IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 85-8128

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH H. HALE,

Defendant-Appellant.

On Appeal From the United States District Court
For The Northern District Of Georgia

BRIEF OF APPELLEE

STATEMENT REGARDING PREFERENCE

This appeal arises from a criminal case and is entitled to preference, pursuant to Appendix One, Section (a)(2), Rules of the Eleventh Circuit and F.R. App. P. 45(b).

LARRY D. THOMPSON
UNITED STATES ATTORNEY

GALE McKENZIE
ASSISTANT UNITED STATES ATTORNEY

1800 United States Courthouse
75 Spring Street, S.W.
Atlanta, Georgia 30335
404/221-6418

Attorneys for Appellee

Of Counsel
JACOB H. STILLMAN
ROBERT MILLS
ANNE H. SULLIVAN
CATHERINE T. DIXON
Securities and Exchange Commission

Washington, D.C. 20549

STATEMENT REGARDING PREFERENCE

This appeal arises from a criminal case and is entitled to preference, pursuant to Appendix One, Section (a)(2), Rules of the Eleventh Circuit, and Fed. R. App. P. 45(b).

STATEMENT REGARDING ORAL ARGUMENT

The United States does not believe that oral argument is necessary in this case. A number of the issues raised by the defendant in his opening brief were not raised before the district court, and are therefore not appropriate for appellate review. In addition, the legal issues are adequately set forth in the briefs, and the factual background is clearly set forth in the record.

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES (continued): Page

MISCELLANEOUS (continued):

STATEMENT OF THE ISSUES

I. WHETHER THE TRIAL COURT'S CHARGE TO THE JURY ON COUNT ONE OF THE INDICTMENT WAS PROPER.

II. WHETHER THIS CRIMINAL CASE, OR THE RESTITUTION IMPOSED AS A CONDITION OF PROBATION, WAS BARRED BY A PRIOR SEC INJUNCTIVE SUIT; AND WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING RESTITUTION.

III. WHETHER DEFENDANT HAS MET HIS BURDEN IN CLAIMING PROSECUTORIAL VINDICTIVENESS.

PRELIMINARY STATEMENT

The defendant in this criminal case, Joseph H. Hale, was an Atlanta businessman engaged in purchasing and selling coins, medallions and other items made of precious and non-precious metal. After 1976 he was left with a large inventory of essentially unsalable medallions commemorating the American bicentennial. Mr. Hale managed to dispose of these medallions after he acquired control of a publicly held company with a large volume of business in coin and medallion brokerage. Immediately after obtaining control of this company, he dumped approximately 27,000 medallions, worth no more than $50,000, into the company's inventory in exchange for 300,000 shares of its treasury stock having an approximate value of $225,000. To accomplish this transaction defrauding the company out of $175,000, defendant falsified the minutes of a meeting of the company's board of directors to reflect that the board had approved his medallion-for-stock transfer, when, in fact, the board never gave its approval. Defendant also falsified the company's accounting records to camouflage the company's $175,000 loss.

Defendant made materially false statements about this transaction and other matters in reports and other disclosure statements, including tender offer materials, that were filed with the Securities and Exchange Commission and distributed to the company's minority shareholders and the investing public. Among other things, he falsely represented in these documents that the medallions were worth $225,000.

When the Securities and Exchange Commission brought a civil action to enjoin him from further violations of the securities laws, defendant committed perjury in an unsuccessful attempt to cover up his misdeeds. He testified

falsely in the civil trial that the company's board of directors had approved the exchange of his greatly overvalued medallions for the company's stock.

As a result of these actions, defendant was convicted in this case of perjury and of six counts of violating provisions of the federal securities laws -- antifraud and reporting provisions, and provisions that require publicly held companies to make and keep books, records and accounts that accurately and fairly reflect the disposition of the company's assets.

Defendant was sentenced to five years' imprisonment and a fine of $10,000 on the perjury count and on each of five of the six securities law counts; the sentences of imprisonment are to run concurrently. On the remaining securities law count, an antifraud charge, the court sentenced defendant to an additional five years' imprisonment to run consecutively with the other sentences, but suspended that five-year sentence and placed the defendant on probation to commence after service of the concurrent sentences. As a condition of probation, the court ordered defendant to make restitution of $175,000 for the loss the company had suffered as a result of the stock-for-medallions transaction.

On appeal the defendant does not challenge the sufficiency of the evidence of his guilt. His principal arguments relate to his conviction on the securities fraud count as to which he was ordered to make restitution. He challenges the trial court's jury instruction on that count, relying, however, on a decision which this Court has held to be inapposite to a charge such as this. He also asserts that the trial court abused its discretion in ordering restitution.

STATEMENT OF THE CASE

A. The Facts

Prior to his involvement in 1979 in the events that gave rise to this criminal conviction, the defendant, Joseph H. Hale, had an extensive background in financial matters. He had an undergraduate degree in finance and a master's degree in business administration (SR 4 at 50-51), and he had been employed as a national bank examiner, an internal auditor, and a stockbroker (SR 4 at 51-52). 1/ In addition, he had been involved in the precious metals and coin business since 1973, when he formed what became East Coast Coin Exchange, a privately held corporation that marketed silver bullion and later commemorative medallions (SR 4 at 52-53). Through East Coast Coin Exchange, defendant acquired thousands of medallions commemorating the American bicentennial in 1976 at low wholesale prices (SR 2 at 181-82; see SR 3 at 4; G.E. 3). In the three years following the bicentennial, when the value of bicentennial items fell drastically, East Coast Coin succeeded in selling only 221 of those medallions (SR 3 at 121).

1. Mr. Hale Acquires Control of World-Wide, Falsifies its Books and Records, and Causes It to Issue $225,000 Worth of Its Stock to Him in Return for Medallions Worth No More than $50,000.

In 1979, Mr. Hale obtained control of a publicly-held company, and, by falsifying its books and records, he contrived to exchange his bicentennial items, including 27,000 bronze medallions which he knew were nearly worthless,

---

1/ References to volumes and pages in the record below are designated "R --- at ---;" references to volumes and pages in the supplemental record are designated "SR --- at ---." Government Exhibits are cited as "G. E. ---" and Defendant's Exhibits as "D.E. ---." Appellant's opening brief in this Court is cited as "Br. ---."

for a large amount of the company's stock worth $225,000. Specifically, in July 1979 the defendant acquired 51 percent of the outstanding common stock of World-Wide Coin Investment Ltd. ("World-Wide"), a publicly-held coin and metals dealer whose stock was traded over the counter and on the Boston Stock Exchange, from John Hamrick, who was then the company's president (SR 1 at 36; SR 4 at 62, 70). During the negotiations for that purchase, Mr. Hale represented to Mr. Hamrick, and to Robert Whitley, World-Wide's attorney, that he would make a substantial capital investment in World-Wide (SR 1 at 37; SR 4 at 65-66, 143).

Mr. Hale's fraudulent scheme involved the preparation of a corporate minute falsely reflecting board approval of a sale of stock to him, false accounting records maintained at World-Wide which showed inflated values for Mr. Hale's medallions, and his use of the false minute indicating board approval to obtain 300,000 shares of World-Wide stock from the company. On July 24, 1979, immediately after Mr. Hale paid Mr. Hamrick for his shares, a meeting of the World-Wide board of directors was convened (SR 1 at 37; SR 4 at 70-71). The minutes for that meeting, found in World-Wide's minute book (G.E. 6; SR 4 at 20), contain the following description of board action purporting to authorize a transaction between World-Wide and Mr. Hale:

> [Mr. Hale] stated he would * * * like the Board to approve the issuance of 300,000 additional shares to him at 75 cents per share to be paid in cash, coin or rare metals. If the stock was to be paid for by coin or rare metals, two outside appraisers would appraise the coin or rare metals. Mr. George Humphreys moved that the Board approve such a transaction, Mr. Louis McClennan seconded the motion. Upon a call of the vote Mr. Humphreys, Mr. McClennan and Mr. Hale voted in favor of the motion.

G.E. 6. In fact, no such motion was made or seconded, and the board

did not approve the issuance of any shares to Mr. Hale. 2/ Nevertheless, these minutes were approved and signed by Mr. Hale (SR 4 at 89). 3/

Mr. Hale used these false minutes to fraudulently obtain 300,000 World-Wide shares worth $225,000 in exchange for medallions purportedly worth the same amount. By letter dated September 7, 1979, the trust department of the National Bank of Georgia, World-Wide's stock transfer agent, was instructed to transfer 300,000 shares of World-Wide stock to Mr. Hale (G.E. 1, p. 2). That letter, which was signed by Ann Ulmo, Mr. Hale's secretary, was accompanied

---

2/ Upon reviewing the quoted language in the minutes, one witness who was present at the board meeting testified at trial that no activity described in that part of the minutes occurred in his presence (SR 2 at 18-19). Mr. Humphries testified that he made no such motion nor was any such motion seconded (SR 2 at 40-41), and Mr. McLennan testified that he did not second any such motion and that the minutes were not correct (SR 2 at 60-61). All witnesses present at the July 24 board meeting, except Mr. Hale, denied that any motions were made or seconded at the meeting. Although they recalled discussions of World-Wide's poor financial condition, no witness other than Mr. Hale recalled a motion to issue World-Wide securities to Mr. Hale. (SR 1 at 38, 40-41; SR 2 at 11-13, 40-41, 60)

These witnesses were all experts in numismatics, and had had no prior dealings with Mr. Hale (SR 2 at 12). They testified that they would have recalled any discussion of this matter, both because of their personal holdings in World-Wide shares (see SR 2 at 13), and because they knew that there was "no market" for bicentennial items in 1979 (see, e.g., SR 2 at 14).

3/ Mr. Hale testified that he first gained possession of these minutes in August or September 1979, denying any knowledge of their source (SR 4 at 87, 88). He testified that Mr. Hamrick had agreed to take minutes of the meeting (SR 5 at 72). Mr. Hamrick, on the other hand, denied that he ever took minutes of that meeting or that he had them typed (SR 1 at 38).

World-Wide's secretary, Sue Woods, also signed the minutes, but did not attend the board meeting or prepare the minutes; nor could she remember typing them (SR 2 at 81). Ms. Woods testified that she routinely signed such documents after their preparation by Mr. Whitley, World-Wide's attorney (SR 2 at 81, 83). Mr. Whitley, however, did not attend the July 24 meeting (SR 4 at 146).

by the purported minutes of the July 24, 1979 meeting of World-Wide's board. (G.E. 1; SR 2 at 87-88) In addition, Mr. Hale telephoned the transfer agent with instructions to mail the shares to him (SR 2 at 87). In accordance with his instructions, the transfer agent issued 300,000 shares of World-Wide stock to Mr. Hale on October 4, 1979 (G.E. 1, p. 1; SR 2 at 87-88).

Before he gained control of World-Wide, Mr. Hale knew his medallions were not worth $225,000. In fact, East Coast Coin had been unable to sell many of them after the bicentennial (SR 2 at 146-47). World-Wide's own coin expert told him, when Mr. Hale was negotiating to buy Mr. Hamrick's shares of World-Wide stock, that Mr. Hale had priced some of his medallions too high at $16 and $17 (SR 2 at 113). Indeed, World-Wide could not sell Mr. Hale's 27,000 bronze medallions during the following year, despite the fact that World-Wide had a large volume of business; Ann Ulmo, Mr. Hale's secretary, testified that she spent four or five hours a day opening orders mailed to World-Wide (R 2 at 7).

In spite of his knowledge that the prices he ascribed to the coins in his collection were too high, shortly after Mr. Hale acquired control of World-Wide he directed the company to sell his bicentennial medallions -- approximately 27,000 bronze and 150 silver items -- at these prices. By October, the previously mentioned World-Wide coin expert had not seen a single order for the medals (SR 2 at 114). Some of the medallions were advertised for sale at $16 and $17 in World-Wide's catalogues in 1979 (SR 2 at 136; SR 3 at 34-35) and displayed at coin shows (SR 2 at 126; SR 3 at 41). For Christmas 1979, the catalogue was mailed to the customers or shareholders of Florafax, a second public company under Mr. Hale's control (SR 3 at 30). In addition, World-Wide solicited state governors (SR 3 at 41). World-Wide ran what one

witness called "a phone call marathon" in late 1980 to try to sell the bicentennial medallions and used them in promotions in Mr. Hale's other businesses (SR 3 at 11-13). Nonetheless, World-Wide succeeded in selling "less than a hundred" bronze medallions (SR 3 at 42). 4/ The medallions made of precious metal were sold for $30,000, to be melted down for scrap value (SR 4 at 12, 133-134).

All the expert witnesses agreed that Mr. Hale's valuation of $225,000 significantly over-valued his medallions. The expert testimony at trial demonstrated that what little market remained for bicentennial items after 1976 would not absorb 27,000 bronze medallions. One expert testified that commemorative medallions such as the bicentennial medallions Mr. Hale exchanged for World-Wide shares are a "one shot event", which "came in 1976" (SR 3 at 75). He observed that someone holding commemorative medallions after the event is "trying to sell something the market isn't after * * * unless you price them at a give away price * * *" (SR 3 at 74).

Similarly, the director of research for the Medallic Art Company of Danbury, Connecticut, a manufacturer of bronze, silver and gold medallions, described the after-market in bronze bicentennial medallions as "very thin. By that it means there were very few collectors who would purchase this." (SR 2 at 164, 170) Another experienced coin dealer testified flatly that "there is no after-market" for non-precious metal commemorative medallions (SR 2 at 112), pointing out that in 1979, before Mr. Hale took control of the company, World-

---

4/ When World-Wide could not sell the medallions, Mr. Hale arranged to hand out some medallions to his own employees and customers in other businesses which he owned personally (SR 2 at 153, 161).

Wide itself was paying between 10 cents and $3 for bronze bicentennial medallions (SR 2 at 112-13). 5/

Ultimately, World-Wide was forced to correct its accounting for the stock-for-medallions transaction with Mr. Hale to reflect the greatly reduced value of the medallions. During the July 1980 fiscal year-end audit, World-Wide's auditors questioned the $225,000 figure at which Mr. Hale's medallions were carried on World-Wide's books. In support of World-Wide's accounting treatment, they were shown a document that was introduced into evidence at the trial below as G.E. 3 (SR 3 at 46). Mr. Hale identified G.E. 3 at trial as an "inventory recap" handwritten by him (SR 4 at 90-91). According to Mr. Hale, between August 15 and October 1, 1979, he had prepared these handwritten sheets containing a schedule of items, including approximately 150 silver commemorative items and approximately 27,000 bronze medals, which he priced at a total of $225,000; the items were to be placed in World-Wide's inventory in exchange for the 300,000 shares (SR 4 at 90-94; G.E. 3). 6/

5/ See also SR 1 at 42-43 (observation by Mr. Hamrick, the former president of World-Wide, that the sale of 27,000 medallions at the original retail price would not have been possible).

6/ Despite notations on G.E. 3 showing various deliveries of medallions to World-Wide in 1979, Mr. Hale did not actually transfer any medallions from his residence -- where they were kept in a garage -- to World-Wide until the company's auditors requested substantiation for their inventory check in connection with the 1980 audit. SR 2 at 144; SR 4 at 16-17. At that point, World-Wide presented its auditors with handwritten sheets (G.E. 3), showing a total value of $225,000 for the medallions, which Mr. Hale has identified as his list of medallions (SR 4 at 14, 90, 93). These schedules prepared by Mr. Hale were initialed, without verification that World-Wide received any of the items they described, by an inventory clerk at World-Wide at Mr. Hale's instruction (SR 2 at 103-04; SR 4 at 93).

At the instruction of the auditors, who were not satisfied with G.E. 3, a World-Wide employee contacted Johnson & Jensen, a wholesale coin company that had been asked by Mr. Hale in August 1979 to place a value on these types of medallions (SR 3 at 37). See note 7, infra. Johnson & Jensen told the employee that the 27,000 bronze medallions remaining in World-Wide's inventory could be sold for between "ten or fifteen cents on the dollar" of the original appraised price (SR 3 at 31-32). After performing the audit, the auditors required World-Wide to write down the value of the medallions on World-Wide's books (SR 4 at 24-25).

Evidence suggests that Mr. Hale himself did not value his medallions at $225,000 for purposes other than his exchange with World-Wide. Mr. Hale testified that many of the medallions placed in World-Wide came from his personal coin collection (SR 4 at 107, 109, 116). Neither Mr. Hale's personal financial statements to banks, nor East Coast Coin's tax returns reflecting its assets, showed a $225,000 valuation for the medallions swapped with World-Wide Coin. Rather, these documents reflect a valuation by Mr. Hale of no more than $40,000, regardless of whether the medallions were in Mr. Hale's personal possession or subject to his control in East Coast Coin. (R1 at 190, 193; SR 4 at 122, 130, 133) 7/

7/ We also note that on August 30, 1979, Mr. Hale had written to Johnson & Jensen, an auction house specializing in medallions, requesting "the appraised value" of certain bicentennial medallions, identifying only types but not quantities of medallions (SR 2 at 165-67; G.E. 10). This letter neither requested nor elicited an appraisal. As described by expert appraisers at the trial below, an appraisal requires physical inspection and verification of quantity and quality (SR 2 at 43). Mr. Hale's letter did not produce a response from the addressee until

(footnote continued)

The evidence demonstrated Mr. Hale's willingness to misappropriate World-Wide's assets. In July or August of 1979, Mr. Hale exchanged a silver plate, for which the then market price was only about $120 to $150, for $2,000 worth of gold jewelry, watches, and coins in World-Wide's inventory. When a World-Wide employee confronted Mr. Hale with the fact that this was not an equal exchange, and that World-Wide had been melting similar silver plates down for scrap value, Mr. Hale told the employee he was wrong about the plate's value, stating, "I own this place." Thereafter, the plate was put in World-Wide's showcase and the gold items removed from inventory. SR 2 at 116-18. Later, World-Wide acquired other silver plates like Mr. Hale's for scrap value prices. At Mr. Hale's instruction, they were scrapped. (SR 2 at 125-26)

On July 28, 1981, because of an investigation into Mr. Hale's dealings with World-Wide by the Securities and Exchange Commission, Mr. Hale and the other two members of the World-Wide board of directors, both of whom were under his control, met to discuss his 300,000 share transaction with World-Wide. World-Wide's board minutes reflect that Mr. Hale undertook to reverse the 1979 issuance of stock to him by returning a portion of the 300,000 shares in exchange

---

7/ (footnote continued)

June 18, 1980, when the auction house merely sent a listing of retail prices during the bicentennial (G.E. 10; SR 2 at 186-88). World-Wide, of course, routinely acquired its inventory, not at retail, but at wholesale. Indeed, in contrast to the much higher prices on the list that the auction house sent to Mr. Hale, the testimony reflects that in 1979 the auction house itself was paying less than a dollar for bronze bicentennial medallions (SR 2 at 168).

Mr. Hale wrote a similar letter to Malvin Hoffman, an associate at Connecticut Mint, a manufacturer of medallions for cities (SR 3, 4). Mr. Hoffman simply sent Mr. Hale a listing of the original retail prices for the medallions. Id.

for the remaining bronze medallions. (SR 4 at 36-38, D.E. 7; SR 3 at 42-43; SR 4 at 9) By that time, Mr. Hale knew that the Commission would bring an injunctive action against him (R 1 at 283). Mr. Hale did not actually return the shares until August 14, 1981 (R 1 at 283).

The World-Wide shares Mr. Hale returned in 1981 were worthless, because there was no market for them (R 1 at 297). Trading in World-Wide securities on the Boston Stock Exchange was later suspended in October, and the stock was ultimately delisted in December 1981 (R 1 at 298).

2. Mr. Hale Makes and Disseminates to the Investing Public False Statements in Tender Offer Materials for World-Wide Stock and in Annual Reports Filed With the SEC.

Within five days of the July 24, 1979 board of directors meeting at which he had assumed control of World-Wide, Mr. Hale prepared materials for a tender offer by him for the remaining shares of World-Wide stock. Under the heading "Background of the Offer," the offering materials falsely stated that World-Wide's board of directors had authorized the stock-for-medallions swap:

> [T]he Offeror agreed to purchase up to an additional 300,000 new Shares from the company at a * * * price of $.75 per share. Payment for these new shares was to be made in any combination of gold, silver, coins, medals, or cash, with an independent appraisal of the inventory. The Board of Directors unanimously approved the issuance of 300,000 Shares to Offeror for the described form of payment.

SR 4 at 80-81; G.E. 2. On July 30, 1979, Mr. Hale arranged to have World-Wide's transfer agent mail copies of his offer to each of the company's shareholders (SR 2 at 89). The tender offer documents were also filed with the Boston Stock Exchange (SR 3 at 103). 8/

8/ During the time Mr. Hale controlled World-Wide, its securities were registered with the SEC. World-Wide stock was listed on the Boston Stock Exchange through 1981 (SR 3 at 102).

World-Wide's annual reports on Form 10-K for 1979 and 1980 -- documents prepared by Mr. Hale (SR 4 at 10) and filed with the Exchange (SR 3 at 103) and with the SEC (G.E. 4, 5) -- also falsely stated that the board of directors had approved Mr. Hale's transfer of bicentennial medallions worth $225,000 to World-Wide in exchange for $225,000 worth of World-Wide stock. The annual report for 1979 further contained a false description of the independence of World-Wide's new board, stating that two new directors -- Gregg Jones and Floyd W. Seibert -- were outside directors; a government expert testified that outside directors would be expected to be "impartial person[s] not connected with the company". (G.E. 4, 5, see SR 3 at 104) In fact, both of these persons received their sole income from companies Mr. Hale owned or controlled (SR 3 at 42-43; SR 4 at 9). Neither of them ever voted contrary to Mr. Hale's wishes. Id.

3. Mr. Hale Commits Perjury During the Trial of an Action in Which the SEC Obtains an Injunction and Other Equitable Relief Against Him Based Upon His Misconduct at World-Wide.

On August 31, 1981, the Securities and Exchange Commission filed a civil action in the United States District Court for the Northern District of Georgia against World-Wide, Mr. Hale, and the directors under his control, Mr. Seibert and Mr. Jones. The Commission alleged that the defendants had violated various provisions of the federal securities laws and sought a permanent injunction against further violations and disgorgement of profits unlawfully obtained by Hale (G.E. 7c). The violations alleged in the Commission's action related to the stock-for-medallions-swap by Hale, as well as to other matters not encompassed by the indictment in this criminal case. Id. During the course of the civil trial, Mr. Hale gave the following false

testimony concerning the events that occurred at the July 24, 1979 meeting of World-Wide's board of directors:

> [Question by Mr. Hale's attorney] After that conversation that you just described was there a proposal to approve what you have called the infusion of merchandise or inventory and what is sometimes call[sic] the medallion for stock transactions?
>
> [Mr. Hale]. Yes. I told Mr. Humphreys he needed to go ahead and make a motion which he did and Mr. McClendon[sic] seconded it and we did pass it.
>
> Q. In your opinion are the minutes of the meeting which are before this court accurate and correct minutes?
>
> A. Yes, they are.
>
> Q. Is there any uncertainty in your mind, Mr. Hale, as to whether the approval of the transaction that you now described to the court as to whether they were or were not discussed at the meeting?
>
> A. There is no uncertainty at all.

G.E. 7. As previously discussed, no such events took place at the board meeting. 9/

Following the civil trial, the court issued an opinion and entered a judgment enjoining World-Wide, Mr. Hale and Mr. Seibert from further violations of provisions of the federal securities laws. SEC v. World-Wide Coin Investments Ltd., 567 F. Supp. 724 (N.D. Ga. 1983). 10/ The court also directed

---

9/ In its opinion in the civil action, the district court (Hon. Robert L. Vining) noted "[t]he possibility that these [July 24, 1979] minutes were falsified". Id. at 732.

Mr. Hale reiterated his false testimony at the trial in this criminal case.

10/ A consent judgment had previously been entered against Mr. Jones.

Mr. Hale to disgorge 260,000 shares of World-Wide common stock as "wrongfully received benefits" and "profit[] from * * * [his] wrongdoing" in the stock-for-medallion swap. 567 F. Supp. at 761.

B. Course of Proceedings and Disposition Below — Mr. Hale is Convicted of Six Counts of Securities Law Violations and One Count of Perjury.

On August 22, 1984 Mr. Hale was indicted on six counts of violating the federal securities laws and one count of perjury. The criminal trial was held before the Hon. Richard C. Freeman from December 4 through December 10, 1984. On December 10, the jury returned a verdict of guilty against Mr. Hale on all seven counts (SR 5 at 93). 11/

11/ Count 1 charged that Mr. Hale committed fraud, in connection with the issuance of 300,000 shares of World-Wide securities to him in return for overvalued medallions, with respect to (a) the value of the medallions he gave World-Wide; (b) the existence of approval by World-Wide's board of directors of the exchange of its stock for Mr. Hale's medallions; (c) the value of World-Wide's equity; (d) the independence of World-Wide's board of directors; and (e) Mr. Hale's control of the board (all in violation of Sections 10(b) and 32(a) of the Securities Exchange Act, 15 U.S.C. 78j(b) and 78ff(a); Commission Rule 10b-5, 17 C.F.R. 240.10b-5; and 18 U.S.C. 2).

Count 2 charged that Mr. Hale committed fraud in connection with his tender offer for World-Wide securities by misstating and omitting, in the tender offer documents, facts relating to his acquisition of the 300,000 shares of World-Wide securities, board approval for that transaction, and dilution of the value of outstanding shares of World-Wide (in violation of Sections 14(e) and 32(a) of the Securities Exchange Act, 15 U.S.C. 78n(e) and 78ff(a)).

Count 3 charged that Mr. Hale falsified and caused to be falsified books, records and accounts kept by World-Wide, specifically a false "inventory recap" (in violation of Section 13(b)(2) of the Securities Exchange Act, 15 U.S.C. 78m(b)(2), which requires publicly held companies to keep accurate internal accounting records; Section 32(a) of the Securities Exchange Act; and Commission Rule 13b2-1, 17 C.F.R. 240.13b2-1).

(footnote continued)

On February 1, 1985, the court sentenced Mr. Hale to serve five years' imprisonment, and to pay fines totalling $60,000, on counts two through seven (SR at 112). 12/ On Count One, the court sentenced Mr. Hale to five years' imprisonment to run consecutively to the five years' imprisonment to be served on the other counts but suspended the execution of the count one sentence and placed Mr. Hale on probation on that count for five years. Id. The court imposed two special conditions of the probation, prohibiting Mr. Hale from serving as an officer or director of a publicly-held company and requiring him to pay restitution of $175,000 to compensate World-Wide for its

---

11/ (footnote continued)

Count 4 charged that Mr. Hale caused World-Wide to file a false and misleading annual report on Form 10-K for the company's fiscal year ending July 31, 1979 with respect to the independence of World-Wide's directors and the value of World-Wide's inventory (in violation of Sections 13(a) and 32(a) of the Securities Exchange Act, 15 U.S.C. 78m(a) and 78ff(a); and Commission Rule 13a-1, 17 C.F.R. 240.13a-1).

Count 5 charged that Mr. Hale caused false and misleading statements of material facts to be made in World-Wide's annual report on Form 10-K for its fiscal year ending July 31, 1980, regarding the value of the medallions Mr. Hale contributed to World-Wide's inventory in exchange for 300,000 shares of its stock (in violation of Sections 13(a) and 32(a) of the Securities Exchange Act; and Commission Rule 13a-1).

Count 6 charged that Mr. Hale wilfully and knowingly caused World-Wide to keep and maintain a corporate minute book which contained an entry stating that the board had approved the issuance to Mr. Hale of 300,000 shares of World-Wide stock when that entry was false (in violation of Sections 13(b)(2) and 32(a) of the Securities Exchange Act; Commission Rule 13(b)(2)-1; and 18 U.S.C. 2).

Count 7 charged that Mr. Hale committed perjury before the court in the Commission's civil action regarding the accuracy of the July 24, 1979 minutes of the meeting of the board of directors (in violation of 18 U.S.C. 1623).

12/ A fine of $10,000 was imposed on each of these counts.

loss in the stock-for-medallions transaction. (SR at 113).

On June 13, 1985, defendant filed a motion to reduce his sentence under Rule 35 of the Federal Rules of Criminal Procedure. The government has opposed the motion, which remains sub judice on the date this brief is filed.

C. Standard of Review

Appellant's challenge to the district court's jury instructions on Count One of the indictment does not demonstrate reversible error because the instructions were correct. See United States v. Sans, 731 F.2d 1521, 1529 (11th Cir. 1984).

Appellant's arguments that criminal prosecution, and restitution as a condition of probation, are barred, either by res judicata or by collateral estoppel, may not be considered here when they are advanced for the first time, because there was no plain error or manifest injustice in the prosecution and sentence. Similarly, his argument of prosecutorial vindictiveness, for which there is no evidentiary support, may not be considered now for the first time. United States v. Lueck, 678 F.2d 895, 904 (11th Cir. 1982). Both arguments also are legally incorrect. United States v. Mumford, 630 F.2d 1023 (4th Cir. 1980); United States v. Goodwin, 457 U.S. 368 (1982). Appellant's challenge to the award of restitution fails to demonstrate abuse of discretion by the district court. United States v. Jones, 712 F.2d 1316, 1323 (9th Cir.), cert. denied, 104 S.Ct. 434 (1983).

SUMMARY OF THE ARGUMENT

Defendant challenges the trial court's refusal to give his requested instruction to the jury on Count One of the indictment requiring the jury to unanimously determine which of the three subsections of Rule 10b-5 his conduct violated. This argument must fail since it is based on a decision which this Court has held inapposite to a charge such as the one involved in this case. Because Rule 10b-5 concerns only one central concept -- fraud in the purchase or sale of securities -- the trial court's instructions were proper, and the jury should not have been required to engage in a semantic exercise concerning the precise category of fraud into which it would parcel defendant's conduct.

Defendant's contentions regarding the propriety of bringing this criminal action and of the trial court's imposition of restitution on Count One are equally meritless. Criminal prosecution and restitution are not precluded by the SEC's prior civil suit against defendant. Moreover, restitution is appropriate here because defendant has not made World-Wide whole for its loss of $175,000 in 1979 by returning worthless stock in 1981 and 1983. Finally, defendant's belated, and totally unsubstantiated, allegation of prosecutorial vindictiveness fails to reach a threshhold level requiring any further judicial attention.

STATEMENT OF JURISDICTION

This is an appeal from a final judgment of a federal district court. The jurisdiction of this Court is founded on Title 28, United States Code, Section 1291.

ARGUMENT AND CITATION OF AUTHORITY

I. THE TRIAL COURT'S CHARGE ON COUNT ONE OF THE INDICTMENT WAS PROPER AND THERE IS NO RISK THAT THE JURY'S VERDICT WAS NOT UNANIMOUS.

Defendant challenges his conviction on Count One of the indictment of violating the antifraud provisions of Section 10(b) of the Securities Exchange Act and Commission Rule 10b-5. The three subsections of Rule 10b-5 make it unlawful, in connection with the purchase or sale of a security, for any person (a) to employ "any device, scheme, or artifice to defraud," (b) to make any false or misleading statement of material fact or (c) to engage in "any act, practice, or course of business which operates * * * as a fraud or deceit upon any person." Defendant does not contend that the evidence was insufficient to support the jury's verdict; indeed, he does not even deny that he committed each of the acts set forth in Count One. Nor does he argue that the instruction on this count given by the court below misstated the securities law. Defendant's only argument (Br. 17-21) is that the court erred in refusing to give a requested instruction which would have admonished the jury that it could not convict Mr. Hale unless "all twelve jurors agree[d] as to the subsection violated." Such an instruction was unnecessary and would have been improper.

Defendant relies on United States v. Gipson, 553 F.2d 453 (5th Cir. 1977), for the proposition that the jury verdict here must be set aside because it does not contain distinct findings for the three subsections of Rule 10b-5. In Gipson, the defendant was convicted of violating a statute which made it unlawful knowingly to receive, conceal, store, barter, sell or dispose of a stolen motor vehicle. The district court in that case instructed the jury that it could convict the defendant if some but not all members found that he

committed one violative act and others found he committed another, for example, if some members of the jury found only that he received a stolen vehicle, while other members found only that he sold a stolen vehicle. The Court of Appeals reversed the conviction because the lower court's instruction "may have judicially sanctioned a non-unanimous verdict." Id. at 457. The court based its decision on the ground that the lower court's instruction failed to distinguish between the "two distinct conceptual groupings" of acts covered by the statute: (1) receiving, concealing and storing, and (2) bartering, selling and disposing. Id. at 458. The defendant was entitled to a unanimous determination regarding these two distinct elements comprehended by the statute: "the housing of stolen vehicles, * * * [as] distinct * * * from * * * dealing with the marketing of stolen vehicles." Id.

As this Court made clear, however, in its subsequent decision in United States v. Acosta, 748 F.2d 577 (11th Cir. 1984), "without two or more such groupings, Gipson has no application." 748 F.2d at 582. In Acosta, the defendant had been charged with embezzling, abstracting, purloining, or wilfully misapplying moneys; the Court found that the acts encompassed by the charge in that case concerned a single conceptual grouping -- a taking. Similarly, the violation of any of the three subsections of Rule 10b-5, charged in Count One here, concerns only one conceptual grouping -- fraud.

That the provisions of Rule 10b-5 encompass only one conceptual grouping is established by the Gipson opinion itself. The court there explained that where, as here, the same behavior constitutes two or more acts proscribed by the statute, then the acts proscribed by the statute fall into the same conceptual category. 533 F.2d at 458. For example, keeping a stolen vehicle

in a certain place may constitute both storing and concealing. Id. With respect to the Rule 10b-5 violations charged in this case, the same act, e.g., using a false corporate minute to obtain 300,000 shares of stock, is not only a false or misleading statement violating subsection (b) of Rule 10b-5 but also an "act, practice or course of business which operates * * * as a fraud" in violation of subsection (c), and may be part of a "scheme * * * to defraud" in violation of subsection (a). There is no requirement that the jury categorize each fraudulent act charged by the indictment into one of these subsections. Where the offense involves only a single conceptual grouping, a jury verdict is deemed unanimous "despite differences among the jurors as to which of the intra-group acts the defendant committed." Gipson, 553 F.2d at 458; United States v. Sutherland, 656 F.2d 1181, 1202 (5th Cir. 1981). See also United States v. Freeman, 619 F.2d 1112, 1119 (5th Cir. 1980) (elements of mail fraud offense charged in an indictment alleging "conspiracy or scheme" fall into a single conceptual group).

Thus, the instruction requested by the defendant in this case would have imposed an improper and unnecessary burden on the jury. 13/

13/ Count One of the indictment charged that defendant violated Rule 10b-5 by engaging in fraud with respect to a number of matters, including the value of the medallions exchanged for World-Wide stock, the board's approval of the issuance of the stock to him, the value of World-Wide's equity after the stock-for-medallion transfer, and the independence of the board. We do not understand defendant to challenge the jury's verdict on the ground that it did not reach unanimity with respect to the particular fraudulent acts committed by him. Such an argument would be without merit.

(footnote continued)

II. NEITHER THIS CRIMINAL ACTION, NOR THE RESTITUTION IMPOSED ON DEFENDANT IN THIS ACTION AS A CONDITION OF PROBATION, WAS BARRED BY THE PRIOR CIVIL ACTION BROUGHT BY THE SEC; NOR DID THE DISTRICT COURT ABUSE ITS DISCRETION IN ORDERING RESTITUTION.

A. The prior SEC civil action cannot operate as res judicata to bar this criminal action.

Defendant argues on appeal, for the first time in this case, that this criminal prosecution was precluded by the doctrine of res judicata because of the prior civil litigation brought by the SEC in which defendant was found to have violated certain provisions of the securities laws, enjoined from future violations of those provisions and ordered to disgorge his fraudulently obtained profits (Br. 21, 40-43). Absent plain error or manifest injustice, neither of which is present here, an issue advanced for the first time on appeal will not be considered by the appellate court. See United States v. Lueck, 678 F.2d 895, 904 (11th Cir. 1982); United States v. Lockett, 674 F.2d 843, 854-55 (11th Cir. 1982).

Even if it were appropriate to consider Mr. Hale's res judicata argument for the first time at this late date, such an argument was squarely rejected in United States v. Mumford, 630 F.2d 1023 (4th Cir. 1980), which refused to give res judicata effect, in a criminal securities fraud prosecution, to a prior

---

13/ (footnote continued)

Where, as here, "a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, * * * the verdict stands if the evidence is sufficient with respect to any one of the acts charged." Turner v. United States, 396 U.S. 398, 420 (1970). In any event, each of the particular fraudulent acts alleged in Count One is also alleged in one or more of the other six counts. By convicting defendant on each of those six counts, each member of the jury clearly found that he was also guilty of the particulars charged in Count One. Cf. Acosta, 748 F.2d at 580-81.

SEC injunctive action. The court there held that civil and criminal actions under the federal securities laws are "two separate causes of action" (id. at 1027 n.4) and, in particular, that an SEC complaint for prospective injunctive relief is "an equitable action which is in many respects sui generis." Id. at 1027. Because a criminal action for securities fraud has different remedies, elements, and burdens of proof than a civil action, the Fourth Circuit concluded that the SEC's earlier failure to obtain an injunction against the defendant could not bar criminal prosecution by the government.

In support of his argument that the SEC's successful litigation against him should have barred this criminal action, defendant erroneously relies upon dictum in Dranow v. United States, 307 F.2d 545 (8th Cir. 1962), that res judicata can apply from a civil action to a criminal case. In Dranow, the Court of Appeals for the Eighth Circuit, in affirming a criminal conviction for mail fraud and wire fraud, upheld the trial court's denial of the appellant's motion to dismiss the indictment, made on the grounds that the criminal case was barred by a prior bankruptcy proceeding. Id. at 556. The Court of Appeals held that res judicata was inapplicable to the decision in the bankruptcy proceeding because the object of that prior civil action was not the same as the punishment sought in the subsequent criminal case. Id. at 556-57. It observed, however, that preclusive doctrines would apply if "both actions are based upon the same facts and both have as their object 'punishment'." Id. at 556. But, as the Fourth Circuit recognized in Mumford, an SEC enforcement action is equitable in nature, having as its end prospective injunctive relief, not punishment. 630 F.2d at 1027. Thus, even accepting the dictum

in Dranow, it would have no application in this case. 14/

This result is consistent with public policy and with Congressional intent to provide for both civil and criminal enforcement of the federal securities laws. See, e.g., Section 27 of the Securities Exchange Act, 15 U.S.C. 78aa. The Supreme Court has held that, when a statute provides for both types of enforcement, the government is not required to make an election of remedies. The Court observed that

> it would stultify enforcement of federal law to require a governmental agency * * * to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial.

United States v. Kordel, 397 U.S. 1, 11 (1970). 15/ The combination of civil and criminal enforcement of the securities laws against the same transgressor, arising out of identical facts, has been repeatedly upheld. SEC v. First Financial Group of Texas, Inc., 659 F.2d 660, 666-67 (5th Cir. 1981); SEC v. Dresser Industries, Inc., 628 F.2d 1368, 1376-77 (D.C. Cir.) (en banc), cert. denied, 449 U.S. 993 (1980).

The government should not be precluded from bringing a criminal action, or seeking restitution in a successful prosecution where appropriate, simply

---

14/ Defendant also relies on dictum in Yates v. United States, 354 U.S. 298 (1957). That case, however, involved the collateral estoppel effect in a criminal case of determinations made in a prior civil action and did not even suggest that a prior civil decision may have the bar effect of res judicata in a criminal case. The applicability of the doctrine of collateral estoppel is discussed infra, pages 27-28.

15/ See also United States v. Alexander, 743 F.2d 472, 476 (7th Cir. 1984), involving a similar point regarding collateral estoppel, citing Standefer v. United States, 447 U.S. 10 (1980), for the proposition that "collateral estoppel effects from noncriminal to criminal proceedings should be recognized sparingly."

because an agency has brought a prior civil action against the defendant arising out of the same facts. The importance of this principle is illustrated by the present case, where, because of the need to protect the investing public by halting fraud, the SEC initiated its civil action before the full scope of the defendant's fraud had been discovered. If defendant's argument were correct, it would mean that in the future the SEC might be forced to abstain from bringing an urgently needed injunctive action until a determination as to the appropriateness of a criminal prosecution could be made. 16/

B. Defendant's disgorgement of worthless stock in the prior civil suit did not preclude the district court from ordering him to make restitution of $175,000 to World-Wide for its loss from the transaction charged in Count One.

The trial court suspended defendant's sentence of five years' imprisonment on Count One of the indictment, but exercised its discretion under 18 U.S.C. 3651 to condition probation on defendant's payment of $175,000 in restitution to World-Wide to compensate it for its loss from the fraudulent stock-for-medallions transaction charged in that count. Defendant challenges the restitution, arguing that in the prior civil action brought against him by the SEC, Judge Vining determined the appropriate amount of restitution due to World-Wide when he ordered him to disgorge 260,000 shares of World-Wide stock. 17/ According to defendant, the principle of collateral estoppel prevents

---

16/ We note that, even if res judicata precluded defendant's prosecution for securities law violations, it could not bar his prosecution for perjury.

17/ This figure represented the difference between the 300,000 shares originally received by Mr. Hale and the 40,000 shares which could have been purchased with the $30,000 received by World-Wide from melting down the silver medallions.

the government from re-litigating the issue of restitution. Defendant also contends that, even if collateral estoppel does not apply, his disgorgement fully compensated World-Wide for its loss from the fraud charged in Count One of the indictment, so that further restitution would be improper. Neither contention is correct.

1. Collateral estoppel did not bar restitution.

Collateral estoppel only precludes the relitigation of issues actually decided in the prior case which were essential to the outcome of that action. Yates v. United States, 354 U.S. 298, 336; United States v. Mumford, 630 F.2d at 1027. Contrary to defendant's repeated assertions (Br. 22, 23, 24, 25, 26), the issue of restitution was not even raised, much less litigated or decided, in the SEC action. There was no finding in that case, as defendant claims (Br. 26), that, because of defendant's disgorgement of stock to World-Wide, "no further restitution was required."

In the SEC action, Judge Vining did not order restitution. He ordered Mr. Hale to disgorge 260,000 shares of World-Wide stock, representing Hale's "wrongfully received benefits from the fraudulent swap of overvalued medallions for stock." 567 F. Supp. at 761. (emphasis supplied). This did not, however, resolve the question of compensating World-Wide for its loss from that transaction -- the function of restitution in this criminal proceeding. See 15 U.S.C. 3651, which provides that, as a condition of probation, the defendant "may be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had."

Thus, the disgorgement ordered in the SEC action against Mr. Hale is not equivalent to the restitution ordered here. Indeed, in his World-Wide opinion, Judge Vining cited SEC v. Commonwealth Securities, Inc., 574 F.2d 90 (2d Cir. 1978), in support of the point that

> the court's power to order * * * [disgorgement] extends only to the amount, with interest, by which the defendants profited from their wrongdoing.

567 F. Supp. at 761. Judge Vining's order to return 260,000 shares merely rescinded the fraudulent issuance of 300,000 shares (allowing credit for the $30,000 realized from the melting down of silver items). It did not purport to make World-Wide whole for the losses it suffered in the stock-for-medallion transaction. These losses are compensated by the restitution imposed as a condition of probation in this criminal action. 18/

Accordingly, the disgorgement ordered in the civil action cannot collaterally estop the imposition of restitution here.

2. The district court's decision to condition Mr. Hale's probation on the payment of $175,000 in restitution to World-Wide was a proper exercise of its discretion.

As appellant acknowledges (Br. 36), a district court's decisions regarding probation are "within the trial judge's broad discretion." United States

---

18/ The purpose of disgorgement in a Commission enforcement action is not to compensate the victims of the defendant's wrongful acts; disgorgement serves to deprive the wrong-doer of his ill-gotten profits, thus discouraging future violations of the securities laws. See SEC v. Blatt, 583 F.2d 1325 (5th Cir. 1978). In some cases, the disgorged profits are paid to the United States Treasury rather than being given to the defendant's victims. Where, unlike here, the victim actually is compensated from the defendant's disgorgement, the defendant would, to the extent of such compensation, not be further required to make restitution. Here, as we show, infra pp. 29-32, the disgorged shares of stock were worthless and therefore cannot offset restitution.

v. McMichael, 699 F.2d 193, 194 (4th Cir. 1983); United States v. Jones, 712 F.2d 1316, 1323 (9th Cir.), cert. denied, 104 S. Ct. 434 (1983) (Section 3651 gives court "broad discretion"). One of the conditions which a trial judge may impose upon probation is the payment of restitution, United States v. Johnson, 700 F.2d 699, 701 (11th Cir. 1983), and his determination in this regard is only to be reviewed for an abuse of discretion. See, e.g., United States v. Carson, 669 F.2d 216, 217 n.2 (5th Cir. 1982). 19/

Defendant does not contest on appeal that World-Wide suffered a loss of $175,000 at the time of the stock-for-medallions transaction. 20/ Rather, he argues that World-Wide was made whole for this loss by his return of the shares he obtained for those medallions. 21/ He claims that this is so,

---

19/ The trial court's determinations of fact may be reversed only for clear error. Anderson v. City of Bessemer City, 105 S. Ct. 1504, 1513 (1985), cited in United States v. Kuna, 760 F.2d 813 (7th Cir. 1985).

20/ As Judge Freeman observed at the sentencing hearing below (R3 at 113):

> There is ample evidence that the medallions were over-valued by $175,000.00.

In awarding restitution in this case, Judge Freeman properly relied upon the determination made in the SEC civil action that World-Wide was defrauded of $175,000 in the stock-for-medallions transaction. Under certain circumstances, courts have even allowed the amount of restitution to be established by determinations to be made in civil litigation which was yet to be completed. United States v. Barringer, 712 F.2d 60, 63 (4th Cir. 1983) (restitution ordered from a trust fund established by the court in the amount of judgment to be rendered in civil litigation between defendant and his former employer); see United States v. Savage, 440 F.2d 1237, 1239 (5th Cir. 1971) (defendant required to negotiate during next twelve months with persons having claims against him and to make restitution accordingly).

21/ As previously noted, the district court in the civil action in 1983 ordered Mr. Hale to return 260,000 shares to World-Wide. Mr. Hale complied with that order by returning to World-Wide the difference between 260,000 shares and the 195,702 shares he had returned in the "reversal" transaction in 1981 (see p.11 supra).

regardless of whether those shares were worthless at the time he returned them. His argument is premised on the contention that the only loss resulting from his fraud in obtaining 300,000 shares of World-Wide stock was the dilution in stock value suffered by the other shareholders (Br. 28-29).

This very argument was rejected by the Fifth Circuit in Hooper v. Mountain States Securities Corporation, 282 F.2d 195 (5th Cir. 1960), an action in which a corporation sued former officers who had fraudulently induced it to issue stock to them. The Court of Appeals explained the plaintiff corporation's loss as follows:

> The theory of the complaint is not that it lost 700,000 shares of stock. Rather, it lost what 700,000 shares of its stock at its then current value would have procured in the acquisition of new properties.

Id. at 208. The company in Hooper actually lost the value of 700,000 shares; thus, it would not be fully compensated by the mere return of those shares at a time when the stock had fallen in value. Id. Similarly, because World-Wide was defrauded into issuing shares to Mr. Hale in return for overvalued medallions, it lost the opportunity to exchange shares having a market value of $175,000 for assets of equivalent value. Thus, Mr. Hale's fraud caused World-Wide to lose what the shares he obtained would -- at their then value of $175,000 -- "have procured in the acquisition of new properties"; and the later return to World-Wide of worthless shares of stock did not, as Mr. Hale contends, make the company whole. As the court aptly stated in Hooper: "If -- as we very much doubt -- accountants would support any such contention as a consequence of the esoteric mysteries of the double entry system, * * * the law with its eye on reality would have to part company with such purists." Id. at 203 (citation omitted).

In support of his contention that the return of World-Wide shares was a "wash" transaction -- a return to the status quo before the fraud -- defendant relies (Br. 30-32) on the testimony of James Dykhouse, an accountant. That evidence, however, does not withstand scrutiny and clearly did not persuade the district court. See R3 at 72 ("I don't believe that for one minute, and I don't buy that argument"). Mr. Dykhouse's testimony fails to establish that the shares returned to World-Wide, either in 1981 or in 1983, were worth anything near their value when they were taken in 1979. Mr. Dykhouse, in accounting for the August 1981 reversal of Mr. Hale's 300,000 share purchase, treated the stock as having the same value that it had in 1979. (R3 at 8). He relied on a public quotation of 75 cents a share as the price at which a market maker in July 1981 was willing to sell World-Wide's shares. (R3 at 104-105). 22/ He admitted, however, that he had made no attempt to discover whether, in the latter portion of 1981 when Mr. Hale returned 195,702 shares, World-Wide's securities actually were traded (R2 at 283, Main Hurdman Report at 4). In fact, World-Wide stock did not trade at all after June 21, 1981, (R1 at 297); Mr. Hale returned his stock on August 14, 1981 (R1 at 283).

Since Mr. Dykhouse did not even investigate whether World-Wide stock was salable in 1981 -- or 1983 -- his testimony does not rebut the Government's evidence that there was no market for World-Wide securities at that time.

22/ Under the Securities Exchange Act, a market maker is required to be ready to buy or sell a limited amount of the quoted security at all times. Section 3(a)(38), 15 U.S.C. 78c(a)(38). See R1 at 297. In public quotation media, market makers signal their position as market makers by entering buy and sell quotations, known as "bid" and "ask" quotations. See generally L. Loll & J. Buckley, The Over-the-Counter Securities Markets 167, 169 (4th ed. 1981).

See R1 at 297-98. Significantly, in December 1981, due to the security's inactivity, the Boston Stock Exchange delisted World-Wide stock (SR3 at 102; R1 at 298). 23/

Thus, while Judge Vining in the SEC action had determined that World-Wide's loss from issuing the 300,000 shares, which were then trading at 75 cents, was $175,000, the Government's evidence here was that its recompense from the return of 260,000 shares, for which there was no market, was nothing. As explained to the court at sentencing, it was as if a thief had stolen a wagon of perishable fruit and returned it to the rightful owner after it had rotted (R3 at 64).

3. Appellant's additional attacks on the order of restitution are without merit.

Defendant incorrectly states (Br. 36) that the provisions of 18 U.S.C. 3579 apply to his sentence. That statute authorizes a court to order restitution as an element of a sentence. Restitution in this case was imposed, not under that statute, but rather as a condition of probation, as authorized under the Probation Act, 18 U.S.C. 3651 (R3 at 60). Thus, the guidelines for restitution in Section 3579 do not apply here.

23/ Mr. Hale was personally responsible for World-Wide stock's decline in value. The Main Hurdman Report on which defendant relies (Br. 30-32) states that between July 31, 1979 (approximately the time defendant gained control of World-Wide) and July 31, 1982, World-Wide's total assets decreased from $2,157,886 to $13,533 (Main Hurdman Report at 2). Between the time defendant gained control of World-Wide and July 1981, the number of the company's employees was reduced from 40 to 3. 567 F. Supp. at 729. Judge Vining found Mr. Hale to be the principal architect of World-Wide's eventual destruction. See World-Wide, 567 F. Supp. at 752. The trial court here, addressing Mr. Hale's counsel, stated that "this man's conduct has largely been responsible for the failure of that corporation." R3 at 72.

In addition, defendant's assertion (Br. 33-34, 39) that debts were allegedly owed him by World-Wide is irrelevent under the Probation Act, which does not permit offset in this situation. The probation statute requires restitution to be directly related to the loss caused by an act for which the defendant was convicted. See United States v. Johnson, 700 F.2d at 701; United States v. McMichael, 699 F.2d at 195. In any event, even if it were proper for the district court to consider an offset relating to matters outside the charges in the indictment, Judge Freeman was entitled to reject Mr. Hale's claim that he had made loans to World-Wide. The existence of those loans was supported only by Mr. Hale's own testimony -- the testimony of a person who was convicted of perjury in this proceeding. Having observed Mr. Hale's testimony, Judge Freeman was entitled to disbelieve it in entering his order of restitution. See United States v. Grayson, 438 U.S. 41 (1978).

Nor can defendant draw support for the existence of these loans from Mr. Dykhouse's report. Contrary to his assertion (Br. 30), the report was not an audit; in fact, as both the report and its author stated, a full audit of World-Wide was impossible under the circumstances, due to World-Wide's lack of documentation and lack of a certified audit for the prior year (R3 at 18, 103, 105-106). The report itself necessarily relies in many instances on Mr. Hale's own oral or written claimed substantiation, without any independent sources of proof such as executed promissory notes, particularly with regard to Mr. Hale's so-called "loans" to World-Wide. See, e.g., R3 at 101-102; notes to Exhibit C of the Main, Hurdman report; World-Wide, 567 F. Supp. at 739. 24/

24/ In light of the inadequacy of Mr. Dykhouse's report, Judge Freeman also properly disregarded comments by the current majority shareholder of World-Wide based on that report. See R3 at 53.

III. THE DOCTRINE OF PROSECUTORIAL VINDICTIVENESS DOES NOT PRECLUDE A CRIMINAL PROSECUTION FOLLOWING AN SEC CIVIL ENFORCEMENT ACTION; DEFENDANT HAS NOT RAISED A PRESUMPTION OF PROSECUTORIAL VINDICTIVENESS AND IS NOT ENTITLED TO AN EVIDENTIARY HEARING.

Defendant argues (Br. 43-49) that, because he was criminally prosecuted after the SEC litigated a civil action against him, rather than before or contemporaneously with the civil action, he may have been the victim of prosecutorial vindictiveness stemming from his having forced the SEC to go to trial in its case. He therefore seeks dismissal of the criminal case. We note at the outset that this argument is raised for the first time on appeal and accordingly need not be considered by this Court. See discussion, supra page 23. 25/ In any event, defendant's claims are legally meritless and factually spurious.

This Court has recognized that as a general rule, the courts are not free to interfere with the prosecuting officer's discretionary decision to prosecute crime. United States v. Spence, 719 F.2d 358, 361 (11th Cir. 1983). The Due Process Clause of the Constitution may, however, limit the discretion of the United States Attorney in certain circumstances in reindicting a criminal defendant. See Blackledge v. Perry, 417 U.S. 21, 25-26 (1974);

25/ Defendant argues that he did not assert his claim of prosecutorial vindictiveness at the trial level because he was unaware of the supposed antipathy of the Commission's trial counsel until learning of the latter's alleged "gleeful" reaction to the jury's guilty verdict and to the district court's imposition of sentence. No explanation is offered, however, as to why defendant failed to bring this matter to the attention of the district judge, whether by a post-trial motion for judgment of acquittal under Fed. R. Crim. P. 29, or new trial under Fed. R. Crim. P. 33, or by any other means. Nor does defendant indicate why neither he nor his counsel apprised the district court before sentencing, pursuant to their rights of allocution under Fed. R. Crim. P. 32(a)(1), of the alleged prosecutorial vindictiveness.

United States v. Taylor, 749 F.2d 1511, 1513 (11th Cir. 1985). In particular, reindictment or retrial of a defendant on more serious charges after his exercise of a procedural right in a prior criminal matter — e.g., a successful appeal by the defendant -- may create a presumption of vindictive prosecution that, if not dispelled by the government, constitutes a due process violation. See United States v. Mays, 738 F.2d 1188, 1189-90 (11th Cir. 1984).

In United States v. Goodwin, 457 U.S 368 (1982), the Supreme Court outlined the rationale for presuming vindictiveness. Noting that "the Due Process Clause is not offended by all possibilities of increased punishment," the Court articulated two factors that, if present, may demonstrate a "realistic likelihood of 'vindictiveness.'" Id. at 384. First, given that the prosecutor generally will be in a position to anticipate, at the time of the original criminal proceeding, the full scope of prosecution for a particular infraction, increased charges on retrial are unlikely to be founded on "'new information or a different approach to prosecutorial duty,'" as opposed to vindictiveness. United States v. Spence, 719 F.2d at 362 (quoting from United States v. Goodwin, 457 U.S. at 381). Second, "institutional biases inherent in the judicial system" militate against the readjudication of issues already resolved. United States v. Goodwin, 457 U.S. at 375-76. See United States v. Spence, 719 F.2d at 362.

The first of the two assumptions identified by the Supreme Court as integral to the creation of a presumption of vindictiveness is the ability of the federal prosecutor to foresee and to bring in the initial proceeding the entire panoply of charges that may be derived from one or more related instances of misconduct. See United States v. Goodwin, 457 U.S. at 381. This assumption,

and hence the doctrine itself, are not apposite to a situation where two separate law enforcement agencies are statutorily empowered to institute separate criminal and civil enforcement proceedings. 26/ The SEC in bringing a civil action, unlike a federal prosecutor who has commenced a criminal proceeding, is not necessarily in a position to assess the full extent to which criminal sanctions might be appropriate. More important, even if the SEC were able to evaluate the scope of potential criminal liability at the outset, the SEC is without authority to act upon that evaluation by bringing any criminal charges that may arise from the defendant's conduct. Only the Department of Justice may institute criminal prosecutions for violations of the federal securities laws. 27/

In addition, there is no inherent bias in the judicial system that disfavors a criminal prosecution for willful violation of the federal securities laws following the completion of a civil action brought by the SEC to enforce those laws. To the contrary, it is well-established that simultaneous and successive civil and criminal actions based on the same set of

---

26/ Ultimate authority for criminal enforcement of the federal securities laws is vested in the Attorney General. See 28 U.S.C. 516; In re Persico, 522 F.2d 41, 54 (2d Cir. 1975); 11A Gadsby, Business Organizations -- Securities Regulation, Federal Securities Exchange Act, Section 9.04 (1984). Conversely, the SEC has responsibility for the conduct of all civil ligitation under these laws. See, e.g., Section 21(d) of the Securities Exchange Act, 15 U.S.C. 78u (d); SEC v. Collier, 76 F.2d 939 (2d Cir. 1935); Mathews, Criminal Prosecutions Under the Federal Securities Laws and Related Statutes: The Nature and Development Of SEC Criminal Cases, 39 Geo. Wash. L. Rev. 901, 904 (1971).

27/ See SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1376-77 (D.C. Cir.) (en banc), cert. denied, 449 U.S. 993 (1980), for a discussion of the respective roles of the SEC and the Department of Justice in enforcing the federal securities laws.

operative facts are entirely proper. 28/ In essence, defendant's contention merely reiterates his argument that the government must elect between civil and criminal enforcement of the federal securities laws. As earlier demonstrated, supra pages 25-26, this argument is plainly without merit.

In any event, defendant has presented no evidence that would support a presumption of vindictiveness, even if the doctrine were relevant here. Vindictiveness may be presumed only if the circumstances surrounding the prosecutorial decision-making process reflect either "actual vindictiveness or [the defendant's] realistic fear of vindictiveness." United States v. Taylor, 749 F.2d at 1513 (citing United States v. Spence, 719 F.2d at 361-62). The circumstances in this case give rise to no such inference. Defendant does not even contend that anyone in the United States Attorney's Office had an improper motive in bringing this action. Rather, he makes an entirely unsubstantiated claim (Br. 44) that "the attorney for the SEC, subsequent to the civil case, referred the case to the Justice Department for further criminal prosecution."

28/ See United States v. Kordel, 397 U.S. 1, 11 (1970); Standard Sanitary Manufacturing Co. v. United States, 226 U.S. 20, 52 (1912). This principle has been recognized as directly applicable in the context of concurrent or successive civil and criminal proceedings brought, respectively, by the SEC and the Department of Justice. See, e.g., SEC v. First Financial Group, 657 F.2d 660, 666-67 (5th Cir. 1981); SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1376-77 (D.C. Cir.) (en banc), cert. denied, 449 U.S. 993 (1980); United States v. Lieberman, 608 F.2d 889, 903 (1st Cir.), cert. denied, 444 U.S. 1019 (1980); United States v. Wencke, 604 F.2d 607, 610-11 (9th Cir. 1979); United States v. Fields, 592 F.2d 638, 643-44 (2d Cir. 1978), cert. denied, 442 U.S. 917 (1979); United States v. Naftalin, 534 F.2d 770, 774 (8th Cir.), cert. denied, 429 U.S. 827 (1976); SEC v. Randolph, 564 F. Supp. 137, 143 (N.D. Cal. 1983); SEC v. Musella, Fed. Sec. L. Rep. (CCH) ¶99,156 at 95,581 (S.D.N.Y. 1983). See also Affidavit of Michael K. Wolensky, Regional Administrator of the SEC's Atlanta Regional Office, R1 at 282 (explaining that consistent with the SEC's practice nation-wide, civil injunctions have been obtained by the SEC's Atlanta Regional Office over the last three years in virtually all, if not all, cases where criminal prosecution has also resulted, and that "[t]here is nothing unusual in both civil and criminal actions being pursued as a result of Securities and Exchange Commission investigations").

In fact, this allegation is untrue. Had appellant urged his claim in the lower court, the government would have demonstrated that the Commission had not referred, formally or informally, this case to the Department of Justice for evaluation and possible criminal prosecution. See Sections 21(d) and 32(a) of the Securities Exchange Act, 15 U.S.C. 78u(d) and 78ff(a). Instead, the U.S. Attorney's Office for the Northern District of Georgia determined that a grand jury investigation was warranted upon consideration of testimonal and documentary evidence presented during the trial of the Commission's civil enforcement case, all of which was then a matter of public record. The grand jury did not begin its investigation until 1984, well after Judge Vining's issuance of an order resolving the Commission's case on the merits in May 1983. World-Wide, 567 F. Supp. 724. As just discussed, the decision to charge defendant criminally following the entry of an injunction against him in the SEC's action is consistent with the governing law and actual practice. See supra at pages 36-37 and note 28.

Even assuming that a referral by the SEC had occurred, defendant has not made a colorable claim that he could reasonably have believed that the referral would have been in response to his exercise of a legally protected right. Nor has he pointed to any evidence that would tend to show that the alleged referral would, in fact, have been improperly motivated. At best, defendant makes vague and unsubstantiated claims (Br. 46) that an attorney for the SEC sat in the courtroom throughout the criminal trial, and bore a grudge against him for exercising his right to litigate the Commission's civil action. 29/

29/ Defendant incorrectly states (Br. 44) that the SEC attorney who tried the SEC's enforcement action against him sat in the courtroom throughout the criminal trial. If the government had been permitted to offer evidence on this point, it would have shown that no SEC attorney connected with the civil case was present in the courthouse at any time during the

(footnote continued)

Even in the case of successive criminal prosecutions, however, the Supreme Court has repeatedly stated that "the mere fact that a defendant refuses to plead guilty and forces the government to prove its case is insufficient to warrant a presumption that subsequent changes in the charging decision are unjustified." United States v. Goodwin, 457 U.S. at 382-83 (citing Bordenkircher v. Hayes, 434 U.S. 357 (1978)). A defendant is expected to urge procedural rights, such as the right to a trial, that will inevitably impose some burden on the prosecutor. Id. at 381. Because the invocation of such rights is characteristic of the adversarial process in which our criminal justice system operates, it cannot reasonably be assumed that the prosecutor will respond vindictively. Id. It is similarly unrealistic to assume that the probable response of SEC attorneys to a defendant's election to go to trial in an enforcement action would be to seek to penalize him by attempting to induce a criminal prosecution. A remand for an evidentiary hearing on this matter, as requested by defendant (Br. 51), is therefore unwarranted, and his convictions should be affirmed in all respects.

29/ (footnote continued)

trial or the jury's return of verdict. Instead, it was an SEC investigator, not an SEC attorney, who was in attendance at the criminal trial. The SEC's attorney who handled the SEC's enforcement action did assist the Assistant U.S. Attorney during the sentencing hearing, at the specific request of the presiding judge. Defendant also makes the unfounded assertion (Br. 45) that an SEC attorney was observed by unnamed witnesses "virtually beside himself with glee at the defeat suffered by Appellant." This assertion has no record support, and in fact the government would have shown that no SEC personnel displayed such emotion. In any event, the mere presence of an SEC attorney at the criminal trial of a securities violator against whom the SEC has prevailed in a prior enforcement action will not support an inference of vindictiveness. Nor, for that matter, would the expression by the SEC attorney or other SEC personnel of satisfaction with the outcome of the criminal case constitute evidence of animosity toward the defendant, especially none that would relate back to the time the criminal prosecution was initiated.

CONCLUSION

For the foregoing reasons, the convictions of the defendant should be affirmed.

Respectfully submitted,

LARRY D. THOMPSON
United States Attorney

GALE MCKENZIE
Assistant United States Attorney

Of Counsel
JACOB H. STILLMAN
ROBERT MILLS
ANNE H. SULLIVAN
CATHERINE T. DIXON

Securities and Exchange
Commission

JULY 1985

CERTIFICATE OF SERVICE

This is to certify that I have this day served by hand upon the person listed below a copy of the attached document :

Seth Kirschenbaum
Rhonda A. Brofman
Davis, Brofman, Zipperman, & Kirschenbaum
918 Ponce de Leon Avenue, N.E.
Atlanta, Georgia 30306

Dated: This ___ day of July, 1985

GALE McKENZIE
Assistant United States Attorney