

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**

APPENDIX TO 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

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-10634

D.C. Docket No. 3:15-cr-00060-MCR-1

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

GARY R. TOMEY, II,

Defendant - Appellant.

Appeal from the United States District Court
for the Northern District of Florida

(July 26, 2019)

Before MARTIN, JILL PRYOR and JULIE CARNES, Circuit Judges.

JILL PRYOR, Circuit Judge:

Appellant Gary R. Tomey, II, operated several nonprofit entities that engaged in telemarketing to collect donations for charities. Solicitors working for the entities called potential donors. Using a script that Tomey prepared, the solicitors stated that they were volunteers with a local charity raising money to support women and children, all the money raised would be donated to the charity, and the money would stay within the donor's state. In fact, though, the solicitors were paid employees calling from another state and only a tiny percentage of the money was donated to charities that served women and children.

Tomey was charged with one count of conspiracy to commit mail and wire fraud as well seven counts of mail fraud. After a nine-day trial, a jury convicted Tomey on all counts. The district court then sentenced him to 90 months' imprisonment. On appeal, Tomey raised several challenges, including whether: (1) the government presented sufficient evidence to support his conspiracy conviction; (2) the district court constructively amended the indictment or allowed the government to introduce evidence that resulted in a material variance from the indictment; and (3) the district court improperly considered Tomey's lack of remorse during sentencing. After a thorough review of the parties' briefs and the record, and with the benefit of oral argument, we affirm Tomey's convictions and sentence.

I. BACKGROUND

A. Factual Background

This case arises out of Tomey's operation of three charitable organizations—Youth Achievement League (“YAL”), Children and Family Services (“CFS”) and Children's Charitable Services (“CCS”)—that used telemarketers to solicit donations. After working for years at for-profit telemarketing businesses, Tomey joined YAL and then founded CFS and CCS.

A. Tomey's History in the Telemarketing Industry

Tomey first worked in the telemarketing industry for Telcom Enterprises, a for-profit company that engaged in telemarketing to raise money for charities in Mississippi, Indiana, and Ohio. Charities hired Telcom to call potential donors and in exchange paid Telcom a percentage of the money raised. Telcom had either its employees or subcontractors make the telemarketing calls.

Tomey began at Telcom as a sales representative, calling potential donors and seeking donations on behalf of charitable organizations. Tomey rose through the ranks at Telcom and eventually became a regional director.

While working at Telcom, Tomey formed Short Call, a for-profit entity that became a Telcom subcontractor. Through Short Call, Tomey ran a call center that solicited donations. By working as a Telcom subcontractor, rather than as an employee, Tomey was able to keep a greater percentage of the donations and

effectively received a pay raise. When Short Call secured a donation, it kept approximately 38-42% of the money raised, about 15-25% went to the charity, and Telcom kept the rest.

B. Tomey's Activities with YAL

While operating Short Call, Tomey attended a Telcom conference with Anthony DiLoreto, another Telcom subcontractor. DiLoreto shared with Tomey a new business idea: to create a nonprofit organization that would solicit contributions and then donate the proceeds to charities. Because the fundraising organization would itself be a charity, solicitors could tell potential donors that all money raised went to “the charity.” In addition, this operation would allow DiLoreto to cut out Telcom, meaning that more money could be given to charity (or, alternatively, be kept by DiLoreto).

In 2006, DiLoreto formed his nonprofit organization, YAL. DiLoreto intended for YAL to raise money to be donated to charities that provided after-school programs and other youth activities. DiLoreto served as president of YAL and as the chair of its board.

About a year after YAL was created, Tomey joined YAL as its executive director and a board member. With board approval, Tomey expanded YAL's fundraising operations from Indiana to Ohio and Mississippi. Tomey had YAL solicit donations using fictitious names: in Ohio it was “Ohio Children Services,”

and in Mississippi it was “Mississippi Children Services.” We now detail how Children Services operated in each state.

1. Children Services’ Operations in Ohio

Tomey expanded YAL’s fundraising operations by having YAL fundraise in Ohio as Ohio Children Services. He had a group of Short Call employees call potential donors in Ohio to solicit donations. When the solicitors called potential donors, they used a script that Tomey had prepared. The solicitors told potential donors that the proceeds raised would stay in Ohio and also that 100% of donations went to “the charity.”

If a person agreed to donate to Ohio Children Services, Tomey would mail the potential donor a package that included a donation form. The donation form, created by Tomey, described Ohio Children Services as a charitable organization that assisted children throughout Ohio by sponsoring them in Special Olympics events, donating to foundations that fulfilled the last wishes of terminally ill children, and donating to shelters for abused women and children. The form also stated that Ohio Children Services hired no fundraisers or professional solicitors and that all fundraising was done by members of the charity, implying that they were unpaid volunteers. In fact, Ohio Children Services had donated no money to charity, and the solicitors were paid fundraisers.

Because Tomey knew that donors were more likely to give to a local charity, he took steps to make it appear that Ohio Children Services was based in Ohio, even though all fundraising activities occurred in Florida. The solicitors placed their calls from Florida, but their phone numbers appeared on caller identification systems with Ohio area codes. When Tomey sent packages to potential donors, he shipped the packages from Florida to a United Parcel Services (“UPS”) store in Ohio so that the store could then place the packages in the mail to make it appear that they had been shipped from Ohio. The donation forms also indicated that Ohio Children Services had an Ohio address and directed donors to mail their contributions to the Ohio address. In fact, the address was for a UPS mailbox that Tomey had rented. The UPS store then forwarded any mail to Tomey in Florida.

Shortly after Ohio Children Services began receiving donations in the mail, the United States Postal Service (“USPS”) opened an investigation into the entity. An investigator notified Tomey that the USPS was withholding mail addressed to Ohio Children Services while it investigated whether Ohio Children Services was using a fictitious or false name and violating the federal mail fraud statute. In response, Tomey told the investigator that Ohio Children Services was a legitimate charity that operated under the umbrella of YAL. Upon learning that Ohio law required YAL to register with the state to solicit donations, Tomey had YAL register with the state and signed the registration documents as YAL’s Chief

Financial Officer. When the USPS investigator contacted YAL to ask about Ohio Children Services, YAL directed the investigator back to Tomey.

The USPS investigator questioned Tomey about statements that Ohio Children Services made to potential donors. The investigator asked whether anyone at Ohio Children Services was getting paid; Tomey responded that the organization was a volunteer effort, failing to disclose that the solicitors were paid. When the investigator asked whether Ohio Children Services had given money to charities, Tomey admitted that Ohio Children Services had given no money.

The investigation was resolved when Tomey, on behalf of Ohio Children Services, signed a consent agreement with the USPS. In the agreement, Tomey agreed to “permanently discontinue[] and abandon[]” making statements that Ohio Children Services was a § 501(c)(3) tax deductible charity or that it donated funds to various charitable organizations. Gov’t Ex. 30i, 30l.¹

2. Children Services’ Operations in Mississippi

Tomey also solicited donations for YAL under the fictitious name Mississippi Children Services. Tomey had Mississippi Children Services operate in much the same way as Ohio Children Services. Solicitors told potential donors that Mississippi Children Services was a nonprofit organization that funded

¹ Citations in the form “Gov’t Ex. X” refer to the government’s trial exhibits.

charities in Mississippi that worked with victims of children abduction and also donated to women and children's shelters in Mississippi. As part of the pitch, the solicitors stated that the donations would be used to help children in Mississippi. The solicitors also told potential donors that "100% of your donation goes directly to the charity" and that the organization did not use professional fundraisers. Gov't Ex. 28h.

As in Ohio, if a person agreed to donate, Tomey would mail him a package of materials. The donation form indicated that Mississippi Children Services was a "[c]hapter of [YAL]." *Id.* The form also identified several charities in Mississippi that Mississippi Children Services assisted. The form emphasized that Mississippi Children Services did not hire any fundraisers or professional solicitors and that all fundraising was "done by members of the charity." *Id.* With each mailer, Tomey would include a return envelope with a Mississippi address. The address was actually for a UPS mailbox that Tomey had rented. Any mail sent to the address was forwarded to Tomey.

After receiving complaints about Mississippi Children Services, the Mississippi Secretary of State's office opened an investigation. Because the donation forms stated that Mississippi Children Services was a chapter of YAL, the Secretary of State's examiner sent a letter to DiLoreto, YAL's president, warning

that YAL needed to be registered with Mississippi to solicit contributions as Mississippi Children Services.

During the investigation, the examiner spoke to DiLoreto. DiLoreto told the examiner that YAL (doing business as Mississippi Children Services) had a physical office in Mississippi that was run by Tomey. In addition, DiLoreto stated that 100% of funds Mississippi Children Services raised were donated to other charities because Mississippi Children Services had no administrative costs.

When the examiner later spoke to Tomey, Tomey admitted that Mississippi Children Services had no office in Mississippi but said that it planned to open one. Tomey provided documentation showing that Mississippi Children Services had received over \$10,000 in donations but gave only \$1,100 to charity.

In response to the Secretary of State's inquiries, YAL d/b/a Mississippi Children Services registered with the state of Mississippi. Tomey submitted the organization's registration materials. In the registration materials, Tomey stated that he and DiLoreto were responsible for distributing funds and maintaining the organization's financial records. Tomey also indicated that Mississippi Children Services used volunteers, not professionals, to solicit donations. Tomey stated that neither YAL nor any of its officers, directors, employees, or fundraisers had (1) been enjoined from soliciting, (2) been the subject of any proceeding regarding any solicitation or registration, or (3) entered into a voluntary compliance agreement

with any government agency. Tomey provided this answer even though just a few months earlier he had entered into a consent agreement to resolve the USPS's investigation of Ohio Children Services.

Later, when YAL sought to renew its Mississippi registration, the Secretary of State's office requested additional financial information from Tomey and YAL. When Tomey failed to provide the requested information, the Secretary of State's office warned YAL that unless it provided complete information, its registration would be denied. DiLoreto responded that YAL would not be renewing its registration and had ceased conducting business in Mississippi. DiLoreto explained that the charity had not been able to raise enough money to continue its fundraising efforts and blamed Mississippi's registration process as being too burdensome "for a volunteer based charity." Gov't Ex. 28p.

C. Tomey's Activities with CFS and CCS

Eventually, Tomey started CFS and CCS, his own nonprofit organizations modeled on YAL. Tomey started CFS in Florida in December 2008, and CCS in Mississippi in February 2010.² Like YAL, these organizations were set up as

² Apparently, Tomey changed the organization's name from Children and Family Services to Children's Charitable Services in response to complaints that the name could be confused with states' children and family services agencies.

nonprofit entities that used telemarketing operations to raise money for other charities.

Tomey operated CFS's and CCS's fundraising efforts from Florida in the same way that he operated YAL's. Tomey again prepared the scripts that the solicitors used and the mailers that were sent to donors. In phone calls, CFS and CCS solicitors stated (1) they were volunteers, (2) they were calling from an office within the potential donor's state, and (3) 100% of donations would go to helping women and children in the state.

None of these statements was entirely true. First, the solicitors were paid employees, not volunteers. Second, the solicitors were located in Milton, Florida, not the potential donor's state. The solicitors used different organization names in each state; for example, in Alabama they stated that they were from Alabama Children and Family Services and in Mississippi they stated they were from Mississippi Children and Family Services. In fact, CFS and CCS had no offices outside of Florida. To make it appear that CFS and CCS were local charities, Tomey again set up UPS mailboxes and had mail forwarded to him in Florida. Third, although 100% of the donations went to CFS and CCS, which were technically charities, much of the money collected was used to cover overhead costs for the organizations themselves, including employees' salaries, and also to pay for Tomey's expenses.

Just like YAL, CFS and CCS were investigated by government agencies in the states where they operated. For example, after CFS solicited donations in Arkansas, the Arkansas Attorney General's Office filed a civil complaint against CFS and Tomey. The complaint alleged that Tomey operated CFS identically to a for-profit fundraising company and that he had created the entity as a nonprofit "to avoid telemarketing regulations concerning charitable solicitations, to deceive customers as to the ultimate use of charitable donations, and ultimately, to enrich himself." Gov't. Ex. 25i at 4. The Arkansas Attorney General claimed that CFS violated the law because (1) it was not properly registered to solicit donations in Arkansas, (2) its name was confusingly similar to Arkansas's Division of Children and Family Services, (3) it falsely used an Arkansas address without maintaining an office in the state, and (4) on phone calls and in written materials it falsely represented that 100% of donations went to charity.

Tomey settled the suit by agreeing to a consent decree with the Arkansas Attorney General. In the consent decree, he admitted that CFS had falsely represented that the funds raised were to be used in Arkansas, the individuals making the telemarketing calls were volunteers, and 100% of funds were to be used for charitable purposes. Tomey also admitted that CFS had used the "overwhelming majority of funds . . . to pay wages and commissions of the telemarketers" while providing "almost no charitable aid or services." Gov't Ex.

251 at 5. The consent decree reflected that although CFS had collected \$50,907.50 in donations in Arkansas, only \$325 had been donated to charities. The decree barred CFS, Tomey, and future ventures that Tomey joined from soliciting charitable contributions in Arkansas and required Tomey to dissolve CFS immediately. CFS and Tomey also were required to pay \$50,907.50 in restitution and a \$50,000 penalty.

After entering into the consent decree, CFS ceased operations in Arkansas. But CFS and/or CCS continued to operate in much the same way in other states, including Alabama, Indiana, Ohio, Mississippi, and Tennessee.

Eventually, the Federal Bureau of Investigation (“FBI”) learned about CFS’s and CCS’s fundraising operations and began to investigate. The FBI interviewed Eric Eakes, whom Tomey hired to oversee day-to-day operations at CFS and CCS. After the interview, Eakes told Tomey that the FBI was investigating them for mail and wire fraud. Yet Tomey continued to run CFS and CCS without any major changes. As part of the investigation, the FBI sent a confidential human source to work at CCS. The source was provided scripts confirming that CCS continued to use the same fundraising tactics.

During the investigation, Tomey agreed to be interviewed by the FBI. In the interview, he was asked about the statement in the scripts that 100% of donations went to “the charity.” He insisted that the statement was accurate because CFS and

CCS, which received the donations, were organized as nonprofits. But he acknowledged that it would have been inaccurate for solicitors to tell potential donors that all money went back to their state. The FBI also questioned Tomey about the practice of solicitors referring to themselves as volunteers. Tomey explained that solicitors had called themselves volunteers because “they volunteer to come to work.” Doc. 131-7 at 35.³ But he indicated that employees no longer stated that they were volunteers.

B. Procedural History

A federal grand jury indicted Tomey, along with Eakes, on one count of conspiracy to commit mail and wire fraud and seven substantive counts of mail fraud. The indictment alleged that between August 12, 2008 and May 31, 2012, Tomey and Eakes conspired “together and with other persons” to commit mail fraud and wire fraud. Doc. 1 at 1. The indictment included a description of the manner and means that Tomey used to operate the scheme, explaining that Tomey operated CFS and CCS and also that he used “other entities as part of the scheme, including [YAL].” *Id.* at 2. The indictment also stated that the USPS had issued a cease and desist order against Tomey based on Ohio Children Services’ fundraising activities. Tomey and Eakes pled not guilty.

³ Citations in the form “Doc. #” refer to the numbered entries on the district court docket.

1. The Criminal Trial

Over the course of a nine-day jury trial, the government presented evidence about how Tomey operated YAL, CFS, and CCS. The government introduced evidence about each organization's fundraising practices. Former employees who solicited donations admitted that they told potential donors that they were volunteers and that 100% of money raised went to children or charity. In addition, the government called as witnesses dozens of victims who received telemarketing calls. The victims described how the solicitors told them that 100% of their donations would go to charity; all money raised would be used in their home state; and the solicitors were volunteers, not paid fundraisers.

The government also introduced evidence about the investigations into each entity. The jury heard testimony from the FBI agent who performed the investigation and had interviewed Tomey and Eakes. The jury also heard about other agencies' investigations of YAL, CFS, and CCS and the resolution of each investigation. The jury thus heard about the Arkansas litigation and the consent decree, where Tomey admitted that CFS had made misrepresentations and violated the law.

The government also presented evidence about how much money YAL, CFS, and CCS raised and donated to other charities. The organizations raised a total of more than \$2 million. But only a small fraction was donated to charities.

The government's evidence indicated that the organizations donated only about \$58,000. Tomey asserted that that YAL, CFS, and CCS donated more to charity—approximately \$200,000. But even if Tomey's number was accurate, it still meant that YAL, CFS, and CCS donated only about 10% of the money they raised to charity.

The jury also heard how Tomey spent the remaining money that YAL, CFS, and CCS had raised. The government presented evidence that a significant amount of the money went to cover payroll expenses. In addition, Tomey and DiLoreto received significant amounts of money from the entities. CFS, CCS, and YAL transferred over \$30,000 to Short Call, Tomey's for-profit business. And the government presented evidence that Tomey spent an additional \$100,000 by using debit cards linked to the organizations' bank accounts to cover his meals, gas, hotels, and other expenses. For example, Tomey used the debit cards to pay for meals and bar tabs at Hooters and a local bar called "Mugs & Jugs." In response, Tomey maintained that the expenses were legitimate because he incurred them while having meals or drinks with the organizations' board members, who were his close friends, and discussing the organizations. The evidence also showed that Tomey regularly transferred money from a YAL bank account that he controlled to a YAL account that DiLoreto controlled, sending more than \$263,000 to DiLoreto.

At the close of the government's case, Tomey orally moved for a judgment of acquittal as to all counts. The court took the motion under advisement while the trial proceeded. Tomey called several witnesses and testified in his own defense. At the close of all evidence, Tomey orally renewed his motion for judgment of acquittal. The motion was taken under advisement, and the case was submitted to the jury.

During its deliberations, the jury sent the judge a single question: "Can one Defendant be found guilty on Count [1] and one Defendant found not guilty on Count [1]?" Doc. 131-8 at 337. The government argued that the answer was yes. Because the indictment charged that Tomey and Eakes conspired "together and with other persons," the government asserted, the jury could find a conspiracy between a defendant and an unnamed coconspirator. Anticipating that the jury might identify DiLoreto as the unindicted coconspirator, the government explained that there was sufficient evidence for the jury to find a conspiracy between Tomey and DiLoreto because DiLoreto: (1) formed YAL and told Tomey about it; (2) gave Tomey permission to form the fictitious entities under YAL; (3) spoke with the Mississippi Secretary of State's office on behalf of Mississippi Children Services; and (4) represented that Mississippi Children Services had an office in Mississippi and that 100% of the money it raised went to charity.

In answering the jury's question, the district court instructed:

[Y]es, one Defendant can be found guilty and one not guilty on Count [1]. However, in order to find either of the Defendants guilty on Count [1], you must first find beyond a reasonable doubt that the Defendant under consideration conspired with at least one other person to commit the offense charged in Count [1]. 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 [1] according to all of the elements of conspiracy as contained in your instruction. To the extent you find one Defendant guilty and the other not guilty, you must identify on the verdict form next to Count [1] for that Defendant the person or persons with whom you have found the Defendant conspired to commit the offense charged in Count [1].

Doc. 131-8 at 345.

Based on the jury's question, Tomey renewed his motion for a judgment of acquittal, arguing among other things that there was insufficient evidence of a conspiracy between Tomey and any unnamed party. The district court took that motion under advisement as to the conspiracy count but denied Tomey's motion as to the remaining counts.

The jury returned a verdict convicting Tomey of all counts but acquitting Eakes of all counts. Next to the conspiracy count on the verdict form, the jury wrote the names of three individuals with whom Tomey had conspired. One of those names was DiLoreto.

2. Tomey's Post-Trial Motion

After the trial, Tomey filed a written motion for judgment of acquittal on the conspiracy count, renewing his argument that there was insufficient evidence that

he had conspired with another individual. The district court denied the motion. The court explained that the government “presented sufficient evidence during its case-in-chief from which a rational jury could find that Tomey conspired with at least one other person, namely, co-defendant Eakes, to commit mail and wire fraud.” Doc. 103 at 4. In the alternative, the court determined, “a rational jury could . . . find that Tomey knowingly and willfully conspired with an unindicted coconspirator, Anthony DiLoreto, to commit mail and wire fraud.” *Id.* at 9.

3. Sentencing

At the sentencing hearing, the district court calculated Tomey’s total offense level as 29 and his criminal history category as I, which yielded an advisory Sentencing Guidelines range of 87 to 108 months’ imprisonment. The court then gave the parties an opportunity to address the factors identified in 18 U.S.C. § 3553(a).⁴

⁴ Under § 3553(a), the district court is required to impose a sentence “sufficient, but not greater than necessary, to comply with the purposes” of the statute. These purposes include the need to: reflect the seriousness of the offense, promote respect for the law, provide just punishment, deter criminal conduct, protect the public from the defendant’s future criminal conduct, and effectively provide the defendant with educational or vocational training, medical care, or other correctional treatment. 18 U.S.C. § 3553(a)(2). The court must also consider the nature and circumstances of the offense, the history and characteristics of the defendant, the kinds of sentences available, the applicable guideline range, the pertinent policy statements of the Sentencing Commission, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims. *Id.* § 3553(a)(1), (3)-(7).

Tomey asked the court to impose a sentence below the guidelines range. He chose to allocute during his sentencing and told the court that he had not given the wording of the solicitation scripts “proper attention.” Doc. 128 at 11. He stated that he had not intended to commit a crime. He explained that he had been advised by colleagues and his attorney that for engaging in the conduct, at most, he would suffer civil penalties. If he had been aware that he could be subject to federal charges and taken away from his family, Tomey declared, he never would have engaged in the activity.

The district court imposed a 90-month sentence, which was at the low end of the guidelines range. In imposing the sentence, the district court indicated that it had considered the nature and seriousness of the offense, Tomey’s history and characteristics, the need to promote respect for the law, the need for general and specific deterrence, and the need to avoid unwarranted sentencing disparities. In addressing the need for deterrence, the court noted that when testifying at trial and speaking at the sentencing, Tomey had characterized the case as being about his failure to properly word scripts. The district court stated that it was “troubling . . . that your denials persist even today.” *Id.* at 29. In imposing the sentence, the court acknowledged that Tomey was not required to admit that what he did was wrong, but the court nonetheless indicated that it was disturbed that Tomey “fail[ed] to show any insight into the wrongfulness of [his] actions.” *Id.* at 29-30.

This is Tomey's appeal.

II. ANALYSIS

Tomey raises three arguments on appeal. First, he contends that the district court erred in denying his motion for a judgment of acquittal because the government presented insufficient evidence to support his conviction on any of the charged crimes. Second, he argues that he was convicted of a conspiracy crime that was not charged in the indictment because the district court's jury instructions constructively amended the indictment and the evidence that the government presented at trial materially varied from the conspiracy crime charged in the indictment. Third, he asserts that the district court improperly considered his lack of remorse at sentencing. We consider each argument in turn.

A. **The District Court Properly Denied the Motion for Judgment of Acquittal Because There Was Sufficient Evidence to Support Tomey's Convictions.**

Tomey argues that we must reverse his convictions on both the conspiracy count and the substantive mail fraud counts. We review *de novo* the district court's denial of a judgment of acquittal on sufficiency of evidence grounds, considering the evidence in the light most favorable to the government and drawing all reasonable inferences as well as credibility determinations in the government's favor. *United States v. Capers*, 708 F.3d 1286, 1296 (11th Cir. 2013). We may not overturn a jury's verdict "if any reasonable construction of the evidence would

have allowed the jury to find the defendant guilty beyond a reasonable doubt.” *Id.* at 1297 (internal quotation marks omitted). Applying this standard of review, we conclude that there was sufficient evidence on the conspiracy count as well as the substantive mail fraud counts.

1. The Government Presented Sufficient Evidence to Establish that Tomey and DiLoreto Agreed to Commit Mail and Wire Fraud.

To sustain a conviction for conspiracy to commit mail and wire fraud, the government must present evidence establishing, beyond a reasonable doubt, that (1) two or more persons agreed to a common, unlawful plan to commit mail or wire fraud, (2) the defendant knew of the unlawful plan, and (3) the defendant voluntarily joined the plan. *United States v. Martin*, 803 F.3d 581, 588 (11th Cir. 2015); *see* 18 U.S.C. §§ 1341, 1343, 1349. “Because conspiracies are secretive by nature, the jury must often rely on inferences from the conduct of the alleged participants or from circumstantial evidence of a scheme.” *Martin*, 803 F.3d at 588 (internal quotation marks omitted). But the inferences must be reasonable and not based on mere speculation. *Id.* at 587.

Tomey argues that the government failed to prove that he and DiLoreto agreed to a plan to commit mail or wire fraud because the government presented no evidence from which a reasonable jury could conclude that “DiLoreto was put on notice of the alleged unlawful activity and willfully joined in the same.”

Appellant's Br. at 18. More specifically, Tomey asserts that there was no evidence that DiLoreto knew that the solicitors who were working for Tomey at Children Services were making misrepresentations to potential donors.

Although there was no direct evidence that Tomey and DiLoreto reached an agreement, there was ample circumstantial evidence that DiLoreto knew about Children Services' fundraising practices, and thus a jury reasonably could infer that Tomey and DiLoreto reached an agreement. The government presented evidence that DiLoreto was the head of YAL and created the plan to form a telemarketing charity so that solicitors could tell potential donors that 100% of proceeds went to "the charity." As a YAL board member, DiLoreto also approved Tomey's expansion of YAL's fundraising activities through entities doing business as Children Services.

In addition, the government introduced evidence showing that DiLoreto knew the solicitors working for YAL (under the fictitious name Children Services) were making false statements. Tomey testified that DiLoreto reviewed the scripts and approved the language in the pitches, including the statement that 100% of donations would go to "the charity." And a jury could conclude that DiLoreto knew that the 100% statement was false from the evidence showing that Tomey transferred approximately \$263,000 of the money that Children Services raised to an account controlled by DiLoreto.

The evidence about DiLoreto's communications with the Mississippi Secretary of State also supports an inference that DiLoreto knew that the solicitors for Children Services were making false statements. When the Mississippi examiner contacted DiLoreto about Children Services' fundraising activity in Mississippi, DiLoreto told the examiner that YAL, operating through the fictitious entity Children Services, had a physical office in Mississippi, 100% of the funds raised by Children Services went to the charity, and Children Services had no administrative costs because YAL was covering all of them. As it turns out, none of these statements was true. A jury reasonably could conclude that DiLoreto made these statements in an attempt to mislead the examiner so that he would not investigate Children Services more closely and uncover the fraud.

The conclusion that DiLoreto conspired with Tomey is also supported by evidence showing that DiLoreto profited from the scheme. Over about an 18-month period, Tomey transferred approximately \$263,000 from his YAL account to a YAL account that DiLoreto controlled. A reasonable jury could conclude from this evidence that Tomey was transferring a share of the fruits of the fraudulent scheme to his partner, DiLoreto. True, Tomey testified that the transfers were innocent and were made to cover the cost of the payroll for the employees who engaged in the telemarketing. But a jury, hearing Tomey's words and observing his demeanor, was entitled to discredit the testimony and, indeed, to

believe the opposite of what Tomey said. *See United States v. Brown*, 53 F.3d 312, 314 (11th Cir. 1995).

Viewing the evidence in the light most favorable to the government and drawing all reasonable inferences in its favor, a jury could find beyond a reasonable doubt that Tomey and DiLoreto conspired to commit mail or wire fraud. The district court therefore did not err in denying Tomey's motion for a judgment of acquittal as to the conspiracy count.⁵

2. The Government Presented Sufficient Evidence to Establish that Tomey Committed Mail Fraud.

Tomey also challenges his mail fraud conviction. To establish that Tomey committed mail fraud, the government had to show that he “(1) intentionally participate[d] in a scheme to defraud and (2) use[d] the mails in furtherance of the scheme.” *United States v. Pendergrast*, 297 F.3d 1198, 1208 (11th Cir. 2002). “An intent to defraud may be found when the defendant believed that he could deceive the person to whom he made the material misrepresentation out of money or property of some value.” *United States v. Maxwell*, 579 F.3d 1282, 1301 (11th Cir. 2009) (internal quotation marks omitted). The government need not produce

⁵ In its order denying Tomey's motion for judgment of acquittal, the district court found in the alternative that there was sufficient evidence that Tomey had conspired with Eakes. On appeal, the government concedes that the district court should not have considered whether there was sufficient evidence that Tomey conspired with Eakes in light of the jury's special verdict form, which did not list Eakes as a co-conspirator. Because we find sufficient evidence that Tomey conspired with DiLoreto, we need not address the district court's alternative theory.

direct evidence of criminal intent but, instead, can rely on circumstantial evidence.

See id.

Tomey argues that the district court erred in denying his motion for judgment of acquittal as to the substantive mail fraud counts because the government failed to introduce sufficient evidence that he acted with an intent to defraud. We disagree—there was overwhelming evidence of his intent.

A jury could find that Tomey acted with an intent to defraud based on the evidence about his acts in designing the scheme. As the person running the telemarketing fundraising activities for YAL, CFS, and CCS, Tomey participated in creating the scripts and donor forms, which included false statements about (1) where the organizations were located, (2) whether the employees were volunteers, (3) the percentage of money collected that went to the charities, and (4) in which state the money would be used. In addition, Tomey took other steps to make it appear to potential donors that YAL, CFS, and CCS were local charities operating in the donor's state, even though they were based in Florida. Tomey would mail a donation package to a UPS store in the donor's home state where it would then be mailed to the donor, making it appear that YAL, CFS, or CCS had mailed the package from within the donor's state. In addition, Tomey rented UPS mailboxes in each state so that it would appear to donors that they were sending

their contributions to a local office. In reality, the donations were forwarded to one office in Florida.

In addition, the evidence shows that Tomey personally profited from the scheme. The government introduced evidence showing that Tomey used money donated to YAL, CFS, and CCS to pay for his personal expenses by charging more than \$100,000 for personal expenses such as meals, gas, hotels, and bar tabs. Although Tomey testified that the expenses were legitimate business expenses, a jury was entitled to disbelieve this testimony and find that he used the donations to pay for his personal expenses. *See Brown*, 53 F.3d at 314.

There's other evidence that makes the inference that Tomey acted with an intent to defraud even stronger. When Tomey signed the consent decree with the Arkansas Attorney General, he admitted that CFS's solicitation materials included misrepresentations. Even after admitting that the materials contained misrepresentations, Tomey continued to have solicitors use the same fundraising practices in other states. Because Tomey directed solicitors to use scripts that he knew contained misrepresentations, a jury reasonably could find that Tomey intended to defraud.

Tomey nevertheless argues that there was insufficient evidence because he simply followed generally accepted practices in the telemarketing industry. Although Tomey testified that he followed generally accepted practices and did not

mean to make any misrepresentations, the jury again was entitled to disbelieve his testimony. *See id.* In light of the overwhelming evidence of Tomey's intent, the district court did not err in denying Tomey's motion for a judgment of acquittal with regard to the mail fraud counts.

B. There Was Neither a Constructive Amendment of Nor a Material Variance from the Indictment.

Under the Fifth Amendment, a defendant can be convicted only of the crimes charged in the indictment. *United States v. Holt*, 777 F.3d 1234, 1261 (11th Cir. 2015). If the evidence at trial or the court's jury instructions deviate from the allegations in the indictment, a constructive amendment or variance can arise. *Id.* Tomey argues that his conspiracy conviction must be vacated because the district court's instruction on the conspiracy charge constructively amended the indictment and the evidence offered at trial materially varied from the indictment's allegations. We disagree.

1. There Was No Constructive Amendment.

A constructive amendment occurs "when the essential elements of the offense contained in the indictment are altered to broaden the possible bases for conviction beyond what is contained in the indictment." *United States v. Narog*, 372 F.3d 1243, 1247 (11th Cir. 2004) (internal quotation marks omitted). An indictment may be constructively amended by a district court's instructions. *Holt*,

777 F.3d at 1261. “A constructive amendment is *per se* reversible error.” *Id.* (internal quotation marks omitted).

Tomey argues that the district court broadened the possible bases for his conviction of the conspiracy offense when the court told the jury that it could find one defendant (Tomey) guilty of conspiracy but the other defendant (Eakes) not guilty. Tomey asserts that this instruction improperly broadened the possible bases for his conviction in two ways: (1) by allowing the jury to find that he conspired with an unnamed individual, even though the indictment alleged only that he conspired with Eakes and (2) by allowing the jury to find that there was a conspiracy as to YAL when the indictment alleged a conspiracy only to CFS and CCS. Because Tomey failed to raise the constructive amendment issue in the district court, we review only for plain error.⁶ *See Holt*, 777 F.3d at 1261. We conclude that Tomey failed to show that the district court committed any error, let alone plain error, because the district court’s response to the jury’s question did not broaden the possible bases for conviction.

⁶ We will reverse a conviction under plain error review only if we find “(1) an error (2) that is plain and (3) that has affected the defendant’s substantial rights; and if the first three prongs are satisfied, we may exercise discretion to correct the error if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *United States v. Madden*, 733 F.3d 1314, 1322 (11th Cir. 2013) (alterations adopted) (internal quotation marks omitted).

With respect to Tomey's first argument, no constructive amendment occurred when the court told the jury that it could consider whether Tomey conspired with individuals other than Eakes. The indictment stated that Tomey and Eakes "conspire[d] . . . together *and with other persons*" to engage in mail and wire fraud. Doc. 1 at 1 (emphasis added). Because the indictment expressly alleged that the conspiracy involved Eakes as well as other unidentified individuals, the district court did not broaden the possible bases for conviction when it told the jury that Tomey could be convicted if the jury found that he engaged in a conspiracy with an individual other than Eakes.

Turning to Tomey's second argument, no constructive amendment occurred when the district court gave an answer that permitted the jury to find that Tomey engaged in a conspiracy involving YAL because the indictment alleged that he engaged in a scheme that involved all three nonprofit entities—YAL, CFS, and CCS. Certainly, the indictment's primary focus was on CFS and CCS. But the indictment's allegations nonetheless were sufficient to give Tomey notice that the scope of the conspiracy included the operation of YAL.

Three aspects of the indictment put Tomey on notice that the charged conspiracy involved YAL. First, the manner and means portion of the indictment alleged that Tomey "also incorporated or registered other entities to use as part" of the scheme. Doc. 1 at 2. Importantly, the first entity listed in this paragraph was

YAL. Second, the manner and means section mentioned that the USPS had issued a cease and desist letter against Tomey. The USPS's investigation arose from fundraising activities that Tomey undertook through YAL under the fictitious name Ohio Children Services, so the reference to the USPS investigation indicated that the charged conspiracy related to YAL. Third, the time period of the conspiracy identified in the indictment—August 2008 through May 2012—notified Tomey that the scheme involved YAL. At the beginning of this time period, Tomey had not yet formed either CFS or CCS. YAL was the only active entity at the time; the date range thus informed Tomey that the conspiracy involved his conduct and actions in operating YAL.

Moreover, because the indictment alleged that the fraudulent scheme extended to YAL, Tomey had notice that DiLoreto was one of the unnamed coconspirators. After all, DiLoreto formed YAL, was its president, and served as a member of its board. And, as we explained above, DiLoreto was involved in the fundraising activities that Tomey had YAL perform under the fictitious name Children Services: DiLoreto reviewed the scripts that YAL's solicitors used and responded to the Mississippi examiners who were investigating the fundraising activities. Because the indictment both alleged a conspiracy that involved unnamed co-conspirators and covered the operation of YAL, the court did not broaden the possible bases for conviction beyond what was contained in the

indictment when it instructed the jury that it could find one defendant (Tomey) guilty of conspiracy, even if they found the other defendant (Eakes) not guilty. *See Narog*, 372 F.3d at 1247.

2. There Was No Material Variance.

A material variance “occurs when the facts proved at trial deviate from the facts contained in the indictment but the essential elements of the offense are the same.” *Narog*, 372 F.3d at 1247 (internal quotation marks omitted). “The allegations in the indictment and proof at trial must correspond so that the defendant is properly notified of the charges, enabling him to present a defense” and protecting the defendant against a subsequent prosecution for the same offense. *Holt*, 777 F.3d at 1261. A variance requires reversal “only when the defendant can establish that his rights were substantially prejudiced.” *Id.*

Tomey argues that a material variance occurred at trial because he was convicted of conspiring with DiLoreto in connection with the operation of YAL, yet the indictment alleged only that he conspired with Eakes regarding the operation of CFS and CCS. Tomey failed to raise this argument in the district court, however; we therefore review only for plain error. *See United States v. Dennis*, 237 F.3d 1295, 1300 (11th Cir. 2001). We conclude that Tomey failed to demonstrate any error, let alone plain error, because he cannot establish that the evidence introduced at trial varied from the allegations in the indictment. And

even if we assume that there was a material variance, Tomey cannot show that he suffered substantial prejudice as a result.

As an initial matter, Tomey cannot show that a material variance occurred. Tomey's variance argument rests on the premise that the scheme alleged in the indictment was limited to a conspiracy with Eakes that involved only CFS and CCS. Given the limited allegations, Tomey contends, the government deviated from the facts alleged when it introduced evidence showing that he conspired with DiLoreto with respect to the operation of YAL. But the same allegations that put Tomey on notice that the conspiracy involved unnamed individuals and YAL allowed the government to prove the offense by showing that he conspired with DiLoreto in operating YAL.⁷

Even if we assume that there was a material variance, though, Tomey cannot show that he experienced substantial prejudice. To demonstrate substantial prejudice, a defendant must show that (1) "the proof at trial differed so greatly from the charges that [he] was unfairly surprised and was unable to prepare an adequate defense" or (2) there were "so many defendants and separate conspiracies before the jury that there [was] a substantial likelihood that the jury transferred

⁷ This is true even though the indictment also alleged that Tomey violated the law by conspiring with Eakes in connection with the operation of CFS and CCS. *See United States v. Simpson*, 228 F.3d 1294, 1300 (11th Cir. 2000) (recognizing that when the government charged several means of violating a statute in the conjunctive, a conviction could be obtained with proof of "only one of the means").

proof of one conspiracy to a defendant involved in another.” *United States v. Calderon*, 127 F.3d 1314, 1328 (11th Cir. 1997). Tomey argues that he experienced substantial prejudice because he was unfairly surprised and unable to prepare an adequate defense to the government’s theory that he conspired with DiLoreto. But we conclude that Tomey had adequate warning such that he was able to prepare an adequate defense.

Tomey had an ample opportunity at trial to present a defense that the government failed to prove that he conspired with DiLoreto as to YAL because he knew about the government’s theory prior to trial. Before trial, the government turned over to the defense an exhibit list indicating that it would be introducing exhibits that related solely to YAL—such as the organization’s bank records and tax returns. In addition, the government listed exhibits that related to regulators’ investigations of Ohio Children Services and Mississippi Children Services, the fictitious names that Tomey used when he engaged in fundraising activities for YAL. The exhibit list thus gave Tomey notice that the government was relying on a theory that the conspiracy extended to YAL. And Tomey’s own actions in trial preparation confirm that he understood that the government would be pursuing this theory because Tomey listed DiLoreto as a potential witness, although he ultimately decided not to call him at trial.

At trial Tomey actually presented a defense that he had not conspired with DiLoreto with respect to YAL. When Tomey testified, he told the jury about his relationship with DiLoreto. He tried to rebut the government's theory that DiLoreto profited from YAL's operation by testifying that the transfers of money to DiLoreto had an innocent explanation—to reimburse YAL for payroll expenses. Although the jury ultimately did not believe Tomey's defense, he had fair notice that the crimes charged included that he conspired with DiLoreto and thus had an opportunity to offer a defense. *See United States v. Glinton*, 154 F.3d 1245, 1252 (11th Cir. 1998) (concluding that there was no prejudice when the defendants were “fairly apprised” of the charged activity and had an opportunity to present a defense to a trial).

C. The District Court Was Entitled to Consider Tomey's Lack of Remorse at Sentencing.

Finally, Tomey argues that the district court erred in considering his lack of remorse at sentencing. We discern no error.

“[T]he familiar abuse-of-discretion standard of review . . . applies to appellate review of sentencing decisions.” *Gall v. United States*, 552 U.S. 38, 46, (2007). A court abuses its discretion in imposing a sentence if it (1) fails to consider relevant factors that were due significant weight, (2) gives an improper or irrelevant factor significant weight, or (3) commits a clear error of judgment by

balancing the proper factors unreasonably. *See United States v. Irely*, 612 F.3d 1160, 1189 (11th Cir. 2010) (en banc). “The party challenging the sentence bears the burden of establishing that the sentence is unreasonable in light of the record and the § 3553(a) factors.” *United States v. Early*, 686 F.3d 1219, 1221 (11th Cir. 2012). We review *de novo* whether the district court considered an impermissible sentencing factor. *See United States v. Stanley*, 739 F.3d 633, 652 (11th Cir. 2014).

When a defendant chooses, without pressure from the court, to allocute at his sentencing hearing and repeatedly denies any wrongdoing, the court is permitted to consider the defendant’s freely offered statements indicating a lack of remorse. *See id.* “Just as a jury weighs a defendant’s testimony once he waives his Fifth Amendment privilege at trial, a judge may consider a defendant’s freely offered allocution regarding remorse during sentencing.” *Id.* Here, because Tomey voluntarily addressed the court during trial and at sentencing, the district court did not err when it considered his lack of remorse.

Tomey nonetheless argues that the district court erred under the former Fifth Circuit’s decision in *Thomas v. United States*, 368 F.2d 941 (5th Cir. 1961).⁸ In

⁸ In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

Thomas, at sentencing the district court told the defendant, who had pled not guilty, that if he “c[a]me clean,” the court would take that into account in imposing a sentence. *Id.* at 944. The court also warned the defendant that if he chose not to confess, the court would take that fact into account at sentencing. *Id.* When the defendant continued to assert his innocence, the court imposed the maximum permissible sentence on the defendant. The former Fifth Circuit vacated the sentence, reasoning that the district court abused its discretion by giving “a judicially imposed penalty” for the defendant’s exercise of his constitutional rights to assert his innocence and continue with his appeal. *Id.* at 946. But *Thomas* does not apply in the situation here. Unlike in *Thomas*, the district court made no statements indicating that the sentence would depend on whether Tomey chose to address the court. Because Tomey freely and voluntarily chose to address the court during allocution without pressure from the court, the court was permitted to consider the content of Tomey’s voluntary statements, including that he had expressed no remorse, in crafting a sentence. *See Stanley*, 739 F.3d at 652-53.

III. CONCLUSION

For the reasons set forth above, we affirm the judgment and sentence of the district court.

AFFIRMED.

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

CASE NO. 3:15cr60/MCR

GARY R. TOMEY, II,

Defendant.

_____ /

ORDER

Gary R. Tomey, II (“Tomey”) was convicted by a jury of one count of conspiracy to commit mail or wire fraud, in violation of 18 U.S.C. § 1349, and seven counts of mail fraud, in violation of 18 U.S.C. § 1341. *See* ECF No. 76, *United States v. Tomey*, No. 3:15-cr-60/MCR (N.D. Fla. May 26, 2016). The jury also found that Tomey committed these offenses in connection with telemarketing and that, in doing so, he victimized ten or more persons over the age of 55, in violation of 18 U.S.C. § 2326. *Id.* Tomey’s co-defendant, Eric Eakes (“Eakes”), was acquitted of all charges.¹ At the close of the Government’s case-in-chief, and again after the defense rested, Tomey orally moved for a Judgment of Acquittal

¹ Count One of the Indictment charged both Defendants with conspiring to commit mail and wire fraud by making false representations telephonically to solicit charitable contributions from prospective donors. Counts Two through Eight charged both Defendants with substantive counts of mail fraud.

under Rule 29 of the Federal Rules of Criminal Procedure, arguing that there was insufficient evidence to support a conviction on any of the charges. The court denied Tomey's motion with respect to Counts 2 through 8, but took the motion under advisement as to Count 1 and requested briefing from the parties, ECF No. 73, which they have now submitted, ECF Nos. 84 and 86. For the following reasons, the court finds that Tomey's motions for Judgment of Acquittal are due to be denied.

Tomey argues that the evidence presented at trial was insufficient for a jury to convict him of conspiracy to commit mail and wire fraud. More specifically, Tomey argues that the Government failed to prove: (1) that he and any other person "in some way or manner agreed to try to accomplish a common and unlawful plan to commit mail fraud," or (2) that any other person knew of and voluntarily participated in the alleged scheme to commit mail fraud. ECF No. 84 at 4. The Government responds that it introduced sufficient evidence from which the jury could infer that Tomey conspired with at least one other person to commit mail and wire fraud. ECF No. 86 at 3. Having presided over the trial and having carefully reviewed the record, pertinent law, and the parties' arguments, the court agrees.

Federal Rule of Criminal Procedure 29 directs the court, on a defendant's motion, to "enter a judgment of acquittal of any offense for which the evidence is

insufficient to sustain a conviction.” Fed. R. Crim. P. 29(a). The Rule also provides that the “court may reserve decision on the motion, proceed with the trial..., submit the case to the jury, and decide the motion...after [the jury] returns a verdict of guilty.” Fed. R. Crim. P. 29(b). Where the court has reserved decision, “it must decide the motion on the basis of the evidence at the time the ruling was reserved.” *Id.* The legal standard, however, is the same, regardless of when the defendant makes his motion. *United States v. Burns*, 597 F.2d 939, 941 (5th Cir. 1979) (“The test...when a trial court rules on a motion for judgment of acquittal challenging the sufficiency of evidence applies to such motions whether made at the close of the Government’s case, at the close of all the evidence, or after the return of a guilty verdict.”).² The court is required to view the evidence “in the light most favorable to the government, with all reasonable inferences and credibility choices made in the government’s favor,” *see United States v. Barsoum*, 763 F.3d 1321, 1329-30 (11th Cir. 2014) (internal marks omitted), and determine whether “*any* rational trier of fact could [find] the essential elements of the crime beyond a reasonable doubt,” *see Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

² The Eleventh Circuit, in *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), adopted as binding precedent all decisions of the former Fifth Circuit rendered prior to October 1, 1981.

The elements of conspiracy to commit mail or wire fraud are: (1) the existence of an agreement or common purpose to execute a scheme to defraud, and (2) use of the mail or wire systems to further the scheme. *United States v. Smith*, 934 F.2d 270, 274 (11th Cir. 1991). Although an agreement may be shown by direct evidence, “[t]he very nature of conspiracy frequently requires that [it] be proved by inferences from the conduct of the alleged participants or from circumstantial evidence of a scheme.” *United States v. Toll*, 804 F.3d 1344, 1355 (11th Cir. 2015).

The court concludes that the Government presented sufficient evidence during its case-in-chief from which a rational jury could find that Tomey conspired with at least one other person, namely, co-defendant Eakes, to commit mail and wire fraud. The essence of the conspiracy charged is that, between August 2008 and May 2012, Tomey and others 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 Government presented evidence that the nerve center of the conspiracy was an office located in Milton, Florida, where Tomey employed numerous telemarketers. Several former employees testified that the telemarketers were paid minimum wage, plus a small commission on consummated “sales” (*i.e.*, gross receipts actually collected as a result of a

telemarketer's solicitations). The Government's evidence showed that Eakes was the office administrator, having previously worked with and for Tomey in various for-profit telemarketing enterprises. FBI Agent Joseph T. Kinard testified, based on statements made to him by Eakes during a prearrest interview, that Eakes trained the telemarketers on how to procure donations and supplied marketing scripts to guide them in responding to prospective donors' questions and concerns regarding the solicitations. Eakes told Agent Kinard that he personally developed the marketing scripts and training materials using his own experience in the telemarketing industry, as well as from input and guidance from Tomey. These scripts contained deceptive and misleading information, which Eakes knew at the time to be false.³ The Government's evidence showed that based on Eakes' training and the marketing scripts he provided, the telemarketers routinely made material misrepresentations to prospective donors about: (1) the percentage of each contribution that would be used for charitable purposes; (2) the physical location of the charity and its beneficiaries; (3) and the employment status of the telephone solicitors. Numerous victims throughout Alabama, Arkansas, Florida, Indiana, Mississippi, Ohio, and Tennessee were induced by these misleading and

³ For example, Eakes told Agent Kinard that he "felt like it was perfectly okay to say that the employees were volunteers" because "sometimes the employees do come in and volunteer their own time to make calls." In truth, Eakes admitted to Agent Kinard that he knew that all of the telemarketers were paid employees of Tomey's organization.

fraudulent representations to mail donations to Tomey's organizations.⁴ From the Government's evidence, a reasonable jury could find, beyond a reasonable doubt, that Tomey and Eakes knowingly agreed to use deceptive and misleading telemarketing tactics to solicit charitable contributions and willfully participated in a scheme to do so. Therefore, Tomey's first motion for judgment of acquittal is due to be denied.

Nothing presented during the defendants' case-in-chief changes the court's view that a rational trier of fact could find evidentiary support for the conspiracy charge beyond a reasonable doubt. As a preliminary matter, the court rejects the notion that Tomey's conspiracy conviction should be vacated merely because the co-conspirator named in the indictment, Eakes, was acquitted of conspiracy.⁵ It is well-established that the acquittal of a defendant's indicted co-conspirator does not necessarily indicate that the jury found that no conspiracy existed between the

⁴ These organizations include: (1) Youth Achievement League, Inc. doing business as Children Services; (2) Children and Family Services Inc.; (3) Children's Charitable Services, Inc.; and (4) Mississippi Children Services, Inc.

⁵ During its deliberations, the jury sent a communication to the court with the following question: "Can one defendant be found 'guilty' on Count One and one defendant found 'not guilty' on Count One?" See ECF No. 75 at 1. The court responded in the affirmative, but in an abundance of caution, instructed the jury that if they did "find one defendant guilty and the other not guilty, [they] must identify on the verdict form next to Count One for that defendant the person or persons with whom [they] have found the defendant conspired." *Id.* at 2. On closer review of the Eleventh Circuit case law on this issue, it is clear to the court that the jury was not required to "identify with particularity" the conspirators, as long as "the evidence was sufficient to show that [Tomey] conspired with someone." See *United States v. Martinez*, 96 F.3d 473, 477 (11th Cir. 1996). As explained more fully in the body of this Order, the court finds that there was sufficient evidence to show that Tomey conspired with at least two other persons—Eakes and Anthony DiLoreto—to commit mail and wire fraud.

two co-defendants. *United States v. Andrews*, 850 F.2d 1557, 1561 (11th Cir. 1988) (en banc) (“Consistent verdicts are unrequired in joint trials for conspiracy: where all but one of the charged conspirators are acquitted, the verdict against the one can stand.”). Juries may reach inconsistent verdicts for a variety of reasons, including “mistake, compromise, or lenity.” *United States v. Powell*, 469 U.S. 57, 65 (1984). Thus, in this case, the jury could have acquitted Eakes and still found that a conspiracy existed between him and Tomey. The apparent inconsistency of Tomey’s conviction and Eakes’ acquittal, standing alone, provides no basis for vacating Tomey’s conspiracy conviction. *See United States v. Mitchell*, 146 F.3d 1338, 1344 (11th Cir. 1998) (“The Supreme Court has plainly determined that jury verdicts are insulated from review on the ground that they are inconsistent.”) (internal marks omitted) *quoted in United States v. Albury*, 782 F.3d 1285, 1295 (11th Cir. 2015). Instead, the court must consider whether there was sufficient evidence of a conspiracy between Tomey and Eakes to sustain the conviction. *See United States v. Wright*, 63 F.3d 1067, 1074 (11th Cir. 1995). A review of the entire trial record reveals sufficient evidence of Eakes’ knowing agreement with Tomey to use deceptive and misleading telemarketing tactics to solicit charitable contributions, and of Eakes’ willful participation in a scheme to do so, for a reasonable factfinder to find that a conspiracy existed.

More specifically, the evidence showed that Eakes was responsible for staffing and managing the call center in Milton, FL, receiving and sorting mail, training telemarketers, monitoring sales calls, and tracking incoming donations. Eakes testified that he and Tomey developed the sales pitches together, by modifying the language from their former, for-profit telemarketing scripts to fit their new, ostensibly non-profit purpose. The evidence showed that the scripts contained deceptive and misleading information, which Eakes knew at the time to be false. For example, telemarketers were initially instructed to tell prospective donors that all fundraising for the charity was done by volunteers. Later, the script changed, and Eakes trained telemarketers to refer to themselves as “volunteer employees” or “members of the charity.” In truth, Eakes knew that all of the telemarketers were paid employees of Tomey’s organization. Eakes and Tomey also agreed that prospective donors would be told that “100%” of each donation “goes directly to the charity.” This statement was technically true because donations went directly to Tomey’s organizations, several of which had 501(c)(3) status under the Internal Revenue Code. However, the statement was also highly misleading, as evidenced by the numerous donors who testified that they understood from what they were told that 100% of each donation would be used for charitable purposes. The court will not engage in the semantic hair-splitting necessary to delineate a distinction between what the telemarketers were trained

to say—that “100%” of each donation goes “to the charity”—and what the donors apparently heard—that 100% goes “to charity.”⁶ For legal purposes, it is a distinction without a difference because the law forbids material misrepresentations that are “reasonably calculated to deceive” another out of money or property. *See United States v. Hasson*, 333 F.3d 1264, 1270-71 (11th Cir. 2003). The court finds that the language from Eakes and Tomey’s script was “reasonably calculated to deceive” prospective donors into believing that 100% of their contributions would be used to support charitable activities. Both Tomey and Eakes testified that they knew people would be more likely to donate to a fundraiser who was calling directly from a charity, as opposed to a professional, third-party telemarketing agency. A jury could reasonably conclude from this evidence that Eakes and Tomey knowingly agreed to use deceptive and misleading telemarketing tactics to solicit charitable contributions and willfully participated in a scheme to do so.

The court finds that a rational jury could also find that Tomey knowingly and willfully conspired with an unindicted coconspirator, Anthony DiLoreto, to commit mail and wire fraud.⁷ Anthony DiLoreto was an experienced,

⁶ The court notes that a number of victims testified that, when they were solicited, the telemarketer explicitly stated that 100% of each donation would go directly to needy children or families in their state.

⁷ The court has found sufficient evidence that Tomey and Eakes conspired to commit mail and wire fraud; therefore, on that basis alone, the jury’s verdict should not be disturbed.

professional fundraising executive and Tomey's former colleague. Tomey testified that Anthony DiLoreto gave him the idea to leave the for-profit telemarketing industry and form a non-profit fundraising organization of his own. In 2006, DiLoreto started such an organization in Indiana called Youth Achievement League Incorporated (YAL). Both DiLoreto and Tomey served on YAL's Board of Directors and Tomey was YAL's registered agent in Florida. In 2008, Tomey signed and filed papers with the Ohio Attorney General as Chief Financial Officer indicating that he and DiLoreto were the only persons at YAL with responsibility for the custody and distribution of contributions. Tomey handled all of the accounting and bookkeeping for the "Florida chapter" of YAL. Also in 2008, Tomey decided to start his own non-profit fundraising organization modeled on YAL. Initially, Tomey did not incorporate a separate legal entity. Instead, he simply registered and operated YAL under the fictitious name (*i.e.*, dba) Children Services of Indiana, Mississippi, and Ohio. Tomey opened a checking account with Regions Bank as President of YAL dba Children Services and periodically transferred funds to DiLoreto's YAL accounts in Indiana.⁸ DiLoreto told Tomey that he could charge expenses to the charity, such as hotel rooms, meals, and alcoholic beverages, if he was discussing charity matters and

However, the jury's verdict is also supported by sufficient evidence of a conspiracy between Tomey and DiLoreto, which the court finds appropriate to detail here.

⁸ Tomey testified that these transfers occurred because, at least in the beginning, DiLoreto handled Tomey's payroll.

Tomey did so until he began drawing a salary in 2011. From this evidence, a reasonable jury could permissibly infer that as DiLoreto was Tomey's early partner and collaborator in non-profit fundraising, and that DiLoreto intentionally participated in, and shared the fruits of, Tomey's efforts to defraud charitable donors.

The evidence was also sufficient to show that DiLoreto knew about the fraudulent nature of Tomey's scheme and acted in furtherance of it. In 2009, Kim Anderson of the Mississippi Secretary of State's office began investigating consumer complaints about solicitations by Mississippi Children Services ("MCS") in Mississippi. Ms. Anderson testified that DiLoreto told her that MCS was a chapter of YAL with a physical office in Columbia, Mississippi that was run by Tomey. DiLoreto also said that YAL was covering all of MCS's administrative costs, so 100% of the funds raised in Mississippi were used for charitable services. In truth, MCS had no physical facility in Mississippi and only a very small percentage of each Mississippi donation was used for charitable purposes. DiLoreto's false statements to the Mississippi Secretary of State in 2009 about Tomey's operation in Mississippi, which are similar to misrepresentations made by Tomey's employees to prospective donors, support a conclusion that DiLoreto was fully aware of and willfully joined in Tomey's fraudulent scheme. Taken as a whole, the evidence was sufficient to permit a

reasonable jury to find that Tomey and DiLoreto conspired to commit mail and wire fraud.

There is no direct evidence in this case of an explicit agreement between Tomey and any other person to use deceptive and misleading telemarketing tactics to solicit charitable contributions. A conspiracy may be inferred, however, from surrounding circumstantial evidence. *Toll*, 804 F.3d at 1355 (11th Cir. 2015). Ultimately, the determination of the strength of the evidence and the credibility of the witnesses is the task of the jury. *See Hollifield*, 870 F.2d at 578; *Corley*, 824 F.2d at 937; *Browning*, 723 F.2d at 1546. The court concludes that a rational jury could find from the circumstantial evidence presented at trial that a conspiracy to commit mail and wire fraud existed and that Tomey, Eakes, and DiLoreto knew about and willfully participated in it. Therefore, Tomey's motions for Judgment of Acquittal are due to be denied.

Accordingly, it is **ORDERED** that Tomey's Motion for Judgment of Acquittal, ECF No. 84, is **DENIED**.

SO ORDERED on this 28th day of November, 2016.

M. Casey Rodgers

M. CASEY RODGERS
CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

Northern District of Florida

UNITED STATES OF AMERICA

v.

GARY R. TOMEY II

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:15cr60-001/MCR

USM Number: 23562-017

Barry Beroset (Retained)

Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☒ was found guilty on count(s) One through Eight of the Indictment on May 26, 2016
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § 1349 and 18 U.S.C. § 2326	Conspiracy to Commit Mail and Wire Fraud In Connection With Telemarketing	May 31, 2012	1
18 U.S.C. § 1341 and 18 U.S.C. § 2326	Mail Fraud In Connection With Telemarketing	April 5, 2012	2 - 8

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

January 20, 2017

Date of Imposition of Judgment

M. Casey Rodgers

Signature of Judge

M. Casey Rodgers, Chief United States District Judge

Name and Title of Judge

February 4th, 2017

Date

DEFENDANT: GARY R. TOMEY II
CASE NUMBER: 3:15cr60-001/MCR

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: **90 months as to as to each of Counts One through Eight, with the terms to be served concurrently, one with the other.**

☒ The court makes the following recommendations to the Bureau of Prisons:

The court strongly recommends to the Bureau of Prisons that the defendant be designated to FPC, Pensacola, Florida, or, in the alternative, Maxwell Air Force Base in Montgomery, Alabama, so that he may receive visitation from his family.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☒ before 12 p.m. noon on February 27, 2017

☒ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____

DEPUTY UNITED STATES MARSHAL

DEFENDANT: GARY R. TOMEY II
CASE NUMBER: 3:15cr60-001/MCR

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: **5 years as to each of Counts One through Eight, with the terms to run concurrently, one with the other.**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - ☒ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
5. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
6. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: GARY R. TOMEY II
CASE NUMBER: 3:15cr60-001/MCR

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: GARY R. TOMEY II
CASE NUMBER: 3:15cr60-001/MCR

SPECIAL CONDITIONS OF SUPERVISION

1. You will be required to pay any unpaid restitution balance in monthly installment payments of not less than \$500 per month to commence within three months of your release from custody.
2. Unless and until you have satisfied your restitution obligation, you must provide the probation officer with access to any requested financial information and report the source and amount of personal income and financial assets to the supervising probation officer as directed.
3. You must not incur new credit charges or open additional lines of credit without the approval of the probation officer unless you have satisfied your restitution obligation.
4. You must not transfer or dispose of any asset, or your interest in any asset, without the prior approval of the probation officer unless you have satisfied your restitution obligation.
5. You must have any and all employment approved in advance by the Probation Officer, and any change in employment must also be preapproved by the Probation Officer.
6. You must submit your person, property, house, residence, vehicle, papers, computers [as defined in 18 U.S.C. § 1030(e)(1)], other electronic communications or data storage devices or media, or office, to a search conducted by a United States probation officer. Failure to submit to a search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that you have violated a condition of your supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

DEFENDANT: GARY R. TOMEY II
CASE NUMBER: 3:15cr60-001/MCR

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 800.00	\$ 0	\$ 0 - waived	\$ 6,677.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☒ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss**</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
Sandra Billmaier	\$175.00	\$175.00	
Richard Blenz	\$350.00	\$350.00	
Vicki Burnett	\$100.00	\$100.00	
Doris Chrisco	\$103.00	\$103.00	
Lisa Eads	\$175.00	\$175.00	
Thomas Echterling	\$459.00	\$459.00	
Subtotals	\$1,362.00	\$1,362.00	

(Continued on Page 7, Sheet 5B)

☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the ☐ fine ☒ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: GARY R. TOMEY II
CASE NUMBER: 3:15cr60-001/MCR

ADDITIONAL RESTITUTION PAYEES

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentages</u>
Gary Don Ellis	\$100.00	\$100.00	
Lynette Gorczyca	\$100.00	\$100.00	
Cynthia Gray-Hart	\$250.00	\$250.00	
Julie Henry	\$100.00	\$100.00	
Daniel Hiser	\$100.00	\$100.00	
Bonnie Huxford	\$100.00	\$100.00	
(payable to Crime Victims Fund)			
Jerry Kempf	\$100.00	\$100.00	
David Kreidler	\$100.00	\$100.00	
Margaret Jane Lynch	\$100.00	\$100.00	
Robert May	\$300.00	\$300.00	
Stephen Seno	\$100.00	\$100.00	
Nancy Shacklock	\$103.00	\$103.00	
Daphane Shultz	\$150.00	\$150.00	
Stephen Spellman, Jr.	\$2,550.00	\$2,550.00	
Marie Thomas	\$353.00	\$353.00	
Wil Thomas	\$309.00	\$309.00	
Carmen Waller	\$300.00	\$300.00	
Esther Wilson	\$100.00	\$100.00	
Subtotals	\$5,315.00	\$5,315.00	
Amount from Page 6	\$1,362.00	\$1,362.00	
GRAND TOTALS	\$6,677.00	\$6,677.00	

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 23, 1994, but before April 23, 1996.

NDFL 245B (Rev. 11/16)

Judgment in a Criminal Case
Sheet 6 — Schedule of PaymentsJudgment — Page 8 of 8DEFENDANT: GARY R. TOMEY II
CASE NUMBER: 3:15cr60-001/MCR**SCHEDULE OF PAYMENTS**

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☒ Lump sum payment of: \$800.00 Special Monetary Assessment due immediately, balance due
- ☐ not later than _____, or
- ☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☒ Payment in equal monthly (e.g., weekly, monthly, quarterly) installments of \$500.00 to commence within 3 months (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

- ☐ Joint and Several
- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☒ The defendant shall forfeit the defendant's interest in the following property to the United States:
Forfeiture Money Judgment (doc. #106) in the amount of \$1,219,129.46 (court waives interest)

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVT A assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION**

UNITED STATES OF AMERICA

v.

INDICTMENT

**GARY R. TOMEY II
and
ERIC T. EAKES**

3:15cr60/MCR

THE GRAND JURY CHARGES:

COUNT ONE

A. THE CHARGE

Between on or about August 12, 2008, and on or about May 31, 2012, in the Northern District of Florida and elsewhere, the defendants,

**GARY R. TOMEY II
and
ERIC T. EAKES,**

did knowingly and willfully combine, conspire, confederate, and agree together and with other persons to commit offenses against the United States, namely:

1. To devise a scheme to defraud and to obtain money and property by means of material false and fraudulent pretenses, representations, and promises, and for the purpose of executing this scheme, did cause items to be sent and delivered by the United States Postal Service and by any private and commercial interstate carrier, in violation of Title 18, United States Code, Section 1341; and

A-58

Returned in open court pursuant to Rule 6(f)	
<i>October 21, 2015</i>	
Date	<i>[Signature]</i>
United States Magistrate Judge	

2. To devise a scheme to defraud and to obtain money and property by means of material false and fraudulent pretenses, representations, and promises, and for the purpose of executing this scheme, did cause wire communications to be transmitted in interstate commerce, in violation of Title 18, United States Code, Section 1343; and these offenses were committed in connection with the conduct of telemarketing as defined in Title 18, United States Code, Section 2325, and in doing so victimized 10 or more persons over the age of 55.

B. MANNER AND MEANS

It was part of the scheme to defraud that:

1. Defendants **GARY R. TOMEY II** and **ERIC T. EAKES** operated a 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"). Defendant **TOMEY** was the registered agent of, and had signatory authority over, CFS and CCS, and defendant **EAKES** managed the CFS and CCS office in Milton, Florida.

2. Defendant **GARY R. TOMEY II** also incorporated or registered other entities to use as part of the scheme, including: Youth Achievement League Inc.; Alabama Children and Family Services Inc.; Arkansas Children and Family Services Inc.; Indiana Children Services Inc.; Mississippi Children and Family Services Inc.; Mississippi Children's Services Inc.; Ohio Children Services Inc.; and Tennessee Children and Family Services Inc.

3. Defendants **GARY R. TOMEY II** and **ERIC T. EAKES** used charity names that were similar to those of state agencies to attract the attention of potential donors and increase the likelihood that they would send donations.

4. Defendants **GARY R. TOMEY II** and **ERIC T. EAKES** directed CFS and CCS employees to make telephone calls from the office in Milton, Florida, to potential donors in Florida and elsewhere soliciting charitable donations.

5. Defendants **GARY R. TOMEY II** and **ERIC T. EAKES** crafted the solicitation language used by employees to falsely represent that CFS and CCS performed charitable works itself and to fraudulently conceal material facts regarding the true nature of the defendants' telemarketing business. As such, defendants **TOMEY** and **EAKES** directed employees to tell potential donors that: 100 percent of their donation would go to the charity; all proceeds go to help poor, abused, or critically ill children in the locality where the potential donor lived; the employees worked as volunteers; the identified charity does all of its own fundraising; and the employees worked directly for the charity for which they claimed they were soliciting donations.

6. To induce donors to make contributions to CFS and CCS, defendants **GARY R. TOMEY II, ERIC T. EAKES**, and employees acting at their direction, also fraudulently omitted facts material to the donors' decision to contribute, including that:

- a. A cease and desist order and a \$25,000 administrative penalty had been issued by the Mississippi Secretary of State against Mississippi Children and Family Services Inc. for soliciting donations without being registered as a charitable organization and making misrepresentations in its solicitation materials;

b. A cease and desist order had been issued by the United States Postal Service against defendant **TOMEY**, doing business as Ohio Children Services Inc., for using the mail to make false representations to solicit money; and

c. As the result of a suit brought by the Arkansas Attorney General for using deceptive and misleading practices to solicit charitable donations, defendant **TOMEY** and CFS, doing business as Arkansas Children and Family Services Inc., paid a \$50,000 fine and were prohibited from doing business in the state of Arkansas.

7. When a donor agreed to make a donation during the solicitation call, defendants **GARY R. TOMEY II** and **ERIC T. EAKES** directed employees to mail the donor a letter that instructed the donor to mail, in the return envelope provided, a donation by check made payable to a specific organization controlled by defendant **TOMEY**. The organization identified was selected because it corresponded to the donor's state of residence.

8. The addresses to which donors were directed to mail checks were identified as office suites, but were, in fact, rented mailboxes at United Parcel Service ("UPS") Stores. Defendants **GARY R. TOMEY II** and **ERIC T. EAKES** caused any mail delivered to the UPS mailboxes to be forwarded to the office of CFS and CCS in Milton, Florida.

9. As a result of this scheme, defendants **GARY R. TOMEY II** and **ERIC T. EAKES** caused CFS and CCS to receive more than \$1.2 million in fraudulently induced donations for their own use and use of others not entitled to the funds, to wit,

employees' wages and commissions, defendants **TOMEY** and **EAKES'** salaries, business expenses, and defendant **TOMEY's** personal use.

All in violation of Title 18, United States Code, Sections 1349 and 2326.

COUNTS TWO THROUGH EIGHT

A. INTRODUCTION

Paragraphs B1 through B9 of Count One of this Indictment are realleged and incorporated herein.

B. THE CHARGE

On or about the dates listed below, in the Northern District of Florida and elsewhere, the defendants,

GARY R. TOMEY II
and
ERIC T. EAKES,

did knowingly and willfully devise a scheme to defraud and to obtain money and property by means of material false and fraudulent pretenses, representations, and promises, and for the purpose of executing this scheme, and attempting to do so, did cause to be sent and delivered by the United States Postal Service and by any private and commercial interstate carrier, the following UPS packages to the CFS and CCS office in Milton, Florida:

COUNT	DATE	SENT FROM
TWO	March 1, 2012	The UPS Store, Maxwell Air Force Base, Alabama
THREE	March 1, 2012	The UPS Store, Indianapolis, Indiana
FOUR	March 1, 2012	The UPS Store, Cincinnati, Ohio

FIVE	March 2, 2012	The UPS Store, Columbia, Mississippi
SIX	March 2, 2012	The UPS Store, Knoxville, Tennessee
SEVEN	March 29, 2012	The UPS Store, Indianapolis, Indiana
EIGHT	April 5, 2012	The UPS Store, Indianapolis, Indiana

and these offenses were committed in connection with the conduct of telemarketing as defined in Title 18, United States Code, Section 2325, and in doing so victimized 10 or more persons over the age of 55.

In violation of Title 18, United States Code, Sections 1341 and 2326.

CRIMINAL FORFEITURE

The allegations contained in Counts One through Eight of this Indictment are hereby realleged and incorporated by reference for the purpose of alleging forfeiture, pursuant to the provisions of Title 18, United States Code, Section 982(a)(8).

From their engagement in any or all of the violations alleged in Counts One through Eight of this Indictment, the defendants,

GARY R. TOMEY II
and
ERIC T. EAKES,

shall forfeit to the United States, pursuant to Title 18, United States Code, Section 982(a)(8), any and all of their rights, title, and interest in any property, real and personal:

- i. used and intended to be used to commit, to facilitate, and to promote the commission of such offenses; and
- ii. constituting, derived from, and traceable to the gross proceeds obtained directly and indirectly as a result of the offenses.

If any of the property described above as being subject to forfeiture, as a result of acts or omissions of the defendants:

- i. cannot be located upon the exercise of due diligence;
- ii. has been transferred, sold to, or deposited with a third party;
- iii. has been placed beyond the jurisdiction of this Court;
- iv. has been substantially diminished in value; or
- v. has been commingled with other property that cannot be subdivided without difficulty,


it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), as incorporated by Title 18, United States Code, Section 982(b)(1), and Title 28, United States Code, Section 2461(c), to seek forfeiture of any other property of said defendants up to the value of the forfeitable property.

A TRUE BILL:

Redacted per privacy policy

FOREPERSON

10 - 21 - 15
DATE


CHRISTOPHER P. CANOVA
Acting United States Attorney


ALICIA H. KIM
Assistant United States Attorney

03:39 1 during the trial, I'm going to give you your
03:39 2 instructions on the law, and then the attorneys will
03:39 3 make their closing arguments to you, and then you will
03:39 4 retire to begin your deliberations.

03:39 5 That's how we will proceed. I'm going to ask
03:39 6 in advance for your patience. The trial -- and you
03:40 7 will learn this, if you haven't served on a jury in
03:40 8 the past, the trial is a very fluid process. And I
03:40 9 still don't have that crystal ball that I have asked
03:40 10 for for the past 13 years, so there's a lot of things
03:40 11 that I can't predict and the attorneys can't predict,
03:40 12 but again, we will do our best to keep the case on
03:40 13 track for you.

03:40 14 Ladies and gentlemen, now is the time for the
03:40 15 attorneys to make their opening statements to you.
03:40 16 Please do give them your careful attention. And I
03:40 17 appreciate the attention you've given to me during
03:40 18 these preliminary instructions. Thank you.

03:40 19 Ms. Kim?

03:40 20 **MS. KIM:** Thank you, Your Honor.

03:40 21 **OPENING STATEMENT**

03:40 22 **MS. KIM:** May it please the Court?

03:40 23 **THE COURT:** Yes, ma'am.

03:40 24 **MS. KIM:** Counsel.

03:40 25 Members of the jury, "When you know what you

03:40 1 want and you want it bad enough, you'll find a way to
03:40 2 get it." That was one of the inspirational quotes
03:41 3 that was posted on the walls of office of Children's
03:41 4 Charitable Services when the Federal Bureau of
03:41 5 Investigation executed a federal search warrant on
03:41 6 their office.

03:41 7 The evidence you'll hear over the course of
03:41 8 this trial will show that the Defendants, Gary Ray
03:41 9 Tomey II and Eric Tyler Eakes, took that motto to
03:41 10 heart. Everything they did was to make a sale, to
03:41 11 make money. This included things like quotes on the
03:41 12 wall to encourage their call center employees, the
03:41 13 sales pitch language that was used by those employees
03:41 14 which the Defendants drafted and perfected and
03:41 15 instructed their employees to use when calling
03:41 16 potential donors to solicit charitable donations, and
03:41 17 this included the commission-based pay scale that they
03:41 18 used to pay all of their employees.

03:41 19 You'll hear over the course of this trial
03:41 20 that the Defendants had been in the telemarketing
03:41 21 business for a long time. They started out working as
03:41 22 professional telemarketers contracting with other
03:41 23 nonprofit organizations to solicit donations and funds
03:41 24 for them. But they found it was a harder sell to have
03:41 25 to comply with Telephone Privacy Act in various

03:42 1 states, having to disclose to potential donors that
03:42 2 they were third-party professional solicitors, and
03:42 3 having to comply with strict registration rules.

03:42 4 So in 2008, the Defendant, Gary Tomey,
03:42 5 incorporated his own 501(c)(3) nonprofit organization,
03:42 6 initially part of a related operation by a former
03:42 7 telemarketing colleague over in Indiana called Youth
03:42 8 Achievement League. The organization that Mr. Tomey
03:42 9 incorporated was initially called Children and Family
03:42 10 Services, Inc. And they used different d/b/a's, or
03:42 11 doing business as, in each of the states they called.
03:42 12 If they were calling Florida, they called themselves
03:42 13 Florida Children and Family Services. If they were
03:42 14 calling Alabama, they called themselves Alabama
03:42 15 Children Services. In Arkansas they called themselves
03:42 16 Arkansas Children and Family Services. In Indiana
03:42 17 they called themselves Indiana Children Services or
03:42 18 Indiana Children and Family Services. If they were
03:42 19 calling Ohio, they called themselves Ohio Children
03:43 20 Services. If they were calling Mississippi,
03:43 21 Mississippi Children Services. And if they were
03:43 22 calling Tennessee, they called themselves Tennessee
03:43 23 Children and Family Services.

03:43 24 And it was not a coincidence that these
03:43 25 different d/b/a's, an organization name sounded a lot

03:43 1 like state agencies.

03:43 2 Mr. Tomey was the owner and registered agent
03:43 3 of Children and Family Services, and he was in charge
03:43 4 of the bank accounts and fund distribution. Mr. Eakes
03:43 5 was the office manager, and he was charged with
03:43 6 supervising day-to-day operations at the office in
03:43 7 Milton, Florida.

03:43 8 The organization only had the one office, but
03:43 9 Mr. Tomey had set up mailboxes at UPS stores in the
03:43 10 various states that they called in the various states
03:43 11 I just named. And they had an agreement with the UPS
03:43 12 stores that any mail that was sent to those drop boxes
03:43 13 would then get forwarded to the office in Milton. And
03:43 14 Mr. Eakes was responsible for opening and sorting all
03:43 15 of the mail that came to the Milton office once it
03:43 16 came in.

03:43 17 The evidence at trial that you'll hear will
03:43 18 include the testimony of employees that worked for the
03:44 19 Defendants' organization. You'll hear that the
03:44 20 employees were instructed to tell potential donors
03:44 21 that they were volunteers and that 100 percent of the
03:44 22 donation money that they were soliciting would go to
03:44 23 help children, quote, "right here" in the state that
03:44 24 they were calling. They were instructed to tell
03:44 25 donors that the charity helps grant last wishes for

1 children and works with local abuse shelters.

2 The solicitation mailers that the employees
3 then sent out, if a potential donor agreed to send in
4 a donation, contained the UPS drop box mailing address
5 for that particular state that they were calling, but
6 it was listed in the letterhead as a suite number to
7 make it look as if there was an office in that state.
8 And employees were further instructed to make it seem
9 like that's where the charity was located when they
10 were calling that particular state at that time.

11 However, every employee that worked there
12 received W-2 wages on a commission-based pay scale,
13 and the, quote/unquote, "charitable work" that the
14 organization was doing during the time frame of the
15 indictment was merely cutting donation checks every
16 once in a while to other 501(c)(3) organizations,
17 usually big national organizations like Special
18 Olympics or the Make-A-Wish Foundation.

19 And some of the organizations that they
20 donated to had never heard of the Defendants'
21 organization before, had no contract with the
22 Defendants' organization, and hadn't asked them to
23 solicit funds.

24 And some of the, quote/unquote, "charitable
25 contributions" that the Defendants' organization was

03:45 1 making that they attributed to their overall
03:45 2 charitable giving included transfers between their own
03:45 3 entities, so they would qualify a donation from
03:45 4 Mississippi Children Services to Children and Family
03:45 5 Services as a charitable donation or a transfer from
03:45 6 Children and Family Services to Youth Achievement
03:45 7 League as a donation, even though it was just moneys
03:45 8 that was going between their own accounts.

03:45 9 You'll also hear during the trial how right
03:45 10 off the bat there were issues with state and federal
03:46 11 agencies because of the Defendants' solicitation
03:46 12 practices, and they were put on notice throughout the
03:46 13 entire time frame of the indictment, from August 2008
03:46 14 through May 2012, that what they were doing was
03:46 15 violating state and federal law.

03:46 16 They were contacted by Attorney General
03:46 17 offices, Secretary of State's offices, United States
03:46 18 Postal Inspection Service, and eventually the Federal
03:46 19 Bureau of Investigation. But the Defendants kept
03:46 20 finding a way. They knew what they wanted and would
03:46 21 do whatever they had to do to keep going.

03:46 22 You'll hear how over time, as a result of
03:46 23 these issues that were coming up with the various
03:46 24 administrative agencies, they would make changes to
03:46 25 the language of their pitches and they would make

03:46 1 changes to the language of their solicitation mailers
03:46 2 to keep trying to stay under the radar. And
03:46 3 eventually they changed the name of the agencies to
03:46 4 Children's Charitable Services, which is why you've
03:46 5 heard that name as well.

03:46 6 And they also tried to do more direct charity
03:46 7 work, and they would do coat drives, and they would
03:46 8 buy Walmart gift cards and send them to abuse
03:47 9 shelters. But what never changed throughout the
03:47 10 course of the conspiracy was their goal to make as
03:47 11 much money as possible. And you'll hear what the
03:47 12 Defendants did with the money that they received in
03:47 13 the form of solicited donations.

03:47 14 First of all, as I said, everybody got paid.
03:47 15 Mr. Tomey got paid, Mr. Eakes got a salary, everybody
03:47 16 who worked for the organization got paid. Their
03:47 17 vendors and business expenses, which included Short
03:47 18 Call, Inc. -- Tomey's own professional telemarketing
03:47 19 company -- all got paid. Mr. Tomey you'll see used
03:47 20 the debit card for the charity bank account like his
03:47 21 own personal piggybank and would pay personal expenses
03:47 22 out of the charity account.

03:47 23 You'll hear how Mr. Tomey filed corporate
03:47 24 returns for his 501(c)(3) registered organization,
03:47 25 which claimed to the Internal Revenue Service that, at

03:47 1 most, 10 percent of the donations being received went
03:47 2 back out to other charities. You'll hear from an FBI
03:47 3 forensic accountant as well who analyzed the
03:47 4 Defendants' bank accounts that, according to her
03:48 5 analysis, it was an even smaller percentage than that.

03:48 6 Finally, during the course of this trial,
03:48 7 you'll hear from the alleged victims, the people who
03:48 8 were called in all of these various different states
03:48 9 and asked over the telephone by the Defendants'
03:48 10 employees to give a donation to their charity. And
03:48 11 some of them, you know, doled out money in response to
03:48 12 the pitch that they received, because they thought it
03:48 13 would be going to a good cause. They thought it was
03:48 14 going to an organization that was going to be a good
03:48 15 steward of their money, because they were told 100
03:48 16 percent of the money was going to charity. What they
03:48 17 were not told is the evidence that you all get to hear
03:48 18 during the course of this trial.

03:48 19 As you heard the judge explain, the
03:48 20 Defendants have been charged with conspiring to commit
03:48 21 mail and wire fraud between August 2008 and May 2012,
03:48 22 and they've also been charged with what we call
03:48 23 substantive counts of mail fraud, which basically
03:48 24 means that they've been charged with seven specific
03:48 25 counts of using the mail as part of their scheme to

03:49 1 defraud these potential donors.

03:49 2 At the end of the trial, you'll also be asked
03:49 3 to find whether the Defendants committed these eight
03:49 4 counts, these offenses, in connection with the conduct
03:49 5 of telemarketing and whether they victimized more than
03:49 6 ten people over the age of 55.

03:49 7 I tell you this to keep those things in mind
03:49 8 as you're listening to the evidence, because those are
03:49 9 elements that the Government -- that I have to prove
03:49 10 beyond a reasonable doubt, and you'll be asked to find
03:49 11 at the end of the trial whether I did or not. And I'm
03:49 12 telling you this because you'll hear me over the
03:49 13 course of this trial ask some of the witnesses how old
03:49 14 they are. And it's not because I'm trying to be rude,
03:49 15 it's because I'm trying to prove an element of the
03:49 16 crime, in that some of the people who were victimized
03:49 17 were over the age of 55.

03:49 18 You'll see from the evidence that will be
03:49 19 presented during this trial that the Defendants wanted
03:49 20 money, and they kept finding ways to earn more and
03:49 21 more of it at the expense of actually running a
03:49 22 charitable organization in good faith in accordance
03:50 23 with the law. And as you'll see, being registered as
03:50 24 a 501(c)(3) organization does not mean that you
03:50 25 actually are operating as a 501(c)(3) nonprofit

03:50 1 organization.

03:50 2 On behalf of the United States, I thank you
03:50 3 in advance for the close attention that I know you'll
03:50 4 pay to the evidence that will be presented during the
03:50 5 course of this trial. And once you've heard and
03:50 6 thoughtfully considered all of that evidence, at the
03:50 7 end of this trial the Government will be asking you to
03:50 8 find the Defendants guilty as charged.

03:50 9 **THE COURT:** Thank you.

03:50 10 Mr. Berozet, on behalf of Mr. Tomey?

03:50 11 **MR. BEROSET:** Thank you, Your Honor. May it
03:50 12 please the Court?

03:50 13 **THE COURT:** Yes, sir.

03:50 14 **MR. BEROSET:** Ms. Kim, Mr. Kinard.

03:50 15 Good afternoon, ladies and gentlemen. This
03:50 16 will be one of two times that I'm going to have an
03:50 17 opportunity to talk to you. I'm going to take my time
03:50 18 and try and go through this, because it is quite
03:50 19 confusing with the various names.

03:50 20 Mr. Tomey is presumed innocent. The
03:50 21 Government has presented an indictment, as the Court
03:51 22 has told you, and of course, that's the nature of the
03:51 23 charges. But what we expect the evidence to prove in
03:51 24 this case is that Mr. Tomey was involved for over 20
03:51 25 years in the telemarketing business. And in the

03:42:02 1 attorneys to argue to you, not at you, to argue to you their
03:42:07 2 respective positions in the case on behalf of their clients
03:42:11 3 based upon the evidence that has now been admitted in
03:42:15 4 conjunction with the law that you have now been instructed on.

03:42:21 5 So I will ask for your continued attention as the
03:42:24 6 attorneys present their closing arguments to you.

03:42:26 7 Ms. Kim, you may proceed.

03:42:28 8 **CLOSING ARGUMENTS**

03:42:30 9 **MS. KIM:** May it please the Court?

03:42:34 10 **THE COURT:** Yes, ma'am.

03:42:35 11 **MS. KIM:** Counsel, members of the jury.

03:42:37 12 On behalf of the United States, I echo the Judge's
03:42:41 13 thanks and gratitude in the close attention that I know you've
03:42:46 14 paid in this case. I know you've heard a lot of testimony,
03:42:49 15 you've seen a lot of documents and a lot of evidence, I know
03:42:52 16 that you've paid very close attention to all of it.

03:42:55 17 If you recall, you remember seeing this poster that
03:42:59 18 was found on the walls of the telemarketing office that was
03:43:02 19 operated by the Defendants known as Children's Charitable
03:43:04 20 Services at the time: "When you know what you want and you
03:43:07 21 want it bad enough, you find a way to get it."

03:43:11 22 All of the evidence that you've heard and seen, and
03:43:14 23 we're going to ask you to thoughtfully consider when you go
03:43:19 24 into your deliberations, proves beyond a reasonable doubt that
03:43:21 25 the Defendants' organization was operated in this manner.

03:43:24 1 While it may have been registered as a nonprofit
03:43:27 2 charitable organization, Children and Family Services or
03:43:29 3 Children's Charitable Services was operating just like a
03:43:31 4 for-profit corporation.

03:43:33 5 You heard the Defendants testify that they ran it just
03:43:36 6 the same way that the for-profit side had been run, and they
03:43:40 7 were running it to scam unsuspecting donors out of money that
03:43:44 8 the donors thought was going to actual charitable causes and to
03:43:48 9 actually help children in their state.

03:43:51 10 The evidence at the trial has proved beyond a
03:43:54 11 reasonable doubt that the Defendants conspired to engage in a
03:43:56 12 scheme to defraud and actually successfully carried it out in
03:44:00 13 seven different states despite attempts by various states to
03:44:03 14 curb their behavior through administrative and civil action.

03:44:10 15 The Defendants excelled at making their charity a
03:44:10 16 moving target. Mr. Tomey would file whatever paperwork he
03:44:13 17 needed with state agencies, and Mr. Eakes would change the
03:44:18 18 sales script and he would train his employees as the conspiracy
03:44:24 19 period continued in order to keep avoiding trouble language.
03:44:29 20 They did whatever they had to do and said whatever they had to
03:44:32 21 say in order to keep the charity running and to keep collecting
03:44:36 22 donations.

03:44:37 23 You heard the judge instruct you on the elements of
03:44:41 24 each of the crimes charged. Count One is the conspiracy
03:44:44 25 charge. And we've charged conspiracy to commit mail fraud and

03:44:52 1 wire fraud. The evidence at trial showed that the Defendants
03:44:54 2 were part of an unlawful plan to use false and misleading
03:44:57 3 statements to solicit donations from potential donors, and used
03:44:57 4 interstate wires and mailings to do so.

03:45:01 5 If you find the Defendants guilty of conspiracy, keep
03:45:03 6 in mind that you'll have to indicate which was the purpose of
03:45:08 7 their unlawful plan. And the Judge will explain that to you
03:45:11 8 after the closing arguments. But we've charged two different
03:45:15 9 conspiracies, as she did explain.

03:45:16 10 The first was to defraud people using wire, basically
03:45:19 11 the telephone, and that's wire fraud; or to defraud people by
03:45:22 12 using mailings, and that's mail fraud.

03:45:25 13 The Government would submit to you that the purpose of
03:45:28 14 their conspiracy was both of these charges. As you heard time
03:45:31 15 and again how the scheme was carried out by using telemarketing
03:45:34 16 telephone calls, calling from Milton, Florida, to other states,
03:45:39 17 and then causing donors to mail checks to drop boxes, which
03:45:43 18 would then be forwarded from those other states via United
03:45:48 19 Parcel Service, UPS, to the office in Milton, Florida.

03:45:51 20 Although the Government does not have to prove that
03:45:52 21 the Defendants actually successfully carried out their scheme,
03:45:56 22 you can consider the evidence that they did successfully carry
03:45:59 23 out their scheme as evidence of the fact that they conspired to
03:46:02 24 do so.

03:46:03 25 Counts Two through Eight, as the Judge explained, were

03:46:06 1 the substantive counts of mail fraud. You've heard the Judge
03:46:12 2 explain these elements the Government needs to prove beyond a
03:46:12 3 reasonable doubt.

03:46:14 4 And what essentially these elements mean is that the
03:46:16 5 Government has to prove that the Defendants intentionally made
03:46:19 6 false statements to get money and caused something as part of
03:46:22 7 their scheme to be mailed via UPS to do it.

03:46:26 8 I'm going to walk you through each of these elements
03:46:26 9 in relation to the evidence that you've heard over the course
03:46:30 10 of this week-and-a-half.

03:46:31 11 The first element is that there was a scheme to
03:46:34 12 defraud that both the Defendants participated in. I know
03:46:36 13 you've heard a lot of confusing and conflicting things about
03:46:40 14 registrations and corporate names and d/b/a's and the alleged
03:46:48 15 separations between these entities and fictitious names. And
03:46:48 16 all those confusions were to do is to allow the Defendants to
03:46:54 17 keep their scheme going.

03:46:54 18 Registering different names with the IRS, with
03:46:57 19 different state agencies. It was a way to get out from under
03:47:00 20 the trouble that the Defendants were on notice that they were
03:47:02 21 getting into.

03:47:04 22 And what the truth about the Defendants' organization
03:47:07 23 was is what you heard from the Defendants' own statements and
03:47:10 24 their employees, that it was all the same organization in the
03:47:12 25 same location, the same employees using the same scripts and

03:47:16 1 the same solicitation mailing.

03:47:17 2 It all started in 2008 when Mr. Tomey decided to
03:47:22 3 branch out of the operation that he had been running with
03:47:25 4 Anthony DiLoreto and incorporate his own nonprofit organization
03:47:29 5 to do telemarketing. And he hired Mr. Eakes, who had been
03:47:32 6 working for him on the for-profit side, to run the charity as
03:47:36 7 his manager.

03:47:37 8 Remember you heard former employee Jessica Reisen
03:47:41 9 testify that they first state they called is Indiana as sort of
03:47:44 10 a guinea pig, to see how it would work using themselves as
03:47:48 11 their own charity to call donors and see how that would work.
03:47:51 12 Then they added Ohio, as you heard, later in 2008, followed by
03:47:55 13 Florida, Alabama, and Mississippi in 2009, and then Arkansas
03:47:59 14 and Tennessee in 2010.

03:48:00 15 And you'll see these from the Government's Exhibit 34
03:48:02 16 that I admitted, which was a summary of timeline of all of the
03:48:05 17 sort of important exhibits that are put in chronological order.
03:48:09 18 You'll see the sequence of events and see how they started
03:48:12 19 soliciting in those states.

03:48:13 20 I think what you'll also see when you look at that
03:48:17 21 timeline is that, as they started adding states, they started
03:48:21 22 adding problems that they were having in those states, and they
03:48:25 23 would move to calling another state or they would change their
03:48:27 24 d/b/a or they would register something differently and the
03:48:30 25 cycle would keep going.

03:48:32 1 Whatever the corporate entity was called, it was all
03:48:34 2 the same company, all the same employees with the same purpose,
03:48:38 3 to call potential donors in other states to tell them
03:48:42 4 fraudulent information about where their money was going and
03:48:44 5 their money was doing in order to induce them to mail in a
03:48:47 6 donation, which would then be forwarded to Florida.

03:48:50 7 A simple conspiracy with a simple purpose using
03:48:53 8 telephone calls and mailings to fraudulently obtain as much
03:48:56 9 money as possible.

03:48:57 10 The second element the Government has to prove beyond
03:49:01 11 a reasonable doubt is that the Defendants made material
03:49:03 12 misrepresentations as part of their scheme.

03:49:05 13 Mr. Tomey and Mr. Eakes intentionally misled people
03:49:08 14 when they wrote their scripts that their employees used to
03:49:13 15 solicit donations from potential donors. You saw the written
03:49:18 16 scripts and heard the testimony of the employees and from a
03:49:21 17 number of donors who actually received solicitation calls.

03:49:24 18 And you also heard from the Defendants themselves that
03:49:26 19 there were four main false and fraudulent representations that
03:49:29 20 were made to donors:

03:49:30 21 First, that 100 percent goes to the charity; second,
03:49:34 22 all fundraising is done by volunteers or volunteer employees;
03:49:38 23 third, the charity was located in the donor's state; and four,
03:49:43 24 all of the donor's money stays in the donor's state.

03:49:46 25 These misrepresentations were material because, as you

03:49:50 1 heard from the donor witnesses, many of them donated because of
03:49:54 2 one or more of these facts, and if one or more of these facts
03:49:58 3 had not been true they would not have donated to the
03:50:01 4 Defendants' organization.

03:50:02 5 As you heard from employee and donor testimony,
03:50:05 6 initially employees were saying that 100 percent goes to the
03:50:08 7 children. But by the time the Government began its
03:50:13 8 investigation, the script said "100 percent of what we raise
03:50:16 9 goes directly to the charity."

03:50:17 10 Although the Defendants testified that this was,
03:50:22 11 quote/unquote, "technically correct," the victims, as you
03:50:26 12 heard, obviously took it to mean that 100 percent was going to
03:50:29 13 a charitable cause, that 100 percent was going to other
03:50:31 14 charities, that 100 percent was going to the sick children and
03:50:34 15 the disabled children and the abuse shelters that the
03:50:39 16 Defendants listed in their solicitation materials as being the
03:50:42 17 people that were helped by their charity.

03:50:44 18 That language did not change even when the Arkansas
03:50:47 19 Attorney General told them that that specific statement was
03:50:50 20 fraudulent and misleading, and it did not change when Special
03:50:54 21 Agent Kinard advised Mr. Eakes of the same thing in May of
03:50:58 22 2011.

03:50:58 23 The representation that the solicitors on the phone
03:51:05 24 were volunteers or volunteer employees. As you heard initially
03:51:08 25 just the term "volunteer" was used, and then there was the term

03:51:11 1 "member" used, and then the term "volunteer employee" used.
03:51:17 2 And both Mr. Eakes and Mr. Tomey admitted that that term was
03:51:20 3 used.

03:51:21 4 Mr. Eakes justified it because at some point the
03:51:29 5 employees were going to volunteer for -- or have the
03:51:30 6 opportunity to volunteer for some events. Mr. Tomey justified
03:51:34 7 it because they were working for this organization of their own
03:51:38 8 volition and no one was forcing them to work there.

03:51:41 9 And on the screen you see here is just some examples
03:51:44 10 of the different variations that they used and the different
03:51:48 11 wordplay that they used to basically imply to donors that all
03:51:51 12 the solicitors were part of a volunteer fundraising effort
03:51:55 13 which further just went to show that when they said 100 percent
03:51:59 14 goes to the charity the donors would get the implication that
03:52:02 15 all the money that they would be donating would be going
03:52:06 16 directly to a charitable cause.

03:52:08 17 As you heard, no board member ever solicited on behalf
03:52:11 18 of the organization. Throughout the entire time frame of the
03:52:14 19 conspiracy, all of the employees that were hired to make calls
03:52:17 20 were paid, and they were paid based on the commission -- they
03:52:22 21 were paid a commission based on the donations that they brought
03:52:24 22 in. And the more sales they earned, the more money they got.

03:52:28 23 And you saw from the Defendants' own rules and
03:52:31 24 regulations that these employees were hired for one purpose and
03:52:35 25 one purpose only -- to make as many sales as possible. And you

03:52:38 1 heard from Ms. Presley that the whole concept of volunteer
03:52:43 2 employees was not even really true because she was basically
03:52:46 3 assigned to start working for the charity even though she
03:52:49 4 didn't want to, she was forced to by her supervisors.

03:52:58 5 The third misrepresentation was the location of the
03:53:00 6 charity. The employees were instructed by the Defendants in
03:53:02 7 their pitches to directly tell or otherwise infer that the
03:53:08 8 charity was actually located in the state that the donor lived
03:53:10 9 and that there was an actual physical office location where the
03:53:14 10 organization's UPS box was.

03:53:14 11 The pitch scripts would use language such as "here in
03:53:17 12 the state" to make it sound like the employees were calling
03:53:20 13 from that state. And employees would provide these addresses
03:53:23 14 of the UPS boxes using the word "suite" to indicate where the
03:53:29 15 donation was going and to further -- and sometimes even just
03:53:32 16 directly say "that's where the charity is located."

03:53:37 17 And you'll notice, for example, there was testimony
03:53:39 18 about the Alabama address. It says Montgomery, even though
03:53:42 19 it's located on Maxwell Air Force Base, to further give the
03:53:46 20 impression that it was actually a physical office address.

03:53:49 21 As you heard several of the donor witnesses testify,
03:53:53 22 the location was particularly important to them, and they
03:53:56 23 wouldn't have donated otherwise. But as you know, the only
03:53:59 24 office that Children and Family Services or Children's
03:54:01 25 Charitable Services ever operated was an office that was

03:54:03 1 located in Milton, Florida.

03:54:04 2 Similar to the implication about charity location was
03:54:07 3 the implication that all of the funds were being distributed
03:54:11 4 within the donor's own state. The employees were instructed to
03:54:15 5 tell donors that all of their funds would be kept to help
03:54:18 6 children or programs just in their state.

03:54:20 7 Again, this basically links to the representation of
03:54:24 8 100 percent going to charity. When you see that all together,
03:54:27 9 the word "all" means the word "all," that all of the funds the
03:54:32 10 donor would be giving would be sent to the state and
03:54:36 11 distributed to the state, and that further implied that 100
03:54:38 12 percent was going to a charitable cause in that state. And
03:54:41 13 again, that's what the donor witnesses heard and that is what
03:54:45 14 caused them to donate.

03:54:47 15 No matter what technicalities the Defendants might use
03:54:51 16 regarding percentages and the use of the word "the" in 100
03:54:57 17 percent goes to "the" charity, in this representation "all"
03:54:59 18 means "all." And they knew that all was not going back to that
03:55:02 19 state, part of it was being kept, as Mr. Eakes said, for
03:55:05 20 fundraising expenses, payroll expenses, all the other overhead
03:55:05 21 expenses, and then maybe some of it was being cut in checks to
03:55:07 22 other organizations that may or may not be located in those
03:55:10 23 states.

03:55:10 24 The third element the Government needs to prove beyond
03:55:16 25 a reasonable doubt is intent to defraud.

03:55:19 1 The representations that the Defendants were making
03:55:23 2 were not the result of an honest mistake or the Defendants'
03:55:27 3 ignorance. As you heard, Mr. Tomey has a lot of experience in
03:55:30 4 telemarketing and Mr. Eakes has a lot -- by this point a lot of
03:55:33 5 experience in telemarketing. He was a very smart student and a
03:55:37 6 bright guy.

03:55:38 7 These Defendants were not ignorant or stupid people.
03:55:42 8 They have been in the telemarketing business, and much of that
03:55:45 9 time they had been working and telemarketing together.

03:55:48 10 In the very beginning a lot of the statements were
03:55:51 11 just false. 100 percent didn't go to the children, none of the
03:55:54 12 callers were volunteers, there were no offices in other states.
03:55:57 13 And then they started, as they were getting in trouble, using
03:56:01 14 those representations, using the wordplay, the half-truths.

03:56:04 15 Now, remember that we don't have any written pitch
03:56:08 16 scripts from prior to November 2011 when Ms. Angel, the first
03:56:13 17 employee you heard testify, was provided a pitch script that
03:56:17 18 had -- so we don't have any admitted into evidence that are
03:56:20 19 earlier than that, but you can rely on the testimony of the
03:56:22 20 donors and the employees about what happened in the earlier
03:56:25 21 years of the conspiracy.

03:56:25 22 And the Defendants were put on notice that these
03:56:29 23 statements were fraudulent and misleading, and so that's when
03:56:33 24 you start seeing the pitch script changes happening. And you
03:56:38 25 can use your common sense and reason and the testimony of the

03:56:41 1 donors to show that they knew that what they were saying was
03:56:45 2 misleading and would lead to a certain impression that was a
03:56:49 3 false or fraudulent impression.

03:56:51 4 The Defendants knew that saying 100 percent went to
03:56:54 5 the charity was a problem, which was why it was finally only
03:56:58 6 removed after the search warrant.

03:56:59 7 And even what the Defendants said eventually after the
03:57:05 8 search warrant was about the charity making sure that 25
03:57:08 9 percent -- at the very least 25 percent was going to the
03:57:12 10 charity was not even true. As you heard from the review of the
03:57:15 11 Defendants' tax records and the Defendants' bank records and
03:57:19 12 even Mr. Tomey's own numbers don't support that statement, and
03:57:23 13 that number was nowhere near 25 percent at the time frame of
03:57:27 14 the conspiracy. In any case, none of the numbers you heard was
03:57:30 15 100 percent.

03:57:31 16 The Judge told you that throughout the trial you can
03:57:34 17 consider whether the Defendants were advised by various
03:57:38 18 agencies that they might be doing something wrong as evidence
03:57:43 19 that the Defendants were put on notice that what they were
03:57:46 20 saying was fraudulent and misleading and that what they were
03:57:50 21 doing was wrong. And the Government showed that the Defendants
03:57:52 22 were put on notice almost immediately upon the Defendants
03:57:56 23 beginning solicitations in a particular state.

03:57:56 24 Again, as I noted, if you look at the timeline that's
03:57:59 25 been admitted as Government's Exhibit 34, I submit to you that

03:58:06 1 you will notice a pattern here in terms of timing of when they
03:58:08 2 started soliciting in that state and when they started having
03:58:11 3 problems.

03:58:12 4 Like I said, the Defendants were very good at being a
03:58:15 5 moving target. And many of the documents notifying the
03:58:18 6 Defendants of agency actions was sent directly to the office,
03:58:22 7 and so certainly Mr. Tomey had notice of it as a lot of the
03:58:25 8 things were found at his home, but certainly a lot of this
03:58:28 9 information was also found at the office where Mr. Eakes was in
03:58:32 10 charge of the mail.

03:58:33 11 People who are told that they have issues with
03:58:36 12 potential fraud by the United States Postal Inspection Service,
03:58:40 13 the Indiana Attorney General, the Mississippi Secretary of
03:58:43 14 State, the Arkansas Attorney General, the Tennessee Secretary
03:58:46 15 of State, and finally eventually about by the Federal Bureau of
03:58:51 16 Investigation, yet continued to solicit donations in the same
03:58:54 17 ways and the same fraudulent tactics are not people who are
03:58:57 18 acting in good faith. Those are people who are acting with
03:59:01 19 intent to defraud, and they're acting willfully and
03:59:02 20 intentionally in making those false and misrepresentations for
03:59:05 21 the purpose of obtaining money from donors.

03:59:07 22 And the whole purpose of this scheme was the money.
03:59:18 23 The Defendants were good at raising money, and they didn't want
03:59:21 24 to do it necessarily just out of the goodness of their hearts.
03:59:26 25 As you recall from the tax records, there was over \$2 million

03:59:28 1 over the four-year period in reported donations, and they had
03:59:31 2 reported just around \$200,000, which is just under 10 percent.

03:59:38 3 During those same four years Mr. Eakes made over
03:59:41 4 \$125,000, almost as much as all the charities combined earned
03:59:43 5 in those four years. Mr. Tomey made \$83,000 directly from the
03:59:45 6 charities reported as payroll. But, as you heard him testify,
03:59:48 7 he also earned money by taking charity funds to pay for
03:59:52 8 personal expenses.

03:59:53 9 He also got money from Short Call, which did receive
03:59:58 10 money from the charity as well. And although Mr. Tomey may not
04:00:03 11 have literally gotten a paycheck, as he was telling people that
04:00:09 12 he wasn't receiving a paycheck in 2008 or 2009, you'll see from
04:00:13 13 Government's Exhibit 21e that he was using the charity accounts
04:00:19 14 and had a debit card for it and was using it basically as his
04:00:23 15 own piggybank.

04:00:25 16 As you heard FBI Forensic Accountant Deborah Kelly
04:00:31 17 testify, she found numerous expenditures that she
04:00:33 18 conservatively categorized as personal expenses, but there were
04:00:35 19 a lot of unknown expenses as well as unknown deposits that she
04:00:39 20 could not account for based on her limited -- you know, the
04:00:41 21 limitations of her analysis, and certainly there were
04:00:44 22 limitations.

04:00:44 23 But it appears, based on Ms. Kelly's analysis, that,
04:00:50 24 in addition to Mr. Tomey's W-2 wages, he spent at least \$43,000
04:00:56 25 out of the charity bank accounts, and that's if you don't

04:01:00 1 include the \$48,000 that had been pilfered out of the Youth
04:01:06 2 Achievement League account in Indiana that was held by
04:01:08 3 Mr. DiLoreto who, with Mr. Tomey, started this whole idea of
04:01:12 4 creating a nonprofit organization that you registered with the
04:01:16 5 IRS so that you can say to the donors "You're giving all your
04:01:19 6 money to the charity."

04:01:20 7 In addition, you'll see that over \$31,000 of the
04:01:24 8 charity's money was transferred to Mr. Tomey's for-profit
04:01:28 9 business, Short Call. And Mr. Tomey, as you saw, was taking
04:01:31 10 money from the charity, just not in the form of a payroll
04:01:36 11 check. And it was fraudulent for him to represent that he was
04:01:39 12 during this time an unpaid board member, when in fact he was
04:01:42 13 receiving money directly from the charities.

04:01:44 14 The last element of substantive mail fraud is that the
04:01:51 15 Defendants caused something that helped their scheme to be put
04:01:54 16 in the mail. This includes either through the United States
04:01:58 17 Postal Service or through a private carrier like UPS.

04:02:01 18 As you've heard and seen on Government's Exhibit 33
04:02:04 19 that's up here on the screen, there was evidence that the
04:02:07 20 Defendants did in fact receive the following UPS packages from
04:02:11 21 these states on these particular dates. That's what all of
04:02:14 22 these boxes are and what the envelopes that Special Agent
04:02:17 23 Kinard pulled out of the trash were.

04:02:19 24 You heard and saw evidence that Mr. Tomey was
04:02:21 25 responsible for setting up those boxes so that they would

04:02:24 1 forward the mail to Milton, and Mr. Eakes knew that was
04:02:27 2 happening because he was responsible on the other end for
04:02:29 3 receiving those boxes, pulling those donations out, and sorting
04:02:32 4 those.

04:02:33 5 So both of the Defendants, as part of this overall
04:02:35 6 scheme to defraud, knowingly caused those donation checks to be
04:02:39 7 shipped via UPS from other states to Florida, and that's the
04:02:43 8 essence of the mail -- part of the mail fraud.

04:02:48 9 As you also heard from the Judge, another
04:02:50 10 consideration that you'll have to make, if you find the
04:02:52 11 Defendants guilty of any of the counts charged in the
04:02:56 12 indictment, is that you'll have to determine if the Defendants
04:02:59 13 committed those crimes in connection with telemarketing as the
04:03:04 14 definition that the Judge gave you.

04:03:07 15 It's pretty self-explanatory. It's the sort of common
04:03:10 16 meaning of the word that you know as telemarketing -- using the
04:03:14 17 phone to make calls from one state to another for the purposes
04:03:18 18 of soliciting money.

04:03:19 19 Finally, you'll remember at the beginning of the trial
04:03:22 20 I told you that you needed to watch out for the number and age
04:03:27 21 of donors that were victimized by the Defendants' scheme,
04:03:31 22 because as the Judge just told you, again, another thing that
04:03:35 23 you will need to determine if you find the Defendants guilty of
04:03:37 24 any of the charges in the indictment, is whether the Government
04:03:39 25 proved beyond a reasonable doubt also that the scheme -- or the

04:03:42 1 conspiracy victimized over ten people over the age of 55.

04:03:47 2 The donor witnesses that you heard from came from
04:03:49 3 Florida, Alabama, Mississippi, Arkansas, Tennessee, Ohio, and
04:03:53 4 Indiana. And the timing of their donations spanned the
04:03:56 5 four-year time period of the conspiracy.

04:03:58 6 You'll recall specifically that you heard from 17 who
04:04:02 7 were over the age of 55 at the time that they were solicited or
04:04:05 8 made a donation. Mr. Coleman and Ms. Waller from Mississippi;
04:04:11 9 Ms. Fruchey, Dr. Huxford, Mr. Kasprzak, Mr. Echterling,
04:04:16 10 Ms. Cottier, Mr. Collins, and Mr. Wesner from Indiana;
04:04:19 11 Mr. Ellis and Mr. Eads from Ohio; Ms. Yantis and Mr. Kempf from
04:04:25 12 Indiana; and Ms. Murphy, Ms. Vaughn, and Mr. Fraker from
04:04:27 13 Tennessee; and Mr. Spellman from Alabama.

04:04:30 14 You'll recall you also heard from nine other donor
04:04:33 15 witnesses as well, including Ms. Gray-Hart from Florida and
04:04:36 16 Ms. Burnett from Arkansas. And while all of the witnesses
04:04:39 17 couldn't remember every detail of each of the solicitation
04:04:42 18 calls they received from the Defendants' organization, they did
04:04:46 19 remember what was important to them, what caused them to give
04:04:49 20 to this particular charity.

04:04:50 21 And those that donated believed that the charity was
04:04:56 22 legitimate. And those that didn't, for example, Mr. Coleman
04:04:58 23 and Ms. Murphy, who were solicited but didn't actually give a
04:05:02 24 donation, only decided not to donate because they checked on
04:05:06 25 the Defendants' status in their particular states, being

04:05:10 1 Mississippi and Tennessee. And after they found out from their
04:05:13 2 respective Secretary of State's office that the Defendants'
04:05:17 3 organization was not registered, they decided not to donate.

04:05:20 4 Now, some of these donors remembered that 100 percent
04:05:25 5 of their money was going to charitable causes, and that was
04:05:29 6 what was important to them. Some of them remembered that the
04:05:31 7 caller was a volunteer, not a third-party solicitor who was
04:05:34 8 being paid, and that was important to them. And some of them
04:05:36 9 -- almost all of them, I think, believed that their money was
04:05:39 10 going to their state, that it was a local charity going to help
04:05:42 11 local children.

04:05:43 12 You've seen from the evidence that the Defendants kept
04:05:52 13 finding ways to get more money, and they used false statements,
04:05:56 14 misleading statements, and wordplay to get that, at the expense
04:06:01 15 of actually running a charity in good faith and in accordance
04:06:05 16 with the law. And as a result, after you've considered all of
04:06:08 17 the evidence and all the testimony you've heard and all of the
04:06:11 18 documents that have been admitted, we're asking that you find
04:06:15 19 both Defendants guilty of all eight counts as charged.

04:06:18 20 **THE COURT:** Thank you.

04:06:24 21 Excuse me just a minute, ladies and gentlemen.

04:06:27 22 *(Conference between the Court and Clerk.)*

04:06:44 23 Ladies and gentlemen, would you like a short recess?

04:06:47 24 *(Jury indicating affirmatively.)*

04:06:50 25 Then we'll do that, we'll take a short recess, maybe

04:06:53 1 ten minutes to stretch your legs, maybe do some jumping jacks,
04:06:58 2 if we have any orange juice in there, coke, something.

04:07:02 3 All right, ladies and gentlemen, please don't discuss
04:07:04 4 the case during the recess. We'll see you back in about ten
04:07:08 5 minutes. Thank you.

04:07:09 6 *(Jury out.)*

04:07:34 7 I think that we -- we're going to need to order some
04:07:40 8 dinner for the jury. Do you have any better idea of how long
04:07:46 9 your closing will take?

04:07:48 10 **MR. BEROSET:** It's going to be less than an hour for
04:07:51 11 sure. One time I did it was about 30 minutes, but I can't tell
04:07:54 12 you -- I could add some more stuff, you know.

04:07:57 13 **THE COURT:** All right. We'll try to time it close.
04:08:02 14 We'll be in recess for ten minutes, come back in, Mr. Beroset,
04:08:07 15 we'll start with yours.

04:08:07 16 **MR. BEROSET:** Thank you, Your Honor.

04:08:08 17 **THE COURT:** And then, Mr. Keith, we won't take another
04:08:10 18 recess, we'll move right into yours.

04:11:03 19 *(Recess taken 4:08 p.m. to 4:19 p.m.)*

04:19:44 20 *(Jury in the box.)*

04:19:45 21 **THE COURT:** Ladies and gentlemen, we're now ready for
04:19:47 22 the closing arguments of the Defense. We'll start with
04:19:51 23 Mr. Beroset on behalf of Mr. Tomey. And I would ask that the
04:19:57 24 same careful attention you paid to Ms. Kim, please pay that
04:20:03 25 same attention to Mr. Beroset.

05:29:50 1 in a scheme to defraud.

05:29:52 2 So I ask, you know, consider all the evidence in the
05:29:57 3 case, but it really, like I say, boils down to what was in his
05:30:01 4 mind as he was working there, and I submit to you that the
05:30:04 5 evidence -- he's not guilty in fact, the evidence doesn't
05:30:08 6 support that he's guilty, and by a long shot the evidence
05:30:12 7 doesn't support beyond a reasonable doubt that he's guilty of
05:30:15 8 these charges against him. And I ask you to return a not
05:30:21 9 guilty because he is in fact not guilty of these charges.

05:30:24 10 I thank you for your service, your time, your patience
05:30:29 11 on Mr. Eakes's behalf and myself. Thank you.

05:30:31 12 **THE COURT:** Thank you.

05:30:34 13 Ms. Kim?

05:30:36 14 **MS. KIM:** Thank you, Your Honor.

05:30:44 15 The Defendants argued that there was no proof at the
05:30:49 16 trial of a meeting or a secret meeting where they got together
05:30:53 17 and agreed at the beginning of the conspiracy or at the
05:30:57 18 inception of the scheme to engage in the scheme to defraud the
05:31:02 19 donors. But that isn't what the Government has to prove with
05:31:05 20 respect to conspiracy.

05:31:06 21 You'll recall the Judge instructed you that what the
05:31:10 22 Government has to prove is the existence of an unlawful plan
05:31:13 23 involving multiple people and that each Defendant joined in on
05:31:19 24 at least one occasion. And we don't have to prove that it was
05:31:25 25 the Defendants' idea -- that it was both of their ideas in

05:31:29 1 order to prove them guilty of the conspiracy charge, just that
05:31:32 2 they each participated in the conspiracy and did so willfully.

05:31:35 3 As you saw from the evidence, Mr. Tomey and
05:31:38 4 Mr. DiLoreto have been the ones that had the idea to start this
05:31:42 5 whole thing in the first place, but Mr. Eakes certainly knew
05:31:45 6 what was going on and joined in, and there is evidence of that.

05:31:48 7 Mr. Eakes was instrumental in making this scheme work.
05:31:51 8 He was the one that helped craft the pitch language, he was the
05:31:54 9 one who trained the employees to make sure that they would use
05:31:58 10 that pitch language in order to defraud donors.

05:32:00 11 He was the one that was good at telemarketing and he
05:32:06 12 trained the telemarketers they hired to make the sales. Under
05:32:09 13 the law, even if you find that just after Mr. Tomey's and
05:32:15 14 Mr. Eakes's meeting at Ollie's after Mr. Eakes's interview with
05:32:20 15 the FBI that they discussed their fraudulent behavior and
05:32:24 16 decided to keep going, that is enough alone to convict
05:32:28 17 Mr. Eakes and Mr. Tomey of conspiracy.

05:32:29 18 You heard from Mr. Tomey that he wouldn't have kept
05:32:31 19 going with the charity if Mr. Eakes had quit. But even if you
05:32:36 20 think that Mr. Eakes's role, as Mr. Keith argued, that he
05:32:41 21 didn't know all that was going on with all of the corporate
05:32:44 22 entities and all the ins and outs of the money because he
05:32:48 23 wasn't in on the bank accounts, even if you consider his role
05:32:51 24 to be minor, the law instructs you that if you find that he
05:32:54 25 knew generally that the operation was unlawful, that the whole

05:32:58 1 point with was to defraud donors, and joined in on just one
05:33:02 2 occasion, he is guilty of conspiracy.

05:33:04 3 And as the Government has shown, both Defendants
05:33:07 4 engaged in this scheme to defraud, and that proves that they
05:33:12 5 conspired to do so beyond a reasonable doubt.

05:33:13 6 You know, Mr. Beroset was probably right when he
05:33:17 7 discussed my comment about the similarities between the
05:33:21 8 operation of the for-profit side of the Defendants'
05:33:26 9 telemarketing business and the Children and Family Services and
05:33:29 10 Children's Charitable Services.

05:33:32 11 There was one difference between the way that they
05:33:35 12 operated. When they were operating as for-profit
05:33:39 13 telemarketers, the charitable organization they contracted with
05:33:42 14 were guarantee 12.5 to 25 percent of the donations. The
05:33:46 15 charities that they were raising funds for when they started
05:33:49 16 their own, quote,unquote, "charity" didn't have such a luxury,
05:33:54 17 they didn't get that much money.

05:33:55 18 Instead, the Defendants opted to run their charitable
05:34:00 19 organization just like a for-profit business, not even like a
05:34:01 20 for-profit telemarketing business, just a for-profit business
05:34:05 21 that had employees and expenses, raised funds, wrote off
05:34:08 22 personal expenses, and just, then, like a lot of businesses do,
05:34:12 23 cut checks to other nonprofit organizations, which, of course,
05:34:16 24 each of those had their own administrative and overhead costs.

05:34:19 25 And if you are to believe the Defendants' arguments,

05:34:24 1 the case turns on the word "the." As you heard the Judge
05:34:29 2 instruct, a statement is still false or fraudulent under the
05:34:32 3 law if it is made with the intent to defraud and is a
05:34:35 4 half-truth or effectively conceals a material fact.

05:34:39 5 The Defendants knew when they added the word "the"
05:34:43 6 they could still argue it was a true statement, a technically
05:34:46 7 correct statement, because all the money was getting deposited
05:34:49 8 into a bank account of an organization that had been registered
05:34:53 9 with the Internal Revenue Service as a 501(c)(3) corporation.

05:34:55 10 But being registered as a nonprofit corporation and
05:35:00 11 operating as one are two totally different things, and the law
05:35:03 12 does not allow you to use that as a cover or to use the fact
05:35:07 13 that you're using technically correct language that leaves out
05:35:10 14 what's really important or implies something that's misleading
05:35:14 15 and false to do that either.

05:35:15 16 And somehow the Defendants -- but the Defendants did
05:35:20 17 use that cover to operate their, quote/unquote, "charitable
05:35:26 18 organization" in a way that acted just like a for-profit
05:35:29 19 business and somehow provided charities less money than they
05:35:33 20 would have if they had just been a for-profit telemarketing
05:35:37 21 business.

05:35:37 22 People who have no experience in forming a charitable
05:35:40 23 organization don't fill the board of their brand new charity
05:35:43 24 with their friends who have no experience with charitable
05:35:46 25 organizations and no experience in running of nonprofits.

05:35:50 1 The law still prohibits something that is technically
05:35:55 2 correct, as Mr. Beroset pointed out, but is only half true.
05:35:59 3 And the law still prohibits something that is technically
05:36:02 4 correct but intentionally conceals material fact in order to
05:36:07 5 defraud someone.

05:36:07 6 And you'll have to remember that things changed over
05:36:11 7 time in this scheme. And so when you're considering the
05:36:13 8 testimony, for example, of the employees, you have to consider
05:36:16 9 when they worked there over the four-year time frame of the
05:36:19 10 conspiracy.

05:36:20 11 Ms. Angel, for example, was only there for a little
05:36:23 12 bit of time at the end of 2010. Ms. Howland and Ms. Mattingly
05:36:28 13 had started in 2011 when things had already begun to change
05:36:33 14 because the Defendants had been put on notice that their
05:36:35 15 original language was fraudulent and misleading and going to be
05:36:38 16 an issue.

05:36:38 17 Ms. Young also got hired I think later in 2010. Now,
05:36:41 18 Mr. Lewis was there from the beginning, but he was not a
05:36:44 19 manager. He was not involved in the writing of the language
05:36:46 20 and those discussions, whereas Ms. Reisen was, she was there
05:36:50 21 from almost the very beginning before it even really started
05:36:52 22 when they were just tested it out.

05:36:53 23 And Mr. Peacock was there also early on, and he had
05:36:57 24 left earlier on as well following the search warrant.

05:37:00 25 What the totality of the evidence shows is that the

05:37:07 1 Defendants were master salesmen, they were masters at the
05:37:12 2 loopholes and the half-truths and the technicalities. For
05:37:16 3 example, Mr. Tomey could say that he "never got a paycheck,"
05:37:20 4 quote/unquote, from the charity, because technically the way
05:37:23 5 that he got money and compensation from the charity was just to
05:37:23 6 use it to pay personal expenses.

05:37:26 7 Mr. Eakes could train his employees to say that 100
05:37:30 8 percent goes to "the" charity because it was and had been
05:37:33 9 registered as a 501(c)(3) charitable organization, while
05:37:37 10 knowing that it was just being run like -- the same as a
05:37:41 11 for-profit telemarketing business, the same kind of business
05:37:43 12 that he had been working for basically his adult life.

05:37:46 13 And he trained employees using these half-truths. I
05:37:50 14 mean, you heard in the training recording that was made that
05:37:55 15 Mr. Eakes was basically giving his new employees the pitch. He
05:37:59 16 was saying that the charity, quote/unquote, "works" with abuse
05:38:06 17 shelters, when we know that all he did was cut a check every
05:38:10 18 once in a while.

05:38:12 19 He would say to the employees of the charity, quote,
05:38:13 20 "help grant last wishes," again, only because they would give
05:38:16 21 donations to other wish fulfilment organizations. He was
05:38:18 22 saying the charity, quote, "sponsors" disabled children at
05:38:23 23 state games. I mean, you heard Ms. Presley when she described
05:38:26 24 the charity as well, she's used to this pitch and she knows how
05:38:28 25 to describe the charity and what they do.

05:38:30 1 But when they use those sorts of words, again, while
05:38:33 2 technically correct, it's only half true, because it's
05:38:38 3 misleading and it made the donors think, first of all, that
05:38:41 4 that charity was doing all of those things, those actual
05:38:46 5 charitable purposes; and second, when they then said that 100
05:38:50 6 percent goes to the charity, that 100 percent was going to
05:38:52 7 those purposes and going to help those children.

05:38:55 8 The Defendants argue that they were acting in good
05:39:01 9 faith and because they honestly believed that they were doing
05:39:04 10 the right thing in trying to earn money for charity.

05:39:07 11 Mr. Tomey testified that he believed he was doing the
05:39:10 12 right thing because he wanted to change the game, basically,
05:39:17 13 that he had -- he had been working in the for-profit
05:39:20 14 telemarketing business, and he thought Mr. DiLoreto had this
05:39:24 15 great idea about making his own nonprofit organization so that
05:39:28 16 they could cut out the middleman.

05:39:30 17 But you can and should consider, as the Judge
05:39:33 18 instructed, both of the Defendants' testimony just like you
05:39:46 19 consider any other witness's testimony. You can consider, for
05:39:46 20 example, the inconsistencies in Mr. Tomey's testimony and the
05:39:46 21 other evidence and witnesses that was presented during the
05:39:48 22 course of the trial.

05:39:48 23 For example, Mr. Tomey stated that he never would have
05:39:51 24 solicited in a state without registering, but as you heard time
05:39:56 25 and time again, that that was not true. And he was made aware

05:39:59 1 of that requirement pretty early on and yet still didn't comply
05:40:03 2 as he was going in different states.

05:40:05 3 Mr. Tomey testified that Mr. Diamond was going to be
05:40:08 4 on the Children and Family Services board and that he wrote the
05:40:11 5 very first solicitation material and that's what he used to
05:40:14 6 work in the other states. But, as you heard Mr. Diamond
05:40:17 7 testify, that was only after Mr. Tomey had been going for a
05:40:20 8 while and he used the information that Mr. Tomey had provided
05:40:24 9 him and just basically added clip art and made it pretty and
05:40:28 10 kind of organized it and added a few things here and there.

05:40:31 11 If you look at all of the mailers that have been
05:40:34 12 admitted into evidence, you'll see the language is virtually
05:40:36 13 the same, just little changes happen over time to adjust
05:40:40 14 things. But in terms of the format and the base structure of
05:40:44 15 the mailers, they all looked the same from the very, very
05:40:45 16 beginning, starting when they were just soliciting in Indiana.

05:40:48 17 Mr. Tomey testified that he was never president of
05:40:51 18 Youth Achievement League, and yet he signed the registration
05:40:53 19 form saying that he was the president of Youth Achievement
05:40:55 20 League.

05:40:55 21 And you can consider all of these things in deciding
05:40:58 22 whether Mr. Tomey's testimony to you was credible.

05:41:00 23 Now, Mr. Eakes testified that he also honestly
05:41:06 24 believed in good faith that it was correct to tell donors that
05:41:10 25 100 percent went to the charitable and that the callers were

05:41:15 1 volunteer employees and that everything they were doing was
05:41:17 2 aboveboard.

05:41:17 3 But you heard Mr. Eakes's educational background. He
05:41:21 4 was a smart, bright young man who was partially college
05:41:25 5 educated, and you can determine based on his testimony whether
05:41:28 6 you believe he's the kind of person that would make a mistake
05:41:33 7 or an honest mistake regarding that and whether he knew what
05:41:36 8 the words he was saying meant and what the words that he was
05:41:38 9 telling his employees that they implied.

05:41:38 10 And he testified that, even after seeing all of the
05:41:44 11 evidence that you all have seen, that he still believes in
05:41:47 12 Mr. Tomey and still believes Mr. Tomey told him the truth. And
05:41:50 13 I would submit to you that that's not the testimony of a person
05:41:53 14 who had an honest belief about the misrepresentations that were
05:41:56 15 being made.

05:41:58 16 And remember both Defendants were professional
05:42:00 17 salesmen, and they've spent years crafting their skills at
05:42:04 18 convincing people to give them money, and they were good at
05:42:07 19 getting people to give them money.

05:42:08 20 The Defendants are also trying to assert that, with
05:42:11 21 respect to Children and Family Services or Children's
05:42:14 22 Charitable Services, that Mr. Tomey in particular relied on the
05:42:17 23 services of a paid attorney who was willing to advocate on
05:42:21 24 their behalf with respect to the state registration issues.

05:42:24 25 But, as the testimony and the evidence showed,

05:42:29 1 Mr. Thomas from Copilevitz & Canter only came on board part way
05:42:35 2 through the conspiracy, and he didn't have all of the evidence
05:42:37 3 that you now have.

05:42:38 4 For example, if you remember, Mr. Thomas said in one
05:42:41 5 of his letters that the employees were paid based on how long
05:42:44 6 they had worked for the organization. As you know, that's not
05:42:47 7 true, and even the Defendants say that's not true. What is
05:42:50 8 true is that the employees got paid based on a commission pay
05:42:55 9 scale in the amount of collections that they brought in.

05:42:59 10 Mr. Tomey even testified that Mr. Thomas had only
05:43:03 11 talked to him about registration issues and said, oh, the other
05:43:07 12 issues you don't have to worry about it. And you have to
05:43:10 13 decide whether, A) Mr. Thomas, if he said that, had all the
05:43:15 14 facts that you all had; and B) whether that's something
05:43:19 15 reasonable for Mr. Tomey to rely on to continue on in his
05:43:24 16 scheme to defraud.

05:43:25 17 Mr. Tomey said Mr. Thomas doesn't do anything else
05:43:27 18 with this, just these charitable registrations. He doesn't do
05:43:32 19 civil law, he's not a criminal defense attorney. There was no
05:43:35 20 evidence that Mr. Thomas advised Mr. Tomey that the specific
05:43:37 21 language he was using in his pitches was okay and not
05:43:40 22 fraudulent and not criminal.

05:43:42 23 And in fact, Mr. Tomey testified that Mr. Thomas had
05:43:45 24 advised him to sign the Arkansas consent judgment, which, as
05:43:49 25 you'll see, clearly states that Mr. Tomey is admitting to

05:43:53 1 fraudulent behavior.

05:43:54 2 If you'll also recall the testimony of Mr. Justin
05:44:00 3 Hazlett, Deputy Attorney General in the Indiana Attorney
05:44:04 4 General's Office, he testified that Mr. Thomas never gave him
05:44:06 5 any material that complied with the specific question in the
05:44:11 6 Civil Investigative Demand about all actions that had been
05:44:14 7 taken by all government agencies.

05:44:17 8 Now, was that because Mr. Thomas didn't have that
05:44:21 9 material? Mr. Tomey testified that he thinks that he might
05:44:24 10 have given Mr. Thomas everything, but he's not really sure.
05:44:27 11 And in order for you to find that Mr. Tomey did not have the
05:44:33 12 intent to defraud based on reliance on advice of counsel, you
05:44:38 13 have to find that the reliance is reasonable. That is one of
05:44:41 14 the elements that you have to find is that, A) that the
05:44:43 15 attorney had all the facts; and then also that the Defendant
05:44:47 16 actually relied on the advice the attorney gave; and then
05:44:52 17 third, that that reliance was reasonable. And you have to
05:44:55 18 determine whether it was reasonable for Mr. Tomey to have
05:44:58 19 relied on an attorney's advice if, if it was true that he had
05:45:03 20 all the facts, he refused to comply with these state agencies
05:45:07 21 as they were asking for information, or if, by filing those
05:45:10 22 registration forms that said that Mr. Tomey and his
05:45:12 23 organizations had never had any governmental cease and desist
09:27:55 24 orders, Assurance of Voluntary Compliance, any sort of actions
05:45:20 25 taken against them, whether that itself was fraudulent behavior

05:45:21 1 or Mr. Thomas was part of the conspiracy.

05:45:23 2 Plus you heard from Mr. Wells from the Arkansas
05:45:26 3 Attorney General's Office about Mr. Thomas and his firm's
05:45:30 4 reputation in the community, that they were known for
05:45:32 5 representing charities that had these registration problems.

05:45:35 6 Finally I want to talk about the burden the Government
05:45:39 7 has.

05:45:40 8 You heard the Judge tell you at the very beginning of
05:45:43 9 this trial what the definition of reasonable doubt is, and that
05:45:47 10 the Government's burden is heavy in this case. And we have the
05:45:50 11 entire burden to prove to you beyond a reasonable doubt that
05:45:53 12 the Defendants are guilty of the crimes charged. But, as the
05:45:57 13 Judge said, it is not beyond all doubt, it is not beyond a
05:46:01 14 shadow of a doubt. It is beyond a reasonable doubt.

05:46:04 15 It is not a determination that you are to make based
05:46:06 16 on emotion or sympathy or how you feel about the Defendants'
05:46:10 17 family. It's a determination that you are instructed to make
05:46:13 18 based on your reason and common sense. It's a determination
05:46:16 19 that you're instructed to make based on a thoughtful and
05:46:20 20 careful and thorough and impartial consideration of all of the
05:46:23 21 evidence that you have been presented, all the evidence you've
05:46:27 22 seen and heard throughout the trial.

05:46:29 23 This is a conspiracy that's spanned four years and
05:46:33 24 seven states and potentially hundreds of thousands of donors
05:46:36 25 and dozens and dozens of employees. You're not sitting here

05:46:40 1 today because the Defendants just didn't give enough to
05:46:44 2 charity. You're not sitting here today because the Defendants
05:46:46 3 used a misleading name for their charity to make it sound like
05:46:50 4 a state agency. You're not sitting here today just because the
05:46:53 5 Defendants used drop boxes in other states and made it look
05:46:57 6 like their office space. You're not here today because the
05:46:59 7 Defendants had some problems registering their organization in
05:47:04 8 various states.

05:47:04 9 You're here because the totality of the evidence shows
05:47:08 10 that they engaged in a scheme to defraud and conspired to do so
05:47:12 11 and did so intentionally and willfully to defraud donors.

05:47:15 12 You have to look at all of the evidence together, all
05:47:19 13 of the pieces together, all of their half-truths and all of
05:47:23 14 their misleading statements all in their totality, in their
05:47:29 15 scripts and on their solicitation materials and what they
05:47:32 16 instructed their employees to say, and you have to decide based
05:47:36 17 on your common sense and reason if that is something that the
05:47:39 18 Defendants knew at the time that they were making those
05:47:42 19 statements were not true, and did so to obtain money from
05:47:44 20 donors.

05:47:44 21 This is not a case about any one thing, any one
05:47:49 22 misrepresentation or about any one half-truth. It's about
05:47:52 23 everything that the Defendants did, everything -- all the
05:47:55 24 language that the Defendants created in their scripts. And you
05:48:00 25 have to decide whether, based on your common sense and reason,

05:48:03 1 that when the Defendants told their employees that 100 percent
05:48:06 2 went to the charity the Defendants did so knowing that it was
05:48:09 3 false and misleading.

05:48:11 4 You have to decide, based on your reason and common
05:48:13 5 sense, whether the Defendants, when they told their employees
05:48:15 6 to tell donors that they were volunteers or volunteer employees
05:48:18 7 that the Defendants did it knowing that that would cause donors
05:48:22 8 to be more likely to give them money and knowing that it was
05:48:25 9 not true.

05:48:25 10 And you have to decide, based on your reason and
05:48:28 11 common sense, whether using a name like -- insert state name
05:48:32 12 here -- Children and Family Services or changing their UPS
05:48:36 13 mailbox to be a suite to look like an office, that the
05:48:41 14 Defendants knew when they were doing that it would, again,
05:48:43 15 cause donors to be more likely to give.

05:48:45 16 And the Government is asking you not to let the
05:48:49 17 Defendants get away with that and to find the Defendants guilty
05:48:52 18 beyond a reasonable doubt of all charges.

05:48:54 19 **THE COURT:** Thank you.

05:48:57 20 Ladies and gentlemen, I have a couple of final
05:49:00 21 instructions on the law for you, but as I instructed you
05:49:04 22 earlier, you should consider all of my instructions on the law
05:49:07 23 as a whole.

05:49:10 24 Any verdict that you reach in the jury room, ladies
05:49:13 25 and gentlemen, whether guilty or not guilty, must be unanimous.

06:04:08 1 And we're in recess. I have to gather some things
06:04:11 2 from the bench, but you're free to go about your business.

08:13:02 3 *(Recess taken 6:04 p.m. to 8:21 p.m.)*

08:21:23 4 **THE COURT:** We have a question from the jury. I'll
08:21:28 5 read it to you verbatim.

08:21:31 6 "Can one Defendant be found guilty on Count One and
08:21:37 7 one Defendant found not guilty on Count One?"

08:21:42 8 That's the question. I'll hear from you all before I
08:21:46 9 give you my thoughts on it.

08:21:49 10 Ms. Kim?

08:21:50 11 **MS. KIM:** I think the answer is just yes.

08:21:53 12 **THE COURT:** Okay. Mr. Berozet?

08:21:57 13 **MR. BEROSET:** I don't think there is any evidence of a
08:22:02 14 conspiracy with anyone else. I think that that cannot happen
08:22:06 15 in this case with the evidence presented.

08:22:07 16 **THE COURT:** Mr. Keith?

08:22:09 17 **MR. KEITH:** I would agree with Mr. Berozet.

08:22:12 18 **THE COURT:** Well, first, the indictment charges that
08:22:14 19 both Defendants agreed together and with other persons.

08:22:24 20 Ms. Kim, how do you get around that, the requirement
08:22:28 21 that before a conspiracy can be found they must have agreed
08:22:34 22 together? They might have also agreed with other persons, but
08:22:39 23 you charged them with agreeing together first and foremost.

08:22:42 24 **MS. KIM:** Well, they're charged in the conjunctive but
08:22:46 25 it can be proved in the disjunctive.

09:35:07 1 be found guilty and one not guilty on Count One. However, in
09:35:12 2 order to find either of the Defendants guilty on Count One, you
09:35:16 3 must find beyond a reasonable doubt that the Defendant under
09:35:21 4 consideration conspired with at least one other person to
09:35:24 5 commit the offense charged in Count One.

09:35:27 6 In order to do so, you must also find that the
09:35:31 7 Government proved beyond a reasonable doubt that the other
09:35:34 8 person or persons committed the crime of conspiracy charged in
09:35:38 9 Count One according to all of the elements of conspiracy as
09:35:42 10 contained in your instructions. In other words, that the
09:35:45 11 person or persons agreed with the Defendant to try to
09:35:49 12 accomplish a common and unlawful plan to commit mail or wire
09:35:54 13 fraud as charged in Count One, and that the person or persons
09:35:59 14 knew of the unlawful plan, and willfully joined in it.

09:36:02 15 In making that determination, you should consider the
09:36:06 16 conspiracy instruction together with all of the other
09:36:08 17 instructions that I've given to you.

09:36:11 18 To the extent that you find one Defendant guilty and
09:36:15 19 the other not guilty, you must identify on the verdict form
09:36:18 20 next to Count One for that Defendant the person or persons with
09:36:23 21 whom you have found the Defendant conspired to commit the
09:36:26 22 offense charged in Count One.

09:36:28 23 Additionally, regarding the instructions I gave to you
09:36:32 24 yesterday, on page 16, which contains a summary of the charges
09:36:38 25 in the case and is taken from the indictment, that page

07:26:25 1 **THE COURT:** Yes.

07:26:26 2 **MADAM CLERK SIMMS:** "Anthony D. DiLoreto, Kennan Todd
07:26:32 3 Bond, and Terry Mercer. Guilty. The object of the conspiracy
07:26:36 4 charged in Count One was wire fraud and mail fraud.

07:26:40 5 "Defendant Gary Tomey committed the offense charged in
07:26:44 6 Count One in connection with the conduct of telemarketing and
07:26:51 7 victimized ten or more persons over the age of 55.

07:26:55 8 "Count Two: Guilty. Defendant Tomey committed the
07:27:00 9 offense charged in Count Two in connection with the conduct of
07:27:04 10 telemarketing and victimized ten or more persons over the age
07:27:09 11 of 55.

07:27:10 12 "Count Three: Guilty. Defendant Tomey committed the
07:27:16 13 offense charged in Count Three in connection with the conduct
07:27:19 14 of telemarketing and victimized ten or more persons over the
07:27:23 15 age of 55.

07:27:24 16 "Count Four: Guilty. Defendant Tomey committed the
07:27:29 17 offense charged in Count Four in connection with the conduct of
07:27:32 18 telemarketing and victimized ten or more persons over the age
07:27:36 19 of 55.

07:27:37 20 "Count Five: Guilty. Defendant Tomey committed the
07:27:46 21 offenses charged in Count Five in connection with the conduct
07:27:48 22 of telemarketing and victimized ten or more persons over the
07:27:51 23 age of 55.

07:27:52 24 "Count Six: Guilty. Defendant Tomey committed the
07:27:57 25 offense charged in Count Six in connection with the conduct of

07:28:02 1 telemarketing and victimized ten or more persons over the age
07:28:05 2 of 55.

07:28:06 3 "Count Seven: Guilty. Defendant Tomey committed the
07:28:12 4 offense charged in Count Seven in connection with the conduct
07:28:15 5 of telemarketing and victimized ten or more persons over the
07:28:20 6 age of 55.

07:28:20 7 "Count Eight: Guilty. Defendant Tomey committed the
07:28:26 8 offense charged in Count Eight in connection with the conduct
07:28:29 9 of telemarketing and victimized ten or more persons over the
07:28:33 10 age of 55."

07:28:35 11 **THE COURT:** Mr. Tomey, you may be seated.

07:28:37 12 Mr. Eakes, if you would, please rise.

07:28:42 13 **MADAM CLERK SIMMS:** "We, the Jury in the
07:28:44 14 above-entitled and numbered case, unanimously find beyond a
07:28:47 15 reasonable doubt that Defendant, Eric T. Eakes is:

07:28:51 16 "Count One: Not guilty.

07:28:54 17 "Count Two: Not guilty.

07:28:57 18 "Count Three: Not guilty.

07:29:00 19 "Count Four: Not guilty.

07:29:03 20 "Count Five: Not guilty.

07:29:09 21 "Count Six: Not guilty.

07:29:12 22 "Count Seven: Not guilty.

07:29:14 23 "Count Eight: Not guilty.

07:29:16 24 "So say we all this 26th day of May 2016," signed by
07:29:24 25 the jury foreperson.

1 You admitted to fraud in Arkansas.

2 But, again, as recently as, you know, your letter to
3 me last month, you still don't acknowledge the criminality of
4 your actions. And a family member shared with me that -- that
5 you had confided in them that you still didn't feel like what
6 you were doing -- or what you had done was illegal.

7 And, again, it appears to the Court that you simply
8 view this as neglecting to properly word presentations. If this
9 was just a matter of an innocent misunderstanding about a
10 telemarketing script that you quickly remedied after you had
11 been notified by authorities of the problems, we wouldn't be
12 here today. I don't have any doubt about that. But that's not
13 what happened. When you were put on notice, you simply changed
14 the name of the business and moved to another state and then
15 continued.

16 So it's troubling to me that your denials persist even
17 today. And for that reason, I feel that the sentence must
18 stress not only the impact of the crime on the victims in this
19 case, but also it must ensure, to the extent possible, that you
20 don't commit or continue this behavior when you're released.

21 It's always troubling to the Court when someone stands
22 before the Court having been -- and sometimes it happens even
23 when people plead guilty, by either having pled guilty or been
24 found guilty by the jury, and still fail to show any insight
25 into the wrongfulness of their actions. And you don't have to.

1 I mean, certainly that -- you're not required to come to the
2 Court and admit that what you did was wrong. But the fact that
3 you don't seem to have any insight into that is concerning to me
4 for the future.

5 So my sentence also must -- obviously must protect the
6 public, and for the same reasons that I've stated -- given, for
7 general and specific deterrence, I do find there's a need to
8 protect the public in the future.

9 I also am required to avoid unwarranted sentencing
10 disparities between Mr. Tomey's sentence and the sentences that
11 have been handed down by this Court in other similar-type cases.

12 And for all of these reasons, I am going to impose a
13 guideline sentence. I cannot find any reason to vary from the
14 guidelines. And, in fact, there are numerous reasons not to
15 vary.

16 The Government argued in its most recent briefing to
17 the Court for an upward variance or even a departure, and I'm
18 not going to do that. I don't believe that would be appropriate
19 for a couple of reasons. One is the defense didn't have,
20 really, notice of that argument that would support the upward
21 variance or departure. But I think a guideline sentence is
22 sufficient here.

23 And I'm going to impose a sentence at the low end of
24 the guideline range for, you know, a few reasons. One is the
25 military service that you have, Mr. Tomey. I always take that