

No. 21-1241

In the Supreme Court of the United States

MICHAEL L. 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*

MEMORANDUM FOR THE UNITED STATES

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Petitioner contends (Pet. 19-30) that the court of appeals erred in denying his motion for leave to file a habeas petition under 28 U.S.C. 2241 challenging his convictions for mail and wire fraud. A federal prisoner may seek relief under Section 2241 only if a motion under Section 2255 itself is “inadequate or ineffective to test the legality of his detention.” 28 U.S.C. 2255(e). The Second Circuit has concluded that Section 2255(e) is limited to “cases involving prisoners who (1) can prove ‘actual innocence on the existing record,’ and (2) ‘could not have effectively raised their claims of innocence at an earlier time.’” *Cephas v. Nash*, 328 F.3d 98, 104 (2003) (brackets and citation omitted).

Here, petitioner contended that he was actually innocent. He asserted that his fraud convictions were based on the theory that a defendant commits fraud if he “denies the victim the right to control its assets by

depriving it of information necessary to make discretionary economic decisions,” Pet. App. 47 (brackets and citation omitted), and that *Kelly v. United States*, 140 S. Ct. 1565 (2020), had invalidated that theory. The court of appeals denied petitioner’s motion for leave to file, reasoning that it had “recently upheld the theory of conviction challenged by” petitioner and finding that he had “not otherwise shown that his case is covered by” *Kelly*. Pet. App. 2-3 (citing *United States v. Gatto*, 986 F.3d 104, 125-127 (2d Cir.), cert. denied, 142 S. Ct. 710 (2021)).

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.*

* The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.

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Respectfully submitted.

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