No. __-____

IN THE

Supreme Court of the United States

JAMES KEVIN KERGIL,
AKA SEALED DEFENDANT 2,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Roger Lee Stavis
Adam Michael Felsenstein
GALLET DREYER & BERKEY, LLP
Attorneys for Petitioner
James Kevin Kergil,
AKA Sealed Defendant 2
845 Third Avenue, 5th Floor
New York, New York 10022
212-935-3131

March 10, 2016

PARTIES TO THE PROCEEDINGS BELOW

The parties to the trial below were Petitioner, James Kevin Kergil, his co-defendants, Michael Binday and Mark Resnick, and the United States of America, represented by the United States Attorney for the Southern District of New York.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, *United States v. Binday*, 804 F.3d 558 (2d Cir. 2015), is reproduced at Appendix A. The opinion of the United States District Court for the Southern District of New York, *United States v. Binday*, 908 F.Supp.2d 485 (S.D.N.Y. 2012), is reproduced at Appendix B.

SUPREME COURT JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit was filed on October 26, 2015. A petition for rehearing *en banc* was denied on December 14, 2015, reproduced at Appendix C and D. This Court has jurisdiction pursuant to Section 1254(1) of Title 28 of the United States Code.

STATUTES INVOLVED

The instant petition involves an interpretation of federal mail and wire fraud statutes, 18 U.S.C. § 1341 and 18 U.S.C. § 1343.

STATEMENT OF THE CASE

Background

James Kevin Kergil, an insurance agent, was convicted of mail and wire fraud and conspiracy to commit mail and wire fraud, stemming from his role in causing clients to make certain false representations on applications for universal life insurance policies. The applications were scrupulously accurate with respect to material terms such as the applicants' age and health, but included false information regarding assets, net worth, and intent to sell the policies to third party investors. These types of policies, termed Stranger Originated Life Insurance ("STOLI"), *i.e.* strangers paying the premiums, were rampant before the 2008 financial collapse. It was undisputed at trial that the applicants were truthful about their age and health and that all of the requisite premiums were paid to the insurance companies before they issued the policies. The fraud and conspiracy charges were premised purely on the financial misinformation provided, which caused the insurance companies to issue policies that they otherwise might not have issued. The Government's fraud prosecution was based on long standing Second Circuit doctrine equating the intangible "right to control" property, with the actual loss of money or property required under the mail and wire fraud statutes.

The District Court Proceedings

In pre-trial motions, Kergil and his co-defendants moved to dismiss the indictment for failure to allege adequately the loss of money or property required under the mail and wire fraud statutes. The district court denied the motion. *See United States v. Binday*, 908 F.Supp.2d 485, 491 (S.D.N.Y. 2012).

Immediately prior to the commencement of trial, the Government disclosed that it would rely on the Second Circuit's "Right to Control" doctrine to establish the "loss" of money or property required under the mail and wire fraud statutes. By letter dated September 5, 2013, the Government wrote: "The right to control is an *aspect* of property, and therefore encompassed within allegations that defendants schemed and conspired to defraud the Subject Insurers of 'money and property'." (Second Circuit Joint Appendix at 889-890 at 243). At the September 10, 2013 final pre-trial conference, the Government referred to the "Right to Control" doctrine as ". . . deprivations of control over economic decisions."

Bound by the Second Circuit's "Right to Control" doctrine, the District Court instructed the jury as follows:

> Now, as I told you a few minutes ago, a scheme to defraud is a course or plan of action to deprive someone of money or property. What does that mean deprive someone of money or property? Well, obviously a per-

> son is deprived of money or property when someone else takes his money or property away from him. But a person can also be ***deprived of the ability to make an informed economic decision about what to do with his money or property. We refer to that as being deprived of the right to control money or property.***

(Second Circuit Joint Appendix at 889-890) (emphasis added).

The Decision of the Second Circuit

The Second Circuit framed the issue succinctly: "The crux of defendants' argument on appeal is that the government failed to prove that they contemplated harm to the insurers that is cognizable under the mail and wire fraud statutes." *United States v. Binday*, 804 F.3d 558, 569 (2d Cir. 2015). It rejected the defense claim under its "Right to Control" doctrine:

> The parties dispute whether the requirement of contemplated harm is satisfied here based on the insurers' issuance of STOLI policies when the insurers believed, because of defendants' fraudulent representations, that they were issuing non-STOLI policies. 'Since a defining feature of most property is the right to control the asset in question, we have recognized that the property interests protected by the [mail and wire fraud] statutes include the interest of a victim in

> controlling his or her own assets." *United States v. Carlo*, 507 F.3d 799, 802 (2d Cir. 2007). Accordingly, we have held that a cognizable harm occurs where the defendant's scheme 'den[ies] the victim the right to control its assets by depriving it of information necessary to make discretionary economic decisions'. *United States v. Rossomando*, 144 F.3d 197, 201 n.5 (2d Cir. 1998).

Id. at 570.

The United States Court of Appeals for the Second Circuit affirmed the convictions of all three defendants. On January 4, 2016 the Second Circuit stayed its mandate and the surrender of all three defendants ". . . pending the filing and disposition of a petition for certiorari." Petitioner James Kevin Kergil remains at liberty pending this Court's determination of the instant petition for certiorari.

REASON FOR GRANTING THE WRIT

A WRIT SHOULD ISSUE TO RESOLVE A CONFLICT BETWEEN THE CIRCUITS AS TO WHETHER, IN LIGHT OF *MCNALLY V. UNITED STATES*, 483 U.S. 350 (1987) AND *SKILLING V. UNITED STATES*, 561 U.S. 358 (2010), THE SECOND CIRCUIT'S INTANGIBLE "RIGHT TO CONTROL PROPERTY" DOCTRINE CAN SURVIVE AS A PROPERTY RIGHT COGNIZABLE UNDER THE FEDERAL MAIL AND WIRE FRAUD STATUTES.

What is the harm required to prove mail and wire fraud? It has been almost 30 years since this Court made clear in *McNally v. United States*, 483 U.S. 350 (1987) that the federal mail and wire fraud statutes are "limited in scope to the protection of property rights." *Id.* at 360. *See Skilling v. United States* 561 U.S. 358, 401 (2010)(noting that *McNally* "stopped the development of the intangible rights doctrine in its tracks."). And yet, lower courts still cannot figure out what constitutes loss of "property rights" for purposes of the fraud statutes.

A prime example of the confusion regarding the requisite harm for conviction under the fraud statutes, would be the Second Circuit's "Right to Control Property" jurisprudence. According to the Second Circuit, depriving a party of the information necessary to make economic decisions, or

interfering with the victim's "Right to Control Property," is tantamount to the tangible loss of money or property required under the fraud statutes. It was this "Right to Control Property" doctrine which led the Second Circuit to affirm the fraud convictions below.

Mail and wire fraud are both defined as "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises." 18 U.S.C. §§ 1341, 1343. In *McNally,* this Court reviewed the history of these statutes, concluding that fraud statutes apply only to schemes which defraud victims of money or property and not to schemes which involve intangible rights, like the right to receive "honest services".[1] In subsequent cases, the Court endeavored to define the outer limits of the pecuniary harm required under the fraud statutes.

In *Carpenter v. United States*, 484 U.S. 19 (1987), the Court found that the fraud statutes applied to confidential information appropriated from a newspaper because "[c]onfidential business information has long been recognized as property." *Id.* at 26. The next opportunity came in *Cleveland v. United Stdtes*, 531 U.S. 12 (2000), where the Court examined whether false applications to the Louisiana State Police for a license to operate video poker machines, came within the ambit of the fraud statutes.

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[1] Congress subsequently added an "honest services" provision to the fraud statutes. 18 U.S.C. § 1346

> We conclude that permits or licenses of this order do not qualify as "property' within § 1341's compass. It does not suffice, we clarify, that the object of the fraud may become property in the recipient's hands, for purposes of the mail fraud statute, the thing obtained must be property in the hands of the victim. State and municipal licenses in general and Louisiana's video poker licenses in particular, we hold, do not rank as 'property' for purposes of § 1341, in the hands of the official licensor.

Id. at 15.

Then, in *Pasquantino v. United States,* 544 U.S. 349 (2004), the Court examined whether the wire fraud statute could encompass a scheme to smuggle liquor into Canada for the purpose of evading Canadian alcohol import taxes. Citing *McNally,* this Court held: "Canada's right to uncollected excise taxes on the liquor petitioners imported into Canada is 'property' in its hands. This right is an entitlement to collect money from petitioners, the possession of which is 'something of value' to the Government of Canada." *Id.* at 355.

Finally, in *Skilling v. United States*, 561 U.S. 358 (2010), the Court returned to *McNally* in order to review the "Honest Services" statute, 18 U.S.C. § 1346, passed in *McNally's* wake. The Court held: "To preserve the statute without transgressing constitutional limitations, we now hold that § 1346

criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law." *Id. at* 408-409.

While this Court was laboring to define the outer limits of the pecuniary harm required under the fraud statutes, the Second Circuit was developing the "Right to Control Property" doctrine. It began with *United States v. Biaggi,* 909 F.2d 662 (2d Cir. 1990) *cert. denied,* 499 U.S. 904 (1991), where the court found that the Defense Department's right to control contract awards was protected by the mail fraud statute. From there, the Second Circuit decided *United States v. Wallach,* 935 F.2d 445 (2d Cir. 1991):

> Examination of the case law exploring 'right to control' reveals that application of the theory is predicated on showing that some person or entity has been deprived of potentially valuable economic information. Thus, the withholding or inaccurate reporting of information that could impact on economic decisions can provide the basis for a mail fraud prosecution.

Id. at 463; *see United States v. DiNome,* 86 F.3d 277, 283 (2d Cir. 1996)(quoting *Wallach*).

When the Second Circuit affirmed the fraud convictions below because the defendants had denied ". . . the victim the right to control its assets by depriving it of information necessary to make discretionary economic decisions" [*United States v. Binday, supra, at* 570], it was relying on what had become, after 25 years, unquestioned doctrine. *See*

United States v. Carlo, 507 F.3d 799, 802 (2d Cir. 2007); *United States v. Rossomando,* 144 F.3d 197, 201 n.5 (2d Cir. 1998)(both relied on in *Binday*). But the information which the Second Circuit held impacted the economic decision and the "Right to Control Property," was not the type of confidential or "trade secret" business information which had its own pecuniary value. *See, e.g. Carpenter v. United States, supra.* Rather, it was general financial information which the insurance companies claimed they needed to control in order to determine whether to enter into business transactions in the form of life insurance policies. The Second Circuit "Right to Control Property" doctrine was precisely the type of intangible right which this Court warned in *United States v. McNally, supra,* would not be cognizable under the fraud statutes.

And yet, the Second Circuit is not alone in recognizing this intangible "Right to Control Property" doctrine. Indeed, the D.C. Circuit [*United States v. Madeoy,* 912 F.2d 1486, 1492 (D.C. Cir. 1990) *cert. denied,* 498 U.S. 1105 (1991)]; the Fourth Circuit [*United States v. Gray*, 405 F.3d 227, 234 (4th Cir. 2005)]; the Eighth Circuit [*United States v. Shyres*, 898 F.2d 647, 651-653 (8th Cir. 1990) *cert. denied,* 498 U.S. 821 (1990)]; and the Tenth Circuit [*United States v. Welch*, 327 F.3d 1081, 1108 (10th Cir. 2003)], also construe the "Right to Control Property" as cognizable under the federal mail and wire fraud statutes. But these circuits are squarely in conflict with the Sixth Circuit [*United States v. Sadler*, 750 F.3d 585 (6th Cir. 2014)] and the Ninth

Circuit [*United States v. Bruchhausen*, 977 F.2d 464 (9th Cir. 1992)], which reject the "Right to Control Property" doctrine.

The point of this Court's jurisprudence, as exemplified by *McNally, Cleveland* and *Skilling,* is that not every "fraud" can meet the requirement of the federal fraud statutes. There must be an outer limit to the pecuniary harm required. An important acknowledgment of the limited nature of these criminal statutes, is that the type of "STOLI" "fraud" committed here, has been overwhelmingly addressed through civil litigation between the insurance companies and the policy holders.[2] The insurance companies impacted by "STOLI" have commenced civil actions to rescind the "fraudulent" policies. *See, e.g. PHL Variable Life Insurance Co. v. Bowie Irrevocable Trust*, 718 F.3d 1 (1st Cir. 2013); *PHL Variable Life Insurance Co. v. Morello Irrevocable Trust*, 645 F.3d 965 (8th Cir. 2011); *Penn Mutual Life Insurance Co. v. Wolk*, 739 F.Supp.2d 387 (S.D.N.Y. 2010); *PHL Variable Insurance Co. v. Joseph Irrevocable Trust*, 970 F.Supp.2d 932 (D.Minn. 2013); *Principal Life Insurance Co. v. Rucker Insurance Trust*, 869 F.Supp.2d 556 (D.Del. 2012); *Sun Life Insurance Co. v. Berck*, 770 F.Supp.2d 728 (D.Del. 2011); *American General Life Insurance v. Goldstein*, 741

[2] Nationwide, there are only a handful of criminal fraud cases in addition to this one. *See, e.g. United States v. Carpenter*, No. 3:13-CR-226. 2015 WL 9305638 (D.Conn. 2015); *United States v. Bazemore*, 608 F. App'x 207, 209 (5th Cir.), *cert. denied,* 136 S. Ct. 223 (2015).

F.Supp.2d 604 (D.Del. 2010); *Lincoln National Insurance Co. v. Snyder*, 722 F.Supp.2d 546 (D.Del. 2010); *Lincoln National Life Insurance Co. v. Calhoun*, 596 F.Supp.2d 882 (D.N.J. 2009); *Ohio Nat. Life Assur. Corp. v. Davis*, 803 F.3d 904 (7th Cir. 2015); *Sun Life Assur. Co. of Canada v. Conestoga Trust Servs., LLC*, No. 3:14-CV-539, 2015 WL 5714542 (E.D.Tenn. 2015); *PHL Variable Ins. Co. v. ESF QIF Trust by & through Deutsche Bank Trust Co.*, No. CV 12-317. 2013 WL 6869785 (D.Del. 2013); *PHL Variable Ins. Co. v. Sheldon Hathaway Family Ins. Trust ex rel. Hathaway*, No. 2:10-CV-67, 2013 WL 6230351 (D.Utah 2013); *PHL Variable Ins. Co. v. 2008 Christa Joseph Irrevocable Trust*, 970 F. Supp. 2d 932, 942 (D. Minn. 2013); *PHL Variable Ins. Co. v. 2008 Christa Joseph Irrevocable Trust ex rel. BNC Nat. Bank*, 782 F.3d 976 (8th Cir. 2015), *reh'g denied* (2015); *Lincoln Ben. Life Co. v. Joanne Bauer Irrevocable Life Ins. Trust 12-2-2005*, No. 8:12-CV-1729-T-33, 2013 WL 24590 (M.D.Fla. 2013); *See also, e.g. Pruco Life Ins. Co. v. Wells Fargo Bank, N.A.*, 780 F.3d 1327 (11th Cir. 2015); *PHL Variable Ins. Co. v. Bank of Utah*, 780 F.3d 863, 865 (8th Cir. 2015), *as corrected* (2015); *Lincolnway Cmty. Bank v. Allianz Life Ins. Co. of N. Am.*, No. 11 C 5907, 2015 WL 7251931 (N.D.Ill. 2015); *U.S. Bank Nat'l Ass'n v. PHL Variable Ins. Co.*, No. 12-877, 2015 WL 6549595 (D.Minn. 2015); *Dukes Bridge LLC v. Sec. Life of Denver Ins. Co.*, No. 10-CV-5491, 2015 WL 3755945 (E.D.N.Y. 2015); *U.S. Bank Nat. Ass'n v. Sun Life Assur. Co. of Canada*, No. 14-CV-562, 2015 WL 3645700 (W.D.Wis. 2015); *Nationwide Life & Annuity Ins.*

Co. v. Golden, No. 2:12-CV-213, 2013 WL 97718 (S.D.Ohio 2013) *report and recommendation adopted,* No. 2:12-CV-213, 2013 WL 361060 (S.D.Ohio 2013); *AXA Equitable Life Ins. Co. v. Infinity Fin. Grp., LLC*, 608 F. Supp. 2d 1349, 1353 (S.D.Fla. 2009).

What is the harm required to prove mail and wire fraud? The answer to the question has proven elusive for so many courts and for so many years. Can the requisite harm include false information which impacts economic decision making and the "Right to Control Property?" To some courts the answer is "no," while others answer the question as though *McNally* were never decided and the "intangible rights doctrine" is alive and well. Lest the ever expanding scope of the fraud statutes continue unabated beyond the bounds which Congress ever intended for this most common of federal crimes, this Court should grant a *writ of certiorari* to resolve the conflict and clarify once and for all, that the intangible "Right to Control Property" is not cognizable under the mail and wire fraud statutes.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
March 8, 2016

Respectfully submitted,

By: _____

Roger L. Stavis
Adam M. Felsenstein
GALLET DREYER & BERKEY, LLP
845 Third Avenue, 5th Floor
New York, New York 10022
212-935-3131

Attorneys for Petitioner
James Kevin Kergil,
AKA Sealed Defendant 2