No. 21-1241

IN THE

Supreme Court of the United States

MICHAEL BINDAY,

Petitioner,

v.

UNITED STATES,

Respondent.

MOTION FOR BAIL PENDING RESOLUTION OF PETITIONER MICHAEL BINDAY'S PETITION FOR WRIT OF CERTIORARI

To the Honorable Sonia Sotomayor, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Second Circuit:

Petitioner Michael Binday applies for bail pending the resolution of his petition for writ of certiorari and in light of this Court's grant of certiorari in *Ciminelli v. United States*, No. 21-1170. Petitioner respectfully requests bail now because his petition for writ of certiorari raises the same question of constitutional law and statutory construction that this Court has agreed to review this term in *Ciminelli*, which was argued on November 28, 2022. Before and during that argument, the government conceded that the "right to control" theory of property is an improper extension of the federal fraud statutes, and the government has conceded that the resolution of *Ciminelli* will affect the disposition of Petitioner's petition. As a result, Petitioner has raised a "substantial question of law" likely to result in reversal of his conviction should he prevail on his petition. He is entitled to bail pending appeal.

BACKGROUND

On March 12, 2021, Michael Binday filed a motion to vacate his convictions pursuant to 28 U.S.C. §§ 2255 and 2241 in the United States District Court for the Southern District of New York. He moved for bail shortly after. Ex. A. The district court transferred Petitioner's motions to the United States Court of Appeals for the Second Circuit. Ex. B. On October 12, 2021, the Second Circuit denied Petitioner permission to file his section 2255 motion and denied his section 2241 petition, rejecting Petitioner's argument that this Court's decision in *Kelly v. United States*, 140 S. Ct. 1565 (2020), undermined the Second Circuit's "right to control" theory of property—the theory under which Petitioner was convicted at trial. Ex. C. The Second Circuit did not rule on Petitioner's bail motion. *Id.*

On February 18, 2022, petitioners in *Ciminelli v. United States*, No. 21-1170, and related cases filed petitions for writ of certiorari in this Court. On March 10, 2022, Petitioner raised the same question presented as the petitioner in *Ciminelli*. Compare the two questions presented:

Question presented in *Ciminelli v. United States*, No. 21-1170	Question presented in *Binday v. United States*, No. 21-1241
Whether the Second Circuit's "right to control" theory of fraud—which treats the deprivation of complete and accurate information bearing on a person's economic decision as a species of property fraud—states a valid basis for liability under the federal wire fraud statute, 18 U.S.C. § 1343.	Whether the Second Circuit's "right to control" theory of fraud – which treats the deprivation of complete and accurate information bearing on one's economic decision as a form of "property" fraud – is a valid basis for a conviction under the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343.

On March 23, 2022, the government waived its right to respond to Petitioner's petition.

On March 29, 2022, Petitioner's petition was distributed for the Supreme Court's April 14, 2022 conference.

On April 6, 2022, the Supreme Court rescheduled Petitioner's conference date, later moving the conference to June 23, 2022.

On May 24, 2022, the government opposed Ciminelli's and his co-defendants' petitions for writ of certiorari.

On June 21, 2022, this Court asked the government to respond to Petitioner's petition.

On June 30, 2022, this Court granted certiorari in *Ciminelli*, holding Ciminelli's codefendants' petitions that also challenged the "right to control" theory without granting or denying them.[1]

Immediately after this Court granted review in *Ciminelli*, the government agreed to release the Ciminelli and his co-defendants on bail because the parties

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[1] The effect of that "hold" is to authorize one defendant to argue the merits that will dictate the result for all four defendants. *See Watson v. Butler*, 483 U.S. 1037, 1038 (1987) ("[t]hree votes suffice to hold a case" pending decision in a case pending review). Of course, this Court does not announce that it is holding a case. *See* Opposing Certiorari in the Supreme Court, ABA Litigation Manual (3d ed.), https://www.mayerbrown.com/en/perspectives-events/publications/1999/01/opposing-certiorari-in-the-us-supreme-court ("The Court does not announce that it is holding a petition. However, you will know that your case is being held if it is not disposed of on the order list following the conference at which it was considered."). If the decision in the case that was accepted for review might affect the held case, then the Court will typically grant, vacate, and remand the held case to the lower court. *See Henry v. City of Rock Hill*, 376 U.S. 776 (1964).

agreed that the grant of certiorari raised a substantial question that will result in reversal if the Court agrees with the defendants. *See* Exhibits D and E (letter and district court order, respectively).

On July 5, 2022, Petitioner asked the government to agree to bail for him, as it had done for the *Ciminelli* co-defendants. The government declined. When asked what distinction the government perceived between Petitioner and the *Ciminelli* co-defendants, the government did not respond.

The government responded to Petitioner's petition on September 21, 2022. It did not oppose the petition, but rather asked the Court to hold the petition along with those filed in *Ciminelli* and its related cases:

> This Court has granted review in *Ciminelli v. United States*, No. 21-1170 (June 30, 2022), to determine the validity of the "Second Circuit's 'right to control' theory of fraud" under the federal wire-fraud statute. Pet. at i, *Ciminelli*, supra (No. 21-1170). It has also granted review in *Jones v. Hendrix*, No. 21-857 (oral argument scheduled for Nov. 1, 2022), to address the circumstances in which a federal prisoner may be entitled to seek relief under Section 2241 on the ground that his conviction is invalid under an intervening retroactive decision of statutory interpretation. Pet. at i, *Jones*, *supra* (No. 21-857). Because this Court's resolution of the questions presented in both *Ciminelli* and *Jones* may affect the judgment of the court of appeals below, the Court should hold the petition for a writ of certiorari pending its decisions in those cases and then dispose of the petition as appropriate.

Mem. of Respondent United States at 2, *Binday v. United States*, No. 21-1241.[2]

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[2] Unlike the petitioner in *Jones v. Hendrix*, No. 21-857, Petitioner challenged the Second Circuit's "right to control" theory of property and asserted his actual innocence at every stage of his proceedings: at trial, on appeal, in his petitions for certiorari to this Court, and in amicus briefs in *Kelly v. United States*, 140 S. Ct. 1565 (2020), and *Aldissi v. United States*, No. 19-5805. By doing so, Petitioner demonstrated why his petition was not a "second or successive" petition and why the

Petitioner filed a reply on October 4, 2022 agreeing that his petition should be held pending a decision in *Ciminelli*. The Court then distributed Petitioner's petition and related filings for its October 28, 2022 conference.

On October 28, 2022, the Court neither granted nor denied Petitioner's petition, strongly suggesting that it has held the petition pending a decision in *Ciminelli* and/or *Jones*. That "hold" decision was reflected in the Court's order list released on October 31, 2022, which omits reference to Petitioner's case.

On November 1, 2022, Petitioner filed another motion for bail in the district court and asked the district court to expedite its consideration of Petitioner's motion because extending his incarceration (even though now on home confinement) during the pendency of his Supreme Court petition would be an unnecessary and improper infringement of his liberty. Ex. F. The district court did not respond to Petitioner's motion or request for expedited treatment.

Two weeks after filing, and a day after the government's response was due under the district judge's rules, Petitioner asked the lower court to grant his motion as unopposed. Ex. G. He advised the court below that he anticipated seeking bail from the Supreme Court absent an expedited ruling on his motion. The lower court instead gave the government an extra week to respond to Petitioner's motion, Ex. H, and the government opposed the bail motion on November 21, 2022, Ex. I. Petitioner replied the next day, on November 22, 2022, pointing out that the

safety valve of 28 U.S.C. § 2255(e) should provide him with an avenue for relief from an illegal conviction.

government's opposition skirted the simple question presented: whether Petitioner raised a substantial question and whether he was flight risk. Ex. J. Petitioner again asked the district court to rule expeditiously and raised his intention to seek relief from this Court. *Id.* The district court has not ruled on Petitioner's bail motion.

On November 28, 2022, this Court heard argument in *Ciminelli*. During the argument, Justice Sotomayor asked whether the government was still "defending the Second Circuit's view that a deprivation of economically valuable information is enough to prove fraud[.]" Oral Arg. Tr. 52:8-12, *Ciminelli v. United States*, No. 21-1170 (Nov. 28, 2022). The government responded that, "if the definition started and stopped there, we do think that is an overbroad definition of property fraud." *Id.* 52:13-16; *see also id.* 32:25-33:7 ("JUSTICE THOMAS: Mr. Feigin, are you abandoning the Second Circuit's control theory? MR. FEIGIN: Well, Your Honor, we do think it -- let me make a few points about that. Just to directly answer your question, we would be fine with the Court explaining that that's not the right way for the Second Circuit to be going about thinking about these cases.").

That same day, Petitioner advised the district court about the government's position that the "right to control" is not property and asked the court to rule on his bail motion. Ex. K. To date, the district court has not ruled on Petitioner's bail motion. Petitioner moves now for bail in this Court because he is entitled to bail and the district court has not indicated if (or when) it will rule on his motion. He

has advised the lower court of this motion, *id.*, and will do so again following the filing of this motion.

ARGUMENT

In *Ciminelli*, this Court granted certiorari to determine the validity of the Second Circuit's "right to control" theory of fraud under the federal wire fraud statute. At least two—and arguably three—other circuits have rejected this "right to control" theory. Pet. at 4, 30-35. If this Court ultimately rules in favor of the petitioner in *Ciminelli* and rejects the Second Circuit's "right to control" theory, Petitioner's petition for writ of certiorari will likely be granted, the decision of the Second Circuit will be vacated, and his case will be remanded for further proceedings consistent with *Ciminelli*. This would likely result in reversal of Petitioner's conviction. And of particular importance for this motion, a decision in favor of Ciminelli—and rejecting the Second Circuit's "right to control theory"—will mean Petitioner has served over seven years of his 12-year prison sentence (the last 15 months of which have been in home confinement)[3] for conduct *that is not a federal crime*. Bail pending resolution of his petition is needed to avoid that unjust result.

18 U.S.C. § 3143(b) sets forth the standard for release pending direct appeal of a conviction. A defendant is entitled to remain at liberty if a judicial officer,

[3] Petitioner surrendered to the Bureau of Prisons on July 1, 2016, and was incarcerated in federal institutions until August 24, 2021, when he was permitted to continue serving his sentence on home confinement, a condition that the BOP may revoke.

including a Member of this Court, finds "by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released on conditions"; and "that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in – (i) reversal, (ii) an order for a new trial, (iii) a sentence that does not include a term of imprisonment, or (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process." 18 U.S.C. § 3143(b)(1).

The inquiry for bail for a habeas petitioner is similar. As Justice Douglas stated in *Aronson v. May*, 85 S. Ct. 3, 5 (1964) (Douglas, J.): "[I]t is [] necessary to inquire whether, in addition to there being substantial questions presented by the appeal, there is some circumstance making this application exceptional and deserving of special treatment in the interests of justice." (citation omitted). The Second Circuit has adopted this test as the standard for bail pending review of a habeas petition. *See Ostrer v. United States*, 584 F.2d 594, 599 (2d Cir. 1978); *see also Mapp v. Reno*, 241 F.3d 221, 223, 226 (2d Cir. 2001). Petitioner readily meets this standard, and he would likewise satisfy section 3143(b)'s similar criteria.[4]

To start, there is no dispute that Petitioner is unlikely to flee, that he poses no danger to the safety of any other person or the community if released, and that

[4] Petitioner applies section 3143(b) in addition to the standard outlined in *Aronson* to demonstrate that he could also satisfy the criteria for bail pending direct appeal of his conviction—the same standard the government presumably concluded the *Ciminelli* co-defendants have met.

he pursues his appeal for a legitimate reason and not for purposes of delay. Indeed, Petitioner was released on bail before trial and pending direct appeal, he self-surrendered to the Bureau of Prisons, and upon the change of his incarceration to home confinement, he has complied with all requirements of his current form of imprisonment. Accordingly, the questions for this Court are (1) whether Petitioner has "raise[d] a substantial question of law or fact" likely to result in reversal or a new trial should he prevail on that question and (2) whether there are exceptional circumstances. The answer to both questions is "yes."

The question presented in Petitioner's petition (and in *Ciminelli*) is substantial. Most courts, including the Second Circuit and the Southern District of New York, define a "substantial" question as a "close" one—one that could very well be decided the other way. *E.g., United States v. Molt*, 758 F.2d 1198, 1200 (7th Cir. 1985); *United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985) (a substantial question is "a 'close' question or one that very well could be decided the other way"); *United States v. Bayko*, 774 F.2d 516, 523 (1st Cir. 1985) (adopting the *Giancola* test); *United States v. Randell*, 761 F.2d 122, 125 (2nd Cir. 1985) ("We do not believe that these definitions of 'substantial' differ significantly from each other, but if we were to adopt only one, it would be the language of *Giancola*."); *United States v. Valera-Elizondo*, 761 F.2d 1020, 1024 (5th Cir. 1985) (following *Giancola*); *United States v. Powell*, 761 F.2d 1227, 1231-32 (8th Cir. 1985) (same); *United States v. Affleck*, 765 F.2d 944, 952 (10th Cir. 1985) (same); *United States v. Perholtz*, 836

F.2d 554, 555-56 (D.C. Cir. 1988) (same); *United States v. Percoco*, No. 16-CR-776 (VEC), 2019 WL 493962, at *4 (S.D.N.Y. Feb. 8, 2019) (applying *Randell*).

Given the importance of the question presented in *Ciminelli*, the sharp split in the circuits, this Court's decision to grant review in *Ciminelli*, and the present hold on Petitioner's petition, it is clear that the question presented in the petition—which mirrors that in *Ciminelli*, *see supra* Table at page 2—is substantial. At least four Members of this Court have implicitly concluded that there are "compelling reasons" for reviewing the "right to control" theory, such as a conflict between courts of appeals on an important question of federal law. *See* S. Ct. Rule 10.

On this point, *Costello v. United States* is instructive. 74 S. Ct. 847 (1954) (Jackson, J.) (mem.). There, although Costello had not been granted review by this Court for his case, the Court granted certiorari in other cases raising the same issue of law. *Id.* Justice Jackson thus followed a "necessary inference for purposes of this application . . . that the Court deems a substantial question of general application to exist" in cases raising the issue on which the Court had granted review. *Id.* Petitioner's case is no different: the same question of law is at issue in *Ciminelli*, the *Ciminelli* petition presents a "substantial question of law," and thus the "necessary inference" is that Petitioner has raised a substantial question of law, too.

The government cannot credibly dispute that Petitioner has raised a substantial question. Immediately upon the Supreme Court's grant of certiorari in *Ciminelli*, the government agreed to release Ciminelli and his co-defendants on bail. All were convicted on the same "right to control" theory as Petitioner, and all were

released with the government's agreement. The defense letter to District Judge Caproni represented that the parties agreed the question presented was substantial. Ex. D at 2 ("The Supreme Court's grants of certiorari to review these questions necessarily establishes that they are substantial questions, which if resolved favorably to the Defendants will result in reversal of their convictions."). Further, in its merit brief before this Court in *Ciminelli*, the government *conceded* that the Second Circuit's right-to-control theory "is incorrect." Gov't Br. 24, *Ciminelli v. United States*, No. 21-1170. The government acknowledged that treating "the right to make informed decisions about the disposition of one's assets . . . as the sort of 'property' giving rise to wire fraud [] would risk expanding the federal fraud statutes beyond property fraud as defined at common law and as Congress would have understood it." *Id.* 25-26. The government conceded the same in oral argument before this Court. *See* Oral Arg. Tr. 52:8-16, *Ciminelli v. United States*, No. 21-1170 (Nov. 28, 2022); *id.* 32:25-33:7.

And finally, the government has at least implicitly conceded that, although the Supreme Court has not yet ruled in Ciminelli's case, Petitioner's circumstances are—like the *Ciminelli* co-defendants'—unusual or extraordinary. Otherwise, the government would not have so quickly agreed to bail for the *Ciminelli* co-defendants or asked the Supreme Court to hold Petitioner's petition pending resolution of *Ciminelli*. The government has failed to explain its differing treatment of nearly identical circumstances, and the government's response to Petitioner's petition in fact concedes similarity between Petitioner and the *Ciminelli* co-defendants, stating

that "[b]ecause this Court's resolution of the questions presented in both *Ciminelli* and *Jones* may affect the judgment of the court of appeals below [in Petitioner's case], the Court should hold the petition for a writ of certiorari pending its decisions in those cases and then dispose of the petition as appropriate." The government simply has not provided any valid basis for denying Petitioner his freedom while this Court resolves his petition for writ of certiorari.

CONCLUSION

Petitioner Michael Binday respectfully asks the Court to enter an order that he be released on bail immediately so that he may enjoy the freedom afforded to the similarly situated *Ciminelli* co-defendants while this Court determines the validity of the Second Circuit's "right to control" theory of fraud.

Respectfully submitted,

David W. Shapiro

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MICHAEL BINDAY, : Case No. 12-cr-00152-CM

Petitioner

v. :

UNITED STATES OF AMERICA,

Respondent. :

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NOTICE OF MOTION AND MOTION FOR BAIL PENDING RESOLUTION OF MOTIONS PURSUANT TO SECTIONS 2255/2241

PLEASE TAKE NOTICE that Michael Binday, by his counsel David W. Shapiro, hereby moves to be released on bail pending resolution of his pending motion to vacate his conviction and sentence pursuant to 28 U.S.C. §§ 2255 and 2241, pursuant to the authority of this Court to grant bail when an inmate demonstrates a substantial claim and extraordinary circumstances.

MEMORANDUM OF LAW IN SUPPORT OF MICHAEL BINDAY'S MOTION FOR BAIL PENDING RULING ON HIS 28 U.S.C. § 2255/2241 MOTION

PROCEDURAL BACKGROUND AND RECENT LEGAL DEVEOPMENTS

On July 31, 2014, Michael Binday was convicted of mail and wire fraud after trial. After his conviction was affirmed on appeal, he moved for rehearing en banc and for certiorari because the government's theory of "property" was inconsistent with Supreme Court precedent in *Skilling v. United States*, 130 S. Ct. 2896 (2010), and *Cleveland v. United States*, 531 U.S. 12 (2000). The Second Circuit denied his rehearing petition, and the Supreme Court denied certiorari.

On May 7, 2020, the Supreme Court decided *Kelly v. United States*, 140 S. Ct. 1565 (2020), and it ruled that the government must prove the defendant's object was to obtain property, in contrast to the Second Circuit's construction that "the mail and wire fraud statutes do not require a defendant to obtain or seek to obtain property," *United States v. Finazzo*, 850 F.3d 94, 107 (2d Cir. 2017). In *Kelly*, the government claimed that the Port Authority's "control" over a bridge's lane allocation was "property," such that defendants' scheme to "commandeer" that right violated the wire fraud statute. *Id*. at 1569. The Supreme Court said no and explained the right to "control" access to the bridge was not "property." While defendants had "exercised" (for selfish reasons) the Port Authority's "regulatory rights of allocation, exclusion, and control," such rights were not "property" protected by the fraud statutes. *Id*. at 1572-73

More recently, the Supreme Court vacated the judgment in *United States v. Blaszczak*, 947 F.3d 19, 32-33 (2d Cir. 2019), *cert. granted, judgment vacated sub nom. Olan v. United States*, 141 S. Ct. 1040 (2021), at the government's request and in light of *Kelly*. On remand to the Second Circuit, and on April 2, 2021, the government confessed error, conceding that the "predecisional confidential information" of a government agency (the CMS) was not property, contrary to the Second Circuit's conclusion that it was. The government admitted that a putative victim's labor and resource costs do not constitute property unless the defendants sought to obtain those resources through material and knowing false statements. The government asked the Second Circuit to reverse the defendants' fraud convictions.

Binday incorporates the facts and legal arguments of his 2255 motion in this motion for bail.

FACTS RELEVANT TO THIS MOTION

On July 1, 2016, Michael Binday surrendered to begin serving his 144-month prison sentence. He has served 57 months. According to the Bureau of Prisons calculation on the inmate locator website, Binday will be released September 20, 2026 (and likely would be released to home confinement in March 2026). In addition, because of his age, Binday could be released to home confinement on June 30, 2024 under the elderly home confinement provisions (and that does not include good time credits).

These calculations do not consider other credits against his sentence to which Binday may be entitled, such as Earned Time Credits under the First Step Act and early

release under the pending COVID–19 Safer Detention Act of 2021. If and when those credits are applied, Binday believes he has now served 50% of his sentence.

ARGUMENT

BINDAY HAS RAISED SUBSTANTIAL CLAIMS IN HIS 2255/2241 MOTION AND EXTRAORDINARY CIRCUMSTANCES EXIST TO JUSTIFY RELEASING HIM ON BAIL

A "district court has inherent power to enter an order affecting the custody of a habeas petitioner who is properly before it contesting the legality of his custody." *Ostrer v. United States*, 584 F.2d 594, 596 n.1 (2d Cir.1978) (citing *Johnston v. Marsh*, 227 F.2d 528, 531 (3d Cir. 1955)). The Second Circuit has recognized that a habeas petitioner should be granted bail when "'extraordinary or exceptional circumstances exist which make the grant of bail necessary to make the habeas remedy effective.'" *Id*. (quoting *Calley v. Callaway*, 496 F.2d 701, 702 (5th Cir.1974)). *See Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001) ("Petitioner must demonstrate that the habeas petition raise[s] substantial claims and that extraordinary circumstances exist[] that make the grant of bail necessary to make the habeas remedy effective").

Where a defendant shows that a change in the law has made the conduct for which he was convicted no longer criminal, he has established both a substantial claim and an extraordinary circumstance justifying bail pending final resolution of a 2255 motion. *See Binion v. United States*, 352 U.S. 1028, 1028 (1957); *United States v. Thompson*, 152 F. Supp. 292 (S.D.N.Y. 1957) (where defendant had served more time in prison than that which the Supreme Court might deem constitutional in a case in which the Court had

accepted certiorari, the defendant was admitted to bail). Otherwise, the defendant who has not committed a crime will remain in prison during the necessarily extended process of reviewing, deciding, and appealing his 2255 motion. *See United States v. Geddings*, 2010 WL 2639920 at *1 (June 29, 2010 E.D.N.C.) (granting bail to defendant convicted of fraud on a theory of fraud rejected by the Supreme Court in *Skilling*).

Here, Binday has established a substantial claim and extraordinary circumstances.

<u>Binday's Substantial Claim</u>

Binday was convicted of fraud for depriving insurers of information relevant to their decisions to enter into insurance contracts. The Second Circuit relied on "four specific discrepancies or harms" to the insurers from selling STOLI policies, and "reputational concerns," which denied the insurers the "right to control" their "assets" to affirm Binday's conviction. *United States v. Binday*, 804 F.3d 558, 567, 570, 573 (2d Cir. 2015). That decision was consistent with Second Circuit precedent because, as explained by Judge Kaplan in *Gatto* and as the Second Circuit held in *Finazzo*, the government need not prove that a defendant sought to obtain any property. However, according to the Supreme Court in *Kelly*, deceit accompanied by incidental economic harm to the victim is not fraud unless the defendant's object was to obtain money or property for himself or others.

Now the government has conceded in *Blaszczak* that the economic effects of deceptions like Binday's cannot be considered "property." It conceded that, after *Kelly*, the "confidential information at issue in this case" – that is, the CMS decision-making process concerning "upcoming changes to agency rules governing reimbursement rates"

– "does not constitute 'property'" because, even though the CMS invested time and resources into generating the confidential information, the defendants' object was not to obtain those resources. Brief on Remand for the United States at 3, 8, 13. (A copy of the government's brief is attached as an exhibit to this motion.)

With respect to just one criminal charge against the defendants (fraud against the government under 18 U.S.C. § 371), the government argued that there was a *Yates v. United States*, 354 U.S. 298 (1957), error (legally valid and invalid criminal liability theories in the same case), but the error was harmless. Its reasoning regarding section 371 is irrelevant here. What is significant is that the government did not argue that other formulations or characterizations of property interests in the case were proper for the wire fraud convictions or that the *Kelly* error was harmless.

It is therefore relevant to Binday's motions to review the property identified by the government and the Second Circuit in *Blaszczak*. The government argued on appeal that there was sufficient evidence to convict the defendants because "confidential government information," like the confidential business information in *Carpenter v. United States*, 484 U.S. 19, 27 (1987), has value and is therefore property. Brief of the United States, *United States v. Blaszczak*, Case No. 18-2811, Doc. 201 at 106-07. It asserted that *Cleveland* was inapposite because the decision "narrowly" held that an unissued license in the government's hands is not property, *id*. at 107, 109. Citing *Fountain* (which Binday discussed at page 20 of his pending 2255/2241 motion), the government argued that it does not matter that a right to regulate versus a right to revenue is implicated by the defendant's conduct because "confidential information … has long been recognized as

property … and the fraud statutes likewise forbid its misappropriation." *Id*. at 110. It contended that the defendants interfered with CMS's "right to control its confidential information" and thus violated the fraud statutes. *Id*. at 59, 67, 126, 127, 130.

In affirming the convictions, the Second Circuit embraced the government's narrow view of *Cleveland*, reaffirmed its broad construction of the word "property" to include the right to control (or, as the Second Circuit phrased it in *Blaszczak*, the "right to exclude"), and reiterated its belief that the government need not prove the defendant's object was to obtain the identified property (as opposed to causing incidental economic harm). It held that "property" means "something of value"; confidential information has value and thus can be "property"; courts have "consistently rejected attempts" to apply *Cleveland*'s holding "expansively"; CMS's "right to exclude" the public from its internal (confidential) information is property; and CMS had an economic interest in that confidential information because it invested "time and resources into generating" its "nonpublic predecisional information." *Blaszczak*, 947 F.3d at 32-33.

That holding conflicted with *Kelly*, according to the government. A person who interferes with a putative victim's decision-making, right to control, right to exclude, etc. through false statements or otherwise cannot be guilty of fraud without proof that his *object* was to *obtain* those rights (which must be traditional concepts of property) for himself or others. Without that proof, any economic harm or impact on the victim is incidental to the deceit, but not criminal. Moreover, prosecutors cannot claim that "property" means one thing for the government and another for businesses or individuals. "Object" and "obtain" mean the same thing in all mail/wire fraud prosecutions.

The government's confession of error in *Blaszczak* confirms that Binday's current 2255/2241 motion is meritorious: the object of his conduct was to buy and pay for insurance, while earning commissions on the sales. The "property" identified by the government – lower profits from STOLI policies and reduced reputation – were incidental economic harms that do not constitute property because Binday did not seek to obtain either one (even assuming one can obtain another's lower profits and reputation in the circumstances of Binday's case). "Predecisional confidential information" is just another way to express the "right to control" one's decision-making process.

In Binday's case, the government did not contend that the insurers' lower profits and negative reputational impacts were Binday's object. To the contrary, the government contended that Binday lied to earn commissions for fully paid policies. Binday wasn't trying to damage the insurers; he was trying to buy and pay for insurance policies.

Moreover, the jury instructions did not limit the jury's consideration to Binday's object and explain that incidental economic harm does not constitute property unless it is the defendant's object. The jury was therefore authorized to convict Binday solely on his deceptive statements in insurance applications and without regard to the object of his conduct or the incidental nature of the economic harm caused to the insurers.

Binday's prosecution was grounded in theories that are not crimes; there are no alternative, legal theories to which the government may point to support the convictions; and there are no separate counts charging other crimes or particular transactions untainted by the government's illegal theory.

<u>Extraordinary Circumstances Support a Release on Bail</u>

Binday has completed a significant part of his prison sentence. He is eligible for release to home detention; the ordinary delays inherent in motion practice and appeals may, and likely will, extend for at least one year and maybe more. Given the tenuous nature of Binday's conviction, fairness dictates in favor of his release on bail. Having fully complied with all conditions of his release pending trial and appeal, and thereafter, Binday has proved himself to be an excellent candidate for bail.

CONCLUSION

For the foregoing reason, Binday respectfully requests that this Court order that he be released on bail immediately.

Respectfully Submitted,

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David W. Shapiro, NY Bar #2054054
The Norton Law Firm
dshapiro@nortonlaw.com

EXHIBIT B

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DEBRA ANN LIVINGSTON
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: May 06, 2021
Docket #: 21-1206
Short Title: Binday v. United States of America

DC Docket #: 17-cv-4723
DC Court: SDNY (NEW YORK CITY)
DC Judge: McMahon

NOTICE REGARDING A SECOND OR SUCCESSIVE APPLICATION FOR A WRIT OF HABEAS CORPUS OR 28 U.S.C. §2255 MOTION

The district court has transferred to this Court the above-referenced second or successive application for a writ of habeas corpus or 28 U.S.C. § 2255 motion. The papers were transferred because you did not seek this Court's permission prior to filing with the district court as required by 28 U.S.C § 1631. A copy of the transfer order is enclosed.

The applicant must file with this Court within 45 days of the date of this notice an application for permission to file with the district court.

Enclosed are instructions on how to file and an application form which must be used to file the request for permission. File an original and two copies of the application and all attachments, with proof of service on all parties to the appeal or their counsel. Service may be accomplished by mail; a signed statement that all parties have been served is sufficient to show proof of service.

Inquiries regarding this case may be directed to 212-857-8546.

EXHIBIT C

S.D.N.Y.–N.Y.C.
12-cr-152
17-cv-4723
McMahon, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 12th day of October, two thousand twenty-one.

Present:

Pierre N. Leval,
Robert D. Sack,
Michael H. Park,
Circuit Judges.

Michael Binday,

Petitioner,

v. 21-1206

United States of America,

Respondent.

Petitioner moves for leave to file in district court a 28 U.S.C. § 2255 motion and/or 28 U.S.C. § 2241 petition. He also moves for leave to file an oversized reply brief. Upon due consideration, it is hereby ORDERED that the stay previously imposed by this Court is lifted, the motion to file an oversized reply brief is GRANTED, but the motion for leave to file a § 2255 motion and/or § 2241 petition is DENIED.

To the extent Petitioner's claim should be brought under § 2255, it would be successive within the meaning of § 2255(h) because Petitioner's first § 2255 motion challenged the same criminal judgment, was decided on the merits, and reached final adjudication before the filing of the present motion. *See Vu v. United States*, 648 F.3d 111, 113 (2d Cir. 2011); *Whab v. United States*, 408 F.3d 116, 118-19 (2d Cir. 2005). We reject Petitioner's argument that a claim based on *Kelly v. United States*, 140 S. Ct. 1565 (2020), would not be successive because that decision announced new law that was previously unavailable; § 2255(h) clearly covers that circumstance and the cases cited by Petitioner are inapposite. Petitioner is not entitled to relief under § 2255(h) because he has not made a prima facie showing that *Kelly* announced "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable,"

as required by § 2255(h)(2). *Kelly* interpreted a statute and did not rely on any constitutional provision.

Petitioner also has not made a showing that he is entitled to relief under § 2241 because he has not made a showing of actual innocence. *See Cephas v. Nash*, 328 F.3d 98, 104 (2d Cir. 2003) (stating standard for proceeding under § 2241 instead of § 2255); *Triestman v. United States*, 124 F.3d 361, 373–74 (2d Cir. 1997) (same). This Court has recently upheld the theory of conviction challenged by Petitioner, *United States v. Gatto*, 986 F.3d 104, 125–27 (2d Cir. 2021), *petition for cert. filed*, No. 21-169 (Aug. 2, 2021), and he has not otherwise shown that his case is covered by the ruling in *Kelly*.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

UNITED STATES SECOND CIRCUIT COURT OF APPEALS

EXHIBIT D

Michael C. Miller
212 506 3955
mmiller@steptoe.com
1114 Avenue of the Americas
New York, NY 10036
212 506 3900 main
www.steptoe.com

July 1, 2022

Via ECF

Hon. Valerie E. Caproni
United States District Court Judge
Southern District of New York
40 Foley Square
New York, NY 10007

Re: ***United States v. Percoco, et al.*** **(Case No. 16-cr-776)**

Dear Judge Caproni:

We are writing on behalf of our client Alain Kaloyeros and, with the consent of their counsel, on behalf of Louis Ciminelli, Steve Aiello and Joseph Gerardi.

On June 30, 2022, the Supreme Court granted certiorari to review the validity of both a) the "right to control" theory that formed the basis of the wire fraud convictions of Defendants Kaloyeros, Aiello, Gerardi, and Ciminelli[1], and b) the fiduciary-duty theory that formed the basis of the honest-services fraud conviction of Aiello.[2]

---

[1] *See Ciminelli v. United States*, __ S. Ct. __, 2022 WL 2347619 (Mem.) (granting review of "[w]hether the Second Circuit's 'right to control' theory of wire fraud ... states a valid basis for liabiliity under the federal wire fraud statute," Pet. for Certiorari, *Ciminelli v. United States* (No. 21-1170), 2022 WL 566444, at *1 (U.S., filed Feb. 18, 2022)).

[2] *See Percoco v. United States*, __ S. Ct. __, 2022 WL 2347617 (Mem.) (granting review of whether "a private citizen who holds no elected office or government employment, but has informal political influence over governmental decisionmaking, owe[s] a fiduciary duty to the general public such that he [is subject to the] honest-services fraud" statute, Pet. for Certiorari, Percoco v. United States (No. 21-1158), 2022 WL 542882, at *i (U.S., filed Feb. 2022).

The Supreme Court's grants of certiorari to review these questions necessarily establishes that they are substantial questions, which if resolved favorably to the Defendants will result in reversal of their convictions. *See* 18 U.S.C. § 3143(b)(1)(B)[3]; *United States v. Randell*, 761 F.2d 122, 124-25 (2d Cir. 1985).[4] And it is undisputed that none of the Defendants present a flight or safety risk, as this Court found when it granted the Defendants release pending appeal and voluntary self-reporting. *See* § 3143(b)(1)(A). Thus, Defendants Kaloyeros, Aiello, Gerardi and Ciminelli are entitled to release pending disposition of their petitions for certiorari, under § 3143(b)(1)(b)(i) and (ii).

Accordingly, Defendants Kaloyeros, Aiello, Gerardi, and Ciminelli respectfully request release pending disposition of certiorari review under § 3143(b)(1). We request that the release be forthwith, on the conditions the Court previously imposed, with those conditions to be met by the Defendants within one week after being released. In addition, we respectfully request that the Defendants not be required to post any cash as a condition of release.

After consultation, counsel for the government has given the government's consent to release on bail Defendants Kaloyeros, Aiello, Gerardi, and Ciminelli, on the conditions the Court previously imposed, with those conditions to be met by the Defendants by one week after release. In addition, the government has stated it does not object to the Defendants not being required to post any cash as a condition of release.

We are submitting a proposed order under separate cover. *See* ECF Rule 18.6.

Respectfully submitted,

Michael C. Miller

cc: All Counsel (via ECF)

---

[3] Section 3143(b)(1) authorizes this Court to grant release for defendants who have "filed an appeal *or a petition for a writ of certiorari*." *Id.* (emphasis added).

[4] When it granted Defendant Gerardi bail pending appeal, this Court ruled that "[i]f Mr. Gerardi's and his co-Defendants' convictions for wire fraud and conspiracy to commit wire fraud were to be reversed, there is a substantial question whether his conviction for false statements would require a new trial, due to the risk of prejudicial spillover from the fraud counts." Dkt. 973, at 1.

EXHIBIT E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

ALAIN KALOYEROS,
STEVEN AIELLO,
JOSEPH GERARDI, and
LOUIS CIMINELLI,

Defendants.

Case No. 16-cr-00776 (VEC)

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 7/1/2022

~~[PROPOSED]~~ ORDER

THIS MATTER having come before the Court upon the unopposed application of Defendants Alain Kaloyeros, Louis Ciminelli, Steven Aiello, and Joseph Gerardi ("Moving Defendants") (ECF No. 1043); and the Court having considered the relevant papers and arguments; and the Court finding by clear and convincing evidence that Moving Defendants are neither a flight risk nor a safety concern; and the Court finding that Moving Defendants' appeal raises substantial questions justifying release on bail; and for other good cause shown:

IT IS, on this 1st day of July 2022:

1. **ORDERED** that Moving Defendants' Motion for Bail is GRANTED pending disposition of *Ciminelli v. United States* (No. 21-1170) and *Percoco v. United States* (No. 21-1158) in the United States Supreme Court and, in the event Moving Defendants' conviction is not affirmed, for such additional time as the case remains on appeal; and it is further

2. **ORDERED** that, in accordance with the above, the Bureau of Prisons shall release Moving Defendants FORTHWITH; and it is further

3. **ORDERED** that the conditions of bail in place immediately prior to Moving Defendants' surrender to serve their sentence are reimposed, with Moving Defendants to re-execute their previously entered personal recognizance bonds within seven days of their release, EXCEPT THAT no posting of cash bail shall be required.

Date: 7/1/2022

HONORABLE VALERIE E. CAPRONI
UNITED STATES DISTRICT JUDGE

EXHIBIT F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

--- x

MICHAEL BINDAY,	:	Case No. 12-cr-00152-CM
Petitioner		
v.	:	
UNITED STATES OF AMERICA,		
Respondent.	:	

--- x

NOTICE OF MOTION AND MOTION FOR BAIL PENDING RESOLUTION OF MICHAEL BINDAY'S PETITION FOR A WRIT OF CERTIORARI

PLEASE TAKE NOTICE that Michael Binday, by his counsel David W. Shapiro, hereby moves to be released on bail pending resolution of his petition for a writ of certiorari to the Supreme Court, pursuant to the authority of this Court to grant bail when an inmate demonstrates a substantial claim accompanied by unusual or extraordinary circumstances.

Because each day of incarceration is contrary to the courts' consensus that the habeas remedy is defeated when a prisoner raises substantial claims that the Supreme Court may vindicate, Binday respectfully requests that this Court shorten the time in which the government is required to oppose this motion.

Prior Proceedings

On March 12, 2021, Michael Binday filed a motion to vacate his convictions pursuant to 28 U.S.C. §§ 2255 and 2241. He simultaneously moved for bail. Doc. 484. This Court transferred Binday's motions to the Second Circuit. On October 12, 2021, the court of appeals denied Binday permission to file the section 2255 motion and denied his 2241 habeas petition, rejecting Binday's argument that the Supreme Court decision in

Kelly v. United States, 140 S. Ct. 1565 (2020), undermined the Second Circuit's "right to control" theory of property – the theory under which Binday was convicted at trial.

This Court did not rule on Binday's bail motion. Binday incorporates the facts and legal arguments in his prior bail motion here.

ARGUMENT

The Court should grant Binday bail now because his petition for certiorari raises a question of constitutional law and statutory construction that the Supreme Court has agreed to review this term in *Ciminelli v. United States*, No. 21-1170. The Supreme Court has held that bail is proper in such situations. The government concedes that Binday has raised a substantial question likely to result in reversal of his conviction; his ongoing home confinement and deprivation of liberty undermines the habeas remedy. It is thus an unusual case. *See Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001) ("Petitioner must demonstrate that the habeas petition raise[s] substantial claims and that extraordinary circumstances exist[] that make the grant of bail necessary to make the habeas remedy effective.").

Binday's Current Petition Raises the Same Claims as *Ciminelli v. United States*

On February 18, 2022, the defendants in *Ciminelli v. United States*, No. 21-1170, filed petitions for certiorari in the Supreme Court. Ciminelli's question presented was as follows: "Whether the Second Circuit's 'right to control' theory of fraud—which treats the deprivation of complete and accurate information bearing on a person's economic decision as a species of property fraud—states a valid basis for liability under the federal wire fraud statute, 18 U.S.C. § 1343."

Following the denial of his petition in the Second Circuit, on March 10, 2022, Binday filed a petition for a writ of certiorari in the Supreme Court, arguing again that the right to control theory is inconsistent with Supreme Court case law. He raised the same question Ciminelli raised because, like Ciminelli, he was convicted on the same theory that "property" in the fraud statutes includes the intangible property right of decision-making associated with owning something or deciding whether to enter a contract.

On March 23, 2022, the government waived its right to respond to Binday's certiorari petition.

On March 29, 2022, Binday's petition was distributed for the Supreme Court's April 14, 2022 conference.

On April 6, 2022, the Supreme Court rescheduled Binday's conference date, later moving the conference to June 23, 2022.

On May 24, 2022, the government opposed Ciminelli's and his co-defendants' writ petitions.

On June 21, 2022, the Court asked the government to respond to Binday's petition.

On June 30, 2022, the Supreme Court granted Ciminelli's petition, holding his co-defendants' petitions that also challenged the right to control theory without granting or denying them. The effect of that "hold" is to authorize one defendant to argue the merits that will dictate the result for all four defendants. *See Watson v. Butler*, 483 U.S. 1037, 1038 (1987) ("[t]hree votes suffice to hold a case" pending decision in a case pending review). The Court does not announce that it is holding a case. See *Opposing Certiorari in the Supreme Court,* ABA Litigation Manual (3d ed.), https://www.mayerbrown.com/en/perspectives-events/publications/1999/01/opposing-certiorari-in-the-us-supreme-court ("The Court does not announce that it is holding a petition. However, you will know that your case is being held if it is not disposed of on the order list following the conference at which it was considered."). If the decision in the case that was accepted for review might affect the held case, then the Court will grant, vacate, and remand the case to the lower court. *See Henry v. City of Rock Hill*, 376 U.S. 776, 776 (1964).

Immediately after the Supreme Court granted review, the government agreed to release the *Ciminelli* co-defendants on bail because the parties agreed that the grant of certiorari raised a substantial question that will result in reversal if the Court agrees with the defendants. Exhibits 1 and 2 attached (letter and district court order).

On July 5, 2022, Binday asked the government to agree to bail for Binday. The government declined. When asked why the government saw a distinction between Binday and the Ciminelli petitioners, the government did not respond.

The government responded to Binday's petition on September 21, 2022. It did not oppose Binday's petition, but rather asked the Court to hold Binday's petition along with those filed in *Ciminelli*:

> This Court has granted review in *Ciminelli* v. *United States*, No. 21-1170 (June 30, 2022), to determine the validity of the "Second Circuit's 'right to control' theory of fraud" under the federal wire-fraud statute. Pet. at i, *Ciminelli*, *supra* (No. 21-1170). It has also granted review in *Jones* v. *Hendrix*, No. 21-857 (oral argument scheduled for Nov. 1, 2022), to address the circumstances in which a federal prisoner may be entitled to seek relief under Section 2241 on the ground that his conviction is invalid under an intervening retroactive decision of statutory interpretation. Pet. at i, *Jones*, *supra* (No. 21-857). Because this Court's resolution of the questions presented in both *Ciminelli* and *Jones* may affect the judgment of the court of appeals below, the Court should hold the petition for a writ of certiorari pending its decisions in those cases and then dispose of the petition as appropriate.

Binday v. United States, Supreme Court, No. 21-1241 (Sept. 21, 2022).[1]

Binday filed a reply on October 4, 2022 agreeing that his petition should be held pending a decision in *Ciminelli*. The Court then distributed Binday's petition and related filings for its October 28, 2022 conference.

On October 28, 2022, the Court did not deny or grant Binday's certiorari petition, meaning that it has held his petition pending a decision in *Ciminelli*. That decision is reflected in the order list released today, October 31, 2022, which omits Binday's case.

---

[1] In *Jones*, the Supreme Court will decide whether to approve the Second Circuit's construction of section 2255(e), allowing people who have previously filed a 2255 motion to use a traditional habeas petition to raise a constitutional or statutory claim of actual innocence that was not previously available to them. The decision in *Jones* will not affect Binday if the Court reverses in *Ciminelli* because Binday (unlike Jones) argued that the right to control theory was unconstitutional on direct appeal and thus preserved his actual innocence claim.

ARGUMENT

DEVELOPMENTS IN THE SUPREME COURT AND THE GOVERNMENT'S AGREEMENT TO BAIL FOR THE *CIMINELLI* DEFENDANTS CREATED EXTRAORDINARY CIRCUMSTANCES JUSTIFYING BAIL FOR BINDAY

The Legal Standard for Granting Bail When the Supreme Court Has Granted Review

Federal district judges in habeas corpus and section 2255 proceedings have inherent power to admit applicants to bail pending the decision of their cases. Thus, a habeas petitioner should be granted bail in "unusual cases" or where "extraordinary or exceptional circumstances exist which make the grant of bail necessary to make the habeas remedy effective." *Ostrer v. United States*, 584 F.2d 594, 596 n.1 (2d Cir. 1978). "[H]abeas corpus is, at its core, an equitable remedy," *Schlup v. Delo*, 513 U.S. 298, 319 (1995), and is to "be administered with ... initiative and flexibility ...." *Harris v. Nelson*, 394 U.S. 286, 291 (1969).

When the Supreme Court grants certiorari in a case, or on a particular issue that may affect other pending cases, the "applicant should be admitted to bail while the questions of law in his case are being settled." *Costello v. United States*, 74 S. Ct. 847, 847 (1954).

The habeas and direct appeal bail standards are the same. Bail pending appeal is proper when the defendant can show by clear and convincing evidence that he is unlikely to flee, his appeal "raises a substantial question that is likely to result in reversal" of his conviction, and he shows exceptional circumstances. 18 U.S.C. §§ 3143(b) and 3145(c). *See United States v. DiSomma,* 951 F.2d 494, 496 (2d Cir. 1991) (consider first two elements and then whether there are exceptional circumstances in granting bail pending appeal).

A "substantial question" is "one of more substance than would be necessary to a finding that it was not frivolous. It is a 'close' question or one that very well could be decided the other way." *United States v. Randell*, 761 F.2d 122, 125 (2d Cir. 1985) (citation omitted).

Where a petitioner for certiorari to the Supreme Court presents a question identical to that of another petitioner whose certiorari petition has been granted, he has demonstrated both a substantial claim and the kind of unusual circumstance justifying bail pending final resolution of his writ petition. Thus, in *Binion v. United States*, 352 U.S. 1028, 1028 (1957), two individuals who filed certiorari petitions to the Supreme Court raising the same question as a third individual whose writ petition was pending oral argument were granted bail: "The question petitioners raise was discussed but not decided in [an earlier case]. This question is presented in Achilli v. United States, No. 430, which the Court has set for hearing during the week of April 29. Pending final determination of this question, we think petitioners are entitled to bail, the Government having presented no adequate reason why bail should not be granted." *Id*. at 1029.

Similarly, the district court in *United States v. Thompson,* 152 F. Supp. 292 (S.D.N.Y. 1957), granted bail where the defendant had served more time in prison than that which the Supreme Court might deem constitutional in a case in which the Court had accepted certiorari. Otherwise, the defendant who has not committed a crime will remain in custody during the necessarily extended process of reviewing, deciding, and appealing his habeas petition. *See United States v. Geddings*, 2010 WL 2639920 at *1 (June 29, 2010 E.D.N.C.) (granting bail to defendant convicted of fraud on a theory of fraud rejected by the Supreme Court in *Skilling*).

Binday Has Met the Requirements for Release on Bail

Taking the bail standard elements in order:

First, Binday is no risk of flight or a danger to the community. He was released on bail before trial and pending appeal, he self-surrendered to the Bureau of Prisons, and upon the change of his incarceration to home confinement, he has complied with all requirements of his current form of imprisonment.

Second, the government cannot dispute that Binday has raised a substantial question: immediately upon Supreme Court's grant of certiorari in *Ciminelli*, the government agreed to release Ciminelli and all his co-defendants on bail. All were convicted on the same "right to control" theory as Binday; all were released with the

government's agreement. The defense letter to District Judge Caproni represented that the parties agreed the question presented was substantial.

Third, the government also at least implicitly concedes that, even though the Supreme Court has not yet ruled in Ciminelli's case, Binday's circumstances are unusual or extraordinary. Otherwise, it would not have so quickly agreed to bail for the Ciminelli defendants or asked the Supreme Court to hold Binday's petition with Ciminelli's. The government has not explained why it considers Binday in a different position as Ciminelli, but there is no difference. Both are properly before the Supreme Court on the same issue. Indeed, the Solicitor General's response to Binday's petition concedes that similarity, stating that "[b]ecause this Court's resolution of the questions presented in both *Ciminelli* and *Jones* may affect the judgment of the court of appeals below [in *Binday*'s case], the Court should hold the petition for a writ of certiorari pending its decisions in those cases and then dispose of the petition as appropriate."

The government made no effort to distinguish Binday from Ciminelli and thus his circumstances do not justify the conflicting positions the government has taken with respect to these two petitioners.

CONCLUSION

For the foregoing reason, Binday respectfully requests that this Court order that he be released on bail immediately.

Respectfully Submitted,

/s/ *David W. Shapiro*
David W. Shapiro, NY Bar #2054054
The Norton Law Firm
dshapiro@nortonlaw.com

EXHIBIT G

David W. Shapiro
dshapiro@nortonlaw.com
510-906-4906

November 15, 2022

VIA ECF AND FED EX

Honorable Colleen McMahon
Daniel Patrick Moynihan
United States Courthouse
Courtroom 24A
500 Pearl Street
New York, NY 10007-1312

Re: Michael Binday v. United States of America, Case No. 12-CR-000152-CM Motion for Bail Pending Resolution of Michael Binday's Petition for Writ of Certiorari

Honorable Judge McMahon:

We request that the Court grant bail to Michael Binday immediately.

On November 1, 2022, Mr. Binday filed a motion for bail based on the Supreme Court's decision to hold his certiorari petition pending a decision in *United States v. Ciminelli*, No. 21-1170. This Court's rules require an opposition to a motion be filed 14 days after the motion is filed. The government has not opposed the bail motion.

The government has admitted to the Supreme Court that the Second Circuit's right-to-control theory "is incorrect." *Ciminelli,* Gov't Br. ("GB") 24. Treating "the right to make informed decisions about the disposition of one's assets ... as the sort of 'property' giving rise to wire fraud," the government concedes, "would risk expanding the federal fraud statutes beyond property fraud as defined at common law and as Congress would have understood it." GB25-26.

The theory the government previously embraced for decades and now rejects is the theory on which Mr. Binday was convicted and his conviction was affirmed by the Second Circuit. *United States v. Binday*, 804 F.3d 558 (2d Cir. 2015).

299 Third Street, Suite 200, Oakland, California 94607

Mr. Binday is entitled to bail during the pendency of his Supreme Court petition.

Very truly yours,

David W. Shapiro
THE NORTON LAW FIRM PC

EXHIBIT H

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 11/16/2022

the NORTON law firm pc
David W. Shapiro
dshapiro@nortonlaw.com
510-906-4906

November 15, 2022

MEMO ENDORSED

11/16/2022 The Government has until 11/21 to respond — not 11/30 as requested. I note that Mr. Binday is NOT in a federal correctional institution but is in his own home, albeit on "house arrest." I want to hear from the government before deciding. CM

VIA ECF AND FED EX

Honorable Colleen McMahon
Daniel Patrick Moynihan
United States Courthouse
Courtroom 24A
500 Pearl Street
New York, NY 10007-1312

Re: Michael Binday v. United States of America, Case No. 12-CR-000152-CM
Motion for Bail Pending Resolution of Michael Binday's Petition for Writ of Certiorari

MEMO ENDORSED

Honorable Judge McMahon:

We request that the Court grant bail to Michael Binday immediately.

On November 1, 2022, Mr. Binday filed a motion for bail based on the Supreme Court's decision to hold his certiorari petition pending a decision in *United States v. Ciminelli*, No. 21-1170. This Court's rules require an opposition to a motion be filed 14 days after the motion is filed. The government has not opposed the bail motion.

The government has admitted to the Supreme Court that the Second Circuit's right-to-control theory "is incorrect." *Ciminelli,* Gov't Br. ("GB") 24. Treating "the right to make informed decisions about the disposition of one's assets ... as the sort of 'property' giving rise to wire fraud," the government concedes, "would risk expanding the federal fraud statutes beyond property fraud as defined at common law and as Congress would have understood it." GB25-26.

The theory the government previously embraced for decades and now rejects is the theory on which Mr. Binday was convicted and his conviction was affirmed by the Second Circuit. *United States v. Binday*, 804 F.3d 558 (2d Cir. 2015).

Mr. Binday is entitled to bail during the pendency of his Supreme Court petition.

Very truly yours,

David W. Shapiro
THE NORTON LAW FIRM PC

EXHIBIT I

U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

November 21, 2022

VIA ECF

Honorable Colleen McMahon
United States District Judge
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: *United States v. Michael Binday*, 12 Cr. 152 (CM)

Dear Judge McMahon:

The Government respectfully submits this letter in opposition to defendant Michael Binday's motion for bail pending the ongoing proceedings on his habeas petition. Binday fails to meet the demanding standard for bail pending habeas.

The defendant's bail motion relies on a case pending in the Supreme Court, *Ciminelli v. United States*, 21-1170, which, Binday argues, will ultimately result in his own convictions being invalidated in his habeas proceedings. But he cannot show either a high probability of success on the merits or that extraordinary circumstances exist that make the grant of bail necessary to make the habeas remedy effective, as he must to obtain bail pending habeas. His argument that the Supreme Court will invalidate the "right to control" theory in *Ciminelli* is speculative. Even if it did, his successive motion pursuant to 28 U.S.C. § 2255 would be barred because *Ciminelli* would almost certainly be a statutory decision, rather than a decision that announces a new rule of constitutional law. Any petition pursuant to 28 U.S.C. § 2241 would also be barred because Binday would be unable to show actual innocence, since the object of his scheme was to obtain money in the form of commissions. Finally, Binday also cannot show extraordinary circumstances warranting release, both because being imprisoned under a sentence claimed to be invalid does not satisfy the standard and because he is currently on home confinement, rather than in prison.

BACKGROUND

Offense Conduct, Trial, and Appeal

On October 7, 2013, following a twelve-day jury trial, Michael Binday and his two co-defendants, James Kergil and Mark Resnick, were found guilty of conspiracy to commit mail and wire fraud, in violation of Title 18, United States Code, Section 1349; mail fraud, in violation of Title 18, United States Code, Section 1341; and wire fraud, in violation of Title 18, United States

Code, Section 1343, in connection with a scheme to defraud insurance companies which the defendants purported to serve as agents. The evidence at trial established that Binday led his co-defendants in a scheme designed to procure "stranger-originated life insurance" (or "STOLI") policies—policies on the lives of seniors for the benefit of investors who were strangers to them—by means of fraudulent applications. The co-conspirators recruited elderly people of modest means (the "Straw Insureds") to apply to insurance companies (the "Insurers") for universal life insurance policies, with the understanding that the resulting policies would actually be owned, paid for, and controlled by third-party investors such as hedge funds. Binday and his co-defendants deceived the Insurers about who was behind these policies, giving the false impression that wealthy individuals wanted the policies on their own lives for estate planning purposes, because they knew that Insurers expressly prohibited their agents from submitting STOLI business to them, in light of the economic risk that such policies imposed upon the Insurers. The defendants backed up the lies in the insurance applications with sham documents, arranged elaborate bank transactions to make it look like the Straw Insureds—rather than investors—were paying the premiums on policies, and instructed Straw Insureds they had recruited to refuse to speak to Insurer representatives and lie if conversation could not be avoided. All three defendants conspired to destroy documents and electronic records related to their fraud. Over the course of their scheme, the defendants submitted at least 92 fraudulent applications, resulting in the issuance of 74 policies with a total face value of over $100 million. These policies generated roughly $11.7 million in commissions to the defendants. *See United States v. Binday*, 804 F.3d 558, 566-67 (2d Cir. 2015).

On July 30, 2014, this Court sentenced Binday principally to 144 months' imprisonment. This Court explained at sentencing that:

> Forget about the amount of the fraud loss, whatever it was or will turn out to be; in the end, this was a scheme perpetrated over a span of years, brazen, as the government has correctly characterized it, and characterized by a number of truly horrible behaviors on the defendants' part.
>
> Starting with the callous disregard for the little people who were the straw purchasers of these policies: Venality, rampant mendacity, the creation of false documents, obstruction of efforts by the victims to ascertain the truth, obstruction of regulators and the government's efforts to learn the truth. It is precisely the sort of criminality that has left large segments of our society convinced that all businessmen are crooks. And many an[ ] honest businessman or woman finds himself or herself unable to overcome the entirely undeserved belief that they are disreputable people and that they ought to be subject to disrepute.
>
> . . .
>
> There are crimes for which a critically important component of sentencing should be to send a message to the community, for the industry that this kind of behavior is intolerable, and to send a message to the community and to the industry that this sort of behavior is every bit as reprehensible as the types of

> crimes for which I and others like me routinely send poor, disadvantaged persons to prison for dozens of years.
>
> It is precisely in cases like this that for too many years there was an underemphasis on prison time. And it is entirely appropriate in my view to redress that underemphasis so that society understands that the guy who steals money while committing fraud while wearing a suit is no better than the guy who steals it, and a whole lot less of it, while wearing a hoodie.
>
> Insurance fraud may not qualify as a crime of violence within the meaning of our sentencing system and that, unfortunately, is why it is all too often punished not with the severity that it deserves.
>
> There are other types of violence, and business fraud do[es] violence to the thin tissue of trust that holds us together as a society. We cannot afford this sort of antisocial behavior and the cynicism that people will get away with it that is engendered in our citizenry. Only if white collar crime is punished commensurate with the damage it inflicts on society will citizens actually believe that the law metes out equal right[s] to the poor and to the rich, which words are the cornerstone of the judicial oath.

Sentencing Tr. at 42, 45-46.

On October 26, 2015, the Second Circuit affirmed the convictions and sentences of Binday and his co-defendants, directing only a limited remand, at the Government's request, for entry of an amended restitution order in a reduced amount of $37,433,914.17. On December 14, 2015, the Second Circuit denied Binday's petition for panel and *en banc* rehearing. On June 20, 2016, the Supreme Court denied Binday's petition for a writ of *certiorari*. On June 24, 2016, this Court entered the amended restitution order that the Second Circuit had directed be entered.

Binday's Previous Attempts to Overturn His Conviction

On October 6, 2016, Binday filed a motion for a new trial based on purported "newly discovered evidence" pursuant to Rule 33(b)(1). Dkt. 394. On August 29, 2017, the Court denied the motion. Dkt. 431.

On June 20, 2017, Binday filed a Section 2255 motion. Dkt. 420. On May 23, 2018, this Court denied the motion. Dkt. 448. On August 17, 2018, before the Second Circuit, Binday moved for a certificate of appealability, which the Second Circuit denied on January 15, 2019. On May 6, 2019, the Second Circuit denied Binday's motion for panel reconsideration or, in the alternative, for reconsideration *en banc*. On February 24, 2020, the Supreme Court denied Binday's petition for a writ of *certiorari*.

Binday's Compassionate Release Motions

On May 5, 2020, Binday filed an emergency motion for compassionate release. Dkt. 464. On July 16, 2020, the Court denied the motion because, among other reasons, "[p]ermitting Binday to be released after serving less than a third of his twelve-year term of imprisonment would neither provide just punishment nor would it promote respect for the law." Dkt. 475 at 16.

On March 22, 2021, Binday moved for reconsideration of the Court's denial of his compassionate release motion. Dkt. 481. On March 24, 2021, the Court denied the defendant's request for reconsideration. Dkt. 482.

On July 25, 2021, Binday moved again for compassionate release. Dkt. 491.

In or about September 2021, the BOP granted home confinement to Binday.

The Instant Motion

On March 12, 2021, Binday filed a motion styled under 28 U.S.C. §§ 2255 and 2241, arguing that his convictions are invalid in light of the Supreme Court's decision in *Kelly v. United States*, 140 S. Ct. 1565 (2020). Dkt. 479.

On April 9, 2021, Binday moved for bail pending his habeas petition, arguing that the Supreme Court's decision in *Kelly* constituted an extraordinary circumstance warranting release on bail while his habeas petition was decided. Dkt. 484.

On May 5, 2021, Judge McMahon transferred Binday's Section 2255/2241 motion to the Second Circuit. Dkt. 489. On October 12, 2021, the Second Circuit denied Binday's request, writing:

> To the extent Petitioner's claim should be brought under § 2255, it would be successive within the meaning of § 2255(h) because Petitioner's first § 2255 motion challenged the same criminal judgment, was decided on the merits, and reached final adjudication before the filing of the present motion. *See Vu v. United States*, 648 F.3d 111, 113 (2d Cir. 2011); *Whab v. United States*, 408 F.3d 116, 118-19 (2d Cir. 2005). We reject Petitioner's argument that a claim based on *Kelly v. United States*, 140 S. Ct. 1565 (2020), would not be successive because that decision announced new law that was previously unavailable; § 2255(h) clearly covers that circumstance and the cases cited by Petitioner are inapposite. Petitioner is not entitled to relief under § 2255(h) because he has not made a prima facie showing that *Kelly* announced "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," as required by § 2255(h)(2). *Kelly* interpreted a statute and did not rely on any constitutional provision.
>
> Petitioner also has not made a showing that he is entitled to relief under § 2241 because he has not made a showing of actual innocence. *See Cephas v. Nash*, 328 F.3d 98, 104 (2d Cir. 2003) (stating standard for proceeding under § 2241 instead of § 2255); *Triestman v. United States*, 124 F.3d 361, 373–74 (2d Cir. 1997)

(same). This Court has recently upheld the theory of conviction challenged by Petitioner, *United States v. Gatto*, 986 F.3d 104, 125–27 (2d Cir. 2021), *petition for cert. filed*, No. 21-169 (Aug. 2, 2021), and he has not otherwise shown that his case is covered by the ruling in *Kelly*.

Dkt. 492.

On March 10, 2022, Binday filed a petition for a writ of certiorari.[1] 21-1206. On September 21, 2022, the United States filed a memorandum in response stating that the Supreme Court should "hold the petition for a writ of certiorari pending its decisions in [*Ciminelli v. United States*, 21-1170 and *Jones v. Hendrix*, 21-857] and then dispose of the petition as appropriate."[2] The Supreme Court has not yet ruled on Binday's certiorari petition.

On November 1, 2022, Binday filed a motion in this Court seeking bail pending the Supreme Court's consideration of his certiorari petition. Dkt. 495. On November 15, 2022, Binday filed a second letter in support of his motion for bail. Dkt. 496. On November 16, the Court directed the Government to respond to the bail motion by November 21. Dkt. 497. On November 17, Binday filed a third letter in support of his motion for bail. Dkt. 498.

Binday's 144-month sentence is scheduled to end on September 20, 2025.

STANDARD FOR BAIL PENDING HABEAS

"The standard for bail pending habeas litigation is a difficult one to meet: The petitioner must demonstrate that the habeas petition raise[s] substantial claims and that extraordinary circumstances exist[ ] that make the grant of bail necessary to make the habeas remedy effective." *Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001) (quoting *Grune v. Coughlin*, 913 F.2d 41, 44 (2d Cir. 1990)); *see also Illaramendi v. United States*, 906 F.3d 268, 271 (2d Cir. 2018) (applying *Mapp* in appeal of denial of bail in Section 2255 proceeding). "Because of the conviction, the Government has a justified interest in petitioner's continued incarceration, and petitioner has the burden of showing special reasons why bail is warranted." *Iuteri v. Nardoza*, 662 F.2d 159, 161 (2d Cir. 1981) (citing *Ostrer v. United States*, 584 F.2d 594, 599 (2d Cir. 1978)). The power to grant bail to habeas petitioners is "a limited one, to be exercised in special cases only." *Grune*, 913 F.2d at 44. This standard "is higher even than that created by 18 U.S.C. § 3143(b), which governs bail pending appeal." *United States v. Manson*, 788 F. App'x 30, 32 (2d Cir. 2019). Courts in other circuits have similarly characterized as very high the hurdle that a habeas petitioner seeking bail must surmount. *See, e.g.*, *Dotson v. Clark*, 900 F.2d 77, 79 (6th Cir. 1990) ("There will be few occasions where a prisoner will meet this standard."); *Martin v. Solem*, 801 F.2d 324, 329 (8th Cir. 1986) ("Habeas petitioners are rarely granted release on bail pending disposition or pending appeal."); *Glynn v. Donnelly*, 470 F.2d 95, 98 (1st Cir. 1972) (holding that habeas petitioners face "a formidable barrier" to obtaining bail).

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[1] Available at https://www.supremecourt.gov/DocketPDF/21/21-1241/218280/20220310160727225_Petition.pdf.

[2] Available at https://www.supremecourt.gov/DocketPDF/21/21-1241/238445/20220921144910332_21-1241%20Binday%20-%20Memo.pdf

Moreover, courts have interpreted the standard for a habeas petitioner seeking bail (*i.e.*, substantial claims and extraordinary circumstances) to require consideration of the likelihood of success on the petition itself. *See, e.g.*, *United States v. Whitman*, 153 F. Supp. 3d 658, 660 (S.D.N.Y. 2015) (requiring a "demonstrated likelihood" that the petition will prevail, "based upon claims of a substantial nature upon which the petitioner has a high probability of success . . . so that victory for petitioner can be predicted with confidence." (citation and internal quotations omitted)); *Richard v. Abrams*, 732 F. Supp. 24, 25 (S.D.N.Y. 1990) (requiring a "demonstrated likelihood" of success); *Harris v. Allard*, No. 01CIV.7191(LAP)(KNF), 2002 WL 31780176, at *2 (S.D.N.Y. Dec. 11, 2002) (same); *Rado v. Meachum*, 699 F. Supp. 25, 26-27 (D. Conn. 1988) (same); *Muja v. United States*, 10 Civ. 2770 (NGG), 2011 WL 1870290, at *1 (E.D.N.Y. May 16, 2011) (requiring a "high probability of success" of the petition and a conclusion that "victory for the petitioner [] can be predicted with confidence").

ARGUMENT

Binday fails to meet the demanding standard for bail pending habeas. He cannot show a high probability of success on the merits. His claim that the Supreme Court will invalidate the right to control theory in *Ciminelli* is speculative. Even if it does, any successive Section 2255 motion would fail because that decision would be statutory, and any Section 2241 motion would fail because Binday cannot establish actual innocence. Further, even if Binday could establish that his underlying habeas motion was likely to succeed, release would not be warranted because being imprisoned under a potentially invalid sentence is not sufficient to satisfy the strict standard for bail pending habeas and because he is on home confinement and is not incarcerated.

I. Binday's Claim that the Supreme Court Will Invalidate the Right to Control Theory in *Ciminelli* is Speculative.

In *United States v. Percoco*, 13 F.4th 158 (2d Cir. 2021), the defendants argued that "the right-to-control theory of wire fraud" is "invalid" because "the right to control one's own assets is not 'property' within the meaning of the wire fraud statute." *Id.* at 164 n.2. The Second Circuit rejected that argument because "the right-to-control theory of wire fraud is well-established in Circuit precedent." *Id.*

The Supreme Court then granted certiorari in *Ciminelli v. United States*, 21-1170,[3] and oral argument is scheduled for November 28, 2022. The brief for the United States[4] defends the *Ciminelli* conviction on two grounds. First, it defends the right to control theory, arguing that, "the right to control theory, appropriately limited, identifies cases of property fraud involving fraudulent inducement to enter into a transaction," *id.* at 23-31, and second, it argues that "even absent the right-to-control lens, the evidence readily supports petitioner's convictions on a straightforward application of the elements of property fraud," *id.* at 31-43.

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[3] Defendant Louis Ciminelli was one of the four defendants in the Second Circuit's *Percoco* opinion.

[4] Available at https://www.supremecourt.gov/DocketPDF/21/21-1170/243007/20221012202656269_21-1170bsUnitedStates%20FINAL.pdf

This letter does not recapitulate those arguments in detail. However, if the Supreme Court agrees with the first argument and upholds the right to control theory, or agrees with the second argument and declines to address the right to control theory, then Binday's habeas claim will fail by its own terms. Binday's argument that the Supreme Court will invalidate the right-to-control theory is purely speculative and thus does not establish a high probability of success on the merits.

II. Even if the Supreme Court Invalidates the Right to Control Theory in *Ciminelli*, any Successive 2255 Motion is Unlikely to Succeed Because *Ciminelli* will be a Statutory Decision.

As the Second Circuit has already held, to the extent Binday's motion is a Section 2255 motion, it is a "second or successive" Section 2255 motion. Binday may not bring his claim based on a future decision in *Ciminelli* in a second or successive motion because such a claim will not be based on either "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court," or on "newly discovered evidence."

Federal prisoners "who seek to collaterally attack the basis for imposing a sentence," including by "challeng[ing] . . . the underlying conviction," generally "must move 'to vacate, set aside or correct the sentence' under 28 U.S.C. § 2255(a)." *Dhinsa v. Krueger*, 917 F.3d 70, 81 (2d Cir. 2019). Binday's motion challenges his convictions, and so would ordinarily fall within the ambit of Section 2255.

Binday filed a Section 2255 motion in 2017 challenging his convictions on grounds of ineffective assistance of counsel. "Generally, to be successive, a second § 2255 motion must attack the same judgment that was attacked in the prior motion, and the prior motion must have been decided on the merits." *Vu v. United States*, 648 F.3d 111, 113 (2d Cir. 2011); *see also Thai v. United States*, 391 F.3d 491, 494 (2d Cir. 2004) ("This Court has often stated that an initial petition will 'count' where it has been adjudicated on the merits or dismissed with prejudice."). The instant motion attacks the same judgment as the prior Section 2255 motion, which Judge McMahon denied on the merits. Dkt. 448. The instant motion is therefore "second or successive" as defined by 28 U.S.C. §§ 2255(h) and 2244(b)(3)(A).[5]

The Antiterrorism and Effective Death Penalty Act of 1996 "places stringent limits on a prisoner's ability to bring a second or successive" Section 2255 motion. *Adams v. United States*, 155 F.3d 582, 583 (2d Cir. 1998). "A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain" a claim relying on either of the following:

[5] Binday's reliance on a future decision in *Ciminell*, which would be decided after his first Section 2255 motion was denied, does not alter this conclusion, as motions are considered second or successive despite petitioners' reliance on intervening Supreme Court decisions. *See Mata v. United States*, 969 F.3d 91, 93 (2d Cir. 2020); *Massey v. United States*, 895 F.3d 248, 250 (2d Cir. 2018); *Washington v. United States*, 868 F.3d 64, 65-66 (2d Cir. 2017); *Green v. United States*, 397 F.3d 101, 102-103 (2d Cir. 2005); *Carmona v. United States*, 390 F.3d 200, 202 (2d Cir. 2004).

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h); *see also* 28 U.S.C. § 2244(b)(2). Binday's claim based on a future decision in *Ciminelli* would not qualify for either Section 2255(h) category.

First, any decision in *Ciminelli* would of course not constitute "newly discovered evidence." *Cf. McCloud v. United States*, 987 F.3d 261, 262 (2d Cir. 2021) (holding that "an intervening development in case law does not constitute a newly discovered fact within the meaning of [28 U.S.C.] § 2255(f)(4)").

Second, any decision in *Ciminelli* is overwhelmingly likely to be a statutory decision, rather than, "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court." In *Ciminelli*, the defendant framed the question presented for the Supreme Court as, "Whether the Second Circuit's 'right to control' theory of fraud—which treats the deprivation of complete and accurate information bearing on a person's economic decision as a species of property fraud—states a valid basis for liability under the federal wire fraud statute, 18 U.S.C. § 1343."[6] The Government framed the question as, "Whether the court of appeals, which applied a 'right to control' theory of property fraud, correctly found sufficient evidence to support petitioner's convictions for wire fraud, in violation of 18 U.S.C. 1343, and conspiring to commit wire fraud, in violation of 18 U.S.C. 1349."[7]

In either framing, the Supreme Court is being called upon to interpret the wire fraud statute and not to create a new rule of constitutional law. The same issue arose when Binday sought habeas based on the Supreme Court's decision interpreting the meaning of the term "property" in *Kelly v. United States*, 140 S. Ct. 1565 (2020). The Second Circuit denied his petition, "because he has not made a prima facie showing that Kelly announced 'a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable,' as required by § 2255(h)(2). *Kelly* interpreted a statute and did not rely on any constitutional provision." Dkt. 492. The same conclusion would apply to any claim based on *Ciminelli*. *See Mata v. United States*, 969 F.3d 91, 93-94 (2d Cir. 2020) (decision that "was simply construing a statute" did not qualify); *Massey v. United Stat*es, 895 F.3d 248, 252 (2d Cir. 2018) (decision that "interpreted [a statutory] clause" did not qualify); *Washington v. United States*, 868 F.3d 64, 66 (2d Cir. 2017) (decision that "was interpreting [a statute], not the Constitution," did not qualify).

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[6] Available at https://www.supremecourt.gov/DocketPDF/21/21-1170/236600/20220829154502902_Ciminelli%20Petitioner%20Brief%20-%20For%20E%20File.pdf at i.
[7] Available at https://www.supremecourt.gov/DocketPDF/21/21-1170/243007/20221012202656269_21-1170bsUnitedStates%20FINAL.pdf at I.

III. Even if the Supreme Court Invalidates the Right to Control Theory in *Ciminelli*, any 2241 Petition is Unlikely to Succeed Because *Binday* Cannot Show Actual Innocence.

Section 2255 contains a saving clause that permits an inmate serving a sentence of imprisonment imposed by a federal court to seek habeas corpus relief only if "the remedy by motion [under Section 2255] is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). The Second Circuit has interpreted the phrase "inadequate or ineffective" in Section 2255's saving clause to refer to "those cases 'in which the petitioner cannot, for whatever reason, utilize § 2255, and in which the failure to allow for collateral review would raise serious constitutional questions.'" *Cephas v. Nash*, 328 F.3d 98, 104 (2d Cir. 2003) (quoting *Triestman v. United States*, 124 F.3d 361, 377 (2d Cir. 1997)). To date, the Circuit has "recognized only one" category of cases satisfying the *Triestman* test and permitting a Section 2241 petition under the saving clause, *id.*: "when § 2255 is unavailable and the petition is filed by an individual who (1) can prove actual innocence on the existing record, and (2) could not have effectively raised his claim of innocence at an earlier time, perhaps due to an intervening change in the governing interpretation of the statute of conviction." *Dhinsa*, 917 F.3d at 81 (quotation marks and brackets omitted) (citing *Cephas* and *Triestman*).

Binday's underlying motion could not proceed under Section 2241 because he would be unable to establish that he is actually innocent, even under a traditional property fraud theory. The object of Binday's scheme was to obtain *money* from the victim insurance companies. *See Binday*, 804 F.3d at 567 (fraud generated $11.7 million in commissions paid by insurers to defendants); *id.* at 585 (recognizing that "[c]omission payments" were "the object of the scheme"); *id.* ("From the indictment through the trial, the government consistently maintained that defendants sought to obtain money (in the form of commissions) from the victim insurers."). Schemes with money as the object are valid under the property fraud statutes. *See, e.g.*, *Kelly*, 140 S. Ct. at 1573 (noting that schemes with government "cash" or employee labor as the object are valid); *Pasquantino v. United States*, 544 U.S. 349, 357 (2005) ("scheme aimed at depriving [government] of money" was valid); *Gatto*, 986 F.3d at 116 (distinguishing *Kelly* where object of scheme was money, *i.e.*, universities' "funds set aside for financial aid"); *United States v. Weigand*, 482 F. Supp. 3d 224, 236 (S.D.N.Y. 2020) (distinguishing *Kelly* were "the object of the alleged scheme was money").

IV. Binday Cannot Show Extraordinary Circumstances Warranting Release.

In addition to a high likelihood of success on the merits, a defendant seeking bail pending habeas must establish, "that extraordinary circumstances exist[ ] that make the grant of bail necessary to make the habeas remedy effective." *Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001) (internal quotation marks omitted).

Binday has failed to show that the grant of bail is necessary to make the habeas remedy effective. His claim that his convictions are invalid does not satisfy this standard, as "[v]irtually all habeas corpus petitioners argue that their confinement is unlawful." *Iuteri*, 662 F.2d at 162; *cf. United States v. Silver*, 954 F.3d 455, 460 (2d Cir. 2020) (rejecting criminal defendant's "customary" argument that there was "good cause for a stay" because he risked serving prison

time when his conviction could ultimately be reversed, which "is true for virtually every criminal defendant seeking a writ of certiorari"). Nor is there any reason to believe that his habeas petition will not be decided before September 20, 2025, the scheduled end of his sentence. In any event, Binday's habeas petition will not have been "for naught," as "the vacatur of his conviction—were it to come to pass—will almost certainly have favorable collateral consequences for the petitioner." *Whitman*, 153 F. Supp. 3d at 661 ("[N]earing the end of a prison term does not qualify as an 'extraordinary circumstance' for purposes of this [bail pending habeas] analysis.").

Furthermore, Binday is not incarcerated in a federal prison—he is serving his sentence on home confinement. While Binday lists several objections to his conditions of home confinement,[8] dkt. 498, there is no doubt that those conditions are far less restrictive than incarceration. Even if the Binday could show a high likelihood of success—and he cannot—his home confinement is not an extraordinary circumstance warranting release.

CONCLUSION

For all the above reasons, this Court should deny Binday's request for bail.

Respectfully submitted,

DAMIAN WILLIAMS
United States Attorney

By: /s/
Kevin Mead
Assistant United States Attorney
(212) 623-2211

cc: David W. Shapiro, Esq. (by ECF)

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[8] According to the PSR, the defendant sold his previous home for approximately $11 million in 2014.

EXHIBIT J

David W. Shapiro
dshapiro@nortonlaw.com
510-906-4906

November 22, 2022

VIA ECF

Honorable Colleen McMahon
Daniel Patrick Moynihan
United States Courthouse
Courtroom 24A
500 Pearl Street
New York, NY 10007-1312

Re: Michael Binday v. United States of America, Case No. 12-CR-000152-CM

Honorable Judge McMahon:

The government's opposition to Binday's bail motion re-sets the bar for bail after the Supreme Court has granted certiorari on the same issue raised by Binday to one requiring Binday to prove the Supreme Court's ultimate disposition of *Ciminelli* and Binday's own case. No case requires a petitioner to win (in district court) on the merits of certiorari petitions the Supreme Court has not yet decided. The government's arguments are meritless, and we respectfully request that this Court rule on Binday's motion expeditiously. In the alternative, Binday will seek bail from Justice Sotomayor.

In his motion, Binday set out the proper standard he is required to meet: he must raise a substantial claim (that is, at least a close question), accompanied by unusual or extraordinary circumstances. If that standard is met, and the defendant is not a flight risk, then bail should be granted to avoid making the habeas remedy ineffective. *Ostrer v. United States*, 584 F.2d 594, 596 n.1 (2d Cir. 1978).

Here, Binday met that standard when (1) the Supreme Court granted certiorari on the same question Binday raised in his pending certiorari petition (as well as in his arguments on direct appeal in the Second Circuit and in his first Supreme Court certiorari petition); (2) the government agreed the question Binday presented was substantial before District Judge Caproni in *Ciminelli*; and (3) the government agreed in the Supreme Court that Binday's petition would rise or fall with the decision in *Ciminelli.* On top of that, in its opposition brief in *Ciminelli*, the government then abandoned the legal theory it used to convict Binday, instead asking the

Supreme Court to adopt a new theory of property to take the place of the "right to control" theory: a diluted version of civil fraudulent inducement liability. Whatever the merits of that "would you believe" effort to create new law, it was not a theory Binday's jury ever heard.

In its response, the government argues Binday has not shown a "high probability of success on the merits." For this standard, the government cites to language in several district court cases that suggest a person seeking bail while his habeas petition is pending in district court must show a "high likelihood of success." None of those decisions are applicable here. The Supreme Court had not granted certiorari in any of those cases. *See United States v. Whitman*, 153 F. Supp. 3d 658, 660 (S.D.N.Y. 2015) (Second Circuit issued certificate of appealability; certiorari not granted); *Richard v. Abrams*, 732 F. Supp. 24, 26 (S.D.N.Y. 1990) (too early in review of habeas petition for district judge to determine likely outcome of petitioner's *Brady* claim); *Harris v. Allard*, No. 01CIV.7191(LAP)(KNF), 2002 WL 31780176, at *4 (S.D.N.Y. Dec. 11, 2002) (denying bail to state habeas petitioner while district court considered his sufficiency of the evidence claim); *Rado v. Meachum*, 699 F. Supp. 25, 27 (D. Conn. 1988) (denying bail while court considered habeas claims because "[a] petition for a writ of habeas corpus raises no automatic invalidity of the judgment attacked."); *Muja v. United States*, No. 10-CV-2770 NGG, 2011 WL 1870290, at *1 (E.D.N.Y. May 16, 2011) (habeas petitioner's contentions failed to demonstrate likelihood of success if fact allegations proved).

If that were the standard when the Supreme Court has granted certiorari, the government would not have been so quick to agree to bail for the *Ciminelli* defendants and would not have suggested to the Supreme Court that it consider Binday's petition along with Ciminelli's. Clearly, the government recognizes the significant difference between a habeas petitioner asking a district court for bail pending consideration of his petition and one whose conviction has been granted review by the Supreme Court because of a challenge to an unconstitutionally broad construction of a criminal statute. Otherwise, it would have opposed the *Ciminelli* bail requests and cited the above district court opinions.

The government then speculates on the various outcomes in the Supreme Court and how the government will try to preserve Binday's conviction even if it loses in *Ciminelli*. This is not the time or place for those arguments; those contentions may only be considered after the Supreme Court rules. In any event, we address each briefly:

First, the government argues that the Supreme Court may uphold the right to control. That is true, but the Supreme Court may also reject the right to control, the government's efforts to advance a new intangible property right, and any future effort by the government or lower courts to disregard or distort the Supreme Court's rulings on the scope of the mail and wire fraud statutes. It may also hold that someone in Binday's shoes – a person who raised valid arguments improperly rejected by the Second Circuit several times – has a due process right to have his

arguments vindicated. It would be a dark day in the United States if errors by the judiciary deprived Binday of his freedom. The government's first contention is thus improper speculation.

Second, the government argues that the Supreme Court decision in *Ciminelli* will "only" construe the words of the mail/wire fraud statutes, rather than ground its decision in constitutional law, and therefore Binday will not be permitted to raise a "second or successive" section 2255 motion. The government again speculates about what the Supreme Court will say and then describes case law on "second or successive" petitions. Binday could – but will not do so here – explain why someone who raised the same argument at every step of his prosecution is not foreclosed from re-raising that argument when the Supreme Court (and the Second Circuit following the Supreme Court) vindicates his argument. The government's arguments have no place here, where the only issue is whether Binday has raised a substantial question (the government agrees he has, at least in the Supreme Court) and the circumstances are unusual (the Supreme Court granted certiorari on the question).

Much of the government's argument is drawn from its opposition to Binday's motion for a certificate of appealability to the Second Circuit. The government could have raised all those claims in opposition to Binday's certiorari petition earlier this year, but it chose not to and instead agreed the Supreme Court should hold Binday's petition. Moreover, the Supreme Court had the Second Circuit's order and the government's arguments before it when considering Binday's petition, yet it accepted Binday's certiorari petition to be considered along with *Ciminelli*'s. It thus found nothing in the government's contentions to stand in the way of its review.

Third, the government argues that Binday will not prevail under section 2241 because he will not be able to show he is "actually innocent." And that is, according to the government, because he earned commissions on the sale of life insurance policies. The argument anticipates a Supreme Court *Ciminelli* decision that jibes with the government's anticipated (but not yet ripe) argument that earning a salary constitutes "money or property," a theory rejected long ago by the Supreme Court in *McNally v. United States*, 483 U.S. 350 (1987). But in any event, it is a theory Binday's jury never considered. *See United States v. Yates*, 16 F.4th 256, 267 (9th Cir. 2021) ("Permitting the government to recharacterize schemes to defraud an employer of one's honest services—thereby profiting 'through the receipt of salary and bonuses,' …—as schemes to deprive the employer of a property interest in the employee's continued receipt of a salary would work an impermissible 'end-run' around the Court's holding in *Skilling*."); *United States v. Ochs*, 842 F.2d 515, 524 (1st Cir. 1988) (rejecting "the government's attempt to favorably reconstruct the jury deliberations on appeal" by disregarding "the actual jury charge it requested and received"). And common-sense dictates that neither the government nor the Supreme Court would agree to hold Binday's petition for writ of certiorari pending disposition of *Ciminelli*, only for the Supreme Court to then deny the petition on a ground – that Binday earned a commission

– that was plainly available at the time (1) the government replied to Binday's petition and (2) the Supreme Court conferenced on Binday's petition.

The government fought hard for its right to control jury instruction in *Binday*; it must live or die by that sword.

Finally, the government downplays the significance of home confinement. The government attorney is not an expert on the emotional, psychological, or physical impacts of any form of incarceration. The government cannot hypocritically agree the *Ciminelli* defendants raised a substantial question and the Supreme Court's review is an unusual circumstance, while denying Binday that same treatment. Binday has met the standard for bail.

Very truly yours,

David W. Shapiro
THE NORTON LAW FIRM PC

EXHIBIT K

David W. Shapiro
dshapiro@nortonlaw.com
510-906-4906

November 28, 2022

VIA ECF

Honorable Colleen McMahon
Daniel Patrick Moynihan
United States Courthouse
Courtroom 24A
500 Pearl Street
New York, NY 10007-1312

Re: Michael Binday v. United States of America, Case No. 12-CR-000152-CM

Honorable Judge McMahon:

The *Ciminelli* case was argued today. The government again conceded that the right to control theory as formulated by the Second Circuit, and under which Mr. Binday was convicted, is an improper construction of the property element of fraud. The defense argued for a reversal. The government conceded multiple times that a remand to the Second Circuit would be appropriate and also argued for a new theory of fraudulent inducement that could be "mapped" onto Ciminelli's facts to affirm the convictions. No Justice suggested that the Court would be willing to "map" facts onto new theories. Thus, at a minimum, Binday's conviction will be either vacated or reversed. That circumstance requires that Binday be admitted to bail.

We request that this Court grant bail immediately. If not, then we plan to move for bail in the Supreme Court.

Very truly yours,

David W. Shapiro
THE NORTON LAW FIRM PC