

**UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 7th day of June, two thousand and nineteen,

Before: Rosemary S. Pooler,
Raymond J. Lohier, Jr.,
Susan L. Carney,

Circuit Judges.

United States of America,

Appellee,

ORDER
Docket No. 17-2440

v.

Jonathan P. Flom,

Defendant - Appellant.

Appellant Jonathan P. Flom having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is DENIED.

For The Court:
Catherine O'Hagan Wolfe,
Clerk of Court




17-2440-cr
United States v. Flom

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York on the 27th day of February, two thousand nineteen.

Present: ROSEMARY S. POOLER,
RAYMOND J. LOHIER, JR.,
SUSAN L. CARNEY,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

17-2440-cr

JONATHAN P. FLOM,

Defendant-Appellant.

Appearing for Appellant: Lawrence D. Gerzog, New York, N.Y.

Appearing for Appellee: Keith D. Edelman, Assistant United States Attorney (Emily Berger, Moira Kim Penza, Assistant United States Attorneys, *on the brief*), for Richard P. Donoghue, United States Attorney for the Eastern District of New York, Brooklyn, N.Y.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Mauskopf, J.).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is **AFFIRMED**.

Appellant Jonathan Flom appeals from the July 31, 2017 judgment of conviction of the United States District Court for the Eastern District of New York (Mauskopf, J.), following a jury trial at which Flom was found guilty of money laundering in violation of 18 U.S.C. § 1956(a)(3). We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

On appeal, Flom asks us to vacate his conviction principally because: (1) the evidence was legally insufficient; (2) the district court abused its discretion in certain evidentiary rulings; and (3) the district court erred in providing a conscious avoidance instruction to the jury. We reject each of these arguments in turn.

A. Sufficiency of the Evidence

"A defendant bears a heavy burden in seeking to overturn a conviction on grounds that the evidence was insufficient." *United States v. Cruz*, 363 F.3d 187, 197 (2d Cir. 2004). "The 'relevant question' in this inquiry is 'whether, after viewing the evidence in the light most favorable to the [government], any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Rodriguez*, 392 F.3d 539, 544 (2d Cir. 2004) (alteration in original) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (emphasis in *Jackson*). Direct evidence is not required; "[i]n fact, the government is entitled to prove its case solely through circumstantial evidence, provided, of course, that the government still demonstrates each element of the charged offense beyond a reasonable doubt." *Id.*

In order to prove the instant crime of money laundering, the government was required to establish beyond a reasonable doubt that: (1) Flom conducted an interstate transaction affecting interstate commerce; (2) the transaction involved money represented by a law enforcement officer and believed by Flom to be the proceeds of fraud; and (3) Flom intended to promote the carrying on of fraud. See 18 U.S.C. § 1956(a)(3)(A). Flom argues that his conviction must be vacated and a judgment of acquittal entered because the evidence was legally insufficient to establish that the undercover law enforcement officer represented to Flom that the relevant transactions involved the proceeds of securities fraud and that Flom believed this to be so.

"Whether a representation that a client is involved in a specified illegal activity for which he needs money laundered sufficiently conveys that the money is derived from that activity is a fact-specific determination." *United States v. Wydermyer*, 51 F.3d 319, 327-28 (2d Cir. 1995). Here, viewing the evidence in the light most favorable to the government, we conclude that a rational trier of fact could have found that the undercover agent "represented" to Flom that the proceeds were fraudulently obtained where the agent expressed concerns to Flom about raising "red flags" with banks (Gov't App'x at 961, 965), described the "securities" at issue as "a lot less real" than other securities (*id.* at 1009), and told Flom that he was being paid 5% of the proceeds—as opposed to 2-3%—because Flom was "taking a risk" (*id.* at 1006). Likewise, the evidence was sufficient with respect to Flom's "belief," where Flom had previously been put on notice by a bank that the pattern of money moving through his account in prior, similar

transactions appeared consistent with the illegal sale of fraudulent securities, Flom told the undercover agent that in the event of an "issue" they would need to "circle the wagons" (*id.* at 978) and that they were in a "protected triangle" with the undercover agent's informant (*id.* at 976), and Flom admitted to the FBI that he "winc[ed]" when the undercover agent mentioned fraudulent securities to him and that he knew the undercover agent and informant were selling fraudulent securities (*id.* at 537-38). Flom's challenge to the sufficiency of the evidence fails.

B. Evidentiary and Discovery Rulings

We review the evidentiary rulings of a district court for abuse of discretion and reverse only in cases involving "manifest error." *United States v. Miller*, 626 F.3d 682, 688 (2d Cir. 2010). "We review a district court's ruling on a motion to compel discovery under an abuse-of-discretion standard." *United States v. Rigas*, 583 F.3d 108, 125 (2d Cir. 2009) (internal quotation marks omitted).

Flom first argues that his conviction must be vacated because the district court erred in permitting under Federal Rule of Evidence 404(b) evidence of an earlier uncharged money-laundering scheme in which he was allegedly involved. This Court "follows the 'inclusionary' approach to 'other crimes, wrongs, or acts' evidence, under which such evidence is admissible unless it is introduced for the sole purpose of showing the defendant's bad character, or unless it is overly prejudicial under Fed. R. Evid. 403 or not relevant under Fed. R. Evid. 402." *United States v. Pascarella*, 84 F.3d 61, 69 (2d Cir. 1996) (citation omitted) (internal quotation marks omitted). The district court did not err in admitting the evidence as relevant to Flom's knowledge of the fraudulent nature of the undercover scheme. Additionally, the district court did not abuse its discretion in finding that the evidence of the prior scheme was more probative than prejudicial. Furthermore, any arguable error was mitigated by the district court's limiting instruction to the jury that the prior scheme was not to be considered as proof that Flom committed the charged crime.

Second, Flom argues that the district court abused its discretion in not ordering disclosure of FBI reports of interviews with a member of the earlier scheme who served as an informant with respect to the charged scheme. Flom sought to introduce evidence that the informant never told the FBI that he, the informant, had told Flom outright that he was committing fraud in the earlier scheme. The district court did not order disclosure of the reports because it reasoned that the absence of knowing proof of fraud did not exculpate Flom and, in any event, the informant's statements that were being admitted were not being offered for their truth. The district court did not abuse its discretion in not ordering such disclosure.

Finally, Flom argues that the district court abused its discretion in precluding him from offering a purportedly exculpatory statement he made during an FBI interview. During trial, the district court sustained the government's objection to defense counsel's question to an FBI agent regarding the statement Flom had made, which was noted in the FBI's interview report. The interview report was not in evidence, and the district court properly sustained the objection because the statement was hearsay as to Flom and was not necessary to explain or put into context the FBI agent's testimony. *See United States v. Johnson*, 507 F.3d 793, 796 (2d Cir. 2007); Fed. R. Evid. 102. Flom's evidentiary challenges fail.

C. Conscious Avoidance Jury Instruction


Flom argues that the district court erred by charging the jury on conscious avoidance. This Court reviews a district court's decision to instruct the jury on conscious avoidance "*de novo*, reversing only where, viewing the charge as a whole, there was a prejudicial error." *United States v. Aina-Marshall*, 336 F.3d 167, 170 (2d Cir. 2003).

"A conscious avoidance instruction permits a jury to find that a defendant had culpable knowledge of a fact when the evidence shows that the defendant intentionally avoided confirming the fact." *United States v. Quinones*, 635 F.3d 590, 594 (2d Cir. 2011) (internal quotation marks omitted). A conscious avoidance instruction is appropriate only when (1) "a defendant asserts the lack of some specific aspect of knowledge required for conviction," and (2) "the appropriate factual predicate for the charge exists, *i.e.*, the evidence is such that a rational juror may reach the conclusion beyond a reasonable doubt that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact." *United States v. Ferguson*, 676 F.3d 260, 277-78 (2d Cir. 2011) (internal quotation marks omitted).

Flom does not claim that the content of the conscious avoidance instruction was error. Rather, he argues that the conscious avoidance instruction should not have been given because there was no evidence in support of the conclusion that he consciously avoided learning of the fraudulent nature of the undercover scheme. Nevertheless, there was an appropriate factual predicate for the charge. *See, e.g.*, Gov't App'x at 986-87 (conversation in which undercover agent tells Flom in part that he wants to give him "a window into what I'm doing and . . . full disclosure," and Flom responds in part "I don't have to know everything"); *id.* at 976 (Flom tells undercover agent "I DO NOT capital letters DO NOT have to know . . . everything that you do").

We have considered the remainder of Flom's arguments and find them to be without merit. Accordingly, we hereby AFFIRM the district court's judgment of conviction.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

The signature of Catherine O'Hagan Wolfe is written in cursive over a circular seal. The seal contains the text "UNITED STATES", "SECOND CIRCUIT", and "COURT OF APPEALS".

UNITED STATES DISTRICT COURT

Eastern District of New York

UNITED STATES OF AMERICA

v.

JONATHAN P. FLOM

JUDGMENT IN A CRIMINAL CASE

Case Number: 14-CR-507 (RRM)

USM Number: 06808-104

Neal R. Sonnett

Defendant's Attorney

THE DEFENDANT:

- ☐ pleaded guilty to count(s) _____
- ☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.
- ☒ was found guilty on count(s) one of the indictment
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1956(a)(3)	Money Laundering	4/3/2014	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s) _____
- ☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

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

7/28/2017

Date of Imposition of Judgment

s/Roslynn R. Mauskopf

Signature of Judge

Roslynn R. Mauskopf, United States District Judge

Name and Title of Judge

7/28/2017

Date

B1

DEFENDANT: JONATHAN P. FLOM
CASE NUMBER: 14-CR-507 (RRM)

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

Forty (48) Eight Months.

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

If consistent with the Bureau of Prisons' classification and designation system, the defendant be designated to FCI Miami.

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

The defendant shall surrender to the United States Marshal for this Southern District of Florida at the US Courthouse in Miami or the

☒ facility designated by the BOP no later than:

☒ 12:00 ☐ a.m. ☒ p.m. on 8/28/2017

☐ as notified by the United States Marshal.

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

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

B2

DEFENDANT: JONATHAN P. FLOM
CASE NUMBER: 14-CR-507 (RRM)

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: Three (3) Years

MANDATORY CONDITIONS

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

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

DEFENDANT: JONATHAN P. FLOM
CASE NUMBER: 14-CR-507 (RRM)**STANDARD CONDITIONS OF SUPERVISION**

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

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

U.S. Probation Office Use Only

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

Defendant's Signature _____

Date _____

DEFENDANT: JONATHAN P. FLOM
CASE NUMBER: 14-CR-507 (RRM)

SPECIAL CONDITIONS OF SUPERVISION

- 1) Upon request, the defendant shall provide the U.S. Probation Office with full disclosure of his financial records, including co-mingled income, expenses, assets and liabilities, to include yearly income tax returns. With the exception of the financial accounts reported and noted within the presentence report, the defendant is prohibited from maintaining and/or opening any additional individual and/or joint checking, savings, or other financial accounts, for either personal or business purposes, without the knowledge and approval of the U.S. Probation Office. The defendant shall cooperate with the Probation Officer in the investigation of his financial dealings and shall provide truthful monthly statements of his income and expenses. The defendant shall cooperate in the signing of any necessary authorization to release information forms permitting the U.S. Probation Office access to his financial information and records.
- 2) The defendant shall comply with all forfeiture orders.
- 3) The defendant shall cooperate with the U.S. Probation Office in the investigation and approval of any position of self-employment, including any independent, entrepreneurial, or freelance employment or business activity. If approved for self-employment, the defendant shall provide the U.S. Probation Office with full disclosure of his self-employment and other business records, including, but not limited to, all of the records identified in the Probation Form 48F (Request for Self Employment Records), or as otherwise requested by the Probation Department.
- 4) The defendant shall not possess a firearm, ammunition, or destructive device.

B5

DEFENDANT: JONATHAN P. FLOM
CASE NUMBER: 14-CR-507 (RRM)

CRIMINAL MONETARY PENALTIES

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

	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 100.00	\$ 0.00	\$ 0.00	\$

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

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

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

<u>Name of Payee</u>	<u>Total Loss**</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
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TOTALS \$ _____ \$ _____

☐ Restitution amount ordered pursuant to plea agreement \$ _____

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

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

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

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

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

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

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DEFENDANT: JONATHAN P. FLOM
CASE NUMBER: 14-CR-507 (RRM)

SCHEDULE OF PAYMENTS

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

- A ☒ Lump sum payment of \$ 100.00 due immediately, balance due
- ☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:
All payments made payable to Clerk, US District Court.

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

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

☐ Joint and Several:

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

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