No. 24-

IN THE

Supreme Court of the United States

SADICK EDUSEI KISSI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether federal courts of appeals exceed the "judicial power" assigned under Article III of the Constitution when they issue non-precedential decisions to resolve contested appellate issues.

2. Whether the right to due process flowing from the statutory right to appeal is violated when non-frivolous appellate challenges to a lower court judgment are disposed of by way of a non-precedential order that does not provide analysis or reasoning to explain the outcome.

RELEATED PROCEEDINGS

- *United States v. Kissi*, No. 22-3220, U.S. Court of Appeals for the Second Circuit. Summary Order and Judgment issued February 16, 2024; petition for rehearing denied April 22, 2024.

- *United States v. Kissi*, No. 21 Cr. 64 (PAC), U.S. District Court for the Southern District of New York. Judgment entered December 14, 2022.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The summary order issued by the court of appeals (App. 1a) is reported at 2024 WL 658622 (2d Cir. Feb. 16, 2024). The district court's order denying petitioner's post-trial motion for a judgment of acquittal (App. 11a) is reported at 2022 WL 4103640 (S.D.N.Y. Sept. 8, 2022).

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on February 16, 2024. The court of appeals denied a timely petition for rehearing on April 22, 2024. On July 3, 2024, this Court granted petitioner's request to file a petition for certiorari on or before September 4, 2024. On August 23, 2024, this Court granted petitioner's request for a further extension of time and for permission to file a petition for certiorari on or before September 19, 2024. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. III, § 1

> The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .

U.S. Const. amend. V

> No person shall be . . . deprived of life, liberty, or property, without due process of law[.]

18 U.S.C. § 1956(a)(1)

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity . . .
>
> ***
>
> (B) knowing that the transaction is designed in whole or in part—
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity . . .
>
> ***
>
> shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment of not more than twenty years, or both.

18 U.S.C. § 2315

> Whoever receives, possesses, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, . . . which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken . . .
>
> ***
>
> [s]hall be fined under this title or imposed not more than ten years, or both.

INTRODUCTION

This case presents two important questions relating to the authority of federal courts of appeals to dispose of non-frivolous appellate challenges by way of non-precedential decisions, including "summary orders" that do not acknowledge material facts and do not provide analysis or reasoning to explain the outcome.

After a six-day jury trial, petitioner Sadick Edusei Kissi was found guilty of conspiring to commit money laundering, in violation of 18 U.S.C. § 1956(a)(1)(B)(i) and (h); conspiring to receive stolen property, in violation of 18 U.S.C. §§ 371 and 2315; and knowingly receiving stolen property, in violation of § 2315. The jury found Kissi not guilty of participating in a conspiracy to commit wire fraud under 18 U.S.C. §§ 1343 and 1349. App. 2a, 12a-13a.

On appeal, Kissi was appointed substitute counsel, and he raised two challenges to the sufficiency of the trial evidence. First, Kissi argued that the credible and corroborated witness testimony elicited by the government proved that his bank transactions were integral to the charged wire fraud scheme, and that a reasonable trier of fact could not have found beyond a reasonable doubt that those transactions were instead "designed in whole or in part to conceal or disguise" an attribute of the proceeds, as required under Section 1956(a)(1)(B)(i).[1] See App. 2a. Second, Kissi argued there was no evidence presented to suggest that he was aware of the unlawful source of the money he was hired to receive and transmit for other

[1] This argument was not raised by Kissi's trial attorney, who primarily attacked the credibility of the government's cooperating witness and other evidence. App. 5a, 15a-17a.

people, as required under Sections 1956(a)(1)(B)(i) and 2315. See *ibid.* In its response brief, and in its two responses to Kissi's subsequent motions for bail pending appeal, the government did not acknowledge the material facts presented in support of those arguments. Nor did the "summary order" issued by the court of appeals three days after oral argument.

The importance of the questions presented cannot be overstated, as more than 86 percent of federal appeals decided on the merits in the year leading up to September 30, 2023 were disposed of through "unpublished," non-precedential orders. See p. 18, *infra*. This case represents an ideal vehicle to resolve those questions. They were both squarely presented to the court of appeals in a timely petition for rehearing, and the extent to which that court's summary order avoided any acknowledgment of the primary facts Kissi repeatedly endeavored to bring to its attention undermined the legitimacy of the proceeding.

The statutory right to appeal encompasses more than the right to a formality. The bedrock principle of *stare decisis*, the "judicial Power" described in Article III, and the Due Process Clause of the Fifth Amendment each forbid "unpublished" or "summary" appellate decisions that purport to interpret the law as it applies to only one set of litigants at a time. Therefore, to safeguard against dissimilar applications of the law in cases involving similar facts, the petition should be granted and federal courts of appeals should be required to issue reasoned, precedential decisions that acknowledge the non-frivolous arguments and material facts presented to them.

STATEMENT OF THE CASE

I. Proceedings Before the District Court

The United States District Court for the Southern District of New York had subject matter jurisdiction over this case pursuant to 18 U.S.C. § 3231.

Through an indictment, the government charged Kissi with four separate crimes stemming from his receipt and transmission of money on behalf of a Ghana-based enterprise that perpetrated a series of online "romance scams." App. 11a-12a. See C.A. App. 18-25. The trial evidence showed how the scam perpetrators targeted victims in the United States who believed they were communicating with, and sending money to, potential romantic companions abroad. App. 3a, 12a. The evidence also showed that Kissi's role was limited to receiving money in the United States, including cash, which the romance scam victims personally deposited into his bank accounts, and then withdrawing and forwarding the funds to the ringleaders in Ghana who hired him to open and maintain those accounts. App. 3a-4a, 12a.

A. Evidence Regarding the "Design" of Kissi's Bank Transactions

The money laundering statute charged herein, § 1956(a)(1)(B)(i), requires proof of the defendant's knowing participation in a financial transaction that "is designed in whole or in part[] to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds[.]" In *Regalado Cuellar v. United States*, this Court held that the word "design," in the context of a neighboring and similarly worded provision, § 1956(a)(2)(B)(i), "means purpose or

plan; *i.e.*, the intended aim of the transportation," and that "merely hiding funds during transportation is not sufficient to violate the statute, even if substantial efforts have been expended to conceal the money." 553 U.S. 550, 563 (2008). Therefore, where the government's evidence establishes that the purpose (*i.e.*, "design") of a financial transaction is "to compensate the leaders of" a criminal organization—thereby completing the underlying criminal activity—the "design . . . to conceal" element is not satisfied. *Id.* at 566.

In its opening statement to the jury, the government argued that Kissi's bank transactions were essential to the success of the charged fraud scheme,[2] and it explained how the scam perpetrators in Ghana needed his accounts to receive money they otherwise could not have successfully elicited from their targeted victims:

> [T]he defendant's job was to use bank accounts here in the United States that he and his partners controlled to take in money stolen from the victims, then he rerouted that money to others involved in the scheme so that they could send the victims['] money back to those running the scams in Ghana[.]

C.A. App. 57.

The government then presented corroborated evidence to prove that Kissi's bank transactions were essential to the completion of the charged scams. First, the government asked victim Milton Duffield to describe how he sent money to the

[2] As noted at oral argument before the court of appeals, the trial record indicates that neither the government nor Kissi's trial counsel were aware of what the government was required to prove under the "design[] . . . to conceal" element following this Court's decision in *Regalado Cuellar*, 553 U.S. 550. Oral Argument at 2:15-2:30 (2d Cir. Feb. 13, 2024). *See* note 1, *supra*.

scammer in Ghana who targeted him. C.A. App. 133. Duffield recalled that "he wanted me to try and send it through my bank[,] wiring it internationally." *Ibid.* However, when Duffield advised the scammer that his credit union "didn't have the code to do international wiring," he was asked instead to send his money to an account held by Kissi in the Bronx. *Ibid.* The government subsequently asked its cooperating witness, Mubarak Baturi, why the scam perpetrators in Ghana "needed someone in the United States to receive money?" *Id.* at 144. Baturi responded:

> Well, because – because there was no way [the victims] would send money to Africa because they would get like a flag, a red flag by Western Union or other money trusted places, so *the only way they could do this was to use my bank account.*

Id. at 145 (emphasis added). The government also asked Baturi why he opened accounts at multiple banks to receive deposits from romance scam victims. *Id*. at 150. Baturi explained that the scam perpetrators in Ghana needed access to particular banks in order for certain victims to make deposits, and he answered "yes" when the government then asked: "was it easier to send money to a bank account at the same bank?" *Id.* at 150-51.

B. Evidence Regarding Kissi's Knowledge of the Source of the Money he Received and Transmitted

The statutes under which Kissi was convicted require proof beyond a reasonable doubt that he knew the "funds involved" in his financial transactions "represent[ed] the proceeds of some form of unlawful activity," § 1956(a)(1)(B)(i), and that he *specifically* knew those funds "ha[d] been stolen, unlawfully converted, or taken," § 2315.

In all, the government called four romance scam victim witnesses to testify. None of them had spoken with or seen Kissi before trial. Indeed, the government repeatedly conceded that Kissi had not communicated with romance scam victims. C.A. App. 57, 628. The government also presented evidence that Kissi opened all of his bank accounts using his own name, social security number, and date of birth, which meant his bank transactions were entirely traceable and any complaints by depositors would have led directly to him. *Id.* at 458. The government did not submit evidence regarding any such complaints.

The government called two witnesses who did claim to have spoken with Kissi before trial. First, cooperating witness Mubarak Baturi testified that he began receiving and transmitting money that *he* knew to be the proceeds of a romance scam several years after he moved to the United States from Ghana. C.A. App. 141-43.[3] Baturi further testified that, after his own accounts were closed, an associate in Ghana put him in contact with Kissi, whom he had not previously met. *Id.* at 146, 167. Notably, the government asked Baturi on three separate occasions about his conversations with other alleged co-conspirators regarding the source of the money he received and transmitted through his own bank accounts.[4] But the government

[3] Baturi explained that he learned about romance scams from people in the town where he grew up. C.A. App. 369-70.

[4] C.A. App. 153 ("Did there come a time when you had a conversation with Lari about where the money you were sending back to Ghana came from?"); *id.* at 169 ("What, if anything, did Ramzi tell you about where the money he was going to send to your bank account would be coming from?"); *id*. at 190 ("What, if anything, did you and Armando discuss about where the money was coming from?").

did *not* ask Baturi if he ever discussed that subject with Kissi. Moreover, in response to the government's questioning, Baturi stated that Kissi "never told me his business." *Id.* at 423. When the government then followed up to ask, "[d]id you ever discuss whether [Kissi] also received money from [romance scam victims] directly into *his* account[s]," Baturi responded: "No. We never discussed that." *Id.* at 424 (emphasis added).

Second, the government called TD Bank investigator Donna Hess, who testified that she spoke with Kissi on the telephone after she received a report of "cash deposits made into [his] account" at one bank branch that were later withdrawn at another location. C.A. App. 269-72. The government did not ask Hess what she said to Kissi during that conversation. Nor did the government ask Hess whether she believed she had reason to suspect the transacted funds had been stolen or produced by an unlawful scheme unrelated to the transactions themselves. See *id.* at 272-74.

C. The Verdict

The jury found Kissi not guilty of participating in a conspiracy to commit wire fraud with the underlying object of receiving stolen property. App. 2a; C.A. App. 21, 853. However, the jury found Kissi guilty of conspiring to commit money laundering, conspiring to receive stolen property, and receiving stolen property. App. 2a.

II. Proceedings Before the Court of Appeals

A. The Primary Arguments and Facts Presented in Support of Kissi's Appellate Challenges to the Sufficiency of the Evidence

Kissi filed a timely notice of appeal and submitted an opening brief to the court of appeals challenging the sufficiency of the trial evidence with respect to his three counts of conviction. First, with respect to the Section 1956(a)(1)(B)(i) "design[] . . . to conceal" element, Kissi argued that the government's evidence proved that his bank transactions were "designed" to advance and complete the underlying romance scams, rather than to "conceal or disguise" an attribute of the transacted funds. Pet. C.A. Br. 29, 33-34, 36-38 (citing *Regalado Cuellar*, 553 U.S. 550).[5] Even if there were reason to believe the fraud perpetrators in Ghana intended for bank transactions (involving the movement of previously untraceable cash through licensed banks) to somehow "conceal or disguise" an attribute of the money, Kissi argued there was no evidence of his awareness of a plan to use *his* accounts, where everything could be traced back to him, to achieve that end. *Id.* at 35-36. Second, as relevant to all three counts of conviction, Kissi argued there was no proof of his knowledge that the people who deposited money into his bank accounts had been scammed, or that the money represented the proceeds of another form of unlawful activity. *Id.* at 30, 35, 38-44. In addition, Kissi raised two sentencing challenges that are not directly relevant to this petition. *Id.* at 44-50.

[5] Kissi also cited relevant post-*Regalado Cuellar* Second Circuit opinions, including *United States v. Ness*, 565 F.3d 73 (2d Cir. 2009), and *United States v. Garcia*, 587 F.3d 509 (2d Cir. 2009). Pet. C.A. Br. 33, 37.

The arguments presented in Kissi's opening brief relied primarily on the facts set forth above in Section I(A)-(B), pp. 6-9, *supra*. See Pet. C.A. Br. 2-3, 8-9, 14-19, 33-34, 35, 39-40. The government did not acknowledge those facts in its response brief. As such, in his reply brief Kissi again highlighted those facts and explicitly sought to prevent the court of appeals from adopting and relying on the government's incomplete recitation. For example, with respect to the Section 1956(a)(1)(B)(i) "design[] . . . to conceal" element, Kissi's reply brief argued that:

> the government chooses to focus on *how* certain financial transactions were conducted, rather than *why*, and to simply ignore the most critical evidence relating to the "design" of those transactions—which may be indicative of a hope that this Court, relying on the appellee's brief as a "guide" to relevant facts and issues, will ultimately do the same.

Pet. C.A. Reply 1. More specifically, Kissi's reply noted that the government's response brief overlooked the fact that "[t]wo of [its] witnesses explained, on direct examination, why the fraud perpetrators in Ghana needed access to U.S. bank accounts to complete their scams." *Id.* at 4. See *id.* at 4-6.

As for his contemporaneous knowledge of the unlawful source of the money he received and transmitted, Kissi's reply brief reiterated that "*all* of [his] accounts were opened with his true name, date of birth, and social security number." Pet. C.A. Reply 7. In addition, the reply brief noted that "[t]he government called only two witnesses who claimed to have spoken with Kissi before trial, and it conspicuously avoided asking either of them about issues relating to Kissi's awareness." *Id.* at 18. For example, the government "repeatedly asked Baturi whether he discussed the money's origins with *other* people," but "scrupulously

avoid[ed] the issue of whether he discussed that subject with Kissi—another point that was emphasized in [the] opening brief but receive[d] no mention in the government's response." *Id.* at 19 (citing Pet. C.A. Br. 16, 39-40). Finally, with respect to the various facts that *were* cited in the government's response brief, Kissi's reply argued that each of those facts confirm, at most, that Kissi had reason to believe his money transmitting activity *itself* was illegal, but there is nothing in the record that specifically tends to prove he knew the money had been produced by some other, preexisting unlawful scheme. *Id.* at 20-22. See *id.* at 18 n.12.

B. Kissi's Bail Motions

1. District Court Bail Motion

After filing his reply brief in the court of appeals, Kissi filed a motion for bail pending appeal in the district court. In setting forth the "substantial question[s] of law" supporting his motion, 18 U.S.C. § 3143(b)(1)(B), Kissi first described how:

> the corroborated and uncontradicted testimony presented by cooperating witness Mubarak Baturi and romance scam victim Milton Duffield proved that the "design" of the relevant financial transactions was not to conceal the nature, location, source, or ownership of the deposited funds, but to advance the scheme and enable fraud perpetrators in Ghana to obtain money.

Def's Mot. 5, No. 21 Cr. 64 (S.D.N.Y. Nov. 13, 2023) (cleaned up). See *id.* at 6-7. Kissi's motion also noted that "[t]hese aspects of Baturi's and Duffield's testimony were highlighted in [the] opening brief on appeal, but the government chose to simply ignore them in [its] response, which is as good a sign as any that Kissi's argument has substantial merit." *Id.* at 7.

Second, Kissi's motion highlighted the material facts he had presented in his appellate briefs relating to his knowledge of the specific source of the money he received and transmitted. In particular, Kissi emphasized that: (1) "all of [his] bank accounts were opened using his own name, date of birth, and social security number"; (2) the "two witnesses who claimed to have spoken with [him] before trial" were not asked "questions relating to [his] contemporaneous awareness of the source(s) of the money he was transmitting"; and (3) "the government asked Baturi whether he discussed the unlawful source of the money he was transmitting with three *other* alleged coconspirators, but . . . conspicuously did *not* ask whether he ever discussed that issue with Kissi." Def's Mot. 9-10. In addition, Kissi's district court bail motion argued that the government's other evidence "tend[ed] to prove, at most, that a prudent person in Kissi's position would have realized that the banks were suspicious of his transactions, and that those transactions themselves might have been illegal." *Id.* at 9.

The government's response in opposition to Kissi's district court bail motion did not acknowledge Kissi's cited facts *or* his argument regarding the specific need for proof that he knew why his bank transactions were illegal. Resp. in Opp., No. 21 Cr. 64 (S.D.N.Y. Dec. 1, 2023).

2. Court of Appeals Bail Motion

More than seven weeks after his district court bail motion was fully briefed, Kissi filed a motion for bail pending appeal in the court of appeals. The district court subsequently denied Kissi's initial bail motion through a one-page written

order that does not contain a factual recitation or evaluation of the relevant issues. App. 9a-10a.

In his court of appeals bail motion, Kissi described how the government had "repeatedly declined to acknowledge the most salient items of evidence . . . supporting [his] arguments." Pet. C.A. Mot. 2, No. 22-3220 (2d Cir. Jan. 23, 2024). Then, after once again repeating the material facts relating to his appellate challenges to the sufficiency of the trial evidence, Kissi wrote:

> These arguments were spelled out in [the] opening and reply briefs on appeal, and were set forth once again in Kissi's District Court motion for bail pending appeal. However, in their responses to those filings, the government has consistently refused to even acknowledge the fact that their cooperating witness *and* an alleged victim *each* provided credible and uncontested testimony (on direct examination) with respect to the *actual* "design" of the financial transactions in which Kissi took part. . . .
>
> Moreover, in the responsive papers they have filed so far, the government has not pointed to a single item of evidence that Kissi specifically knew or consciously avoided the fact that the money he was receiving and transmitting represented the proceeds of a felonious scheme separate and apart from the transactions themselves. Nor has the government responded to Kissi's observation that only two witnesses claimed to have spoken to him before trial, and neither of them were even asked if they had discussed the unlawful source of the money with him. Instead, the government continues to rely on evidence which shows that Kissi had reason to believe the transactions themselves—intercontinental transfers of funds that had been willingly sent to him by people who never contacted him or demanded their return—may have been viewed skeptically by the banks and/or by law enforcement.

Id. at 7-9 (citations omitted).

The government's response in opposition to Kissi's court of appeals bail motion did not acknowledge any of these facts or arguments. Resp. in Opp., No. 22-3220 (2d Cir. Feb. 2, 2024).

C. The Non-Precedential "Summary Order" Issued by the Court of Appeals

During its oral argument presentation to the court of appeals, the government did not address, and was not asked to respond to, any of Kissi's cited facts or his argument regarding the need for proof that he was specifically aware of the unlawful source of the money he received and transmitted. Oral Argument at 10:30–19.50 (2d Cir. Feb. 13, 2024). Three days later, the court issued a non-precedential "summary order" affirming the district court judgment in all respects and denying Kissi's request for bail as moot. App. 1a-8a.

In a bold printed statement before the case caption, the summary order states that it "DO[ES] NOT HAVE PRECEDENTIAL EFFECT." App. 1a. See 2d Cir. R. 32.1.1(a) (confirming that "[r]ulings by summary order do not have precedential effect."). Then, under a heading titled "Relevant Circumstantial Evidence," the summary order provides a brief recitation of the trial evidence that does not include any of the material facts Kissi repeatedly endeavored to bring to the court of appeals' attention. App. 3a-4a.

Addressing Kissi's challenge to the sufficiency of the evidence that his financial transactions were "designed . . . to conceal or disguise" an attribute of the transacted funds, the summary order provides a legal conclusion with no associated factual analysis or reasoning:

> [T]he government provided sufficient circumstantial evidence for a rational jury to infer that Kissi knew the transactions were designed to conceal the nature of the funds as fraud proceeds, the source of the funds as fraud victims, and the ownership and control of the funds by the co-conspirators in Ghana.
>
> The district court did not commit error—much less "plain" error—in determining that the government's evidence was sufficient. We thus affirm Kissi's conviction for conspiracy to money launder.

App. 5a-6a.

With respect to Kissi's knowledge of the unlawful source of the money he received and transmitted, the summary order repeats the same conclusion multiple times in slightly different ways, but again does not provide anything in the way of factual analysis or reasoning:

> The district court properly determined that the government's evidence was sufficient to prove that Kissi knew the deposited funds were stolen, satisfying the knowledge requirement of the statutes underlying Counts Three and Four. Because the government's evidence proved that Kissi knew that the funds came from unlawful activity, the same evidence was sufficient to satisfy the knowledge requirement of the statute underlying Count Two. It is well established that juries may make reasonable inferences based on circumstantial evidence.
>
> After considering the totality of the circumstantial evidence, the jury reasonably inferred that Kissi understood that the funds were unlawfully taken, and thus necessarily stemmed from unlawful activity. We affirm the district court's judgment convicting Kissi of conspiracy to receive stolen money and receiving stolen money; the jury permissibly found that Kissi had the requisite knowledge of the unlawful source of funds sufficient to support a conviction of conspiracy to commit money laundering.

App. 4a-5a (citations omitted).

By contrast, the summary order *does* provide factual analysis and reasoning with respect to the two briefed sentencing issues. App. 6a-8a.

D. The Petition for Rehearing

Kissi filed a timely petition for panel rehearing or rehearing *en banc*. After once again describing the material facts supporting his primary points on appeal, Kissi noted that:

> These facts were highlighted in both of Kissi's appellate briefs and in both of his motions for bail pending appeal, and the government conspicuously refused to acknowledge them at every turn. Whether this was strategic, based on an expectation that the Court would count on their filings for an accurate and candid recitation of the relevant facts and issues, or because they simply did not have good answers and were willing to take a chance on being pressed to finally address them at oral argument, the extent to which the government succeeded in avoiding the material evidence *they presented* at trial undermined the fairness and integrity of Kissi's appeal.

Reh'g Pet. 8, No. 22-3220 (2d Cir. Apr. 1, 2024) (citations omitted). Because the court of appeals followed the government's lead in declining to acknowledge relevant presented facts and arguments, and because the non-precedential summary order does not contain factual analysis or reasoning to explain its conclusions with respect to Kissi's challenges to the sufficiency of the evidence, the rehearing petition raised two "questions of exceptional importance":

> Whether the right to due process in connection with an appeal is satisfied when a litigant's arguments are disposed of by way of a non-precedential order that overlooks material facts and does not explain its conclusions[.]
>
> [Whether] Kissi's right to an adequate and effective process [was] satisfied by the issuance of a non-precedential order that lacks analysis or reasoning with respect to the most important points on appeal.

Id. at 2, 11, 13.

The petition for rehearing was denied on April 22, 2024. App. 24a.

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

I. The questions presented are critically important.

During the 12-month period ending September 30, 2023, 86.4 percent of all decisions issued by the federal courts of appeals (excluding the Federal Circuit) were "unpublished"—an umbrella term that encompasses the Second Circuit's "summary orders."[6] But notwithstanding the various local rules that have been promulgated to encourage and seemingly validate this practice,[7] adherence to the doctrine of precedent is not discretionary; courts of appeals should not have the unreviewable power to create and selectively enforce law by choosing which of their decisions will have binding effect.

As Justice Story explained long ago, it "is the constant practice under our whole system of jurisprudence" that "[a] case is not alone considered as decided and settled; but the principles of the decision are held, as precedents and authority, to bind future cases of the same nature." Joseph Story, *Commentaries on the*

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[6] U.S. Courts, *Table B-12: U.S. Courts of Appeals—Type of Opinion or Order Filed in Cases Terminated on the Merits, by Circuit, During the 12-Month Period Ending September 30, 2023*, https://www.uscourts.gov/statistics/table/b-12/judicial-business/2023/09/30.

[7] See generally David R. Cleveland, *Local Rules in the Wake of Federal Rule of Appellate Procedure 32.1*, 11 J. App. Prac. & Process 19 (2010). The Second Circuit's Internal Operating Procedures provide that, "[w]hen a decision in a case is unanimous and each panel judge believes that no jurisprudential purpose is served by an opinion (i.e., a ruling having precedential effect), the panel may rule by summary order." 2d Cir. I.O.P. 32.1.1(a). In this case, no prior judicial decision applying either of the relevant criminal statutes (Sections 1956(a)(1)(B)(i) and 2315) to a similar factual scenario was identified by either of the parties, by the district court, or by the court of appeals. *See* Reh'g Pet. at 9.

Constitution of the United States, §§ 377-78 (1833), *quoted in Anastasoff v. United States*, 223 F.3d 898, 903-04 (8th Cir. 2000). See 1 J. Kent, *Commentaries on American Law*, 475-476 (1826) ("If a decision has been made upon solemn argument and mature deliberation, . . . the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it."), *quoted in Rogers v. Tenn.*, 532 U.S. 451, 473 n.2 (2001) (Scalia, Stevens, Thomas, JJ., dissenting). While federal courts of appeals have moved away from this "constant practice" in recent decades, this Court has yet to rule on the legitimacy of non-precedential appellate decisions.

"The fact that the vast majority of federal appellate decisions are non-precedential and contain limited reason-giving seems at odds with the core organizing principles of the federal judicial system." Rachel Brown, Jade Ford, Sahrula Kubie, Katrin Marquez, Bennett Ostdiek, & Abbe R. Gluck, *Is Unpublished Unequal? An Empirical Examination of the 87% Nonpublication Rate in Federal Appeals*, 107 Cornell L. Rev. 1, 4 (2021). Indeed, when an appeal involving contested, non-frivolous issues is resolved through an order that the issuing court itself does not consider fit to bind future litigants, it sends a clear message that is antithetical to the concept of equal justice under the law.

In this case, there is little more the court of appeals could have done to signal that, for whatever reason, it was not willing to provide a carefully considered ruling that accounts for the facts and arguments the government did not wish to acknowledge or respond to. See pp. 15-16, *supra*. And by declaring that its ruling

will not have precedential effect, the court of appeals confirmed that the legal conclusions through which it affirmed Kissi's criminal convictions may not be applied in a similar manner to future cases involving similar facts and arguments.[8] In combination, these factors "send an especially strong signal . . . about the perceived low value of [Kissi's] case" and his dignitary interests. Brown et al., *supra*, at 102. See Merritt E. McAlister, *Bottom-Rung Appeals*, 91 Fordham L. Rev. 1355, 1374 (2023) (noting that a "summary" appellate decision "may lead the litigant to question whether they have received attention or respect from the court—a concern that may only grow if the decision is also perfunctory, circular, or unreasoned."). In addition, these factors highlight extent to which courts of appeals have improperly assigned themselves the power "to deprive the common law of valuable precedents, to make law good only for a single time and place," and "to treat similar cases dissimilarly[.]" David R. Cleveland, *Overturning the Last Stone: The Final Step in Returning Precedential Status to All Opinions*, 10 J. App. Prac. & Process 61, 137 (2009).

[8] In practice, the precedential value of "summary orders" is entirely dependent on whether a court chooses to "consider" them "for their persuasive value," *Brault v. Social Sec. Admin. Comm'r*, 683 F.3d 443, 450 n.5 (2d Cir. 2012), or simply disregard them as "without binding effect," *J.S. v. NYS Dept. of Corrs. and Comm. Supervision*, 76 F.4th 32, 39 n.7 (2d Cir. 2023).

II. The "judicial Power" described in Article III does not encompass the authority to make and selectively enforce law by choosing which appellate decisions will have precedential effect.

"It is emphatically the province and duty of the judicial department to say what the law is," and "[t]hose who apply the rule to particular cases[] must of necessity expound and interpret that rule." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). See *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544 (1991) ("[W]hen the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata."). This view of judicial power was shared by James Madison, who recognized the "obligation arising from judicial expositions of the law on succeeding judges,"[9] and by Alexander Hamilton, who wrote that, "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents," and that "the records of those precedents must unavoidably swell to a very considerable bulk[.]"[10] See William Cranch, *Reports of Cases Argued and Adjudged in the Supreme Court of the United States - Preface*, iii-iv (1804) ("Whatever tends to render the laws certain, equally tends to limit that discretion. . . . Every case decided is a check upon the judge. He can not decide a similar case differently, without strong reasons, which, for his own justification, he will wish to

[9] *Letter to Charles Jared Ingersoll* (June 25, 1831), *quoted in Anastasoff*, 223 F.3d at 902.

[10] *The Federalist Papers* No. 78, at 470 (Signet Classic ed., 2003).

make public."), *quoted in* Erica S. Weisgerber, *Unpublished Opinions: A Convenient Means to an Unconstitutional End*, 97 Geo. L.J. 621, 638 (2009); Cleveland, *Overturning, supra*, at 135 ("[W]hat is apparent from the earliest days of English common law and throughout the framing of the Constitution is that each decision rendered by a common law court has traditionally been part of the common law, regardless of its publication status[.]").

In *Anastasoff*, 223 F.3d at 899, the Eighth Circuit held that a local rule designating unpublished opinions as non-precedential "purport[ed] to confer on the federal courts a power that goes beyond the 'judicial.'" According to the late Judge Richard S. Arnold's opinion on behalf of a unanimous panel, the Framers of the Constitution intended for the principles underlying the "doctrine of precedent" to "limit the judicial power" assigned under Article III in a manner that requires "judicial decisions [to] become binding precedents in subsequent cases." *Id.* at 900-02. Accordingly, when appellate courts "choose for themselves, from among all the cases they decide, those that they will follow in the future, and those that they need not," they exceed the limits of "judicial power, which is based on reason, not *fiat*." *Id.* at 904.

Addressing the "practicalities" of its decision, the Eighth Circuit noted that:

> It is often said among judges that the volume of appeals is so high that it is simply unrealistic to ascribe precedential value to every decision. We do not have time to do a decent enough job, the argument runs, when put in plain language, to justify treating every opinion as a precedent. If this is true, the judicial system is indeed in serious trouble, but the remedy is not to create an underground body of law good for one place and time only.

223 F.3d at 904. Cf. Brown et al., *supra*, at 8 (differentiating "an opinion that judges choose to designate as unpublished because it involves a routine matter" from "one they choose not to publish as part of a 'bargain' with other judges on the panel to reach consensus.").

The *Anastasoff* opinion was subsequently vacated as moot when the government paid the appellant the money she sued for, even though she had lost her appeal. *Anastasoff v. United States*, 235 F.3d 1054, 1055 (8th Cir. 2000). But despite the potential inconvenience to judicial economy that might have arisen if his ruling had been upheld,[11] Judge Arnold's interpretation of "judicial power" is correct. Indeed, "it seems unlikely that the Framers would have intended a system (or understood one) that would allow federal courts to make decisions good in only single times and places[.]" Cleveland, *Overturning*, *supra*, at 135. Therefore, the petition should be granted, and the Court should issue a ruling to safeguard the dignitary interests of appellate litigants and prevent federal courts of appeals from making and selectively enforcing law by choosing which non-frivolous cases they will or will not dedicate attention sufficient to produce reasoned and precedential opinions.

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[11] The purported need for "unpublished decisions as a time-saving device appears to have lessened over time," as "courts receive more than 20,000 fewer appeals today than they did at their caseload zenith in 2005, yet the nonpublication rate is approximately 5 percent higher today than it was then." McAlister, *supra*, at 1369. Cf. Cleveland, *Overturning*, *supra*, at 167 ("Surveys of judges and lawyers in the federal system have indicated that the attempt to create a body of 'disposable opinions' that could be produced more cheaply and ignored by later litigants has failed.").

III. The right to due process in connection with an appeal is not satisfied when a litigant's primary arguments are disposed of through a non-precedential order that does not explain its conclusions.

"[T]he Constitution recognizes higher values than speed and efficiency," *Stanley v. Illinois*, 405 U.S. 645, 656 (1972), and where the right to an appeal is provided by statute "that appeal must accord with due process," *Simmons v. Reynolds*, 898 F.2d 865, 868 (2d Cir. 1990).[12] Accordingly, "a criminal appellant pursuing a first appeal as of right" is guaranteed "certain minimum safeguards necessary to make that appeal 'adequate and effective.'" *Evitts v. Lucey*, 469 U.S. 387, 392 (1985) (quoting *Griffin v. Illinois*, 351 U.S. 12, 20 (1956)). See *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 430 (1994) (noting that, when the absence of a procedure grounded in common law tradition "would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process.").

A litigant's right to a precedential and reasoned determination of his appeal is—no less than the substantive limit on punitive damages awards at issue in *Honda*, 512 U.S. at 432—deeply rooted in common law traditions. See pp. 18-19, 21-22, *supra*. Therefore, a denial of that right is presumptively violative of due process. See *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009) (confirming that the right to "a fair tribunal" applies to appellate proceedings). Just as the right

[12] Section 1291 of Title 28 provides for appeals as of right "from final decisions of the district courts." *Digital Equip. Corp v. Desktop Direct, Inc.*, 511 U.S. 863, 865 (1994).

to effective assistance of counsel on appeal "cannot be satisfied by [the] mere formal appointment" of an attorney, an appeal of right itself must be "more than a meaningless ritual," *Evitts*, 469 U.S. at 394, 395 (internal quotations omitted), resulting in a decision that does not acknowledge material facts or provide a reasoned explanation as to how the evidence cited by the opposing party can, under relevant binding precedents, support the outcome.[13]

IV. This case is an ideal vehicle to resolve the questions presented.

There is no existing "circuit split" with respect to either of the questions presented. Aside from the brief period before *Anastasoff* was rendered moot, see pp. 22-23, *supra*, no federal court of appeals has willingly limited its own power to make and selectively enforce law by choosing which of its rulings will be given precedential effect. But the questions presented are critically important, and this case provides an ideal vehicle for the Court to address them.

The "summary order" issued three days after oral arguments does not acknowledge material facts and does not provide analysis or reasoning with respect to the most important points on appeal.[14] These factors, particularly when combined

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[13] The manner in which appellate decisions are designated as non-precedential may also implicate Equal Protection concerns. See *Evitts*, 469 U.S. at 393; Brown, et al., *supra*, at 36 (describing the "significant disparities in publication rates across types of litigants and substantive areas of law," whereby "litigants with access to fewer resources are disproportionately denied published opinions, as are areas of law that are often associated with those types of litigants.").

[14] As noted, the summary order *does* provide reasoned analysis with respect to other, less important matters, see p. 16, *supra*, suggesting that efficiency concerns alone do not explain the absence of reasoning with respect to Kissi's challenges to the sufficiency of the evidence.

with a boilerplate no-precedential-effect designation, App. 1a, are highly indicative of a procedure that failed to "protect[] against arbitrary and inaccurate adjudication." *Honda*, 512 U.S. at 430. Indeed, the manner in which Kissi's principal appellate challenges were disposed of exemplifies many of the problems that jurists and scholars have attributed to non-precedential and unreasoned appellate decisions. See *Plumely v. Austin*, 574 U.S. 1127, 135 S.Ct. 828, 831 (Mem) (2015) (Thomas, J., dissenting from denial of certiorari) ("It is hard to imagine a reason that the Court of Appeals would not have published this opinion except to avoid creating binding law for the Circuit."); *United States v. McFarland*, 311 F.3d 376, 417 (5th Cir. 2002) (Jones, Jolly, Smith, DeMoss, & Clement, JJ., dissenting) ("[T]he necessity of stating reasons not infrequently changes the results by forcing the judges to come to grips with nettlesome facts or issues which their normal instincts would otherwise cause them to avoid.") (internal quotation omitted).[15]

[15] Justice Stevens once stated that he was more likely to vote to review unpublished circuit court rulings "on the theory that occasionally judges will use the unpublished opinion as a device to reach a decision that might be a little hard to justify." Adam Liptak, *Courts Write Decisions That Elude Long View*, N.Y. Times, Feb. 2, 2015, at A10. See Hon. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371, 1374 (1995) ("I have seen judges purposely compromise on an unpublished decision incorporating an agreed-upon result in order to avoid a time-consuming public debate about what law controls. I have even seen wily would-be dissenters go along with a result they do not like so long as it is not elevated to a precedent."); Hon. Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. App. Prac. & Process 219, 223 (1999) ("If, for example, a precedent is cited, and the other side then offers a distinction, and the judges on the panel cannot think of a good answer to the distinction, but nevertheless, for some extraneous reason, *wish* to reject it, they can easily do so through the device of an abbreviated, unpublished opinion[.]") (emphasis added).

No prosecutor or court has ever acknowledged the material facts supporting Kissi's appellate challenges to his criminal convictions. If those facts—consisting mostly of corroborated items of testimonial evidence the government presented at trial, see pp. 6-9, *supra*—were properly considered, there is a substantial possibility that a careful and impartial analysis of the relevant legal issues would result in a reversal of at least one of the three counts of conviction. Kissi made extensive efforts to prevent the government's strategic refusal to acknowledge those facts from influencing the outcome of his appeal. In his final attempt—a petition for rehearing—he provided the court of appeals an opportunity to address the two issues presented in this petition. As such, this case is an ideal vehicle for this Court to resolve these important questions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: September 19, 2024
New York, New York

Respectfully submitted,

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APPENDIX

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United States v. Kissi

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 16th day of February, two thousand twenty-four.

PRESENT:

AMALYA L. KEARSE,
MICHAEL H. PARK,
BETH ROBINSON,
Circuit Judges.

United States of America,

***Appellee*,**

v. **22-3220**

Sadick Edusei Kissi, AKA Sealed Defendant 1,

Defendant-Appellant.

FOR APPELLEE: KATHERINE REILLY (Hagan Scotten and Mitzi Steiner, *on the brief*), Assistant United States Attorneys, *for* Damian Williams, United States Attorney for the Southern District of New York, New York, NY.

FOR APPELLANT: LUCAS ANDERSON, Rothman, Schneider, Soloway & Stern, LLP, New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (Crotty, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Appellant Sadick Edusei Kissi was indicted on four counts: Count One for conspiracy to commit wire fraud in violation of 18 U.S.C. § 1349; Count Two for conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h); Count Three for conspiracy to receive stolen money in violation of 18 U.S.C. § 371; and Count Four for receiving stolen money in violation of 18 U.S.C. § 2315.

A jury acquitted Kissi on Count One but convicted him on the others. The district court sentenced Kissi to a below-Guidelines sentence of 36 months' imprisonment, imposing a restitution amount of $422,694.53 and forfeiture amount of $101,468. Kissi now appeals, claiming that the government failed to provide sufficient evidence to find him guilty of Counts Two, Three, and Four. Specifically, Kissi argues that the government failed to prove that he knew that (1) the funds at issue had been "stolen, unlawfully converted, or taken," 18 U.S.C. § 2315, as required under Counts Three and Four; (2) the funds came from "some form of unlawful activity," 18 U.S.C. § 1956(a)(1), as required under Count Two; and (3) the purpose of the fund transactions was to "conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity," 18 U.S.C. § 1956(a)(1)(B)(i), as required under Count Two. Kissi also claims that the district court erred in its loss and forfeiture calculations. We

assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

We "review[] de novo a challenge to the sufficiency of evidence supporting a criminal conviction, and must affirm if the evidence, when viewed in its totality and in the light most favorable to the government, would permit any rational jury to find the essential elements of the crime beyond a reasonable doubt." *United States v. Geibel*, 369 F.3d 682, 689 (2d Cir. 2004) (citation omitted). But when a defendant's Rule 29 motion for acquittal "state[s] a ground different from what he now urges on appeal," we review for plain error. *United States v. Delano*, 55 F.3d 720, 726 (2d Cir. 1995). As to the district court's loss and forfeiture calculations, we review factual findings for clear error and conclusions of law *de novo*. *United States v. Carboni*, 204 F.3d 39, 46 (2d Cir. 2000) (loss); *United States v. Sabhnani*, 599 F.3d 215, 261 (2d Cir. 2010) (forfeiture). "Although the district court's factual findings relating to loss must be established by a preponderance of the evidence, the court need not establish the loss with precision but rather need only make a reasonable estimate of the loss, given the available information." *United States v. Uddin*, 551 F.3d 176, 180 (2d Cir. 2009) (cleaned up). We apply this same standard to forfeiture. *See United States v. Roberts*, 660 F.3d 149, 165-66 (2d Cir. 2011).

I. Sufficiency of Evidence

A. Relevant Circumstantial Evidence

Multiple fraud victims testified that they sent funds to Kissi at the behest of purported romantic partners they met online.

From July 2015 to February 2020, Kissi opened multiple personal U.S. bank accounts; received criminal proceeds amounting to approximately $1 million of deposits and withdrawals;

and facilitated numerous deposits of over $2,000 that he would withdraw immediately in cash, through wire transfers, or through account-to-account transfers. Kissi's deposits often arrived with false references. *See, e.g.*, App'x at A483-84, A490, A496 (testifying to deposits labeled as "building materials," "purpose paying loan," "business investment"). When banks suspected fraudulent activity and closed Kissi's accounts, he opened new ones and continued to funnel funds into those accounts. He also used accounts belonging to his co-conspirator, Mubarak Baturi, some of which were held under false names.

At trial, Baturi testified that Kissi acted as the "agent" or "middleman" between co-conspirators in Ghana and himself. Baturi's testimony was supported by text messages with Kissi, discussing transactions to bank accounts under false names and negotiations over Kissi and Baturi's "cuts" of the proceeds with Ghanaian co-conspirators, also known as the "fraud boys." Baturi also indicated that the terms "fraud boys" and "the boys" were interchangeably used by all co-conspirators, including Kissi.

B. Source of Funds

The district court properly determined that the government's evidence was sufficient to prove that Kissi knew the deposited funds were stolen, satisfying the knowledge requirement of the statutes underlying Counts Three and Four. Because the government's evidence proved that Kissi knew that the funds came from unlawful activity, the same evidence was sufficient to satisfy the knowledge requirement of the statute underlying Count Two. It is well established that juries may make reasonable inferences based on circumstantial evidence. *See United States v. Huezo*, 546 F.3d 174, 180 (2d Cir. 2008) ("[B]oth the existence of a conspiracy and a given defendant's participation in it with the requisite knowledge and criminal intent may be established through

circumstantial evidence."); *United States v. Persico*, 645 F.3d 85, 104 (2d Cir. 2011) ("The jury may reach its verdict based upon inferences drawn from circumstantial evidence, and the evidence must be viewed in conjunction, not in isolation." (internal quotation marks omitted)).

After considering the totality of the circumstantial evidence, the jury reasonably inferred that Kissi understood that the funds were unlawfully taken, and thus necessarily stemmed from unlawful activity. *See Huezo*, 546 F.3d at 182 ("[J]urors are entitled, and routinely encouraged, to rely on their common sense and experience in drawing inferences."). We affirm the district court's judgment convicting Kissi of conspiracy to receive stolen money and receiving stolen money; the jury permissibly found that Kissi had the requisite knowledge of the unlawful source of funds sufficient to support a conviction of conspiracy to commit money laundering.

C. Purpose of Fund Transactions

Kissi argues that the government did not prove that the fund transactions were designed to conceal the nature, location, source, ownership, or control of the funds as required to support his conviction of conspiracy to commit money laundering under Count Two. He alleges that the transactions "were needed to advance and complete the charged scams" and that he could not have conspired to conceal anything because there is no evidence to suggest he was attempting to cover up any part of the transactions. Appellant's Br. at 33, 35. He claims that even if he was attempting to conceal the transactions from authorities, the evidence still does not prove that he knew the purpose of the transactions was to conceal the fraudulent activity. *Id*. at 36. We disagree. First, Kissi concedes that he did not preserve these new challenges at the district court, so we review for plain error. *See United States v. Finley*, 245 F.3d 199, 202 (2d Cir. 2001). Second, the government provided sufficient circumstantial evidence for a rational jury to infer that

Kissi knew the transactions were designed to conceal the nature of the funds as fraud proceeds, the source of the funds as fraud victims, and the ownership and control of the funds by the co-conspirators in Ghana.

The district court did not commit error—much less "plain" error—in determining that the government's evidence was sufficient. We thus affirm Kissi's conviction for conspiracy to money launder.

II. Loss and Forfeiture Calculations

A. Loss Calculation

The district court did not procedurally err in its loss calculation. Record evidence demonstrates that it was more likely than not that all of Kissi's undeclared income—"[m]uch of [which] was untraceable in cash and was quickly withdrawn with large wire transfers and cash withdrawals," and was related to "suspicious conduct" that "occurred through several bank accounts"—was from an illegitimate source. App'x at A941. Kissi argues that the loss calculation should be limited to the specific victims and specific timeframe supported by direct evidence, but "the court need not establish the loss with precision but rather need only make a reasonable estimate of the loss, given the available information." *Uddin*, 551 F.3d at 180 (internal quotation marks omitted). The district court reasonably relied on account transactions from 2015 to 2020, including transactions outside of those involving specific victims that exhibited consistently suspicious activity.

Kissi alleges that approximately $135,000 of account-to-account transfers and a single $5,614 deposit from his domestic partner were inappropriately included in the court's $900,000 estimate of funds unlawfully deposited into Kissi's account. Even if the contested amounts were

removed from the calculus, it would not change the Sentencing Guidelines calculation. The total loss would still fall between $550,000 and $1,500,000, triggering a 14-level increase in Kissi's offense level. Kissi's alternative argument that certain funds could have come from selling cars or other undeclared employment fails as well. Kissi stipulated to his employment dating back to 2015, and none of it involved selling cars. Moreover, the testifying forensic accountant considered all of this information when determining Kissi's sources of legitimate income.

The district court thus appropriately determined that "[b]etween the money in defendant's accounts, approximately $900,000, and the transaction in Mr. Baturi's accounts, approximately [$]148[,000], the government has proven a loss between 550[,000] and 1.5 million." App'x at A942.

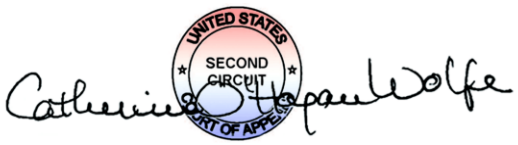
B. Forfeiture Calculation

The district court properly ordered Kissi to forfeit $101,468. First, Kissi claims the district court should have based the forfeiture amount on the restitution amount, not the loss amount. But he provides no support for that claim; in fact, restitution and forfeiture are separate measures. *See United States v. Torres*, 703 F.3d 194, 196 (2d Cir. 2012) ("Restitution and forfeiture are authorized by different statutes and serve different purposes—one of remediating a loss, the other of disgorging a gain."). Second, for the first time on appeal, Kissi objects to the court's use of 10 percent for Kissi's estimated "cut" of illegal proceeds to calculate the forfeiture penalty. We review this new objection for plain error. Although there is no direct evidence in the record of Kissi's actual percentage cut, the district court permissibly "use[d] general points of reference" and made "reasonable extrapolations from the evidence" in calculating the forfeiture amount. *See United States v. Treacy*, 639 F.3d 32, 48 (2d Cir. 2011). Specifically, the district court considered

Baturi's testimony regarding his typical cut percentage, varying cut percentages based on whose account was being used and who was taking a higher risk in conducting withdrawals, and cut negotiations with Kissi, in light of the large amount of funds that flowed through Kissi's own accounts. Based on this information, the district court reasonably determined that a 10 percent cut attributed to Kissi was a reasonable estimate. We thus conclude that the district court properly used the loss amount in its forfeiture calculation and did not commit plain error in determining the percentage cut in its forfeiture calculation.

We have considered all of Kissi's remaining arguments and find them to be without merit. For the foregoing reasons, the judgment of the district court convicting Kissi of conspiracy to commit money laundering, conspiracy to receive stolen money, and receipt of stolen money is **AFFIRMED**. Kissi's motion for bail pending appeal is **DENIED** as moot.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
	:	21 Cr. 64 (PAC)
- against -	:	
	:	**ORDER**
SADICK EDUSEI-KISSI,	:	
	:	
Defendant.	:	

HONORABLE PAUL A. CROTTY, United States District Judge:

On June 2, 2022, following a one-week trial, a jury convicted Defendant Sadick Edusei-Kissi on three out of four counts arising from his involvement in predatory romance scams. On December 13, 2022, the Court sentenced the Defendant to thirty-six months' imprisonment, to be followed by a term of three years' supervised release. On December 27, 2022, the Defendant filed a notice of appeal of his sentence and conviction, which is now pending oral argument. Presently before the Court is Defendant's motion for an order of release on bail pending appeal, pursuant to Rule 42(c) of the Federal Rules of Criminal Procedure and 18 U.S.C. § 3143(b).

Upon review of the parties' arguments and the underlying record in this case, the Court finds that the Defendant has failed to raise "a substantial question of law or fact" on appeal, 18 U.S.C. § 3143(b), sufficient to meet "the defendant's burden to rebut the presumption in favor of detention by clear and convincing evidence." *United States v. Silver*, 203 F. Supp. 3d 370, 376 (S.D.N.Y. 2016). Specifically, the Court finds that the Government presented sufficient evidence at trial from which a reasonable juror could conclude that: (1) Kissi's financial transactions were designed to conceal the illicit nature of unlawful proceeds within the meaning of 18 U.S.C. § 1956(a)(1)(B)(i); (2) that Kissi knew the funds deposited into his accounts were the proceeds of unlawful activity; and (3) that Kissi knew that the funds he received were stolen. The Court further finds that in imposing sentence on the Defendant, it properly calculated the loss amount pursuant

to U.S.S.G. § 2B1.1(b)(1), resulting in an appropriate recommended Guidelines range of 51-63 months' imprisonment.

CONCLUSION

Defendant has failed to raise a substantial question of law or fact on appeal. Accordingly, Defendant's motion for an order of release on bail pending appeal, pursuant to Rule 42(c) of the Federal Rules of Criminal Procedure and 18 U.S.C. § 3143(b) is **DENIED**.

Dated: New York, New York
January 29, 2024

SO ORDERED

HONORABLE PAUL A. CROTTY
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	
	21 Cr. 64 (PAC)
- v -	**OPINION & ORDER**
SADICK EDUSEI KISSI,	
Defendant.	

On June 2, 2022, following a four-day trial and two days of deliberations, a jury convicted Defendant Sadick Edusei Kissi on three out of four counts arising from his involvement in a scheme of predatory financial and romance scams conducted through email, online dating services, and other electronic means. Kissi now renews his Rule 29 motion for acquittal on all counts, arguing that the Government failed to offer evidence at trial sufficient to prove that he knowingly and willfully became a member of the charged conspiracies, and relatedly, that he knew that the money he received had been unlawfully taken.

Having carefully reviewed the parties' arguments and the underlying record in the light most favorable to the Government—as it must do when adjudicating a Rule 29 motion—the Court disagrees. Therefore, for the reasons set forth further below, the Rule 29 motion for acquittal is **DENIED**.

BACKGROUND

In February 2021, Kissi was arrested and charged for his alleged role in a criminal enterprise (the "Enterprise") that specialized in scamming individuals and businesses located across the United States. (*See* Indictment, ECF No. 2.) The Indictment alleges that members of the Enterprise used email, text messaging, and online dating sites to trick victims into transferring hundreds of thousands of dollars into Enterprise-controlled accounts. (*Id.*) As to Kissi's specific,

personal involvement, the Indictment alleges he deposited proceeds from fraud victims into bank accounts he controlled in New York and elsewhere. (*Id.*) Once he received these funds, Kissi was alleged to have withdrawn, transported, and laundered the money to other members of the Enterprise located in Ghana. (*Id.*)

Based on these allegations, the Indictment charged Kissi with four counts: conspiring to commit wire fraud in violation of 18 U.S.C. § 1349 (Count One); conspiring to launder these funds in violation of 18 U.S.C. § 1956(h) (Count Two); conspiring to receive stolen money in violation of 18 U.S.C. § 371 (Count Three); and receiving stolen money in violation of 18 U.S.C. § 2315 (Count Four). (*Id.*)

The trial commenced on May 25, 2022. In its case-in-chief, the Government called eight witnesses and introduced 196 exhibits, including, *inter alia*, bank records, other financial records, phone logs, and chat transcripts involving Kissi and his co-conspirators. The witnesses included several romance scam victims who had sent thousands of dollars to Kissi's bank accounts; an additional victim who had transferred money to an alleged co-conspirator acting in concert with Kissi, Mubarak Baturi; Baturi himself, pursuant to his cooperation agreement with the Government; a forensic accountant who testified as to the small fraction of the money flowing through Kissi's account that was attributable to legitimate sources such as employment (and the even smaller fraction that Kissi paid taxes on); and a TD Bank investigator who had investigated suspected fraud activity in Kissi's bank account.

For his part, Kissi did not call any witnesses. His case-in-chief consisted of a single stipulation read into the record and one additional exhibit. (*See* Trial Tr. at 512:19–516:15.)

At the close of the Government's case-in-chief, Kissi moved for—and the Court denied—a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. (Trial Tr.

at 512:18–23, 517:2–518:11.)[1] Two days later, on June 2, 2022, the jury returned its verdict, finding Kissi not guilty on the wire fraud conspiracy count (Count One), but guilty on all other counts, including conspiracy to launder money, conspiracy to receive stolen money, and receipt of stolen money (Counts Two, Three, and Four, respectively). (Jury Verdict, ECF No. 65.)

Kissi then renewed his Rule 29 motion (Trial Tr. at 673:4), and the parties proceeded to brief the issue. This Opinion addresses Kissi's renewed motion.

DISCUSSION

I. Legal Standard

Rule 29 of the Federal Rules of Criminal Procedure provides that a judgment of acquittal must be entered for "any offense for which the evidence is insufficient to sustain a conviction." However, a defendant bears a "heavy burden" in seeking to overturn a conviction on this basis. *United States v. Jones*, 965 F.3d 190, 193 (2d Cir. 2020)[2] (internal quotation marks omitted). The Court reviews the evidence "in a light that is most favorable to the government, and with all reasonable inferences resolved in favor of the government," *United States v. Anderson*, 747 F.3d 51, 60 (2d Cir. 2014) (internal quotation marks omitted), and must therefore "resolve all issues of credibility in favor of the jury verdict." *Jones*, 965 F.3d at 193. "The question is not whether this Court believes that the evidence at trial established guilt beyond a reasonable doubt, but rather, whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Mi Sun Cho*, 713 F.3d 716, 720 (2d Cir. 2013) (per curiam) (cleaned up) (emphasis in original). Therefore, "[a] judgment of acquittal can be entered only if the evidence that the defendant committed the crime alleged is nonexistent or so meager" as to

[1] The Trial Transcript is docketed at ECF Nos. 66, 68, 70, 72, 74, 76.

[2] *Cert. denied*, 141 S. Ct. 2795 (2021).

entirely preclude a rational guilty verdict. *Jones*, 965 F.3d at 193.

In assessing a sufficiency challenge, the Court reviews the evidence "in its totality, not in isolation." *Anderson*, 747 F.3d at 59 (internal quotation marks omitted). The Government "need not negate every theory of innocence," and "may prove its case entirely by circumstantial evidence so long as guilt is established beyond a reasonable doubt." *United States v. Glenn*, 312 F.3d 58, 63–64 (2d Cir. 2002). "Both the existence of a conspiracy and a given defendant's participation in it with the requisite knowledge and criminal intent may be established through circumstantial evidence." *United States v. Stewart*, 485 F.3d 666, 671 (2d Cir. 2007). However, "[w]here the Government asks the jury to find an element of the crime through inference, the jury may not be permitted to conjecture or to conclude upon pure speculation or from passion, prejudice or sympathy." *United States v. Vernace*, 811 F.3d 609, 615 (2d Cir. 2016) (cleaned up). Rather, those inferences must be "sufficiently supported to permit a rational juror to find that the element, like all elements, is established beyond a reasonable doubt." *United States v. Pauling*, 924 F.3d 649, 657 (2d Cir. 2019) (internal quotation marks omitted).

Still, courts must be "careful not to usurp the role of the jury," whose responsibility it is to "choose among competing inferences" and "assess the weight of the evidence." *United States v. Jabar*, 19 F.4th 66, 76, 81 (2d Cir. 2021)[3] (internal quotation marks omitted). In a conspiracy case, the deference accorded to a jury's verdict is "especially important because a conspiracy by its very nature is a secretive operation, and it is a rare case where all aspects of a conspiracy can be laid bare in court with the precision of a surgeon's scalpel." *United States v. Atilla*, 966 F.3d 118, 128 (2d Cir. 2020) (internal quotation marks omitted).

[3] *Cert. denied sub nom. Bowers v. United States*, 142 S. Ct. 1396 (2022).

II. Analysis

Kissi does not challenge the lion's share of the Government's case. Instead, he aims a single overarching attack on his conviction: that the Government failed to prove he had "knowledge of the unlawfulness of the source of money" that he was alleged to have conspired to launder and receive—a necessary element of all three counts of conviction. (Def.'s Mem. at 2, ECF No. 79.) Specifically, Kissi argues (1) the Government's cooperating witness, Baturi, was not credible; (2) the remaining evidence of Kissi's state of mind was insufficient; and (3) the Government overstated and misstated the evidence in its closing.

The Court addresses, and rejects, each argument in turn.

A. Baturi's Credibility

Kissi first argues that the Government's case concerning his state of mind "hinged" on Baturi's testimony, and that this testimony was "simply not credible." (Def.'s Mem. at 3–5.) Kissi emphasizes that Baturi "admitted to lying repeatedly," "gave conflicting testimony," and "had clear incentives to lie in this case." (*Id.*)

Even assuming Kissi is correct, Rule 29 offers him little comfort. Credibility determinations are "the province of the jury and not of the court." *United States v. O'Connor*, 650 F.3d 839, 855 (2d Cir. 2011). Accordingly, courts must "resolve all issues of credibility in favor of the jury verdict." *Jones*, 965 F.3d at 193. Furthermore, as the jury was instructed in this case,[4] it was entirely permissible for the jury to conclude that "a witness who may have been inaccurate, contradictory and even untruthful in some respects was nonetheless entirely credible in the

[4] The Court instructed the jury in the following manner with respect to cooperating witnesses: "As with any witness, let me emphasize that the issue of credibility need not be decided in an all-or-nothing fashion. Even if you find that a witness testified falsely in one part, you still may accept their testimony in other parts, or you may disregard all of it." (Trial Tr. at 607:18–22.)

essentials of his testimony." *O'Connor*, 650 F.3d at 855 (although several indicators of dishonesty, including past perjury, "surely impaired [a cooperating witness's] credibility, none of them rendered his testimony incredible as a matter of law"); *see also United States v. Truman*, 688 F.3d 129, 139 (2d Cir. 2012) ("[E]ven the testimony of a single accomplice witness is sufficient to sustain a conviction, provided that it is not incredible on its face or does not defy physical realities.") (internal quotation marks omitted).

The Court therefore declines Kissi's invitation to substitute the jury's credibility findings with its own, and denies his bid for acquittal on this basis.

B. Other Evidence of Kissi's State of Mind

Beyond Baturi's testimony, Kissi next takes aim at the Government's remaining evidence that Kissi fully understood, and intended to further, the Enterprise's purposes. First, he argues the Government failed to establish that the cell phone communications in GX 201 in fact involved him at all. And second, Kissi argues that the evidence of his state of mind *other* than Baturi's testimony and GX 201 is "speculative at best and requires a significant level of assumption and conjecture" from the jury. (Def.'s Mem. at 9–10.) The Court rejects both arguments.

GX 201. With respect to the phone communications in GX 201, Kissi argues the Government failed to establish that the phone number tied to several incriminating communications belonged to him. The Government introduced evidence that Kissi controlled two separate numbers: a "347" phone recovered when he was arrested, and the "233" number featured throughout GX 201. The crux of Kissi's argument is that these two numbers could not possibly have both belonged to Kissi. Not only, he observes, were both numbers participants in the same group chats, but they even exchanged messages "exclusively between the two of them, making it clear that the numbers belonged to two separate individuals." (Def.'s Mem. at 6.)

But viewing this evidence in the light most favorable to the Government, it was plausible for a rational jury to conclude otherwise. The "233" number was stored in Baturi's phone as belonging to "Mayor Papik," Kissi's nickname. (GX 201, 301.) Kissi's bank account information was sent to Baturi from this number—and soon thereafter, Baturi sent a photo to the "233" number confirming that he had deposited $5,000 into the Kissi account. (GX 201.) And perhaps most notably, an invitation to Kissi's wedding was sent to Baturi from this number. (*Id.*) There was, in sum, no shortage of evidence tying Kissi to the "233" number.

While the Court recognizes the appeal of Kissi's argument that it would be unusual for the same person to communicate with himself using multiple phones, it was entirely permissible for the jury to prefer a different common-sense conclusion: that a phone associated with a person's nickname, sharing his personal information, and discussing his personal affairs, in fact belonged to that person. *See United States v. Akefe*, No. 09-CR-196 (RPP), 2010 WL 2899805, at *15–17 (S.D.N.Y. July 21, 2010) (holding that the "jury was entitled to use its common sense" in determining the participants of a phone conversation from the contents and context of the communication) (quoting *United States v. Huezo*, 546 F.3d 174, 182 (2d Cir. 2008)).

Other Evidence. The jury was permitted to apply that same common sense to determine whether other evidence demonstrated that Kissi had the requisite knowledge and intent to sustain his convictions. The Government presented evidence of hundreds of thousands of dollars flowing through Kissi's account, unexplained by any professional or other legitimate source of income. (*See generally* GX 401.) Many of those transfers were accompanied by memo lines reflecting "purchases" that the senders admit they never received and never intended to receive, and that no evidence suggested Kissi ever provided. (*See, e.g.*, Trial Tr. at 92:3–5; GX 401 at 15.) Financial records and testimony at trial demonstrated that this pattern continued for years, even as (and after)

Kissi's bank accounts were repeatedly shut down by bank officials in charge of investigating fraud. (Trial Tr. at 231:10–13, 459:1–463:16; GX 401 at 29–34.)

Not only did this constitute yet more evidence probative of Kissi's actual knowledge, but—even setting aside the other evidence of actual knowledge—it was, on its own, sufficient for a jury to convict Kissi on a "conscious avoidance" theory. *See United States v. Kozeny*, 667 F.3d 122, 133–34 (2d Cir. 2011) ("[T]he same evidence that will raise an inference that the defendant had actual knowledge of the illegal conduct ordinarily will also raise the inference that the defendant was subjectively aware of a high probability of the existence of illegal conduct.") (internal quotation marks omitted); *United States v. Stinn*, 379 F. App'x 19, 21 (2d Cir. 2010) ("[A] conscious avoidance instruction is proper even where the government's primary theory is that defendant had actual knowledge.") (summary order citing *United States v. Hopkins*, 53 F.3d 533, 542 (2d Cir. 1995)). Here, the jury was instructed that, "[i]n determining whether Mr. Kissi acted knowingly," it was permitted to consider "whether he deliberately closed his eyes to what otherwise would have been obvious," and, if so, that it "may treat this deliberate avoidance of positive knowledge as the equivalent of knowledge."[5] (Trial Tr. at 643:5–644:17.)

Although contrary inferences may also have been possible, it was entirely permissible for a jury to affix the "conscious avoidance" label to Kissi's conduct. At trial, the jury was presented with (largely undisputed) evidence of a defendant with an uneven employment record suddenly

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[5] The Court clarified that although a conscious avoidance theory "cannot be used as a basis for finding that Mr. Kissi knowingly joined the conspiracy," the jury was permitted to "consider whether he deliberately avoided confirming an otherwise obvious fact, such as that the purpose of the partnership he joined was to commit" the substantive offenses underlying each conspiracy count. (Trial Tr. at 643:25–644:8.)

The jury was also instructed that it could consider a conscious avoidance theory of knowledge both with respect to the three conspiracy counts (*id.* at 642:25–645:12), and the single substantive count (*id.* at 645:13–646:1). Kissi did not object to any of these instructions. (*Id.* at 653:2–5).

shepherding hundreds of thousands of dollars through his bank accounts—until those accounts were shut down for suspected fraud—in purported payment for goods and services he never intended to provide. The Government introduced evidence, for example, that Kissi received money in exchange for "farm equipment" despite being employed in unrelated security and healthcare industries. (Trial Tr. at 440:6; GX 401 at 15; S3.) The jury was well within its discretion to conclude that these "surrounding circumstances" were sufficiently suspicious that they "alone should have apprised defendant[] of the unlawful nature of [his] conduct." *Stinn*, 379 F. App'x at 21 (2d Cir. 2010) (quoting *United States v. Civelli*, 883 F.2d 191, 195 (2d Cir. 1989)); *see United States v. Cuti*, 720 F.3d 453, 463 (2d Cir. 2013) ("Conscious avoidance may be established where a defendant's involvement in the criminal offense may have been so overwhelmingly suspicious that the defendant's failure to question the suspicious circumstances established the defendant's purposeful contrivance to avoid guilty knowledge.") (cleaned up). Then, having found the knowledge requirement satisfied as to the unlawful nature of the conspiracies and funds at issue, the same rational jury could comfortably have concluded that Kissi willfully joined those conspiracies and received the stolen funds.

In sum, again viewing the record in the light most favorable to the Government, the Court cannot conclude that this evidence—both on its own, and in conjunction with the corresponding phone records and Baturi's testimony—was too scant for a jury to conclude Kissi possessed the requisite state of mind to sustain his convictions. Kissi's motion for acquittal therefore fails on these grounds as well.

C. Closing Arguments

Finally, Kissi argues the Government's closing "overstated key evidence presented at trial and prompted the jury to speculate as to a number of key issues," thus depriving him of a fair trial.

(Def's Mem. at 8–9.) Specifically, Kissi cites the Government's statements that he (1) laundered "over a million dollars of dirty money"; and (2) "brazenly continued to have other victims . . . send money to bank accounts of a co-conspirator." (*Id.*)

Neither statement unlocks the relief Kissi seeks. As a starting point, "[b]oth prosecution and defense are entitled to broad latitude in the inferences they may suggest to the jury during closing arguments." *United States v. Feng Ling Liu*, No. 12-CR-934-01 (RA), 2015 WL 4460898, at *8 (S.D.N.Y. July 20, 2015)[6] (quoting *United States v. Suarez*, 588 F.2d 352, 354 (2d Cir. 1978)). To be sure, counsel may not "refer to facts that are not in the record," "misstate the evidence," nor "indulge in an appeal wholly irrelevant to any facts or issues in the case." *United States v. Hollier*, 306 F. Supp. 2d 345, 346 (S.D.N.Y. 2004) (cleaned up) (citing *Viereck v. United States*, 318 U.S. 236, 247 (1943); *Suarez*, 588 F.2d at 354). But the Government's closing fell well short of violating these commands.

With respect to the "over a million dollars" comment, the Government offered evidence that Kissi had over a million dollars flowing through his own bank accounts during the relevant time period, and that only about $100,000 of those funds could be attributed to legitimate income. (Trial Tr. at 416:10–18, 424:22–429:1; GX 401 at 2, 9.) It also introduced evidence that Kissi was involved in coordinating the receipt and laundering of roughly $150,000 more through Baturi's accounts. (Trial Tr. at 173:3–176:11; GX 401 at 37–41.) This plainly laid a sufficient foundation for the Government's "over a million dollars" argument at closing.

With respect to the Government's contention that Kissi "brazenly continued to have" victims send money to Baturi's accounts, Kissi's argument is based on too narrow a view of what the verb "have" can mean. Kissi interprets the phrase "have other victims . . . send money to bank

[6] *Aff'd sub nom. United States v. Bandrich*, 636 F. App'x 65 (2d Cir. 2016).

accounts" as equivalent to the suggestion that Kissi actually, himself, "directed these victims to send money" to Baturi's accounts. (Def's Mem. at 8.) But the Government never claimed anything of the sort. To the contrary, in its rebuttal—the last word to the jury from either party on this (or any) subject—the Government again clarified that Kissi "never spoke to" the victims: "He wasn't the one who told them the lies. And we have never contested that." (Trial Tr. at 585:13–15.) Rather, the Government argued—as its evidence had suggested—that Kissi played a role in organizing the circumstances that led to the victims sending money to Baturi's accounts. (*See, e.g.*, *id.* at 587:21–588:3.)

The parties' broad latitude at closing can accommodate these varied roles the word "have" can play, particularly where context further illuminates the intended meaning. At worst, therefore, the Government's two complained-of statements "represented fair—if aggressive—inferences that the jury was entitled to draw from the evidence." *United States v. Bonventre*, 646 F. App'x 73, 88 (2d Cir. 2016) (summary order) (citing *United States v. Salameh*, 152 F.3d 88, 138 (2d Cir. 1998)).

Nor did these statements go unchecked. Kissi was "entitled to—and, in fact, did—argue for opposing inferences on the basis of the same evidence." *Bonventre*, 646 F. App'x at 88. Moreover, the jury was instructed several times that "[n]one of what the lawyers have said in their opening statements, closing arguments, questions, or objections is evidence" (Trial Tr. at 594:14–19), and that it must rely upon only its "own recollection of the evidence" (*id.* at 594:13–14). *See Bonventre*, 646 F. App'x at 88 (concerns regarding the Government's closing were "adequately addressed by the district court's instructions that only the jury's own recollection of the evidence controlled").

Thus, not only was the Government's rhetoric grounded in evidence, but to the extent the Government invited jurors to meander towards more remote (but permissible) inferences, there

were sufficient protections in place to corral them from straying too far afield. At that point, it was "up to the jury, not this Court, to determine which of the permissible inferences it w[ould], in fact, draw from that evidence." *Feng Ling Liu*, 2015 WL 4460898, at *8. In sum, nothing in the Government's closing warrants acquittal under Rule 29.

D. Rule 33 Motion

In his reply brief, for the first time, Kissi requests a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure "in the alternative" to his Rule 29 motion. (Def.'s Reply at 5, ECF No. 83); Fed. R. Crim. P. 33. As a threshold matter, it is not clear that Kissi has preserved his right to move for a new trial. He moves under Rule 33—for the first time—in one sentence at the end of his reply memorandum. (Def.'s Reply at 5, ECF No. 83.) Not only has he deprived the Government of a chance to respond to the motion, but the memorandum was also filed on July 29, 2022—well past 14 days since the verdict entered on June 2, 2022. (Verdict, ECF No. 65.) It is thus likely that Kissi's potential Rule 33 motion is untimely. *See* Fed. R. Crim. P. 33(b) ("Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty.").

The Court need not decide whether Kissi's Rule 33 motion is proper, however, because Kissi's arguments do not warrant a new trial. "[A] district court may not grant a Rule 33 motion based on the weight of the evidence alone unless the evidence preponderates heavily against the verdict to such an extent that it would be 'manifest injustice' to let the verdict stand." *United States v. Berry*, No. 20-CR-84 (AJN), 2022 WL 1515397, at *11 (S.D.N.Y. May 13, 2022) (quoting *United States v. Archer*, 977 F.3d 181, 188 (2d Cir. 2020)). Courts in this jurisdiction "review sufficiency challenges raised in a new trial motion in the same fashion as those brought in motions for a judgment of acquittal." *United States v. Encarnacion*, No. 13-CR-30 JSR, 2015

WL 756702, at *1 (S.D.N.Y. Feb. 17, 2015) (quoting *United States v. Leslie*, 103 F.3d 1093, 1100 (2d Cir.1997)). Therefore, to the extent Kissi properly moves pursuant to Rule 33 for a new trial based on the insufficiency of the Government's evidence, the Court denies that motion for the same reasons it denies the Rule 29 motion.

Further, Kissi's argument regarding purported government overreach in its closing argument does not rise to the "extraordinary circumstances" necessary to trigger the trial court's discretion to order a new trial. *United States v. McCourty*, 562 F.3d 458, 475 (2d Cir. 2009) (internal quotation marks omitted); *see also United States v. McDaniel*, No. 03-CR-550 (LTS), 2004 WL 1057627, at *5 (S.D.N.Y. May 10, 2004) (new trial was not warranted where a challenged comment from the Government's closing "was but one statement in the context of two weeks of trial testimony and argument"). Thus, Kissi's Rule 33 motion—to the extent it was properly brought—is denied.

CONCLUSION

For the foregoing reasons, Kissi's Rule 29 motion for acquittal is **DENIED**. The Clerk of Court is respectfully directed to terminate the motion at ECF No. 79.

Dated: New York, New York
September 8, 2022

SO ORDERED

HONORABLE PAUL A. CROTTY
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22nd day of April, two thousand twenty-four.

United States of America,

Appellee,

v.

Sadick Edusei Kissi, AKA Sealed Defendant 1,

Defendant - Appellant.

ORDER

Docket No: 22-3220

Appellant, Sadick Eduesi Kissi, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk