# 23-6842

*To Be Argued By*:
DEREK WIKSTROM

## United States Court of Appeals
**FOR THE SECOND CIRCUIT**
**Docket No. 23-6842**

UNITED STATES OF AMERICA,
*Appellee*,

—v.—

TIMOTHY SHEA,
*Defendant-Appellant*,

BRIAN KOLFAGE, also known as Sealed Defendant, STEPHEN BANNON, also known as Sealed Defendant 2, ANDREW BADOLATO, also known as Sealed Defendant 3,
*Defendants*.

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

# BRIEF FOR THE UNITED STATES OF AMERICA

DAMIAN WILLIAMS,
*United States Attorney for the Southern District of New York, Attorney for the United States of America.*
26 Federal Plaza, 37th Floor
New York, New York 10278
(212) 637-2200

ROBERT SOBELMAN,
DEREK WIKSTROM,
HAGAN SCOTTEN,
*Assistant United States Attorneys, Of Counsel.*

## TABLE OF CONTENTS

PAGE

Preliminary Statement . . . . . . . . . . . . . . . . . . . . . . . 1

Statement of Facts . . . . . . . . . . . . . . . . . . . . . . . . . . 2

A. The Government's Case . . . . . . . . . . . . . . . . 2

B. The Defense Case and the Verdict . . . . . . . 7

ARGUMENT:

POINT I—The District Court Correctly Denied Shea's Motion for a Juror Inquiry . . . . . . . . . . . . . . . . . 7

A. Relevant Facts . . . . . . . . . . . . . . . . . . . . . . . 8

B. Applicable Law . . . . . . . . . . . . . . . . . . . . . . 10

C. Discussion . . . . . . . . . . . . . . . . . . . . . . . . . 12

POINT II— The District Court Correctly Rejected Shea's Post-Trial Challenges to the Indictment and Jury Instructions on Count Two . . . . . . . . 16

A. Relevant Facts . . . . . . . . . . . . . . . . . . . . . 17

1. The Indictment's Money Laundering Charge . . . . . . . . . . . . . . . . . . . . . . . . 17

2. The Jointly Proposed Money Laundering Jury Instructions . . . . . . . . . . . . . . . . . 18

3. Shea's Post-Trial Motion to Set Aside Verdict . . . . . . . . . . . . . . . . . . . . . . . . 20

B. Applicable Law . . . . . . . . . . . . . . . . . . . . . 21

PAGE

1. Motions to Dismiss the Indictment . . 21

2. Instructional Error . . . . . . . . . . . . . . . 23

C. Discussion . . . . . . . . . . . . . . . . . . . . . . . . 25

1. Shea's Challenge to the Indictment Is Waived . . . . . . . . . . . . . . . . . . . . . . . . 25

2. The Indictment Stated an Offense . . . 27

3. Shea Cannot Challenge an Instructional Error He Invited . . . . . . . . . . . . . . . . . 31

4. The Instructional Error Is Harmless . . . . . . . . . . . . . . . . . . . . . . 33

POINT III—Shea's Sentence Was Procedurally and Substantively Reasonable. . . . . . . . . . . . . . . . . 36

A. Relevant Facts . . . . . . . . . . . . . . . . . . . . . 36

B. Applicable Law . . . . . . . . . . . . . . . . . . . . . 38

C. Discussion . . . . . . . . . . . . . . . . . . . . . . . . 40

CONCLUSION . . . . . . . . . . . . . . . . . . . . . . . . . . . . 43

## TABLE OF AUTHORITIES

*Cases*:

*Ciminelli v. United States*,
598 U.S. 306 (2023). . . . . . . . . . . . . . . . . . . . . . . . 31

*Gall v. United States*,
552 U.S. 38 (2007). . . . . . . . . . . . . . . . . . . . . . 38, 39

PAGE

*Hamling v. United States*,
418 U.S. 87 (1974) . . . . . . . . . . . . . . . . . . . . . . 21, 29

*Hedgpeth v. Pulido*,
555 U.S. 57 (2008) . . . . . . . . . . . . . . . . . . . . . . . . 35

*Leecan v. Lopes*,
893 F.2d 1434 (2d Cir. 1990) . . . . . . . . . . . . . . . . 26

*Neder v. United States*,
527 U.S. 1 (1999) . . . . . . . . . . . . . . . . . . . . . . . 25, 33

*Pope v. Illinois*,
481 U.S. 497 (1987) . . . . . . . . . . . . . . . . . . . . . 33, 34

*Puckett v. United States*,
556 U.S. 129 (2009) . . . . . . . . . . . . . . . . . . . . . . . 32

*Remmer v. United States*,
347 U.S. 227 (1954) . . . . . . . . . . . . . . . . . . . . . . . 14

*United States v. Afriyie*,
27 F.4th 161 (2d Cir. 2022) . . . . . . . . . . . . . . . . . 13

*United States v. Agrawal*,
726 F.3d 235 (2d Cir. 2013) . . . . . . . . . . . . . . 33, 36

*United States v. Ahmed*,
No. 21-2820, 2023 WL 193623
(2d Cir. Jan. 17, 2023) . . . . . . . . . . . . . . . . . . . . 42

*United States v. Al Kassar*,
660 F.3d 108 (2d Cir. 2011) . . . . . . . . . . . . . . . . . 23

*United States v. Alcius*,
952 F.3d 83 (2d Cir. 2020) . . . . . . . . . . . . . . . 40, 41

PAGE

*United States v. Alfonso*,
143 F.3d 772 (2d Cir. 1998) . . . . . . . . . . . . . . . . . . 21

*United States v. Aller*,
384 F. App'x 34 (2d Cir. 2010) . . . . . . . . . . . . . . . . 41

*United States v. Al-Moayad*,
545 F.3d 139 (2d Cir. 2008) . . . . . . . . . . . . . . . . . . 24

*United States v. Atuana*,
816 F. App'x 592 (2d Cir. 2020) . . . . . . . . . . . . . . . 27

*United States v. Bailey*,
820 F. App'x 57 (2d Cir. 2020) . . . . . . . . . . . . . . . . 42

*United States v. Baker*,
899 F.3d 123 (2d Cir. 2018) . . . . . . . . . . . . . . . 11, 12

*United States v. Balde*,
943 F.3d 73 (2d Cir. 2019) . . . . . . . . . . . . . . . . . . . 26

*United States v. Binday*,
804 F.3d 558 (2d Cir. 2015) . . . . . . . . . . . . . . . 31, 32

*United States v. Borland*,
No. 21-2761, 2023 WL 4072830
(2d Cir. June 20, 2023) . . . . . . . . . . . . . . . . . . . . . . 32

*United States v. Broxmeyer*,
699 F.3d 265 (2d Cir. 2012) . . . . . . . . . . . . . . . 39, 41

*United States v. Bryant*,
976 F.3d 165 (2d Cir. 2020) . . . . . . . . . . . . . . . . . . 40

*United States v. Calbas*,
821 F.2d 887 (2d Cir. 1987) . . . . . . . . . . . . . . . . . . 14

PAGE

*United States v. Caltabiano*,
871 F.3d 210 (2d Cir. 2017) . . . . . . . . . . . . . . 24, 31

*United States v. Carr*,
880 F.2d 1550 (2d Cir. 1989) . . . . . . . . . . . . . . . . 23

*United States v. Cavera*,
550 F.3d 180 (2d Cir. 2008) . . . . . . . . . . . . . . 39, 41

*United States v. Clinton*,
820 F. App'x 34 (2d Cir. 2020) . . . . . . . . . . . . . . . 40

*United States v. Cotton*,
535 U.S. 625 (2002). . . . . . . . . . . . . . . . . . . . 22, 26

*United States v. Crowley*,
318 F.3d 401 (2d Cir. 2003) . . . . . . . . . . . . . . . . . 24

*United States v. Cuthbert*,
466 F. App'x 46 (2d Cir. 2012) . . . . . . . . . . . . . . . 42

*United States v. De La Pava*,
268 F.3d 157 (2d Cir. 2001) . . . . . . . . . . . . . . . . . 21

*United States v. Dhinsa*,
243 F.3d 635 (2d Cir. 2001) . . . . . . . . . . . . . . . . . 30

*United States v. Eltayib*,
88 F.3d 157 (2d Cir. 1996) . . . . . . . . . . . . . . . . . . 22

*United States v. Forrester*,
60 F.3d 52 (2d Cir. 1995) . . . . . . . . . . . . . . . . . . . 27

*United States v. Gansman*,
657 F.3d 85 (2d Cir. 2011) . . . . . . . . . . . . . . . . . . 25

*United States v. Garcia*,
587 F.3d 509 (2d Cir. 2009) . . . . . . . . . . . . . . . . . 28

PAGE

*United States v. Gershman*,
31 F. 4th 80 (2d Cir. 2022) . . . . . . . . . . . . . . . . . . 42

*United States v. Gill*,
674 F. App'x 56 (2d Cir. 2017) . . . . . . . . . . . . 31, 32

*United States v. Giovanelli*,
464 F.3d 346 (2d Cir. 2006) . . . . . . . . . . . . . . 25, 32

*United States v. Goldsmith*,
108 F.2d 917 (2d Cir. 1940) . . . . . . . . . . . . . . . . . 30

*United States v. Hidalgo*,
736 F. App'x 255 (2d Cir. 2018) . . . . . . . . . . . . . . 30

*United States v. Ianniello*,
866 F.2d 540 (2d Cir. 1989) . . . . . . . . . . . . . *passim*

*United States v. Jones*,
460 F.3d 191 (2d Cir. 2006) . . . . . . . . . . . . . . . . . 39

*United States v. Maher*,
108 F.3d 1513 (2d Cir. 1997) . . . . . . . . . . . . . . . . 33

*United States v. Marcus*,
560 U.S. 258 (2010). . . . . . . . . . . . . . . . . . . . . . . . 24

*United States v. Martinelli*,
454 F.3d 1300 (11th Cir. 2006) . . . . . . . . . . . . . . 33

*United States v. Masotto*,
73 F.3d 1233 (2d Cir. 1996) . . . . . . . . . . . . . . 23, 24

*United States v. McGauley*,
279 F.3d 62 (1st Cir. 2002). . . . . . . . . . . . . . . . . . 29

*United States v. McIntosh*,
753 F.3d 388 (2d Cir. 2014) . . . . . . . . . . . . . . . . . 38

PAGE

*United States v. Moon*,
718 F.2d 1210 (2d Cir. 1983) . . . . . . . . . . . . . 11, 12

*United States v. Morgan*,
380 F.3d 698 (2d Cir. 2004) . . . . . . . . . . . . . . . . . 26

*United States v. Moten*,
582 F.2d 654 (2d Cir. 1978) . . . . . . . . . . . . . . . . . 13

*United States v. Neill*,
166 F.3d 943 (9th Cir. 1999) . . . . . . . . . . . . . . . . 30

*United States v. Neuman*,
621 F. App'x 363 (9th Cir. 2015) . . . . . . . . . . . . . 29

*United States v. Nkansah*,
699 F.3d 743 (2d Cir. 2012) . . . . . . . . . . . . . . 23, 31

*United States v. O'Brien*,
926 F.3d 57 (2d Cir. 2019) . . . . . . . . . . . . . . . . . . 21

*United States v. O'Garro*,
700 F. App'x 52 (2d Cir. 2017) . . . . . . . . . . . . . . . 25

*United States v. Pastore*,
No. 18-2482, 2022 WL 2068434
(2d Cir. June 8, 2022) . . . . . . . . . . . . . . . . . . . . . . 22

*United States v. Perez-Frias*,
636 F.3d 39 (2d Cir. 2011) . . . . . . . . . . . . . . . . . . 41

*United States v. Peter*,
310 F.3d 709 (11th Cir. 2002) . . . . . . . . . . . . . . . 27

*United States v. Peterson*,
385 F.3d 127 (2d Cir. 2004) . . . . . . . . . . . . . . . . . 12

PAGE

*United States v. Pope*,
554 F.3d 240 (2d Cir. 2009) . . . . . . . . . . . . . . . . . 42

*United States v. Press*,
336 F.2d 1003 (2d Cir. 1964) . . . . . . . . . . . . . . . . 30

*United States v. Quinones*,
511 F.3d 289 (2d Cir. 2007) . . . . . . . . . . . . . . . . . 31

*United States v. Rigas*,
490 F.3d 208 (2d Cir. 2007) . . . . . . . . . . . . . . . . . 39

*United States v. Rigas*,
583 F.3d 108, 123 (2d Cir. 2009) . . . . . . . . . . . . . 39

*United States v. Roney*,
833 F. App'x 850 (2d Cir. 2020) . . . . . . . . . . . . . . 42

*United States v. Sabbeth*,
262 F.3d 207 (2d Cir. 2001) . . . . . . . . . . . . . . . . . 22

*United States v. Sabhnani*,
599 F.3d 215 (2d Cir. 2010) . . . . . . . . . . . . . . 10, 11

*United States v. Silver*,
864 F.3d 102 (2d Cir. 2017) . . . . . . . . . . . . . . . . . 23

*United States v. Sisnero-Gil*,
No. 20-4102, 2022 WL 289319
(2d Cir. Feb. 1, 2022) . . . . . . . . . . . . . . . . . . . . . 42

*United States v. Spero*,
331 F.3d 57 (2d Cir. 2003) . . . . . . . . . . . 21, 22, 25

*United States v. Stavroulakis*,
952 F.2d 686 (2d Cir. 1992) . . . . . . . . . . . . . . 28, 33

PAGE

*United States v. Stewart*,
433 F.3d 273 (2d Cir. 2006) . . . . . . . . . . . . . . . . . . 11

*United States v. Thompson*,
356 F.2d 216 (2d Cir. 1965) . . . . . . . . . . . . . . . . . . 22

*United States v. Vitale*,
459 F.3d 190 (2d Cir. 2006) . . . . . . . . . . . . . . . . . . 11

*United States v. White*,
552 F.3d 240 (2d Cir. 2009) . . . . . . . . . . . . . . . . . . 23

*United States v. Wiseberg*,
727 F. App'x 1 (2d Cir. 2018) . . . . . . . . . . . . . . . . . 28

*United States v. Wydermyer*,
51 F.3d 319 (2d Cir. 1995) . . . . . . . . . . . . . . . . 23, 30

*United States v. Young*,
745 F.2d 733 (2d Cir. 1984) . . . . . . . . . . . . . . . . . . 32

*United States v. Yousef*,
327 F.3d 56 (2d Cir. 2003) . . . . . . . . . . . . . . . . . . . 27

*Statutes, Rules & Other Authorities:*

18 U.S.C. § 1343 . . . . . . . . . . . . . . . . . . . . . . . . . . 28, 35

18 U.S.C. § 1349 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 28

18 U.S.C. § 1956(h). . . . . . . . . . . . . . . . . . . . . . . . . . . 17

18 U.S.C. § 1956(c) . . . . . . . . . . . . . . . . . . . . . . . . . . . 28

18 U.S.C. § 1961(1). . . . . . . . . . . . . . . . . . . . . . . . . . . 28

PAGE

18 U.S.C. § 3553(a) . . . . . . . . . . . . . . . . . . . . . . . . . . . 37

Fed. R. Crim. P. 7(c) . . . . . . . . . . . . . . . . . . . . . . . . . . 21

Fed. R. Crim. P. 12(b). . . . . . . . . . . . . . . . . . . . . . . 21, 26

Fed. R. Crim. P. 12(c) . . . . . . . . . . . . . . . . . . . . . . . 25, 26

Fed. R. Crim. P. 30(d). . . . . . . . . . . . . . . . . . . . . . . . . 24

Fed. R. Crim. P. 52(a). . . . . . . . . . . . . . . . . . . . . . . . . 25

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

## Docket No. 23-6842

UNITED STATES OF AMERICA,

*Appellee,*

—v.—

TIMOTHY SHEA,

*Defendant-Appellant.*

BRIAN KOLFAGE, also known as Sealed Defendant,
STEPHEN BANNON, also known as Sealed Defendant 2,
ANDREW BADOLATO, also known as Sealed
Defendant 3,

*Defendants.*

## BRIEF FOR THE UNITED STATES OF AMERICA

### Preliminary Statement

Timothy Shea appeals from a judgment of conviction entered on July 26, 2023, in the United States District Court for the Southern District of New York, following a trial before the Honorable Analisa Torres, United States District Judge, and a jury.

Superseding Indictment S2 20 Cr. 412 (AT) (the "Indictment") was filed on April 21, 2022, in three counts. Count One charged Shea with conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349. Count Two charged Shea with conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h). Count Three charged Shea with falsification of records, in violation of 18 U.S.C. §§ 1519 and 2.

Trial commenced on October 24, 2022, and ended on October 28, 2022, when the jury convicted Shea on all three counts of the Indictment.

On July 25, 2023, Judge Torres sentenced Shea to a term of 63 months' imprisonment on each count, to run concurrently, to be followed by three years' supervised release, and imposed $1,801,707 in restitution and a $300 mandatory special assessment.

Shea is serving his sentence.

## Statement of Facts

### A. The Government's Case

At trial, the Government called 12 witnesses, introduced more than 400 exhibits, and proved beyond a reasonable doubt that Shea (1) participated in a scheme to fraudulently induce donors to give money to an organization called We Build the Wall, and to deprive that organization of the honest services of its president, co-defendant Brian Kolfage, by funneling donated money into bank accounts controlled by Shea and others, and using a portion of those funds to pay kickbacks to Kolfage; (2) participated in a scheme to launder the proceeds of that fraud; and (3) falsified

records to obstruct the Government's investigation into those schemes.

The trial evidence established that in December 2018, Shea and Kolfage hatched a plan to fundraise, nominally to build a wall on the southern border of the United States, but in fact to enrich themselves. In mid-December, Kolfage texted Shea and Shea's wife, Amanda Shea, "Let's create a gofundme to pay for the Trump wall. And if Trump doesn't take the money, then we donate it to our organization." (Tr. 185; GX 1).[1] Shea almost immediately replied "Lol!!! That's so perfect!" (Tr. 185; GX 1). He then explained to his wife, in the same text chain, "Amanda, Trump can't take the money . . . so we could transfer it." (Tr. 185; GX 1). Less than a week later, they had created a GoFundMe page, "We The People Will Fund The Wall." (GX 301).

Soon after creating the GoFundMe page, Shea and his co-conspirators formed a non-profit entity, We Build the Wall, Inc., to receive the donated money and

---

[1] "GX" refers to a Government exhibit admitted at trial; "Tr." refers to the transcript of the October 2022 trial in which Shea was convicted; "Br." refers to Shea's brief on appeal; "A." refers to the appendix filed with that brief; "Dkt." refers to an entry on the District Court's docket for this case; and "PSR" or "Presentence Report" refers to the Presentence Investigation Report prepared by the United States Probation Office (the "Probation Office") in connection with Shea's sentencing. Unless otherwise noted, case quotations omit internal quotation marks, citations, and alterations.

use it to privately build a wall along the border with Mexico. (*E.g.*, Tr. 74-76; GX 302, 306). Kolfage was the president and public face of the organization. (Tr. 69, 78). He and We Build the Wall repeatedly made representations to donors, regulators, and the general public, to the effect that "100% of the funds raised on GoFundMe will be used in the execution of our mission and purpose," and that Kolfage would "personally not take a penny of compensation from these donations." (GX 306; *see also, e.g.*, Tr. 83-84, 122-32, 448-49, 468-69, 482-84; GX 352). Two victims testified that those promises influenced their decisions to donate to We Build the Wall, and that they would not have donated had they known the promises were false. (Tr. 449-50, 469-70). But as discussed below, the representations were not true; Shea and his co-conspirators stole hundreds of thousands of dollars from We Build the Wall, and kicked back substantial portions of that money to Kolfage.

The GoFundMe page was an immediate success. Less than a month after it launched, the page had raised almost $20 million, from hundreds of thousands of donors across the country. (Tr. 74; GX 313). Thousands of the people who donated did so from the Southern District of New York. (Tr. 223-25). And by mid-2019, We Build the Wall's GoFundMe campaign "was the largest GoFundMe in the company's history." (Tr. 94).

Shea and his co-conspirators did not use that money as they had promised they would. To be sure, they built short segments of wall at the southern border. (*See, e.g.*, Tr. 401-02). But the conspirators agreed

to find an "end around" to funnel money—$100,000 up front, then $20,000 per month—to Kolfage. (GX 16, 26, 36, 109, 112). They transferred We Build the Wall donor funds to entities and bank accounts set up by intermediaries, who then kicked back some of the money to Kolfage and kept some of it for themselves. (GX 900). Shea knew that the promises that We Build the Wall would use the donations only to build a wall and that Kolfage would not be paid a penny were false. (*See, e.g.*, Tr. 208 (quoting Shea asking whether "we want this statement"—that "All proceeds go directly to building the wall"—"at the top" of a website; after Kolfage responded "I think since it can't be proven, it's okay," Shea wrote "K. I don't want to go to jail")).

Shea was one of the intermediaries who helped funnel donor money to Kolfage. He created a shell company called Ranch Property Marketing and Management ("Ranch Property"). (Tr. 246-48; GX 501). Over a period of months, Ranch Property repeatedly received transfers from We Build the Wall and kicked back portions of the transfers to Kolfage; on one occasion, Shea used his own bank account, rather than Ranch Property's account, as the intermediary account. (GX 900, 901-C). To conceal those intermediary kickback transactions, Shea and Kolfage used fraudulent invoices and fraudulent memo lines in checks and wire transfers. (*E.g.*, GX 906-C, 906-E, 906-F, 906-H). One witness, Charlie Ford, testified about an example of this. Ford's company provided security services to We Build the Wall as a contractor, and Shea was Ford's point of contact at We Build the Wall. (Tr. 397-99). Ford's company sent We Build the Wall an invoice for approximately $20,000. (Tr. 407). Shea then created a

fraudulent invoice for the same services Ford's company had provided, but in Ranch Property's name, for almost $50,000, and sent it to We Build the Wall. (Tr. 405-11; GX 116A, 118A). Using the proceeds from the nearly $50,000 We Build the Wall paid to Shea's Ranch Property on that fraudulent invoice, Shea paid Ford's invoice, paid a $20,000 kickback to Kolfage, and kept the remainder of the money for himself. (GX 901-H).

By October 2019, Shea and Ranch Property had received hundreds of thousands of dollars in We Build the Wall money and paid about a quarter of a million dollars to Kolfage. (GX 900). That month, the Government issued a grand jury subpoena to Synovus Bank, where We Build the Wall had previously held an account. (Tr. 146-47). Disclosure of that subpoena was prohibited by law. (Tr. 151). But an employee at Synovus who did not see the subpoena's warning to that effect contacted an outside lawyer for We Build the Wall and disclosed the subpoena. (Tr. 148-51). The employee soon realized his error and sought to correct it, but by then it was too late. (Tr. 151-53). The We Build the Wall attorney had informed various conspirators, who proceeded to exchange numerous phone calls and text messages to discuss the subpoena. (GX 909; Tr. 305-15).

Realizing the risk the investigation posed to them, Shea and Kolfage sought to cover their tracks by creating backdated contracts to retroactively justify their theft of We Build the Wall money and payment of kickbacks. Kolfage instructed Shea to "[g]et Ranch Property stuff ASAP." (Tr. 316-17). Shea created a

backdated "vendor services agreement" between Ranch Property and We Build the Wall, and he executed a backdated letter agreement purporting to memorialize an agreement between Kolfage and Shea regarding licensing of We Build the Wall's donor list. (Tr. 316-34; GX 127, 128, 129, 129A, 130, 130A, 907). Although the documents were created in October 2019, Shea and Kolfage dated them six months earlier (Tr. 316-17, 319-23, 327-34), so that they would falsely appear to justify the prior payments.

### B. The Defense Case and the Verdict

Shea put on a short case, entering documents such as emails and invoices into evidence by stipulation and reading portions of those documents to the jury, rereading a stipulation previously entered into evidence, and playing a video about the promised border wall. (Tr. 637-44). The next day, the jury convicted Shea on all counts. (Tr. 811-13).

## ARGUMENT

## POINT I

### The District Court Correctly Denied Shea's Motion for a Juror Inquiry

Shea argues that the District Court abused its discretion by denying his post-verdict request to inquire into whether any juror misconduct had occurred. But the District Court acted well within its discretion by declining to inquire based on a showing that, as Shea's

brief acknowledges, fell well short of the standard set by this Court's precedent.

## A. Relevant Facts

On October 29, 2022—the day after the jury's verdict convicting Shea on all three counts in the Indictment—one of the Assistant United States Attorneys on the trial team (the "AUSA") received an email from a person ("Person-1") whose mother had served on the jury. Person-1 was a law student outside the New York City metropolitan area. Person-1 and the AUSA had attended the same college at different times, and over approximately the preceding three years had periodically communicated about Person-1's education and career. The AUSA never met or communicated with Person-1's mother. (A. 332.1).

On October 25, 2022, Person-1 emailed the AUSA to provide an update on Person-1's education and career, and to seek career-related advice. On October 29, 2022, after Shea's trial ended, the AUSA responded to Person-1's email, saying, as relevant here, that the AUSA had just finished the trial in this case. That same day, Person-1 responded, in relevant part:

> My mom was on the jury of your case! She was juror #[] in the [] row. I've heard lots about it all week, congratulations on the win! What a funny coincidence. Good thing my mom didn't make the

> connection beforehand and have to recuse herself. I know she enjoyed it.[2]

(A. 332.1). The Government filed a letter on November 3, 2022, informing the District Court about that email. (A. 332.1).

On November 14, 2022, Shea moved for a "hearing at which the juror and Person-1 . . . may be questioned about the representations outlined in the Government's letter." (A. 333). Specifically, Shea requested that the District Court "inquire of the juror the reason for her failure to disclose her adult child's relationship with the US Attorney's Office" and "inquire both of the juror and of Person-1 what, if anything, they discussed about the trial . . . and whether the juror's deliberations were influenced in any manner by such discussions." (A. 333-34).

On November 30, 2022, the District Court denied Shea's motion for a juror inquiry, giving two main reasons:

*First*, the District Court held that "Person-1's statement that they 'heard lots about' the trial 'all week' does not establish misconduct" because, among other reasons, Shea did "not provide a specific or nonspeculative basis to question the juror's adherence to" the standard instruction, which the District Court had "repeatedly" given, that jurors were "not to discuss the case while it was ongoing." (A. 339). The District Court

---

[2] As it did in the District Court, the Government has redacted the relevant juror's number and position in the jury box to protect the juror's privacy interests.

explained that "a number of innocent inferences may be drawn from the statement that Person-1 'heard lots about' the trial 'all week,' including that the juror generally discussed that she had been seated on a jury." (A. 339). Moreover, the District Court concluded, "even assuming improper communications did occur," Shea failed "to provide evidence to explain how such impropriety could have prejudiced the jury during its deliberations." (A. 339).

*Second*, the District Court held that Shea "fail[ed] to point to evidence that the juror was untruthful during voir dire" or to "identify any question during voir dire that the juror answered dishonestly." (A. 339). As the District Court explained, it "did not ask the juror about her adult child, who does not live with her," and "there is no evidence that the juror, who has never met the AUSA, knew anything about Person-1's prior contact with the AUSA." (A. 339).[3]

### B. Applicable Law

This Court has warned that the "gravity of granting" a post-verdict request to question a juror "should not be underestimated." *United States v. Ianniello*, 866 F.2d 540, 543 (2d Cir. 1989). Courts are "always reluctant" to conduct post-verdict inquiries into allegations of juror misconduct. *Id.*; *accord, e.g.*, *United States v.*

---

[3] On October 23, 2023, Shea moved in this Court for bail pending appeal, claiming that this juror-inquiry issue presented a substantial question on appeal. On November 14, 2023, this Court denied the motion.

*Sabhnani*, 599 F.3d 215, 250 (2d Cir. 2010) ("[D]istrict judges should be particularly cautious in conducting investigations into potential jury misconduct after a verdict . . . ."); *United States v. Moon*, 718 F.2d 1210, 1234 (2d Cir. 1983) ("[C]ourts are, and should be, hesitant to haul jurors in after they have reached a verdict in order to probe for potential instances of bias, misconduct or extraneous influences."). That reluctance stems from the "evil consequences" of such inquiries: "subjecting juries to harassment, inhibiting juryroom deliberation, burdening courts with meritless applications, increasing temptation for jury tampering and creating uncertainty in jury verdicts." *Ianniello*, 866 F.2d at 543.

A court should conduct a post-trial jury hearing only when the defendant presents "clear, strong, substantial and incontrovertible evidence that a specific, non-speculative impropriety has occurred." *United States v. Baker*, 899 F.3d 123, 130 (2d Cir. 2018); *accord Sabhnani*, 599 F.3d at 250; *United States v. Vitale*, 459 F.3d 190, 197 (2d Cir. 2006); *United States v. Stewart*, 433 F.3d 273, 302-03 (2d Cir. 2006); *Moon*, 718 F.2d at 1234. Although allegations in support of a motion for a juror inquiry "need not be irrebuttable because if the allegations were conclusive, there would be no need for a hearing," the "[a]llegations of impropriety must be concrete allegations of inappropriate conduct that constitute competent and relevant evidence." *Baker*, 899 F.3d at 130.

This Court "review[s] a trial judge's handling of alleged jury misconduct for abuse of discretion," *Baker*, 899 F.3d at 130, because "the trial judge is in a unique

position to ascertain an appropriate remedy, having the privilege of continuous observation of the jury in court," *United States v. Peterson*, 385 F.3d 127, 134 (2d Cir. 2004).

### C. Discussion

The District Court correctly denied Shea's post-verdict request to inquire into his claim of possible juror misconduct, and certainly did not abuse its discretion in doing so. Shea acknowledges that he did not present the " 'clear, strong, substantial, and incontrovertible evidence' that the trial court demanded." (Br. 31). The language he quotes is taken from this Court's published opinions. *See Baker*, 899 F.3d at 130 ("As we have repeatedly said, a post-verdict inquiry into allegations of such misconduct is only required 'when there is clear, strong, substantial and incontrovertible evidence that a specific, nonspeculative impropriety has occurred which could have prejudiced the trial of a defendant.' " (quoting *Moon*, 718 F.2d at 1234)). That Shea admits he cannot meet the exact standard this Court has specified suffices to defeat his claim.

Shea also cannot reasonably argue that "this Court should clarify the statements quoted [in Shea's brief] which discourage, or essentially prohibit defense attorneys or their investigators from approaching jurors where the clearly less-intrusive approach is for the court to make the inquiry after an issue has been raised." (Br. 31). There is no need for "clarification," because the standard announced in those cases is clear —which is why Shea can so easily discern that he has failed to meet it. Shea is thus asking this Court to

overrule, not clarify, *Baker* and the other published opinions applying the same standard. That, however, is not an option for the panel which will hear this appeal. *See United States v. Afriyie*, 27 F.4th 161, 168 (2d Cir. 2022) ("Published panel decisions . . . are binding on future panels unless they are reversed *en banc* or by the Supreme Court" or "when an intervening Supreme Court decision casts doubt on our controlling precedent.").

Shea further errs in depicting tension between the long line of cases imposing the standard he cannot meet, and this Court's finding that post-verdict inquiry was required in *United States v. Moten*, 582 F.2d 654 (2d Cir. 1978). (*See* Br. 25-27). In *Moten*, there was formidable evidence that two jurors reached out to a defendant, offering to be influenced, but only one was removed from the jury. *See* 582 F.2d at 656-59. Indeed, the evidence that the excused juror had engaged in "corruption" was "undisputed," and the evidence that the unexcused juror had joined him was "powerful." *Id.* at 668.[4] This Court has thus described *Moten* as an example of the "clear, strong, substantial and incontrovertible evidence" standard being met. *See Ianniello*, 866 F.2d at 543. Because this case in no way resembles

---

[4] Even then, the *Moten* court accepted the Government's request that, on remand, the District Court's inquiry be limited to questioning the excused juror and two witnesses who were not jurors, with the jurors who rendered the verdict to be interviewed only if that "less drastic" inquiry failed to resolve the matter. 582 F.2d at 668.

*Moten*, and *Moten* in no way undermines the precedents Shea admits he cannot satisfy, *Moten* does not aid him.

The other cases on which Shea relies similarly serve only to illustrate how far short his argument falls. In *Iannello*, three jurors submitted affidavits "alleging specific acts of inappropriate conduct by the district judge and a federal marshal responsible for the jury." *Id.* A juror submitted an affidavit that she had gathered extra-record information, which she then used in an effort to persuade the remainder of the jury, in *United States v. Calbas*, 821 F.2d 887, 894-95 (2d Cir. 1987). And the jury's foreperson told the trial court that someone had attempted to bribe him to return a verdict for the defendant in *Remmer v. United States,* 347 U.S. 227, 228 (1954). Those cases show that —contrary to Shea's claim—the *Baker* standard is not impossible to meet. They also show that this standard is not met here.

Nor is there anything troubling about the application of settled precedent to this case. Shea's description of both the facts and his proposed inquiry makes plain that he is engaged in speculation. He says, for instance, that the court should have "conduct[ed] a minimally-intrusive inquiry of the juror. . .*simply to make sure there was nothing there*" (Br. 31-32 (emphasis added); *see also id.* at 26 ("[I]t is an abuse of discretion to refuse to [conduct an inquiry] in the face of evidence that impropriety *may have* occurred." (emphasis added))). There are compelling reasons for the high standard for court-led juror inquiries, and the corresponding limitations on parties' abilities to

unilaterally investigate a jury's deliberations: the need to avoid "subjecting juries to harassment, inhibiting juryroom deliberation, burdening courts with meritless applications, increasing temptation for jury tampering and creating uncertainty in jury verdicts." *Ianniello*, 866 F.2d at 543. Given the "evil consequences" of post-verdict inquiry based on allegations of juror misconduct, *id*, Shea cannot rightly argue that the District Court abused its discretion in declining to inquire simply to confirm that no misconduct occurred here.

Shea also fails to grapple with the contents of Person-1's email to the AUSA: During the trial, Person-1 had been unaware that the AUSA was involved in the trial for which Person-1's mother was sitting as a juror, and the juror had been unaware that the AUSA involved in the trial had any relationship with Person-1. (*See* A. 332.1). It was only *after* the trial ended, when the AUSA responded to Person-1's outreach and informed Person-1 that the AUSA had just finished participating in Shea's trial, that either Person-1 or the juror made the connection. (*See* A. 332.1 ("What a funny coincidence. Good thing my mom didn't make the connection beforehand. . . .")). Because the chain of connection between the juror, Person-1, and the AUSA was unknown during the trial, there is no risk that it somehow influenced the juror.

## POINT II

### The District Court Correctly Rejected Shea's Post-Trial Challenges to the Indictment and Jury Instructions on Count Two

On appeal, Shea renews challenges he first brought after trial, to both Count Two of the Indictment and the District Court's jury instructions on that count, on the ground that both erroneously stated that wire fraud conspiracy was a "specified unlawful activity" for purposes of the money laundering statute. It is true that wire fraud conspiracy—unlike substantive wire fraud—does not quality as a "specified unlawful activity." But Shea's challenges fail. His post-trial challenge to the Indictment is waived. And even setting aside the waiver, the Indictment was sufficient: Count Two accurately stated all elements of money laundering conspiracy, which do not include the particular specified unlawful activity from which the laundered funds derived. Shea's post-trial jury instruction challenge is likewise waived, because Shea himself jointly proposed the instruction he now challenges, thereby inviting the error. And in any event, the instructional error was harmless because under the facts of this case, the jury's verdict on wire fraud conspiracy necessarily meant that it found substantive wire fraud as well.

## A. Relevant Facts

### 1. The Indictment's Money Laundering Charge

Count Two of the Indictment charged a two-object conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h). The complete charging language of Count Two was as follows:

> From at least in or around December 2018 up to and including in or around June 2020, in the Southern District of New York and elsewhere, TIMOTHY SHEA, the defendant, and others known and unknown, intentionally and knowingly did combine, conspire, confederate, and agree together and with each other to violate Title 18, United States Code, Sections 1956(a)(1)(B)(i) and 1957(a).
>
> It was a part and an object of the conspiracy that TIMOTHY SHEA, the defendant, and others known and unknown, in an offense involving interstate and foreign commerce, knowing that the property involved in certain financial transactions, to wit, wire transfers and checks, represented the proceeds of some form of unlawful activity, would and did conduct and attempt to conduct such financial transactions, which in fact involved the proceeds of *specified unlawful activity, to wit, the conspiracy to commit wire fraud alleged in Count One of this Indictment*,

> knowing that the transactions were designed in whole and in part to conceal and disguise the nature, the location, the source, the ownership, and the control, of the proceeds of the specified unlawful activity, in violation of Title 18, United States Code, Section 1956(a)(1)(B)(i).
>
> It was a further part and an object of the conspiracy that TIMOTHY SHEA, the defendant, and others known and unknown, within the United States, knowingly would and did engage and attempt to engage in monetary transactions in criminally derived property of a value greater than $10,000 and that was derived from *specified unlawful activity, to wit, the conspiracy to commit wire fraud alleged in Count One of this Indictment*, in violation of Title 18, United States Code, Section 1957(a).

(A. 41-42 ¶¶ 4-6 (emphasis added, paragraph numbers omitted)).

Shea did not file a pretrial motion to dismiss the Indictment.

#### 2. The Jointly Proposed Money Laundering Jury Instructions

Shea's first trial, held in May and June 2022, ended in a mistrial. (Dkt. 256 at 883). In advance of that trial, the parties jointly submitted proposed jury instructions (Dkt. 165), and later jointly submitted revised proposed jury instructions (A. 46). The parties' joint

proposed jury charge included the following requested instruction:

> The term "specified unlawful activity" means any one of a variety of offenses described in the statute. In this case, the Government has alleged that the money involved in financial transactions at issue in this case was derived from the wire fraud conspiracy charged in Count One of the Indictment. *I instruct you, as a matter of law, that the charge in Count One meets the definition of "specified unlawful activity,"* but you must determine whether the funds involved in the financial transactions were the proceeds of that unlawful activity.

(A. 100 (emphasis added)). The parties' joint submission contained some objections from one side or the other to particular instructions (*see* A. 46 (describing color-coded system for noting objections)), but both parties agreed to the joint proposal quoted above (*see* A. 100).

The District Court adopted the jointly proposed language quoted above, and, without objection, used the same jury instructions at the October 2022 trial at issue in this appeal. (*See* Tr. 773). Relying on the parties' joint proposal, the District Court told the jury "I instruct you, as a matter of law, that the [wire fraud conspiracy] charge in Count One meets the definition of 'specified unlawful activity.' " (Tr. 773).

### 3. Shea's Post-Trial Motion to Set Aside Verdict

More than seven months after the jury's verdict, the Government noticed that the jury instructions on Count Two erroneously stated that wire fraud conspiracy constituted a specified unlawful activity. On June 11, 2023, the Government filed a letter alerting the District Court to the error, but arguing that no further action was necessary. (A. 408). On June 28, 2023, Shea moved to dismiss Count Two for failure to state an offense, and for a new trial on Counts One and Three, based on purported spillover prejudice from the erroneous language in the Indictment and jury instructions relating to Count Two. (A. 418). The Government opposed the motion, arguing that (i) it was untimely; (ii) the motion to dismiss was waived because it was not raised before trial; (iii) regardless of the error Count Two of the Indictment stated an offense; (iv) the challenge to the instructional error was waived because Shea jointly requested the erroneous instruction; and (v) the instructional error was harmless. (A. 445-54).

On July 14, 2023, the District Court denied Shea's motion. (A. 455). With respect to the motion to dismiss Count Two, the District Court held that the count stated an offense notwithstanding its language incorrectly defining "specified unlawful activity." (A. 458-60). With respect to Shea's jury-instruction challenge, the District Court held that having invited the error by jointly requesting the erroneous instruction, Shea had waived any objection to it. (A. 460).

## B. Applicable Law

### 1. Motions to Dismiss the Indictment

"[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States*, 418 U.S. 87, 117 (1974); *see also* Fed. R. Crim. P. 7(c). An indictment "need not be perfect," *United States v. De La Pava*, 268 F.3d 157, 162 (2d Cir. 2001), and, indeed, "need do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime," *United States v. Alfonso*, 143 F.3d 772, 776 (2d Cir. 1998). When courts evaluate indictments, "common sense and reason are more important than technicalities." *De La Pava*, 268 F.3d at 162.

A defendant can move to dismiss an indictment where, among other things, it "fail[s] to state an offense." Fed. R. Crim. P. 12(b)(3)(B)(v). Such a motion must be made before trial. *Id.*; *see also United States v. Spero*, 331 F.3d 57, 61 (2d Cir. 2003). Motions that are not filed before trial are "untimely," and may only be "entertain[ed] if the movant shows 'good cause' for his failure to [move] prior to the deadline." *United States v. O'Brien*, 926 F.3d 57, 83 (2d Cir. 2019); *see also id.* at 82-83 (noting that prior versions of the rule permitted motions to dismiss for failure to state an offense at any time, on the theory that they raised a "jurisdictional" issue, a theory that was rejected by

*United States v. Cotton*, 535 U.S. 625, 629-31 (2002)). Where a defendant's motion under Rule 12 is not filed "prior to trial, as unambiguously required by the law of this Circuit," and he has shown no cause for failing to timely move, the claim "must be rejected." *Spero*, 331 F.3d at 61-62; *see, e.g.*, *United States v. Pastore,* No. 18-2482, 2022 WL 2068434, at *3 (2d Cir. June 8, 2022) (where defendant failed to allege deficiencies in the indictment before trial, any such claim on appeal necessarily fails).

Where good cause is shown, a convicted defendant claiming that the indictment against him should have been dismissed still bears a heavy burden. A trial and guilty verdict remedy most indictment defects. *See, e.g.*, *United States v. Eltayib*, 88 F.3d 157, 173 (2d Cir. 1996) ("[A] guilty verdict by a petit jury remedies any possible defects in the grand jury indictment."). When a defendant objects to the sufficiency of an indictment post-verdict, the indictment must be "interpreted liberally, in favor of sufficiency." *United States v. Sabbeth*, 262 F.3d 207, 218 (2d Cir. 2001).

Even a significant error that might have required dismissal on a timely motion to dismiss can be cured by trial. For instance, an indictment's omission of an element would support a pretrial motion to dismiss for failure to state an offense, but is not necessarily a basis to reverse a conviction post-trial. *See United States v. Thompson*, 356 F.2d 216, 226 (2d Cir. 1965) ("[T]he courts of the United States long ago withdrew their hospitality toward technical claims of invalidity of an indictment first raised after trial, absent a clear showing of substantial prejudice to the accused—such as a

showing that the indictment is so obviously defective that by no reasonable construction can it be said to charge the offense for which conviction was had."); *accord, e.g.*, *United States v. Wydermyer*, 51 F.3d 319, 325-26 (2d Cir. 1995) (applying same standard, and rejecting post-verdict challenge to indictment that failed to specify all elements of substantive money laundering offenses). This Court has compared the required showing to that necessary to establish plain error. *See United States v. Nkansah*, 699 F.3d 743, 752 (2d Cir. 2012), *abrogated on other grounds by United States v. Bouchard*, 828 F.3d 116 (2d Cir. 2016).

### 2. Instructional Error

A defendant challenging a jury instruction faces a heavy burden: He "must demonstrate both error and ensuing prejudice." *United States v. White*, 552 F.3d 240, 246 (2d Cir. 2009). In reviewing jury instructions, this Court does not review the particular phrases challenged by the defendant in isolation; it reviews "the instructions as a whole to see if the entire charge delivered a correct interpretation of the law." *United States v. Al Kassar*, 660 F.3d 108, 127 (2d Cir. 2011); *United States v. Carr*, 880 F.2d 1550, 1555 (2d Cir. 1989). A jury instruction is "erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law." *United States v. Silver*, 864 F.3d 102, 118 (2d Cir. 2017).

The standard of appellate review for jury instructions depends on who proposed the instruction and whether an objection was preserved. Preserved objections to jury instructions are reviewed *de novo*. *United*

*States v. Masotto*, 73 F.3d 1233, 1238 (2d Cir. 1996). To preserve an objection to jury instructions, a defendant must "direct the trial court's attention to the contention that is to be raised on appeal." *Id.* at 1237; *see also* Fed. R. Crim. P. 30(d) ("[A] party. . .must inform the court of the specific objection . . . before the jury retires to deliberate. . . . Failure to object in accordance with this rule precludes appellate review, except as permitted under Rule 52(b).").

Jury instructions proposed by the Government or the Court, and to which the defendant did not contemporaneously object, are reviewed only for plain error. *E.g.*, *United States v. Al-Moayad*, 545 F.3d 139, 177 (2d Cir. 2008); *United States v. Crowley*, 318 F.3d 401, 414 (2d Cir. 2003). Under the plain-error standard, a defendant must demonstrate that: "(1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant's substantial rights, which in the ordinary case means it affected the outcome of the district court proceedings; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States v. Marcus*, 560 U.S. 258, 262 (2010).

On the other hand, there is no standard of review where a party challenges a jury instruction he proposed—in that circumstance, appellate review is foreclosed. A party who proposes a jury instruction waives "any objection" to it. *United States v. Caltabiano*, 871 F.3d 210, 219 (2d Cir. 2017). This is a species of the "invited error" doctrine: "If a party invited the charge . . . she has waived any right to appellate review of the

charge." *United States v. Giovanelli*, 464 F.3d 346, 351 (2d Cir. 2006) (per curiam); *see, e.g.*, *United States v. O'Garro*, 700 F. App'x 52, 53-54 (2d Cir. 2017) (where defendant requested an instruction "identical in every material respect to the now-challenged instruction," it was a true waiver and foreclosed *any* review).

Finally, even where a jury-instruction objection was preserved and the Court does find error, reversal is not warranted if the alleged error was harmless. Fed. R. Crim. P. 52(a); *United States v. Gansman*, 657 F.3d 85, 91-92 (2d Cir. 2011). Thus, a conviction should be affirmed despite instructional error if it "appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Neder v. United States*, 527 U.S. 1, 15 (1999).

## C. Discussion

### 1. Shea's Challenge to the Indictment Is Waived

Shea did not move to dismiss Count Two of the Indictment until after he was convicted, meaning that his motion can be considered only if he shows "good cause." Fed. R. Crim. P. 12(c)(3). On appeal, Shea does not attempt to show good cause for his late filing. (*See* Br. 32-40). This Court should thus reject his claim without reaching the merits. *Spero*, 331 F.3d at 62.[5]

---

[5] The District Court did not reach the question whether good cause excused the failure to move before trial. (A. 458 n.2 ("[T]he Court does not reach the question of whether defendant's untimely motion can be

Shea argues, however, that his claim that Count Two failed to charge a crime may be raised at any time because it attacks the District Court's jurisdiction, and the Supreme Court's decision in *Cotton* "only *really held that certain kinds of defects are not jurisdictional*." (Br. 33). This argument errs in at least two ways: *First*, regardless how *Cotton* might be read, the post-*Cotton* amendment to Rule 12 plainly requires a claim for "failure to state an offense" to be raised before trial, absent good cause. Fed. R. Crim. P. 12(b)(3)(B)(v), Fed. R. Crim. P. 12(c)(3). *Second*, the holding of *Cotton* does not exempt Shea's claim that Count Two failed to charge a crime; the opinion states that a district court "has jurisdiction of all crimes cognizable under the authority of the United States and the objection that the indictment does not charge a crime against the United States goes only to the merits of the case." *Cotton*, 535 U.S. at 631. This Court has thus repeatedly held that an indictment's failure to state a claim is not a jurisdictional defect. *See United States v. Balde*, 943 F.3d 73, 88-93 (2d Cir. 2019). This Court has also recently rejected Shea's request (*see*

---

excused by good cause, because even assuming good cause, Defendant's challenge fails.")). But this Court can affirm on this or any other "ground with support in the record." *United States v. Morgan*, 380 F.3d 698, 701 n.2 (2d Cir. 2004); *see also, e.g.*, *Leecan v. Lopes*, 893 F.2d 1434, 1439 (2d Cir. 1990) ("[W]e are free to affirm an appealed decision on any ground which finds support in the record, regardless of the ground upon which the trial court relied.").

Br. 33-34) that it adopt the Eleventh Circuit's narrow reading of *Cotton*, declining to follow the same case on which Shea relies. *United States v. Aquart*, 92 F.4th 77, 89-90 (2d Cir. 2024) (explaining that *Cotton* and circuit precedent require rejecting *United States v. Peter*, 310 F.3d 709, 714-15 (11th Cir. 2002)).

Shea's belated claim thus cannot be heard absent a showing of good cause. In the District Court, Shea argued that his failure to challenge Count Two sooner was a product of inadvertence rather than strategic thinking, and that "the government . . . counsel for the co-defendants, and the Court," likewise "failed to notice the error" before the trial. (A. 441). Those arguments do not establish good cause. Shea cited no authority in the district court, nor any on appeal, for the proposition that inadvertence—whether shared by a litigation adversary or not—constitutes good cause. And this Court's decisions are to the contrary. *See, e.g.*, *United States v. Atuana*, 816 F. App'x 592, 596-97 (2d Cir. 2020) (inadvertence is insufficient to show good cause (citing *United States v. Yousef*, 327 F.3d 56, 125 (2d Cir. 2003) and *United States v. Forrester*, 60 F.3d 52, 59 (2d Cir. 1995)).

### 2. The Indictment Stated an Offense

Even if this Court accepted Shea's invitation to review Count Two under the plain error standard (Br. 32), his attack would fail. Indeed, his argument would fail even under *de novo* review, because Count Two set forth all the elements of money laundering conspiracy, and sufficiently informed Shea of the charge against him.

Count Two alleged that Shea conspired to commit money laundering, and that the object of the conspiracy was to launder "proceeds of specified unlawful activity, to wit, the conspiracy to commit wire fraud alleged in Count One." (A. 41 ¶ 5; *see also* A. 42 ¶ 6). In fact, specified unlawful activity includes "any act which is indictable under" a list of statutes that contains substantive wire fraud in violation of 18 U.S.C. § 1343, and does not include wire fraud conspiracy in violation of 18 U.S.C. § 1349. *See* 18 U.S.C. §§ 1956(c)(7)(A) & 1961(1)(B). But the District Court correctly held that Count Two nonetheless stated an offense. As the District Court explained, the errors in the challenged "to wit" clause "relate[d] to an ancillary issue and not an essential element of the conspiracy itself," and even "after removing this erroneous language," Count Two "still states an offense." (A. 459).

That analysis was exactly right. "The two elements of a money laundering conspiracy are [1] the existence of a conspiracy and [2] that the defendant knowingly participated in it." *United States v. Wiseberg*, 727 F. App'x 1, 5 (2d Cir. 2018); *see also, e.g.*, *United States v. Garcia*, 587 F.3d 509, 515 (2d Cir. 2009) ("Conspiring to launder money requires that two or more people agree to violate the federal money laundering statute, and that the defendant knowingly engaged in the conspiracy with the specific intent to commit the offenses that are the objects of the conspiracy."). This Court has recognized that the particular specified unlawful activity at issue is "ancillary," and not an element of money laundering conspiracy. *United States v. Stavroulakis*, 952 F.2d 686, 691 (2d Cir. 1992) (rejecting argument that "the *particular* specified unlawful

activity is an essential element of the crime"); *see also, e.g.*, *United States v. Neuman*, 621 F. App'x 363, 365 (9th Cir. 2015) (rejecting claim that conspiracy to commit mail or wire fraud cannot constitute specified unlawful activity, because "Section 1956(h) criminalizes the *agreement to commit* transactional money laundering," and "does not require that substantive specified unlawful activity be charged or proven"); *United States v. McGauley*, 279 F.3d 62, 70 (1st Cir. 2002) (even when charging substantive money laundering, for which it is an element that laundered funds were in fact proceeds of a specified unlawful activity, "we do not require the indictment to specify the predicate offense underlying a money laundering charge").

The Indictment alleged both elements of money laundering conspiracy (*see* A. 41 ¶ 4), and then went on to provide additional details. The error, if any, went only to those additional details. Shea nevertheless asserts that "the erroneous language of count two amounted to a 'failure to state a crime.'" (Br. 35). But he does not dispute that Count Two of the Indictment correctly stated the elements of a money laundering conspiracy. Indeed, he comes close to conceding that point. (*See id.* at 38 ("[T]he count without the specification of the source of the money might have, in fact, been sufficient.")). Shea's attack on Count Two therefore fails, because the Indictment "contain[ed] the elements of the offense charged" regardless of the challenged language. *Hamling*, 418 U.S. at 117.

Shea argues that one "purpose" of indictments is "to inform the jury of what the government contends was the basis for believing a crime was committed,"

and that "the challenged language in the indictment misled the jury." (*Id.* at 38-39). But informing the trial jury is not the "purpose" of an indictment. Indeed, this Court has long held that the petit jury need never see the indictment. *See United States v. Press*, 336 F.2d 1003, 1016 (2d Cir. 1964) (whether "to give the indictment to the jury for use during its deliberations" is "in the sound discretion of the court"). An indictment gives notice to *the defendant*. *See, e.g.*, *United States v. Dhinsa*, 243 F.3d 635, 667 (2d Cir. 2001) ("The essential purpose of an indictment is to give the defendant notice of the charge so that he can defend or plead his case adequately." (quoting *United States v. Neill*, 166 F.3d 943, 947 (9th Cir. 1999))); *United States v. Goldsmith*, 108 F.2d 917, 920-21 (2d Cir. 1940) (purpose of indictment is to "acquaint the defendant with the offense of which he stands charged, so that he can prepare his defense and protect himself against double jeopardy"); *see also Wydermyer*, 51 F.3d at 324 ("Indictments are now reviewed for constitutional infirmities, most notably whether the alleged defect offends the Sixth Amendment right of the accused to be informed of the charges against him, the Fifth Amendment right not to be prosecuted without indictment by a grand jury, or the Fifth Amendment protection against double jeopardy."). Count Two of the Indictment, by accurately reciting the elements of money laundering conspiracy as well as providing the time and place of the offense, gave Shea all the notice to which he was entitled. And because Shea was on adequate notice of the money laundering conspiracy charge against him, his post-verdict indictment challenge fails. *See, e.g.*, *United States v. Hidalgo*, 736 F. App'x 255, 259 (2d Cir.

2018) ("As this court has observed, as long as a defendant has notice adequate to allow him to prepare a defense, 'omissions in the indictment do not affect substantial rights' so as to manifest plain error." (quoting *Nkansah*, 699 F.3d at 752)).

### 3. Shea Cannot Challenge an Instructional Error He Invited

Shea and the Government submitted a joint request to charge with respect to Count Two, and that joint request contained the error Shea now challenges on appeal. The District Court correctly recognized that this was a complete waiver of Shea's right to challenge the instruction. (A. 460). Having proposed the erroneous language, Shea waived "any objection" to it. *Caltabiano*, 871 F.3d at 219. This Court has thus explained that where, as here, "the parties jointly submitted a proposed charge that included the instruction" that the defendant challenges on appeal, it is a "true waiver" and "precludes even plain error review." *United States v. Gill*, 674 F. App'x 56, 58 (2d Cir. 2017); *accord United States v. Binday*, 804 F.3d 558, 582-83 (2d Cir. 2015) (finding waiver based on invited error where "the parties jointly submitted the language which defendants now contend was insufficiently clear"), *abrogated on other grounds by Ciminelli v. United States*, 598 U.S. 306 (2023).

Shea argues that a true waiver occurs only when a party's failure to object, or affirmative proposal, is "tactical," and that there was no "tactical" justification here for defense counsel's joint proposal of the cerroneous jury instruction. (Br. at 41-43 (citing *United States*

*v. Quinones*, 511 F.3d 289, 321 (2d Cir. 2007)). But a tactical benefit is not required to find waiver. *See United States v. Borland*, No. 21-2761, 2023 WL 4072830, at *3 (2d Cir. June 20, 2023) ("Though we have not made a tactical benefit a prerequisite to identifying waiver, an identifiable tactical benefit provides some evidence that the relinquishment of a right was intentional."). Therefore, that a tactical benefit constitutes evidence that a waiver was intentional does not mean that this Court will review invited errors merely because a party claims they were not tactical. *See Puckett v. United States*, 556 U.S. 129, 134 (2009) ("the contemporaneous-objection rule prevents a litigant from 'sandbagging' the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor"). This Court has thus not scrutinized the motivations underlying a defendant's proposed jury instructions before concluding that the defendant could not challenge instructions he invited. *See, e.g.*, *Binday*, 804 F.3d at 582-83; *Giovanelli*, 464 F.3d at 351 (waiver based on "invitation" of the instructional error, without analysis of tactics); *United States v. Young*, 745 F.2d 733, 752 (2d Cir. 1984) ("[The defendant] cannot now complain of this charge . . . because he requested it, and not even the plain error doctrine permits reversal on the ground that the trial court granted a defendant's request to charge."); *Gill*, 674 F. App'x at 58-59 (finding waiver where defendant jointly proposed instruction, without analyzing underlying tactical justification for proposal).

#### 4. The Instructional Error Is Harmless

If the Court reaches the error in the jury instructions, it should nevertheless affirm because the error was harmless. Even the complete omission of an element from the instructions is harmless where the trial evidence overwhelmingly proved that element. *See, e.g.*, *Neder*, 527 U.S. at 8-9, 15-16; *United States v. Agrawal*, 726 F.3d 235, 257 (2d Cir. 2013). The same is true regarding the misstatement, rather than omission, of an element. *See, e.g.*, *Pope v. Illinois*, 481 U.S. 497, 502-03 (1987).

Here, the error was harmless beyond a reasonable doubt, and certainly did not affect Shea's substantial rights. As an initial matter, the specific nature of the specified unlawful activity was not an element of the charged offense. (*See supra* § II.C.2). The Government also did not need to prove beyond a reasonable doubt that Shea committed the underlying specified unlawful activity. *See, e.g.*, *United States v. Martinelli*, 454 F.3d 1300, 1312 (11th Cir. 2006) (collecting cases for the proposition that "[i]t is by now abundantly clear that in a money laundering case (or in a money laundering conspiracy case), the defendant need not actually commit the alleged specified unlawful activity"). Nor, for that matter, did the Government need to prove beyond a reasonable doubt that Shea "knew which 'specified unlawful activity' he was helping to conceal," *United States v. Maher*, 108 F.3d 1513, 1526 (2d Cir. 1997), or that Shea and his co-conspirators agreed about which underlying unlawful activity had generated the proceeds they agreed to launder, *Stavroulakis*, 952 F.2d at 690-91.

But the trial evidence overwhelmingly proved all of those things. The evidence showed that Shea and his co-conspirators repeatedly committed substantive wire fraud, and then repeatedly transferred proceeds of those acts to launder them, and "no rational juror, if properly instructed, could find" otherwise. *Pope*, 481 U.S. at 503. The District Court discussed this evidence at some length in rejecting a sufficiency challenge that Shea has not pursued on appeal:

> Defendant and his co-defendants pocketed hundreds of thousands of dollars from WBTW [that is, We Build the Wall] by setting up business intermediaries and transferring WBTW's donor funds to those intermediaries, which then retained some of the money and transferred some of it back to Kolfage. For example, Defendant created a company called Ranch Property Marketing and Management LLC ("RPMM"). Over several months, WBTW transferred funds to RPMM on multiple occasions, and portions of those transfers were sent to Kolfage. On one occasion, WBTW transferred money to Defendant's personal bank account to serve as the intermediary . . . . The Government also presented exhibits and testimony demonstrating that Defendant and his co-defendants used fraudulent invoices and memo lines in checks and wire transfers to conceal the purposes of the money transfers.

(Dkt. 357 (citing Tr. 246-48; GX 501, 900, 900-1, 901-C, 906-C, 906-E, 906-F, 906-H)). The evidence the District Court discussed, as well as other evidence, established a wire fraud conspiracy comprised of numerous acts of substantive wire fraud. For instance, each of the donations that Shea and his co-conspirators fraudulently induced violated 18 U.S.C. § 1343. The defendants transmitted (via the internet) material false statements to induce donations to We Build the Wall. (*See, e.g.*, Tr. 83-84, 122-32, 448-49, 468-69, 482-84; GX 352). Relying on those false representations, hundreds of thousands of people, from each of the 50 states, donated to We Build the Wall. (GX 313). For the most part, they made those donations by using interstate wires: to donate, they would navigate to We Build the Wall's GoFundMe page on the internet, and make a payment by debit or credit card. (Tr. 62-63). And Shea and his co-conspirators then embezzled some of that donated money, using a series of financial transactions and intermediary accounts to conceal the scheme. (*See* GX 901-C, 901-E, 901-F, 901-H, 901-I, 901-J, 901-K).

In his arguments on the jury instructions, Shea neither disagrees that an error in the instructions can be harmless, nor attempts to show why the error here was not, as the District Court found, harmless. At best, he argues—in support of his argument to dismiss Count Two—that the jury instructions were misleading. (Br. 39-40). But any erroneous statement of law is inherently misleading, in that it misstates the law. Yet even where—unlike here—an objection to the misleading instruction is preserved, this Court still reviews for harmlessness. *See, e.g.*, *Hedgpeth v. Pulido*, 555 U.S.

57, 61-62 (2008) (jury instruction allowing defendant to be convicted on incorrect legal theory subject to harmless error analysis). Because the evidence here overwhelmingly proved substantive wire fraud, and because the jury's verdict on wire fraud conspiracy necessarily rested on finding that numerous acts of substantive wire fraud occurred, Shea "cannot show a reasonable probability that the error [in his jury instructions] affected the outcome of his trial, as necessary to demonstrate the requisite adverse effect on his substantial rights." *Agrawal*, 726 F.3d at 250 (rejecting challenge to inaccurate jury instructions on plain error review).

## POINT III

## Shea's Sentence Was Procedurally and Substantively Reasonable

### A. Relevant Facts

At Shea's sentencing, the District Court calculated an advisory range under the United States Sentencing Guidelines (the "Guidelines") of 108 to 135 months' imprisonment, consistent with the Presentence Report. (A. 465-66; *see also* PSR ¶¶ 76-90).[6] The District Court

---

[6] As the Government noted at sentencing (A. 466), a new section of the Guidelines that was scheduled to (and later did) take effect in November 2023 provided an additional two-level reduction to certain defendants who, like Shea, had no criminal history. The District Court acknowledged the upcoming amendment and stated that it had considered it at

then heard from the Government, defense counsel, and Shea himself regarding the appropriate sentence. (A. 466-79). The District Court next described, accurately, the factors it was required to consider under 18 U.S.C. § 3553(a), and noted that it had "given substantial thought and attention to the appropriate sentence in light of the Section 3553(a) factors and the purposes of sentencing as reflected in the statute." (A. 479-80). The District Court explained its view that "Mr. Shea committed a serious offense," which the District Court described at length. (A. 480-83). But the District Court noted that, "on the other hand," there were mitigating factors, including Shea's lack of any criminal history and his strong network of supportive family and friends. (A. 483-84). The District Court also gave Shea credit—notwithstanding his having twice gone to trial —for having "taken responsibility for his actions to a certain degree." (A. 484). The District Court further noted the sentences it had imposed on two of Shea's co-defendants, and discussed their relative culpability:

> I've also considered the sentences of Mr. Shea's co-defendants. The Court previously sentenced Mr. Kolfage to 51 months' imprisonment, and Mr. Badolato to 36 months' imprisonment. However, both Mr. Kolfage and Mr. Badolato had

---

sentencing. (A. 479 ("I want to make clear that I have considered the upcoming amendment which reduces the guidelines range to 87 to 108 months' imprisonment. That of course is not yet in effect, but it is something that I have considered.")).

> severe medical conditions which were extremely strong mitigating factors during their sentences.
>
> Lastly, the Court has assessed the role that Mr. Shea played in the overall scheme. The government states that Mr. Shea certainly was less critical to the scheme than either Mr. Badolato or Mr. Kolfage.

(A. 484).

The District Court stated the intention to impose a sentence that would simultaneously "credit Mr. Shea for his good qualities" while recognizing "the seriousness of his crimes." (A. 484-85). On balance, the District Court decided "that a sentence below the guidelines range is merited," and imposed concurrent sentences of 63 months' imprisonment on each count of conviction. (A. 485).

### B. Applicable Law

This Court's "review of criminal sentences includes both procedural and substantive components and amounts to review for abuse of discretion." *United States v. McIntosh*, 753 F.3d 388, 393-94 (2d Cir. 2014) (per curiam). "Procedural error occurs in situations where, for instance, the district court miscalculates the Guidelines; treats them as mandatory; does not adequately explain the sentence imposed; does not properly consider the § 3553(a) factors; bases its sentence on clearly erroneous facts; or deviates from the Guidelines without explanation." *Id.* at 394; *see also Gall v. United States*, 552 U.S. 38, 51 (2007).

If there was no procedural error, this Court "should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Gall*, 552 U.S. at 51. This review "take[s] into account the totality of the circumstances, giving due deference to the sentencing judge's exercise of discretion, and bearing in mind the institutional advantages of district courts." *United States v. Cavera*, 550 F.3d 180, 190 (2d Cir. 2008) (en banc). A district judge can rely at sentencing on his or her "own sense of what is a fair and just sentence under all the circumstances," *United States v. Jones*, 460 F.3d 191, 195 (2d Cir. 2006), and this Court does not substitute its own judgment for that of the district court, *Cavera*, 550 F.3d at 189. This Court therefore will "set aside a district court's *substantive* determination only in exceptional cases where the trial court's decision 'cannot be located within the range of permissible decisions.'" *Id.* (quoting *United States v. Rigas*, 490 F.3d 208, 238 (2d Cir. 2007)).

A defendant arguing substantive unreasonableness "bears a heavy burden because . . . review of a sentence for substantive reasonableness is particularly deferential." *United States v. Broxmeyer*, 699 F.3d 265, 289 (2d Cir. 2012). This Court will identify "as substantively unreasonable only those sentences that are so 'shockingly high, shockingly low, or otherwise unsupportable as a matter of law' that allowing them to stand would 'damage the administration of justice.'" *Id.* (quoting *United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009)). The "particular weight to be afforded aggravating or mitigating factors is a matter firmly committed to the discretion of the sentencing judge." *Id.*

### C. Discussion

Shea received a sentence substantially below the range recommended by the Guidelines. He now challenges that sentence based on the "disparities among the sentences imposed on appellant as compared with his co-defendants." (Br. 47). That challenge, whether construed as procedural or substantive, is without merit.

As a procedural matter, arguing that the District Court failed to consider alleged disparities in the sentences of Shea's co-defendants is "a nonstarter." *United States v. Bryant*, 976 F.3d 165, 180 (2d Cir. 2020) ("We have "repeatedly made clear that section 3553(a)(6) requires a district court to consider *nationwide* sentence disparities, but does not require a district court to consider disparities between co-defendants."); *see also United States v. Alcius*, 952 F.3d 83, 89 (2d Cir. 2020) ("There is no requirement that a district court consider or explain sentencing disparities among codefendants."). Moreover, the District Court *did* consider, and *did* explain, the difference between the sentences imposed on Shea and his co-defendants. (*See* A. 484). Particularly given that the District Court considered Shea's arguments about the sentences imposed on his co-defendants, but was simply unpersuaded by them, Shea cannot establish procedural error. *See, e.g.*, *United States v. Clinton*, 820 F. App'x 34, 37 (2d Cir. 2020).

Nor can Shea meet the heavy burden of establishing that his sentence was substantively unreasonable. He effectively concedes this in admitting that his sentence was not "shocking" (Br. 44), because to be

substantively unreasonable, the sentence would have to be "shockingly high," or "otherwise unsupportable as a matter of law." *Broxmeyer*, 699 F.3d at 289. In any event, the District Court's sentence was far from an abuse of discretion: the substantially below-Guidelines sentence, for a long-term fraud and money laundering scheme and obstruction of justice, was grounded in the applicable sentencing factors. It was both reasoned and reasonable, and plainly falls within the range of permissible decisions to which this Court should defer. *See Cavera*, 550 F.3d at 189; *United States v. Perez-Frias*, 636 F.3d 39, 43 (2d Cir. 2011) (because "[i]n the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances," it is "difficult to find that a below-Guidelines sentence is unreasonable").

To the extent Shea is asserting that it was substantively unreasonable for the District Court to impose a sentence higher than his co-defendants' sentences, this argument errs. Sentencing disparities among co-defendants are not "unwarranted" where, as here, the co-defendants are not similarly situated. Shea proceeded to trial (twice) instead of pleading guilty, as his co-defendants did. *See, e.g.*, *Alcius*, 952 F.3d at 89 (defendant not similarly situated to her codefendant where, among other things, codefendant pled guilty and defendant went to trial); *United States v. Aller*, 384 F. App'x 34, 36 (2d Cir. 2010) ("[A]ppellant is not similarly situated to his co-defendants for various reasons—not the least of which is that appellant refused to cooperate with authorities and insisted on going to trial."). Moreover, the District Court found that the

"severe medical conditions" of Shea's co-defendants "were extremely strong mitigating factors." (A. 484). Shea thus cannot show that it was substantively unreasonable for him to receive a lengthier sentence than his differently situated co-defendants. *See, e.g.*, *United States v. Gershman*, 31 F. 4th 80, 107-08 (2d Cir. 2022) (rejecting substantive reasonableness challenge based on sentencing disparities with codefendant); *United States v. Ahmed*, No. 21-2820, 2023 WL 193623, at *2-3 (2d Cir. Jan. 17, 2023) (summary order) (same); *United States v. Sisnero-Gil*, No. 20-4102, 2022 WL 289319, at *2 (2d Cir. Feb. 1, 2022) (summary order) (same); *United States v. Bailey*, 820 F. App'x 57, 62 (2d Cir. 2020) (rejecting argument that sentence was substantively unreasonable "based on the comparatively shorter sentenced received" by the defendant's coconspirators).

Shea's challenge boils down to an argument that the District Court did not place enough weight on the sentences of his co-defendants. But this Court "will not second guess the weight (or lack thereof) that the judge accorded to a given factor or to a specific argument made pursuant to that factor." *United States v. Pope*, 554 F.3d 240, 247 (2d Cir. 2009). Shea's disagreement with the way the District Court balanced the competing sentencing factors thus "is not a sufficient ground for finding an abuse of discretion." *United States v. Roney*, 833 F. App'x 850, 853 (2d Cir. 2020); *see also, e.g.*, *United States v. Cuthbert*, 466 F. App'x 46, 47 (2d Cir. 2012) ("That the court did not weigh [mitigating factors] as heavily in [the defendant's] favor as he would have liked does not make the sentence substantively unreasonable, nor does it transform this case

into one of the exceptional cases where the trial court's decision cannot be located within the range of permissible decisions.").

## CONCLUSION

**The judgment of conviction should be affirmed.**

Dated: New York, New York
March 8, 2024

Respectfully submitted,

DAMIAN WILLIAMS,
*United States Attorney for the Southern District of New York,*
*Attorney for the United States of America.*

ROBERT SOBELMAN,
DEREK WIKSTROM,
HAGAN SCOTTEN,
*Assistant United States Attorneys,*
*Of Counsel.*

## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of the Federal Rules of Appellate Procedure and this Court's Local Rules. As measured by the word processing system used to prepare this brief, there are 10,118 words in this brief.

DAMIAN WILLIAMS,
*United States Attorney for the Southern District of New York*

By: HAGAN SCOTTEN,
*Assistant United States Attorney*