No. 22-6121
No. 23-5561

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee,

v.

DOYCE G. BARNES,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

BRIEF FOR APPELLANT DOYCE G. BARNES

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STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument. Appellant was convicted of white-collar criminal offenses after a lengthy trial with novel and erroneous jury instructions. The errors raised by Barnes are compound and extreme, and each warrant reversible. Given the size of the trial-court record and the complexity of the legal issues presented, oral argument will aid the Court.

As the Government recognizes, pyramid scheme cases are rarely tried, and it is even rarer where the Government tries a "pyramid scheme" case after admitting there is no risk of market saturation. Given the substantial evidence of reliance on false evidence, oral argument is warranted to discuss the relief that Barnes should receive.

STATEMENT OF JURISDICTION

The District Court had jurisdiction pursuant to 28 U.S.C. § 3231. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. Appellant timely filed his notice of appeal after the District Court entered the criminal judgment against him.

STATEMENT OF THE ISSUES

1. Whether the Emperor program is a fraudulent pyramid scheme.
2. Whether *Percoco* requires reversal.
3. Whether the court's definition of pyramid scheme was incorrect.
4. Whether the court erred by not agreeing to give instructions on affirmative defenses raised by Barnes.
5. Whether the court erred because the Court lacks jurisdiction over an indictment which fails to specify an intent to defraud.
6. Whether the court erred in its jury instructions.
7. Whether the government violated *Brady* or *Jencks*.
8. Whether Keep's opinions should have been excluded.
9. Whether Keep should have been prevented from commenting on credibility and the declarants' truthfulness.
10. Whether the Government's reliance on false evidence warrants reversal.
11. Whether the Government relied on inadmissible exhibits and hearsay.
12. Whether the court wrongfully excluded Manning Warren.
13. Whether an Emperor package was a security.
14. Whether the sentencing and restitution were correct.
15. Whether the court erred in how it answered the jury question.
16. Whether the Government conceded that the Emperor program was not a pyramid scheme.

STATEMENT OF THE CASE

Finance Ventures ("Finance Ventures" or "I2G"), a business created, controlled, and operated by Rick Maike, started business in 2013 with an innovative business plan—use network marketing to distribute digital products and drive overseas traffic to an online casino. Many strongly believed in the potential of I2G. Ultimately, the business failed because of unanticipated events that were unrelated to the criminal charges in this case. For the reasons that follow, the conspiracy convictions of Doyce Barnes must be reversed.

In early 2013, Maike was in the process of formulating an innovative business plan.[1] He believed that the worldwide markets of online digital products and gambling were growing.[2] He also believed that network marketing arising from a multi-level marketing company ("MLM") would provide an effective avenue to distribute these products and drive traffic to an on-line casino.[3] Maike had a history of developing large networks of individuals internationally and believed the

[1] U.S. Ex.503b, I2G Business Plan.
[2] U.S. Ex.107a & 503b.
[3] U.S. Ex.503b, I2G Business Plan.

distribution of digital products would avoid problems that arose when MLMs distributed physical products across borders.

To implement the plan, Maike needed an MLM, an online casino, and products. In February 2013, Maike and his wife, Angela Leonard, with the help of a Kentucky accountant named Robb Flener, formed Finance Ventures.[4] The corporate records listed Leonard as the owner of the company. Despite suggestions by Maike that Barnes was an owner of Finance Ventures, the corporate records never reflected this. Flener controlled the company finances; he wrote every check and deposited every payment.[5] Flener never included anyone other than Maike and Leonard on communications about company money.[6] Flener believed that Maike's plan "sounded good at the time."[7] Flener never believed Maike was doing anything improper and would not have been involved if he did.[8]

To implement his network marketing strategy, Maike developed a compensation system that is typical for MLMs – a binary compensation plan. The plan provided for compensation for bringing other participants

[4] U.S. Ex.170 & 171.
[5] R.670, #7158.
[6] *Id.* at 7257.
[7] *Id.*
[8] *Id.*

("IBOs") to I2G and for the sale of products (e.g. chips for the on-line casino) to non-IBOs. He turned to Jerry Reynolds, the owner of a software company that specialized in creating systems for MLMs. Reynolds had worked with over one thousand MLMs and many of them used a binary compensation system.[9] Reynolds translated Maike's compensation plan into a computer program so that I2G, through Angela Leonard, could administer the compensation plan.[10] Reynolds, a man of integrity, "would not work with [a company] that was a pyramid scheme."[11] Reynolds testified he would not have been involved if he believed the compensation plan was not feasible or that the company was dishonest.[12] If he ever thought Maike was doing anything incorrect, Reynolds would have refused to work with him.[13]

Maike also located a company to provide I2G with an online casino. In June 2013, a contract was entered with Plus Five Gaming, a Malta based gambling company, for the creation of an overseas online casino.[14]

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[9] R.498, #4184.
[10] R.498, #4179.
[11] R. 498, #4183.
[12] *Id.*
[13] *Id.*
[14] US Ex.100; US Ex.53.

Under the terms of the agreement, Plus Five Gaming provided an online casino that players outside the United States could use to gamble, while Finance Ventures would pay Plus Five Gaming a minimum 3,000 Euro per month for use of the casino.[15] The casino's business model was straightforward: the casino profited when gamblers lost money. The contract provided that each month, Finance Ventures would receive 70% of any of the casino's monthly profits, and Plus Five Gaming would receive 30%.[16] Profits earned by Finance Ventures would first be applied to pay the monthly fee that Finance Ventures owed Plus Five Gaming.[17]

Maike also pursued the plan to provide innovative digital products. In 2013, Richard Anzalone, who Maike knew from involvement in MLMs, connected Maike with a California software developer named Rocky Wright.[18] Wright had a company named Qubeey that had developed an innovative product called the "Touch." Anzalone's wife, Susan, who was computer savvy, was impressed with the product.[19] Other sophisticated investors, with no connection to I2G, were impressed with the technology.

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[15] U.S. Ex.100.
[16] U.S. Ex.100.
[17] U.S. Ex.100.
[18] R.465, #3583.
[19] R.505, #4689.

For example, Jon Paul Javellana, a high net worth financial adviser, had a client invest $10,000,000 in the technology prior to I2G's involvement.[20] Javellana believed the technology was revolutionary.[21] Michael Scott Bennett, a private equity investor in software companies, considered investing in the Touch prior to I2G's involvement.[22] He had an engineer review the technology and believed moving forward was worthwhile.[23] Bennett was impressed with the technology but realized it would soon have to be updated.[24] Bennett ultimately did not invest but became aware of Maike who thought the Touch would be very valuable to I2G.[25]

Despite the innovative nature of the Touch, Rocky Wright had not had luck distributing it. Maike believed that an MLM network would provide a valuable avenue to distribute the technology. Qubeey licensed the technology to I2G and permitted it to be distributed as the I2G touch. Finance Ventures invested hundreds of thousands of dollars to improve

[20] R.689, #9272.
[21] *Id.*. #9265.
[22] *Id.*, #9209.
[23] *Id.*, #9210.
[24] *Id.*, #9216-17.
[25] *Id.*, #9217.

and add features to the Touch. Based on I2G's payments, many improvements were made to the Touch.[26]

The version of the I2G Touch that was distributed to I2G IBOs was unique for the time. In 2013, the I2G Touch software "was a social media management platform that allowed a business owner or user to connect their social media accounts in one place and manage them all from one place."[27] It had unique features that other platforms did not have.[28] For example, it had web-conferencing capabilities (essentially Zoom) and audio and video telephone technology (essentially Skype) that was ahead of its time and not offered by other platforms in 2013.[29] It also had file transfer capabilities.[30] Not only did the I2G Touch aggregate social media accounts, it also had an internal social network that was built into the platform, which "was very unique."[31] Finally, it had the ability for individuals "to live stream" and "broadcast a video stream to the people

[26] R.684, #8867.
[27] R.691, #9781. This is the very thing X, formerly Twitter, is trying to do ten years later.
[28] R.691, #9781.
[29] R.691, #9782.
[30] R.691, #9790.
[31] R.691, #9782.

on this particular network."[32] The I2G Touch offered this feature 2-3 years ahead of the marketplace and had a significant competitor advantage.[33] The undisputed testimony was that this feature left an expert "very impressed" and it was a "powerful" feature because it "was at least a couple of years ahead."[34] A company that had technology with less impressive features was "[v]ery successful" and has been valued "north of a billion dollars."[35] The I2G Touch was a "unicorn software" for a multi-level marketing company.[36]

The I2G Touch worked and was used but like all emerging technology experienced glitches.[37] The I2G's functionality was demonstrated at trial through videos.[38] Videos were created to instruct on use of the Touch.[39] The investments in the I2G Touch included both money and significant time.[40]

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[32] R.691, #9783.
[33] R.691, #9783.
[34] R.691, #9795.
[35] R.691, #9801.
[36] R.691, #9801.
[37] R.684, #8869; *see also id.* at #8868.
[38] R.691, #9783; Barnes Ex. 5; R.505, #4791; U.S. Ex.153.
[39] R.691, #9790.
[40] R.691, #9790.

The I2G Plan caught fire in the MLM world. Anzalone, experienced with MLMs and the Government's cooperating witness who entered a guilty plea, testified that neither he nor other participants believed that anything was improper with I2G's business plan.

I2G plan involved an Emperor category. 5,000 Emperor packages were available for sale around the world. The cost of an Emperor package was $5,000. The proceeds of Emperor sales were paid to Finance Ventures and the person who sold the Emperor package would receive a commission (as would people in the seller's upline).[41] In exchange for the $5,000, a purchaser of an Emperor package received three things: (1) the right to use current and future I2G products; (2) the right to participate in the I2G compensation plan; and (3) a right to receive a portion of 50% of any casino profits that I2G received pursuant to the Plus Five Gaming contract.[42] This case concerns Emperor packages.

Doyce Barnes is a 74-year old retired jeweler who has lived his entire life in Goldsboro, North Carolina. Barnes is married, a father of four, a grandfather of ten, and a great grandfather of two. He is "a very

[41] R.682, 8530.
[42] US Exhibit 107a; US Exhibit 107b.

loving caring father."[43] He is a respected member of his community as a business owner, an involved and founding member of his church, and a family man.[44] Throughout his career, he has been an entrepreneur. "He started many businesses with the sole purpose of employing people," including a restaurant and a jewelry business.[45] He built his jewelry business on honesty and integrity.[46]

His entrepreneurial spirit resulted in his involvement in various MLMs. At times, he enjoyed success and developed an ability to create large networks of people, especially in Asia. As a result of his involvement in MLMs, Barnes met Maike. Maike was respected in the MLM industry, and Barnes viewed him favorably.

In 2013, Barnes was retired from involvement as an MLM distributor but communicated with Maike about the I2G plan. Barnes "is very technology challenged" and "knows nothing about computers or technology."[47] "To this day… the only thing he can do is turn on an Ipad

[43] R.689, Stephen Barnes, #9285.
[44] *Id.* at #9285-86.
[45] *Id.* at #9286-9287.
[46] *Id.* at #9286.
[47] *Id.* at #9287.

and play solitaire."[48] As such, he gave the I2G Touch to his son, Stephen Barnes, to check out the software.[49] Stephen thought it had "real value to it," and he told his dad "it was a very valuable product."[50] Stephen Barnes was excited about the product, and Barnes was happy that he found something that would make his son's life easier and that his son could use personally and in the business context.[51]

As a result in his belief in the business plan, Barnes agreed to work with Maike as an owner but not a distributor. Maike said that "the attorneys were onboard[,]" and it "sounded like [Maike] had all his ducks in a row."[52] Barnes helped with the company in the early stages but progressively was less involved because of health problems.[53] Barnes did not participate in I2G's compensation plan.[54] Barnes did not recruit for commissions.[55] Barnes did not have access to as much information as other people in I2G.[56]

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[48] *Id.*
[49] *Id.* at #9288.
[50] *Id.* at #9289.
[51] *Id.* at #9290.
[52] *Id.*
[53] R.505, #4758; R.689, #9294.
[54] R.487, #3962.
[55] *Id.*
[56] R.669, #7032.

At first, the I2G plan showed promise. Many Emperor packages were sold, which enabled the company to fund its plan of obtaining additional digital products to provide IBOs and customers. In addition to paying hundreds of thousands of dollars to improve the Touch, I2G paid $250,000 for a license for another Rocky Wright product called Sonstergram.[57] Songstergram was a social media product where users could create, edit and share their own music videos or unique content.[58] Emperors would have the ability to distribute the technology to customers and make money when customers used the product to make videos.[59] Emperors would be compensated through the I2G compensation plan for driving customers to Songstergram.[60]

This generated great excitement, and Wright demonstrated the product at an IBO gathering. Catrina Dugger, U.S. Navy Reservist, started with I2G as a Novice player with plans to upgrade to an Emperor

[57] R.670, #7292.
[58] R.505, #4720.
[59] *Id.*
[60] R.504, #4313.

package. She loved Songstergram, and making music videos.[61] Government witness Eric Wiksten was also excited about the product.[62]

Other products were added in 2014, including a travel product, fantasy sports, and a video game application called Boardwalk.[63] After Rocky Wright, proved to be an unreliable business partner and the I2G Touch was no longer available, Finance Ventures paid to have an improved product created, which was named the G1E Touch.[64] The consistent testimony was that the G1E Touch was a fine product.

I2G's unique product was the casino. I2G recognized that one of the most difficult issues in the industry was attracting new customers at a reasonable cost.[65] Thus, I2G paid Emperors through its compensation plan to refer individuals to the casino.[66]

The I2G products generated revenue. Fantasy sports generated revenue for IBOs.[67] In the short time the casino operated, it had $1.3 million in retail sales. I2G had over 2,000 transactions involving the

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[61] R.690, #9468.
[62] R.683, #8673; R. 505, #4772.
[63] R.505, #4583; R.690, #9467.
[64] *Id.* at #4583, 4671; Barnes Exhibit 6.
[65] *Id.* at 6.
[66] *Id.* at 5.
[67] U.S. Ex. 101b.

casino. This activity resulted in compensation to Emperors who engaged in sales activities through the pay plan. The ability to earn commissions from customer play and casino chip transactions made I2G a unique MLM.

Non-U.S. adults played in the online casino.[68] In the early months, use of the casino progressively increased, and by April and May 2014, I2G's share of the monthly casino profits exceeded the monthly fee owed to Plus-Fine Gaming.[69] The only three people who had access to the monthly casino statements and the casino financial profits were Maike, Leonard, and Flener.[70] Barnes never had access to this information.

At the time the casino began to be profitable, however, I2G began to experience significant problems with U.S. banks. While casino access was properly limited to legal overseas markets, the global promotion of I2G alarmed banks and led to the closure of I2G's merchant accounts. and five bank accounts.[71] Based on a call Maike had with I2G's lawyer and compliance officer, I2G decided to rebrand to G1E to ensure that

[68] R.670, #7259.
[69] R.670, #7261.
[70] R.670, #7258.
[71] R.670, #7261.

future accounts were not closed, which were vital to I2G's business. The goal was to avoid the business problems that were resulting from the public connection between I2G and the on-line casino. As such, I2G had to adapt; even though, it was complying with domestic bank regulations.

Based on the switch, I2G had to abandon what had made the casino start to earn a profit—tying I2G's network marketing to driving casino traffic. While the bank problems arose, Rocky Wright turned out to be unreliable, and this created issues for I2G related to the Songstergram and other I2G products. This resulted in dissatisfaction with many IBOs who were attracted to I2G because of the original plan. An online campaign of dissatisfied IBOs results and eventually complaints resulted in a federal investigation. This case resulted.

Despite the unfortunate demise of I2G, there was no evidence that Barnes ever knew of any misrepresentation to any purchaser of an Emperor package. Even the Government's star witness, Anzalone, testified that he did not believe that Barnes ever believed that I2G was doing anything wrong.[72]

[72] R.505, #4760.

On June 14, 2017, the Government indicted Maike, Angela Leonard (Maike's wife), Barnes, Richard Anzalone, Faraday Hosseinipour, Dennis Dvorin, and Syn on one count of conspiracy to commit mail fraud.[73] The indictment generally alleged:

> defendants...engaged in a $25 million dollar "pyramid" scheme, operating under the name…I2G, by representing that investors would receive a return on investment based upon an on-line internet gaming site called i2gcasino.com.

The indictment claimed that conspirators "falsely represented that… I2G[] was generating massive profits from its on-line internet gambling site and that the public could share in such profits through the purchase of a $5,000 'Emperor' position." The indictment did not allege that Barnes acted with an intent to defraud.

Barnes moved to dismiss because the indictment did not allege that Barnes acted with the requisite "criminal intent."[74] The court denied the motion."[75]

On July 11, 2018, the Government filed a superseding indictment with no new count against Barnes. On November 13, 2019, the

[73] R.1, Indictment.
[74] R.78-1, Motion to Dismiss.
[75] R.88.

Government filed a second superseding indictment ("Indictment"). The Indictment still did not allege that Barnes acted with the requisite criminal intent. It also included a new conspiracy to commit securities fraud (Count 13).

On March 30, 2018, the Government disclosed a purported expert on MLMs, William Keep. On May 31, 2018, Barnes disclosed law professor Manning Warren as an expert witness. On May 6, 2019, Barnes filed a motion to exclude certain opinions of Keep on pyramid schemes.[76]

On November 18, 2019 the court entered an order denying the motion to exclude Keep.[77]

On March 23, 2020, Barnes filed motions in limine.[78] The court overruled the motions.[79]

Barnes moved to dismiss Count 13 for failure to identify any overt act. The court denied the motion and held that the Indictment alleged fraud that resulted in the purchase of Emperor packages by twenty individuals listed in the Indictment.

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[76] R.168, Motion to Exclude.
[77] R.238, Order Denying Motion to Exclude.
[78] R.306, Motion in Limine; R.308, Maike's Motion in Limine.
[79] R.347, Order Denying Motions in Limine.

On April 13, 2022, the Government moved to exclude Manning Warren from rebutting Keep's testimony on pyramid schemes.[80] On July 11, 2022—one day before trial—the court granted the motion holding that Warren was not minimally qualified to testify on pyramid schemes. This resulted in a trial without any for Barnes on the pyramid scheme issue despite the fact that Barnes disclosed Warren more than four years before the trial began.[81]

The trial occurred from July 12, 2023 to September 7, 2023. The court, with the Government's consent, held that "One objection is an objection for all."[82]

During its case-in-chief, the Government presented false and manipulated evidence. Jerry Reynolds possesses a database that tracked every financial transaction for I2G that went through his system.[83] He testified that he set it up "to always track every penny that goes through the system."[84] The Government met with Reynolds several times.[85] The

[80] R.381, Motion to Exclude Warren.
[81] R.381-1, Defendants' Expert Report, #2931.
[82] R.700, #10457.
[83] R.497, #4064.
[84] *Id.*
[85] R.498, #4217.

Government subpoenaed spreadsheets from Reynolds, and he created them based on the Government's subpoena.[86] Specifically, Reynolds "pull[ed] and extract[ed] data from the database and then loaded it into a spreadsheet" based on "queries" that he ran against the data.[87]

The Government had Reynolds testify that 101i showed all gains and losses and labeled it "participant gain-loss."[88] But the Government, however, had Reynolds filter out commissions earned, and it significantly overstated losses and understated gains.[89] The Government then had Keep opine that 96% of participants lost money, which makes it a pyramid scheme.[90] This was higher than the eighty-five to ninety percent of participants who Keep testified typically lose money in all multi-level marketing companies.[91] However, that calculation was based on false testimony and false, manipulated data.[92] The Government relied on Keep's opinion and the false evidence throughout the trial.

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[86] R.498, #4209, 4217.
[87] R.498, #4210.
[88] R.498, #4169-71.
[89] R.721-2, #11428.
[90] R.487, #3876–78; R.498, #4163
[91] *Id.* at #3925.
[92] R.721-2, #11428; R.663, #6549–6552, 6570, 6576; R.721-2, #11430; Exhibit 3 to Declaration, CD.

At the close of the Government's proof, Barnes moved for judgment of acquittal, and at the close of all proof, Barnes again moved for judgment of acquittal. Barnes also moved to dismiss the Indictment based on a *Brady* violation.

On September 7, 2022, the jury convicted Barnes on conspiracy to commit mail fraud and conspiracy to commit securities fraud.[93] Barnes moved for a judgment of acquittal and a new trial.

The court denied the motions for acquittal and new trial of Barnes and Maike.[94]

The court ultimately imposed a sentence of 48 months and imposed a judgment of restitution against Barnes in the amount of $3,923,167.10.

LEGAL STANDARD

The Court reviews "'*de novo* a challenge to the sufficiency of the evidence supporting a criminal conviction.'" *U.S. v. Pritchett*, 749 F.3d 417, 430 (6th Cir. 2014). The Court reviews "evidentiary rulings for an abuse of discretion." *Id.*

[93] R.553, Jury Verdict.
[94] R.601, Order Denying Barnes and Maike's Motions for Acquittal and New Trial, #5756.

"[W]hether a statement is hearsay is a legal question that we review de novo." *U.S. v. Porter*, 886 F.3d 562, 566 (6th Cir. 2018).

The Court reviews "a properly preserved objection to a jury instruction by determining 'whether the charge, taken as a whole, fairly and adequately submits the issues and applicable law to the jury.'" *U.S. v. Blood*, 435 F.3d 612, 623 (6th Cir. 2006). "[A] jury instruction alleged to be faulty on a question of law is reviewed de novo," and the Court "will reverse a judgment where the jury instruction 'fails accurately to reflect the law.'" *Id.*

When a court refuses to give a requested instruction, it is reversible "if that instruction is (1) a correct statement of the law, (2) not substantially covered by the charge actually delivered to the jury, and (3) concerns a point so important in the trial that the failure to give it substantially impairs the defendant's defense." *United States v. Williams*, 952 F.2d 1504, 1512 (6th Cir. 1991).

"[B]efore an appellate court can correct an error not raised at trial, there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'" *Johnson v. U.S.*, 520 U.S. 461, 466-67 (1997).

For cumulative error, a defendant "'must show that the combined effect of individually harmless errors was so prejudicial as to render [the] trial fundamentally unfair.'" *U.S. v. Eaton*, 784 F.3d 298, 311 (6th Cir. 2015).

"A court's factual findings in relation to the application of Sentencing Guidelines are subject to a deferential 'clearly erroneous' standard of review. Legal conclusions…however, are reviewed *de novo*" *United States v. Latouf*, 132 F.2d 320, 331 (6th Cir. 1997).

"The amount of restitution ordered is reviewed under the abuse of discretion standard." *United States v. Johnson*, 440 F.3d 832, 849 (6th Cir. 2006).

SUMMARY OF THE ARGUMENT

The Government alleged that the Emperor program was a pyramid scheme that involved misrepresentations to purchasers of Emperor packages. The conviction must be reversed for multiple reasons.

A pyramid scheme is a plan that it is doomed to fail because it is dependent on endless recruiting unrelated to sales to ultimate users. As a matter of law, the Emperor program was not a pyramid scheme. In fact,

the Government conceded that market saturation was not at issue. I2G's failure was not predestined.

The Government relied on the definition of pyramid scheme in *U.S. v. Gold Unlimited, Inc.*, 177 F.3d 472, 475 (6th Cir. 1999) ("*Gold*"), to pursue its charges. However, *Percoco v. United States*, 143 S. Ct. 1130, 1131 (2023), recently held that using a previously unclear definition of a scheme to defraud in a jury instruction is subject to the same constitutional restrictions as statutes. *Percoco* requires reversal.

The instructions were also incorrect. The definition of "pyramid scheme" was an incorrect statement of law. Further, they omitted a critical affirmative defense that the evidence supported, and they improperly instructed the jury that its definition of pyramid scheme (which omitted any criminal intent) automatically constituted a scheme to defraud.

The court failed to require the elements of intent to defraud in the conspiracy counts. The error began in the indictment, which failed to include the essential element of intent to defraud in the conspiracy to commit mail fraud count. The court refused to include the element of intent to defraud in the conspiracy instruction. The court gave an

erroneous good-faith instruction that imposed a heightened good-faith standard that did not make sense in this case. The court violated the current Supreme Court requirement that a defendant both cheat and deceive to be convicted of fraud.

The Government deprived Barnes of a fair trial by intentionally introducing false evidence and by violating *Brady* and *Jencks*. The court permitted the Government to introduce evidence of a co-conspirator's guilty plea as substantive evidence of guilt and failed to give the required limiting instruction.

Errors also occurred at trial regarding expect testimony on the issue of pyramid schemes. The court failed to exclude inadmissible opinions of the Government expert and excluded the Barnes's qualified rebuttal expert. The court also permitted a misleading and prejudicial exhibit related to pyramid schemes.

The court made other evidentiary errors that infected the whole trial. The original case agent closed the Government's case-in-chief with testimony replete with inadmissible evidence.

Regarding Count 13, conspiracy to commit securities fraud, the proof established that Emperor packages were not securities as a matter

of law. The court also failed to accurately define the alleged security at issue—investment contract. The Count 13 instruction on overt acts was also legally incorrect. And the proof established a failure to prove that a charged overt act occurred within the limitations period. Finally, the court made a critical error when answering the jury question regarding the statute of limitations.

The court also made prejudicial errors in its sentencing guideline and restitution calculations.

ARGUMENT

I. THE COURT SHOULD REVERSE BECAUSE OF ERRORS RELATED TO THE ALLEGED SCHEME TO DEFRAUD.

Count 1 and 13 are conspiracy counts dependent upon the same alleged scheme to defraud. The Indictment alleges that the defendants conspired to fraudulently sell Emperor packages. The Indictment alleges that the defendants engaged in a "pyramid scheme…by representing that investors would receive a return on investment based upon an online internet gaming site called i2gcasino.com."[95]

[95] R.230, #1452.

A. Pyramid Scheme Overview.

No federal law specifically criminalizes pyramid schemes. "No clear line separates illegal pyramid schemes from legitimate multilevel marketing programs…." *Gold*, 177 F.3d at 475. "[I]t's pretty rare to have a pyramid scheme alleged and go to trial."[96]

The definition of "pyramid scheme" evolved from the civil regulatory context. "Pyramid schemes are said to be inherently fraudulent because they must eventually collapse." *Webster v. Omnitrition Int'l*, 79 F.3d 776, 781 (9th Cir. 1996). "Like chain letters, pyramid schemes may make money for those at the top of the chain or pyramid, but 'must end up disappointing those at the bottom who can find no recruits.'" *Id.* (quoting *In re Koscot Interplanetary, Inc.*, 86 F.T.C. 1106, 1181 (1975)); *Harrison v. Dean Witter Reynolds, Inc.*, 79 F.3d 609, 613 n.3 (7th Cir. 1996).

"The Federal Trade Commission has recognized that a pyramid scheme harms its participants 'by virtue of the very nature of the plan as opposed to any dishonest machinations of its perpetrators.'" *Torres v. S.G.E. Mgmt., L.L.C.*, 838 F.3d 629, 639 (5th Cir. 2016) (quoting *In re*

[96] R.692, #9993.

Koscot, 86 F.T.C. at 1182). "Participants are then harmed by the fraud involved in pyramid schemes not because of any misrepresentations, but because the ultimate collapse of the scheme, and thus harm to participants, is a direct and foreseeable consequence of such structure." *Torres*, 838 F.3d at 639-40. Critically, "those who profit from a fraudulent pyramid scheme make money *only* by virtue of the participation of downline investors" who lose money. *Id.* at 640 (emphasis in original).

"[I]t is reasonable to infer that individuals do not knowingly join pyramid schemes because (1) pyramid schemes are inherently deceptive and operate only by concealing their fraudulent nature; and (2) knowingly joining a pyramid scheme requires the individual to choose to become either a victim or a fraudster." *Id.* at 643. "Whether a multi-level marketing program is fraudulent or legitimate depends on its internal structure[,]" and "such information is not readily apparent or interpreted." *Id.* "If a scheme's illegality were apparent, the scheme would not work." *Id.*

"Some structures pose less risk of harm to investors and the public, however, and authorities permit these programs to operate even though the programs contain some elements of a pyramid scheme." *Gold*, 177

F.3d at 479-80. "All multilevels are not considered *per se* deceptive and unlawful." *State ex rel. Stratton v. Sinks*, 741 P.2d 435, 440 (N.M Ct. App. 1987); *State ex rel. Ieyoub v. Phipps*, 634 So. 2d 51, 53 (La. Ct. App. 1994) ("Not all pyramid-type…plans are illegal.").

"In order to distribute… products, nearly every manufacturer uses a system of middlemen to reach the ultimate consumer." Vincent G. Ella, Comment, Multi-Level or Pyramid Sales Systems: Fraud or Free Enterprise, 18 S.D. L. REV. 358, 359 (1973) (cited by *Gold*). The secret to success for direct retailing "is the quantity of salespeople which can be recruited to carry the message to individual homes." *Id.* at 360. Establishing the network of salespeople naturally creates levels in the distribution and is the oldest method in the marketplace. *Id.* Certain businesses have accelerated this model of sales by giving commissions for recruiting salespeople, and salespeople can choose to be headhunters and product sellers simultaneously. *Id.* at 361.

Thus, for a pyramidal structure to constitute an inherently fraudulent pyramid scheme, courts have required a finding that "the Plan, as conceived by the parties and represented to the purchasers, could not possibly work." *Blachly v. U.S.*, 380 F.2d 665, 671 (5th Cir.

1967). However, a structure that has multiple levels and involves both recruitment and product sales does not automatically constitute a pyramid scheme. A "structure that allows commissions on downline purchases by other distributors does not, by itself, render a multi-level marketing scheme an illegal pyramid." *Whole Living, Inc. v. Tolman*, 344 F. Supp. 2d 739, 745 (D. Utah 2004). "If it did, the Amway Plan would have been an illegal pyramid scheme." *Id.*

B. As a matter of law the Emperor program was not a pyramid scheme, and the evidence was insufficient to support a conviction.

As explained above, pyramid scheme is fraudulent because it depends on endless recruitment and poses the risk of saturation. The Government concedes that "saturation (and thus anti-saturation) is not at issue in this case."[97] For the Emperor program, "saturation is not the problem."[98] The Government realized this is not akin to *Gold*: "Unlike in Gold Unlimited, the United States has no plans to present a witness to testify on the dangers of market saturation" or "argue that 'the laws of geometrical progression would make it impossible to recruit continually

[97] R.381, #2922.
[98] *Id.* at #2923.

since inevitably a point of saturation would be reached.'"[99] Thus, as the Government conceded, the Emperor program had no market-saturation concerns. As such, it was not a pyramid scheme as a matter of law, and the evidence was insufficient.

The material facts concerning the Emperor program were undisputed. I2G limited the sale of Emperor packages to 5,000. In exchange for $5,000, Emperors received three things – the right to receive as the ultimate users of I2G's current and future digital products, the right to share in profits resulting from ultimate users of the casino, and the right to participate in I2G's pay plan, which rewarded selling I2G packages to others and selling products to non-I2G participants.

The Emperor program was not doomed to fail because of a dependency on endless recruitment unrelated to the sale of products to the ultimate users. Promotions of the Emperor packages stressed the potential for earning money without the need to recruit.[100] Several Emperors testified at trial that the reason they purchased was because

[99] *Id.*

[100] *See, e.g.* R.682, #8504; U.S. Ex.107a; R.504, #4404.

there was no requirement to recruit.[101] The de-emphasis on recruiting was reflected in limiting the number of Emperors to 5,000. The plan was to create an initial round of capital that could be used to ensure the current and future supply of innovative digital products that would result in customers who would continue to pay for these products.

The program offered three categories of value that were not dependent on endless recruitment.

First, the funding from the Emperor program was used to fund and develop current and future innovative digital products. As Retired Lt. Colonel Glen Logan testified, what interested him most about the Emperor package was "the opportunity to pay a license, get a master license, and access all… current and future products."[102] This aspect of the plan was implemented. The products were actually provided to Emperors and other customers (both IBOs and non-IBO customers). These included the I2G Touch, the online casino, Songstergram, the G1E Touch, Fantasy Sports, G1E Boardwalk, and International Vacation.[103]

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[101] *See, e.g.* R.667, #6724; R.512, #4975; R.669, #6862, #6948; R.683, #8668-69, 8704.
[102] R.701, #10889.
[103] R.690 #9467-68, 9498, 9454-57.

The products were real. The success of subscription-based access to digital products is not dependent on endless recruitment.

Second, the proof at trial was that I2G established other avenues for customers sales that were built into the compensation plan. Emperors earned money by selling products to non-IBO customers. For example, compensation was earned when a customer spent money to play the casino (which was accessible to anyone where online casino gaming was legal), to use of fantasy sports products, and to use of the travel product.

Third, Emperors were entitled to receive fifty percent of the casino profits that I2G received. The success of the casino was dependent on the consumer use of the casino, not "endless recruitment."

Under these circumstances, the Government's proof that the sale of Emperor packages was a pyramid scheme was insufficient. The fact that I2G ultimately failed for reasons unrelated to saturation does not establish that it was a pyramid scheme. Businesses fail. *See DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990). Hindsight does not make them fraudulent. *Id.* Moreover, I2G had a refund policy, which is antithetical to a pyramid scheme. *See, e.g. U.S. v. Woolf*, No. 1:08cr12,

2009 U.S. Dist. LEXIS 98857, at *37-39 (E.D. Va. Oct. 23, 2009). The Emperor program was not a pyramid scheme.

C. *Gold* Overview.

Unlike a pyramid scheme, which is inherently fraudulent regardless of the intent of the participants, a scheme to defraud must involve intentional fraud: "[A] scheme to defraud must involve intentional fraud, consisting in deception intentionally practiced to induce another to part with property…, and which accomplishes the end design." *U.S. v. Frost,* 125 F.3d 346 (6th Cir 1997); *see* Sixth Circuit Pattern Jury Instruction, Mail Fraud ("A 'scheme to defraud' includes any plan or course of action by which someone intends to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises."). The Government claims that I2G was a "pyramid scheme" and, thus, a "scheme to defraud."

Gold, under plain-error review, affirmed the following definition of pyramid scheme: "[A]ny plan…characterized by the payment by participants of money to the company in return for which they receive the right to sell a product and the right to receive in return for recruiting other participants into the program rewards which are unrelated to the

sale of the product to the ultimate user." *Gold*, 177 F.3d at 478-84. The Court explained that civil regulators have determined that certain plans will inevitably fail because they are dependent upon perpetual recruitment of new participants, which is impossible to sustain. *Id. Gold* endorsed the proposition that a "pyramid is improper only if it presents a danger of market saturation—that is, only if at some point, persons on the lowest tier of the structure will not be able to find new recruits." *Id.* at 481. Civil regulators have said that MLMs are "inherently fraudulent" when "they must eventually collapse." *Webster*, 79 F.3d at 776. Thus, a plan that is not doomed to failure and not dependent on endless recruits is not inherently fraudulent.

Gold recognized that "[s]ome structures pose less risk of harm to investors and the public, however, and authorities permit those programs to operate even though the programs contain some elements of a pyramid scheme." *Gold*, 177 F.3d at 479-80. "Courts and legislatures recognize a distinction between legitimate programs (known as multi-level marketing systems) and illegal schemes." *Id.* at 480. The Court encouraged future trial judges to supplement the definition used in *Gold*'s instructions

> to reflect the difference between legitimate multi-level marketing and illegal pyramids….For example, most states have statutes defining pyramid schemes….Many states prohibit only those schemes that compensate participants 'primarily' for the recruitment of new participants or that 'are based primarily' on the recruitment of new participants, as opposed to sales of goods or services.

Id. at 483. In other words, this Court found that, even when a plan has participants paying to receive rewards unrelated to the sale of the product to the ultimate user in return for recruiting other participants, that plan would be legal so long as those rewards were not the "primary" compensation of participants. *Gold* also cited Kentucky's pyramid statute (KRS 367.830), which clearly indicates that sales of good or services to participants in a plan constitute sales to ultimate users.[104]

As is detailed below, the court here did not follow *Gold's* directive to more clearly restrict the definition of pyramid scheme to plans that

[104] KRS 367.830(4) defines "Pyramid distribution plan" as "any plan…by which a participant gives consideration for the opportunity to receive compensation or things of value in return for inducing other persons to become participants in the program" but KRS 367.830(5) provides, "Compensation does not include payment based on sales of goods or services by the person or by other participants in the plan to anyone, including a participant in the plan, who is purchasing the goods or services for actual use or consumption."

regulators and state legislatures deem illegal. Rather, the court broadened the definition in an unprecedented way.

D. *Percoco v. U.S.* requires reversal of the instructions' definition of pyramid scheme.

In *Percoco*, 143 S.Ct. 1130 (2023), the Supreme Court recently held that a jury instruction that defines the scope of a scheme to defraud is held to constitutional standards applicable to criminal statutes. At issue was an instruction attempting to define the wire and mail fraud statutes' inclusion of a "scheme…to deprive another of the intangible right of honest services" within the term "scheme or artifice to defraud." *Id.* at 1136. The Court held that the instruction's definition "must be defined with the clarity typical of criminal statutes and should not be held to reach an illdefined category of circumstances simply because of a smattering of [previous court] decisions." *Id.* at 1137. The concurrence confirmed that "the jury instructions…were too vague….And the Constitution's promise of due process does not tolerate that kind of uncertainty in our laws—especially when criminal sanctions loom. *Id.* at 1139 (internal quotation marks omitted).

The Court held that precedent relied on in instructions must define the illegal act "with sufficient definiteness that ordinary people can

understand what conduct is prohibited or in a manner that does not encourage arbitrary and discriminatory enforcement." *Id.* at 1138 (internal quotation marks omitted). The Court reversed because the judicial standard that was relied on in the instructions was too vague. The concurrence explained that vague laws "impermissibly hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges, and they leave people with no sure way to know what consequences will attach to their conduct." *Id.* at 1139 (internal quotation marks omitted). This happened in this case.

The constitutional standard that *Percoco* applied to judicial definitions of include the following. "[T]he vagueness doctrine bars enforcement of 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'" *U.S. v. Lanier*, 520 U.S. 259, 266 (1997) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). "[T]he canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *Id.* "[D]ue process bars courts from applying a novel construction of a criminal

statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *Id.* These doctrines ensure that it must be made "reasonably clear at the relevant time that the defendant's conduct was criminal." *Id.* There may be times even when a non-vague statute cannot be applied to marginal cases because it is difficult to determine on which side the particular fact situation falls. *U.S. v. Frost*, 125 F.3d 346, 370 (6th Cir. 1997).

If no clear line delineates between legal and illegal conduct, a defendant cannot be charged with a crime based on such conduct. *Smith v. Goguen*, 415 U.S. 566, 574 (1974). "'It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.'" *Kolender v. Lawson*, 461 U.S. 352, 358 n.7 (1983)(quoting *U.S. v. Reese*, 92 U.S. 214, 221 (1876)). The courts may not step in for the legislature and fashion a test to decide what MLMs are legal and illegal.

Gold suggested that future courts fashion the definition of pyramid scheme through the use of state statutes (which conflict) or regulatory precedent and the recognition that the definition *Gold* approved may be

overly restrictive and revised in the future. This violates *Percoco* because the court was left to fashion an instruction without a "reasonably clear" standard. Moreover, the Government cannot prove a crime by proving a civil regulatory violation. *U.S. v. Christo*, 614 F.2d 486, 492 (5th Cir. 1980); *U.S. v. Wolf*, 820 F.2d 1499, 1505 (9th Cir. 1987). "[I]t is wrong to equate illegality with criminality, since many illegal acts are not criminal." *Texas v. U.S.*, 787 F.3d 733, 745 n.15 (5th Cir. 2015) (quoting *Bryan A. Garner*, Garner's Dictionary of Legal Usage 912 (Oxford 3d ed. 2011)).

The direction from Gold that future courts crate previously undefined standards resulted in a violation of *Percoco*. Here, the court demonstrated the constitutional problems inherent in *Gold*'s direction when it expanded the definition of pyramid scheme from Gold by incorporating a sentence based on language in *FTC v. BurnLounge, Inc.*, 753 F.3d 878, 880 (9th Cir. 2014), into the instruction.[105]

[105] R.692, #9943, 9947.

E. The definition of pyramid scheme in the instructions was incorrect.

Barnes tendered an instruction that followed the directive in *Gold* that future courts revise the definition of pyramid scheme "to reflect the difference between legitimate multi-level marketing and illegal pyramids" by using state statutes that restrict the definition.[106] *Gold* at 483. Barnes objected to any expansion of the definition from *Gold*.[107] The court stated that *Gold* indicated there was room for improvement in the instruction[108] and added the following sentence: "The structure of a pyramid scheme suggests that the focus is on promoting the sale of interests in the venture rather than the sale of products, where participants earn the right to profits by recruiting other participants, who themselves are interested in recruitment rather than products." This gave no guidance to the jury and expanded the definition in *Gold*. Plans that were not pyramid schemes under *Gold* became pyramid schemes under this sentence.

Instructing that the structure of a pyramid suggests something

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[106] R.533 at #5090. This also contained a proposed anti-saturation instruction.
[107] R.702 #11132.
[108] *Id.* at #11132.

deprives the jury of its fact-finding function. It was improper for the court to tell the jury what certain evidence suggested. *See, e.g. Morissette v U.S.*, 342 U.S. 246, 275 (1952) ("Such incriminating presumptions are not to be improvised by the judiciary."). Also, telling the jury that a structure suggests anything was incorrect. All MLMs and many non-network marketing companies have pyramidal structures and this is irrelevant in evaluating whether they cross the "[un]clear line separat[ing] illegal pyramid schemes from legitimate multilevel marketing programs…." *Gold* at 475. What is relevant is whether the plan "presents a danger of market saturation—that is, only if at some point, persons on the lowest tier of the structure will not be able to find new recruits." *Id.* at 481. There is nothing inherently fraudulent in a "focus…on promoting the sale of interests in the venture rather than the sale of products." While it is unclear what was meant by "interests in the venture," promotion of interests in a venture can increase sales to ultimate users. Those who have "interests in the venture" can also be ultimate users or talented in direct sales. A structure that focuses on recruiting excellent salespeople to the ultimate user is not doomed to fail. The added definition is erroneous because it assumes that promoting the sale of interests in the

venture is mutually exclusive from the sale of products. This is not the law.[109] There is nothing about paying successful recruiters that dooms a plan to fail. The added sentence describes virtually every legal MLM as well as many non-MLM companies. The new sentence violated *Gold* and is an incorrect statement of law, requiring reversal.

F. Failure to include an anti-saturation affirmative defense was reversible error.

Barnes was entitled to an affirmative defense instruction. "In such circumstances, '[r]efusal to give an accurate jury instruction is reversible if it impairs the defendant's theory of the case and is not covered adequately by the instructions given.'" *U.S. v. Clark*, 485 F. App'x 816, 818 (6th Cir. 2012). "'This burden is not a heavy one, and is met even when the supporting evidence is weak or of doubtful credibility.'" *Id.* (quoting *U.S. v. Johnson*, 416 F.3d 464, 467 (6th Cir. 2005)).

A program limited to 5,000 participants is not doomed to fail because of saturation. The Emperor program was not going to fail because of market saturation; it would succeed or fail based on the

[109] KRS 367.830(4).

success of the online casino and the continued distribution of I2G products. Barnes argued this at the charge conference.[110]

Further, as noted above, the Government conceded that the Emperor program had no risk of saturation: "[S]aturation…is not at issue in this case."[111] The Government argued that "saturation is not the problem."[112] "Unlike in *Gold Unlimited*, the United States has no plans to present a witness to testify on the dangers of market saturation."[113] "[T]he United States has no plans to argue that 'the laws of geometrical progression would make it impossible to recruit continually since inevitably a point of saturation would be reached.'"[114]

However, *Gold* is clear that what makes something an illegal pyramid scheme is the saturation issue. *Gold*, 177 F.3d at 479. Therefore, because the Government conceded saturation was a non-factor, it was error to require Barnes to prove an affirmative defense. A company that has no risk of saturation is not a pyramid scheme. *Gold*, 177 F.3d at 484.

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[110] R.692, #9993.
[111] R.381, #2922.
[112] *Id.* at #2923.
[113] *Id.*
[114] *Id.*

In the criminal context, the Government must prove a fraudulent enterprise. A defendant is not required to offer any evidence to disprove it. That the Emperor program was a scheme to defraud was an essential element of the crimes charged. The court impermissibly shifted the burden of proving that I2G was not fraudulent to the defendants.

G. The court incorrectly instructed that its definition of pyramid scheme constituted a scheme to defraud.

Courts are prohibited "from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime." *Francis v. Franklin*, 471 U.S. 307, 313 (1985). Thus, "[j]ury instructions relieving States of this burden violate a defendant's due process rights." *Carella v. California*, 491 U.S. 263, 265 (1989).

"[A] trial judge commits error of constitutional magnitude when he instructs the jury as a matter of law that a fact essential to conviction has been established by the evidence, thus depriving the jury of the opportunity to make this finding." *U.S. v. Mentz*, 840 F.2d 315, 319 (6th Cir. 1988). This is true even for mixed questions of fact and law. *U.S. v. Cunningham*, 679 F.3d 355, 375 (6th Cir. 2012).

Here, as is explained more fully below, the court failed to include the element of intent to defraud in the elements of the actual crimes at issue – conspiracy. Then, Instruction 8 defined "scheme to defraud" as "any plan or course of action by which someone intends to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises."[115] In the next paragraph, pyramid scheme was defined.[116]

That definition, consistent with the fact that a pyramid scheme is inherently fraudulent irrespective of whether any participant intends it to be, did not include intent to defraud. Despite this, the court instructed at the end of the paragraph: "A pyramid scheme constitutes a scheme or artifice to defraud for purposes of this instruction." Instruction 9, the securities fraud instruction, repeated the error.

Thus, because the court included intent to defraud in its definition of "scheme to defraud" and because the court instructed that a "pyramid scheme" was a "scheme to defraud," the court effectively directed that if

[115] R.554, #5265.
[116] *Id.* at #5265.

the definition of pyramid scheme was established the jury must find the existence of intend to defraud.

Thus, the instructions presume the specific intent to defraud. Moreover, the jury necessarily followed that instruction,[117] and it is of no consequence whether the jury might have reached the same conclusion without the instruction.[118] This was constitutionally infirm. *See Francis*, 471 U.S. at 313; *Mentz*, 840 F.2d at 319.

A similar but distinct issue arose in *Gold*. *Gold* considered whether the court's instruction that the pyramid scheme definition in that case constituted a scheme to defraud was plain error. The opinion held there was no plain error because a different instruction required the government "to prove, beyond a reasonable doubt, that the defendants knowingly devised a scheme or artifice to defraud" and the "instructions did not permit or command the jury to infer knowledge from any actions." *Gold* at 485. Thus, to convict, the jury had to find that "the defendants

[117] "We must assume that the jury acted in accordance with the instructions given them." *Mentz*, 840 F.2d at 320 n.7 (citing *City of Los Angeles v. Heller*, 475 U.S. 796 (1986)).

[118] *See Mentz*, 840 F.2d at 320 ("It is not important that the jury might have reached a similar conclusion had it been given an opportunity to decide the issue under a correct instruction.").

knowingly devised a pyramid scheme." *Id.* Judge Moore dissented on this issue and stated, "The problem with this instruction is that a pyramid scheme, as the court defined it, does not necessarily constitute a scheme to defraud." *Id.* at 490. Judge Moore found it inexplicable that the majority could recognize the potential for an effective saturation policy yet conclude "as a matter of law that a pyramid scheme, as defined, constitutes a scheme to defraud. *Id.* Judge Moore concluded that the instruction "largely eliminated the government's burden of establishing the existence of a scheme to defraud" and that the error was clear. *Id.* at 490.

The holding of the majority is inapplicable here for at least four reasons. First, the instruction that *Gold* relied on to salvage the directive that a pyramid scheme is a scheme to defraud is materially different here. In *Gold,* in addition to finding the existence of a pyramid scheme, the jury had to find the defendant knowingly devised the pyramid scheme. *Id.* at 484. Here, that instruction was materially different. The first element of mail fraud was "that the defendant knowingly participated in or devised a scheme to defraud."[119] There was no question

[119] R.554, #5265 (emphasis added).

that the defendants knowingly participated in I2G. Therefore, unlike in *Gold*, if the jury found I2G was a pyramid scheme and, thus, a scheme to defraud, the jury would have to conclude that the defendants "knowingly participated" in a scheme to defraud. Defense counsel attempted to address this by requesting a requirement in the instructions that a defendant knowingly devised a pyramid scheme.[120] The Government disagreed that this was required, and the request was rejected.

Second, the instructions are also distinct because the actual crime at issue here was conspiracy (not a substantive mail fraud count), and the conspiracy instruction lacked the element of intent to defraud. Third, unlike *Gold,* the review here is not plain error, the issue was preserved both in tendered instructions and objection.[121] *See Mattox v. Edelman*, 851 F.3d 583, 593 (6th Cir. 2017)(previous "panel's dicta do not bind [new panel]"). Fourth, the recent Supreme Court case, *Ruan v. U.S.*, 142 S. Ct. 2370, 2376 (2022), stressed that "criminal law seeks to punish the vicious will" and that "wrongdoing must be conscious to the criminal." The

[120] R.703, #11105-09.
[121] *Id.* at #11110-11.

Supreme Court reinforced the importance that the scienter element exists with respect to each element. This did not occur.

H. The Court erred in failing to include services in pyramid scheme definition.

Barnes requested that definition of pyramid scheme be expanded to include services. Pyramid schemes generally "'are based primarily' on the recruitment of new participants, as opposed to sales of goods or services." *Gold*, 177 F.3d at 483. Offering participants the ability to gamble is a service, not a product. Based on the definition in the instructions, the jury could not consider the casino in determining whether the Emperor program was a pyramid scheme. This is inappropriate under *Gold* and requires reversal.

II. THE COURT ERRED REGARDING INTENT TO DEFRAUD.

A. The Court lacks jurisdiction because the Indictment failed to allege a specific intent to defraud.

"'In a conspiracy indictment, the gist of the offense is the agreement and specific intent to commit an unlawful act, and when required by statute, an overt act.'" *U.S. v. Applewhaite*, 195 F.3d 679, 684 (3d Cir. 1999)(quoting *U.S. v. Wander*, 601 F.2d 1251, 1259 (3d Cir. 1979); *see also U.S. v. Zhao Wu Chen*, 322 F. App'x 43, 45-46 (2d Cir. 2009)).

"A defendant challenges a court's jurisdiction when he asserts that the 'indictment failed to charge the elements of a federal offense.'" *U.S. v. Stone*, 762 F. App'x 315, 320 (6th Cir. 2019)(quoting *U.S. v. Martin*, 526 F.3d 926, 934 (6th Cir. 2008)).

The Second Superseding Indictment did not allege that Barnes had the requisite intent to defraud. Barnes preserved this issue by moving to dismiss the indictment.[122] The court erred by denying the motion. In its order, it held that "the indictment adequately alleges that Defendant Barnes knowingly conspired and agreed with others to commit the offense of mail fraud."[123] However, that is plainly insufficient under Sixth Circuit law. *See U.S. v. Younes*, 194 F. App'x 302, 308 (6th Cir. 2006)(requiring intent to defraud to be alleged in indictment for conspiracy charge); *U.S. v. Frost*, 125 F.3d 346, 354 (6th Cir. 1997)("A defendant does not commit mail fraud unless he possesses the specific intent to deceive or defraud."). Therefore, Barnes' conviction must be overturned.

[122] R.78-1, Motion to Dismiss.
[123] R.88, #552.

B. The court erred in failing to require specific intent to defraud in the conspiracy instruction.

"[I]n order to sustain a judgment of conviction on a charge of conspiracy to violate a federal statute, the Government must prove at least the degree of criminal intent necessary for the substantive offense itself." *U.S. v. Feola*, 420 U.S. 671, 686 (1975). "Specific intent to defraud is an essential element of [mail fraud]." *U.S. v. Curry*, 681 F.2d 406, 410 (5th Cir. 1982) (collecting cases); *see U.S. v. Hale*, 774 F.2d 1164 (6th Cir. 1985). Because the intent to defraud is an element of the conspiracy charges and was a central issue, Barnes requested that the following element be added to Instructions 3 and 4: "Third, that the defendant acted with an intent to defraud purchasers of Emperors."[124] The court refused.

In a case involving an obviously illicit crime (conspiracy to sell narcotics), knowingly and voluntarily joining a conspiracy would satisfy the intent element. Here, however, the alleged conspiracy involved participants in a company. There was no dispute that the defendants knowingly and voluntarily joined this alleged conspiracy. The critical

[124] R.545, #5221; R.692, #9912.

issue was whether they did so with the intent to deceive – an element that was omitted. The Sixth Circuit Commentary on Pattern Instruction 3.01A states,

> Instruction 3.03, which requires the Government to prove that the defendant knew the conspiracy's main purpose, and voluntarily joined it "intending to help advance or achieve its goals," should suffice in most cases, particularly where the object offense is also charged and defined elsewhere in the instructions.

This instruction did not suffice in this unique case because the court instructed that a pyramid scheme – defined any intent to defraud – constituted a "scheme to defraud." Thus, knowledge of the of conspiracy's main purpose (allegedly, fraud) was defined to not include the intent to defraud. Even the court indicated that it struggled to read the specific intent element in its instructions.[125] There was simply no reason not to include the critical element at issue in the case in the instructions.

C. The good faith defense instruction incorrectly deprived Barnes of a defense.

The Court modified Sixth Circuit Pattern Instruction 10.04 by adding the following sentence: "Good Faith does not include the defendant's belief or faith that the venture will eventually meet his or

[125] R.692, #9914-23.

her expectations."[126] The defense objected.[127] Because the alleged scheme was a pyramid scheme (i.e. a scheme doomed to fail), belief that the venture would succeed was a complete defense because it contradicted the scienter element. The inclusion of this instruction was especially devastating in light of the instruction that a pyramid scheme (defined without the element of intent to defraud) automatically constituted a scheme to defraud.

The court did not want to include this sentence but felt that the Pattern Instruction commentary required it: "I looked at that very, very carefully, and I don't like that instruction. I do not…. I'm going to leave it in….I don't get to make the law….I disagree with it, but I am bound to follow that."[128] The court was wrong: the commentary says, "In *Stull*, 743 F.2d at 446, the court approved a good faith instruction that stated, *inter alia*, 'Good faith does not include the defendant's belief or faith that the venture will eventually meet his or her expectations.' This provision can be added to the instruction if relevant in the case." Sixth Circuit Pattern Instructions. This addition was not relevant in a pyramid scheme case;

[126] R.554, #5271
[127] R.702, #11178; R.692, #10024.
[128] R.702, #11078-79.

rather, it contradicted the requirement that the Government prove an intent to defraud.

It also is an incorrect statement of law. *See Ruan v. U.S.*, 142 S. Ct. 2370, 2381 (2022). The inclusion of this language inappropriately suggested that subjective good faith was not a defense to the specific intent crime.[129] *See id.* Other courts have recognized that the subjective belief that a venture will be successful is an absolute defense of good faith: "[A] defendant's good faith belief in his venture's economic soundness is a complete defense to mail fraud." *U.S. v. Roylance*, 690 F.2d 164, 168 (10th Cir. 1982); *see also U.S. v. Smith*, 13 F.3d 1421, 1426 (10th Cir. 1994); *U.S. v. Hopkins*, 744 F.2d 716, 718 (10th Cir. 1984).

Here, the proof established that the defendants believed that I2G would be successful because of its products. The court summarized this evidence as follows:

> my impression is that the defendants have a pretty good argument -- let me rephrase that. That there will be an argument that -- Mr. Maike in particular -- that he believed that eventually -- well, he believed Songstergram was going to make everybody a ton of money. He believed that these other things that he – this casino, that he -- the casino was --

[129] This error was further compounded by the fact that the court instructed that the crimes charged only required a knowing state of mind instead of knowing and willfulness, which is the proper standard.

> even, frankly, he thought that the casino royalties were going to blossom. I mean, I guess my impression that as initially intended that I2G was going to be marketed more in Asia where the people in Asia…were going to be driving people to the casino because everybody in Asia could -- you know, could engage in that, so you could encourage your neighbors, your downlines, everybody would be willing to use it… [130]

Proof supporting the defendants' belief that the venture would succeed as a result of I2G's products contradicted a conclusion that Barnes intended to deceive purchasers of Emperor packages because I2G was a pyramid scheme. This instruction deprived defendants of a fair trial.

D. The jury instructions on cheat or deceive were improper.

The Sixth Circuit's pattern jury instruction that defined intent to defraud as an intent to deceive or cheat was improper.[131] Although case law predating the Supreme Court's decision in *Shaw v. U.S.*, 580 U.S. 63 (2016), suggests that "[t]he requisite intent to defraud requires 'an intent to deceive or cheat for the purpose of either causing a financial loss to another or bringing about a financial gain to oneself.'" *U.S. v. McAuliffe*, 490 F.3d 526, 531 (6th Cir. 2007) (quoting Sixth Circuit Pattern Jury

[130] R.692, #10026-27.

[131] Barnes did not preserve this objection, and the argument is subject to plain-error review.

Instruction 10.01(2)(E)). These cases are no longer good law. *See Shaw*, 580 U.S. at 72.

The Ninth Circuit has subsequently cleared up that instructions that define an intent to defraud as either an intent to deceive or cheat are improper. "[W]ire fraud requires the intent to deceive and cheat — in other words, to deprive the victim of money or property by means of deception." *U.S. v. Miller*, 953 F.3d 1095, 1103 (9th Cir. 2020). "The Government concedes that the jury instruction that 'intent to defraud' requires 'intent to deceive or cheat' was erroneous." *U.S. v. Rodriguez*, 2021 U.S. App. LEXIS 22244, at *4 (9th Cir. July 27, 2021). The Sixth Circuit has agreed. A "'scheme must be one to deceive the bank and deprive it of something of value.'" *U.S. v. McDaniels*, 2022 U.S. App. LEXIS 31468, at *2 (6th Cir. Nov. 14, 2022) (quoting *U.S. v. Hall*, 979 F.3d 1107, 1117 (6th Cir. 2020)).

Thus, the Court erred in permitting this instruction to the jury. Further, the error was harmful. As explained *infra*, the purchasers of Emperor packages received exactly what they bargained for. There was no intent to cheat the purchasers of Emperor packages. Here, the purchasers received the opportunity to participate in the profits of the

casino, which was the basis of the bargain. No one was cheated. As such, the instruction was improper.

III. THE GOVERNMENT VIOLATED DUE PROCESS BY PRESENTING FALSE EVIDENCE

Under *Napue v. Illinois* and its progeny, the prosecution's introduction of false evidence deprives a defendant of a fair trial and is inconsistent with "any concept of ordered liberty." 360 U.S. 264, 269 (1959). The Government commits a *Napue* violation "when the Government introduces false or misleading testimony or allows it to go uncorrected, *see Giglio v. United States*, 405 U.S. 150, 153…(1972), even though the Government knew or should have known that the testimony was false, *see, e.g., United States v. Agurs*, 427 U.S. 97, 103…(1976)." *U.S. v. Straker*, 800 F.3d 570, 602-603 (D.C. Cir. 2015) (per curiam). A conviction obtained through the false evidence must be set aside if there is "any reasonable likelihood" it could have affected the judgment of the jury. *Giglio v. U.S.*, 405 U.S. 150, 154 (1972).

The Government presented false evidence during the testimony of Jerry Reynolds. Reynolds is a software engineer who had a company named Trinity Software that provided software for MLMs.[132] Reynolds

[132] R.497, #4012-14.

would customize software to, among other things, track enrollments and his clients' compensation plans. Reynolds would translate his clients' compensation plans into a software system that could implement it.[133] Reynolds received the plan for I2G from Rick Maike and customized his software to implement Maike's company plan. Leonard, Maike's wife, was the IT person for I2G with whom Reynolds worked.[134] Reynolds, vastly experienced in the MLM industry, did not believe anything was improper with the plan and would never associate with what he believed to be a pyramid scheme. The system Reynolds implemented tracked all compensation earned by participants.[135]

The Government introduced a series of spreadsheets of data from Reynold's system. They were critical to the Government's case. The prosecutor states that the Government met with Reynolds "multiple times" and that "Jerry's information is gold in this trial."[136] However, this evidence was false, and the Government knew it was false. Additionally, even the court remarked that "Mr. Reynolds has been an extraordinary

[133] *Id.* at #4018.
[134] *Id.* at #4016.
[135] *Id.* at #4041.
[136] R.681, #8324-25.

witness. Extraordinary. I mean, honestly. So thoughtful, so precise."[137] The Government called him "astounding."[138] Despite sounding "thoughtful" and "precise[,]" to the jury, however, the record shows that the testimony was false.

The most significant example of the Government's false evidence is US 101i. 101i is a spreadsheet named "participant gain-loss." It purported to show how many I2G participants earned more money than they paid to the company and how many participants earned less money than they paid to the company. 101i purported to compare (1) amounts paid by each participant to the company to (2) the total amount earned by each participant. Reynolds characterized 101i by testifying that one column (""ValueAllPurchases") included the sum total of all orders a participant ordered from I2G and another column ("ValueChecksRequestedAndPaid") included "how much commission they were paid."[139] When the ValueChecksRequestedAndPaid column had $0.00, Reynolds testified it meant the person "didn't earn any

[137] R.681, #8340.
[138] R.681, #8341.
[139] R.498 at #4169-71.

commissions at all."[140] The Government expert Keep testified that he sorted the 101i by "gains and losses" and determined that 96% of the "20-plus thousand accounts" on 101i lost money.[141] Evidence uncovered during the sentencing and restitution litigation (including a declaration from Reynolds) revealed that every aspect of this evidence was false.

The *Napue* elements are met. First, the Government presented false evidence. To actually determine the percentage of Emperors (or other IBOs) who earned more money than they paid to I2G, the following would be essential:

> 1. Base the calculation on only IBOs who did business with I2G during the period at issue in the Indictment (not IBOs who did business with a different Maike business--XTG1--started after the relevant period. 101i included over 4,000 positions that post-dated the Indictment period.
> 2. Consider only money paid by the IBO that was not refunded. For example, if a person received an Emperor package for free, the calculation should not assume that money was paid. Instead, 101i used the "Value" of an individual's purchases regardless of whether the person paid the money.
> 3. Consider all commissions earned not just "ChecksRequestedAndPaid." Evidence uncovered by the defense proved that millions of dollars in commission were earned and used by IBOs that the Government intentionally omitted from 101i.
> 4. Properly conduct the calculation.

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[140] *Id.* at #4173.
[141] R.487 at #3877.

After 2014 (the end of the period at issue in the Indictment) and after a search warrant was executed at his house, Maike started a new company called XTG1. Agent Matt Sauber confirmed this at the sentencing hearing.[142] Emails introduced both at trial and the restitution proceedings confirmed this.[143] Reynolds' system included information from the entire period he provided service to Maike.[144] 101i utilized all of the information in Reynolds' system.[145] 101i included thousands of individuals who were associated with a different Maike business after December 31, 2014. This is established by U.S. 101d ("Member List w Levels"), which includes enrollment dates for each "member." Specifically, 4057 individuals have enrollment dates after December 31, 2014.[146] The enrollment dates continued until March 9, 2017.

Many of the "participants" on 101i were also not "participants." 2,665 of the individuals listed on 101i had a "ValueAllPurchases" of

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[142] R.663 at #6572.
[143] R. 721, #11397; R.721-2, #11428; *see also* Exhibit 3 to Declaration, CD.
[144] R.497 at #4070.
[145] R.496 at #4163-64.
[146] 101d is an excel spreadsheet and the column containing enrollment dates can be sorted in chronological order revealing the number of individuals who enrolled after the relevant period after I2G/G1E ceased to exist.

$19.95 revealing that they never purchased a membership package and only participated as a customer. Every one of these customers have a "loss" on 101i because they would not have even participated in the pay plan. Another 418 people on 101i have a "ValueAllPurchases" of less than $100, reflecting the same conclusions. 219 of the entries on 101i have notations that the entries were reported as fraud. These fraudulent entries are all listed with a "loss."

The proof established that 101i indicated that those who did not pay for packages still had a "value" attributed to them. Sauber confirmed that Reynolds' spreadsheets "can't account for positions that [were given] away to people and confirmed multiple examples of people who received free Emperor packages but were attributed with "Value" on 101i.[147] 101i also did not account for the over $600,000 in refunds that I2G paid to participants.[148] Justin Moyer testified he received a full refund, yet 101i still lists his "Value" at $5,019.95. With the commissions he earned, he had a "gain" but is listed with a "loss." Defendants' Restitution brief listed several other examples of the fact that 101i did not account for refunds.[149]

[147] R.663, #6571.
[148] *See* U.S. Ex.229.
[149] R.721.

Reynolds testified that the spreadsheet reflected gifted or discounted packages and calculated whether a participant had a net gain or loss by subtracting the commissions earned form the amounts paid.[150]

101i also skewed the truth by listing individuals with multiple packages as having a "loss" regardless of how much the person actually earned. The most egregious example is Jason Syn, a defendant in the Indictment, who has at least 231 Emperor packages on 101i. Every one of those packages has a "loss" despite the fact that the Government has claimed he achieved significant profits. The Government filed an affidavit of Syn in the restitution proceedings where he admitted he was paid over $1,000,000 by I2G (outside of the compensation system) thus confirming the falsity of 101i. A person with Emperor packages who earned more than $20,000 from one package does not have four packages with "loss."

A final example of "value" attributed to Emperors that was not paid is the monthly subscription fees. These fees were waived, yet Reynolds'

[150] *Id.*

system included the "value" of these unpaid fees.[151] The total "value" attributed to these unpaid in Reynolds' system was $832,000.[152]

The most egregious falsehood in 101i is the deliberate choice to exclude millions of dollars of commission that IBOs earned and used. 101i does not include all commissions earned by Emperors but only payment of checks ordered through the Reynolds' back office computer system that were sent to the IBO. The undisputed proof was that I2G paid IBOs outside of the system and that this was not uncommon (especially for high earners because of the limit in Reynolds' system).[153] For example, the Government's Affidavit of Jason Syn indicates that commissions in Korea were not paid through Reynolds' back office system.[154] Rather, Syn indicates that constraints inherent in the Korean banking system resulted in commissions being paid from a separate Korean bank account in the name of Susie Park; Syn also indicates that Korean participants typically preferred to transact business in cash. Therefore, all payments of these types would not be reflected in 101i.

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[151] R.663, #6573
[152] U.S. Ex.101b.
[153] R.498 at #4164.
[154] R.708-5, Syn Affidavit (filed under seal).

In a declaration of Reynolds filed with Defendants' Restitution Brief, Reynolds confirmed other reasons 101i is false.[155] 101i also does not include commissions earned that were used to purchase other I2G products or packages.[156] For example, if a participant earned $5,000 in commissions and used that to purchase an Emperor package, 101i would not reflect any earnings and would indicate that the "value" of the Emperor package was $5,019.95. Reynolds confirmed that participants could use commissions earned to pay for another product.[157] 101i does not include commissions earned that were transferred to other participants.[158] 101i does not reflect when a participant was the recipient of transferred funds from another participant.[159] Indeed, after working with the Government, Reynolds "filtered out" certain commissions from 101i[160] but testified that all gains were included.[161]

After trial, Reynolds produced a spreadsheet that details each of these categories and the total amount of commissions earned by

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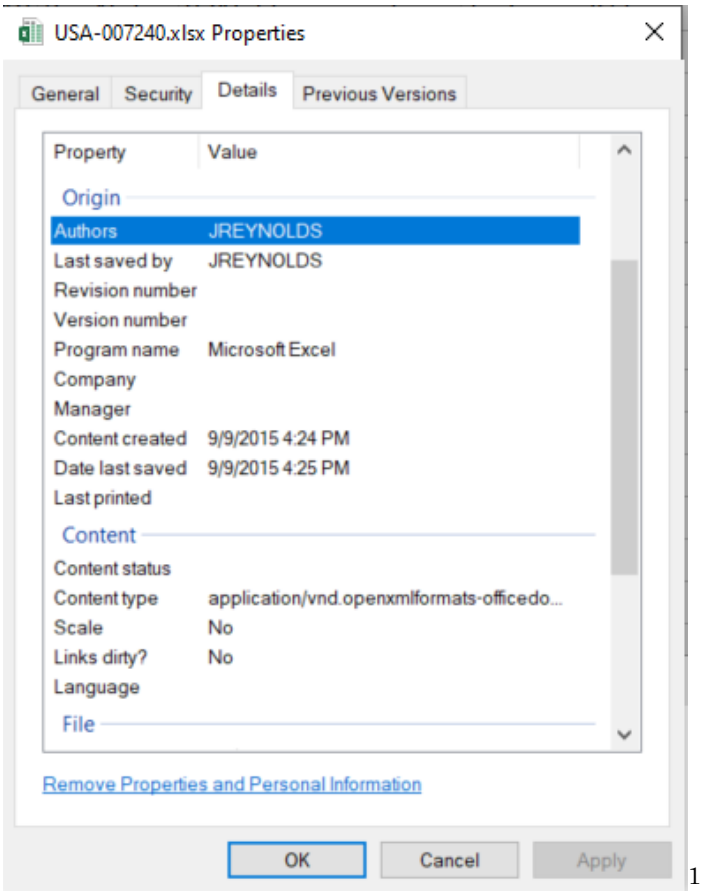
[155] R.721-2.
[156] *Id.*
[157] R.498, #4185.
[158] R.721-2.
[159] *Id.*
[160] R.721-2, #11428.
[161] R.498, #4164.

Emperors.[162] This provides an accurate measure of the total commissions earned by Emperors and established the falsity of 101i. There is no question that 101i was false.

The Government knew (and should have known) that 101i was false. In discovery, the Government produced a document identified as US-007240 ("7240").[163] 7240 is a spreadsheet that was produced to the Defendants with the initial discovery in 2017.[164] At the time it produced 7240, United States provided an index and 7240 was identified as "Backoffice Enterprise Solutions: Checks.xlsx". Metadata for this spreadsheet shows it was authored by JREYNOLDS and created on 9/9/15. See a screenshot of the metadata below:

[162] CD, Reynolds Spreadsheet, *see* R. 721-2 (Exhibit 3 to Declaration).
[163] R.656
[164] R.721, #11401.



[165]

7240 includes commissions earned by IBOs that were not included in 101i. Examples are set forth in the Defendants' Restitution Brief.

Despite its knowledge of and ability to include the actual commissions earned, the Government instructed Reynolds to create 101i for trial and solicited false testimony and argument based on it. The Government "worked with Jerry Reynolds over the years" and "Jerry knows how to produce the spreadsheet from the data that is

[165] R.721, #11402.

meaningful."[166] At trial, the prosecutor asked Reynolds, "Do you recall receiving a request from the United States to provide data on all the participants' gain and loss?....And did you provide this spreadsheet because of that request?...So this is just the gain and loss that was tracked by your system?"[167] The Government deliberately chose to manipulate the data and present false evidence.

It is reasonably likely that the false evidence affected the jury. The Government cannot deny the significance of the false evidence. The prosecutor referred to it as "gold," the evidence was central to Keep's expert opinion, and the Government stressed Keep's 96% bogus calculation in opening statement[168] and in the conclusion of the rebuttal closing argument.[169] Due Process requires reversal.

IV. The Government violated *Brady* and *Jencks*.

After the defendants closed their proof, during the weekend prior closing arguments, counsel for Hosseinipour called undersigned counsel and informed him that had discovered a Memorandum of Interview

[166] R.681, #8336.
[167] R.498, #4163,
[168] R.485, #3735.
[169] R.671, #7724.

("MOI") of his client that he did not realize had been provided to him. The document had never been produced to Barnes. The MOI was written by Sauber describing extensive statements by Hosseinipour.[170] Because the document contained exculpatory evidence, Barnes filed a motion to dismiss.[171] The court overruled the motion.

At the pre-trial conference, counsel for Maike asked whether there were 302s that would constitute *Brady* material.[172] The Government claimed it was "up to date with all of its *Brady* disclosures. There's no *Brady* information we're sitting on and waiting to disclose."[173] This was false. On the morning of Sauber's testimony, Barnes's counsel specifically requested any "302s that have anything that's favorable to the defense."[174]

The Government never produced the MOI to Barnes. The MOI extensively detailed Hosseinipour's statements explaining her innocence. The document refuted many of the Government's allegations. The MOI

[170] R.583-1.
[171] R.543.
[172] R.677 at #7943.
[173] *Id.*
[174] R.699, #10125.

was exculpatory. For example, Barnes was accused of conspiring with Hosseinipour. If she were innocent, he could not have conspired with her.

The government was required to produce this under *Brady v. Maryland*, 373 U.S. 83 (1963). *Brady* includes impeachment evidence. *U.S. v. Bagley*, 473 U.S. 667, 676 3375, 3380 (1985).

The MOI would have been admissible as a statement of an agent of a party opponent. *See* FRE 801(d)(2)(A)&(C). Moreover, the statements of Hosseinipour within the MOI were admissible under FRE 806. Throughout trial, the Government relied on Hosseinipour's statements promoting I2G and also introduced her emails against Barnes under FRE 801(d)(2)(E). "Rule 806 equates co-conspirator statements with statements made at trial, and treats the out-of-court declarants of those co-conspirator statements as if they were witnesses at trial." *Caruso v. U.S.*, 1999 U.S. Dist. LEXIS 19678, at *11 (S.D.N.Y. Dec. 22, 1999). "Therefore, it follows that the Brady rules regarding impeachment evidence are applicable even where the impeachment material concerns an out-of-court declarant of a co-conspirator statement." *Id.*

The MOI shows that Hosseinipour relied on and believed statements by Maike, attorneys approved the legality of the online

casino, she believed I2G was on the "up and up," that she did not know the actual casino profits, and that "[a]ll of the defendants believed that the casino had long term potential." Additionally, the MOI shows that, when Hosseinipour said major artists were lined up in support of Songstergram, she was relying on Rocky Wright. This refutes an exact statement that the Government offered into evidence and that the Government claimed Hosseinipour lied about. *See Schledwitz v. U.S.*, 169 F.3d 1003, 1011 (6th Cir. 1999)(credibility evidence is *Brady*); *U.S. v. Strifler*, 851 F.2d 1197, 1201 (9th Cir. 1988)(evidence on significant witness' credibility is *Brady*). Under these circumstances, the MOI met the requirements of *Brady*. *See, e.g. U.S. v. Enright*, 579 F.2d 980, 989 (6th Cir. 1978)("The government's position that Brady does not require it to turn over to the defense material which merely raises a conflict in the evidence, such as inconsistent statements by a co-conspirator, but only requires revelation of material which is directly exonerating, is in our judgment without merit.").

Additionally, the MOI was *Jencks* material.[175] Barnes consistently requested all *Jencks* material, and the court largely deferred to the good

[175] *See* R.671, #7422, 7429 (arguing MOI is *Jencks*).

faith of the Government.[176] The MOI was a signed statement of Sauber, and he testified. He testified about the revenue that Hosseinipour made from I2G[177] and the casino.[178] The MOI related to the substance of his testimony. The non-disclosure was deliberate.[179] Under these circumstances, the court's denial of the motion to dismiss and motion for acquittal was incorrect.[180]

V. THE COURT ERRED BY PERMITTING KEEP'S TESTIMONY AND EXCLUDING WARREN'S TESTIMONY.

Because of the lack of clarity on where the line is drawn between legal MLMs and illegal pyramid schemes, expert testimony on this issue was extra critical at trial. Accordingly, the parties disclosed expert witnesses in 2018. On April 2, 2018, the Government disclosed William Keep, a marketing professor at the College of New Jersey who has

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[176] R.699, #10140 ("As I've indicated before, I do know Marisa Ford, I've dealt with her for a long time, and she's got a great track record. Quite frankly, I do trust her judgment, her experience, and I appreciate the defendants raising these points.").
[177] R.699, #10322-23.
[178] R.699, #10332-33.
[179] R.671, #7424.
[180] R.671, #7438 ("What I don't know is what exactly is supposed to be done with this so the Court of Appeals can look at it, I guess, among the 3,000 points that have been raised in this case. I can't wait to see the top 15 list of what the errors have been.").

studied MLMs.[181] On June 6, 2018, Barnes disclosed Manning Warren, a law professor at the University of Louisville.[182]

The court entered a scheduling order that set a deadline for the parties to file *Daubert* motions for August 24, 2018.[183] The Government did not move to exclude Manning Warren prior to that deadline. Defendants moved to exclude the opinions that Keep testified about at trial.[184] The court overruled defendants' motions and held that the issues raised could be adequately addressed through "cross-examination" and Defendants' own expert testimony.[185] But on April 13, 2022, almost four years after Warren had been disclosed, the United States moved to exclude Warren's testimony related to pyramid schemes. On the day before trial, the court granted the motion because it felt that Warren lacked the necessary expertise. This deprived Barnes of the ability to rebut Keep.

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[181] R.94
[182] R.95.
[183] R.31
[184] R.168; R.435.
[185] *See, e.g.* R.168 at 13 ("To be sure, Barnes is free to address whether I2G's products are merely incidental to the MLM through the use of its own expert testimony, as well as through vigorous cross-examination of Dr. Keep.").

Keep's improper testimony combined with the exclusion of Warren requires a new trial.

A. Keep's opinions should have been excluded.

Keep has been critical of the MLM industry for thirty years.[186] Keep was unable to identify one MLM that did not have characteristics of a pyramid scheme.[187] Keep exposed the jury to a series of opinions that should have been excluded under FRE 702.

1. Keep's pyramid scheme definition was incorrect.

The court erred by permitting Keep to misstate the definition of pyramid scheme. Defendants moved to prohibit this before trial.[188] The Emperor program was unique. Emperors each paid $5,000 and received three things – the right to receive as the ultimate user I2G's innovative current and future electronic products, the right to share in profits resulting from ultimate users of the casino, and the right to participate in I2G's pay plan, which rewarded selling I2G packages to others and selling I2G products to non-I2G participants. Thus, when an Emperor received a commission for selling an Emperor package to another, the

[186] R.487, #3941
[187] *Id.* at #3941-42.
[188] R.168.

compensation was related to the sale of products or services to the ultimate user. And, when an Emperor received compensation because of a customer's use of a product (e.g. fantasy sports or buying casino chips[189]), the compensation was related to the sale to the ultimate user. And the plan would not inevitably fail because it was not dependent on endless recruitment. Rather, the plan was to sell 5,000 Emperor packages and those Emperors would perpetually receive a share of profits from an on-line casino and from ultimate users who would continue to pay for I2G's digital products.

The definition Keep stated at trial was different from the *Gold* definition and failed to account for the legality of payments for recruiting that are related to the sale of products to ultimate users. Keep was asked on direct, "So based on all your research and work and your career, do you have an understanding of what a pyramid scheme is?" [190] He testified that he did and that "[a] pyramid scheme is an organization in which participants pay money for the right to obtain monetary rewards by enrolling new people into a program as opposed to selling products and

[189] *See* US 158 (I2G pay plan providing for compensation for a percentage of the chips purchased by ultimate users of the casino); R.505, #4551-54.
[190] R.486, #3743.

services to the public. So the emphasis is on enrolling people in, not selling to the public."[191] Keep testified that a "compensation plan that is…reflective of a pyramid scheme is one where the compensation is directed towards recruitment and not towards selling goods and services to the public, and we're not even going to see any measurable consumer demand. The only demand we're seeing is from the distributors themselves."[192] Keep confirmed that by "[s]ales to the public, [he] mean[t] sales to people who are not within the multi-level structure."[193] Keep then testified at length about the various ways that the compensation plan rewarded participants for recruiting other individuals to buy a package with I2G.[194] For example, Keep noted that I2G participants were paid ten percent of the cost of any person they recruited to join I2G and that having "someone in your downline…particularly productive in generating recruitment" would be beneficial.[195] The Government completed this discussion by pointing out that an Emperor who sells two Emperor packages would earn $1,600 under the compensation plan and

[191] R.486, #3742–43.
[192] *Id.* at #3747.
[193] R.487, #3900.
[194] R.486, #3757-78.
[195] *Id.* at #3757, 3767.

that the company would earn $10,000. Keep then agreed to the question, "And this is how a pyramid scheme works?"[196] After hearing Keep's definition and description of the compensation plan, the jury had no choice but to incorrectly find that the Emperor program was a pyramid scheme.

However, Keep's definition was incorrect for multiple reasons. First, Keep declared every plan illegal that rewards for enrolling people in the program. Examples of companies that would meet Keep's definition include those that pay commissions for selling restaurant franchises or that pay a recruiter or "head hunter" a fee to locate people to place. Under Keep's definition, such companies would qualify as pyramid schemes so long as the recruiters paid the company (for training, for example) to be eligible to receive their commissions.

Second, Keep's definition assumes that recruiting a person to participate in a program and selling products or services to the "public" are mutually exclusive concepts. For example, a company that compensates those who recruit successful sales people to join a company is not a program that is inherently doomed to fail. Rather, paying to

[196] *Id.* at #3777-78.

recruit people who will then successfully sell products to ultimate users will cause the program to succeed. Yet, the mere decision to pay those who recruit (but do not sell) renders the plan illegal according to Keep.

Third, Keep's definition is wrong because it deems plans illegal that pay enrollment rewards that are related to the sale of products or services to the ultimate user. Stated another way, Keep's definition did not account for "internal consumption" or sales to participants in the plan. Keep used "public" to incorrectly suggest that there was legal distinction between ultimate users who were plan participants and those who were not. This was deadly to Barnes because I2G's distribution included sales to its participants. Emperors were ultimate users of I2G's products and services. Emperors purchased the status of ultimate user.

Keep's definition's prohibition against an "emphasis" on enrolling people rather than selling to the "public" amplified the prejudice of his legally incorrect definition. Emphasis is a vague term that simply provides no guidance on the line between a legal and illegal plan.

Experts should not proclaim the law to juries. Doing so invades the province of the court to determine the applicable law and to instruct the jury. *Torres v. Cty. of Oakland*, 758 F.2d 147, 150 (6th Cir. 1985). Experts

may not proclaim the law in an incorrect way. *See U.S. v. Mazumder*, 800 F. App'x 392, 396 (6th Cir. 2020); *Torres*, 758 F.2d at 150. A court in a civil case reviewing Keep's opinions recently held that Keep "may not opine that defendants' practices or alleged scheme do or do not satisfy the legal standards or elements for establishing the existence of a pyramid scheme." *In re PFA Ins. Mktg. Litig.*, No. 4:18-cv-03771 YGR, 2022 U.S. Dist. LEXIS 142011, at *19 (N.D. Cal. June 15, 2022). As that court reasoned, "[b]y tying facts in the case to legal opinions that set forth legal standards for identifying the existence of a pyramid scheme, the opinions in question could be interpreted as being impermissible legal conclusions that usurp the role of the factfinder." *Id.* at *18. This similarly violates controlling Sixth Circuit law: expert testimony "may not 'define legal terms.'" *Mazumder*, 800 F. App'x at 395 (quoting *Killion v. KeHE Distribs., LLC*, 761 F.3d 574, 592-93 (6th Cir. 2014)). Keep, who has no legal training, was particularly unqualified to define a pyramid scheme.

Keep's incorrect definition was particularly damaging because the court instructed the jury that a pyramid scheme automatically constituted a scheme to defraud.[197] Because of this instruction,

[197] R.554, #5266.

permitting Keep to testify as to the definition of a pyramid scheme had the effect of permitting him to directly tell the jury that I2G was a scheme to defraud.[198] This resulted in a violation of the rule that "[u]nder Fed. R. Evid. 704(b), an expert testifying as to mens rea in a criminal case may not 'state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged." *U.S. v. Rahm*, 993 F.2d 1405, 1411 n.3 (9th Cir. 1993).

2. The court erred by allowing Keep to criticize the likelihood of Emperors realizing gains from the online casino.

Keep improperly gave his opinions concerning the online casino.[199] Defendants moved to exclude these opinions.[200] Specifically, Keep was asked, "[W]hat's the likelihood that an emperor will recoup their investment by the revenue share alone?" Keep replied, "It's not going to happen."[201] Keep was not qualified to render this opinion, this testimony was not helpful to the trier of fact, and it was not the product of reliable principles and methods as required by Rule 702. Where an expert is

[198] *See* R.486, #3778, 3805, 3886.
[199] R.487, #3878–84.
[200] R.168, #978-81.
[201] R.486, #3779.

merely expressing an unsupported personal opinion, the testimony is inadmissible. *Turpin v. Merrell Dow Pharmaceuticals*, Inc., 959 F.2d 1349, 1360 (6th Cir. 1992). Keep based his opinion on rank speculation. On-line gaming is big business. Growing large networks of people who are financially motivated to drive traffic to an on-line casino is a viable and legal strategy. If successful, the results could be lucrative for a long time. Emperors earned a perpetual share of the profits and commissions from the online casino. Keep had no basis for these opinions, based on his training or any reliable principle, to communicate that the success of this plan was "not going to happen."

3. The court erred by allowing Keep to testify that certain statements by the defendants were false

Keep testified at length about certain statements in recordings that he believed were false or misleading[202]—a determination for the jury, not an expert witness. As the Supreme Court has held, "[a] fundamental premise of our criminal trial system is that 'the jury is the lie detector.'" *U.S. v. Scheffer*, 523 U.S. 303, 313 (1998). An expert's "testimony on [a declarant's] credibility fails under Rule 702 because it 'encroache[s] upon

[202] R.486, #3812–36.

the jury's vital and exclusive function to make credibility determinations, and therefore [does] not assist the trier of fact.'" *U.S. v. Hill*, 749 F.3d 1250, 1263 (10th Cir. 2014). "[E]xpert opinion testimony is not a permissible form of evidence as to a declarant's credibility." *Hill*, 749 F.3d at 1261.

Barnes moved to exclude Keep's opinions that certain marketing statements were false and misleading.[203] The court denied[204] and permitted him to testify that statements in marketing materials by defendants lacked credibility. In addition, none of this testimony was probative of whether the Emperor program was a pyramid scheme. The existence of misrepresentations is not relevant to whether a plan is a pyramid scheme.

Examples of Keep's improper testimony follow. The Government played certain clips from U.S. Exhibit 145, an October 28, 2013 conference call. Keep then testified that a statement by Maike that "there is a variation in benefits from the product depending on the rank" was contradicted by the fact that the company documentation did not so

[203] R.168, #983-86; R.435.
[204] R.679, #8197-99.

indicate.[205] Keep then incorrectly and without any basis testified that paying for features on products that would exist in the future "wouldn't work for the consumer."[206] Keep then testified that a statement in the same exhibit about the I2G Touch was "really extreme" because Keep claimed the I2G Touch "didn't deliver what it was promising."[207] Barnes then objected because (1) Keep was improperly testifying that certain statements were not true, (2) Keep had no expertise that would assist the jury in evaluating credibility, and (3) Keep was criticizing statements that were not provably false and therefore could not form the basis of a mail fraud conviction.[208] The court overruled the objection and allowed Keep to continue to provide his opinions. In allowing the testimony, the court found it entirely permissible for Keep to make an "assumption" that a "claim simply was not accurate, verifiably inaccurate…"[209]

Keep then criticized a prediction by Barnes about the number of people he thoughts would join I2G in the future as "overly optimistic" and

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[205] R.486, #3815.
[206] *Id.* at #3816.
[207] *Id.*
[208] The defendants made very specific objections to this testimony, including both oral and written objections, and the court understood that they were preserved. *See* R.435; R.679, #8240.
[209] R.679, #8258.

then testified that Barnes's prediction did not ultimately come true.[210] Keep also testified that a statement about the possible market for the company was a "gross overstatement."[211] Keep criticized statements by Hosseinipour. Keep claimed U.S. Exhibit 144 contained "earnings claims…that could easily be misleading…[that] I'm absolutely certain cannot be supported….So this is just another exaggeration."[212] He also claimed Hosseinipour's use of the word "sales" was false – "[t]he actual word is recruitment. There's no sales outside of getting people in by recruiting them into the ranks."[213] Keep then criticized a statement by Hosseinipour about the value of I2G and claimed that because investors poured millions of dollars into Peloton for a worthless product somehow showed how that her statement was false.[214] He claimed with regard to other statements Hosseinipour made that "other evidence available suggests that's not true."[215] Keep also criticized statements that he claimed were "unverifiable" and showed a "pattern of extreme

[210] *Id.* at #3819-20.
[211] *Id.* at #3821.
[212] *Id.* at #3821.
[213] *Id.* at #3823.
[214] *Id.* at #3824-25.
[215] *Id.* at #3825.

statements."[216] He testified that he was "absolutely certain" other statements were false" and said others were "gross overstatement[s]," "could not be true," and were "disingenuous."[217] Finally, about other statements, Keep testified "I don't believe the claim…can be supported at all," "they certainly cannot be true," and "[i]t's a completely unsupportable claim."[218]

On the second day of his testimony, Keep again criticized certain statements by Defendants. The Government played a portion of U.S. Exhibit 177 where Maike truthfully disclosed that the I2G was rebranding to G1E and explained the need to do so because of problems that company had with keeping bank accounts open due to the connection to legal internet gaming. Keep testified that his impression "was that there was a real problem here…[F]irms do not typically walk away from their brand….They don't want the sales force…to publicly…associate themselves with I2G or mention I2G, which struck me as very odd."[219] He testified that "based on [his] experience as a marketing professor" the

[216] *Id.* at #3826-28.
[217] *Id.* at #3828, 3834.
[218] *Id.* at #3835-36.
[219] R.487, #3878-79.

analogies that Maike used were "disingenuous."[220] This was improper. Rebranding a company does not make it more likely it is a pyramid scheme. Plus, Keep's opinion is not based on any reliable principles or methods. For example, the decision to rebrand Twitter as X does not establish "there [is] a real problem here."

Keep completed his direct testimony by claiming that "as a marketing professor" he found a statement "disingenuous given the industry overall." Finally, he referenced past FTC positions regarding "check flashing" and "income representations" and claimed that I2G's were nowhere close to being adequate.[221] This testimony was not probative of whether I2G's plan was a pyramid scheme. He closed by criticizing an income disclaimer that Hosseinipour made and saying that he did not "think the data [would] support" her statements.

This testimony violated the prohibition on experts testifying about credibility. It was severely prejudicial.

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[220] *Id.*

[221] *Id.* at #3882-83.

4. Keep based his opinions on false data

An expert's testimony must be based on "sufficient facts or data." FRE 702. Less than a month before trial, after the deadline for disclosing expert opinions had passed, and five years after the original indictment, the Government disclosed an unsigned supplemental report of Keep. The report explained that the United States obtained additional material, and it allowed him to address how I2G played out in practice.[222] Keep relied on Reynolds' spreadsheets before Reynolds testified. Two spreadsheets Keep relied on were U.S. Exhibits 101i and 101g-1.

As is set forth above, 101i (participant-gain loss) was false. Keep relied on the fact that this spreadsheet reflected that ninety-six percent of participants lost money in support of his opinion that I2G was a pyramid scheme.[223] This was higher than the eighty-five to ninety percent of participants who Keep testified typically lose money in all multi-level marketing companies.[224] The falsehoods associate with 101i are set forth above. 101g-1 was similarly flawed. Keep relied on 101g-1 as establishing that I2G had 22,447 allocated positions and commented

[222] *See, e.g.* R. 679, #8260.
[223] R.487, #3876–78; R.498, #4163.
[224] *Id.* at #3925.

on the level of the downlines that certain people were placed.[225] These numbers were also false. Sauber confirmed in his testimony that Maike started another company named XTG1 after I2G.[226] Over 4,000 data entries on 101g-1 were after the relevant period at issue in the Indictment, and some were as late as in March of 2017. The data had no relevance to I2G and should have not been considered. The Government conceded saturation was not at issue, so a participant's location downline was irrelevant.

Barnes raised the flaws in Keep's reliance on this false data in his motion for a new trial.[227] The court should have granted the motion.

5. The court erred by allowing the Qubeey video to be played because it was inadmissible hearsay

Qubeey distributed an earlier version of the Touch. Qubeey prepared a video describing the software and the video indicated that the software was available for free. Distributing basic versions of software for free to increase the number of users with additional features available for payment is not unusual in the on-line economy.[228] In any event, the

[225] R.487, #3849-50.
[226] R.663, #6572.
[227] R.568.
[228] R.486, #3815.

video was created prior to the significant investment of money by I2G to improve the software and to add features. Regardless, the court permitted the Government to play this video during Keep's deposition to establish the truth of the matter asserted in the video – that Qubeey's software was available for free.[229] The court then compounded the error by telling the jury that Keep relied on the video as part of his foundation for comparing the value between the I2G Touch and the Qubeey product.[230] Keep never offered any opinion based on the video. Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. "Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 595 (1993); *U.S. v. Bonds,* 12 F.3d 540, 567-68 (6th Cir. 1993); *Renot v. Secura Supreme Ins. Co.*, 671 S.W.3d 282, 287 (Ky. 2023). It was error to permit the playing of this inadmissible hearsay.

[229] R.486, #3797-3803; U.S. Ex.153.
[230] *Id.* at #3803.

6. The court erred in admitting US 1 as substantive evidence.

The Government portrayed I2G as a classical pyramid scheme; even though, it claimed it would not put on a "witness to testify on the dangers of market saturation" or "argue that 'the laws of geometrical progression would make it impossible to recruit continually since inevitably a point of saturation would be reached.'"[231] The admission of U.S. Exhibit 1 was prejudicial and confused the jury, and the court erred in denying Barnes' counsel objection regarding its admission as substantive evidence. Before trial, Barnes objected to U.S. Exhibit 1 because it was irrelevant and unfairly prejudicial and did not fit with the allegations in the Indictment.[232]

In its opening statement and through the trial, the Government relied on a chart showing a pyramid.[233] However, this chart had nothing to do with I2G.[234] This is the chart:

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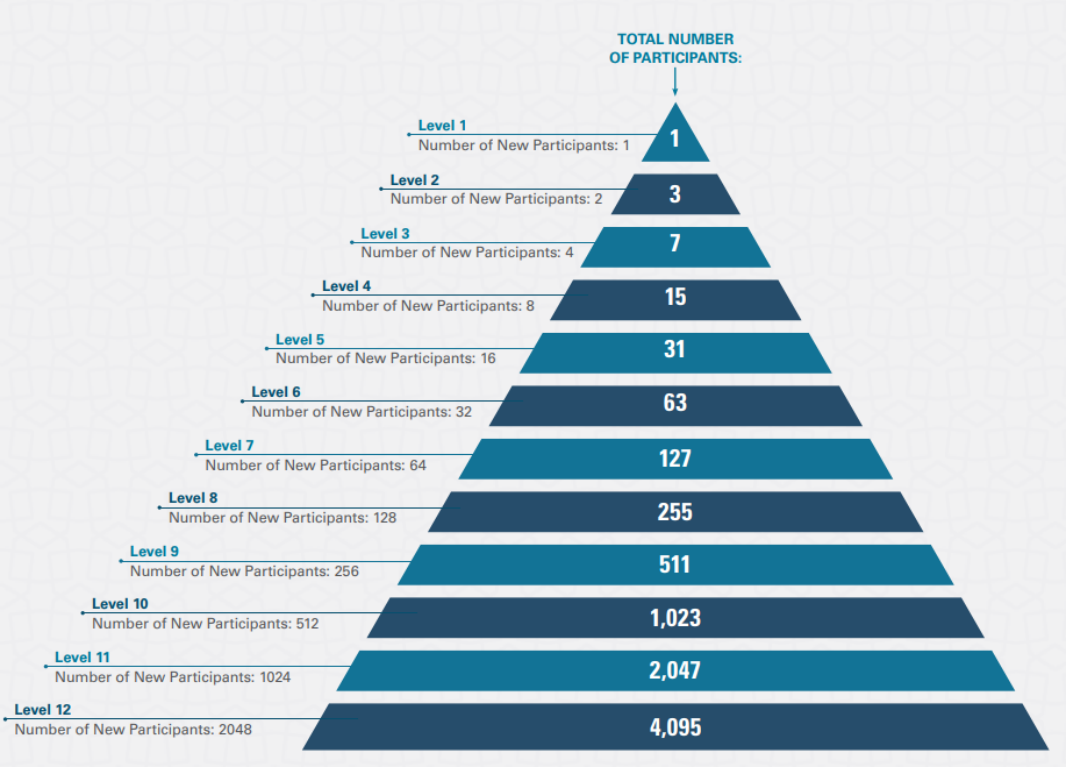
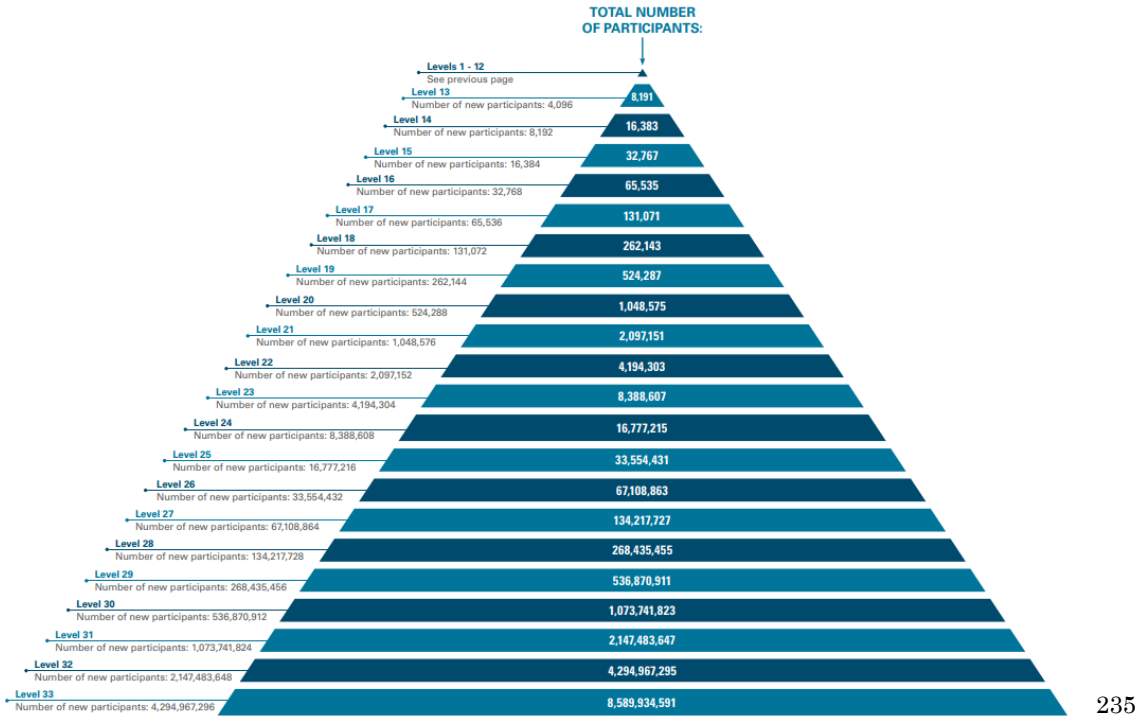
[231] *Id.*
[232] R.455, #3549.
[233] *See* U.S. Ex.1; *see also* R.485, #3730.
[234] R.498, #4143 ("Well, it's a tree, not a pyramid"); R.498, #4183 (would not work for a pyramid scheme); R.498, #4251 (At Level 57, a participant could still make money at I2G); R.381, #2922-23.





[235]

[235] U.S. Ex.1.

The premise of the chart was that pyramid schemes fail because they depend on the recruitment of new participants. The alleged scheme at issue in the instructions, consistent with the Indictment, was "the sale of Emperor positions."[236] Barnes objected and requested that testimony be limited to the sale of Emperor packages because that is what the Government charged in the Indictment.[237] I2G limited the number of Emperor packages to 5,000.[238] The chart has no helpful explanatory value. There was never a risk that there would be 8 billion emperors in I2G, so the Government's reliance on the fact that at "Level 33, the bottom row there, the total number of participants is now more than the population of the world" was simply misleading.[239] The Government had Keep testify regarding this diagram.[240]

Keep opined that no matter what, the bottom three rows would be in a loss position.[241] The Government still asked Keep to opine if 8 million emperors in the bottom row would have been in a loss position; even

[236] R.554, #5265.
[237] R.679, #8214.
[238] R.1, #1-2; R. 96, #568-69; R.230, #1452-53.
[239] R.485, #3731.
[240] R.486, #3743.
[241] R.487, #3842.

though, the Government knew that could never happen. Additionally, I2G sold other products and services, but Keep's hypothetical assumes there were no product sales. U.S. 1 was inadmissible.

B. Professor Warren was qualified to rebut Keep's testimony on pyramid schemes.

Manning Warren had 40 years of experience publishing and instructing law students on business organizations. His expert disclosure demonstrated his extensive qualifications that were more than adequate to permit him to rebut Keep.[242] Summarizing his extensive professional accomplishments and scholarship, the disclosure stated,

> He teaches classes to law students that include the definition of a "security," including illegal pyramid schemes. Professor Warren has addressed illegal pyramid schemes (including cases such as *In re Koscot Interplanetary, Inc.*, 86 F.T.C. 1106 (1975) and *S.E.C. v. Glenn W. Turner Enters., Inc.*, 474 F.2d 476 (9th Cir.)) and related textual material in every securities law school course he teaches. These cases address legal principles arising from illegal pyramid schemes (including application to multilevel marketing companies). The evolution of the law on inherently fraudulent pyramid schemes arose from and is inextricably linked to securities jurisprudence.
>
> Professor Warren has also provided enforcement training on Ponzi schemes to securities regulators. Attached as exhibit 1 is the agenda from enforcement training for the North American Securities Administrators Association (NASAA), an

[242] R.433.

> organization consisting of state and provincial securities regulators from the United States, Canada, and Mexico at which Professor Warren trained regulators on the necessities of proving the existence of a Ponzi scheme.

The court held that Warren did not have adequate expertise to rebut Keep.[243] This was an abuse of discretion particularly in light of the decision to allow a non-lawyer (Keep) to explain the technical legal concept of pyramid scheme.

"[I]t is an abuse of discretion to exclude testimony simply because the trial court does not deem the proposed expert to be the best qualified or because the proposed expert does not have the specialization that the court considers most appropriate." *Pineda v. Ford Motor Co.*, 520 F.3d 237, 244 (3d Cir. 2008). An expert may testify in a general area, and any lack of background with specific issues is grounds for cross-examination, not exclusion. *Morales v. Am. Honda Motor Co.*, 151 F.3d 500, 516 (6th Cir. 1998). For example, a professor who has general expertise but has not worked in the field may not be barred from testifying. *SEC v. Capwealth Advisors, LLC*, 2022 U.S. Dist. LEXIS 167133, at *11 (M.D. Tenn. Aug. 3, 2022); *Davis v. Combustion Engineering, Inc.*, 742 F.2d 916,

[243] R.454.

919 (6th Cir. 1984). "[A]n expert only needs to be minimally qualified to testify and does not need to have extensive experience in the exact field or subject of their testimony." *Castro v. Carnival Corp.*, 2022 U.S. Dist. LEXIS 140074, at *9 (S.D. Fla. July 11, 2022) (collecting cases). "After a witness is found to be minimally qualified, challenges to…qualifications attack the weight…not its admissibility." *Id.* An expert's lack of specialization does not affect the admissibility of an expert opinion, only the weight given to it. *Pages-Ramirez v. Ramirez-Gonzalez*, 605 F.3d 109, 114 (1st Cir. 2010). "Under this liberal approach, expert testimony is presumptively admissible." *U.S. ex rel. Gale v. Omnicare, Inc.*, 2013 U.S. Dist. LEXIS 135653, at *4-6 (N.D. Ohio Sep. 21, 2013).

Warren meets the minimally qualified test. The court erred in contrasting Warren's extensive background in securities regulation with his experience with MLMs.[244] *Bradley v. Ameristep, Inc.*, 800 F.3d 205, 209 (6th Cir. 2015) (court abuses its discretion in excluding opinion based on comparing the expert's experience in two fields and finding one area lacking based on the relative comparison).

[244] R.454, #3538.

Having "substantial experience in the securities industry" permits an expert to testify to an array of topics that "are tied to his knowledge and experience in the securities industry." *U.S. v. Birks*, No. 07-153 (JBS), 2009 U.S. Dist. LEXIS 50668, at *7 (D.N.J. June 16, 2009). Warren's expertise in the securities industry informed his understanding of pyramid schemes.[245] As such, the court erred in excluding Warren from rebutting Keep. Improperly and untimely excluding Warren's testimony on pyramid schemes prevented Barnes from "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984). "Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 19 (1967). This is particularly true when the Government is permitted to present expert testimony on a critical issue that goes unrebutted.

[245] The conspiracy to commit securities fraud count incorporated the pyramid scheme definition for scheme to defraud.

VI. FORMER SPECIAL AGENT MCCLELLAND'S TESTIMONY WAS REPLETE WITH INADMISSIBLE TESTIMONY.

Former special agent Dave McClelland was the Government case agent when this case began. He retired before trial but still testified for over a day. Defendants were concerned about the potential that he would testify about inadmissible hearsay and filed a motion in limine to exclude "course of investigation" testimony as well as the anticipated hearsay.[246] The concern was well founded. McClelland's testimony was replete with inadmissible testimony. Examples follow.

A search warrant was executed at Maike's family home and several computers were seized.[247] US Exhibit 237, a spreadsheet purporting to list 4,728 Emperors, was located on one of the computers.[248] The Government moved to introduced it. Counsel for Barnes objected on hearsay grounds and because it violated Barnes' Confrontation Clause rights. The Court first admitted it because McClelland "authenticated" the document as a document "Maike had on his computer as a business record."[249] Defense counsel noted that the presence of a document on a

[246] R.421.
[247] R.700, #10453-54.
[248] *Id.* at #10458-59.
[249] *Id* at #10456.

computer is not an exception to the hearsay rule.[250] The Government then argued that the document was not a business record but that it was a record that was obtained during the execution of a search warrant.[251] Defense counsel again noted that there was no such exception to the hearsay rule. The Court then ruled that "it was on…Maike's computer" and therefore a "statement of Mr. Maike…used against his co-conspirators."[252] The court then ignored the request for a limiting instruction.[253]

This Government did not meet its burden of proving that spreadsheet was admissible under FRE 801(d)(2)(E). First, the Court was required to make a finding that Maike was the declarant. There was no evidence of that; rather, the only evidence was that the document was on one of several computers in the home Maike lived with his wife Angela – the person who did the computer work for I2G. Second, there was no showing that the spreadsheet was in furtherance of the conspiracy:

> To be in furtherance of the conspiracy, a statement must be more than "a merely narrative" description by one co-conspirator of the acts of another. *United States v. Beech-Nut*

[250] *Id.*
[251] *Id.* at #10457.
[252] *Id.* at #10457-58.
[253] *Id.*

> *Nutrition Corp.*, 871 F.2d 1181, 1199 (2d Cir. 1989)(internal citations and quotations omitted). The statements must "prompt the listener . . . to respond in a way that promotes or facilitates the carrying out of a criminal activity." *Maldonado-Rivera*, 922 F.2d at 958. However, the statements need not be commands, but are admissible if they "provide reassurance, or seek to induce a coconspirator's assistance, or serve to foster trust and cohesiveness, or inform each other as to the progress or status of the conspiracy." *Id.* at 959.

U.S. v. SKW Metals & Alloys, Inc., 195 F.3d 83, 88 (2d Cir. 1999). There was no such evidence or even any evidence that anyone else ever saw this spreadsheet. It was error to admit US Exhibit 237.

The error was compounded when, over objection, the court improperly admitted US 230 and 232, charts that were based in part on US Exhibit 237.[254] US 230 is titled Emperor Sales Analysis and is a chart that the Government created comparing the total amount of money deposited into I2G bank accounts each month to a calculation of $5,000 multiplied by the number of Emperors that US 237 indicated signed up in a particular month. US 230 did not meet the requirements of FRE 1006. First, documents that underlie a summary chart must be admissible (US 237 was not). *U.S. v. Moon*, 513 F.3d 527, 545 (6th Cir. 2008). Second, the chart was not a summary. Rather, it was based on a

[254] *Id.* at #10500.

calculation based on an incorrect assumption – that $5,000 was paid for every Emperor package purchased. Moreover, the chart's point – apparently that money generated from Emperor sales was not deposited into a bank account – was irrelevant. Because summaries are elevated to the position of evidence, courts must take care to omit argumentative matter lest the jury believe that such matter is itself evidence of the assertion it makes. *U.S. v. Spalding*, 894 F.3d 173, 185 (5th Cir. 2018). The court erred in this regard.

US 232 also did not meet the requirements of FRE 1006 for the same reasons.US 232 is titled "Emperor Profit Results by # of Emperors through 12/31/14.[255] It compares a calculation of $5,000 multiplied by the number of Emperor Packages that Exhibit 237 indicated a person owned to the amount of "payments made out to members through Global Gateway Payroll"[256] The exhibit is not a summary; it is an argumentative document based on the following incorrect assumptions – (1) that every Emperor package was paid for and (2) that the Global Gateway payments reflected all of the commissions earned by participants. The

[255] R.688, #8980-84 (Barnes's objections).
[256] *Id.* at #8979 (McClelland testified this is what he utilized to create the chart).

undisputed proof is that Emperors were paid outside of the Global Gateway system, the Global Gateway system was replaced with the use of another system, and significant commission were earned and used by participants but never distributed through a payroll system. Finally, the use of the term "profit" in the title of US 232 was argumentative and not a summary of anything. It assumed that the products received by the participants had no value.

Despite the pretrial efforts to prohibit investigative hearsay, the Government asked McClelland if he had interviewed Emperor purchasers and why they purchased the Emperor packages.[257] Barnes objected on hearsay grounds. The court overruled the objection stating, "Isn't it the state of mind of the declarant?"[258] McCelland then testified that the people who paid for Emperor packages "were hoping to share in the casino profits…." [259] This was error. The "state of mind" exception says that statements "of the declarant's then-existing state of mind" are admissible. McClelland was testifying about what people told him during interviews; therefore, their statements were not about their "then-

[257] *Id.* at #10478-79.
[258] *Id.*
[259] *Id.* at #10479-80.

existing" state of mind. Under FRE 803(3), the statement must have been contemporaneous with the declarant's experience of the state of mind referred to when the declarant did not have an "an opportunity to reflect and possibly fabricate or misrepresent his thoughts." *U.S. v. LeMaster*, 54 F.3d 1224, 1231 (6th Cir. 1995). In fact, the rule explicitly excludes "a statement of memory' from the exception.

Here, the witnesses interviewed by McClelland were allegedly saying why they decided to buy Emperor packages when they did so in the past. Moreover, the state of mind of the declarant must be a relevant issue in the case. *U.S. v. Jeri*, 869 F.3d 1247, 1261 (11th Cir. 2017). The subjective motivation of people who purchased Emperor packages was not a relevant issue. The court's error permitted the Government to introduce the content of supposed out of court statements by purported victims and deprived the defendants of their constitutional right to cross examine the declarants.

McClelland's testimony was also filled with investigative hearsay. For example, the McCelland described his understanding of the business relationship between Finance Ventures and Plus-Five Gaming, and the Government then asked, "[A]s part of your investigation, did you have

any contact with anyone at Plus-Five Gaming that…was able to confirm that you were interpreting their invoices correctly?"[260] Over objection,[261] McCelland confirmed that he had.

A series of inadmissible emails were introduced during McClelland's testimony. The Government introduced evidence of an "unaccounted-for foreign bank account[]" through U.S. Exhibit 685,.[262] The email was dated April 13, 2015 and related to a bank account in Hong Kong. Barnes objected to the email because it was irrelevant and after the period at issue in the case.[263] I2G business plan of included creating large networks of people worldwide to use the casino. Barnes participated in this. This was not criminal. The existence of a foreign bank account is not probative of the alleged conspiracy at issue in the case—defrauding people to buy Emperor packages. Rather, the Government used this in an attempt to paint Barnes as somehow shady. It should not have been admitted.

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[260] R.700, #10496.
[261] Counsel for Maike objected on hearsay grounds. The court had ruled that an objection by one defendant constituted an objection for the other two defendants unless a defendant opted out of the objection. *See* R.700, #10457.
[262] R.700, #10520.
[263] *Id*. at #10521-24.

U.S. Exhibit 617 was improperly admitted over a hearsay objection.[264] It is an email from a person named Lorence Irvine introduced for the truth of the matter asserted that he had decided to sell his shares in I2G. The email is hearsay of a person there is no proof Barnes ever met. The introduction of the email violated Barnes' Confrontation Clause rights.

The court also erred by permitting McClelland to introduce investigative hearsay regarding a list of people the Government claimed purchased Emperor packages, The Indictment contained lists of initials in Counts 1 and 13. The Government introduced a series of checks the names on which matched the initials. Defense counsel objected fearing that the Government would attempt to introduce facts learned from interviews with the people.[265] The Government did just that. For example, McClelland testified that he prepared a list of people that "sent cashier's checks that were deposited into the Finance Ventures account here in Owensboro."[266] McClelland also testified where the various individuals lived based on his interviews of them, even referencing his

[264] *Id.* at #10581.
[265] *Id.* at #10639-41.
[266] *Id.* at #10641.

report.[267] He provided details about how funds were transported to Owensboro.[268] He testified that certain people bought Emperor packages.[269] All of this information was not evident from the face of the checks that were admitted. Rather, it was information provided by alleged victims in out of court statements introduced for the truth of the matters asserted. This violated Barnes's Confrontation Clause rights.

VII. THE GOVERNMENT'S RELIANCE ON ANZALONE'S GUILTY PLEA AND THE COURT'S FAILURE TO GIVE A CURATIVE INSTRUCTURE WARRANT REVERSAL.

"Co-defendant or co-conspirator guilty pleas are not admissible as substantive evidence of the defendant's guilt." *U.S. v. Benson*, 591 F.3d 491, 498 (6th Cir. 2010). "When a guilty plea or conviction is introduced into evidence, the district court ***is required*** to give a cautionary instruction to the effect that the jury may use the conviction or guilty plea only to determine the testifying witness's credibility." *U.S. v. Sanders*, 95 F.3d 449, 454 (6th Cir. 1996)(emphasis added); *Benson*, 591 F.3d at 498. Prior to opening statement, Barnes objected to any reference by the Government to the fact that Anzalone had entered a guilty plea

[267] *See id.* at #10645, 10647, and 10648; R.688, #8969-72.
[268] R.700. at 10645.
[269] R.688 at #8969-72.

and cited controlling precedent related to the introduction of guilty pleas.[270] In responding to objections, the Government said "[t]hat's bizarre. It's not true at all. It is not remotely true."[271] The Government stated its plan to tell the jury in opening statement about the Anzalone's guilty plea because that is what the evidence would show, not because of any credibility concerns.[272] The court stated, "I'm going to trust the United States knows what they're doing and they've got case law to support the fact that they can mention in opening statements that the co-defendant has pled guilty, and the defense can deal with that."[273] When the court overruled the objection, a limiting instruction was requested.[274] When counsel attempted to cite additional authority, the court stated, "[W]e're done talking….I really don't want to hear an objection to that."[275] He then instructed counsel not to object during opening statement.[276]

Here, despite the fact that the Government cannot rely on a guilty plea in an opening statement to show the guilt of other defendants, the

[270] R.678, #8022-23.
[271] R.678, #8023.
[272] *Id.* at #8025.
[273] R.678, #8033.
[274] *Id.* at #8029.
[275] *Id.* at #8030-31.
[276] *Id.* at #8029.

Government went ahead and did it: "**You'll hear from Richard Anzalone, who was once Hosseinipour's partner in this crime but has pleaded guilty in this case**."[277] No limiting instruction was given. The court had previously prohibited the defendants from objecting to this. Here, the only way to understand that statement is that Hosseinipour's partner in crime is guilty. That is what was said. There was no discussion of credibility.

During Anzalone's testimony, Barnes again attempted to obtain a limiting instruction. Barnes filed a written motion that stated, "Barnes requests that the Court instruct the jury that Anzalone's guilty plea can only be considered to assess his credibility; it cannot be considered as evidence of any defendant's guilt."[278] The Government did not object.[279] The court agreed to give the limiting instruction.[280] The court then did not give a limiting instruction. This was improper and reversible.

The prejudice compounded during the direct examination of Anzalone:

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[277] R.485, #3736.
[278] R.473, #3624.
[279] R.697, #10067.
[280] R.697, #10068.

> Q. Okay. Now, were you charged?
> A. Yes, I was.
> Q. With criminal charges?
> A. Yes, I was.
> Q. What were you charged with?
> A. Conspiracy to commit mail fraud and conspiracy to commit security fraud.
> Q. And did you plead guilty?
> A. Yes, I did.
> Q. What did you plead guilty to?
> A. Conspiracy for security fraud.
> Q. And only that charge?
> A. Yes, sir.
> Q. Why just that charge?
> A. It's the lesser of the two charges and the one I feel for sure we did.
> Q. Did you also commit the crime in Count 1, the conspiracy to commit mail fraud?
> A. I believe so, now that I understand it.[281]

The Government improperly used Anzalone's guilty plea to prove the guilt of the other Defendants. The prejudicial impact of Anzalone's testimony was confirmed when the court stated its "impression that without Mr. Anzalone's testimony these convictions might not have happened."[282] In an effort to address this prejudice, Barnes again requested a limiting instruction in the final instructions.[283] The court never gave the limiting instruction.

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[281] R.465, #3576.
[282] R.675, #7855.
[283] R.692, #9907.

The introduction of the guilty plea was "especially prejudicial": "'[A] guilty plea entered by a co-defendant can be especially prejudicial if the plea is made in connection with a conspiracy to which the remaining defendants are charged.'" *U.S. v. Carson*, 560 F.3d 566, 576 (6th Cir. 2009); *U.S. v. Alanis*, 611 F.2d 123, 126 (5th Cir. 1980)("the introduction of evidence of a co-defendant's guilty plea is plain error and reversible even in the absence of an objection at the trial court.").

VIII. THE COURT SHOULD REVERSE ON BOTH COUNTS BECAUSE THERE WAS INSUFFICIENT PROOF THAT BARNES KNEW OF MISREPRESENTATIONS TO PURCHASERS OF EMPEROR PACKAGES.

In both Counts 1 and 13, Barnes was charged with conspiring in a scheme to defraud involving misrepresentations to purchasers of Emperor packages.[284] Thus, for sufficient evidence to exist, there must have been evidence that Barnes knew that misrepresentations were made to induce a purchase.

[284] *See, e.g.* R.554 at #5265 ("the defendant knowingly participated in or devised a scheme to defraud in order to deprive another of money or property, that is through the sale of Emperor positions in…i2g" and "the scheme included material misrepresentation or concealment of a material fact….").

In evaluating the evidence, it is essential to consider that the mail and securities fraud statutes punish "one kind of scheme – schemes intended 'to deprive [people] of their money or property.'" *United States v. Sadler*, 750 F.3d 585, 590 (6th Cir. 2014) (quoting *Cleveland v United States*, 531 U.S. 12, 19 (2000)). The Government must prove that the defendant intended to deprive someone of money and "paying the going rate for a product does not square with the conventional understanding of 'deprive.'" *Sadler,* 750 F.3d at 590. "To be guilty of fraud, an offender's 'purpose must be to injure.'" *Id.* (*quoting Horman v. United States,* 116 F. 350, 352 (6th Cir. 1902)). Even a defendant who lies in order to get a purchaser to pay full value for a product does not violate the federal fraud statutes. "Lightly equating deceptions with property deprivation, even when the full sales price is paid, would occupy a field of criminal jurisdiction long covered by the States, a consideration that has prompted the [Sixth Circuit] to resist like-minded readings of 'scheme to defraud before.'" *Sadler,* 750 F.3d at 591.

In *United States v. Takhalov*, 827 F.3d 1307, 1312 (11th Cir. 2016), the 11th Circuit, in an opinion by Judge Thapar, sitting by designation, held that, in the judicially defined phrase "scheme to defraud," "there is

a difference between deceiving and defrauding: to *defraud*, one must intend to use deception to cause some injury; but one can *deceive* without intending to harm at all.…Put another way, one who defrauds always deceives, but one can deceive without defrauding."

> [A] "scheme to defraud," as that phrase is used in the wire-fraud statute, refers only to those schemes in which a defendant lies about the nature of the bargain itself. That lie can take two primary forms: the defendant might lie about the price (*e.g.*, if he promises that a good costs $10 when it in fact costs $20) or he might lie about the characteristics of the good (*e.g.*, if he promises that a gemstone is a diamond when it is in fact a cubic zirconium). In each case, the defendant has lied about the nature of the bargain and thus in both cases the defendant has committed wire fraud. But if a defendant lies about something else—*e.g.*, if he says that he is the long-lost cousin of a prospective buyer—then he has not lied about the nature of the bargain, has not "schemed to defraud," and cannot be convicted of wire fraud on the basis of that lie alone.

Id. at 1313-14. Judge Thapar continued,

> [C]ases have drawn a fine line between schemes that do no more than cause their victims to enter into transactions that they would otherwise avoid—which do not violate the mail or wire fraud statutes—and schemes that depend for their completion on a misrepresentation of an essential element of the bargain—which do violate the mail and wire fraud statutes.

Id. at 1314. A jury cannot convict "based on 'misrepresentations amounting only to a deceit.'" *Id.* at 1314. "[E]ven if a defendant lies, and

even if the victim made a purchase because of that lie, a wire-fraud case must end in an acquittal if the jury nevertheless believes that the alleged victims 'received exactly what they paid for.'" *Id.*

"A defendant does not commit mail fraud unless he possesses the specific intent to deceive or defraud…; a scheme to defraud must involve intentional fraud, consisting in deception intentionally practiced to induce another to part with property…, and which accomplishes the end design." *United States v. Frost,* 125 F.3d 346 (6th Cir 1997) (internal quotation marks omitted).

Here, there was no proof that Barnes ever knew of any misrepresentation, let alone any misrepresentation regarding any essential element of the Emperor package. Barnes knew that there were real products and services that Emperors would receive, that there was a real online casino and that Emperors would share in any profits earned by the company, and that there was an MLM compensation system that enabled Emperors to earn payments from product sales, casino usage, and commissions. There is no evidence that he was aware of any misrepresentation about any of these components. The evidence that the Government pointed to in its closing reveals the absence of such proof.

The Government described the evidence it felt established Barnes' guilt. But none of that evidence was probative that Barnes knew a conspirator made a false statement to a person who purchased an Emperor package. The exhibits relied on by the Government show that Barnes and Maike became acquainted in past business ventures[285] and interacted during certain aspects of the planning and operation of I2G. The Government argued that Barnes was privy to *some* decisions or otherwise aware of *some* happenings within the company to insinuate he must have known that some statement to an Emperor purchaser was false.[286] Specifically, the Government relied on evidence that he was copied on early emails relating to the business plan and contributed to parts of that initial plan; was copied on some later emails related to the business; provided an agenda at an event early on during the company's promotional phase; was listed as owning various small percentages of I2G but was listed as the sole owner for the purpose of obtaining merchant accounts; assisted I2G with obtaining merchant accounts it needed to operate; was present for some company phone calls; and

[285] R.671, #7692-94.
[286] R.583, #5478.

originally promoted the company in his hometown.[287] But none of these exhibits relate to any false statement by a conspirator to a purchaser of an Emperor package. And they certainly do not show Barnes's knowledge that any conspirator made a false statement to a purchaser about any characteristic of the Emperor package.

Guilt by association is insufficient, and as a matter of law, evidence of Maike's guilt is insufficient to establish Barnes' knowledge. *United States v. Lee*, 991 F.2d 343, 348 (6th Cir. 1993).

The Government argued that Barnes's signature was on multiple merchant accounts and he received emails about new merchant accounts from time to time.[288] However, the applications and communications do not include any information that would relate to any misrepresentation to a purchaser of an Emperor package. Indeed, the evidence established that certain financial institutions closed I2G accounts because of its legal connection with international on-line gaming. Barnes's efforts to obtain bank accounts for I2G demonstrates an effort to enable I2G to operate

[287] U.S. Exhibits 505a, 505b, 580, 629a, 629b, 540a, 540b, 564a, 564b, 564c, 145, 50a, 620a, and 620b).
[288] R.671, #7703.

not knowledge that a conspirator made a misrepresentation to a purchaser about a characteristic of the Emperor package.

Proof concerning false statements by Maike about casino profits does not show that Barnes had any knowledge related to them. The undisputed proof was that Barnes did not have access to any information concerning the financial performance of the casino. There is no proof that Barnes even heard the statements by Maike concerning the casino profits, and there is no proof that Barnes would have known that Maike's statements were false. Any conclusion that he did would require speculation or conjecture.

The testimony established that Barnes participated little at the beginning and progressively less throughout the business's life. Barnes received a business plan early on—one that, by his and most objective accounts, represented a promising venture.[289] From there, Barnes was looped in when it became clear to those who *were* in charge that Barnes's financial capabilities were needed to surpass the latest obstacle.[290] Many witnesses did not know who Barnes was. Barnes was copied on very few

[289] U.S. Exs. 697a and 697b.
[290] U.S. Exs 505a, 505b, 580, 629a, 629b.

emails. This is consistent with the evidence about Barnes's declining health shortly after the company was developed. There was no evidence that Barnes made any company decision.

The Government introduced Barnes's October, 2013 statement about the ability to earn passive income as an Emperor without recruiting.[291] However, these statements were true. The appropriate inquiry is whether a statement of fact "is literally true, or, more accurately, might, under favorable conditions, be literally true…" *United States v. Rabinowitz*, 327 F.2d 62 (6th Cir. 1964).

The Government also introduced evidence of an account opening and closing at Little Bank in Barnes's hometown. The Government argued that Barnes's failure to mention I2G or Maike in the application constituted deception.[292] While Barnes disagrees, the interaction with Little Bank does not relate to knowledge by Barnes of a misrepresentation to an Emperor package purchaser. No Emperors was involved with or induced by any communication between Barnes and Little Bank. The evidence was so irrelevant that Barnes's objection under

[291] U.S. Ex.145 at 26:08-27:55
[292] R.671, #7700.

FRE 404b should have been sustained. There is simply no evidence that Barnes knew of any false statement to any purchaser of an Emperor package. For this reason, his convictions must be reversed.

IX. THE COUNT 13 CONVICTION SHOULD BE REVERSED.

A. The securities fraud conspiracy overt act instruction was error filled.

To convict on Count 13, the jury was required to find that a co-conspirator committed one of the overt acts charged in the Indictment. *See* Sixth Circuit Pattern Jury Instruction 304; *Brown v. Elliott*, 225 U.S. 392, 401 (1912)("[T]he period of limitation must be computed from the date of the last [overt act] of which there is appropriate allegation and proof….")(emphasis added).

Before trial, Defendants moved to dismiss Count 13 because it failed to include any overt acts.[293] The court denied the motion and held that paragraph 40 of the Indictment contained overt acts: "It specifically lists 20 individuals who were allegedly defrauded, the days they were defrauded and the amounts of money each allegedly lost."[294] Paragraph 40 alleges, "On or about the following dates,…defendants,…in connection

[293] R.437.
[294] R.452, #3528.

with the sale of securities…did use and employ manipulative and deceptive devices and contrivances….” In other words, the overt acts were acts of fraud by conspirators that induced the purchases of Emperor packages listed in Count 13.

As a result, counsel for Barnes requested that the overt act instruction state,

> For Count 13, the third element that the Government must prove is that a member of the alleged conspiracy did one of the following overt acts for the purpose of advancing or helping the conspiracy: made an untrue statement of material fact or omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading during the sale of the following Emperor packages: [list names of purchasers of Emperor packages listed in Count 13].[295]

An initial draft of the court’s instructions did not so limit the overt acts. Defendants objected “it is impossible to decipher what the alleged overt acts are” and that it was necessary for the court to limit the overt acts at issue in the instruction to those charged in the Indictment.[296] The court agreed and ruled that “we’re going to define overt acts as -- as it was defined in…paragraph 40, sub (c).”[297]

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[295] R.533, #5089.
[296] R.702, #11098.
[297] R.702, #11104.

Despite this ruling, the final version of the instructions did not limit the overt acts to those charged in the Indictment. Rather, the instruction read, "For Count 13,…the Government must prove…that a member of the conspiracy committed an overt act for the purpose of advancing or helping the conspiracy to commit securities fraud with respect to the sale of the following securities."[298] This did not contain any limitation on the potential overt acts at issue. Because there was no proof that any conspirator committed an act of fraud within the statute of limitations, the error in this instruction was prejudicial.

The court's instruction also improperly instructed the jury that the Emperor packages were securities. This was a critical issue in dispute.

Finally, instead of listing the names of the purchasers of Emperor packages as requested, the court listed a series of initials and referred to them as "Victim-Investor[s]."[299] Defendants from the beginning of the trial expressed concern about how the court referred to the purchasers. For example, on the first day of trial, Barnes requested that the court not refer to purchasers as "investors."[300] The court agreed and indicated he

[298] R.554, #5263.
[299] R.554, #5263-64.
[300] R.678, #8013-15.

would refer to them as "purchase[rs] of interests."[301] Contrary to this ruling, the court instructed the jury that the purchasers were "Victim-Investors."

This was a direct remark, which the jury was instructed to follow and is presumed to have followed. *U.S. v. Steele*, 919 F.3d 965, 973 (6th Cir. 2019). The court may not comment on the evidence through an instruction, especially in a manner that implies guilt. *See Buchanan v. U.S.*, 244 F.2d 916, 920 (6th Cir. 1957); *U.S. v. Smith*, 399 F.2d 896, 899 (6th Cir. 1968)("It cannot do indirectly what it cannot do directly, and by its instructions in effect advocate such a verdict of guilty."); *see also U.S. v. Sibley*, No. 2:14-cr-196, 2015 U.S. Dist. LEXIS 191136, at *6 (S.D. Ohio May 5, 2015)("The parties and all witnesses shall avoid referring to D.T. as a victim."); *U.S. v. Sena*, No. 19-CR-01432, 2021 U.S. Dist. LEXIS 170971, at *3 (D.N.M. Sep. 9, 2021)(use of victim "is prejudicial when the core issue at trial is whether a crime has been committed—and, therefore, whether there is a victim.").

[301] *Id.*

B. There was no proof of an overt act charged in the Indictment within the limitations period.

The court properly instructed that to convict on Count 13 the jury must find "that at least one overt act was committed for the purpose of advancing or helping the conspiracy after November 13, 2014."[302] However, as noted above the overt act must be charged in the Indictment. *See Brown*, 225 U.S. at 401. The only overt act that the Government contended fell within the limitations period related to "S.H."

But the undisputed proof shows that S.H. purchased his Emperor packages (from Scott Magers) on October 31, 2014.[303] Thus, the overt charged in the Indictment -- fraudulent acts by a conspirator that induced the purchase -- necessarily occurred on or before the date S.H. made the purchase.[304] Thus, the securities fraud claim was barred by the statute of limitations.

Finally, S.H. purchased the Emperor packages outside of the United States. Magers met with S.H. in London, England in August

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[302] R.554, #5264.
[303] R.671, #7456-67.
[304] There was also no proof that Magers, who over objection testified for the Government on rebuttal, was a conspirator. R.671, #7444-7464.

2014.[305] Based on that conversation, S.H. agreed to become an Emperor.[306] S.H. wired money from London, England on October 31, 2014.[307] Because the alleged overt act is an act of securities fraud with respect to S.H.'s purchase, that allegation would be barred as extraterritorial. Only domestic transactions are governed by the securities laws. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 267 (2010); *U.S. v. Vilar*, 729 F.3d 62, 74-75 (2d Cir. 2013).

C. The court erred in the manner it answered the jury question.

"A question from a deliberating jury often represents a pivotal moment in a criminal trial." *U.S. v. Duncan*, 850 F.2d 1104, 1115 (6th Cir. 1988). "Particularly in a criminal trial, the judge's last word is apt to be the decisive word." *Id.* (quoting *Bollenbach v. U.S.*, 326 U.S. 607, 612-13 (1946)). "[A]t this critical stage of the trial the wording may be as significant as the substance of the response." *U.S. v. Ronder*, 639 F.2d 931, 935 (2d Cir. 1981).

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[305] R.671, #7452.
[306] *Id.*
[307] R.671, #7456-7457.

"Recognizing that juries place great weight upon the words of the district court, the Supreme Court cautioned that district courts must 'use great care that an expression of opinion upon the evidence should be so given as not to mislead, and especially that it should not be one-sided.'" *U.S. v. Olea-Monarez*, 908 F.3d 636, 639-40 (10th Cir. 2018) (quoting *Quercia v. U.S.*, 289 U.S. 466, 469 (1933)).

"[W]here a jury's questions relate to a factual matter, a substantive reply (whether by the judge or the attorneys) risks interfering with the jury's exclusive responsibility for resolving factual questions." *U.S. v. Ayeni*, 374 F.3d 1313, 1320 (D.C. Cir. 2004); *see U.S. v. Walker*, 575 F.2d 209, 214 (9th Cir. 1978).

The jury asked the following question during deliberations: "Can we use the evidence from the whole case to determine if the positions sold are/were a security…or just the purchase within the statute of limitations?"[308] There was no proof of any purchase that occurred within the statute of limitations.[309]

[308] R.672, #7736.
[309] R.671, #7456-67.

Barnes proposed a response: "You are permitted to review any evidence that was admitted that you deem appropriate."[310] The Government agreed.[311]

However, when instructing the jury, the court offered a completely different answer.

> You are permitted to use any evidence which you deem appropriate to consider whether positions sold are/were a security, and because y'all asked two questions, I will answer the second one as well. You are not limited to the evidence regarding the purchase within the statute of limitations.[312]

The defense objected to the second sentence both before the court read it to the jury and immediately after.[313]

It was error for the court to affirm to the jury that a purchase occurred within the limitations period. The Court's response to the jury was the decisive, last word. Within an hour, the jury convicted. The response interfered with the jury's exclusive role of resolving factual questions. This alone mandates reversal. However, the response also misstated the evidence. There was no purchase that occurred within the

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[310] R.672, #7738.
[311] *Id.*
[312] R.672, #7740.
[313] *Id.* at #7738-41.

statute of limitations in the record,[314] and the court's response suggested there was one. The conviction should be reversed.

D. The Emperor packages were not securities as a matter of law.

A threshold question for Count 13 was whether the Emperor packages were securities. The Government claimed they were securities because they were "investment contracts." However, the evidence demonstrated that, as a matter of law, they were not investment contracts.

Courts have cautioned against shoehorning "every conceivable arrangement that would fit a dictionary definition of an investment contract" into the statutory definition of a security. *Curran v. Merril Lynch, Pierce, Fenner, & Smith, Inc.*, 622 F.2d 216, 222 (6th Cir. 1980). "The ultimate question of whether an instrument is a security is a question of law and not of fact." *Klein v. Roe*, 76 F.4th 1020, 1035 (10th Cir. 2023). When evaluating whether a particular transaction is a security, courts must disregard form in favor of substance – the economic realities underlying the transaction are dispositive. *Union Planters Nat'l*

[314] R.671, #7456-67 (undisputed proof shows that S.H. purchased his Emperor packages--from Magers--on October 31, 2014).

Bank v. Commercial Credit Business Loans, Inc., 651 F.2d 1174, 1181 (6th Cir, 1981); *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). This is an "objective inquiry" into the "expectations of a reasonable investor" under the circumstances. *Warfield v. Alaniz*, 569 F.3d 1015, 1021 (9th Cir. 2009); *Piambino v. Bailey*, 610 F.2d 1306, 1320 (5th Cir. 1980).

For a transaction to be an investment contract, the economic realities must establish "(1) the presence of an investment; (2) in a common venture; (3) premised on a reasonable expectation of profits; (4) to be determined from the entrepreneurial on managerial efforts of others." *Union Planters*, 651 F2d at 1181 (quoting *U.S. Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 852 (1975)). This test, first established in *SEC v. Howey Co.*, 328 U.S. 293 (1946), is commonly referred to as the *Howey* test. Courts, including this Court, have explained each of these elements, and these precedent shows that the Emperor packages did not meet any of these elements. These elements will be addressed in reverse order.

1. The Emperor packages did not create profit from the efforts of others.

In *SEC v. Edwards*, the Court clarified that "profits" "from the efforts of others" refers to "profits that investors seek on their

investment, not the profits of the scheme in which they invest." 540 U.S. 389, 394 (2004). Here, the Government contended that the "profits" were the profits from the casino. The casino profits were not derived from the efforts of "others."

The "efforts of others" prong focuses on the extent of the investors' dependency on the entrepreneurial or managerial skills of the promoter to profit from the investment. *Gordon v. Terry*, 684 F.2d 736, 740 (11th Cir. 1982). "The owner of a security lacks the *ability* to control the venture in which he is investing. This concept of control, or lack of control, is the basis for the requirement that a security derives its value from the managerial or entrepreneurial efforts of others." *First Financial Federal Sav. & Loan Asso. v. E.F. Hutton Mortg. Corp.*, 834 F.2d 685, 689 (8th Cir. 1987) (emphasis added). If the promoter's managerial and entrepreneurial efforts are "the undeniably significant ones…which affect the failure or success of the enterprise," then courts have found that the *Howey* test is satisfied. *Crowley v. Montgomery Ward & Co.*, 570 F.2d 875, 877 (10th Cir. 1975). If, on the other hand, investors retain control over their investments, "the agreement is no security." *Albanese v. Florida Nat'l Bank*, 823 F.2d 408, 410 (11th Cir. 1987).

When determining whether an investment relied on the managerial and entrepreneurial efforts of others, this Court has limited the scope of the inquiry to focus on the efforts of the promoter. *Union Planters*, 651 F.2d at 1185. In order to be an investment contract, the managerial and entrepreneurial efforts of the *promoter*, acting after the initial investment, must drive profits, rather than some outside actor or force. *Id.; SEC v. Life Partners, Inc.*, 87 F.3d 536 at 548 (D.C. Cir. 1996); *see Procter & Gamble Co. v. Bankers Trust Co.*, 925 F.Supp. 1270, 1278 (S.D. Ohio 1996). So long as profits are generated by someone other than the promoter, this Court has held that there is no security. *Id.*

Even substantial administrative oversight on the part of the promoter does not meet this prong. In *Union Planters*, this Court held:

> Although [defendant] was clearly responsible for certain administrative tasks, those services are not managerial or entrepreneurial within the meaning of the Howey-Forman test…Although [defendant] supervised the loan, policed the collateral, and collected interest and principal payments, its efforts were not managerial or entrepreneurial in the sense that they generated the return expected by the parties.

Id. at 1185.

Finance Ventures' role in the profitability of the online casino was similarly administrative. Finance Ventures entered into a contract with

Plus Five Gaming and performed an exclusively administrative role. Within I2G's structure, the promoter's role was to uphold its contractual obligations by ensuring that Plus Five Gaming received its minimum payments and to oversee the distribution of any revenues that came out of the casino. The growth of the casino's revenue was left entirely up to the I2G purchasers, who, collectively, were the driving force behind recruiting new membership for the casino and convincing those members to gamble. As a matter of law, Finance Venture's role was administrative, and cannot satisfy the "efforts of others" prong of the *Howey* test.

In situations where participants in a multi-marketing business rely on their own efforts and the efforts of fellow participants to drive the profits, courts have found that the "efforts of others" prong is not satisfied. *Kerrigan v. Visalus, Inc.*, 112 F. Supp. 3d 580, 598 (E.D. Mich. 2015); *Piambino*, 610 F.2d at 1319-1320.

In *Kerrigan*, the court looked to the language in a MLM's promotional materials. 112 F. Supp. at 598-599. The court explained that the ability of participants to act independently and develop their own marketing strategies "cut[] sharply against" the determination that participants were reliant on the efforts of others. *Id.* This aligns with this

Court's finding that there is no security when investors play significant, independent roles in the creation of profit. *Odom v. Slavik*, 703 F.2d 212, 215 (6th Cir. 1983).

In I2G, the "investors" retained the ability to drive casino profits – the business, and the plan required that they do so. The reasonable purchaser would understand that the generation of "profits" permitted and required their independent efforts. As an MLM, the success of the casino depended on the "investors'" use of the online casino and their marketing efforts. Marketing materials made clear the casino's profits were dependent on how much traffic IBOs drove to the casino.[315] Moreover, promotional materials informed that earnings "depend solely on the ideas, techniques, knowledge, skills, and time invested into your independent business."[316]

2. The casino revenue was not "profits" under the *Howey* test.

Finance Ventures did not use or develop investor funds to generate revenue from the casino. Emperors purchased a contractual right to a profit stream that Finance Ventures had already contracted for with Plus

[315] R.682, 8533.
[316] US Exhibit 107b.

Five. Finance Ventures did not use the proceeds of Emperor packages to generate earnings for Emperors. Because casino revenue was not a result of the use or development of the money from that original purchase, casino revenue was not "profit" for purposes of the *Howey* test.

The focus of the Securities Act is on capital markets and "the sale of securities to raise capital for profit making purposes."[317] *Forman*, 421 U.S. 837. For purposes of the *Howey* test, the definition of profits is therefore limited to either (1) capital appreciation resulting from the development of an initial investment or (2) a participation in earnings resulting from the use of investors' funds. *Union Planters*, 651 F.2d at 1184; *Edwards*, 540 U.S. at 394 (2004).Courts have found that, in the absence of some development of the investor's funds through entrepreneurial efforts, not every return on an investment should be considered profit under *Howey*. *Kansas State Bank v. Citizens Bank of Windsor*, 737 F.2d 1490, 1495 (8th Cir. 1984).

[317] R.691, 9694-9699.

3. The money Emperors paid was not "pooled," and therefore there was no horizontal commonality.

Under this Court's horizontal commonality test, an investment is only a security if the investor's funds are combined with other investors' funds to create a "pool of capital" the losses and profits of which are distributed among the entire group of investors. All of the proceeds of sales of Emperor packages were revenue to Finance Ventures and were never pooled to generate profits or losses for the Emperors. The requirements for horizontal commonality were not met.

Horizontal commonality is a "stringent" test that "examines the relationship among investors in a given transaction, requiring a pooling of investors' contributions and distributions of profits and losses on a pro-rata basis." *SEC v. Infinity Group Co.*, 212 F.3d 180, 187-88, n. 8 (3d Cir. 2000)); *SEC v. Prof'l Assocs.*, 731 F.2d 149, 354 (6th Cir. 1984). The Sixth Circuit applies this stricter test out of concern that loosening the standard "effectively excises the common enterprise requirement of *Howey*." *Curran v. Merril Lynch, Pierce Fenner & Smith*, 622 F.2d. 216, (6th Cir. 1980). Horizontal commonality properly limits the scope of securities law to "the capital market" and promoters who seek to create "a pool of capital by dividing up the needed base into units for individual

sales…no different in operating reality from the sale of stock by a corporation." *Forman*, 421 U.S. at 849; *Milnarik v. MS Commodities, Inc.*, 457 F.2d 274, 278 (7th Cir. 1972); *Deckebach v. La Vida Charters, Inc. of Florida*, 867 F.2d 278, 282 (6th Cir. 1989)(aligning the Sixth Circuit's horizontal commonality approach with *Milnarik*.).

Other circuits that require horizontal commonality agree that the requirement of horizontal commonality requires pooling of the investor funds. "Horizontal commonality requires a pooling of investors' contributions and distribution of profits and losses on a pro-rata basis among investors." *Steinhardt Grp. v. Citicorp*, 126 F.3d 144, 151 (3rd. Cir. 1997)(emphasis added); *Life Partners*, 87 F.3d at 543 (defining horizontal commonality as the "pooling of investment funds, shared profits, and shared losses"); *Goldberg v. 401 North Wabash Venture LLC*, 755 F.3d 456, 465 (7th Cir. 2014)("a 'common enterprise'...means an enterprise in which 'multiple investors...pool their investments and receive pro rata profits.'"); *Infinity Grp.*, 993 F. Supp. at 323 ("horizontal commonality 'requires a pooling of investors' contributions and distribution of profits and losses on a pro-rata basis among investors . . . Our review of cases in other Circuits that apply the definition of

horizontal commonality suggests that pooling of investor funds is most often the determinative factor.").

Here, the revenue that Finance Ventures made from selling Emperor Packages was not pooled. Additionally, while each Emperor received a share of the proceeds from the casino's revenue, there was no sharing of pro rata losses in a manner that resembled a corporate stock. Instead, each purchase was treated as revenue by Finance Ventures, and the purchased share in the casino's revenue existed regardless of how many others purchased Emperor packages.

4. Purchases of Emperor packages did not constitute a severable investment in the casino.

> [I]n every decision of this Court recognizing the presence of a 'security' under the Securities Acts, the person found to have been an investor chose to give up a specific consideration in return for a separable financial interest with the characteristics of a security….In every case the purchaser gave up some tangible and definable consideration in return for an interest that had substantially the characteristics of a security.

International Brotherhood of Teamsters v. Daniel, 439 U.S. 551, 559-560 (1979). The Court found that there was no security because the noninvestment interests that drew participants to the company were not separable from the potential benefits of the security. Other circuits have

found that the investment prong requires that the investor "commit his assets to the enterprise in such a manner as to subject himself to financial loss." *SEC v. Rubera* 350 F.3d 1084, 1090 (9th Cir. 2003).

A reasonable purchaser of an Emperor Package was not committing their assets to an enterprise—they were purchasing a package of rights. In this situation, neither the risk of loss nor the specific consideration allocated for the purchase of the casino's revenue stream are calculable.

E. The definition of "investment contract" was incorrect in the instruction.

Based on the authorities cited above, the instruction on "investment contract" in Instruction 9 was incorrect. First, it did not include a requirement of the pooling of investor funds as is required by the horizontal commonality requirement. This objection was preserved.[318] The instruction was also incorrect because the court refused to include the following instruction Barnes requested:

> While considering whether the Government has proven beyond a reasonable doubt that the portion of the Emperor package that provided for the sharing of casino profits was an investment contract, you should consider the economic realities of I2G's offer of the Emperor program from the perspective of an objectively reasonable purchaser.[319]

[318] R.702, #11170-72.
[319] R.545, #5221.

The instruction was also incorrect because it defined "others" as "persons other than the investor." This allowed a finding of an "investment contract" if one Emperor subjectively expected profits to be derived from the efforts of other Emperors. As set forth above, this is incorrect. The instruction tendered by Barnes[320] should have been used in its entirety. It described this element as follows: "[T]hat profits to the Emperors would be derived primarily from the efforts of people other than the I2G IBOs." This flawed instruction alone requires a reversal.

X. THE COURT ERRED IN IT IS SENTENCING GUIDELINE CALCULATION.

The court incorrectly based its determination of Barnes' offense level on its finding that Barnes intended a loss of more than $25,000,000.[321] The court based its finding on multiplying the 5,000 potential Emperor packages by the $5,000 purchase price.[322] This was error.

[320] R.533, 5090-92
[321] R.663, #6614-15.
[322] *Id.*

Barnes objected to the use of the intended loss and cited *U.S. v. Banks*, 55 F.4th 246 (3d Cir. 2022).[323] There, the Third Circuit held that the plain text of §2B1.1(b) requires a monetary amount of loss and that the ordinary meaning of loss does not include "intended loss" as referenced in the commentary. While Barnes is aware of the current precedent of this Court set forth in *U.S. v. You*, 74 F.4th 378 (6th Cir. 2023), Barnes submits that the Court should adopt the holding of *Banks* and reverse the court's reliance on intended loss.

In any event, the court's intended loss calculation violated binding precedent. The Government had the burden of proving that a sentencing enhancement applies. *U.S. v. Byrd*, 689 F.3d 636, 640 (6th Cir. 2012). In conspiracy cases, "the scope of conduct for which a defendant can be held accountable under the sentencing guidelines is significantly narrower than the conduct embraced by the conspiracy." *U.S. v. Swiney*, 203 F.3d 397, 402 (6th Cir. 2000). This is because "the scope of the criminal activity jointly undertaken by the defendant . . . is not necessarily the same as the scope of the entire conspiracy." *Id.* The Guidelines' approach to sentencing a defendant for conspiracy is much narrower than the

[323] *Id.* at #6600.

standard for establishing guilt of the offense itself. *U.S. v. Lanni*, 970 F.2d 1092, 1093 (2nd Cir. 1992).

"Intended loss…means the pecuniary harm that [Barnes] purposely sought to inflict."[324] The defendant's subjective intent is relevant to the intended loss inquiry.[325] The "loss" at issue is the loss intended to be caused by the offense. *U.S. v. Riccardi*, 989 F.3d 476, 481 (6th Cir. 2021). The court "shall" then reduce the estimate by "[t]he money returned, and the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected."[326] *U.S. v. Johnson*, 79 F.4th 684 (6th Cir. 2023).

The court's conclusion that Barnes purposely sought to inflict loss arising from the offense in the amount of $5,000 multiplied by 5000 Emperors violated these principles. The "offense" here was defined by Jury Instruction 8, which required the existence of material misrepresentations. Thus, in order to show that Barnes purposely intended criminal conduct to cause loss, the Government was required to

[324] U.S.S.G. § 2B1.1 Application Note 3(A)(ii).
[325] U.S.S.G. App. C, amend. 792 (effective Nov. 1, 2015)
[326] U.S.S.G. § 2B1.1 cmt. 3(E)(i);

prove that he intended payments by every Emperor to be a result of misrepresentation. There was no proof of this. Rather, many Emperors never heard any misrepresentation. For example, witnesses at trial testified that they purchased the packages because of the truthful fact that they would obtain the right to share in any profits that would be received from the online casino.

It was also legally erroneous for the court to include payments by alleged conspirators in the intended loss calculation. Under the Government's theory, promoters like Jason Syn, Dennis Dvorin, David Manning, and other large players did not purchase Emperor packages because they were victims. The Government claimed they paid money to benefit from a conspiracy. The 276 Emperor packages owned by Jason Syn cannot be included as intended loss.

Finally, the court failed to include the credits that the Guidelines require to be deducted in the loss calculation. The court failed to account for the fact that Emperors received things of value in exchange for payments. Committee Note 3(E) requires credit for the fair market value of property returned to or services received by a person who pays money. For example, this Court determined that, although a construction

contractor committed fraud in the bidding process to secure a contract, the contractor was to be credited the value of services rendered before the customer cancelled the contract. *U.S. v. Anders*, 333 F. App'x 950, 954–55 (6th Cir. 2009).

The amount of loss cannot include the value of items or services that Emperors received from I2G after their payment. Thus, loss cannot include the value of the digital products, the value of the right to participate in the IBO compensation plan, and the value of the right to use and potentially profit from the on-line casino.

Similarly, the court failed to account for the sums paid to Emperors throughout the course of their relationship with I2G.[327] The binary compensation system was programmed to return 65% of funds received to participants. Emperors received millions of dollars of commissions. Over $600,000 in refunds were paid to Emperors. The Guidelines require that these amounts be subtracted from any payments by Emperors. This requirement is confirmed by § 2B1.1 Advisory Note 3(F)(iv): "In a case

[327]§2B1.1 Advisory Note 3(E); *U.S. v. Snelling*, 768 F.3d 509 (6th Cir. 2014) ("Accordingly, the district court was in error when it declined to reduce the loss figure by the value of the payments made by [defendant] to his investor victims").

involving a fraudulent investment scheme, such as a Ponzi scheme, loss cannot be offset by the money or value of property transferred to any individual investor in the scheme in excess of that investor's principal investment." In other words, if an Emperor paid $5,000 (and that payment constituted intended loss) but that Emperor received payments of $5,000, the loss would be 0. If that Emperor received $1,000, the loss would be $4,000. And if that Emperor received $10,000, the net loss would still be 0. The Advisory Note explains this in its own words: "i.e., the gain to an individual investor in the scheme shall not be used to offset the loss to another individual investor in the scheme." *See U.S. v. Sloman*, 909 F.2d 176, 182 (6th Cir. 1990).

Barnes also objected to the finding of "substantial financial hardship." 2B1.1(b)(2) requires the Government to prove that "the offense resulted in substantial financial hardship" to victims. This requires proof that Barnes' criminal conduct – the "offense" -- proximately caused "substantial financial hardship." *U.S. v. Skouteris*, 51 F.4th 658, 672-673 (6th Cir. 2022). Thus, the Government had the burden of proving that a particular person was a "victim" (i.e., he or she purchased an Emperor package in reliance on a misrepresentation), that the person suffered

financial loss (the amount paid exceeded the value of what the person received, that the person suffered "substantial financial hardship," and that Barnes' criminal conduct proximately caused the "substantial financial hardship." No evidence was presented at sentencing that Barnes' criminal conduct caused any of the alleged "substantial financial hardship." Rather, the Government introduced notes from the case agent concerning interviews with some people who participated with I2G.[328]

Moreover, 2B1.1 Application Note 4(F) instructs the Court to consider whether the offense resulted in the victim enduring a series of life-changing financial events in determining whether the offense resulted in substantial financial hardship. The Government cannot prove that harm of this magnitude was proximately caused by Barnes' criminal conduct.

XI. THE COURT ERRED IN ITS RESTITUTION CALCULATION

The Government relied on 101i to support its restitution calculations and continued to falsely argue that the data "reflects commissions earned, not commissions paid."[329] For the reasons set forth

[328] R.663, #6625-29.
[329] R.708.

above, 101i did not accurately reflect reality. The court, inconsistently endorsed the restitution calculations based on 101i while also finding, "Testimony at trial suggested that the data in Reynolds' software was not representative of the victims' actual experience with I2G."[330]101i did not reflect commissions earned. Rather, Jerry Reynolds in his declaration confirmed that 101i, for example, did not include any commissions earned that IBOs used for purchases or transferred to other IBOs. It was error to rely on 101i at all. The court also failed to even address the defendants' argument that the restitution amounts should not include earned commissions that IBOs benefited from but did not receive as cash payment.[331] For these reasons alone, the Court should reverse the restitution calculations.

CONCLUSION

For the foregoing reasons and based on cumulative error,[332] the Court should reverse the convictions of Barnes and remand with instructions to dismiss the Indictment. Alternatively, the Court should

[330] R.744, #11538.
[331]R.721, #11397-11408.
[332] Taking the errors together, the cumulative effect requires reversal. *See U.S. v. Adams*, 722 F.3d 788, 832 (6th Cir. 2013).

reverse the convictions of Barnes and remand with instructions to set a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have moved for enlargement of the word count based on the extensive record and consolidated nature of the appeal. If the Court grants the extension, this brief will comply with the Court's order, which would be double the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). This brief, including headings, footnotes, and quotations, contains 25,116 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 6 Cir. R. 32(b). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14-point Century Schoolbook.

/s/R. Kenyon Meyer
R. Kenyon Meyer

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CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2023, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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