No. 22A-____

IN THE
Supreme Court of the United States

KENNETH W. RAVENELL,

Applicant,

– v. –

UNITED STATES OF AMERICA,

Respondent.

On Application from the United States Court of Appeals for the Fourth Circuit

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APPLICATION TO THE CHIEF JUSTICE FOR BAIL PENDING APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND REQUEST FOR ADMINISTRATIVE STAY

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APPLICATION IN SUPPORT OF BAIL PENDING APPEAL
ON BEHALF OF KENNETH RAVENELL

To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the Fourth Circuit:

Kenneth Ravenell respectfully submits this Application to your Honor as Circuit Justice for the Fourth Circuit Court of Appeals, pursuant to Supreme Court Rule 22 subd. 5, seeking bail and a stay of sentence pending his appeal in the United States Circuit Court for the Fourth Circuit, following his conviction upon a single count of Conspiracy to Commit Money Laundering and sentence of 57 months. Mr. Ravenell has been ordered to surrender on or before ***October 15, 2022***, and we therefore respectfully request that this application be expedited.[1]

This Application is made following the Fourth Circuit's September 7, 2022, Order denying Mr. Ravenell's petition for en banc review of the denial of bail by a panel of the Fourth Circuit (one judge dissenting). Neither the panel opinion nor the en banc majority explained the reasons for its ruling. However, five of the active Judges of the Fourth Circuit, including Chief Judge Gregory, dissented from the denial of en banc review and four of these judges dissented in a published opinion written by Circuit Judge Wynn, who did not mince words regarding the reasons for their dissent:

[1] Mr. Ravenell is presently at liberty on his own recognizance with his travel restricted to the continental United States.

The Court today refuses to consider a trial judge's order denying the motion of Kenneth Ravenell—a prominent African American attorney in Baltimore—for bail or release pending appeal.[2] What puzzles me is that this same Court had no problem with granting the former Governor of Virginia, Robert McDonnell, the very same relief that Ravenell seeks even though there is no relevant factual difference between the two defendants' motions.

Like Governor McDonnell, the trial judge denied Ravenell bail. Like Governor McDonnell, Ravenell appealed to this Court for relief. Like Governor McDonnell, it is undisputed that Ravenell is not likely to flee or pose a danger to the safety of any other person or the community if released.[3] So, like Governor McDonnell, the only question here is whether Ravenell's appeal raises "a substantial question of law or fact likely to result in . . . an order for a new trial." 18 U.S.C. § 3143(b)(1)(B). A "substantial question" is defined as "a close question that could be decided either way." *United States v. Steinhorn*, 927 F.2d 195, 196 (4th Cir. 1991) (per curiam).

Herein lies the rub. The issue of whether a substantial question is present is far more evident in Ravenell's case than it was in Governor McDonnell's case. Ravenell points to an extraordinarily close question of whether the trial judge should have instructed the jury on the statute of limitations on the basis of significant evidence that the statute of limitations bars *all of the conduct* related to Ravenell's offense from criminal prosecution. And, as in Governor McDonnell's case, "'if decided in favor of the accused[,]' [this issue] is 'important enough' to warrant reversal or a new trial." Order Granting Release Pending Appeal at 2, *U.S. v. McDonnell*, No. 15-4019 (4th Cir. Jan. 26, 2015) (quoting *Steinhorn*, 927 F.2d at 196).

Try as one might, one can point to no discernible difference that justifies granting release pending appeal to Governor McDonnell and denying it to Ravenell. It is an inconsistency that my good colleagues decline to confront. That's not fair.

I dissent.

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[2] The Dissent's first footnote states: "On appeal to this Court, a divided panel, inexplicably, declined to reverse the trial court's order. Ravenell now asks us to vacate that panel determination, consider his motion en banc, and reverse the trial court's order."

[3] The Dissent's second footnote states: "Nor is there any contention that his appeal is brought 'for the purpose of delay.'" 18 U.S.C. § 3143(b)(1)(B).

(*See* Application Exhibit C.)[4]

The dissenting opinion expresses concerns we respectfully hope will also concern your Honor, and merit your review. Indeed, the conviction in this case hangs by a thread, with both of Mr. Ravenell's co-defendants having been acquitted and the jury having acquitted Mr. Ravenell of six of the seven charges against him. With obviously substantial legal issues on appeal, as set forth in detail below and in Mr. Ravenell's Fourth Circuit brief, and the strong dissents of five circuit court judges, this case stands out from the ordinary. Below, we provide the following overview of the case and the reasons Mr. Ravenell should be granted bail pending appeal.[5]

THE ONLY ISSUE RELEVANT TO BAIL IN THIS CASE IS WHETHER THE APPEAL PRESENTS A "SUBSTANTIAL ISSUE"

Bail pending appeal should be granted where the defendant is not likely to flee and does not pose a danger to any person or the community, and the appeal raises "a substantial issue of law or fact likely to result in" reversal or a new trial. *See* 18 U.S.C. § 3143(b). "[I]n the Fourth Circuit, a 'substantial question of law or fact' is one that presents a 'close question or one that very well could be decided the

[4] Mr. Ravenell's Petition for En Banc Review is attached as Application **Exhibit A**. The Government's Memorandum in Opposition is attached as Application **Exhibit B**. The Fourth Circuit's Order denying en banc review, and the Dissenting Opinion are attached as Application **Exhibit C**. Mr. Ravenell's Brief on Appeal which provides a more detailed exploration of the issues is attached as Application **Exhibit D**. A letter of support from 22 past presidents of the National Association of Criminal Defense Lawyers is attached as Application **Exhibit E**. To distinguish these exhibits from trial and other exhibits referenced herein, Exhibits A through E have been designated as "Application Exhibit (A-E)" Upon the Court's request we will make available the entire record below or any part thereof.

[5] Mr. Ravenell's appellate brief was filed on September 2, 2022. The Government's brief and Mr. Ravenell's reply brief will be filed on September 23 and October 3, respectively. We anticipate that oral argument, if ordered, and the Fourth Circuit's opinion will follow soon thereafter.

other way.'" *United States v. Antoine*, No. 1:18CR17-1, 2021 WL 3882972, at *1 (N.D.W. Va. Aug. 13, 2021), quoting *United States v. Steinhorn*, 927 F.2d 195, 196 (4th Cir. 1991) (granting bail pending appeal because "Steinhorn's assignment of error to the court's refusal to instruct on entrapment presents a close question that could be decided either way.").

In this case the parties agreed that Mr. Ravenell is neither a flight risk nor a danger to the community and, therefore, the sole issue was, and is, whether the appeal presents a substantial question of law or fact. We and the published dissent believe that question must be answered in the affirmative and thus bail should be granted.

STATEMENT OF FACTS

Born into a sharecropping family in South Carolina in 1959, Mr. Ravenell escaped the cage of poverty through hard work, scholastic achievement, and dedication to the law. (Dkt. 549 at 22–24.) His perseverance led him to the University of Maryland Law School, and upon graduation, the Office of the State's Attorney for Baltimore, where he served the community as a prosecutor for over three years. *Id.* In 1988, Mr. Ravenell left public service and joined private practice. *Id.*

Over his 37-year career, Mr. Ravenell has become a recognized and respected fixture of the Maryland legal community. *Id*. As retired Fourth Circuit Court of Appeals Justice Andre M. Davis testified at trial: "Mr. Ravenell is a person of unquestioned good character. . . . He has the respect of judges and other lawyers, and he has really manifested, in my view over the course of his career, just

everything we want in a legal professional." Trial Tr. Vol. X at 96:9–14 (Dec. 17, 2021); *see also id.* at 89:2–3 (retired Judge Joseph F. Murphy, Jr. who served as Chief Judge of the Maryland Court of Special Appeals and later on the Court of Appeals: "[Mr. Ravenell] has a very fine and excellent character for truthfulness [and] candor, and candor to the tribunal."). The attorney who vetted Mr. Ravenell's candidacy for his induction into the American College of Trial Lawyers further testified at trial that, based on interviews with numerous judges and attorneys (including prosecutors), Mr. Ravenell's reputation in the legal community "was in a word, superlative." JA2487-2490 at 16:12–19:3. Among the eighty-eight character letters submitted to the district court, thirty-seven lawyers attested to Mr. Ravenell's outstanding character, unquestionable integrity, unparalleled work ethic, and legal acumen, including ACLU lawyers who stated: "Simply put, we know Mr. Ravenell to be an attorney of extraordinary ability, integrity, and dedication to the public good, who is a credit to the Maryland bar." (Dkt. 549 at 27–28.)

On December 28, 2021, a jury acquitted Mr. Ravenell of six charges alleging RICO and narcotics conspiracies and obstruction of justice. The jury convicted Mr. Ravenell of a single count alleging conspiracy to commit money laundering. This count alleged three conspiratorial objects, any one of which could support conviction if proven: (1) 18 U.S.C. § 1956(a)(1)(A)(i) (promotion); (2) 18 U.S.C. § 1956(a)(1)(B)(i) (concealment); and (3) 18 U.S.C. § 1957(a) (monetary transaction of over $10,000 in criminally derived property). Because the jury returned a general verdict, there is no way to determine which conspiratorial object(s) it found proven. The possibility

the jury convicted under a legally infirm theory as to the § 1957(a) object mandates reversal of Mr. Ravenell's conviction and therefore supports the granting of bail.

At trial, the government presented evidence of money laundering involving Mr. Ravenell's receipt of proceeds from two distinct, unrelated clients charged with drug trafficking, Richard Byrd and Leonaldo Harris, who paid Mr. Ravenell solely for criminal defense representation. *See* Trial Tr. Vol. III at 120:2–8 (Dec. 8, 2021) (Byrd testifying that Harris "was a part of a different [marijuana] operation"); Trial Tr. Vol. IX at 170:4–9 (Dec. 16, 2021) (Harris testifying that he and Byrd were not part of the same drug organization and "never worked together"); Trial Tr. Vol. XIII at 108:2–4 (Dec. 22, 2021) (government summation explaining Harris was in "an entirely separate [drug] crew" with "[n]o association with Richard Byrd").

The vast majority of the government's evidence at trial, which dated back to *2009*, related solely to the Byrd organization, including testimony from Byrd, his relatives, and others involved in his marijuana distribution operation. Byrd testified that Mr. Ravenell knowingly received drug proceeds, including over half of the money for legal fees, and was an active member of the Byrd drug trafficking organization from 2009 to early 2014. *See, e.g.*, Trial Tr. Vol. III at 82:5–83:4 (Dec. 8, 2021); Trial Tr. Vol. V at 69:14–70:6 (Dec. 10, 2021). Byrd's last payment to Mr. Ravenell (to his law firm) was made on January 6, 2014. Exhibit G at 4. Byrd also testified that he did not engage in any criminal activity after he was arrested on April 29, 2014. Trial Tr. Vol. V at 74:1–3 (Dec. 10, 2021). Byrd, however, also admitted to perjuring himself repeatedly before the district court and Fourth

Circuit. *See id.* at 135:1–24, 193:10–194:3. Ultimately, the jury, having had the opportunity to judge Byrd's credibility and to compare Byrd's depiction of Mr. Ravenell with the description of Mr. Ravenell's character provided by Judges Davis and Murphy and numerous others, acquitted on *every* count that required them to credit evidence relating to Byrd.

The government also presented testimony from Harris and his friend Avarietta Bailey about legal fees paid to Mr. Ravenell's firm for Harris's criminal defense. Both testified that the funds were Harris's drug proceeds and were delivered principally by Bailey, and that Mr. Ravenell knew their source at some point prior to Harris's final payment. *See* Trial Tr. Vol. IX at 176:3–14, 178:17–180:4, 236:7–12, 243:1–2, 246:21–247:18, 254:17–18 (Dec. 16, 2021). All of the drug proceeds Mr. Ravenell received from Harris were indisputably used to pay for Harris's criminal representation. *Id.* at 171:15–172:25, 176:3–8, 240:9–20. The last of these payments was made on April 25, 2014. Exhibit H at 2. In rebuttal closing, addressing the fact that Byrd had been thoroughly discredited at trial, the government argued the jury could reject the testimony of Byrd and his accomplices and convict Mr. Ravenell based *solely* on the testimonies of Bailey and Harris. *See* Trial Tr. Vol. XIV at 81:9–82:14 (Dec. 23, 2021) *See* JA3258 at 81:9–16 ("Leonaldo Harris and Avarietta Bailey both testified that they gave Ken Ravenell drug proceeds and that Bailey told Ravenell they were drug proceeds. Harris testified that Ravenell himself told Harris that Bailey had discussed with Ravenell that these were drug proceeds. And Harris gave Ravenell more than $10,000 in drug

proceeds. *That satisfies Count Two, the money laundering conspiracy and you can convict on the basis of Harris and Bailey alone*.") (emphasis added). Post-trial, the court and government each agreed Mr. Ravenell may have been convicted solely on the testimony of Harris and Bailey. Exhibit E at 3 ("the jury *could* have convicted Mr. Ravenell on the basis of testimony of Mr. Harris and Ms. Bailey alone"); Gov't Resp. to Def. Sent. Mem. at 3 (Dkt. 560) ("the jury *could* convict the Defendant based on the testimony of Harris and Bailey *alone*").

Per a pre-indictment tolling agreement, the parties agreed to toll the statute of limitations from July 2, 2019 until October 2, 2019. Accordingly, the five-year statute of limitations period applicable to the money laundering conspiracy here ran back to July 2, 2014. Thus, a charge based on a conspiracy that concluded prior to July 2, 2014, was precluded under the applicable statute of limitations.

After the government presented its case-in-chief, Mr. Ravenell moved for a judgment of acquittal under Rule 29 based in part upon the government's failure to establish criminal conduct within the applicable limitations period, which motion the trial court denied. Trial Tr. Vol. XII at 28:19–30:12, 39:10–15 (Dec. 21, 2021).

During the charge conference, the defense requested a jury instruction on the statute of limitations, which the court provisionally denied. *Id*. at 64:16–23, 69:17–70:17. The next day, Mr. Ravenell renewed his request for a jury instruction on the statute of limitations, offering the following revised instruction:

> There is a limit on how much time the government has to obtain an indictment. For you to find the defendant guilty of conspiracy as to Count Two, the government must prove by a preponderance of the

> evidence that the purposes of the alleged conspiracy continued after July 2, 2014.

Exhibit I at 2; *see also* Trial Tr. Vol. XIII at 4:17–5:4 (Dec. 22, 2021).

In response to this proposed instruction, the Government argued that the defense did not cite "any authority for the proposition that this [statute of limitations] is actually something the jury finds by a preponderance of the evidence" and that the cases cited by the defense "stand for the proposition that there is a statute of limitations, but not that the jury finds it by a preponderance of the evidence." JA2879 at 5:6–11. The district court ruled it would not give any statute of limitations instruction. JA2879 at 5:21–22. The defense then argued that the statute of limitations was "a factual matter" upon which the court was "required" to instruct the jury and, responding to the Government's argument that the (lower) burden of proof in the defense's proposed instruction was unsupported by case law, offered to correct the error, explaining that "[f]ixing the preponderance [of evidence standard], obviously that's very easy, that's easy to explain." JA2880 at 6:1–4. The district court, adopting arguments made by the Government, nonetheless refused to give *any* instruction on the statute of limitations issue, ruling that it "would quite clearly confuse the jury" and was "an issue that can be dealt with as a *matter of law*, I believe, post-verdict, if necessary." JA2880 at 6:5–13. (emphasis added.)

During the charge conference, neither party requested an instruction on the definition of "monetary transaction" under 18 U.S.C. § 1957, an essential element of that offense, which served as one of the possible charged conspiratorial objects. Accordingly, while the jury was instructed that a money laundering conspiracy

under 18 U.S.C. § 1956(h) required an "agreement to commit money laundering" and that those money laundering activities could include "engag[ing] (or attempt[ing] to engage) in a monetary transaction" prohibited under 18 U.S.C. § 1957, the jury was never instructed on the definition of a "monetary transaction," which expressly excludes "any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution." *Compare* Exhibit J at Instructions 52, 58 *with* 18 U.S.C. 1957(f)(1).

ARGUMENT

The Fourth Circuit should have granted Mr. Ravenell's motion to remain at liberty pending appeal because all agree he is neither a flight risk nor a danger to the community and because the district court's significant instructional errors present substantial issues likely to result in reversal or an order for a new trial. *See* 18 U.S.C. § 3143(b); *Antoine*, 2021 WL 3882972, at *1.

I. Mr. Ravenell's Appeal Raises Substantial and At Minimum Close Questions Likely To Result in Reversal or an Order for New Trial.

In his bail application Mr. Ravenell presented to the Fourth Circuit three substantial appellate issues that are likely to result in reversal or an order for a new trial. As these errors present, *at the least*, close questions that could be decided either way, the Fourth Circuit should have granted bail pending appeal and we respectfully suggest that your Honor should therefore do so. *See Steinhorn*, 927 F.2d at 196.

A. The Trial Court Erred in Refusing to Instruct on the Statute of Limitations, Usurping the Jury's Fact-Finding Function.

1. Where timeliness is genuinely disputed and a defendant has requested a limitations instruction, the trial court must give the requested instruction.

The trial court's refusal to instruct the jury on the statute of limitations on the untenable bases that it "would confuse the jury" and "c[ould] be dealt with as a matter of law . . . post-verdict" usurped the fact-finding role entrusted to the jury and constitutes a substantial error likely to result in reversal. *See* Trial Tr. Vol. XIII at 5:21–6:13 (Dec. 22, 2021); *Fowler v. Land Mgmt. Groupe, Inc.*, 978 F.2d 158, 162 (4th Cir. 1992) ("issues of fact bearing on the application of a statute of limitations are submitted, as are other issues of fact, for determination by the jury").

The defense requested the court instruct the jury that they had to find that the government had proven that "the alleged [money laundering] conspiracy continued after July 2, 2014." Exhibit I at 2; *see also United States v. Fishman*, 645 F.3d 1175, 1191 (10th Cir. 2011); *United States v. Green*, 599 F.3d 360, 372 (4th Cir. 2010); *United States v. Campbell*, 347 F. App'x 923, 927 (4th Cir. 2009) ("the statute of limitations is satisfied if the government 'alleges and *proves* that the conspiracy continued into the limitations period'") (quoting *United States v. Seher*, 562 F.3d 1344, 1364 (11th Cir. 2009)) (emphasis added). The vast majority of the evidence presented at trial dating back to *2009* concerned conduct that occurred well before July 2, 2014. Although the evidence supported a finding that the charged conspiracy was time-barred, and despite the defense requesting a statute of limitations instruction, the court refused to give any limitations instruction, incorrectly ruling

that the issue was too confusing and not an appropriate matter for the jury. *See* Trial Tr. Vol. XIII at 5:21–6:13 (Dec. 22, 2021). As case law makes clear this was error.

Once defense counsel requested a limitations instruction in a case, as here, where timeliness is a legitimate factual issue, the court was bound to instruct on that issue, either using a modification of the instruction requested by the defense which offered to fix the burden of proof or using its own language. *United States v. Head*, 641 F.2d 174, 177 (4th Cir. 1981) ("there can be no doubt that [the defendant] was entitled to an instruction"); *United States v. Pursley*, 22 F.4th 586, 587, 591–92 (5th Cir. 2022) (vacating defendant's conviction and holding, "[b]ecause Pursley timely raised this [statute of limitations] defense, he was entitled to have it considered and to have the jury instructed on it," noting the defense "offered to modify the instruction" after the government argued it was not "substantially correct"). *Cf. United States v. Ellis*, 121 F.3d 908, 924 (4th Cir. 1997) ("While a trial court *must* instruct the jury on the defendant's theory of the case, it is not required to use the precise language requested.") (*citing United States v. Smith*, 44 F.3d 1259, 1270-71 (4th Cir. 1995)) (emphasis added). As noted, in this case, the district court rejected defense counsel's request for a statute of limitations instruction for reasons entirely unrelated to the language proposed by the defense, erroneously ruling that any such instruction would "confuse" the jury and could be addressed by the court, post-trial, as a matter of law. JA2880 at 6:5–6:13.

The district court's error here was in failing to give *any* statute of limitations instruction when that factual issue was implicated by the trial evidence. Contrary to the district court's ruling and the law, this issue could not be decided as a matter of law, and limitations determinations are not too confusing for the jury. Over defense objection, and despite evidence at trial supporting the instruction, the court did not allow the jury to determine whether the Government proved that the charged conspiracy continued into the limitations period. This was error requiring reversal.

The central purposes of the alleged money laundering conspiracy were to launder Byrd's money through the Murphy Firm and other businesses, *see* JA357 at 137:4–19, and, separately, to accept Harris's drug proceeds to pay Harris's criminal defense fees. The evidence at trial indicated that the final payments were made by Byrd on January 6, 2014, and by Harris on April 25, 2014, more than two months before July 2, 2014, the start of the applicable limitations period. Moreover, there was no evidence at trial that any further payment was anticipated (*See* JA3334), and any suggestion by the Government to the contrary is not supported by the record. *See* Exhibit G at 4; Exhibit H at 2. Specifically, the Government's argument in its en banc opposition that the final payment by Harris on April 25, 2014 "just *happened* to be the last payment" and was a "mere cessation" is not supported by any evidence in the record, nor is the Government's statement that "Bailey's efforts to collect money was still ongoing." (Emphasis added.) (*See* Application Exhibit B) Nowhere in the record citations referenced by the Government in its opposition to

en banc review does either Harris or Bailey state that Bailey's efforts to collect money were still ongoing beyond April 25, 2014, or that the April 25, 2014 payment "just happened" to be the last payment. Additionally, the Government's reliance, in its opposition to en banc review, on Bailey's unilateral actions in November 2014, after she received a target letter from the Government, is irrelevant to whether the central purpose of the conspiracy ended with the last payment of legal fees on April 25, 2014. (*See* Application Exhibit B) At bottom, it was for a properly instructed jury to consider the facts argued by the defense and those argued by the Government and decide whether the conspiracy continued beyond July 2, 2014.

The fact that the final Byrd and Harris payments each occurred before the applicable limitations date alone provides an evidentiary basis upon which a properly instructed jury could have found that the central purpose of the charged money laundering conspiracy had been achieved before July 2, 2014, and was therefore time-barred.[6] *See United States v. United Med. & Surgical Supply Corp.*, 989 F.2d 1390, 1399 (4th Cir. 1993) ("A conspiracy ends when its central purpose has been accomplished.") (internal quotation marks omitted). Mr. Ravenell was therefore prejudiced by the court's refusal to permit the jury to determine whether the charged conspiracy continued within the applicable limitations period.

In denying Mr. Ravenell's Rule 33 motion, the district court, apparently recognizing the reasons it gave at trial were incorrect as a matter of law, sought to

[6] Extensive additional evidence was presented at trial from which the jury could have concluded the alleged conspiracy terminated before the limitations period, including evidence of Byrd's arrest on April 29, 2014, which ended any alleged conspiracy to launder money for Byrd's drug trafficking organization, and Byrd's testimony that he ceased all illegal activity on that date.

justify its untenable refusal to instruct the jury on the statute of limitations with a number of new rationales. However, none of these post-hoc rationalizations can overcome the fact that it was the jury's job, not the court's, to determine whether the conspiracy extended into the limitations period. First, the court posited that Mr. Ravenell "was charged with - and tried on - a single money laundering conspiracy." Exhibit C at 3. While it is correct that there was only a single money laundering charge, this fact is irrelevant to whether the jury had to be instructed on the applicable limitations period and does not address whether the charged conduct occurred during that period.

The court also cited the lack of an overt act requirement for a money laundering conspiracy charge, as well as the fact that its "instructions to the jury contained all of the[] elements." Exhibit C at 4–5. Again, neither of these points are relevant to the limitations issue. Mr. Ravenell's final requested instruction did not suggest that there was an overt act requirement for this charge. *See* Exhibit I at 2 (proposed instruction that the jury determine whether conspiracy "continued after July 2, 2014"). And, merely instructing on the elements of a charge does not relieve the court of its obligation to instruct the jury on the statute of limitations where the charge relies in part on conduct falling outside the limitations period. *See Head*, 641 F.2d at 177.

The court further opined that "there is no evidence that Ravenell ever withdrew from the conspiracy." Exhibit C at 5. This rationale also did not address the issue before the court. Mr. Ravenell never alleged withdrawal from any

conspiracy. Rather, Mr. Ravenell's limitations defense was based on when the conspiratorial objective was achieved, thereby terminating the conspiracy irrespective of any withdrawal.

Finally, the court found that "the aspect of the money laundering conspiracy that related to Harris and Bailey did not, as Ravenell claims, terminate on April 25, 2014 - nor at any time prior to July 2, 2014." Exhibit C at 5. The court's implicit acknowledgement that this determination was critical to deciding the limitations issue and the court's *factual* finding to decide the issue actually reinforce the defense's argument: that the question of when a conspiracy terminates is a *factual* determination reserved for the jury. The last payment to Mr. Ravenell was made by Byrd on January 6, 2014, and by Harris on April 25, 2014, and the jury could therefore have reasonably determined that either date marked the termination of any conspiracy to launder money. Whether the jury ultimately would have done so, the parties will never know because the district court improperly usurped the jury's fact-finding function and supplanted it with its own factual determinations.

None of the district court's original or reimagined justifications for refusing to instruct on the statute of limitations addresses the simple fact that the question of when the conspiracy terminated was one for the jury, not the court.

2. The trial court's erroneous failure to give the requested limitations instruction was not harmless.

The district court's failure to instruct on the statute of limitations can only be deemed harmless if: (1) the Fourth Circuit can conclude beyond a reasonable doubt that the verdict would have been the same without the error, and (2) the record does

not contain any evidence that "could" lead a jury to rationally reach a contrary finding. *See United States v. White*, 810 F.3d 212, 221 (4th Cir. 2016) (citing *Neder v. United States*, 527 U.S. 1, 17 (1999) and *United States v. Ramos-Cruz*, 667 F.3d 487, 496 (4th Cir. 2012)).

The district court's error was not harmless because there was ample evidence from which the jury could have determined the charged conspiracy terminated prior to the limitations period (which *necessarily* would have resulted in a contrary verdict). There is no way to know now, beyond a reasonable doubt, what conclusion the jury would have reached had it been properly instructed and permitted to make a factual finding on the limitations issue. *See Head*, at 177-79 (4th Cir. 1981) (reversing conviction where statute of limitations instruction was not given, explaining "[w]e simply have no way of knowing whether [defendant] was convicted for an offense barred by limitations. We decline to engage in speculation of this sort in determining guilt in a criminal case.") Indeed, just a few months ago, the Fourth Circuit vacated two convictions based upon an instructional error which the Court ruled could not be harmless because it could not conclude beyond a reasonable doubt that the verdict would have been the same absent the error. *United States v. Lindberg*, No. 20-4470, 2022 WL 2335366, at *7 (4th Cir. June 29, 2022). As the dissent states, "Ravenell points to an extraordinarily close question of whether the trial judge should have instructed the jury on the statute of limitations on the basis of significant evidence that the statute of limitations bars *all of the conduct* related to Ravenell's offense from criminal prosecution." (Emphasis in original.) (*See*

Application Exhibit C.) At the very least, this issue "presents a close question that could be decided either way," entitling Mr. Ravenell to bail pending appeal. *Steinhorn*, 927 F.2d at 196.

B. The Court's Failure to Instruct the Jury on the Safe Harbor Provision of 18 U.S.C. § 1957 Was Plain Error.

The district court and government agree the jury may have convicted Mr. Ravenell on the theory that he accepted drug proceeds for Harris's criminal defense in a conspiracy to violate 18 U.S.C. § 1957, which prohibits "monetary transactions" in criminally derived property exceeding $10,000. Harris and Bailey each testified that the drug proceeds paid to Mr. Ravenell were solely for Harris's criminal defense. *See, e.g.*, Trial Tr. Vol. IX at 171:15–72:25, 175:21–76:8, 240:9–20 (Dec. 16, 2021). However, such conduct is expressly exempt from prosecution under § 1957, which excludes from the definition of "monetary transaction" "any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution." 18 U.S.C. § 1957(f)(1); *see United States v. Blair*, 661 F.3d 755, 771 (4th Cir. 2011); *United States v. Velez*, 586 F.3d 875, 877 (11th Cir. 2009).

Neither party requested an instruction on this "safe harbor" language, but the court's failure to so instruct the jury was plain error such that Mr. Ravenell should be granted bail pending appeal.[7] In denying Rule 33 relief the district court

[7] The Government's invocation of the "invited error" doctrine in its en banc opposition is unfounded as the defendant did not invite the error by asking a court "to take a step in a case." *See United States v. Herrera*, 23 F.3d 74, 75 (4th Cir. 1994). (*See* Application Exhibit B.) The defense did not ask the Court to exclude a safe harbor instruction; rather, counsel inadvertently and without strategic

ruled that its failure to so instruct was not erroneous for two reasons: (1) the "Court is not required to instruct the jury on each definition of 18 U.S.C. § 1957," and (2) regardless, "Section 1957's 'safe harbor' provision would still not apply to Ravenell's conduct." Exhibit C at 6–7.

The court's first reason is incorrect because, although certain elements of a substantive crime identified as the object of a charged conspiracy are not also elements of a conspiracy to commit that crime, other elements are common to both offenses and therefore must be included in the jury instructions. For example, with respect to a conspiracy to violate § 1957, the court need not instruct the jury that the defendant must be found to have completed a prohibited monetary transaction, since he need only have agreed to do so. But a jury cannot convict a defendant of conspiring to engage in a prohibited "monetary transaction" if the conduct in which the jury believes the defendant conspired to engage is not, in fact, a "monetary transaction" as defined in § 1957(f)(1).

Here, the jury could not have meaningfully deliberated upon whether Mr. Ravenell—an attorney accused of receiving drug proceeds for Harris's criminal defense fees—conspired to engage in a prohibited "monetary transaction," since it

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design failed to request the instruction. *See United States v. Day*, 700 F.3d 713, 727 n.1 (4th Cir. 2012) (invited error where defense requested the instruction later objected to on appeal); *United States v. Collins*, 372 F.3d 629, 635 (4th Cir. 2004) (same). The Government's expansive interpretation of the invited error doctrine is inconsistent with federal rules and established case law in the Fourth Circuit. *See* Fed. R. Crim. P. 52(b); *United States v. Muslim*, 944 F.3d 154, 164 (4th Cir. 2019) ("where . . . a defendant does not object below to the district court's jury instructions regarding a specific count, we review for plain error"). Failure to instruct on § 1957(f)(1)'s safe harbor also falls within the invited error doctrine's exception requiring reversal "to preserve the integrity of the judicial process or to prevent a miscarriage of justice." *See United States v. Lespier*, 725 F.3d 437, 450 (4th Cir. 2013). Lastly, as discussed above the district court did not rely on this invited error argument for denying Rule 33 relief.

did not know, and was not instructed on, what that phrase means. Although certain words and phrases require no further explanation, the phrase "monetary transaction" obviously does (which is why it is statutorily defined), as jurors could not reasonably intuit that it excludes criminal defense fees. As the Fourth Circuit recently held in *Lindberg*, a conviction *must* rest on the jury's determination beyond a reasonable doubt of every element of a crime, and failing to allow the jury to make such a determination is not harmless error. *See Lindberg*, 2022 WL 2335366, at *7.

The district court's second rationale—that the safe harbor provision did not apply to Mr. Ravenell—is also incorrect. The court noted that the funds were provided by Bailey; according to the court, "Bailey was not in an attorney-client relationship with Ravenell, and therefore had no Sixth Amendment rights that put Ravenell's receipt of the drug proceeds from her within the safe harbor." Exhibit C at 8–9. This finding is inconsistent with the facts and the law, as follows.

All of the evidence at trial indicated that the funds at issue were Harris's. *See* Trial Tr. Vol. IX at 178:17–180:4 (Dec. 16, 2021) (Harris); *id*. at 236:7–12, 243:1–2, 246:18–20, 254:17–18 (Bailey). The Government has acknowledged that the money paid to Mr. Ravenell belonged to Harris and was earmarked for Harris's criminal defense. *See* JA3724-3725 (describing Mr. Ravenell's representation of Harris, "who had been charged with federal narcotics offenses," and noting that "*Harris paid* Ravenell more than $350,000 in drug proceeds through an associate of Harris's, Avarietta Bailey") (emphasis added).

An attorney enjoys the benefit of the safe harbor regardless of whether the client personally transfers funds to his lawyer, or the money is transferred by an intermediary. *See United States v. Velez*, No. 05-20770-CR, 2008 WL 5381394, at *3 n.6, *4 (S.D. Fla. Dec. 22, 2008), *aff'd*, 586 F.3d 875 (11th Cir. 2009) ("[a] reasonable reading of the statute [§ 1957] could usually limit the scope of the exemption to transactions between a criminal defendant and his or her attorney, *or someone acting on their behalf*") (emphasis added). Any other conclusion would make the safe harbor unavailable to lawyers representing incarcerated clients who cannot personally possess funds. By logical extension, it would also make the safe harbor inapplicable whenever money goes through a third party on the way to the lawyer, including where transferred by a banking institution. This would read the safe harbor provision out of existence entirely, other than for cash transactions directly from a criminal defendant.

The district court relied on a misapplication of the Fourth Circuit's decision in *Blair*, maintaining that "[i]n *Blair*, as here, the funds at issue were drug proceeds which, the Court noted, legally belonged to the United States," and "the money paid to the Defendant came from persons and entities other than criminal defendants whom the Defendant represented." Exhibit C at 8. *Blair*, however, is fully consistent with applying the safe harbor to Mr. Ravenell. In *Blair*, the defendant (a lawyer not acting as such in connection with the transaction) transferred a kingpin's money to two attorneys to represent two of the kingpin's associates in a drug prosecution. *See* 661 F.3d at 771. The Court explained that Blair did not qualify for the safe harbor

because he "used someone else's unlawful drug proceeds to pay for counsel for others . . . [a]nd . . . took a cut of that money for himself." *Id.*

While Blair did not fall within the safe harbor because he had not received a client's money to represent that client, the Fourth Circuit expressly rejected the district court's position here, that an attorney such as Mr. Ravenell—hired with a client's drug proceeds to represent that client in a criminal prosecution—would fall outside the statute's safe harbor protection. Responding to the dissenting judge's concerns, and anticipating future attempts to exclude those in Mr. Ravenell's position from the safe harbor, the Fourth Court clarified that it "ha[s] never suggested that the attorneys hired . . . should come in for sanction." *Id.* at 773.

The district court's suggestion that Mr. Ravenell does not fall within the safe harbor because the money he received from Harris through Bailey was drug proceeds is inconsistent with the plain language of the statute, conflicts with the legislative intent behind it, and is not supported by the Fourth Circuit's decision in *Blair* or any other appellate court ruling.

In fact, other appellate courts have come to the opposite conclusion when faced with this argument from the Government. In *Velez*, for example, the government made this same argument, and the Eleventh Circuit expressly rejected it as an "absurd" attempt to "nullif[y] the provision and divorce[] it from its statutory context, thereby violating basic canons of statutory construction," explaining:

> [A]ccepting [the government's] interpretation of § 1957(f)(1) would read all meaning out of the exemption. Section 1957 criminalizes only

> transactions involving criminally derived proceeds. It would therefore make little sense—and would be entirely superfluous—to read § 1957(f)(1) as an exemption from criminal penalties for *non-tainted* proceeds spent on legal representation, as those funds can always be used for any legal purpose. We do not believe Congress intended such an absurd result, which nullifies the provision and divorces it from its statutory context, thereby violating basic canons of statutory construction.

Velez, 586 F.3d at 879.

Because the safe harbor covered the conduct that the district court and government concede may have formed the basis of the jury's conviction, i.e., Mr. Ravenell's receipt of Harris's drug proceeds for his criminal representation, the failure to instruct the jury on the safe harbor was plain error. *See United States v. Marcus*, 560 U.S. 258, 262–64 (2010). At the very least, the issue presents a close question.

C. The Government Presented Legally Improper Theories of Guilt, Mandating Reversal Under *Yates v. United States.*

Independent of the district court's instructional errors, Mr. Ravenell's conviction cannot survive because the jury may have convicted him solely for the receipt of Harris's criminal defense fees, which conduct did not violate § 1957 and/or was time-barred. Under *Yates v. United States*, a verdict upon a count alleging multiple theories of guilt, at least one of which is legally infirm, cannot survive absent a finding of harmless error. 354 U.S. 298 (1957).

The government presented multiple theories to support its charged money laundering conspiracy (which posited three possible conspiratorial objects), including theories based on Mr. Ravenell's agreement to receive drug proceeds from Byrd and, separately, from Harris. *See* Trial Tr. Vol. XIII at 108:2–4 (Dec. 22, 2021).

Mr. Ravenell's receipt of Harris's money could not violate § 1957 (and could not support a conspiracy under this object) because it fell within the statutory "safe harbor" and/or occurred outside the limitations period. *See* discussion *supra* Parts II(A)-(B).

In *Yates*, the Supreme Court addressed challenges to a conviction for a conspiracy that had two objects, one of which was time-barred. *See* 354 U.S. at 311–12. The Court held that the conviction could not be upheld under the alternative timely conspiratorial object because it was not possible, upon the general verdict returned, to ascertain whether the jury convicted upon that object. *Id.* The Court explained that "the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." *Id.* at 312.

The Fourth Circuit has held that where a *Yates* "alternative-theory error" occurs, "the reviewing court must attempt to ascertain what evidence the jury necessarily credited in order to convict the defendant under the instructions given," and such an error is harmless only "[i]f that evidence is such that the jury must have convicted the defendant on the legally adequate ground in addition to or instead of the legally inadequate ground." *Bereano v. United States*, 706 F.3d 568, 577–78 (4th Cir. 2013) (quoting *United States v. Hastings*, 354 U.S. 298, 242 (4th Cir. 1998)). In other words, a conviction cannot survive where the proper and improper theories are not supported by the same evidence. The Fourth Circuit has consistently reversed for *Yates*-type errors where it could not be certain the jury

convicted upon a lawful theory. *See, e.g.*, *United States v. Cone*, 714 F.3d 197 (4th Cir. 2013); *United States v. Pitt*, 482 F. Appx. 787 (4th Cir. 2012); *United States v. Ellyson*, 326 F.3d 522 (4th Cir. 2003); *Head*, 641 F.2d 174.[8]

The government and trial court each concede the jury may have convicted upon a theory Mr. Ravenell argues is legally infirm—Harris's payments for his criminal defense. *See* Exhibit E at 3; Dkt. 560 at 3. The possibility that Mr. Ravenell was convicted under a legally infirm theory—as the government expressly invited the jury to do—presents a substantial issue of law and fact that warrants bail pending appeal. *See* Trial Tr. Vol. XIV at 81:2–16 (Dec. 23, 2021).

II. Reasons for Granting this Application

This Application is unique, and we implore your Honor to consider and grant it. One circuit judge dissented from the panel's denial of bail and *five* circuit judges – one being the Chief Judge – dissented from the court's refusal to grant en banc review. Four of those dissenting judges dissented in a published opinion sharply criticizing their colleagues. The dissenters were "puzzle[d]" by the en banc court's refusal to consider the bail application of Mr. Ravenell – "a prominent African American attorney in Baltimore" – when it "had no problem with granting the former Governor of Virginia, Robert McDonnell, the very same relief that Ravenell seeks even though there is no relevant factual difference between the two defendants' motions." (*See* Application Exhibit C) Further support for this

[8] The Government's reliance in its en banc opposition on *United States v. Pitt*, 482 F. App'x 787, 791–92 (4th Cir. 2012), a plain error case, is misplaced and it does not apply the standard articulated in *Yates*. (*See* Application Exhibit B)

Application is offered by the attached letter of support from 22 past presidents of the National Association of Criminal Defense Lawyers. (*See* Application Exhibit E.)

Indeed, Mr. Ravenell, like Mr. McDonnell, is neither a flight risk nor a danger to the community and both presented substantial appellate issues entitling them to bail; what is the distinction between the two that made the difference? The en banc majority declined to say; the four Circuit Judges joining the published dissent explicitly expressed their concern knowing that any Application to your Honor would include the dissent.

Certainly, Circuit Justices accord "'great deference'" to decisions of the lower courts with respect to bail, *Mecom v. United States*, 434 U.S. 1340, 1341 (1977) (Powell, J., in chambers) (quoting *Harris v. United States*, 404 U.S. 1232, 1232 (1971) (Douglas, J., in chambers)), but there are limits to this deference and Circuit Justices considering a bail application have "a responsibility to make an independent determination on the merits" of such an application. *Id.* at 1340, 1341 (1977). *See also Hung v. United States*, 439 U.S. 1326, 1328 (1978) (Brennan, J., in chambers) (noting that, although great deference must be given to decisions of district courts in denying bail, "[a] Circuit Justice has a nondelegable responsibility to make an independent determination on the merits of the [bail] application") (citation omitted); *Harris v. United States,* 404 U.S. 1232, 1232 (1971) (Douglas, J., in chambers) (same); *Sellers v. United States*, 89 S. Ct. 36 (1968) (Black, J., in

chambers) (same); *Leigh v. United States*, 82 S. Ct. 994 (1962) (Warren, C.J., in chambers) (same).[9]

In sum, because (1) Mr. Ravenell is neither a flight risk nor a danger to the community, (2) he presents several substantial issues for review on appeal, (3) this appeal will be fully briefed within the next few weeks, and (4) there exists grave concern that Mr. Ravenell was wrongly denied bail, we respectfully ask that your Honor grant the instant Application and order that Mr. Ravenell's bail be continued pending appeal. If your Honor is unable to decide the matter before Mr. Ravenell's surrender date of October 15, 2022, Mr. Ravenell respectfully requests that your Honor order a stay until the matter is decided.

[9] Although bail relief is not often granted by the Circuit Justices, the Supreme Court granted bail relief to McDonnell *after* his appeal was heard and denied. (Application Case No. 15-4019). Grants of bail pending direct appeal by Circuit Justices include the following: *Truong Dinh Hung v. United States*, 439 U.S. 1326, 1327 (1978) (Brennan, J., in chambers); *In re Lewis*, 418 U.S. 1301, 1301 (1974) (Douglas, J., in chambers) (noting that the applicant's case raised "[s]ubstantial First Amendment claims"); *Brussell v. United States*, 396 U.S. 1229, 1230 (1969) (Marshall, J., in chambers) (explaining that the application for bail, which followed the applicant's incarceration for civil contempt, raised "serious questions" under *Curcio v. United States*, 354 U.S. 118 (1957), about a corporate custodian's personal right "not to testify" concerning the location of corporate records); *Chambers v. Mississippi*, 405 U.S. 1205 (1972) (Powell, J., in chambers) (granting bail pending appeal before the Court set aside the applicant's conviction in *Chambers v. Mississippi*, 410 U.S. 284 (1973)).

CONCLUSION

For the foregoing reasons, Mr. Ravenell respectfully requests that your Honor grant his motion for bail and stay of sentence pending appeal.

Dated: September 21, 2022

Respectfully submitted,

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