No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

GARY R. TOMEY, II,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 224-2340
FL Bar No. 114227
Email: ufferman@uffermanlaw.com

COUNSEL FOR THE PETITIONER

A. QUESTIONS PRESENTED FOR REVIEW

1. Whether a constructive amendment and/or material variance of the indictment occurs when a court instructs the jury for the first time – during its deliberations – that it can find a defendant guilty of a theory that was not sufficiently developed in the indictment or argued by the prosecution during the trial.

2. Whether the Fifth Amendment right against self-incrimination prohibits a court from considering a defendant's lack of remorse during a sentencing hearing.

B. PARTIES INVOLVED

The parties involved are identified in the style of the case.

C. TABLE OF CONTENTS AND TABLE OF AUTHORITIES

1. TABLE OF CONTENTS

2. TABLE OF CITED AUTHORITIES

a. Cases

b. Statutes

c. Other Authority

The Petitioner, GARY R. TOMEY, II, requests the Court to issue a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals entered in this case on July 26, 2019. (A-1).[1]

D. CITATION TO OPINION BELOW

United States v. Tomey, 783 Fed. Appx. 832 (11th Cir. 2019).

E. BASIS FOR JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1) to review the final judgment of the Eleventh Circuit Court of Appeals.

F. CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." The Fifth Amendment also protects an individual's right to remain silent. Finally, the Fifth Amendment states that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

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[1] References to the appendix to this petition will be made by the designation "A" followed by the appropriate page number.

G. STATEMENT OF THE CASE

The Petitioner and Codefendant Eric T. Eakes were charged in an indictment with the following counts: conspiracy to commit mail and wire fraud in connection with telemarketing, pursuant to 18 U.S.C. §§ 1349 and 2326 (count 1) and mail fraud in connection with telemarketing, pursuant to 18 U.S.C. §§ 1341 and 2326 (counts 2-8). (A-58). The essence of the allegations in this case is that between August 2008 and May 2012, the Petitioner and Codefendant Eakes conspired to use deceptive and misleading telemarketing tactics to solicit charitable contributions under the pretext that the contributions would be used to furnish services for abused women and needy children. The Petitioner operated the telemarketing business in Milton, Florida, under the name of Children and Family Services, Inc. ("CFS"), and later under the name of Children's Charitable Services, Inc. ("CCS"). The Petitioner was the registered agent of, and had signatory authority over, CFS and CCS, and Codefendant Eakes managed the CFS and CCS office in Milton, where other telemarketers worked for the business. The CFS and CCS employees/telemarketers made telephone calls from the office in Milton to potential donors in Florida and elsewhere soliciting charitable donations. Codefendant Eakes trained the employees/telemarketers on how to procure donations and supplied marketing scripts to guide them in responding to prospective donors' questions and concerns regarding the solicitations. At trial, the Government asserted that the employees/telemarketers misrepresented that 100 percent of the collected donations would go the charity. In the indictment, the Government alleged that CFS and CCS received more than $1.2 million in fraudulently induced donations, which the

Government alleged was improperly used for employees' wages and commissions, the Petitioner's and Codefendant Eakes' salaries, business expenses, and personal use. The theory of defense was that (1) there was no conspiracy between the Petitioner and Codefendant Eakes and (2) there was no intent to defraud.

The case proceeded to trial in May of 2016. During the trial, an issue arose concerning count 1 of the indictment (i.e., the conspiracy count). Count 1 of the indictment alleged that the Petitioner and Codefendant Eakes "did knowingly and willfully combine, conspire, confederate, and agree together and with other persons to commit offenses against the United States . . . ." (A-58). In the manner and means section of count 1 of the indictment, the *only parties* who are referenced are the Petitioner and Codefendant Eakes and employees who acted at their direction. During the trial – in opening statements as well as in closing arguments – the Government only referenced and argued that there were two co-conspirators: the Petitioner and Codefendant Eakes. (A-65-107). After the jury began its deliberations, the jury submitted the following question:

> "Can one Defendant be found guilty on Count One and one Defendant found not guilty on Count One?"

(A-108). After discussing the question with the attorneys, the district court told the jurors that the answer to their question was "yes" (i.e., one defendant can be found guilty and one not guilty on count 1) and the district court then stated the following to the jury:

> However, in order to find either of the Defendants guilty on Count One, you must find beyond a reasonable doubt that the Defendant under

consideration conspired with at least one other person to commit the offense charged in Count One.

In order to do so, you must also find that the Government proved beyond a reasonable doubt that the other person or persons committed the crime of conspiracy charged in Count One according to all of the elements of conspiracy as contained in your instructions. In other words, that the person or persons agreed with the Defendant to try to accomplish a common and unlawful plan to commit mail or wire fraud as charged in Count One, and that the person or persons knew of the unlawful plan, and willfully joined in it.

In making that determination, you should consider the conspiracy instruction together with all of the other instructions that I've given to you.

To the extent that you find one Defendant guilty and the other not guilty, you must identify on the verdict form next to Count One for that Defendant the person or persons with whom you have found the Defendant conspired to commit the offense charged in Count One.

Additionally, regarding the instructions I gave to you yesterday, on page 16, which contains a summary of the charges in the case and is taken from the indictment, that page contains a typographical error, which I apologize to you for. The instruction mistakenly identified January 12th, 2008, as the alleged date on or about which the conspiracy began, while the indictment charges that the conspiracy began on or about August 12th, 2008.

So the instructions said January, the indictment said August, and the indictment controls this, because this, again, was just a summary of the indictment on page 16. So I'm correcting this typographical error now and instructing you, consistent with the Government's charge in the indictment, that the conspiracy allegedly began on or about August 12th, 2008.

These are the only changes to your instructions, and you should consider them along with all of the instructions you were given yesterday in deciding your verdict.

And so we will have copies of these for each of you, and you may now retire, ladies and gentlemen, to continue your deliberations. Thank you.

(A-109). Ultimately, the jury found Codefendant Eakes not guilty of all counts. (A-111). The jury found the Petitioner guilty of the conspiracy count and the jury wrote on the verdict form that the conspiracy was with "Anthony D. DiLoreto, Kennan Todd

Bond, and Terry Mercer." (A-110). The jury also found the Petitioner guilty of the remaining counts.

Sentencing began on December 1, 2016, and concluded on January 20, 2017. During the sentencing hearing, the district court stated the following:

> It's always troubling to the Court when someone stands before the Court having been – and sometimes it happens even when people plead guilty, by either having pled guilty or been found guilty by the jury, and still fail to show any insight into the wrongfulness of their actions. And you don't have to. I mean, certainly that – you're not required to come to the Court and admit that what you did was wrong. But the fact that you don't seem to have any insight into that is concerning to me for the future.

(A-112-113). The district court subsequently sentenced the Petitioner to ninety months' imprisonment for all eight counts, with the sentences to run concurrently. (A-50).

On direct appeal, the Petitioner raised three claims – two of which are the subject of the instant petition. First, the Petitioner asserted that the jury instruction given by the district court amounted to a constructive amendment and/or material variance of the indictment. Second, the Petitioner asserted that the district court improperly considered his "lack of remorse" during the sentencing hearing. The Eleventh Circuit rejected both of these claims. *See United States v. Tomey*, 783 Fed. Appx. 832 (11th Cir. 2019).

H. REASON FOR GRANTING THE WRIT

The questions presented are important.

1. Whether the district court's answer to the jury's question amounted to a constructive amendment and/or material variance of the indictment.

The first question presented by the Petitioner is

> [w]hether a constructive amendment and/or material variance of the indictment occurs when a court instructs the jury for the first time – during its deliberations – that it can find a defendant guilty of a theory that was not sufficiently developed in the indictment or argued by the prosecution during the trial.

A fundamental principle stemming from the Fifth Amendment is that a defendant can only be convicted for a crime charged in the indictment. It is fundamentally unfair to convict a defendant on charges of which he had no notice. Two types of problems can arise as a result of a trial court's deviation from an indictment. When a defendant is convicted of charges not included in the indictment, an amendment of the indictment has occurred. If, however, the evidence produced at trial differs from what is alleged in the indictment, then a variance has occurred. In *United States v. Fisher*, 3 F.3d 456, 462-463 (1st Cir. 1993), the First Circuit Court of Appeals stated the following about "constructive amendments" and "material variances":

> A constructive amendment occurs when the charging terms of the indictment are altered, either literally or in effect, by prosecution or court after the grand jury has last passed upon them. A variance occurs when the charging terms remain unchanged but when the facts proved at trial are different from those alleged in the indictment. A constructive amendment is considered prejudicial *per se* and grounds for reversal of a conviction. Variance is grounds for reversal only if it affected the defendant's "substantial rights"—i.e., the rights to have sufficient knowledge of the charge against him in order to prepare an effective

> defense and avoid surprise at trial, and to prevent a second prosecution for the same offense.

(Internal quotation marks and citations omitted).

As explained above, count 1 of the indictment alleged that the Petitioner and Codefendant Eakes "did knowingly and willfully combine, conspire, confederate, and agree together and with other persons to commit offenses against the United States . . ." (A-58). In the manner and means section of count 1 of the indictment, the *only parties* who are referenced are the Petitioner and Codefendant Eakes and employees who acted at their direction. During the trial – in opening statements as well as in closing arguments – the Government only referenced and argued that there were *two co-conspirators*: the Petitioner and Codefendant Eakes. (A-65-107).

This changed, however, when the jury asked the following question during deliberations:

> "Can one Defendant be found guilty on Count One and one Defendant found not guilty on Count One?"

(A-108). By telling the jury that it could "find one Defendant guilty and the other not guilty" and by inviting the jury to "identify on the verdict form" the "person or persons with whom you have found the Defendant conspired to commit the offense charged in Count One" (A-109), a constructive amendment and/or material variance of the indictment occurred. The district court broadened the possible basis for conviction beyond what was contained in the indictment, thereby resulting in a constructive amendment of the superseding indictment (which is *per se* reversible error) or a material variance (because the Government did not present any evidence that the

Petitioner conspired with any person other than Codefendant Eakes).

The Petitioner's rights were substantially prejudiced by this constructive amendment/material variance because he was nevertheless found guilty despite the fact that the defense disproved the allegations set forth in count 1 (i.e., by acquitting Codefendant Eakes and excluding his name on the verdict form for count 1, the jury concluded that the Government failed to prove that any conspiracy existed between the Petitioner and Codefendant Eakes). The focus of this trial was on the alleged conspiracy between the Petitioner and Codefendant Eakes. It was not until the jury's deliberations that the notion of a conspiracy with another individual was brought to the jury's attention. Of course, at that point in time, the evidence was closed and the attorneys had already presented their arguments. The Petitioner had no opportunity to present any evidence in response to such an assertion and – more importantly – had no chance to argue to the jury why there was insufficient evidence to find that the Petitioner had allegedly conspired with anyone other than Codefendant Eakes.

A criminal trial should not be a moving target such that the criminal defendant is blindsided – after the trial has ended – by a theory not advanced by the Government during the trial. Clearly the Petitioner's trial strategy would have changed had he known that the alleged conspiracy could be expanded to include someone other than Codefendant Eakes.

Accordingly, for the reasons set forth above, the jury instruction given by the district court amounted to a constructive amendment and/or material variance of the indictment. By granting the petition for writ of certiorari in the instant case, the Court

will have the opportunity to answer this important question and clarify the law regarding constructive amendments and material variances.

2. Whether a court can consider a defendant's lack of remorse as a basis for imposing a sentence.

The second question presented by the Petitioner is

> [w]hether the Fifth Amendment right against self-incrimination prohibits a court from considering a defendant's lack of remorse during a sentencing hearing.

As explained above, during the sentencing hearing, the district court stated the following:

> It's always troubling to the Court when someone stands before the Court having been – and sometimes it happens even when people plead guilty, by either having pled guilty or been found guilty by the jury, and still fail to show any insight into the wrongfulness of their actions. And you don't have to. I mean, certainly that – you're not required to come to the Court and admit that what you did was wrong. But the fact that you don't seem to have any insight into that is concerning to me for the future.

(A-112-113). Undersigned counsel submits that a defendant's due process rights are violated where a district court relies on constitutionally impermissible factors in imposing a sentence. When a court predicates the length of a sentence on the defendant's failure to show any inclination toward repentance, the court violates the defendant's right not to be required to incriminate himself. In the instant case, the record indicates that the district court considered the Petitioner's "lack of remorse" in determining his sentence.

In *Thomas v. United States*, 368 F.2d 941 (5th Cir. 1966), the Fifth Circuit held that it was a clear abuse of discretion for the sentencing judge to threaten the

defendant with a more severe sentence if he did not "come clean" and admit his guilt. The court recognized that a defendant retains important Fifth Amendment rights after the jury reaches a verdict, and these rights may not be made the price of sentencing leniency. Thus, a district court cannot place a defendant in the dilemma of either abandoning his Fifth Amendment rights or risking a harsher sentence. *See United States v. Rodriguez*, 498 F.2d 302 (5th Cir. 1974). *See also United States v. Laca*, 499 F.2d 922, 927 (5th Cir. 1974) (explaining that where the court predicated the length of the sentence on the defendant's failure to show any inclination toward repentance, which in the context of the comment clearly meant failure to confess, the court violated the defendant's right not to be required to incriminate himself).

Based on the foregoing, the Petitioner submits that the district court in his case violated his due process/Fifth Amendment rights by considering his "lack of remorse" when determining his sentence. The Petitioner respectfully requests the Court to grant the instant petition in order to answer the question of whether a court can consider a defendant's lack of remorse as a basis for imposing a sentence.

I. CONCLUSION

The Petitioner requests the Court to grant his petition for writ of certiorari.

Respectfully Submitted,

/s/ Michael Ufferman

MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 224-2340
FL Bar No. 114227
Email: ufferman@uffermanlaw.com

COUNSEL FOR THE PETITIONER