No. 97-2076

In the Supreme Court of the United States

OCTOBER TERM, 1997

ERIC WYNN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government must prove, as an essential element of the offense of unlawful manipulation under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b) and 78ff, and SEC Rule 10b-5, 17 C.F.R. 240.10b-5, that identifiable investors purchased or sold securities in reliance on manipulative practices employed in the scheme to defraud.

2. Whether the three substantive securities fraud counts in the indictment were duplicitous.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued: Page

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 134 F.3d 542.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1998. On May 6, 1998, Justice Souter extended the time for filing a petition for a writ of certiorari to June 20, 1998, and the petition was filed on June 22, 1998 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted on one count of conspiring to commit securities fraud, in violation of 18 U.S.C. 371; three counts of securities fraud, in violation of Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78j(b) and 78ff, and Securities and Exchange Commission (SEC) Rule 10b-5, 17 C.F.R. 240.10b-5; and on nine counts of wire fraud, in violation of 18 U.S.C. 1343. He was sentenced to 52 months' imprisonment, to be followed by three years of supervised release, and was fined $50,000. Pet. App. 10a-11a.

1. In 1987, petitioner and Barry Davis formed Princeton Financial Consultants in New Jersey. Through that company, petitioner directed a securities manipulation scheme designed to inflate artificially the prices of various penny stocks traded on the over-the-counter market through the National Association of Securities Dealers Automated Quotation system (NASDAQ). The scheme involved four steps. First, petitioner gained control of the supply of a company's stock by "boxing"—*i.e.*, restricting the allocation of available stock to accounts controlled by "players" who had agreed to trade the stock according to petitioner's directions in initial public offerings of the securities. Second, petitioner generated demand for the securities by bribing the colluding brokers to hold the stock off the market for a period of time after they sold it to customers. In some instances, he generated demand for the stock by secretly advising the brokers of impending mergers before public announcement of the event. Third, petitioner caused the price of the stock to rise through pre-arranged and restricted trading by selected brokers who bought the stock at steadily increasing prices. Petitioner engaged the help of colluding "market makers" (*i.e.*, brokerage firms which, in general, maintain a wholesale market in specific

securities by buying from and selling to other dealers), who maintained the inflated price by setting their bid and ask prices (the prices at which they were offering to buy and sell securities) in accordance with petitioner's instructions in exchange for guaranteed trading profits. Fourth, petitioner and his accomplices reaped large profits when they sold their stock at the inflated price. Pet. App. 5a-7a; Gov't C.A. Br. 7-12.

Between January and December 1988, petitioner and his accomplices used the scheme to manipulate the prices of the stock of several companies. Gov't C.A. Br. 12-19. Petitioner and Davis used the services of Sheffield Securities, a brokerage firm in Florida run by Ronald Martini, to assist in the manipulation scheme. Petitioner and Davis entered into an agreement with Martini and his co-owners that allowed petitioner and Davis to control the trading of stocks in certain shell companies (*i.e.*, inactive public companies with no income or business operations) whose IPOs Sheffield underwrote. Through Sheffield, petitioner used his scheme to manipulate the price of the stock of Vista Capital Corporation (Vista), Castleton Investors Corporation (Castleton) and Bellatrix Corporation (Bellatrix). As a result of petitioner's use of the fraudulent scheme, the investing public was deceived into buying the stock of Vista, Castleton, Bellatrix, and other companies at grossly inflated prices. Pet. App. 6a-10a; Gov't C.A. Br. 19-35.

2. Count 1 of the indictment charged petitioner and others with conspiracy to commit securities fraud between January and December 1988. Count 2 charged that petitioner and others employed a scheme to defraud by manipulating the price of Vista securities; Count 3 charged that petitioner and others employed a scheme to defraud by manipulating the price of

Castleton securities; and Count 4 charged that petitioner and others employed a scheme to defraud by manipulating the price of Bellatrix. Pet. App. 11a-12a.

Before and after the trial, co-defendant Brad Haddy moved to dismiss the indictment on the ground that Counts 2, 3, and 4 were duplicitous because each individual securities transaction should have been charged in a separate count. The district court denied the motions, ruling that the scheme to defraud with respect to each company was the appropriate unit of prosecution. See Haddy C.A. Br. 25.

At trial, petitioner moved for a judgment of acquittal on the ground that the government had failed to prove that an identifiable person relied on a misrepresentation or was otherwise deceived in connection with the purchase or sale of any of the securities. The district court denied the motion, and ruled that reliance was not an element of the offense of stock manipulation under Section 10(b) of the Exchange Act and Rule 10b-5. See Pet. C.A. Br. 44-45.

a. The court of appeals affirmed. Pet. App. 1a-19a. It first rejected petitioner's contention that Counts 2, 3, and 4 were duplicitous in that each count improperly joined, in a single count, distinct and separate securities fraud offenses that should have been charged in separate counts. *Id.* at 11a-15a. After noting that the "clear wording" of Section 10(b) of the Exchange Act and Rule 10b-5 "emphasize[s] the use of manipulative devices in describing the offense[,]" the court observed that "[t]he particular counts of the indictment * * * track the statutory and regulatory language" and "describe the manipulative implementation of a securities trading scheme, the precise activity described in the statute and the implementing rule as illegal." *Id.* at 13a. "Here," the court noted, "the [prohibited] device was a four-part scheme in which the buying and selling of securities was a segment." *Ibid.* The court concluded that "the individual purchase or sale [of a security] was not the appropriate unit of prosecution" in this case because "these retail events were only a step in the advancement of the scheme as a whole." *Id.* at 14a.

Although the court "decline[d] to dictate an inflexible rule regarding the allowable unit of prosecution in a securities fraud case[,]" it decided that in this case "each count properly charged a manipulation of securities of each of the three separate companies—each involving a discrete scheme." Pet. App. 14a. In addition, the court found that, "even if the indictments were duplicitous, the error would be harmless" because "[n]one of the concerns of duplicity have been implicated." *Ibid.*

b. The court also rejected petitioner's contention that his securities fraud convictions should be reversed because the government had failed to prove that any investor had relied on the manipulative practices in purchasing or selling any identifiable security. Pet. App. 15a-18a. The court held that "no such statutory requirement" of proof of reliance exists in a criminal prosecution for manipulation under Section 10(b) and Rule 10b-5. *Id.* at 15a.

The court first observed that "[n]either the statute nor the rule includes a reliance requirement[,]" but rather "both section 10(b) and Rule 10b-5 prohibit the employment of manipulative and deceptive devices in connection with the purchase or sale of securities." Pet. App. 15a. "The language does not proscribe deception on a purchaser or seller of a security; instead it speaks to deceptive devices employed 'in connection with the purchase or sale of any security.'" *Id.* at 16a (quoting

United States v. *O'Hagan*, 117 S. Ct. 2199, 2210 (1997)). Furthermore, the court noted, both Section 10(b) and Rule 10b-5 authorize the SEC to prohibit deceptive acts that, it concludes, would have a deleterious effect on the integrity of the securities market, in order to "insure the maintenance of fair and honest markets." *Ibid.* (quoting 15 U.S.C. 78b). "This clear language obviates the necessity of identification of a specific victim who acted upon the deception." *Ibid.*

The court further observed that in *United States* v. *Naftalin*, 441 U.S. 768, 772-773 (1979), this Court rejected the contention that Section 17(a) of the Securities Act of 1933, which prohibits fraud "in" the offer or sale of securities, requires that the deception be perpetrated on the individual purchasing the stock. Pet. App. 16a. The court noted that this Court had decided *Naftalin* on the assumption that the 1933 Act, limited to fraud "in" securities transactions, has a narrower scope than the 1934 Exchange Act, which prohibits fraud "in connection with" the purchase or sale of securities. *Ibid.* The court therefore read *Naftalin* "as teaching that if fraud 'in' a securities transaction, as prohibited by [Section 17(a) of the Securities Act of 1933], does not require fraud on an investor, then deception 'in connection with' a securities transaction per [Section 10b of the Exchange Act] does not have such a requirement." *Ibid.*

The court rejected (Pet. App. 17a) petitioner's reliance on the purchaser-seller standing rule for implied private damages actions adopted in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975). The decision in *Naftalin*, noted the court, had stated that the *Blue Chip Stamps* rule was "inapplicable" in a criminal prosecution. Pet. App. 17a. The court also found support for its conclusion in *United States* v.

O'Hagan, *supra*, because, "although *O'Hagan* differs by virtue of the [misappropriation] theory the prosecution pursued, it is strong affirmation of the language of *Naftalin* and *Blue Chip*[] that convictions under the securities laws do not require identification of or reliance by a particular victim." *Id.* at 18a. The court accordingly held that "reliance on the deceptive practice by an identifiable victim participating in a securities transaction [was] not required for conviction in the type of stock manipulation" presented in this case. *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 20-30) that the government must prove, in a stock manipulation prosecution under Section 10(b) of the Exchange Act and Rule 10b-5, that an identifiable investor relied on the manipulation in connection with an identifiable purchase or sale of stock. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

a. The essence of the scheme charged and proved against petitioner was that he engaged in a four-step device involving artificially controlled sales of shares to affect the price of those securities. Thus, although petitioner contends (Pet. 28) that "there is simply no basis on which price may be asserted as being a misrepresentation or in any way deceptive," it is well settled that stock trades made for the purpose of artificially manipulating market prices are a form of fraud actionable under the securities laws. Indeed, the elimination of such manipulative schemes was one of the central goals of the federal securities laws. Congress passed the Exchange Act in order to "insure the maintenance of fair and honest markets" in securities transactions. 15 U.S.C. 78b. Because Congress concluded that "[f]requently the prices of securities on [securities] exchanges and [over-the-counter] markets [we]re susceptible to manipulation and control," 15 U.S.C. 78b(3), it prohibited trading activity aimed at deceiving investors about the state of the market for a security.

Among the targets of the Exchange Act were the so-called "pools," groups who engaged in trades for the purpose of affecting security prices. S. Rep. No. 1455, 73d Cong., 2d Sess. 30-32 (1934); see H.R. Rep. No. 1383, 73d Cong., 2d Sess. 10 (1934) (discussing the "conscious marking up of prices to make investors believe that there is constantly increasing demand for stocks at higher prices"); N. Poser, *Stock Market Manipulation and Corporate Control Transactions*, 40 U. Miami L. Rev. 671, 695-697 (1986). The Committee Reports accompanying the Exchange Act noted that such trading interfered with market prices "established by the free and honest balancing of investment demand with investment supply." H.R. Rep. No. 1383, *supra*, at 10; S. Rep. No. 1455, *supra*, at 81.

Section 10(b) of the Exchange Act, in particular, was designed to proscribe all intentional conduct contrived to deceive investors, including schemes to affect stock prices "beyond the operation of normal market factors." *Alabama Farm Bureau Mut. Cas. Co.* v. *American Fidelity Life Ins. Co.*, 606 F.2d 602, 611 (5th Cir. 1979), cert. denied, 449 U.S. 820 (1980). Section 10(b) thus prohibits the use, "in connection with the purchase or sale of any security," of "any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe." 15 U.S.C. 78j(b). It is implemented by Rule 10b-5, which, among other things, declares it unlawful, "in connection with the purchase or sale of any security," for any person to "employ any device, scheme, or artifice to defraud" or "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." 17 C.F.R. 240.10b-5.

As used in Section 10(b), "manipulative" is a term of art that "connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities." *Schreiber* v. *Burlington Northern, Inc.*, 472 U.S. 1, 6 (1985) (emphasis omitted). "The term refers generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity." *Ibid.* It encompasses "the full range of ingenious devices that might be used to manipulate securities prices." *Id.* at 7.

Unlawful manipulation is not limited to misleading statements, but also includes conduct, such as artificially controlled sales of stock, intended fraudulently to influence the market price of securities. As Lord Lopes observed more than 100 years ago, with regard to securities fraud, there is "no substantial distinction between false rumours and false and fictitious acts." See *Schreiber*, 472 U.S. at 7 n.4 (quoting *Scott* v. *Brown, Doering, McNab & Co.*, [1892] 2 Q.B. 724, 730 (C.A.)). And as one of the preeminent authorities on securities law wrote, "the highest type of representation which can be made to the market is the representation contained in the published report of a sale," because a reported sale price "constitutes an open representation to the market of an appraisal at which one party has been willing to sell and another party willing to buy; and it promptly becomes an element in every subsequent appraisal, at least for a period of time." A. Berle, *Liability for Stock Market Manipulation,* 31 Colum. L. Rev. 264, 270-271 (1931).

Thus, it has long been recognized that stock trades made without verbal misrepresentations, but executed for the purpose of manipulating the stock price, are a form of actionable fraud under Section 10(b) and Rule 10b-5.[1] Petitioner was convicted for such affirmative acts of deception in this case. Here, petitioner affirmatively engaged in a price-rigging scheme designed to deceive investors by creating artificial market prices for the stock of several different companies, including Vista, Castleton and Bellatrix. Moreover, petitioner's scheme was designed to deceive the investing public into purchasing the manipulated stocks at grossly inflated prices. See Gov't C.A. Br. 8. He therefore engaged in manipulation prohibited by Section 10(b) and Rule 10b-5.

b. Petitioner also contends (Pet. 29-30) that the government must prove, as an essential element of the offense of stock manipulation under Section 10(b) of the Exchange Act and Rule 10b-5, that identifiable investors relied upon the fraudulent and manipulative practices in purchasing or selling the securities. Petitioner points to no case, however, in which a court has held that the government must show such an

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[1] See *Halsey, Stuart & Co.* 30 S.E.C. 106, 112 (1949) (trades made for the purpose of manipulating stock prices are prohibited by Rule 10b-5, because their effect "is to distort the character of the market as a reflection of the combined judgments of buyers and sellers, and to make it a stage-managed performance."); see also *Pagel, Inc.* v. *SEC*, 803 F.2d 942, 945-946 (8th Cir. 1986); *Alabama Farm Bureau Mut. Cas. Co.* v. *American Fidelity Life Ins. Co.*, 606 F.2d 602, 611-613 (5th Cir. 1979), cert. denied, 449 U.S. 820 (1980); *United States* v. *Charnay*, 537 F.2d 341, 347-351 (9th Cir.), cert. denied, 429 U.S. 1000 (1976).

element of reliance.[2] In particular, petitioner errs in arguing (Pet. 27-28) that the court of appeals' decision in this case conflicts with *United States* v. *Russo*, 74 F.3d 1383 (2d Cir.), cert. denied, 117 S. Ct. 293 (1996), and *United States* v. *Persky*, 520 F.2d 283 (2d Cir. 1975). In neither of those cases did the Second Circuit hold that reliance is an essential element of the offense in a stock manipulation prosecution.

In *Russo*, the defendants were convicted of a stock manipulation scheme that included short sales of high value stocks to generate false credits in an account with a clearing broker, and they claimed that the district court failed to adequately instruct the jury on the defense theory that the short sales had not deceived the clearing broker. The Second Circuit rejected the defendants' claim in that case because the jury instructions "clearly stated that the jury could not find [the defendants] guilty of conspiracy to commit fraud through the short sales unless they found that [the clearing broker] was deceived." 74 F.3d at 1393. Thus, as the court of appeals in this case observed, *Russo* "did not hold, nor was it an issue, that reliance is a required element in a securities fraud case." Pet. App. 18a n.8.

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[2] A private plaintiff pursuing an implied cause of action for damages under Section 10(b) and Rule 10b-5 generally must prove reliance on a material misrepresentation by the defendant as an element of the cause of action. *Basic Inc.* v. *Levinson*, 485 U.S. 224, 243 (1988); see also *Central Bank of Denver* v. *First Interstate Bank of Denver*, 511 U.S. 164, 173 (1994). In that context, the element of reliance serves to establish the "causal connection between a defendant's misrepresentation and a plaintiff's injury" that is required to entitle a civil plaintiff to recover damages for the injury. *Basic Inc.*, 485 U.S. at 243; see also *Burke* v. *Jacoby*, 981 F.2d 1372, 1378-1379 (2d Cir. 1992), cert. denied, 508 U.S. 909 (1993).

In *Persky*, the defendant argued that the district court had not properly instructed the jury on the "in connection with" requirement of Section 10(b) and Rule 10b-5. The Second Circuit found no flaw with the district court's instruction that required the jury to find, among other things, that "the device or scheme employed or act or practice was of a sort that would cause reasonable investors to rely thereon, and in connection therewith so relied to purchase or sell shares" of the stock at issue. 520 F.2d at 288 & n.5. The court did not separately address whether reliance is an essential element of the offense in a stock manipulation case. Hence, neither *Russo* nor *Persky* considered the issue presented in this case.

Petitioner's attempt to gain support from *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975), is also unavailing. In that case, the Court limited the class of persons who may bring an implied private right of action under Section 10(b) and Rule 10b-5 to those who have actually purchased or sold securities. The Court adopted that purchaser-seller standing rule in *Blue Chip Stamps* largely because of "policy considerations" (*id.* at 737) involving the dangers of litigation by investors who did not make an actual purchase or sale but who might later claim that they would have done so in the absence of alleged deceptive conduct by others. This Court, however, recently reiterated in *United States* v. *O'Hagan*, 117 S. Ct. 2199 (1997), that "[c]riminal prosecutions do not present the dangers the Court addressed in *Blue Chip Stamps*, so that decision is 'inapplicable' to indictments for violations of § 10(b) and Rule 10b-5." *Id.* at 2213 (quoting *United States* v.

Naftalin, 441 U.S. 768, 774 n.6 (1979)); see also *Blue Chip Stamps*, 421 U.S. at 751 n.14.[3]

Nor does this Court's decision in *United States* v. *O'Hagan*, *supra*, assist petitioner. There, the Court held that one violates Section 10(b) and Rule 10b-5 when he "trades in securities for personal profit, using confidential information misappropriated in breach of a fiduciary duty to the source of the information." 117 S. Ct. at 2205. That case involved the "misappropriation theory," which "premises liability on a fiduciary-turned-trader's deception of those who entrusted him with access to confidential information." *Id.* at 2207. The Court's reasoning in *O'Hagan* undercuts, rather than supports, petitioner's claim, for the Court noted that "[t]he misappropriation theory comports with § 10(b)'s language, which requires deception 'in connection with

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[3] Petitioner's assertion (Pet. 28-29) that the court of appeals' decision "reduce[s] the burden of proof in a Rule 10b-5 criminal prosecution below that which is applicable * * * in a Rule 10b-5 civil action[]" is also without merit. That argument confuses the burden of proof with the elements of the offense. Nothing in the court of appeals' decision suggests that the government may establish the elements of the criminal offense under Section 10(b) and Rule 10b-5 by any standard of persuasion other than proof beyond a reasonable doubt. Rather, consistent with the decisions of other circuits, the court of appeals here simply recognized that the elements of actionable fraud under Section 10(b) and Rule 10b-5 in a proceeding brought by the government are different from the elements of the implied civil cause of action brought by private litigants. Cf. *SEC* v. *Rana Research, Inc.*, 8 F.3d 1358, 1363-1364 (9th Cir. 1993) (SEC need not prove reliance in action for injunctive relief); *SEC* v. *Blavin*, 760 F.2d 706, 711 (6th Cir. 1985) (same); *SEC* v. *North Am. Research & Dev. Corp.*, 424 F.2d 63, 84 (2d Cir. 1970) (same). See also note 2, *supra* (explaining that reliance element of private cause of action for securities fraud serves to establish causation of damages).

the purchase or sale of any security,' not deception of an identifiable purchaser or seller." *Id.* at 2210.

In any event, petitioner's convictions in this case were based on a form of deception through nondisclosure entirely different from the misappropriation involved in *O'Hagan*: artificial trading designed to deceive public investors into believing that the demand for and the market price of the stocks were higher than they actually were. Petitioner's scheme did entail a failure to disclose his manipulative conduct,[4] but his "false and fictitious acts" of manipulation (*Schreiber*, 472 U.S. at 7 n.4) were the core of the scheme and the basis of petitioner's convictions. Whether or not a person has assumed a fiduciary relationship giving rise to a duty to make disclosure, he has a duty under Section 10(b) and Rule 10b-5 themselves not to engage in affirmative acts of deception, including acts of manipulation. See *Basic Inc.* v. *Levinson*, 485 U.S. 224, 240 n.18 (1988) (even those who have no duty to disclose are "under the ever-present duty not to mislead").

2. Petitioner also contends in summary fashion (Pet. 30) that each of the three substantive securities fraud counts (Counts 2, 3, and 4) improperly charged multiple offenses in a single count. The court of appeals correctly rejected that contention.

An indictment is improperly duplicitous if it charges two or more wholly distinct crimes in a single count. *United States* v. *Aracri*, 968 F.2d 1512, 1518 (2d Cir. 1992); *United States* v. *Berardi*, 675 F.2d 894, 897 (7th Cir. 1982). The traditionally expressed dangers of duplicitous counts include the possibility that the defendant may lack adequate notification of the charges

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[4] "Indeed, nondisclosure is usually essential to the success of a manipulative scheme." *Schreiber*, 472 U.S. at 7.

against him; that he may be prejudiced in a subsequent double jeopardy defense; that the jury may convict him without unanimously agreeing on the commission of a particular offense; and that he may be prejudiced by evidentiary rulings at trial. See, *e.g.*, *Aracri*, 968 F.2d at 1518; *Berardi*, 675 F.2d at 899; *United States* v. *UCO Oil Co.*, 546 F.2d 833, 835 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977).

A count in an indictment is not duplicitous, however, if it charges the defendant with a single offense or scheme, carried out through various means. See, *e.g.*, *Aracri*, 968 F.2d at 1518; *Berardi*, 675 F.2d at 898; *United States* v. *Pavloski*, 574 F.2d 933, 936 (7th Cir. 1978); see also Fed. R. Crim. P. 7(c)(1) ("It may be alleged in a single count that * * * the defendant committed [the offense] by one or more specified means."). The courts of appeals, moreover, have generally rejected duplicity challenges to counts of an indictment that charge several criminal acts that are part of a single unlawful scheme, even if those acts could have been separately charged in different counts.[5] In particular, "[a]s long as the essence of the alleged crime is carrying out a single scheme to defraud, then aggregation is permissible." *United States* v. *Tutino*,

[5] See, *e.g.*, *United States* v. *Bruce*, 89 F.3d 886, 889-890 (D.C. Cir. 1996); *United States* v. *Pless*, 79 F.3d 1217, 1220 (D.C. Cir.), cert. denied, 117 S. Ct. 251 (1996); *United States* v. *Jaynes*, 75 F.3d 1493, 1502 (10th Cir. 1996); *United States* v. *Pollen*, 978 F.2d 78, 84 (3d Cir. 1992), cert. denied, 508 U.S. 906 (1993); *United States* v. *Hammen*, 977 F.2d 379, 383 (7th Cir. 1992); *United States* v. *Tutino*, 883 F.2d 1125, 1141 (2d Cir. 1989), cert. denied, 493 U.S. 1081 (1990); *United States* v. *White*, 879 F.2d 1509, 1512 (7th Cir. 1989), cert. denied, 494 U.S. 1027 (1990); *United States* v. *Shorter*, 809 F.2d 54, 56 (D.C. Cir.), cert. denied, 484 U.S. 817 (1987).

883 F.2d 1125, 1141 (2d Cir. 1989), cert. denied, 493 U.S. 1081 (1990).

There is no merit in petitioner's contention (Pet. 30) that the three substantive securities fraud counts were duplicitous because each individual transaction involving a particular company's stock should have been charged in a separate count. Each of the three substantive securities fraud counts charged petitioner with an ongoing scheme to defraud in connection with the purchase and sale of the securities of a particular company (*i.e.*, Vista (Count 2), Castleton (Count 3) and Bellatrix (Count 4)). Pet. App. 11a & n.6. Because, in each case, the individual trades of the stock of each company were part of the means and methods by which petitioner executed the overall scheme to manipulate the price of the stock, none of the three substantive securities fraud counts was duplicitous.

Contrary to petitioner's contention (Pet. 30), the court of appeals' decision in this case does not conflict with *United States* v. *Langford*, 946 F.2d 798 (11th Cir. 1991), cert. denied, 503 U.S. 960 (1992). In *Langford*, the defendant was charged in three securities fraud counts with the use of three different instrumentalities of interstate commerce in furtherance of a single scheme to artificially inflate the price of one company's stock. *Id.* at 800, 803 n.16. He argued that the three counts were multiplicitous in that they charged a single offense in more than one count. *Id.* at 802-804. The Eleventh Circuit agreed with the defendant that the three counts were multiplicitous, and held that "several mailings (or other instrumentalities of interstate commerce), all based on a single transaction, [cannot] be charged in multiple counts." *Id.* at 804. The court also stated in *Langford* that "[t]he allowable unit of prosecution under [Section 10(b)] is * * * the use of a manipulative device or contrivance." *Id.* at 803. The court did not hold that the unit of prosecution under Section 10(b) must always be the individual purchase or sale of securities; it held only that several mailings, each based on a single transaction, cannot be charged in multiple counts, because in such a case there is only one manipulative device that underlies all the transactions. *Id.* at 803-804. In this case, however, it was proper for the government to charge that one manipulative scheme underlay all the transactions in securities in each of the companies that formed the basis of the indictment.

Finally, the court of appeals correctly noted that any duplicity in the three substantive securities counts was clearly harmless because "[n]one of the concerns of duplicity have been implicated." Pet. App. 14a. Even if the indictment was faulty, therefore, petitioner suffered no prejudice as a result. Petitioner's claim accordingly warrants no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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