No. 19-273

In the Supreme Court of the United States

MICHAEL BINDAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly denied a certificate of appealability on petitioner's claim that his trial counsel provided ineffective assistance by misunderstanding the elements of mail and wire fraud.

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OPINIONS BELOW

The order of the court of appeals denying a certificate of appealability (Pet. App. 1-2) is unreported. The order of the district court (Pet. App. 3-23) is not published in the Federal Supplement but is available at 2018 WL 2731269. A previous opinion of the court of appeals in petitioner's case is reported at 804 F.3d 558.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 2019. A petition for rehearing was denied on May 6, 2019 (Pet. App. 24-25). On July 3, 2019, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including October 3, 2019, and the petition was filed on August 27, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. 1349; mail fraud, in violation of 18 U.S.C. 1341; and wire fraud, in violation of 18 U.S.C. 1343. Judgment 1; Pet. App. 3. The district court sentenced petitioner to 144 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed petitioner's convictions and sentence, but directed a limited remand at the government's request for entry of an amended restitution order. 804 F.3d 558. This Court denied a petition for a writ of certiorari. 136 S. Ct. 2487.

Petitioner subsequently filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255. Pet. App. 4; see 17-cv-4723-1 D. Ct. Doc. 1-1 (June 20, 2017). The district court denied the motion and declined to issue a certificate of appealability (COA). Pet. App. 3-23. The court of appeals likewise denied a COA and dismissed the appeal. *Id.* at 1-2.

1. Petitioner is an insurance broker who, along with two co-defendants, participated in an insurance fraud scheme involving "stranger-oriented life insurance" (STOLI) policies. 804 F.3d at 564-565. A STOLI policy is obtained by the insured for resale to an investor who is a stranger. *Id.* at 565. Insurance companies generally have rules against issuing STOLI policies, and they adopt measures to try to detect them before issuing a policy. *Ibid.* That is in part because of legal and moral impediments, and in part because insurers generally expect to receive less revenue from STOLI policies than from otherwise equivalent non-STOLI policies. *Id.* at

573. For example, in comparison to non-STOLI policies, the mortality rates for individuals insured tend to be higher and the rates at which STOLI policies lapse tend to be lower. *Ibid.*

In 2006, petitioner developed a scheme to make millions of dollars in profits for his insurance brokerage firm by lying to insurance companies to induce them to issue STOLI policies under the pretense that they were issuing non-STOLI policies. 804 F.3d at 566. At petitioner's direction, field agents recruited older persons of modest means to act as "straw buyers," who were promised (and sometimes paid) six-figure sums when the policies were sold to investors. *Ibid.* Petitioner arranged the necessary medical tests for the straw buyers, submitting the results to multiple insurers for preliminary assessments and to companies that predicted the straw buyers' life expectancies. *Ibid.* Based on those predictions and the insurers' preliminary assessments, petitioner generated "illustrations" for prospective investors, projecting the expected premium payments necessary to fund a given value of policy until the straw buyer's projected death. *Ibid.* After an investor chose from among the different straw buyers and policies, petitioner applied for the policy. *Ibid.* Petitioner and his co-defendants then pocketed a substantial commission. *Id.* at 567.

In executing the scheme, petitioner and his co-defendants had straw buyers sign blank applications, which the brokers filled with false financial information, supported by fraudulent documents prepared by an accountant relative of petitioner and supposedly verified by an independent third-party inspector, who in reality simply "assumed [the information] was correct." 804 F.3d at 566-567 (citation omitted). Petitioner and

his co-defendants also lied in response to insurers' questions aimed at detecting STOLI policies, including questions about the purpose of the policy, how the premiums would be paid, and whether the applicant had discussed selling the policy. *Id.* at 567. And petitioner and his co-defendants also lied by providing required certifications that, to their knowledge, the policies were not STOLI. *Ibid.*

Over the course of the scheme, petitioner and his co-defendants submitted at least 92 fraudulent applications, resulting in the issuance of 74 STOLI policies with a total face value of more than $100 million. 804 F.3d at 567. Those policies generated for petitioner and his agents a total of roughly $11.7 million in commissions, which ranged from 50%-100% of the first year's premium payments and typically exceeded $100,000 on any given policy. *Ibid.*

2. A federal grand jury in the Southern District of New York returned an indictment charging petitioner with conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. 1349; mail fraud, in violation of 18 U.S.C. 1341; and wire fraud, in violation of 18 U.S.C. 1343. Indictment 22-28.[1]

The indictment alleged that petitioner defrauded insurers by causing them to issue STOLI policies through misrepresentations about the applicants' financial information, the purpose of procuring the policy and the intent to resell the policy, the financing of premiums by third parties, and the existence of other policies or applications for the same applicant. Indictment 4-5. According to the indictment, those misrepresentations

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[1] Petitioner was also charged with obstruction of justice, 18 U.S.C. 1512(c), but that charge was dismissed before trial. Indictment 29-30; 14-2809 Gov't C.A. Br. 2.

"caused a discrepancy between the benefits reasonably anticipated by the [insurers] and the actual benefits received." Indictment 4.

Before trial, petitioner filed a motion to dismiss the fraud counts, arguing that the misrepresentations alleged by the government could not form the basis of a valid mail or wire fraud prosecution because the deceit did not (and was not intended to) affect the essential elements of the bargain between the insurers and purchasers of the policies. 12-cr-152 D. Ct. Docs. 29-30 (Oct. 1, 2012). The district court denied petitioner's motion, concluding that "the indictment alleges that [petitioner] made material misrepresentations as part of a scheme to defraud the" insurers "and explains how those misrepresentations actually cause[d] the [insurers] economic harm." 12-cr-152 D. Ct. Doc. 51, at 7 (Dec. 10, 2012).

3. At trial, petitioner argued that his "conduct was not fraudulent because the insurers in fact happily issued STOLI policies, while paying lip service to weeding out STOLI policies for public relations reasons." 804 F.3d at 568. Petitioner and his co-defendants again asserted that "they did not intend to inflict, and that the insurers had not in fact suffered, any harm that is cognizable under the mail and wire fraud statutes." *Ibid.* The government, however, presented the testimony of insurance executives who explained that insurers refuse to issue STOLI policies because such policies have different economic characteristics than comparable non-STOLI policies, and that those characteristics can reduce the policies' profitability. *Id.* at 568, 572-573.

At the close of evidence, the district court instructed the jury on the requirements for proving a scheme to "deprive someone of money or property." 804 F.3d at

581 (citation omitted). The court stated that "a person is deprived of money or property when someone else takes his money or property away from him," and that "a person can also be deprived of money or property when he is deprived of the ability to make an informed economic decision about what to do with his money or property," which courts refer to "as being deprived of the right to control money or property." *Ibid.* The court also instructed the jury that while the government need not "prove that any insurance company actually lost money or property as a result of the scheme," it was required to prove that "[s]uch a loss" was "contemplated by the defendant." *Ibid.* And the court further instructed the jury that "the loss of the right to control money or property constitutes deprivation of money or property only when the scheme, if it were to succeed, would result in economic harm to the victim." *Ibid.*

The jury found petitioner guilty on all counts. Judgment 1. The district court sentenced him to 144 months of imprisonment, to be followed by three years of supervised release. Judgment at 2-3.

4. The court of appeals affirmed petitioner's convictions and directed a limited remand, at the government's request, for entry of an amended restitution order. 804 F.3d 558. As relevant here, the court rejected petitioner's argument that the government's evidence was insufficient because it failed to establish an economic difference between STOLI and non-STOLI policies. *Id.* at 572-574. The court observed that the insurance executives' testimony "provided a legally sufficient basis for a jury to find that [petitioner's] misrepresentations exposed the insurers to an unbargained-for risk of economic loss, because the insurers expected STOLI

policies to differ economically, to the insurers' detriment, from non-STOLI policies." *Id.* at 574. The court similarly found sufficient evidence that petitioner had intended such harm. *Id.* at 578-579.

The court of appeals also rejected petitioner's assertion that the jury instructions "permitted conviction absent a showing of cognizable harm." 804 F.3d at 582. The court observed that the instructions did require a showing of cognizable harm because "the charge states explicitly that 'the loss of the right to control money or property constitutes deprivation of money or property only when the scheme, if it were to succeed, would result in economic harm to the victim.'" *Ibid.* (citation and emphasis omitted). The court further observed that the charge "reiterates that the government would not meet its burden if it showed only that the insurers 'enter[ed] into transactions that they otherwise would not have entered into, without proving that the ostensible victims would thereby have suffered some economic harm.'" *Ibid.* (citation omitted; brackets in original).

This Court denied a petition for a writ of certiorari. 136 S. Ct. 2487.

5. In 2017, petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255. Pet. App. 4; see 17-cv-4723 D. Ct. Doc. 1-1. His sole claim was that he was "deprived of his federal constitutional right to the effective assistance of counsel" under the Sixth Amendment. Pet. App. 4. The district court denied the motion without a hearing, finding that petitioner could not satisfy either the deficient "performance" or the "prejudice" requirements of *Strickland* v. *Washington*, 466 U.S. 668, 689, 692 (1984). Pet. App. 5-6.

The district court first rejected petitioner's contention that his trial counsel's performance was constitutionally

deficient, which was premised on the assertion that his counsel focused on arguing that there was no "actual economic loss" to the insurance companies, even though economic loss is an element of the fraud. Pet. App. 7 (citation omitted). The court observed that the absence of "actual economic loss" was "not the gravamen of [petitioner's] defense at trial." *Id.* at 8. Instead, petitioner's defense was that the insurance companies had engaged in a "wink and a nod practice" of criticizing STOLI policies publicly, while "secretly letting such policies 'slip through the cracks' so that they could earn the hefty premiums that the policies generated." *Ibid.* (citation omitted). The court accordingly determined that petitioner's "attempts to establish his attorneys' deficient performance through misleadingly incomplete compilation of portions of the trial transcript are simply without merit." *Id.* at 9.

The district court also found that petitioner had failed to show prejudice. Pet. App. 9-17. Although petitioner asserted that competent defense counsel would have introduced certain emails, *id.* at 10, presented certain "speculative and hypothetical" evidence regarding the value of STOLI policies, *id.* at 11, and called petitioner to testify in his own defense, *id.* at 15, the court explained that none of these tactics would have improved petitioner's outcome, *id.* at 10-17. It observed, for example, that trial counsel's advice not to take the stand was "sound and reasonable" given the "risk that [petitioner] would be confronted with his systemic and repeated pattern of lies." *Id.* at 17.

After similarly rejecting petitioner's assertion that his sentencing counsel was constitutionally deficient, Pet. App. 17-23, the district court declined to issue a COA, *id.* at 23. The court of appeals likewise denied a COA and dismissed petitioner's appeal without an opinion. *Id.* at 1-2.

ARGUMENT

Petitioner seeks review (Pet. 16-19) of the court of appeals' denial of a certificate of appealability that would have allowed him to pursue his claim that his trial counsel deficiently focused the defense on the absence of an actual loss to the victims of petitioner's fraud. The court of appeals' unpublished decision is correct, and petitioner identifies no conflict with this Court or another court of appeals. Petitioner also asserts (Pet. 11-36) two arguments that were not presented in his Section 2255 motion or considered by the courts reviewing that motion: (1) that his trial counsel acted deficiently in failing to challenge the "right to control" theory on which his indictment was allegedly predicated, and (2) that his conviction is invalid because it rests on that improper theory of fraud. Those issues are not properly before this Court, and—even if they were—petitioner's contentions are based on a misdescription of the record and revive the same argument that this Court declined to review when petitioner presented it in his first unsuccessful petition for certiorari. Plenary review is unwarranted, and no reason exists to hold the petition for *Kelly* v. *United States*, cert. granted, No. 18-1059 (oral argument scheduled for Jan. 14, 2020).

1. A federal prisoner seeking to appeal the denial of a motion to vacate his sentence under 28 U.S.C. 2255 must obtain a COA. 28 U.S.C. 2253(c)(1)(B). To obtain a COA, a prisoner must make "a substantial showing of the denial of a constitutional right," 28 U.S. 2253(c)(2)—that is, a "showing that reasonable jurists could debate whether" a constitutional claim "should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack* v. *McDaniel*, 529 U.S. 473, 484

(2000) (citation omitted). The lower courts correctly recognized that petitioner's ineffective assistance claim did not satisfy that standard.

To establish ineffective assistance of counsel under *Strickland* v. *Washington*, 466 U.S. 668 (1984), a defendant must prove both (1) deficient performance and (2) prejudice. *Id.* at 687. *Strickland*'s deficient-performance prong requires a showing that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Ibid.* A defendant must therefore "show that counsel's representation fell below an objective standard of reasonableness" under "prevailing professional norms" and overcome the "strong presumption" that counsel's conduct fell "within the wide range of reasonable professional assistance." *Id.* at 688-689. And as this Court has explained, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689.

Petitioner contends (Pet. 16-19) that his counsel provided ineffective assistance by arguing at trial that the insurers were not economically harmed by his scheme, even though economic loss is not required to establish mail or wire fraud. The district court correctly rejected petitioner's argument, and the court of appeals did not err in denying a COA on that issue. The record does not support petitioner's assertion that his trial counsel made the absence of economic loss the "gravamen" of petitioner's defense. Pet. App. 8. As the district court explained, the defense theory was that petitioner's con-

duct was not fraudulent because the insurers happily issued STOLI policies while publicly disavowing them (an argument about materiality and lack of a cognizable scheme to defraud). *Ibid.*; see 804 F.3d at 568-569. Petitioner's counsel also argued that the economic difference between STOLI and non-STOLI policies is so slight that petitioner could not have intended for the insurers to suffer any injury and in fact caused no injury (an argument about the lack of intent to defraud and materiality). Pet. App. 8. The district court's factbound determination that petitioner's criticism of counsel's performance as singularly focused on the lack of economic loss to the insurers is "simply without merit," and relies on a "misleadingly incomplete compilation of portions of the trial transcript," *id.* at 9, does not merit this Court's review.

2. Petitioner dedicates most of his petition (Pet. 20-36) to arguments that were not raised in his Section 2255 motion or passed upon by the reviewing courts. He contends (Pet. 25-36) that he was convicted under an invalid "right to control" theory of fraud, and he tries to tie that claim into his Section 2255 petition by asserting—for the first time in his petition for a writ of certiorari—that trial counsel was ineffective for failing to raise a legal challenge to the "right to control" theory at trial (Pet. 20-24). The court of appeals did not err in denying a COA on an issue that petitioner did not properly raise. See 28 U.S.C. 2253(c)(3); *Slack*, 529 U.S. at 484 (COA requires a showing that "the district court's assessment of the * * * claims was debatable or wrong"). In any event, this Court's "traditional rule * * * precludes a grant of certiorari" when "'the question presented was not pressed or passed upon below,'"

United States v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted). No reason exists for an exception to that rule here, particularly because petitioner's arguments are based on a misdescription of the record.

Petitioner misdescribes the record in two ways. First, petitioner asserts that, in order to obtain a guilty verdict, the government "d[id] not even have to prove a contemplated loss" to his victims. Pet. 17; see Pet. 18 (asserting that the jury was instructed that "an actual or contemplated financial loss was completely irrelevant"). In fact, however, the jury was explicitly instructed that "the loss of the right to control money or property constitutes deprivation of money or property *only when the scheme, if it were to succeed, would result in economic harm to the victim*." 804 F.3d at 581 (emphasis added). And the instructions reiterated that "[i]f all the government proves is that under the scheme the insurance companies would enter into transactions that they otherwise would not have entered into, without proving that the ostensible victims would thereby have suffered some economic harm, then the government will not have met its burden of proof." *Ibid.* Petitioner is therefore mistaken in asserting that he was convicted under a theory that excused the government from any need to show a "contemplated loss." Pet. 17.

Indeed, this Court refused to consider a similar challenge to the "right to control" theory that petitioner advanced in the petition for certiorari he filed after his direct appeal. 136 S. Ct. 2487. There, as here, petitioner asserted that he was convicted based only on alleged harms to an "amorphous 'right to control' property." 15-1140 Pet. i. As the United States explained in its response to that petition, petitioner was not convicted

merely because he deprived insurers of a "right to control." See 15-1140 U.S. Br. in Opp. 14-26. Rather, the district court's instructions required the government to prove that the scheme would result in "economic harm to the victim." 804 F.3d at 581. And ample evidence established that the insurance companies in fact suffered economic harms because they issued STOLI policies that had economic characteristics that made them less likely to be profitable than the non-STOLI policies that the insurers thought they were issuing. *Id.* at 568, 572-573.

Second, petitioner erroneously asserts (Pet. 20) that trial counsel may have acted deficiently by failing to "raise his objection to the right to control theory by way of a motion to dismiss." Trial counsel *did* move to dismiss the indictment on the ground that it set forth an invalid legal theory. 12-cr-152 D. Ct. Docs. 29-30. Petitioner's pre-trial motion argued that the indictment did not adequately allege the elements of mail and wire fraud because it failed to allege a cognizable harm. *Ibid.* The district court denied the motion, because "the indictment alleges that [petitioner] made material misrepresentations as part of a scheme to defraud the" insurers "and explains how those misrepresentations actually cause[d] the [insurers] economic harm." 12-cr-152 D. Ct. Doc. 51, at 7. Petitioner fails to explain what counsel should have done to mount a "more effective legal attack" (Pet. 24) or why counsel's legal challenge to the fraud theory amounts to constitutionally deficient performance.

3. As an alternative to his request for plenary review of "right to control" arguments that petitioner failed to advance below, he asks this Court (Pet. 31-32) to hold his petition pending a decision in *Kelly*, *supra*. The

Court should not hold this petition for *Kelly*. In that case, the defendants were convicted of federal fraud charges after conspiring with other public officials to divert the money and property of the Port Authority of New York and New Jersey (Port Authority) to create massive traffic jams in Fort Lee, New Jersey, by lying about conducting a fictitious traffic study. Pet. App. at 2a-7a, *Kelly*, *supra* (No. 18-1059).

The Court's resolution of *Kelly* would not affect the proper disposition of petitioner's Section 2255 motion here. A "right to control" theory of fraud does not appear in the question presented in *Kelly*. See Kelly Br. at i; Baroni Br. at i; U.S. Br. at I, *Kelly*, *supra*, (No. 18-1059). The court of appeals found "ample evidence" supporting the jury's determination that the defendants had "obtained by false or fraudulent pretenses, at a minimum, public employees' labor," thereby depriving the Port Authority of its property rights in those employees' "time and wages." Pet. App. at 22a, *Kelly*, *supra*, (No. 18-1059). Because the court found the evidence sufficient to show that the Port Authority was deprived of money or property, it reasoned that it "need not reach or decide" whether the fraud convictions could also be sustained on the ground that the defendants deprived the Port Authority of its "'right to control'" the George Washington Bridge. *Id.* at 26a. Although the court nonetheless went on to observe that the defendants' scheme had interfered with the Port Authority's "unquestionable property interest" in the exclusive operation of its physical property, *id.* at 27a, petitioner's case does not involve a scheme to gain the authority to operate a physical asset like the bridge, or otherwise involve facts similar to those at issue in *Kelly*.

In any event, because petitioner's challenge to the "right to control" theory was not raised or even mentioned in his Section 2255 petition, this Court's decision in *Kelly*, even if it were to address that theory, would not warrant a remand to the courts below. If the Court's decision in *Kelly* sheds any light on the lawfulness of petitioner's convictions, he can seek permission from the court of appeals to file another Section 2255 motion, assuming he can satisfy the statutory prerequisites. See 28 U.S.C. 2255(h).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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