NO. 21-642

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IN THE

SUPREME COURT OF THE UNITED STATES

JEHU HAND

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

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

PETITION FOR WRIT OF CERTIORARI

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Petitioner in propria persona

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This case involves the conviction and sentencing of a securities attorney for securities fraud, wire fraud, and conspiracy to commit the same.

QUESTIONS PRESENTED

A. Can criminal liability under Securities Exchange Act Rule 10b-5 lie when the "total mix" of information includes a warning that the public disclosure is "hype" and that investors can only profit if they resell their shares before the stock price crashes.*

B. Does the rule of lenity preclude criminal liability under Securities Exchange Act Rule 10b-5 for an attorney's legal opinion that a company is not a "shell company" when the Securities and Exchange Commission intentionally made the "shell company" definition ambiguous.*

C. Is Securities Act Rule 405, which defines "control" for purposes of determining whether a person is an "affiliate" under Rule 144, as "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise," invalid as it is counter to the legislative history of the Securities Act, which indicates that the lodestar defining "control" is simply whether the named person has the power to cause the issuer to file a registration statement covering those securities, and should in fact should *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843-844 (1984) be overturned.

D. Is a district court's failure to consider a defendant's inability to pay a fine, and the sanctioning of that failure by the Court of Appeals, procedurally unreasonable, requiring resentencing.*

E. Does 18 U.S.C. §3624(e)'s requirement that a criminal fine be paid within two years of release from prison, except in special circumstances, and United States Sentencing Guidelines, §5E1.2(f), which mandates that the fine, if not immediately payable on sentencing, must be paid within the maximum term of supervised release authorized for the offense, indicate that Congress, in providing for the imposition of a fine pursuant to 18 U.S.C. §3571 and §3572, intends that the fine be such amount as can reasonably be expected to be paid within such period of time after release from prison.*

F. Is a district court' failure to adopt or reject disputed items on the Presentence Report as required by Fed. R. Cr. P. 32(i)(3) procedurally unreasonable, requiring resentencing.*

* These issues were raised by Petitioner on appeal.

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PETITION FOR A WRIT OF CERTIORARI

The Court has never ruled on the following important questions of Federal law which should be settled:

1. An individual cannot be convicted of wire fraud or securities fraud (nor underlying conspiracy to commit the same) if the investors are frankly informed that the entire scheme is a fraud.

2. The fine imposed violates both 18 U.S.C. §3624(e) and United States Sentencing Guideline 5E1.2(f), because it is impossible for the Petitioner to pay the fine during the three-year term of his supervised release.

3. The rule of lenity prohibits the securities fraud conviction of a lawyer for a false opinion, when the SEC refuses to provide a bright line definition of "shell company."

4. Securities Act Rule 405, which interprets Securities Act §2(11) in part to mean that a person "controls" an issuer when he or she has "possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise," is contrary to the legislative history of the Securities Act and any deference under *Chevron* (which should be overturned) is not warranted.

Secondly, the Court should exercise its supervisory power to correct the error of the First Circuit in sanctioning:

5. The district court's imposition of an arbitrary $1 million fine, when the Petitioner proved, with the government's concurrence, that he was unable to pay a fine, and

6. The district court's departure from the requirement of Fed. R. Cr. P. 32(i) to affirmatively accept, reject or state as immaterial the defendant's objections to the PSR.

DECISION BELOW

The decision of the United States Court of Appeals for the First Circuit is reproduced at App. 1a.

JURISDICTION

The First Circuit entered judgment on August 6, 2021, consolidated case numbers 18-2212 and 19-1320. *See* App. 1a. This Petition is being filed less than 90 days after said judgment, and therefore is timely under Supreme Court Rule 13.1. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

In May, 2018, Petitioner Jehu Hand ("Petitioner"), a securities lawyer, was convicted after trial on two counts each of wire fraud under 18 U.S.C. §1343, securities fraud under Rule 10b-5 and conspiracy to commit same, in the District of Massachusetts. The trial concerned stock promotions (the illegal variant of which is termed a "pump and dump" because the trading price of the shares is inflated with the stock promotion and then the share price falls when all of the insiders' shares are sold) carried on the over-the counter market by Greenway and Crown. Petitioner was the incorporator and the original legal counsel for the two companies, although by the time of the stock promotions, he had left the United States to live on a boat with his child, and other securities attorneys counseled Greenway and Crown during the stock promotions. Although the district court held that his participation in the schemes was "key," it was limited to his provision of legal services. App-34a.

A. The Greenway Stock Promotion.

Greenway was incorporated in May 2008 to construct and operate an oil recycling plant, with wealthy businessman Benjamin Hoskins as president, sole director, and owner of 84% of the corporation's stock, including nearly 10 million common shares and 50 million shares of common stock issuable upon conversion of voting preferred stock. The preferred stock voted as a class with the common stock. 14% of the common stock, 9,869,000 shares, were owned by Petitioner and his friends and family, including 888,000 shares held by Petitioner, 750,000 by an ex-wife, and the remainder by three friends. According to its published financials, Greenway raised $540,000 to build the plant, including $230,000 in cash from a promissory note issued May 2008. The note was issued to an investment fund controlled by Petitioner.

By 2012, Greenway had run out of funds and Hoskins sought to sell control of Greenway. Frank Morelli III ("Morelli"), a stock promoter, heard of Greenway through a business acquaintance named Andy Austin, who in turn knew Petitioner's brother Adam Hand. Morelli met with Petitioner in June 2012 and agreed to purchase control of Greenway via a transfer of the preferred stock, which, it was agreed, would be converted into 150 million shares of common stock and constitute the control block. While Petitioner and the ex-wife did not sell their shares, Morelli's three friends purchased 8 million of the 9,869,000 shares. Morelli disclaimed control of the 8 million shares held by his friends, telling Petitioner only that he was "friendly" with the purchasers. App-33a. In addition, seven million additional free-trading shares were to be issued to Mitchell Brown and Antonio "Tony" Katz, who had worked with Morelli in the past. These shares were issued to two corporations, Lara Mac, a company openly controlled by Brown, and Florence Consulting, whose control person was stated to be another individual which Katz stated at trial was Brown's nominee. The terms of the deal were set forth in a June 20, 2012 email exchange authored by Morelli and Katz.

The purchase price of $175,000 for the control block was to be paid out of $37,500 in escrow with a law firm, and released when the shares were all delivered to the purchasers in good form. Additional funds were to be paid out of sales proceeds of the shares, when sold by the purchasers. However, after the 15 million shares were delivered, the escrow turned out to be a sham, and the purchasers only paid $11,900. Kevin Holbert, a friend of Katz, then replaced Hoskins as officer and director. Holbert and Katz pumped up Holbert's resume to make him appear to be an experienced executive, not a mere bartender.

Petitioner's principal role was to coordinate the transfer or issuance of the shares and deliver legal opinions permitting the 15 million shares to be deposited in brokerage accounts.

In the June 20 agreement, the parties had agreed to spend 65% of the proceeds of any share sales on "marketing," that is, costs of stock promotion, and 9.7% of the proceeds to be paid to each of the Austin Group (comprised of the Morelli friends), the Katz Group (Mitchell Brown but not Katz) and the Jehu Group, (consisting of Hoskins but no more was shown about the composition of that group). Later in December 2012, when Petitioner made demand on Brown for payment of the $161,300, Brown appeared to have no knowledge of the June 20 agreement. Morelli obtained login information for all of the brokerage accounts holding Greenway shares so he could verify who was selling and the proceeds could be divided. There were about 177 million shares outstanding during the stock promotion.

In Greenway, Petitioner issued legal opinions, App-39a and App-48a, that Greenway was not a "shell company," as defined under Securities Act Rule 405 to be a company with neither non-nominal, non-cash assets and non- nominal operations. Petitioner apparently relied on the fact that the company had $252,100 in non-cash assets, App-35, and such amount was not "nominal." Petitioner's conviction was based upon his pro bono provision of legal services ("he furnished attorney certifications without which the public trades could not have gone on"). App-34a.

Eventually, in October 2012, Bernard Fried, the nominee of John Madsen, took control of the 150 million share control block and replaced Petitioner with attorney Andrew Farber. Fried/Madsen's company, Andalusian Resorts, LLC, purported to be engaged in seeking -to purchase and operate hotel resorts geared to homosexual travelers, was vended in to Greenway. Fried signed a $163,100 promissory note for the balance of the purchase price of $175,000, secured by a pledge of the control block. Fried then removed Holbert as an officer.

On November 19, 2012, an email blast, App-51a, touting Greenway and a press release were issued, and Lara Mac sold all of its shares for about $405,000. The email blast openly warned investors not to believe the "hype" about Greenway's business plan, and that the stock would rise in price then likely crash:

The other parties holding shares sold over the next 6 weeks. One of the sellers was Esthetics World, with one million shares. Esthetics World was originally controlled by Petitioner's former girlfriend, but Morelli's wife had been installed as President and director prior to the stock promotion. Although denying that he controlled that company, Morelli was unable to state that it was controlled by Petitioner, stating it was his brother Adam who traded the shares. About $19,000 of the $30,000 Esthetics World proceeds were transferred to MX Mining, and Hoskins received monies from that account. Petitioner received $1,700 and the remainder was withdrawn in the form of cash; Petitioner's assistant Kim Peterson, who was the sole signer on the Esthetics World bank account, testified that Petitioner never took cash, so it was clear that Petitioner did not receive more than $1,700.

Another shareholder was William Wilkinson, which the government argued was Petitioner's alter ego. Wilkinson sold no shares. Morelli's three friends and Brown sold another $400,000. A total of about 14 million shares were sold to the public. The entire stock promotion ended when Fried was unable to pay the $163,100 note when due, and the control block was foreclosed upon. Petitioner never sold any of his shares.

B. The Crown Stock Promotion

Preparation for the Crown stock promotion overlapped that of Greenway. Petitioner incorporated Crown in 2010, with his friend Produn as President. Crown filed an S-1 registration statement which was declared effective by the SEC on January 3, 2012. The S-1 included a number of selling shareholders, including Petitioner's legal assistant Peterson and her family and friends. But most shares held for resale were owned by 5 entities and one individual, Wilkinson, who collectively. together with warrant shares, held 26.4 million shares. These six persons agreed to a share lockup under which they could only sell 20,000 shares each per month until June 30, 2013, unless Crown attained $.10 per share earnings or ceased to be a "penny stock" under Rule 3a51-1, that is, listed on a stock exchange or NASDAQ and was regularly quoted at $5 per share or higher.

Crown had traded before 2012, but had fallen off the trading system. Petitioner helped Crown file an application to be quoted on the over-the- counter market through Pennaluna Securities. As part of the application, documentation regarding the original purchase of shares by the selling shareholders had to be reviewed by The Financial Regulatory Authority ("FINRA"). This was to verify that the selling shareholders actually existed, according to FINRA testimony. The documentation included the lockup agreements and the cancelled checks for the purchase of the shares. For four of those checks, the purchaser was a corporation and Peterson was the signer on the checks. When the cancelled checks were emailed from Petitioner on April 3, 2012, five of them had been altered to change the bank branch location and/or to replace Peterson's signature with that of the purported control person. The inference was that it was Petitioner who altered the checks. But two hours after the checks were emailed. Petitioner was present in court as the victim in a domestic violence matter.

A few weeks before the S-1 became effective, Petitioner's other brother, Learned Jeremiah Hand ("Jeremiah") approached Petitioner proposing to take public the patented controlled drug delivery system owned by Jeremiah's wife, through merger with a public vehicle. Jeremiah had been the COO of a highly successful pharmaceutical company connected with his wife's family and he believed he could repeat his success with the drug delivery technology if it were part of a public company. After working with consultants and preparing Crown's new business plan to include the patented technology, Jeremiah replaced Produn as officer and director and Crown acquired the technology in October 2012. At the same time, Petitioner sent $100,000 to Jeremiah. Jeremiah immediately replaced Petitioner as counsel with Carlos Duque, a Boston lawyer who was his close personal friend. Duque had saved Jeremiah's life years before.

It was never made clear who introduced Morelli to Jeremiah, Adam or some other person. Morelli was engaged by Adam and Jeremiah to carry out the stock promotion in a meeting in December 2012, at which Petitioner was not present. Morelli planned to use his acquaintance Dino Palucci, from Toronto, to manage the stock promotion. Morelli sought to control the sales of Crown stock in the market so that Palucci's investors, who would buy the shares, would not be harmed. To that end, Morelli obtained the login information for the brokerage accounts holding Crown stock. In other words, there was to be a "pump," but not a "dump." Later, Palucci dropped out, although there was no indication Petitioner knew of this change. Palucci was replaced with Lou Buonocore, a Massachusetts resident. In October 2012, Jeremiah and Adam effected a matched trade of 200 Crown shares for $5.00 per share ($.50 per share after giving effect to a forward stock split). Petitioner was only informed that Crown had finally traded after the fact. Petitioner had sent an email to Jeremiah asserting that additional warrant shares could be issued if Crown traded at $5 per share, but the additional warrant shares were never issued.

Crown began its stock promotion in January 2013, after Petitioner had moved abroad to live on his boat. The promotion began with an email blast, which emphasized in bold type that the trading potential, and not Crown's intrinsic merits, was critical and then warned investors that a dump was likely:

> **Keep in mind that CWNM was trading at more than a dollar as recently as October! The 52 week high of $1.01 PPS indicates that this stock has plenty of room to run within its established trading channel! A return to this impressive high or even beyond would translate into a gain of more than 300% from the current levels! Don't think for a second that CWNM can't reach this high! As we observed from our last alert, which ran more than 6,000% and quadrupled its previous 52 week high, it's not difficult for a high pote11tial stock to soar right past a previously established high with the right catalyst. We believe that CWNM is a perfect alert and we are extremely excited to** see what **tomorrow** holds for our readers!
>
> As you can see from the information above, CWNM is an opportunity which should be taken very seriously! We urge everyone to put CWNM on the top of your watchlist and begin researching this incredible company immediately! Opportunities of this magnitude do not come along every day! Be prepared for an amazing trading session for CWNM tomorrow!

> Anyone viewing this newsletter should assume the hiring party or affiliates of the hiring party own shares of CWNM of which they plan to liquidate, further understanding that the liquidation of those shares may negatively impact the share price.

Of the 26.4. million shares, Esthetics World and Wilkinson, original selling shareholders, each retained 400,000 shares. Wilkinson sold $340 in shares in an involuntary buy in. Esthetics World, with Adam holding trading authority, sold shares for $74,000. Petitioner received $17,000 of those proceeds. The other original selling shareholders did not sell to the public, but transferred to three groups. Eight million shares were transferred to Fortune Industries, a company ostensibly owned by the Hand's disabled sister who lived on Jeremiah's farm. Fortune received $621,000 from sales of its shares. Jeremiah sent about $40,000 of those proceeds to Petitioner, although there was no proof Petitioner knew about the trading of any shares nor of any stock promotion, nor the source of the $40,000. Fortune paid stock promoters in part by wiring the funds first to Able Direct Marketing, a company controlled by Petitioner and signed on by Peterson. Peterson testified that it was most likely that Jeremiah who directed those cash transfers; Jeremiah had used Able Direct to buy a marijuana business. Jeremiah also during this time induced the disabled sister to let him "borrow" $600,000 of her money to make an investment in the commercial building for his marijuana business. Morelli's three friends, which Morelli told Petitioner he did not control, held 16 million shares, and realized over $1 million from selling their shares. Petitioner acquired 1,200,000 shares from the original selling shareholders, but he was the only person who sold no shares.

As with Greenway, the Crown stock promotion commenced with an email blast and a series of press releases. Petitioner did not write any press releases; they were written by Duque and Jeremiah. Nor did Petitioner have any involvement in the stock promotion of Greenway or Crown. One press release touted favorable lab results of the Crown technology with diabetes medication Metformin. The press release was true except that it did not state that the lab results had actually been obtained years before. Petitioner did not review this press release. He did review one press release on Crown's ongoing diet pill business, albeit reluctantly, on May 15, 2013. Petitioner's remedial comments on this press release were mostly ignored by Jeremiah in the final version of the press release.

At trial, Jeremiah claimed that the diet pill business was a sham, asserting the existence of a secret deal with Hoskins, arranged by Petitioner. The "deal" was that Hoskins would siphon off all the profit from the diet pill business, but Crown would benefit by having glowing press releases to pump the stock. But, as shown by newly-discovered evidence, Jeremiah lied to the jury on this point. Jeremiah concealed the fact that 25% of the gross sales of the diet pills was held back in a reserve account by the merchant bank. Jeremiah did not report these profits in Crown's 10-Qs or 10-K. After the stock promotion ended, Jeremiah pocketed the money, and closed down the business. This newly- discovered evidence is the basis for Petitioner's pending motion for new trial.

C. Summary

Petitioner was sentenced to serve 66 months incarceration, three years of supervised release, restitution of $486,953.44 and a fine of $1,000,000.

The total investor losses from the two schemes were out $2.5 million, although only 20% of the victims responded to the government's invitation to receive restitution.[1] Petitioner, who was at sea during the actual execution of the schemes, was the only participant who did not sell any of his shares. Petitioner received no payment for his legal services. The co-defendants, most of which received $130,000 to $1,000,000 in illicit proceeds, all plead guilty and received dramatically lower sentences than the Petitioner. Petitioner timely appealed and his conviction and sentence were affirmed. App-1a.

1. The government agreed at sentencing that restitution must be limited to identifiable victims, and only $486,953.44, (about 20% in number and value of victims were willing to come forward.

REASONS FOR GRANTING THE WRIT

A. Liability under Securities Act §10b and Rule 10b-5 or for 18 U.S.C. §1343 (the wire fraud statute) on the Greenway stock promotion cannot exist if all purchasers are warned it was a scam.

Trial Exhibit 158, App-51a, is the email blast disseminated to the public on the first day of the Greenway stock promotion. In relevant part, on App-56a, it states

> Remember that every single alert I send is very volatile and risky. Any one of them could turn into a big loser. In my personal opinion, **no matter how much potential any company has, 99% of the time all that matters is HOW THE STOCK TRADES**.If a stock doesn't trade well, <u>nothing else</u> matters. <u>Don't believe the hype</u>. Be sure to use a tight stop, <u>book profits quickly on these volatile trades</u>, never let any trade move too far against you, watch out for gaps, make sure the stock is trading in a healthy way before you enter, and monitor it closely to make sure momentum is positive. <u>It's always safest to book profits quickly, even on alerts with long-term potential</u>. (**bold** in original, <u>underline</u> added)

Rule 10b-5(b) proscribes materially false or misleading statements including the omission to state material facts necessary to make the statements made not misleading. Since the fundamental purpose of the securities laws is to implement a policy of full disclosure, rather than merit regulation, if full disclosure is provided to the public, there can be no violation of the Rule. See, *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963).

The misleading statement or omission must be material:

> To fulfill the materiality requirement, there must be a substantial likelihood that the disclosure of the

omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available. *Basic v. Levinson*, 485 U.S. 224, 231-2 (1988)(citing *TSC Industries, Inc. v. Northway*, 426 U.S. 438, 449 (1976).

This email blast clarified right from the beginning to potential Greenway purchasers that the promotional information regarding Greenway represented only 1% of the factors involved in purchase of the shares--an immaterial amount. No reasonable investor would purchase Greenway shares based on any motivation other than the chance to jump on a roller-coaster; that is, pure unadulterated speculation, akin to a roulette wheel, based on when, if not if, the stock price would crash.

In the modern Internet age, no reasonable investor considers any new, unknown issuer without performing a Google check on the information available. which would not only reveal the contents of this email blast, but mountains of other information that Greenway was a pure pump and dump. There was no manipulative or other deceptive price information under 10b-5(a) or (c), and no wire fraud, since investors were warned that the trading price was simply a casino. Greenway was not your grandfather's pump and dump. It was in fact actively touted as a pump and dump, for those day traders willing to place down their chips. The conduct of the co-conspirators might be morally suspect, reprehensible, or reprobate, or constitute a violation of gaming or other laws, but not violative of 10b-5 or the wire fraud statute, regardless of any other impropriety in the sale process, such as the Defendant's allegedly false legal opinion or the alleged agreement of the conspirators to manipulate the price. Prospective investors were told right up front that it was all a scam.

This is borne out by the testimony of Greenway purchaser Hansen, who testified that he would not have purchased Greenway if he had reviewed the publicly available information. App-31a-32a. He never saw any press releases. He only heard about Greenway from a "friend" and purchased it solely based on its business website, whose content is unknown., and from Googling the company ("the majority of my reasoning was just from looking at that website.") This is not a reasonable investor. Greenway's press releases disclosed that its plans were all subject to "our ability to obtain financing necessary to do so." App-36a, -38a.

Petitioner is not making a claim that investors could not have relied on the public information; reliance is not a necessary element in wire fraud or securities criminal cases. Petitioner is stating that the quoted paragraph in the email blast provided full disclosure and therefore insulates any person from any criminal liability for actions taken preparatory to the actual sale of shares to the public.

B. The Rule of Lenity directs that Petitioner cannot have criminal liability for a legal opinion based on an intentionally vague rule.

Rule 144 (App-9a) is a safe harbor for holders of "restricted" securities (those acquired in private transactions) to resell to the public, whose sale is not made pursuant to an effective registration statement filed under the Securities Act of 1933) to avoid classification as "underwriters" as defined in Securities Act §2(11) and thus meet the exemption from registration provided by Securities Act §4(a)(1) (a transaction not effected by an issuer, underwriter or dealer").

Petitioner issued opinions in connection with removing restrictive legends on Greenway common stock. App-39a and -48a. There were two principal blocks of shares involved. 9.6 million shares were issued when Greenway commenced business in 2008, amounting to 14% of the outstanding shares; the founding officer and director owned 84% of the shares. Petitioner and his ex wife eventually owned 1.6 of the 9.6 million shares; these were never resold. The 144 legend was removed on about 8 million remaining shares by virtue of legal opinions, some of which were authored by Petitioner. Of these 8 million shares, one million shares were owned by a Mr. Wilkinson who the government argued was Petitioner's alter ego; those shares were never sold.[2] Another one million shares were never resold. The remaining approximately 6 million shares were sold by three persons which were only "friendly" parties but were independent and not controlled by the promoter Frank Morelli III. App-33a ("they were friendly to me")

The second block of shares on which Petitioner issued legal opinions consisted of 7 million shares issued on conversion of a partial assignment of a 2008 promissory note, to Lara Mac, Inc. and Florence Consulting, two companies controlled by Mitchell Brown.[3]

In the context of these resales, as applied to a non-reporting company such as Greenway, Rule 144 has four requirements:

1. "Current public information" regarding the issuer must be publicly available. Rule 144(c). This was not at issue with Greenway, as it had published the required financial and other information.

2. The securities must have been held for at least one year after being fully paid for in a purchase transaction from the issuer, or from an "affiliate" of the issuer. (144(d)(1)(ii)). (The date of the sales purchase agreement is irrelevant; the date of payment controls. (Rule 144(b)(1)(iii).

2 FINRA witness Peter Melley testified that this individual sold $718 in value of common stock, but a review of the evidence shows this to be untrue. No shares were sold by Wilkinson.
3 It appears that Brown used a nominee to conceal his ownership of one half of these shares.

However, a security holder can "tack" the holding period of the securities in the hands of the previous owner, if purchased from a non-affiliate. Further, under Rule 144(d)(3)(ii), if the subject securities were issued solely in conversion of other securities of the same issuer, the holding period of the security tacks onto the holding period of the security from which they are converted. Since both the 8 million shares and Brown's shares (as converted from, and tacking on, the underlying note) were originally issued in 2008, the relevant question is whether the five sellers of the shares had acquired them in 2012 from an "affiliate."

"An affiliate of an issuer is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer." Rule 144(a)(1). Generally speaking, any director or executive officer of an issuer is deemed to control that issuer. "The term control (including the terms controlling, controlled by and under common control with) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." Securities Act Rule 405, App-22a. (But see Section C below).

The determination of whether a person "controls" the issuer or is under common control of an issuer, and therefore is an "affiliate," solely because of its share ownership is a facts and circumstances issue.

On July 9, 2012, Lara Mac and Florence Consulting each purchased a $10,000 principal slice of a promissory note issued for cash in 2008 to JK Advisers Hedge Fund. (App-45). Petitioner was the manager of that Fund. The note was not convertible, and had no voting or other contractual rights to control the management of Greenway. At the time when these share transfers were made, 84% of Greenway voting rights were owned by a Mr. Hoskins, a wealthy businessman. Although Petitioner was at that time legal counsel for Greenway, merely being legal counsel does not make a person a "control" person of an issuer. Even if Petitioner secretly controlled all of the 9.6 million shares, that would only provide him with 14% of the voting rights and, under Nevada Revised Statutes 78.257 (App-28a) and the corporations' bylaws (App-29a), he could neither inspect Greenway's books of account or call a special meeting of shareholders, let alone direct Greenway's policies, or, cause Greenway to file a registration statement. Petitioner was therefore never an "affiliate," at least at any time that that Morelli's "friends" and Lara Mac and Florence acquired their shares; and those persons therefore could "tack" their holding period for the common stock back to 2008.

There was some evidence at trial that Lara Mac and Florence were "affiliates" of Greenway because their nominee Holbert was the officer and director from late July until October, when a Mr. Fried took over that position, and that as a result Rule 144 was not available. But since no purchase or sale activity took place during the time they may have been affiliates, that is irrelevant. By the time any sales were made, Fried was in sole control (App-37a, third paragraph).

3. Under subsection (i) of Rule 144, Greenway must not have been a "shell company" at any time at or prior to the time the securities were "initially issued." All of the Greenway shares at issue were "initially issued" in 2008, when the prior business of designing and building an expanded recycled oil refinery was in full swing, and so subsection (i) would be inapplicable. But even so, Greenway was not a "shell company" in 2012, because it had "non-nominal" assets at that time of $252,100.[4]

4 The note to subsection (i) states that the determination as to the value of any asset should be based on such value as would be assigned under generally accepted accounting principles. The asset in question consisted of engineering blueprints for the

The word "nominal" means "in name only, not in fact; as, the *nominal* leader," or "very small compared to expectations; slight; hardly worth mention; as, a *nominal* fee." Webster's New Twentieth Century Dictionary, Second Edition. In promulgating the definition of "shell company" in Release 33-8587 (App-24a) the Securities and Exchange Commission refused to provide a bright line amount for what constituted "nominal" assets, arguing that a bright line would more easily permit circumvention of the Rule. In other words, the Commission wished to be able to move those goalposts as it saw fit and in its subjective view of what was "nominal." This violates the principle of lenity in the criminal liability context. Petitioner cannot be held criminally liable for opining that Greenway was not a shell company. In addition, $252,100 cannot be viewed as "very small," "hardly worth mentioning," or otherwise as "nominal" in its ordinary meaning.

C. Securities Act Rule 405, which defines "control" for purposes of determining whether a person is an "affiliate" under Rule 144, as "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise," is invalid as it is counter to the legislative history of the Securities Act, which indicates that the lodestar defining "control" is simply whether the named person has the power to cause the issuer to file a registration statement covering those securities.

Petitioner was convicted because of his pro bono work as legal counsel. App-34a, statement by district judge on 15). His legal opinions, App-39a, -48a, were based on the assumption that he was not an "affiliate"; as defined in Rule 144, an "affiliate" is a person who controls, is controlled by, or is under common control of the issuer.

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contemplated an expanded oil refinery factory and its equipment, which are tangible assets according to GAAP.

Securities Act Rule 405 defines "control" quite expansively, to be "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise."

The Commission's interpretation of "control" and the resulting definition of "affiliate" is not supported by the legislative history of §2(11), which indicates that a person "controls" an issuer if he has the ability, by virtue of his officer or director position, share ownership or other position, to cause the issuer to file a registration statement on his behalf, and that the Commission's employment of Rule 405 is contrary to the legislative history, as set forth at H. R. Rep. No. 85, 73d Cong., 1st Sess. 13- 14 (1933). See, Exempted Transactions Under the Securities Act of 1933, Second Edition, §9:70, J. William Hicks, for a full exegesis of the legislative history, at App-70a.

Petitioner is aware of this Court's definition of judicial deference to an agency's interpretation of statutes, enunciated in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843-844 (1984):

> If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, [Footnote 10] as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. [Footnote 11]
>
> "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz,* 415 U. S.

> 199, 415 U. S. 231 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. [Footnote 12] Sometimes the legislative delegation to an agency on a particular question is implicit, rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Petitioner notes that there exists a philosophical division on the Court as to whether legislative intent, as set forth in statements of members of Congress, should be given weight in statutory interpretation. One pole, setting legislative history as controlling over the words of the statute, was relied upon in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 412, n. 29 (1971) (Marshall, J.) ("The legislative history . . . is ambiguous . . . Because of this ambiguity it is clear that we must look primarily to the statutes themselves to find the legislative intent").

Another example showcasing the philosophical division in the Court, was *City of Chicago v. Environmental Defense Fund,* 511 U.S. 328 (1994), in which Justice Scalia found the text of the statute unambiguous and not entitled to *Chevron* deference, but Justice Steven's dissent relied on Senate Committee and Conference Committee reports. Whichever way the Court now views this question, the legislative history is clear: Rule 405 goes much beyond, and encompasses more possibilities for criminal liability, than Congress' intent as shown in the legislative history.

In *Michigan v. EPA*, 576 U.S. 743 (2015) the concurring opinion by Justice Thomas' stated that

> *Chevron* deference raises serious separation-of-powers questions . . . In reality, as the Court illustrates in the course of dismantling EPA's interpretation of §112(n)(1)(A), agencies "interpreting" ambiguous statutes typically are not engaged in acts of interpretation at all. [internal citation] Instead, as *Chevron* itself acknowledged, they are engaged in the " 'formulation of policy.' " 467 U. S., at 843. Statutory ambiguity thus becomes an implicit delegation of rule-making authority, and that authority is used not to find the best meaning of the text, but to formulate legally binding rules to fill in gaps based on policy judgments made by the agency rather than Congress.
>
> Although acknowledging this fact might allow us to escape the jaws of Article III's Vesting Clause, it runs headlong into the teeth of Article I's, which vests "[a]ll legislative Powers herein granted" in Congress. U. S. Const., Art I., §1. For if we give the "force of law" to agency pronouncements on matters of private conduct as to which " 'Congress did not actually have an intent,' " [citation], we permit a body other than Congress to perform a function that requires an exercise of the legislative power. See Department of Transportation v. Association of American Railroads, 575 U. S. ___, ___–___ (2015) (Thomas, J., concurring in judgment) (slip op., at 21–22).

Petitioner calls for this Court to finally overturn *Chevron* and not defer to the Commission's interpretation of control set forth in Rule 405. The "by virtue of his . . . position, to cause the issuer to file a registration statemen on his behalf" test for control makes sense, since one with such a position should be required to file a registration statement, and the powerless securityholder excused.

D. The Court of Appeals incorrectly stated that the Petitioner did not provide evidence that he could not pay a $1 million fine, and ignored the evidence that the District Court imposed an arbitrary fine and one contrary to law.

The district court imposed a $1 million fine pursuant to 18 U.S.C. § 3571(a), without explanation. App-34a. If a sentence is procedurally unreasonable, the substantive reasonableness of the sentence need not be examined. The sentence is invalid. *United States v. Clogston*, 662 F. 3d 588, 590 (1st Cir. 2011). Procedural unreasonableness exists if the court fails to consider the statutory factors, selects a sentence not based on facts, or fails to adequately explain the sentence. *United States v. Martin*, 520 F. 3d 87, 92 (1st Cir. 2008). A fine is invalid if the record fails to support its imposition. *United States v. Rowe*, 268 F.3d 34,39 (1st Cir. 2001).

United States Sentencing Guideline §5E1.2(a) provides that a fine shall not be. imposed "where the defendant establishes that he is unable to pay a fine and is unlikely to be able to do so," and subsection (d) requires the court to determine the amount of a fine in consideration of his future earning capacity, the impact of restitution obligations, the effect on dependents, collateral consequences, and the need to deprive the defendant of ill-gotten gains. App-25a. 18 U.S.C. § 3572(a) contains similar requirements. App-6a-7a.

Petitioner produced evidence reflecting that he received little or nothing from the two schemes, and the government argued that he received no more than $80,000, or about 3% of the total proceeds to the conspirators. There was therefore no need to deprive Petitioner of ill gotten gains. He was ordered to pay nearly a half million dollars in restitution. The government agreed that Petitioner was unable to pay any fine. App-30a. And, contrary to the Court of Appeal, App-2a, Petitioner *did* provide information as to his inability to pay. He provided a completed Probation

Form 48, showing net assets of $60,020. App-82a. Age 67½ when his term of incarceration ends, stripped of his law license, with debt of $212,000, 4 minor children yet to house, clothe and feed, and a deficit monthly household cash flow, it is impossible for Petitioner to be able to pay any fine. According to the 2017 actuarial table published by the Social Security Administration at https://www.ssa.gov/oact/STATS/table4c6.html, Petitioner could be expected to live another 16.67 years. Should he work until he dropped dead at age 87, he would need to generate about $90,000 above and beyond living expenses to enable him to pay the $1,486,000 in fines and restitution.

The District Court gave no explanation for the amount of the fine, stating simply, "The Court imposes upon you a fine of $1 million." App-34a. The Court of Appeal stated that "in view of his extensive educational background and language skills, there is no reason to think he will be unable to find work outside the practice of law." App-2a. True enough, Petitioner can find work but it is unreasonable to believe that Petitioner can even earn enough to fully pay restitution and the fine.

Since the $1 million fine was imposed in violation of §5E1.2(a) and 18 U.S.C. §3624(e), it is illegal.

E. Notwithstanding the statutory directions as to the maximum amount, a fine imposed in a criminal case should be in an amount such that it can be reasonably paid by the offender within 2 years or the term of supervised release.

18 U.S.C. §3572(d) requires that a fine should be payable immediately, "unless, in the interest of justice, the court provides for payment on a date certain or in installments." 18 U.S.C. §3624(e) requires that, s requirement that a criminal fine be paid, if not immediately, under a "schedule, not to exceed 2 years

except in special circumstances, to pay for any fine imposed for the offense committed by such prisoner."

Both of these provisions are located in 18 U.S.C. Part II, Criminal Procedure. Under the Whole Text Canon, these provisions must be interpreted together.

> In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)(per Kennedy, J)(cited in Reading Law: The Interpretation of Legal Texts, A. Scalia and B. Garner, Thomson/West 2012, p. 167.

Further, §5E1.2(f) provides that a fine should be paid in a lump sum, or, if that is not possible given the defendant's financial condition, the fine can be paid in installments, but "[t]he length of the installment schedule generally should not exceed twelve months, and **shall not** exceed the maximum term of probation authorized for the offense." App-26a, emphasis added. Taken together, these provisions show that the fine imposed in a criminal case should be in such amount as may be payable relatively quickly, absent any hiding of assets or non-cooperation by the defendant. The fine of $1,000,000 imposed on Petitioner is illegal.

F. The Court of Appeals erred in not remanding this case for resentencing due to non-compliance with Fed. R. Cr. P. 32(i)(3).

The Petitioner, through counsel, timely provided a number of comments to the presentence report prepared by the government, and the Probation Office deferred to the Court on them. App-63a to 69a.

Fed. R- Cr. P. 32(i)(3) requires the sentencing court to rule on any disputed portion of the PSR or decline to rule on any disputed portion because it would not affect sentencing. Failure to comply with 32(i)(3) is procedurally unreasonable. *United States v. Cureton*, 89 F. 3d 469, 474-5 (7th Cir. 1996):

> Disputed factual issues are subject to a number of different resolutions, and unless the district court specifically states its finding of fact, an appellate court or prison official may be unable to determine precisely upon what information the defendant was ultimately sentenced.

The requirement to make a finding as to disputed portions of the PSR is a matter of strict compliance. *United States v. Savoie*, 985 F. 2d 612, 620 (1st Cir. 1993).

The District Judge failed to comply with this requirement, only stating that he had read the PSR. App-33a. He failed to accept or reject any of the objections, or to state that acceptance or rejection would be immaterial. The disputed matters were significant and would have affected the severity of his sentence, including the fine. The Petitioner must be resentenced with instructions for the district court to rule on the disputed items.

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court grant his petition for certiorari.

Respectfully submitted on October 20, 2021.

Jehu Hand
Pro se Petitioner