*, 977 F.2d 464 (9th Cir. 1992). In that case, the government argued that the defendant deceived manufacturers about the identity of the end users of high-tech equipment. The court reversed his fraud conviction because the "manufacturers received the full sale price for their products; they clearly suffered no monetary loss. While they may have been deceived into entering sales that they had the right to refuse, their actual loss was in control over the destination of their products after sale. It is difficult to discern why they had a property right to such post-sale control." *Id*. at 467.

The decision in *Bruchhausen* was directly contrary to one of the leading Second Circuit right to control cases, *United States v. Schwartz*, 924 F.2d 410 (2d Cir. 1991), where the defendants sold American-built arms to disfavored end users, and the Second Circuit upheld the conviction because the defendants lied about the identity of the end users. *Bruchhausen* rejected *Schwartz* noting that the Second Circuit failed to address *McNally* and *Carpenter v. United States*, 484 U.S. 19 (1987). *See* 977 F.2d at 468 n.4.

Other circuits have also questioned the doctrine. The Sixth Circuit rejected the theory in *United States v. Murphy*, 836 F.2d 248, 254 (6th Cir. 1988) ("unissued certificate of registration is not property of the State of Tennessee and once issued, it is not the property of the State of Tennessee"), and in *United States v. Sadler*, 750 F.3d 585, 591 (6th Cir. 2014) ("[T]hese were not the kind of 'property' rights safeguarded by the fraud statutes. . . .").

The decision in *Sadler*, which was issued before Binday's final appeal brief was filed, made clear that the "Supreme Court stopped th[e] expanding universe of intangible-right protections, limiting the fraud statutes' scope to rights that sounded in property" in *McNally* and *Cleveland* [*v. United States*, 531 U.S. 12 (2000)], and that the Congressional addition of section 1346 was limited solely to the "intangible right of honest services." *Id.* The *Sadler* court held that "lightly equating deceptions with property deprivation, even when the full sales price is paid, would occupy a field of criminal jurisdiction long covered by the States." *Id*.

The mere "right to accurate information" is not, without more, a property interest protected by the fraud statutes. *Id*. at 592. The ruling in *Sadler* is a direct repudiation of the right to control doctrine.

The Seventh Circuit has likewise questioned the government's broad right to control arguments. It faced another disfavored buyer in *United States v. F.J. Vollmer & Co*., 1 F.3d 1511 (7th Cir. 1993), and endorsed the Ninth Circuit's approach. "The property interest alleged here is quite similar to that alleged in *Bruchhausen*, and we conclude that the government's interest in the Steyr AUG–SA rifles is not one that can be characterized as a property interest for purposes of *McNally*." *Id*. at 1521.

The Seventh Circuit also reversed a right to control conviction in *United States v. Walters*, 997 F.2d 1219 (7th Cir. 1993). Walters was convicted for depriving universities of their right to control athletic scholarships. The Seventh Circuit ruled that "only a scheme to obtain money or other property from the victim" violates the federal fraud statutes, *id*. at 1227, but Walters only circumvented the NCAA's rules. He did not obtain money or property from the victim. The court spotted the government's attempt to recast the intangible right rejected by *McNally* as the " 'right to control' who received the scholarships," and rejected it as an "intangible rights theory once removed." *Id*. at 1226 n.3.

In words particularly apt for Binday's situation, the court stated: "In this case the mail fraud statute

has been invoked to shore up the rules of an influential private association." *Id*. at 1224.

The right to control theory is clearly complicated, as the hair-splitting opinions in Binday's and other cases reveal.[8] The phrase "right to control" is not defined by statute or regulation, and is instead explained in long, complicated, and divergent court opinions that, even within the same circuit, do not elucidate standards by which someone can guide his own conduct or counsel his client. How would a lawyer counsel a client entering into negotiations for the purchase of goods if the client did not want to lay all his cards on the table and also wanted to avoid prison?

As Judge Jacobs explained in his dissent in an honest services en banc decision, "this Circuit's long experience with section 1346 is nevertheless telling

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[8] The opinion in *Finazzo*, issued 27 years after *Wallach*, took almost six pages to explain the right to control, "obtainable property," the theory's scope, and the sufficiency of the evidence. The court added a long footnote, n.18, in which it provided examples of how a scheme could implicate economic harm.

Remarkably, the court said a seller who puffs his own reputation, by claiming to be someone he is not, is guilty of fraud because the impersonated retailer's reputation was damaged.

The court also said it is fraud when a seller claims his workers are all adults when, in fact, children are producing the products. Would that same seller be guilty of fraud if he claimed all his employees were paid minimum wage, when they were not? Those are the facts of *United States v. Handakas*, 286 F.3d 92, 96 (2d Cir. 2002), which found there was no fraud. *Handakas* was overruled by *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003). But in *Skilling*, this Court rejected *Rybicki*'s version of the self-dealing prong of honest services law.

evidence that most lawyers and judges, not to speak of ordinary laymen or prospective defendants, cannot be expected to understand the statute." *United States v. Rybicki*, 354 F.3d 124, 158 (2d Cir. 2003) (en banc) (Jacobs, J., dissenting). *See McDonnell v. United States*, 136 S. Ct. 2355, 2373 (2016) (requiring criminal laws to be defined with "sufficient definiteness that ordinary people can understand what conduct is prohibited," or "in a manner that does not encourage arbitrary and discriminatory enforcement" (quoting *Skilling*, 561 U.S. at 402-03)).

A reasonable attorney undertaking the defense of a fraud case must familiarize himself with the legal theory embraced by the government. Research would have revealed that the right to control doctrine is very much disputed. A reasonable attorney therefore would have mounted a more effective legal attack than did Binday's trial counsel.

Making matters worse, while failing to move to dismiss based on the doctrine, Binday's counsel relied on an irrelevant "no financial loss" theory at trial. Those twin failures doomed Binday's chances for a successful defense and led inexorably to his conviction.

POINT TWO

THE RIGHT TO CONTROL THEORY IS UNCONSTITUTIONALLY VAGUE

1. The Right to Control Property Is the Same as the Self-Dealing Theory This Court Rejected in *Skilling*

The right to control theory suffers from the same defects as the honest services theory of "undisclosed self-dealing" that this Court rejected in *Skilling*. Before *Skilling*, self-dealing was fraud if the defendant failed to disclose his "secret interest" in a business deal and thereby possibly caused "some detriment—perhaps some economic or pecuniary detriment—to the employer." *Rybicki*, 354 F.3d at 141.

The government explained the self-dealing theory in *Skilling* in the same way the Second Circuit explained the right to control for Binday. "In those undisclosed self-dealing cases, the defendant's conduct also implicated tangible economic harm because the defendant made money based on his false statements," and "concealing from [the] employees and investors information which was critical for them to make good decisions about what to do with their own stock" constituted money or property. Brief for the United States, *Skilling v. United States*, No. 08-1394, 2010 WL 302206. In practice, Skilling lied to the public to increase the stock price and earn his bonuses; Binday lied to the insurers to earn commissions.

The right to control theory grew from the same root as honest services. In the early to middle twentieth

century, lower courts across the country began to expand the fraud statutes by expanding traditional conceptions of property—and what it means to "obtain property." *United States v. Rowe*, 56 F.2d 747, 749 (2d Cir. 1932), was a leading example of this trend, and it stands today as the font of the right to control and honest services doctrines.

In *Rowe*, the Second Circuit explained that an actual loss under the criminal fraud statutes need not be proved, even though a plaintiff must prove damages in a civil fraud case: "A man is none the less cheated out of his property, when he is induced to part with it by fraud, because he gets a quid pro quo of equal value. It may be impossible to measure his loss by the gross scales available to a court, but he has suffered a wrong; he has lost his chance to bargain with the facts before him. That is the evil against which the statute is directed."[9]

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[9] The sentiment quoted was unnecessary to the decision. In *Rowe*, the defendants promised to convey land to the victims in exchange for the victims' causes of action against others plus cash. The defendants did not own the land they purported to sell, and they also inflated the value of the land; the victims clearly were out at least the amount of cash they paid the defendants plus the value of their causes of action.

The defendants complained that the indictment did not allege the victims suffered a loss, and Judge Hand's oft-quoted language simply covered the point that the government need not prove an actual loss in a fraud case.

The jury instructions in *Rowe* made clear that the jury had to find that the defendants made "fraudulent representations" to "induce the purchaser to part with his money and such was (sic) calculated to mislead a reasonably intelligent person." *Rowe*, 56

Later courts expressed the *Rowe* suggestion that a person is defrauded even if he gets his full price as a right to all the information he may want to "make the best bargain, even where the bargain he has struck is a reasonable or even excellent one." *United States v. Mandel*, 415 F. Supp. 997, 1013 (D. Md. 1976) (citing *Rowe*), *disapproved of on other grounds by United States v. Long*, 651 F.2d 239 (4th Cir. 1981). When Mandel appealed his conviction, the Fourth Circuit affirmed saying that "schemes involving bribery and some schemes of non-disclosure and concealment of material information come within the purview of the mail fraud statute." *United States v. Mandel*, 591 F.2d 1347, 1361 (4th Cir.), *on reh'g*, 602 F.2d 653 (4th Cir. 1979).

The Second Circuit in turn relied on *Mandel* to develop its "concealment of information" as property theory. These cases sometimes arose under the honest services rubric. *See, e.g.*, *United States v. Bronston*, 658 F.2d 920, 926 (2d Cir. 1981) ("[T]he concealment by a fiduciary of material information which he is under a duty to disclose to another under circumstances where the non-disclosure could or does result in harm to the other is a violation of the statute."); *United States v. Von Barta*, 635 F.2d 999, 1006 (2d Cir. 1980) ("The additional element which frequently transforms a mere fiduciary breach into a criminal offense is a violation of the employee's duty to disclose material information to his employer."); and *United States v. Margiotta*, 688

F.2d at 749. The instruction was a classic money/property instruction, not a right to control instruction.

F.2d 108, 121 (2d Cir. 1982) (it is "commonplace [in the private sector] that a breach of fiduciary duty in violation of the mail fraud statute may be based on artifices which do not deprive any person of money or other forms of tangible property").

The decision in *United States v. Wallach*, 935 F.2d 445, 462-63 (2d Cir. 1991), is often cited as the first of the modern right to control cases in the Second Circuit, even though earlier cases used the same *Rowe* and *Mandel* language of concealment.

The court in *Wallach* relied on *United States v. Little*, 889 F.2d 1367 (5th Cir. 1989), that concealing economic information can constitute "property" within the meaning of the fraud statutes. The Fifth Circuit recognized that *McNally* undermined its "concealing information" theory, but reasoned that Congress reinstated the theory with the passage of section 1346. *Id*. at 1368-69. In other words, the Fifth Circuit saw that section 1346 justified both honest services and the right to control—two branches of the same root (reasoning directly contrary to what the Sixth Circuit held in *Sadler*).

In *Binday*, the Second Circuit embraced "fraudulent inducement" as the equivalent of "concealing information," holding that Binday fraudulently "induce[d] a counterparty to enter a transaction without the relevant facts" through his misstatement in an insurance application. *Binday*, 804 F.3d at 579. Outside the all-encompassing world of the right to control theory, Binday only breached a contract. "[A] false promise

can support a claim of fraud only where that promise was 'collateral or extraneous' to the terms [of] an enforceable agreement in place between the parties. . . . [T]here are numerous decisions in which courts have dismissed fraud actions premised upon false promises made in advance of binding agreements." *Int'l CableTel Inc. v. Le Groupe Videotron Ltee*, 978 F. Supp. 483, 487-88 (S.D.N.Y. 1997) (Sotomayor, J.).

2. The Right to Control Doctrine is Inconsistent with this Court's Decisions on the Meaning of "Property"

This Court reversed Skilling's conviction and rejected the undisclosed self-dealing theory. It found that *Mandel*'s "some schemes of non-disclosure" fell squarely into the broadly defined self-dealing honest services category and rejected the theory as too vague. It rejected the reasoning of all the circuit courts that had broadly applied the fraud statutes, including opinions adopting the theory that concealing information from a counter-party who could bargain better with that information is sufficient to convict, such as *Bronston, Margiotta, Von Barta*, and *Mandel*. *Skilling*, 561 U.S. at 410 (rejecting *Mandel*'s "concealment of material information" as too amorphous); *see also id*. at 417, 419.

Skilling was consistent with this Court's jurisprudence—one that has been ignored by lower courts, perhaps in particular the Second Circuit. Prior to *Skilling*, several lower courts used the single strand right to

control property to support prosecutions. For example, in *Wallach*, the court found that "the right to complete and accurate information is one of the most essential sticks in the bundle of rights that comprise a stockholder's property interest." *Wallach*, 935 F.2d at 463.

In *United States v. Salvatore*, 110 F.3d 1131, 1140 (5th Cir. 1997), the court ruled: "Necessarily encompassed within the right to use and dispose of an object is the right to control that object—and in the case of licenses, the right to control their issuance." The First Circuit had similarly held in *United States v. Bucuvalas*, 970 F.2d 937, 945 (1st Cir. 1992), that, "Even if these licenses did not become 'property' until their issuance, . . . the city retained the right to control their alienation by the licensees, a property right analogous to those recognized at common law (fee simple determinable with a possibility of reverter)."

Salvatore and *Bucuvalas* were both expressly overruled by this Court in *Cleveland v. United States*, 531 U.S. 12, 23 (2000), where the government argued that the State lost money when the defendant lied in his application for a video poker license because the State lost its "right to control" the revenue from such licenses. This Court rejected the substitution of deception for property, holding that "[e]ven when tied to an expected stream of revenue, the State's right of control does not create a property interest."

The Court ruled the same way in *Sekhar v. United States*, 570 U.S. 729 (2013), where the government argued that an alleged victim's decision on how to invest

his money was "obtainable property." Again, this Court rejected the contention, holding that "an employee's yet-to-be-issued recommendation [cannot] be called obtainable property." *Id*. at 737; *see also Scheidler v. NOW*, 537 U.S. 393, 402 (2003) (the right to control property is "well beyond" the concept of property under the Hobbs Act).

Strands of property rights—such as the right to control the property—are not property, and the subcategory of false information that may affect someone's decision making is certainly not property. *See Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) ("At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety.").

In short, under this Court's cases, proof of deception cannot by itself constitute proof of property loss. To do so collapses the property and misrepresentation (and probably the intent) elements into one. In order to give meaning to each element, property must be limited to its common-law meaning. And a defendant is only guilty if he seeks to obtain actual property from the victim. A seller's desire for a particular piece of information is not property.

3. Kelly and Binday Were Convicted Under the Same Theory

This case is worthy of certiorari on its own merits. But in the alternative, this Court should hold this case pending the outcome in *Kelly*, the so-called "Bridgegate"

case. This Court recently granted certiorari in *Kelly*, and the question presented there encompasses the right to control theory.

In *Kelly*, the defendants were convicted of violating the wire fraud statute for pretending that they closed traffic lanes on the George Washington Bridge for a traffic study when in fact they closed them as political payback to a local mayor.

The defendants in *Kelly* did not obtain any money from their conduct, or even scheme to obtain money from the traffic study. The jury was told it nevertheless could convict if it found that the defendants deprived a state agency of its ability "to make discretionary economic decisions about what to do with [its] money or property." *United States v. Baroni*, 909 F.3d 550, 563 (3d Cir. 2018), *cert. granted sub nom. Kelly v. United States*, No. 18-1059, 2019 WL 588845 (U.S. June 28, 2019). That is the right to control doctrine.

* * *

The right to control theory, if accepted, applies to a breathtaking array of business, political, and even personal decisions. Cases like Kelly's and Binday's criminalize perhaps sharp business or political practices that a local federal prosecutor deems beyond the pale, but which the defendants may correctly say is simply the rough and tumble of the marketplace.

Making it a federal crime to lie about an otherwise legal, post-sale disposition of property that breaches a contract representation could put a lot of people in

prison. For example, a real estate developer buying individual properties through straw purchasers to avoid driving up target property prices would clearly be guilty of fraud if he failed to tell the sellers he planned to aggregate the properties to build a skyscraper. The later targeted sellers could easily bargain for a much better deal if they knew the truth.

Similarly, brokers or lawyers negotiating a transaction or settlement of a dispute are guilty of fraud if they tell their counterparties that their clients "will not pay a penny more" when in fact those clients would pay more. The seller would have a strong argument that he would have held out for more money if he knew the buyer was willing to pay more. That would be an absurd criminal prosecution, and yet it fits well into the right to control theory.

An investment advisor who tells a client he will invest the client's money in utilities and earn 15% interest, and who earns 16% interest on other than utility stocks, would be guilty of fraud under the right to control theory, but not so clearly under ordinary money/property concepts if he only earned commissions.

A participant in a dating service who specifies she will only date "under 35 year olds" is clearly deprived of information relevant to making an economic decision if her date lies about his age and thus causes her to spend money to take her date out to dinner. State law is fully capable of handling such a case. *See generally, "LA's Alleged 'Dine-and-Dash Dater' Is Now*

Facing Up to 13 Years in Prison," https://www.vice.com/en_us/article/gy37j4/los-angeles-dine-and-dash-dater-arrested-vgtrn.

A general contractor who has a history of litigation over his work decides he will not work for lawyers in the future (or not at the same rate if he chooses to take them as clients). He asks each prospective client, "are you a lawyer?" A lawyer-client lies and says he is an architect. The work is done poorly; the lawyer sues. The contractor may owe money for a breach of contract, but the lawyer goes to prison for depriving the contractor of his right to control his own potential legal expenses, workers, and other assets.

In *Walters*, Judge Easterbrook dismissed as "unnerving" the government's claim that prosecutors only wisely bring cases based on broad theories of fraud where the defendant has not obtained property from the victim. *Walters*, 997 F.2d at 1224. He explained that, under the government's right to control theory, practical jokers who cost people gas money would be federal felons. The "idea that practical jokes are federal felonies would make a joke of the Supreme Court's assurance that § 1341 does not cover the waterfront of deceit." *Id*.

"But what is it about § 1341 that labels as a crime all deceit that inflicts any loss on anyone? Firms often try to fool their competitors, surprising them with new products that enrich their treasuries at their rivals' expense. Is this mail fraud because large organizations inevitably use the mail?" *Id*. at 1225.

The right to control theory covers the waterfront of any deceit that may affect economic decision making, expanding the fraud statutes into "a wide range of conduct traditionally regulated by state and local authorities." *Cleveland*, 531 U.S. at 24. Binday's agency status and conduct were governed by New York's insurance law; violations are handled by the regulator and may constitute a misdemeanor. NY Ins. Law § 109 (McKinney). New York was fully capable of handling the insurers' complaints about Binday.

In the Second Circuit alone, there have been many right to control prosecutions in the last 10 years since *Skilling* was decided[10] and none (other than *Sadler*) in

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[10] For example: *United States v. Lebedev*, No. 17-3691-CR, 2019 WL 3366714, at *3 (2d Cir. July 26, 2019); *United States v. Shkreli*, No. 18-819-CR, 2019 WL 3228933 (2d Cir. July 18, 2019); *United States v. Williams*, 736 F. App'x 267, 273 (2d Cir. 2018), *cert. denied*, 139 S. Ct. 1283, 203 L. Ed. 2d 293 (2019); *United States v. Finazzo*, 850 F.3d 94 (2d Cir. 2017); *United States v. O'Garro*, 700 F. App'x 52 (2d Cir. 2017); *United States v. Lowe*, 664 F. App'x 38, 43 (2d Cir. 2016); *United States v. Heinz*, 607 F. App'x 53 (2d Cir. 2015); *United States v. Viloski*, 557 F. App'x 28 (2d Cir. 2014); *United States v. Tagliaferri*, 648 F. App'x 99 (2d Cir. 2016); *United States v. Grimm*, 738 F.3d 498, 502 (2d Cir. 2013); *United States v. Levis*, 488 F. App'x 481 (2d Cir. 2012); *United States v. Ferguson*, 676 F.3d 260 (2d Cir. 2011).

Some right to control cases did not reach the court of appeals. *E.g.*, *United States v. Gatto*, 295 F. Supp. 3d 336, 346 (S.D.N.Y. 2018); *United States v. Johnson*, No. 16-CR-457-1 (NGG), 2017 WL 5125770 (E.D.N.Y. Sept. 21, 2017); *United States v. Jabar*, No. 09-CR-170, 2017 WL 4276652 (W.D.N.Y. Sept. 27, 2017); *United States v. Davis*, No. 13-CR-923 (LAP), 2017 WL 3328240, at *15 (S.D.N.Y. Aug. 3, 2017) (acquitting defendant because the false statement did not relate to "essential element of the contract"), *appeal withdrawn*, No. 17-3190, 2017 WL 6803303 (2d

the Sixth Circuit. Now that the self-dealing component of honest services has been eliminated, courts can expect many more right to control prosecutions—except in those circuits that have said it is not a crime.

CONCLUSION

This Court should grant certiorari in this case to address the significant constitutional question presented by trial counsel's disregard of established circuit law and to settle the circuit split over the right to control theory. It should find counsel was ineffective and prejudiced Binday's trial, and it should reject the right to control doctrine. In the alternative, this Court should hold Binday's petition pending its decision in *Kelly*. If the ultimate opinion in *Kelly* addresses the right to control doctrine, this Court could then vacate Binday's conviction and remand his case.

Respectfully submitted,

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Cir. Dec. 7, 2017); *United States v. Carpenter*, 190 F. Supp. 3d 260, 265 (D. Conn. 2016); *United States v. Duckett*, No. 3:16-CR-124 (SRU), 2017 WL 6001491, at *10 (D. Conn. Dec. 4, 2017) ("right to control theory . . . is a component of every wire and mail fraud allegation, whether implicitly or explicitly alleged").