NO:

IN THE
SUPREME COURT OF THE UNITED STATES

JUNIOR JEAN BAPTISTE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Where hearsay, consisting of an inculpatory, out-of-court statement made other than to law enforcement, is erroneously introduced to the defendant's prejudice in a criminal trial, should appellate review for harmlessness track the same standard applicable under *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), for review of an equivalent violation of the Confrontation Clause, given the indistinguishable impact on the defendant's cross-examination and other trial rights?

INTERESTED PARTIES

There are no parties interested in the proceeding other than those named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Junior Jean Baptiste respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case numbers 16-17175 and 16-17595, in a decision rendered by that court on August 28, 2019, and published at 935 F.3d 1304 (11th Cir. 2019), affirming the judgment and commitment order of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the published decision of the United States Court of Appeals for the Eleventh Circuit is contained in the Appendix (App. 1). A copy of the order denying the petition for rehearing is attached in the Appendix (App. 29).

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on August 28, 2019, and rehearing was denied on December 11, 2019. This petition is timely filed pursuant to SUP. CT. R. 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall 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; nor shall private property be taken for public use, without just compensation.

U.S. Const., amend. VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Fed. R. Crim. P. 52(a).

> (a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

STATEMENT OF THE CASE

Petitioner was prosecuted on federal charges of participating in a tax refund fraud and money laundering scheme. He was charged with conspiracy to commit money laundering (18 U.S.C. § 1956(h)); money laundering (18 U.S.C. §§ 2 and 1956(a)(1)(B)(i)); possession of five or more false identification documents with unlawful intent (18 U.S.C. §§ 2 and 1028(a)(3)); theft of government money (18 U.S.C. §§ 2 and 641); and aggravated identity theft (18 U.S.C. § 1028A(a)(1)).

The basis for the prosecution was petitioner's operation of a check cashing business that cashed numerous income tax refund checks that were fraudulent and had been obtained by means of identity theft. The government's case was premised on

the testimony of two individuals who claimed that they brought fraudulent checks to petitioner's store and that petitioner was aware of the fraud. The two witnesses had received substantial benefits from the government for testifying. Petitioner's defense was that another person (Marvin Pagnon) had brought the entire check cashing business to petitioner's computer and security system store, that Pagnon had responsibility for verifying the checks, and that he had duped petitioner. The district court barred petitioner from introducing reverse Fed. R. Evid. 404(b) evidence showing Pagnon's repeated pattern and practice of manipulating check cashers to believe that tax refund checks Pagnon processed were valid. The trial court ruled, however, that it would permit testimony only as to what "happened with the defendant," even though the court excluded evidence as to whether Pagnon duped other unsuspecting individuals in similar prior and contemporaneous schemes. Petitioner was permitted to call Pagnon's former girlfriend (Francesse Chery) to testify as to how Pagnon had specifically duped petitioner regarding tax refund checks.

Defense witness Francesse Chery offered petitioner's principal affirmative evidence at trial to support his sole defense that Pagnon, who purported to be collecting checks for tax preparer businesses and handling the cashing of the preparers' low-income clients' refund checks to assure the preparers were paid for their services, had duped petitioner. After Francesse testified and was excused from her subpoena, the government presented a new witness on rebuttal, Anael Chery (Francesse's brother) to testify, over defense hearsay and confrontation objections, that when he questioned

his sister's decision to testify at trial, she claimed that petitioner offered to give her an expensive Mercedes Benz car in exchange for testifying. In closing argument, the prosecutor repeatedly stated that Francesse's testimony was completely perjured in its entirety, and petitioner was convicted on all counts. The district court sentenced petitioner to 212 months imprisonment.

Petitioner appealed his convictions to the Eleventh Circuit, contending that the use of hearsay to vitiate his entire trial defense required reversal. Petitioner also appealed the use of the hearsay statement as the sole basis for an obstruction-of-justice sentencing guideline enhancement. The court of appeals did not resolve whether admission at trial of an out-of-court statement alleging criminal and obstructive conduct by a defendant violates the rule against hearsay, but found the asserted error harmless given testimony by the government's two fraud-participant witnesses attributing guilty knowledge to petitioner. App. 2–3 ("We conclude that we needn't decide whether Anael's testimony was inadmissible hearsay because even if the district court did err in allowing it, the error was harmless. There was more than *enough* compelling—and undoubtedly admissible—*evidence* to support [petitioner]'s conviction.") (emphasis added); *see also* App. 16 (explaining that nonconstitutional error requires reversal only if it resulted in substantial and injurious effect or influence in determining the jury's verdict); App. 18 ("Even if we strike Anael's testimony, there was still ample evidence supporting Baptiste's conviction. With regard to that component of the trial, Anael's testimony was harm*less*.") (emphasis in original).

The Eleventh Circuit also ruled that a hearsay allegation of uncharged criminal conduct could be used to enhance petitioner's sentencing guideline range. App. 18–19. Unlike the court of appeals' harmless error ruling as to use of the hearsay at trial, the Eleventh Circuit found that the hearsay was harmful to petitioner at sentencing because it was the sole basis for finding he had wilfully obstructed justice at trial in presenting Francesse's testimony to the jury. App. 18 ("Anael's testimony provided the only evidence supporting Baptiste's enhancement for obstruction. With regard to that component of the trial, Anael's testimony was necessarily harm*ful*.") (italic emphasis in original; underline emphasis added). The Eleventh Circuit's decision confirms that the hearsay statement alone led to the conclusion that the defense was a fraud, particularly given that there was no other contradiction of Francesse's good faith in testifying to her knowledge about Pagnon's effort to dupe petitioner and make him the fall guy for the tax refund fraud scheme.

REASONS FOR ISSUING THE WRIT

Harmless error analysis is the single most important factor in appellate decision making. Harmless error findings have a dramatic impact on prosecutorial and judicial practices at the trial court level. Reading from a cold record, the court of appeals found the testimony of two government witnesses regarding petitioner's mens rea to be "compelling" in proving the government's case, but made no findings as to whether Francesse's testimony would have been compelling if left unrebutted by a hearsay

claim that had no foundation and was denied under oath by Francesse at petitioner's sentencing. The skewed form of harmless error analysis employed by the court of appeals—like that employed by most circuits when reviewing nonconstitutional error—is to determine that a substantial injury has not been established if there was, in the admissible evidence, substantial evidence of guilt. This amorphous standard that nearly mirrors the standard for reviewing sufficiency of the evidence has rendered most appellate error explication a mere academic exercise.

The arbitrary and unreasonable nature of the government-favorable harmless error standard employed in petitioner's case is most clearly seen in comparing the more meaningful review that would have been available if the purported out-of-court incriminating statement had been made to a law enforcement investigator rather than a member of the hearsay declarant's family.

As the Court observed in *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986), "we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt."

> The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on

> material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Id. at 684.

In criminal cases, this Court has identified categories of constitutional error which are "of the first magnitude and no amount of showing of want of prejudice would cure it." *Davis v. Alaska*, 415 U.S. 308, 318 (1974). "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (citations omitted). "This right is a fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 19 (1967). And the right of cross-examination of directly inculpatory statements likewise is constitutionally based. There can be no doubt that the right to "cross-examination [is] the greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970) (citation omitted).

In petitioner's case, we deal not with hearsay evidence of guilt of the charged offense, but hearsay evidence of an uncharged criminal attempt to defraud the court, mislead the jury, and present perjured testimony. Measuring the "untainted" weight of the government's case, which was viewed by the court of appeals in a light favorable to the prosecution, simply fails to answer the question of whether the error was harmless. And because the jury likely accepted the un-crossed out-of-court statement and turned its back on all defense arguments as a result, the ordinary review for sufficient untainted evidence of guilt is wholly insufficient to the task of gauging harm.

In *Ohio v. Clark*, 135 S.Ct. 2173, 2180 (2015), the Court explained that even where a private interrogator is seeking to test a potential witness's claims about a criminal event, there is no Confrontation Clause violation. In light of *Clark*, government cooperator Anael Chery's purported questioning of his sister Francesse in implicit criticism of her testimony did not yield the type of hearsay that is constitutionally barred. However, the inadmissible hearsay nature of the statement—which the court of appeals assumed—rendered its admission just as unfairly prejudicial as if the Confrontation Clause was violated. For that reason, the Eleventh Circuit's application of a deferential harmless-error review standard divorced from the concerns for protection of the right of cross-examination was misdirected. The Eleventh Circuit based its decision on its own belief in the credibility of impeached witnesses and failed to take into consideration that, along with the barring of reverse Fed. R. Evid. P. 404(b) evidence, the destruction of Francesse's testimony after petitioner had rested his defense case, left him without any defense, despite a real likelihood of the culpability of another person, not himself. *See Holmes v. South Carolina*, 547 U.S. 319, 329, 331 (2006) (exclusion of defense evidence of third-party guilt violated defendant's right to a fair trial; rejecting argument that where "prosecution's case is strong enough," third-party guilt evidence may be excluded without violating due process; "The point is that, by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt.")

In tension with the Eleventh Circuit's decision, the Fourth Circuit presumes that a jury verdict will be influenced by an error that touches a central or highly contested issue. *United States v. Ince*, 21 F.3d 576, 583 (4th Cir. 1994) (holding harmful an error that affected "virtually the only controverted issue at trial"). Absent an impact on constitutional guarantees, review for harmlessness has focused on whether the court of appeal can say "with fair assurance, after pondering all that happened *without stripping the erroneous action from the whole*, that the judgment was not substantially swayed by the error." *Kotteakos v. United States*, 328 U.S. 750, 765 (1946) (emphasis added). But where, as in petitioner's case, the hearsay error mirrors exactly a Confrontation Clause error (and can be seen as even more prejudicial to the ability to present a defense and conduct cross-examination), narrowing the harmlessness review to a prediction about harm from weighing the rest of the government's evidence wholly undermines the adversarial function of trial. *See United States v. Nyman*, 649 F.2d 208, 212 (4th Cir.1980) ("In applying this test it is important to keep in mind that it does not ask whether we believe that irrespective of the error there was sufficient evidence to convict, but whether, as Justice Traynor expressed it, we believe it "highly probable that the error did not affect the judgment.") (quoting Roger J. Traynor, *The Riddle of Harmless Error* 34–35 (1970)).

"The crucial thing is the *impact of the thing done wrong* on the minds of other men, not on one's own, in the total setting." *Kotteakos*, 328 U.S. at764. "Even where a hearsay evidence concerns "merely cumulative evidence," a circumstance at 180

degrees from petitioner's case, the court must still look to whether the "hearsay declaration may not have been the weight that tipped the scales against petitioner." *Krulewitch v. United States*, 336 U.S. 440, 445 (1949); *see Neder v. United States*, 527 U.S. 1, 18–19 (1999) (applying harmless error test to omission of an offense element, but limiting the harmlessness inquiry to whether there was any evidentiary dispute about the element in question).

The Eleventh Circuit's limited review for harm fails to accommodate the multiple impacts of errors equivalent to that addressed in *Delaware v. Van Arsdall*. Even where not technically constitutional, such errors, "no less than the failure to instruct on an element in violation of the right to a jury trial, infringe upon the jury's factfinding role and affect the jury's deliberative process in ways that are, strictly speaking, not readily calculable." *Neder*, 527 U.S. at 18; *cf. Chapman v. California*, 386 U.S. 18, 24 (1967) (constitutional error harm where there is "a reasonable probability that the [error] might have contributed to the conviction"); *Smith v. Cain*, 132 S.Ct. 627, 630 (2012) (for *Brady* purposes, a reasonable probability that the proceedings would have been different means "only that the likelihood of a different result is great enough to 'undermine[] confidence in the outcome of the trial") (citations omitted).

The government's theory was that Francesse was lying and that her testimony permitted the jury to discount the entire defense case. That such "hearsay encompasses statements that are inherently unreliable," *Lilly v. Virginia*, 527 U.S. 116, 131 (1999),

and that a presumption of unreliability applies to such evidence, *Crawford v. United States,* 212 U.S. 183, 204 (1909), only heightens the need to be more assured of harmlessness than merely to find adequate independent evidence of guilt offered by the government. The unreliability of such evidence is intolerably compounded when the declarant alleges uncharged criminal conduct that deprives petitioner of his right to present a defense cannot be tested by cross-examination. *See Bruton v. United States*, 391 U.S. 123, 136 (1968)).

The procedural posture of this case and the record below make this case an appropriate candidate for resolving questions regarding the application of the harmless error standard in cases that go far beyond the improper admission of merely cumulative evidence and that, instead, present the same or greater harm as the constitutionalized form of restrictions of confrontation. *See* Harry T. Edwards, *To Err is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. Rev. 1167, 1170-1171 (1995) (distinguishing between a "guilt-based approach" and an "effect-on-the-verdict-approach" in determining whether an error is harmless); Jason M. Solomon, *Causing Constitutional Harm: How tort law can help determine harmless error in criminal trials*, 99 Nw. U. L. Rev. 1053, 1055 (2005) (noting that "[t]he conventional wisdom on harmless-error doctrine is that there are two different and irreconcilable approaches that judges use in determining harmless error which are reflected in two co-existing lines of Supreme Court cases); Roger A. Fairfax, Jr., *Harmless Constitutional Error and the Institutional Significance of the*

Jury, 76 Fordham L. Rev. 2027, 2037 (2008) (noting that the Supreme "Court has shifted between the two standards - harmlessness based upon whether the error contributed to the verdict and harmlessness based upon whether the residual evidence was overwhelming"); Jeffrey O. Cooper, *Searching For Harmlessness: Method And Madness in the Supreme Court's Harmless Constitutional Error Doctrine*, 50 U. Kan. L. Rev. 309, 311 (2002) (tracing the development of "two tests for constitutional harmless error [], one focusing on the effect that the error … had on the deliberations of the jury, and one focusing on whether the evidence properly before the jury was overwhelming"); *Holland v. Attorney General of New Jersey*, 777 F.2d 150, 158 (3d Cir. 1985) (crediting the idea that "the Supreme Court has variously formulated the harmless error standard, in some cases inquiring whether the constitutional error might have contributed to a guilty verdict and in others whether the non-tainted evidence was overwhelming to support the jury's verdict).

Harmless error analysis is probably the most cited doctrine in the criminal law, and its consequences are significant. The outcome of the harmless error analysis means the difference between offering a remedy for an injury to an individual's rights and making the decision that such an injury is an acceptable cost of an error-filled criminal justice system. With such significant consequences in the balance, the Court's consideration of the issue is warranted.

CONCLUSION

The Eleventh Circuit's decision in petitioner's case warrants review.

Respectfully submitted,

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March 2020

APPENDIX

APPENDIX

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Nos. 16-17175, 16-17595

D.C. Docket No. 1:15-cr-20777-JEM-1

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

JUNIOR JEAN BAPTISTE,

Defendant - Appellant.

Appeals from the United States District Court
for the Southern District of Florida

(August 28, 2019)

Before WILLIAM PRYOR, NEWSOM, and BRANCH, Circuit Judges.

NEWSOM, Circuit Judge:

Jean Junior Baptiste was a businessman. In addition to a portfolio of media and entertainment companies, Baptiste owned and operated Surveillance Master

CCTV. Surveillance Master installed security cameras, repaired computers, and—one of these things is not like the others—cashed checks. In 2016, a jury found that Baptiste had taken part in an $11 million scheme that involved cashing tax-refund checks that he had fraudulently obtained in the names of inmates, minors, dead people, and other insentient or otherwise unsuspecting "clients." Baptiste now appeals his conviction and 212-month sentence.

Although Baptiste raises a number of issues on appeal, we focus primarily on two questions related to the hearsay testimony of a government witness. The abridged version of the story: Francesse Chery was one of Baptiste's key witnesses. The government countered with her brother, Anael Chery, who testified (among other things) that Francesse had told him that, in exchange for her (false) testimony supporting Baptiste's narrative, Baptiste would give her a Mercedes. Baptiste argues that Anael's testimony was inadmissible hearsay and that the district court's error in allowing the jury to hear it tainted both his conviction and his sentence.

Baptiste's challenge presents two questions. First, was Anael's testimony indeed inadmissible hearsay? The district court admitted the testimony pursuant to the statement-against-interest exception to the general prohibition on hearsay evidence, and on appeal the government has offered a smattering of additional theories of admissibility. We conclude that we needn't decide whether Anael's

testimony was inadmissible hearsay because even if the district court did err in allowing it, the error was harmless. There was more than enough compelling—and undoubtedly admissible—evidence to support Baptiste's conviction.

Second, and (sort of) relatedly, did the district court err in relying on Anael's testimony when it imposed a sentencing enhancement for obstructing justice? If you're saying, "Didn't they just say they weren't going to decide whether the testimony was admissible?"—we hear you. As it turns out, though, thanks to a doctrine called (somewhat oxymoronically) "reliable hearsay" we can answer the second question without deciding the first. Under the reliable-hearsay doctrine, so long as certain preconditions are met, a sentencing court can rely on evidence that would be off-limits in the guilt phase. For Baptiste, this means that even if Anael's description of his sister's supposed deal was inadmissible hearsay (and we aren't saying either way) the district court might not have erred in relying on that testimony for the obstruction enhancement—again, so long as the preconditions are met.

So, what are they? Well, our case law has arguably sent mixed signals about that. There is, though, a synthesis. We hold (and clarify) today that the Sentencing Guidelines permit use of hearsay testimony so long as the overall record provides "sufficient indicia of reliability"—and we conclude that the indicia of reliability here are sufficient.

Accordingly—and because we find that none of Baptiste's other arguments has merit—we affirm Baptiste's conviction and, with one asterisk, his sentence. The asterisk? Pursuant to the parties' joint request, we remand the case to the district court for the limited purpose of allowing Baptiste to allocute, a right that he was denied at sentencing.

I

During Baptiste's trial, two cooperating witnesses, Andy Louissaint and Karl Moltimer, described the tax-refund scheme. Baptiste would first provide tax preparers such as Louissaint and Moltimer with a list of individuals—many of them young, incarcerated, dead, or otherwise unlikely to discover the use of their identities—along with accompanying personal information such as birthdates and social security numbers. The tax preparers used that information to (fraudulently) obtain refund checks from the IRS, which they then brought to Baptiste's Surveillance Master for cashing.

Baptiste contracted with a third party to process the checks. He would fabricate the necessary documents—work permits, passports, green cards, driver's licenses—to avoid raising red flags. Baptiste and the tax preparers would divide the proceeds, with Baptiste often taking a cut of between 25% and 50%. Not bad, given that typical check-cashing fees range from 1.5% to 3%.

When the IRS reviewed Surveillance Master's records in conjunction with a routine inspection, an agent noticed that several refund checks were for identical (or nearly identical) amounts. During a subsequent investigation, the IRS obtained copies of identification documents, Treasury checks, and lists containing personal information for both the quick and the dead. Customs and Immigration Services conducted an evaluation of approximately 630 permanent-resident and employment-authorization cards that Baptiste had used to verify the checks; all but one—belonging to Baptiste's wife—were fraudulent.

The ensuing indictment charged Baptiste with money laundering, conspiracy to commit money laundering, possession of false identification documents with unlawful intent, theft of government money, and aggravated identity theft. At trial, Baptiste's story was that he was an unwitting participant in a broader scheme concocted by a now-dead business partner, Marvin Pagnon. Pagnon's ex-girlfriend, the aforementioned Francesse Chery, echoed Baptiste's account in her testimony and explained how Pagnon operated. In particular, she explained that because Pagnon had poor credit, he would ask would-be associates such as Baptiste to partner with him. Pagnon, she said, laid out a collaboration that was straightforward and above board: Pagnon would obtain (real) refund checks from tax preparers; Baptiste would cash whatever Pagnon handed him. Baptiste signed up, and he seems to have been well compensated for his efforts. During the

scheme, Baptiste purchased a Mercedes Benz CL 63, a Mercedes Benz E Class, a Range Rover, and—again, one of these things is not like the others—a $345,000 share in a 200-foot long cargo ship.

The government painted a different picture. Moltimer and Louissaint both testified, for instance, that Pagnon played no role in Baptiste's check-cashing operation. Louissaint added that when Baptiste first became aware that an indictment could be coming down the pike, he had told Louissaint that he planned to "basically blame everything on Marvin [Pagnon]." The government also offered testimony from Francesse Chery's brother, Anael. Anael first opined, as a general matter, that his sister just wasn't a very truthful person. He went on to testify, much more specifically, that Francesse had told him that Baptiste was going to give her a Mercedes CLA 45 so long as she "h[e]ld up her end of the bargain" by backing Baptiste's it-was-all-Pagnon's-idea narrative. Baptiste objected that Anael's testimony—relaying what his sister had allegedly told him—was inadmissible hearsay. The district court ultimately admitted Anael's statement, citing the statement-against-interest exception to the general prohibition on hearsay evidence. *See* Fed. R. Evid. 804(b)(3).

The jury convicted Baptiste on all counts. At sentencing, the district court applied enhancements for the amount of money that Baptiste had fraudulently obtained from the government (exceeding $11 million), for the number of victims

(perhaps hundreds), for the victims' vulnerable status (many incapacitated in some form or fashion), and for obstructing justice (for the perjury-for-a-Mercedes deal with Francesse). The district court sentenced Baptiste to 212 months' imprisonment and restitution of more than $11 million.[1] This is Baptiste's appeal.

II

As already noted, our focus here will be the related contentions that the district court (1) abused its discretion by admitting Anael's hearsay testimony as evidence against Baptiste and (2) violated the Sentencing Guidelines by imposing an obstruction-based enhancement that relied on the same. Before getting there, though, we'll address a few other guilt-phase matters—namely, whether the district court erroneously refused to admit Rule 404(b) evidence, whether the government failed to reveal (alleged) deals with its witnesses, and whether the prosecutor made improper statements to the jury during his closing argument. Then, after dealing with the Anael-related issues, which span the trial and sentencing phases, we'll conclude with a few additional, sentencing-specific arguments—namely, that the district court erred in increasing Baptiste's sentence due to the amount of money that the government lost as well as the number and vulnerability of the scheme's victims, as well as in declining to permit Baptiste to allocute personally.

A

[1] The court ordered that $70,000 of that total be paid jointly and severally with Moltimer.

1

During the trial, the district court refused to allow Baptiste to put on evidence that Marvin Pagnon had duped others into participating in similar schemes. On appeal, Baptiste contends that, in so doing, the district court misapplied Federal Rule of Evidence 404(b), which states, in relevant part—

> **(1) Prohibited Uses.** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
> **(2) Permitted Uses; Notice in a Criminal Case.** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

Fed. R. Evid. 404(b). In particular, Baptiste argues that his evidence would have demonstrated only Pagnon's *capacity* to implement his scheme—he had done so before, and so could do so again—rather than Pagnon's character or propensity more generally, and was therefore admissible as "reverse" 404(b) evidence—i.e., bad-acts evidence that "tends to negate the defendant's guilt of the crime charged against him." *United States v. Seals*, 419 F.3d 600, 606 (7th Cir. 2005); *see also, e.g.*, *United States v. Cohen*, 888 F.2d 770, 776 (11th Cir. 1989) (admitting evidence showing that the government's witness "was capable of concocting and managing [a] fraudulent scheme").

The government doesn't really dispute Baptiste's premise—that the evidence bore on whether Pagnon was competent of pulling off such a scheme—

and, indeed, it quotes Baptiste's own brief back at him to make its point. In his brief, the government says, Baptiste admits that "[t]he purpose of the proffered evidence was to show that Pagnon was capable of implementing his fraudulent tax-refund scheme without the knowledge and involvement of the nominal owners." Br. of Appellant at 41. In so stating, the government contends, Baptiste has effectively conceded that the evidence was of the "pure propensity" variety, probative only of Pagnon's general mendacity.

The parties thus read the same bit of testimony in two very different ways. And not implausibly so. The evidence demonstrating that Pagnon had previously deceived others could be construed as indicating either Pagnon's capacity to do so again and/or his propensity to do so again—either "Pagnon is well-equipped to lie in these circumstances" or "Pagnon is a liar." The two interpretations are interrelated—mutually reinforcing, you might say—but only the former is generally admissible under Rule 404(b).

The trouble for Baptiste is that even scales won't get the job done. "Determinations of admissibility of evidence rest largely within the discretion of the trial judge and will not be disturbed on appeal absent a clear showing of an abuse of discretion." *United States v. Russell*, 703 F.2d 1243, 1249 (11th Cir. 1983). That this evidence can reasonably be read as (permissible) capacity

evidence or (impermissible) character evidence demonstrates that Baptiste hasn't made the required "clear showing."

2

Baptiste also objects to how the government prosecuted his case. He makes two claims: first, that the government failed to disclose material issues involving key witnesses; and second, that the prosecutor's closing argument mischaracterized and exaggerated the evidence.

a

Baptiste alleges three disclosure violations. First, he argues that the government failed to correct false testimony when one of its key witnesses, Moltimer, stated that he had derivative U.S. citizenship. Baptiste contends that, in fact, Moltimer was *granted citizenship in exchange for testifying against Baptiste*. Second, Baptiste claims that Moltimer lied—and the government failed to correct—when he testified that he only met Pagnon in 2013. Pagnon died in 2011, and according to Baptiste, the government's failure to set the record straight undermined Baptiste's defense that "Pagnon masterminded the scheme to dupe the unsuspecting Baptiste." Br. of Appellant at 19. Finally, Baptiste asserts that the government failed to disclose a cooperation agreement with Louissaint, preventing the jury from taking the true measure of Louissaint's incentives.

All three claims fall short. Baptiste's first argument—about the government's alleged citizenship deal with Moltimer—rests on misleadingly selective quotations of the record. Baptiste explains that Moltimer's attorney indicated that Moltimer had been "granted American citizenship," encouraging us to infer that this "grant[]" was in exchange for Moltimer's testimony against Baptiste. But just before the snippet that Baptiste highlights, Moltimer's attorney stated that Moltimer "has been granted American citizenship *because of his being brought here when he was very young*" and that Moltimer's "mother was an American citizen." (emphasis added). And just after the passage excerpted by Baptiste, Moltimer's attorney continued, "ICE came to see him and went forward, and he has been granted American citizenship, *which he should have had from the start*." (emphasis added). Come on. Baptiste's assertion that the government failed to disclose a citizenship-for-testimony deal with Moltimer is worse than conjectural—it appears to be flatly contradicted by the record.

As for Moltimer's testimony that he first met Pagnon three years after Pagnon's death, Baptiste is of course correct that—barring either time travel or necromancy—Moltimer was wrong. But the focus for our purposes is not the shakiness of Moltimer's chronology but rather the government's failure to correct it. *See Giglio v. United States*, 405 U.S. 150, 153 (1972). To prove that the government's inaction violated his rights, Baptiste must show not only that the

government "[1] knowingly used perjured testimony, or failed to correct what [it] subsequently learned was false testimony, and [2] that the falsehood was material," but also that the testimony was "[3] given with the willful intent to provide false testimony and not as a result of a mistake, confusion, or faulty memory." *United States v. Horner*, 853 F.3d 1201, 1206 (11th Cir. 2017) (quoting another source), *cert. denied*, 138 S. Ct. 674 (2018). Even setting aside that the jury was repeatedly reminded—including by Baptiste's attorney—that Pagnon was long dead by 2014, and that the falsehood was thus unlikely to have been material, Moltimer's testimony clearly indicates "mistake, confusion, or faulty memory." *See id.* He said, for instance: "I've been in prison for almost two years. I think met Marvin [Pagnon] in 2014. I don't remember the exact date . . . ." That testimony, we think, hardly suggests a "willful intent" to deceive on the government's part.

Finally, Baptiste alleges that the government failed to disclose a cooperation agreement with Louissaint. Baptiste seizes on Louissaint's testimony that he was "still going to get charged." Baptiste points out that, in fact, Louissaint was never charged, and he asks us to infer that the government cut a(nother) secret deal. Again, we aren't persuaded—in part because the claim is highly speculative, and in part because, in order to prove materiality, Baptiste must show that the jury made credibility inferences from Louissaint's comment that don't necessarily follow. For Louissaint's comment to be material, the jurors would have had to follow

something like the following chain of logic: (1) Louissaint testified that he was "still going to get charged"; (2) therefore [the jurors infer], Louissaint was not a cooperating witness, and in no way beholden to the government; (3) therefore [the jurors continue], Louissaint's testimony is more persuasive than it would have been if he weren't "going to get charged." The second statement doesn't necessarily follow from the first, nor the third from the second. Absent more compelling evidence that Louissaint actually cut a deal, we decline to indulge the sorts of leaps that Baptiste's argument requires.

b

The prosecutor told the jury during his closing argument that "everything out of [Francesse Chery's] mouth was a complete lie," that Baptiste "paid [a witness] to lie on the stand," and that "the only thing that smells like a fish . . . is the testimony of Francesse Chery." Baptiste argues that these statements mischaracterized the evidence presented at trial. He also takes issue with the prosecutor's summary of his defense as being "duped" by a "dead guy."

We'll start with the fish. "[A] prosecutor is justified in arguing during closing arguments that a particular witness is lying, if that is an inference supported by the evidence at trial." *United States v. Schmitz*, 634 F.3d 1247, 1270 (11th Cir. 2011). Anael Chery's testimony regarding his sister's truthfulness (or lack thereof) provided adequate support for the inference that Francesse lied on the

stand. The government's description of the piscatorial odor emanating from Francesse's testimony was also permissible, if a little cheesy. *Cf. Tucker v. Kemp*, 762 F.2d 1496, 1507 (11th Cir. 1985) (en banc) (references to defendant as "less than human," "not somebody in our society that we can afford to keep," and "a danger like a time bomb" permitted because "supported by the evidence.").[2]

What about the government's duped-by-a-dead-guy description of Baptiste's defense theory? While Baptiste undoubtedly dislikes the government's turn of phrase, a passage from his own brief suffices to indicate its essential accuracy. To recap, in closing, the government's lawyer said that Baptiste was trying to "make it look like some dead guy duped [him]." Baptiste's brief on appeal summarizes his position as follows: "Pagnon masterminded the scheme to dupe the unsuspecting Baptiste." Br. of Appellant at 19. Pretty similar.

In sum, although "[l]ittle time and no discussion is necessary to conclude that it is improper for a prosecutor to use misstatements and falsehoods," *Davis v. Zant*, 36 F.3d 1538, 1548 (11th Cir. 1994), we see neither here.

B

[2] We'll cut the government a bit of slack given the context. The government's "fish" comment came in response to Baptiste's attorney's extended analogy at closing comparing Baptiste to a starfish tossed ashore by a hurricane. Baptiste's attorney concluded, "My client, Junior Jean Baptiste, is the starfish," asking the jury "to fulfill your oath, look in your heart, do what the law requires, apply reasonable doubt and throw [Baptiste] back, throw him back to his family." Ooooooookay.

Now for the feature presentation. Recall Anael Chery testified that his sister, Francesse, told him that Baptiste was going to give her a Mercedes CLA 45 in exchange for favorable testimony. Responding to Baptiste's objection, the district court said that's "got to be hearsay." Yep—textbook: "'Hearsay' means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c). Even so, the district court ultimately admitted Anael's testimony under the statement-against-interest exception to the rule against hearsay, *see* Fed. R. Evid. 804(b)(3), because Francesse's underlying statement "could subject [her] to perjury" or other "charges."

1

Perhaps anticipating some rough sledding, the government makes only a token effort to defend the district court's ruling—the statement-against-interest exception typically requires that the declarant be "unavailable," after all, and Francesse testified at trial. *See* Fed. R. Evid. 804(b) ("The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness . . . ."). The government goes on, though, to float three alternative rationales for why Anael's testimony was admissible: as the statement of a party opponent under Federal Rule of Evidence 801(d)(2)(D); as a statement by a co-conspirator under

Rule 801(d)(2)(E); and, finally, under Rule 807's residual exception. For good measure, the government concludes its tour of the Federal Rules of Evidence by adding that even if the admission of Anael's testimony was erroneous, this error was harmless in light of the weight of the other (undoubtedly admissible) evidence against Baptiste.

We'll forgo the tour and head straight to the finish line. We conclude that we needn't determine whether the district court erred in admitting Anael's testimony—as a statement against interest, or via any other exclusion or exception to the hearsay rule—because any error was indeed harmless. "Even where an abuse of discretion is shown, nonconstitutional evidentiary errors are not grounds for reversal absent a reasonable likelihood that the defendant's substantial rights were affected." *United States v. Sellers*, 906 F.2d 597, 601 (11th Cir. 1990); Fed. R. Evid. 103(a); *see also United States v. Guzman*, 167 F.3d 1350, 1353 (11th Cir. 1999) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946), for the proposition that "a nonconstitutional error requires reversal only if it resulted 'in actual prejudice because it had substantial and injurious effect or influence in determining the jury's verdict'") (cleaned up).

It's the government's burden to demonstrate that an alleged error was harmless, *United States v. Sweat*, 555 F.3d 1364, 1367 (11th Cir. 2009), and we conclude that it has met that burden here. Strike Anael's testimony and the jury

would still have had before it—and we're only hitting the highlights here—Baptiste's curiously high income, gobs of documentary evidence showing fraudulent behavior, and the testimony of Moltimer and Louissaint, including that Baptiste planned to (and at trial did) "blame it on Marvin." Under a long line of precedent, *see United States v. Hornaday*, 392 F.3d 1306, 1316 (11th Cir. 2004) (collecting applications of *Kotteakos*), such overwhelming evidence of guilt suffices to demonstrate that whatever error the district court might have committed didn't have a "substantial and injurious effect." *Kotteakos*, 328 U.S. at 776. Nor could the alleged error have influenced a reasonable juror's verdict.

2

Anael's testimony relating Francesse's statement about the Mercedes also underlay the district court's imposition of a sentencing enhancement for obstruction of justice. Baptiste objects that because Francesse's statement was inadmissible hearsay, the district court improperly relied on it in finding obstruction.

Section 3C1.1 of the Sentencing Guidelines provides for a two-level enhancement if "the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction." U.S.S.G. § 3C1.1.

Examples of covered conduct include "committing, suborning, or attempting to suborn perjury." *Id*. at cmt. 4(B).

If Anael's testimony were admissible under one of the exceptions or exclusions to the rule against hearsay, there wouldn't be any question that the district court was on firm footing in relying on it for the enhancement. But if the testimony was inadmissible, then our earlier conclusion that its admission at trial was harmless wouldn't (in and of itself) validate the district court's reliance on it at sentencing. It all boils down to harm. Even if we strike Anael's testimony, there was still ample evidence supporting Baptiste's conviction. With regard to that component of the trial, Anael's testimony was harm*less*. But Anael's testimony provided the only evidence supporting Baptiste's enhancement for obstruction. With regard to that component of the trial, Anael's testimony was necessarily harm*ful*.

So have we reached the end of the road, such that we finally have to make a call on the admissibility of Anael's testimony? Not quite. Thanks to the "reliable hearsay" doctrine—which permits sentencing courts to rely on otherwise-inadmissible hearsay evidence in certain circumstances—we can reserve judgment on the evidence's admissibility (as we've done) while still addressing the district court's enhancement.

The doctrine is rooted in § 6A1.3 of the Sentencing Guidelines, which states that a court "may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." U.S.S.G. § 6A1.3. Indeed, it's well established that "[i]n determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial." *Id.* at cmt. The reason, the Supreme Court has explained, is that "modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial." *Williams v. New York*, 337 U.S. 241, 247 (1949). *Williams*' "modern concepts" are old hat today, but no less important for it. Hence the need for a clear-headed understanding of when—and under what circumstances—hearsay evidence, in particular, can be deemed sufficiently reliable to support a sentencing decision.

The Sentencing Guidelines' text—just quoted—is crystal clear. It articulates a single precondition to a district court's consideration of otherwise inadmissible evidence, including hearsay, as part of its sentencing calculus: The evidence is fair game "provided that the information has sufficient indicia of reliability to support its probable accuracy." U.S.S.G. § 6A1.3. The trickier question is whether our

case law has engrafted another, extratextual criterion. In particular, we've sent vaguely mixed signals about whether, as a prerequisite to relying on hearsay evidence at sentencing, a district court must make express findings on the record that the evidence is reliable—or if, instead, as the Guidelines' language indicates, it's enough that the record as a whole provides "sufficient indicia of reliability." The distinction matters here because it's undisputed that the district court did *not* make any explicit findings about the reliability of Francesse's testimony.

Some have read our decision in *United States v. Lee*, 68 F.3d 1267 (11th Cir. 1995), as requiring express findings that the hearsay evidence is reliable. For reasons we have explained before—and will reiterate here—that is incorrect. The defendant in *Lee* objected that the district court had relied on the hearsay evidence of one of his co-conspirators—Russell—in determining his sentence. *See id*. at 1275. We observed, as an initial matter, that "[a]ccording to the Sentencing Guidelines, and our case law interpreting them, the district court 'may consider any information, including reliable hearsay, regardless of the information's admissibility at trial, provided that there are *sufficient indicia of reliability* to support its probable accuracy.'" *Id*. (quoting *United States v. Castellanos*, 904 F.2d 1490, 1495 (11th Cir. 1990), and citing U.S.S.G. § 6A1.3). We stated that "the focus" of the inquiry "is upon the question of [the hearsay evidence's] reliability," and we further explained that reliability "must be determined on a case

by case basis." *Id*. The government there contended that Russell's hearsay statements were reliable because they were "against his penal interest," and we acknowledged that as a general matter "a statement made against one's penal interest may bolster its credibility." *Id*. at 1275–76. Even so, we concluded that "[i]n Russell's case," his penal interest "fail[ed] to qualify as a 'sufficient indic[ium] of reliability'" given his "status as a fugitive from justice." *Id*. at 1276. Accordingly, we concluded that "[s]pecific findings on Russell's credibility [were] necessary before the district court c[ould] use this evidence as a basis for determining" the defendant's sentence, and we remanded for the district court "to make further findings as to the reliability of Russell's hearsay statement." *Id*.

Our subsequent decision in *United States v. Gordon*, 231 F.3d 750 (11th Cir. 2000), clarified *Lee*'s holding and reach. The defendant there cited *Lee* in support of his contention "that the district court was required to make specific findings regarding the reliability" of hearsay testimony on which the government sought to rely at sentencing. *Id*. at 760. In response, we explained that *Lee* was never intended to—and didn't—prescribe a *per se* rule that findings are always necessary. *Id*. at 760–61. Rather, we made clear, *Lee*'s holding—that findings were required there—was a product of the "circumstances" that underlay that particular case. *Id*. Specifically, we said, it was because the traditional against-penal-interest justification didn't cut it, and because the hearsay declarant was a

fugitive, that the *Lee* court found "the absence of findings … particularly glaring and troubling." *Id*. By contrast, we emphasized in *Gordon*, where the record and the circumstances of the case "demonstrate adequate indicia of reliability," findings are not strictly necessary. *Id*. at 761. In such a case, a "district court's failure to make separate findings regarding the reliability of [hearsay] statements [is] not error." *Id*. Put differently, "the absence of such findings does not necessarily require reversal or remand where the reliability of the statements is apparent from the record." *Id*.[3]

So … is this a "*Lee*" case—in which the traditional indicia of reliability fall short and findings are thus required—or a "*Gordon*" case—in which the traditional indicia provide the necessary comfort? Clearly the latter, we think. For one,

[3] One loose end: After *Lee* but before *Gordon*, in *United States v. Anderton* we addressed a similar complaint that a district court had erroneously based its sentencing decision on "unreliable hearsay." 136 F.3d 747, 751 (11th Cir. 1998). In the course of rejecting that contention, we recited that "a court may rely on hearsay at sentencing, as long as the evidence has sufficient indicia of reliability, the court makes explicit findings of fact as to credibility, and the defendant has an opportunity to rebut the evidence." *Id.* Seemingly in support of the "explicit findings" aspect of that statement—albeit without saying so expressly—we cited our earlier decision in *Lee*. *Id. Anderton*, though, doesn't stand for the sort of *per se* rule that the *Gordon* defendant sought and that the *Gordon* panel rejected. The parties in *Anderton* never disputed whether "explicit findings" were required, and nothing rode on that issue. *Id.* Our decision simply assumed (at least in the circumstances presented) that they were, observed that the district court had made them, and held that they weren't clearly erroneous. *Id.* The same is true of our post-*Gordon* decisions in *United States v. Zlatogur*, 271 F.3d 1025, 1031 (11th Cir. 2001), and *United States v. Patti*, 337 F.3d 1317, 1326 (11th Cir. 2003), which merely recite *Anderton*'s boilerplate. And to the extent that one could read *Anderton* as contradicting *Lee*, and as holding that express findings of credibility are always required, we are bound by our prior-precedent rule to apply our earlier decision in *Lee*. *See United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir. 1998) (en banc).

Francesse's statement—that Baptiste had promised her a Mercedes in exchange for favorable testimony—was clearly against both her and Baptiste's penal interests,[4] and there's no "fugitive from justice"-like reason here, as there was in *Lee*, to discount the force of that established gauge of reliability. For another, Francesse's statement aligned with Louissaint's testimony regarding how Baptiste planned to "blame everything" on Pagnon. And for yet another, her statement specifically identified the make and model of car she was set to receive. All of these are "indicia of reliability," and by our lights, collectively clear the "sufficien[cy]" threshold. *See Lee*, 68 F.3d at 1276.

Because this isn't the sort of case in which explicit findings were required, the district court didn't err in not making any. Nor did it err in relying on Francesse's sufficiently-reliable testimony to impose the obstruction-of-justice enhancement.

C

That leaves a few sentencing-related loose ends.

1

As an initial matter, Baptiste challenges the district court's imposition of sentencing enhancements for the amount of money that the government lost and

[4] Even if, as we have said, it might (?) not formally qualify for the statement-against-interest exception to the hearsay rule because Francesse testified at trial and thus might (?) not have been "unavailable," as Rule 804(b)(3) requires. *See supra* at 16–17.

the number and vulnerability of the scheme's victims. U.S.S.G. § 2B1.1(b)(1)(K) (amount lost exceeding $9,500,000); § 2B1.1(b)(2)(A) (offense involving more than 10 victims); § 3A1.1(b)(1)–(2) (vulnerable victims).

a

As for the amount of money involved, we note first that Baptiste expressly withdrew all objections except those relating to the enhancements for obstruction of justice and the number and vulnerability of his victims. We needn't determine whether in doing so Baptiste invited any alleged error, because even under the typical clear-error standard, *see United States v. Castaneda-Pozo*, 877 F.3d 1249, 1251 (11th Cir. 2017), Baptiste's argument fails. The government submitted evidence indicating that Surveillance Master and its associated bank accounts were all under Baptiste's name. The identification documents reviewed by Customs and Immigration Services also demonstrated that it was reasonable for the district court to conclude that virtually all of Surveillance Master's check-cashing business was fraudulent—629 of the 630 IDs reviewed were fakes. Finally, "[t]he district court is only required to make a reasonable estimate of the loss." *United States v. Cobb*, 842 F.3d 1213, 1218 (11th Cir. 2016); U.S.S.G. § 2B1.1, cmt. 3(C); *see also United States v. Medina*, 485 F.3d 1291, 1304 (11th Cir. 2007) (indicating that a reasonable estimate is particularly appropriate in fraud cases because the amount lost is often difficult to determine with precision). We thus have evidence

indicating that the sums lost went to Baptiste, that virtually all of the money that passed through the check-cashing business was linked to the scheme, as well as precedent underscoring that the district court could apply this enhancement even if it couldn't determine a precise figure. Taken together, we don't see error here, much less of the "clear" variety.

b

Baptiste's challenges to the enhancements based on the vulnerability and number of the scheme's victims travel together. The Sentencing Guidelines provide for a two-level increase on the ground that he "knew or should have known that a victim of the offense was a vulnerable victim." U.S.S.G. § 3A1.1(b)(1). We have held that "both circumstances and immutable characteristics can render a victim vulnerable," *United States v. Bradley*, 644 F.3d 1213, 1288 (11th Cir. 2011), and that "[n]either bodily injury nor financial loss is required" for the enhancement, *United States v. Moran*, 778 F.3d 942, 978 (11th Cir. 2015). Our decision in *United States v. Pierre*, 825 F.3d 1183 (11th Cir. 2016), settles the matter with regard to Baptiste's use of prisoners' identities. We explained there that "inmates have unique circumstances and immutable characteristics that make them . . . vulnerable to . . . fraudulent activity." *Id*. at 1196; *see also id.* ("Inmates usually do not file tax returns during periods of incarceration, and they are less likely to discover that their identities have been compromised."). The government

presented evidence showing that Baptiste specifically requested the identities of prisoners, so the vulnerability-of-victims enhancement checks out.[5] So too the number-of-victims enhancement; the district could reasonably infer from the evidence detailing the number of checks that Baptiste cashed that he had targeted a "large number" of people. *See* U.S.S.G. § 3A1.1(b)(2) (stipulating that if (i) § 3A1.1(b)(1) applies and (ii) "the offense involved a large number of vulnerable victims," the defendant's offense level should be raised an additional two levels.).

2

Finally—and simply for us—the parties agree that the district court plainly erred in failing to "address the defendant personally in order to permit the defendant to speak" at sentencing, as Federal Rule of Criminal Procedure 32(i)(4)(A)(ii) expressly requires.[6] In response to the district court's query, "Does the defendant wish to address me?", Baptiste's attorney responded on his client's behalf: "Mr. Baptiste respectfully has nothing to add." However formalistic it may seem, and even reviewing for plain error, we agree with the parties that this

[5] Because the record supports the district court's finding that Baptiste targeted incarcerated victims, we can affirm the enhancement for vulnerable victims on that ground alone. We needn't determine whether the deceased count as "vulnerable" as that term is used in § 3A1.1(b). *Compare United States v. Roberson*, 872 F.2d 597, 609 (5th Cir. 1989) (sentence of a defendant convicted of fraud properly enhanced where the defendant used a dead companion's credit card after burning his corpse), *with United States v. Shumway*, 112 F.3d 1413, 1424 (10th Cir. 1997) (refusing to find that skeletal remains are a "vulnerable victim").

[6] "Before imposing sentence, the court must . . . (ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence . . . ." Fed. R. Crim. P. 32(i)(4)(A)(ii).

exchange—between court and counsel rather than court and defendant—amounted to "(1) error, (2) that is plain and (3) that affect[ed] [Baptiste's] substantial rights," and that the error "[4] seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *United States v. Turner*, 474 F.3d 1265, 1276 (11th Cir. 2007); *United States v. Doyle*, 857 F.3d 1115, 1120 (11th Cir. 2017) ("[T]he presumption of prejudice in denial of allocution cases is still the rule when a defendant is not sentenced at the bottom of his guidelines range . . . ."); *United States v. Prouty*, 303 F.3d 1249, 1251 n.1 (11th Cir. 2002) (rejecting "the Government's argument that directing comments to the lawyers suffices to comply with the rule"). On remand, Baptiste should be afforded the opportunity to address the court directly.

III

Accordingly, we hold as follows:

(A) The district court did not abuse its discretion in refusing to allow Baptiste to introduce evidence that Marvin Pagnon had duped others into participating in similar schemes. Nor did the government fail to disclose any material information concerning its witnesses or mischaracterize or exaggerate the evidence during its closing argument.

(B) Any error that the district court might have committed in admitting Anael Chery's testimony relaying his sister Francesse's statement that Baptiste had

promised her a car in exchange for favorable testimony was harmless. And the district court did not err in relying on the same evidence to support an obstruction-related sentencing enhancement because the record reveals that the evidence bore "sufficient indicia of reliability."

(C) The district court did not err in imposing sentencing enhancements pertaining to the amount of money that the government lost and the number and vulnerability of Baptiste's scheme's victims. The district court did reversibly err, however, when it failed to permit Baptiste to allocute personally.

AFFIRMED IN PART AND REMANDED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-17175-AA ; 16-17595 -AA

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

JUNIOR JEAN BAPTISTE,

Defendant - Appellant.

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

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILLIAM PRYOR, NEWSOM, and BRANCH, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

UNITED STATES CIRCUIT JUDGE

ORD-46

Date of Original Judgment: 11/16/2016

Reason for Amendment:

X – Remand from 11th Circuit Court of Appeals.

UNITED STATES DISTRICT COURT

Southern District of Florida
Miami Division

UNITED STATES OF AMERICA
v.
JUNIOR JEAN BAPTISTE

SECOND AMENDED
JUDGMENT IN A CRIMINAL CASE

Case Number: **15-20777-CR-MARTINEZ(s)**
USM Number: **08580-104**

Counsel For Defendant: **Richard Klugh**
Counsel For The United States: **Michael Berger**
Court Reporter: **Ellen Rassie**

The defendant was found guilty on count(s) 1, 3 through 28 of the Superseding Indictment.

The defendant is adjudicated guilty of these offenses:

TITLE & SECTION	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
Title 18, U.S.C. § 1956(h)	conspiracy to commit money laundering	01/25/2012	1
Title 18 U.S.C. § 1956(a)(1)(B)(i)	money laundering	02/18/2011	3 and 4
Title 18 U.S.C. § 1028(a)(3)	possession of five or more false identification documents with unlawful intent	10/12/2011	5
Title 18 U.S.C. § 1028(a)(3)	possession of five or more false identification documents with unlawful intent	01/25/2012	6
Title 18 U.S.C. § 641	theft of government money	02/22/2011	7
Title 18 U.S.C. § 641	theft of government money	03/08/2011	8
Title 18 U.S.C. § 641	theft of government money	03/08/2011	9
Title 18 U.S.C. § 641	theft of government money	05/01/2011	10
Title 18 U.S.C. § 641	theft of government money	05/02/2011	11
Title 18 U.S.C. § 641	theft of government money	05/09/2011	12
Title 18 U.S.C. § 641	theft of government money	05/24/2011	13
Title 18 U.S.C. § 641	theft of government money	06/07/2011	14
Title 18 U.S.C. § 641	theft of government money	07/06/2011	15
Title 18 U.S.C. § 641	theft of government money	07/07/2011	16
Title 18 U.S.C. § 641	theft of government money	08/24/2011	17

Title 18 U.S.C. § 641	theft of government money	09/01/2011	18
Title 18 U.S.C. § 641	theft of government money	09/01/2011	19
Title 18 U.S.C. § 1028A(a)(1)	aggravated identity theft	10/12/2011	20 to 22
Title 18 U.S.C. § 1028A(a)(1)	aggravated identity theft	01/25/2012	23 to 25
Title 18 U.S.C. § 1028A(a)(1)	aggravated identity theft	10/12/2011	26 to 28

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

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.

Date of Imposition of Sentence: **1/29/2020**

Jose E. Martinez
United States District Judge

Date: 2/3/2020

DEFENDANT: **JUNIOR JEAN BAPTISTE**
CASE NUMBER: **15-20777-CR-MARTINEZ(s)**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **212 Months; this term of imprisonment consists of 188 months as to each counts 1, 3, 4; and 60 months as to counts 5, 6; and 120 months as to counts 7 through 19; all to run concurrently; and 24 months as to counts 20 through 28; to run consecutively to the 188 months term.**

The court makes the following recommendations to the Bureau of Prisons: Defendant shall be assigned to a facility in South Florida or as close as possible commensurate with his background and the offense of which he stands convicted.

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

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **JUNIOR JEAN BAPTISTE**
CASE NUMBER: **15-20777-CR-MARTINEZ(s)**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3 years - this term of supervised release consists of 3 years as to each of counts 1, and 3 through 19; and 1 year as to each of counts 20 through 28; all to run concurrently.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall 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 defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

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

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **JUNIOR JEAN BAPTISTE**
CASE NUMBER: **15-20777-CR-MARTINEZ(s)**

SPECIAL CONDITIONS OF SUPERVISION

Financial Disclosure Requirement - The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

No New Debt Restriction - The defendant shall not apply for, solicit or incur any further debt, included but not limited to loans, lines of credit or credit card charges, either as a principal or cosigner, as an individual or through any corporate entity, without first obtaining permission from the United States Probation Officer.

Permissible Search - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Self-Employment Restriction - The defendant shall obtain prior written approval from the Court before entering into any self-employment.

Substance Abuse Treatment - The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

DEFENDANT: **JUNIOR JEAN BAPTISTE**
CASE NUMBER: **15-20777-CR-MARTINEZ(s)**

CRIMINAL MONETARY PENALTIES

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

	Assessment	Fine	Restitution
TOTALS	$2,700.00	$0.00	$11,098,262.50

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.

NAME OF PAYEE	TOTAL LOSS*	RESTITUTION ORDERED
Internal Revenue Service (IRS)-RACS		$11,098,262.50

Restitution with Imprisonment - It is further ordered that the defendant, **JUNIOR JEAN BAPTISTE**, shall pay restitution in the amount of **$11,098,262.50**, of this amount, $70,000.00 is owed joint and several with Karl Yves Moltimer in a related case number 14-CR-20227-CMA. During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay a minimum of $25.00 per quarter toward the financial obligations imposed in this order. Upon release from incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the Court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the Court any material change in the defendant's ability to pay. These payments do not preclude the government from using any other anticipated or unexpected financial gains, assets or income of the defendant to satisfy the restitution obligations. The restitution shall be made payable to Clerk, United States Courts, and forwarded to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 N MIAMI AVENUE, RM 8N09
MIAMI, FL 33128

The restitution will be forwarded by the Clerk of the Court to the victims.

* 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.

**Assessment due immediately unless otherwise ordered by the Court.

DEFENDANT: **JUNIOR JEAN BAPTISTE**
CASE NUMBER: **15-20777-CR-MARTINEZ(s)**

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 $2,700.00 due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during 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.

This assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 08N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

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.

CASE NUMBER DEFENDANT AND CO-DEFENDANT NAMES (INCLUDING DEFENDANT NUMBER)	TOTAL AMOUNT	JOINT AND SEVERAL AMOUNT
14-20117-CR-ALTONAGA-01, KARL YVES MOLTIMER		$70,000.00
15-20777-CR-MARTINEZ-01, JUNIOR JEAN BAPTISTE		$11,098,262.50

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) penalties, and (8) costs, including cost of prosecution and court costs.