

NO.

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2023

FRANCIS ARTHUR

PETITIONER,

v.

UNITED STATES OF AMERICA

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fourth Circuit erred in affirming the district court's denial of Arthur's motion to dismiss the indictment because the Government deported a witness whose testimony would have been material, favorable, and non-cumulative.
2. Whether the Fourth Circuit erred in affirming the district court's refusal to inspect the Government's file of the deported witness for material subject to disclosure under *Brady v. Maryland*, 373 U.S. 83 (1963), based on the Government's claim that it had satisfied its *Brady* obligations.
3. Whether the Fourth Circuit erred in affirming the district court's exclusion of statements that the deported witness made that were against his penal interest.
4. Whether the Fourth Circuit erred in affirming the district court's giving a "willful blindness" jury instruction lacking any evidentiary basis.
5. Whether Arthur was entitled to acquittal because the Government failed to prove that Arthur knew that: (1) the funds derived from illegal activity, an element of all charged offenses; and (2) the transactions were designed to conceal the funds, an element of concealment money laundering.

RULE 14.1(b) STATEMENT

There are no parties in addition to those listed in the caption.

TABLE OF CONTENTS

	<u>PAGE</u>
ISSUES PRESENTED.....	i
RULE 14.1(b) STATEMENT.....	ii
TABLE OF CONTENTS.....	iii, iv
TABLE OF AUTHORITIES.....	v-viii
OPINIONS BELOW.....	ix
JURISDICTION.....	ix
CONSTITUTIONAL PROVISIONS.....	ix
STATEMENT OF THE CASE/STATEMENT OF THE FACTS.....	2
a. The Government's Case.....	4
b. Arthur's Defense.....	8
c. Jury Charge, Closing Arguments, Verdict, Sentencing.....	10
SUMMARY OF ARGUMENT.....	12
ARGUMENT.....	18
1. The Government Violated Arthur's Constitutional Right To Present Favorable Testimony by Deporting Asare.....	18
A. Arthur Preserved His Access-to-Evidence Claim.....	18
B. Asare's Deportation Violated Arthur's Constitutional Right to Present Favorable Testimony and So Required Dismissal.....	21
2. The District Court's Refusal to Review Asare's File Requires Reversal.....	23
3. The District Court's Trial Errors Require Reversal.....	26

A. Asare's Statements Were Admissible Under Rule 804(b)(3)	26
B. There Was No Factual Basis for the Willful Blindness Instruction...	31
4. Arthur's Convictions Cannot Stand.....	34
A. The Evidence Does Not Establish That Arthur Knew That The Funds Derived From Illegal Activity.	34
B. The Evidence Does Not Establish Intentional Concealment As Necessary For Counts Three Through Six.....	37
CONCLUSION.....	39
APPENDIX I.....	41

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page(s)</u>
<i>Arizona v. Youngblood</i> , 488 U.S. 51 (1988)	19
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963)	16
<i>Buie v. Sullivan</i> , 923 F.2d 10 (2d Cir. 1990)	19
<i>Glob.-Tech Appliances, Inc. v. SEB S.A.</i> , 563 U.S. 754 (2011)	15, 31
<i>Holguin-Hernandez v. United States</i> , 140 S. Ct. 762 (2020)	3
<i>Ingram v. United States</i> , 360 U.S. 672 (1959)	35
<i>United States v. Abdallah</i> , 911 F.3d 201 (4th Cir. 2018)	13, 24
<i>United States v. Adefehinti</i> , 510 F.3d 319 (D.C. Cir. 2007)	22, 23, 36, 36
<i>United States v. Blankenship</i> , 382 F.3d 1110 (11th Cir. 2004);	22, 24
<i>United States v. Bobo</i> , 994 F.2d 524 (8th Cir. 1993)	28
<i>United States v. Bolden</i> , 325 F.3d 471 (4th Cir. 2003)	38
<i>United States v. Boyd</i> , 5 F.4th 550 (4th Cir. 2021)	4
<i>United States v. Brainard</i> , 690 F.2d 1117 (4th Cir. 1982)	27
<i>United States v. Bran</i> , 950 F. Supp. 2d 863 (E.D. Va. 2013)	21

<i>United States v. Brizuela,</i> 962 F.3d 784 (4th Cir. 2020)	34
<i>United States v. Brown,</i> 186 F.3d 661 (5th Cir. 1999)	38
<i>United States v. Burgos,</i> 703 F.3d 1 (1st Cir. 2012)	35
<i>United States v. Caldwell,</i> 560 F.3d 1214 (10th Cir. 2009)	22, 23
<i>United States v. Chaparro-Alcantara,</i> 226 F.3d 616 (7th Cir. 2000)	19
<i>United States v. Damra,</i> 621 F.3d 474 (6th Cir. 2010)	19
<i>United States v. Dargan,</i> 738 F.3d 643 (4th Cir. 2013)	27
<i>United States v. Dring,</i> 930 F.2d 687 (9th Cir. 1991)	19
<i>United States v. Esterman,</i> 324 F.3d 565 (7th Cir. 2003)	37
<i>United States v. Giovannetti,</i> 928 F.2d 225 (7th Cir. 1991)	33
<i>United States v. Graham,</i> 796 F.3d 332 (4th Cir. 2015), <i>rev'd on other grounds,</i> 824 F.3d 421 (4th Cir. 2016)	28
<i>United States v. Holmes,</i> 722 F.2d 37 (4th Cir. 1983)	25
<i>United States v. Ibisevic,</i> 675 F.3d 342 (4th Cir. 2012)	29
<i>United States v. Iribe-Perez,</i> 129 F.3d 1167 (10th Cir. 1997)	19
<i>United States v. Jordan,</i> 509 F.3d 191 (4th Cir. 2007)	27

<i>United States v. Katsougrakis,</i> 715 F.2d 769 (2d Cir. 1983)	27
<i>United States v. King,</i> 628 F.3d 693 (4th Cir. 2011)	23, 24
<i>United States v. Lang,</i> 589 F.2d 92 (2d Cir. 1978)	27
<i>United States v. Leal-Del Carmen,</i> 697 F.3d 964 (9th Cir. 2012)	21
<i>United States v. Lighty,</i> 616 F.3d 321 (4th Cir. 2010)	32
<i>United States v. Lis,</i> 120 F.3d 28 (4th Cir. 1997)	29
<i>United States v. Macias,</i> 786 F.3d 1060 (7th Cir. 2015)	33
<i>United States v. McGahee,</i> 257 F.3d 520 (6th Cir. 2001)	22
<i>United States v. Moussaoui,</i> 382 F.3d 453 (4th Cir. 2004)	20
<i>United States v. Nicholson,</i> 176 F. App'x 386 (4th Cir. 2006)	35
<i>United States v. Nyman,</i> 649 F.2d 208 (4th Cir. 1980)	30
<i>United States v. Robinson,</i> 744 F.3d 293 (4th Cir. 2014)	4
<i>United States v. Singh,</i> 518 F.3d 236 (4th Cir. 2008)	34
<i>United States v. Valenzuela-Bernal,</i> 458 U.S. 858 (1982)	13, 21
<i>Yee v. City of Escondido,</i> 503 U.S. 519 (1992)	4, 5

STATUTES

18 U.S.C. § 1349	4
18 U.S.C. § 1956(a)(1)(B)(i)	4
28 U.S.C. Sec. 1254(1)	ix

OPINIONS BELOW

The December 1, 2023 opinion of the United States Court of Appeals for the Fourth Circuit is attached hereto as Appendix I.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fourth Circuit was entered on December 1, 2023. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS

Fifth Amendment to the United States Constitution

Sixth Amendment to the United States Constitution

Fourteenth Amendment to the United States Constitution

See Brady v. Maryland, 373 U.S. 83 (1963) (Defendant has Constitutional Rights to receive exculpatory evidence)

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STATEMENT OF THE CASE/STATEMENT OF THE FACTS

Arthur came to the United States from Ghana in 2012. He lived in Maryland, where he worked as an aide to adults with developmental disabilities during the day and restocked shelves at a big box store at night.

In May 2017, a grand jury indicted Arthur and three others – Kelvin Asare, Samuel Attakora, and Gifty Amponsah – for conspiracy to commit bank fraud. The indictment centered on a scheme to defraud Nymeo Federal Credit Union (“Nymeo”) by obtaining confidential customer information from an insider at Nymeo, using that information to make a counterfeit identification card, and then impersonating the account holder to withdraw their funds. The indictment alleged that Arthur created a company named Anivac, Inc. (“Anivac”) to launder the proceeds. The indictment also alleged that on February 25, 2017, the day after \$327,000 was transferred from a Nymeo account to Anivac, Arthur withdrew cash, obtained cashier’s checks, and wired \$201,000 to a bank account that Amponsah controlled. The government later obtained a superseding indictment, adding another defendant and charges for conspiracy to commit money laundering and money laundering. Only Arthur went to trial.¹

¹

Asare pleaded guilty on February 23, 2018. See *United States v. Attakora*, No. 8:17-cr-00253-PWG, ECF No. 90 (D. Md. Feb. 23, 2018). Attakora pleaded guilty on April 2, 2018. See *id.*, ECF No. 116. Kokou Azianbidji pleaded guilty on November 18, 2018. See *id.*, ECF

Arthur's right to put the government to its proofs was thwarted, however, by his inability to present exculpatory evidence. At a pretrial conference on October 4, 2019, Arthur announced his intent to call Asare – his alleged co-conspirator – as a witness. Arthur's counsel asked the government for Asare's location, but the government never responded. A few weeks later, Asare called Arthur's counsel. Arthur's counsel declined to talk, believing Asare to be represented by counsel. Asare called again. After confirming that Asare was not represented, Arthur's counsel interviewed him. Asare said that Arthur did not know about the fraud. He also said that he had volunteered this information to the government.

From these calls, Arthur's counsel learned that Asare had been deported to Ghana on September 6, 2019. Arthur moved to continue his trial, which was then scheduled for November 5, 2019, so he could depose Asare. The district court granted the motion and reappointed Marc Hall, Asare's former counsel, to represent Asare. When Asare spoke with Hall, Asare reiterated that Arthur was not involved in the fraud. On the day of the deposition, however, Asare failed to appear at the U.S. embassy in Ghana and stopped responding to messages.

Arthur moved to dismiss the indictment, arguing that the

No. 193. And Amponsah entered into a deferred prosecution agreement on August 16, 2019. See *id.*, ECF No. 276.

Government's failure to disclose Asare's statements and Asare's unavailability violated his constitutional right to exculpatory evidence and delayed his trial in violation of the Speedy Trial Act. He also moved to compel the government to produce its file on Asare to the district court to determine whether it contained material subject to disclosure. While the government had previously produced memoranda and video recordings of its interviews with Asare, it had withheld other materials, such as its notes. The court denied dismissal and refused to review Asare's file. Arthur sought to call Hall to testify about his conversation with Asare. The court denied that motion, too.

In a second superseding indictment returned in September 2021, the government charged Arthur with conspiracy to commit wire fraud in violation of 18 U.S.C. § 1349 (Count One); conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h) (Count Two); and five counts of money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(i), (B)(i) (Counts Three through Seven). Counts Three, Four, and Six related to cashier's checks drawn from Anivac's account, Count Five was for a \$7,000 withdrawal, and Count Seven was for the \$201,000 wire transfer.

a. The Government's Case.

The Government's case consisted of nine witnesses. One witness, Eric Black, was the Nymeo investigator who detected the fraud. He testified that on February 24,

2017, an individual impersonating an account holder withdrew \$6,000 and transferred \$327,000 to a Wells Fargo account belonging to Anivac. The account holder testified that he did not approve the transfer. Neither witness linked Arthur to the fraud.

The Government also called Special Agent Heather Turner, an investigator with the U.S. Secret Service. She testified that Arthur was the sole agent for Anivac, which listed Arthur's home address as its principal office. Arthur also opened an account in Anivac's name at Wells Fargo using his correct name, email address, and home address. He was the sole signatory on the account.

Special Agent Turner testified that on February 25, 2017, Arthur accessed Anivac's Wells Fargo account and performed five transactions: he withdrew \$7,000 in cash; obtained three cashier's checks that named him as the remitter; and wired the remaining \$201,000 to an account Amponsah controlled. She acknowledged, however, that Arthur received none of that money. While Amponsah sent a \$20,000 check to Anivac the following week, she canceled it before Arthur cashed it. By contrast, Amponsah gave Attakora \$16,000, and Asare and Attakora each bought a luxury car with the cashier's checks.

The centerpiece of the Government's case was the one witness

who had firsthand knowledge of the fraud: Attakora. He admitted to participating in the scheme and pleading guilty. And he admitted that, facing thirty years in prison, he had agreed to cooperate with the government and was testifying against Arthur hoping to receive a reduced sentence. He also admitted to perpetrating other frauds with Asare on top of the Nymeo scheme without Arthur's knowledge or involvement.

According to Attakora, Asare concocted the scheme in fall 2016, and they quickly recruited Valerie Hughes, a Nymeo bank teller who Attakora was dating. Asare, Attakora, Hughes, and Amponsah – but not Arthur – met to discuss the scheme. Using information from Hughes, Attakora created a fake ID, which someone Amponsah recruited then used to impersonate the account holder and access their funds.

Attakora said that they tried to access the victim's account three times. He claimed that he, Asare, and Arthur drove to Atlanta around Valentine's Day 2017, and met with the imposter, who tried unsuccessfully to access the account. On February 24, Asare and Attakora took the imposter to a Nymeo branch in Maryland, where he wired \$327,000 to Anivac. Lastly, Asare and Attakora went back to Atlanta without Arthur in early March, but that trip also was unsuccessful.

Attakora testified unequivocally that Arthur knew about the fraud, but his testimony was vague and inconsistent. According to

Attakora, "Arthur knew the money was coming from [a] Nymeo bank account to his account and he knew how [they] were getting it" because Asare had told him about the scheme. Attakora admitted, however, that he did not overhear Asare describe the scheme to Arthur. Attakora also claimed to have overheard Asare tell Arthur about the February 24 deposit, but Asare did not mention Nymeo or the fraud. While Attakora initially testified that Asare informed Arthur of the second Atlanta trip, Asare later said that Arthur never knew of the trip. Attakora's testimony that Arthur knew of the fraud also conflicted with other testimony he provided. For example, he testified that Asare boasted that he "kn[ew] how to handle" Arthur, and that Asare "w[ould] hold details" from others.

Attakora's credibility was thoroughly undermined on cross-examination. For instance, Attakora insisted that he received "maybe \$2000" from Amponsah, JA334, despite Special Agent Turner testifying that Attakora had received \$16,000. But Arthur could not impeach Attakora with statements that Attakora made to the Government that deviated from his testimony because Attakora repeatedly professed he could not recall having made a particular statement. He did not recall telling the government that Arthur "did not have too many details about the scheme," that Arthur asked Asare about the money, but Attakora "didn't remember the specific answers Asare gave," that Asare "was very secretive"

with Arthur, and that Asare never told Arthur why he transferred the funds to Anivac. The Government attorneys who elicited Attakora's testimony, and who were present when Attakora made the original statements, said nothing.

The Government also presented evidence of two unrelated frauds not referenced in the indictment. Special Agent Turner testified that on March 21, 2017, Anivac received \$20,000 from TP, who testified that she had fallen for an online dating scam. Special Agent Turner also stated that Anivac received \$15,360 on March 22, 2017, from Libgo Travel, which she said had been the target of a phishing scam.

After the Government rested, Arthur moved for a judgment of acquittal. The motion was denied.

b. Arthur's Defense.

Arthur testified in his own defense. He explained that he met Asare in 2016, and was drawn to him because they were from the same tribe in Ghana. Asare proposed that they start a business exporting car parts to Ghana. Arthur agreed and gave Asare \$10,000 – his entire life savings – to invest in the company. Asare took Arthur to the Maryland Department of Assessments and Taxation to incorporate Anivac and directed Arthur to open accounts at Wells Fargo and SunTrust Bank. Arthur testified that he went with Asare and Attakora to Atlanta believing that they would inspect car parts, that he never

visited a bank, and that he spent stretches of the trip alone in the hotel room.

Around 10 p.m. on February 24, Asare told Arthur that he had wired \$327,000 to Anivac's Wells Fargo account. Arthur was "shocked" because he "didn't know where the money came from." The next morning, Arthur went to the police and then to the bank, where he asked that a hold be placed on his account. After, Arthur rushed to take care of his client, a teenager with Down syndrome and Autism. Asare and Attakora called repeatedly. When Arthur did not answer, Asare and Attakora accosted him at his client's home. They accused Arthur of stealing the money, threatened him, and demanded that he distribute the funds. Arthur gave into Asare's and Attakora's threats. He and Asare went to a Wells Fargo branch, and, at Asare's direction, Arthur withdrew cash, procured three cashier's checks, and wired the leftover funds to Amponsah.

At the bank, Asare promised Arthur that he would receive some of the money, which Arthur understood to mean his \$10,000 investment plus profits from Anivac's car-parts business. Several weeks later, Arthur received a \$20,000 check from Amponsah, but the check did not clear.

Arthur adamantly denied knowing about the fraud. He did not attend any of the planning meetings. Nor did Asare ever mention Nymeo or tell him where the money had come from. Arthur had never

heard of TP or Libgo Travel until after his arrest.

c. Jury Charge, Closing Arguments, Verdict, Sentencing.

At the charge conference, the district court overruled Arthur's objection to the willful-blindness instruction. It informed jurors that they could impute knowledge to Arthur if they found that he "took deliberate actions to avoid knowing that the money at issue was the proceeds of fraud or other illegal activity or that [he] was subjectively aware of a high probability that the money at issue was the proceeds of fraud or other illegal activity and that [he] acted with deliberate disregard of the facts."

During closing arguments, the Government repeatedly told the jurors that Arthur's "intent" was "the key issue" in the case. The Government said that they could infer that Arthur "knew what he was doing" from six pieces of evidence: a photo of Arthur and Asare at Wells Fargo on February 25, Arthur's visit to the police, Attakora's testimony, the TP and Libgo Travel deposits, Arthur's financial status in October 2016, and the \$20,000 check from Amponsah. During rebuttal, though, the Government exploited the willful-blindness instruction, touting it as an "alternate theor[y]" the jury could use to convict.

After roughly five hours of deliberation over two days, the jury sent a note to the district court asking: "Can we get some additional clarification on the difference between concealment and promotion money laundering?" The court repeated its original instructions. The jury returned a special verdict an hour later, acquitting Arthur of nearly half of the charges. It found Arthur not guilty of wire fraud conspiracy (Count One) and conspiracy to commit promotion money laundering (Count Two), but guilty of conspiracy to commit concealment money laundering (Count Two). For Counts Three through Six, which relate to the cashier's checks and \$7,000 withdrawal, the jury found Arthur not guilty of promotion money laundering but guilty of concealment money laundering. For Count Seven, which relates to the \$201,000 wire transfer, the jury found Arthur guilty of both promotion and concealment money laundering.

The district court denied Arthur's motion for acquittal or for a new trial based on insufficiency of the evidence.

At sentencing, the district court found that Arthur played a minimal role in the scheme, observing that he "was played by two pros, Asare and Attakora,"; "the clear masterminds of th[e] fraud," Attakora, the court noted, was a "career fraudster," who "would lie to get himself out of trouble in any way he could," and his "conclusory" testimony "had the feel of someone who was singing for their supper." The court sentenced Arthur to 366 days in prison and ordered him to pay \$339,000 in restitution.

SUMMARY OF ARGUMENT

The month before his trial was set to start, Arthur discovered that Asare, his alleged co-conspirator and undisputed leader of the fraud, had told the government that Arthur was unaware of the scheme. But Arthur could not call Asare to testify because the government had deported Asare. That transformed this case into a credibility contest between Arthur and Attakora, a professional fraudster with a favorable plea deal tied to his testimony. The district court then tipped the balance decisively against Arthur in a series of erroneous rulings, which crippled his defense and reduced the government's burden of proof. The result was a one-sided trial in which Arthur was convicted of crimes lacking evidentiary support.

I. After Asare failed to appear for a deposition, Arthur

moved to dismiss the indictment on due process grounds and asked the district court to review the government's file on Asare to determine whether it contained exculpatory evidence. The court denied his motion. Both rulings were erroneous and rendered Arthur's trial fundamentally unfair.

A. The district court erred in denying Arthur's motion to dismiss the indictment because Asare's deportation violated Arthur's Fifth and Sixth Amendment right to present favorable testimony. See *United States v. Valenzuela-Bernal*, 458 U.S. 858, 873 (1982). Arthur demonstrated that, based on Asare's statements to Arthur's counsel, Asare's testimony would have been material and favorable because it would have corroborated Arthur's testimony and directly contradicted the government's star witness. The Fourth Circuit had expressly left open whether a defendant must show that the government deported the witness in bad faith. It should not adopt that requirement here. In any event, the Government acted in bad faith by deporting Asare despite knowing that his testimony would have been favorable to Arthur.

B. The district court compounded that error by failing to review the government's file on Asare. Given Asare's statements to Arthur's counsel, it is more than plausible that Asare's file contains exculpatory evidence. The court, therefore, was required to inspect it *in camera*. See *United States v. Abdallah*, 911 F.3d

201, 218 (4th Cir. 2018). The court reasoned that no inspection was warranted given the government's assertion that it had complied with its *Brady* obligations. That ruling flies in the face of this Court's admonition that a "district court cannot solely 'rely on the government's good faith' as a basis to avoid review." *Id.* This Court has reversed convictions in similar circumstances. See *id.* at 221-22. The Court should do so here as well.

II. The district court's evidentiary errors and improper jury instructions further eviscerated Arthur's defense.

A. The district court erred when it precluded Arthur from introducing Asare's statements to Hall that Arthur was not involved in the fraud. Those statements were admissible under the hearsay exception for statements against penal interest. Fed. R. Evid. 804(b)(3). They meet all the criteria for admissibility: Asare was unavailable due to his deportation; Asare's statements exposed him to perjury charges because they contradicted sworn statements that he made during his guilty plea; and the circumstances and trial evidence corroborated the statements. The court's erroneous exclusion was not harmless because it deprived the jury of critical exculpatory evidence that cut to the heart of this extremely close case.

B. The district court also gave the jury an invalid path to conviction by instructing jurors that they could find Arthur

guilty even if he lacked actual knowledge of the relevant facts if, in their view, he "consciously avoided" learning those facts. Because such instructions encourage the jury to convict based on a mere failure to investigate, they are permissible only when the government establishes a clear factual predicate, by showing that the defendant made "active efforts" to avoid gaining knowledge. *Glob.-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 770 (2011). The Government established no such predicate; to the contrary, the evidence showed that, far from burying his head in the sand, Arthur investigated the source of the money in Anivac's account. Because the instruction gutted Arthur's defense that he lacked the guilty knowledge necessary for the charged crimes, the government cannot prove that this error was harmless.

III. Even ignoring the above errors, Arthur's convictions must be reversed because the evidence is insufficient to support them. Francis Arthur's money-laundering trial centered on his intent. The Government's case rested on Samuel Attakora, a "career fraudster" who claimed that Arthur knowingly participated in a fraud scheme. Arthur testified that Kelvin Asare, the scheme's mastermind, kept him in the dark about it. It was a classic case of competing stories. The account the jury believed would decide the verdict.

But the Government's conduct and district court's erroneous rulings prevented Arthur from presenting a complete defense. The

Government's deportation of Asare denied Arthur crucial testimony that would have confirmed his innocence and discredited Attakora. Compounding this prejudice, the district court wrongly refused to review Asare's file for *Brady* material, excluded Asare's statements that Arthur was unaware of the fraud, and gave a jury instruction that reduced the government's burden of proof on the hotly disputed scienter element. These errors — singly, and certainly in concert — fatally undermine the verdict.

Rather than confront Arthur's arguments head-on, the government distorts the record and disregards the law. In response to Arthur's challenge to Asare's deportation, the government urges the Court to apply the wrong standard of review, warps Supreme Court jurisprudence, and downplays the prejudice that Arthur suffered by overstating the strength of its case. The Government defended the district court's failure to conduct an *in camera* review with dicta from an outdated case that is contrary to controlling law. And the Government regurgitated the district court's flawed analysis for its evidentiary and instructional rulings without furnishing precedent or record citations responsive to Arthur's contentions.

Reversal is also required because the Government failed to prove beyond a reasonable doubt that Arthur conspired to and did commit money laundering. Given the Government's anemic proof of intent, only impermissible speculation could lead the jury to

find that Arthur knew that the funds that he distributed derived from illegal activity. At the very least, Arthur's convictions for Counts Three through Six cannot stand because the underlying transactions consist of cash and checks obtained from an account linked to Arthur, conduct which cannot support the inference that Arthur knew that the transactions were designed to conceal the funds.

Here, too, the Government's responses lack merit. Despite presenting nine witnesses over a week-long trial, the Government hanged its hat on Arthur's testimony — which it misstates — as evidence establishing knowledge that the funds were unlawful. The Government also fails to cite a single case upholding a conviction for concealment money laundering based on similar conduct. There is no sound basis for doing so here, which would break with the uniform view of other courts of appeals and dramatically expand the money laundering statute, criminalizing virtually any transaction involving illicit proceeds.

The Fourth Circuit should have reversed and directed an acquittal, or at least order a new trial, on all counts.

ARGUMENT

1. The Government Violated Arthur's Constitutional Right To Present Favorable Testimony by Deporting Asare.

The district court erred by not dismissing the indictment because Asare's deportation denied Arthur testimony critical to his defense. While the Government's intent is irrelevant, it acted in bad faith by deporting Asare despite knowing from its interviews that he had made statements favorable to Arthur. And given Asare's statements to Arthur's counsel that Arthur was unaware of the fraud, it is plausible that his testimony would have been uniquely material and favorable.

A. Arthur Preserved His Access To Evidence Claim.

As a first-line defense, the Government contended that Arthur failed to preserve his claim. It next maintains that Asare's deportation did not violate Arthur's constitutional rights because the government did not act in bad faith. The government's last-ditch defense is that Asare's testimony would not have been material or favorable. The Government is wrong at every turn. The Government's merits arguments underscore why it fights for plain-error review. It first urged the Court to graft a bad-faith requirement onto *Valenzuela-Bernal*'s test for when a witness's deportation rises to a constitutional violation. But the fact that some

circuits require a showing of bad faith does not make them right. The Second and Tenth Circuits' adoption of a bad-faith requirement was unreasoned. See *United States v. Iribar-Perez*, 129 F.3d 1167, 1173 (10th Cir. 1997); *Buie v. Sullivan*, 923 F.2d 10, 11 (2d Cir. 1990). The Sixth Circuit wrongly held that *Arizona v. Youngblood*, 488 U.S. 51 (1988), modified *Valenzuela-Bernal* because both cases concern the right to access evidence. See *United States v. Damra*, 621 F.3d 474, 489 (6th Cir. 2010). The Seventh Circuit read *Youngblood* as "pointing to *Valenzuela-Bernal* as an example of a case in which the defendant was required to show bad faith." *United States v. Chaparro-Alcantara*, 226 F.3d 616, 624 (7th Cir. 2000). That is not right; *Youngblood* said that *Valenzuela-Bernal* illustrated "the importance for constitutional purposes of good or bad faith on the part of the Government when the claim is based on loss of evidence." *Youngblood*, 488 U.S. at 57 (emphasis added). And the Ninth Circuit misread *Valenzuela-Bernal* as imposing a bad-faith requirement; it makes no mention of bad faith. See *United States v. Dring*, 930 F.2d 687, 693 (9th Cir. 1991).

Beyond that, none of the courts in those cases confronted

the argument that *Youngblood* and *Valenzuela-Bernal* concern the loss of fundamentally different types of evidence. *Youngblood* addressed the destruction of "potentially useful" evidence "of which no more can be said than that it . . . might have exonerated the defendant." 488 U.S. at 57-58. By contrast, the Supreme Court was explicit in *Valenzuela-Bernal* that the mere loss of testimony is not enough to establish a constitutional violation; the defendant must "make[] a plausible showing that the testimony of the deported witnesses would have been material and favorable to his defense." 458 U.S. at 873. That distinction is critical because, under *Brady*, the loss of material and favorable evidence "violates due process . . . irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. This Court has suggested that "the Government's good faith deportation of the potential witnesses would be sanctionable if the witnesses were material." *United States v. Moussaoui*, 382 F.3d 453, 475 (4th Cir. 2004). It should so hold here.

Even if bad faith were required, Arthur has shown it because the Government knew that Asare had made statements that exculpated Arthur before deporting him. Resisting this conclusion, the Government submitted that Arthur cannot establish bad faith because "the prosecution team was not aware of the deportation before it occurred." But bad faith "turns on what

the government knew at the time it deported the witness.” *United States v. Leal-Del Carmen*, 697 F.3d 964, 970 (9th Cir. 2012) (emphasis added); see *United States v. Bran*, 950 F. Supp. 2d 863, 874 (E.D. Va. 2013) (finding bad faith where the “United State[s] deported [the witness] even though it was aware” he “almost certainly did[] have [favorable] information”). Who in the government knew of Asare’s deportation is irrelevant.

B. Asare’s Deportation Violated Arthur’s Constitutional Right To Present Favorable Testimony And So Required Dismissal.

The Government also offered a string of reasons why, in its view, Asare’s testimony would have been unfavorable, immaterial, and cumulative. None of its contentions stick. Given Asare’s conversations with his counsel, Marc Hall, and Arthur’s counsel, Arthur made a “plausible showing,” *Valenzuela-Bernal*, 458 U.S. at 873, that Asare would have testified that Arthur was unaware of the scheme to defraud Nymeo. This testimony would have been favorable to Arthur’s defense. It would have reinforced Arthur’s testimony that he did not know that Anivac’s funds derived from illegal activity – an element essential to all offenses. And it would have discredited Attakora, who claimed that Arthur knowingly participated in the fraud. See *Leal-Del Carmen*, 697 F.3d at 972 (testimony that “could well have cast doubt on”

government witnesses was favorable and material). Insofar as Asare's testimony would have conflicted with his prior statements that goes to his credibility, which is a call for the jury. See *id.* (credibility of deported witness was "for the jury to determine").

Nor, as the Government contended, would Asare's testimony have been duplicative. As the only witness to corroborate Arthur's account of events, Asare would have provided the jury an independent basis to acquit on all charges.

Finally, Asare's testimony would have been material because it would have created reasonable doubt that Arthur knew that Anivac's funds were illegal. The Government greatly exaggerates the strength of its case in claiming that Asare's testimony would not have influenced the jury given the "overwhelming" evidence against Arthur. As Arthur showed, the Government's case rested on speculative inferences and the vague testimony of a convicted fraudster motived to please the Government. Had the jury heard Asare's testimony, and accepted Arthur's account as a result, there is a "reasonable likelihood" that it would have voted to acquit. *Valenzuela-Bernal*, 458 U.S. at 874 (cautioning that "courts should afford some leeway" in assessing the materiality of a deported witness's testimony because "the defendant necessarily proffers a description of the material evidence

rather than the evidence itself").

2. The District Court's Refusal To Review Asare's File Requires Reversal.

The district court erroneously denied Arthur critical discovery by refusing to review the government's file on Asare for exculpatory information based on the Government's representation that it had complied with its *Brady* obligations. That ruling cannot be squared with this Court's precedent and requires reversal for an *in camera* inspection of Asare's file.

The Government admitted, as it must, that a court is required to review the Government's files upon a plausible showing that they may contain *Brady* material. But the Government stated that the court was not obligated to conduct an *in camera* review here because there is no evidence that it withheld exculpatory statements by Asare. That is incorrect. Asare told Arthur's counsel that he volunteered to the government that Arthur was unaware of the fraud. Those statements, however, appear nowhere in the interview summaries or video recordings that the government produced. While the Government maintains that it disclosed "every document relevant to Asare," it did not produce notes by law enforcement and prosecutors about Asare. It is therefore plausible that Asare's file "could contain materially favorable evidence," *United States v. King*, 628 F.3d 693, 704 (4th Cir. 2011), such as notes that capture Asare's statements

that Arthur was unaware of the fraud, see *United States v. Abdallah*, 911 F.3d 201, 218 (4th Cir. 2018) (recognizing drafting notes can be *Brady* material).

The Government also suggests that there was no need to review Asare's file because Asare's missing statements, if they exist, are not material and favorable. This puts the cart before the horse: The very purpose of *in camera* review is for the court to determine whether the disputed file contains *Brady* material. Because the government withheld Asare's file from Arthur, he cannot be expected to prove that it includes information that qualifies as *Brady* material. See *Abdallah*, 911 F.3d at 218 ("Because the defendant does not have access to the confidential material, the defendant 'cannot possibly know . . . that particular information exists which meets *Brady*'s requirements'" (brackets omitted)); *King*, 628 F.3d at 703 (recognizing "the Government deprived [the defendant] of any access to the [disputed material] and so prevented him from specifically proving its materiality").

Although the Government strenuously avoids citing *King* – the case appears just once in its brief – all the facts that compelled *in camera* review there are present here. In asking the court to review Asare's file, Arthur "identified the information sought with sufficient particularity." *King*, 628 F.3d at 703. Asare "figured prominently in [Arthur's] trial," and his missing

statements that Arthur was unaware of the fraud "could have provided [Arthur] important ammunition for his defense." *Id.* at 704. Given Asare's representations to Arthur's counsel, "it remains plausible" that notes or other withheld documents concerning Asare contain his missing statements. *Id.* In the end, this Court need look no further than *King*.

Contrary to the Government, *United States v. Holmes*, 722 F.2d 37 (4th Cir. 1983), does not excuse the district court's failure to conduct an *in camera* review. The language that the Government relies on is dicta: The *Holmes* Court reversed based on violations of the Jencks Act and "add[ed]" as an aside that it "t[hought]" that the district court did not err in declining to conduct an *in camera* review "when the prosecutor had assured the district court that all possibly exculpatory material had been produced." *Id.* at 41. Moreover, this dicta, which this Court has never followed, is irreconcilable with *Abdallah* and *King*, which make clear that once a defendant has made a plausible showing that the government has withheld potentially exculpatory material, a district court cannot refuse to conduct an *in camera* review based on the government's self-serving assurances. See Def.Br.30; *Abdallah*, 911 F.3d at 218; *King*, 628 F.3d at 702. Adopting the government's position here would render those decisions a dead letter. This Court should reverse with

instructions to inspect Asare's file.

III. The District Court's Trial Errors Require Reversal.

The district court's evidentiary and instructional errors deprived Arthur of a fair trial. The court prevented the jury from hearing Asare's statements to his attorney that Arthur was not involved in the fraud even though they were admissible as statements against penal interest. The court also gave a willful blindness instruction that skewed the jury's deliberations in favor of conviction even though Arthur took no active steps to avoid discovering the funds' source. Each error was harmful and compels reversal.

A. Asare's Statements Were Admissible Under Rule 804(b)(3).

Asare's statements to his attorney that Arthur was not involved in the fraud satisfied the admissibility requirements of Federal Rule of Evidence 804(b)(3), and the district court wrongfully usurped the jury's role by excluding them on the grounds that Asare lacked credibility. None of the Government's justifications for the district court's ruling withstands scrutiny or minimizes the harm to Arthur caused by the exclusion of this testimony.

The Government does not dispute that Asare's statements to Hall exposed him to perjury charges because they were contrary to statements that he made under oath during his plea hearing.

Instead, the Government contends that Asare's statements were not adverse to his penal interest because he made them while he was in Ghana, where he was unlikely to face prosecution. This argument finds no support in case law. Rule 804(b)(3)'s adversity requirement is satisfied if the statement implicates the declarant in a crime. See *United States v. Dargan*, 738 F.3d 643, 649-50 (4th Cir. 2013) ("intrinsically inculpatory" statements "satisfy this element of the rule"). It "does not require that the declarant be aware that the incriminating statement subjects him to immediate criminal prosecution." *United States v. Lang*, 589 F.2d 92, 97 (2d Cir. 1978). Indeed, this Court and others have held that statements admitting to criminal conduct were against the declarant's penal interest even though surrounding circumstances made it unlikely that the statements would lead to the declarant's prosecution. See, e.g., *United States v. Jordan*, 509 F.3d 191, 203 (4th Cir. 2007) (admitting statements to friend); *United States v. Brainard*, 690 F.2d 1117, 1125 (4th Cir. 1982) (admitting statements to secretary); *United States v. Katsougakis*, 715 F.2d 769, 775 (2d Cir. 1983) (admitting statement by declarant who "was approaching death and was talking privately with his friend"). Asare's inherently inculpatory statements were against his penal interest regardless whether the government is likely to charge him with perjury.

The Government fared no better in arguing that Asare's statements lack indicia of reliability. According to the Government, Asare's statements are untrustworthy because Asare and Arthur are "close friends and associates." The record says otherwise. Asare and Arthur were not friends when Asare spoke with Hall in November 2019. By then, Arthur had learned that Asare had lied to him about Anivac, stolen his life savings, and implicated him in a fraud. They had not communicated in more than two years. Arthur's and Asare's relationship (or lack thereof) is a corroborating factor, not a disqualifying one.

The Government relied on cases that look nothing like this one. The statement in *United States v. Graham*, 796 F.3d 332 (4th Cir. 2015), *rev'd on other grounds*, 824 F.3d 421 (4th Cir. 2016) (en banc), lacked crucial indicia of trustworthiness; it was never repeated, nor was it corroborated by evidence at trial apart from the defendant's testimony. See *id.* at 371. None of these difficulties exist here: Asare's statements to Hall mirror what he told Arthur's counsel, and evidence at trial independently corroborated Asare's statements, including Attakora's testimony that Arthur did not attend planning meetings, JA329-331, and Special Agent Turner's testimony that Arthur got none of the fraud proceeds, JA553. In *United States v. Bobo*, 994 F.2d 524 (8th Cir. 1993), the defendant sought to admit his brother's statement claiming ownership of the

contraband. *Id.* at 528. Arthur and Asare are not related, much less friends.

The Government also asserts that Asare's statements are untrustworthy because they conflict with his prior statements. But as Arthur explained, that amounts to a determination of Asare's credibility, which is irrelevant for purposes of Rule 804(b)(3). The Government had no answer. And, as Arthur explained, under that flawed logic no perjurious statement would ever satisfy Rule 804(b)(3). *Id.* Once again, the Government offered no response.

The Government did not carried its burden of proving this error was harmless. In a single paragraph lacking case citations, the Government asserted that excluding Asare's statements was harmless because "Arthur discussed his own knowledge and state of mind during his testimony" and its case was purportedly "overwhelming." Nonsense. The crucial issue at trial was whether Arthur knew that the money in Anivac's account derived from illegal activity. Asare's statements to Hall that Arthur was not involved in the fraud would have directly supported Arthur's testimony on that question, enhanced Arthur's credibility, and undercut the government's key witness. The wrongful exclusion of such evidence is paradigmatically prejudicial. See *United States v. Ibisevic*, 675 F.3d 342, 350-54 (4th Cir. 2012); *United States v. Lis*, 120 F.3d 28, 31 (4th Cir.

1997); *United States v. Nyman*, 649 F.2d 208, 211-12 (4th Cir. 1980). That is especially true here, where objective factors reveal that jurors struggled with this case: They deliberated for two days, asked for additional instruction, and acquitted Arthur on multiple charges. See *Ibisevic*, 675 F.3d at 354 (length of jury deliberations and request for instructions indicated case was close). The Government's boilerplate assertion of "overwhelming" evidence comes nowhere close to establishing

harmlessness.

**B. There Was No Factual Basis For The Willful
Blindness Instruction.**

As Arthur explained in his opening brief, a willful blindness instruction is appropriate only in the rare case in which the Government establishes a factual basis for the charge. That factual predicate, the Supreme Court held in *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754 (2011), requires proof that the defendant not only was aware of a "high probability" of the disputed fact but also undertook "active efforts" to avoid learning it. *Id.* at 769-70. Nothing in the record indicates that Arthur made "active efforts" to avoid learning about the funds in Anivac's account. In fact, the evidence shows just the opposite: He asked Asare about the funds and went to the police and bank to investigate their provenance. Def.Br.38-39. As a matter of law, therefore, the willful blindness instruction lacked the requisite factual predicate, and the court erred by giving it.

In an attempt to salvage the instruction, the Government resorts to toppling straw men. The Government insists that the willful blindness instruction is proper even though it primarily proceeded on the theory that Arthur had actual knowledge of the fraud. This is true, but beside the point. The problem, as Arthur argued below and in his opening brief, is that the instruction

lacks the necessary factual predicate because there is no evidence that Arthur made active efforts to avoid learning of the fraud. Similarly, the Government vigorously defends the district court's conclusion that Arthur believed there was a high probability that Anivac's funds were unlawful, a finding that Arthur does not challenge on appeal.

When the Government finally turns to Arthur's actual argument it says tellingly little. It parrots the district court's finding that Arthur consciously avoided learning whether the funds were legitimate by distributing them. As Arthur has explained, that finding is clearly erroneous because there is no evidence that Arthur distributed the funds to remain ignorant of their origin and because it conflates the *actus reus* of the charged offense with conscious avoidance. If Arthur's conduct suffices, then willful blindness instructions will become commonplace in money laundering cases, a result incompatible with this Court's admonition that the instruction "be given only in rare circumstances." *United States v. Lighty*, 616 F.3d 321, 378 (4th Cir. 2010) (internal quotation marks omitted). To all this, the Government says nothing.

The Government also argues that "Arthur traveling to Georgia . . . but failing to ask [Asare and Attakora] specific questions about what they were doing there" is evidence of conscious avoidance. This argument fails on the facts and the law.

Factually, it misstates the record: The Government never asked Arthur whether he questioned Asare and Attakora on the way to Atlanta about the trip's purpose. And for good reason: Arthur testified that Asare told him that they were going to Atlanta to inspect car parts for Anivac's business.

Legally, the premise of the Government's argument – that the failure to inquire can constitute conscious avoidance – runs headlong into *Global-Tech*. There, the Supreme Court made clear that the “deliberate actions” requirement is met only if the defendant takes “active efforts . . . to avoid knowing.” 563 U.S. at 770. A failure to ask questions is not an “active effort.” So the government's argument is invalid even on its own terms. See *United States v. Macias*, 786 F.3d 1060, 1063 (7th Cir. 2015) (willful blindness instruction was erroneous where defendant “failed to display curiosity, but . . . did not act to avoid learning the truth”).

This error, too, cannot be deemed harmless. In fact, the Government does not even try to argue that the willful blindness instruction, if in error, was harmless. That amounts to a concession that the erroneous instruction requires a new trial. See *United States v. Giovannetti*, 928 F.2d 225, 226-27 (7th Cir. 1991) (per curiam) (government's failure to address whether erroneous willful blindness instruction was harmless “signals its acquiescence that if there was error, it indeed was

prejudicial"); *cf. United States v. Brizuela*, 962 F.3d 784, 799 (4th Cir. 2020) (declining to find evidentiary error harmless given government's failure to brief the issue).

4. Arthur's Convictions Cannot Stand.

Moving from procedure to substance, the evidence is insufficient to sustain Arthur's convictions. The Government failed to prove that Arthur knew that the transactions he performed involved the proceeds of criminal activity, an element essential to both conspiracy and substantive money laundering. Arthur is independently entitled to acquittal on Counts Three through Six because Arthur openly spending money from an account linked to his name that only he controlled is not concealment money laundering.

A. The Evidence Does Not Establish That Arthur Knew That The Funds Derived From Illegal Activity.

Arthur is entitled to acquittal on all counts because the Government failed to prove the knowledge element of money laundering and conspiracy – that Arthur distributed the funds in Anivac's account “knowing” that they were “the proceeds of some form of unlawful activity.” 18 U.S.C. § 1956(a)(1) (money laundering); see *United States v. Singh*, 518 F.3d 236, 248 (4th Cir. 2008) (conspiracy). The Government's case, as Arthur's opening brief demonstrated, required jurors to impermissibly stack inference upon inference to reach the

conclusion that Arthur knew that the funds had been stolen. Thus, even viewing the evidence in the light most favorable to the Government and crediting every fair inference in its favor, the evidence is insufficient to sustain the convictions. See *Ingram v. United States*, 360 U.S. 672, 680 (1959) (knowledge cannot be proven by "piling inference upon inference"); *United States v. Burgos*, 703 F.3d 1, 10 (1st Cir. 2012) (vacating convictions where government relied on a chain of inferences to prove knowledge).

The Government's one-paragraph response betrayed the weakness of its case. It points to the photograph of Asare and Arthur inside the Wells Fargo branch on February 25, 2017 as evidence of guilty knowledge. But as Arthur has explained (and the Government ignores), "[m]ere association with those implicated in an unlawful undertaking is not enough to prove knowing involvement." *United States v. Nicholson*, 176 F. App'x 386, 398-99 (4th Cir. 2006) (per curiam) (Michael, J., concurring in part and concurring in the judgment); The Government also says (at 31) that Attakora "directly implicated Arthur." But while Attakora's testimony spans over 125 pages of the trial transcript, the Government cites no testimony from Attakora that could support a beyond-reasonable-doubt finding that Arthur knew

the funds in Anivac's account derived from illegal activity. The Government's silence speaks volumes.

The Government's claim that Arthur's testimony provided "powerful evidence" of his guilty knowledge is likewise unavailing. Arthur did not deny that he incorporated Anivac (at Asare's direction); opened bank accounts for Anivac using his name and address (at Asare's direction); and accessed Anivac's account on February 25, 2017 to withdraw cash, obtain cashier's checks, and wire funds (at Asare's direction). Nor did Arthur deny that he expected to receive some of that money, explaining that Asare had promised him the \$10,000 he had invested in Anivac plus profits from the car parts sold in Ghana. But Arthur never "admitted to suspecting the funds were fraudulent" as the Government contends. Rather, Arthur repeatedly testified that he "didn't know where the money came from or the source of the money." ("I knew nothing about the money."), ("I don't know where the money is coming from."). That is not an admission of guilty knowledge.

In sum, the evidence is wholly deficient to establish that Arthur knew that the funds in Anivac's account derived from illegal activity as is necessary to sustain the convictions. The Court should accordingly reverse and direct the Fourth Circuit and the district court to enter a judgment of acquittal on all counts.

B. The Evidence Does Not Establish Intentional Concealment As Necessary For Counts 3 Through 6.

The Government maintains that Arthur's intent to conceal "can be inferred" from the fact that he "kn[ew] that [Anivac] had no real le with the decisions of other circuits, which agree that "the mere transfer and spending of funds is not enough to sweep conduct within the money laundering statute." *Esterman*, 324 F.3d at 570. If cashing checks from an account clearly linked to the defendant establishes intentional concealment, then *Adefehinti*, *Caldwell*, *Blankenship*, *Esterman*, and *McGahee* all should have come out the other way. In each case, the defendant was convicted of concealment money laundering for withdrawing cash or writing checks from a bank account that they controlled. In each case, the court of appeals reversed. Such transactions, the D.C. Circuit explained, did not evidence an intent to conceal because "[a]n observer who reads the endorsement on the initial check and studies the names and numbers on the subsequent deposit slips and checks could discern the money trail with ease." *Adefehinti*, 510 F.3d at 323. The Tenth Circuit reached the same conclusion, reasoning that the transactions "failed to conceal what was going on" and "actually exposed" the fraud. *Caldwell*, 560 F.3d

at 1222. So if the government is right here, then these courts were wrong.

The courts were not wrong. In the absence of direct evidence, proof of intentional concealment requires "something more than mere transfer and spending"; there must be "sufficiently complex transactions that such an intent could be inferred." *Esterman*, 324 F.3d at 572. This "ensure[s] that the money laundering statute [does] not turn into a 'money spending statute.'" *Id.* at 573. That result would be "directly at odds with the text and purpose of the statute." *Blankenship*, 382 F.3d at 1130. And it would "provide overzealous prosecutors with a means of imposing additional criminal liability any time a defendant makes benign expenditures with funds derived from unlawful acts." *United States v. Brown*, 186 F.3d 661, 670 (5th Cir. 1999). This Court and the Fourth Circuit should not be the first to jettison this limiting principle.

No reasonable juror could conclude from Anivac's lack of business that Arthur knew that the transactions were designed to conceal the funds. True, this Court has recognized that the "use of sham businesses" can be "highly relevant to the proof of concealment money laundering." *United States v. Bolden*, 325 F.3d 471, 490 (4th Cir. 2003).² But not here. The use of Anivac's

² *Bolden* is inapposite. There, the defendants were convicted of concealment money laundering in connection with "a complex

account did not obscure the funds' nature, source, and location: The funds were transferred directly from Nymeo to Anivac, and then Arthur went to the bank and withdrew cash and obtained three cashier's checks. Nor did the use of Anivac's account obscure who owned or controlled the funds: Anivac's Wells Fargo account listed Arthur's identifying information and he was the sole signatory. Indeed, Eric Black, the Nymeo investigator, testified that he connected the transactions to Arthur by checking Anivac's articles of incorporation, which were "available online to anyone . . . immediately." Anivac concealed nothing.

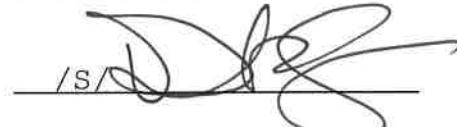
CONCLUSION

This Court should grant Certiorari and reverse the decision of the Fourth Circuit, based on the arguments above.

Medicaid fraud scheme" in which they transferred money to an intermediary company and then used the intermediary to purchase goods from a company related to the original holder of the funds in order to evade Medicaid's restrictions on related-party transactions. *Bolden*, 325 F.3d at 478, 483-84. This Court affirmed because the transactions "concealed the fact that the money flowing into [the holding company], and ultimately to the [defendants], was derived from Medicaid funds." *Id.* at 490. Arthur did not funnel funds through intermediary accounts, nor did his transactions hide the source of the money.

RESPECTFULLY

SUBMITTED,


/S/

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APPENDIX 1

UNPUBLISHED**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 22-4268

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

FRANCIS ARTHUR,

Defendant - Appellant.

Appeal from the United States District Court for the District of Maryland, at Greenbelt.
Paul W. Grimm, Senior District Judge. (8:17-cr-00253-PWG-4)

Submitted: November 20, 2023

Decided: December 1, 2023

Before GREGORY, AGEE, and WYNN, Circuit Judges.

Affirmed by unpublished per curiam opinion.

ON BRIEF: Peter L. Goldman, SABOURA, GOLDMAN & COLOMBO, P.C., Alexandria, Virginia; Alex P. Treiger, KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C., Washington, D.C., for Appellant. Erek L. Barron, United States Attorney, Baltimore, Maryland, Christian J. Nauvel, Special Assistant United States Attorney, Thomas M. Sullivan, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Greenbelt, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Francis Arthur was convicted after a jury trial of conspiracy to commit concealment money laundering, in violation of 18 U.S.C. § 1956(h), four counts of concealment money laundering, in violation of 18 U.S.C. § 1956(a)(1)(B)(i) (counts 3 through 6), and one count of promotion and concealment money laundering, in violation of 18 U.S.C. § 1956(a)(1)(A)(i), (B)(i). The district court sentenced Arthur to 12 months and 1 day in prison and 3 years of supervised release. On appeal, Arthur raises several challenges to his convictions. We affirm.

Arthur first challenges the district court's denial of his motion to dismiss the superseding indictment, arguing that the pretrial removal from the United States of his codefendant Kelvin Asare violated his rights under the Fifth and Sixth Amendments to present favorable testimony at trial. The parties debate the standard of review that governs this claim. Ordinarily, in an appeal of the district court's ruling on a motion to dismiss an indictment, we review the district court's factual findings for clear error and its legal conclusions *de novo*. *United States v. Barringer*, 25 F.4th 239, 246 (4th Cir. 2022). Arthur contends he adequately preserved this claim in the district court because his motion to dismiss the superseding indictment was based in part on the due process violation he experienced because of Asare's unavailability. Thus, while he did not argue in the district court that Asare's unavailability affected his ability to present favorable testimony, he argues that because the due process claim is preserved that this argument is allowed on appeal as a new argument supporting a preserved claim. The Government contends Arthur is raising this claim for the first time on appeal and that plain-error review applies. We

conclude that, regardless of the standard of review that applies, Arthur cannot prevail on this claim because he cannot demonstrate that an error occurred.

In *United States v. Valenzuela-Bernal*, the Supreme Court recognized that the Executive Branch's responsibility to faithfully execute the immigration policy adopted by Congress justifies the prompt removal of individuals without lawful status in the United States. 458 U.S. 858, 863-65, 872-73 (1982). That the Government removes a potential witness is not by itself sufficient to establish a violation of the Due Process Clause of the Fifth Amendment or the Compulsory Process Clause of the Sixth Amendment. *Id.* at 872-73. Rather, violation of these rights is established by the defendant making “a plausible showing that the testimony of the [removed] witness[] would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses.” *United States v. Kaixiang Zhu*, 854 F.3d 247, 254, 256 (4th Cir. 2017) (per curiam) (internal quotation marks omitted). We conclude that Arthur has not made this showing here.

Arthur’s argument that Asare would have furnished material, favorable, and exculpatory testimony rests on a thin reed. His argument presumes that we accept his contention that Asare contacted Arthur’s defense counsel before Arthur’s trial—but after Asare had pleaded guilty to conspiracy to commit bank fraud, served his sentence, and was removed from the United States—and told counsel that Arthur was unaware of the conspiracy and that he (Asare) had informed prosecuting attorneys about Arthur’s “lack of involvement in the conspiracy” during his (Asare’s) plea and sentencing. But the Government disputed that contention below and disputes it on appeal. The district court

never resolved the issue, and the record discloses only that the person who spoke with defense counsel *claimed* to be Asare. Though this person initially agreed to appear for a deposition to provide testimony under oath confirming his identity and that defense counsel had accurately recounted his statements, he ultimately failed to appear for the deposition. These circumstances, we conclude, counsel against the conclusion that Arthur has established prejudice from the lack of Asare's testimony at trial.

Moreover, even if Asare was the person who spoke with defense counsel, and even if he had appeared and testified at trial that Arthur was unaware of the conspiracy and lacked involvement in it, Arthur still fails to show prejudice because such testimony "simply would not have been 'material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses.'" *Kaixiang Zhu*, 854 F.3d at 256 (quoting *Valenzuela-Bernal*, 458 U.S. at 873). "Evidence is material 'only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact.'" *Id.* (quoting *Valenzuela-Bernal*, 458 U.S. at 874). "Materiality 'must be evaluated in the context of the entire record.'" *Id.* (quoting *Valenzuela-Bernal*, 458 U.S. at 868).

Arthur, we conclude, cannot show Asare's testimony would have been both material and favorable to his defense in ways not merely cumulative to the testimony of available witnesses when that testimony is evaluated in the context of the entire record. Asare had repeatedly inculpated Arthur in his statements to government investigators and admitted under oath to the district court when pleading guilty that he had conspired with Arthur to execute a scheme to defraud financial institutions and that Arthur participated in aspects of that scheme. Of course, at trial, Asare could have disclaimed or renounced these

admissions and testified that Arthur knew nothing about the conspiracy and lacked involvement in it. But if Asare had done so, the Government could have impeached that testimony. And, critically, Arthur’s knowledge or lack thereof of the conspiracy and the scope of his participation in it were matters that could have been addressed by other witnesses and, indeed, *were* addressed by the testimony Arthur and named coconspirator Samuel Attakora gave at trial. Asare’s testimony, we therefore conclude, was not both material and favorable to Arthur’s defense in ways not merely cumulative to the testimony of the available witnesses. Because Arthur fails to show a constitutional error, he cannot prevail on this claim, under review for plain error or otherwise.

Next, Arthur contends that the district court reversibly erred in refusing to conduct an *in camera* review of the Government’s files on Asare. In denying Arthur’s motion to dismiss the superseding indictment, the district court declined to review the Government’s files for material subject to disclosure under *Brady v. Maryland*, 373 U.S. 83 (1963).

“*Brady* requires the disclosure by the [G]overnment of evidence that is both favorable to the accused and material to guilt or punishment.” *United States v. Caldwell*, 7 F.4th 191, 207 (4th Cir. 2021) (cleaned up). In evaluating the district court’s ruling declining to review the Government’s files for such material, we review the district court’s legal conclusions de novo and its factual findings for clear error. *Id.* at 208. “[W]here a defendant at least makes some plausible showing that the particular information sought exists and that it would be both material and favorable to his defense,” he is “entitled to have the information he has sufficiently identified submitted to the trial court for *in camera* inspection and a properly reviewable judicial determination made whether any portions

meet the material and favorable requirements for compulsory disclosure.” *Id.* (cleaned up).

However, “mere speculation that the information may be helpful is insufficient to justify an *in camera* review.” *Id.* (cleaned up).

We conclude that Arthur fails to show reversible error in this regard. The Government produced to the defense all memoranda of interviews with Asare and DVDs containing video recordings of interviews of him conducted by law enforcement it had in its possession; in those produced materials, Asare made statements that both appeared to confirm and deny the existence of a conspiracy and that described his relationship with Arthur in conflicting ways. Although Arthur agrees on appeal that the Government disclosed these materials, he still maintains that the district court’s review refusal was erroneous because the Government never produced “the rest of its file on Asare.” This “file,” Arthur continues, could contain evidence in the form of Asare’s statements that Arthur was unaware of the fraud. Thus, in Arthur’s view, because he had identified specific evidence—this “file”—that could contain materially favorable evidence in the form of Asare’s statements that he was unaware of the fraud, he made a plausible showing requiring the district court’s *in camera* review.

We reject this argument. It is premised on the existence of some “file” or portion containing notes by law enforcement and prosecutors about Asare in the Government’s possession that it did not disclose. But Arthur has identified nothing in the record tending to suggest or show that such file or portion indeed exists or, if it exists, contains any such undisclosed notes about Asare. Arthur’s mere speculation that such file or portion exists is not enough to meet the plausibility requirement needed for *in camera* review. *Cf. United*

States v. King, 628 F.3d 693, 703 (4th Cir. 2011) (stating that, in making requisite plausible showing, defendant must identify material with some degree of specificity and concluding that King made required plausible showing triggering his right to an *in camera* inspection by identifying existing transcript of grand jury testimony given by one witness that Government refused to disclose to defense); *Love v. Johnson*, 57 F.3d 1305, 1307, 1316 (4th Cir. 1995) (granting *in camera* examination in response to request for alleged victim's existing file with county social services department). We therefore affirm the district court's ruling declining to conduct an *in camera* review.¹

Arthur also contends that the district court reversibly erred in denying his motion under Fed. R. Evid. 804(b)(3) to introduce into evidence testimony from Asare's former attorney Marc Hall about Asare's statement to him. We review a district court's ruling on the admissibility of evidence for abuse of discretion, viewing the "evidence in the light most favorable to the proponent[and] maximizing its probative value and minimizing its prejudicial effect." *Burgess v. Goldstein*, 997 F.3d 541, 559 (4th Cir. 2021) (internal quotation marks omitted). Thus, we "will overturn an evidentiary ruling only if it is arbitrary and irrational." *Id.*

¹ Relying on *United States v. Abdallah*, 911 F.3d 201 (4th Cir. 2018), Arthur also argues that it was error for the district court to rely on the Government's assurances that all material, exculpatory evidence had been produced. But in *Abdallah*, we cautioned that the district court "cannot solely 'rely on the government's good faith' as a basis to avoid review" where a defendant has "identifie[d] specific evidence that could plausibly be favorable to his defense." *Abdallah*, 911 F.3d at 218 (quoting *King*, 628 F.3d at 702). Here, *Abdallah* is inapplicable because Arthur has failed to plausibly identify such evidence.

Rule 804(b)(3) of the Federal Rules of Evidence provides, in relevant part, that a hearsay statement made by a declarant who is unavailable as a witness may be admitted into evidence if the statement was one that “a reasonable person in the declarant’s position would have made only if the person believed it to be true because, when made, it . . . had so great a tendency to . . . expose the declarant to civil or criminal liability” and if the statement is “supported by corroborating circumstances that clearly indicate its trustworthiness.” Fed. R. Evid. 804(b)(3). “Stated otherwise, ‘hearsay may be admitted under this exception if (1) the declarant is unavailable, (2) the statement is genuinely adverse to the declarant’s penal interest, and (3) corroborating circumstances clearly indicate the trustworthiness of the statement.’” *United States v. Alvarado*, 816 F.3d 242, 250 (4th Cir. 2016) (quoting *United States v. Bumpass*, 60 F.3d 1099, 1102 (4th Cir. 1995)).

Arthur’s motion asserted that, after contacting defense counsel, Asare told attorney Hall that Arthur did not have knowledge about “the conspiracies and unlawful activities alleged in” the second superseding indictment. We conclude that Arthur cannot prevail on this claim because Asare’s purported statement does not satisfy the second and third admissibility requirements under Rule 804(b)(3).

On the second requirement, the Rule only allows the admission of the self-inculpatory portions of a hearsay statement. *Williamson v. United States*, 512 U.S. 594, 599, 604 (1994). It does not permit the admission of statements about the roles of other individuals in the alleged crime. *Id.* at 599-600. “[W]hether a statement is self-inculpatory or not can only be determined by viewing it in context.” *Id.* at 603. The question under Rule 804(b)(3) “is always whether the statement was sufficiently against

the declarant's penal interest that a reasonable person in the declarant's position would not have made the statement unless believing it to be true, and this question can only be answered in light of all the surrounding circumstances." *Id.* at 603-04 (internal quotation marks omitted).

Asare's purported statement to attorney Hall was made after Asare had pleaded guilty, been sentenced, served his sentence, and been removed from the United States. As the district court determined, and as the parties do not dispute on appeal, at the time of this statement, Asare was beyond the reach of the United States to bring him back for further criminal charges. Given these circumstances, Arthur's argument that Asare's statement was inculpatory for Asare lacks merit because the statement was not against his penal interest. *See, e.g., United States v. Grajales-Montoya*, 117 F.3d 356, 364 (8th Cir. 1997) (finding it illogical for defendant to argue that statement by wife regarding defendant's lack of criminal involvement was inculpatory to wife because wife's statements about defendant's role would not have subjected wife to increased criminal liability).

Moreover, even if this statement was against Asare's penal interest, Rule 804(b)(3) also requires that such statement be supported by corroborating circumstances for it to be admitted. In determining whether such circumstances are present, we consider:

(1) whether the declarant had at the time of making the statement pled guilty or was still exposed to prosecution for making the statement, (2) the declarant's motive in making the statement and whether there was a reason for the declarant to lie, (3) whether the declarant repeated the statement and did so consistently, (4) the party or parties to whom the statement was made, (5) the relationship of the declarant with the accused, and (6) the nature and strength of independent evidence relevant to the conduct in question.

United States v. Dargan, 738 F.3d 643, 650 (4th Cir. 2013).

Considered together, the circumstances here show the corroboration requirement was not met. Although Asare's purported statement to attorney Hall was consistent with what defense counsel claimed Asare had told him, it deviated from both Asare's statements to investigators that inculpated Arthur and his statements inculpating Arthur made to the district court under oath in connection with his guilty plea. Additionally, this unsworn statement to attorney Hall was made after Asare had served his sentence and was beyond the reach of the Government to further prosecute him, and no evidence suggests he was or is exposed to prosecution for making that statement. Further, we conclude after review that the evidence adduced at trial does not provide strong support for Asare's purported statement. Given the absence here of corroborating circumstances, the district court did not reversibly err in denying Arthur's motion.

Arthur next challenges the district court's decision to instruct the jury on willful blindness over his objection. We review the district court's decision to instruct the jury on willful blindness for abuse of discretion. *United States v. Vinson*, 852 F.3d 333, 357 (4th Cir. 2017). “The willful blindness doctrine is premised on the idea that defendants should not be permitted to ‘escape the reach’ of criminal statutes that require proof that a defendant acted knowingly or willfully ‘by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances.’” *United States v. Oloyede*, 933 F.3d 302, 316 (4th Cir. 2019) (quoting *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766 (2011)). To ensure that the willful blindness doctrine retains “an appropriately limited scope that surpasses recklessness and negligence,” its application has “two basic requirements: (1) the defendant must subjectively believe that

there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact.” *Id.* (quoting *Global-Tech Appliances*, 564 U.S. at 769).

In deciding to instruct the jury on willful blindness here, the district court found both requirements had been satisfied. On appeal, Arthur challenges the district court’s determination on only the second prong, arguing the instruction was unwarranted because there was no evidence that he took deliberate action to avoid learning of a scheme to defraud a credit union. We disagree. The evidence justified the instruction because it amply allowed the inference that Arthur “t[oo]k[] deliberate actions to avoid learning of” the fraud. *Global-Tech Appliances*, 563 U.S. at 769. The Wells Fargo bank account associated with corporation Anivac—which did not do any business—on which Arthur was the sole signatory received a fraudulently made wire transfer of \$327,000 from a Nymeo Federal Credit Union account after Arthur was present during a meeting with Attakora and Asare where an imposter was shown fake credentials needed to effect the transfer from the Nymeo account to the Wells Fargo account.

On cross examination, Arthur admitted he was nervous about these funds and feared his dealings with Attakora and Asare could result in the involvement of law enforcement. Despite this nervousness, however, Arthur was careful not to confirm the details of the operation. Although he traveled with Asare and Attakora from Maryland to meet with the imposter in Atlanta, Georgia, he never asked questions about why the trio had traveled there. Arthur never contacted the Nymeo account holder after the \$327,000 transfer had been made. Further, there was evidence suggesting that Arthur’s reason for distributing

funds out of the account was to avoid having to deal with funds identified as fraudulently transferred. Although Arthur argues that he took affirmative steps to discover the source of the funds, the jury was not required to believe his testimony. *See Oloyede*, 933 F.3d at 316. Thus, because the jury could have reasonably inferred from all of this that Arthur took deliberate actions to discern the source of the funds, we discern no reversible error in the district court's decision to instruct the jury on willful blindness.

Finally, Arthur challenges the district court's denial of his post-trial motion for a judgment of acquittal or a new trial. He argues that the evidence is insufficient to support his convictions because the Government failed to prove he knew the funds in the Anivac Wells Fargo account that he distributed were proceeds of unlawful activity. He also contends that he is independently entitled to acquittal on counts 3 through 6 because the Government failed to prove he withdrew funds through cashiers checks and made a cash withdrawal knowing such transactions were designed to conceal proceeds of unlawful activity.

We review de novo the denial of a Fed. R. Crim. P. 29(c) motion for a judgment of acquittal after a guilty verdict. *United States v. Young*, 916 F.3d 368, 384 (4th Cir. 2019). In assessing the sufficiency of the evidence, we determine whether there is substantial evidence to support the verdict when viewed in the light most favorable to the Government. *Id.* Substantial evidence is "evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *Id.* (internal quotation marks omitted) (quoting *United States v. Howard*, 773 F.3d 519, 525 (4th Cir. 2014)). In assessing whether substantial evidence is present, we are

“‘not entitled to assess witness credibility’ and must ‘assume that the jury resolved any conflicting evidence in the prosecution’s favor.’” *United States v. Robinson*, 55 F.4th 390, 404 (4th Cir. 2022) (quoting *United States v. Savage*, 885 F.3d 212, 219 (4th Cir. 2018)). Defendants “bear[] a heavy burden” under this standard, and “appellate reversal on grounds of insufficient evidence is confined to cases where the prosecution’s failure is clear.” *Savage*, 885 F.3d at 219.

To obtain a conviction for money laundering conspiracy violating 18 U.S.C. § 1956(h), the Government had to prove: (1) 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; (2) that the defendant knew that the money laundering proceeds had been derived from an illegal activity; and (3) the defendant knowingly and voluntarily became part of the conspiracy. *United States v. Green*, 599 F.3d 360, 371 (4th Cir. 2010). Concealment money laundering requires, *inter alia*, proof that the defendant knew that the property involved represented the proceeds of some form of unlawful activity, *United States v. Farrell*, 921 F.3d 116, 137 (4th Cir. 2019), and “proof ‘that the defendant knew that the transaction was designed in whole or part, to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of the unlawful activity,’” *United States v. Millender*, 970 F.3d 523, 530 (4th Cir. 2020) (quoting *Farrell*, 921 F.3d at 137).

We review the district court’s decision whether to grant a new trial for abuse of discretion. *Id.* at 531. Under Fed. R. Crim. P. 33, the district court “may vacate any judgment and grant a new trial if the interest of justice so requires.” Fed. R. Crim. P. 33(a).

“But a court should exercise its discretion to grant a new trial sparingly, [and a] new trial is warranted only when the evidence weighs so heavily against the verdict that it would be unjust to enter judgment.” *Millender*, 970 F.3d at 531 (cleaned up).

We conclude after review that the Government presented sufficient evidence to show Arthur knew the funds in the Anivac Wells Fargo account that he distributed were the proceeds of unlawful activity. Arthur established a corporation that did no business, opened a bank account associated with it in which funds could be deposited, distributed fraudulently transferred funds to coconspirators, expected to receive a portion of the funds, and held suspicion about the nature of the funds and fear of the police as a result of the funds being present in the account yet nonetheless processed the distribution of funds out of the account. Attakora’s testimony directly implicated Arthur as a knowing and voluntary participant in the fraud scheme and distributions and confirmed Arthur understood that, after the imposter used fraudulent documentation to effect the wire transfer of funds into the Anivac account, that his (Arthur’s) role was to distribute funds out of the account. Attakora’s testimony addressing the timing of and motivation for moving funds out of the Anivac account also allowed the jury to infer that the transactions distributing the funds were performed in order to conceal from Wells Fargo their unlawful nature, *see* 18 U.S.C. § 1956(a)(1)(B)(i); *see Millender*, 970 F.3d at 530 (noting that transactions supporting conviction need not conceal source of proceeds if they conceal the nature of proceeds and upholding conviction where jury could reasonably find that false purposes noted on checks were designed to make funds look like lawful reimbursements).

While Arthur criticizes Attakora's testimony as vague and inconsistent, it is the jury, not this court, that weighs the credibility of the evidence and resolves any conflicts in the evidence presented, *Caldwell*, 7 F.4th at 209, and the jury's credibility determinations are not susceptible to judicial review, *Robinson*, 55 F.4th at 404. The jury heard from Attakora (as a witness for both the prosecution and the defense) and Arthur himself. Both Attakora and Arthur were cross-examined, and the jury could assess the credibility of the testimony given by each. Because we decline to second-guess the jury's determination, *Robinson*, 55 F.4th at 404, Arthur's credibility challenge provides no basis for him to receive relief on appeal. Arthur fails to show the evidence weighs so heavily against the jury's verdict or a lack of substantial evidence supporting the verdict. The district court thus did not reversibly err in denying his post-trial motion for a judgment of acquittal or a new trial.

Accordingly, we affirm the criminal judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

FILED: December 1, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-4268
(8:17-cr-00253-PWG-4)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

FRANCIS ARTHUR

Defendant - Appellant

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ NWAMAKA ANOWI, CLERK