IN THE
SUPREME COURT OF THE UNITED STATES

MATTHEW WHEELER,

LOWER CASE NO. 17-15003-HH

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CHARLES G. WHITE, ESQ.

CHARLES G. WHITE, P.A.
Counsel for Petitioner
1031 Ives Dairy Road
Suite 228
Miami, FL 33179
Tel: (305) 914-0160
Fax: (305) 914-0166
Florida Bar No. 334170

QUESTIONS PRESENTED

1. **Whether the Government Must Prove an Intent to Harm as an Element in Establishing a Defendant's Participation in a "Scheme to Defraud" in Any Prosecution for Conspiracy to Commit and the Substantive Offense of Mail or Wire Fraud**

    A. **Scheme to Defraud vs. Scheme to Merely Deceive**

    B. **Scope of the Conspiracy**

    C. **Prosecutorial Misconduct – Telling the Jury to Ignore the Theory of Defense**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

INTRODUCTION

Petitioner, **MATTHEW WHEELER**, through counsel, hereby petitions for a Writ of Certiorari from the United States Court of Appeals for the Eleventh Circuit which affirmed the Judgment of the United States District Court for the Southern District of Florida convicting and sentencing him for violations of Federal criminal law.

OPINION BELOW

The United States Court of Appeals for the Eleventh Circuit issued a published Opinion reversing the District Court's entry of a Judgment of Acquittal and denying him a new trial. *United States v. Wheeler*, 16 F.4th 805 (11th Cir. 2021). A copy of that Opinion is included in the Appendix. A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on February 10, 2022. A copy of that Opinion is included in the Appendix.

STATEMENT OF JURISDICTION

MATTHEW WHEELER invokes the jurisdiction of this Court to hear final judgments or decrees issued by United States Courts of Appeals pursuant to Title 28, United States Code, Section 1254 (1).

CONSTITUTIONAL PROVISIONS

AMEND. VI, - RIGHT TO JURY TRIAL – BURDEN OF PROOF

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .

AMEND. V, - DUE PROCESS OF LAW

. . . nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .

STATUTORY PROVISIONS

Title 18, U.S.C. Section 1341 – Mail Fraud

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises or to sell . . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private of commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place

at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years.

Title 18, U.S.C. Section 1349 – Conspiracy to Commit Mail and Wire Fraud

Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

Petitioner was found guilty of Conspiracy to Commit Mail and Wire Fraud, in violation of 18 U.S.C. Section 1349 (Counts 1, 11), and Mail Fraud, in violation of 18 U.S.C., Section 1341 (Count 13) by a jury after a nine-week trial. He was tried with four co-defendants, including James Long, who were also convicted. Motions for Judgment of Acquittal pursuant to Fed.R.Crim.P. 29(c) were granted as to Petitioner and Long. The Government appealed the acquittals to the Eleventh Circuit Court of Appeals. Petitioner and Long filed cross-appeals alleging trial error. The appeals were consolidated.

The conspiracy charged in Count 1 related to the sale of publicly-traded stock (O.T.C.) in Sanomedics International Holdings ("Sanomedics"). The conspiracy charged in Count 11 related to the pre-Initial Public Offering–"IPO")

sale of stock in Fun Cool Free, Inc. ("FCF"). The mail fraud charged in Count 13 related to the sale of FCF stock to Bruce Molina. According to the Indictment, Petitioner's role was as a salesman ("fronter") who would have the initial contact with investors and make the initial sale. All subsequent larger sales would be made by the "loader".

The Government's burden could be divided into two steps. First, there had to be sufficient proof that Petitioner had entered into an agreement with his co-conspirators to achieve an unlawful objective and knowingly participate in that agreement. *Direct Sales Co. v. United* States, 310 U.S. 703, 713 (1943); *United States v. Falcone*, 311 U.S. 205 (1940); *United States v. Adkinson*, 158 F.3d 1147, 1155 (11th Cir. 1998). The defendant must have the intent to commit the offenses that were its objectives. *Direct Sales,* 319 U.S. at 713. "[K]nowledge of the existence and goals of a conspiracy does not of itself make one a coconspirator." *United State v. Cianchetti*, 315 F.2d 584, 588 (2nd Cir. 1963); *see e.g., Direct Sales,* 310 U.S. at 711.

Second, the Government had to prove that the defendant intended to defraud the victims in this case. A scheme to defraud requires proof of material misrepresentations, or the omission or concealment of material facts. *Neder v.*

United States, 527 U.S. 1, 25 (1999). "A scheme to defraud requires proof of a material representation, or omission or concealment of a material fact calculated to deceive another out of money or property." *United States v. Maxwell*, 579 F.3d 1282, 1299 (11th Cir. 2009).

A material misrepresentation is one having a natural tendency to influence, or capable of influencing, the decision-maker to whom it is addressed. *Neder*, 527 U.S. at 16. Not all misrepresentations are material. Puffery, for example, is not part of a scheme to defraud because a person of ordinary prudence would not rely on it; nor would a person of ordinary prudence engaged in an arm's length purchase rely on the seller's representations regarding the market value of the property when the market value can be, and should be, easily verified by consulting other sources. *United States v. Brown*, 79 F.3d 1550, 1557 (11th Cir.1996).

The Eleventh Circuit clarified the definition of "scheme to defraud" in *United States v. Takhalov*, 827 F.3d 1307 (11th Cir. 2016). The Court stated, "a schemer who tricks someone to enter into a transaction has not 'schemed to defraud' so long as he does not intend to harm the person he intends to trick." *Id.*, at 1313. A "scheme to defraud", as opposed to a "scheme to deceive" is treated

differently by the law. A scheme to deceive where there is no intent to cause harm on the alleged victim does not become a scheme to defraud when the victim is harmed unless the schemer knew the victim would be harmed. *Id*.

The Court in *Takhalov* explained the difference. A scheme to defraud "refers only to those schemes in which a defendant lies about the nature of the bargain itself." *Takholov*, 827 F.3d at 1313. The Court reasoned that a scheme to deceive wherein "a defendant lies about something else–i.e., if he says that he is the long-lost cousin of a prospective buyer–then he has not lied about the nature of the bargain, has not 'schemed to defraud' . . ." *Id*., at 1314.

The Court in *Takholov* relied heavily on Second Circuit precedent interpreting the wire fraud statute. The Court noted that the Second Circuit cases had "drawn a fine line between schemes that do no more than cause their victims to enter transactions that they would otherwise avoid–which do not violate the mail or wire fraud statutes–and schemes that depend upon their completion on a misrepresentation of an essential element of the bargain–which do violate the mail and wire fraud statutes." *Takholov*, 827 F.3d at 1314, quoting *United States v. Shellef*, 507 F.3d 82, 108 (2nd Cir. 2007); *see also*, *United States v. Starr*, 816

F.2d 94, 98 (2nd Cir. 1987) ("misrepresentations amounting only to a deceit are insufficient to maintain a mail or wire fraud prosecution" when not coupled with a contemplated harm to the victim [that] affect[s] the very nature of the bargain itself.) *See also*, *United States v. Regent Ocean Supply Co.*, 421 F.2d 1174, 1182 (2nd Cir. 1970)

The Government's believed that all it needed to prove was that defendants made misrepresentations reasonably calculated to induce investors to buy Sanomedics and FCF stock. In the Government's view, that the defendants were trained to use the same false representations inferred a conspiracy to accomplish the objective of selling the stock.

The defense was twofold. First, the Government had failed to prove Petitioner had joined the overall conspiracy to defraud investors by selling them worthless stock because he did not know that the stock was worthless. As the Eleventh Circuit admitted, Petitioner lacked knowledge that the leaders of the conspiracy; Sizer, Houlihan and Mesa, were using Petitioner to sell worthless stock. Petitioner unwittingly sold the stock using misrepresentations he was trained to use, and thought were true. Although he made money selling this stock, if the net funds had been invested in the company, then the investor would have

received his money's worth. Instead, the "higher ups" were stealing all the money received and only using a fraction of it to keep the façade of an operating entity alive. Petitioner only received the sales commissions he was promised. The Government conflated his 10% commission with the theft of 80% of the net proceeds by Sizer, Houlihan and Mesa to argue that Petitioner's compensation had a material effect on the value of the companies. The Government failed to prove that Petitioner intended to join the conspiracy to steal any of the investors' money.

Second, the Government had failed to prove Petitioner had agreed to participate and participated in a scheme to defraud. Petitioner argued that whatever false statements he made were intended to convince them to buy stock he believed had value. He never intended to harm the investors. This argument was based on the *Takhalov* holding. He contended that at best, the Government had proven a "scheme to deceive", but not a "scheme to defraud."

After over eight hours of in-court time, and over the strenuous objections by the Government, the District Court agreed to give a so-called "Theory of Defense" instruction. This instruction was intended to advise the jury on how to evaluate Petitioner's lawful defense under *Takhalov*. The final version read to the jury was

as follows.

> It is Defendants' Theory of Defense that they did not knowingly and intentionally participate in a fraud, and that the fraud actually occurred when, unbeknownst to the Defendants, the owners and officers of the corporations, Craig Sizer and Keith Houlihan, together with Miguel Mesa, stole millions of dollars in investor funds. Although they may have been aggressive salesmen, they did not intend to defraud the investors, and that they were unwitting pawns in the scheme orchestrated by the owners and Mesa to steal investors' funds.
>
> Defendants contend that there is a difference between deceiving and defrauding. To defraud the defendants must have intended to use deception to cause financial harm to investors.
>
> In other words, if a defendant selling stock reasonably believes that it had value, and the price charged reflects that value, his or her use of deceit would not constitute a scheme to defraud. Deceiving does not always involve harming another person; defrauding does.
>
> Fraud requires proof of a material misrepresentation, or the omission or concealment of a material fact. Mere "puffing" or "seller's talk" is insufficient.

Petitioner argued in summation that the Government had failed to prove that he was aware that both the Sanomedics and FCF stock he was selling was worthless. Both Sanomedics and FCF were operating businesses that sold products in the open market. Petitioner relied on the press releases

provided by Mesa that he assumed were factual to pitch the potential of their business plans, and their future earnings prospects. In the case of Sanomedics, Petitioner could refer investors to its public listing on the O.T.C..

During their rebuttal closing argument, the prosecutors stated:

Mr. Cruz: I'd like to now go over some of the jury instructions. Yours doesn't have a title, but its aiding and abetting. It's on page 15 if you'd like to mark it.

Before we get into that, let's again make sure that we're all clear. She instructed you that you are to follow her instructions on page 1. We already went over the fact that you are the judges of the law (sic).

I want you, please, before we go to this instruction, turn to page 23. This page is very special. It's special because it's not the law. It is not the law. Of the 32 pages in your hands, 23 is no more–

Mr. Solomon: Objection, Judge.

The Court: Overruled.

Mr. Cruz: It's a theory of defense. Okay? 23 is, as you can see at the top–we'll go through it real quick–it is the defendants' theory of defense. That's their theory. That's the one where it says they were unwitting.

The next paragraph says the defendants contend. They already told you what they contend. They already had a shot. They all went. Some talked for an hour. Some

talked for an hour and 40 minutes. They told you what they contend.

The rest of this page, again, is what they believe. The only thing that the Government agrees with is what I already told you about, the last paragraph; that there is a difference between puffery, seller's talk, and what fraud does requires proof of material misrepresentations or omissions or concealments of material facts. That's the essence of this case: intentional misrepresentation.

So again, page 23, is in the packet. The Judge obviously thought it was important for you to have it. But ladies and gentlemen, this is not the law. This is a theory of defense.

Mr. White: Objection, Judge.

The Court: Sustained.

Mr. White: Motion, Your Honor.

Mr. Cruz: Page 23–

Mr. Sakin: Judge, we need a contemporaneous objection and a contemporaneous motion, please.

The Court: Noted, please. Mr. Cruz, move on.

Immediately after the prosecutor finished his closing argument, the Court rebuked him.

The Court: You know, Mr. Cruz, we worked very hard to craft instructions in this case that maybe not everyone agreed with but one I thought would pass legal muster and for

> you to take the defendants' theory of the case instruction and basically tell the jury it's a joke, that was wrong. Wrong. . . . , but you basically trashed the instruction they asked for. And I think [we] went through a lot of effort to craft one that was appropriate under the instruction. The defense didn't like it, you didn't like it. It's not up to [you] whether people like it, it's as to whether I think it's a correct statement of the law, and I thought it was.

Petitioner and his co-defendants all made *ore tenus* Motions for Mistrial. The District Court reserved ruling until after the verdict.

The following day, June 22, 2017, the jury found Petitioner guilty of Counts 1, 11, and 13.

Petitioner filed post-trial motions addressing both the Motion for Mistrial and the Motions for Judgment of Acquittal renewed after the jury's verdict pursuant to Fed.R.Crim.P. 29(c).

On October 2, 2017, the District Court ruled on the outstanding post-trial motions. The Court denied the Motion for New Trial Based on Prosecutorial Misconduct at Closing Argument stating:

The Court: Here is my conundrum: Although the defense has a right to have a theory of defense instruction given, I cannot find support that this is considered the law. Does the Government have the right to discuss and cast the validity and doubt on a defendant's theory through the evidence presented at trial? Of course. I believe the Government had

> chosen an improper path, but because I cannot find that the instruction in and of itself is not the law, I must deny the Motion.
>
> As counsel for Mr. Wheeler, ably pointed out in his Motion, the goal of the prosecutor is not to win the case, but to ensure that justice is done. Improper insinuations and suggestions shouldn't be used.
>
> Since I cannot support that a defense theory of the case, even though required, is an instruction on the law, I am denying the Motion for New Trial on those grounds—.

As to Petitioner's Rule 29(c) Motion, the District Court decided to grant it.

The Court made the following salient points.

> The trial evidence established that Sizer and Mesa were the hubs of this fraud. They created the scheme to defraud the investors and never intended to use the investor funds despite the press releases to grow either Sanomedics or Fun Cool Free.
>
> Despite the Government's effort to shift the Court from reading *Takhalov* has fair numbers, it does. Although the case does not change the law on intent to defraud, the case clarifies that Courts must be mindful that all deceits are not fraudulent. Even prior to *Takhalov*, the Eleventh Circuit made clear that a salesperson's intent to defraud in *United States v. Parker*, 839 F.2d 1473, 1478, that the intent to defraud element is critical, and unless the Government independently proves the salesmen's intent to defraud, the conviction cannot stand.
>
> There is insufficient evidence that Defendants Wheeler and Long knew about the scheme to defraud or agreed to participate in the scheme's objective. Yes, they were paid commission, but there is no evidence of any other financial gain other than their own salaries or the commission . . .

As the Eleventh Circuit stated in *Takhalov*, there's a difference between deceiving and defrauding. To defraud, one must intend to use deception to cause injury, but one can deceive without intending to cause harm. There is insufficient evidence to indicate that this Defendant, Matt and Long, knew of Mesa and Sizer's over-arching financial scheme. Therefore, the Defendant Wheeler's Motion for Judgment of Acquittal is granted–excuse me–Defendant Long's Motion for Judgment of Acquittal is granted.

Defendant Wheeler is no different. In his Reply, Defendant Wheeler shows that Wheeler did not intend–that there is insufficient evidence to show that Wheeler is not (sic] intending to defraud. He specifically takes the Court through the Bradshaw transactions where there were no statements as to being a W-2 employee. In the Molina transaction, the buyer even said he was not relying on any statements of the salesman in order to make his decision whether or not to invest and research Fun Cool Free independently. Lynch admitted that she did not share her suspicions with Wheeler, and the issue of the stock restrictions were not even apparent until after Wheeler left. When Wheeler worked at Sanomedics, it was an OTC stock. The price was listed. Remember, there was even an actual news story on the Sanomedics product.

It appeared to the unwatchful eye that the company was trying to raise funds for investors. Maybe Sizer thought that at the beginning, but it soon became clear that to him, this was going to be a scheme and he was the masterminder of it . . .

The Government has presented insufficient evidence as to the intent to defraud for Defendants Wheeler and Long. Their Motions for Judgment of Acquittal are granted.

The Government appealed the District Court's entry of a Judgment of Acquittal. Petitioner cross-appealed the denial of the Motion for Mistrial based on prosecutorial misconduct during closing argument.

The Eleventh Circuit rejected both Petitioner's arguments. The Judgment of Acquittal was vacated, and the conviction based on the jury's verdict was affirmed.

STATEMENT OF PERTINENT FACT

Craig Sizer, Keith Houlihan, and Miguel Mesa created Sanomedics in 2009 as a vehicle to manufacture and market a non-contact infrared thermometer. Sanomedics was listed on the Over-The-Counter ("OTC") market. Sanomedics would later develop a similar non-contact infrared thermometer for pets. Sizer was the founder and CEO. Houlihan was the President and COO. Mesa oversaw the "phone room" where salespeople raised money from investors to build the business for an anticipated IPO. Petitioner was one of those salespeople.

Sanomedics appeared on the surface to be a legitimate business. Its corporate offices were in a premium office building. The thermometers could be

purchased on Amazon. Houlihan testified that initially he arranged for the manufacture of the thermometers and market them to make a profit. Throughout the 2009 – 2014 period, business operations continued although the amount of money earned was far lower than the salespeople were trained to tell the investors.

Sizer and Mesa had other plans. They devised a scheme to sell company shares to the public and keep the money. The investors would be told that the money was being invested in the company's growth in the hopes that there would be an IPO. In fact, the salespeople were selling Sizer's shares that he had issued to himself. He, Houlihan and Mesa split the proceeds. Records indicated that their haul was approximately $20 million.

Mesa set up the phone room far away from the swanky corporate offices. He acquired lead lists from other telephone sales operations. He trained the salespeople to use press releases to sell the stock. The press releases were posted on the internet and were available to the general public. At daily sales meetings, Mesa provided the salespeople with the press releases and trained them how to use them. The salespeople were told that the press releases were true.

Houlihan assisted Mesa by providing him with press releases. He admitted

fabricating or exaggerating facts in these press releases. Although Mr. Houlihan had pled guilty and was cooperating with the Government, he was called as a defense witness. He went through all the press releases introduced by the Government and explained which ones were true and which ones were false. He knew that Mesa used the press releases to sell stock. He knew that Mesa never told the salespeople that the press releases were false. When he was called by disgruntled investors, he covered up the lies.

Mesa taught Petitioner and the other salespeople to sell Sanomedics stock from a script. Investors were told that since they were purchasing the stock directly from the company, and there would be no commissions or fees charged.

According to the Government, when the salespeople explained there were no commissions, they were telling the investors that *they* were not paid by the company a commission on the sale. The District Court rejected that reasoning finding that the investors had to understand that the salespeople would be paid somehow, and the method of compensation could not reasonably have been a factor in the investors' decision to purchase the stock.

After the initial call, the press releases would be sent to the investors for their review before any purchase was made. Petitioner had no reason to believe that the press releases and representations made by Mesa at the sales meetings were false. Petitioner would base his sales calls on the information provided.

Petitioner was 26 years old when he started working in Mesa's phone room in 2009. He was a high school graduate whose last job was delivering pizzas. The pizza parlor happened to be next store to Mesa's phone room. On a whim, he walked in and was hired.

Shawna Lee Lynch was the office manager for Mesa's phone room. She was a close personal friend of Mesa's. Part of her job was to send out the press releases to the prospective investors. At first, she thought the company was legitimate, but over time realized it was not.

When Petitioner first started to work in Mesa's phone room, he did not have a car. Lynch used to pick him up and take him home from work. She testified to Petitioner's enthusiasm for the job and never shared with him her growing doubts.

One of the more controversial claims made by the salespeople concerned the connection between Sanomedics and John Sculley, former CEO of Pepsi and

Apple. Mesa told the salespeople that Sculley had invested in Sanomedics and was assisting in its management and showed them a press release to prove it (DX: D-4). It quoted a legitimate news source to announce that a private equity firm connected to Sculley named South Ocean Growth Equity was purchasing 10% of Sanomedics and was going to provide "management expertise and deep domain experience." Petitioner used this interpretation of the press release to sell Sanomedics stock.

Starting in 2013, the published price of Sanomedics stock on the OTC began to plummet after reaching over $5.00 earlier in the year. The price collapsed after a reverse split in late 2013. By late 2014, it was worthless. Shareholders called and complained that they were not able to sell their shares. That was when the salespeople realized that the stock they had been selling was worthless. Petitioner had left Mesa' phone room in May 2012 and was not around to hear these complaints or to learn that the stock could not be sold. When Juan Perez Ortega testified that Petitioner "knew" that the stock was restricted, he was mistaken. Petitioner was not there. *See*, *Wheeler*, 16 F.4d at 823, n. 5.

Mark Bradshaw was the only investor in Sanomedics who testified at trial

against Petitioner. Petitioner did not discuss whether he was paid by commission, but Bradshaw understood that he was getting paid somehow. Bradshaw did not remember what Petitioner had told him about his compensation, but whatever it was raised no "red flags" with him.

Bradshaw recalled Petitioner mentioning John Sculley's involvement in the company. Petitioner made no claims of profitability or guaranteed increase in the stock price. Bradshaw did not make his purchase based on any claims of profitability or estimates of future stock price. The information Petitioner provided Bradshaw was based upon Mesa's representations and the press releases, which at the time Petitioner had no reason to doubt.

In late 2014, Sizer and Mesa introduced a new stock called FCF to sell from Mesa's phone room. It was an "app" of games that could be purchased on the Apple "app" Store. FCF was not publicly traded, but it was purportedly raising capital for an IPO. FCF, like Sanomedics was an active business selling its "apps" to retail customers and was following a well respected business model.

Petitioner came back to work at Mesa's phone room in March 2015 to sell FCF stock. He worked there until Mesa's phone room was raided by the FBI on August 3, 2015.

Petitioner and the other salesmen were instructed to tell investors that FCF was going to expand from just Apple's to Android's "app" store, and that the company would be making millions of dollars in profits when that happened. Petitioner would tell investors that he was not a broker and there would be no commission or fees charged to them.

Bruce Molina was an investor in FCF who was named in Count 13, the only substantive mail fraud count against Petitioner. He was an accredited investor and declared himself experienced in analyzing pre-IPO stocks.

Petitioner did not tell Molina about Sculley's association with FCF. "Mr. Kenn", who was identified as Charles Topping, who functioned as a "loader" made that representation according to Molina's notes. There is no evidence that Petitioner lied to any investor about Sculley's association with FCF.

Sufficiency of the Evidence on Appeal

The Eleventh Circuit acknowledged that *Takhalov* required proof that the defendant must have intended to harm the victim, "meaning that they intended to deceive the victim about something that affected the value of the bargain." *Wheeler*, 16 F.4d at 819 citing *Talkhalov*, 827 F.3d at 1313. Not all the

misrepresentations that dominated the Government's theory of prosecution qualified as fraudulent misrepresentations. "[N]either the salesperson's employment status nor his use of an alias would amount to a scheme to defraud." *Wheeler*, 16 F.4d at 820.

The Court held that Petitioner [and Long] had made misrepresentations or failed to disclose information that went to the "nature of the bargain." Petitioner had purportedly "misled investors to believe that FCF had made millions of dollars in profit and was closely associated with high-profile companies and executives." *Id*. The Court found that Petitioner had told Bruce Molina that John Sculley, a former CEO of Apple, was closely involved in FCF. As to both companies, Petitioner "misrepresented their form of compensation, telling investors that they were paid only in company stock and did not make commissions of stock sales." *Id*. The Court concluded that these misrepresentations were essential characteristics of the stock that would alter the nature of the bargain.

The Court emphasized the Sculley connection as one of the more critical false claims made by Petitioner in the case. *Wheeler*, 16 F.4d at 820-1. The

Government never proved that Petitioner individually had ever told any investor that Sculley was connected to Sanomedics as a factually matter. There was evidence that other salespeople pitched Sculley's relationship to Sanomedics, but even to the extent that the jury could infer that Petitioner had, the Government never established that he knew that the connection was false.

The Court further found that Petitioner had misrepresented his compensation structure, "telling investors that they were paid only in company stock and did not make commissions on stock sales." "The investors' money, they said, would go back into the company." The Court found from this that "a reasonable jury could have found that it would decrease the value investors got from the bargain if their money was going to a salesperson's pocket in the form of commissions, rather than injecting capital for FCF to expand or to conduct research and development." *Wheeler*, 16 F.4d at 820-21.

The Court explained why the misrepresentations regarding commissions went to the nature of the bargain. "Although investors presumably knew the salespeople were being paid somehow . . ., a reasonable jury could find that it

would decrease the value investors got from the bargain if their money was going to a salesperson's pocket in the form of commissions, rather than injecting capital for FCF [and presumably Sanomedics] to expand or to conduct research and development." *Id*. at 822.

The Panel found that "[b]oth Petitioner and Long misled investors to believe that FCF had made millions of dollars in profit and was closely associated with high-profile companies and executives." It was alleged that Petitioner had told Molina that John Sculley, the CEO of Apple was closely involved in FCF. *Wheeler*, 16 F.4d at 820. This assertion is not supported by the Record. To the extent that the press releases and Mesa's representations asserted profit figures, Petitioner had no reason to doubt them.

The Court also concluded that Petitioner had "concealed from investors that they would be indefinitely restricted from selling their Sanomedics stock." *Wheeler*, 16 F.4d at 823 n.5. Juan Perez Ortega, one of the "loaders" who testified for Government was the source of that statement. The Court was incorrect to attribute this statement as authoritative. Petitioner and the others had been taught to tell the investors that there was a two-year restriction on their

right to resell their discounted stock. That the investors could not sell the stock at all was not known until 2014 when the share price began its plummet to zero. Petitioner left the phone room selling Sanomedics stock in May 2012 when the price listed on the O.T.C. was between $3.00 and $5.00 per share. He was not around when the investor panic set in. The Court's assessment of Petitioner's knowledge of the indefinite restrictions on the stock was without foundation and clearly erroneous.

Having concluded that Petitioner may have made misrepresentations that went to the "benefit of the bargain," finding the evidence sufficient to convict him of the conspiracy seemed to follow logically. The Court started its analysis with the purpose of the conspiracy as set forth in the Indictment.

The Court quoted the Indictment's objective as to the Conspiracy charged in Count 11, the FCF Conspiracy as follows:

lt was the purpose of the scheme and artifice for the defendants and their coconspirators to unlawfully enrich themselves by misappropriating investor money for their personal use and benefit by making material representations that were false, and concealing and failing to state material facts concerning, among other things, the safety and profitability of Fun Cool Free stock, and the defendants and their co-conspirators' commissions and fees.

The Court did not quote the Conspiracy objectives charged in Count 1, the Sanomedics Conspiracy, but noted it was similar.

On the one hand, the Court acknowledged that the overall conspiracy was by the "higher ups" stealing the investors' money. *Wheeler,* 16 F.4d at 823, n. 5 ("Unbeknownst to the investors, they were not buying shares directly from Sanomedics; they were buying Sizer's personal shares which were restricted"). On the other hand, the Court did not believe that Petitioner needed to have knowledge of this to be part of the conspiracy. *Wheeler*, 16 F.4d 805, 823.

By its holding, the Court ignored contrary precedent to the contrary. *United States v. Toler*, 144 F.3d 1423 (11th Cir. 1998) ("Government must find an 'interdependence' among the alleged co-conspirators in order to prove that the indicted conspiracy was a single unified conspiracy as opposed to a series of smaller, uncoordinated conspiracies); *United States v. Chandler*, 376 F.3d 1303 (11th Cir. 2004) ("[W]ithout proof of some connection" between the two objectives . . ., the government had not proved the single conspiracy it alleged in the indictment); *United States v. Pearlstein*, 576 F.2d 531 (3rd Cir. 1978) ("although

the defendants might have made fraudulent misrepresentations during the course of their individual sales presentations, the jury could not reasonably infer that the salesman knew of the fraudulent purpose of the overall [fraudulent] scheme"). *Wheeler*, 16 F.4d at 821-22.

The decision of the Eleventh Circuit in this case was not only inconsistent with *Toler, Chandler* and *Pearlstein* but with those decisions of this Court in *Direct Sales v. United States*, 319 U.S. 703 (1943) and *United States v. Falcone*, 311 U.S. 205 (1940). All these cases addressed the scope of knowledge required to find that a low-level defendant could be convicted of his participation in a larger conspiracy.

The Eleventh Circuit improperly applied *Tahkalov* to both the substantive crime and the conspiracy count. If the reason the stock was worthless was because of the theft of the investors' money by Sizer, Houlihan and Mesa, should not the Government be required to prove that the Petitioner had knowledge of and agreed to join that conspiracy before determining whether he intended to defraud rather than merely deceive the investors?

In both *Direct Sales* and *Falcone*, this Court established that the

Government in any conspiracy case must prove that the defendant agreed to the illegal objective. The burden would be higher if the object of the conspiracy would have appeared to be legal. In that instance, as was the case in *Falcone*, the Government bore an even heavier burden. The Eleventh Circuit in this case has held directly in contradiction with that principle. This Court needs to take the case to bring the law of conspiracy in line with principles of due process.

Prosecutorial Misconduct on Appeal

The Eleventh Circuit held that the Theory of Defense Instruction that the prosecutor told the jury was not the law, was not the law but only a theory that the prosecutor was entitled to tell the jury to ignore. *Wheeler*, 16 F.4d at 826-27. In support of that position, the Court quoted the District Court, who agreed and had told counsel during the charge conference. *Id*.

The question for this Court to decide is whether the Eleventh Circuit is correct. Is a Theory of Defense Instruction the law that the jury is to apply to deciding the case? Can the jury ignore the legal principles contained in it? Can a prosecutor tell the jury to ignore it? The answer must be in the affirmative. This Court must take up this case to affirm that principle.

ARGUMENT

That the Government Must Prove an Intent to Harm as an Element in Establishing a Defendant's Participation in a "Scheme to Defraud" in Any Prosecution for Conspiracy to Commit and the Substantive Offense of Mail or Wire Fraud

A. Scheme to Defraud vs. Scheme to Merely Deceive

The Eleventh Circuit in *Takhalov* opened the door to what it perceived to be a new understanding of what constituted a "scheme to defraud" by explaining the difference between proof of an intent to deceive and an intent to defraud when determining whether a defendant is guilty of participating in a scheme to defraud in a mail and wire fraud prosecution. First, the Court acknowledged that the phrase "scheme to defraud" has been "judicially defined." *Talkhalov*, 827 F.3d at 1312 *citing United States v. Pendergraft*, 297 F.3d 1198, 1208 (11th Cir. 2002). Second, the Court observed that the definition of "fraud" could be expansive but, of necessity, had some limits. "The most important limit is obvious from the statute itself: the scheme must be a scheme to defraud rather than to do something other than defraud." *Id.* The conclusion drawn was the corollary that "a schemer who tricks someone to enter into a transaction has not "'schemed to defraud' so long as he does not intend to harm the person he intends to trick." *Id*. at 1313.

The Eleventh Circuit borrowed heavily from a line of cases from the Second Circuit. *Id*. *citing United States v. Shellef*, 507 F.3d 82 (2nd Cir. 2007), *United States v. Starr*, 816 F.2d 94 (2nd Cir. 1987), and *United States v. Regent Office Supply Co.*, 421 F.2d 1174 (2nd Cir. 1970). All three of these cases grappled with defendants whose deception led their victims to enter financial transactions that harmed them, but who never intended that harm. The conclusion in those cases that was adopted by the Eleventh Circuit was "[a] jury cannot convict a defendant of wire fraud, then, based on 'misrepresentations amounting only to a deceit.'" *Id*. at 1314 *citing Shellef*, 507 F.3d at 108.

The Court struggled with creating a standard that would assist the finder of fact to differentiate between mere deceit and deceit to defraud. It was not enough that the defendants "lacked the specific intent to deceive the victims; indeed, they admitted that they fervently hoped to do just that." The defendants in *Talkhalov* were only intending to deceive the victims in one way – by tricking them into coming into the bars. The Court noted that "what they specifically intended to do was not a crime." *Id*. at 1317. The bar girl defendants were not involved in the actual fraud that involved running up fake bills on the victims' credit cards and charging absurd drink prices that the menus nowhere advertised. *Id*.

Talkhalov was a jury instruction case. The defendants had wanted an instruction that "[f]ailure to disclose the financial arrangement between the B-girls and the Bar, in and of itself, is not sufficient to convict a defendant of any offense[.]" Id. at 1311. The district court gave an instruction that did not cover the proffered defense. The instruction read to the jury stated that the term "'scheme to defraud' includes any plan or course of action *intended to deceive or cheat someone out of money or property* by using false or fraudulent pretenses, representations or promises." (emphasis in opinion). It defined "[t]he intent to defraud is the specific intent to deceive or cheat someone, usually for personal financial gain or to cause financial loss to someone else." The Eleventh Circuit found this instruction did not "substantially cover" the defendants' requested instruction. *Id.* at 1317. The concluded that the "refus[al] to give a jury instruction that was a correct statement of the law, was critical to the defense is case theory, and was not substantially covered by other instructions" was reversable error.

In the instant case, the District Court did give a Theory of Defense instruction based on *Takhalov*. Applying that instruction to the facts of the case,

the evidence was legally insufficient to establish the Petitioner participated in a scheme to defraud or conspired to do so.

Stuart Rubens testified as a Government witness. He was working off a prison sentence he received for organizing and managing "boiler rooms." The Government presented him as a quasi-expert on the operations of "boiler rooms."

Mr. Rubens structured his stock fraud operations in a similar structure to the ones set up in the instant case. First, he told his sales staff that they were selling the company's stock when, in fact, they were selling his and his partners' stock. Second, he provided his sales staff with press releases that he represented were true, but he knew they were false. Third, he never told the sales staff that they were committing fraud.

If Petitioner believed that Sanomedics and FCF were legitimate businesses, he did not intend to harm the investors he sold their stock to. *See e.g., United States v. Martinelli*, 454 F.3d 1300, 1315-16 (11th Cir. 2006). If Petitioner believed that the representations he had made to investors were true, he did not intend to harm the investors. *See e.g., United States v. Hill*, 643 F.3d 807, 852-54 (11th Cir. 2011). Under *Talkhalov*, even if he deceived in order to persuade investors to

invest in a stock he believed was legitimate and valuable by making claims he believed were true, the fact that others were stealing the money and destroying the business by not investing the invested proceeds did not prove that he had participated in *their* scheme to defraud.

B. Scope of the Conspiracy

The Eleventh Circuit agreed with the Government that the Conspiracies charged in Counts 1 and 11 were limited to making material misrepresentations to sell stock. *Wheeler*, 16 F.4d at 823. The language defining the goals of the conspiracy were "not limited to a higher-level conspiracy by Sizer and Mesa to pocket investments." The Court was satisfied that the Government had proven "salespeople made misrepresentations and concealed their excessive commissions to sell stock." The Court found that "[a]s a result, the Government could prove that the defendants knew about the conspiracy charged in the indictment without proving that they knew what Sizer and Mesa were up to." *Id*.

Proving that the salespeople made misrepresentations to sell stock, even if proven, did not *ipso facto* lead to the conclusion that they conspired to defraud. It

was only if by agreeing to sell the stock, they agreed that the investors would lose money. All they received were their commissions, which the Government never proved were excessive. Even if there was evidence that Petitioner was overcompensated, the effect his commissions had on the financial health of the companies was *de minimus* when compared to the wholesale theft of over $20 million by Sizer, Mesa and, to a lesser extent, Houlihan. The companies' stock was worthless because of the theft of the money, not the commissions paid to the salespeople.

This was a classic "hub" conspiracy. Sizer, Mesa and Houlihan were the hub. The salespeople, including Petitioner, were the spokes. To the extent that salespeople were making misrepresentations to sell stock to earn their commissions, that was a smaller separate conspiracy than the one involving Sizer, Mesa and Houlihan. The overall conspiracy was to steal the money, and Sizer, Mesa and Houlihan were the thieves. If the money had been invested in the businesses, the companies might have prospered and the investors would have received their money's worth, even if the company eventually failed. For Petitioner to be a conspirator, the Government had to prove his knowledge that the stock he was selling was worth materially less that the price he was selling it for.

Knowledge that the "higher ups" were stealing the money was necessary to demonstrate Petitioner's intent to defraud. Put another way, if the Government could not prove Petitioner's knowledge of the "higher up" conspiracy, then he was improperly joined with Sizer, Houlihan and Mesa in the conspiracies charged in Counts 1 and 11. *Direct Sales v. United States*, 319 U.S. 703 (1943); *United States v. Falcone*, 311 U.S. 205 (1940).

On these two occasions, this Court assessed the culpability of a person who supplies goods to people who intend to use those goods unlawfully. Where the goods were "themselves innocent," the Court held that the evidence was insufficient to support convictions of aiding and abetting a conspiracy of persons who knowingly supplied the goods to the conspirators. *Falcone*, 311 U.S. at 210-211. Where the defendant had supplied restricted narcotics, however, the Court was willing to infer the supplier's knowledge of and complicity in the illegal narcotics distribution scheme from the large quantity and narcotics sold over a prolonged period of time. *Direct Sales*, 319 U.S. at 710-11.

Falcone and *Direct Sales* must be viewed along a continuum of sales of goods to persons engaged in an unlawful conspiracy. At one end of the continuum

is *Falcone*, which did not involve an inherently illegal transaction at all, but rather the sale of goods quote "in themselves innocent." *Falcone*, 311 U.S. at 307. The sale of morphine in *Direct Sales* fell somewhere in the middle of the continuum, and that it involved the sale of a restricted commodity. Thus, "not every instance of sale of restricted goods" would support a charge of conspiracy. *Direct Sales*, 319 U.S. 712. The question before the Court is where on the continuum Petitioner's conduct falls?

Petitioner's case falls closer to *Falcone* than *Direct Sales* on the above continuum. There was nothing inherently illegal about petitioner selling stock. He had to know something more about the stock he was selling before he could have the intent to harm the investor. To be a member of the conspiracy, he had to agree to join a scheme to defraud that intended to harm the investors by selling them worthless or nearly worthless stock periods. The Government could not sustain its burden by merely showing that he made misrepresentations to convince investors to buy stock that he believed was valued properly.

The *Toler, Chandler* and *Pearlstein* cases addressed these same principles in the mail fraud context. The Eleventh Circuit distinguished them based on an incorrect finding that the conspiracy was limited to the making of false

representations to sell stock of whatever value. The intent to join the larger or "higher up" conspiracy to loot the companies for the benefit of Sizer, Mesa and Houlihan was rejected as a factor necessary to find Petitioner's guilt in the Conspiracies charged in Count 1 and Count 11.

Analyzing the scope of the conspiracy to encompass the objectives for all of the coconspirators, including the "higher ups", is consistent with the *Takhalov* analysis presented above. If Petitioner does not know that he is selling stock that is worthless or nearly worthless, how can he agree to participate in a scheme to defraud with Sizer, Mesa and Houlihan? If he had no knowledge of the "higher up" conspiracy, he lacked the intent to harm?

In Petitioner's case, however, the Government failed to prove that he had any knowledge of the "higher ups" conspiracy. He thought that both companies were legitimate and selling their stock was not a crime. Without that knowledge at the least, Petitioner was more unwitting dupe rather than a coconspirator. *United States v. Feola*, 420 U.S. 671, 692 (1975) ("[T]he essence of conspiracy is agreement and persons cannot be punished for acts beyond the scope of their agreement.")

The Court should take this case to affirm and explain how *Falcone* and *Direct Sales* apply to the conspiracies to commit mail and wire fraud. The Court should also resolve the conflict between the instant case and T*oler, Chandler* and *Pearlstein*.

Prosecutorial Misconduct at Closing

Nearly a half century ago this Court counselled prosecutors "to refrain from improper methods calculated to produce a wrongful conviction...." *Berger v. United States,* 295 U.S. 78, 88 (1935). The Court made clear, however, that the adversary system permits the prosecutor to "prosecute with earnestness and vigor." *Id.* In other words, "while he may strike hard blows, he is not at liberty to strike foul ones." *Id.*

When assessing whether a criminal conviction is marred by prosecutorial misconduct, the courts employ a two-step framework: "(1) the remarks must be improper, and (2) the remarks must prejudicially affect the substantial rights of the defendant." *Wheeler*, 16 F.4d at 826. Although a prosecutor can attack a defense theory duing closing argument, he cannot misstate to law or tell the jury to ignore

it. *Wheeler*, 16 F.4d at 826 *citing Spivey v. Head*, 207 F.3d 1263, 1275 (11th Cir. 2000).

The issue in this case was whether the prosecutor's statement telling the jury that the Theory of Defense instruction was "not the law" violated Petitioner's substantial rights. The District Court based its decision to deny a mistrial in the belief that, in essence, the prosecutor was right: the Theory of Defense instruction was not the law, but a theory.

The Eleventh Circuit agreed. "[W]hen considered in context, however, we cannot say that the prosecutor's remarks were improper. The District Judge repeatedly emphasized to the lawyers that the theory of defense instruction was not an instruction about the law and did not affect the legal elements for mail and wire fraud." *Id.*

This Court needs to accept this case to affirm the principle that *Takhalov*'s distinction between finding the intent to deceive or the intent to defraud *is* a modification and improvement over the standard instruction for mail and wire fraud. If the jury finds an intent to deceive but not an intent to defraud, it must acquit. For the Government to tell the jury that they can ignore its legal burden of

proof was improper.

Takhalov compared the challenged instruction with the jury instructions requested but rejected in *Martinelli* and *Hill*. "The difference between those cases on the one hand, and this case on the other, is the size of the logical leap that a juror would need to make to get from the instruction in the court gave to the instruction the defendant requested." *Takhalov*, 827 F.3d at 1318.

In the instant case, the District Court decided that the theory of defense instruction was necessary to help the jury make that "logical leap" not included in the standard instructions. Whether she intended to or not, the jury was instructed to decide whether Petitioner intended merely to deceive or intended to defraud. By telling the jury that such an analysis was not the law, the prosecutor was telling them that he need not prove Petitioner had the intent to defraud.

That this misconduct violated the substantial rights of the Petitioner is clear. The Government rejected the *Takhalov* theory *in toto*. It took the position that the jury did not need to consider the instruction because the standard mail and wire fraud instructions were sufficient. *Takhalov* held otherwise. The Government did

not want to assume the burden of proving beyond a reasonable doubt that Petitioner intended to defraud the investors he sold stock to. The law required that he do so, and by telling the jury to ignore the law, he violated the substantial rights of the Petitioner to have his theory of defense properly weighed.

This Court should accept certiorari to affirm that the *Takhalov* instruction given was the law and did modify the elements of mail and wire fraud.

CONCLUSION

Upon the arguments and authorities aforementioned, Petitioner requests this Court accept certiorari in this case.

Respectfully submitted,

/s/Charles G. White
CHARLES G. WHITE, P.A.
Counsel for Defendant
1031 Ives Dairy Road, Suite 228
Miami, FL 33179
Tel: (305) 914-0160
Fax: (305) 914-0166
E-mail: cgwhitelaw@aim.com
Florida Bar No. 334170