No. 98-765

In the Supreme Court of the United States

OCTOBER TERM, 1998

MILTON SONNEBERG, 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 petitioner was properly convicted of mail and wire fraud based on a scheme that included his failure to disclose to investors his conviction for securities fraud and an injunction prohibiting him from selling securities.

2. Whether the district court properly excluded tape-recorded evidence of a prior inconsistent statement made by a witness, when that statement was read in open court to the witness, and the witness admitted that he had made the inconsistent statement.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A1-A2) is unreported. The memorandum opinion of the district court denying petitioner's pretrial motions (Pet. App. A3-A26) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1998. The petition for a writ of certiorari was filed on November 10, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted on one count of conspiracy to commit wire fraud and

interstate transportation of money obtained through fraud, in violation of 18 U.S.C. 371; one count of conspiracy to commit mail fraud and interstate transportation of money obtained through fraud, in violation of 18 U.S.C. 371; one count of wire fraud, in violation of 18 U.S.C. 1343; 23 counts of interstate transportation of money obtained through fraud, in violation of 18 U.S.C. 2314; and four counts of mail fraud, in violation of 18 U.S.C. 1341.[1] He was sentenced to 76 months' imprisonment, to be followed by five years' supervised release. He was also ordered to pay $5,200,000 in restitution. See Pet. C.A. Br. App. 2-4. The court of appeals affirmed. Pet. App. A1-A2.

1. From 1993 through 1995, petitioner participated in two fraudulent schemes. The first involved the sale of so-called limited liability company (LLC) interests in a wireless cable television venture known as Nationwide. Petitioner sold LLC interests in Nationwide even though he realized that those interests were securities, and even though he had been enjoined by the Securities and Exchange Commission (SEC) from selling securities because of a guilty plea to a securities fraud conspiracy charge. Petitioner concealed his involvement in the sale of interests in Nationwide by using the alias "Sonny Hill." Pet. C.A. App. A491, A709-A710. Petitioner also lied to investors over the telephone by greatly exaggerating the returns that they could make on their investments in Nationwide. *Id.* at A365, A432. Co-defendant Irwin

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[1] The first page of the judgment of conviction in petitioner's case states that he was convicted on the mail fraud Counts "16 and 19" (Pet. C.A. Br. App. 1) but the rest of the judgment makes clear that he was in fact convicted on mail fraud Counts 16 *through* 19 (see *id.* at 3, 4).

"Sonny" Bloch, a nationally syndicated radio personality, promoted the scheme on his radio show but failed to disclose that he was receiving fees for such promotions. The conspirators also failed to reveal that many of the participants had criminal records. *Id.* at A494, A708-A711, A864-A865. Petitioner and his co-participants in the scheme sold about $9,375,000 in interests in Nationwide, but they took approximately 40% of that amount in commissions, leaving no money to turn over to Nationwide's management committee. *Id.* at A713; Gov't C.A. Supp. App. 16.

The conspirators also fraudulently promoted LLC interests in two Venezuelan wireless cable ventures. Pet. C.A. App. A498. They marketed those LLCs in the same deceptive manner as in the earlier scheme. *Id.* at A498-A501, A711-A714, A866-A873. Petitioner again concealed his identity by posing as "Sonny Hill." *Id.* at A360-A361, A371-A373. The conspirators took as their commissions about one third of the almost $3,000,000 invested. Gov't C.A. Supp. App. 14. Petitioner made almost $57,000 from the wireless cable scheme. *Ibid.*; Pet. C.A. App. A1354.

In the summer of 1994, petitioner joined Bloch and others in selling LLC interests for the purchase of radio stations. Petitioner created offering brochures for the radio stations; those brochures contained false financial information. Pet. C.A. App. A506, A718, A885, A887, A1169. The conspirators sold interests in three radio stations and earned 20-25% in commissions for themselves. *Id.* at A508-A509, A718, A721, A884-A888. Petitioner earned $149,000 on the radio station deals. *Id.* at A1358; Gov't C.A. Supp. App. 14.

2. At trial, two of petitioner's co-conspirators, Herbert Herr and Alan Herr (Herbert's son), testified for the government. On cross-examination, petitioner's

counsel showed Herbert Herr the transcript of a tape-recorded conversation among petitioner, Herbert Herr, Alan Herr, and Stanley Mindel (another of the conspirators), which took place shortly after Herbert Herr had signed a plea agreement to cooperate with the government. Reading from the transcript, petitioner's counsel asked Herbert Herr: "Did you tell [petitioner], quote: My feeling is we can lie better than he [petitioner] can tell the truth? Did you say 'Three good lies can outweigh a good truth any time?' Did you say that to [petitioner]?" Pet. C.A. App. A607. Herbert Herr acknowledged making that statement. *Ibid.* Petitioner's counsel then read further from the transcript and asked: "Did you also say to him and to Alan and Stanley, * * * 'Well that's his word against ours. And if you're lying, speaking to Alan and Stanley, you're going to have to lie and if he calls us, we're going to have to be consistent with the lie. And that's all there is to it.'" *Ibid.* Herbert Herr acknowledged making that statement as well. *Ibid.*

When Alan Herr testified, he initially denied having had any conversation with his father, Mindel, or petitioner about lying in order to obtain a favorable deal from the government. Pet. C.A. App. A808. Petitioner's counsel then handed Alan Herr the transcript of the tape-recorded conversation, and asked him whether he had ever said to petitioner: "[Y]our option is to be indicted, lie and be at [the prosecutor's] mercy or tell the truth, stand up for what you believe in and * * * a year goes by, you're on the hook, you'll be in all the papers and then you have to sit for a five or six month potential trial in the defense stand right next to Sonny [Bloch]." *Ibid.* After reading the transcript, Alan Herr acknowledged making the statement. *Ibid.*

Defense counsel requested that the full tape recordings of the conversations be played to the jury. The trial court, however, concluded that the recording should not be played to the jury because it was extrinsic evidence dealing only with the witnesses' credibility, and not substantive evidence. In addition, the court concluded that the matter had been fully explored on defense counsel's "both incisive and detailed cross-examination of the witnesses as to these prior statements," and that "it is before the jury in sufficient form for [counsel] to argue it in the summation of the matter." Pet. C.A. App. A1369.

3. On appeal, petitioner argued, *inter alia*, that his convictions could not stand because (he contended) liability may be imposed under the mail and wire fraud statues for an omission only if the government proves that the defendant had a duty to disclose the omitted information. Petitioner maintained that, because he had no fiduciary duty to the investors to whom he had marketed the LLC interests, he also had no duty to disclose to them the fact of his securities fraud convictions and the injunction prohibiting him from selling securities, and therefore he could not be punished for failing to disclose that information. See Pet. C.A. Br. 14-17. Petitioner also contended that the trial court had improperly excluded the tape recording of the conversation among himself, Herbert Herr, Alan Herr, and Stanley Mindel. See *id.* at 38-41. The court of appeals affirmed by judgment order. Pet. App. A1-A2.

ARGUMENT

1. Petitioner contends (Pet. 12-19) that he was improperly convicted of mail and wire fraud based on his failure to disclose to investors his conviction for securities fraud and the injunction prohibiting him from

selling securities. He argues that the decision below is inconsistent with this Court's decision in *Chiarella* v. *United States*, 445 U.S. 222 (1980), and conflicts with decisions of other courts of appeals supposedly holding that a conviction for mail or wire fraud based on a theory of omitted material statements requires proof that the defendant had an independent legal duty to disclose those statements. There is no merit to that contention. Further, even if there were some basis to petitioner's contention that a conflict among the circuits exists, this case would not be an appropriate vehicle for resolution of that disagreement, because the court of appeals did not issue any opinion addressing the merits of petitioner's contention about the scope of the mail and wire fraud statutes.

In *Chiarella*, the defendant, a printer who had access to announcements of corporate takeover bids before they were made public, was charged with securities fraud under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and SEC Rule 10b-5, 17 C.F.R. 240.10b-5, for purchasing stock in the target companies on the basis of nonpublic information about the planned takeovers. This Court reversed the conviction, and ruled that liability under Section 10(b) and Rule 10b-5 based on a failure to disclose material, nonpublic information (as opposed to making affirmative misrepresentations) when trading in securities must be "premised upon a duty to disclose arising from a relationship of trust and confidence between parties to a transaction." 445 U.S. at 230. The Court relied on the common law principle that "one who fails to disclose material information prior to the consummation of a transaction commits fraud only when he is under a duty to do so." *Id.* at 228.

The mail and wire fraud statutes, however, are not limited to matters that would be punishable as common-law fraud. See *Durland* v. *United States*, 161 U.S. 306, 313-314 (1896); *United States* v. *Moore*, 37 F.3d 169, 172-173 (5th Cir. 1994); *United States* v. *Stewart*, 872 F.2d 957, 960 (10th Cir. 1989); *United States* v. *Bishop*, 825 F.2d 1278, 1280 (8th Cir. 1987). The courts have also long recognized that, under the mail and wire fraud statutes, "[t]he fraudulent aspect of the scheme to 'defraud' is measured by a nontechnical standard." *Ibid.*; *Blachly* v. *United States*, 380 F.2d 665, 671 (5th Cir. 1967); *Gregory* v. *United States*, 253 F.2d 104, 109 (5th Cir. 1958). Indeed, it has long been settled that, to be punishable as mail or wire fraud, a deceptive scheme "need not be fraudulent on its face." *United States* v. *Pearlstein*, 576 F.2d 531, 535 (3d Cir. 1978); see *Oesting* v. *United States*, 234 F. 304, 307 (9th Cir. 1916), cert. denied, 242 U.S. 647 (1917). "[I]f a scheme is devised with the intent to defraud, and the mails are used in executing the scheme, the fact that there is no misrepresentation of a single fact makes no difference." *Silverman* v. *United States*, 213 F.2d 405, 407 (5th Cir.), cert. denied, 348 U.S. 828 (1954).

Applying those standards, the lower courts have generally recognized that "omissions or concealment of material information can constitute fraud * * * cognizable under the mail fraud statute, without proof of a duty to disclose the information pursuant to a specific statute or regulation." *United States* v. *Keplinger*, 776 F.2d 678, 697 (7th Cir. 1985), cert. denied, 476 U.S. 1183 (1986). For example, in *United States* v. *Riebold*, 135 F.3d 1226 (8th Cir.), cert. denied, 118 S. Ct. 2356 (1998), the defendant sold interests in nonexistent gold and copper mining operations and failed to disclose that he had previously been convicted for having perpetrated

similar fraudulent schemes. The court of appeals affirmed over the defendant's claim that he had no obligation to disclose his prior convictions. The court ruled that, in the circumstances of that case, where the defendant's conduct was similar to the conduct for which he had previously been convicted, "the fact that [the defendant] concealed his past went directly to whether he intended to devise a scheme to defraud under [the wire fraud statute]." 135 F.3d at 1229. The court also concluded that, because certain investors testified that they would not have invested had they known about the defendant's prior convictions, his "concealment of his prior convictions was an important part of the scheme; otherwise, investors would have been hard to come by." *Ibid.* Similarly, in *United States* v. *Moore*, *supra*, the court concluded that the failure to disclose a first mortgage on property offered for sale was mail fraud, notwithstanding the defendants' contention that they had no duty under state law to disclose the mortgage to the purchaser. See 37 F.3d at 172-173.

Petitioner contends (Pet. 13) that *United States* v. *Cochran*, 109 F.3d 660 (10th Cir. 1997), applied *Chiarella*'s requirement of a duty to disclose to the mail and wire fraud statutes. The *Cochran* court, however, did not hold that an omission or concealment violates the mail fraud statute only when there is an independent legal duty to make disclosure. Although the court noted that the defendant had relied on that position, it observed that "deceitful concealment of material facts may constitute actual fraud," *id.* at 665, and it also stated that, "[e]ven apart from a fiduciary duty, in the context of certain transactions, a misleading omission is actionable as fraud if it is intended to induce a false belief and resulting action to the advantage of the mis-

leader and the disadvantage of the misled," *ibid.* (internal quotation marks, brackets, and ellipsis omitted). See also *ibid.* (noting government's "alternate theory" that disclosure was required because "any statements unaccompanied by such disclosure [would be deemed] fraudulent"). Although the court reversed certain of the defendant's wire fraud convictions in that case, it did so not because the wire fraud statute requires a duty to disclose, but rather because there was no evidence of a fiduciary relationship that would have entailed such a duty *and* because the evidence did not show that a bond underwriter's nondisclosure about its fees would have induced false beliefs in the alleged victim. *Id.* at 665-667.

Petitioner also relies on *United States* v. *Brown*, 79 F.3d 1550 (11th Cir. 1996), where the court reversed mail fraud convictions that rested on the defendants' sales of houses without disclosing that the houses cost more than comparable homes sold by competitors in the area. The court did observe in *Brown* that the defendants and their customers were entering into an arm's-length transaction, and that they were not in a legal relationship that would have required the defendants "to disclose pricing structures under every circumstance." *Id.* at 1557. But the court also noted that "it can be criminal fraud for a seller to conceal, or even sometimes fail to disclose, information after already affirmatively misleading customers about material facts." *Id.* at 1558. Moreover, the principal basis of the court's decision in *Brown* was its conclusion that a person of ordinary prudence would not have relied on the pricing representations made by the defendants alone, but would have conducted an independent examination of comparative house prices, since those prices were readily available to the buyers. *Id.* at 1558-1559.

We disagree with that holding in *Brown*, but nonetheless it does not aid petitioner here. *Brown* does not hold that a mail fraud conviction must be reversed when the defendant omits to disclose certain information *and* that information could not be readily discovered by a reasonably prudent person. To the contrary, the *Brown* court expressly distinguished "sale of distant property" cases, "where the purchaser has no chance to investigate the property's condition and value." 79 F.3d at 1560. That principle applies here. Petitioner's customers could not have readily discovered the fact of his criminal conviction and the injunction against his selling securities, and his failure to disclose those facts was an important part of his scheme to defraud customers into purchasing worthless LLC interests.

Petitioner argues further (Pet. 17-19) that the rule of lenity and the notice component of due process require reversal of his convictions because he had no notice that his failure to disclose his criminal record would later support a fraud charge. But, as we already have shown, the case law has long held that the mail and wire fraud statutes reach beyond common law fraud, and in particular may reach omissions even in the absence of a fiduciary or regulatory duty to disclose. That the prohibition against deceptive omissions may turn on the facts of the case does not mean that petitioner lacked notice of his obligation to reveal important information that would have motivated his customers' investment decisions, namely his criminal record and the prohibitory injunction entered against him.

Finally, petitioner's claim that the *Chiarella* rule applies to the mail and wire fraud statutes does not warrant review in this case, since it is highly unlikely that petitioner would benefit from application of that

rule. The indictment in this case charged that petitioner's fraudulent schemes involved not just the failure to disclose his criminal conviction and the civil injunction against him, but also false and misleading statements and material omissions of fact made with regard to matters such as the true identity of the principals involved in his investment schemes, the uses of the proceeds, the profits to be made, and the ability of investors to participate in management decisions. See Pet. C.A. App. A45, A49, A52, A69-A70. The concealment allegations that petitioner challenges were only the last of several charged components of the schemes.

The trial court instructed the jury that the charged schemes included both false statements about the details of the venture, such as the use to be made of the investors' money, and the failure to disclose material facts about the investment and petitioner and others involved in the ventures. See Pet. C.A. App. A1474.[2]

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[2] The court instructed the jury (Pet. C.A. App. A1474):

> Count 1 charges that the alleged fraud included (a) false statements about details of the ventures, such as the use to be made of the investors' money, the claimed subscribership for the wireless cable services, the manner in which the entities owning the investments would be operated and the profits to be made from the investment and (b) the failure to disclose to the investors material facts about the investment and about the defendant and others involved in the ventures.
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> * * * * *
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> Count 15 charges that the alleged fraud included (a) false statements about details of the ventures, such as the use to be made of the investors' money, the manner in which the entities owning the investment would be operated and the profits to be made from the investment and (b) the

The court also instructed the jury that while it was not required to find that every charged component of the scheme was proved, it did have to find that "the scheme, substantially as charged, was set up." *Id.* at A1478. In light of those instructions, the jury's verdict means that it found that the scheme, "substantially as charged," was set up. There is no reasonable possibility that the verdict would have been different if the single charge of concealment of petitioner's convictions and the civil injunction had not been included in the indictment. Accordingly, this would not be an appropriate case in which to determine whether the concealment of prior convictions and a civil injunction, standing alone, could support a mail fraud conviction.[3]

2. Petitioner also contends (Pet. 19-22) that the trial court should have admitted tape-recorded excerpts of statements by two witnesses even though the witnesses admitted making the statements after reading transcripts of the recordings and hearing the crucial portions of those transcripts read in the presence of the jury. Because the court of appeals affirmed by judgment order, it is not possible to determine whether the court disagreed with petitioner's contention that the recordings should have been played for the jury, or

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failure to disclose to the investors material facts about the investment and about the defendant and others involved in the ventures.

[3] Petitioner's reliance (Pet. 12) on *Yates* v. *United States*, 354 U.S. 298 (1957), is misplaced. *Yates* requires reversal only when the jury's verdict may have rested on a legally invalid ground, and "it is impossible to tell which ground the jury selected." *Id.* at 312. In this case, the instructions did not permit the jury to select only one charged misstatement or omission and convict on that basis, but required a finding that the scheme was set up "substantially as charged."

whether it concluded that any error was harmless; because of that uncertainty, this case is not an appropriate vehicle for resolution of petitioner's contention. In any event, the trial court committed no reversible error in excluding the tape recording.

Petitioner argues that the district court's ruling was contrary to *Gordon* v. *United States*, 344 U.S. 414 (1953). *Gordon*, however, involved the quite different situation where the testifying witness admitted that he had made prior inconsistent statements about the defendant's culpability, and where the trial court denied the defendant's request that the government produce those statements. See *id.* at 416. In this case, by contrast, the prior inconsistent statements were not only produced but were read aloud to the jury. Thus, although the Court in *Gordon* suggested that, because of the "best evidence" rule, the testifying witness's acknowledgment of the contradiction between his live testimony and his prior statement was not sufficient to exclude the prior statement itself from evidence (see *id.* at 420-421), the Court was not addressing a situation like this one, where the crucial portions of the transcript of the recording were read aloud to the witness in the presence of the jury, and the trial court concluded that admission of the recording itself would be merely cumulative evidence on the same point. And lower courts have concluded that, when a witness is shown a prior inconsistent statement and admits making the statement, the witness is thereby impeached and no further proof is necessary. See *United States* v. *Dennis*, 625 F.2d 782, 796 (8th Cir. 1980); *United States* v. *Jones*, 578 F.2d 1332, 1340 (10th Cir.), cert. denied, 439 U.S. 913 (1978); *United States* v. *Roger*, 465 F.2d 996, 997 (5th Cir.), cert. denied, 409 U.S. 1047 (1972); *United States* v. *Hibler*, 463 F.2d 455, 462 (9th Cir.

1972); cf. Fed. R. Evid. 1007 ("Contents of * * * recordings * * * may be proved by the testimony * * * of the party against whom offered * * * without accounting for the nonproduction of the original.").

Petitioner relies also on the decisions of three courts of appeals, *United States* v. *Strother*, 49 F.3d 869, 874 (2d Cir. 1995); *United States* v. *Lashmett*, 965 F.2d 179, 181-182 (7th Cir. 1992); and *Williams* v. *United States*, 403 F.2d 176, 179 (D.C. Cir. 1968). Those cases, however, do not adopt a per se rule that, when a witness acknowledges making a prior inconsistent statement, the original of that statement must always be provided for the jury. In *Strother*, the defendant sought to introduce prior statements that differed from the witness' testimony at trial and were crucial to the defendant's defense, because, contrary to the government's assertion, the written statements suggested that the defendant had not asked the witness to pay a check (for which he did not have sufficient funds) rather than to hold it until he had the requisite funds in his account. 49 F.3d at 874-875. The court concluded that, in the circumstances, cross-examination of the witness as to the documents did not render harmless the failure to admit them into evidence. *Id.* at 876. But that holding reflected a determination about the effect of the exclusion of the documents on the facts of the particular case; it did not establish a blanket rule that a prior inconsistent statement always should be admitted when a witness admits making the statement. The court indeed emphasized that, "[b]ecause of the exclusion of the [documents], [the defendant] was restricted from effectively presenting his defense," *ibid.* The same cannot be said of this case, where the trial court specifically found that defense counsel had effectively cross-

examined the Herrs on their supposed plans to lie at trial.

In *Lashmett*, the defendant sought to admit the complaint and affidavits from a civil case that two witnesses had filed. In their testimony at the defendant's fraud trial, the witnesses said that the complaint was false and was part of the fraudulent scheme. The court of appeals held that the complaint should have been admitted, 965 F.2d at 181-182, but it also found that the error was harmless in that case, because the jury was fully apprised of the witnesses' hoax and deceitfulness, *id.* at 182-183. Moreover, in *Lashmett*, the district court cut off all questioning about the contents of the complaint and affidavits, because the witnesses testified on the stand that they had made false statements in those documents; the district court viewed the documents as prior *consistent* statements and therefore inadmissible hearsay. *Id.* at 181.

In *Williams*, the trial court refused to admit into evidence a written statement made to the police by a testifying witness; on cross-examination, the defense counsel provided the statement to the witness, and after the witness read the statement, he changed his testimony. 403 F.2d at 178. Relying on *Gordon*, the court of appeals concluded that the trial court's exclusion of the statement was error, *id.* at 179, although it also found that the error was harmless in part because the "basic fact of an inconsistency between his initial testimony and a prior statement which he admitted signing became known to the jury," *ibid.* In *Williams*, unlike this case, the statement was not read aloud in the courtroom; the jury did not know the contents of the prior statement, and therefore could not judge the extent to which it contradicted the witness's testimony. In this case, by contrast the jury heard the contents of

the prior statements made by the Herrs and therefore had adequate means with which to determine those witnesses' credibility.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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