No. _____

In the Supreme Court of the United States

UNITED STATES OF AMERICA V. NADEGE AUGUSTE

APPLICATION FOR RELEASE ON BAIL PENDING APPEAL TO THEUNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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PARTIES TO THE PROCEEDING

Defendant-Applicant is Nadege Auguste ("Auguste"). Plaintiff-Respondent is the United States of America.

The proceedings below were *United States of America v. Nadege Auguste*, Case No. 23-CR-60010-WPD and Case No. 23-CR-60175-WPD, U.S. District Court for the Southern District of Florida, Fort Lauderdale Division. Pending before the United States Court of Appeals for the Eleventh Circuit are Case No. 24-10741 and Case No. 24-10757, in each of which Auguste is the Appellant. Auguste is serving a 42 month sentence to imprisonment at the Federal Medical Center, Carswell, Fort Worth, Texas, for wire fraud and money laundering (the predicate for which was the charged wire fraud).

Auguste's applications, pursuant to 28 U.S.C. § 3143, to the District Court and the Court of Appeals for release on bail pending appeal have been denied.

TO THE HONORABLE CLARENCE THOMAS, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE ELEVENTH CIRCUIT:

Auguste respectfully applies to Your Honor and the Court for the entry of an order granting her release on bail pending the dispositions of her appeals to the United States Court of Appeals for the Eleventh Circuit. The charging documents underlying Auguste's wire fraud and money laundering convictions allege the "right to control" theory of "money or property" which was rejected in *Ciminelli v. United States*, 598 U.S. 306 (Case No. 21-1170, decided May 11, 2023).

JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C. § 3143 because Your Honor is a "judicial officer" who is empowered to grant Auguste's application for release on bail pending appeal.

STATUTORY PROVISIONS INVOLVED

These cases involve convictions under the federal wire fraud and money laundering statutes, 18 U.S.C. §§ 1343 and 1957(a).

REASONS FOR GRANTING THE APPLICATION

Release on bail pending appeal is warranted when the judicial officer finds, "by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3143(b) or (c) of this title; and that the appeal is not for the purpose of delay and raises a substantial, or a question or law or fact likely to result in ... reversal, an order for a new trial, a sentence that does not include a term of imprisonment, or a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process." 18 U.S.C. § 3143(b)(1)(A), (B)(i-iv).

At the age of 16 years, Auguste (who is 49 years old) was diagnosed with rheumatoid arthritis (which is the basis for her confinement to a Federal Medical Center operated by the United States Bureau of Prisons). Consequently, if released on bail, Auguste would be neither a flight risk nor a danger to the safety of any person or the community.

THE PROCEEDINGS BELOW

Auguste was indicted on January 12, 2023, for wire fraud (18 U.S.C. § 1343) and conspiracy to commit wire fraud (18 U.S.C. § 1349) concerning an alleged scheme to sell fraudulent school transcripts and diplomas issued by Sacred Heart International Institute, Inc., Fort Lauderdale, Florida, to aspiring practical/vocational nurses, who would use those credentials to obtain licenses and employment in the health care industry. The indictment, which commenced Case No. 24-CR-60010-WPD, tracked the "right to control" theory of "money or property" under 18 U.S.C. § 1343, *United States v. Percoco,* 13 F. 4th 158 (2nd Cir. 2021):

> It was the purpose of the conspiracy for the defendants and their co-conspirators to unlawfully enrich themselves by, among other things: (a) soliciting and recruiting co-conspirators, via interstate wire communications, seeking nursing credentials to obtain employment as an LPN/VN in the health care field; (b) creating and distributing, via interstate wire communications, false and fraudulent diplomas and transcripts for co-conspirators seeking LPN/VN licensure and employment in the health care field; (c) using the false and fraudulent documents to obtain employment, pay, and other benefits in the health care field; (d) *concealing the use of fraudulent documents used to obtain employment in the health care field*; and (e) using the proceeds of the conspiracy for their personal use and benefit, and the use and benefit of others, and to further the conspiracy. (Emphasis supplied)

Auguste pleaded not guilty to the indictment in Case No. 24-CR-60010-WPD.

On May 11, 2023, the Court, in *Ciminelli v. United States, supra,* with a unanimous opinion written by Your Honor, reversed a wire fraud conviction and rejected the "right to control" theory of "money or property" under the wire fraud statutes:

> In this case, we must decide whether the Second Circuit's longstanding "right to control" theory of fraud describes a valid basis for liability under the federal wire fraud statute, which criminalizes the use of interstate wires for "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U. S. C. §1343. Under the right-to-control theory, a defendant is guilty of wire fraud if he schemes to deprive the victim of "potentially valuable economic information" "necessary to make discretionary economic decisions." *United States v. Percoco*, 13 F. 4th 158, 170 (CA2 2021) (internal quotation marks omitted). Petitioner Louis Ciminelli was charged with, tried for, and convicted of wire fraud under this theory. And the Second Circuit affirmed his convictions on that same basis.
>
> We have held, however, that the federal fraud statutes criminalize only schemes to deprive people of traditional property interests. *Cleveland v. United States*, 531 U. S. 12, 24 (2000). Because "potentially valuable economic in- formation" "necessary to make discretionary economic decisions" is not a traditional property interest, we now hold that the right-to-control theory is not a valid basis for liability under §1343. Accordingly, we reverse the Second Circuit's judgment.

598 U.S. at 308-309.

* * * * * * * *

Despite indicting, obtaining convictions, and prevailing on appeal based solely on the right-to-control theory, the Government now concedes that the theory as articulated below is erroneous. Brief for United States 24-26. The Government frankly admits that, "to the extent that language in the [Second Circuit's] opinions might suggest that depriving a victim of economically valuable information, without more, necessarily qualifies as 'obtaining money or property' within the meaning of the fraud statutes, that is incorrect." *Id.*, at 24. That should be the end of the case.

> Yet, the Government insists that its concession does not require reversal because we can affirm Ciminelli's convictions on the alternative ground that the evidence was sufficient to establish wire fraud under a traditional property-fraud theory. *Id.*, at 31-32. With profuse citations to the records below, the Government asks us to cherry-pick facts presented to a jury charged on the right-to-control theory and apply them to the elements of a *different* wire fraud theory in the first instance. In other words, the Government asks us to assume not only the function of a court of first view, but also of a jury. That is not our role. *See, e.g., McCormick v. United States*, 500 U. S. 257, 270-271, n. 8 (1991) ("Appellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury"); *Chiarella v. United States*, 445 U. S. 222, 236 (1980). Accordingly, we decline the Government's request to affirm Ciminelli's convictions on alternative grounds.

598 U.S. at 316-317.

Auguste's multiple *Ciminelli*-based motions to dismiss the indictment in Case No. 23-CR-60010-WPD were denied by the District Court. Following a non-jury trial on stipulated facts, the District Court convicted Auguste of the conspiracy and all but one of the substantive counts of the indictment.

On October 5, 2023, the Government obtained a *second* indictment against Auguste, thereby commencing Case No. 23-CR-60175-WPD, charging wire fraud and money laundering offenses relating to allegedly fraudulent transcripts and diplomas issued by Siena College of Health II, LLC, Lauderhill, Florida.

The superseding information in Case No. 23-CR-60175-WPD tracked the "right to control" theory of "money or property" under 18 U.S.C. § 1343, *United States v. Percoco, supra,*:

> It was the purpose of the conspiracy for the defendants and their co-conspirators to unlawfully enrich themselves by, among other things: (a) soliciting and recruiting co-conspirators, via interstate wire communications, seeking nursing credentials to obtain employment as an LPN/VN in the health care field; (b) creating and distributing, via interstate wire communications, false and fraudulent diplomas and transcripts for co-conspirators seeking LPN/VN licensure and employment in the health care field; (c) using the false and fraudulent documents to obtain employment, pay, and other benefits in the health care field; (d) *concealing the use of fraudulent documents used to obtain employment in the health care field*; and (e) using the proceeds of the conspiracy for their personal use and benefit, and the use and benefit of others, and to further the conspiracy. (Emphasis supplied)

Auguste pleaded not guilty to the indictment and the superseding information in Case No. 24-CR-60175-WPD.

Auguste's multiple *Ciminelli*-based motions to dismiss the indictment and the superseding information in Case No. 23-CR-60175-WPD were denied by the District Court. Following a non-jury trial on stipulated facts, the District Court convicted Auguste on all of the counts of the indictment.

In Case No. 24-CR-60010-WPD and Case No. 24-CR-60175-WPD, on March 5, 2024, the District Court denied Auguste's motions for release on bail pending her appeals. Also, on March 5, 2024, the District Court conducted a combined sentencing hearing and sentenced Auguste to 42 months of imprisonment. She was immediately taken into the

custody of the Attorney-General of the United States.

In Case No. 24-CR-60010-WPD and Case No. 24-CR-60175, amended final judgments were entered on March 6, 2024, from which Auguste filed her notices of appeal on March 7, 2024. Auguste's appeals were docketed by the Clerk of the Court of Appeals as Case No. 24-10741 and Case No. 24-10757, which thereafter were consolidated. Auguste's brief to the Eleventh Circuit was filed on April 28, 2024, and the Government's brief was filed on August 12, 2024.

The Court of Appeals, on July 31, 2024, denied Auguste's motion for release on bail pending appeal.

THE REJECTED "RIGHT TO CONTROL" THEORY

The Government, consistently with its posture before the District Court, has denied to the Court of Appeals that, in prosecuting Auguste, it is relying on the [rejected] "right to control" theory of "money or property" under the wire fraud statute.

But the documents which charged Auguste with wire fraud conspiracy and wire fraud belie the Government's denial. This is so because those charging documents alleged that Auguste had concealed "the use of fraudulent documents used to obtain employment in the health care field."

The Government's concealment allegations stated the essence of the [rejected] "right to control" theory of "money or property": the deprivation of the health care providers'

access to "potentially valuable economic information" "necessary to make discretionary economic decisions" (*i.e.,* whether to hire nurses whose diplomas and transcripts may had been issued by corrupt nursing schools).

Although the Court, in *Ciminelli v. United States, supra,* rejected the "right to control" theory of "money or property" under the wire fraud statute, the Government has not broken off its love affair with that theory. Instead, the Government has attempted to "re-brand" the "right to control" theory.

Such an attempt was rebuffed in *United States v. Colletti,* 84 M.J. 594, (U.S. Navy-Marine Corps Court of Criminal Appeals, March 12, 2024, Case No. 202300104). In that case, a Marine Corps staff sergeant used a dating site to engage in sexually explicit conversations with two adult women, which ultimately resulted in the women exchanging sexually explicit digital images with the accused, who was convicted of wire fraud by a court-martial. Citing the Court's decision in *Ciminelli v. United States, supra,* the appellate court reversed the conviction. Judge Mizer's opinion for the appellate court observed:

> For its part, upon being haled before the Supreme Court in *Ciminelli*, the Government immediately beat a hasty retreat and abandoned the right-to-control theory. Despite relying on the right-to-control theory for decades, the Government conceded that if "the right to make informed decisions about the disposition of one's assets, without more, were treated as the sort of 'property' giving rise to wire fraud, it would risk expanding the federal fraud statutes beyond property fraud as defined at common law and as Congress would have understood it." "Thus, even the Government now agrees that the Second Circuit's right-

> to-control theory is unmoored from the federal fraud statutes' text."
>
> But the Government makes no such concession here. Despite the repeated references in the record to *Martinez*,[1] and *Martinez's* express reliance on Second Circuit precedent like *Percoco* that has since been reversed, the Government insists Appellant "was not prosecuted under a 'right-to-control' theory." No. Appellant was prosecuted, according to the Government, under an "exclusive use" theory, which the Government maintains is "traditionally recognized property right." Under this newly-minted, traditional property right, the victims in this case lost "the exclusive use over their intangible property—the sexually explicit depictions of their bodies in digital photographs." Put another way, they lost the right to control the use of their digital images. Needless to say, that is "slicing the baloney mighty thin."

84 M.J. at 598.

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> To be clear, the conduct in this case is despicable and potentially criminal under the UCMJ, but if the wire fraud statute doesn't protect the right to information needed to make discretionary economic decisions, like how to spend $750 million, it certainly doesn't protect the right to information needed to make the discretionary decision to share nude digital images.
>
> Indeed, this case heralds the arrival of the parade of horribles predicted in cases like *Ciminelli* and *Cleveland*. The Government's "exclusive use" theory of criminal liability "makes a federal crime of an almost limitless variety of deceptive actions traditionally left to state contract and tort law—in flat

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[1] *United States v. Martinez,* ACM 39973, 2022 CCA LEXIS 212 (Air Force Court Of Criminal Appeals, April 6, 2022), *affirmed on other grounds,* 83 M.J. 439 (C.A.A.F. 2023). (Footnote numbered in the same sequence as the naval appellate court's decision.)

> contradiction with our caution that 'absent a clear statement by Congress,' courts should 'not read the mail and wire fraud statues to place under federal superintendence a vast array of conduct traditionally policed by the States.
>
> Judges interpret the law as written, not as they wish it were written. And Congress may yet empower the Government to police internet dating sites to ensure that Marines obtain nude photographs from otherwise consenting adults without resorting to loathsome deception. Congress just hasn't done that in the federal wire fraud statute. (Citations and footnotes omitted)

84 M.J. at 601.

In summary, the District Court erred when it determined that the indictment in Case No. 23-CR-60010-WPD and the superseding information in Case No. 23-CR-60175-WPD did not proceed on the [rejected] "right to control" theory of "money or property" under the wire fraud statute, as construed by the Court in *Ciminelli, supra.*

EMPLOYMENT AS "MONEY OR PROPERTY"

In *Ciminelli, supra,* the Court introduced the "traditional property interest" concept into the "money or property" inquiry under the wire fraud statute. Prior to *Ciminelli* and its "traditional property interest" focus, the United States Courts of Appeals were in disagreement whether, for the purpose of the wire fraud statute, a potential employer's discretionary hiring authority and employee benefits constituted the potential employer's "money or property".[2] In *Ciminelli,* which involved the award of a real property

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[2] The Eighth Circuit has answered "yes". *United States v. Granberry,* 908 F. 2d 278 (8th Cir. 1990). The First and District of Columbia Circuits have answered "no".

development contract, the Court neither addressed nor alluded to the foregoing disagreement.

In *Kelly v. United States,* 590 U.S. 391 (2020), the Court reversed the wire fraud convictions which had been entered against two of the participants in the 2013 "Bridgegate" affair. That reversal was predicated upon the absence of evidence that the defendants had sought to deprive the New York-New Jersey Port Authority of its "money or property". Justice Kagan's opinion for the unanimous Court declared:

> The realignment of the toll lanes was an exercise of regulatory power- something this Court has already held fails to meet the statutes' property requirement. *And the employees' labor was just the incidental cost of that regulation, rather than itself an object of the officials' scheme.* We therefore reverse the convictions. (Emphasis supplied)

590 U.S. at 394.

In Case No. 23-CR-60100-WPD and Case No. 23-CR-60175-WPD, the Government and Auguste stipulated that Auguste had received *up front* payments from aspirants for fraudulent nursing school diplomas and transcripts. The salaries and employee benefits which were eventually received by the aspirants who obtained nursing licenses did not redound to Auguste's pecuniary benefit. Borrowing the nomenclature of *Kelly v. United States, supra,* the salaries and employees received by the nursing licensees were "incidental"

Berroa v. United States, 856 F. 3d 141 (1st Cir.), *cert. denied sub nom. Davila v. United States,* 583 U.S. 1003 (2017), and *United States v. Guertin,* 67 F. 4th 445 (D.C. Cir. 2023). Auguste respectfully disagrees with the Eighth Circuit and agrees with the First and District of Columbia Circuits.

to, and *not* the objects of, Auguste's scheme and, therefore, did not satisfy the wire fraud statute's "money or property" criterion.

Moreover, a healthcare provider's discretionary decision to employ a licensed nurse does not implicate a "traditional *property* interest", which is required by the Court's decision in *Ciminelli, supra,* in order to satisfy the "money or property" element of the wire fraud statute. But such a discretionary decision does implicate a "traditional *contract* interest", which the *Ciminelli* decision did *not* recognize as satisfying the "money or property" criterion of the wire fraud statute.[3]

In summary, the District Court erred when it determined that, for the purpose of the wire fraud statute, employment and its benefits constituted the "money or property" of the healthcare providers which would eventually hire Auguste's alleged co-conspirators.

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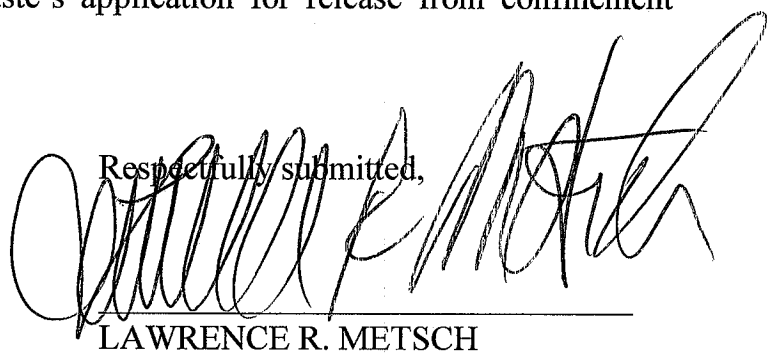
[3] Prior to the abolition of slavery, the purchase, sale or management of a slave implicated a "traditional *property* interest". *See, Scott v. Sandford,* 60 U.S. 393 (1857).

CONCLUSION

For the foregoing reasons, Auguste's application for release from confinement pending appeal should be granted.

Dated: August 27, 2024

Respectfully submitted,



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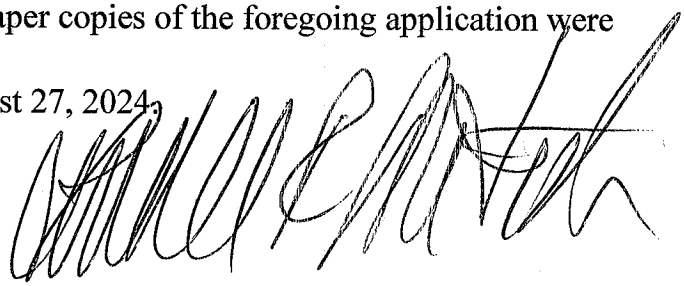
CERTIFICATE OF SERVICE

I hereby certify, pursuant to Supreme Court Rules 22.2 and 29, that on August 27, 2024, the foregoing application was electronically filed with the Clerk of the Court and was electronically served on: The Honorable Elizabeth B. Prelogar, Solicitor General of the United States, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001, E-Mail-SupremeCtBriefs@USDOJ.gov.

Pursuant to Supreme Court Rule 22, paper copies of the foregoing application were transmitted to the Clerk of the Court on August 27, 2024.



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