

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
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND
CIRCUIT

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

To the Honorable Sonja Sotomayor, 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: from January 12, 2022 to and including
March 12, 2022.

In his anticipated certiorari petition, Binday will ask this Court to review a Second
Circuit order denying him authorization to pursue a 2255 motion because of its erroneous belief
that Binday's motion was "second or successive." As Binday will explain in his petition to this
Court, his motion was not second or successive (which Binday explained to the Second Circuit),
but rather was a revival of the same argument he previously made on direct appeal – this time
based on under *Kelly v. United States*, 140 S. Ct. 1565 (2020). A person in Binday's position,
who challenges a court of appeals decision ruling that a second in time 2255 motion is a

prohibited “second or successive” motion may seek review in this Court. *See Castro v. United States*, 540 U.S. 375, 380 (2003) (“The ‘subject’ of Castro’s petition is not the Court of Appeals’ ‘denial of an authorization.’ It is the lower courts’ refusal to recognize that this § 2255 motion is his first, not his second. That is a very different question.”).

The Second Circuit should have allowed Binday to pursue the merits of his motion once it recognized that Binday preserved his right to challenge his conviction by consistently attacking the constitutionality of the right to control theory of property, even though he previously filed an ineffective assistance of counsel claim. Instead, the Second Circuit ignored that issue and decided that *Kelly* had no effect on Second Circuit caselaw, so Binday’s substantive argument was foreclosed.

Binday requests additional time to file his certiorari petition because of undersigned counsel’s case schedule, personal travel, and the intervening holidays.

PROCEDURAL HISTORY

On March 12, 2021, Binday filed a motion pursuant to 28 U.S.C. § 2255 in the Southern District of New York contending that his conviction was invalid under *Kelly v. United States*, 140 S. Ct. 1565 (2020). He contended that (a) *Kelly* undermined the Second Circuit’s line of cases holding that decision-making (also called the “right to control” property) is a property interest within the meaning of the mail and wire fraud statutes, and (b) he was not required to seek authorization from the court of appeals (despite having previously filed a 2255 motion for ineffective assistance of trial counsel) because he attacked the theory of conviction at every step of his case. Thus, under *Davis v. United States*, 417 U.S. 333, 342 (1974) and related case decisions, his 2255 motion was not “second or successive.” He further argued that he was entitled to relief under the “escape hatch” provision of 28 U.S.C. § 2241, which authorizes a

habeas petition when petitioner is actually innocent of the crime with which he was convicted and which is not subject to the “second or successive” limit.

On April 26, 2021, the district court, without reasoning, ordered that, “Mr. Binday must go to the Second Circuit, as the government asserts.” The district court transferred Binday’s motion to the Second Circuit on May 5, 2021.

On May 6, 2021, Binday filed his motion for authorization in the Second Circuit, contending that his current motion was not a second or successive motion because he made the same argument – before *Kelly* was decided – at trial, on direct appeal, in his petition for rehearing en banc, and in his original certiorari petition to this Court. He further contended that he was entitled to relief under section 2241 if section 2255 was unavailable to him because *Kelly* rejected the right to control theory, undermining the legal basis for Binday’s conviction, and his conduct was not criminal.

On June 1, 2021, shortly before the Second Circuit was required to rule on Binday’s motion (pursuant to 28 U.S.C. § 2244(b)(3)(D)), a motions panel stayed Binday’s motion and ordered the government to respond to Mr. Binday’s motion and answer seven substantive questions about the effect of *Kelly* on the Second Circuit’s right to control line of cases. (*Binday v. United States*, No. 21-1206, Doc. 17 (Second Circuit)). The stay was based on the Second Circuit’s decision in *Galtieri v. United States*, 128 F.3d 33 (2d Cir. 1997), which adopted a flexible approach to the 30-day time limit to decide motions for a second 2255 motion to allow decision longer than 30 days from the submission of the parties’ briefs “only where an issue requires a published opinion that cannot reasonably be prepared within 30 days, consistent with the Court’s other obligations.” *Id.* at 37. *Galtieri*’s “published opinion” exception to the 30-day decision statute was reaffirmed in *Johnson v. United States*, 623 F.3d 41, 43 n.3 (2d Cir. 2010).

The government and Binday filed their respective briefs on July 13, 2021 and August 10, 2021.

On October 12, 2021, about 60 days after the briefs were submitted, the Second Circuit issued an unpublished order. It ruled that Binday's 2255 was second or successive because it challenged the same criminal judgment as his prior-in-time ineffective assistance motion. It reasoned that section 2255(h) foreclosed Binday from relying on *Kelly* because *Kelly* only "interpreted a statute" and was not a retroactive new rule of constitutional law. It did not address Binday's arguments that his 2255 motion revived an argument that he made throughout the proceedings and thus was permissible under *Davis* and related cases.

The panel further ruled Binday could not seek relief under section 2241 because the Second Circuit upheld the right to control theory after *Kelly*, so Binday could not show he was actually innocent of a criminal offense.

Copies of the Second Circuit's June 1, 2021 and October 12, 2021 orders are attached.

Absent an extension of time, Binday's petition for a writ of certiorari would be due on January 12, 2021 (90 days from the date of the October 12, 2021 order). 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. He was granted compassionate release and is currently serving his sentence on home confinement.

REASONS FOR GRANTING AN EXTENSION OF TIME

Binday's petition to this Court will concern the limited issue whether his new section 2255 motion is second or successive, and whether his section 2241 motion is authorized because the decision in *Kelly* effected a material change in the law. See *Alaimalo v. United States*, 645 F.3d 1042, 1049 (9th Cir. 2011) (where a petitioner did not "have an unobstructed chance to present his innocence claim in his first § 2255 motion, he may now raise that claim in a § 2241 petition without a certificate of appealability"). Even if the Second Circuit might ultimately conclude that *Kelly* had no effect on Second Circuit law, Binday had a right to pursue the argument in that court and in this Court.

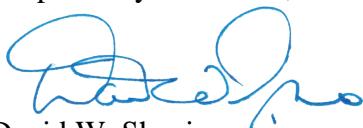
Binday's counsel is actively engaged in an ongoing state habeas case in San Mateo County (*In re McIntosh*, No. HC-2748/SC023606A), as well as representing clients in connection with a complex and ongoing grand jury and SEC investigation. Those matters, coupled with counsel's personal travel schedule and the intervening holidays, will make it difficult to prepare an effective petition for certiorari.

There will be no prejudice to the government by the delay because Binday already began serving his sentence.

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 March 12, 2022.

Respectfully submitted,



David W. Shapiro

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PROOF OF SERVICE

Diana Abad hereby declares under penalty of perjury under the laws of the United States
that she emailed a copy of this motion to Respondent by at the address below:

Solicitor General of the United States
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Washington, D. C. 20530-0001

Executed on December 1, 2021



Diana Abad