No. 22A-____

IN THE
Supreme Court of the United States

KENNETH W. RAVENELL,

Applicant,

– v. –

UNITED STATES OF AMERICA,

Respondent.

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

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

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

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

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

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

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

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

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

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

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

I dissent.

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

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

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

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

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

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

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

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

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

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

STATEMENT OF FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Velez, 586 F.3d at 879.

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

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

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

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

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

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

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

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

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

II. Reasons for Granting this Application

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

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

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

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

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

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

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

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

CONCLUSION

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

Dated: September 21, 2022

Respectfully submitted,

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EXHIBIT A

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

KENNETH RAVENELL'S PETITION FOR REHEARING EN BANC

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Pursuant to Federal Rule of Appellate Procedure 35 and Local Rule 35, Kenneth Ravenell petitions for rehearing en banc from the August 12, 2022 Order of a panel of this Court by a 2-1 vote denying Mr. Ravenell's motion for bail pending appeal. The only contested issue was whether there exists on appeal a "close question or one that very well could be decided the other way" that would require reversal. *See United States v. Antoine*, No. 1:18CR17-1, 2021 WL 3882972, at *1 (N.D.W. Va. Aug. 13, 2021) (quoting *United States v. Steinhorn*, 927 F.2d 195, 196 (4th Cir. 1991)).

The majority's denial of bail conflicts with established precedent (including binding precedent in this Circuit), including: *United States v. Head,* 641 F.2d 174 (4th Cir. 1981) and *United States v. Pursley*, 22 F.4th 586 (5th Cir. 2022) (requiring that the jury determine upon request whether the prosecution was brought within the limitations period whenever the issue is fairly raised by the evidence); *United States v. Blair*, 661 F.3d 755 (4th Cir. 2011) and *United States v. Velez*, 586 F.3d 875 (11th Cir. 2009) (finding that the definition of "monetary transaction" under 18 U.S.C. § 1957(f) forecloses an attorney's conviction for receiving tainted funds in exchange for criminal representation); and *Yates v. United States*, 354 U.S. 298 (1957) (holding that a conviction upon a count alleging multiple theories of guilt, at least one of which is legally infirm, cannot survive absent a finding of harmless error). Here, the Government *explicitly* invited the jury to convict Mr. Ravenell of

conspiring to violate 18 U.S.C. § 1957 based on criminal defense fees he received on behalf of his client Leonaldo Harris—a legally infirm theory.

While motions for bail pending appeal are rarely considered en banc, Mr. Ravenell is an attorney with an otherwise spotless reputation who was convicted of a single non-violent offense whose professional life will effectively be destroyed forever the moment he surrenders himself to prison, whatever the outcome of his appeal. *See, e.g.*, Trial Tr. Vol. X at 96:9–14 (Dec. 17, 2021) (trial testimony of Davis, J. (4th Cir., Ret.): "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."). All parties agree he is neither a flight risk nor a danger to the community and, therefore, requiring him to be imprisoned where there exist "close" issues on appeal is unsupportable.[1]

STATEMENT OF FACTS

On December 28, 2021, a jury acquitted Mr. Ravenell of six charges alleging RICO, narcotics conspiracies, and obstruction of justice. The jury convicted him

[1] This Court has previously granted bail pending appeal for defendants convicted of non-violent offenses. *See, e.g.*, Order at 2, *United States v. McDonnell*, No. 15-4019 (4th Cir. Jan. 26, 2015) (Dkt. 39) (granting bail pending appeal where appellant was "not likely to flee or pose a danger" and appeal "raise[d] a substantial question of law or fact that, 'if decided in favor of the accused' is 'important enough' to warrant reversal or a new trial").

only of one count charging conspiracy to commit money laundering. This count alleged three conspiratorial objects, any one of which could have supported 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 exceeding $10,000 in criminally derived property).

At trial, the Government presented evidence of money laundering involving Mr. Ravenell's receipt of proceeds from two distinct, unrelated clients charged with drug trafficking, Richard Byrd and Leonaldo Harris. *See* Trial Tr. Vol. XIII at 108:2–4 (Dec. 22, 2021) (Government summation explaining Harris was in "an entirely separate [drug] crew" with "[n]o association with Richard Byrd").

Most of the Government's evidence related solely to Byrd's marijuana operation. Byrd testified that Mr. Ravenell knowingly received drug proceeds, including for legal fees, and was an active member of Byrd's organization from 2009 to early 2014. On cross examination, though, Byrd admitted that he lied to both the district court and this Court, and that prior to his conviction and 26-year sentence, he wrote unsolicited letters acknowledging Mr. Ravenell's innocence and asserting that Mr. Ravenell had been unfairly targeted by the Government. *See* Trial Tr. Vol. V at 135:1-24, 193:10-194:3, 106:10-111:12 (Dec. 10, 2021). The jury acquitted Mr. Ravenell on *every* count that required it to credit evidence relating to Byrd. Mr. Ravenell's two codefendants were acquitted on all counts related to Byrd as well.

The Government also presented testimony from Harris and his friend Avarietta Bailey regarding Harris's unrelated operation. Their testimony related to Harris's drug proceeds, which Bailey collected and transferred to Mr. Ravenell to defend Harris on then-pending criminal charges. The last of these payments was made on April 25, 2014. In rebuttal closing, addressing Byrd's damaged credibility, the Government argued that the jury could reject Byrd and his cohorts' testimony and convict solely on Harris's and Bailey's testimony regarding payment of Harris's criminal defense fees with drug proceeds. *See* Trial Tr. Vol. XIV at 81:9–82:14 (Dec. 23, 2021). The Government and district court have reaffirmed this possibility post-trial. Exhibit E at 3 ("the jury *could* have convicted Mr. Ravenell on the basis of testimony of Mr. Harris and Ms. Bailey alone");[2] Gov't Resp. to Def. Sent. Mem. at 3 (Dkt. 560) ("the jury *could* convict the Defendant based on the testimony of Harris and Bailey *alone*").

Mr. Ravenell timely moved for a judgment of acquittal under Rule 29 based upon the Government's failure to establish criminal conduct within the applicable limitations period. The trial court denied this motion. During the charge conference, the defense requested a jury instruction on the applicable limitations period, which the court denied as well. *See infra* Part I.

[2] Exhibits to Mr. Ravenell's Motion for Bail Pending Appeal are incorporated by reference.

Neither party requested an instruction on the definition of "monetary transaction," which is an essential element of the 18 U.S.C. § 1957 conspiratorial object contained in the sole count of conviction. Accordingly, although the jury was instructed that a money laundering conspiracy under § 1957 required an "agreement to commit money laundering" and those money laundering activities could include "engag[ing] (or attempt[ing] to engage) in a monetary transaction" prohibited under § 1957, the jury was never instructed on the definition of "monetary transaction." As a result, the jury did not know that the criminal defense fees Mr. Ravenell received from Harris could not support conviction under the § 1957 conspiratorial object.

ARGUMENT

I. The Panel's Order Conflicts with Settled Fourth Circuit Law Requiring Trial Courts to Give a Limitations Instruction Where the Issue Is Fairly Raised by the Evidence.

The panel's Order denying Mr. Ravenell bail pending appeal 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." Such a finding is contrary to clear, unequivocal, and established Fourth Circuit precedent.

The parties agree that a conviction based on a conspiracy that concluded prior to July 2, 2014, was precluded under the applicable statute of limitations. As noted,

the Government argued, and the trial court agreed, that Mr. Ravenell could have been convicted solely based on the money received to represent Harris. The evidence at trial was that the final payment to Mr. Ravenell for the criminal representation of Harris pre-dated the limitations period. This evidence would support a jury finding that any conspiracy to launder the money received to defend Harris was time-barred.

Settled law holds that reversal is mandated when a jury was empowered to convict under a legally infirm theory unless the error was harmless beyond a reasonable doubt. The evidence here supported a finding that Mr. Ravenell could not be convicted on the theory that he conspired to launder Mr. Harris's legal fees in violation of the §1957 conspiratorial object because the last such payment was made on April 25, 2014, and "[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) (internal quotation marks omitted).[3]

At the charge conference, defense counsel twice requested that the jury be instructed regarding the statute of limitations. The court's refusal to give any instruction on that issue was erroneous because the conspiracy charge here relied heavily on conduct that occurred outside the limitations period. *See United States v.*

[3] The same argument regarding the requested limitations instruction also exists as to payments on behalf of Byrd. Byrd's last payment to Mr. Ravenell's law firm was made on January 6, 2014, before the limitations date. Exhibit G at 4. Byrd testified he did not engage in any criminal activity after he was arrested on April 29, 2014. Trial Tr. Vol. V at 74:1–3 (Dec. 10, 2021).

Head, 641 F.2d 174, 177–79 (4th Cir. 1981); *see also United States v. Pursley*, 22 F.4th 586, 591–92 (5th Cir. 2022). At the charge conference, the district court rejected the request for a limitations instruction because it "would confuse the jury" and "c[ould] be dealt with as a matter of law . . . post-verdict." *See* Trial Tr. Vol. XIII at 5:21–6:13 (Dec. 22, 2021). This ruling violated this Court's precedent and usurped the fact-finding role entrusted to the jury. *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").

In denying Mr. Ravenell's new trial motion, the district court adopted new reasons for its ruling that were also erroneous. The court noted that money laundering has no overt act requirement; that "there is no evidence that Ravenell ever withdrew from the conspiracy"; and that the court's instructions "contained all of the[] elements" of the charged offense. Yet defense counsel's final proposed instruction included no overt act requirement; defense counsel's request for a limitations instruction was *not* based on a withdrawal theory but rather on evidence that the alleged conspiracy terminated prior to the applicable limitations date; and whether the court's instructions included all elements of the charged offense is irrelevant to whether a limitations instruction was required.

The Government's argument that Mr. Ravenell's final proposed instruction

contained the wrong (more government-friendly) burden of proof—requiring proof of a timely prosecution by a preponderance of the evidence rather than beyond a reasonable doubt—is of no moment, because when this was pointed out at the charge conference, defense counsel offered to correct it. Trial Tr. Vol. XIII at 6:3–4 (Dec. 22, 2021); *see also United States v. Pursley*, 22 F.4th 586, 591–92 (5th Cir. 2022) (vacating conviction for failing to instruct on statute of limitations, noting the defense "offered to modify the instruction" after the Government argued it was not "substantially correct"). In any event, the requested instruction was a standard instruction based on established case law; defense counsel's request for the instruction, supported by evidence in the record, triggered the court's responsibility to give an instruction either using defense counsel's language or its own. *See Head*, 641 F.2d at 177–78.

The district court's error was not harmless beyond a reasonable doubt (*see United States v. White*, 810 F.3d 212, 221 (4th Cir. 2016) (citing *Neder v. United States*, 527 U.S. 1, 17 (1999) and *United States v. Ramos-Cruz*, 667 F.3d 487, 496 (4th Cir. 2012)), because there was ample evidence from which the jury could have determined the charged conspiracy terminated prior to the limitations period (which *necessarily* would have resulted in a contrary verdict). Just two months ago, this Court vacated two convictions based upon an instructional error, which the Court ruled could not be harmless because it could not conclude beyond a reasonable doubt

that the verdict would have been the same absent the error. *United States v. Lindberg*, No. 20-4470, 2022 WL 2335366, at *7 (4th Cir. June 29, 2022). At the least, this issue "presents a close question that could be decided either way," entitling Mr. Ravenell to bail pending appeal. *See Steinhorn*, 927 F.2d at 196. The panel's implicit finding otherwise is contrary to settled Fourth Circuit law.

II. The Panel's Order Conflicts with Settled Fourth Circuit Law Regarding the Definition of "Monetary Transaction" Under 18 U.S.C. § 1957.

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

Neither party requested an instruction on this "safe harbor" language, but the court's failure to so instruct the jury was plain error, and the panel's failure to

recognize this issue as a "close" one is contrary to settled Fourth Circuit law. The district court ruled that its failure to instruct was not erroneous because: (1) when instructing on a conspiracy to launder money, the Court "is not required to instruct the jury on each definition of 18 U.S.C. § 1957," and (2) "Section 1957's 'safe harbor' provision would still not apply to Ravenell's conduct." Exhibit C at 6–7.

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

The jury could not have determined whether Mr. Ravenell—an attorney accused of receiving Harris's drug proceeds for his criminal defense—conspired to engage in a prohibited "monetary transaction" since it could not have known, absent a proper instruction, what that phrase means. Although certain terms require no further explanation, the statutorily-defined phrase "monetary transaction" does, as

jurors would not intuit that it excludes criminal defense fees. As this Court recently held in *Lindberg*, a conviction *must* rest on the jury's determination beyond a reasonable doubt of every element of a crime, and failing to allow the jury to make such a determination is not harmless error. *See Lindberg*, 2022 WL 2335366, at *7.

The district court's second rationale—that the safe harbor provision did not apply to Mr. Ravenell—is also incorrect. Observing that the criminal defense payments were provided to Mr. Ravenell by Bailey, the court ruled, "Bailey was not in an attorney-client relationship with Ravenell, and therefore had no Sixth Amendment rights that put Ravenell's receipt of the drug proceeds from her within the safe harbor." Exhibit C at 8–9. This rationale enjoys no support in either the facts or the law of this and other Circuits.

All of the evidence at trial indicated that the funds at issue were Harris's. *See* Trial Tr. Vol. IX at 178:17–180:4 (Dec. 16, 2021) (Harris); *id*. at 236:7–12, 243:1–2, 246:18–20, 254:17–18 (Bailey). An attorney enjoys the benefit of the safe harbor regardless of whether the client personally transfers funds to his lawyer, or the money is transferred by an intermediary. *See United States v. Velez*, No. 05-20770-CR, 2008 WL 5381394, at *3 n.6, *4 (S.D. Fla. Dec. 22, 2008), *aff'd*, 586 F.3d 875 (11th Cir. 2009) ("[a] reasonable reading of the statute [§ 1957] could usually limit the scope of the exemption to transactions between a criminal defendant and his or her attorney, *or someone acting on their behalf*") (emphasis added). Any other

conclusion would make the safe harbor unavailable to lawyers representing incarcerated clients who cannot personally possess funds, and would read the safe harbor provision out of existence other than for cash transactions directly from a criminal defendant.

The district court's decision relied on a misapplication of this Court's decision in *Blair*, maintaining that "[i]n *Blair*, as here, the funds at issue were drug proceeds which, the Court noted, legally belonged to the United States," and "the money paid to the Defendant came from persons and entities other than criminal defendants whom the Defendant represented." Exhibit C at 8. *Blair*, however, is fully consistent with applying the safe harbor to Mr. Ravenell, and for this reason, the Panel's Order is contrary to this Court's precedent. In *Blair*, the defendant (a lawyer not acting as such in connection with the transaction) transferred a drug dealer's money to two attorneys to represent two of the dealer's associates in a drug prosecution. *See* 661 F.3d at 771. This Court explained that Blair did not qualify for the safe harbor because he "used someone else's unlawful drug proceeds to pay for counsel for others . . . [a]nd . . . took a cut of that money for himself." *Id*. However, responding to then Chief Judge Traxler's dissent and anticipating future attempts—like the district court's here—to exclude those in Mr. Ravenell's position from the safe harbor, this Court clarified that it "ha[s] never suggested that the attorneys hired . . . should come in for sanction." *Id.* at 773.

Because the safe harbor covered the conduct that the district court and Government concede may have formed the basis of the jury's conviction, the court had a responsibility to provide the jury the statutory definition of "monetary transaction" *with or without request*. The failure to instruct the jury on the safe harbor was plain error. *See United States v. Marcus*, 560 U.S. 258, 262–64 (2010). At the very least, the issue presents a close question.[4]

III. The Panel's Order Is Contrary to *Yates* and its Progeny, Which Require Reversal when One of Several Conspiratorial Objects Is Legally Infirm.

Finally, the panel's Order denying Mr. Ravenell bail conflicts with *United States v. Yates* and its progeny. Regardless of the instructional errors, Mr. Ravenell's conviction cannot survive because the jury may have convicted him solely for the receipt of Harris's criminal defense fees, which cannot, as a matter of law, violate

[4] The Government's invocation of the "invited error" doctrine is unfounded as the defendant did not invite the error by asking a court "to take a step in a case." *See United States v. Herrera*, 23 F.3d 74, 75 (4th Cir. 1994). The defense did not ask the Court to exclude a safe harbor instruction; rather, counsel inadvertently and without strategic design failed to request the instruction. *See United States v. Day*, 700 F.3d 713, 727 n.1 (4th Cir. 2012) (invited error where defense requested instruction later objected to on appeal); *United States v. Collins*, 372 F.3d 629, 635 (4th Cir. 2004) (same). The Government's expansive interpretation of the invited error doctrine is inconsistent with federal rules and established case law in this Circuit. *See* Fed. R. Crim. P. 52(b); *United States v. Muslim*, 944 F.3d 154, 164 (4th Cir. 2019) ("where . . . a defendant does not object below to the district court's jury instructions regarding a specific count, we review for plain error"). Failure to instruct on § 1957(f)(1)'s safe harbor also falls within the doctrine's exception requiring reversal "to preserve the integrity of the judicial process or to prevent a miscarriage of justice." *See United States v. Lespier*, 725 F.3d 437, 450 (4th Cir. 2013).

§ 1957 and/or was time-barred. Under *Yates* a verdict upon a count alleging multiple theories of guilt, at least one of which is legally infirm, cannot survive absent a finding of harmless error. 354 U.S. 298, 311-12 (1957) (vacating conviction where Court could not ascertain upon general verdict returned whether jury convicted upon a timely-charged conspiratorial object).

The Government presented multiple factual theories to support the charged money laundering conspiracy (which posited three possible conspiratorial objects), including ones based on money Mr. Ravenell received to represent Byrd and money he received to represent Harris who had an "entirely separate" organization. *See* Trial Tr. Vol. XIII at 108:2–4 (Dec. 22, 2021). Mr. Ravenell's receipt of Harris's money could not have violated § 1957, and therefore could not have supported a conspiracy conviction under the § 1957 object, because it fell within the statutory "safe harbor" and/or occurred outside the limitations period. *See* discussion *supra* Parts I and II.

A *Yates* error is harmless only "[i]f that evidence is such that the jury must have convicted the defendant on the legally adequate ground in addition to or instead of the legally inadequate ground." *Bereano v. United States*, 706 F.3d 568, 577–78 (4th Cir. 2013). In other words, a conviction cannot survive where the proper and improper theories are not supported by the same evidence. *Id*. This Court has consistently reversed for *Yates*-type errors where it could not be certain the jury convicted upon a lawful theory. *See, e.g.*, *United States v. Cone*, 714 F.3d 197 (4th

Cir. 2013); *United States v. Pitt*, 482 F. Appx. 787 (4th Cir. 2012); *United States v. Ellyson*, 326 F.3d 522 (4th Cir. 2003); *Head*, 641 F.2d 174.

The Government and trial court each concede the jury may have convicted upon a theory Mr. Ravenell argues is legally infirm—Harris's payments for his criminal defense. *See* Exhibit E at 3; Dkt. 560 at 3. The possibility that Mr. Ravenell was convicted under a legally infirm theory, as the Government expressly invited the jury to do, presents a substantial issue of law and fact that warrants bail pending appeal, and the panel's implicit finding otherwise is contrary to both Supreme Court and Fourth Circuit precedent.

CONCLUSION

For the foregoing reasons, Mr. Ravenell respectfully requests the Court grant rehearing en banc and grant Mr. Ravenell's motion for bail and a stay of sentence pending appeal.

Respectfully submitted,

/s/ Peter White

_____

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Counsel for Kenneth Ravenell

August 16, 2022

CERTIFICATE OF COMPLIANCE
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 Motion is proportionately spaced, has a typeface of 14 points or more, and contains 3,786 words.

/s/ Peter White
_____
Peter H. White

August 16, 2022

CERTIFICATE OF SERVICE

I, Peter H. White, counsel for Kenneth Ravenell and a member of the Bar of this Court, certify that on August 16, 2022, a copy of the attached Petition was filed with the Clerk and served on the parties via CM/ECF.

/s/ Peter White

_____

Peter H. White

August 16, 2022

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

Philip Selden
Attorney for the United States
Acting Under Authority Conferred by 28 U.S.C. § 515

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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,

Philip Selden
Attorney for the United States
Acting Under Authority Conferred by 28 U.S.C. § 515

By: _____/s/_____
Leo J. Wise
Zachary H. Ray
Assistant United States Attorneys

Derek E. Hines
Special Assistant United States Attorney

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

EXHIBIT C

FILED: September 7, 2022

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-4369
(1:19-cr-00449-LO-1)

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KENNETH WENDELL RAVENELL,

Defendant - Appellant.

O R D E R

The court denies appellant's petition for en banc reconsideration of this court's denial of his motion for bail and stay of sentence pending appeal.

A requested poll of the court failed to produce a majority of judges in regular active service and not disqualified who voted in favor of reconsideration en banc. Chief Judge Gregory, Judge Motz, Judge King, Judge Wynn, and Judge Thacker voted to grant reconsideration en banc. Judge Wilkinson, Judge Niemeyer, Judge Agee, Judge Diaz,

Judge Harris, Judge Richardson, Judge Quattlebaum, Judge Rushing, and Judge Heytens voted to deny reconsideration en banc.

Judge Wynn wrote a dissenting opinion, in which Judges Motz, King, and Thacker joined.

Entered at the direction of Judge Agee.

For the Court

/s/ Patricia S. Connor, Clerk

WYNN, Circuit Judge, with whom Judges MOTZ, KING and THACKER join, dissenting from the denial of rehearing en banc:

The Court today refuses to consider a trial judge's order denying the motion of Kenneth Ravenell—a prominent African American attorney in Baltimore—for bail or release pending appeal.[1] What puzzles me is that this same Court had no problem with granting the former Governor of Virginia, Robert McDonnell, the very same relief that Ravenell seeks even though there is no relevant factual difference between the two defendants' motions.

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

Herein lies the rub. The issue of whether a substantial question is present is far more evident in Ravenell's case than it was in Governor McDonnell's case. Ravenell points to

[1] On appeal to this Court, a divided panel, inexplicably, declined to reverse the trial court's order. Ravenell now asks us to vacate that panel determination, consider his motion en banc, and reverse the trial court's order.

[2] Nor is there any contention that his appeal is brought "for the purpose of delay." 18 U.S.C. § 3143(b)(1)(B).

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

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

I dissent.

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,

/s/ Peter White

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September 2, 2022

CERTIFICATE OF COMPLIANCE
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

_____

Peter H. White
Attorney for Appellant Kenneth Ravenell

September 2, 2022

CERTIFICATE OF SERVICE

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

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

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(s) Peter H. White

Party Name Kenneth Ravenell

Dated: 09/02/2022

EXHIBIT E

PRESIDENTS EX OFFICIO OF THE NATIONAL ORGANIZATION
OF CRIMINAL DEFENSE LAWYERS

September 17, 2022

Chief Justice John G. Roberts, Jr.
United States Supreme Court
1 First Street, NE
Washington, DC 20543

Re: Application of Kenneth Ravenell for Bail Pending Appeal in *U.S. v. Ravenell*, No. 22-4369

Letter Brief of Past Presidents of the National Association of Criminal Defense Lawyers in Support of Kenneth Ravenell's Petition for Release Pending Appeal

Dear Chief Justice Roberts:

Introduction and Background of Undersigned

Undersigned are 22 Past Presidents of the National Association of Criminal Defense Lawyers who in their individual capacities write to strongly support the fair and equal application of the law and attorney Kenneth Ravenell's Application to Your Honor for bail pending his appeal to the Fourth Circuit, following that court's Order denying *en banc* review of a panel decision denying him bail. *See* Order Denying *En Banc* Review at 1, *U.S. v. Ravenell*, No. 22-4369 (4th Cir. Sept. 7, 2022) (Dkt. No. 28) ("Order"). As more fully discussed below, five Circuit Judges, including Chief Judge Gregory, dissented from the Order, and Judge Wynn authored a dissenting opinion joined by three of his colleagues supporting en banc review.

We are mindful and take note that we write today on September 17, 2022, Constitution Day.

This group of past presidents of NACDL are exceedingly well versed, well known individually as prestigious, highly accomplished and highly regarded practitioners of criminal law.

In addition to their past leadership position in NACDL, many if not all, of the undersigned serve or have served in leadership positions in other local, state, national, international bar associations and/or legally related institutions.

Collectively this group of lawyers has specialized knowledge of the practice of criminal law, including issues related to bail pending appeal, and have maintained a steadfast commitment to assuring the fair and equal application of the law for all. The group's collective experience spans countless cases and represents some 1000 years of experience. This group has defended the independence of the Courts and believes in promoting the foundational and core concept of trust in our judicial system. We believe there is strong public interest in the appearance of and the actual fair and equal application of the law as determined by the Courts, which insures the necessary and critical faith, confidence and respect for our judicial system to properly function. This is such a case.

This is the first time a collection of past presidents of NACDL has agreed to co-sign such a letter of support.

Argument

Mr. Ravenell is a highly respected African American criminal defense attorney based in Baltimore, Maryland. The Fourth Circuit's dissent unmistakably recognized this compelling fact when it described applicant as "Kenneth Ravenell – a prominent African American attorney in Baltimore – …"

Mr. Ravenell has been a member of NACDL. NACDL is a nonprofit voluntary professional bar association founded in 1958. NACDL works on behalf of criminal defense attorneys to ensure justice and due process for those accused of criminal conduct. NACDL has a nationwide membership of nearly 10,000 members. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public

defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice.

We support Mr. Ravenell's Application for bail because we believe, as Fourth Circuit Judge James A. Wynn, Jr., wrote in his dissent from the denial of en banc review, joined by Judges Motz, King and Thacker, it is undisputed that Mr. Ravenell is unlikely to flee or pose a danger to the community, and the appeal presents "a substantial question of law or fact likely to result in . . . an order for a new trial." 18 U.S.C. § 3143(b)(1)(B). Order at 3 (dissenting opinion).

In Mr. Ravenell's case, the court failed to instruct the jury on the statute of limitations even though such an instruction was requested by the defense and supported by the evidence. As a result, the jury did not have the opportunity to consider whether the statute of limitations barred prosecution under Count Two- the sole count of conviction.

As Judge Wynn explained, "[t]he issue of whether a substantial question is present is far more evident in Ravenell's case than it was in [former Virginia] Governor [Robert] McDonnell's case," in which the Fourth Circuit granted bail pending appeal. *Id*. As Judge Wynn appropriately wrote: "Try as one might, one can point to no discernible difference that justifies granting release pending appeal to Governor McDonnell and denying it to Ravenell." *Id.* at 4. He added, "[t]hat's not fair," nor is it consistent with the standard for granting bail pending appeal. *Id.* at 4. Undersigneds strongly agree.

Accordingly, the undersigned 22 past presidents of NACDL ask your Honor to grant Mr. Ravenell's application for bail pending his Fourth Circuit appeal. That *is* fair.

Respectfully submitted,
(Alphabetically)
John Ackerman, Houston, Texas
Chris Adams, Charleston, South Carolina
Barbara Bergman, Tucson, Arizona
Drew Findling, Atlanta, Georgia
Nina Ginsberg, Alexandria, Virginia
Gerald Gold, Cleveland Ohio

Gerald Goldstein, San Antonio, Texas
Carmen Hernandez, Highland Park, Maryland
Nancy Hollander, Albuquerque, New Mexico
Rick Jones, N.Y, New York
Jim Lavine, Houston Texas
Gerald Lefcourt, N.Y, New York
Bruce Lyons, Ft. Lauderdale, Florida
Edward Mallett, Houston, Texas
Gerry Morris, Austin, Texas,
Cynthia Hujar Orr, San Antonio, Texas
Larry Pozner, Denver, Colorado
Martin Sabelli, San Francisco, California
Barry Scheck, N.Y, New York
Theodore Simon, Philadelphia, Pa.
Neal Sonnett, Miami, Florida
Jeff Weiner, Miami, Florida