

23-7566

To Be Argued By:
ALEXANDRA A.E. SHAPIRO

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

—against—

NEIL COLE, AKA SEALED DEFENDANT 1,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANT-APPELLANT

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INTRODUCTION

The government does not dispute that after Neil Cole was acquitted of conspiracy, it retried him using the same evidence, and made the same arguments to a second jury. Its brief does not grapple with these troubling facts or analyze the record of the first trial in the practical and realistic manner required by the controlling caselaw. Instead, the government's double jeopardy argument largely boils down to the assertion that defendants arguing double jeopardy have a heavy burden and retrials are "rarely" barred. That may be true, but it begs the question: What did the jury here "necessarily" decide by its acquittal? The central issue in both trials was whether there were secret side agreements. That was, as the district court observed, a "he said/he said" question. And the first jury necessarily resolved that question in Cole's favor.

To the extent the government discusses the record at the first trial, it focuses on the jury charge, and that the alleged conspiracy had three objects. But there is no realistic possibility the jury found a conspiracy but disagreed on what its object was. The government's theory of prosecution has always been the same. It claims Cole entered secret side agreements in which GBG agreed to "overpay" Iconix for two joint venture stakes, on the understanding that the alleged "overpayments" would be "given back" after Iconix recorded revenue from the transactions. Such an agreement is not unlawful by itself; it is only unlawful if it is used to overstate

Iconix's financial position in public filings. In other words, for the agreements to be the products of a conspiracy, the unlawful object of that conspiracy had to be securities fraud. And no rational jury could find either of the other charged objects—false SEC filings or deceiving Iconix's auditors—unless it found a conspiracy to commit securities fraud in the first place. The government's appellate arguments cannot be reconciled with the arguments it made, unsuccessfully, to the jury that acquitted Cole of conspiracy.

With respect to Cole's other appellate claims, the government ignores most of his arguments, relies on inapposite caselaw, and paints a misleading picture of the facts. The record establishes that Ethan Cole had no knowledge of any alleged side agreements and no dealings with Neil Cole; that Margolis testified the invoices represented real work and were not fake; and that there was no basis to find Rule 801(d)(2)(E)'s requirements met. Likewise, the record shows that the defense did try to call Ethan Cole; that as a practical matter Ethan was not "equally available" to the defense; and that moving to compel immunity would have been futile because the district court had already denied such relief for other potential defense witnesses, noting (correctly) that such motions face "an almost impossible burden." Ethan's hearsay emails were the only documents that used words like "overpay," and the government referred to them repeatedly throughout the trial. The combined impact of the erroneous admission of these emails and the

instruction falsely suggesting the defense could have called Ethan Cole to correct the government's misleading spin on the emails was a one-two punch that severely prejudiced the defense.

The conviction should be reversed.

ARGUMENT

I. THE RETRIAL VIOLATED THE DOUBLE JEOPARDY CLAUSE

A unanimous jury acquitted Cole of the conspiracy counts. When he was retried on the substantive counts, the government presented the same evidence and made the same jury arguments. The government itself conceded that there was “almost an entirety of overlap” between Count One and the substantive counts, and that, for all these charges, it had to prove the same thing: “that Cole and Jason Rabin agreed to an overpay-for-giveback arrangement and then worked with their subordinates to accomplish that plan.” (A-503, A-628-29).

In its brief, the government does not dispute any of this. Nor does it dispute that double jeopardy barred the retrial if the first jury determined the government failed to prove such secret side agreements. The government also concedes that the controlling authorities “eschew[] a ‘hypertechnical’ approach” and instead “direct courts to examine” the entire record (GB24) “with realism and rationality,” *Ashe v. Swenson*, 397 U.S. 436, 444 (1970), and “in a practical frame...with an eye

to all the circumstances of the proceedings,” *Yeager v. United States*, 557 U.S. 110, 120 (2009).

Yet rather than parsing the trial record “with realism and rationality” and “in a practical frame,” the government largely ignores it.¹ Instead, it repeatedly invokes platitudes about “rarity” and “onerous” burdens to suggest it is impossible to satisfy the test for collateral estoppel, so this Court should not even bother to examine the government’s jury arguments and the evidence it presented. The government also speculates that the jury might have acquitted Cole even if it thought he was involved in secret side agreements, but no rational jury could have acquitted Cole in that situation. And it hypothesizes legal theories that would permit conviction in the second trial even if there was no conspiracy—*e.g.*, that Cole aided and abetted others, or acted on his own—even though those theories are incompatible with the government’s arguments at trial and irreconcilable with the jury’s finding that Cole did not participate in any secret side agreements.

¹ The government’s unwillingness to confront the record is also reflected in its bizarre decision to base its entire “factual” background on the PSR, which typically incorporates a narrative drafted by the government, instead of the actual trial record. (*See* GB3-14). This tactic enables it to assert many “facts” that are either unsupported by the record or supported only by Horowitz’s say-so.

A. The Government Offers No Plausible Basis For The Jury’s Acquittal Other Than A Finding Of No Secret Side Agreements

1. The government claims “the record is inconclusive” about what the first jury might have found. (GB22). But that isn’t true. There was only one issue in the first trial: whether the SEA-2 and SEA-3 deal prices were increased in exchange for later payments from Iconix to GBG—in other words, whether Cole, Horowitz, and GBG had secret side agreements for GBG to increase its payment and be refunded later. The government itself identified “the central question in this case” as “[w]ere there secret agreements? Did Mr. Cole strike dirty deals? And was there a scheme for overpayments and givebacks?” (A-453). And it told the jury: “What you have to find...is that there were commitments here and that those commitments were designed to inflate revenue.” (A-481; *see* OB29-31). The defense oriented its trial strategy and jury arguments around the very same “central question,” urging from opening statements through summations that the jury should acquit because “[t]here were no secret agreements or secret side deals.” (A-81; *see* OB29-31).

That was “[t]he single rationally conceivable issue in dispute before the jury,” and thus necessarily the issue the jury decided—in Cole’s favor—when it acquitted him of conspiracy. *Ashe*, 397 U.S. at 445; *see United States v. Mespouledé*, 597 F.2d 329, 333 (2d Cir. 1979) (jury “must have” acquitted by finding no possession, because other elements were “never in dispute”).

2. The government doesn't identify *any* other disputed fact, or any other argument by the parties, that realistically and rationally could have led to the acquittal. The government agrees (GB24) that the Court must examine the *entire* “record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter,” *Ashe*, 397 U.S. at 444, but instead, like the district court, only considers the jury charge. The government contends the jury might have found Cole participated in a conspiracy yet “disagreed over the object of the conspiracy,” because the jury was required to be unanimous as to at least one object to convict on Count One. (GB23). It hypothesizes that some jurors might have found a securities fraud conspiracy involving Cole, Rabin, and Margolis, while others might have found Cole and Horowitz conspired to deceive auditors or the SEC. (GB25).

This hypothesis makes no sense, given the prosecution theory and the trial record. No rational jury considering the evidence and arguments presented at trial could have found a conspiracy and that Cole was a member yet disagreed as to the object.

First, if there were side agreements, they would not have been unlawful in themselves—they would have been unlawful only if they were improperly accounted for in Iconix's financial statements and public SEC filings. In other words, the illegal purpose of any conspiracy had to be inflating the revenue Iconix

could report from the JV transactions. Under those circumstances, it is implausible any juror would have found that Cole was a conspirator in anything other than a conspiracy to commit securities fraud. What other plausible purpose could there be? The only purpose the government suggested to the jury was misleading public investors. It argued, for example, that investors “would rank Iconix lower” and “put their money elsewhere” if Iconix missed its published financial targets, so Cole told Horowitz to get GBG “to pay more by agreeing to give the money back again.” (A-455). And Horowitz, the government’s main witness, testified he understood this to be the purpose: “I was excited that we were going to hit our quarterly numbers.” (A-109). If the jury had found Cole and Horowitz had secret side agreements with GBG, there is no way any juror could rationally conclude that the purpose of the conspiracy did not include securities fraud.

Second, the three objects were inextricably intertwined. The securities fraud object involved deceiving public investors through statements to the market about Iconix’s financial condition, and those statements were made in the SEC filings referenced in the second object. Likewise, deceiving auditors was not, as a practical matter, an independent object of any conspiracy—the government’s theory was that to commit the securities fraud (and false filings), the existence of the alleged side agreements had to be concealed from Iconix’s auditors, because otherwise they might find out about the supposed plot to inflate the reported

revenues. It would not make sense to find a conspiracy to make false SEC filings that did not also have securities fraud as an object, or vice versa. Nor would it make sense to find a conspiracy to deceive auditors unless the deceit of the auditors was in furtherance of securities fraud and false statements in SEC filings.

For that reason, the government did not present the three charged conspiracy objects as a menu of alternative options. Rather, the government focused almost exclusively on securities fraud, presenting the auditor- and SEC-related objects as integral to that object, not separate and distinct from it. The government argued that for the securities fraud scheme to work, the secret side agreements needed to remain hidden from Iconix's auditors and the SEC: "When Cole and Horowitz hid the secret [s]ide deals from the auditors, they all but ensured the accounting would be wrong"; "[a]fter that, Mr. Cole had to lie to the SEC" by certifying 10-Ks and 10-Qs that "all contain[ed] false statements about the SEA deals and the gain and the revenue that Iconix could recognize." (A-462; *see* A-497; OB35-36). The government has no response to any of this.

Third, it is inconceivable any juror would find a conspiracy but not believe Horowitz was part of it. Horowitz, not Cole, negotiated SEA-2 and SEA-3 for Iconix. (A-361, A-380, A-406, A-409). Horowitz told the jury he pled guilty to the very same offenses with which Cole was charged, that he did so "because I am guilty of those," and that he "committed those offenses with other people,"

including Cole. (A-86-87, A-167). He said: “I was a part of this fraud. I helped negotiate these deals. I hid the information from the finance team and from the legal team. I was Neil’s right hand in this.” (A-165).

In short, the government’s thesis of a jury intractably divided over Count One’s objects finds no support in the record of the first trial.² The only realistic and rational conclusion is that the jury found the government failed to prove Cole participated in any secret side agreements. Had it found otherwise, the jury would have had to convict.

B. The Acquittal Barred Retrial On The Substantive Counts

The government apparently concedes that if the first jury concluded there were no secret side agreements, the second trial violated double jeopardy. It nowhere disputes that argument. Instead, it relies on boilerplate, generic legal principles, none of which defeats collateral estoppel in the particular circumstances of this case.

1. The government says there is “no general principle” that a conspiracy acquittal bars retrial on a substantive count (GB32) and spills much ink on the

² The government also suggests the jury might have acquitted because “one or more jurors found that the Government failed to prove any object” at all. (GB25). But it is inconceivable that the jury would unanimously find an unlawful conspiracy that used secret side agreements, yet not a single juror would find the object was securities fraud or either of the other two alleged objects.

“heavy” and “onerous” burden on defendants, and the “rar[ity]” and “difficulty” of collateral estoppel (GB18, 20-22, 24).

But all of that is beside the point. The question is whether on this record, the retrial involved the litigation of an issue the first jury “necessarily decided” by its acquittal. *Yeager*, 557 U.S. at 119. Here, the conspiracy and substantive counts were materially indistinguishable, and both required the government to prove Cole’s involvement in the same alleged secret side agreements. The government admitted as much before (A-632), and does not claim otherwise now. But having tried and failed to prove the existence of those secret side agreements in the first trial, the government was precluded from trying again.

Not only is *Sealfon v. United States*, 332 U.S. 575 (1948), the Supreme Court’s seminal decision about criminal collateral estoppel, it is also precisely on point. That is why Cole discussed it at length in his opening brief. (OB21, 25-26, 39-40). The Court held that, viewing the first trial “in a practical frame,” the jury’s conspiracy acquittal was a finding there was no conspiratorial agreement and therefore precluded a second trial on the substantive offense, which depended on proof of the same agreement. 332 U.S. at 580. *Sealfon* is dispositive.

Yet the government barely mentions *Sealfon*, addressing it only briefly at the tail end of its arguments. (GB32-33). The government tries to distinguish *Sealfon* by saying “the only way” the government could establish a conspiracy there was

through proof Sealfon wrote a letter pursuant to an agreement, whereas “[t]his case...involved acquittal on a multi-object conspiracy related to a complicated and lengthy scheme.” (GB33). But *Sealfon* also involved an alleged multi-object conspiracy. See Brief for Respondent, *Sealfon v. United States*, 332 U.S. 575 (1948) (No. 174), 1947 WL 44217, at *12-13. And the alleged scheme here was no more “complicated”: Either Cole and GBG secretly agreed to raise the sale prices for the two JVs in return for later givebacks, or they didn’t. (OB44-45).

The government’s attempt to distinguish *United States v. Kramer*, 289 F.2d 909 (2d Cir. 1961) (GB31-32) is no more convincing. As the government notes, there was only one issue in the first trial—alibi—so this Court concluded the jury must have accepted that defense when it acquitted Kramer. 289 F.2d at 915. The government contends *Kramer* is inapplicable because here “the question before the jury was not the identity of the criminal, but whether Cole’s conduct made him guilty of conspiracy and/or certain substantive crimes.” (GB32). But that is a distinction without a difference. Just as in *Kramer*, the question of Cole’s guilt turned on a single issue—whether he entered secret side agreements with GBG. Under *Kramer* (and *Sealfon*, *Ashe*, and *Mespouledé*), that single issue was necessarily the issue the jury decided in Cole’s favor when it acquitted him, and its centrality to the substantive counts precluded the government from “forc[ing]

[Cole]...to relitigate the identical question on a further charge arising out of the same course of conduct.” *Kramer*, 289 F.2d at 916.

2. The government also argues the acquittal did not bar retrial because of the possibility of aiding and abetting liability. (GB25-33). It is true that no blanket rule automatically forecloses an aiding and abetting prosecution after a conspiracy acquittal. (GB19, 25). But in this case, the jury’s acquittal of conspiracy did foreclose any later aiding and abetting theory.

First, the government fails to address *the reason* for the conspiracy acquittal, which is critical to any collateral estoppel analysis. The government cannot relitigate an issue already decided by a conspiracy acquittal simply by repackaging it under an aiding and abetting theory. Indeed, in *Sealfon*, the government charged the substantive offense as aiding and abetting, but the Supreme Court had no trouble holding that the conspiracy acquittal barred a subsequent trial on the substantive offense because the jury had determined there was no agreement, and “petitioner could have aided and abetted Greenberg in no other way.” 332 U.S. at 580. The same is true here. The jury’s prior finding that Cole was not involved in any secret side agreements with GBG absolutely precludes a further trial on the subsequent offenses, even under an aiding abetting theory. Cole could not have aided and abetted GBG and Horowitz in any “other way.”

Second, the government *never contended at trial* that Cole merely aided and abetted Horowitz, Rabin and Margolis, “or vice versa” (GB26), nor did the evidence support any such arguments. Instead, the government argued that Cole devised the supposed scheme on his own, and the other three joined it as his “partners”—“enthusiastic participants in this crime...[who] would play ball and have no second thoughts about being a part of this scheme...[to mislead] Iconix and its shareholders and its investors and its auditors.” (A-1116). In fact, after the government’s summation in the second trial, the defense asked the district court to strike the aiding and abetting instruction because “[t]he government, a number of times in its closing, said Neil Cole was in charge of this fraud” and “never mentioned or pursued one time in their closing an aiding and abetting theory.” (A-1099). The government admitted it had “characterized the evidence and martialed the facts” to argue only that Cole was a primary violator but insisted on the instruction because “aiding and abetting is in the indictment.” (*Id.*).

Third, the government cites cases holding a prior acquittal did not foreclose subsequent prosecution. (GB26-28). But in each of those cases, unlike here, the first trial did not necessarily decide the issue the government would need to prove at the second trial.

In *United States v. Hicks*, 5 F.4th 270 (2d Cir. 2021), for example, the defendant regularly received cocaine shipments but was acquitted of cocaine

conspiracy charges. This Court held that evidence of the shipments could be admitted against Hicks in a subsequent RICO trial because Hicks had not been charged with a substantive drug offense, so the acquittal did not determine whether he personally “bought or sold drugs.” *Id.* at 276.

Similarly, the defendant in *United States v. Jackson*, 778 F.2d 933 (2d Cir. 1985), posed as the wife of someone who purchased heroin from drug smugglers. The defendant occasionally handled drug money but had no direct involvement in the drug trafficking operation. This Court held that the defendant’s prior drug conspiracy acquittal was no bar to a subsequent trial for aiding and abetting possession with intent to distribute because she was not “at the center of the conspiracy.” *Id.* at 940. Her “relatively peripheral role” meant that a rational jury could have found her not “guilty of willful participation in a conspiracy” yet still “guilty of aiding and abetting.” *Id.* at 940-41.

Both are fundamentally different from this case, in which Cole was alleged to be not some bit player, accessory, or mule, but the key player in the alleged overpayment-for-giveback scheme. Where, as here, the government’s theory in the prior trial was that the defendant “was one of the principal guiding forces” of the scheme and the jury acquitted, the acquittal “precludes the Government from seeking to prove” his participation in the scheme “either directly or as an aider or abetter.” *Kramer*, 289 F.2d at 918-19. Moreover, unlike in *Hicks*, the first jury

was required to determine whether Cole was involved in secret side agreements. It doesn't matter whether the jury concluded those agreements "never existed or that [Cole] never joined [them]." *Hicks*, 5 F.4th at 276. Either way, such a finding resolved the issue at the core of each substantive count, and double jeopardy barred further prosecution.

3. The government notes that Margolis and Rabin both testified they didn't think they did anything wrong and argues that, as a result, the jury might find Cole had no co-conspirators yet still find him guilty under an aiding and abetting theory. (GB28). But that doesn't make sense. Cole couldn't aid and abet Margolis and Rabin unless Margolis and Rabin themselves were principals, which requires criminal intent. So if the jury agreed that Margolis and Rabin lacked criminal intent, it could not find that Cole aided and abetted them. Likewise, Margolis and Rabin could not have aided and abetted Cole unless they had criminal intent. *See Rosemond v. United States*, 572 U.S. 65, 71 (2014) ("[A] person is liable under § 2 for aiding and abetting a crime if (and only if) he [acts]...with the intent of facilitating the offense's commission."). Thus, if the jury credited Margolis and Rabin's testimony that they lacked criminal intent, it couldn't find that they aided and abetted Cole.

Regardless, if the jury had found Cole was involved in secret side agreements with GBG, it would have had to conclude that he conspired with

Horowitz, at least. All the evidence—including Horowitz’s mea culpas (A-86-87, A-165, A-167)—put Horowitz alongside Cole at the center of the alleged scheme. The government points out that a jury is free to credit only some of a witness’ testimony—it needn’t accept or reject it in full. (GB29). But the testimony in question was the heart of the trial—it concerned whether Cole entered secret side agreements. No reasonable jury could discredit all of Horowitz’s testimony about all the things Horowitz supposedly did—regarding the JV negotiations, the marketing invoices, Rocawear Kids, and his discussions with Cole—yet nonetheless believe his bare, uncorroborated assertion that Cole had entered secret side agreements with GBG.

C. At A Minimum, Evidence Of Conspiracy Should Have Been Excluded Because Of The Prior Acquittal

As explained in Cole’s opening brief, the law is well-settled that the district court at least should have precluded the government from introducing evidence to prove the secret side agreements that the first jury determined did not exist. (OB40-42).

The government doesn’t dispute that it presented the same witnesses and exhibits as in the first trial, or that it used that evidence in seeking to prove the secret side agreements once again. But the government claims it was permitted to do that—and accuses Cole of “misunderstand[ing] the law”—because the

government used the evidence “to prove Cole’s participation in the substantive offenses,” not the conspiracy. (GB34).

It is the government that misunderstands the law. The caselaw holds that “although the government is free to charge a defendant with new crimes arising out of the same conduct, it may not prove the new charge by asserting facts necessarily determined against it on the first trial.” *United States v. Zemlyansky*, 908 F.3d 1, 13 (2d Cir. 2018). The focus is on the *facts* the government seeks to prove in the second trial, not the criminal offense the government chooses to charge. *See Mespouledé*, 597 F.2d at 335-36 (“transaction is out of bounds on retrial” if already rejected by prior jury); *Kramer*, 289 F.2d at 921 (remanding for retrial but prohibiting government from offering evidence of the acquitted burglaries). The government’s offense-based approach would eviscerate the Double Jeopardy Clause’s issue preclusion protection. It would give the government a second chance to prove the same facts it tried and failed to prove initially, as long as the same conduct can be recast as a violation of some other statute it failed to charge the first time. But the entire purpose of the Double Jeopardy Clause is to prevent the government from relitigating a factual issue that a jury already resolved in the defendant’s favor. To allow the government to select a different offense “from the extensive catalogue of crimes furnished it in the Criminal Code, would permit the

very abuse[] that led English judges to develop the rule against double jeopardy long before it was enshrined in the Fifth Amendment.” *Kramer*, 289 F.2d at 916.

II. THE ERRONEOUS ADMISSION OF ETHAN COLE’S HEARSAY EMAILS REQUIRES A NEW TRIAL

Ethan Cole was a low-level employee at GBG, never interacted with Neil Cole, was not involved in the relevant negotiations, knew little about the relevant JVs, and knew nothing about purported secret side agreements. The marketing invoices he helped prepare reflected bona fide marketing expenses, and GBG routinely submitted such invoices to other JV partners. And Ethan Cole didn’t know whether GBG issued those invoices to Iconix because of a binding “giveback” agreement, or as part of a routine effort to recoup expenses from its trusted business partner—a critical distinction because only a binding agreement at the time of the JV would reduce revenue under the accounting rules. (OB44-45). The government does not dispute any of these facts.

The government refuses to engage with this evidence and barely responds to Cole’s arguments about why Ethan Cole’s hearsay emails labeling items “overpay” and “offset”—terms GBG used regularly in connection with other deals—were erroneously admitted as co-conspirator hearsay. Instead, the government cites inapposite caselaw and misleads about the facts. Its arguments are meritless.

1. The government notes that for purposes of the co-conspirator exception, “[t]he conspiracy between the declarant and the defendant need not be

identical to any conspiracy...specifically charged in the indictment or...the subject of the relevant trial.” (GB39). That is true, but entirely irrelevant. The government has never argued that any other conspiracy could satisfy the requirements of Rule 801(d)(2)(E). It has only argued for admissibility based on the alleged “overpay-for-giveback” conspiracy. (GB41-42).

As to *that* conspiracy, the government relies on the same evidence the first jury unanimously rejected in acquitting Cole. The government offers little beyond uncorroborated testimony of a cooperator of questionable reliability. As the district court explained, the case boiled down to a “he said/he said” between Cole and Horowitz. (A-1814). The government claims a handful of exhibits corroborate that Cole orchestrated secret side agreements (GB42), but that is not true. Not a single document refers to any future agreement or obligation specifically tied to SEA-2 or SEA-3—no internal memo, no handwritten notes, no text message. The government’s theory was implausible: The supposed SEA-2 “giveback” *exceeded* the alleged overpayment by 7%, and the purported SEA-3 “giveback” never happened, nor did GBG ever complain that Iconix failed to deliver on its supposedly *binding* \$6 million commitment. (OB15).

Nor does the fact that the emails use the terms “overpay” and “offset” (GB42) establish the invoices proved any secret side agreement. The government’s own witness testified that “overpay” was commonly used at GBG to

mean simply paying more than they believed a deal was worth—not a payment the other side was obligated to return. (A-379-80, A-388).

Uncorroborated testimony is insufficient to prove the requisite conspiracy, even under a preponderance standard, where, as here, a jury already has acquitted the defendant of the same offense. *United States v. Willis*, 14 F.4th 170, 189 (2d Cir. 2021); *see* OB49. Just as in *Willis*, the district court failed to account for “gaps in the government’s evidentiary presentation.” *Id.* The government tries to distinguish *Willis* by saying that here the district court made its finding after hearing “extensive evidence...and argument.” (GB42). But the same thing happened in *Willis*: The district court issued its ruling only after considering the evidence and hearing argument. *See* 14 F.4th at 189; Decision and Order, *United States v. Willis*, No. 1:17-cr-00032 (LVM) (JJM), Dkt.153 at 3-4 (W.D.N.Y. Nov. 2, 2018). Yet this Court held that was not enough and that it was “clearly erroneous” for the district court to fail to explain *why* the evidence was sufficient despite “gaps” in the government’s case. *Willis*, 14 F.4th at 189. For the same reasons, the district court’s conspiracy finding here—which referred generally to “emails and other communications” (A-646-47)—failed to adequately support the existence of a conspiracy.

2. The government’s arguments that Ethan Cole and Neil Cole were part of the same conspiracy are equally baseless. The government relies on meetings

and other events in which Neil Cole (and sometimes Ethan Cole) did not even participate.

For instance, the government emphasizes a meeting between Horowitz and Margolis, which Ethan attended but to which Neil Cole was not even invited. (GB43-44). The government cites a document Horowitz prepared for himself that describes \$5 million in marketing payments to GBG for various projects, but nothing in the document suggests these payments were required by a prior secret deal. (GB44). The government also omits that the other participant in the meeting, Margolis, testified he did not believe Ethan did anything wrong (A-959-60); that the invoices Ethan helped prepare represented real work and were not fake (A-966); and that the practice of round-number billing, which the government claimed proved the invoices were a sham, was standard at GBG and across the industry (A-966). The only other evidence the government mentions is Horowitz’s testimony that Ethan once dropped off invoices at Iconix. (GB44). But Horowitz himself contradicted that testimony (OB52)—a fact the government simply ignores.

In any event, simply attending a meeting and delivering invoices does not make one a co-conspirator. To prove someone is a conspirator, the government must prove the person was “aware[] of the [joint enterprise’s] general nature and extent” and he entered into the enterprise with “at least the degree of criminal intent necessary for the substantive offense itself.” *United States v. Torres*, 604

F.3d 58, 65 (2d Cir. 2010). That intent is critical to the rationale for allowing co-conspirator hearsay: The declarant must be united with the defendant in pursuit of a “specific criminal goal,” because “[i]t is the unity of interests stemming from a specific shared criminal task that justifies Rule 801(d)(2)(E) in the first place.” *United States v. Gigante*, 166 F.3d 75, 82-83 (2d Cir. 1999); *Anderson v. United States*, 417 U.S. 211, 218 n.6 (1974) (likening co-conspirator statements to an agent’s statements on behalf of his principal).

As the opening brief explained, there was no evidence Ethan Cole had any intent to participate in the charged conspiracy. (OB50-52). The government has no response, because there is simply no evidence Ethan had any intent (or incentive) to defraud Iconix’s investors, auditors, or the SEC. (OB50-52). On the contrary, Ethan knew very little about SEA-2 or SEA-3, was unaware of any supposed side agreements, and did not believe he was doing anything unlawful. (A-1795). And as a recently hired, low-level assistant at GBG who at most met Neil Cole only once in passing at a large meeting, Ethan had no interest or incentive to inflate *Iconix*’s revenue, mislead *Iconix*’s investors and auditors, or cause *Iconix* to make false filings to the SEC.

Instead, the government focuses on the legal principle that individuals may play different roles in a criminal scheme and yet be part of the same conspiracy. (GB45 (citing *United States v. Kellerman*, 431 F.2d 319 (2d Cir. 1970))).

However, in *Kellerman*, the court found defendants linked in the same conspiracy because, “while each...may not have been present on every occasion and each may have had a somewhat different role...the thread of continuity was as visible as Ariadne’s thread which led Theseus safely through the Cretan labyrinth.” 431 F.2d at 323. Here the “thread of continuity” from Ethan to Cole was not only invisible, it was non-existent.

3. The government does not dispute that the Ethan Cole emails could not have had any role in deceiving Iconix’s investors, auditors, or the SEC, and so were not directed at the purported conspiracy’s “specific criminal purpose.” *Gigante*, 166 F.3d at 83. Indeed, the government does not—and cannot—dispute that the emails were internal to GBG and never sent to anyone at Iconix, let alone Cole; the emails were about securing money *from* Iconix, not inflating Iconix’s revenue; and whether GBG eventually secured the money had no effect on the supposed conspiracy’s objectives. Moreover, GX1139 was sent months after SEA-2 and SEA-3 had closed, the relevant earnings were reported, and the purported conspiracy’s objectives were achieved, and GX1068 was sent months after SEA-2 had closed and reflected “offsets” different from the ones the government claimed were agreed to in SEA-3. (OB53).

Instead, the government compares the emails to ledgers kept in the course of a conspiracy. (GB45-46). It cites summary orders finding ledgers kept during a

conspiracy to track illicit funds qualified as co-conspirator statements. *See, e.g., United States v. Donovan*, 55 F. App'x 16, 22 (2d Cir. 2003) (ledger tracked commissions to cold callers in telemarketing scheme). But the analogy is inapposite and unpersuasive because Ethan Cole's emails were created for an entirely different purpose. He was not tracking proceeds of an ongoing conspiracy, but rather helping secure funds *for GBG*—a purpose distinct from the alleged conspiracy's "specific criminal purpose." *Gigante*, 166 F.3d at 83. Whether GBG succeeded in that endeavor was irrelevant to the success of the alleged conspiracy, and thus Ethan's emails could not have been in furtherance of it.

4. The government does not even attempt to bear its burden of showing harmless error. *United States v. Kaiser*, 609 F.3d 556, 573 (2d Cir. 2010). Nor could it. (OB54-56). Regardless, the government has waived any harmless error claim. "Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal." *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998).

III. THE MISLEADING "EQUALLY AVAILABLE" WITNESS INSTRUCTION REQUIRES A NEW TRIAL

As the opening brief explained, Ethan Cole would have disputed the government's interpretation of his emails, only the government could have compelled him to testify, and the "equally available" witness instruction misleadingly created a false impression that either side could have called him as a

witness. (OB56-60). The government does not dispute any of this. Instead, it relies on a misleading account of the historical facts and the fanciful suggestion that the district judge might have compelled it to immunize Ethan Cole, if only the defense had asked him to do so. That is not a serious argument.

1. The government argues that Ethan had already indicated he would invoke the Fifth Amendment even before the prosecutors threatened him with a new obstruction charge in September 2021. (GB51-52). It is true that in 2020 Ethan said he would take the Fifth and that his attorney confirmed that position at the start of the September 2021 conversation. But by then the statute of limitations on the underlying conduct had already run. Thus, Ethan had effectively waived his Fifth Amendment privilege, making the representation that he would continue to assert the Fifth Amendment an empty one. *See United States v. Forbes*, 790 F.3d 403, 409 (2d Cir. 2015) (Fifth Amendment privilege “effectively waived” when statute of limitations has run).

That context shows the government’s 2021 statements—that it had “concerns” about Ethan’s proffer, it was “clear he obstructed,” the government “won’t let go lightly” unless Ethan “cooperate[s]”—were threatening and coercive. (A-1807). The government led Ethan to believe that he continued to risk being charged with a crime that was not time-barred, particularly if he testified in a manner consistent with his proffer (*i.e.*, if he didn’t “cooperate” with the

government). In fact, in a 2022 call just before the second trial, Ethan’s attorney specifically referenced the “call last year” and told the prosecutors Ethan would invoke the Fifth because of concerns about a false statements charge, not because of what he had said at the beginning of the September 2021 conversation. (A-1809). The new threat of a new crime was what made Ethan unavailable to the defense.

2. The government claims *United States v. Myerson*, 18 F.3d 153 (2d Cir. 1994), held that a witness who takes the Fifth is unavailable, despite the government’s immunity power. (GB52). But *Myerson* primarily concerned the denial of a defense request for a “missing witness” instruction permitting an adverse inference against the government. That is not the issue here. Additionally, the instruction given in *Myerson*—unlike the one here—did not say the witness was equally available to both sides. (OB60n.6).

3. The government’s contentions that Cole made “no genuine effort” to call Ethan and that he should have asked the district court to compel the government to immunize Ethan are both spurious. (GB52-53). Cole sought to call Ethan as a defense witness and was in contact with Ethan’s lawyer regarding possible testimony. (A-630-31, A-1034-35). Cole was unable to secure Ethan’s testimony, however, because Ethan’s counsel said he would invoke his Fifth Amendment right and would refuse to testify. (*Id.*).

The government’s suggestion that Cole cannot attack the instruction on appeal because he didn’t move to compel the government to immunize Ethan is Kafkaesque. As the government well knows, any such motion would have been futile under the governing law—including cases cited in its brief, like *United States v. Ebberts*, 458 F.3d 110, 118-20 (2d Cir. 2006). *See also United States v. Stewart*, 907 F.3d 677, 685 (2d Cir. 2018) (district court may compel government to grant immunity only in “extraordinary circumstances”); *United States v. Ferguson*, 676 F.3d 260, 291 (2d Cir. 2011) (situations in which government can be compelled to grant immunity to defense witnesses are “few and exceptional”).

Indeed, Cole’s earlier experience in this case showed it was pointless to try to compel the government to immunize any defense witness. His prior attempts to do just that had been fruitless. For the first trial, Cole unsuccessfully moved to compel the immunization of two witness, Ron Ventricelli, GBG’s CFO, and Dow Famulak, GBG’s President (A-715). Ventricelli and Famulak were key witnesses—top executives at GBG who denied any giveback scheme and whose proffers and statements the government produced under *Brady* as potentially exculpatory material. (Dkt.133 at 78-79). Yet the district court responded that Cole faced “an almost impossible burden” and refused to order the government to immunize them. (*Id.* at 77, 84). That was not surprising, given this Court’s precedent. Indeed, to our knowledge, there is not a single case in this Circuit in

which any judge has compelled the government to immunize a defense witness, and the government cites no such case. “[T]he situations in which conferring immunity would be required are so few and exceptional that [this Court] ha[s] yet to reverse a failure to immunize.” *Stewart*, 907 F.3d at 685.

The “gamesmanship” cases the government cites are inapposite. In *United States v. Torres*, 845 F.2d 1165 (2d Cir. 1988), this Court suggested a witness was not really “unavailable” to the defense, and the defense likely had no interest in calling him, because the government would have introduced a damning tape recording had the defense done so. *Id.* at 1170. Similarly, in *Myerson*, the district court found that “strategically, [defendant] d[id]n’t really want [the witness] to testify.” 18 F.3d at 158. By contrast, here the district court made no such finding. And there was no evidence that Ethan’s testimony would have harmed the defense. On the contrary, his proffers confirmed he would undermine the government’s misleading contention that his emails reflected secret side agreements between Iconix and GBG. He had told the government he “did not know why [the purchase price for SEA-2] changed.” (A-1802; *see also, e.g.*, A-1795). Ethan would have testified he knew little about the JVs but believed they were fully vetted by people at the highest level. (A-1803 (“[Ethan] thought the accountants, lawyers, and auditors all knew everything [about SEA-2].... These were deals that were happening at the most senior level.”)).

4. Contrary to the government’s conclusory argument (GB53-54), the error was prejudicial. As explained, the notes from Ethan’s proffers—which the jury never saw—directly undermined the government’s interpretation of the emails. These proffers show that Ethan was a new, low-level hire at GBG who did not believe there was anything improper about GBG billing Iconix for marketing work, had no reason to think there was any secret side agreement, and had little-to-no visibility into the executive-level decisions of the company. (A-1795, A-1802-03). Ethan’s testimony would have been devastating for the government.

The government also argues that the “equally available witness” instruction did not mention Ethan by name and simply told the jury not to allow a witness’s absence to affect the jury’s judgment. (GB53). That is a bit much, given that the government told the jury to apply the instruction to Ethan, saying: “Judge Ramos’ instructions [] will tell you that there are people whose names you’ve heard during the course of this trial that did not...testify [and] Ethan Cole is one of them.” (A-1116). The government expressly invoked the erroneous instruction to suggest, misleadingly, that the defense could have simply called Ethan if he had anything helpful to say: “Judge Ramos[...][is] also going to tell you that each party had an equal opportunity or lack of opportunity to call any of these witnesses.” (*Id.*). Having highlighted the instruction to the jury, the government cannot “now argu[e]

that any error [in giving it] was harmless.” *United States v. Joseph*, 542 F.3d 13, 20 n.7 (2d Cir. 2008).

CONCLUSION

For the foregoing reasons, the judgment should be reversed, and the case remanded with instructions to dismiss the indictment with prejudice.

Alternatively, the Court should vacate and remand for a new trial.

Dated: New York, New York
June 20, 2024

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1. The undersigned counsel of record for Defendant-Appellant Neil Cole certifies pursuant to Federal Rule of Appellate Procedure 32(g) and Local Rule 32.1 that the foregoing brief contains 6,972 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), according to the Word Count feature of Microsoft Word 2023.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2023 in 14-point font of Times New Roman.

Dated: June 20, 2024

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