NO.

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2018

SAMMY R. ARAYA

PETITIONER,

v.

UNITED STATES OF AMERICA

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS..... i,ii

TABLE OF AUTHORITIES..... iii-iv

RULE 14.1(b) STATEMENT..... vi

QUESTIONS PRESENTED vi

OPINION BELOW.....1

JURISDICTION..... 1

STATEMENT OF THE CASE..... 2

STATEMENT OF THE FACTS..... 3

SUMMARY OF ARGUMENT..... 8

ARGUMENT..... 9

I. THE FOURTH CIRCUIT ERRED BY AFFIRMING THE TRIAL COURT'S FAILURE TO INVESTIGATE AND CONCLUSIVELY DETERMINE IF PERJURY INFECTED THE TRIAL..... 10

A. The Standard Of Review..... 10

B. The Perjured Testimony Of April Smokowicz..... 11

C. The Trial Court Compromised Mr. Araya's Due Process Rights..... 12

II. THE FOURTH CIRCUIT ERRED BY AFFIRMING THE TRIAL COURT'S ALLOWING INTO EVIDENCE HEARSAY EXHIBITS THAT WERE NOT PROPER BUSINESS RECORDS..... 15

A. The Standard Of Review..... 16

B. The List Prepared By Government Witness Acosta Was Not A Business Record, But Instead Was Prepared For Trial..... 16

C. The Exhibits At Issue Were Not Proper Business Records..... 18

III. THE EVIDENCE WAS INSUFFICIENT TO CONVICT MR. ARAYA 20

A. The Standard Of Review..... 21

B. Virtually All Of The Government's Witnesses Could Neither Identify Mr. Araya Nor Connect Him To Essential Elements..... 21

1. The Alleged Victims Did Not Identify Mr. Araya 22

2. Mortgage Company Witnesses Did Not Identify Mr. Araya..... 23

3. Mail Service/Money Processors Did Not Identify Mr. Araya..... 23

4. The Alleged Conspiracy Employees Did Not Offer Evidence Of The Elements Of The Charges..... 24

CONCLUSION..... 26

APPENDIX I..... 27

TABLE OF AUTHORITIES

CASES	PAGE
Caperton v. A.T. Massey Coal Company, 556 U.S. 868 (2009)	13
Jackson v. Virginia, 443 U.S. 307 (1979)	21
Nix v. Whiteside, 475 U.S. 157(1986)	13
Palmer v. Hoffman, 318 U.S. 109 (1943)	20
Certain Underwriters at Lloyd's, London v. Sinkovich, 232 F.3d 200 (4th Cir. 2000)	19
ePlus Tech, Inc. v. Aboud, 313 F.3d 166 (4th Cir. 2002)	10
Hurles v. Ryan, 650 F.3d 1301 (9th Cir. 2011)	13
United States v. Arch Trading Company, 987 F.2d 1087 (4th Cir. 1993)	
United States v. Friedhaber, 856 F.2d 640(4th Cir. 1988)	14
United States v. Littleton, 76 F.3d 614 (4th Cir. 1996)	14
United States v. Murray, 65 F.3d 1161 (4th Cir. 1995)	16
United States v. Porter, 821 F.2d 968 (4th Cir. 1987)	
United States v. Stotts, 113 F.3d 493 (4th Cir. 1997)	14
United States v. United Medical & Surgical Supply Corporation, 989 F.2d 1390 (4th Cir. 1993)	21
United States v. Weaver, 282 F.3d 302 (4th Cir. 2002)	16

STATUTES

18 U.S.C. Sec. 981(a)(1)(c) 2

18 U.S.C. Sec. 982(a)(8) 2

18 U.S.C. Sec. 1254(1) 1

18 U.S.C. Sec. 1341 2

18 U.S.C. Sec. 1343 2

18 U.S.C. Sec. 1349 2

18 U.S.C. Sec. 1621(1) 13

18 U.S.C. Sec. 1623(a) 13

18 U.S.C. Sec. 2461(c) 2

RULES

Fed. R. Crim. P. 29(a) 8

Fed. R. Crim P. 35(b) 7, 24

Fed. R. Evid. 802 15

Fed. R. Evid. 803(6) 9, 15

RULE 14.1(b) STATEMENT

There are no parties in addition to those listed in the caption.

QUESTIONS PRESENTED

I. Whether the Fourth Circuit erred by failing to find that the District Court compromised Mr. Araya's Constitutional Rights to a Fair Jury Trial by failing to adequately investigate a claim of perjured testimony by a Government Witness?

II. Whether the Fourth Circuit erred by failing to find that the District Court abused its discretion by allowing certain exhibits into evidence under the Business Records Exception (Fed. R. Evid. 803(6)) to the Hearsay Rule (Fed. R. Evid. 802), where the exhibits in question were not business records maintained in the normal course of business?

III. Whether the Fourth Circuit erred by failing to find that the evidence was insufficient to convict Mr. Araya of Counts 1-11?

NO.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is attached hereto as Appendix I.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fourth Circuit was entered on June 7, 2019. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

STATEMENT OF THE CASE

On July 7, 2016, a Superseding Indictment was filed charging the Appellants, Jan Seko, Sammy R. Araya, and Michael David Henderson, with: (Count 1) Conspiracy to Commit Mail and Wire Fraud, in violation of 18 U.S.C. Sec. 1349; (Counts 2-6) Wire Fraud, in violation of 18 U.S.C. Secs. 1343 and 2; and (Counts 7-11) Mail Fraud, in violation of 18 U.S.C. Secs. 1341 and 2; Forfeiture of assets was also sought, pursuant to 18 U.S.C. Secs. 981(a)(1)(c) and 982(a)(8), and 18 U.S.C. Sec. 2461(c).

On April 10-21, 2017, a jury trial was conducted before the Honorable James C. Cacheris of the United States District Court for the Eastern District of Virginia, Alexandria Division, in Criminal Case No. 1:15cr00301. On April 21, 2017, the jury returned a verdict of guilty on all charges against Mr. Araya, and verdicts of guilty on Counts 1-6, and 9-11 against Ms. Seko and Mr. Henderson. Ms. Seko and Mr. Henderson were both acquitted on Counts 7 and 8.

At the close of the Government's evidence, Mr. Araya moved for Judgment of Acquittal on all counts, pursuant to Fed. R. Crim. P. 29(a). That motion was denied by the trial court.

On July 19, 2017, the District Court sentenced Mr. Araya to 240 months of incarceration, concurrent on each count, three years of supervised release, and other conditions.

On July 19, 2017, the District Court sentenced Mr. Henderson to 144 months of incarceration, concurrent on each guilty count,

three years of supervised release, and other conditions.

On July 19, 2017, the District Court sentenced Ms. Seko to 84 months of incarceration, concurrent on each guilty count, three years of supervised release, and other conditions.

The District Court reserved for later adjudication the issue of restitution. The Court held a Hearing on Restitution on August 11, 2017. The Appellants filed timely Notices of Appeal.

On June 7, 2019, the United States Court of Appeals for the Fourth Circuit issued a written decision affirming the trial court's decision. *See* Appendix I.

STATEMENT OF THE FACTS - MR. ARAYA

A. <u>The Allegations In The Superseding Indictment</u>.

The Government alleged that the three Appellants, and other co-defendants including some named in the Superseding Indictment, were engaged in a fictitious mortgage/refinance conspiracy and scheme. The Government alleged that Araya, Seko and Henderson, conspiring together and with others, identified individuals in arrears on mortgage payments, and through mailings generated by Seko and her business, offered mortgage assistance, modification and relief.

The Government alleged that Araya, Henderson, and others, often using fictitious names and aliases, would field inquiries from individuals who had received the Seko mailings. Those individuals sought mortgage modification and assistance. Araya,

Henderson and others, under the guise of various entities purporting to be legitimate mortgage assistance companies, obtained information from the individuals as if they would assist in mortgage refinance. According to the Government, instead of actually assisting individuals in refinancing mortgages, Araya, Henderson and others obtained "reinstatement fees", monthly payments, and other fees from the individuals. These various fees were not applied to the individuals' mortgages; no real refinancing applications were processed by the Appellants; and instead, the Government alleged that Araya, Henderson, and others pocketed all of these fees obtained through fraud and misrepresentations to numerous individuals.

B. The Government's Evidence.

The Government offered evidence through over thirty witnesses and numerous exhibits.

1. Alleged Victims Of The Conspiracy.

The Government offered the testimony and related exhibits of alleged victims of the conspiracy. These individuals testified generally to the same set of facts: they were in arrears on a mortgage; they received a mailing from a company offering mortgage modification assistance; they contacted the mortgage assistance company and provided requested information; at the request of the company representative, they sent the company a mortgage "reinstatement fee", and in some instances, monthly mortgage and/or

modification payments.

They all testified that they eventually learned that: their actual mortgage companies were not contacted by these entities; they received no payment credits on their mortgages via their payments; they did not receive their money back; and their later attempts to contact these mortgage modification entities were very difficult. (Testimony of David Augustin, Gladys West, Daniel Thompson, David Outing, Archie Davis, Trivenee Seunath, James Williams, Paul Haynes, Barbara Barkley, Kathleen Kovach, Woodrina Jones, Auntrae Boyd, Ronald Day, April Smokowicz, Sonia Gonzalez.)

2. Representatives Of Mortgage Companies.

The Government offered the testimony of representatives of certain mortgage companies, related to the respective mortgages of various alleged victims. These witnesses generally testified that: their mortgage companies did not work with the Appellants' mortgage modification entities; most of the mortgage companies did their mortgage modifications in-house; and they did not receive the "reinstatement fees" or other payments made by the alleged victims. (Testimony of Crystal Kearse, Ocwen Financial/David Augustin mortgage company, Nicholas Jones, Dovenmuehle Mortgage/Gladys West mortgage company, Stewart Derrick, Ditech Financial/Daniel Thompson mortgage company, Chad Anderson, Bank of America/Outing and Davis mortgage company, *see also* Testimony of Danielle Johnson-Kutch, Dept. Of Treasury/Office of Financial Stability/TARP; no knowledge

of ABC Marketing; mortgage modification companies need Government approval.)

3. Representatives Of Private Mail/Money Receipt Stores.

The Government offered the evidence of various proprietors and employees of private mail/shipping stores, money gram payment stores, and bulk mail vendors. This evidence was introduced to allegedly show that Araya, Henderson and others maintained various mail boxes and other means of receipt of checks from the individuals, and the retrieving of these checks by Araya and/or his employees. (Testimony of Nadi Abrahem, (identifies Henderson); Visva Kumar, (identifies "Ian Plymesser"); Surbhi Lohia, (met Mr. Araya who picked up mail); Ricardo Ramirez-Rivas, Tapowtong Chaiwan, Moneygram/Albertson's, (identifies Henderson); Justin Acosta, YouMail, Boolai Kim, Fullerton, CA Post Office, bulk mail, (identifies Jan Seko)).

4. The Testimony Of Employees Of The Alleged Conspiracy.

The Government offered the testimony of three (3) alleged former employees of the mortgage refinance entities.

Joshua Johnson testified for the Government. He acknowledged working for the mortgage fraud conspiracy. He pled guilty to the conspiracy charge (Count I). He identified Mr. Araya as the CEO and overall director of the company. He stated that Mr. Araya used aliases.

Johnson admitted that he was a manipulator and liar. He

testified that he agreed with Umali in the Alexandria Jail that they would blame everything on Phil Ortega, who was deceased.

During his employment, Johnson testified that he used "crystal meth", drank heavily, smoked marijuana, used cocaine, and he would black out. He wanted a reduction of his sentence pursuant to Fed. R. Crim P. 35(b), substantial assistance provided to the Government.

Sabrina Rafo testified for the Government. She testified that she was hired to be Mr. Araya's assistant. Mr. Araya was her "boss" and leader of the operation. She picked up mail for him. He gave her checks, and she returned cash to him. She was paid by ABC Marketing. She said employees used aliases.

Rafo pled guilty to the Conspiracy charge (Count I). The other 11 counts against her were dismissed in exchange for her plea. She had the potential of a Fed. R. Crim P. 35(b) reduction of he sentence for her substantial assistance provided to the Government.

Nicholas Estilow testified for the Government. Estilow described the essence of the conspiracy and scheme. He stated that Mr. Araya was in charge. He identified Mr. Araya's voice mail, e-mail addresses, and aliases.

Estilow testified that he had lied, manipulated customers, smoked marijuana, drank alcohol, and had memory lapses.

5. Other Government Evidence.

The Government introduced other evidence, including the testimony of Ivorie Marie Ladd, employed by the JP Morgan Chase fraud department. She testified about the entity Trust Funding, LLC, and she identified Henderson as a manager.

The Government offered the testimony of Richard Bardwell of the office of the Special Inspector General of TARP. He testified about the execution of search warrants in Las Vegas, Nevada, and Placentia, California, and certain electronic data and e-discovery recovered in those searches.

The Government offered the testimony of Rebecca Lee of FHFA, Office of Inspector General. She testified about her review of certain bank accounts, including alleged bank accounts of Mr. Araya.

The Court admitted into evidence numerous Government Exhibits. The Government's exhibits included transcripts of Seko's telephone calls with Mr. Araya.

C. Post-Trial Motions.

Mr. Araya filed a Motion for a New Trial Pursuant to Rule 33 and Motion for Acquittal Pursuant to Rule 29. The trial court denied Mr. Araya's Motions.

SUMMARY OF ARGUMENT - MR. ARAYA

I. The Fourth Circuit and the trial court deprived Mr. Araya of Due Process and a fair trial by failing to conclusively

determine if a Government Witness committed perjury during the trial.

II. The Fourth Circuit and the trial court abused their discretion by allowing into evidence exhibits under the Business Records Exception to the Hearsay Rule, where the exhibits did not constitute records kept in the normal course of business, as required under Fed. R. Evid. 803(6).

III. The evidence was insufficient to convict Mr. Araya of Counts 1-11. Virtually all of the witnesses could not identify Mr. Araya. The remaining evidence did not implicate all of the elements of the respective charges against Mr. Araya.

ARGUMENT

I. THE FOURTH CIRCUIT ERRED BY AFFIRMING THE TRIAL COURT'S FAILURE TO INVESTIGATE AND CONCLUSIVELY DETERMINE IF IF PERJURY INFECTED THE TRIAL.

A trial court's most important function is to protect and preserve the administration of justice in its Court, particularly in a criminal case when a defendant exercises his Due Process right to a fair jury trial under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Mr. Araya and the defense brought to the trial court's attention an act of perjury by a Government Witness. However, the trial court's inadequate response to address this serious Due Process claim by Mr. Araya constituted error that infected and undermined not only the trial proceeding and jury verdict, but also the trial court's rulings on

forfeiture and restitution. Accordingly, Fourth Circuit should have reversed the jury's verdict and decision of the trial court, in their entirety.

A. The Standard Of Review.

For a claim of deprivation of Due Process right to a Fair Trial, the Fourth Circuit should have conducted a Plenary Review of the record and circumstances that led to the Due Process violation. *See ePlus Tech, Inc. v. Aboud*, 313 F.3d 166, 178 n. 12 (4th Cir. 2002).

B. The Perjured Testimony Of April Smokowicz.

April Smokowicz testified that she responded to a mailing offering mortgage refinance assistance. She testified that she mailed $9,987.54 to the mortgage assistance company.

Ms. Smokowicz later testified that she never received a refund of her $9,987.54 from the mortgage assistance company.

On July 19, 2017, at Mr. Araya's Sentencing Hearing, trial counsel for Mr. Araya informed the trial court that Ms. Smokowicz had received a full refund of her monies, and thus her testimony potentially constituted perjury.

The Government stated that, in response to Mr. Araya's trial counsel's inquiry about this issue, it had reviewed its records and found no evidence to support the claim that Smokowicz had received a refund.

The trial court acknowledged the seriousness of the issue, not

just for Mr. Araya, but also for the other defendants. The trial court stated "I'm going to require [the Government] to do that and check with [Ms. Smokowicz] and to let Mr. Salvato know and all other counsel *because it affects them as well*. So they can file any motions if they deem appropriate. Let all counsel know by [July 26, 2017]. Okay?" The Government agreed. (Emphasis added.)

At the August 11, 2017 Restitution Hearing, the Government informed trial counsel and the Court that it had communicated with Ms. Smokowicz, and she informed them that she had not received a refund.

However, Mr. Araya pressed the issue in an extensive statement and *de facto* Motion with the Court. Mr. Araya stated:

> When I came for sentencing months ago I told my attorney about the perjury about April Smokowicz. ... I specifically said, recorded, that they could easily verify the perjury by looking at the woman's bank accounts two weeks to four weeks after the check was issued to verify that she received a refund.
>
> I spoke to my attorney a couple of days ago and I said "Did you guys verify the perjury?" He said "The prosecution said they called the woman." I told [trial counsel] ... "Who's going to admit doing perjury?"
>
> So I'm asking for an actual real investigation, I'm asking for the bank statements to be pulled. I specifically said that the woman received nine U.S. Postal money orders for a total amount ... The reason why is because if someone didn't get help, they got a refund.

Instead of responding to Mr. Araya's eminently reasonable request, the trial court "punted" this serious issue. The trial

court stated that it could only act on a written motion, not an oral motion. However, the trial court knew at this time that Mr. Araya's court-appointed trial counsel, who had the knowledge and background of this issue, was withdrawing as counsel. While new counsel was being appointed for Mr. Araya, new counsel was appointed for the appeal to this Court, and did not have the benefit of the background on this issue at that time in August 2017. The Notice of Appeal had already been filed, and jurisdiction was passing from the District Court to this Court. Further, Mr. Araya was soon transferred from the Alexandria Detention Center, and was not available to newly appointed appellate counsel.

On July 19, 2017, and on August 11, 2017, Mr. Araya put the trial court on notice about this very serious issue he wanted to pursue. Nevertheless, the trial court, knowing that the appellate process had already commenced via the filing of a Notice of Appeal, took no realistic action to allow Mr. Araya, the other defendants, and the trial court itself, to investigate this serious issue. Indeed, the trial court could have stayed its proceedings to allow the investigation Mr. Araya sought in open court on July 19, 2017, and August 11, 2017.

C. <u>The Trial Court Compromised Mr. Araya's Due Process Rights</u>.

Constitutional due process is a fundamental and essential right of all criminal defendants engaged in the legal and trial process. Trial courts have a general responsibility to protect the

procedures that ensure due process and the administration of justice in their courts. *See generally Caperton v. A.T. Massey Coal Company*, 556 U.S. 868, 888 (2009) (due process violated where defendant's company made a substantial contribution to judge's reelection campaign just prior to ruling); *Hurles v. Ryan*, 650 F.3d 1301, 1314 (9th Cir. 2011) (due process violated because judge improperly participated in special action to defend her own ruling, made troubling comments about simplicity of the case before witnesses were called, and questioned competence of defendant's attorney).

As the trial court acknowledged at the July 19, 2017 Hearing, perjury in the trial by a Government Witness was a serious issue not just for Mr. Araya, but for the other defendants as well. No one can dispute that perjury is a serious matter. *See* 18 U.S.C. Sec. 1621(1); 18 U.S.C. Sec. 1623(a). *See Nix v. Whiteside*, 475 U.S. 157, 162 (1986)(trial court has an obligation not to permit known perjury from being placed before the jury).

The Government's theory put before the jury was that Mr. Araya ran a fraudulent mortgage assistance business where *funds were not returned*. The Smokowicz perjured testimony at issue, whether she received a full refund of her funds, goes to the essence of the Government's case, and without question the perjured testimony at issue was material to the Government's case.

Perjury involves the false testimony under oath regarding a

material matter where the witness has a willful intent to deceive the fact finder. *See United States v. Stotts*, 113 F.3d 493, 497 (4th Cir. 1997). "A statement is material if it has a natural tendency to influence, or is capable of influencing, the decision-making body to which it is addressed." *United States v. Littleton*, 76 F.3d 614, 618 (4th Cir. 1996). *See generally United States v. Arch Trading Company*, 987 F.2d 1087, 1095 (4th Cir. 1993) (it is irrelevant whether the false statement actually influenced or affected the decision-making process); *United States v. Friedhaber*, 856 F.2d 640, 642 (4th Cir. 1988) (*en banc*) (materiality not dependent upon whether the fact finder was actually influenced by false statements).

The Record before this Court is problematic and troubling:

* On July 19, 2017, the trial court *acknowledged and conceded the seriousness of the perjury claim*;

* The investigation ordered by the trial court was inadequate; the Government's calling Smokowicz and asking her, in essence, did you commit perjury, was an empty gesture; as Mr. Araya perceptively noted in court on August 11, 2017 - "Who's going to admit doing perjury?";

* As Mr. Araya requested in open court on August 11, 2017, obtaining Smokowitz's pertinent bank records was the obvious way to conclusively investigate the perjury issue;

* On August 11, 2017, the trial court, knowing full well that

Mr. Araya's trial counsel was withdrawing, appellate counsel, with no knowledge of the case, was just being appointed; and that jurisdiction was passing from the trial court to this Court, "punted" on the issue under the guise of needing a written motion.

Perjury is serious business, directly affecting the integrity of the trial process. Perjury on a material issue, going to the essence of the Government's case, compromised the Due Process rights of Mr. Araya and the other defendants. In protection of those Constitutional Rights, the trial court had an obligation to conclusively determine if Smokowicz committed perjury.

Further, the issues of forfeiture and restitution were affected by this perjury. Smokowicz, via her perjury, may be "double-dipping" and unjustly enriched with a second refund. The trial court should have stayed the proceeding and authorized the issuance of subpoenas for Smokowicz's pertinent bank records. The trial court's failure to do so compromised Mr. Araya's Due Process rights to a fair trial, and undermined the integrity of the entire case. This Court should grant certiorari and vacate the Judgment against Mr. Araya.

II. THE FOURTH CIRCUIT ERRED BY AFFIRMING THE TRIAL COURT'S ALLOWING INTO EVIDENCE HEARSAY EXHIBITS THAT WERE NOT PROPER BUSINESS RECORDS.

Fed. R. Evid. 802 precludes the use of Hearsay at trial, except, *inter alia,* as allowed under the Federal Rules of Evidence.

Fed. R. Evid. 803(6) is an Exception to the Hearsay Rule,

commonly referred to as the "Business Records Exception". Rule 803(6) allows introduction into evidence of a record of a "Regularly Conducted Activity", made at or near the time by - or from information transmitted by - someone with knowledge; kept in the course of a regularly conducted activity or business; making the record was a regular practice of that activity. Fed R. Evid. 803(6)(A-C).

The trial court allowed into evidence purported Business Records that were, in fact, not Business Records, and did not meet the criteria of Rule 803(6). Mr. Araya objected to their introduction. The Fourth Circuit erroneously affirmed.

A. <u>The Standard Of Review</u>.

The Fourth Circuit Court reviews a district court's evidentiary rulings under an abuse of discretion standard. *See United States v. Murray*, 65 F.3d 1161, 1170 (4th Cir. 1995). Under this standard, the Fourth Circuit affords the evidentiary ruling substantial deference, and will not overturn the ruling unless the decision was arbitrary and irrational. *See United States v. Weaver*, 282 F.3d 302, 313 (4th Cir. 2002).

B. The List Prepared By Government Witness Acosta Was Not <u>A Business Record, But Instead Was Prepared For Trial</u>.

The Government called Justin Acosta, who worked at YouMail. YouMail is a "visual voice service" for a smartphone. The service provides call forwarding or conditional call forwarding. Users get

alerts for voice mails received.

Acosta identified an account record with a phone number the Government alleged was associated with Mr. Araya. The Government showed Acosta an additional "spreadsheet" "based on underlying records" that YouMail maintained for voice mails. When the Government showed Acosta its Exhibits 19-1 and 19-1A, Mr. Araya objected.

Exhibit 19-1A was just a list of voice mails to the call forwarding number. Mr. Araya objected on foundation and relevance grounds, given that the record included individuals with no connection to the case. Mr. Araya objected to the spreadsheet, as well as the recordings.

The spreadsheet was plainly not a business record as defined under Rule 803(6). Ms. Seko objected as well. "It was created for litigation."

The trial court asked "Was the spreadsheet something he keeps in the normal course of business?" The Government responded "It's based on the records that he keeps in the normal course of business in the database ... the spreadsheet is - it's just a printout of the database. The database is kept in the regular course of business."

Acosta later testified that he created the spreadsheet by exporting from files that YouMail has in its possession.
The underlying voice mail records are kept in the normal course of

business. The district court admitted Exhibits 19-1 and 19-IA.

The Government used this evidence to show Mr. Araya's alleged voice mails from alleged victims, from Ms. Seko, and from other sources.

However, on cross-examination, Acosta conceded that 19-1A, the spreadsheet, was prepared at the request of the Government. (JA 1200.) Most of the calls were from 2012. The spread sheet, prepared for litigation, was prepared in 2017 for the April 2017 trial, or perhaps 2016, four to five years after the calls.

C. <u>The Exhibits At Issue Were Not Proper Business Records</u>.

Rule 803(6) is not some casual, vague and amorphous rule to be applied by trial courts. Instead, Rule 803(6) has requirements and standards that allow documents to be admitted under this exception to the Hearsay Rule.

Rule 803(6)(A) requires that "the record was made at or near the time by - or from information transmitted by - someone with knowledge;" The exhibits at issue fail this requirement. First, Acosta testified that the voice mails were from 2012. On cross-examination, Acosta conceded that 19-1A, the spreadsheet, was prepared at the request of the Government. Most of the calls/voice mails were from 2012. The spread sheet, prepared for litigation, was prepared in 2017 for the April 2017 trial, or perhaps 2016, four to five years after the calls.

This Court has stated that, as to records under Rule 803(6),

"The absence of trustworthiness is clear, however, when a report is prepared in the anticipation of litigation because the document is not for the systematic conduct and operations of the enterprise but for the primary purpose of litigating." *Certain Underwriters at Lloyd's, London v. Sinkovich,* 232 F.3d 200, 2004-05 (4th Cir. 2000).

Rule 803(6)(B) requires that "the record was kept in the course of a regularly conducted activity of a business, organization...." Acosta *conceded* that the 19-1A list was prepared at the Government's request, for trial. "[R]outine and habitual patters of creation lend reliability to business records." *Sinkovich,* 232 F.3d at 205.

Rule 803(6)(C) requires that "the making of the record was a regular practice of that activity;" YouMail is not in the litigation support business.

Rule 803(6)(A) refers to "someone with knowledge;" Rule 803(6)(D) refers to "the testimony of the custodian or another qualified witness...."

Acosta testified that he was a "[c]ustomer care manager." (JA 1185). What's that? It certainly isn't a custodian of records. In fact, beyond asking for his job title, the Government did not seek the basis or foundation of Acosta's knowledge, experience or duties at YouMail to establish for the district court that he worked at YouMail in 2012, or otherwise had sufficient knowledge to testify about these exhibits, the YouMail process of record-keeping, or

anything else. In determining the admissibility of "business records", district courts are to consider "the character of the records and their earmarks of reliability ... from their source and origin and the nature of their compilation." *Palmer v. Hoffman*, 318 U.S. 109, 114 (1943).

A review of Acosta's direct examination shows that the Government *did not bother or attempt to establish a foundation about Acosta's tenure, experience, training, duties, or knowledge about the subject of his testimony, and in particular, YouMail's record-keeping practices. See United States v. Porter*, 821 F.2d 968, 977 (4th Cir. 1987) (to be a "qualified witness" under Rule 803(6), one must be the custodian of records, or know the company's record keeping requirements). Acosta was not the custodian or records; the Government never asked him if he had knowledge about YouMail's record keeping requirements.

Yet, despite the requirements of Rule 803(6), the trial court admitted the exhibits at issue. This Record constitutes an example for this Court on just how casually Rule 803(6) can be applied.

Further, the improperly admitted evidence, connecting Mr. Araya to victims and Ms. Seko, was very prejudicial. The trial court abused its discretion in its cursory application of Rule 803(6). This Court should vacate the Judgment against Mr. Araya.

III. <u>THE EVIDENCE WAS INSUFFICIENT TO CONVICT MR. ARAYA</u>.

A careful reading of the Record shows that the evidence

was insufficient to convict Mr. Araya of Counts 1-11, and for the Fourth Circuit to affirm that conviction.

A. The Standard Of Review.

The Fourth Circuit reviews *de novo* the district court's decision to deny a motion for judgment of acquittal. *See United States v. United Medical & Surgical Supply Corporation*, 989 F.2d 1390, 1401-02 (4th Cir. 1993). Where the motion for judgment of acquittal is based upon insufficiency of the evidence, the conviction must be sustained if the evidence, viewed in a light most favorable to the Government, is sufficient for any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

At the close of the Government's evidence, Mr. Araya moved for Judgment of Acquittal on all counts, pursuant to Fed. R. Crim. P. 29(a). That motion was denied by the trial court.

B. Virtually All Of The Government's Witnesses Could Neither Identify Mr. Araya Nor Connect Him To Essential Elements.

The Government put on over thirty witnesses, and entered numerous exhibits into evidence. *Virtually all of the Governments witnesses could not identify Mr. Araya. Some witnesses and documents showed that he picked up mail, and had e-mail accounts, proving nothing that related to all 11 counts. The alleged entity employees' testimony: (1) did not specifically identify or tie Mr.*

Arraya to the elements of the charges; and (2) was hopelessly compromised by their drug use, alcohol use, memory lapses, and their self-serving desire to offer the Government "substantial assistance" in order to obtain their own "get out of jail free cards."

This Court should make no mistake: there was far, far less than met the eye in the Government's two week, 30 plus witness case. Specifically, the Government *did not adduce evidence of all of the elements of all of the charges against Mr. Araya.*

1. <u>The Alleged Victims Did Not Identify Mr. Araya</u>.

The Government put on the testimony of fifteen (15) alleged victims. *Not one of them identified Mr. Araya at trial as being part of the alleged conspiracy.* (*See* alleged victim testimony, unable to identify Mr. Araya: David Augustin, Gladys West, (could not identify ABC Marketing); David Outing, Trivenee Seunath, James Williams, Paul Haynes, Barbara Barkley.)

None of the 15 alleged victims identified Mr. Araya in court, by a picture, by a voice recording, or by any other means. They offered no evidence connecting Mr. Araya to any of the elements in the 11 charges. (*See* testimony of other alleged victims: Daniel Thompson, Archie Davis, James Williams, Kathleen Kovach, Woodrina Jones, Auntrae Boyd, Ronald Day, April Smokowicz, Sonia Gonzalez.)

2. <u>Mortgage Company Witnesses Did Not Identify Mr. Araya</u>.

Crystal Kearse, Nicholas Jones, Stewart Derrick, Chad

Anderson, and Danielle Johnson-Kutch did not identify Mr. Araya in court, by a picture, by a voice recording, or by any other means. They offered no evidence connecting Mr. Araya to any of the elements in the 11 charges.

3. Mail Service/Money Processors Did Not Identify Mr. Araya.

None of the mail service owners/employees, or money exchange employees, identified Mr. Araya at trial, with one exception. (*See* testimony of Nadi Abrahem, Visva Kumar, Ricardo Ramirez-Rivas, Tapowtong Chaiwan, Moneygram/Albertson's, Justin Acosta, YouMail, Boolai Kim, Fullerton, CA Post Office, bulk mail.)

Surbhi Lohia, met Mr. Araya when he picked up mail at her store. Picking up mail is not a federal or state crime.

4. The Alleged Conspiracy Employees Did Not Offer Evidence Of The Elements Of The Charges.

As the Court can see, the first three sets of Government witnesses reviewed above *did not identify or connect Mr. Araya to the elements of the 11 charges against him*. Accordingly, the Government's two week, 30 plus witness, document-intensive case *relied almost entirely on the testimony of three convicted felons, admitted liars, substance abusers, all with powerful incentives to lie.*

Further, this Court must consider the Record: did any of these three felons and liars connect Mr. Araya to all of the elements in all of the charges? They did not.

First, even under the Standard of Review, this Court must

consider the backgrounds and motivations of the Government's star witnesses.

Johnson pled guilty to the conspiracy charge (Count I). He admitted that he was a manipulator and liar. He testified that he concocted a lie with Umali in the Alexandria Jail that they would blame everything on Phil Ortega, who was deceased.

During his employment, Johnson testified that he used "crystal meth", drank heavily, smoked marijuana, used cocaine, and he would black out. He wanted a reduction of his sentence pursuant to Fed. R. Crim P. 35(b), substantial assistance provided to the Government.

Rafo pled guilty to the Conspiracy charge (Count I). The other 11 counts against her were dismissed in exchange for her plea. She had the potential of a Fed. R. Crim P. 35(b) reduction of he sentence for her substantial assistance provided to the Government.

Nicholas Estilow testified for the Government. He pled guilty to the Conspiracy charge (Count I). Estilow testified that he had lied, manipulated customers, smoked marijuana, drank alcohol, and had memory lapses.

All three felons were desperate for a Rule 35(b) reduction of sentence.

Second, the problem in the Record for the Government is that these three witnesses gave vague and general testimony about Mr. Araya and his alleged actions.

Johnson acknowledged working for the mortgage fraud conspiracy. He identified Mr. Araya as the CEO and overall director of the company. He stated that Mr. Araya used aliases.

Rafo testified she was hired to be Mr. Araya's assistant. Mr. Araya was her "boss" and leader of the operation. She picked up mail for him. He gave her checks, and she returned cash to him. She was paid by ABC Marketing.

Estilow described the essence of the conspiracy and scheme. He stated that Mr. Araya was in charge. He identified Mr. Araya's voice mail, e-mail addresses, and aliases.

In sum, they testified that Mr. Araya was the boss, in charge, that Araya used aliases. They didn't testify about what actions Mr. Araya took to implicate all of the elements of the 11 charges. Their collective testimony was vague and general.

Their testimony, crucial to the Government's case, must be applied to the *specific elements of the crimes charged*. The Court should review the Jury Instructions for the *requisite specific elements of the charges*:

JI 10: Conspiracy to Commit Mail and Wire Fraud;

JI 11: Conspiracy to Commit Mail and Wire Fraud;

JI 12: Elements of the Offense - Conspiracy to Commit Wire and Mail Fraud;

JIs 13-17: Conspiracy Elements/Factors;

JIs 18-20: Wire Fraud (Counts 2-6);

JIs 26-29: Mail Fraud (Counts 7-11);

The issue for the Court is straightforward: did the testimony of Johnson, Rafo and Estilow adduce evidence *of all of the requisite elements* of Count 1, Counts 2-6, and Counts 7-11, against Mr. Araya?

Their testimony did not do so. The Government put on a case extensive in length, witnesses and documents. But quantity is not a substitute for the qualitative adducing of evidence of all of the elements of the charges. This Court should grant certiorari and vacate the Judgment against Mr. Araya.

IV. CONCLUSION

Mr. Araya respectfully requests that this Court grant certiorari to address the errors of the Fourth Circuit as set forth above.

Respectfully submitted,

/s/

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APPENDIX I

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-4479

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JEN SEKO, a/k/a Hanh Thuy Nguyen,

Defendant - Appellant.

No. 17-7116

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JEN SEKO, a/k/a Hanh Thuy Nguyen,

Defendant - Appellant.

No. 17-4495

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SAMMY REDI ARAYA, a/k/a Samaraii, a/k/a Samaraii Rainmaker,

Defendant - Appellant.

No. 17-4497

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MICHAEL DAVID HENDERSON, a/k/a Money Making Mike,

Defendant - Appellant.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. James C. Cacheris, Senior District Judge. (1:15-cr-00301-JCC-6; 1:15-cr-00301-JCC-7; 1:15-cr-00301-JCC-10)

Submitted: May 30, 2019 Decided: June 7, 2019

Before WILKINSON and RICHARDSON, Circuit Judges, and DUNCAN, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Peter L. Goldman, O'REILLY & MARK, P.C., Alexandria, Virginia; Craig W. Sampson, BARNES & DIEHLL, PC, Richmond, Virginia; Curtis S. Fallgatter, FALLGATTER & CATLIN, P.A., Jacksonville, Florida, for Appellants. G. Zachary Terwilliger, United States Attorney, Samantha P. Bateman, Ryan S. Faulconer, Assistant United States Attorneys, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for

Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

A jury convicted Jen Seko, Sammy Redi Araya, and Michael David Henderson (collectively, "Defendants") of conspiracy to commit wire and mail fraud, in violation of 18 U.S.C. § 1349 (2012), as well as several substantive counts of wire fraud, in violation of 18 U.S.C. §§ 1343, 2 (2012), and mail fraud, in violation of 18 U.S.C. §§ 1341, 2 (2012). In these consolidated appeals, Defendants challenge their convictions on multiple grounds. Finding no reversible error, we affirm.

First, Henderson argues that the district court erred in denying his motion to dismiss the charges against him pursuant to the Speedy Trial Act, 18 U.S.C. § 3161 (2012). We review the district court's Speedy Trial Act determinations de novo and its underlying factual findings for clear error. *United States v. Rodriguez-Amaya*, 521 F.3d 437, 440 (4th Cir. 2008). Henderson argues that the district court continued his trial date from February 13, 2017, to April 10, 2017, without his consent and that the Speedy Trial Act does not permit the exclusion of this continuance from the 70-day period by which his trial was required to begin. *See* 18 U.S.C. § 3161(c)(1). We need not resolve this question because, as the Government notes, Henderson's trial commenced within the 70-day statutory period, regardless of whether the continuance Henderson challenges is excluded. We therefore find no reversible error in the district court's Speedy Trial Act ruling.

Next, Henderson argues that the district court erred by issuing a jury instruction about willful blindness. We review this issue for abuse of discretion, *United States v. Bartko*, 728 F.3d 327, 343 (4th Cir. 2013), and find none here. Because Henderson's

defense included a claim that he lacked knowledge of the other Defendants' criminal conduct, the district court properly instructed the jury on willful blindness. *See United States v. Ruhe*, 191 F.3d 376, 384 (4th Cir. 1999).

Seko and Araya challenge different evidentiary rulings by the district court that they claim resulted in the improper admission of hearsay evidence. We review a trial court's evidentiary rulings for abuse of discretion and "will only overturn an evidentiary ruling that is arbitrary and irrational." *United States v. Cole*, 631 F.3d 146, 153 (4th Cir. 2011) (internal quotation marks omitted).

Seko's hearsay claim concerns testimony from a Government witness about an out-of-court statement that explicitly was introduced not for its truth, but to show its effect on Seko's state of mind. The district court duly gave the jury an appropriate limiting instruction regarding this testimony, both during the Government's case-in-chief and prior to final deliberations. As the district court repeatedly explained in rejecting Seko's argument numerous times, a statement not offered for its truth is, by definition, not hearsay. *See* Fed. R. Evid. 801(c)(2). We find no error in the district court's ruling.

Araya's hearsay argument relates to hard copies, in spreadsheet form, of electronic voicemail records that were kept by a voicemail company in the ordinary course of its business. Because machine-generated raw data do not constitute hearsay, *United States v. Washington*, 498 F.3d 225, 231 (4th Cir. 2007), the district court did not err by admitting these documents.

Seko and Araya further argue that the evidence at trial was insufficient to support their convictions. "A defendant challenging the sufficiency of the evidence faces a heavy

burden." *United States v. Foster*, 507 F.3d 233, 245 (4th Cir. 2007). "A jury's verdict must be upheld on appeal if there is substantial evidence in the record to support it." *Id.* at 244. Evidence is "substantial" if, viewed in the light most favorable to the Government, "there is evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *Id.* at 245. We review de novo the district court's evaluation of the sufficiency of the evidence supporting a conviction. *United States v. Barefoot*, 754 F.3d 226, 233 (4th Cir. 2014).

Having carefully reviewed the entire record, we conclude that the jury had ample evidence from which it could reasonably find that these Defendants were guilty beyond a reasonable doubt of each offense of conviction. Because Defendants have not met the heavy burden necessary to disturb the verdicts against them, we reject their claims of insufficient evidence.

Finally, Araya contends that the district court erred by declining his invitation to open a posttrial investigation into a Government witness who, Araya believes, committed perjury at trial. The record contains no evidence to support Araya's allegation of perjury, and we reject this claim as baseless.

Accordingly, we affirm the judgments of the district court with respect to all Defendants. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

FILED: June 7, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-4479 (L)
(1:15-cr-00301-JCC-6)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JEN SEKO, a/k/a Hanh Thuy Nguyen

Defendant - Appellant

No. 17-4495
(1:15-cr-00301-JCC-7)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

SAMMY REDI ARAYA, a/k/a Samaraii, a/k/a Samaraii Rainmaker

Defendant - Appellant

No. 17-4497
(1:15-cr-00301-JCC-10)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

MICHAEL DAVID HENDERSON, a/k/a Money Making Mike

Defendant - Appellant

No. 17-7116
(1:15-cr-00301-JCC-6)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JEN SEKO, a/k/a Hanh Thuy Nguyen

Defendant – Appellant

JUDGMENT

In accordance with the decision of this court, the judgments of the district court are affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK