

No. 08-67

In the Supreme Court of the United States

F. SCOTT YEAGER,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

	Page
A. The “Tension” Among Appellate Courts Recognized by the Government Is in Fact a Deep Split That Requires Resolution By This Court	1
B. Review is Also Warranted Because the Petition Presents an Important Question of Law, and Resolution in Yeager’s Favor Would Bar His Retrial	2
CONCLUSION	4

TABLE OF AUTHORITIES

Richardson v. United States,
468 U.S. 317 (1984) 3

United States v. Powell,
469 U.S. 57 (1984) 2

REPLY BRIEF FOR PETITIONER

**A. The “Tension” Among Appellate Courts
Recognized by the Government Is in Fact a Deep
Split That Requires Resolution By This Court.**

There is deep division among the circuits about whether the acquittal of a defendant on some counts can ever bar his retrial on counts on which the same jury failed to reach a verdict. In the proceedings below, the Fifth Circuit panel found that its opinion “parted ways” with other circuits that have held that the presence of hung counts is legally irrelevant to the collateral estoppel analysis. App. 27a.

The government refuses to recognize the conflict between decisions of the Sixth, Seventh, and Ninth Circuits and the decision in this case, choosing instead to label it a “tension.” Gov’t Opp. at 17-19 (citing *United States v. Romeo*, 114 F.3d 141 (9th Cir. 1997); *United States v. Bailin*, 977 F.2d 270 (7th Cir. 1992); *United States v. Frazier*, 880 F.2d 878, 885-86 (6th Cir. 1989)). It admits that a decision of the Eleventh Circuit conflicts with the case below. Gov’t Opp. at 20 (citing *United States v. Ohayon*, 483 F.3d 1281, 1288-91 (11th Cir. 2007)).

In finding a “tension”—but no conflict—among the Circuit opinions on this issue, the government argues that none of the decisions holds that hung counts are always irrelevant for collateral estoppel purposes. Gov’t Opp. at 19. But even the government admits that “it may be true” that the practical effect of the Fifth Circuit’s holding will produce the same result as a categorical rule that

collateral estoppel never applies in mixed verdict cases. Gov't Opp. at n. 4.

In fact, the Sixth, Seventh, Ninth, and Eleventh Circuit decisions conflict with the opinion below because, after rejecting the Government's argument that *United States v. Powell*, 469 U.S. 57 (1984), should apply to a mixed verdict of acquittals and hung counts, those courts "ignored the mistried counts." App. 27a. In this case, however, the panel concluded that Fifth Circuit precedent required it to weigh the mistried counts, even though it agreed that *Powell* did not apply in this case. *Id.* There is therefore a direct conflict between the decision below and the Sixth, Seventh, Ninth, and Eleventh Circuits as to whether hung counts should be weighed as part of a collateral-estoppel analysis.¹

B. Review is Also Warranted Because the Petition Presents an Important Question of Law, and Resolution in Yeager's Favor Would Bar His Retrial.

The government also argues that review is unwarranted because "the question presented arises relatively infrequently." Gov't Opp. at 21. While it may be true that the question in this petition has not been brought to this Court often, that is more the result of the realities of criminal practice than a reflection of the importance of the issue, which has

¹ The Government speculates that the Eleventh Circuit may reconsider *Ohayon* in light of the decision below. Gov't Opp. at 20. But while the Eleventh Circuit is bound by precedent occurring before the reorganization of the Fifth Circuit, it gives no special weight to post-reorganization decisions of that court.

concerned trial courts for many years and has already been considered by eight of the Circuits.

When a jury fails to resolve some counts but acquits on other counts, the government may decide not to retry the defendant. Alternatively, the remaining hung counts may be resolved through a settlement or guilty plea. But even if the situation presented in this petition rarely finds its way to this Court, the Court's resolution of this question will have a significant effect on the ability of prosecutors to retry hung counts, and, therefore, on charging decisions.²

Moreover, contrary to the government's assertion, if the issues presented in this petition are resolved in Yeager's favor, his retrial on the remaining charges against him will be barred. The court below, after a thorough *de novo* review of the record, found that "the jury must have found when it acquitted Yeager that Yeager himself did not have any insider information." App. 21a. Yeager carried his burden to demonstrate what essential element of the remaining charges was necessarily decided in his favor by the jury, but the Fifth Circuit found that the mere presence of the hung counts prevented the application of collateral estoppel. A ruling from this Court that collateral estoppel can apply to hung counts would prevent Yeager from being placed in

² *Richardson v. United States*, 468 U.S. 317, 324 (1984), cited by the government, did not resolve the question presented by this petition. In *Richardson*, the court held that a defendant may be retried on a hung count, without considering whether an acquittal on one count may bar his retrial on a different hung count.

jeopardy for a second time on the insider trading and money laundering counts of the indictment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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