

**In the United States Court of Appeals
for the Fourth Circuit**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

THOMAS C. GOLDSTEIN,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND, No. 8:25-CR-00006-LKG-1
HON. LYDIA KAY GRIGGSBY

BRIEF FOR DEFENDANT-APPELLANT THOMAS C. GOLDSTEIN

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INTRODUCTION

In this case, the government decided to seek a conviction no matter the facts or law. After a sprawling investigation, the government charged Tom Goldstein with various tax- and mortgage-related offenses. But once trial began, the government's case fell apart. To salvage the prosecution, the government took increasingly aggressive positions that violated Goldstein's rights and led to multiple legal errors—each of which warrants a new trial.

The central factual dispute was whether Goldstein willfully committed tax offenses. Given the “complexity of the tax laws,” a person cannot be convicted of tax crimes simply because he failed to pay the right amount, file a return, or maintain adequate records; instead, prosecutors must prove he had the “specific intent to violate the law.” *Cheek v. United States*, 498 U.S. 192, 200 (1991).

This prosecution arose from false testimony and information that Goldstein's tax preparer, Walter Deyhle, made to the IRS. In 2016, Goldstein's assistant informed Deyhle that Goldstein had opened a foreign bank account. But Deyhle failed to disclose the account on Goldstein's tax returns, prompting an IRS criminal investigation. When investigators interviewed Deyhle, he did not admit his mistake. Instead, he doubled down with another false statement: that Goldstein never provided Deyhle with his 2016 gambling winnings from an individual named Alec

Gores, which totaled about \$26 million. In fact, Goldstein had emailed Deyhle the income amounts in October 2017, as Deyhle was preparing Goldstein's returns.

When trial began, the government made Deyhle's story about Goldstein's 2016 gambling income its central theory. A week into trial, however, the government discovered Goldstein's October 2017 email (which was produced years earlier) and realized the story was false. With that theory debunked, the government scrambled to save the case—causing three due process violations.

First, the government violated *Brady v. Maryland*, 373 U.S. 83 (1963). After discovering the October 2017 email, the government scheduled two emergency meetings with Deyhle to rework his testimony. Although the government claims it took no notes, one thing is clear: Deyhle admitted he received the email and used it to prepare Goldstein's 2016 returns. That admission contradicted his previous story and was classic impeachment evidence that had to be disclosed, along with the government's outlines from those meetings. But the government failed to disclose that evidence, materially undermining the defense's position that the tax errors stemmed from Deyhle's incompetence.

Next, the government convinced the district court to erroneously exclude Goldstein's most important evidence. When the government's original theory fell apart, it pivoted to a new theory that Goldstein made \$50 million gambling in 2016 and was motivated to evade taxes on that income in all ensuing years. The

government misleadingly offered a subset of Goldstein’s text messages to investors describing his gross winnings and suggested that he was describing his net income. To prove he did not believe his 2016 income was anything close to \$50 million, Goldstein offered messages with another investor explaining how most of his winnings were offset by losses, owed to investors, or not paid until 2017. But the court wrongly excluded this state-of-mind evidence as hearsay.

Finally, the government aggressively pursued an accessory liability theory under 18 U.S.C. § 2 for all counts, pointing to numerous third parties involved in Goldstein’s alleged offenses. But after closing argument, the government persuaded the court to instruct jurors only on Section 2’s statutory text and to delete further instructions on its elements. As this Court recognized in *United States v. Odum*, 65 F.4th 714 (4th Cir. 2023), instructing jurors using Section 2’s text alone violates due process. And the district court further violated Federal Rule of Criminal Procedure 30(b), which prohibits amendments to jury instructions after closings.

Because each of these errors crippled Goldstein’s defense, this Court should order a new trial—and remind the government that “while [it] may strike hard blows, [it] is not at liberty to strike foul ones.” *Berger v. United States*, 295 U.S. 78 (1935).

JURISDICTIONAL STATEMENT

Goldstein timely appealed from a final judgment of conviction entered on July 28, 2026, and amended on July 31, 2026. JA745-747. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the government violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose impeachment evidence from meetings with its key witness.
2. Whether the district court erred by excluding Goldstein’s primary state-of-mind evidence as hearsay.
3. Whether the jury instructions—which were amended after closing arguments—violated due process and Rule 30(b) by failing to specify the elements of 18 U.S.C. § 2.

STATEMENT OF THE CASE

A. Factual Background

For decades, Goldstein was a distinguished appellate litigator who owned his own firm. In 2016, Goldstein began playing high-stakes poker backed by Paul Phua, a businessman who invested in Goldstein’s games. JA380-381. Goldstein asked his assistant to establish a bank account in Montenegro (Phua’s residence) to exchange money more easily. JA406-407. After doing so, the assistant reported it to Goldstein’s accountants, including Walter Deyhle. JA406-407.

With Phua’s help, Goldstein played numerous high-stakes games in 2016. Goldstein initially lost millions and thus sought coaching from two professional players—Keith Gipson and Andrew Robl—who began investing in his games. JA399-402.

Backed with those investments, Goldstein arranged games against three businessmen: “Chairman” and “Tango” (whom he played at casinos in Asia where Phua controlled payouts), and Alec Gores. JA381. Goldstein won those games, with gross winnings of about \$13 million from Chairman, JA403-404, \$26 million from Gores, JA420-421, and \$12 million from Tango, JA503-504. So, as Goldstein texted Gipson and Robl in December 2016, his gross winnings from those games were about \$51 million. JA1134-1135.

But those gross numbers represented only part of the financial picture. Throughout 2016, Goldstein was in constant communication with “Kids”—Phua’s assistant—about his poker results and debts to investors. JA501-502. In texts, Kids conveyed that Goldstein lost millions in earlier 2016 games; that Goldstein owed most of his winnings from Gores, Chairman, and Tango to investors; and that Tango did not pay until 2017:

- In October, Kids texted a ledger documenting Goldstein’s results. The ledger conveyed that Goldstein’s share of the Chairman games—which occurred in September—was about \$5.4 million and that Goldstein lost about \$4.4 million in other games in Asia. JA5546-5547.

- Kids and Goldstein subsequently exchanged messages documenting investors' shares of Goldstein's wins against Gores. JA5548-5555. For one session involving gross winnings of about \$18 million, they agreed Phua's share was 45%, Goldstein's share was 30%, and other investors' shares totaled 25%. JA5551-5552. After the Gores games, Kids stated Phua was entitled to over \$10 million. JA5555; JA416.
- In mid-December, Kids confirmed Goldstein was entitled to \$60.56 million HKD—roughly \$8 million—from Tango. JA5558-5559.
- In February 2017, Kids said Tango had still not paid for the 2016 games. JA5561.

In 2017, Goldstein and Phua agreed to “swap” their respective shares of the Gores and Tango games, as Gores paid Phua's share to Goldstein and Tango eventually paid Goldstein's share to Phua. JA514-515.

In late 2016 and early 2017, Goldstein played games without investors, lost about \$16 million, and ran out of money. JA519. Throughout this period, Goldstein maintained a record of wires in and out of his poker bank account. JA430. This “wires document” reflects he paid more than \$20 million in 2016. JA5477-5478. Because Goldstein and Phua swapped their shares of the Tango and Gores winnings, the document does not reflect exchanges with Phua for those games.

Because taxes are owed on net income “actually received during the tax year,” *Edwards v. Douglas*, 269 U.S. 204, 211 (1925), Goldstein knew the combination of losses, offsets, and unpaid winnings would complicate his 2016 taxes. In January

2017, he told Deyhle he had significant gambling winnings in 2016 but a large portion was owed to investors or offset by losses. JA441-442.

In March, Deyhle wrote that Goldstein could request an extension until October 15 without filing or paying taxes and stated the only consequence was penalties and interest. JA5843. Deyhle said Goldstein only needed to provide his 2016 “net winnings.” JA5469.

Just before the October deadline, Deyhle followed up. JA5462. Goldstein used the wires document to quickly calculate that he had won \$27,185,050 (which included the \$26 million Gores winnings), lost \$13,498,000, and distributed \$10,938,700 to investors, resulting in net gambling income of \$2,748,350. JA5462. He emailed these figures to Deyhle, who subsequently filed a 2016 tax return derived from those amounts. JA5462.

From 2017 to 2021, Goldstein stopped playing high-stakes poker and focused on his law practice. JA521. During these years, Goldstein relied heavily on his assistants and Deyhle to manage his taxes and bookkeeping. As the firm’s sole owner, Goldstein sometimes asked assistants to pay his personal expenses out of the firm’s accounts. JA3930-3931.

In 2021, Goldstein and his wife purchased a home in Washington, D.C. Because Goldstein did not disclose his poker debts to his wife, their mortgage applications omitted the debts. JA3975. Goldstein was traveling when they

submitted at least one of the applications, so his wife signed it on his behalf. JA4083-4084.

Meanwhile, the government began investigating Goldstein for tax violations. In October 2020, government investigators interviewed Deyhle, who made several false statements. Initially, the government was focused on Goldstein's Montenegro bank account, which Deyhle had not reported. JA3919-3920. Although Goldstein's assistant had informed Deyhle about the account, Deyhle said Goldstein had not told him about it. JA5488.

Deyhle then made additional false statements that took the investigation in a different direction: He stated that Goldstein never provided information about his 2016 gambling income in writing, never responded to requests for information, and never disclosed his gross winnings from the Gores games. JA5485-5486. Those statements were false because, as noted, Goldstein had emailed Deyhle about his gross winnings, losses, and investor distributions. JA5462.

Believing Deyhle's story, the government interviewed Deyhle three more times before calling him as a grand jury witness. JA5491; JA5498; JA5533; JA5540. Throughout, Deyhle repeated his false statements about Goldstein's 2016 gambling income. JA5492-5493; JA5534-5535; JA5513-5514.

The government sought an indictment based on Deyhle's story—but took no steps to confirm it. The government did not, for instance, subpoena Deyhle's

communications with Goldstein or read the October 2017 email to Deyhle, which Goldstein had produced.

B. Procedural History

In January 2025, Goldstein was charged with multiple tax and mortgage-related offenses. For each count, the indictment charged Goldstein with the substantive offense and accessory liability under 18 U.S.C. § 2. JA787-801.

When trial began in January 2026, the operative indictment included sixteen counts: (1) one count of tax evasion related to Goldstein’s 2016 income, in violation of 26 U.S.C. § 7201; (2) eight counts of assisting the preparation of a false tax return in tax years 2017 through 2021, in violation of 26 U.S.C. § 7206(2); (3) four counts of willful failure to pay taxes in tax years 2017, 2019, 2020, and 2021, in violation of 26 U.S.C. § 7203; and (4) three counts of making false statements on a loan application, in violation of 18 U.S.C. § 1014. JA748.

1. A central aspect of the trial was the government’s shifting theory of willfulness. The government pursued an overarching theory focused on Goldstein’s 2016 poker activities, arguing that if Goldstein willfully hid millions from the IRS in 2016, subsequent inaccurate tax returns and missing payments were likely not mistakes. This theory was critical to the government’s case because there was no independent evidence that many inaccuracies it charged as felonies—*e.g.*, the law

firm assistants' occasional mischaracterization of personal expenses as firm expenses, or the omission of \$263 interest income in 2017, JA595—were willful.

The government's key witness was Deyhle. Heading into trial, the government planned to focus on the \$26 million Goldstein received from Gores and showcase Deyhle's story that Goldstein hid those winnings. As the defense later learned, the government met with Deyhle on December 28, 2025, to confirm that story and prepared an outline to walk Deyhle through his planned testimony. JA3110. In its opening argument three weeks later, the government emphasized that Goldstein "hid" the Gores winnings from "his tax preparer." JA1043-1045. The government repeatedly urged jurors to credit Goldstein's "tax preparers" and deem Goldstein a liar. JA1045-1050.

But midway through trial, the government finally reviewed the defense's exhibits and discovered Goldstein's October 2017 email—which proved Deyhle's story false. JA3279. The government quickly scheduled additional meetings with Deyhle to salvage its case. On January 28, it met with Deyhle and informed him of the October 2017 email. Deyhle confirmed he had received that email and used it to prepare Goldstein's 2016 tax return—contradicting multiple prior statements, including to the grand jury. JA3280-3282. But instead of scrutinizing Deyhle's inconsistencies, the government simply used a new outline to walk Deyhle through his expected new testimony given the email. JA3281-3282. Two days later, the

government and Deyhle had a final preparation session. JA3282. The government took no notes at either session.

The preparation sessions and Deyhle's changed story were not revealed until his cross-examination. JA3040. The defense immediately sought relief, arguing that the government had violated *Brady v. Maryland*, 373 U.S. 83 (1963), a second time. JA3069. Earlier in the trial, the district court had found that the government violated *Brady* by failing to disclose exculpatory emails between the lead case agent and an accountant at Deyhle's firm. JA2071-2072. But the court denied relief because it thought the absence of notes meant there was nothing to disclose. JA12-15.

With Deyhle's original story debunked, the government developed a new willfulness theory: that Goldstein had \$50 million in 2016 income from the games against Gores, Chairman, and Tango and evaded taxes on that income. JA4548-4549. To prove that income, the government introduced text messages Goldstein sent Gipson and Robl describing \$50 million in gross winnings and called Gipson and Robl as witnesses. JA1134-1135; JA4555.

But Goldstein did not believe his *net* 2016 gambling income was anything close to \$50 million. He believed that most of his gross winnings were offset by losses, owed to investors, or—in the case of the Tango winnings—not paid until 2017.

To rebut the government’s theory, the defense offered Goldstein’s contemporaneous messages with Kids. JA3847. It explained that Goldstein relied on those messages to track his wins, losses, and investor shares, so they were evidence of his beliefs about his 2016 income. JA3854. But the district court excluded the messages as hearsay. JA349.

The government’s closing crystallized its new willfulness theory: Goldstein’s desire to avoid paying taxes on his \$50 million 2016 income “motivated everything that Mr. Goldstein did from March 2016 through December 2022.” JA4549. Thus, after spending “the bulk of [its] time” in closing “talking about Count One,” JA4552, the government addressed the other charges briefly “[f]or expediency,” JA4576.

2. Another central aspect of the trial was the government’s aggressive pursuit of conviction on an accessory liability theory under 18 U.S.C. § 2 across all counts. Section 2 covers two forms of accessory liability. Section 2(a)—aiding-and-abetting liability—provides that “[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.” 18 U.S.C. § 2(a). Section 2(b)—cause liability—provides that “[w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States” is likewise “punishable as a principal.” *Id.* § 2(b). The jury instructions adopted by the court prior to closings permitted the jury to convict only under Section 2(a). *Infra* at 47.

Following closing arguments, however, the government made an extraordinary request: It asked the court to delete the instructions setting forth the elements of Section 2(a) liability, while preserving all remaining Section 2 language—thereby enabling conviction under both Section 2(a) *and* Section 2(b). JA4740. When the defense objected that this change omitted the statutory elements, the government argued that simply reading “the statute is sufficiently clear” to instruct on Section 2. JA539; JA4947. The district court sided with the government. JA554-555. As a result, the instructions permitted jurors to convict under Section 2(a) or 2(b) without specifying the elements of accessory liability.

3. After more than two days of deliberations, the jury returned a mixed verdict, acquitting Goldstein on four counts of assisting the preparation of a false tax return—Counts 2, 4, 5, and 6—and convicting him on the remaining twelve counts. JA4774-4777. One of those convictions—for Count 15—necessarily depended on an accessory liability theory under Section 2(b). *Infra* at 52-53.

Goldstein moved for a new trial. Among other things, he argued the erroneous accessory liability instruction violated due process and Federal Rule of Criminal Procedure 30(b). JA4869. He also argued the erroneous exclusion of the messages with Kids required a new trial. JA4902.

In its opposition, the government reversed its position on the accessory liability instructions—claiming it had proposed amending the instructions to remove

Section 2 from the case entirely, rather than to permit conviction under both Section 2(a) and Section 2(b). *Compare* Dkt. 23 at 21, *and* JA4948, *with* JA4740. On the evidentiary issue, the government maintained that the messages were inadmissible hearsay. JA4983.

The district court denied Goldstein’s new-trial motion. JA639. The court subsequently sentenced Goldstein to 72 months’ imprisonment. JA681.

SUMMARY OF ARGUMENT

The district court committed multiple errors, each of which independently requires a new trial.

I. The government violated *Brady* by failing to disclose evidence about trial-preparation sessions where its lead witness, Deyhle, changed his story about Goldstein’s 2016 gambling income. The undisclosed evidence necessarily included Deyhle’s admission that he received and used Goldstein’s October 2017 email, as well as outlines the government used to walk Deyhle through the testimony it expected him to give.

A. That evidence was “suppressed” because it did not come to light until Deyhle testified—and even then, it was only partially disclosed. *United States v. George*, 95 F.4th 200, 209 (4th Cir. 2024). The government’s failure to take notes does not absolve it of its *Brady* obligations. And in any event, the government had an obligation to disclose its outlines.

B. The suppressed evidence was favorable and material. It was exculpatory because it confirmed Goldstein’s innocence under the government’s lead theory. And it was impeaching because the defense could have used it to discredit Deyhle, whose testimony was the cornerstone of the government’s case.

II. The district court wrongly excluded Goldstein’s messages with Kids, which contained state-of-mind evidence critical to rebut the government’s overarching willfulness theory.

A. The messages were not hearsay because they were offered to prove Goldstein’s “state of mind” regarding his 2016 income. *United States v. Gallagher*, 90 F.4th 182, 195 (4th Cir. 2024) (citation omitted). Indeed, they were powerful evidence of Goldstein’s contemporaneous belief that his 2016 income was nowhere close to \$50 million.

B. The government cannot show the error was harmless. The excluded evidence went to “the central issue in the case, *i.e.*, [Goldstein’s] intent,” and rebutted the government’s overarching willfulness theory. *United States v. Ibisevic*, 675 F.3d 342, 350 (4th Cir. 2012). The court “took no steps to mitigate [the erroneous exclusion’s] effects.” *Id.* at 351. And the “closeness of the case,” *id.* at 350 (citation omitted), is confirmed by the “split verdict,” *United States v. Brizuela*, 962 F.3d 784, 799 (4th Cir. 2020), and by the government’s failure to offer any “direct evidence” on the central issue of intent, *Ibisevic*, 675 F.3d at 353-54.

III. Finally, the district court erroneously authorized conviction under Section 2 without instructing the jury on its elements. There is, at minimum, a “reasonable likelihood” that a “reasonable juror” would have understood the instructions to permit conviction under Section 2. *Boyde v. California*, 494 U.S. 370, 380 (1990). The government itself understood the instructions that way until its post-trial about-face. And the text of the instructions, the context in which the jurors received them, and the jury’s ultimate verdict confirm that reading. The court was thus required to instruct the jury on Section 2’s elements. Yet it failed to do so. Instead, it stripped those crucial instructions after closing arguments and opted to simply read the text of Section 2—in direct contravention of this Court’s ruling in *Odum*, 65 F.4th at 721-22. That last-minute change violated due process and Rule 30(b).

STANDARD OF REVIEW

A district court’s failure to recognize a *Brady* violation is a “legal error” that this Court reviews “de novo.” *George*, 95 F.4th at 208 (citation omitted). Evidentiary and instructional rulings are reviewed for “abuse of discretion,” which occurs when the district court “commits an error of law.” *Gallagher*, 90 F.4th at 195 (citation omitted); see *United States v. Passaro*, 577 F.3d 207, 221 (4th Cir. 2009).

ARGUMENT

I. THE GOVERNMENT’S *BRADY* VIOLATION REQUIRES A NEW TRIAL

This case involves a blatant *Brady* violation. The government suppressed evidence that its lead witness, Deyhle, reversed his story midway through trial—including between trial preparation sessions held just weeks apart. The government had an obligation to record and disclose the details of those sessions before Deyhle testified, as well as to produce the outlines used in those sessions. When the government finally disclosed a few details after Deyhle testified, it was too late for the defense to make effective use of them. And the government still has not disclosed its outlines.

Under *Brady*, prosecutors must “disclose exculpatory evidence” and “evidence that would be useful to impeach government witnesses.” *Moore v. Maryland*, 163 F.4th 828, 840 (4th Cir. 2026). To prevail on a *Brady* claim, a defendant must prove that (1) prosecutors suppressed evidence; (2) the evidence was favorable; and (3) “the evidence was material, such that it may have impacted the outcome of the case.” *Id.* Here, Goldstein’s claim satisfies those elements because the government suppressed evidence—Deyhle’s inconsistent statements—that would have bolstered Goldstein’s claim of innocence and allowed the defense to impeach the government’s key witness.

A. The Government Suppressed Evidence About The Deyhle Preparation Sessions

1. “Evidence disclosed after a trial commences is ‘suppressed’ for *Brady* purposes if the prosecution’s delay prevented the defendant from ‘using the disclosed material effectively in preparing and presenting [his] case.’” *Moore*, 163 F.4th at 840 (citation omitted). Accordingly, this Court has held that evidence disclosed for the first time during a witness’s examination is suppressed. In *George*, the government’s key witness stated in a pre-trial interview that two other people had been in the back seat of the car. 95 F.4th at 202-03. But “two weeks before trial,” the government re-interviewed the witness, who identified different passengers. *Id.* at 203. The government did not disclose the new story, so the defense did not learn it until the witness testified. *Id.* at 208-09. This Court held that the “inconsistent statement” was suppressed under *Brady*. *Id.*

By the same logic, the government here suppressed evidence related to the trial-preparation sessions where Deyhle changed his story about Goldstein’s conduct with respect to his 2016 income. In the months before trial, Deyhle maintained that Goldstein avoided providing information in writing, never disclosed his gross winnings from the Gores games, and never provided information about investor payouts. Most notably, on December 28, 2025, Deyhle met with the government to prepare his trial testimony. JA3277-3278. Contrary to its practice for other witness meetings, the government did not prepare a memorandum describing the Deyhle

meeting and did not disclose it to the defense. But according to the government, Deyhle's statements at the meeting were consistent with his earlier story that Goldstein hid his 2016 gambling income, including the Gores winnings. JA3278. The government later admitted during a colloquy with the court that it had prepared an outline to walk Deyhle through his planned testimony, and had added checkmarks to the outline—seemingly indicating that Deyhle's planned testimony met its expectations. JA3110.

But after trial began, the government discovered the October 2017 email and realized that Deyhle's narrative—the centerpiece of its case—was wrong. *Supra* at 10-11. The government quickly scheduled additional meetings with Deyhle to figure out a new strategy. On January 28, it met with Deyhle, informed him of the October 2017 email, and confirmed he used that email to prepare Goldstein's 2016 tax return. JA3280-3282.

Deyhle's admission that he received the email contradicted his prior representations that:

- Goldstein only provided information about his winnings “verbally,” JA5513-5514;
- Goldstein wanted to avoid providing information in writing, JA5512;
- Goldstein did not provide any information about his gambling winnings to Deyhle after January 2017, JA5514; and

- Goldstein never responded to Deyhle's requests for documentation. JA5534-5535.

Likewise, Deyhle's admission that he used the email to prepare Goldstein's tax returns contradicted his prior representations that:

- Goldstein provided the incorrect gambling winnings figure used on the 2016 tax return, JA5496;
- Goldstein provided the incorrect gambling loss figure used on the 2016 tax return, JA5496;
- Goldstein never provided his gross gambling winnings, JA5534-5535;
- Goldstein acknowledged only \$1.6 million in net gambling winnings in 2016, JA5511-5512; and
- Goldstein never specified whether the Gores winnings included shares owed to investors. JA5534-5535.

Notwithstanding those inconsistencies, the precise details of the January 28 meeting are unknown. Although Deyhle's admissions about the October 2017 email contradicted the story he told just one month earlier, the government conspicuously took no notes. The government later admitted it decided to assume Deyhle's prior representations were mistakes and therefore did not press him on the inconsistencies. JA3281. Instead, the government once again prepared an outline to walk Deyhle through his expected new testimony given the email. JA3282. The government again added checkmarks to the outline, seemingly indicating that Deyhle had agreed to the contradictory version of events. JA3282.

The government and Deyhle met for a final time on January 30. JA3282. Again, the government took no notes and did not press Deyhle on his inconsistent statements. Instead, it appears the government used the session to confirm Deyhle's new testimony, presumably using another outline.

The government's discovery that its key witness had given false information to a grand jury—and the preparation sessions it held in the wake of that discovery—were not revealed until Deyhle's cross-examination. On direct, the government asked Deyhle to review the October 2017 email and explain how he used it to prepare Goldstein's 2016 taxes. JA2897. On cross-examination, the defense questioned Deyhle about his changed story and Deyhle mentioned only that he reviewed the email in a single trial-preparation session with the government. JA3040; JA3065-3070. When the defense sought *Brady* relief, the government finally disclosed the other preparation sessions. JA3110-3113.

Thus, as in *George*, the government did not timely “disclose [Deyhle's] inconsistent statement,” the meetings, or the outlines—“[i]nstead, [Goldstein] was ambushed” at trial. 95 F.4th at 209. Goldstein did not learn about Deyhle's new story until direct examination and did not learn about the first and second preparation sessions until “cross examination.” *Id.* at 204, 209. He did not learn about the third session or the outlines—which have still not been disclosed—until after Deyhle's testimony. JA3282. All this evidence was therefore “suppressed.”

2. The district court rejected the *Brady* claim on the theory that there was no evidence to suppress. The government represented it took no notes because Deyhle made no “exculpatory statements,” and did not “challenge[]” him because it presumed his prior testimony reflected his “best (if inaccurate) recollection.” JA3281-3284. Relying on that representation, the court denied relief. JA12-15.

That ruling violates settled law: The government’s “obligation to disclose” “material information that impeaches its witness or exculpates the defendant” exists “without regard to whether that information has been recorded in tangible form.” *United States v. Rodriguez*, 496 F.3d 221, 222, 226 (2d Cir. 2007). The government “does not avoid the obligation under *Brady/Giglio* to disclose the information by not writing it down.” *Id.* at 222. Moreover, the government must “resolve doubtful questions in favor of disclosure” because “the significance of an item of evidence can seldom be predicted accurately until the entire record is complete.” *United States v. Agurs*, 427 U.S. 97, 108 (1976).

Here, the government should have disclosed several pieces of evidence regardless of whether it took notes. It should have disclosed that the preparation sessions occurred and their purpose—to ask Deyhle about the October 2017 email that contradicted his prior statements. And it should have disclosed Deyhle’s admission that he received and used the email. Even if Deyhle said nothing further, he necessarily confirmed receipt and use when the government “informed him that

[it] had identified [the] emails” and “walked Deyhle through” a “math demonstration” of how he calculated Goldstein’s taxes using the email. JA3281.

The district court’s contrary holding would gut *Brady* with respect to pretrial witness statements. If the government could avoid disclosure by refusing to take notes on anything that does not directly aid its narrative or by taking notes only on statements it deems directly exculpatory, then it would almost never need to disclose impeaching pretrial witness statements.

In any event, the government’s representation that it withheld no written evidence was incorrect. There was a written record of the preparation sessions: the prosecutors’ outlines of Deyhle’s anticipated testimony. JA3110; JA3282. Those outlines were (partial) written records of the sessions because they included checkmarks that prosecutors presumably added to indicate Deyhle agreed with the content they prepared. Because the outlines documented that Deyhle made inconsistent statements just weeks apart—and likely revealed that the government prepared two irreconcilable versions of Deyhle’s testimony—those outlines were critical impeachment evidence and had to be disclosed.

B. The Suppressed Evidence Was Favorable And Material

Suppressed evidence “is considered favorable to the defendant when it is exculpatory or impeaching” and “material” when “there is a reasonable probability that, had [it] been disclosed, the result of the proceeding[s] would have been

different.” *Moore*, 163 F.4th at 842 (citation omitted). Thus, when suppressed evidence could have been used to impeach a key witness, it is both favorable and material. *See George*, 95 F.4th at 209.

As discussed, the government suppressed: (1) the occurrence of the Deyhle preparation sessions and their purpose; (2) outlines from the sessions; and (3) Deyhle’s admission that he received the October 2017 email and used it to calculate Goldstein’s 2016 taxes. This evidence was both favorable and material for two reasons. Most obviously, it confirmed Goldstein’s innocence under the government’s lead theory—that Goldstein hid the Gores winnings from Deyhle.

More broadly, the defense would have used the suppressed evidence to impeach Deyhle, who was the government’s key witness on the central issue of willfulness. Deyhle’s credibility was key to the government’s case because he supplied its most important evidence across every tax charge. *Supra* at 9-10. Apart from the government’s evidence regarding Goldstein’s 2016 income, Deyhle’s testimony that he informed Goldstein of his tax obligations was the government’s only evidence of willfulness. Accordingly, the core of Goldstein’s defense was that his mistakes in reporting his taxes resulted from Deyhle’s bad advice—not from any willful scheme. For instance, Deyhle told Goldstein he would not be breaking the law if he paid his taxes late with penalties and interest, JA5843; JA3156-3157, or only reported his net gambling income, JA5469; JA3074.

Because the “question of guilt or innocence essentially involved a credibility determination between’ [Goldstein] and [Deyhle],” *George*, 95 F.4th at 209 (citation omitted), Deyhle’s credibility was a central issue. While the government presented Deyhle and his firm as victims of Goldstein’s supposed scheming, the defense argued that Deyhle could not be trusted because he was incompetent and had an incentive to protect himself. For instance, the defense called an expert who testified that Deyhle’s performance was plainly inadequate. JA3446. Thus, the suppressed evidence was both “favorable” and “material” because it would have “undermined [Deyhle’s] credibility.” *George*, 95 F.4th at 209 (citation omitted). Specifically, the evidence would have further discredited Deyhle’s testimony and the government’s case in at least three ways.

1. To start, the defense would have emphasized that Deyhle’s core story changed significantly. If a witness changes his story in a “trial preparation interview,” the new story is an “inconsistent statement” that impeaches credibility. *George*, 95 F.4th at 208-09. Additionally, a witness’s “prior inconsistent statement relating to the central issue that the jury was required to decide” is “material.” *Spicer v. Roxbury Corr. Inst.*, 194 F.3d 547, 561 (4th Cir. 1999). Thus, Deyhle’s statements were favorable and material. Deyhle repeatedly stated before trial that Goldstein never shared his gross winnings from Gores in writing and made numerous other claims about Goldstein’s conduct with respect to his 2016 gambling income. *Supra*

at 8-9. But Deyhle’s admissions at the January 28 and 30 preparation sessions contradicted *nine* of those claims. *Supra* at 19-20. Those “inconsistent statement[s]” undoubtedly were “impeaching.” *George*, 95 F.4th at 208-09 (citation omitted). And because they “relat[ed] to the central issue” in the case—*i.e.*, whether Goldstein intentionally violated his tax obligations—they were “material.” *Spicer*, 194 F.3d at 561.

Indeed, the suppression of evidence from the preparation sessions materially impeded Goldstein’s ability to cross-examine Deyhle. When the defense asked Deyhle whether the October 2017 email was inconsistent with his prior statements, he professed not to remember those prior statements, stating they occurred years ago. *See, e.g.*, JA3040; JA3044; JA3045; JA3061. The defense had no ready means to rebut Deyhle’s claim that his memory had faded. But if the government had disclosed evidence about the trial preparation sessions—including the outline from the December 28 session, where Deyhle apparently *reaffirmed* his prior statements—it would have emphasized the implausibility of Deyhle’s feigned ignorance. Because that evidence was disclosed so late and the outline was never disclosed at all, the defense could not make “effective use” of it during cross-examination and its suppression had a material impact. *George*, 95 F.4th at 210.

2. The defense would have further used the suppressed evidence to establish Deyhle’s bias toward the government. It is well-established that “an effective

showing of bias held by a witness” diminishes his credibility. *United States v. Parker*, 790 F.3d 550, 559 (4th Cir. 2015). And one way to “demonstrate” an individual’s “potential bias in testifying as a government witness” is to show he faced potential liability under federal law. *Id.* at 558.

If the defense had known about Deyhle’s changed story at the January 28 preparation session in advance of cross-examination—and that he told a contradictory story a month earlier—it would have prepared an even stronger argument that Deyhle was biased because he wanted to save himself and his accounting firm from serious consequences. The government’s investigation originally targeted Deyhle, and he faced significant liability after the government discovered he urged Goldstein to create a secret bank account to avoid IRS collection (which Goldstein declined to do). JA3057; JA5497. Additionally, any government finding that Deyhle’s firm made material errors would have had adverse professional consequences. JA3454. The defense argued that Deyhle’s testimony was not credible given his interest in avoiding these consequences. JA4601-4602. Evidence of the January 28 session would have reinforced that argument by showing Deyhle knew the government had unequivocal proof he had testified falsely to the grand jury and thus “was influenced by a desire to receive favorable treatment from the government.” *Parker*, 790 F.3d at 561.

Disclosure of the government’s outlines would have also shown that Deyhle simply repeated testimony the government prepared for him. At trial, the government used the October 2017 email to walk Deyhle through how he prepared Goldstein’s 2016 returns—a routine that came straight from the January 28 session. JA2897. Specifically, the government admitted it “walked Deyhle through a similar math demonstration as the one used on direct examination,” relying on an “outline” with “checkmarks” to ensure he hit the right points. JA3281. Had the defense received the January 28 outline, it would have used it to argue that Deyhle would have testified to anything the government asked. And had the defense received the December 28 outline, which the government used to walk Deyhle through a *conflicting* version of his testimony, the defense’s argument would have been even stronger.

3. The suppressed evidence also undermines the legitimacy of the government’s investigation. Evidence that undermines “the thoroughness” of “the [government’s] investigation” can be used to impeach the government’s case. *Kyles v. Whitley*, 514 U.S. 419, 445 (1995). In *Kyles*, for instance, the Court concluded that disclosure of a witness’s inconsistent statements to the police “would have revealed a remarkably uncritical attitude on the part of the police,” which the defendant could have used to “attack[] the reliability of the investigation.” *Id.* at 445-46.

Here, the defense could have used the January 2026 preparation sessions to reinforce its argument that the government's investigation was incompetent. The government's pursuit of a theory of guilt that was easily falsified by the October 2017 email already demonstrated serious flaws in its investigative process. *Supra* at 8-9. Disclosure of the preparation sessions would have cast further doubt on "the thoroughness and even the good faith of the [government's] investigation" by showing the government failed to review the defense's exhibits before trial. *Kyles*, 514 U.S. at 445-46.

Moreover, evidence about the government's approach to the Deyhle sessions would have confirmed its witnesses were unreliable. The government admitted that "no one from [the] prosecution team asked or challenged Deyhle about his prior statements." JA3281. Disclosing that fact "would have revealed a remarkably uncritical attitude on the part of the" government. *Kyles*, 514 U.S. at 445, 450.

Finally, the defense would have emphasized that this was the government's second *Brady* violation. *Supra* at 11. Had the district court found a second *Brady* violation based on the suppression of *additional* evidence, the defense would have used that finding "to cap an attack on the integrity of the investigation" by arguing that the government could not be trusted to give an honest account of the evidence. *Kyles*, 514 U.S. at 449.

4. The fact that the defense had other limited opportunities to impeach Deyhle does not require a different conclusion. Even if a witness's "credibility" is "already impugned," evidence "further diminish[ing]" his credibility is material. *Wearry v. Cain*, 577 U.S. 385, 393 (2016). Indeed, courts have held that specific evidence of a witness's "prior inconsistent statement" is material even where a witness has already been impeached. *Spicer*, 194 F.3d at 561; see *United States v. Service Deli Inc.*, 151 F.3d 938, 943-44 (9th Cir. 1998). In *Spicer*, this Court concluded that such a statement would be "a far more serious blow to the prosecution's case" than other impeachment evidence the defense had presented. 194 F.3d at 561. Similarly, in *Service Deli*, the Ninth Circuit rejected the government's argument that suppression of a witness's "conflicting" statements and evidence about his "motivation to testify" was not material because "each of these areas of impeachment was in fact brought out by [the defense] at trial." 151 F.3d at 943-44. The "most damning impeachment evidence" was "withheld," and prior impeachment attempts did not render that evidence immaterial. *Id.*

That logic applies here. Although the defense impeached Deyhle in several ways, it did not have one piece of evidence that tied the various threads together. But if the defense had known about Deyhle's inconsistent statements at the preparation sessions before he testified, it could have used that evidence to simultaneously lay bare Deyhle's inconsistent statements, his incentive to curry

favor, and the government’s flawed investigation. Accordingly, that evidence was material because it would have dealt a “far more serious blow to the prosecution’s case” than any evidence the defense used to attack particular aspects of Deyhle’s story. *Spicer*, 194 F.3d at 561.

The appropriate remedy for the government’s second *Brady* violation is, at minimum, a new trial. *See Monroe v. Angelone*, 323 F.3d 286, 316-17 (4th Cir. 2003). In addition, this Court should order several conditions to avoid “persistent prejudice,” including disclosure of all details about the Deyhle meetings and a jury instruction stating that the government violated *Brady* twice. *United States v. Pasha*, 797 F.3d 1122, 1138-39 (D.C. Cir. 2015).

II. THE ERRONEOUS EXCLUSION OF GOLDSTEIN’S TEXT MESSAGES REQUIRES A NEW TRIAL

The district court further erred by excluding Goldstein’s key state of mind evidence. After Deyhle reversed his story, the government developed a new willfulness theory: that Goldstein had \$50 million in 2016 net income and, after underreporting that income, took additional actions in subsequent years to evade taxes on it. JA4548-4549. According to the government, Goldstein’s desire to avoid paying taxes on his 2016 income “motivated everything [he] did from March 2016 through December 2022.” JA4549.

In fact, Goldstein believed that \$50 million represented his *gross* winnings from the games against Gores, Chairman, and Tango—not his 2016 *net* income. To

prove that belief, he offered his contemporaneous text messages with Kids. But at the government's urging, the district court excluded them as hearsay.

Because Goldstein offered the messages to prove his state of mind, they were not hearsay. And excluding the messages was not harmless.

A. The District Court Incorrectly Excluded The Messages

The hearsay rule does not apply to a statement that “tend[s] to prove state of mind.” 2 McCormick on Evidence § 274 (8th ed.). Because that rule applies only to a “statement offered ‘to prove the truth of the matter asserted in the statement,’” a statement “is not hearsay and may not be excluded on that basis” if it is offered to establish the defendant’s “state of mind” or beliefs. *Gallagher*, 90 F.4th at 195 (citation omitted); *see also* Fed. R. Evid. 803(3) (“A statement of the declarant’s then-existing state of mind” is “not excluded by the rule against hearsay.”). Accordingly, this Court has repeatedly reversed district courts for excluding state-of-mind evidence as hearsay. *E.g.*, *Gallagher*, 90 F.4th at 195-96; *Ibisevic*, 675 F.3d at 349-50; *United States v. Leake*, 642 F.2d 715, 720-21 (4th Cir. 1981).

Under those principles, Goldstein’s messages with Kids could not be excluded as hearsay because Goldstein offered them to rebut the government’s theory of willfulness. The government argued that the jury could infer willfulness for every tax charge based on Goldstein’s decision to underreport his 2016 income. *Supra* at 9-10. In support, the government introduced texts to Gipson and Robl in which

Goldstein conveyed he won \$50 million in the games against Chairman, Gores, and Tango. JA1134-1135. The government argued those messages established both that Goldstein's 2016 gambling income was \$50 million *and* that he willfully underreported that income. *See United States v. Jinwright*, 683 F.3d 471, 476 (4th Cir. 2012).

To rebut that willfulness theory, the defense offered Goldstein's messages with Kids showing that Goldstein did not believe he had net income of \$50 million—or anything close to that. As discussed, Kids conveyed that: (1) Goldstein lost significant sums gambling in 2016; (2) Phua and other investors were entitled to significant shares of Goldstein's wins against Chairman, Gores, and Tango; and (3) Tango did not pay until 2017. *Supra* at 5-6. Goldstein's responsive messages conveyed he believed Kids' calculations were correct. As the defense argued at the time, the messages thus “speak directly to Mr. Goldstein's state of mind” regarding his 2016 income. JA3854. Regardless of whether the facts asserted in the messages were true, the messages showed Goldstein *believed* them to be true and therefore did not think his 2016 taxable income was anything close to \$50 million. That is because taxes are owed only on net income “actually received during the tax year,” *Edwards*, 269 U.S. at 211, and the messages demonstrated Goldstein's belief that his 2016 winnings were offset by losses, owed to investors, or not paid until 2017.

Goldstein was therefore entitled to use the messages to prove his beliefs and “state of mind” regarding his 2016 income. *Gallagher*, 90 F.4th at 196-97. The district court’s decision to exclude that state-of-mind evidence under the hearsay rule—while allowing the government to use similar evidence to prove Goldstein’s state of mind—was an “error of law.” *Id.* at 195 (citation omitted).

In resolving Goldstein’s new-trial motion, the district court barely defended its decision to exclude the messages, beyond suggesting that Goldstein could have “intended to use this evidence” for the truth of the matter “to show [he] suffered poker losses in 2016.” JA664. But even if a risk existed that Goldstein could use the messages for an improper hearsay purpose, their relevance to his intent meant they could not be excluded as hearsay. When a “fact” is “admissible for one purpose but inadmissible for another,” “the established rule is that the evidence should be accepted” with an “instruction” to prevent “misuse.” *Sprinkle v. Davis*, 111 F.2d 925, 931 (4th Cir. 1940). This principle applies to out-of-court statements offered to prove the defendant’s state of mind: The court should “admit the statement and direct the jury to consider it only as proof of the state of mind.” 2 McCormick on Evidence § 274 (8th ed.); see *United States v. Rafiekian*, 991 F.3d 529, 550 (4th Cir. 2021) (district court erred in excluding messages based on risk they could be used for “improper [hearsay] purpose”).

B. The District Court's Error Was Not Harmless

When the district court commits an evidentiary error, the burden shifts to the government to demonstrate it “did not have a ‘substantial and injurious effect or influence in determining the jury’s verdict.’” *Ibisevic*, 675 F.3d at 349-50 (citation omitted). This Court applies three factors in assessing whether the government has met its burden: “(1) the centrality of the issue affected by the error; (2) the steps taken to mitigate the effects of the error; and (3) the closeness of the case.” *Id.* (citation omitted).

Ibisevic and *Gallagher* are the key precedents. In *Ibisevic*, this Court vacated a conviction because the district court excluded an out-of-court statement tending to show the defendant lacked the intent to lie to customs agents. 675 F.3d at 355. The court explained that (1) the statement went “to the central issue in the case, *i.e.*, [the defendant’s] intent”; (2) the defendant’s testimony did not mitigate the error because the absence of corroborating evidence may have caused jurors to think the defendant was lying; and (3) the case was close because the Government “presented no direct evidence of [the defendant’s] intent.” *Id.* at 350-53. In *Gallagher*, this Court found that the district court’s exclusion of messages was not harmless for almost identical reasons. 90 F.4th at 197-98. Moreover, because “the messages were relevant to rebutting the government’s central contention at trial,” this Court reversed on *all* counts. *Id.* at 196-98. The same result is warranted here.

1. The text messages were relevant to the central issue of willfulness

The first factor weighs heavily in Goldstein’s favor because “the excluded [evidence] clearly did go to the central issue in the case, *i.e.*, [Goldstein’s] intent.” *Ibisevic*, 675 F.3d at 350. Willfulness was the key disputed issue for all tax charges, and Goldstein offered the excluded evidence to prove lack of willfulness for all such charges—therefore, this “factor points toward vacatur.” *Gallagher*, 90 F.4th at 197.

Indeed, the government emphasized to jurors that willfulness was “the main question in [their] deliberations.” JA4551. And critically, the government itself told jurors that Goldstein’s beliefs regarding his 2016 income were central to *every* tax charge—not just Count 1. The first words of the government’s closing were: “In 2016, Tom Goldstein won almost \$50 million playing poker.” JA4548. The government then repeatedly emphasized that Goldstein’s desire to avoid paying taxes on gambling income he “secretly won” in Asia “motivated everything that Mr. Goldstein did from March 2016 through December 2022.” JA4549; *see* JA4565 (“[E]verything that happens is motivated by Mr. Goldstein’s decision to cheat on his taxes in 2016.”). And the government promised to spend “the bulk of [its] time” in closing “talking about Count One,” JA4552, and to address the other charges only briefly “[f]or expediency” because “all of this is motivated by his tax evasion in 2016,” JA4576.

The excluded messages were essential because they directly rebutted the government’s core argument that Goldstein made \$50 million in 2016 and deliberately evaded taxes on that income in subsequent years. After claiming that Goldstein made \$50 million in 2016, the government urged jurors to “reject Mr. Goldstein’s claim” that he believed those winnings were “offset” by “unreported losses in Asia and set asides” for investors, JA4573-4574. It follows that “the messages”—showing Goldstein’s belief that most of his 2016 winnings were offset by losses, owed to investors, or not paid until 2017—“were relevant to rebutting the government’s central contention” about Goldstein’s “intent.” *Gallagher*, 90 F.4th at 196-97.

The excluded messages were also “central to the defense” because they were the “*only* evidence” corroborating “[Goldstein’s] claim that he believed” his 2016 net income was nowhere close to \$50 million. *Ibisevic*, 675 F.3d at 350-51. Because the defense had initially focused on Deyhle’s story about the Gores winnings and planned to principally argue the tax errors resulted from Deyhle’s incompetence, it had to adjust to respond to the government’s new theory. And to make matters worse, the only witnesses who could have corroborated Goldstein’s beliefs—Phua, Kids, Chairman, and Tango—were unavailable to testify. Accordingly, Goldstein needed to introduce the messages as the “only evidence,” *Ibisevic*, 675 F.3d at 351,

that could corroborate his testimony and “rebut[] the government’s central contention,” *Gallagher*, 90 F.4th at 196.

Finally, the erroneous exclusion of the messages affected every charge because the messages would have broadly bolstered Goldstein’s credibility. Throughout closing, the government emphasized that jurors could not trust Goldstein’s testimony because of his asserted lies. JA4552; JA4690. And its primary example was Goldstein’s supposed “lie[s] to his accountants about the \$50,000,000 2016 poker income.” JA4690. Thus, excluding the “only evidence that would have corroborated [Goldstein’s] testimony of assertedly innocent conduct” affected the jury’s assessment of Goldstein’s credibility. *Ibisevic*, 675 F.3d at 351.

The district court’s contrary conclusion was fundamentally flawed. The court asserted that “the issue of whether Mr. Goldstein had poker gambling winnings or losses in 2016” was “relevant only to” Count 1. JA665. Even as to Count 1, the court concluded Goldstein’s 2016 gambling income was not “central” because the government introduced evidence of improper business deductions to show a tax deficiency and “other evidence to show affirmative acts of tax evasion.” JA665.

That analysis misses the point. Tax evasion requires proving: (1) “a substantial tax deficiency”; (2) “an affirmative act” constituting attempted evasion; and (3) “willfulness.” *United States v. Goodyear*, 649 F.2d 226, 227-28 (4th Cir. 1981). Even if the government had “other evidence” of a tax deficiency and an

affirmative act, the messages provided powerful evidence about the *third* element: willfulness.

Moreover, in concluding the error could have affected only Count 1, the district court “fail[ed] to grapple with how [the excluded messages] cast doubt on the government’s overarching theory of the case.” *Gallagher*, 90 F.4th at 197. In *Gallagher*, the defendants were charged with multiple counts of fraud arising from alleged misstatements over several years. But instead of presenting count-by-count evidence of fraudulent intent, the government presented a central “theory” of intent, as articulated in its “closing argument.” *Id.* at 195. This Court held that the excluded messages were relevant to every charge because they directly “rebutt[ed] [that] central contention.” *Id.* at 196. The same is true here.

2. The district court did nothing to mitigate its error

The second factor strongly favors Goldstein because “the district court failed to acknowledge any existence of an error” and therefore “took no steps to mitigate [its] effects.” *Ibisevic*, 675 F.3d at 351. Nor is there anything the court could have done to cure its erroneous exclusion of the messages. All cases “rel[ying] on mitigation efforts to find an error harmless” have involved the erroneous *admission* of evidence. *Id.* at 351-52. There, courts can direct jurors to “disregard” what they have seen. *United States v. Lighty*, 616 F.3d 321, 361 (4th Cir. 2010). But courts cannot direct jurors to *consider* evidence they have not seen.

Moreover, the government exacerbated the error by making improper remarks. After the court excluded the messages, Goldstein testified about the ledger to explain how he tracked his results. JA397-398. The government countered that Goldstein's testimony could not be trusted because he failed to produce the ledger. Throughout closing, the government referred to the "supposed" ledger, JA4561, and stated that "Goldstein's own testimony" was his "only evidence," JA4574. The government further misled the jury by asserting Goldstein never asked his expert to review the ledger. JA4574. As the government knew, however, Goldstein had hired *another* expert to analyze the ledger; but because the court excluded the ledger, that expert never testified. JA4594-4595.

The Sixth Circuit's decision in *United States v. Toney*, 599 F.2d 787 (6th Cir. 1979), illustrates the seriousness of the government's misconduct. There, the defendant sought to introduce a witness's out-of-court statements to corroborate his story. *Id.* at 788-89. After the prosecutor successfully objected "on hearsay grounds," the prosecutor emphasized in closing there was no evidence of that story. *Id.* at 789-90. The court deemed those remarks "foul play" because "the prosecutor well knew" that corroborating evidence existed. *Id.* at 790-91. "[T]he nature of the closing argument" meant the exclusion of the statement was not "harmless error." *Id.* at 791. Here, too, the government's remarks were "foul play." The government

successfully objected to the ledger, but then misleadingly suggested in closing it did not exist. JA4574.

Although the district court instructed the jury “not to speculate about why the Phua Ledger was not admitted into evidence,” JA614, that instruction did not mitigate the harm. In cases where the defendant has sought a new trial based on improper remarks, this Court has explained that “whether the court gave a curative instruction” is just one of several relevant factors. *United States v. Joyner*, 187 F.4th 84, 104 (4th Cir. 2026). If improper remarks can justify a new trial *even with* a curative instruction, then they can surely amplify the harm from the exclusion of evidence. Thus, while the mitigation factor would favor Goldstein even absent the improper remarks, those remarks conclusively “foreclose[] any possible claim” of “harmless[ness].” *Toney*, 599 F.2d at 791.

In holding otherwise, the district court misapplied this Court’s precedent. The court believed any error was mitigated because Goldstein “testified extensively about the excluded evidence.” JA665. But this Court has repeatedly held that a defendant’s “in-court testimony about” the substance of excluded documentary evidence “d[oes] not mitigate the effects of the error”—“[q]uite the contrary.” *Gallagher*, 90 F.4th at 197; *see Ibisevic*, 675 F.3d at 351-52. When a defendant testifies “about what [he] ‘believed,’” the court’s “exclu[sion] [of] ‘the sole evidence that directly corroborated [his] testimony’” is “particularly problematic given the

risk that jurors may disregard self-serving testimony by criminal defendants.” *Gallagher*, 90 F.4th at 197.

Goldstein’s use of the messages to refresh his recollection does not change the analysis. When a witness uses a document to refresh his recollection, “the evidence is the witness’s present recollection, not the [document].” 2 Wharton’s Criminal Evidence § 8:16 (15th ed.); see *United States v. Rydland*, 461 F. App’x 208, 210 (4th Cir. 2012). It follows that a witness’s use of excluded evidence to refresh his recollection does not mitigate the harm from its exclusion. See *Pittman v. County of Madison*, 863 F.3d 734, 736-37 (7th Cir. 2017) (“It was senseless to think that testimony by [the witness] seven *years* after [the event] was as or more reliable than his recorded testimony made three *hours* after the [event].”).

The district court also cited its curative instruction that jurors not speculate about “why the ledger was not admitted into evidence.” JA665. But as already explained, an instruction can only mitigate improperly *admitted* evidence. *Supra* at 39. And in any event, the curative instruction was only a (failed) attempt to mitigate the *additional* prejudice from the government’s improper remarks about the ledger’s absence—not to mitigate the erroneous exclusion itself. *Supra* at 40-41.

3. The case was close

The closeness of the case confirms a new trial is required. Where the defendant’s “intent” was the central issue, “the Government presented no direct

evidence” of intent, and the defendant’s credibility was contested, this Court has held the third factor favors the defendant—especially if the excluded evidence would have “directly corroborat[ed]” his testimony. *Ibisevic*, 675 F.3d at 353-54.

This is such a case. The government sought to prove willfulness based on circumstantial evidence about Goldstein’s 2016 gambling income—most notably, Goldstein’s messages to Gipson and Robl. *Supra* at 32-33. The excluded messages would have “countered [that] somewhat weak evidence,” *Gallagher*, 90 F.4th at 197, by revealing the flaws in the government’s story. And the messages would have “directly corroborat[ed]” Goldstein’s testimony. *Ibisevic*, 675 F.3d at 353-54.

The government has suggested that jurors could infer Goldstein’s intent to underreport his 2016 income because he improperly included several deductions on his returns. JA4560. But a court may not find an evidentiary error harmless simply because “there was sufficient untainted evidence to convict” on an alternative theory. *United States v. Urbanik*, 801 F.2d 692, 698-99 (4th Cir. 1986). Instead, the “closeness inquiry ‘involves assessing whether’” the “‘evidence is not only sufficient to convict, but whether it is sufficiently powerful in relation’ to the excluded [evidence] to ensure the error did not affect the outcome.” *Ibisevic*, 675 F.3d at 354 (citation omitted). Any inference of willfulness from isolated deductions—which did not remotely suggest a broader motive—is not so powerful that this Court can conclude the exclusion was harmless.

The split verdict reinforces the point. A “split verdict indicates the case was close, perhaps so much so that the erroneously admitted evidence was the deciding factor.” *Brizuela*, 962 F.3d at 799. That is particularly true where “all counts largely relied on the same evidence” and the “matter ‘not in evidence’” was “relevant to all counts.” *United States v. Adams*, 139 F.4th 931, 942 (D.C. Cir. 2025) (citation omitted). Here, the jury acquitted on four tax counts. And given the government’s overarching theory of willfulness, “all counts largely relied on the same evidence” and the excluded messages were “relevant to all counts.” *Id.*

Indeed, the split verdict suggests the excluded messages could have made all the difference because the jury acquitted on every substantive tax charge where Goldstein presented documentary evidence. For instance, Counts 2 and 6 charged Goldstein with false returns because he did not report gross gambling income. JA595-596. But documents showed Deyhle told Goldstein he only needed to report his net income, corroborating the lack of willfulness. JA5469. Thus, the “excluded [messages] ‘could have been of decisive importance.’” *Ibisevic*, 675 F.3d at 354 (citation omitted).

The district court incorrectly reasoned that the case was not close because jurors “never indicated during [their] two-day deliberations that [they were] struggling to reach a verdict.” JA665-666. But the court cited cases in which this Court found the error *prejudicial* because jurors deliberated for several hours on a

handful of counts. *Ibisevic*, 675 F.3d at 352; *United States v. Sanders*, 964 F.2d 295, 299 (4th Cir. 1992). In this case, deliberations lasted more than two days—so the cited authorities only underscore the error here was not harmless.

Moreover, the district court’s conclusion warrants no deference because its analysis contradicts this Court’s precedent. The court ignored the split verdict completely. Instead, the court stated—without further explanation—that “the Government presented the testimony of 39 witnesses, extensive documentary evidence and six factual stipulations.” JA665. That conflates the quantity of evidence with its strength. In any event, “the strength of the Government’s case does not, in itself, resolve the ‘closeness’ question.” *Ibisevic*, 675 F.3d at 354. Even in cases where “the Government presented strong direct evidence of guilt,” this Court has “weigh[ed] that evidence in relation to the excluded evidence” and “held that the improper exclusion was not harmless.” *Id.* Here, no witness besides Deyhle testified directly to Goldstein’s willfulness. And the court never considered how the excluded messages would have directly corroborated Goldstein’s lack of willfulness.

III. THE DISTRICT COURT’S INSTRUCTIONAL ERRORS REQUIRE A NEW TRIAL

Due process required the district court to instruct the jury on the elements of Section 2 before permitting conviction on an accessory liability theory. Rule 30(b) additionally barred the court from substantively altering the instructions following closing arguments. The court failed to abide by these mandates. At the

government's urging, the court deleted the only instruction containing several elements not set forth in the statutory text—while retaining instructions inviting conviction under Section 2 for every count. And the court made this crucial change after the parties had given their closing arguments. The result was a constitutionally deficient charge that enabled Goldstein's wrongful conviction.

A. The District Court Erroneously Removed The Instructions On Section 2's Elements

1. A district court abuses its discretion in instructing jurors if it fails to “fairly state the controlling law.” *Burgess v. Goldstein*, 997 F.3d 541, 557 (4th Cir. 2021) (citation omitted). “The key question is whether, when viewed holistically and in context, the instructions ‘adequately informed the jury of the controlling legal principles without misleading or confusing the jury to the prejudice of the objecting party.’” *Odum*, 65 F.4th at 721. Where, as here, “a defendant timely objects” to “an erroneous instruction,” a conviction must be reversed unless the prosecution proves “beyond a reasonable doubt[] that the error was harmless.” *United States v. Hastings*, 134 F.3d 235, 241 (4th Cir. 1998).

Importantly, the court must instruct on “the elements of [each] offense charged.” *United States v. Polowichak*, 783 F.2d 410, 415 (4th Cir. 1986) (citation omitted). Simply “reading” the “statute to the jury” does not suffice; instructing on the elements “is mandatory and indispensable.” *United States v. Harris*, 346 F.2d 182, 184 (4th Cir. 1965). Section 2 liability is no exception: In *Odum*, this Court

held the district court plainly erred by “‘read[ing] directly from’ 18 U.S.C. § 2” without instructing on its elements. 65 F.4th at 720. Additionally, Rule 30(b) prohibits courts from substantively amending jury instructions after closing arguments. *See* Fed. R. Crim. P. 30(b).

The government led the district court to violate both principles. At the charge conference, the district court agreed that a standalone instruction specifying Section 2(a)’s elements was “needed.” JA4493-4494. Critically, that instruction limited the jury to Section 2(a) and excluded Section 2(b) cause liability as a path to conviction. *See* JA4591-4592; JA4707-4708.

After closing, however, the government realized it needed Section 2(b) to be available under the instructions to secure a conviction on Count 15. *Infra* at 52-53. It therefore requested that the court delete the instructions on Section 2’s elements, arguing that the remaining language in the instructions “quoting Section 2(a) and (b)” would suffice to submit those charges to the jury. JA550. When the defense objected that the government wanted to “tell the jury they can convict Mr. Goldstein of aiding and abetting and then remove the instruction explaining to them what they would have to find to do that,” JA537, the government did not disavow seeking a conviction under Section 2—or suggest the instructions precluded conviction under Section 2. Instead, the government argued the language describing Section 2(a)’s elements “should come out, and *the other aiding and abetting language should stay*

in,” JA537 (emphasis added), because “the statute is sufficiently clear” to submit Section 2 liability to the jury, JA539.

The district court ultimately agreed with the government and changed the instructions post-closing to merely quote Section 2’s text, JA585; JA593-594; JA607-608. That error devastated Goldstein’s defense. Jurors did not know that Section 2(a) aiding-and-abetting liability requires finding another guilty principal, that the defendant shared the principal’s intent, and that the defendant committed an affirmative act. *See United States v. Horton*, 921 F.2d 540, 543-45 (4th Cir. 1990); *United States v. Winstead*, 708 F.2d 925, 927 (4th Cir. 1983); *Odum*, 65 F.4th at 721. And jurors did not know that Section 2(b) cause liability requires finding “the defendant had the *mens rea* required by the underlying statute.” *United States v. Gumbs*, 283 F.3d 128, 135 (3d Cir. 2002). Because none of these elements appears in Section 2’s text, omitting them while inviting conviction under Section 2 violated due process. *Odum*, 65 F.4th at 720-21.

2. When Goldstein identified this error in his new-trial motion, the government reversed course. Rather than defend its prior theory that reading the statute was “sufficiently clear,” JA539, the government claimed the instructions “*did not* permit the jury to convict under *any* § 2 theory.” JA4947. The government even misrepresented its prior position, asserting it proposed amending the instructions to remove Section 2 from the case, Dkt. 23 at 21. That assertion is false: After closing

arguments, the government sent an email to defense counsel asserting that “this is a § 2(b) case (in addition to (a)),” and proposing an amendment including instructions on the elements of both Section 2(a) *and* 2(b). JA4743. The government explained that the purpose of this post-closing request was to eliminate the instruction limiting the jury to applying only Section 2(a) so that the instructions would also be “[a]ppropriate for cases involving violations of subsection (b).” JA4740; *see* JA552 (government stating “the reality is that both sections are charged. That’s already in part of the jury instructions”).

Despite recognizing the government’s position on accessory liability had “shifted,” the district court denied relief. JA5167-5168. The court did not dispute that, if the instructions permitted conviction under Section 2, then the instructions were substantively inadequate, prejudicial, and not harmless error—requiring a new trial on all counts. But the court agreed with the government’s post hoc theory that the instructions did not permit conviction under Section 2 in the first place. JA658-659.

That conclusion cannot be squared with the instructions and basic interpretive principles. To determine if the instructions permitted conviction under Section 2, the Court must ask whether a “reasonable likelihood” exists that a “reasonable juror” would have understood them that way. *Boyd*, 494 U.S. at 380; *see United States v.*

Ealy, 363 F.3d 292, 298 (4th Cir. 2004) (applying “reasonable likelihood” standard to Section 2).

Here, there is a “reasonable likelihood”—indeed, a virtual certainty—that jurors read the instructions to permit conviction under Section 2. *Boyde*, 494 U.S. at 380. After all, the government itself insisted the instructions would submit Section 2 liability to the jury, until the moment the government realized the error in briefing the post-trial motions. *Compare* JA552, *with* JA4947; *see supra* at 13-14. And the district court ultimately sided with the government, denying the defense’s request to remove the remaining Section 2 language when it deleted discussion of its elements. JA555. Given that the government fought to keep Section 2 language in the instructions on the theory that reading the statute sufficed to permit conviction under Section 2—and the district court agreed—it is implausible to suggest there is not even a reasonable likelihood that lay jurors would have read the instructions that way.

Moreover, the government’s initial position was correct. Four points in the instructions, read together, plainly invited conviction under Section 2. First, the court instructed the jury that its role was to “find Mr. Goldstein guilty or not guilty” of the “offenses charged.” JA570-571. Second, the instructions on all counts specified that Goldstein was “charged” with the substantive offense *and* Section 2 liability—“aiding and abetting, counseling, commanding, inducing or procuring

such an offense.” JA584; JA589-590; JA600; JA604-605. Third, the instructions regarding tax evasion, false returns, and mortgage fraud each quoted Section 2’s text in full. JA585; JA593-594; JA607-608. And fourth, each time, the instructions described Section 2’s text as “pertinent.” JA585; JA593-594; JA607-608. In total, the instructions invoked Section 2 seven times—more than any other basis for liability or charge.

Reading those instructions as a whole, any reasonable jury would have understood that its role was to determine “guilt or innocence” on the “offenses charged”; that Section 2 liability was one such “charge” for every count; and that Section 2’s text set forth the “pertinent” information to determine such liability. At minimum, there is a “reasonable likelihood” jurors would have understood the instructions that way. *Boyde*, 494 U.S. at 380. To suggest otherwise would require assuming that jurors *ignored* the court’s repeated invocation of Section 2. But “our legal system presumes that jurors will ‘attend closely [to the instructions]’” and “strive” to “follow them.” *Samia v. United States*, 599 U.S. 635, 646 (2023) (citation omitted). And “the purpose of jury instructions is to instruct the jury clearly regarding the law to be applied in the case,” *United States v. Lewis*, 53 F.3d 29, 34 (4th Cir. 1995)—not to provide irrelevant language about extraneous charges in the indictment to be disregarded.

Additional “context [from] the proceedings” reinforces that jurors understood Section 2 liability as an available basis for conviction. *Boyde*, 494 U.S. at 383. The jury had previously received the preliminary instructions, which likewise repeatedly quoted Section 2’s text and explained that Goldstein was separately “charged” with aiding and abetting for every offense. JA1022-1023; JA1027; JA1029-1030; JA1033. And the jury received the final instructions only after hearing the government’s case, which repeatedly stressed the role that third parties played in Goldstein’s alleged crimes. In its opening statement, the government highlighted the involvement of Goldstein’s accountants, assistants, and wife in the charged conduct. JA1047-1054. Over the next six weeks of trial, the government then built out its Section 2 case. On the tax charges, the government highlighted Phua’s involvement, questioned Deyhle about how he prepared Goldstein’s tax returns, and elicited testimony from the firm’s assistants about their role classifying transactions as personal or business expenses. JA1737-1740; JA2879-2880; JA2902-2903; JA2929-2930; JA3240. And on the Count 15 mortgage fraud charge, the government put on an entire rebuttal case aimed at proving that Goldstein violated Section 2 by causing his wife to submit the false applications from Maryland. JA545-546. That evidence provided fertile ground for a wrongful conviction based on a misunderstanding of Section 2’s elements.

If there were any remaining doubt, the Count 15 mortgage fraud conviction confirms that jurors understood the instructions to permit conviction under Section 2. The government acknowledged during closing that Goldstein “was in the Virgin Islands,” not Maryland, when the relevant mortgage application was submitted. JA4590. That concession was necessary given Goldstein’s flight records, which the jury requested to review during deliberations. JA4759-4760. Thus, Section 2 cause liability provided the only potential basis for venue on Count 15. And, critically, the Section 2 instructional language for Count 15 was identical for the tax evasion, false returns, and remaining mortgage fraud counts. JA585; JA593-594; JA607-608. If the jury understood it could convict under Section 2 for Count 15—as it must have given the verdict—then it is “reasonabl[y] like[ly]” it understood the same for those other counts. *Boyde*, 494 U.S. at 380.

3. The district court’s contrary reasoning lacks merit. To begin, the court failed to apply *Boyde*’s “reasonable likelihood” standard, instead offering its own interpretation without asking whether a “reasonable likelihood” exists that a “reasonable juror” would have read the instructions to permit conviction under Section 2. 494 U.S. at 380, 386; *see* JA656 (acknowledging the defense advocated for this standard, but nowhere applying it). The court then compounded that error by suggesting a retrial is warranted only if the court is convinced the defendant is “innocent.” JA655. Instead, retrial to correct a preserved instructional error is

required unless the prosecution proves “beyond a reasonable doubt” that the jury convicted on a valid basis. *Hastings*, 134 F.3d at 241. These legal errors alone justify reversal.

In any event, the court’s reading of the instructions is wrong. Start with the court’s contention that the repeated “references to Section 2” “simply summarized the charges alleged” and were “not evidence for the Jury to consider.” JA659. In support, the court cited its instruction that “an indictment is merely a statement of charges and not itself evidence.” JA658-659. But telling the jury the indictment is not “evidence” says nothing about the legal theories available to convict. Instead, that clarification addresses a separate issue: that “one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial.” *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978). And instructing that the indictment set forth the “charges” only reinforces the problem. The court instructed jurors to “find Mr. Goldstein guilty or not guilty” of the “offenses charged.” JA570-571. So if those “charges” included Section 2 liability—as the court told jurors—then the jury would have understood its role as determining guilt or innocence on Section 2 liability. Moreover, as detailed above, the Section 2 instructions went far beyond “summarizing the charges” in the indictment, JA659—which merely included a bare reference to “18 U.S.C. § 2” for each count without quoting it. JA787; JA796-801.

The court likewise erred in finding no Section 2 problem because jurors were “properly instructed” on “the essential elements” for each “tax and mortgage fraud offense[.]” JA659. Proper instructions on the elements of the substantive offenses cannot cure inadequate instructions on Section 2. *See Harris*, 346 F.2d at 184. Nor does it matter that the instructions on the substantive offense elements did not “refer to Section 2.” JA659. The charges contained two separate paths for conviction: (1) the substantive offenses, and (2) accessory liability for those substantive offenses, defined only by Section 2’s statutory text. Instructions on the substantive-offense elements would not have changed the jury’s understanding that Section 2 remained an independent basis for conviction.

Tellingly, the court never grappled with the government’s complete reversal in position. The government included Section 2 in the preliminary instructions it drafted, JA804; argued to keep Section 2 instructions in during the charge conference, JA4454-4455; and insisted after closing argument that the language on Section 2 should “stay in,” with only the further description of Section 2’s elements omitted, JA537. A court assessing the “reasonable likelihood” that jurors would have read the instructions to permit conviction under Section 2 cannot simply ignore that the government itself read the instructions that way—and vigorously argued to keep Section 2 language in the instructions for that very purpose. *Boyde*, 494 U.S. at 380.

Finally, the court’s decision to preserve Section 2 language in the final instructions cannot be reconciled with its own practice. When the court dismissed certain charges before trial, it omitted language about those charges from the instructions in full. *See* JA548-612. Rightly so: instructions set forth the “law to be applied in the case”—not irrelevant language to be disregarded. *Lewis*, 53 F.3d at 34. If Section 2 truly was not part of the case, as the government now contends, then the court should have excised the Section 2 references in full. Instead, the government fought to keep Section 2 in, and the court agreed. That is powerful evidence that both the government and the court understood Section 2 to remain a live basis for conviction, as any “reasonable juror[]” would have. *Boyde*, 494 U.S. at 383.

B. The Instructional Errors Were Not Harmless

The district court did not dispute that, if the instructions permitted conviction under Section 2, a new trial is required. With good reason: The government could not—and did not—attempt to meet the demanding standard to show harmless error.

Because the instruction was substantively erroneous, “the government bears the burden of establishing that the error was harmless.” *United States v. Naum*, 134 F.4th 234, 241 (4th Cir. 2025). To do so, it must prove “beyond a reasonable doubt[] that a correctly instructed jury would have reached the same conclusion.” *Hastings*, 134 F.3d at 241. Where, as here, the instructions permit conviction “on two or more

alternate theories, one of which is the subject of an erroneous instruction,” the government must show the “jury must have convicted the defendant on the legally adequate ground.” *Id.* at 242. Here, that means the government must establish beyond a reasonable doubt that—for every count—the jury *must have* convicted under the primary liability theory.

The government cannot meet that demanding burden. Indeed, it did not even try below. *See* JA4946-4972. That makes sense because the government repeatedly insisted during trial that there was sufficient evidence to submit Section 2 liability to the jury for every count—even with proper instructions on its elements. In its proposed jury instructions, for instance, the government argued it had “introduced more than sufficient evidence to support an aiding and abetting instruction” for every count. JA4177. During the charge conference, it again asserted there “[a]bsolutely” was sufficient evidence to support an “aiding and abetting instruction”—highlighting the “evidence of Mr. Goldstein working with accountants” and “evidence that other people, including firm managers, helped him with these crimes.” JA4454-4455. And the district court sided with the government, concluding it had presented sufficient evidence to pursue a Section 2(a) theory of aiding-and-abetting liability. JA4455-4456. Even post-closing, moreover, the government reiterated “this is a § 2(b) case (in addition to (a)).” JA4743. The government cannot now claim with a straight face “that the jury *must have*

convicted” Goldstein on a primary liability theory, rather than accessory liability, for each count. *Hastings*, 134 F.3d at 242 (emphasis added).

As for the Rule 30(b) violation—which the district court acknowledged, *see* JA5169—the district court erred in finding no prejudice. Prejudice under Rule 30(b) turns on whether the violation affected the defense’s closing—for instance, by impacting counsel’s ability to address a “new line of argument.” *Horton*, 921 F.2d at 547-48. That is because the Rule ensures the defendant has “an adequate opportunity to argue his innocence under the district court’s instructions in order to be assured a fair trial.” *Id.* at 546-47. Actual prejudice exists here because if defense counsel had known the court would omit Section 2’s elements, he would have approached closing differently—arguing that conviction under an aiding-and-abetting theory requires a guilty principal, shared willful intent, and an affirmative act. For the reasons discussed above, it was “essential” that jurors know those elements to avert an erroneous accessory liability conviction. *Id.*

CONCLUSION

The Court should vacate Goldstein’s convictions and remand for a new trial.

REQUEST FOR ORAL ARGUMENT

Goldstein respectfully requests oral argument. Given the importance of the constitutional questions in the case, oral argument would assist the Court’s consideration.

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CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2026, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

I certify that:

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it consists of 12,998 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced, serif typeface using Microsoft Word in 14-point Times New Roman font.

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