Exhibit B

No. 22-4369

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

KENNETH W. RAVENELL,

Appellant.

Appeal from the United States District Court for the
District of Maryland, Northern Division
Honorable Liam O'Grady, District Judge for the Eastern District of Virginia,
Sitting by designation in the District of Maryland

RESPONSE IN OPPOSITION TO PETITION FOR REHEARING EN BANC

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I. Background

On December 28, 2021, a Baltimore jury convicted Kenneth Ravenell of money laundering conspiracy in violation of 18 U.S.C. § 1956(h).

From 2009 to 2014, Richard Byrd sold hundreds of thousands of pounds of marijuana, generating millions in cash. During that time Ravenell advised Byrd to set up cash-generating businesses and invest in real estate projects, which Byrd did, in order to launder proceeds from drug sales.

In 2011, Byrd was arrested. At that time Byrd became a formal client of Ravenell and Ravnell's law firm, Murphy, Falcon & Murphy (MFM). From 2011 until 2014, in addition to advising Byrd on how to launder money, Ravenell personally laundered Byrd's drug proceeds using MFM's attorney trust accounts. Ravenell accepted more than $1.8 million in funds, including drug proceeds and funds co-mingled with drug proceeds. Ravenell also directed the payment of more than $1.2 million to various real estate projects and third parties to benefit Byrd. On Ravenell's instructions, and to conceal the source of the funds, none of the money deposited in the MFM attorney trust accounts associated with Byrd actually came from Byrd himself. Instead, Byrd gave cash drug proceeds, to third parties or corporate entities, who then provided the funds to MFM.

In exchange for Ravenell's advice, and for laundering Byrd's funds through MFM, Byrd paid Ravenell in cash, using drug proceeds.

In June 2013, Ravenell began representing Leonaldo Harris, who was charged with federal narcotics offenses. Ravenell received more than $350,000 in drug proceeds from Harris's associate, Avarietta Bailey. Bailey discussed with Ravenell that she was actively collecting drug proceeds from Harris's drug customers and converting them into money orders before she gave them to Ravenell.

In 2014, prior to his arrest, Byrd discussed entering into a criminal partnership with Darnell Miller, another known drug trafficker. Eventually, Miller met with Ravenell. The plan was for Ravenell to act as an intermediary between Byrd and Miller and collect his, Ravenell's and Byrd's profits from the operation. During this meeting, Ravenell also offered to launder Miller's drug proceeds, like he had done for Byrd, for a $250,000 to $300,000 fee. Before Miller could act on Ravenell's offer, Miller learned that MFM was searched by law enforcement, in August 2014. Miller then ceased communication with Ravenell.

The jury deliberated for 3 days. The district judge described the jury as "incredibly responsible, introspective, careful [and] discerning," for listening to "almost a month of evidence" and "101 pages of jury instructions." Sentencing Transcript at 54:7–17.

On June 22, 2022, Ravenell was sentenced to 57 months in prison.

Having been denied bond before the district court, and a panel of this Court, the Appellant now seeks en banc review. Ravenell has litigated these exact issues

three times—twice before the trial court, and once before this Court. Each time the court has ruled against him.

The Appellant's arguments in this petition are no more persuasive as they have been in the past. Accordingly, this Court should deny his petition.

II. Legal Standard

"En banc courts are the exception, not the rule. They are convened only when extraordinary circumstances exist that call for authoritative consideration and decision by those charged with the administration and development of the law of the circuit," *United States v. Am.-Foreign S. S. Corp.*, 363 U.S. 685, 689 (1960). The policy of the en banc statute is that "the active circuit judges shall determine the *major* doctrinal trends of the future for their court." *Id.* at 69

Rehearing petitions are justified only if: (A) "the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed"; or (B) "the proceeding involves one or more questions of exceptional importance[.]" Fed. R. App. P. 35.

III. Argument

The Appellant's petition merely repackages the same three arguments he made previously, which were rejected by the district court and by a panel of this Court. Even the Appellant concedes that motions for bail pending appeal are seldom considered, much less granted, en banc. Petition at 2. To succeed Ravenell must

demonstrate that the panel's Order was an extraordinary deviation from precedent, which impacts major Fourth Circuit jurisprudence. But the Appellant's petition falls well short of this high bar.

a. The Panel's Order is Consistent with Fourth Circuit Law, Which Requires Trial Courts to Reject Legally Incorrect Jury Instructions

The Appellant argues that the panel's Order "implicitly rejected his argument that the trial court's failure to instruct the jury regarding the statute of limitations 'presented a close question or one that very well could be decided the other way,'" and that "[s]uch a finding is contrary to clear, unequivocal, and established Fourth Circuit precedent." Petition at 5. The Appellant is wrong because the panel's Order is consistent with Fourth Circuit law, which requires trial courts to reject legally incorrect jury instructions, like those requested by the Appellant.

The Appellant requested two statute of limitations jury instructions—one on December 21, and another on December 22. The Appellant now concedes that neither instruction correctly stated the law. *See* Exhibit A, Mot. for New Trial at 7 (recognizing that, contrary to the Appellant's December 21 instruction, money laundering conspiracy "does not require proof of an overt act"), Petition at 8 (recognizing that the December 22 instruction contained a legally incorrect burden of proof, namely a preponderance of the evidence).

In his petition, the Appellant misrepresents the record to falsely claim that he "offered to correct," his incorrect December 22 instruction, which told the jury to find the money laundering conspiracy continued into the limitations period *by a preponderance of the evidence*. *See* Petition at 8. That is not accurate. Government counsel objected to the December 22 instruction, saying:

> [T]hey don't [cite] any authority for the proposition that this is actually something the jury finds by a preponderance of the evidence . . . **They also don't tell the jury what preponderance of the evidence means** and now introducing a lower burden of proof without any definition. . . And so it's unsupported . . . **it introduces additional concepts that are not defined** . . . . And none of that is anything the jury determines.

Exhibit B, Trial Transcript Volume XIII at 5:6–20 (emphasis added). The Appellant responded:

> It's a factual matter. It's an element like anything else we believe the jury is required to have it. Fixing the preponderance, obviously that's very easy, **that's easy to explain.**

Id. at 6:1–4 (emphasis added). Defense counsel offered to "explain," the preponderance of evidence standard, not to "correct it." In other words, defense counsel persisted in their incorrect view that the jury had to find the conspiracy extended into the limitations period by a preponderance of the evidence. Thus, *United States v. Pursley*, 22 F.4th 586 (5th Cir. 2022), which Appellant cites, is inapposite. Here, defense counsel offered to modify the instruction in a way that did not make it correct.

The Appellant compounded his legal errors on December 22 by incorrectly arguing that the statute of limitation issue is a required element of the charged conspiracy. Exhibit B at 5:23–6:4. The Appellant now acknowledges that too was legally incorrect. *See* Exhibit C, Mot. for Reconsideration at 5 ("Instructing on the elements of the charge crimes is separate from . . . a statute of limitations instruction.").

Jury instructions must "fairly state[ ] the controlling law." *United States v. Cobb*, 905 F.2d 784, 789 (4th Cir. 1990). "A district court commits reversible error in refusing to provide a proffered jury instruction only when the instruction (1) was correct; (2) was not substantially covered by the court's charge to the jury; and (3) dealt with some point in the trial so important, that failure to give the requested instruction seriously impaired the defendant's ability to conduct his defense." *United States v. Hassan*, 742 F.3d 104, 129 (4th Cir. 2014). Given three opportunities to propose a correct statute of limitations instruction, the Appellant struck out. Each time, the Appellant failed at step one of *Hassan*. At no time prior to jury deliberations did he propose a legally correct statute of limitations instruction. Accordingly, the court was not required to give a legally incorrect instruction. *See United States v. Head*, 641 F.2d 174, 177–78 (4th Cir. 1991).

In addition to instructional error, the Appellant contends that the Government's argument in closing, that Ravenell could have been convicted of

money laundering conspiracy on the basis of Harris and Bailey alone, rendered the third object of the money laundering conspiracy, violating 18 U.S.C. §1957, legally infirm. Petition at 6. But arguments of counsel do not affect whether an object of a conspiracy is legally infirm because "closing arguments are just that—arguments." *United States v. Sutherland*, 921 F.3d 421, 429 (4th Cir. 2019). Thus, the panel correctly rejected Ravenell's motion on that basis.

Further, the evidence supported exactly what the Government said in its closing arguments. Bailey agreed to give Ravenell drug proceeds so that Ravenell would represent Harris. Exhibit D, Trial Transcript Vol. IX at 171:11-181:9; 236:22-241:16. The Appellant asks this Court to infer that the conspiracy ended because Bailey's last payment to Ravenell was made before the statute of limitations period. Petition at 6. But in focusing on individual payments instead of the scope of the entire conspiracy, the Appellant misses the forest for the trees. A "[c]onspiracy is a continuing offense that does not end until its termination is affirmatively established." *United States v. Dodson*, 129 F.3d 118 (4th Cir. 1997). "A conspiracy ends 'when its central purpose has been accomplished.'" *United States v. United Med. & Surgical Supply Corp.*, 989 F.2d 1390, 1399 (4th Cir. 1993).

The central purpose here was to launder drug proceeds. No trial evidence indicated that Bailey's last payment ended the *agreement* to launder drug proceeds—it just happened to be the last payment. But "[a] mere cessation of activity in

furtherance of the conspiracy is insufficient." *United States v. Walker*, 796 F.2d 43, 49 (4th Cir. 1986). Bailey's efforts to collect drug proceeds were ongoing and that Ravenell's money laundering was intertwined with his representation of Harris. Exhibit D at 171:11-181:9, 236:22-241:16. For example, Harris attempted to contact Ravenell around August 2014, about his representation, but later sought new counsel once he learned Ravenell's law firm had been searched by law enforcement. *Id.* at 7:9-12, 186:16-187:8. And Harris's federal criminal docket sheet showed that the Ravenell did not withdraw as Harris' counsel until November 13, 2014, well after July 2, 2014. *See* Exhibit E. Because the *agreement* to launder drug proceeds was intertwined with Ravenell's representation of Harris, it cannot be that the conspiracy terminated before Ravenell's representation of Harris ended.

Bailey also testified that in November 2014 she received a target letter from the United States Attorney's Office. *See* Exhibit D at 260:17-22. In response she reached out to Ravenell, destroyed records of the drug proceeds she paid Ravnell, and contacted Ravenell because she "was wondering where this was coming from and what [she] needed to do." *Id.* at 260:23-261:15. Bailey actions apart from the payments—destruction of evidence and seeking to collaborate with co-conspirators—also demonstrate the continued existence of the conspiracy.

Even if the closing argument had somehow been improper, any error would be harmless because there was ample evidence, apart from Harris and Bailey,

demonstrating that the conspiracy continued into the limitations period. Byrd testified that Ravenell received drug proceeds from third parties, including individuals and corporations, to represent Byrd and to launder the drug proceeds. And Ravenell remained Byrd's lawyer until October 2014. *See* Exhibit F, Exhibit G, Trial Transcript Vol. III at 220:25–221:14. Indeed, Ravenell made a $750 payment on August 1, 2014, to Phoenix Towing Services, on behalf of Byrd. *See* Exhibit H. This payment obviously occurred after July 2, 2014. And the drug proceeds provided to the Appellant and deposited in the MFM escrow account were tracked on falsified ledgers. *See* Exhibits H, I, and J. That the laundered drug proceeds remained at MFM, credited to Byrd, after July 2, 2014, demonstrates that the money laundering conspiracy continued after that date.

The Appellant repeatedly cites *United States v. Lindberg*, 39 F.4th 151 (4th Cir. 2022), to argue that the district court committed error and reversal is warranted. But Ravenell's reliance on *Lindberg* is misplaced. This Court vacated the convictions in *Lindberg* because the district court took an *element* out of the hands of the jury to decide. 39 F.4th at 159. But, "[c]ommission of the crime within the statute-of-limitations period is not an element of the conspiracy offense," *Smith v. United States*, 568 U.S. 106, 112 (2013) (citation omitted), therefore *Lindberg* does not apply here.

b. The Panel Majority Ruled Consistently with Fourth Circuit Law, Which Holds That Drug Proceeds Provided by a Third Party to an Attorney Do Not Fall Within Section 1957's Safe Harbor

The Appellant next argues that "[n]either party requested an instruction on [the Section 1957's] 'safe harbor' language, but the court's failure to so instruct was plain error and the panel's failure to recognize this issue as a 'close' one is contrary to settled Fourth Circuit law." Petition at 10–11. The Appellant is wrong because he jointly submitted jury instructions, which included all of the elements of the charged offense and these instructions, correctly, did not include the Section 1957 Safe Harbor because settled Fourth Circuit law is that drug proceeds provided by a third party to an attorney do not fall within Section 1957's Safe Harbor provision.

To show plain error, the appellant must establish: (1) "that the district court erred," (2) "that the error was plain," (3) and that error "affect[ed] [his] substantial rights." *United States v. Robinson*, 627 F.3d 941, 954 (4th Cir. 2010). "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *United States v. Lespier*, 725 F.3d 437, 450 (4th Cir. 2013) (internal citation and quotation marks omitted). "In the context of plain error review, an error that was invited by the appellant cannot be viewed as one that affected the fairness, integrity, or public reputation of judicial proceedings." *Id.* (internal citation and quotation marks omitted).

The Appellant cannot establish plain error because he invited the error of which he complains, if there was one. The Appellant and the Government submitted jury instructions that included what the parties agreed were the elements of Section 1956(h). *See* Exhibit K. They did not include a Safe Harbor instruction. Having affirmatively agreed that it was not an element of Section 1956(h), the Appellant cannot now claim that the district court's failure to instruct the jury on it was "affected the fairness, integrity, or public reputation of judicial proceedings" and thus cannot establish plain error. *Id.*

Regardless of whether error was invited, the Appellant cannot meet any of the requirements for plain error. First, the district court did not err so obviously that it's conduct is not subject to reasonable dispute. *United States v. Lester*, 985 F.3d 377 (4th Cir. 2021). Ravenell was not convicted of substantive structuring money laundering under 18 U.S.C. § 1957. He was convicted of 18 U.S.C. § 1956(h), conspiracy to commit any one of three species of money laundering: (i) promotional money laundering, 18 U.S.C. § 1956(a)(1)(A)(i); (ii) concealment money laundering, 18 U.S.C. § 1956(a)(1)(B)(i); or (iii) structuring money laundering, 18 U.S.C. § 1957.

Proof of substantiative money laundering pursuant to 18 U.S.C. § 1957 is not required to prove conspiracy to commit money laundering under 18 U.S.C. § 1956(h). "Proof of a conspiracy does not require proof that the object of the

conspiracy was achieved or could have been achieved, only that the parties agreed to achieve it." *United States v. Tucker*, 376 F.3d 236, 238 (4th Cir. 2004) (citation omitted)). "Therefore, the district court is not required to instruct the jury on the elements of each of the substantive offenses identified as objects of such a conspiracy." *Hagen v. United States*, 2014 WL 3895062, at *6 (W.D.N.C. Aug. 8, 2014), *aff'd* 611 F. App'x 159 (4th Cir. 2015). The district court was required to instruct the jury on 18 U.S.C. § 1956(h), and those instructions were proper. The district court did not err by omitting the definition of "monetary transaction" because it is not an element of 18 U.S.C. § 1956(h).

Second, even if the trial court committed an obvious error by failing to *sua sponte* define "monetary transaction," the error could not have affected the Appellant's substantial rights because the Appellant's conduct fell well outside of what the Safe Harbor protects.

"[A]nyone seeking to benefit from § 1957(f) must tie his conduct to the Sixth Amendment right to counsel." *United States v. Blair*, 661 F.3d 755, 771 (4th Cir. 2011). And, "there is no Sixth Amendment right to use someone else's money to hire counsel[.]" *Id.* (citation omitted). Here, neither the funds used, nor the services offered were constitutionally protected under the Sixth Amendment. The Appellant knowingly received and laundered drug proceeds from associates of Byrd, Bailey and others, who were not accused of crimes and whom the Appellant did not

represent. Moreover, laundering drug proceeds through a law firm falls well outside of the Sixth Amendment's guarantee of the right to counsel.

Relying on dicta in a footnote from an unpublished, out-of-circuit case, the Appellant argues that "[a]n 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." Petition at 12 (citing *United States v. Velez*, 2008 WL 5381394, at *3 n.6 (S.D. Fla. Dec. 22, 2008)). But Bailey did not act as an intermediary. A bank is an intermediary—it does not collect debts owed to its customers. By contrast, Bailey was an active participant in Harris's drug dealing operation, not merely a conduit through whose hands Harris's funds passed. In any event, *Velez* is not binding. *Velez*'s expansive interpretation of § 1957 was explicitly rejected in *Blair*. "The Supreme Court has been clear that there is no Sixth Amendment right to use someone else's money to hire counsel: 'A defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney....'" *Blair*, 661 F.3d at 771 (quoting *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 618 (1989)). And, "drug money, of course, legally belong[s] to the United States." *Id.* Thus, Appellant's argument that the drug proceeds Bailey provided to Ravenell were really Harris's money misses the mark. Regardless of whether the Appellant contends the drug proceeds given to Ravenell belonged to Harris or Bailey, the money legally belonged to the United States.

Relying on hyperbole, the Appellant claims that the panel's decision, "would make the safe harbor unavailable to lawyers representing incarcerated clients who cannot personally *possess* funds, and would read the safe harbor provision out of existence other than for cash transaction *directly* from a criminal defendant." Petition at 13 (emphasis added). This argument also misses the mark. The Appellant misreads *Blair* and confuses possession with ownership. "As the Supreme Court explained, 'A robbery suspect, for example, has no Sixth Amendment right to use funds he has stolen from a bank to retain an attorney to defend him if he is apprehended. The money, though in his possession, is not rightfully his....'" *Id.* at 772 (quoting *Caplin & Drysdale*, 491 U.S. at 626). Regardless of if Bailey or Harris possessed the drug money, the money did not rightfully belong to either of them. *See id.* Therefore, using the drug money to hire counsel fell outside of the representation guaranteed by the Sixth Amendment.

The dissent in *Blair* expressed concern about prosecuting "legitimate criminal defense attorneys" who "accept bona fide legal fees from clients charged with or suspected of . . . criminal conduct." *See id.* at 776 (Traxler, C.J., dissenting). But that is not the case before the Court. Ravenell is not a "legitimate defense attorney" as the jury found. Using a law firm to *knowingly* launder more than $1.8 million for drug traffickers, as Ravenell did, is not what a "legitimate criminal defense attorney" does. And payments for laundering money under the guise of legal representation

are not "bona fide legal fees." Ravenell is nowhere close to the hired attorneys in *Blair*, who did not knowingly solicit drug proceeds and were not leading a money laundering conspiracy of which their clients were members.

c. The Panel Majority is Consistent with *Yates* Because There is No Legally Invalid Theory of Prosecution

The Appellant claims that the panel's Order denying bail conflicts with *United States v. Yates* and its progeny. Petition at 14. "[W]hen a general verdict of guilty rests on two alternative theories of prosecution, one valid and the other invalid, the verdict should be set aside if it is 'impossible to tell which ground the jury selected.'" *Bereano v. United States*, 706 F.3d 568, 577 (4th Cir. 2013).

The Appellant first argues that *Yates* is triggered because Ravenell's receipt of drug money from Bailey occurred outside of the statute of limitations period. However, the Appellant gets the law and the facts wrong. As a matter of law, cessation of payments is insufficient to demonstrate the end of a conspiracy. *Walker*, 796 F.2d 43, 49 (4th Cir. 1986). Furthermore, the evidence at trial, including payments for and on behalf of Byrd, demonstrate the *agreement* to launder money continued into the limitations period and beyond the specific payments. *See* Section III(a), *infra*. Most importantly, payments of drug proceeds related to Byrd or Harris are not separate objects of the conspiracy or separate legal theories of guilt. Rather, the payments are evidence of the existence of the money laundering conspiracy. The objects of the conspiracy are violations of (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 (structuring). The Section 1957 object is not specific to Harris or Byrd. Further, even though the last payments related to Byrd and Harris to Ravenell were made before the statute of limitations period, it does not necessarily follow that the Section 1957 object of the conspiracy was accomplished by the time of those payments and that the conspiracy terminated as a result and is therefore barred by the statute of limitations and legally infirm.

The Appellant next argues that the § 1957 object is legally infirm because the Safe Harbor exception applies. "With respect to *Yates* errors in particular, this Court has held that a defendant who fails to preserve his objection to a flawed instruction must demonstrate that the erroneous instruction given resulted in his conviction, not merely that it was impossible to tell under which [theory] the jury convicted." *United States v. Pitt*, 482 F. App'x 787, 791–92 (4th Cir. 2012) (citation and quotation marks omitted). The Appellant cannot meet that bar, particularly because he was not entitled to a Safe Harbor instruction and because his actions fall outside of what the Sixth Amendment guarantees. *See* Section III(b), *infra*.

Because the Appellant has not and cannot demonstrate any legally infirmity, his *Yates* challenge fails.

IV. Conclusion

Because the petition fails to demonstrate that any part of the panel's decision conflicts with Supreme Court or Fourth Circuit precedent, it must be denied.

Respectfully submitted,

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By: _____/s/_____
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CERTIFICATE OF COMPLIANCE

This petition has been prepared using 14-point Times New Roman font. Exclusive of the caption, signature block and certificate of compliance this petition contains no more than 3,900 words.

/s/
Leo J. Wise
Assistant United States Attorney

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CERTIFICATE OF SERVICE

I certify that, on August 26, 2022, I filed a copy of this response via CM/ECF, which serves it on all counsel of record.

/s/
Leo J. Wise
Assistant United States Attorney