EXHIBIT D

No. 22-04369

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KENNETH W. RAVENELL,

Defendant-Appellant.

Appeal from the United States District Court for the District of Maryland
Case No. 1:19-cr-00449
The Honorable Liam O'Grady
United States District Court for the District of Virginia,
sitting by designation in the District of Maryland

OPENING BRIEF OF APPELLANT KENNETH RAVENELL

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STATEMENT REGARDING ORAL ARGUMENT

Appellant Kenneth Ravenell requests the Court order oral argument in this case. The instructional errors at issue in this case are complex, and the Court's decision will have a significant impact on cases within and outside the Circuit regarding removal of statute of limitations issues from the purview of the jury, the scope of the safe harbor provision of 18 U.S.C. § 1957(f), and the necessity for instructions on the safe harbor when an attorney has been charged under an 18 U.S.C. § 1957 conspiratorial object.

INTRODUCTION

The conviction of Kenneth Ravenell on a sole count of conspiracy to commit money laundering was premised upon faulty instructions from the district court and an invalid legal theory posited by the Government. In this case, these combined to create a significant risk that a man was convicted for conduct that is not prosecutable.

Mr. Ravenell was tried upon a seven-count superseding indictment charging him with engaging in an elaborate conspiracy with a client, Richard Byrd. Byrd claimed that Mr. Ravenell advised and guided his drug trafficking organization, instructed Byrd on how to avoid law enforcement, and helped him launder the considerable profits he made from his large-scale marijuana business. Notwithstanding an extensive investigation, the jury acquitted Mr. Ravenell of all six counts that relied upon the testimony of Byrd and his co-conspirators.

The sole count of conviction charged Mr. Ravenell with conspiring to launder the money of both Byrd and an entirely unrelated client, Leonaldo Harris, in violation of 18 U.S.C. §§ 1956 and/or 1957. In light of extensive evidence presented that any conspiracy involving Byrd terminated with Byrd's arrest prior to the applicable limitations period, and rightfully concerned that the jury would discredit Byrd and his cohorts, the Government invited the jury to convict Mr. Ravenell of conspiring to launder only Harris's money, which Mr. Ravenell had received to represent Harris in a criminal case. There were two significant problems with this

theory: first, the final payment on Harris's behalf was transferred to Mr. Ravenell outside the limitations period; and second, § 1957(f)(1)'s definition of "monetary transaction" creates a safe harbor exempting criminal defense legal fees like these from the reach of § 1957.

Two of the errors addressed in this appeal helped the Government surmount these two obstacles. The statute of limitations issue was taken away from the jury's consideration (as to both Harris and Byrd) because the district court refused defense counsel's request that the jury be instructed regarding the applicable limitations period. The jury also was not advised that it could not convict Mr. Ravenell solely for receipt of Harris's money if that money was "necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution" as provided in 18 U.S.C. § 1957(f). The failure to instruct on this safe harbor constituted plain error by the district court. A third instructional error—giving a conscious avoidance instruction unsupported by the evidence at trial—also contributed to this lone conviction.

Regardless of these instructional errors, each of which presents an independent ground for reversal, there is no way to know now whether Mr. Ravenell was convicted on a legally valid theory. The Government specifically argued the legally infirm theory that Mr. Ravenell conspired to violate § 1957 by accepting drug proceeds for criminal defense fees, and the district court and Government have

conceded that theory may have served as the basis for conviction. As a long line of cases from the United States Supreme Court on down has repeatedly explained, where legally valid and invalid theories of guilt exist, a conviction must be reversed unless the reviewing court can determine beyond a reasonable doubt that the valid theory served as a basis for conviction. That determination is impossible here, where the jury returned only a general verdict and acquitted on every count that relied upon the same evidence that supported the Government's legally viable money laundering theory.

To uphold Mr. Ravenell's conviction despite these significant errors would allow trial courts to substitute their judgment for the jury's judgment of the facts and to eliminate statutory provisions from the jury's consideration. Mr. Ravenell's conviction should be vacated, and he should be granted a new trial.

JURISDICTIONAL STATEMENT

Appellant Kenneth Ravenell appeals a final judgment of conviction entered June 22, 2022, in the U.S. District Court for the District of Maryland. JA3815-3820. The district court had jurisdiction over the underlying action pursuant to 18 U.S.C. § 3231. Mr. Ravenell timely noticed his appeal, JA3841-3843, giving this Court jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

This appeal presents the following questions:

1. Whether this Court should vacate Mr. Ravenell's conviction because the district court erroneously declined defense counsel's request that it instruct the jury on the statute of limitations.

2. Whether this Court should vacate Mr. Ravenell's conviction because the district court plainly erred when it failed to instruct the jury on the definition of "monetary transaction" under 18 U.S.C. § 1957(f)(1) in its instruction on the § 1957 conspiratorial object of the charged money laundering conspiracy.

3. Whether the Court should vacate Mr. Ravenell's conviction because the district court erroneously gave the jury a conscious avoidance instruction over the defense's objection.

4. Whether the Court should vacate Mr. Ravenell's conviction under *Yates v. United States*, 354 U.S. 298 (1957) because the Government presented alternative theories of guilt and conspiratorial objects, at least one of which was time-barred and/or based upon conduct statutorily exempt from prosecution, and the jury returned a general verdict preventing this Court from determining the basis for conviction.

STATEMENT OF CASE

On December 28, 2021, a jury acquitted Mr. Ravenell of six charges alleging

RICO and narcotics conspiracies and obstruction of justice. JA3323-3326. The jury convicted Mr. Ravenell of a single count alleging conspiracy to commit money laundering. *Id*. 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). JA123-124. The sole count of conviction was also the only count for which a conscious avoidance instruction was given and for which alternative, unrelated sets of evidence were offered.

At trial, the Government presented evidence of money laundering involving unlawful proceeds from two unrelated clients charged with drug-related offenses—Richard Byrd and Leonaldo Harris. *See* JA340 at 120:2–8 (Byrd testifying that Harris "was a part of a different [marijuana] operation"), JA2079 at 170:4–9 (Harris testifying that he and Byrd were not part of the same drug organization and "never worked together"), JA2982 (Government summation explaining Harris was in "an entirely separate [drug] crew" with "[n]o association with Richard Byrd").

Most of the Government's evidence at trial 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 for legal fees, and was an active member of the

Byrd DTO from 2009 to early 2014. *See, e.g.*, JA302-303 at 82:5–83:4, JA688-689 at 69:14–70:6. Byrd's last payment to Mr. Ravenell, which went to his law firm, Murphy Falcon Murphy (the "Murphy Firm"), was made on January 6, 2014. JA3331. Byrd testified that he did not engage in any criminal activity after he was arrested on April 29, 2014. JA692-693 at 73:16–74:3. Byrd, the Government's primary witness, also admitted on cross-examination to perjuring himself repeatedly before the district court and Fourth Circuit to facilitate his release from prison. *See* JA754 at 135:1–24, JA812-813 at 193:10–194:3.

In contrast, the jury heard evidence of Mr. Ravenell's position as a recognized and respected fixture in the Maryland legal community and his "unquestioned good character." *See* JA2331 at 96:9–14 (retired Fourth Circuit Court of Appeals Justice Andre M. Davis: "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."); *see also* JA2324 at 89:2–3 (retired Judge Joseph F. Murphy, Jr.: "[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, Mr. Ravenell's reputation in the legal community "was in a word, superlative." JA2487-2490 at 16:12–19:3.

Ultimately, after weighing the evidence, the jury acquitted on every count that required them to credit any evidence relating to Byrd, including fully acquitting Mr. Ravenell's two co-defendants.

The Government also presented unrelated 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 trafficking proceeds, were delivered by Bailey, and that Mr. Ravenell knew that the source of the money was drug proceeds sometime prior to Harris's final payment. *See* JA2085 at 176:3–14, JA2087-2088 at 178:17–180:4, JA2145 at 236:7–12, JA2152 at 243:1–2, JA2155-2156 at 246:21–247:18, JA2163 at 254:17–18. All of the proceeds Mr. Ravenell received from Harris were indisputably used solely to pay for Harris's criminal defense. *Id*. at JA2081-2082 at 171:15–173:13, JA2085 at 176:3–8, JA2149 at 240:9–20. The last of these payments was made on April 25, 2014, well before the relevant limitations date here. JA3334.

In rebuttal closing, responding to evidence discrediting Byrd's and his accomplices' testimony, the Government invited the jury to convict Mr. Ravenell of the money laundering conspiracy based solely on Harris's and Bailey's testimony. *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 district court and Government each agreed that the jury may have convicted on precisely that theory. JA3823 ("the jury *could* have convicted Mr. Ravenell on the basis of testimony of Mr. Harris and Ms. Bailey alone"), JA3788 ("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. A charge based on a conspiracy that concluded prior to July 2, 2014, was therefore precluded under the applicable statute of limitations. *See* JA2756-2757 at 28:23–29:17, JA2765-2766 at 37:24–38:2, JA2878-2879 at 4:17–5:5.

Defense counsel raised the statute of limitations issue multiple times before trial, identifying the statute of limitations as an issue that would be contested at trial. *See* JA49-50, JA3341, JA3344-3345, JA3347-3349. After the Government rested, 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. JA2756-2758 at 28:19–30:12, JA2767 at 39:10–13.

During the charge conference, the defense requested a statute of limitations instruction, which the court provisionally denied. JA2792 64:12–23, JA2797-2798 at 69:17–70:17. Additionally, over defense objection, the court agreed to give the Government's proposed "conscious avoidance" instruction. JA2776-2778 at 48:15–49:4, 50:16–18, JA3374. The next day, Mr. Ravenell submitted a renewed statute of limitations 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.

JA3760; *see also* JA2878-2879 at 4:17–5:4.

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 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.

During the charge conference, neither party requested an instruction on the definition of "monetary transaction," an essential element of 18 U.S.C. § 1957, which was one of the charged conspiratorial objects. Accordingly, 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. JA3414, JA3422. But 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* JA3422. *with* 18 U.S.C. 1957(f)(1).

The jury returned a general verdict on December 28, 2021, acquitting Mr.

Ravenell on all counts except the money laundering conspiracy charged in Count Two. JA3323-3326. Mr. Ravenell moved for a new trial pursuant to Federal Rule of Criminal Procedure 33(a), which the district court denied on May 11, 2022. JA3762. Mr. Ravenell moved for reconsideration of the court's order, which was denied on June 6, 2022. JA2802-2803. The district court entered a final judgment after a sentencing and forfeiture hearing on June 22, 2022, after which Mr. Ravenell timely noticed this appeal. JA3815-3820, JA3841-3843.

SUMMARY OF ARGUMENT

Mr. Ravenell's conviction must be vacated because the jury was not properly instructed on key legal issues, which usurped its fact-finding function and allowed it to convict Mr. Ravenell for conduct that is expressly lawful. Independent of the instructional errors, reversal is also mandated under *Yates v. United States*, 354 U.S. 298 (1957), because the Government presented evidence to support multiple theories of guilt—at least one of which was legally infirm—and the jury could have convicted Mr. Ravenell for conduct that was lawful and/or time-barred.

First, the district court committed reversible error by denying defense counsel's request that it instruct the jury on the statute of limitations. The court ruled that the issue was "too confusing" for the jury and the court could decide the issue "as a matter of law . . . post-verdict." JA2880 6:5–13. The Government, however, was required to prove beyond a reasonable doubt that the charged money laundering

conspiracy continued into the limitations period. *See, e.g.*, *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 court's refusal to instruct the jury on the statute of limitations supplanted the jury's fact-finding function, constituting reversible error. *See United States v. Head*, 641 F.2d 174, 177-79 (4th Cir. 1981); *United States v. Pursley*, 22 F.4th 586, 593 (5th Cir. 2022).

Second, the district court committed plain error by failing to instruct the jury on the definition of a "monetary transaction" under 18 U.S.C. § 1957, which served as one of the charged conspiratorial objects. Mr. Ravenell was charged with a money laundering conspiracy under 18 U.S.C. § 1956(h), which requires an agreement to commit an offense proscribed under §§ 1956 or 1957. An element of a § 1957 offense is an agreement to engage in a "monetary transaction," as that term is statutorily defined. *United States v. Velez*, No. 05-20770-CR, 2008 WL 5381394, at *3-4 (S.D. Fla. Dec. 22, 2008), *aff'd*, 586 F.3d 875 (11th Cir. 2009). Importantly, Mr. Ravenell was accused of conspiring to violate § 1957 based on his acceptance of drug proceeds from a client for criminal defense legal fees, and § 1957(f)(1) expressly provides that the definition of "monetary transaction" excludes any payment made to secure representation in a criminal proceeding. *See United States v. Blair*, 661 F.3d 755, 770-71 (4th Cir. 2011); *United States v. Velez*, 586 F.3d 875, 877 (11th Cir. 2009). Absent a proper instruction, the jury would not intuit that this

phrase excludes criminal defense fees, and failure to properly instruct the jury undermines confidence in the verdict and whether "the proceedings resulted in a fair and reliable outcome." *See United States v. Ramirez-Castillo*, 748 F.3d 205, 217 (4th Cir. 2014).

Third, the district court committed reversible error by instructing the jury that it could find Mr. Ravenell acted knowingly if he consciously avoided knowing the money involved in the relevant transactions was criminally derived, when there was no evidence presented at trial to support a finding of conscious avoidance. *See United States v. Mancuso*, 42 F.3d 836, 846 (4th Cir. 1994). While such an error is usually harmless if there is sufficient evidence of actual knowledge, the jury's acquittals on every other count (which required actual knowledge and for which no conscious avoidance instructions were given) creates a strong inference that the jury convicted on an unsupported conscious avoidance theory.

Finally, the Indictment charged multiple, alternate theories under which Mr. Ravenell could be convicted, including a conspiracy to violate § 1957 for his receipt of drug proceeds from a client for criminal defense fees, and conspiracies for which all payments ceased prior to the statute of limitations period. This theory was legally infirm, as it could not support conviction as a matter of law under § 1957(f)(1). Presenting this legally erroneous theory to the jury, in conjunction with the general verdict returned, leaves this Court with no means to determine beyond a reasonable

doubt whether the jury based its verdict on a legally supportable ground. Under these circumstances, Mr. Ravenell's conviction must be vacated. *See Yates v. United States*, 354 U.S. 298, 312 (1957); *United States v. Jefferson*, 674 F.3d 332, 360 (4th Cir. 2012), *as amended* (Mar. 29, 2012).

STANDARD OF REVIEW

A party must state its objection to a jury instruction, or failure to give a jury instruction, "before the jury retires to deliberate." Fed. R. Crim. P. 30(d). Where a defendant so objects and the Court of Appeals finds error, a new trial must be granted unless the Court finds the error was harmless beyond a reasonable doubt. *United States v. Ramos-Cruz*, 667 F.3d 487, 496 (4th Cir. 2012). An error is harmless only if the Court can conclude beyond a reasonable doubt that the error did not contribute to the verdict and the verdict would have been the same absent the error. *See United States v. Lindberg*, 39 F.4th 151, 163 (4th Cir. 2022) (citing *Neder v. United States*, 527 U.S. 1, 2, 18-19 (1999)).

Where an appeal is premised on an erroneous jury instruction that was not objected to before the jury retired to deliberate, reversal is required only upon a finding of plain error. *United States v. Hastings*, 134 F.3d 235, 239 (4th Cir. 1998). To establish plain error, a party must demonstrate: "(1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant's substantial rights, which in the ordinary case means it affected the

outcome of the district court proceedings; and (4) the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *United States v. Marcus*, 560 U.S. 258, 262 (2010); *see also* Fed. R. Crim. P. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.").

Where the Government presents alternate theories of guilt, at least one of which is legally infirm, the Court must vacate the conviction absent a finding of harmless error beyond a reasonable doubt. *Jefferson*, 674 F.3d at 360.

ARGUMENT

I. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO INSTRUCT THE JURY ON THE STATUTE OF LIMITATIONS, USURPING THE JURY'S FACT-FINDING FUNCTION.

Mr. Ravenell's conviction must be vacated because the jury was not instructed on the statute of limitations and was not required to make a factual finding as to whether the Government had proven that the alleged conspiracy continued into the limitations period (*i.e.*, beyond July 2, 2014). The district court refused to instruct the jury on the statute of limitations despite evidence that Count Two was untimely and defense counsel's request for an instruction, erroneously ruling that the statute of limitations issue "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 6:5–6:13. The district court's ruling conflicts with all established case law,

circumvented the jury's authority, and constitutes reversible error.

A. The Government Was Required to Prove to the Jury that the Alleged Money Laundering Conspiracy "Continued Into" the Applicable Limitations Period.

To sustain a conviction, the Government was required to prove to the jury that the alleged money laundering conspiracy "continued into" the limitations period. *See United States v. Fishman*, 645 F.3d 1175, 1191 (10th Cir. 2011); *Green*, 599 F.3d at 372; *see also Campbell*, 347 F. App'x at 927 ("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); *see also Smith v. United States*, 568 U.S. 106, 113 (2013) (citing *Grunewald v. United States*, 353 U.S. 391, 396 (1957)) ("[T]he Government must prove the time of the conspiracy offense if a statute-of-limitations defense is raised," for example by "prov[ing] that the conspiracy continued past the statute-of-limitations period."). The district court here prohibited the jury from making that determination and improperly relieved the Government of its burden of proof.

Where, as here, the defendant raises a statute of limitations defense, it is the Government's burden to prove beyond a reasonable doubt that the conduct fell within the applicable limitations period. *See, e.g., United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 324 (4th Cir. 1982) ("the Government must prove beyond a reasonable doubt that the offending agreement continued into the five-year

limitations period"); *United States v. Sampson*, 898 F.3d 270, 276 (2d Cir. 2018) (same); *United States v. Ciavarella*, No. 3:09-CR-272, 2018 WL 317974, at *8 (M.D. Pa. Jan. 8, 2018), *aff'd*, 765 F. App'x 855 (3d Cir. 2019) ("To find [the defendant] guilty of . . . money laundering conspiracy in the face of an appropriate statute of limitations instruction, the jury would have to find that the . . . conspirac[y] continued into the limitations period."); *United States v. Piette*, No. 20-7008, --- F. 4th ----, 2022 WL 3452464, at *14 (10th Cir. Aug. 18, 2022) (explaining "[i]t is therefore settled that if a defendant invokes the statute of limitations as a defense, the burden shifts to the government to establish the timing of the offense beyond a reasonable doubt," and holding that "by instructing the jury to the contrary, the district court misled the jury and committed plain error"). Mr. Ravenell timely raised a statute of limitations defense to the Government and the Court before and during trial, and an appropriate instruction was supported by the evidence. JA49-50, JA3341, JA3344-3345, JA3347-3349, JA2756-2758 at 28:19–30:12, JA2797-2798 at 69:17–70:17, JA2878-2880 at 4:17–5:4, 6:1–4. The Government, however, was never required to meet its burden because the court refused to properly instruct the jury.

Contrary to the district court's ruling during the charge conference, "the complexity of issues involved does not justify denying a defendant a requested instruction." *See United States v. Pursley*, 22 F.4th 586, 592 (5th Cir. 2022). Indeed,

the *Pursley* court expressly rejected the same position adopted by the district court at the charge conference: that "the issue was 'highly complex' and 'was opening a can of worms awfully, awfully late' [and] that it was 'an unnecessary request' that was 'preserved for appeal.'" *Compare id*. *with* JA2880 at 6:5–6:13 (ruling that the statute of limitations issue "would quite clearly confuse the jury. And it's an issue that can be dealt with as a matter of law, I believe, post-verdict, if necessary."). As courts universally make clear, determining whether the Government has established the alleged offense conduct within the statute of limitations is a *factual* issue that the jury *must* decide. *See, e.g.*, *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 jury was prevented by the court from doing so here.

B. Failure to Instruct the Jury on the Applicable Limitations Period Was Error.

When a conspiracy charge relies on acts outside of the limitations period and there is a legitimate question whether it continued into the limitations period, the jury must be instructed to determine whether the prosecution was timely; failure to do so is reversible error absent a finding of harmless error beyond a reasonable doubt. *See United States v. Head*, 641 F.2d 174, 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."); *see also Pursley*, 22 F.4th at 592-93 (vacating conviction because, among other things, "[defendant] was entitled . . . to a jury instruction on the statute of limitations defense"). Here, the sole count of conviction relied heavily on conduct that occurred outside the limitations period, necessitating an instruction.

In *Head*, the defendant was convicted of conspiracy to commit three bribery and tax evasion offenses. This Court held that because the indictment relied on acts occurring outside the limitations period, "there can be no doubt that [the defendant] was entitled to an instruction requiring the jury to find an overt act committed within the limitations period before it could find him guilty." *Head*, 641 F.2d at 177 (noting that two of the three alleged objects of the conspiracy "rested in large part on acts occurring without the limitations period"). Reversal was required because the jury returned only a general verdict, and therefore, the Court "simply ha[d] no way of knowing whether [the defendant] was convicted for an offense barred by limitations." *Id*. at 179; *see also Yates*, 354 U.S. at 303-12 (reversing conviction where jury returned general verdict and one theory of prosecution was barred by statute of limitations), *overruled in part on unrelated grounds by Burks v. United States*, 437 U.S. 1 (1978).

The same rules apply where, as here, the statute in question does not include an overt act requirement; the only difference is *how* the Government can prove

compliance with the limitations requirement. *See Seher*, 562 F.3d at 1364 ("The government satisfies the requirements of the statute of limitations for a non-overt act conspiracy if it alleges and proves that the conspiracy continued into the limitations period."); *accord Campbell*, 347 F. App'x at 927; *see also Portsmouth Paving Corp.*, 694 F.2d at 324 (holding government was required to "prove beyond a reasonable doubt" that a non-overt act conspiracy "continued into the . . . limitations period," and explaining that "evidence of that continuation may relate to something other than an overt act"); *Green*, 599 F.3d at 372 (explaining that while proof of an overt act is not required for a money laundering conspiracy, "proof of overt acts can be useful for . . . showing that a conspiracy begun more than five years before the return of an indictment continued into a period within the statute of limitations").

The relevant facts here are indistinguishable from *Head*. Here, as in *Head*, the district court refused to give a statute of limitations instruction when requested, finding that it was not a matter for the jury but could be decided by the court as a matter of law. *See Head*, 641 F.2d at 177 n.4 ("The district court repeatedly expressed the view that 'the jury has nothing to do with the statute of limitations.'"). Here, the indictment and evidence presented at trial relied on numerous acts occurring outside the statute of limitations period, and the jury returned only a general verdict. *See, e.g.*, JA123-124 (incorporating by reference JA109, JA112-113, JA116-119), JA3328-3332, JA3334, JA3323-3326.

Absent a special verdict, it is impossible to know what facts the jury credited, and it is entirely possible that the jury convicted Mr. Ravenell by relying on conduct that occurred entirely outside of the applicable statute of limitations period. For example, if the jury convicted Mr. Ravenell on the theory that he conspired to launder Harris's money—a possibility both the district court and Government acknowledged—it likely relied solely on evidence that predated the limitations period given that the date of the final payment was April 25, 2014. JA3334. As in *Head*, the Court now "simply ha[s] no way of knowing whether [Mr. Ravenell] was convicted for an offense barred by limitations" because the jury was prevented from making that finding. *See* 641 F.2d at 179.

The Government has previously argued the statute of limitations issue was not properly raised to the district court (and would therefore be subject only to plain error analysis) because defense counsel's final requested instruction included a minor error (beneficial to the Government) as to the standard the Government must meet to prove the timeliness of the prosecution. (*See* Dkt. 22-1 at 5-8.) This ignores the plain language of the transcript, in which defense counsel offered to correct the error, explaining that "[f]ixing the preponderance, obviously that's very easy, that's easy to explain." JA2880 at 6:1–4.

Regardless, once defense counsel requested a limitations instruction in a case where timeliness is a legitimate factual issue, the court was bound to instruct on that

issue, either in the form requested by the defense or using its own language. *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); *see also Head*, 641 F.2d at 177 ("there can be no doubt that [the defendant] was entitled to an instruction"); *Pursley*, 22 F.4th at 587 ("Because Pursley timely raised this defense, he was entitled to have it considered and to have the jury instructed on it."). In this case, the district court rejected defense counsel's request for a statute of limitations instruction for reasons entirely unrelated to the proposed language, 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—either defense counsel's requested instruction, a modification of that instruction as offered by the defense regarding the burden of proof, or its own—when that factual issue was implicated by the trial evidence. Contrary to the district court's ruling, this issue could not be decided as a matter of law, and limitations determinations are not too confusing for the jury. Because the court, over defense objection, did not allow the jury to determine whether the Government proved the charged conspiracy continued into the limitations period, the court erred.

C. The District Court's Error in Failing to Instruct on the Statute of Limitations Was Not Harmless, and Therefore Requires Reversal.

The district court's refusal to instruct the jury on the statute of limitations was not harmless error. An instructional error is harmless "if it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *United States v. Ramos-Cruz*, 667 F.3d 487, 496 (4th Cir. 2012) (quoting *Neder v. United States*, 527 U.S. 1, 18 (1999)). Where a defendant has contested an omitted instruction, the Court must determine "whether the record contains evidence that could rationally lead to a contrary finding"; if so, "reversal is necessary." *United States v. White*, 810 F.3d 212, 221 (4th Cir. 2016) (citing *Ramos-Cruz*, 667 F.3d at 496).

The trial record is replete with evidence from which a jury could rationally have concluded the Government failed to prove beyond a reasonable doubt that the alleged money laundering conspiracy continued past July 2, 2014, into the limitations period. This is so regardless of whether the jury focused on the Byrd or Harris money, and whether it focused on violations of § 1956 or § 1957.

The evidence supporting a finding that any money laundering conspiracy involving Byrd terminated prior to the limitations date included, among other things: (1) Byrd's arrest on April 29, 2014, which ended any conspiracy to launder money for the Byrd DTO (JA692-693 at 73:16–25); (2) Byrd's testimony that he ceased all illegal activity after his arrest (JA693 at 74:1–3); (3) the Murphy Firm ledger for

Byrd, demonstrating that all payments from Byrd ceased by January 6, 2014, more than six months prior to the relevant limitations period (JA3331); and (4) that the only payment from the Byrd ledgers after the relevant limitations date was a court-required payment, which is not evidence that the conspiracy continued (JA3331).

The evidence supporting a finding that any money laundering conspiracy involving Harris terminated prior to the limitation date included, among other things: (1) the Murphy Firm ledger for Harris, which demonstrated that all payments ceased on April 25, 2014 (over two months before the limitations period) (JA3334); and (2) the lack of any testimony by Harris or Bailey, or any other evidence, that any further payment was due or contemplated after that last payment (*see generally* JA2076-2196 at 167:12–287:21, JA2241-2275 at 6:1–40:16).

The last payment from Byrd to Mr. Ravenell's law firm was on January 6, 2014, almost six full months before the limitations period. JA3331. A properly instructed jury could have concluded the Government failed to prove that any conspiracy to launder Byrd's money continued into the statute of limitations period. "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) (quoting *United States v. McKinney*, 954 F.2d 471, 475 (7th Cir. 1992)). The central purpose of the alleged Byrd money laundering conspiracy was to launder Byrd's money through the Murphy Firm and other businesses, *see* JA357 at 137:4–19,

which purpose a jury could have concluded was accomplished as of the last payment by Byrd on January 6, 2014, or last monetary transaction involving allegedly illegal proceeds on February 26, 2014. *See* JA3331.

Moreover, Byrd was arrested over two months prior to the relevant limitations date, an event which a rational juror could view as the conclusion of the Byrd money laundering conspiracy. *See United States v. Dunn*, 775 F.2d 604, 607 (5th Cir. 1985) ("It is well settled that a person's participation in a conspiracy ends when that person is arrested for his role in the conspiracy."); *see also United States v. Lopez*, 153 F.3d 723 (table), 1998 WL 476788 (4th Cir. 1998) ("Defendants' involvement in the conspiracy charged in the 1994 indictment ended with their arrest and conviction") (citing *Dunn*, 775 F.2d at 606-07). Byrd testified that he did not engage in any criminal activity after his arrest. *See* JA693 at 74:1–3. With Byrd out of the conspiracy—whose central purpose was laundering money *for Byrd*—a jury could rationally have concluded the central purpose of the conspiracy ended no later than April 29, 2014, and so did the conspiracy itself. *See United Med. & Surgical Supply Corp.*, 989 F.2d at 1399. Thus, a jury could rationally have found that the alleged conspiracy as it pertains to Byrd concluded outside the applicable limitations period. And, of course, the error may be found harmless only if a properly instructed jury *necessarily* would have found the prosecution timely beyond a reasonable doubt, *not*

if the evidence would merely have *permitted* it to so find.[1] *See White*, 810 F.3d at 221 (citing *Ramos-Cruz*, 667 F.3d at 496).

The same analysis applies to the Harris-related evidence, upon which the Government invited the jury to rely solely, to the exclusion of the Byrd-related evidence. *See* JA3258 at 81:9–16. The last of the Harris payments took place on April 25, 2014—more than two months before July 2, 2014, the start of the applicable limitations period, and there was no evidence adduced at trial that any further payment was anticipated. *See* JA3334. The only alleged object and central purpose of the Harris/Bailey money laundering conspiracy was the payment of Harris's criminal defense fees (which are exempt from prosecution under § 1957), and none of those legal fees were paid during the limitations period. *See id.*; JA2080-2082 at 171:11–173:13, JA2085 at 176:3-5, JA2148-2149 at 239:9–240:20. A properly instructed jury, therefore, may well have found the prosecution untimely. The lack of a special verdict identifying the jury's basis for conviction precludes a finding beyond a reasonable doubt that the failure to properly instruct the jury was harmless.

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[1] The only evidence of any Byrd-related transaction after July 2, 2014, is a single $750 payment to Phoenix Towing Services on August 1, 2014. *See* JA3331. This lone payment is not evidence of a continuing conspiracy because it was made for the storage of Byrd's vehicles after the Arizona Court of Appeals *ordered* Byrd not to remove any vehicles from its jurisdiction during the pendency of the State's appeal. *See* JA3336-3337. At a minimum, it was for a properly instructed jury to decide whether that transaction was part of the conspiracy.

The evidence the district court and Government previously cited to suggest the Government proved the charged conspiracy continued within the limitations period *at most* presented contested factual issues for consideration by a properly instructed jury. *See* JA3740-3744, JA3778-3779; *see also United States v. Lindberg*, 39 F.4th 151, 162-63 (4th Cir. 2022) (vacating two convictions based upon an instructional error which the Court held was not harmless beyond a reasonable doubt because the Court could not conclude the verdict would have been the same absent the error). It was for a properly instructed jury to weigh this evidence. The trial record here presented extensive evidence from which the jury rationally could have determined the charged conspiracy terminated prior to the limitations period. This factual conclusion would require acquittal on this charge, and the court's refusal to permit the jury to deliberate upon this issue therefore requires reversal. *See White*, 810 F.3d at 221; *Neder*, 527 U.S. at 18; *Head*, 641 F.2d at 179; *Yates*, 354 U.S. at 303-12.

II. THE DISTRICT COURT COMMITTED PLAIN ERROR BY FAILING TO INSTRUCT THE JURY ON THE DEFINITION OF A "MONETARY TRANSACTION" UNDER 18 U.S.C. § 1957(f)(1), ALLOWING THE JURY TO CONVICT ON LAWFUL CONDUCT.

A trial court is required to instruct the jury on the elements of a crime. *United States v. Hutchison*, 338 F.2d 991, 991 (4th Cir. 1964). 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, 39 F.4th at 159-63. "In a conspiracy case, the jury instructions must define the elements . . . for the underlying offense that is the object of the conspiracy." *United States v. Bairamis*, 522 F. App'x 379, 379 (9th Cir. 2013). Here, Count Two charged Mr. Ravenell with violating 18 U.S.C. § 1956(h) (JA123-124), and one of the elements of that charged conspiracy is "the existence of an agreement between two or more persons to commit one or more of the substantive money laundering offenses proscribed under 18 U.S.C § 1956(a) or § 1957." *Green*, 599 F.3d at 371. The jury was required to find that the Government proved at least one of these conspiratorial objects beyond a reasonable doubt. One of the elements of a § 1957 conspiracy offense is that the defendant agreed to engage in a prohibited "monetary transaction," a term defined in 18 U.S.C. § 1957(f)(1) and which provides a safe harbor for money provided for criminal defense representation.

This safe harbor indisputably applied to Mr. Ravenell's receipt of Harris's money to defend Harris's criminal case. The district court's failure to define for the jury the "monetary transaction" element of § 1957 was plain error because (1) there was error; (2) the error was clear or obvious; (3) the error affected Mr. Ravenell's substantial rights; and (4) the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *See Marcus*, 560 U.S. at 262; *see also* JA3422.

A. Failure to Instruct on § 1957's Safe Harbor Was Erroneous Because it Prevented the Jury from Determining Whether an Element of the Alleged Conspiracy Was Proven Beyond a Reasonable Doubt.

An agreement to violate § 1956(a) or § 1957 is an essential element of a money laundering conspiracy, and engaging or attempting to engage in a monetary transaction, as that term is defined in § 1957(f)(1), is an essential element of a § 1957 offense. *See Green*, 599 F.3d at 371; 18 U.S.C. § 1957(a); *see also United States v. Velez*, No. 05-20770-CR, 2008 WL 5381394, at *3-4 (S.D. Fla. Dec. 22, 2008), *aff'd*, 586 F.3d 875 (11th Cir. 2009) (holding safe harbor exemption of § 1957(f)(1) to be an element of money laundering under § 1957). Thus, at the very least, the district court was required to instruct the jury on what constitutes a "monetary transaction" under § 1957 for it to determine whether Mr. Ravenell agreed to engage in one as part of a § 1956(h) conspiracy; absent such instruction, the jury could not possibly have properly considered whether Mr. Ravenell conspired to violate that statute.

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 the defendant conspired to engage in does not constitute a "monetary transaction" as defined in § 1957(f)(1). Absent a proper instruction, the jury could not have known that this phrase excludes criminal defense fees; jurors do not intuit the law.

It is impossible to know under which of the three conspiratorial objects the jury convicted Mr. Ravenell because the Government did not seek a special verdict. *Cf. United States v. Rhynes*, 196 F.3d 207, 238 (4th Cir. 1999), *opinion vacated in part on reh'g en banc on other grounds*, 218 F.3d 310 (4th Cir. 2000) ("It is 'the government's responsibility to seek special verdicts.'") (quoting *United States v. Barnes*, 158 F.3d 662, 672 (2d Cir. 1998)). Based on the evidence presented at trial, Mr. Ravenell's exoneration on every other count related to Byrd, and the Government's express invitation to the jury to convict on receipt of the Harris money alone (JA3258 at 81:9–16), the jury may have convicted Mr. Ravenell solely for his receipt of drug proceeds which paid legal fees for the defense of Harris in the exercise of his Sixth Amendment rights. The district court and Government have conceded this may have occurred. JA3823, JA3788. Harris's payment of his criminal defense fees with his drug proceeds is not, by definition, a "monetary transaction" under 18 U.S.C. § 1957(f)(1), and even though not requested, the omission of an instruction defining "monetary transaction" constitutes plain error.

B. The Error Was Clear or Obvious.

The district court's error was clear or obvious because a court must instruct the jury regarding every element of each charged offense. *See Chamberlain v. Clarke*, No. 7:18CV00461, 2021 WL 4487606, at *7 (W.D. Va. Sept. 30, 2021) ("Failure to properly instruct the jury on each element of the charged offense violates the Sixth Amendment's jury trial guarantee.") (citing *Neder*, 527 U.S. at 12); *Lindberg*, 39 F.4th at 159 ("Criminal convictions must 'rest upon a jury determination that the defendant is guilty of *every element* of the crime with which he is charged, beyond a reasonable doubt.'") (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995)). This requirement includes instructing on the elements of conspiratorial objects. *Bairamis*, 522 F. App'x at 379. The safe harbor contained in § 1957(f) is part of the "monetary transaction" element of that statute, and a money laundering conspiracy under § 1956(h) requires an agreement to commit a proscribed offense under §§ 1956 or 1957. *See Velez*, 2008 WL 5381394, at *3-4; 18 U.S.C. § 1956(h). The district court's failure to so instruct the jury was therefore clear or obvious.

The Government was free to argue to a properly instructed jury that Mr. Ravenell's conduct fell outside the statutory safe harbor for criminal defense payments. But the district court was not permitted to remove this factual determination from the purview of the jury, which it did by failing to instruct on the

definition of a "monetary transaction."

C. The Error Affected Mr. Ravenell's Substantial Rights Because There Is a Reasonable Probability the Error Affected the Verdict.

The district court's failure to instruct on the safe harbor provision of § 1957 affected Mr. Ravenell's substantial rights because there is a reasonable probability that, but for the error, a different result would have occurred at trial. The standard on review does not require a defendant to show it is more probable than not that the verdict would have been different, but merely that the error undermines confidence in the verdict. *See United States v. Lockhart*, 947 F.3d 187, 192-93 (4th Cir. 2020) ("defendant need not 'prove by a preponderance of the evidence that but for error things would have been different'").

Here, the district court's failure to define the "monetary transaction" element of § 1957 undermines confidence in the verdict because the jury may well have accepted the Government's invitation to convict Mr. Ravenell for conspiring to violate § 1957 by agreeing to accept Harris's drug money for his criminal defense, even though that act is explicitly excluded from § 1957's definition of "monetary transaction." *See* 18 U.S.C. § 1957(f)(1); *see also Blair*, 661 F.3d at 771; *United States v. Velez*, 586 F.3d 875, 877 (11th Cir. 2009); JA3258 at 81:9–16, JA3823, JA3788.

Mr. Ravenell's alleged conduct falls squarely under the safe harbor protections of § 1957. Both Harris and Bailey testified that the money provided to

Mr. Ravenell were paid solely for Harris's criminal defense legal fees and served no function in promoting Harris's drug trafficking. *See* JA2080-2085 at 171:11–76:5 (Harris testifying that payments were for Harris's criminal defense legal fees), JA2149 at 240:1–20 (Bailey testifying to same). Each also testified that all the money belonged to Harris and was collected by Bailey, who delivered it to Mr. Ravenell to pay Harris's criminal defense fees. *See, e.g.*, JA2087-2089 at 178:17–80:4 (Harris), JA2145 at 236:7–12 (Bailey), JA2152 at 243:1–2 (Bailey), JA2155 at 246:18–20 (Bailey), JA2163 at 254:17–18 (Bailey). The Government has acknowledged that the money paid to Mr. Ravenell belonged to Harris and the money 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). As such, the transactions by which Mr. Ravenell received the funds were "transaction[s] necessary to preserve [Harris's] right to representation as guaranteed by the sixth amendment to the Constitution." *See* 18 U.S.C. § 1957(f)(1).

The Fourth Circuit addressed the scope of § 1957's safe harbor language in *Blair*. There, the defendant—an attorney not acting as an attorney in that case—was charged with violating § 1957 for having "used someone else's unlawful drug proceeds to pay for counsel for others . . . [a]nd . . . t[aking] a cut of that money for

himself." 661 F.3d at 771. The attorney-defendant was merely acting as a conduit for the money, *see id*. at 771-72, 772 n.3—a stark contrast to Mr. Ravenell, who the Government admits (and all evidence establishes) was compensated solely for providing criminal defense legal services to Harris. The *Blair* Court held that the defendant there could not, under those circumstances, benefit from § 1957's safe harbor provision, because "[a] defendant [*i.e*., Blair] has no Sixth Amendment right to spend another person's money for services rendered by an attorney[.]" *Id.* at 771 (quoting *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 626 (1989)). Unlike Mr. Ravenell's representation of Harris, Blair used one dealer's drug proceeds to pay for the legal representations of two other drug dealers represented by other attorneys. *See id*. at 761. Simply put, Blair was outside the safe harbor because his monetary transactions were not in connection with *his client's* exercise of his Sixth Amendment rights.[2]

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[2] The defendant in *Blair* "ostensibl[y]" served as co-counsel for one of the drug dealer clients, but did not provide any legal services for the other. *See* 661 F.3d 755, 761-63 (4th Cir. 2011). This Court discounted the defense services Blair was supposedly providing as co-counsel for the one drug dealer client, noting that Blair took $10,000 "he claim[ed] was his fee for being co-counsel" but was not licensed in relevant jurisdiction and only obtained a pro hac vice admission on the basis of a fraudulent application. *See id*. at 772 n.3. The Court concluded Blair "placed himself in a position to monitor the government's investigation into the drug proceeds he was dispersing" and took the $10,000 merely "as a fee for doing so." *Id*. In contrast, the trial record here unequivocally demonstrates that Mr. Ravenell provided criminal defense legal services to Harris. *See* JA2080-2081 at 171:11–72:25, JA2085 at 176:3–5, JA2149 at 240:9–20; *see generally United States v. Harris*, No. 8:13-cr-00202 (D. Md. 2013).

The Fourth Circuit emphasized, however, that its holding *did not* apply to the lawyers hired *with* the money in question to represent their clients, expressly rejecting the notion that an attorney hired with drug proceeds to provide criminal defense services, such as Mr. Ravenell, would fall outside the statute's safe harbor protections. Indeed, prescient and leery of potential future attempts to exclude conduct like Mr. Ravenell's from the safe harbor, the Court underscored that it "*ha[s] never suggested that the attorneys hired . . . should come in for sanction*." *Id*. at 773 (emphasis added); *see also Velez*, 586 F.3d at 877 ("the plain meaning of the exemption set forth in § 1957(f)(1), when considered in its context, is that transactions involving criminally derived proceeds are exempt from the prohibitions of § 1957(a) when they are for the purpose of securing legal representation to which an accused is entitled under the Sixth Amendment.").

Neither of the two circumstances that removed Blair from the safe harbor provision apply to Mr. Ravenell. First, the money at issue in *Blair* belonged to a drug dealer who was not the client for whose benefit the funds were transferred. *Blair*, 661 F.3d at 773. Second, the defendant in *Blair* was not acting as an attorney but was serving merely as a conduit between the third-party benefactor and the clients' lawyers. *Id*. *Blair* recognizes that attorneys, like Mr. Ravenell, who supposedly know they are receiving tainted money to represent a defendant in a criminal action, act within the safe harbor. *Id*.

Post-trial, the district court incorrectly concluded that the safe harbor did not apply to Mr. Ravenell because he received Harris's legal fees via Bailey; according to the district 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." JA3781-3782. This analysis, though, is not consistent with the applicable law.

Even assuming the safe harbor is not available to a lawyer who receives a third party's money to represent a client—a dubious proposition[3]—all of the evidence at trial indicated that the funds transferred here belonged to Harris. *See* JA2087-2089 at 178:17–80:4, JA2145 at 236:7–12, JA2152 at 243:1–2, JA2155 at 246:18–20, JA2163 at 254:17–18. The Government has acknowledged as much. *See* JA3724-3725. That the money was physically transferred by Bailey (because Harris was in jail) is of no moment. 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 Velez*, 2008 WL 5381394, at *3 n.6, *4 ("[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).

[3] After all, the *Blair* Court explained that its holding would not apply to the defendants' actual lawyers, who had received the third-party payments. *See* 661 F.3d at 773.

Any other conclusion would make the safe harbor unavailable to lawyers representing incarcerated clients who cannot personally transfer funds directly to their lawyers. This logic 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. Such a holding would read the safe harbor provision out of existence entirely, other than for cash transactions directly from a criminal defendant. Not surprisingly, no authority requires a defendant/client to personally deliver fees to his attorney for the attorney to be within the safe harbor.[4]

The safe harbor protects precisely the transaction at issue here—a client's payment of his money derived from specified unlawful activity to an attorney for criminal defense services in exercise of that client's Sixth Amendment rights. *See* 18 U.S.C. § 1957(f)(1); *see also* JA2080-2085 at 171:11–76:5, JA2149 at 240:1–20. In denying Mr. Ravenell's motion for a new trial, the district court disagreed with this statement of the law, suggesting that Mr. Ravenell did not fall within the safe

[4] In response to briefing before this Court regarding Mr. Ravenell's Motion for Bail Pending Appeal, the Government conceded that incarcerated defendants' attorneys would have the benefit of the safe harbor if defendants "direct attorneys to funds that the client actually has possession of or direct true intermediaries to make funds that the defendant controls available to their counsel." (Dkt. 14-1 at 19.) It is illogical to suggest the safe harbor would apply if Bailey had deposited the collected funds into Harris's bank account before Harris had it transferred to Mr. Ravenell, but does not apply without that intervening deposit. Nor does the Government explain why Bailey, who collected Harris's funds and brought them to Mr. Ravenell to fund Harris's defense, was not a "true intermediar[y]." *See, e.g.*, JA2145 at 236:7–12, JA2152 at 243:1–2, JA2155 at 246:18–20, JA2163 at 254:17–18.

harbor merely because Harris's money was drug proceeds. *See, e.g.*, JA3781 (noting that "[i]n *Blair*, as here, the funds at issue were drug proceeds which, the Court noted, legally belonged to the United States" but "Harris testified that, '[a]ll the monies paid by Ms. Bailey came from drug proceeds.'"). That analysis is inconsistent with the plain language of the statute, conflicts with the legislative intent behind it, and is not supported by this Court'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. 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. This Court should also reject the Government's attempts to circumvent Congressional intent and rewrite this statute to negate its force and effect. Contrary to the Government's "absurd" argument, *Caplin* did not nullify or

vitiate the § 1957 safe harbor as *Caplin* "addresses a different statute governing the civil forfeiture of criminally derived proceeds[and] has no bearing on § 1957(f)(1) and indeed *supports* the conclusion that such proceeds have been statutorily exempted from criminal penalties." *Velez*, 586 F.3d at 877 (citing *Caplin*, 491 U.S. 617) (emphasis added).

The district court's failure to instruct the jury regarding the meaning of the "monetary transaction" element of § 1957 created the distinct possibility that the jury convicted Mr. Ravenell of conduct that is not criminal, and therefore affected his substantial rights.

D. The Error Seriously Affects the Fairness, Integrity, and Public Reputation of These Judicial Proceedings.

The only remaining question is whether the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *See United States v. Olano*, 507 U.S. 725, 736 (1993). Here, there can be no dispute that it did.

The Fourth Circuit has held that "[f]ailure to instruct on an element of the offense would typically constitute plain error, because it would deprive the accused of his substantial right to an instruction that includes every element of the offense which must be proved by the government beyond a reasonable doubt." *United States v. McLamb*, 985 F.2d 1284, 1293 (4th Cir. 1993) (no plain error where judge merely declined to *reiterate* instruction on an element). The Fourth Circuit has further instructed that an error seriously affects the fairness, integrity, or public reputation

of judicial proceedings where the error undermines confidence in whether "the proceedings resulted in a fair and reliable outcome." *Ramirez-Castillo*, 748 F.3d at 217 (holding instruction "invaded the jury's province by declaring that certain facts essential to conviction had been conclusively established" and was an "error of constitutional magnitude").

Here, the Court failed to instruct on a definition necessary to understanding an essential element of the charged money laundering conspiracy—whether Mr. Ravenell agreed to commit an offense proscribed by § 1957, which requires an agreement to engage in a "monetary transaction"—thereby depriving Mr. Ravenell of his substantial right to an instruction that includes every element of the offense which must be proved by the Government beyond a reasonable doubt. This definition was crucial to the jury's ability to differentiate between transactions the jury could consider for purposes of convicting on a § 1957 conspiratorial object from those it could not.

That error undermines confidence that the guilty verdict was fair and reliable because the failure to instruct the jury regarding the "safe harbor" exception of § 1957 created a substantial risk that Mr. Ravenell was convicted for lawful conduct. This is particularly so when the jury's acquittal on all other counts strongly suggests that the jury did not believe Byrd and his cohorts, but rather took the Government's invitation to convict Mr. Ravenell based on his receipt of tainted funds to represent

Harris (JA3258 at 81:9–16)—conduct that the safe harbor protects from prosecution. The district court's error therefore seriously affects the fairness, integrity, or public reputation of these judicial proceedings. *See Olano*, 507 U.S. at 736.

III. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY INSTRUCTING THE JURY ON CONSCIOUS AVOIDANCE IN THE ABSENCE OF ANY SUPPORTING EVIDENCE.

The district court improperly gave the jury a conscious avoidance instruction despite the lack of any evidentiary basis in the record to support one, resulting in prejudicial error. Courts restrict the use of conscious avoidance instructions "to cases not only where there is asserted lack of knowledge but also where there is evidence of deliberate ignorance." *United States v. Mancuso*, 42 F.3d 836, 846 (4th Cir. 1994). Here, the Government solely presented evidence that Mr. Ravenell had actual knowledge of the unlawful sources of the funds he received and took steps to conceal those sources from law enforcement.

The Fourth Circuit has observed that a proposed conscious avoidance instruction should be handled with caution, and is "proper only in rare circumstances." *United States v. Ruhe*, 191 F.3d 376, 385 (4th Cir. 1999). It is "only warranted when the defendant claims lack of guilty knowledge in the face of evidence supporting an inference of deliberate ignorance." *United States v. Farrell*, 921 F.3d 116, 145 (4th Cir. 2019). Additionally, "[c]ourts often are wary of giving a willful blindness instruction, because of the danger they perceive in it allowing the

jury to convict based on an ex post facto 'he should have been more careful' theory or to convict on mere negligence." *Mancuso*, 42 F.3d at 846 (quoting *United States v. Sanchez-Robles*, 927 F.2d 1070 (9th Cir. 1992).

The Government presented no evidence at trial that Mr. Ravenell consciously avoided knowing he was laundering drug proceeds; instead, the Government only presented evidence that Mr. Ravenell had *actual* knowledge that he was paid with drug proceeds, presenting several witnesses who were members of the Byrd and Harris organizations to testify that Mr. Ravenell knew that the funds he received were drug proceeds. *See, e.g.*, JA427-428 at 207:11–208:24, JA431-433 at 211:22–13:10, JA544 at 58:17–25, JA1494 at 217:5–23, JA2149-2150 at 240:7–41:16. During closing arguments, the Government extensively referenced evidence that Mr. Ravenell knew the money given to him by Byrd and the other cooperating witnesses was drug money. *See, e.g.*, JA2970-2971 at 96:22–97:15, JA2982 at 108:9–17, JA2984-2985 at 110:17–11:4. The Government also pointed to conduct of Mr. Ravenell demonstrating his alleged actual knowledge. *See, e.g.*, JA2970-2971 at 96:22–97:15. The Government introduced no evidence from which the jury could have found that Mr. Ravenell consciously avoided or deliberately ignored learning the source of the funds he received.

Notwithstanding the evidence presented and looking for another path to conviction after its witnesses had been discredited, the Government pressed the

district court for a conscious avoidance instruction, which the court gave over defense objection. *See* JA2776-2779 at 48:15–49:4, 49:22–51:21, JA2899-2900 at 25:25–26:25, JA3374. The Government argued that Mr. Ravenell could be convicted under a conscious avoidance theory based on testimony regarding the "Okullo transaction," which involved a transfer of $90,000 from a Jamaican attorney to the Murphy Firm. JA2974-2975 at 100:3–101:13, JA2980 at 106:1–3. But this purported example of conscious avoidance was anything but: Byrd expressly testified that Mr. Ravenell directed this circuitous transaction and knew the money involved was drug proceeds. JA427-428 at 207:18–209:4.

Post-trial, the district court rejected Mr. Ravenell's argument that the conscious avoidance instruction should not have been given, citing evidence that Mr. Ravenell supposedly *directed* clients to conceal the source of the funds he received from law enforcement. *See* JA3782. But those examples do not support a finding of conscious avoidance; rather, if credited, they support a finding of actual knowledge: that Mr. Ravenell *deliberately* sought to conceal the source of the funds he was paid, which he *knew to be unlawful*. Allegations that Mr. Ravenell directed others to conceal the source of illicit funds require Mr. Ravenell to have actual knowledge that the funds had an illicit source. Such allegations are fundamentally inconsistent with any suggestion of conscious avoidance.

Finally, the district court found that any error in giving the instruction was

harmless since there was "sufficient evidence in the record of actual knowledge on the defendant's part." *See* JA3783. The ultimate guide to assessing harmlessness, however, is whether the jury may have relied on the erroneous instruction to convict. *See, e.g.*, *Lindberg*, 39 F.4th at 163.

Here, the jury acquitted Mr. Ravenell of *every* count that required them to believe the Byrd DTO members' testimony regarding actual knowledge, raising the distinct possibility that the jury accepted the Government's invitation to convict on its alternate—but unsupported—conscious avoidance theory advanced during summation: "Byrd and others testified that [Mr. Ravenell] knew, but his actions show at a minimum he was willfully blind." JA2969 at 95:20–23. The jury's acquittals on each of the Byrd-dependent charges indicate the jury may have relied on the erroneous instruction in its sole count of conviction. *Cf. Head*, 641 F.2d at 178 n.6 (using acquittals on other counts to inform court's assessment of basis for conviction, noting "the probability of prejudice [is] much more significant than the government suggests"). Indeed, the Government's phrasing of its argument—"show at a minimum"—suggests that conscious avoidance presents a less demanding burden of proof than beyond a reasonable doubt, which is precisely the concern addressed in *Mancuso*, notwithstanding the court's instructions that the Government was nonetheless required to prove guilt beyond a reasonable doubt. *See* 42 F.3d at 846. Thus, the erroneous conscious avoidance instruction was not harmless.

IV. THE GOVERNMENT PRESENTED LEGALLY IMPROPER THEORIES OF GUILT, MANDATING REVERSAL UNDER *YATES v. UNITED STATES*.

Regardless of the district court's instructional errors, Mr. Ravenell's conviction cannot survive because they jury may have convicted him for conduct that was lawful under § 1957 and time-barred. *See* discussion *supra* Parts I(C), II(C). Where there is a possibility a jury may have convicted the defendant on a legally infirm theory, the Court must vacate the conviction, subject only to a finding of harmless error beyond a reasonable doubt. *See Yates v. United States*, 354 U.S. 298, 312 (1957) ("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"); *United States v. Jefferson*, 674 F.3d 332, 360 (4th Cir. 2012), *as amended* (Mar. 29, 2012). The possibility that Mr. Ravenell was convicted on an improper basis mandates reversal under *Yates*.

A. *Yates* Mandates Reversal Where the Court Cannot Be Certain the Jury Convicted the Defendant Upon a Lawful Theory.

Under *Yates*, a verdict must "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." 354 U.S. at 312 (reversing conviction where one of two conspiratorial objects was barred by statute of limitations and it was not possible, upon general verdict returned, to ascertain whether jury convicted upon timely

conspiratorial object); *see also Jefferson*, 674 F.3d at 361 ("when a general verdict on a single criminal charge rests on alternative theories, one valid and the other invalid, the verdict must be set aside if it is 'impossible to tell which ground the jury selected'") (quoting *Yates*, 354 U.S. at 312). The *Yates* rule applies wherever a theory of conviction is infirm on a ground unrelated to a finding of factual insufficiency by a properly instructed jury, *see Griffin v. United States*, 502 U.S. 46, 59 (1991), subject only to a finding of harmless error beyond a reasonable doubt. *See Jefferson*, 674 F.3d at 360; *see also Skilling v. United States*, 561 U.S. 358, 414 (2010) ("errors of the *Yates* variety are subject to harmless-error analysis").

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 that such an error is only harmless "[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) (emphasis added) (citing *United States v. Hastings*, 134 F.3d 235, 241-42 (4th Cir. 1998)).

In other words, courts will examine whether the same evidence supported both the proper and improper theories. If it did, the conviction may stand. If it did not, the conviction cannot survive unless the jury returned a special verdict

demonstrating it convicted upon a proper theory, or there was otherwise a means to ascertain with certainty that the jury convicted upon a proper theory. *See United States v. Lawson*, 677 F.3d 629, 655 (4th Cir. 2012) ("we are not confronted with a situation in which we are uncertain whether a jury's verdict was solely attributable to an underlying conviction which we have set aside on legal grounds").

The Fourth Circuit has consistently reversed under *Yates* where the Court could not be certain the jury convicted the defendant upon a lawful theory. For example, in *United States v. Cone*, the defendant was charged with, *inter alia*, counterfeiting and money laundering, with the latter count alleging the defendants laundered the funds derived from counterfeiting. 714 F.3d 197, 201 (4th Cir. 2013). The counterfeiting count included two theories, "pure" counterfeiting and "material alteration." *Id*. at 205. After concluding the "material alteration" theory was inconsistent with the statute, and therefore could not support conviction, the Court agreed with the defendant that, "neither the indictment, nor the evidence adduced at trial allow us to conclude that the jury necessarily convicted [the defendant] of money laundering based on the government's 'pure' counterfeiting theory." *Id.* at 215.

Similarly, in *Head*, the Court reversed a defendant's conviction for a conspiracy to commit three offenses because the court failed to instruct the jury regarding the statute of limitations applicable to one theory and it was impossible to

determine whether the jury had relied upon the time-barred theory. 641 F.2d at 179. The Court explained, "[w]e simply have no way of knowing whether [the 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." *Id*. The Court distinguished cases where the conspiracy conviction was affirmed because the defendant was convicted on the related substantive offense, because in *Head*—as here—the defendant had been acquitted of the other counts. *See id*. at 178 n.6.

Cone and *Head* are not outliers; they reflect a long line of cases reversing for *Yates* errors. *See, e.g.*, *United States v. Pitt*, 482 F. App'x 787, 793-94 (4th Cir. 2012) (plain error where district court failed to limit "honest services" fraud object to bribery and kickback schemes and Court could not conclude jury convicted defendant upon alternative pecuniary theory of mail fraud rather than "infirm honest services charge"); *United States v. Ellyson*, 326 F.3d 522, 531 (4th Cir. 2003) (reversing defendant's conviction for possessing child pornography because district court's instructions permitted jury to convict defendant on alternate grounds, one of which was an improper theory of guilt, and "there [wa]s no way for [the court] to determine the jury's basis for its verdict"); *Skilling*, 561 U.S. at 413-14 (holding defendant did not commit honest-services fraud and, citing *Yates*, finding that "[b]ecause the indictment alleged three objects of the conspiracy—honest-services wire fraud, money-or-property wire fraud, and securities fraud—[the defendant's]

conviction is flawed").

Yates applies directly to situations like this—where a defendant was charged on multiple theories (here, three possible conspiratorial objects and evidence of laundering for Byrd and Harris), at least one of which was legally infirm.

B. The Possibility that Mr. Ravenell Was Convicted for Lawful Conduct Is Not Harmless Beyond a Reasonable Doubt.

Since the jury returned only a general verdict, there is no way to know whether the jury convicted Mr. Ravenell on one of the legally infirm theories presented by the Government, and his conviction must be vacated. *See, e.g.*, *Yates*, 354 U.S. at 312; *Head*, 641 F.2d at 177-79; *Jefferson*, 674 F.3d at 361. The crux of a *Yates* analysis is whether the charged conduct could have been proven in multiple ways—at least one of which is legally untenable—and there is no way to determine which theory of guilt served as the jury's basis for conviction.

Mr. Ravenell, like the defendant in *Yates*, was charged with a single conspiracy supported by multiple possible conspiratorial objects, and the jury returned only a general verdict. *See* JA123-124, JA3323-3326; *Yates*, 354 U.S. at 311-12. As the Government conceded, Mr. Ravenell may have been convicted under a § 1957 conspiratorial object "on the testimony of Harris and Bailey *alone*." *See* JA3788. Absent a special verdict, there is no way of knowing post-trial which conspiratorial object, theory, or set of facts the jury based its verdict on. *See Yates*, 354 U.S. at 311-12.

Because the Harris transactions cannot lawfully support Mr. Ravenell's conviction under the § 1957 conspiratorial object, the mere possibility that the jury may have wrongly convicted him by improperly employing that object and theory rather than a legally permissible object under § 1956 mandates reversal under *Yates*. The Harris money laundering theory should never have been submitted to the jury as a § 1957 conspiratorial object because the Harris funds were transferred to Mr. Ravenell for Harris's criminal defense and therefore did not violate § 1957, and because the last transaction was made outside the limitations period. *See* discussion *supra* Parts I(C), II(C). And similar to *Bereano*, the evidence admitted to prove that Mr. Ravenell laundered Harris's money (the improper theory) was *not* the same evidence as that required to prove he laundered Byrd's money; Byrd and Harris ran two entirely unconnected operations. JA340 at 120:2–8, JA2079 at 170:4–9, JA2982 at 108:2–4. In any event, there was neither a special verdict nor any other circumstances—such as a conviction on another Byrd-related count—that could substitute for this lack of correspondence between the proof relating to the two theories.

The jury could have convicted on the charged money laundering conspiracy on an improper basis—a conspiratorial object (such as a § 1957 conspiracy involving only Harris's money) that is lawful, or a Byrd and/or Harris conspiracy that terminated prior to the limitations period. Such an error is not harmless unless the

jury "*must* have convicted the defendant on the legally adequate ground in addition to or instead of the legally inadequate ground." *Bereano*, 706 F.3d at 578 (emphasis added) (citing *Hastings*, 134 F.3d at 241-42). There is no way to know what evidence or theory of guilt the jury credited in the absence of a special verdict, and thus the error cannot be found harmless. Vacating Mr. Ravenell's conviction also serves the interests of justice, which include ensuring he was not convicted for conduct that is permissible as a matter of law or conduct that fell outside the applicable limitations periods and is therefore not prosecutable. *See* Fed. R. Crim. P. 33(a).

CONCLUSION

For the foregoing reasons, Mr. Ravenell's conviction should be vacated and remanded for a new trial.

Respectfully submitted,

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September 2, 2022

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WITH TYPEFACE AND WORD COUNT LIMITATIONS

I, Peter H. White, counsel for Kenneth Ravenell and a member of the Bar of this Court, certify that the attached Opening Brief is proportionately spaced, has a typeface of 14 points using Times New Roman font, and contains 12,625 words.

/s/ Peter White

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Peter H. White
Attorney for Appellant Kenneth Ravenell

September 2, 2022

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I, Peter H. White, counsel for Kenneth Ravenell and a member of the Bar of this Court, certify that on September 2, 2022, a copy of the attached Opening Brief and Joint Appendix was filed with the Clerk and served on the United States via CM/ECF. The sealed portion of the Joint Appendix was served on the United States via mail. I further certify that all parties required to be served have been served.

/s/ Peter White

_____

Peter H. White
Attorney for Appellant Kenneth Ravenell

September 2, 2022

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 22-04369 **Caption:** US v. Kenneth Ravenell

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