No.

IN THE
SUPREME COURT OF THE UNITED STATES

AARON HICKS

PETITIONER

v.

UNITED STATES,

RESPONDENT

On Petition for a Writ of Certiorari to the
United States Court of Appeals,
Second Circuit

PETITION FOR WRIT OF CERTIORARI

Jamesa J. Drake
Drake Law, LLC
P.O. Box 56
Auburn, Maine 04212
jdrake@drakelawllc.com

Counsel for Petitioner

Questions Presented

1. When a co-defendant is represented by counsel who previously represented the defendant, thereby creating an actual conflict of interest, may a court cure the conflict by severing the cases rather than disqualifying counsel?

2. Did the government's unfettered use of acquitted conduct to prove the defendant's guilt violate the issue preclusion component of the Double Jeopardy Clause?

List of Parties

All parties appear in the caption of the case on the cover page.

Petition for a Writ of Certiorari

Petitioner Aaron Hicks respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit.

Opinion Below

The opinion of the Second Circuit under review is reported at *United States v. Hicks*, 5 F.4th 270 (2d Cir. 2021).

Statement of Jurisdiction

The Second Circuit issued its decision on July 16, 2021. On July 30, 2021, Hicks timely filed a petition for rehearing or, in the alternative, for rehearing *en banc*. (CA2 Dkt. No. 144). On September 10, 2021, the Second Circuit summarily denied Hicks's petition. The time within which to file a petition for a writ of certiorari extends until December 9, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Constitutional Provisions

The Fifth Amendment to the U.S. Constitution provides in pertinent part that: "No person shall be…subject for the same offense to be twice put in jeopardy of life or limb…."

Table of Contents

Questions Presented ..... *i*

List of Parties ..... *ii*

Petition for a Writ of Certiorari ..... *iii*

Opinion Below ..... *iii*

Statement of Jurisdiction ..... *iii*

Constitutional Provisions ..... *iii*

Statement of the Case *1*

I. Proceedings in the District Court 1

A. Severance 2

B. Issue Preclusion 5

II. The Second Circuit's Decision 6

Reasons for Granting the Writ *9*

I. The Second Circuit's decision regarding severance cannot be reconciled with two strands of this Court's case-law. 9

A. Although a criminal defendant does not have a "right" to a joint trial, this Court's case-law makes very clear that joint trials are highly favored. 9

B. This Court's case-law makes equally clear that a criminal defendant's right to counsel of choice is never absolute and must yield when there exists an actual conflict of interest. 10

C. This case provides an excellent vehicle for further instruction by this Court. 11

II. The Second Circuit's decision regarding issue preclusion is likewise inconsistent with this Court's case-law. 15

Conclusion 22

Table of Authorities

Cases

Allen v. United States, 164 U.S. 492 (1896) 5

Allen v. United States, 164 U.S. 492 (1986) 20

Ashe v. Swenson, 397 U.S. 436 (1970).....15

Currier v. Virginia, 138 S.Ct. 2144 (2018).....15, 16, 18

Dowling v. United States, 493 U.S. 342 (1990) 17, 18

Richardson v. Marsh, 481 U.S. 200 (1987) 9

Sattazahn v. Pennsylvania, 537 U.S. 101 (2003) 15

United States v. Alfonso, 158 Fed. Appex. 356 (2d Cir. 2005) 13

United States v. Arrington, 941 F.3d 24 (2d Cir. 2019) 4, 5, 10

United States v. Cala, 521 F.2d 605 (2d Cir. 1975).....15

United States v. Curcio, 680 F.2d 881 (2d Cir. 1982)..... 4

United States v. Dabney, 498 F.3d 455 (7th Cir. 2007) 14

United States v. Frederick, 702 F.Supp.2d 32 (E.D.N.Y. 2009).....14

United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) 10

United States v. Gotti, 459 F.3d 296 (2d Cir. 2006) 13

United States v. Hicks, 2018 WL 4057526, *1 (2d Cir. 2018) ..... passim

United States v. McClain, 377 F.3d 219 (2d Cir. 2004).....13

United States v. McGowan, 58 F.3d 8 (2d Cir. 1995) 7

United States v. Salameh, 152 F.3d 88 (2d Cir. 1998) 2

United States v. Zemlyansky, 908 F.3d 1 (2d Cir. 2018)..... 7

Wheat v. United States, 486 U.S. 153 (1988) 10

Zafiro v. United States, 506 U.S. 534 (1993 9

Statutes

18 U.S.C. § 1962(d) 1

18 U.S.C. § 924(c)(1)(A)(i) 2

18 U.S.C. § 924(c)(2) 2

21 U.S.C. § 846..... 2

Constitutional Provisions

U.S. Const. amend. V.....14

Statement of the Case

I. Proceedings in the District Court

According to the government, Aaron Hicks was a member of a drug-trafficking gang dubbed the "Schuele Boys," which from 2010 to 2014, peddled marijuana, cocaine and cocaine base on the east side of the City of Buffalo. Hicks and other gang members arranged for hundreds of kilograms of cocaine and multiple pounds of marijuana to be transported from Texas and resold in Buffalo. Also, Hicks and others planned and committed a retaliatory murder against Quincy Balance, whom they believed murdered Walter Davison, a Schuele Boys associate and close friend of Hicks. Hicks denied selling cocaine and cocaine base, and he maintained that his low-level marijuana dealing was unconnected to any criminal enterprise.

On June 19, 2015, the government filed a superseding indictment to allege, in Count 1, a racketeering conspiracy with Hicks, Marcel Worthy, Roderick Arrington, LeTorrance Travis, and Julio Contreras.[1] (A-51). The superseding indictment listed forty-one overt acts that some

[1] In violation of 18 U.S.C. § 1962(d).

or all of the defendants allegedly committed in furtherance of that conspiracy. (A-55-62). Count 2 alleged a narcotics distribution conspiracy among those defendants.[2] (A-63-64). Count 3 charged that defendants (except for Contreras) possessed a firearm as overt acts for the racketeering or drug conspiracies.[3] (A-64-65).

A. Severance

On May 12, 2016, Contreras moved to sever his case from those of his codefendants. (SPA-4). On November 1, 2016, the District Court denied that motion because "the preference for [a] joint trial is 'particularly strong' (and the basis for severance is particularly weak) where codefendants 'are alleged to have participated in a common plan or scheme.'" (SPA-7) (citing *United States v. Salameh*, 152 F.3d 88, 115 (2d Cir. 1998)). The court further reasoned that all of the defendants "are alleged to have engaged in related or overlapping conspiracies that…spanned a number of years" and "[t]rying the same case twice is inefficient…when, as in this case, severance would require trying large, complex, and overlapping conspiracy cases multiple times." (SPA-8).

---

[2] In violation of 21 U.S.C. § 846.

[3] In violation of 18 U.S.C. § 924(c)(1)(A)(i) and (2).

On August 28, 2017, Travis pleaded guilty; he was principally sentenced to 120 months' prison.[4] On August 31, 2107, Contreras pleaded guilty; he was principally sentenced to 121 months' imprisonment.[5]

Jury selection for the joint trial of the remaining codefendants was scheduled to begin on September 7, 2017. On September 3, 2017, Hicks moved to disqualify Arrington's attorney, Andrew LoTempio, on the ground that he had an actual conflict of interest stemming from his prior representation of Hicks in a matter referenced as an overt act in the superseding indictment, *e.g.* Hicks's alleged receipt of a parcel from UPS containing thirty-three pounds of marijuana. (Dkt. No. 197, p. 1, 3). Hicks argued that the conflict of interest was either unwaivable or a conflict that he was unwilling to waive. (*Id.* at 1, 5).

---

[4] *See* ECF Dkt. 1:15-cr-00033-RJA-HBS-4, Entry No. 184 (plea agreement entered and change of plea hearing held on August 28, 2017); Entry 07/11/2018 (defendant principally sentenced to 120 months' prison).

[5] *See* ECF Dkt. 1:15-cr-00033-RJA-HBS-5, Entry No. 194 (plea agreement entered and change of plea hearing held on August 31, 2017); Entry 10/12/2018 (defendant principally sentenced to 121 months' prison).

On September 5 and 6, 2017, the district court held a *Curcio* hearing to address the conflict arising from LoTempio's prior representation of Hicks. *United States v. Curcio*, 680 F.2d 881 (2d Cir. 1982). During that hearing, LoTempio suggested that the district court sever Arrington's case from Hicks's case. (A-95). Hicks objected to a severance, and the government doubted whether a severance could cure the conflict of interest that LoTempio's involvement created for both Hicks and Arrington. (A-129-132). The district court severed the trials anyway and arranged to immediately try Arrington and Worthy. (A-135-37). Worthy pleaded guilty on the first morning of jury selection; he was principally sentenced to 240 months' imprisonment.[6]

This left Arrington to be tried alone. Arrington was ultimately convicted of a multitude of charges, and he appealed to the Second Circuit. The Second Circuit recognized that LoTempio's involvement in the trial gave rise to a conflict with both Hicks and Arrington. *United States v. Arrington*, 941 F.3d 24, 41-42 (2d Cir. 2019). It vacated

---

[6] *See* ECF Dkt. 1:15-cr-0003-RJA-HBS-2, Entry No. 215 (plea agreement entered and change of plea hearing held on September 11, 2017); Entry 6/28/2018 (defendant principally sentenced to 240 months' prison).

Arrington's convictions and remanded his case for a new trial, reasoning that Arrington did not knowingly or intelligently waive LoTempio's conflict. *Id.* at 42-43.

B. Issue Preclusion

Hicks's two-and-a-half week jury trial took place shortly after Arrington's. Testifying in his own defense, Hicks admitted to low-level marijuana dealing, but denied membership in the Schuele Boys enterprise. After two lengthy days of deliberation, and an *Allen* charge, the jury returned a mixed verdict. *Allen v. United States*, 164 U.S. 492, 501 (1896). The jury was deadlocked on Count 1, the racketeering conspiracy charge, and the district court declared a mistrial on that count. On Count 2, the narcotics conspiracy charge, the jury found Hicks guilty, but only with regard to marijuana.[7] The parties agreed that the jury acquitted Hicks of cocaine and cocaine base conspiracies. The jury also acquitted Hicks of Count 3, the firearms charge.

---

[7] The jurors received a special verdict form, which asked them to indicate the type of controlled substance(s) that Hicks allegedly conspired to possess with intent to distribute or to distribute. The options were cocaine, cocaine base, and marijuana. On the verdict form, the jury only checked "marijuana" and wrote nothing next to "cocaine" or "cocaine base." (A-1784).

Following the verdict, Hicks argued that the jury's partial acquittal on the narcotics conspiracy charge limited the proof that the Government could introduce in any retrial of the racketeering conspiracy charge. (A-1801-2). Concluding that the issue preclusion component of the Double Jeopardy Clause did not prevent the government from introducing, on retrial, evidence concerning the cocaine or cocaine base conspiracies, the district court denied defendant's motion. (SPA-29-35).

The government retried Hicks on the racketeering conspiracy charge, and the second jury convicted him. Hicks did not testify at his second trial. The district court principally sentenced Hicks to 360 months' imprisonment and it ordered him to forfeit $10.6 million dollars. (SPA-38, A-3007).[8]

II. The Second Circuit's Decision

The Second Circuit affirmed Hicks's convictions. Insofar as the severance issue was concerned, the court reasoned that Hicks had no "discernible right" to a joint trial with Arrington and, "in the absence of a clear right to a joint trial faced with an unpalatable alternative that

[8] Cocaine and cocaine-base evidence was attributed to Hicks to support the forfeiture amount.

potentially would have violated Arrington's Sixth Amendment right to counsel of his choice, it was not an abuse of discretion for the district court to sever the trials." *Hicks*, 5 F.4th at 279.

Regarding issue preclusion, the court acknowledged that it "precludes the government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial." *Id.* at 275 (quoting *Yeager v. United States*, 557 U.S. 110, 119 (2009). But, the court said, "Hicks's involvement in any particular cocaine or cocaine base transaction was not a fact 'necessarily decided in his favor by a prior verdict,'" and because the government did not introduce evidence of Hicks's prior cocaine trafficking with the "specific purpose" of proving that Hicks joined a cocaine conspiracy, the district court did not err by permitted evidence of cocaine or cocaine base trafficking as proof of Hicks's participation in the racketeering conspiracy. *Id.* at 276 (quoting *United States v. McGowan*, 58 F.3d 8, 12 (2d Cir. 1995) and *United States v. Zemlyansky*, 908 F.3d 1, 11 (2d Cir. 2018), respectively).

The Second Circuit further concluded that "[a]lthough a close call," the government's remarks during summation, which Hicks maintains encouraged the jurors to find that Hicks became a member of the

racketeering conspiracy in order to sell cocaine, was not problematic because the government did not "seek 'to reuse the [acquitted conduct] evidence for the *specific purpose* of proving conduct of which he was previously acquitted.'" *Id.* at 277 (quoting *Zemlyansky*, 908 F.3d at 13).

Lastly, the court reasoned that any error was harmless because "there was strong evidence that Hicks and other Schuele Boys gang members were involved in Balance's murder, the distribution of marijuana, and the use of firearms. So the jury's verdict was amply supported by evidence separate and apart from the challenged evidence of Hicks's participation in a cocaine conspiracy with Contreras." *Id.* at 278.

Hicks timely filed a petition for rehearing, or, in the alterantive, for rehearing *en banc*. (CA2 Dkt. No. 146). The Second Circuit summarily denied that request by order dated September 10, 2021.

Reasons for Granting the Writ

I. The Second Circuit's decision regarding severance cannot be reconciled with two strands of this Court's case-law.

The Second Circuit erroneously framed the issue as a contest between one defendant with no right to a joint trial versus a co-defendant with a right to counsel of his choosing. With regards to both sides of the ledger, the Second Circuit was wrong.

A. Although a criminal defendant does not have a "right" to a joint trial, this Court's case-law makes very clear that joint trials are highly favored.

For decades, this Court has recognized the virtue of joint trials for codefendants. There is a strong preference for the joint trial of defendants who have been indicted together, and guidance from this Court dictates that a trial court should sever cases only where there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants or prevent the jury from making a reliable judgment about guilt or innocence. *Zafiro v. United States*, 506 U.S. 534, 539 (1993). In fact, severance is appropriate only if no other "less drastic measures" will suffice to cure any risk of prejudice. *Id.* at 539; *Richardson v. Marsh*, 481 U.S. 200, 210 (1987). As between disqualification and

severance of complicated multi-week trials involving the same alleged enterprise, disqualification was the far less drastic option.

The Second Circuit's observation that Hicks had no "discernible right" to a joint trial with Arrington is true, *Hicks*, 5 F.4th at 279, but respectfully, it misses the point entirely and ignores this Court's consistent instruction that joint trials are strongly favored.

B. This Court's case-law makes equally clear that a criminal defendant's right to counsel of choice is never absolute and must yield when there exists an actual conflict of interest.

The Second Circuit's suggestion that Arrington had a countervailing right to LoTempio's representation is plainly wrong. This is so for two reasons. *One*, a criminal defendant's right to counsel of his or her own choosing is never absolute; often, choice-of-counsel decisions must yield (and very often do yield) to other considerations. *See e.g. United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006) ("To be sure, the right to counsel of choice "is circumscribed in several important respects.") (quoting *Wheat v. United States*, 486 U.S. 153, 159 (1988)). One such circumstance is the existence of an actual conflict of interest; when a court finds an actual conflict of interest, it may deny

representation by the counsel-of-choice. *Wheat*, 486 U.S. at 162. The court may – as Hicks requested – disqualify the attorney. *Id.* at 162-63.

Two, the record does not support the notion that LoTempio was Arrington's counsel of choice. In fact, the Second Circuit reversed Arrington's conviction because he did not knowingly and intelligently select LoTempio as his attorney, with complete knowledge of how LoTempio's prior representation of Hicks would disadvantage Arrington's own case. *United States v. Arrington*, 941 F.3d 24, 42-44 (2d Cir. 2019). It's certainly possible that with a full understanding, disqualification is what Arrington would have wanted.

C. This case provides an excellent vehicle for further instruction by this Court.

Because the district court failed to disqualify LoTempio, Hicks was forced to abandon his trial strategy of relative guilt and devise an entirely new strategy in short order. Hicks was also deprived of the bolstering effect that Arrington's case would have had on important aspects of his own case; to a very large degree, their defenses were synchronized. And, severance made it possible for the government to present damning evidence against Hicks that otherwise would have been unavailable to it. The splintered verdict returned by Hicks's first jury strongly suggests

that it was underwhelmed by the government's case. It is impossible to conclude that none of these things would have impacted the outcome.

First, as Hicks argued in the district court, a joint trial enables the jury to assess relative culpability, and the jury may well have decided that Hicks's alleged position as a drug dealer paled in comparison to Arrington's alleged position as a cold-blooded killer. Severance forced Hicks to devise an entirely new trial strategy; the record suggests that Hicks's original theme was one of relative culpability – one that he obviously could no longer present if he was the sole defendant on trial.

Second, although Arrington and Hicks were, in some areas, antagonistic towards one another (which is hardly unusual in multi-defendant matters and not itself sufficient cause for severing the cases, *Zafiro*, 506 U.S. at 538-39), to a very large degree, their defenses would have bolstered one another.

Like Hicks, Arrington denied the existence of an organization named the "Schuele Boys." Arrington stridently echoed Hicks's argument that the Government's case was nothing more than an indictment against the entire neighborhood. Arrington had an explanation for Hicks's low-level drug dealing in college that seemingly

favored Hicks. Arrington denied that he was an enforcer for Hicks or the Schuele Boys and he denied offering to kill someone to avenge Davison's death. Arrington also pressed the point that Hicks had no advanced knowledge that Balance and Hunter would flag down his car moments before Balance was killed. Without question, the Hicks would have benefited from Arrington's counsel reinforcing the very same arguments he made to the jurors.

Third, severance enabled the government to admit evidence that would have been unavailable to it had the trials been joined. The government presented testimony from three prosecutors or former prosecutors – Kristin St. Mary, John Schoemick and Lauren Nash – regarding Hicks's pleas of guilty to three incidents listed in the superseding indictment as overt acts. These witnesses read into the record the transcript of the plea hearing corresponding to each overt act. None of this evidence would have been admissible in a joint trial. The government explained it best in its supplemental memorandum on the subject:

> The Second Circuit in *United States v. Gotti*, indicated that it was error to admit guilt pleas of one defendant against a codefendant. 459 F.3d 296, 343 (2d Cir. 2006); *see also*

United States v. McClain, 377 F.3d 219, 222 (2d Cir. 2004). The Second Circuit's concern with the Confrontation Clause, however, is where a plea allocution of a co-conspirator was admitted as evidence against another defendant. *See McClain supra*; *United States v. Alfonso*, 158 Fed. Appex. 356 (2d Cir. 2005). In the instant matter, this Court has severed the trial of [Hicks] from that of his codefendants. The guilty pleas at issue in this case were all made by only this defendant. Based on this Court's severance order, there is no longer a danger in violating a codefendant's right to confront witnesses.

At a trial of multiple defendants, a defendant's guilty plea would be inadmissible because it would violate the Confrontation Clause with respect to the codefendants. Since this trial concerns only a single defendant and witnesses who were actually present during the entering of the plea will testify, the defendant's guilty pleas should be admitted. *See United States v. Dabney*, 498 F.3d 455, 458-59 (7th Cir. 2007); *United States v. Frederick*, 702 F.Supp.2d 32, 36-37 (E.D.N.Y. 2009) (collecting cases). The defendant's in court statements should be treated like an admission in any other form.

(ECF Dkt. No. 231, p. 2-3). Objecting to severance, Hicks repeatedly cited to *Gotti*.

Severance is a "drastic" option. When in doubt, a district court should err on the side of disqualification; here, disqualification was appropriate. Respectfully, the district court devised a cure in this case that made matters worse. Fidelity to this Court's case-law required the Second Circuit to vacate Hicks's convictions. As of this filing date (and likely for quite some time into the future), Arrington's case sits on the district court's docket in a pretrial posture.

II. The Second Circuit's decision regarding issue preclusion is likewise inconsistent with this Court's case-law.

The Double Jeopardy Clause protects individuals from being "twice put in jeopardy of life or limb" "for the same offense." U.S. Const. amend. V. Once a defendant is placed in jeopardy, and jeopardy terminates, "the defendant may neither be tried nor punished a second time for the same offense." *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106 (2003).

The issue-preclusion component of the Double Jeopardy Clause prohibits the Government from re-litigating issues necessarily resolved in a defendant's favor at an earlier trial presenting factually related offenses. *Ashe v. Swenson*, 397 U.S. 436, 445-46 (1970); *Currier v. Virginia*, 138 S.Ct. 2144, 2150 (2018) ("*Ashe* forbids a second trial only if to secure a prosecution the prosecution must prevail on an issue the jury

necessarily resolved in the defendant's favor in the first trial.") The burden is on the defendant "to establish that the issue he seeks to foreclose from litigation…was necessarily decided in his favor by the prior verdict." *United States v. Cala*, 521 F.2d 605, 608 (2d Cir. 1975). Respectfully, the Second Circuit failed to heed this instruction.

Hicks's first jury found that Hicks was not a member of a cocaine or cocaine-based conspiracy (the "narcotics conspiracy") with the co-defendants named in the superseding indictment. At Hicks's second trial, the government sought to prove that Hicks and his co-defendants were involved in a racketeering conspiracy involving murder and narcotics trafficking (specifically, cocaine, cocaine base, heroin and marijuana).

Hicks pauses to note two things. Because the racketeering scheme involved more than just cocaine and cocaine base trafficking, Hicks could still be liable for racketeering conspiracy even if he had nothing to do with cocaine-related trafficking. And, because Hicks's first jury made no finding about Hicks's intent to further the Schuele Boys racketeering scheme (or whether a pattern of racketeering activity existed), the

government was not precluded from re-trying the racketeering conspiracy charge. Hicks concedes those points, as he must.

However, none of this means that, at retrial, the government had unfettered use of evidence regarding the acquitted narcotics conspiracy. To the contrary, the acquittal obligated the government to use such evidence with careful regard for its limited purpose. That did not happen.

"Issue preclusion bars only a subset of trials – those in which the prosecution rests its case on a theory of liability a jury earlier rejected." *Currier*, 138 S.Ct. at 2162. Nevertheless, here, the government erroneously utilized the very same cocaine and cocaine-base evidence it had at Hicks's first trial, just as if the first trial had never taken place. The government repeatedly suggested to the jurors that the acquitted conduct could be used for an impermissible purpose: to establish that Hicks joined the Schuele Boys' racketeering scheme by reference to the evidence that he committed, or conspired to commit, cocaine or cocaine-base trafficking. The government took the erroneous position before the trial began that it could use acquitted conduct to establish Hicks's participation in the racketeering conspiracy, and during summation, the government repeatedly invited the jurors to find that Hicks joined the

racketeering conspiracy so that he could sell cocaine. At one point, the government even went so far to suggest that Hicks *created* the racketeering conspiracy so that he could traffic cocaine. None of this was appropriate because it encouraged the jurors to use acquitted conduct for an impermissible purpose.

Dowling v. United States, 493 U.S. 342 (1990), is instructive. In that case, this Court recognized that the introduction of acquitted conduct in a subsequent trial "has the potential to prejudice the jury or unfairly force the defendant to spend time and money relitigating matters considered at the first trial." *Id.* at 352. To combat this, this Court approved of "limiting instructions by the trial judge." *Id.* at 353. In *Dowling*, after a witness testified to the acquitted conduct, the district court told the jurors that the defendant had been acquitted of that conduct and emphasized the limited purpose for which the evidence was being offered. *Id.* at 346. The district court reiterated that admonition in its final charge to the jury." *Id.* No such limiting instruction was provided here. *See Currier*, 138 S.Ct. at 2165 (Ginsburg, J., dissenting) (suggesting that "at a minimum" such an instruction is required).

Respectfully, the Second Circuit's analysis is wrong and cannot be reconciled with either the record below or this Court's case-law. The Second Circuit acknowledged that "[a]t retrial, the government relied on substantially the same evidence that it had presented during the first trial." *Hicks*, 5 F.4th at 274. This alone should have set off warning bells. In addition to introducing all the same evidence, the government in summation used that evidence for an impermissible purpose, and the jury never received any correcting or limiting instruction from the district court. Eliding all that, the Second Circuit accused Hicks of "ignor[ing] the important difference for a double jeopardy claim between a substantive crime and a crime of conspiracy." *Id.* at 276. Not so. The superseding indictment alleged substantive charges as racketeering predicates: a narcotics conspiracy involving cocaine and cocaine base with the named co-defendants, and firearms possession. Hicks was acquitted of both a narcotics conspiracy involving cocaine and cocaine base and of firearms possession, meaning that the first jury found that Hicks did *not* commit the same substantive charges that were *also* alleged as racketeering predicates. And yet, the government altogether ignored the preclusive effect that the first jury's verdict had, and it

introduced and emphasized the same (rejected) evidence in support of its theory that Hicks's involvement in cocaine trafficking proved he joined the Schuele Boys.

Compounding the problem, building on a supposed distinction between "a substantive crime and a crime of conspiracy," the Second Circuit found no error because "the government was under no obligation to show that Hicks committed or agreed to commit any of the predicate acts charged in the RICO conspiracy count." *Id.* at 278. While technically true, this reasoning altogether ignores the way in which the government utilized the acquitted-conduct evidence: to establish Hicks's membership in (or, perhaps, even creation of) the Schuele Boys racketeering conspiracy.

Lastly, the Second Circuit intimated that any error was harmless because the government presented "strong evidence" of Hicks's guilt:

> At the first trial and the retrial, there was strong evidence that Hicks and other Schuele Boys gang members were involved in Balance's murder, the distribution of marijuana, and the use of firearms. So the jury's verdict was amply supported by evidence separate and apart from the challenged evidence of Hicks's participation in a cocaine conspiracy with Contreras. We therefore conclude that the Government's arguably objectionable (but unobjected to) summation comments did not impact the outcome of Hicks's retrial or affect his substantial rights.

Id. at 278. Respectfully, in reaching this conclusion, the court again ignored important record evidence, principally the government's seeming concession at oral argument that any error was structural in nature, *see* Oral arg. 22:03-22:30, 28:48-29:00, and secondarily, the overwhelming proof that neither Hicks's first nor second jury was impressed with the Government's case.

Moreover, even assuming that a structural error analysis is inapt (the government's concession notwithstanding), Hicks's cannot emphasize strongly enough that this was a very close case. Hicks's first jury received an *Allen* charge and returned a mixed verdict. *Allen v. United States*, 164 U.S. 492, 501 (1986). The district court remarked that the jury likely credited Hicks's testimony over the Government's case. Hicks's second jury also struggled. They repeatedly asked for read-backs of testimony and, mid-deliberations, a juror told the court, "we're not in total agreement back there." The record proves that even minor alterations to the presentation of the case could have impacted the verdict.

Conclusion

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,
AARON HICKS
By his attorney,

/s/ Jamesa J. Drake
JAMESA J. DRAKE
Counsel of Record
Drake Law LLC
P.O. Box 56
Auburn, ME 04212
(207) 330-5105
jdrake@drakelawllc.com

Appendix

United States v. Hicks, 5 F.4th 270 (2d Cir. 2021).....A

Order, dated September 10, 2021, denying Hicks's petition for rehearing, or, in the alternative, for rehearing en banc.....B

5 F.4th 270
United States Court of Appeals, Second Circuit.

UNITED STATES of America, Appellee,
v.
Aaron HICKS, aka Boog, aka
Boogy, Defendant-Appellant. *

Docket No. 19-590-cr
|
August Term, 2020
|
Argued: February 11, 2021
|
Decided: July 16, 2021

Synopsis

Background: Defendant was convicted in the United States District Court for the Western District of New York, No. 19-590-cr, Richard J. Arcara, Senior Judge, of marijuana conspiracy and, during retrial, on conspiracy under Racketeer Influenced and Corrupt Organizations (RICO) Act, and was sentenced to 360 months' imprisonment. Defendant appealed.

Holdings: The Court of Appeals, Lohier, Circuit Judge, held that:

charging component of Double Jeopardy Clause did not bar government from retrying defendant for RICO Act conspiracy;

issue preclusion component of Double Jeopardy Clause did not bar government from retrying defendant for RICO Act conspiracy; and

District Court did not abuse its discretion by severing defendant's trial from that of his co-defendant.

Affirmed.

Procedural Posture(s): Appellate Review.

***272** Appeal from the United States District Court for the Western District of New York (Arcara, J.)

Attorneys and Law Firms

Jamesa J. Drake, Drake Law LLC, Auburn, ME, for Defendant-Appellant Aaron Hicks.

Monica J. Richards, Assistant United States Attorney, for James P. Kennedy, Jr., United States Attorney for the Western District of New York, Buffalo, NY, for Appellee United States of America.

Before: PARKER, LOHIER, and MENASHI, Circuit Judges.

Opinion

LOHIER, Circuit Judge:

Aaron Hicks was retried on one count of conspiracy under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(d), after having been convicted in an earlier trial of participating in a marijuana trafficking conspiracy but acquitted of participating in a cocaine and cocaine base conspiracy and a related firearms charge. Before his first trial, Hicks ***273** moved to disqualify the attorney for one of his co-defendants because the attorney had previously represented Hicks in a related state court matter. The United States District Court for the Western District of New York (Arcara, J.) denied the motion. It elected instead to sever Hicks's trial from that of the co-defendant and proceeded to try Hicks alone. Hicks claims that this was an abuse of discretion. During the retrial, moreover, the District Court admitted evidence suggesting that Hicks had participated in the cocaine conspiracy notwithstanding his earlier acquittal. On appeal, Hicks argues that this violated his rights under the Double Jeopardy Clause.

We address two questions. First, did the District Court's decision to admit evidence of Hicks's involvement in cocaine or cocaine base trafficking during his retrial on the RICO conspiracy charge violate the prohibition against double jeopardy? Second, did the District Court err when it denied Hicks's motion to disqualify his co-defendant's counsel and instead severed Hicks's trial?

We answer each question in the negative and affirm the judgment of the District Court.

BACKGROUND

In 2015 Hicks, along with other defendants, was charged principally with conspiracy to distribute marijuana, cocaine, and cocaine base in violation of 21 U.S.C. § 846, possession of a firearm in furtherance of a crime of violence and a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A)(i), and RICO conspiracy in violation of 18 U.S.C. § 1962(d). Before trial, Hicks moved to disqualify co-defendant Roderick Arrington's counsel, Andrew LoTempio, on the ground that LoTempio had previously represented Hicks in a state court matter that, it turned out, the Government alleged was an overt act in furtherance of the RICO conspiracy charged in this case. The District Court held a Curcio hearing to probe the nature of LoTempio's potential conflict and to determine whether Arrington would waive the conflict. See United States v. Curcio, 680 F.2d 881 (2d Cir. 1982). After the hearing, Arrington waived the potential conflict, and the District Court accepted Arrington's waiver. [1]

The District Court nevertheless recognized that Arrington's waiver did not fully resolve the potential conflicts that might arise in a joint trial. If Hicks testified, the court observed, LoTempio could exploit his prior representation of Hicks to cross-examine him. To avoid this problem, LoTempio proposed severing Hicks's trial from Arrington's, while Hicks sought LoTempio's disqualification altogether. The District Court decided that severing the trials was the better option. Disqualifying LoTempio as Hicks proposed, it explained, would violate Arrington's Sixth Amendment right to be represented by the counsel of his choice.

Hicks was tried alone. At trial the Government sought to prove that Hicks was a member of a violent Buffalo-based drug-trafficking organization it called the "Schuele Boys." The Government introduced evidence that Hicks and other Schuele Boys members trafficked in marijuana, cocaine, and cocaine base. [2] For example, one cooperating government witness, Julio Contreras, ***274** testified that he started selling cocaine to Hicks, his main contact within the Schuele Boys, in late 2010, with an initial shipment of sixteen kilograms of cocaine from Texas to Buffalo. Contreras continued to transport cocaine routinely from Texas directly to Hicks until Contreras was arrested a year later, in November 2011. There was also evidence that Hicks, Arrington, and others plotted to murder Quincy Balance in retaliation for the murder of a Schuele Boys member. One witness testified that Hicks and others discussed murdering Balance, while another placed Hicks at the scene of Balance's murder.

The jury reached a mixed verdict. It found Hicks guilty of engaging in the marijuana conspiracy, but it acquitted him of conspiring to traffic in cocaine or cocaine base. [3] Hicks was also acquitted of the firearm possession charge. The jury was unable to reach a verdict on the RICO conspiracy count, as to which the District Court declared a mistrial. Hicks moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29. Because it was likely that he would be retried on the RICO conspiracy count, he also moved to exclude evidence of any cocaine or cocaine base trafficking in the retrial. Admitting the evidence, he claimed, would violate his double jeopardy rights.

The District Court denied both motions. On the motion to exclude evidence at the retrial, it explained that the jury could have concluded "that cocaine and cocaine base conspiracies existed but that [Hicks] was not a member of the conspiracies." Sp. App'x 35. Because double jeopardy attached only if the jury had necessarily decided both of those elements in Hicks's favor and because the retrial involved the very different charge of RICO conspiracy, the court reasoned, there was no basis to preclude evidence of the cocaine or cocaine base trafficking in Hicks's retrial.

Hicks was retried in 2018. At the retrial, the Government relied on substantially the same evidence that it had presented during the first trial. [4] In particular, it reintroduced evidence that Contreras regularly shipped cocaine from Texas to Hicks in Buffalo—the same evidence that it had used unsuccessfully in the first trial to convict Hicks of engaging in a cocaine conspiracy. The Government also emphasized the relationship between Contreras and Hicks in its summation, as follows: "Contreras told you that they became members, right; that he came up in November of 2010 with 16 kilograms of cocaine and they established what the prices were going to be and how they were going to be sold .... [T]hey established their agreement then. [Hicks] knew that he was ***275** a member, knew what he was getting into." App'x 2820.

The second jury convicted Hicks of the RICO conspiracy count. The District Court then sentenced Hicks principally to 360 months' imprisonment. This appeal followed.

DISCUSSION

Hicks challenges his RICO conspiracy conviction on double jeopardy grounds. He challenges his convictions for both marijuana conspiracy and RICO conspiracy on the ground that the District Court should not have severed his trial.

I

A

The Double Jeopardy Clause of the Fifth Amendment guarantees that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. "This guarantee recognizes the vast power of the sovereign, the ordeal of a criminal trial, and the injustice our criminal justice system would invite if prosecutors could treat trials as dress rehearsals until they secure the convictions they seek." Currier v. Virginia, —— U.S. ——, 138 S. Ct. 2144, 2149, 201 L.Ed.2d 650 (2018).

The clause has two components. The more familiar "charging" component derives from the Supreme Court's opinion in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), and governs the charges that the government may pursue against a criminal defendant. It "embodies a kind of 'claim preclusion' rule, [but] bears little in common with its civil counterpart." Currier, 138 S. Ct. at 2154. The charging component "asks whether each offense contains an element not contained in the other, and provides that, if not, they are the same offense and double jeopardy bars additional punishment." United States v. Garavito-Garcia, 827 F.3d 242, 250 (2d Cir. 2016) (quotation marks omitted).

The Government was not barred on double jeopardy grounds from retrying Hicks for RICO conspiracy. As Hicks concedes, the elements of the narcotics conspiracy of which he was acquitted and the elements of the RICO conspiracy count of conviction that he challenges on appeal differ substantially. A narcotics conspiracy that involves five or more kilograms of cocaine, as was alleged here, requires that the Government prove the existence of the conspiracy, that the defendant willfully joined it, and the drug quantity. See United States v. Taylor, 816 F.3d 12, 19 (2d Cir. 2016). The RICO conspiracy charged here, meanwhile, has the following elements: (1) "an agreement to join a racketeering scheme"; (2) "the defendant's knowing engagement in the scheme with the intent that the overall goals be effectuated"; and (3) "that the scheme involved, or by agreement between any members of the conspiracy was intended to involve, two or more predicate acts of racketeering." United States v. Zemlyansky, 908 F.3d 1, 11 (2d Cir. 2018). Because each offense contains at least one element not contained in the other, we are persuaded that the charging component of the Double Jeopardy Clause is not implicated here.

We therefore turn to the second component of double jeopardy, sometimes described as the "issue preclusion" component, which is more relevant to this appeal. It "precludes the Government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial." Yeager v. United States, 557 U.S. 110, 119, 129 S.Ct. 2360, 174 L.Ed.2d 78 (2009). Put another way, "a jury verdict that necessarily decided [an] issue in [a defendant's] favor protects him from prosecution for any charge for which that [issue] is an essential element." ***276** Id. at 123, 129 S.Ct. 2360. The defendant bears the burden of persuading "the court that the issue he seeks to foreclose was necessarily decided in his favor by the prior verdict." United States v. McGowan, 58 F.3d 8, 12 (2d Cir. 1995) (quotation marks omitted). The burden of persuasion "is particularly onerous where the acquittal in the first trial involves the crime of conspiracy." United States v. Clark, 613 F.2d 391, 400 (2d Cir. 1979). In a different but relevant context involving the first component of double jeopardy, for example, we have described how "[a] charge of a wide-ranging narcotics conspiracy consisting of numerous transactions is ... sufficiently distinct from a charge of a substantive violation based on a single sale" that the prohibition against double jeopardy permits both a prosecution for conspiracy and a prosecution based on the substantive sale. United States v. Ortega-Alvarez, 506 F.2d 455, 457–58 (2d Cir. 1974).

When the challenge is to the Government's use of evidence at a retrial, the defendant must show that the Government sought "to reuse the [challenged] evidence for the specific purpose of proving conduct of which he was previously acquitted." Zemlyansky, 908 F.3d at 13. We assess that challenge by examining "the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." Clark, 613 F.2d at 400 (quotation marks omitted).

As an initial matter, Hicks's argument that the Government was barred from reusing any evidence of cocaine or cocaine base trafficking is unavailing. Hicks was not charged with a substantive drug crime at his original trial. The Government therefore was not required to show that he bought or sold drugs for the jury to convict him of conspiring to do the same. The jury's verdict of acquittal as to the cocaine and cocaine base conspiracy charge reflects only that it found either that the conspiracy never existed or that Hicks never joined it. See Taylor, 816 F.3d at 19. In other words, Hicks's involvement in any particular cocaine or cocaine base transaction was not a fact "necessarily decided in his favor by the prior verdict." McGowan, 58 F.3d at 12 (quotation marks omitted). Nor (as we explain further below) does the Government appear to have introduced the challenged evidence of Hicks's prior cocaine trafficking with the "specific purpose" of proving that he had joined a cocaine conspiracy. See Zemlyansky, 908 F.3d at 13. The District Court was thus free to admit that evidence as proof of Hicks's participation in the RICO conspiracy.

Relying on United States v. Mespoulede, Hicks argues that he was retried in part on the acquitted conduct "just as if [the first] trial had never taken place." 597 F.2d 329, 335 (2d Cir. 1979). Because his argument ignores the important difference for a double jeopardy claim between a substantive crime and a crime of conspiracy, Hicks's reliance on Mespoulede is misplaced. In that case, the defendant was first acquitted of a substantive charge of narcotics possession arising from the sale of drugs on a specific date and then retried for conspiring to do the same. Id. at 330–31. This Court held that it was error to admit evidence that the defendant possessed cocaine on the same date. See id. at 335–36. We explained that "the Government was free to introduce new evidence of various illicit deals and to persuade the jury that it should infer the existence of a conspiracy from these transactions," but that the defendant could not be forced again "to confront an assertion that he possessed cocaine" on the relevant date. Id. at 335. Here, by contrast, the first jury ***277** was not required to find that Hicks was involved in specific drug transactions on specific dates.

Following up on the same theme, Hicks submits that the District Court also should have excluded evidence of the cocaine conspiracy itself, let alone his involvement in that conspiracy. But here again the existence of a cocaine conspiracy was not a fact necessarily decided by the jury in Hicks's favor. As the District Court observed, the jury could have found that the conspiracy existed but that Hicks had not joined it. And under those circumstances, the prohibition against double jeopardy would not prevent the Government from introducing (or the District Court from admitting) evidence of the conspiracy itself at Hicks's retrial. See Zemlyansky, 908 F.3d at 13–14.

B

Hicks raises similar double jeopardy concerns stemming from the Government's summation at the retrial, during which the Government's attorney explained: "Contreras told you that they became members, right; that he came up in November of 2010 with 16 kilograms of cocaine and they established what the prices were going to be and how they were going to be sold .... [T]hey established their agreement then. [Hicks] knew that he was a member, knew what he was getting into." App'x 2820. This summation, Hicks argues, used the challenged evidence relating to the cocaine conspiracy for the "specific purpose" of showing that he willfully joined it despite his prior acquittal. Zemlyansky, 908 F.3d at 13.

In addressing this argument, we keep in mind that "[i]t is a rare case in which we will identify a prosecutor's summation comments, even if objectionable, as so prejudicial as to warrant relief from conviction." United States v.

Aquart, 912 F.3d 1, 27 (2d Cir. 2018) (quotation marks omitted). Because summation arguments "frequently require improvisation, courts will not lightly infer that every remark is intended to carry its most dangerous meaning." United States v. Farhane, 634 F.3d 127, 167 (2d Cir. 2011) (quotation marks omitted).

A fair reading of the challenged summation is that the Government pointed to Contreras's testimony to encourage the jury to find that Hicks and Contreras participated in and were members of the charged RICO conspiracy, not the cocaine conspiracy. After all, objects of the RICO conspiracy included cocaine trafficking, as well as murder and the use of firearms. But the existence of a cocaine conspiracy (as opposed to the substantive crime of cocaine trafficking) was not necessary to convict Hicks for his involvement in the RICO conspiracy. The prosecutor never actually referred to a cocaine conspiracy, and the prosecutor's remarks, though imprecise and perhaps infelicitous, did not cross the line to encourage the jury to find that Hicks was a member of a cocaine conspiracy separate and apart from the RICO conspiracy. Although a close call, we conclude that the Government did not seek "to reuse the evidence for the specific purpose of proving conduct of which he was previously acquitted." Zemlyansky, 908 F.3d at 13 (emphasis added).

Nor, in any event, were the prosecutor's remarks "so prejudicial as to warrant relief from conviction." Aquart, 912 F.3d at 27. Before the retrial Hicks had urged the District Court to exclude all evidence of a cocaine conspiracy on double jeopardy grounds. The District Court denied the motion because (as we have noted above) the jury could have determined that a cocaine conspiracy existed but that Hicks never joined it. During the Government's summation, however, Hicks failed to object to the prosecutor's arguably contrary suggestion ***278** that he had joined the conspiracy. Hicks's failure to object means that we review only for plain error—that "there was an error that is clear or obvious, [and] that the error affected [his] substantial rights, which in the ordinary case means it affected the outcome of the district proceedings; and the error seriously affects the fairness, integrity or public reputation of judicial proceedings." United States v. Williams, 690 F.3d 70, 77 (2d Cir. 2012) (quotation marks omitted).

Here, the Government was under no obligation to show that Hicks committed or agreed to commit any of the predicate acts charged in the RICO conspiracy count. It needed to prove only that Hicks "intended that the broad goals of the racketeering scheme be realized, along with evidence that some (or any) members of the conspiracy intended that specific criminal acts be accomplished." Zemlyansky, 908 F.3d at 11. At both the first trial and the retrial, there was strong evidence that Hicks and other Schuele Boys gang members were involved in Balance's murder, the distribution of marijuana, and the use of firearms. So the jury's verdict was amply supported by evidence separate and apart from the challenged evidence of Hicks's participation in a cocaine conspiracy with Contreras. We therefore conclude that the Government's arguably objectionable (but unobjected to) summation comments did not impact the outcome of Hicks's retrial or affect his substantial rights.

II

On appeal, Hicks continues to insist that the District Court erred when it severed his trial. He argues that Judge Arcara should have disqualified Arrington's conflicted counsel (LoTempio) and held a joint trial. We disagree, largely because "[t]he decision to sever [a trial] ... is committed to the sound discretion of the trial judge, and we will not override an exercise of that discretion absent clear abuse." United States v. Delgado, 972 F.3d 63, 81 (2d Cir. 2020) (quotation marks omitted).

This Court has previously considered the potential conflict presented by LoTempio's representation of Arrington—after having represented Hicks in one of the charged overt acts—in United States v. Arrington, 941 F.3d 24 (2d Cir. 2019). As mentioned, Arrington asked to keep LoTempio as his counsel at a joint trial with Hicks, notwithstanding the potential conflict. Hicks asked to disqualify LoTempio rather than sever the trials. The District Court severed the trial because it was "[t]he only apparent way to protect" the rights of both Hicks and Arrington. Sp. App'x 19. In particular, the court said, "disqualification of ... LoTempio ... would violate ... Arrington's Sixth Amendment right to be represented by the counsel of his choice." Id. In our decision on appeal, we explained that "LoTempio ... represented Hicks with respect

to one of the overt acts in the indictment, and he was therefore barred from using the fruits of that representation to benefit Arrington or from fully cross-examining witnesses about related events. The effects of this conflict would have been magnified had Hicks testified in his own defense at a joint trial." Arrington, 941 F.3d at 41. We also held that Arrington's decision to waive the conflict and to retain LoTempio was not knowing and intelligent because he had never been properly apprised of "the main strategic disadvantages arising from LoTempio's conflict"—that Arrington's trial would be severed from his co-defendant's and that he would proceed to trial first. Id. at 42–43.

On this appeal, Hicks points to our prior holding to suggest that Arrington did not ever meaningfully choose LoTempio as his counsel. He argues that the District Court was thus compelled to disqualify LoTempio ***279** as a less drastic alternative to severance, even though we have held that district courts "have broad latitude in making a decision whether to disqualify a defendant's chosen counsel." United States v. Cain, 671 F.3d 271, 294 (2d Cir. 2012) (quotation marks omitted).

Hicks's argument assumes that Arrington would have rejected LoTempio had he been properly informed of the pitfalls of not doing so. Nothing in the record supports that assumption. More importantly, Hicks's argument also assumes that he had a "discernible right" to a joint trial with Arrington. But like Arrington, he did not. Arrington, 941 F.3d at 42 ("Arrington had no discernible right to proceed to trial with or after Hicks." (citing Zafiro v. United States, 506 U.S. 534, 539–40, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993))). And in the absence of a clear right to a joint trial and faced with an unpalatable alternative that potentially would have violated Arrington's Sixth Amendment right to counsel of his choice, it was not an abuse of discretion for the District Court to sever the trials.

CONCLUSION

We have considered Hicks's remaining arguments and conclude that they are without sufficient merit to warrant reversal. For the foregoing reasons, we AFFIRM the judgment of the District Court.

All Citations

5 F.4th 270

Footnotes

* The Clerk of Court is directed to amend the caption as set forth above.

1 This Court later held that Arrington's waiver was not knowing and intelligent because he was not fully informed of the consequences of the waiver. See United States v. Arrington, 941 F.3d 24, 42–44 (2d Cir. 2019).

2 In addition to evidence of various drug deals, the Government introduced two music videos produced by a record label associated with the Schuele Boys that featured lyrics about the drug business and depicted Hicks (and others) with cash and prop drugs.

3 On the special verdict form finding Hicks guilty of a narcotics conspiracy only with respect to marijuana, the jury checked "marijuana" but wrote nothing next to "cocaine" or "cocaine base." The District Court understood that this alone would not be enough to conclude that Hicks was *acquitted* of trafficking in cocaine or cocaine base. See United States v. Gotti, 451 F.3d 133, 136 (2d Cir. 2006) ("[A] jury verdict must be unanimous.") (citing Fed. R. Crim. P. 31(a)). The District Court nevertheless concluded that an acquittal could be inferred "[b]ased on the Court's instruction to the jury, together with the way in which the jury returned its verdict on Count 2"; when the clerk asked whether the jury had found that Hicks had trafficked in cocaine or cocaine base, the foreperson said "no" rather than "unable to reach a verdict," which is how the District Court had

instructed the foreperson to respond when the jury was unable to reach a unanimous verdict. Sp. App'x 22-23 & n.3. Neither party disputes that the jury acquitted Hicks of cocaine or cocaine base trafficking.

4 The only new evidence of Hicks's participation in a cocaine conspiracy that was admitted at the retrial consisted of the testimony of an individual who said he sold marijuana and cocaine that he had obtained from Hicks.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 10th day of September, two thousand twenty-one.

United States of America,

Appellee,

v.

Aaron Hicks, AKA Boog, AKA Boogy,

Defendant - Appellant.

ORDER

Docket No: 19-590

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

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk