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WHITE-COLLAR CRIME

SCOTUS to Assess 'Right-to-Control' and Honest Services Fraud

By **Robert J. Anello** And **Richard F. Albert**

Federal courts long have struggled to define the limits of the mail and wire fraud statutes, laws famously characterized as the prosecutor's true love for their vast breadth and catch-all adaptability. After sidestepping opportunities in the past, the U.S. Supreme Court is now wading into two different and controversial manifestations of that flexibility. The first, which has proved particularly useful to Second Circuit prosecutors in recent years, is the "right-to-control" theory. This approach treats the deprivation of complete and accurate information bearing on a person's economic decision as a species of property fraud. Critics have focused on this theory because it allows federal prosecution of a broad range of conduct that may be unsavory or deceptive—like violating NCAA recruiting rules, lying in an employment application or retaliating against a political rival by closing entrance lanes to a busy bridge—but which does not contemplate the concrete economic harm at which fraud statutes are aimed. The second is a line of cases based on the Second Circuit's 1982 decision upholding the conviction of the former Republican leader in Nassau County, Joseph Margiotta, holding that a private citizen who has informal influence over government decision making can be convicted of honest services fraud.

The cases the Supreme Court accepted for review arise from scandals touching New York state government that were the subject of two separate trials in 2018 before Judge Valerie Caproni of the Southern District of New York. On June 30, the last day before its summer recess, the Supreme Court granted a petition for certiorari in *Ciminelli v. United States*, No. 21-1170, often referred to as the "Buffalo Billion" case, arising from alleged bid-rigging regarding contracts for development projects in Buffalo and Syracuse. That same day, the court also granted a petition for certiorari in *Percoco v. United States*, No. 21-1158, which stemmed from a bribery scandal involving one of the defendants in the "Buffalo Billion" case and Joseph Percoco, a top aide to then Governor Andrew Cuomo who was not a state employee at the time of the conduct at issue. Coming in the wake of *Kelly v. United States*, 140 S. Ct. 1565 (2020)—the court's unanimous ruling rejecting an expansive construction of the fraud statutes in overturning the "Bridgegate" convictions—the court's decision to hear both cases suggests it may take the opportunity to further rein in prosecutors' efforts to impose their views of ethical behavior by extending the fraud statutes beyond protecting against classic property fraud.

The 'Right-To-Control' Theory

Wire fraud is defined under 18 U.S.C. §1343 as "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits … by means of wire, radio, or television communication … any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice." Its twin statute, 18 U.S.C. §1341, outlaws

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the same conduct when executed via the mail. Although stated in the disjunctive, since *McNally v. United States*, 483 U.S. 350 (1987), the Supreme Court repeatedly has held that the statutes' reach is limited to schemes that seek to obtain "money or property."

The right-to-control theory entails a dispute about the statutory meaning of "property." A line of Second Circuit decisions holds that a scheme can rise to the level of mail or wire fraud if it intends to deprive "the victim of potentially valuable economic information … necessary to make discretionary economic decisions." *United States v. Binday*, 804 F.3d 558, 570 (2d Cir. 2015). The Eighth and Tenth Circuits have joined the Second in recognizing the validity of the theory while the Sixth and Ninth Circuits have rejected it outright. *Ciminelli* provides a particularly apt vehicle for the court to resolve this circuit split because unlike prior efforts to obtain high court review, the petitioners wire fraud convictions are based solely on the deprivation of potentially valuable information, without any proof that the alleged victim suffered economic harm.

Honest Services Fraud

18 U.S.C. §1346, enacted to overturn the Supreme Court rejection of the honest services theory of liability in *McNally*, provides that a "scheme or artifice to defraud" subject to prosecution under the mail or wire fraud statutes "includes a scheme or artifice to deprive another of the intangible right of honest services." In *Skilling v. United States*, the Supreme Court clarified that this section applied only to schemes intended to deprive the public of honest services through "bribes or kickbacks," not mere ethical breaches or conflicts of interest. 561 U.S. 358, 409-10 (2010).

'Buffalo Billion': The Bid-rigging Case

Both *Ciminelli* and *Percoco* arise out of a wide-ranging federal investigation into alleged corruption in New York state government. Defendants in the "Buffalo Billion" bid-rigging case were participants in a state program that aimed to invest $1 billion in upstate development projects centered around the Buffalo region. At the center of this program was the Fort Schuyler Management Corporation (FSMC), a nonprofit entity tasked with awarding the state funded projects to developers. Before awarding any specific project, FSMC would issue requests for proposals (RFPs), and companies would first bid to be selected as a "preferred developer," granting the right to negotiate first with FSMC. Notably, FSMC was not bound to preferred developers in any way beyond the obligation to first negotiate with them regarding specific projects. Among others, FSMC selected a company controlled by petitioner Louis Ciminelli and one controlled by petitioners Stephen Aiello and Joseph Gerardi as preferred developers for RFPs in Buffalo and Syracuse, respectively. Petitioners' companies ultimately won bids for projects valued at $750 million (Ciminelli) and $105 million (Aiello/Gerardi).

In 'Ciminelli' and 'Percoco', the Supreme Court will have the opportunity to further limit prosecutors' use of unduly broad interpretations of the federal fraud laws to impose their own notions of an integrity code onto state government and many other arenas beyond their proper reach.

Investigators discovered that a member of FSMC's board, Dr. Alain Kaloyeros, drafted RFPs to favor the selection of petitioners' companies as preferred developers. For example, in 2013, FSMC issued the RFP for Buffalo requiring, among other things, that preferred developers be headquartered in Buffalo and have at least 50 years of experience "in the construction and operation of mixed-use facilities," a requirement that strongly advantaged Ciminelli's company. A similar pattern held for the Aiello's and Gerardi's company and the Syracuse RFP.

On Sept. 19, 2017, prosecutors charged Ciminelli, Aiello, Gerardi and Kaloyeros with both conspiracy to commit wire fraud and substantive wire fraud based upon their involvement in the alleged RFP bid-rigging scheme. At trial, prosecutors offered no proof that FSMC was deprived of a fair price, fair terms, or quality in the (non-binding) negotiations following the selection of petitioners' companies as preferred developers or in their performance of the contracts they were ultimately awarded. The government likewise introduced no evidence that FSMC could have obtained the same services or outcome for a better price from another provider. The prosecution's theory was the "right to control," which were reflected in jury instructions that provided that a "deprivation of money or property" could include "intangible property," which could include "potentially valuable economic information," that an alleged victim would find valuable when assessing a

transaction or how to use its assets. The jury found each defendant guilty of one count of conspiracy and one count of wire fraud, aside from Kaloyeros, who was found guilty of one count of conspiracy and two counts of wire fraud. Gerardi also was found guilty of making false statements to federal officers.

The Percoco Bribery Case

Investigators also learned that Aiello had arranged for his RFP-bidding company, COR Development Co., to make payments totaling $35,000 for the benefit of Percoco, a top aide to Governor Cuomo who had just left state employment and was working on the re-election campaign at the time. Aiello requested Percoco's assistance in getting COR a waiver from a labor peace agreement that the state would otherwise require. Percoco, who was due to resume official state employment but had not yet done so, reached out to a state official. State officials later reversed their prior decision denying COR state funds, with the official who received Percoco's outreach saying that he felt "pressure" to do so.

Prosecutors brought charges against Aiello, Percoco and Gerardi for bribery and honest services wire fraud that were adjudicated in a separate trial. Aiello and Percoco were found guilty of one and two counts, respectively, of conspiracy to commit honest-services wire fraud, and Percoco was also convicted of one count of soliciting bribes or gratuities. Gerardi was acquitted on all counts, and Aiello was acquitted of bribery and making false statements.

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The district court sentenced defendants in both cases to multi-year prison terms. The Second Circuit affirmed all convictions on appeal. All defendants had begun serving their sentences, but Percoco was released to a halfway house in late 2021, and the remaining defendants were released from prison following the Supreme Court's grant of review.

Bid-Rigging Petitioners' Arguments

In seeking certiorari, the bid-rigging petitioners make a forceful case that the right-to-control theory of fraud conflicts with current Supreme Court doctrine. They begin with *McNally*'s requirement that the alleged scheme seek to "obtain[] money or property," and subsequent decisions defining such property to mean only what has traditionally qualified as a property interest, including intangible property interests. Petitioners then address how the right to have accurate information about a potential transaction, without any loss of property (realized or intended), is not analogous to any traditional property interest. Petitioners also assert that the right-to-control theory also fails to satisfy the "obtainability/transferability" requirement of the federal fraud statutes because the "property" allegedly lost by FSMC, potentially valuable information, was not, and could not be obtained by petitioners.

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Petitioners next argue that the expansive and amorphous right-to-control theory undermines the court's decision in *Skilling v. United States*, 561 U.S. 358, 412-13 (2010), which limited the honest services theory of fraud to cases involving bribery and kickbacks and specifically rejected its application to undisclosed conflicts of interest, because prosecutors can always avoid its strictures by charging such a conflict of interest under the right-to-control theory. Petitioners also assert that the right-to-control theory would render the mail and wire fraud statutes impermissibly vague as it leads to "arbitrary and discriminatory prosecutions" and assertions of prosecutorial regulation of an expansive range of conduct that constitutes mere deceit, without the requisite tie to obtaining money or property. Put another way, the right-to-control theory makes it wholly unnecessary for prosecutors to show that even the completed scheme produced tangible economic harm.

Petitioners' briefs are reinforced by an *amicus* brief submitted by the New York Council of Defense lawyers (NYCDL) that argues that, particularly in the Second Circuit, prosecutors increasingly have relied upon the right-to-control theory when they can prove deceit but not contemplated economic harm, with the effect of criminalizing non-disclosure of information that before "was addressed at most through state civil remedies and, because of the absence of harm, uncomplained of." The NYCDL lists examples of wire and mail fraud charges based in whole or in part on a right-to-control theory brought against at least 112 different defendants in the Second Circuit within the last decade, in widely disparate

factual circumstances. NYCDL identifies cases where prosecutors have used the theory to vastly expand the reach of mail and wire fraud to criminalize acts Congress has chosen not to regulate or violations of rules of private organizations like the NCAA, as well as breaches of unenforceable oral promises in the financial markets, and even misrepresentations by job candidates, rendering the fraud statutes' "property" requirement essentially meaningless. NYCDL also points to the unintelligibility of the relevant jury instructions, arguing that they invite jurors to convict without finding the necessary contemplation of economic harm.

Bribery Petitioners' Arguments

Petitioners in the bribery case focus on the conflict between the holding in *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982), and the Supreme Court's subsequent decisions in *Skilling* and *United States v. McDonnell*, 136 S. Ct. 2355, 2371-72 (2016), the latter of which held that "an official act" for the federal bribery statutes must "involve a formal exercise of governmental power," arguing that close ties to people in public office cannot suffice. As Percoco's petition memorably begins: "When a public official accepts money to convince the government to do something, we call him a crook. But when a private citizen accepts money to convince the government to do something, we call him a lobbyist." Percoco asserts that *Margiotta* was abrogated by *McNally*, and despite's Congress's subsequent passage of 18 U.S.C. §1346, *Margiotta*'s expansive reach and reasoning appropriately have been condemned as no longer good law by courts both within and without the Second Circuit. See, e.g., *United States v. Adler*, 274 F. Supp. 2d 583, 587 (S.D.N.Y. 2003) ("*Margiotta* was wrongly decided and is no longer good law in this Circuit or anyplace.") NYCDL's amicus brief emphasizes *McNally*'s official act requirement and *McDonnell*'s requirement of a formal exercise of governmental power. NYCDL argues that an interpretation of the honest services fraud statute that extends beyond formal acts by government officials becomes impermissibly arbitrary and expansive, sweeping in even ordinary lobbying practices.

Government Arguments

The government's arguments, which of course were limited to opposing the petitions for review, do not address petitioners' "right to control" arguments at length, but do point to the court's previous recognition of intangible property rights similar to those embodied in the right-to-control theory of fraud, such as the general "economic interest" noted in *Pasquantino v. United States*, 544 U.S. 349, 357 (2005), or one's "use of valuable property" as expressed in *Dickman v. Commissioner*, 465 U.S. 330, 336 (1984). As for the circuit split, the government attempts to distinguish the decisions of the Sixth and Ninth Circuits as limited to the facts of those cases to deny that the courts rejected the right-to-control theory of fraud generally.

As for the honest services fraud convictions, the government contends that the facts of this case fall far short of the extent or breadth of the rule in *Margiotta*. The government also argues that the Second Circuit's holding below is not in conflict with *Skilling* because its language allows for someone to qualify as a "public official" without "formal employment" so long as they occupy a position of public trust. It is likewise not in conflict with *McDonnell* because that decision explicitly allows for the notion that exerting "pressure on another official" can constitute an official act without foreclosing the possibility that such pressure can come from someone who lacks a formal employment relationship.

Conclusion

In *Ciminelli* and *Percoco*, the Supreme Court will have the opportunity to further limit prosecutors' use of unduly broad interpretations of the federal fraud laws to impose their own notions of an integrity code onto state government and many other arenas beyond their proper reach. Of the two petitions, a conclusive holding in *Ciminelli* rejecting the right-to-control theory promises to have a broader impact given its frequent and creative application, particularly by prosecutors in the Second Circuit, to a wide range of disparate conduct entailing alleged deceit without economic harm. Although many may see the court's grant of review as a signal, it is of course too soon to tell what impact these cases will have on prosecutors' future ability to deploy their longtime favorite statutes.

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