24-1221

To Be Argued By:
ALEXANDRA A.E. SHAPIRO

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

MARK JOHNSON,

Petitioner-Appellant,

—against—

UNITED STATES OF AMERICA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AND SPECIAL APPENDIX FOR PETITIONER-APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

INTRODUCTION

Two sophisticated multibillion-dollar companies agree to engage in a commercial transaction. They enter a written contract expressly disclaiming any fiduciary or similar relationship. If one later sues the other for breach of fiduciary duty, the case would be dismissed. Can the government still charge criminal fraud based on the alleged breach of a fiduciary duty? That is the principal question presented in this appeal. The correct and obvious answer is no.

This Court had an opportunity to answer the question five years ago but declined. Instead, it affirmed Mark Johnson's conviction exclusively under the government's other theory, "right to control" fraud. *See United States v. Johnson,* 945 F.3d 606 (2d Cir. 2019). The Supreme Court subsequently jettisoned that theory, but too late for Johnson to avoid serving a two-year sentence and paying $300,900 in penalties. Johnson can never get back the time he spent in prison, but his conviction continues to prevent him from pursuing his chosen profession and inflicts other personal and professional harms. This Court can and should afford him the modest relief of annulling his conviction to stem those continuing injuries.

For decades, Johnson had a successful career in the foreign exchange industry. It was unmarred by any customer complaint or civil, regulatory, or criminal investigation or charge. Then the government charged him with fraud for conducting a currency exchange in what witnesses called "the normal way" in the

industry. The transaction was an arm's-length, $3.5 billion currency conversion between Johnson's employer, HSBC, and Cairn Energy, a major global energy conglomerate. The transaction was executed consistent with the terms of the governing contract and in a manner that violated no applicable law, regulation, rule, or industry norm. The government's experts could not identify a plausible alternative way to execute the transaction. Cairn, the purported victim, never complained to law enforcement about HSBC's or Johnson's conduct. But the Department of Justice prosecuted Johnson anyway.

Throughout the criminal proceedings, Johnson maintained his innocence. At every stage, he argued that, even accepting the government's view of the facts, his conduct was consistent with standard industry practice and, as a matter of law, did not constitute criminal fraud under either of the government's two theories. After this Court affirmed Johnson's conviction under the right-to-control theory, the Supreme Court denied Johnson's petition for certiorari, which challenged the validity of that theory.

But in 2023, as Johnson was completing his sentence, the Supreme Court unanimously held in *Ciminelli v. United States,* 598 U.S. 306 (2023), that "right to control" is legally invalid. Johnson promptly petitioned for a writ of error *coram nobis.* To obtain relief, he had to demonstrate that (1) relief is necessary to achieve justice; (2) there were sound reasons for not seeking relief earlier; and (3) he

suffers continuing harms from the conviction. *See Foont v. United States,* 93 F.3d 76 (2d Cir. 1996). The district court agreed the last two factors were met and that the conviction could no longer stand under "right to control." It denied relief only because it thought the jury could have convicted under the government's other theory-misappropriation-and this rendered the *Ciminelli* error harmless.

The district court was wrong. Misappropriation fraud requires a duty of trust and confidence that was breached. Black-letter law forecloses such a duty where sophisticated parties at arm's length expressly disclaim a fiduciary or similar relationship, as occurred here. Thus, Johnson was not guilty under that theory as a matter of law. But the district court ignored the parties' unambiguous contract and instead conjured up a duty based on extrinsic evidence.

The district court also misunderstood and misapplied the harmless error standard. The government invited the jury to convict based on the erroneous right-to-control theory, and the extensive evidence showing the lack of any fiduciary relationship created, at a minimum, "grave doubts" as to whether the jury convicted on misappropriation.

The judgment should be reversed with instructions to grant the writ.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction pursuant to 28 U.S.C. §1331. This Court has appellate jurisdiction pursuant to 28 U.S.C. §1291. Final judgment was entered on April 25, 2024. (SPA-28). The Notice of Appeal was filed the same day. (A-331).

ISSUES PRESENTED

1. Under the misappropriation theory of wire fraud, can a fiduciary or similar relationship arise between sophisticated parties operating at arm's length, where their contract expressly disclaims such a duty?

2. Where alternative theories of guilt were presented to a jury, and one is legally invalid and the other requires proof of an additional, hotly contested element, is the erroneous instruction permitting conviction on the invalid theory harmless on *coram nobis* review?

STATEMENT OF THE CASE

A. Background

On October 23, 2017, Johnson was convicted on one count of wire fraud conspiracy (18 U.S.C. §1349) and eight counts of wire fraud (18 U.S.C. §1343) following a jury trial in the Eastern District of New York before the Honorable Nicholas G. Garaufis. The charges were based on allegations that, while serving as head of HSBC's foreign exchange business, Johnson deceived a counterparty in a

large currency exchange transaction and that, as a result, HSBC earned greater profits from the transaction than it otherwise would have.

The evidence at trial showed the following:

I. *The Transaction*

Cairn Energy is one of Europe's leading oil and gas companies, with income and assets in the billions. It is among the largest companies listed on the London Stock Exchange. (A-73-74, A-95). In 2010, Cairn announced it would sell a foreign subsidiary and distribute approximately $4 billion in proceeds to shareholders. *Johnson,* 945 F.3d at 608-09. To complete the distribution, Cairn needed to convert the dollars to British pounds.

Cairn assessed various conversion methods and ultimately chose a "fix"-using a benchmark exchange rate published hourly by a financial services company. The "fix" rate is based on the average price of trades executed in a one-minute window beginning 30 seconds before the hour and ending 30 seconds after the hour. (A-180). With this method, parties agree to exchange currencies at the fix rate set at a specified future time. (A-136). For instance, a bank and a customer might agree at 1pm to exchange U.S. dollars into pounds based on the 3pm fix rate. The bank then accumulates the requisite pounds between 1pm and 3pm and sells them to the customer at the published 3pm rate. (A-139-40, A-148-49).

In this scenario, banks charge no fee and instead try to make money by "beating the fix." *(E.g.,* A-106-07). In other words, the bank hopes to buy pounds at an average rate lower than the future fix rate at which it must sell them to the counterparty. In a large transaction such as Cairn's, the bank incurs significant risk, but the pound's price is likely to rise as the bank buys pounds because the significant quantities involved in those predicate transactions may move the market. If the pound's price does rise, and the bank's average purchase price is lower than the fix price, the bank profits by selling the counterparty pounds at the higher price. (A-136-38).

This practice is also known as "trading ahead" of the fix. It was the legal, standard practice for banks to manage their risk and was not-and is still not-prohibited by any law or regulation. (A-66, A-90-91). The government's expert confirmed it was "the normal way in 2011 that banks executed these trades." (A-66). Nor is it certain that a bank would profit by trading ahead of the fix. Rather, as the government's expert testified, banks incur risk in every such transaction, because they agree to sell currency to the customer at an exchange rate that has yet to be determined. (A-63-64). If the rate moves *against* the bank, the bank will sell to the customer at a loss. *(Id.).*

In "fix" transactions, the bank must act as a principal. (A-141). It retains all the execution risk of movements in the currency market at issue, and its profit or

loss is the difference between the average purchase price and its sale price. By contrast, when a bank acts as an agent for a customer, the customer retains the market risk, and the bank simply charges a fee, as when a customer places an order with a stockbroker who earns a commission. Thus, to manage the risk they take on, banks acting as principals engage in "pre-hedging: accumulating an inventory of currency by engaging in smaller trades with other market participants before the larger trade with their customer at the Fix." (CA2 Dkt. 107 at 3; A-139-40).[1] Guidance by multiple regulators and industry organizations states that dealers should pre-hedge to manage their risk when acting in a principal role.[2]

Several federal agencies, including the CFTC, restrict dealers from transacting FX for their own accounts in priority to *retail* client orders ("front-running"). Notably, however, no similar statute or rule regulates banks' dealings

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[1] "CA2 Dkt." refer to the Second Circuit docket in Johnson's direct appeal, *United States v. Johnson,* No. 18-1503 (2d Cir.); "Dkt." refers to the district court docket in Johnson's original criminal proceedings, *United States v. Johnson,* No. 16-cr-457 (NGG) (E.D.N.Y.); and "CN Dkt." refers to the district court's *coram nobis* docket, *Johnson v. United States,* No. 23-cv-5600 (NGG) (E.D.N.Y.).

[2] *See, e.g., Global Preamble: Codes of Best Market Practice and Shared Global Principles,* Federal Reserve Bank ofNew York, March 30, 2015, p.6, https://www.newyorkfed.org/medialibrary/microsites/fxc/files/2015/Global%20Preamble%20March30.pdf; BIS FX Global Code, Principle 9, p.14, https://www.globalfxc.org/docs/fx_global.pdf; FICC Markets Standards Board, *Reference Price Transactions Standard for the Fixed Income Markets,* November 2016, p.7, https://fmsb.com/wp-content/uploads/2017/05/2016-001-FMSB-Std ReferencePriceTransactions FIMarkets_Final-Updated.pdf.

with non-retail counterparties to FX transactions. (CA2 Dkt. 73 at 21-22). In fact, despite extensive consideration after Dodd-Frank reforms, the Treasury Department deliberately refrained from extending the regulations governing retail FX trades to banks' FX transactions with large institutions. *(Id.* at 22-23).

2. *Cairn's Advisor And Selection Of Counterparty*

Cairn retained Rothschild & Co., one of London's "premier investment banks," as its "financial advisor" for the currency exchange. (A-75-76, A-94, A-147). Rothschild had advised Cairn on an earlier similar transaction involving a large currency exchange for a shareholder distribution. (A-76, A-99-101).

In early October 2011, Cairn "did a selection process to find the best bank." (A-93). Cairn sent a Request for Proposal ("RFP") to nine major banks, including HSBC. (A-169). Rothschild "r[an] the RFP process" for Cairn. *(Id.).* It called banks to gather information, hosted meetings with them at Rothschild's offices, analyzed their proposals, and provided its recommendations to Cairn. (A-205, A-215, A-223, A-264, A-326-27).

Each bank signed an identical non-disclosure agreement ("NDA"). (A-77-79, A-166). The NDA stated that "Confidential Information" was being provided "solely for the purposes ... set out in the RFP." (A-166 §l(ii)). The RFP, in tum, said the purpose was "to assist the [] banks in their analysis of the proposed currency exchange transaction," so that Cairn could "[o]btain feedback" before

"select[ing]" a bank. (A-169, A-172). The NDA thus prohibited banks from using the confidential information supplied during the RFP process for any purpose other than their "analysis" of the transaction. (A-72, A-166, A-172). The NDA did not extend to any information "in the public domain by printed publication, or otherwise." (A-167 §4.1(i)).

Most of the information Cairn supplied was not confidential because it had already been disclosed in press releases and in various financial publications. (A-296-320). For instance, Cairn's sale of the Indian subsidiary and its plan to distribute up to $4 billion in proceeds to shareholders after converting them to pounds was public before the NDAs were issued. (A-96, A-312).

HSBC signed the NDA and submitted a slide deck in response to Cairn's RFP on October 7, 2011. (A-166-68, A-173). Dipak Khot ofHSBC's sales department prepared this presentation and labeled it a "financial promotion." (A-204). Cairn's Treasurer, Rob Scriven, testified he viewed the presentation as a "sales pitch." (A-116-17). The pitch discussed various currency exchange methodologies, including a "fix." (A-179-80, 183). It suggested Cairn "choose a [bank] [with] a track record" of avoiding "excessive market volatility" and said HSBC "would like to execute this [transaction] in the best interest of the company." (A-175, A-177).

However, the pitch warned Cairn it "should not rely on any information in the document"; that the fix "fully exposed [Cairn] to any adverse [foreign exchange] movements" and was among "the riskiest of the strategies to consider"; and that Cairn would be "taking" on "risk by trading against a fix." (A-178, A-180, A-204). The pitch also advised that "[n]either HSBC nor any of its affiliates are responsible for providing [Cairn] with... specialist advice" and that Cairn was "solely responsible for making [its] own independent appraisal of and investigation into the... transaction[]." (A-204).

Johnson never saw the NDA or sales pitch. (A-102-03, A-146).

On October 13, 2011, during the selection process, Francois Jarrosson, the Rothschild partner advising Cairn, called Johnson on a recorded line. Jarrosson asked questions about what would happen if Cairn chose a fix. Johnson said HSBC would accumulate pounds ahead of the fix and would make money based on the difference between the price it paid for the pounds and the eventual fix price. (A-274-75). Because HSBC was otherwise earning no fee, that was the only way for HSBC to earn a profit, and "[its] business" "clearly" is "to make... money." (A-275). Johnson also stated that the extent of HSBC's profits depended in part on when HSBC began trading. He said HSBC needed a "minimum of two hours" to avoid undue upward pressure on the fix rate; only "30 minutes" notice would "cause a lot of noise" because HSBC would have "a lot to buy"; and "[t]he more

time we have... the more quietly we can just accumulate the position" to provide "a fair price." (A-274-75); *Johnson,* 945 F.3d at 609.

Jarrosson asked whether HSBC would "share some upside" if it earned substantial profits. (A-277); *Johnson,* 945 F.3d at 609. Johnson refused, stating that if a bank agrees in advance to share profits, "you're doing it cause you're intending to ramp the fix," *i.e.,* pressure the rate higher. (A-277); *Johnson,* 945 F.3d at 609. The government said this was "a promise" that "HSBC isn't going to ramp the fix." (A-158).

Rothschild conducted a rigorous analysis of each currency exchange methodology, its advantages and drawbacks, and how much each bank would charge. As early as October 9, 2011, Rothschild advised Cairn's Scriven that the fix was "the only" method that made "sense." (A-105). At that time, Rothschild concluded that it made the "most sense"for "shareholders" because it would preclude "shareholder scrutiny/questioning" of the exchange rate by relying upon a rate published by WM/Reuters and "is the only solution which removes all FX risk for Cairn." (A-287). Rothschild then "research[ed] more deeply," and reiterated its recommendation of a fix trade because it was likely to cost less than the other main alternative and provided "optimal transparency as fixings [are] publicly available." (A-206-08, A-290-91, A-287). However, Rothschild warned Cairn it would not control the timing of the trades HSBC would make prior to the fix and

of the "[r]isk of market disruption owing to a compressed execution window." (A-208).

3. *Cairn's Arm's-Length Relationship With HSBC*

Cairn selected HSBC as its counterparty. Before it would commit to proceeding, however, Cairn insisted that HSBC sign an agreement setting forth the parties' respective rights and obligations. Cairn wanted to "lock in... key terms" including "pricing." (A-110). Its "final decision on bank choice" was thus "subject to" an agreement witnesses referred to as the "Mandate Letter," which was signed on October 24, 2011. (A-329, A-210, A-92, A-108). The contract was drafted by Rothschild and approved by Cairn's internal and external counsel. (A-92, A-108-09, A-284, A-326-27).

The contract committed HSBC to converting up to $4 billion at Cairn's request, using whichever of three conversion methods Cairn selected. (A-210). If Cairn chose a "fixing," it was obliged to give HSBC two hours' advance notice. *Johnson,* 945 F.3d at 610.

The Mandate Letter specified that any transaction would be "governed by" the parties' existing International Swap Dealers Association Master Agreement ("ISDA"). (A-210). The ISDA is widely used in FX transactions and "governs the legal and credit relationship between the parties and other aspects of the agreement." *Aon Fin. Prods., Inc. v. Societe Generale,* 476 F.3d 90, 93 n.4 (2d

Cir. 2007). The Cairn-HSBC ISDA expressly stated that it "supersede[d] all oral communication" between the parties "with respect to its subject matter." (A-250). Nothing in the Mandate Letter or ISDA restricted how HSBC would accumulate pounds to fill Cairn's order.

The contract expressly established an arm's-length relationship. Both the Mandate Letter and the incorporated ISDA expressly disclaimed any fiduciary, agency, or advisory relationship. The Mandate Letter said it "shall not be regarded as creating any form of advisory or other relationship." (A-211). The ISDA said each party agreed "[t]he other party is not acting as fiduciary for or as an adviser to it in respect of [any] Transaction" and "is entering into the Agreement, including each Transaction, as principal and not as agent of any person or entity." (A-261). These provisions are standard ISDA terms that courts typically enforce. *See, e.g., Negrete v. Citibank, N.A.,* 759 Fed. Appx. 42, 46 (2d Cir. 2019) (ISDA created "arms-length counterparty relationship between" bank and its customer, such that bank "had no fiduciary obligation to provide" "best execution" in FX transaction); *(see generally* CA2 Dkt. 73 at 10-11).

Nothing in the Mandate Letter or ISDA required HSBC to act in Cairn's "best interest," refrain from "buying ahead," avoid adverse market impact to Cairn or limit HSBC's profit. Although Scriven claimed HSBC had a "best execution

duty not to influence the market adversely with our trade," he admitted this was not "a term" but "just an expected behavior." (A-110).

Additionally, throughout its dealings with HSBC, Cairn kept the bank at arm's length. Cairn was "deliberate and intentional" in not "disclos[ing]" its plans to HSBC (A-105) and strategized with Rothschild about what information to conceal from HSBC *(e.g.,* A-284). As Scriven conceded, in his conversations with HSBC, Jarrosson was "masking" Cairn's true intentions about what conversion method and timing it would use. (A-115). Cairn deliberately gave the bank "as little information as possible." (A-104-05, A-113-14). For example, Cairn decided on its "fix" strategy and the exact amount of the transaction in October 2011 and knew of the specific timing by December 1, 2011. (A-206, A-293). But Cairn withheld its plan to use a fix until immediately before placing its order on December 7, 2011, and did not disclose the full amount of its order until 32 minutes before the fix. (A-218, A-226, A-105, A-118-19).

4. *Execution Of Transaction*

On December 7, 2011, Cairn received the dollar proceeds of its India sale. By this time, Cairn had publicly disclosed the plan to provide its shareholders with most of the proceeds of the sale in a series of press releases, and the market was anticipating a massive foreign exchange transaction. (A-294, A-296-320, A-212, A-80-86, A-96-98). The market was only unaware of precisely when the

transaction would occur and what the exact amount would be. And, as discussed, Cairn withheld these details from HSBC until it placed its final order.

At 1:56pm that day, Cairn instructed HSBC to exchange approximately $1.15 billion at the 3pm fix rate, providing one hour's notice instead of the contractually required two. (A-227). At 2:28pm, just 32 minutes before the fix rate would be set, Cairn replaced that order with one to exchange £2.25 billion worth of dollars. (A-226).

Most of HSBC's trades for this transaction were placed by Frank Cahill in London. Cahill testified that Johnson "didn't" give him "any direction" about "how to execute." (A-120-21). Cahill traded "the same way [he] normally trade[s] fixes," and used various strategies to minimize upward movement of the pound's price, including stopping his buying to let the market breathe after seeing the price go up, along with some "aggressive" methods. (A-127-35, A-142-43).

At 2:54pm, Johnson, who was in New York, learned HSBC was still £1.2 billion short of the amount needed to complete the currency exchange. (A-124-25, A-236). He then instructed Stuart Scott, his colleague in London who was supervising Cahill's trading, not to "ramp" higher than the price would have been under an alternative conversion method Cairn had rejected.[3] *Johnson,* 945 F.3d at

[3] Scott was named as a co-defendant. However, he successfully fought extradition from the U.K. and never appeared in the case. On June 21, 2023, while his motion

610-11. Johnson also twice directed Scott to "go short some"-meaning it was not necessary to purchase *all* the pounds HSBC needed-to reduce upward pressure on the pound's price. (A-236). However, Cahill apparently never received these instructions and purchased the remaining pounds in the next six minutes, during which time the pound's price increased significantly. (A-122-23, A-330).

Neither of the government's two experts could identify any plausible way to execute the transaction without purchasing pounds before the fix. David DeRosa suggested HSBC might have purchased the pounds "after the fix" rate was set. (A-65). But that would require-contrary to the parties' discussions and expectations-the bank to assume all the risk of adverse rate movement following the fix, but without the substantial premium that banks charge to compensate for their risk when they employ a different conversion methodology Cairn had rejected. DeRosa identified no fixing transaction in which a bank ever traded after the fix, and he agreed the "normal way" to execute a fix was "by buying ahead of the customer" as HSBC had done. (A-66).

On a 3:14pm call after the transaction, Scott told Cairn that HSBC began "taking action" at 2:55pm. Cairn knew purchasing £2.25 billion in the five

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to dismiss the indictment on extraterritoriality and *Ciminelli* grounds was pending, the government moved for dismissal of the charges against Scott. (Dkt. 315). The district court granted the motion on June 27, 2023. (Dkt. 316).

minutes before 3pm would have significantly ramped up the price. Yet Cairn didn't complain or suggest HSBC should have spread its trades out more evenly to try to reduce the fix price. During that call, Scott (allegedly falsely) attributed an unspecified portion of the rate increase to "the Russian Central Bank" buying pounds before 3pm. *See Johnson,* 945 F.3d at 611. Johnson remarked that central banks are "always selling dollars." *Id.*

HSBC earned a profit of about $7 million, representing only 0.2% of the value of the $3.5 billion transaction. *Id.* Neither Johnson nor any other HSBC trader personally profited. All the trades were for the bank, and only the bank made money from those trades. *(See, e.g.,* A-126, A-144-45).

B. Procedural History

1. *District Court Proceedings In Criminal Case*

The government presented two theories of fraud liability. It claimed the alleged scheme (1) misappropriated Cairn's "confidential information .. .in breach of a duty of trust and confidence owed to Cairn," and (2) denied Cairn its "right to control its assets by depriving it of information necessary to make discretionary economic decisions." *Johnson,* 945 F.3d at 608. The jury was instructed that the government could satisfy its burden of proving the alleged scheme "target[ed] money or property" based on either of the theories. (A-46-47).

Johnson was convicted of conspiracy and all but one wire fraud count. (A-163-65). The jury rendered a general verdict without specifying which fraud theory it had relied upon. *Johnson,* 945 F.3d at 612.

The district court sentenced Johnson to 24 months' imprisonment, followed by three years' supervised release, and imposed a $300,000 fine and a $900 special assessment. (Dkt. 239 at 2-3, 7). The court remanded Johnson.

Johnson sought bail pending appeal in the Circuit. His motion explained that his appeal would challenge both the misappropriation and right-to-control theories and that each claim presented a "substantial question" under 18 U.S.C. §1343. (CA2 Dkt. 14-2).

This Court granted bail pending appeal. (CA2 Dkt. 47). Although the Court did not specify which issue or issues were "substantial," misappropriation was the primary focus of Johnson's motion. *(See* CA2 Dkt. 14-2, at 10-17; CA2 Dkt. 37-1, at2-10).

2. *Direct Appeal*

On appeal, Johnson argued that misappropriation was barred as a matter of law and that "right to control" failed under Second Circuit case law. (CA2 Dkt. 60, at 26-46; CA2 Dkt. 96, at 3-24). He also challenged the Circuit's right-to-control doctrine as foreclosed by Supreme Court precedent. (CA2 Dkt. 60, at 46-49; CA2 Dkt. 96, at 25).

The government relied principally on its right-to-control theory to defend the conviction. *(See* CA2 Dkt. 87, Argument Point I).

This Court affirmed Johnson's conviction based solely on the "right to control" theory. It expressly declined to "reach Johnson's arguments as to the misappropriation theory." *Johnson,* 945 F.3d at 608. The Court said: "We conclude that the evidence was sufficient to convict Johnson of wire fraud and conspiracy to commit wire fraud for depriving Cairn of the 'right to control' its assets. Accordingly, we need not and do not consider Johnson's arguments with respect to the misappropriation theory." *Id.* at 612.

Johnson filed a timely petition for certiorari, arguing, *inter alia,* that the Supreme Court should grant review to invalidate the "right to control" doctrine. *See* Petition for Certiorari, Point II, *Johnson v. United States* (No. 19-1412).

The Supreme Court denied certiorari on November 2, 2020.

C. *Ciminelli*

In *Ciminelli,* the Supreme Court unanimously held that "[b]ecause 'potentially valuable economic information' 'necessary to make discretionary economic decisions' is not a traditional property interest,... the right-to-control theory is not a valid basis for liability under§ 1343." 598 U.S. at 309; *see also id.* at 316 ("[T]he right-to-control theory cannot form the basis for a conviction under

the federal fraud statutes."); *id.* at 317 ("The right-to-control theory is invalid under the federal fraud statutes.").

The Court explained that the wire fraud statute protects only property rights, and that the "so-called 'right to control' is not an interest that had 'long been recognized as property' when the wire fraud statute was enacted." *Id.* at 314. Accordingly, the Court reversed this Court's decision affirming a conviction under the right-to-control theory. *Id.* at 308-09.

D. *Coram Nobis* Petition

On May 14, 2023, three days after *Ciminelli* was decided, Johnson completed service of his sentence. (A-59).

On July 25, 2023, Johnson filed a *coram nobis* petition based on *Ciminelli* to vacate his convictions and return the $309,900 in financial penalties he had paid. Johnson argued that *coram nobis's* three requirements were satisfied because, *inter alia,* (1) his conviction was procured and upheld based on a wire fraud theory the intervening *Ciminelli* decision had invalidated; (2) he sought the relief promptly after *Ciminelli* was decided; and (3) he continues to suffer various adverse legal consequences from his conviction. (A-4).

The government conceded the petition was timely but opposed the writ on other grounds. (CN Dkt. 5).

The district court rejected most of the government's arguments. The court found the second requirement satisfied because the Petition was filed promptly after *Ciminelli,* which the government did "not contest." (SPA-13). The court also found the third requirement satisfied: "[T]he ongoing harms cited by Petitioner. .., in particular his restrictions on travel and his career, extend beyond a 'mere desire to be rid of the stigma of a conviction' ... [and] are thus sufficient to demonstrate that Johnson continues to suffer consequences that resulted from his conviction." *(Id.* (quoting *Fleming v. United States,* 146 F.3d 88, 90 (2d Cir. 1998))).

Accordingly, the first factor, whether "justice compels granting the writ," was the "determinative question." (SPA-13). The court agreed *Ciminelli* could justify *coram nobis* relief if the error were not deemed harmless. (SPA-12-14). The court also rejected the government's argument that the conviction could be upheld under a "traditional" fraud theory, because the jury instructions showed "the traditional fraud theory was not properly before the jury." (SPA-14).

Thus, the dispositive issue was whether "the jury would have convicted Johnson under the misappropriation theory." *(Id.).* The court concluded that misappropriation was not invalid as a matter of law; that the theory was properly submitted to the jury; that the "facts presented at trial support a jury's finding that Johnson owed a duty of trust and confidence to Cairn"; and that the *Ciminelli* error was harmless. (SPA-15-26).

STANDARD OF REVIEW

This Court reviews the legal standards the district court applied to a *coram nobis* petition *de nova. Kovacs v. United* States, 744 F.3d 44, 49 (2d Cir. 2014). Statutory interpretation and contract interpretation are likewise reviewed *de nova. United States v. Gayle,* 342 F.3d 89, 91 (2d Cir. 2003); *Phillips v. Audio Active Ltd.,* 494 F.3d 378, 384 (2d Cir. 2007). And harmless error requires "'a *de nova* examination of the trial record.'" *Peck v. United States,* 106 F.3d 450, 456 (2d Cir. 1997) (quoting *Brecht v. Abrahamson,* 507 U.S. 519, 638 (1993) (Stevens, J., concurring)).

SUMMARY OF ARGUMENT

A *coram nobis* petition will lie under 28 U.S.C. §1651 with respect to a federal felony conviction when, as here, the sentence has been fully served. *United States v. Morgan,* 346 U.S. 502, 505 & n.6 (1954). To obtain relief, the petitioner "must demonstrate that 1) there are circumstances compelling such action to achieve justice, 2) sound reasons exist for failure to seek appropriate earlier relief, and 3) the petitioner continues to suffer legal consequences from his conviction that may be remedied by granting of the writ." *Kovacs,* 744 F.3d at 49. The district court denied relief solely because it thought the misappropriation theory was properly put to the jury, and it did "not have grave doubts" that the jury would have convicted Johnson of misappropriation. (SPA-26).

That conclusion was wrong as a matter of law.

First, the *Ciminelli* error itself demonstrates that relief is necessary to achieve justice. This Circuit and others have held *coram nobis* should be granted where intervening precedent establishes that jury instructions permitted conviction on an invalid legal theory or for conduct not prohibited by the statute. That is exactly what occurred here. The district court ignored this caselaw.

Second, the misappropriation theory does not apply where, as here, the government failed to prove the existence of a fiduciary or similar relationship. Such a relationship is an essential element of misappropriation fraud. *United States v. O'Hagan,* 521 U.S. 642,654 (1997). HSBC and Cairn were sophisticated, arm's-length counterparties. They signed a written agreement that unambiguously and expressly disclaimed, in multiple ways, any duty of trust and confidence. As such, the requisite duty was barred as a matter of law and fact. Yet the district court manufactured a duty by disregarding the contract-flouting fundamental principles and controlling authorities, while also misconstruing the (legally irrelevant) extrinsic evidence.

The district court also erroneously disregarded a basic requirement of the misappropriation theory-that there is no fraud if the defendant discloses his intent to use the alleged victim's information. Here, Johnson disclosed to Cairn HSBC's

intent to trade ahead of the fix. That "disclosure forecloses liability under the misappropriation theory." *0 'Hagan,* 521 U.S. at 655.

Third, the district court misconstrued and misapplied the harmless error standard. The court was required to review the trial record as a whole to assess whether the *Ciminelli* error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht,* 507 U.S. at 623. This meant determining whether there was "ample evidence in the record that a properly instructed jury would have [found misappropriation] beyond a reasonable doubt." *Stone v. United States,* 37 F.4th 825, 832 (2d Cir.), *cert. denied,* 143 S. Ct. 396 (2022). Instead of analyzing that question, however, the court erroneously relied on its view that the evidence was *sufficient* to establish the requisite duty to conclude the jury would have found the duty. The court compounded that error by disregarding the government's arguments inviting the jury to convict on right-to-control (which has no duty element) alone, and by disregarding that the nature of the relationship between HSBC and Cairn was fiercely disputed and that the defense position was supported by extensive evidence showing no duty existed.

ARGUMENT

I. JUSTICE REQUIRES *CORAM NOBIS* RELIEF BECAUSE BOTH FRAUD THEORIES PRESENTED TO THE JURY WERE INVALID

A. *Ciminelli* Eradicated This Court's Rationale For Affirming Johnson's Conviction

The jury at Johnson's trial was instructed that it could convict him on all counts based on the right-to-control theory. The instructions tracked the Second Circuit doctrine invalidated in *Ciminelli.* They emphasized the same concepts the Supreme Court found insufficient to establish wire fraud in *Ciminelli:* that the right to control one's assets is itself a property interest protected by the statute and that the deprivation of "potentially valuable economic information" is a harm cognizable under the statute.

For instance, the jury instructions said the government contended Johnson "committed wire fraud by making material misrepresentations and omissions that deceived Cairn and *deprived it of potentially valuable economic information"* and that, "[u]nder the 'right to control' theory, the property at issue is the *alleged victim's right to control its assets,* which can be harmed when the alleged victim is deprived of potentially economically valuable information that would be valuable in deciding how to use those assets." (A-50 (emphasis added)).

Moreover, this Court affirmed Johnson's conviction based *solely* on the "right to control." *Johnson,* 945 F.3d at 612.

Thus, Johnson was convicted based on jury instructions that were manifestly erroneous under *Ciminelli,* and his conviction was affirmed based on the invalid theory reflected in those jury instructions. Justice requires *coram nobis* relief for two reasons.

First, as the district court acknowledged, *Ciminelli* applies on *coram nobis,* because "a new rule of substantive criminal law is presumptively retroactive because a defendant may have been punished for conduct that simply is not illegal.'" (SPA-12 (quoting *United States v. Mandanici,* 205 F.3d 519,525 (2d Cir. 2000))).

Second, this Court and others have found justice requires *coram nobis* relief where-as here-"subsequent decisions have made it clear that the petitioner committed no federal offense." *Edwards v. United States,* 564 F.2d 652, 654 (2d Cir. 1977). This includes instances where the jury instructions permitted conviction on an invalid legal theory or for conduct not prohibited by the statute. *See, e.g., United States v. Lesane,* 40 F.4th 191, 194, 198-201, 205 (4th Cir. 2022) (reversing denial of *coram nobis* where theory of conviction was subsequently invalidated); *United States v. Bruno,* 903 F.2d 393, 396 (5th Cir. 1990) ("[A] conviction [under a wire fraud theory invalidated by *McNally]* would constitute a 'complete miscarriage of justice' such as is required for coram nobis relief."); *United States v. Mandel,* 862 F.2d 1067, 1071-75 (4th Cir. 1988) (similar).

Coram nobis relief is warranted in such cases because the petitioner was "convicted and punished for an act that the law does not make criminal." *United States v. Travers,* 514 F.2d 1171, 1176 (2d Cir. 1974) (Friendly, J.). That is an "error of 'the most fundamental character.'" *United States v. Marcello,* 876 F.2d 1147, 1154 (5th Cir. 1989).

Indeed, many of these decisions involve-as here-intervening Supreme Court decisions limiting the scope of federal fraud. *See, e.g., United States v. Peter,* 310 F.3d 709, 711, 715 (11th Cir. 2002) (per curiam); *Bruno,* 903 F.2d at 396; *Marcello,* 876 F.2d at 1154; *United States v. Walgren,* 885 F.2d 1417, 1422-24 (9th Cir. 1989); *Allen v. United States,* 867 F.2d 969, 970-72 (6th Cir. 1989); *Mandel,* 862 F.2d at 1071-75; *Travers,* 514 F.2d at 1172-79.

But even if the *Ciminelli* error alone were insufficient, Johnson was entitled to relief because his conviction was not valid under the misappropriation theory either, as explained below.

B. Johnson Was Not Guilty Of Misappropriation Fraud

The misappropriation theory was foreclosed as a matter of law because Cairn and HSBC dealt at arm's length and expressly disclaimed any fiduciary relationship in a fully integrated contract. The district court's conclusion that the jury could have found the requisite duty of trust and confidence was based on a legally erroneous premise-that extrinsic evidence could trump the unambiguous

contractual disclaimers. Applying the misappropriation doctrine in this context would also conflict with policy decisions by Congress and the relevant federal agencies *not to* regulate this type of FX transaction and trigger vagueness concerns.

I. *The Prosecution's Misappropriation Theory*

The indictment charged a "front-running" theory. It alleged misappropriation by "[u]sing information provided in confidence to HSBC by [Cairn]... to purchase Sterling in advance of the transaction, knowing that the transaction would cause the price of Sterling to increase ... (a scheme that is commonly referred to as 'front-running') in breach of HSBC's duty of trust and confidence to" Cairn. (Dkt. 9 at 3; *see also id.* at 7 (alleging defendants used "insider knowledge of the details of [Cairn's] FX Transaction to front-run that transaction")). The indictment identified specific alleged "front-running purchases of Sterling for HSBC" that defendants "quickly orchestrated" "within minutes" of a call with Cairn before Cairn's first order on December 7, 2011 *(id.* at 9) and on two earlier dates *(id.* at 7-8).

The government pursued the same "front-running" theory at trial. It argued HSBC breached a duty to Cairn by buying Sterling ahead of the Cairn transaction and that such "front running" misappropriated Cairn's confidential information. (A-150-57, A-159-62).

2. *Misappropriation Requires A Fiduciary Or Similar Relationship*

To establish fraud liability for misappropriation, the government must prove the defendant had a "fiduciary duty or similar relationship of trust and confidence" with the purported victim. *United States v. Chestman,* 947 F.2d 551, 566 (2d Cir. 1991) (en bane); *see also O'Hagan,* 521 U.S. at 654 ("misappropriation" entails "violation of a fiduciary duty"). "A 'similar relationship of trust and confidence'" is "the functional equivalent of a fiduciary relationship." *Chestman,* 947 F.2d at 568.

"One acts in a 'fiduciary capacity' when the business which he transacts, or the money or property which he handles, is not... for his own benefit" but for another, who "depends on... the fiduciary [] to serve his interests." *Id.* at 568-69. Fiduciary status is "not to be lightly implied," *United States v. Skelly,* 442 F.3d 94, 98 (2d Cir. 2006), because "an elastic and expedient definition of... relations of trust and confidence ... has no place in the criminal law," *Chestman,* 947 F.2d at 570; *accord United States v. Miller,* 997 F.2d 1010, 1019 (2d Cir. 1993). Thus, courts must "tread cautiously in extending the misappropriation theory to new relationships." *Chestman,* 947 F.2d at 567.

Recent Supreme Court decisions underscore that when the "existence of a fiduciary relationship" is an element of federal fraud, the duty must be "beyond dispute." *Skilling v. United States,* 561 U.S. 358, 407 n.41 (2010). For instance,

last year the Supreme Court rejected this Circuit's *Margiotta* test for fiduciary status-whether the defendant exercised "control" and "dominance" over a party who "relied" on him-as "too vague" to satisfy due process. *Percoco v. United States,* 598 U.S. 319, 330-31 (2023).

3. *The Law Forecloses Any Fiduciary Or Similar Relationship*

a. The Contract For The Transaction Expressly Disclaims Any Duty.

The agreement governing the FX transaction confirms HSBC was "not acting as fiduciary for or as an adviser" to Cairn. (A-261). Using language reviewed by Cairn's in-house "legal team" and "external legal counsel" (A-109), the Mandate Letter repeatedly disclaimed any "fiduciary" or "similar relationship of trust and confidence," *Chestman,* 947 F.2d at 566. For example, Cairn unambiguously "agree[d]" the Letter did not "creat[e] any form of advisory or other relationship" between HSBC and Cairn. (A-211). That disclaims one of the hallmarks of a fiduciary relationship. Indeed, absent "transformative 'special circumstances,'" "an express advisory contract" is required to create a fiduciary advisory relationship. *de Kwiatkowski v. Bear, Stearns & Co.,* 306 F.3d 1293, 1308-09 (2d Cir. 2002). Far from an express advisory contract, the contract here umnambiguously disclaimed such a relationship.

The Mandate Letter further specified that HSBC was "not responsible for providing" Cairn with "advice" and that Cairn was "solely responsible for making

its own independent appraisal" of the transaction. (A-211). That express acknowledgement of Cairn's independence from HSBC also foreclosed any fiduciary relationship. As this Court has explained, "reliance" is "[a]t the heart of the fiduciary relationship," and there is no such relationship if the counterparty does not "depend[] on... the fiduciary [] to serve his interests." *Chestman,* 947 F.2d at 568-69. Because the agreement governing the currency conversion "explicitly states that every FX customer entered into each transaction 'independent' of any advice or judgment offered" by the bank, there is no fiduciary relationship. *Kirschner v. Bennett,* 648 F. Supp. 2d 525, 534-35 (S.D.N.Y. 2009) (Lynch, J.).

The Mandate Letter also specified that HSBC was not "acting on behalf of' Cairn (A-211), disclaiming the essence of any fiduciary relationship, which is that the purported fiduciary acts not "for his own benefit, but for the benefit of another person." *Chestman,* 947 F.2d at 568. Courts routinely reject a "fiduciary relationship" where, as here, the alleged fiduciary "was never hired by" the counterparty "to act on [the counterparty's] behalf." *Walton v. Morgan Stanley & Co.,* 623 F.2d 796, 798 (2d Cir. 1980). Indeed, the Mandate Letter stated: "HSBC may *only* be regarded as acting on behalf of [Cairn] as financial adviser or otherwise *following the execution of an engagement letter on mutually satisfactory terms."* (A-211 (emphasis added)). It was therefore clear HSBC could "only"

become Cairn's fiduciary through a separate agreement, and no such agreement was entered.

The ISDA further confirms the parties' intent to disclaim any fiduciary or similar relationship. The Mandate Letter provided that "[a]ny transaction undertaken will be governed by the terms of the ISDA." (A-210). This made the ISDA "part of [the Mandate Letter] as if incorporated into the body of it." *PaineWebber Inc. v. Bybyk,* 81 F.3d 1193, 1201 (2d Cir. 1996). The ISDA said HSBC was "not acting as fiduciary for or as an adviser" to Cairn; that HSBC was "acting for its own account" as opposed to Cairn's; that Cairn had "made its own independent decisions to enter into th[e] Transaction... based upon its own judgment"; and that Cairn was "capable of assessing the merits of' the transaction "on its own behalf or through independent professional advice." (A-261). At trial, Cairn's general counsel agreed that the ISDA disclaimers meant that "HSBC is not acting as a fiduciary for Cairn Energy." (A-87-89). The government's expert also conceded the ISDA "establish[ed] that the parties... do not rely on their counterparties' representations or advice." (A-67-71).

It is hard to fathom any more definitive way to disclaim a fiduciary relationship. Where, as here, the parties "expressly disclaimed any sort of advisory, brokerage, or other fiduciary relationship ... there is no factual issue" because any fiduciary duty is legally foreclosed. *Wachovia Bank, Nat'l Ass'n v.*

VCG Special Opportunities Master Fund, Ltd., 661 F.3d 164, 174 (2d Cir. 2011). Consequently, as a matter of law, HSBC owed no duty of trust and confidence to Cairn. *See, e.g., Cooper v. Parsky,* 140 F.3d 433, 440-41 (2d Cir. 1998) ("clear" agreement that parties "were not... fiduciaries" is legally dispositive); *Jacked Up, L.L.C. v. Sara Lee Corp.,* 854 F.3d 797, 808-09 (5th Cir. 2017) (enforcing "agreement [that] itself disclaims a fiduciary relationship"); *Children's Broad. Corp. v. Walt Disney Co.,* 245 F.3d 1008, 1022 (8th Cir. 2001) (where parties "expressly disclaimed any [fiduciary or agency] relationship in their contract," that "precludes[] claim for breach of fiduciary duties"); *Kirschner,* 648 F. Supp. 2d at 534-35 (no "fiduciary relationship" where broker "entrusted" with "the execution of foreign currency transactions upon receiving explicit customer instructions" and agreement disclaimed "fiduciary" or "advisor" relationship).

b. The Parties' Arm's-Length Relationship Forecloses Any Duty.

Independent of what the contracts say, the parties were sophisticated, multibillion-dollar enterprises dealing at arm's length. This also forecloses any fiduciary relationship as a matter of law. "[A]rms' length dealings do not admit an inference" that parties were "fiduciaries." *Allen v. Credit Suisse Sec. (USA) LLC,* 895 F.3d 214, 224 (2d Cir. 2018); *see also In re Mid-Island Hosp., Inc.,* 276 F.3d 123, 130 (2d Cir. 2002) (sophisticated counterparties dealing "at arms length in a commercial transaction" have no "fiduciary relationship" "absent extraordinary

circumstances"); *United States v. Hirsch,* 239 F.3d 221,227 (2d Cir. 2001) (there is "not a fiduciary" relationship where the parties "ha[ve] an arms-length contractual relationship"); *Banca Cremi, S.A. v. Alex. Brown & Sons, Inc.,* 132 F.3d 1017, 1038 (4th Cir. 1997) (brokerage firm had no "fiduciary duty" where parties "conducted their business at arm's length in a principal-to-principal relationship"). Indeed, Cairn withheld relevant information from HSBC, *see supra* at 14, which "is not consistent with the view that [HSBC] was [Cairn's] agent," *United States v. Litvak,* 889 F.3d 56, 71 (2d Cir. 2018).

Allen is instructive. Plaintiffs were trustees of sophisticated employee benefit plans who alleged that defendant banks (including HSBC) acted as the plans' "fiduciaries" when executing fix FX transactions. Like the government here, they claimed the banks breached their fiduciary duties by "amass[ing] large proprietary currency positions ... just before or during the fixing window" to manipulate the fixing rate. 895 F.3d at 220. The district court dismissed the complaint because the banks were not "performing a fiduciary function when they executed [the] FX transactions." *Id.* at 223. This Court agreed. It held that a fiduciary must "control... the disposition of [its clients'] assets," and the banks did not exercise the requisite "unilateral[]" "control." *Id.* at 224.

The same is true here. Cairn, like the *Allen* plaintiffs, determined whether to transact and dictated the pertinent details. HSBC never had possession of Cairn's

money and instead traded its own pounds for Cairn's dollars at the 3pm exchange rate. (A-139-41). Indeed, HSBC exposed its own assets to significant risk, since it had to use its own dollars to purchase an enormous quantity of pounds to fill Cairn's order. Lacking control over Cairn's assets, HSBC was simply an arm's-length counterparty, not a "fiduciary."

The district court refused to follow *Allen* based on a legal error. It said *"Allen* was expressly limited to the ERISA context" and ERISA's definition of fiduciary. (SPA-19). In fact, however, *Allen* was clear that the rule it applied-that one must *control* the plaintiff/victim's assets to be a fiduciary-is a general principle of law, not a quirk of the ERISA statute. *Allen* invoked "the basic proposition, *applicable in both the ERISA context and more generally,* that a relationship of trust is established when one acquires possession of another's property with the understanding that it is to be used for the owner's benefit, and in these circumstances an obligation arises on the part of the one in possession to act in the owner's best[] interests rather than his own." 895 F.3d at 223-24 (emphasis added; brackets in original). And *Allen* supported this statement by citing (among other authorities) a criminal fraud case-this Court's decision in *Skelly,* discussed above. *See Allen,* 895 F.3d at 224. Moreover, *Chestman* relied on ERISA's definition of a de facto fiduciary when discussing the applicable criminal standards. 947 F.2d at 569 (citing 29 U.S.C. §1002(2l)(A)).

4. *Other Legal Errors Permeated The District Court's Analysis*

First, the district court flouted controlling law in holding the jury could have found the requisite duty based on extrinsic evidence. (SPA-20-23). The "plain and ordinary meaning" of agreements is "construed without reference to extrinsic evidence." *Olin Corp. v. Am. Home Assur. Co.,* 704 F.3d 89, 99 (2d Cir. 2012); *accord Hunt Ltd. v. Lifschultz Fast Freight, Inc.,* 889 F.2d 1274, 1277 (2d Cir. 1989). It is "a firmly settled principle that parol evidence" of an extrinsic promise "cannot be permitted to vary, qualify, or contradict, to add to or subtract from the absolute terms of the written contract." *Specht v. Howard,* 83 U.S. 564, 566 (1872); *accord Cruzan by Cruzan v. Dir., Missouri Dep't of Health,* 497 U.S. 261, 284 (1990); *cf Miller,* 997 F.2d at 1021 (reversing mail fraud convictions where purported victims lacked contractual right to profits they claimed defendants usurped).

In short, courts may not "impose obligations on the parties that are not mandated by the unambiguous terms of the agreement itself." *Red Ball Interior Demolition Corp. v. Palmadessa,* 173 F.3d 481, 484 (2d Cir. 1999) (Sotomayor, J.). *Chestman* is particularly instructive on this point. When rejecting a "less rigorous threshold for a fiduciary-like relationship," the Court took aim at the equitable tests developed "in order to right civil wrongs arising from non-compliance with the statute of frauds, statute of wills and *parol evidence rule."*

947 F.2d at 569 (emphasis added). The Court's *en bane* decision, which made clear that such standards "ha[ve] no place in the criminal law," *id.* at 570, left no room for the district court's reliance on extrinsic evidence to find a fiduciary-like relationship here.

Second, the cited extrinsic evidence underscores the flaws in the lower court's analysis:

The district court cited Cairn's subjective desire for a "best execution" that would not "influence the market adversely" and "representations about how [HSBC] would execute the transaction." (SPA-22-23). The latter apparently was a reference to the "pitch" prepared by HSBC's sales team and Johnson's October 13 call with Jarrosson. The district court relied on this evidence to erroneously conclude that "Johnson's committing to engage in the transaction in this manner while receiving Cairn's confidential information indicates that he fostered and accepted a heightened duty of trust and confidence." (SPA-21).

This reasoning was flawed for multiple reasons. First, none of these representations were in the contract, and a "bare promise" that a party will "act to protect [a counterparty' s] interests" is "insufficient... to demonstrate the 'extraordinary circumstances' required for the creation of a fiduciary relationship." *Boccardi Cap. Sys., Inc. v. D.E. Shaw Laminar Portfolios, L.L.C.,* 355 F. App'x 516, 520 (2d Cir. 2009). Indeed, Scriven admitted the supposed "best execution

duty not to influence the market adversely with our trade" was not "a term" but "just an expected behavior." (A-110). In other words, the district court relied on mere "wishes" or "desires," which are "not actionable." *Economu v. Borg-Warner Corp.,* 829 F.2d 311, 314, 316-17 (2d Cir. 1987).

Additionally, the court's reasoning contradicts this Court's holding that "[i]n the absence of evidence of an explicit acceptance ... of a duty of confidentiality, ... acceptance may be implied [only] from a pre-existing fiduciary-like relationship." *Chestman,* 947 F.2d at 571. Here no such pre-existing relationship existed. To the contrary, "the context of the disclosure," *id.,* makes clear that the parties disclaimed any such relationship and operated only at arm's length. Cairn was a multibillion-dollar company represented by sophisticated counsel, and it insisted upon and directed its adviser to draft a fully integrated written contract to "lock in key terms," including "pricing." (A-108, A-110). Knowing HSBC intended to accumulate pounds before the fix to fill Cairn's order, Cairn elected *not* to bargain for any limitation on when and how it did so-likely because such a term would have contravened industry practice and subjected HSBC to risks Cairn knew were unacceptable to the bank. And the ISDA's integration clause expressly "supersedes all oral communications," confirming that, regardless of any prior representations about how HSBC would execute a fix, the contract did not impose any limitation on how HSBC could execute Cairn's order. (A-250). Permitting

extrinsic oral promises "to defeat the clear words and purpose of the Final Agreement's integration clause" would mean contracts "would not be worth the paper on which they are written." *One-0-0ne Enters., Inc. v. Caruso,* 848 F.2d 1283, 1287 (D.C. Cir. 1988) (R.B. Ginsburg, J.). Thus, a party like Cairn "with the capacity and opportunity to read a written contract"-and here, draft it- "cannot overcome the written instrument. .. and, particularly, the integration clause," by "later claim[ing] fraud." *Id.*

The district court also erred by citing the NDA as evidence of a fiduciary relationship. The NDA did not create a duty that could be breached by FX trading months later pursuant to the Mandate Letter. The district court noted the NDA "was to remain in effect for two years" and that "the Bank promised not to disclose the confidential information provided and to use it solely for the purposes for which it was provided." (SPA-21). But the NDA was never intended to govern how HSBC executed the transaction. It was entered "solely for the purposes ... set out in the RFP," *i.e.,* "to assist [the] banks in their *analysis* of the proposed currency exchange transaction," so that Cairn could obtain "feedback" before "select[ing]" a bank. (A-169, 172 (emphasis added)). That "analysis" occurred at the RFP stage, when Cairn was holding a beauty contest among nine banks; the execution was a separate matter, handled through the Mandate Letter after Cairn selected its counterparty.

Third, when it dismissed the ISDA because it was executed over a year before Cairn's selection process even though the Mandate Letter expressly incorporated it *(see* SPA-22), the district court ignored the black-letter principle that a document incorporated by reference is "part of the [agreement] as if incorporated into the body of it," *PaineWebber Inc,* 81 F.3d at 1201, such that "the two form a single instrument," 11 Williston on Contracts §30:25 (4th ed. May 2024 update). And the Mandate Letter itself post-dates and thus "supersede[s]" prior documents that were not incorporated (like the NDA) as a matter of law. *Applied Energetics, Inc. v. NewOak Capital Mkts., LLC,* 645 F.3d 522, 526 (2d Cir. 2011).

Fourth, the district court flouted Supreme Court guidance on statutory interpretation. It dismissed *Ciminelli'* s instruction "that the federal fraud statutes must be construed narrowly" as inapplicable to "defendants who enter into a relationship of trust and confidence to the victim." (SPA-17-18). This misses the point. In *Ciminelli, Percoco,* and numerous other decisions before and since, the Supreme Court has insisted that criminal statutes be construed narrowly to avoid various constitutional problems. *See, e.g., Fischer v. United States,* 144 S. Ct. 2176, 2189 (2024) (separation of powers); *Snyder v. United States,* 144 S. Ct. 1947, 1956-58 (2024) (federalism and fair notice); *Van Buren v. United States,* 593

U.S. 374, 393-96 (2021) (federalism); *McDonnell v. United States,* 579 U.S. 550, 576 (2016) (democracy, federalism, and fair notice).

It also begs the question to say narrow construction principles do not apply to "defendants who enter into a relationship of trust and confidence to the victim." The question is *whether* Johnson entered such a relationship. If he did not, he cannot be guilty of fraud by misappropriation. Thus, the existence of a duty had to be clear at the time of the conduct. A narrow definition of duty is necessary to ensure that the statute is confined to conduct constituting fraud. "More than a perfunctory nod at the rule of lenity, then, is required," and courts should "not apply outer permutations ... in addressing what is frequently the core inquiry in [misappropriation cases]-whether a fiduciary duty has been breached." *Chestman,* 947 F.2d at 570. Because the written agreement expressly disclaimed a duty of trust and confidence, this is exactly the scenario where courts must exercise "restraint in assessing the reach of a federal criminal statute." *Fischer,* 144 S. Ct. at 2189.

5. *Imposing A Duty Would Undermine Industry-Specific Law, Unsettle Expectations About Commercial Contracts, And Create Due Process Problems*

As amici in Johnson's initial appeal explained, the "front-running" the government alleged here is merely a form of "pre-hedging that currency dealers routinely engage in" to manage risk when conducting transactions in the FX

market. (CA2 Dkt. 107 at 1-2, 9-12; CA2 Dkt. 73 at 17-19).[4] This conduct is essential to the functioning of global currencies markets in that it "helps provide more liquidity, less price volatility, and more orderly execution," while also providing an "economic incentive to execute trades with customers at the Fix." (CA2 Dkt. 107 at 3).

Congress and the Treasury endorsed these facts when making the reasoned decision not to subject these transactions to the Commodity Exchange Act's fraud sanctions. (CA2 Dkt. 73 at 21-22). In enacting the Dodd-Frank reforms, Congress deferred to the U.S. Treasury Department on whether FX contracts like the one between HSBC and Cairn should be regulated. The Treasury Secretary concluded they should not, reasoning, *inter alia,* that they "already trade in a highly transparent and liquid market" and "[m]arket participants have access to readily available pricing information through multiple sources." *Determination of Foreign Exchange Swaps and Foreign Exchange Forwards Under the Commodity Exchange Act,* Dep't of the Treasury, 77 FR 69,697 (Nov. 20, 2012).

Affirming the district court's endorsement of the government's misappropriation theory would wrongly criminalize-by judicial fiat-a routine practice that the industry and its regulators view as beneficial. It would further

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[4] *See also supra* at 7 n.2; Brief Of ACI-Financial Markets Association As Amicus Curiae In Support Of Mark Johnson's Petition For A Writ Of Certiorari 5-18, *Johnson v. United States* (No. 19-1412)

disrupt sophisticated industry participants' legitimate, bargained-for expectations. Here, a major bank negotiated a transaction with a blue-chip public company that received able counsel from lawyers and a premier investment bank. Such "[p]arties are entitled to rely upon contract and established law, to know their duties and when and how they are required to act." *Fin. Guar. Ins. Co. v. Putnam Advisory Co., LLC,* No. 12-CV-7372 (LJL), 2020 WL 5518146, at *103 (S.D.N.Y. Sept. 14, 2020). To hold otherwise would be to ignore the Supreme Court's instruction not to create new duties in areas "that demand[] certainty and predictability." *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,* 511 U.S. 164, 188 (1994).

And as this Court's decision in *United States v. Brennan* demonstrates, there is "no precedent for criminal liability" under these circumstances. 183 F.3d 139, 150 (2d Cir. 1999). The defendant's employer there supposedly breached "fiduciary duties" to its counterparty, a "sophisticated compan[y] with experience in the industry." *Id.* at 150. Because the parties transacted at "arms-length," there was "substantial reason" for the defendant "to conclude that the relationship[] at issue w[as] not fiduciary." *Id.* This, in turn, "substantially undercut the notion that he had fair notice" of the alleged fiduciary relationship, rendering the charges "seriously problematic." *Id.* at 149-50. The same is true here, which is why Johnson's alleged misappropriation cannot "constitute a crime under the federal

mail [and wire] fraud statute." *Id.* at 150; *see also Chestman,* 947 F.2d at 570 ("[A]n elastic... definition of... relations of trust and confidence ... would offend not only the rule of lenity but due process as well.").

In sum, the district court invoked "inherently imprecise" standards as to when a fiduciary relationship can arise in fix transactions, which would "prevent[] parties from ordering their actions in accord with legal requirements" going forward. *Chestman,* 947 F.2d at 570 (quoting *Dirks v. S.E.C.,* 463 U.S. 646, 658 n.17 (1983)). And because "neither the statute nor any prior judicial decision" "fairly disclosed" this "novel" application of misappropriation fraud, it would violate the Due Process Clause. *United States v. Lanier,* 520 U.S. 259, 266 (1997).

6. *Disclosure That HSBC Would Trade Ahead Of The Fix Bars Misappropriation*

Where a "fiduciary discloses to the source that he plans to trade on the nonpublic information," that "disclosure forecloses liability under the misappropriation theory." *O'Hagan,* 521 U.S. at 655. Johnson's disclosure to Cairn that HSBC would profit by trading ahead of the fix provides an additional, independent reason the misappropriation theory does not apply here. Johnson was explicit that HSBC would trade ahead because otherwise it would earn no fee and "[its] business" "clearly" was "to make... money." (A-275). Indeed, this Court previously "agree[d], based on the trial evidence, that Johnson disclosed HSBC's intent to trade ahead of the fix." *Johnson,* 945 F.3d at 614.

Cairn knew HSBC would trade in advance of the transaction, that it would seek to "make money on the trade" by "beat[ing] the fix," and that, given the size of the transaction, HSBC's trading would "pressure the fixing." (A-285, A-111, *accord* A-93 (Scriven acknowledging a "transaction" this "large" could "mov[e] the market")). Cairn even asked Johnson whether it could "share some [of the] upside" if HSBC "beat the fix," but Johnson declined. (A-277-78). It therefore could not have been any clearer to Cairn that HSBC-which was not otherwise collecting a fee for this transaction-would seek to earn a profit by trading ahead of the fix. (A-111-12).

In short, misappropriation must involve a fiduciary stealing information and "secretly" using it to trade. *0 'Hagan,* 521 U.S. at 653. Here, the entire point of hiring HSBC was for it to trade using information Cairn supplied. It is not "secret" or "deceptive" to trade on information given to you for that very purpose.

II. EVEN IF MISAPPROPRIATION WAS NOT BARRED AS A MATTER OF LAW, THE ERROR WAS PLAINLY NOT HARMLESS

The *Ciminelli* error was not harmless because the only other theory presented to the jury-misappropriation-failed as a matter of law and thus should not have been submitted to the jury at all. But even if misappropriation was properly submitted to the jury, the jury easily could have relied exclusively on the invalid right-to-control theory because the evidence of misappropriation was

equivocal, at best, for the government. The *Ciminelli* error was not harmless for that reason too.

The district court held the error harmless based on extrinsic evidence that, in the court's view, was sufficient to permit a finding of a fiduciary duty. But that confuses sufficiency with harmlessness, which requires a court to conclude "beyond a reasonable doubt" that the error did not affect the verdict. *Stone,* 37 F.4th at 831. Here, no court could "conclude[] with a high degree of confidence 'that a properly instructed jury would have found'" Johnson guilty of misappropriation. *Colotti v. United States,* 71 F.4th 102, 119 (2d Cir. 2023) (quoting *Stone,* 37 F.4th at 832). Among other things, the contractual disclaimers of any fiduciary duty, Cairn's sophistication, and the parties' arm's-length relationship weigh heavily against finding beyond a reasonable doubt that Johnson owed a duty to Cairn. The record thus creates "grave doubt" that "the flaw in the instructions had substantial and injurious effect or influence in determining the jury's verdict." *Hedgpeth v. Pulido,* 555 U.S. 57, 58 (2008) (citing *Brecht,* 507 U.S. at 623).[5]

[5] Although the Court "has not yet decided what harmless error standard applies" to collateral challenges to federal convictions, *Tavarez v. United States,* 81 F.4th 234, 240 n.8 (2d Cir. 2023) (citing *Kassir v. United States,* 3 F.4th 556, 564 n.43 (2d Cir. 2021)), it continues to apply the standards outlined in *Stone* and *Colotti. See also Gomez v. United States,* 87 F.4th 100, 107 (2d Cir. 2023) (applying *Stone's* "beyond a reasonable doubt" formulation).

A. If *Ciminelli* Had Been Decided Before Johnson's Appeal Was Decided, Reversal Would Have Been Required

"Where a jury is presented with multiple theories of conviction, one of which is invalid, the jury's verdict must be overturned if it is impossible to tell which theory formed the basis for conviction." *United States v. Szur,* 289 F.3d 200, 208 (2d Cir. 2002). A conviction must be reversed if it is "possible" the jury convicted defendant based upon an incorrect instruction and thus "may have convicted [the defendant] for conduct that is not unlawful." *McDonnell,* 579 U.S. at 578-80; *see also Yates v. United States,* 354 U.S. 298, 312 (1957) (where it is "impossible to tell" which of two theories a jury selected and "the verdict is supportable on one ground, but not on another," it must be "set aside").

Here, the jury rendered a general verdict and was not required to specify which theory it relied on to find Johnson guilty. It is therefore impossible to conclude that it did not rely exclusively on the legally invalid right-to-control theory.

First, the duty element of the misappropriation theory was hotly contested. The contractual disclaimers of any duty weighed heavily against a finding that one existed. And, as discussed, there was abundant evidence that HSBC and Cairn were both principals and that HSBC was not acting as Cairn's agent or adviser and did not have control over Cairn's money. *See* Point I.B. That is more than sufficient to show that, if *Ciminelli* had been on the books at the time of Johnson's

appeal, he would have been entitled to a reversal. In these circumstances, "where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding," the court "should not find the error harmless." *Neder v. United States,* 527 U.S. 1, 19 (1997). As this Court has held, *Neder* requires reversal where the defendant offers "innocent explanations" or "disputed evidence" that go to the element. *United States v. Quattrone,* 441 F.3d 153, 179 (2d Cir. 2006). Johnson plainly did that here-in spades.

Second, the government repeatedly relied upon the erroneous instructions and the invalid "right to control" doctrine in its closing arguments and invited the jury to convict on that theory alone. For example, the government urged the jury to convict because "a victim's intangible right to control his or her own property" is "a property right" (A-54) and said:

- "Under the right to control theory... the property at issue is the alleged victim's right to control its assets, which can be harmed when the alleged victim is deprived of the potentially valuable economic information." (A-54-55).
- "[I]n addition to hiding the important information from the client, we see that Johnson said things, he made affirmative lies that also cheated the client out of its right to control its property, meaning, the right to control its money and how it is exchanged." (A-55-56).
- Johnson's purported promise on his October 13 call not to "ramp" was "the affirmative lie that deprived that victim of its right to control how it uses its money." (A-56).

The government also stressed that the jury could rely solely on "right to control" and did not need to find that it had proven misappropriation. *(See* A-55).

The district court ignored the government's closings, but they are important indicators that the error was not harmless. "The risk of an improper conviction based only on [the invalid theory] was heightened by the Government's summation." *United States v. Joseph,* 542 F.3d 13, 18 (2d Cir. 2008); *see also United States v. Sabhnani,* 599 F.3d 215,240 (2d Cir. 2010) ("[A] party's summation can heighten the already present risk that an erroneous jury instruction may mislead the jury.").

Given this record, the government cannot show "beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *United States v. Silver,* 864 F.3d 102, 118 (2d Cir. 2017). Accordingly, Johnson would have been entitled to at *least* a new trial had *Ciminelli* been decided before his direct appeal.

B. The Outcome Should Be The Same On *Coram Nobis*

1. An accident of timing-that *Ciminelli* was decided several years after Johnson's direct appeal-should not bar *coram nobis* relief, which is meant to achieve "justice." Thus, where, as here, an intervening decision invalidates a jury instruction, courts grant *coram nobis* relief even if some other theory theoretically *might* have supported a conviction. For instance, in *United States v. Mandel,*

coram nobis was granted because the jury was permitted to convict under an honest services fraud theory subsequently rejected by the Supreme Court. 862 F.2d at 1071-75. There, the court expressly rejected the government's argument "that granting a writ of error *coram nobis* is improper where the change in the law did not vitiate the criminality of the petitioners' conduct but only brings into question the propriety of the jury instructions." *Id.* at 1075. And it confirmed that "in a case in which the jury considers alternate theories of liability, we must reverse the convictions if either theory is an improper basis for punishment." *Id.* at 1073.

Likewise, in *Travers,* the court granted *coram nobis* because of an intervening change in mail fraud law (affecting the mailing element), even though the defendant's conduct was not innocent. Judge Friendly stated that "Travers, to be sure, engaged in criminal conduct, but not in the crime for which he was convicted." *Travers,* 514 F.2d at 1179. And that was enough to warrant the extraordinary remedy of *coram nobis.*

The Fifth Circuit reached a similar result in *United States v. Bruno:* "Because the intangible rights theory of wire fraud, which, under *McNally,* is not a criminal violation, may have infected the jury's decision to convict on the conspiracy charge, it is possible that the jury convicted for conspiracy to commit a noncriminal act. Such a conviction would constitute a 'complete miscarriage of

justice' such as is required for coram nobis relief." 903 F.2d at 396; *see also United States v. Shamy,* 886 F.2d 743, 744-45 (4th Cir. 1989) (per curiam) (granting *coram nobis* relief where jury was instructed on valid and invalid theories of fraud); *Martingnoni v. United States,* Nos. 92 Cr. 1097 (JFK), 10 Civ. 6671 (JFK), 2011 WL 4834217, at *5, 9-10 (S.D.N.Y. Oct. 12, 2011).

2. The district court ignored the caselaw cited above. It paid lip service to the general harmless error standard (SPA-12-13) but failed to apply the more specific law concerning this situation-where a jury is presented with alternate theories, one of which is valid and one invalid. It failed to grapple with the government's argument that the jury could convict solely on right-to-control. And it failed to acknowledge the mountain of evidence weighing against any finding of a duty-including the contractual disclaimers and the multiple other facts pointing *against* a fiduciary relationship discussed above.

The court also confused sufficiency of the evidence with harmlessness. For instance, the court began its "Harmless Error Review" section by saying: "The facts presented at trial *support a jury* 's finding that Johnson owed a duty of trust and confidence to Cairn." (SPA-20 (emphasis added)). It then purported to explain why various facts could have supported a finding of duty despite the contractual disclaimers, and reiterated why it believed "whether Johnson owed a duty was a

question for the jury." (SPA-20-22). But that is like saying if the evidence is sufficient to go to a jury then the jury *must* find the defendant guilty.

Not so. Sufficiency is satisfied if, viewing all the evidence in the light most favorable to the government, a reasonable juror *could* find the defendant guilty. Errors are not harmless on collateral review just because "the evidence was sufficient to support the conviction." *Henry v. Speckard,* 22 F.3d 1209, 1215 (2d Cir. 1994). Harmlessness requires more; it requires "ample evidence in the record," *Stone,* 37 F.4th at 832, strong enough to warrant a conclusion that the jury would have found him guilty on the theory in question. *See United States v. Mejia,* 545 F.3d 179, 199 n.5 (2d Cir. 2008). Thus, even if the contracts didn't foreclose a fiduciary or similar relationship, that doesn't mean the jury actually found one, or that the evidence of such a relationship was so "overwhelming" that the *Ciminelli* error could not have "had substantial and injurious effect or influence" on the verdict. *Colotti,* 71 F.4th at 117, 115. The court erred in suggesting otherwise.

3. Notably, the judge himself conceded during the trial that duty was a "knotty issue." In denying *coram nobis* he did not disavow that remark; instead, he acknowledged that he had "found this to be a 'knotty issue' but ultimately held that it was a jury question." (SPA-17). In other words, the district court recognized-and still believes-that whether a relationship of trust and confidence existed was a difficult question here. That the court "ultimately held it was a jury

question" does not change anything; it simply shows the court left resolving this "knotty question" to a different decisionmaker.

That further confirms the *Ciminelli* error was not harmless. A "grave doubt" exists if "in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise." *O'Neal v. McAninch,* 513 U.S. 432,435 (1995). That apparently was the case here. And if the issue was difficult for the judge, there is no reason to assume it was easy for the jury-especially when the government told the jury it could convict on "right to control" alone. Accordingly, there is no basis to conclude "beyond a reasonable doubt," *Stone,* 37 F.4th at 831, or with a "high degree of confidence," *Colotti,* 71 F.4th at 116, that a properly instructed jury would have convicted on misappropriation.

This Court's grant of bail pending appeal similarly weighs against harmless error. The Court necessarily found that Johnson's appeal presented a "substantial question," meaning "a close question or one that very well could be decided the other way" which, if resolved in his favor, "is likely to result in reversal." *United States v. Randell,* 761 F.2d 122, 125 (2d Cir. 1985). The Court did not identify which issue or issues it found substantial, but it it is reasonable to infer that the bail panel must have believed the case was close, or it would not have concluded a victory on either argument was likely to lead to reversal.

4. Finally, to the extent the district court engaged with the record to try to determine what the jury actually found, its analysis was deeply flawed, even apart from the legal errors catalogued in Point LB. The court observed that to convict on "right to control," its instructions required the jury to find "that Johnson made 'misrepresentations and omissions that deceived Cairn' and that went to the 'heart of Cairn's bargain with HSBC.'" (SPA-23). The court went on to conclude that the "jury would be unlikely to have found this if the ISDA language was controlling as to the relationship between Cairn and Johnson such that it made meaningless the representations that preceded and succeeded the Mandate Letter." *(Id.)*.

But this makes no sense. It assumes that to convict under the right-to-control instructions, the jury had to conclude the contractual language disclaiming a fiduciary relationship was not controlling, *i.e.,* it was not part of the "bargain." But that isn't true. The right-to-control instructions didn't require the jury to think about the contractual disclaimers of duty at all. The instructions told the jury it could find Johnson guilty under "right-to-control" if it found the statements at issue were false and material to the bargain-which the jury could find without considering or making any findings related to the contractual disclaimers of duty. Under the instructions, in other words, the contractual disclaimers of duty were irrelevant to "right to control" fraud-the jury just had to find that Johnson

engaged in material "deception" about how HSBC would execute the transaction. *Johnson,* 945 F.3d at 612-13. Therefore, if the jury found the government had proved its right-to-control theory, that finding would not speak to whether it found there was a fiduciary relationship.

And the alleged false statements were irrelevant to misappropriation. Under the misappropriation theory, a person only commits fraud if he breaches a duty of trust or confidence by using confidential information for his own "personal gain." *See generally O'Hagan,* 521 U.S. at 653. A misappropriator may make misrepresentations as well, but if he does, that doesn't prove he owed and violated a duty. Indeed, here the misrepresentations the district court cited could not alone give rise to the requisite duty. *See supra* at 36-38.

In sum, the ISDA and Mandate Letter were highly relevant to whether the government proved the relationship necessary to establish misappropriation, but the jury did not even have to analyze them to convict under the right-to-control instructions. Thus, if the jury found Johnson guilty under the right-to-control theory, that does not mean they made any finding that required them to also find he was guilty under the misappropriation theory. It presents no basis for finding the *Ciminelli* error harmless.

* * *

Coram nobis is an extraordinary remedy, but this is an extraordinary case.

A person's liberty should not tum on an accident of timing. If *Ciminelli* had been decided while Johnson's direct appeal was pending, he would have been entitled-at a minimum-to a new trial, because the jury was permitted to convict him, and may have convicted him, based upon a legally invalid theory of wire fraud. And if *Ciminelli* had been decided while Johnson's direct appeal was pending, this Court would have had to address his claim that the alternative misappropriation theory also failed as a matter of longstanding black letter law.

That should have led to a reversal with instructions to enter a judgment of acquittal. Johnson was prosecuted for executing a complex foreign exchange transaction "the normal way in 2011 that banks executed these trades." Banks deal at arm's length with counterparties in these situations, and here the absence of a fiduciary or similar relationship could not be clearer. The parties repeatedly and expressly disclaimed one in the agreement governing the deal. The government's misappropriation theory would not even survive a motion to dismiss in a civil case. It should never have been submitted to the jury and is not a valid theory of criminal fraud.

But *Ciminelli* did not exist at the time of Johnson's direct appeal. Accordingly, the Court affirmed Johnson's conviction under a theory that the

Supreme Court subsequently pronounced cannot sustain a wire fraud charge, and Johnson served a significant term of incarceration and suffered onerous financial penalties for conduct that is not criminal.

Johnson can never recover the time he spent in prison. However, this Court can and should grant the more modest remedy of alleviating the collateral harms he continues to suffer.

CONCLUSION

It would be manifestly unjust to let Johnson's conviction stand. The Court should reverse the decision below and remand for entry of an order granting the writ.

Dated: New York, New York
August 7, 2024

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

1. The undersigned counsel of record for Petitioner-Appellant Mark Johnson certifies pursuant to Federal Rule of Appellate Procedure 32(g) and Local Rule 32.1 that the foregoing brief contains 12,852 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), according to the Word Count feature of Microsoft Word 2024.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2023 in 14-point font of Times New Roman.

Dated: August 7, 2024

/s/Alexandra A.E. Shapiro
Alexandra A.E. Shapiro

SPECIAL APPENDIX

TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MARK JOHNSON,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM & ORDER
23-CV-5600 (NGG)

NICHOLAS G. GARAUFIS, United States District Judge.

Petitioner Mark Johnson was convicted in October 2017 of one count of wire fraud conspiracy and eight counts of wire fraud for actions he undertook as the head of HSBC's Global Foreign Exchange Business. He has since served his sentence and term of supervised release and has paid his fine. He now seeks to vacate his conviction by bringing a petition for a writ of error *coram nobis* following the Supreme Court's decision in *Ciminelli v. United States,* 598 U.S. 306 (2023), which invalidated the right-to-control theory of wire fraud, a theory which was included in Mr. Johnson's jury charge.

For the reasons discussed herein, because a review of the record demonstrates that justice does not require vacatur of Mr. Johnson's conviction, his Petition is DENIED.

I. BACKGROUND

A. Factual Background

In 2016, Mark Johnson was charged with wire fraud and wire fraud conspiracy for activities he undertook in 2011, while the London-based head of HSBC Bank plc's ("HSBC" or the "Bank") Global Foreign Exchange Business. (Mot. For Writ of *Coram*

Nobis ("Petition"), *Mark Johnson v. United States of America,* No. 23-CV-5600 ("Civ. Dkt.") [1], Civ. Dkt. 1); see *also* Indictment, *United States v. Mark Johnson,* No. 16-CR-457 (NGG) ("Cr. Dkt."), Cr. Dkt. 182; Final Jury Charge (Cr. Dkt. 162) at 33-37.) (Cr. Dkt. 9).)

In this role, Mr. Johnson acted with others at HSBC to pitch and service the foreign exchange ("FX") needs of Cairn Energy ("Cairn" or the "Client"), a large European energy company. Cairn sought a bank to execute FX transactions following a recent sale of its stake in Cairn India, which required the conversion of approximately 4 billion US Dollars ("USD") to GB Pounds Sterling ("GBP"). *(See* Cairn Request for Proposal dated October 4, 2011 ("Cairn RFP") (Government Exhibit ("GX") 103B) at 1; *see also* A-267.[2])

Cairn required banks, before receiving the request for proposals ("RFP"), to enter into a confidentiality agreement which required HSBC not to disclose any confidential information received from Cairn and only to use the confidential information for the reasons for which the information was provided. *(See generally* Non-Disclosure Agreement (GX 102B); *see al.so* A-264.) The Agreement stated that it would "remain in full force and effect" for two years. (Non-Disclosure Agreement at 2.)

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[1] The court cites to Mr. Johnson's civil docket, No. 23-CV-5600, which includes briefing relating to his Petition, with "Civ. Dkt." The court cites to Mr. Johnson's criminal docket, No. 16-CR-457, which includes filings relating to his criminal trial and conviction with "Cr. Dkt."

[2] "A-" refers to the page numbers provided in the Second Circuit Appendix. *See* Appendix, *United States v. Johnson,* No. 18-1503 (2d Cir. Aug. 30, 2018) Dk.ts. 57-59. The court generally cites to the criminal docket and trial exhibits. However, when first citing to the exhibits, the court references the first page on which the exhibits are included in the Second Circuit Appendix, which is cited throughout Johnson's briefing. *(See generally* Petition; Reply.)

While pitching its services, HSBC, including Mr. Johnson, made certain representations about how it would engage in PX transactions. *See infra.* Most relevant are representations about how the Bank would engage in a "fix" transaction where the Bank agrees to engage in a currency transaction at what is essentially a proxy for the prevailing market rate (the "fix rate") at some future designated time (the "fix time"). (Mandate Letter (GX 115B); *see al.so* A-309.)[3] In these transactions, all things equal, the Bank's profit depends on the difference between the price at which the Bank buys the target currency and the price at which the Bank sells the target currency to the Client at the fix time. *(See* Sept. 25, 2017 Trial Tr., (Cr. Dkt. 270) at 86:5-11, 105:8-108:24 (testimony of Dr. David DeRosa, an expert in the field of foreign exchange transactions, reviewing the mechanics of a fix transaction).) The Client, on the other hand, prefers a lower "fix rate," because a lower rate means it receives more of the target currency using the same amount of base currency.

In this case, Cairn was seeking to convert USD to GBP. They would thus desire a lower GBP/USD rate because a lower rate means Cairn would receive more GBP per unit of USD. So if the rate increased ten minutes before the fix time, Cairn would receive fewer GBP for the same amount of USD than if the fix time was ten minutes earlier. The Bank, however, stood to profit if the market GBP/USD exchange rate (the "price" of 1 GBP in USD) at the fix time was higher than the GBP/USD rate at which the Bank accumulated USD.[4]

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[3] Under the terms of the Mandate Letter, HSBC committed to "[t]rade with Cairn at a Spot execution price equivalent to one (or several) publicly available fixing(s), the price would be no higher than the mid fixing(s) level, provided HSBC is given c. 2 hours notice prior to each fixing." (Mandate Letter at 1.)

[4] The "price" at the relevant fix time was 1.57185 GBP/USD, and HSBC offered to conclude the transaction at a rate 0.00025 better for Cairn at

Because of the misaligned incentives in FX transactions, Cairn sought assurances that, if chosen to engage in the relevant transaction, HSBC would act in Cairn's interest by limiting the risk of a spike in the exchange rate. Cairn's RFP stated that the "key criterion for the selection of banks for the role of Execution Bank will be the ability to deliver a seamless process for the currency exchange within a defined timetable whilst providing Cairn with the best execution strategy and pricing." (Cairn RFP at 1.) And HSBC and Johnson made specific representations about how they would provide this. In a slide deck used to pitch Cairn, HSBC stated that:

> Time to execute is essentially a choice for the company, as HSBC is able to provide one quote for the full amount or even **drip feed the market in utmost confidential nature so as to ensure there are no sudden FX moves against the company.** (HSBC Sales Pitch (GX 104B) at 5 (emphasis added); *see al.so* A-272).

Mr. Johnson also spoke with Francois Jarrosson, a partner at the investment bank Rothschild who was working on behalf of Cairn, where he described to Jarrosson how HSBC would effectuate the transaction. *(See generally* Transcript of October 13, 2011 Phone Call (GX 193(T)) ("Oct. 13, 2011 Jarrosson Call"); *see al.so* A-376.) When discussing the Bank's approach to a fixed transaction, Mr. Johnson stated that the Bank would accumulate the desired currency "quietly" and described the process for accumulating the funds for a fix transaction as gradually building up

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1.5716 GBP/USD. (Email From Hamza Azeem dated December 7, 2011 (GX 153); *see also* A-325.) This exchange rate allowed Cairn to convert USO 3,536,100,000 into the GBP 2,250,000,000 Cairn requested (GBP 2,250,000,000 times 1.5716 GBP/USD = USO 3,536,100,000). (Id.) If the GBP/USD rate was 0.0010 lower, Cairn would save USD 2,250,000 (GBP 2,250,000,000 times 0.0010 GBP/USD = USO 2,250,000).

their position while trying to "control the market so it doesn't look too noisy." *(Id.* at 12.)

Johnson also stated that the Bank has "absolutely no control over where the price is" but that accumulating funds over a longer period of time would allow the Bank to avoid "noise," or price volatility, around the fix time. *(Id.* at 12-13.) And Johnson drew a distinction between HSBC's approach and other banks. *(Id.* at 14.) He stated that the pricing that other banks offer indicates that they "ramp the fix" (or increase the fix rate to the benefit of the Bank) which undermines the whole point of this type of transaction which is to offer price clarity and transparency by providing the customer the average rate around the fix time. *(Id.* at 14-15.)

Cairn ultimately chose HSBC. They also decided to use the fixing transaction rather than alternative trading strategies. The decision to do so was in part due to the transparency of this strategy and their understanding that HSBC had a "'best execution' duty not to influence the market adversely with the Company's trade." (Cairn Board Meeting Minutes (Defense Exhibit ("DX") 309) at 2; *see also* A-407; Rothschild Information Memorandum (GX 113B) at 4; A-308.)

After being chosen, the Bank committed to the transaction in a "Mandate Letter," which noted that the transaction is subject to the terms of the International Swap Dealers Association Master Agreement ("ISDA")[5], entered into between Cairn and HSBC the prior year, in June 2010. (Mandate Letter at 1; *see also* ISDA (GX

[5] An ISDA Master Agreement is a standard form agreement published by the International Swap Dealers Association that provides certain legal and credit protections for parties in over-the-counter transactions. *Sonterra Cap. Master Fund, Ltd. v. Barclays Banlc PLC,* 366 F. Supp. 3d 516, 521 n.8 (S.D.N.Y. 2018); *see also In re Lehman Bros. Holdings Inc.,* 970 F.3d 91, 96 n.3 (2d Cir. 2020).

191); *see also* A-351.) The ISDA included several provisions relating to the relationship between Cairn and HSBC, including: a "non-reliance" provision in which the parties state that they are acting for their own account, a provision in which HSBC disclaimed that it was acting as a fiduciary of the other party, and a provision in which HSBC disclaimed an agency relationship. *(Id.* at 23.) The ISDA also noted that the relationship for a given transaction may be modified by a "written agreement between the parties that expressly imposes affirmative obligations to the contrary for that Transaction." *(Id.)*

On December 7, 2011, a little over a month after Cairn chose HSBC for its FX needs, Cairn requested that HSBC exchange USD into GBP 2.25 billion (the equivalent of approximately USD 3.5 billion) using a fix transaction with the fix rate to be set that day at 3:00 p.m. *See United States v. Johnson,* 945 F.3d 606,610 (2d Cir. 2019).[6] Stuart Scott, who worked with Mr. Johnson, passed this information to Frank Cahill, an HSBC trader who would execute the transaction. (Oct. 4, 2017 Trial Tr. (Cr. Dkt. 265-2) at 987:17-988:25, 1001:2-1003:21.) Cahill then accumulated Sterling in a manner that he testified intentionally caused the GBP/USD fix rate to increase ahead of the fix time, which led to greater profits for HSBC at the expense of Cairn. *(Id.* at 994:15-997:17, 1127:24-1128:21.) If trying to keep the price low, he would have employed a different trading strategy. *(Id.* at 998:6-998:22).

[6] The initial request was for a smaller amount but was then increased to GBP 2.25 billion. (Oct. 6, 2017 Trial Tr. (Dkt. 265-4) at 1424:7-1425:25; *see also* Oct. 12, 2017 Trial Tr. (Dkt. 275) 2044:2-20; GX 163.) Upon learning that the amount would increase, Johnson said "[n]o, you're kidding" and "fucking Christmas" and did not express concern about the potential for a price increase given the larger order size. (Oct. 6, 2017 Trial Tr. at 1425:16-25; Oct. 17 Tr. (Dkt. 277) at 2285:1-17; *see also* GX 163.)

A recorded phone call between Johnson and Scott that began at 2:54 p.m., minutes prior to the fix time, indicates that Mr. Johnson was aware that the trader was increasing the price. *(See* First Dec. 7, 2011 Phone Call Tr. (GX 167(T)) ("Jarrosson / Scott Phone Call") at 1; *see also* A-335.) Johnson and Stuart discussed the increase in the exchange rate and Johnson stated that the trader engaged in the transaction should not try to "ramp" the fix above a certain level to avoid raising concerns with Cairn. *(Id.)* Specifically, Johnson stated that the trader should not ramp the fix above 1.5730 GBP/USD, because the client would "squeal" if the rate was 100 "pips"[7] higher than the rate that morning when Cairn requested the transaction, which is what the Client would have received in a "full risk transfer" transaction, an alternative to the fix transaction. *(Id.; see also* Mandate Letter (describing the "full risk transfer" method)).[8] Cahill testified that, apart from the direction not to ramp the price above the level noted by Johnson, he did not have any discussions in which he was told he should not increase the price, which he would otherwise do to increase profits for the Bank. (Oct. 4, 2017 Trial Tr. at 993:2-7, 999:10-1003:21.)

In a call just fourteen minutes after the fix time, Scott falsely stated to Cairn's adviser, Francois Jarrosson, that the increase was a result of FX activities by the Russian Central Bank. *(See* Second Dec. 7, 2011 Phone Call Tr. (GX 168(T) ("Post-Transaction Jarrosson Call") at 1-3; *see also* A-338.) Johnson supported

[7] A pip in this context is one one-hundredth of a penny; a movement of 100 pips in a GBP 2 billion trade would be equal to $20 million. (Sept. 25, 2017 Trial Tr., at 111:10-112:8.)

[8] Under the full risk transaction, HSBC committed to "[t]rade with Cairn at a Spot execution price of prevailing screen rate (to be independently benchmarked and agreed with Rothschild) plus, at most, lOOpips for a full risk transfer execution." (Mandate Letter at 1.)

Scott's lie, stating that the Russian Central Bank was "always selling dollars." (Post-Transaction Jarrosson Call at 3.)

HSBC ultimately profited about $7 million on the transaction with Cairn.[9] *Johnson,* 945 F.3d at 611. A significant portion of the profit was attributed to Johnson's trading book. (Oct. 5, 2017 Trial Tr. at 1190:15-25 (Cr. Dkt. 265-3); *see also* Government's Opposition to Petition ("Opp.") (Civ. 0kt. 5) at 2 n.2.)

B. Procedural Background

Mr. Johnson was indicted in August 2016 on nine counts of wire fraud, in violation of 18 U.S.C. § 1343, and one count of wire fraud conspiracy, in violation of 18 U.S.C. § 1349.[10] *(See general"fy* Indictment.) In describing Johnson's wire fraud charge, the Indictment stated that he "did knowingly and intentionally devise a scheme and artifice to defraud the Victim Company, and to obtain money and property from the Victim Company by means of materially false and fraudulent pretenses, representations and promises." *(Id.* **ffff** 37, 39.)

Mr. Johnson's jury instructions, when describing the elements of wire fraud, stated that the government must prove, *inter alia,*

[9] The defense's expert calculated that HSBC made between $6.7 million and $7.5 million on the deal. (Oct. 10, 2017 Trial Tr. at 1636:22-25 (Cr. Dkt. 273).)

[10] Johnson's colleague Stuart Scott was named as a co-defendant. *(See* Indictment.) However, he never appeared because, in July 2018, the U.K. High Court of Justice found that he was not extraditable. (Government Mot. to Dismiss as to Stuart Scott (Cr. Dkt. 315) at 2.) The Government moved to dismiss Mr. Scott in June 2023, after concluding that efforts to secure his appearance are futile and that the small probability of secllling his appearance did not justify keeping the matter on the court's docket. *(Id.)* In so concluding, the Government's motion noted that *Ciminelli* invalidated the right-to-control theory, one of the two theories with which it planned to proceed against Scott. *(Id.* at 3 n.1.) The court granted the government's motion on June 27, 2023. (Cr. Dkt. 316.)

that the scheme targeted "money or property." (Final Jury Instructions (Cr. Dkt. 162) at 30, 33.) The instructions then noted that the Government put forward two theories that pertain to money or property, the right-to-control theory and the misappropriation theory, and that, to convict Johnson, the government had to prove *either* of these theories beyond a reasonable doubt. *(Id.* at 33-37.) [11] Based on these instructions, the jury convicted Johnson of eight of the wire fraud counts and his sole count of wire fraud conspiracy. (Jury Verdict (Cr. Dkt. 182); Judgment (Cr. 0kt. 239).) The jury did not indicate on which theory it relied upon. *(See* Jury Verdict.)

The Second Circuit Court of Appeals affirmed Mr. Johnson's conviction on the right-to-control theory, concluding that "the evidence was sufficient to convict Johnson of wire fraud and conspiracy to commit wire fraud for depriving [Cairn] of the 'right to control' its assets." *See Johnson,* 945 F.3d at 612.[12] In doing so, the Second Circuit held that Johnson made "at least two" material misrepresentations "to Cairn about how HSBC would trade ahead of the fix and the price would be determined." *Id.* at 614-15. The first was Johnson's representation on his call with Jarrosson that he would not "ramp the fix." *Id.* at 614. The Circuit found that, based on the trial evidence, Johnson misrepresented the process by which HSBC would engage in the fix transaction because he knew how important the execution process was to Cairn and, contrary to his representations, he directed the HSBC trader to "ramp the fix to a rate just below 1.5730." *Id.* The second misrepresentation was that the Russian Central Bank caused the market movement before the fix time, a story that Johnson

[11] The Indictment did not reference the "right-to-control" theory, but it did reference the misappropriation theory's elements, reviewed *infra,* noting that as part of the scheme, Johnson breached "HSBC's duty of trust and confidence to the Victim Company." (Indictment fj 10.)

[12] When quoting cases, unless otherwise noted, all citations and internal quotation marks are omitted, and all alterations are adopted.

supported despite knowing it was untrue. *Id.* at 614-15. Although this statement was made after the fix time, it was found to be material because a jury could have found that it influenced "Cairn's decision not to pursue various courses of action immediately after the fact." *Id.* at 615. The Second Circuit did "not consider Johnson's arguments with respect to the misappropriation theory" because it affirmed based on the right-to-control theory. *Id.* at 612.

Following his conviction, this court sentenced Johnson to twenty-four months followed by three years of supervised release and imposed a $300,000 fine. (Judgment at 2-3, 7-8.) Johnson has since served his sentence and paid his fine. (Petition at 12; *see also* Satisfaction of Judgment (Cr. Dkt. 305).)

On July 25, 2023, Mr. Johnson filed the present *coram nobis* Petition, requesting that this court vacate his conviction after the Supreme Court 2023 invalidated the right-to-control theory **in** *Ciminelli. (See generally* Petition). Before reviewing Johnson's Petition, the court finds it useful to first review the right-to-control theory that was invalidated by *Ciminelli.*

C. Legal Background: The Right-To-Control Theory of Wire Fraud and *Ciminelli*

It is a federal crime to devise or intend to devise "any scheme or artifice to defraud" by means of the wires. *See* 18 U.S.C. § 1343. To sustain a wire fraud conviction, the Government must establish the defendant (1) had an intent to defraud, (2) engaged in a scheme or artifice to defraud involving material misrepresentations, meaning misrepresentations that tend to influence, or are capable of influencing, the decision of the decision-making body to which they were addressed, and (3) used the interstate or international mails or wires to further that scheme. *United States v. Caltabiano,* 871 F.3d 210, 218 (2d Cir. 2017). *(See also* Final Jury Instructions at 30.)

The Supreme Court has long held that "to defraud" refers to "wronging one in his property rights." *Cleveland v. United States,* 531 U.S. 12, 19 (2000); *McNally v. United States,* 483 U.S. 350, 358 (1987). Prior to the Supreme Court's decision in *Ciminelli,* this Circuit considered the "right to control" a property right. *See United States v. Wallach,* 935 F.2d 445, 462-463 (2d Cir. 1991). This property right encompassed the right to control "potentially valuable economic information necessary to make discretionary economic decisions." *Ciminelli v. United States,* 598 U.S. 306, 309 (2023); *see also Wallach,* 935 F.2d at 462-463. Examples of convictions under the right-to-control theory included when the scheme "affected the victim's economic calculus or the benefits and burdens of the agreement, pertained to the quality of services bargained for, or exposed the victim to unexpected economic risk." *United States v. Percoco,* 13 F.4th 158, 170 (2d Cir. 2021), *rev'd and remanded sub* nom. *Ciminelli,* 598 U.S. 306.

In 2023, the Supreme Court roundly rejected the right-to-control theory. *Ciminelli,* 598 U.S. at 309. The Court held that because "the wire fraud statute reaches only traditional property interests" the "right-to-control theory cannot form the basis for a conviction under the federal fraud statutes." *Id. at 316.* The Court noted a particular concern with the breadth of the right-to-control theory, noting a concern that it treats "mere information as the protected interest" and "criminalizes traditionally civil matters and federalizes traditionally state matters." *Id.* at 315-16. In *Ciminelli,* the defendant's indictment and conviction were based solely on the right-to-control theory. *Id.* at 316.[13]

[13] *Ciminelli* and Percoco v. *United States,* 598 U.S. 319 (2023), decided the same day, have led to the vacatur of at least one conviction in this district. *See United States* v. *Full Play Grp., S.A.,* No. 15-CR-25253 (PKC), 2023 WL 5672268, at *15, *19-26 (E.D.N.Y. Sept. 1, 2023) (finding that after Percoco and Ciminelli, the wire fraud statute, Section 1346, does not extend to the "foreign commercial bribery schemes" charged against the defendants.).

The court now turns to the standard for reviewing Mr. Johnson's Petition.

II. LEGAL STANDARD

"The writ of error *coram nobis* is an extraordinary remedy that issues only in extreme cases, and typically is available only when habeas relief is unwarranted because the petitioner is no longer in custody." *United States v. Rutigliano,* 887 F.3d 98, 108 (2d Cir. 2018). The burden is on the defendant to show that reliefis warranted. *Id.*

To receive *coram nobis* relief, a petitioner must demonstrate that "l) there are circumstances compelling such action to achieve justice, 2) sound reasons exist for failure to seek appropriate earlier relief, and 3) the petitioner continues to suffer legal consequences from his conviction that may be remedied by granting of the writ." *Kovacs v. United States,* 744 F.3d 44, 49 (2d Cir. 2014).

In considering whether circumstances compel granting of the writ to achieve justice, "a new rule of substantive criminal law is presumptively retroactive because a defendant may have been punished for conduct that simply is not illegal." *United States v. Mandanici,* 205 F.3d 519, 525 (2d Cir. 2000). This includes substantive changes in the controlling interpretation of criminal statutes. *United States* v. *Reguer,* 901 F. Supp. 515, 520 (E.D.N.Y. 1995) (citing *Davis v. United States,* 417 U.S. 333 (1974)). The Supreme Court invalidating the right-to-control theory in *Ciminelli* may therefore serve as a basis for *coram nobis* relief for defendants convicted under this theory.

However, when the jury was presented with multiple theories for criminal liability, only one of which was subsequently invalidated, the court applies a harmless error analysis. *See Hedgpeth v. Pulido,* 555 U.S. 57, 58 (2008) (citing *Brecht v. Abrahamson,* 507 U.S. 619, 623 (1993)). This analysis considers "whether the

flaw in the instructions had substantial and injurious effect or influence in determining the jury's verdict." *Hedgpeth,* 555 U.S. at 58 (citing *Brecht,* 507 U.S. at 623). This "substantial influence" standard is met if there is "grave doubt" that the error affected the jury's verdict; if so, "the conviction cannot stand." *O'Neal v. McAninch,* 513 U.S. 432, 435, 437-38 (1995). "A judge is in 'grave doubt' when 'the matter is so evenly balanced that the judge feels himself in virtual equipoise as to the harmlessness of the error.'" *Peck v. United States,* 106 F.3d 450, 454 (2d Cir. 1997) (quoting *O'Neal,* 513 U.S. at 435).

III. DISCUSSION

The determinative question for Johnson is whether he can meet the first *coram nobis* factor, that justice compels granting the writ.14

A. Circumstances Compelling Action

Mr. Johnson was convicted of one count of wire fraud conspiracy and eight counts of wire fraud. The jury instructions stated that either the misappropriation theory or the right-to-control theory would be sufficient to convict, and it is unclear upon which theory the jury relied when finding Johnson guilty. (Final Jury Charge 33-37; Jury Verdict.) The question as to the first *coram*

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[14] As noted, comm *nobis* requires showing compelling circumstances to justify action, sound reasons for delay, and continuing legal harm. As to the second factor, Johnson brought this Petition in July 2023, just two months after *Ciminelli* which formed the basis of his Petition. Johnson is thus able to justify the delay in bringing this Petition, which the Government does not contest. *(See generally* Opp.) As to the third, the ongoing harms cited by Petitioner, *(see* Opp. at 24-25; Ex. C to Petition (Civ. Dkt. 1-5)), in particular his restrictions on travel and his career, extend beyond a "mere desire to be rid of the stigma of a conviction." *Flemingv. United States,* 146 F.3d 88, 90 (2d Cir. 1998). They are thus sufficient to demonstrate that Johnson continues to suffer consequences that resulted from his conviction.

nobis factor is therefore whether there is grave doubt that including the invalid right-to-control theory affected the verdict's outcome. If there is not grave doubt that the jury would have convicted Johnson under the misappropriation theory based on a review of the trial record, the error is harmless and the first *coram nobis* factor is not met.[15]

In considering the misappropriation theory, the court first addresses Petitioner's argument that the theory is invalid outside of the securities context. (Petition at 26 n.6.) The court then reviews Johnson's case under the elements of the misappropriation theory. These elements are that: (1) "the Defendant entered into a

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[15] The govermnent argues that the court should uphold the conviction under both the misappropriation theory and the "traditional" theory of fraud. (Opp. at 12, 22-24.) The Second Circuit's recent analysis in *United States v. Tuzman* is helpful in considering whether this theory should be considered in the court's harmless en-or analysis. No. 21-2229, 2024 WL 1173044 (2d Cir. Mar. 19, 2024). ln *Tuzman,* the Second Circuit upheld a wire fraud conviction on direct review by applying the traditional theory of fraud when the jury charge included instructions similar to Johnson's. *Id.* at *3. In both *Tuzman* and here, the instructions note that the scheme must have deprived the victim of money or property and expands the definition of property to include the right to control assets (i.e. the right to control money or property or assets). The Second Circuit found that although the definition of money or property included the right to control assets, the court still "read the jury the traditional property theory," *Tuzman,* 2024 WL 1173044 at *3; *see also Tuzman* Jury Charge, Ttial Tr. at 7171:22-7172:10, *United States v. Tuzman,* No. 15-CR-536 (PG) (S.D.N.Y. December 22, 2017), Dkt. 707. However, the traditional fraud theory is inappropriate here because the jury in Johnson's case was also instructed that to find Petitioner guilty under the right-to-control theory, it must find that the scheme was meant to deprive Cairn of money or property and that the "the **property at issue** is **the alleged victim's right to control its assets,** which can be harmed when the alleged victim is deprived of potentially economically valuable information that would be valuable in deciding how to use those assets." (Final Jury Charge at 36 (emphasis added).) Because the court directed the jury to focus solely on the right to control assets if convicting under the right-to-control theory, the traditional fraud theory was not properly before the jury and will not be considered.

relationship of trust and confidence with Cairn"; (2) "Cairn provided the Defendant with confidential information in the course of such a relationship"; (3) "the defendant ... secretly used that information for his own benefit, under circumstances where that use could or did result in a tangible harm to Cairn"; and (4) the defendant acted "with knowledge and fraudulent intent." (Final Jury Charge at 35.)

1. Whether the Misappropriation Theory is Valid

In a footnote, Petitioner suggests that the misappropriation theory is invalid because it is limited to the securities context and that applying it to foreign exchange trading would not have "made sense." (Petition at 26 n.6 (citing *United States v. O'Hagan,* 521 U.S. 642 (1997)).) Johnson's trial counsel raised a similar argument when arguing that the court should not include the misappropriation theory in the jury charge. (Defense Letter dated October 15, 2017 (CR Dkt. 153) at 7-20.)[16] But, as this court found prior to including this theory it in the jury charge, although this theory is generally brought in the securities context, the "Supreme Court has held that wire fraud charges may also proceed on a misappropriation theory." (Memorandum and Order dated September 1, 2017 (Dkt. 101) at 10 (citing *Carpenter v. United States,* 484 U.S. 19, 26-27 (1987)); *see also* Memorandum and Order dated September 21, 2017 (Dkt. 126) at 4-5 (discussing the misappropriation theory in the context of "both prosecutions under the wire fraud and mail fraud statutes as well as civil and criminal actions enforcing SEC Rule l0b-5, 17 C.F.R. § 240."); Charge Conference Tr. at 2246:24-2247:11 (finding that

[16] There is some overlap between Petitioner's argument that the misappropriation theory is invalid outside of the securities context and the argument that Johnson did not owe a duty of trust and confidence as a matter of law, which is discussed in the following section.

whether Johnson owed a duty to Cairn under the misappropriation theory was a question for the jury to decide)). *See also United States* v. *Chestman,* 947 F.2d 551,566 (2d Cir. 1991).

Petitioner does not cite to any intervening and controlling law that would lead the court to reverse its prior determination that the theory is valid. The court thus finds that this theory is valid for the purpose of evaluating Mr. Johnson's Petition under the harmless error analysis.

Johnson also argues that it is unfair or unjust that the Circuit did not to consider the validity of the misappropriation theory directly because it upheld the conviction solely under the now-invalid right-to-control theory. (See, *e.g.,* Mot. at 12-13, 16, 21; Reply at 1-2, 7.) *See also Johnson,* 945 F.3d at 612 ("[W]e need not and do not consider Johnson's arguments with respect to the misappropriation theory."). However, the Circuit through its silence did not indicate, much less hold, that the misappropriation theory was invalid as a matter of law. And the Circuit's failure to consider this theory does not provide reason for this court to reconsider its own prior rulings.

The court thus moves onto whether there is grave doubt as to whether the jury would find that the elements of the misappropriation theory were met.

2. Misappropriation Theory Element #1: Duty of Trust and Confidence

a. Duty as a Matter of Law

To meet the first element of the misappropriation theory, the jury had to find that Johnson owed Cairn a "duty of trust and confidence." (Final Jury Charge at 34.) Whether this was a matter for the jury to decide, or whether Johnson did not owe this duty as a matter of law, was thoroughly litigated by Johnson's trial counsel. *(See* Memorandum and Order dated September 1, 2017 at 8-

13 (discussing the misappropriation theory when ruling on Johnson's fourth motion *in limine* to exclude evidence and testimony related to the non-disclosure agreement); Memorandum and Order dated September 21, 2017 at 4-10 (same) (citing *Carpenter v. United States,* 484 U.S. 19, 27 (1987) and *Chestman,* 947 F.2d at 568); Defense Letter dated October 15, 2017 at 7-15 (defense arguing that the misappropriation theory fails because "the evidence does not support ... the existence of any 'duty of trust and confidence'"); Charge Conference Tr. at 2242:11-2247:11 (parties discussing the misappropriation theory).)

The court found this to be a "knotty issue" but ultimately held that it was a jury question as to whether Johnson owed Cairn a heightened duty that went beyond a straightforward counterparty duty. (Charge Conference Tr. 2242:13-14, 2246:24-2247:11; *see also* Final Jury Charge at 34-35 (including the misappropriation theory as a valid theory of conviction).)

Petitioner reiterates many of the arguments raised by trial counsel in arguing that, as a matter of law, Johnson did not owe this duty to Cairn. *(Compare* Petition at 26-31 *with* Defense Letter dated October 15, 2017 at 7-15.) But Petitioner again does not cite to any intervening and controlling cases that would lead it to reverse its decision that the question of duty was validly put before the jury. Petitioner notes the concern raised in *Ciminelli* that the federal fraud statutes must be construed narrowly, (Petition at 315-16 (citing *Ciminelli,* 598 U.S. at 315-16)), but this general statement was made in the context of a concern of criminalizing "mere information," as compared to traditional property interests. *Ciminelli,* 598 U.S. at 315-16. That concern is not implicated when applying the misappropriation theory which imposes "heightened responsibilities" on defendants who enter into a relationship of trust and confidence with the victim. (Final Jury Charge at 35.) *See also Carpenter* 484 U.S. at 25 (distinguishing the property rights under the misappropriation theory from the

property rights at issue in *McNally.) As* per Johnson's Final Jury Charge, criminal liability may only be imposed where the jury finds: that this duty exists, that the defendant had as a result of this relationship, that the defendant received information as a result of this relationship, that the defendant used this information with knowledge and fraudulent intent, and that this could or did result in "tangible harm" to the victim. *(Id.)* This stricter standard mitigates the over-criminalization concerns raised in *Ciminelli.*

Petitioner also argues that *Ciminelli* altered the law as it relates to the language in the Mandate Letter and ISDA because *Ciminelli* overruled the Second Circuit's decision in *United States v. Binday, (see* Reply at 16), which the Circuit cited when, in upholding Johnson's conviction, it stated that "Section 1343 applies even if the parties' contract was never breached." *Johnson,* 945 F.3d at 613 (citing *United States v. Binday,* 804 F.3d 558, 564 (2d Cir. 2015), *abrogated by Ciminelli,* 598 U.S. 306). This argument is also unavailing. First, the Second Circuit discussed *Binday* only after Johnson relied on it in part to argue essentially the same argument he raises here, that he cannot be liable for wire fraud absent a contractual breach. *Johnson,* 945 F.3d at 613 ("Relying in part on our decision in *Binday,* Johnson urges that he cannot be criminally liable for wire fraud in the absence of a contractual breach."). The Circuit then discussed and rejected Johnson's interpretation of the case. *Id.* ("[F]raudulent intent may be apparent where the false representations are directed to the quality, adequacy or price of the goods themselves ... because the victim is made to bargain without facts obviously essential in deciding whether to enter the bargain. Similarly here, Johnson represented to Cairn that the price of the FX Transaction would be determined under particular conditions.") Second, and more significantly, *Ciminelli's* reference to *Binday* related to the harm to the property interests at issue in *Binday,* specifically, the "right to control [] assets," *Ciminelli,* 598 U.S. at 313. The Supreme Court did not discuss *Binday's* analysis of the relation between

the misrepresentations at issue, the harm, and any relevant bargains, *Binday,* 804 F.3d at 570, or otherwise invalidate Second Circuit law that a defendant may commit wire fraud even absent a breach of contract when the defendant had an intent to defraud and the contemplated harm affects the "very nature of the bargain." *United States v. Starr,* 816 F.2d 94, 98 (2d Cir. 1987). Thus, *Ciminelli* did not change the law as it relates to whether the Mandate Letter's reference to the ISDA eliminated the possibility of finding guilt under the misappropriation theory.[17]

Petitioner also cites to a 2018 Second Circuit case, *Allen v. Credit Suisse Securities (USA) LLC,* in which, according to Petitioner, the Circuit "held that a multitude of analogous fix transactions performed by HSBC did not give rise to ... fiduciary status." (Reply at 13-14 (citing *Allen v. Credit Suisse Sec. (USA) LLC,* 895 F.3d 214, 223 (2d Cir. 2018)).) However, this case involves different relationships between Johnson and Cairn than the relationships considered in *Allen,* and *Allen* was expressly limited to the ERISA context, considering the ERISA definition of fiduciary which focuses on "the exercise, as well as the possession, of authority or control over a pension plan's assets." *Allen,* 895 F.3d at 222-23. There, the Circuit concluded that "the alleged wrongdoing did not afford defendants the control over the Plans' assets necessary to make them ERISA functional fiduciaries." *Id.* at 225-26. The

[17] The court does not consider the Government's alternative argument that Petitioner's argument also fails because the confidentiality agreement constituted an express term that would impose affirmative obligations on HSBC for a specific transaction (i.e., the FX transactions that were the subject of the RFP process), which, according to the Government, would then impose an obligation on the parties under the terms of the ISDA. (Opp. at 19; *see al.so* ISDA at 23 (noting that the terms of the ISDA relating to the relationship between the parties may be altered with "a written agreement between the parties that expressly imposes affirmative obligations to the contrary for that Transaction."))

case does not control in this wire fraud case, considering a separate duty of trust and confidence.

The court thus declines to reconsider its rejection of trial counsel's argument that Johnson did not owe a duty of trust and confidence under the misappropriation theory as a matter of law.

b. Harmless Error Review

Turning to whether there is grave doubt that the jury would have found, absent the right-to control-theory, that the defendant "entered into a relationship of trust and confidence with Cairn." *(See* Final Jury Charge at 34.) *See also United States v. O'Hagan,* 521 U.S. 642,652 (1997).

This duty "exists only where (1) a defendant explicitly accepts that duty, or (2) where a defendant's acceptance of that duty may be implied from a pre-existing fiduciary or similar relationship of trust and confidence between that defendant and the claimed principal." (FinalJury Charge at 35.) *See also Chestman,* 947 F.2d at 571. A "duty of trust and confidence is not to be lightly implied." (Final Jury Charge at 35.) *See also United States v. Skelly,* 442 F.3d 94, 98 (2d Cir. 2006). "[E]ntrusting someone with confidential information does not, without more, give rise to a relationship of trust and confidence." (Final Jury Charge at 35.) *See also Chestman,* 947 F.2d at 568 (citing *Walton v. Morgan Stanley* & Co. *Inc.,* 623 F.2d 796, 799 (2d Cir. 1980)). Important considerations in determining whether this duty is to be found are: "reliance" of the victim on the defendant, control over the victim's assets, the victim's sharing of confidential information with the defendant, and the degree of confidence and trust that the victim placed in the defendant. (Final Jury Charge at 34.) *See also Chestman,* 947 F.2d at 568-69.

The facts presented at trial support a jury's finding that Johnson owed a duty of trust and confidence to Cairn. The Government provided evidence that HSBC entered into a confidentiality

agreement that was to remain in effect for two years, where the Bank promised not to disclose the confidential information provided and to use it solely for the purposes for which it was provided. Johnson and HSBC also made specific representations about how they would engage in the relevant transaction, with Johnson explaining how the Bank would purchase the target currency in a way that avoids noise and an increase in price prior to the fix time, distinguishing how HSBC would approach the transaction with competitors that ramp up the fix rate to profit at their clients' expense. Then, once Cairn engaged HSBC for the transaction, Cairn acted in reliance on this relationship of trust and confidence to provide Johnson and HSBC information that Johnson exploited to increase the fix rate ahead of the fix time in a way that increased their profits.

The record also demonstrates the importance of trust in Cairn's decision to choose HSBC. Cairn required the Bank to maintain confidentiality as a precondition to be considered in the selection process. Cairn was also explicit that the key criteria in the selection would be best execution and pricing. While generalized agreements to offer best execution would not, on their own, create a heightened duty on HSBC or Johnson, Cairn's criteria are relevant when considering the later representations about the fix transaction and the Client's reasonable reliance on these statements. These include later representations that HSBC would "drip feed" the market to avoid moves against the company and Johnson's statements to Jarrosson about how they would engage in the fix transaction-Le. that they would limit noise, that they cannot control the price, and that they would not act like other banks that ramp up the price. Johnson's committing to engage in the transaction in this manner while receiving Cairn's confidential information indicates that he fostered and accepted of a heightened duty of trust and confidence. This is not a case where

a duty was imposed "unilaterally" by a purported victim entrusting someone with confidential information. *Chestman,* 947 F.2d at 567. *(See also* Final Jury Charge at 35.)

Taken together, the court finds that there are not grave doubts that a jury would find that there was a relationship of trust and confidence between Johnson and Cairn.

Petitioner argues that the Mandate Letter disclaimed any heightened duty, citing to language stating that any "transaction undertaken will be governed by the terms of the ISDA in place between HSBC and Cairn." (Mandate Letter at 1.) This language, according to Johnson, precludes finding a duty under the misappropriation theory because it incorporated the ISDA's non-reliance provision and a provision stating that the parties are not acting as fiduciaries. (Petition at 29-30; *see also* ISDA at 23.) Johnson's trial counsel raised similar arguments when requesting that the court not instruct the jury on the government's misappropriation theory. (Defense Letter dated October 15, 2017 at 8-9, 13-14.) As discussed *supra,* there has not been intervening and controlling law and the court thus declines to reverse its prior determination that whether Johnson owed a duty was a question for the jury. (Jury Charge Tr. at 2246:24-2247:11; Defense Letter dated October 15, 2017 at 8-9 (reviewing the ISDA and testimony presented at trial concerning the ISDA).)

The court also finds that the standard language in the ISDA does little to support Petitioner on this grave doubt as to harmless error review. HSBC and Cairn executed the ISDA in June 2010, over a year prior to HSBC signing the confidentiality agreement as part of the RFP process and Cairn engaging HSBC for the transaction at issue. If relying on these provisions, it would require the jury to set aside: the confidentiality agreement which, by its terms, was to be in effect for two years; the RFP which specified that Cairn was interested in a transaction that guaranteed best execution for the specific currency transaction; the

representations HSBC and Johnson made about how they would engage in the transaction; and that Cairn chose HSBC based on their understanding that the Bank would have a "'best execution' duty not to influence the market adversely with the Company's trade." (Cairn Board Meeting Minutes at 2.) The court rejects that the jury would find that the line in the Mandate Letter would carry the weight that the Petitioner places on it. That there is not grave doubt on this issue is further supported by the jury finding, which it was required to do even if relying on the right-to-control theory to convict, that Johnson made "misrepresentations and omissions that deceived Cairn" and that went to the "heart of Cairn's bargain with HSBC." (Final Jury Charge at 36.) The jury would be unlikely to have found this if the ISDA language was controlling as to the relationship between Cairn and Johnson such that it made meaningless the representations that preceded and succeeded the Mandate Letter.

Petitioner also argues that a duty of trust and confidence did not exist because HSBC and Cairn are sophisticated, multibillion dollar enterprises operating at arm's length. (Petition at 30; Reply at 13.) But the record demonstrates a different relationship. Cairn sought a Bank to engage in a specific transaction in a specific manner. And Johnson and HSBC provided specific representations about how they would execute the transaction, including representations that the Bank could not control the price and would not act in a way that ramped up the price to Cairn's loss. This was not someone placing a generic market order through a broker based on the broker's representation that they provided a "fair price." It was a transaction that was preceded by specific statements by HSBC and Johnson that "would deceive an objectively reasonable investor." *United States v. Litvak,* 889 F.3d 56,

69 n.13 (2d Cir. 2018).[18] When considering the transaction in context, the evidence demonstrates that the parties were not mere counterparties operating at arm's length.

In sum, absent the invalid right-to-control theory, the court does not have grave doubts that the jury would find beyond a reasonable doubt that Johnson owed a duty of trust and confidence to Cairn. This element therefore favors upholding Johnson's conviction.

3. Misappropriation Theory Elements #2 through #4

There are also not grave doubts that a jury would find that the remaining elements are met based on the record presented at trial.

The second element requires that "Cairn provided the Defendant with confidential information in the course" of the relationship of trust and confidence. (Final Jury Charge at 35.) There is no serious dispute that this occurred. After the parties entered into a non-disclosure agreement, Cairn provided confidential information relating to the transaction at issue, including the information provided in the request to engage in the 2.25 billion

[18] The parties dispute the application of *Litvak* to the facts here with Petitioner arguing that it supports a finding that here there was an arms-length relationship. *(Compare* Opp. at 17-18 *with* Reply at 12.) In *Litvak,* the Circuit found that the "banter employed" by the appellant, a broker-dealer in the RMBS market, did not support that an agency relationship existed when considering the context of the broker-dealer relationship. *Litvak,* 889 F.3d at 69 n.13. However, this was because the government pointed to "no evidence" that the appellant "took steps sufficient to cause [the victim] to disregard the common knowledge of the market." *Id.* at 69. Here, by contrast, there is significant evidence in the record that Johnson's statements amount to "more than a salesman's banter" such that a reasonable investor would consider their relationship one of "special trust." *Id.* at 69 n.13.

GBP *I* 3.5 billion USD FX transaction at the fix time, which allowed the Bank to profit by accumulating the target currency and increasing the fix rate ahead of the fix.

The record also supports that the jury would find the third element met, that Johnson used this confidential information for his own benefit in a manner that could cause Cairn tangible harm. The evidence demonstrates that the use of the confidential information, after being passed onto HSBC's trader, led to greater profits for HSBC and greater profits attributable to Johnson at the expense of Cairn, which suffered tangible economic harm by paying more for the target currency. In addition, regardless of the theory adopted by the jury, the jury had to find beyond a reasonable doubt that the scheme to defraud resulted in "tangible economic harm" to Cairn in order to convict Johnson. (Jury Charge at 36.) The court is confident that the jury would find that the third element is met.

Finally, four calls demonstrate that a jury would find that Johnson meets the fourth element, acting with lmowledge and fraudulent intent. First, in the call between Jarrosson, who was acting on behalf of Cairn, and Johnson before HSBC was chosen to engage in the transaction, Johnson described how the Bank would engage in the fix transaction if chosen by the Client. Specifically, Johnson stated that HSBC would slowly build up their position in the currency to allow Cairn to receive a better price in the transaction. He then distinguished their approach from competitors who engage in practices that increase the fix price for their own profit, which "horrified" Johnson because it undercuts "the point of doing a fix" which is to provide the client clarity as to the average price around the fix time. (Oct. 13, 2011 Jarrosson Call at 14-15.) This indicates Johnson's lmowledge and awareness, when describing his approach to the transaction, that ramping up the price would benefit himself and harm Cairn.

The next three calls occurred between Johnson and his colleague, Stuart Scott, on the day of the relevant transaction. In the second call, Johnson expresses excitement that the Client wished to increase the transaction amount, exclaiming "fucking Christmas" upon hearing this news, and he does not express a concern that the larger amount could cause the exchange rate to increase. *(See* GX 163; *see al..so* Oct. 6, 2017 Trial Tr. at 1424:7-1425:25 (playing the phone call audio for the jury).) This indicates Johnson's knowledge that the transaction would generate a substantial profit and that Johnson was not concerned that an increase in the transaction amount to such a large size could increase the exchange rate and harm Cairn. The third call occurred at 2:54 p.m.,just minutes before the 3:00 p.m. fix time. In this call, Johnson and Scott discuss the level to which Cahill, the HSBC trader, should increase the exchange rate with Johnson saying that he should not do so past 100 pips to avoid upsetting the Client. This indicates that Johnson was aware of the price increase and that he directed it to happen only up to a certain level, contradicting his prior representations to the Client. The fourth call occurred at 3:14 p.m., after the fix transaction. In this call, Scott falsely told Jarrosson, who was acting on behalf of Cairn, that the price increased because of actions undertaken by the Russian Central Bank. Johnson then supported this statement, despite his awareness that his trader was increasing the price to HSBC's benefit, by stating that the Russian Central Bank was always buying dollars. These calls, considered together, demonstrate that Johnson acted lmowingly and with fraudulent intent.

In sum, the misappropriation theory was presented to the jury and remains valid. When reviewing the record, the court does not have grave doubts that, absent the invalid right-to-control theory, the jury would have found that Johnson met each of the elements required under the misappropriation theory. The court therefore finds that Johnson is unable to demonstrate that justice compels granting of the writ and DENIES his motion.

IV. CONCLUSION

For the reasons discussed herein, Mr. Johnson is unable to demonstrate that circumstances compel granting his Petition for writ of error *coram nobis* to achieve justice. His Petition is therefore DENIED.

SO ORDERED.

Dated: Brooklyn, New York
Aprill;.. 2024

s/Nicl)ol as G. Garaufis
frICHOLAS G. GARAUFIS
United States District Judge'

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

MARK JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

----------X

JUDGMENT
23-CV-5600 (NGG)

A Memorandum and Order of Honorable Nicholas G. Garaufis, United States District Judge, having been filed on April 23, 2024, denying the petition for writ of error *coram nobis;* it is

ORDERED and ADJUDGED that the petition for writ of error *coram nobis* is denied.

Dated: Brooklyn, NY
April 25, 2024

Brenna B. Mahoney
Clerk of Court

By: */s/Jalitza Poveda*
Deputy Clerk

Significant Rules of Law

18 U.S.C.A. § 1343. Fraud by wire, radio, or television
Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.