No. 19-273

# 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**

## REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

## THE SIGNIFICANCE OF BINDAY'S PETITION

The government ignores the elephant in the room – the judicial creation of an overbroad definition of "property" – hoping the Court will not evaluate the criminalization of contract breaches. It admits that the Sixth and Ninth Circuits have rejected the right to control theory,[1] and it calls Judge Easterbrook's opinion in *Walters* "decades old,"[2] but instead of addressing the merits of Binday's arguments, it raises a host of incorrect and ineffective arguments.

Lower courts use the right to control doctrine to convert fiduciary and contract breaches, or deceptive business or political practices, into property fraud. It is a judicially created legal fiction, an end-run around this Court's decisions. It is a fiction with ever-growing importance, as prosecutors use it more often. This Court should grant certiorari to address the validity of the right to control doctrine.



## PENDING RIGHT TO CONTROL CASES

Given prosecutors' increasing use of the right to control doctrine, it is no surprise that a growing number of criminal defendants are challenging it. There are

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[1] *Aldissi v. United States*, No. 19-5805, Brief for the United States at 13.

[2] *Aldissi v. United States*, No. 19-5805, Brief for the United States at 12.

now five cases pending in this Court in which petitioners challenge the right to control theory.

- *Kelly v. United States*, No. 18-1059.
- *Aldissi v. United States*, No. 19-5805.
- *Kelerchian v. United States*, No. 19-782.
- *Baker v. United States*, No. 19-667.
- *Binday v. United States*, No. 19-273.

More convictions have recently been affirmed based on the theory, and those defendants are likely to seek review here:

- *United States v. Johnson*, No. 18-1503-CR, 2019 WL 6834021, at *3 (2d Cir. Dec. 16, 2019).
- *United States v. Calderon*, 944 F.3d 72, 88 (2d Cir. 2019).
- *United States v. Blaszczak*, No. 18-2811, 2019 WL 7289753, at *6 (2d Cir. Dec. 30, 2019).
- *United States v. Percoco*, No. 16-CR-776 (VEC), 2017 WL 6314146, at *7 (S.D.N.Y. Dec. 11, 2017), appeal pending, No. 18-3710 (2d Cir. 2020).

Most of these cases come from the two New York City districts, where prosecutors regularly and aggressively invoke the theory. Given modern wire and mail facilities, those prosecutors can reach conduct all over

the country. The right to control theory is the property theory *du jour*, and it is ripe for review.

## ARGUMENT

Binday's case is an ideal vehicle for review because it demonstrates the theory's defects and the difficulty lawyers and judges have understanding and applying it, and because the doctrine was central to Binday's conviction. At a minimum, this Court should hold Binday's petition pending its decision in *Kelly*. If it grants review in one of the other pending right to control cases, this Court should hold the petition pending the outcome of that case.

The government does not seriously contest the critical legal importance of the right to control theory. Nor does it make much effort to defend the theory on the merits. The theory has no foundation in the text of the fraud statutes or the common law from which those statutes derived. Rather, the government primarily contends that this case is not an appropriate vehicle for addressing the doctrine. Even if that were true – and it is not – it would still be appropriate for this Court to hold this petition pending its review of the other right to control cases.

In any event, the government is wrong about this case.

In his petition, Binday described multiple instances when his trial counsel misstated the circuit's

law of "property": His client would be convicted of fraud if the government proved that Binday's misstatements about the later disposition of fully paid insurance policies interfered with the insurers' "informed economic decision" to sell the policies. He nevertheless argued repeatedly that no one was hurt – everyone made money. That contention ignored the law, and Binday was convicted.

In its opposition to Binday's petition, the government picks at the margins, but those complaints are meritless.

1. The government first argues that certiorari is not warranted because the lower court denied a certificate of appealability. This Court may independently review Binday's arguments even if a certificate of appealability was not issued below. Indeed, it has done so in the past. It did that in *Buck v. Davis*, 137 S. Ct. 759 (2017), and it noted that a certificate of appealability should be "decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Id*. at 773 (2017) (citation omitted); *see Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003) (reversing conviction where court of appeals denied CoA, finding that the CoA "should have issued"). Moreover, there is nothing in 28 U.S.C. § 2253 that "limit[s] the scope of [the Supreme Court's] consideration of the underlying merits." *Buck*, 137 S. Ct. at 775.

The lower court did not explain its reasons for denying the certificate of appealability. Its decision to proceed in summary fashion does not and cannot bind

this Court. Moreover, when it denied Binday a certificate of appealability, the court of appeals did not know that this Court would grant review in *Kelly*. *Kelly* presents closely related legal issues, and if this Court ultimately rules in Kelly's favor, it will add significant weight to Binday's arguments.

2. The government next argues that the district court correctly ruled that trial counsel did not make "the absence of economic loss the 'gravamen' of [Binday's] defense." Opp. 10. It quotes from the district court's reasoning that trial counsel raised *other* defenses and its conclusion that trial counsel was not "singularly" focused on the lack of economic loss. Opp. 11. That is argument by misdirection.

First, there is nothing in *Strickland* or *Hinton* suggesting that a lawyer's misstatement of the law may be ignored because the lawyer also made other (legally appropriate) arguments. Deficient performance of a critical aspect of the defense is still deficient performance even if other aspects of the defense were handled competently. The defense attorney in *Lee v. United States*, 137 S. Ct. 958 (2017), for example, did everything right in helping his client plead guilty – except explain the immigration consequences of his plea. This Court did not excuse the error with examples of the things the lawyer did right. It focused on what the lawyer did wrong.

Second, even if Binday's counsel's faulty arguments were not the *sole* defense presented at trial, they were still a *central* defense. As Binday showed in his

petition, his attorney made his incorrect arguments on about half of his 14-page opening and during at least half of his 35-page summation (with the bulk of his "no actual harm" argument in the first half of the closing). Pet. 6-10. The attorney rested an essential pillar of the defense on a legally faulty foundation. That decision denied Binday his constitutional right to an adequate defense.

3. The government then claims Binday's petition relies on arguments not raised below. Opp. 11 (citing to Pet. 20-36). Not so. The cited portion of Binday's petition anticipated an argument that the government has made before – that Binday waived his objection to the right to control instruction. *See* Brief of the United States, No. 14-2809 (2d Cir.) Doc. 127 at 85-87 (arguing that Binday waived his objection to the right to control theory when his lawyer agreed to a particular jury instruction); Brief of the United States, Nos. 15-1140, 15-1177 and 15-8582 (Supreme Court) at 18 n.3 ("Petitioners' failure to object to the language of the jury instructions in the district court is an additional reason to deny their petitions now.").

Binday did, in fact, challenge the right to control theory in the Second Circuit, on his direct appeal, and he raised it again in his 2255 motion. (12-cr-152 Doc. 446 at 5) ("Mr. Binday continues to assert that the right to control theory is inconsistent with United States Supreme Court precedent.").[3] Equally important:

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[3] The government also mistakenly asserts that Binday's first trial counsel challenged the right to control theory in his original

the government cannot dispute that Binday's trial counsel should have been familiar with the controlling case law when the government announced its plan to rely on the right to control theory. *See* Pet. 20-24. This Court cannot decide if counsel was ineffective without knowing the law, and it would be a fool's errand for Binday to raise his attorney's ineffective performance without also challenging the defective law his lawyer misapplied.

In any event, a petitioner may raise associated errors in his petition for certiorari that were not explicitly raised below but that are subsumed in his arguments. *See* Sup.Ct.Rule 14.1. *See Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 540 (1999) (Court addresses issues "intimately bound up" with and "easily subsumed" within the questions presented); *Skilling v. United States*, 561 U.S. 358, 377 n.3 (2010) (considering whether actual prejudice occurred where question challenged a presumption of prejudice). Moreover, any new arguments are made largely in response to this Court's grant of certiorari in *Kelly.*

In short, the government cannot be surprised by Binday's challenge to his lawyer's performance and to

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motion to dismiss in the district court. That motion to dismiss did not challenge the theory; it only claimed the facts did not meet the right to control standard. (12-cr-152 D. Ct. Docs. 29-30) After Binday obtained new counsel shortly before trial, new trial counsel noted that *Skilling* undermined the theory. (12-cr-152 D. Ct. Doc. 233 n.9) The district court did not discuss that contention and so effectively denied Binday's objection.

the right to control theory, which is bound up with that performance.

4. The government argues that Binday misdescribed the record, Opp. 12, asserting that the jury *was* told it had to find a contemplated loss; however, the government elides portions of the charge and its context. The jury charge was both wrong and incoherent.

The government cites to one portion of the district court's charge, which stated that the government must prove the scheme "would result in economic harm to the victim." But the charge went on to state that "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." The court then utterly diluted the "economic harm" instruction by saying that economic harm "is not limited to the bottom line." Pet. 12. Those portions of the instructions are the objectionable portions – and they are largely ignored by the government.

Read as a whole, the instruction told the jury it could convict if the defendant affected the insurers' decision-making process, even without any loss to the bottom line. The jury could not have understood that instruction as anything other than a direction to convict upon proof that Binday made a misstatement to the insurers that the insurers deemed important. In other words, the instructions allowed conviction for a breach of contract. That is not a permissible theory under this Court's decisions interpreting the federal fraud statutes.

5. The government claims that it proved an actual economic loss anyway, and so the Court should not take up the question whether the "right to control" is property. Opp. 13. But this is not a case about whether the evidence was insufficient. This is a case about whether the jury was correctly instructed and whether trial counsel correctly understood the law under those instructions.

The question here, and in *Kelly*, is whether a jury should be told that the (alleged) right to information that affects decision making is in and of itself property. It does not matter whether the government incidentally proves there was a financial impact on the seller. What matters is how to define the property element of the offense. As some lower courts have recognized, the statute requires "an actual [ ]or a potential transfer of property from the victim to the defendant," and "business plans causing incidental losses are not mail fraud." *United States v. Walters*, 997 F.2d 1219, 1224, 1226 (7th Cir. 1993). The right to control theory is "just an intangible rights theory once removed." *Id*. n.3.

False resale motives while paying full price do not "obtain property" for the deceitful buyer. "Nancy may have had many unflattering motives in mind in buying the pills, but unfairly depriving the distributors of their property was not one of them. As to the wire-fraud count, she ordered pills and paid the distributors' asking price, nothing more." *United States v. Sadler*, 750 F.3d 585, 590 (6th Cir. 2014); *see also United States v. Ochs*, 842 F.2d 515, 525-26 (1st Cir.

1988) (holding that "an expansive view of property protected by the mail fraud statute is irreconcilable with the basic holding of *McNally*").

Criminalizing an intentional breach of contract "could make a criminal out of anyone who breaches any contractual representation: that tuna was netted dolphin-free; that stationery is made of recycled paper; that sneakers or T-shirts are not made by child workers; that grapes are picked by union labor – in sum so called consumer protection law and far more." *United States v. Handakas*, 286 F.3d 92, 108 (2d Cir. 2002), *overruled on other grounds by United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003) (en banc).

During the *Kelly* oral argument, the Court asked where to draw the line when people misuse employers' assets or act in an unauthorized manner. The answer is that *services* (like misdirected snowplows and house painters) are not property, *People v. Ashworth*, 220 A.D. 498, 501 (App. Div. 1927), and undisclosed, unauthorized self-dealing is not property, *Skilling*, 561 U.S. at 410. State statutes cover theft of services and official misconduct. *See* N.Y. Penal Law § 165.15 and N.J. Stat. Ann. § 2C:20-8 (theft of services); N.Y. Penal Law § 195.00 and N.J. Stat. Ann. § 2C:30-2 (official misconduct). The misconduct statutes expressly require an examination of the official's authorization; the federal fraud statutes say nothing about it.

The government's effort to rename dishonest services as "commandeering fraud" during the *Kelly* argument is old wine in a new bottle, just like the right to

control is another name for self-dealing dishonest services. State laws more than adequately cover the conduct in Kelly's, Binday's and others' cases with clear definitions and proscribed conduct. "[O]ur constitutional structure leaves local criminal activity primarily to the States." *Bond v. United States*, 572 U.S. 844, 848 (2014).

The First Circuit in *Ochs* noted that "old habits die hard. But we do not think courts are free simply to recharacterize every breach of fiduciary duty as a financial harm, and thereby to let in through the back door the very prosecution theory that the Supreme Court tossed out the front." 842 F.2d at 526-27. This case – and the cluster of other pending right to control cases – proves the point. When this Court limited the honest services doctrine in *Skilling*, lower courts responded by enhancing the right to control doctrine to characterize contract or fiduciary breaches as "property harm."

6. The government asks the Court not to hold Binday's petition pending the decision in *Kelly*. First, it asserts that "right to control" does not appear in the question presented in *Kelly*. Its reading of the record is crabbed. It ignores the following:

- The amicus briefs filed by Black and McDonnell in *Kelly*, at 7-10.
- The amicus brief filed by Binday in *Kelly*.
- The petition for certiorari filed by Kelly at 16, 21, 26 ("The Third Circuit's decision runs headlong into *Cleveland*. Just as the sovereign right to control who obtains a

> license is not a property interest, neither is the right to control who drives on the public roads.").
>
> - The merits brief filed by Kelly at 36-38, 40-43.
> - The government's own merits opposition brief at 22 ("the right to control the real property of the George Washington Bridge – [is] a 'species of valuable right [or] interest' that constitutes 'property' under the fraud statutes") (quotes omitted).

In *Skilling*, the reasoning adopted by the majority of this Court was that advanced by Professor Alschuler: "our construction of § 1346 'establish[es] a uniform national standard, define[s] honest services with clarity, reach[es] only seriously culpable conduct, and accomplish[es] Congress's goal of "overruling" *McNally*.' Brief for Albert W. Alschuler as Amicus Curiae in *Weyhrauch v. United States*, O.T. 2009, No. 08-1196, pp. 28-29." *Skilling*, 561 U.S. at 411.

Second, the government suggests that Binday can start again with another 2255 motion if this Court limits or rejects the right to control theory. The suggestion that Binday languish in his prison cell while other right to control cases wend their way through the courts is inconsistent with the principle identified in *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980). Binday may assert an issue that has been "squarely presented and fully briefed" and "is an important, recurring issue and is properly raised in another petition for certiorari. . . . " This Court should grant certiorari to hear

Binday's case on the merits, or at least grant and hold pending its resolution of the right to control doctrine. Given the number of right to control cases pending, there is no reason for this Court to wait to address the validity of the doctrine. And if it reviews the validity of the doctrine in one of those cases, the fairest, and most efficient, solution is to hold the other cases and then remand them for reconsideration after this Court considers (and rejects) the right to control theory.

## CONCLUSION

The government ought to welcome this Court's consideration of the right to control theory, given its prolific use of the theory in New York and rarely anywhere else. It should want a national standard, but instead it chips away at challenges, hoping that no case will present the perfect set of facts, leaving New York prosecutors free to indict anyone from around the country under a theory that sends people who may cut corners to federal prison.

Respectfully submitted,

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