No. _____

In The

Supreme Court of the United States

RUDOLPH CARRYL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. WHETHER VIOLATION OF §10(b) OF THE SECURITIES EXCHANGE ACT OF 1934 (15 U.S.C. §78j(b)) AND THE HOLDING OF *SEC v. Zandford*, 535 U.S. 813 (2002) HAS BEEN EXTENDED TO ENCOMPASS ACTS WHERE THE FRAUD DOES NOT COINCIDE WITH A SALE

LIST OF THE PARTIES

RICKY CARLOS GRANT, *Petitioner*

UNITED STATES OF AMERICA, *Respondent*

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Rudolph Carryl (hereinafter "Petitioner") respectfully prays for a Writ of Certiorari to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The opinion of the Fourth Circuit is reported at *United States of America v. Rudolph Carryl* (4th Cir. 19-4748). Pursuant to Federal Rules of Appellate Procedure 32.1, the decision is unpublished.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit decided this case on 8 June 2020. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1), and this Petition is timely filed within ninety days of the underlying Judgment of the Fourth Circuit pursuant to United States Supreme Court Rule 13(1) and 28 U.S.C. §2101.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. 15 U.S.C. §78j(b) and 15 U.S.C. §78ff, 18 U.S.C. §1343, 18 U.S.C. §1957, and 18 U.S.C. §3147

STATEMENT OF THE CASE

Petitioner Rudolph Carryl (hereinafter referred to as "Petitioner") was indicted on one count of securities fraud, six counts of wire fraud, and two counts of transactional money laundering in violation of 15 U.S.C. §78j(b) and 15 U.S.C. §78ff, 18 U.S.C. §1343, 18 U.S.C. §1957, and 18 U.S.C. §3147 in the Western District of North Carolina on 22 August 2019 (JA, pp. 143-150).

On 13 March 2019, the Petitioner entered into a Plea Agreement wherein Petitioner pled guilty to one count of Securities Fraud (Count One), and the remaining eight (8) counts of Securities Fraud were dismissed (JA 151). Petitioner was sentenced on 19 September 2019 by the Honorable Max O. Cogburn, Jr., United States District Judge, to be imprisoned for a term of seventy-four (74) months, followed by a period of two years of supervised release (JA 109, 110). The Petitioner timely filed notice of appeal from this Order (JA 132, 136).

On 2 March 2020, Respondent filed a Motion to Dismiss Petitioner's Appeal to the Fourth Circuit Court of Appeals. On 8 June 2020, the Fourth Circuit Court of Appeals dismissed Petitioner's Appeal "as barred by Carryl's waiver of appellate rights included in the plea agreement." Petitioner timely files this Writ of Certiorari before the United States Supreme Court.

STATEMENT OF THE FACTS

The Petitioner is accused of Securities Fraud (JA, p. 146). The victims are two couples: a cousin of the Petitioner and his wife, and a family friend and his wife (JA, p. 79). The Government alleges that the Petitioner solicited the victims to invest their money in an investment fund with Carryl Capital Management (hereinafter "CCM") (JA, p. 167). The Petitioner defends these allegations by asserting that the victims contacted the Petitioner about investing their money through a private relationship they had with the Petitioner as an individual, rather than through CCM (JA, p. 79).

Petitioner owned and operated CCM, an investment management firm with offices in New York City, New York (JA, p. 166). CCM maintained a website, which said it was a firm dedicated to achieving the investment goals of preservation of capital and superior long-term returns for its clients, and claimed that CCM strictly adhered to rigorous risk control measures (JA, p. 167). The website is quoted as stating CCM "specializes in mid-cap growth stocks within the market capitalization range of $500 million to $10 billion" (JA, p. 59). None of the victims in this matter reported looking at the website prior to investing funds with Petitioner, or invested anywhere close to the range provided for by the website (JA, pp. 85-94).

Prior to agreeing to help the alleged victims, the Petitioner did not disclose to them that he had filed Chapter 7 Bankruptcy in the Eastern District of New York in January 2015, or that he was the Defendant in two lawsuits filed by investors, one filed in August 2014 and the second filed in January 2015 (JA, p. 169). Petitioner also did not disclose that he was the subject of an ongoing federal investigation concerning investments from 2012 (JA, p.167).

The Petitioner and alleged victims first discussed the Petitioner's help with the stock market on or around February of 2015. In February 2015, MG, a resident of Creedmoor, North Carolina, gave Petitioner money to invest in stocks on his behalf (JA, p. 167). Petitioner and MG are cousins (JA, p. 85). MG told the Court that while in New York for a funeral, he was invited to Petitioner's home and was "blown away at the way my cousin was living" (JA, p. 87). Once he returned to North Carolina, MG, "reached out to [Petitioner] in terms of investing" (JA, p. 87).

MG wired $64,000.00 to an account controlled by Petitioner (JA, p. 167). MG wired additional funds to Petitioner in 2015 and 2016 (JA, p. 144) for a total of $94,550.00. (JA, p. 170). Petitioner used much of the funds for personal expenses and withdrew a substantial amount in cash (JA, p. 167).

In May 2015, the Petitioner first discussed helping with stocks and securities with alleged victims WB and AB. The Petitioner contends that the victims, WB and AB, both approached him about investing their money (JA. p. 79). The Petitioner told WB and AB that the fund would invest in safe investments that would not lose any principal and that Petitioner was personally investing money in the fund (JA, p. 167). The Petitioner also informed WB and AB that any losses that did occur in the fund, would come out of Petitioner's investment first (JA, p. 167).

The Petitioner later sent an email to WB and AB purportedly identifying the various stocks making up their portion of the portfolio, and included well-known companies such as Apple, Inc. and Valero Energy (JA, p. 167).

Rather than purchasing any stocks or securities on the alleged victims' behalf, the Petitioner used the funds obtained from WB and AB for personal and unrelated expenses, even withdrawing a substantial amount in cash (JA, p. 167). Some stocks were purchased by the Petitioner after he received funds from the victims and their wives; however, the vast majority of those stocks listed in the earlier email were not purchased (JA, p. 62-63).

REASONS FOR GRANTING THE WRIT

I. WHETHER VIOLATION OF §10(b) OF THE SECURITIES EXCHANGE ACT OF 1934 (15 U.S.C. §78j(b)) AND THE HOLDING OF *SEC v. Zandford*, 535 U.S. 813 (2002) HAS BEEN EXTENDED TO ENCOMPASS ACTS WHERE THE FRAUD DOES NOT COINCIDE WITH A SALE

A. Standard of Review

"A petitioner collaterally attacking his or her conviction bears the burden of proving that the conviction imposed violated the United States Constitution or laws, that the court lacked jurisdiction to impose such a sentence, that the sentence exceeded the maximum authorized by law, or that the sentence otherwise is subject to collateral attack." *United States v. Carter*, 2011 U.S. Dist. LEXIS 143849 (4th Cir 2011).

B. Argument.

The Petitioner was charged and convicted of securities fraud in violation of Title 15, United States Code, Sections 78j(b) and 78ff, and Title 17, Code of Federal Regulations, Section 240.10b-5. To prove the crime of securities fraud, the Government must prove beyond a reasonable doubt that:

(1) The defendant, directly or indirectly, knowingly did any one or more of the following:

(a) employed a device, scheme, or artifice to defraud; or

(b) made an untrue statement of a material fact, or omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

(c) engaged in a transaction, practice or course of business that operated or would operate as a fraud and deceit on any person;

(2) The defendant did so in connection with the purchase or sale of a security;

(3) The defendant made use of or caused another to use any means or instrumentality of interstate commerce, or of the mails; and

(4) The defendant acted willfully, and with the intent to deceive, manipulate or defraud. *United States v. Litvak*, 808 F.3d 160, 178-179 (2d Cir. 2015).

The Petitioner argues in this appeal that the facts do not show that the transaction was "in connection with the purchase or sale of a security." The Petitioner respectfully requests this Court to analyze this issue by narrowly applying its holding and reasoning from *SEC v. Zandford* 535 U.S. 813 (2002) regarding Section 10(b)'s requirement that the transaction occur "in connection with the purchase or sale of a security" to instances where a sale coincides with a fraudulent act.

In *Zandford,* the Defendant Broker was charged with persuading an elderly man to open a joint investment account wherein Zandford had control and discretion to manage the account. *Zandford*, at 815 (2002). The facts in *Zandford* indicate that he did invest the alleged victim's funds into the accounts, but then sold the proceeds and made personal use of the proceeds. *Id*. The Supreme Court reversed the Fourth Circuit's finding that the defendant broker had a fiduciary duty to his clients, and that his alleged conduct constituted fraud in connection with the purchase or sale of a security within the meaning of 10(b) because the Defendant in *Zandford* sold his

client's securities and subsequently used the proceeds for his own benefit. *SEC v. Zandford*, 535 U.S. 813 (2002).

In *Zandford*, the Supreme Court stated that "...the statute must not be construed so broadly as to convert every common-law fraud that happens to involve securities into a violation of §10(b)." *Zandford*, at 820 (2002). This Court in *Zandford* states that this element is found when the fraud coincides with the sale itself. *Id*. This Court relied on prior holdings of *United States v. O'Hagan* and *Superintendent of Ins. of N.Y. v. Bankers Life & Casualty Co.*, which both presented cases where the fraud involves the sale of certain securities, and the misappropriation of the proceeds from the sale.

Here, the analysis from *Zandford, O'Hagan,* and *Superintendent of Ins. of N.Y. v. Bankers Life & Casualty Co.* is being extended to include cases where the alleged defendant's fraud does not coincide with a sale. Although the requirements of §10(b) are to be broadly construed, this Court has never extended a finding of §10(b) to instances where the alleged defendant pocketed the money *without* either investing or selling in securities.

Here, the alleged fraudulent activity of the Petitioner does not "touch" or "coincide" with a security transaction because the fraudulent scheme concluded prior to the purchase or sale of any securities. The facts here, if taken as true, indicate that the Petitioner is guilty of fraud rather than securities fraud because the alleged victims sent money to the Petitioner to invest that Petitioner used instead for his personal benefit. The Petitioner here allegedly took the money for himself and paid his own

personal expenses, converting some of it to cash (JA, p. 167). The Petitioner did purchase some stocks, but only after he converted the money to his own personal use. Therefore, the Petitioner misappropriated the victims' monies prior to investing in any security, and the securities transaction was not necessary to the completion of the misappropriation of the victims' money.

The Petitioner's fraudulent activity does not "coincide" with any security transactions because they are independent, unrelated circumstances, and the fraud is not dependent on Petitioner's purchase of securities. Pursuant to precedent, not every common law fraud should be considered a violation of §10(b). Through this Writ of Certiorari, the Petitioner requests this Court to address whether §10(b) encompasses acts wherein the fraud is completed prior to the investment or sale of any securities.

The Fourth Circuit dismissed Petitioner's appeal based on the Appellate Waiver in his plea agreement and not on the merits of Petitioner's argument. Petitioner respectfully requests this Court to consider Petitioner's arguments that, notwithstanding past precedent, Petitioner's acts do not rise to the level of a violation of §10(b) of the Securities Exchange Act of 1934.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the United States Supreme Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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