***Percoco* Jury Instruction**

**Standard of Review**

Hosseinipour brought a vagueness challenge below. (R.579,#5455-56.) Barnes expressly incorporated the argument. (R.568,#5330.) The issue is preserved.[[1]](#footnote-2) Moreover, the Government failed to ask that the vagueness challenge be reviewed for plain error, (Br.115-16; *U.S. v. Williams*, 641 F.3d 758, 764 (6th Cir. 2011)(Government must specifically request plain-error review.)) The standard of review is *de novo*. *U.S. v. Krumrei*, 258 F.3d 535, 537 (6th Cir. 2001).

**Merits**

A vague statute that leaves it for the court or the executive branch to fashion what is illegal violates the separation of powers. (Hosseinipour Br.28 (citing *U.S. v. Reese*, 92 U.S. 214, 221 (1876)). 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); *Robinson v. Waterford*, 883 F.2d 75 (6th Cir. 1989)(“Criminal statutes must draw reasonably clear lines between behaviour which is forbidden and that which is not.”). The standard applies to jury instructions. *Percoco v. U.S.*, 143 S. Ct. 1130, 1131 (2023). 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.

“No clear line separates illegal pyramid schemes from legitimate multilevel marketing programs.” *Gold*, 177 F.3d at 475. The distinction between a legitimate MLM and a pyramid scheme is nonexistent, and Congress and the FTC leave it to the courts to fashion the test as to what an illegal pyramid scheme is on a case-by-case basis. (Barnes Reply\_\_; *see also* H.R.3409 - Anti-Pyramid Promotional Scheme Act of 2017.) The FTC recognizes that “determining whether an MLM is a pyramid scheme requires a fact-intensive, case-by-case analysis.” 76 FR 76816, 76822. Even the FTC could not come up with what a MLM would need to disclose for a consumer to identify a fraudulent pyramid scheme. *Id.* (“The Commission, however, was not persuaded that workable, meaningful disclosures could be devised that would help consumers identify a fraudulent pyramid scheme.”). Applying *Robinson* and *Percoco*, the law at the time of the events charged and jury instructions did not draw reasonably clear lines between what is forbidden and that which is not, so reversal is required. *Gold*, 177 F.3d at 475.

Whether a company is actually a pyramid scheme depends on “information is not readily apparent or interpreted.” *Torres*, 838 F.3d at 643. The court’s instruction did not give the jury the guidance of how to meaningfully interpret the information presented, how to differentiate between legitimate MLMs and pyramid schemes, or even the unclear line that divides them.[[2]](#footnote-3) Thus, ordinary people were unable to “understand what conduct is prohibited,” and the jury instructions lacked the definiteness as to not “encourage arbitrary and discriminatory enforcement.” *Id.* at #1138. The forty-year-old test out of *Koscot* does not provide a clear line between pyramid schemes and legitimate MLMs. *Gold*, 177 F.3d at 475. Instead, it requires updating or supplementing. *Id.* at 483; *Torres*, 838 F.3d at 640. *Neora LLC*, 2023 U.S. Dist. LEXIS 217429, at \*30.

Indeed, Judge Jones and Judge Clement out of the Fifth Circuit recognize that there is “so little definition” that district courts have “unfettered and untutored discretion.” *See, e.g. Torres*, 838 F.3d at 654 (Jones J. dissenting)(“I do not ever recall sending a case to a jury with so little definition of the elements of the offense, much less, for class action purposes, assuming guilt from the enterprise’s mere structure.”). Judge Moore has similarly concluded that “[t]he problem with this instruction is that a pyramid scheme, as the court defined it, does not necessarily constitute a scheme to defraud.” *Gold*, 177 F.3d at 490(Moore J. dissenting). As phrased, “the contested instruction here largely eliminated the government’s burden of establishing the existence of a scheme to defraud.” *Id.* Because reasonable jurists disagree over what the *Koscot* test actually requires the Government to prove and recognize its vagueness, it does not allow ordinary people to understand what is prohibited.

Adding a sentence about what the company’s structure suggests does not clarify the definition; instead, it makes the definition vaguer and more expansive. What a company’s ***structure suggests*** cannot support a finding of criminal liability. The word suggests does not tell a jury what they need to find; instead, it instructs the jury to infer guilt because an MLM has a pyramidal structure or shape.Ordinary people would interpret structure to mean structure or shape. Legitimate MLMs have “structures” that “contain some elements of a pyramid scheme.” *Gold Unlimited, Inc.*, 177 F.3d at 480. All MLMs have pyramid or tree shapes, and the structure, which includes recruiting new legs, necessarily suggests a focus on recruitment. *See Whole Living, Inc. v. Tolman*, 344 F. Supp. 2d 739, 745 (D. Utah 2004)(“A structure that allows commissions on downline purchases by other distributors does not, by itself, render a multi-level marketing scheme an illegal pyramid.”). “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.”). This is consistent with the testimony of the Government’s expert as well as the literature on pyramid schemes. “This pyramid scheme shape alone, however, does not mean it is a pyramid scheme.” Adam Epstein, Multi-Level Marketing and Its Brethren: The Legal and Regulatory Environment in the Down Economy, ATL. L.J., 91, 104 (2010). “Having a pyramid shape in and of itself is not indicative of a pyramid scheme.” (R.487, #3901.) If that were the case, contrary to *Gold*, all MLMs would be illegal pyramid schemes. A 2012 study of 500 MLMs found that they were all pyramid schemes as they were all “recruitment-driven and top-weighted.” See JON M. TAYLOR, THE CASE (FOR AND) AGAINST MULTI-LEVEL MARKETING, CONSUMER AWARENESS INST. 7-2 (2012). No court has supported a criminal conviction on what a structure suggests, and the Sixth Circuit has held that all MLMs are not pyramid schemes. *See Gold*, 177 F.3d at 480 (“Courts and legislatures recognize a distinction between legitimate programs (known as multi-level marketing systems) and illegal schemes.”). The definition in the jury instruction did not clarify *Koscot*; instead, it made the definition vaguer and clashed with *Gold*.

Barnes and Hosseinipour interpret the instruction as not requiring the Government to prove that the scheme would eventually lead to market saturation. The Government interprets the instruction the same way. (Br.36.) The Government also claims that the definition was a straightforward application of *Omnitrition*, so it is not a novel concept. But the Ninth Circuit believed the whole purpose of the test was that “[p]yramid 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)(second element is meant to show company “is nothing more than an elaborate chain letter device”). In the context of the facts of this case (as opposed to serial fraudster operating a gold coin business that did not actually sell gold coins), Barnes, Hosseinipour, and the Government agree that that pyramid scheme definition did not require the proof that the sale of Emperor packages “must eventually collapse[,]” which is the whole purpose of the *Koscot* test as clarified by *Ominitrition*. As such, the law at the time did not put Hosseinipour and Barnes on notice of what was prohibited, and the instruction failed to offer sufficient definiteness for ordinary people to understand what was illegal.

Other factors show the unconstitutionally vague nature of the instruction. Keep’s unrebutted opinion was that internal sales do not count, and the instruction failed to correct the erroneous opinion. For example, the FTC’s guidance provides that a “[p]roduct that is purchased and consumed by participants to satisfy their own genuine product demand – as distinct from all product purchased by participants that is not resold – is not in itself indicative of a problematic MLM compensation structure.” Business Guidance Concerning Multi-Level Marketing, FED. TRADE COMM’N, https://www.ftc.gov/tips-advice/business-center/guidance/business-guidance-concerning-multi-level-marketing (last visited Mar. 25, 2024). Thus, the instruction needed to express that internal consumption counts especially since Keep wrongly testified that internal consumption does not count. Defendants expressly requested this instruction, but the court refused. (R.692,#9937.) Finally, the instruction expanded *Gold* to reach mere participants instead of just the individuals who devised the scheme.

This is a marginal case where the mail fraud and securities fraud statutes cannot be applied. *U.S. v. Frost*, 125 F.3d 346, 370 (6th Cir. 1997). The jury instructions and law at the time failed to meaningfully define when an MLM becomes an illegal pyramid scheme. As such, they were unconstitutionally vague and require reversal.

1. The court also refused to hear any more objections on the pyramid scheme definition. (R.671,#7478 (“If it’s wrong, it’s wrong.”)) As the court denied defendants the opportunity to make additional objections, that cannot be used to find a lack of preservation. [↑](#footnote-ref-2)
2. Defense counsel specifically asked that the “no clear line” language be included, and the court refused. (R.671,#7478.) All objections were incorporated. (R.671,#7479,83.) [↑](#footnote-ref-3)