

No. ____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The courts of appeals are deeply divided as to whether, when conducting the Fifth Amendment collateral estoppel analysis set out by this court in *Ashe v. Swenson*, 397 U.S. 436 (1970), a court should consider the jury's failure to reach a verdict on some counts. The issue presented here is:

1. Whether, when a jury acquits a defendant on multiple counts but fails to reach a verdict on other counts that share a common element, and, after a complete review of the record, the court of appeals determines that the only rational basis for the acquittals is that an essential element of the hung counts was determined in the defendant's favor, collateral estoppel bars a retrial on the hung counts.

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the United States Court of Appeals for the Fifth Circuit were Joseph Hirko, Rex Shelby, Petitioner F. Scott Yeager, and Respondent the United States of America.

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PETITION FOR WRIT OF CERTIORARI

Petitioner F. Scott Yeager respectfully seeks a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (App. 1a-28a) is reported at 521 F.3d 367. The opinion of the United States District Court for the Southern District of Texas (App. 29a-66a) is reported at 446 F. Supp. 2d 719.

JURISDICTION

The judgment of the Court of Appeals was entered on March 17, 2008. A petition for rehearing en banc was denied on April 14, 2008. (App. 68a-70a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

**CONSTITUTIONAL
PROVISION INVOLVED**

The Double Jeopardy Clause of the Fifth Amendment, set out in the appendix to the petition (App. 71a), provides in pertinent part: “nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.”

STATEMENT

This case is one of several criminal matters relating to the fall of the Enron Corporation. Petitioner F. Scott Yeager, along with other executives at Enron Broadband Services (“EBS”), was charged with conspiracy to engage in securities fraud and wire fraud, 18 U.S.C. § 371, wire fraud, 18 U.S.C. § 1343, securities fraud and insider trading, 15 U.S.C. §§ 78j(b) and 78ff, and money laundering, 18 U.S.C. § 1957.

After a lengthy jury trial, Yeager was acquitted of the conspiracy, securities fraud, and wire fraud charges, but the jury failed to reach a verdict on the insider trading and companion money laundering charges. Yeager moved to bar a retrial on these charges, claiming that collateral estoppel precluded relitigation of ultimate issues of fact common to the acquitted and hung counts. In affirming the district court’s denial of his motion, the court of appeals held that, even though the jury could only have acquitted Yeager by determining a necessary element of the insider trading charges in his favor, the mere existence of the hung counts precluded application of collateral estoppel. In so ruling, the court of appeals rejected the majority rule adopted by other circuits that hung counts are not dispositive.

In *Ashe v. Swenson*, 397 U.S. 436 (1970), this Court confirmed that the principles of collateral estoppel embodied in the Double Jeopardy Clause form an important part of the constitutional protections afforded to criminal defendants. Here, the jury acquitted Yeager of multiple fraud counts, and, as the court of appeals recognized, the only rational interpretation of those acquittals was that

Yeager did not possess insider information that contradicted what was presented to the public. Nevertheless, the court of appeals refused to apply collateral estoppel to prevent the government from retrying Yeager for the very same conduct. App. 22a. The sole basis for its refusal to preclude Yeager's retrial was that "when we consider the hung counts along with the acquittals, we are faced with a potential inconsistency, making it impossible for us to decide with any certainty what the jury necessarily determined." App. 22a. The court of appeals went on to hold that the presumed uncertainty created by the hung counts "preclude[d]" Yeager from establishing that the jury necessarily decided a common element of the acquitted and hung counts. App. 27a. The court of appeals acknowledged that, by considering the presence of hung counts when evaluating the collateral estoppel consequences of the acquitted counts, it was "parting ways with" the majority of other circuits to have considered the question. App. 27a. Those courts refuse to consider the uncertainty created by hung counts as part of their *Ashe* analysis.

The practical effect of this holding is to render the protections of collateral estoppel entirely unavailable where a jury acquits a defendant on some counts but fails to resolve others that have a common element. That is because in all but the (exceedingly rare) situation where the substance of a jury's deliberations is made known, a defendant will never be able to demonstrate why the jury necessarily determined a particular element in his favor when acquitting him on some counts but failing to render a verdict on related counts.

A. Proceedings at Trial.

The government's theory of prosecution was that Yeager, along with others, planned and carried out a scheme to defraud investors in Enron stock by purposely making a series of misrepresentations and material omissions about the capabilities and performance of EBS and its products and services. The alleged object of the scheme was to inflate the price of Enron stock by linking it with promising developments at EBS. As the culmination of this scheme, Yeager and others were alleged to have sold large amounts of Enron stock while in possession of information about the true state of EBS. These stock sales were charged as insider trading. This scheme to defraud was expressly incorporated into all of the charges against Yeager.¹

At trial, the government focused on whether statements to stock analysts and in press releases were false or omitted truthful information. Yeager testified that he did not make or cause false statements or material omissions at the presentations to analysts or in the press releases, and that in fact he barely spoke at the analyst presentation and had no role in the issuance of the press releases. His defense was that he could not have participated in defrauding investors by failing

¹ Yeager was charged with one count of conspiracy to commit wire fraud and securities fraud, one count of securities fraud based on misrepresentations and omissions at a January 2000 Enron conference for securities analysts, four counts of wire fraud based on misrepresentations in EBS press releases, 20 counts of insider trading and 99 counts of money laundering. Each count incorporated the scheme to defraud allegations contained in paragraphs 1-33 of the Fifth Superseding Indictment.

to disclose adverse information about EBS when he believed in good faith that the problems did not exist or were being cured. Yeager flatly denied that the alleged problems at EBS played any role in the sale of his Enron stock.² Yeager's testimony that he had a good-faith, reasonably held belief in the functionality and prospects for the EBS network and products he helped develop was affirmed by several government witnesses.³

After a thirteen-week trial, the jury acquitted Yeager on all of the conspiracy, securities fraud, and wire fraud counts. The jury failed to reach a verdict on charges that Yeager, as the culmination of the scheme to defraud, engaged in insider trading and money laundering by conducting monetary transactions with the proceeds of the wire fraud and insider trading.

The government then issued an Eighth Superseding Indictment charging Yeager with some of the same insider trading and money laundering offenses. Yeager moved to dismiss those charges on the ground that they were barred by collateral estoppel. Specifically, Yeager argued that when the jury acquitted him of conspiracy, securities fraud, and wire fraud, it necessarily determined an essential element of the insider trading charges, and that those charges were therefore barred by collateral estoppel. Yeager argued in the alternative that if the insider trading charges were not completely barred, evidence relating to the acquitted conduct could not be introduced against him at a future trial. The district court denied Yeager's

² Trial Tr. 10175, June 22, 2005.

³ *See, e.g., id.* at 9920-21.

motion, finding that the insider trading and money laundering charges were not barred by collateral estoppel.⁴

B. Proceedings in the Court of Appeals.

Yeager appealed, and on March 17, 2008, a panel of the United States Court of Appeals for the Fifth Circuit affirmed, concluding that the insider trading and money laundering charges were not barred by collateral estoppel. The Fifth Circuit conducted the *de novo* review of the record required by *Ashe* to determine the basis for the jury's acquittals. After a thorough review of the indictment, jury charge, trial evidence, and arguments of counsel to the jury, the court of appeals concluded that the "jury must have found when it acquitted Yeager that Yeager himself did not have any inside information that contradicted what was presented to the public." App. 21a. The court specifically acknowledged that "when we consider the acquittals by themselves, it appears that Yeager is correct that collateral estoppel bars a retrial." App. 21a-22a. But notwithstanding that finding, the court ruled that Yeager's prosecution for insider trading and money laundering could proceed on the sole ground that the hung counts made it impossible to determine what the jury decided when it acquitted

⁴ The district court also placed limits on the evidence that could be introduced against Yeager at a future trial but ruled that the prosecution could effectively rely on the exact evidence it presented on the acquitted counts in any retrial. App. 61a. Only the district court's ruling that the counts were not entirely barred was immediately appealable, and it is that ruling that is at issue here. *See Abney v. United States*, 431 U.S. 651, 657-62 (1977).

Yeager of the other fraud-based charges in the indictment. App. 22a.

The court of appeals concluded that it must consider the hung counts in addition to the acquittals, and that the presence of the hung counts created a “potential inconsistency, making it impossible for us to decide with any certainty what the jury necessarily determined.” App. 22a. The court therefore held, despite its finding that the rest of the trial record compelled the conclusion that Yeager did not possess insider information that contradicted what was disclosed to the public, that the presence of the hung counts alone meant that “we cannot apply collateral estoppel in this case.” App. 22a.

More particularly, the court of appeals held that the jury acquitted Yeager of securities fraud⁵ either because there were no material misrepresentations or omissions made at the 2000 Enron Analysts Conference or because “Yeager did not knowingly make misrepresentations and omissions because he believed the presentations were truthful.” App. 20a. Under either rationale, the court concluded, “the jury must have found when it acquitted Yeager that Yeager himself did not have any insider information that contradicted what was presented to the public.” App. 21a.

Nevertheless, the court of appeals speculated that if the jury had acted “rationally [it] would also have acquitted Yeager of the insider trading counts.”

⁵ The court of appeals limited its collateral estoppel analysis to the securities fraud count based on its finding that Yeager did not possess insider information, and accordingly it was unnecessary for it to determine if the jury reached the same conclusion in acquitting Yeager of the other counts. App. 18a.

App. 22a. Based on this presumption of the sole way that a “rational” jury could have reached a verdict, the court of appeals held that, when the hung counts were considered, the court was “faced with a potential inconsistency, making it impossible for us to decide with any certainty what the jury necessarily determined.” App. 22a. Given its presumption that a split verdict was an irrational verdict, it concluded that “[w]hether we can weigh hung counts in applying collateral estoppel then is critical to our analysis.” App. 22a. The end result was that if only the acquittals, not the hung counts, were considered, “collateral estoppel bars a retrial.” App. 22a.

The court of appeals concluded that its prior decisions required consideration of hung counts. App. 23a (citing *United States v. Larkin*, 605 F.2d 1360 (5th Cir. 1979), *withdrawn in part on other grounds*, 611 F.2d 585 (5th Cir. 1980)). It further acknowledged that its holding required it to “part ways with” several other circuits, which have held that the presence of hung counts is legally irrelevant to the collateral estoppel analysis. App. 27a.

The court of appeals then set about attempting to explain the “discrepancy” created by the presumed irrationality of the partial verdict and offered several guesses why the jury may have acted as it did. It first speculated that “the jury was irrational.” App. 24a. Another possibility, the court supposed, was that the split verdict simply occurred for some unknown reason. Finally, it posited that the jury might not have even reached the hung counts in its deliberations. It therefore concluded that, because it could not choose between these options with any certainty, “Yeager failed to carry his burden and establish what the jury necessarily

decided.” App. 25a.⁶

On April 14, 2008, Yeager’s request for a rehearing en banc was denied by the court of appeals. App. 69a.

REASONS FOR GRANTING THE PETITION

This petition presents a question of law upon which the circuits are starkly divided: whether a jury’s failure to reach a verdict on one or more counts must be considered when examining the collateral estoppel consequences of the jury’s verdict of acquittal on other counts. The court of appeals’ willingness to presume that a jury acts irrationally when it reaches a verdict on some counts and fails to reach a verdict on related counts imposes an impossible burden that renders the protections of collateral estoppel unavailable to all who face this situation. This Court’s review is necessary to resolve this clear conflict and to restore the collateral estoppel protections afforded to defendants when juries return partial verdicts.

A. The Doctrine of Collateral Estoppel and the *Ashe v. Swenson* Analysis.

⁶ The court did, however, reject the government’s argument that this Court’s decision in *United States v. Powell*, 469 U.S. 57 (1984) precluded application of collateral estoppel whenever a jury acquits a defendant on some counts but fails to reach a verdict on related counts. In doing so, it quoted from *Powell* that this Court’s holding was “predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict.” App. 26a (quoting *Powell*, 469 U.S. at 68). The court of appeals chose to follow its sister circuits that had rejected this same argument.

Collateral estoppel following a criminal acquittal is guaranteed by the Double Jeopardy Clause of the Fifth Amendment of the Constitution. *Ashe*, 397 U.S. at 445. Though “[c]ollateral estoppel is an awkward phrase . . . it stands for an extremely important principle in our adversary system of justice.” *Id.* at 443. The doctrine ensures that “when an issue of ultimate fact has once been determined by a valid and final judgment, the issue cannot again be litigated between the same parties in any future lawsuit.” *Id.* The doctrine was first developed in civil litigation, but it was a fixed principle of federal criminal law for many years even before the landmark *Ashe* decision. *See, e.g., United States v. Oppenheimer*, 242 U.S. 85, 88 (1916) (holding that where a criminal charge has been adjudicated it “may be pleaded to bar any subsequent prosecution”).

The collateral estoppel principles embodied in the Double Jeopardy Clause serve an important role in protecting a defendant against being reprosecuted for an issue of ultimate fact of which he has been acquitted. In such situations, a defendant should not have to run the gauntlet a second time or be subjected to the “hazards of trial and possible conviction more than once.” *Ashe*, 397 U.S. at 447 (Black, J., concurring). Collateral estoppel protects the defendant from being “forced to live in a continuous state of anxiety and insecurity” concerning the particular issues that have already been tried, and it prevents the government from repeated attempts to subject him to “embarrassment, expense and ordeal.” *Green v. United States*, 355 U.S. 184, 187 (1957).

The defendant bears the burden of demonstrating that the issue to be estopped was necessarily decided in the first trial. *Dowling v. United States*, 493 U.S. 342, 350 (1990). To test a defendant's claim, the court must “examine the record of [the] 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.” *Ashe*, 397 U.S. at 444. This inquiry must be “set in a practical frame and viewed with an eye to all the circumstances of the proceedings.” *Sealfon v. United States*, 332 U.S. 575, 579 (1948). As the Court observed in *Ashe*, any test “more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings.” *Ashe*, 397 U.S. at 444.

Here, Yeager successfully defended himself in a lengthy trial, and a jury determined that he was not guilty on multiple counts. The court of appeals recognized that the only way the jury could have reached these determinations was by accepting his defense that his good faith belief in the truthfulness of information about EBS conveyed to the public precluded a finding that he possessed insider information to the contrary. Despite this finding, Yeager will be forced to face a second jury, which will be presented with the same evidence in an effort to convince the jurors that they should make a finding contrary to the only reasonable interpretation of the acquittals by the first jury. He thus will be forced to run the gauntlet a second time, due solely to the judicially imposed presumption that

a rational jury would also have acquitted him of the hung counts.

B. The Courts of Appeals Disagree
Whether Collateral Estoppel Applies
When a Jury Fails to Reach a Verdict
on Some Counts and Acquits a
Defendant on Others.

The courts of appeals are divided as to whether collateral estoppel ever applies when a jury acquits on some counts but fails to reach a verdict on other counts. A majority of courts has held that it is improper to consider hung counts and refuses to impute any meaning to a jury's failure to reach a verdict. In the decision below, the Fifth Circuit expressly "part[ed] ways with" those courts, instead adopting the contrary rule followed by a minority of circuits. App. 27a.

1. *A Majority of the Courts of Appeals Facing This Issue Have Found that Hung Counts Do Not Prevent the Application of Collateral Estoppel.*

The Courts of Appeals for the Sixth, Seventh, Ninth, and Eleventh Circuits agree that the failure of a jury to reach agreement on some counts cannot deprive an acquittal of collateral estoppel consequences, because the presence of hung counts should not be weighed as part of the *Ashe* analysis. See *United States v. Ohayon*, 483 F.3d 1281 (11th Cir. 2007); *United States v. Romeo*, 114 F.3d 141, 144 (9th Cir. 1997); *United States v. Bailin*, 977 F.2d 270, 276 (7th Cir. 1992); *United States v. Frazier*,

880 F.2d 878, 885-86 (6th Cir. 1989). The Second Circuit has similarly held that hung counts do not create an inconsistency that prevents the application of collateral estoppel. *United States v. Mespouledé*, 597 F.2d 329, 336-37 (2d Cir. 1979).⁷

These courts agree that the *Ashe* collateral estoppel analysis must focus on the counts on which the jury actually reached a verdict, because consideration of why the jury failed to reach a verdict on other counts requires speculation inconsistent with the practical analysis mandated by *Ashe*. The inconclusiveness inherent in a hung count makes it impossible to find an inconsistency between an acquittal and a hung count, and therefore, “when a jury acquits on some counts in a multicount indictment, principles of collateral estoppel may preclude retrial of charges upon which the jury was unable to agree at the earlier trial.” *Frazier*, 880 F.2d at 883. *See also Mespouledé*, 597 F.2d at 336-37.

⁷ The Court of Appeals of Maryland follows the majority rule as well. *See Ferrell v. State*, 567 A.2d 937, 944 (Md. 1990) (“There is no question that those verdicts [of acquittal] do constitute a valid determination of issues of ultimate fact. Because the jury’s failure to agree [on other counts] did not decide any facts, it did not make the validity of that determination questionable.”). The Fourth and Eighth Circuits have not specifically addressed whether the presence of hung counts bars collateral estoppel, but have conducted an *Ashe* analysis even when the jury hung on some counts, implying that the mere presence of hung counts does not prevent the application of collateral estoppel. *See United States v. Goodine*, 400 F.3d 202, 209-10 (4th Cir. 2005); *United States v. Bearden*, 265 F.3d 732, 735-36 (8th Cir. 2001). The Third, Tenth, and Federal Circuits have not had occasion to apply collateral estoppel to partial verdicts.

In *Romeo*, the Ninth Circuit held that “[b]ecause there are so many variable factors which can cause a jury not to reach a verdict,” a court should not “speculate on why the jury could not agree. The inquiry under *Ashe* is what the jury actually decided when it reached its verdict, not on why the jury could not agree on the deadlocked count.” 114 F.3d at 144. Reaching the same conclusion, the Seventh Circuit held in *Bailin* that

[t]he government cannot prevail with the . . . argument that an acquittal on one count, coupled with a hung jury on a related count, makes it impossible to determine that the jury necessarily established any common element of those two offenses against the government. . . . [T]he jury’s failure to reach a verdict is too inconclusive to qualify as inconsistent for the purposes of issue preclusion. The powerful double jeopardy protections that attach to acquitted counts should not be outweighed by the inconclusiveness inherent in hung counts.

977 F.2d at 279-80. Most recently, in *Ohayon*, the Eleventh Circuit considered whether collateral estoppel applied in a case where the jury acquitted on some counts but hung on others.⁸ The defendant

⁸ The *Ohayon* court, like the Fifth Circuit in this case, was bound to follow the Fifth Circuit’s decision (decided before the Eleventh Circuit’s creation) in *United States v. Larkin*, 605 F.2d 1360 (5th Cir. 1979), *withdrawn in part on other grounds*, 611 F.2d 585 (5th Cir. 1980). That the Fifth and Eleventh Circuits reached different answers to the same question while following the same precedent further illustrates the confusion in the appellate courts and the need for guidance from this Court.

in *Ohayon* was acquitted of attempting to possess drugs with the intent to distribute, but the jury hung on a charge of conspiracy to possess with intent to distribute. 483 F.3d at 1282. The court found that the sole disputed fact at trial was whether Ohayon knew that certain duffle bags contained drugs. *Id.* at 1283. After reviewing the record, the court concluded that “a rational jury could not have acquitted Ohayon on a ground other than his ignorance of the contents of the bags.” *Id.* at 1287. The court rejected the notion that the jury’s verdicts could have resulted from juror error, “[b]ecause we ask what a rational jury would have done.” *Id.* at 1288. Similarly, the Eleventh Circuit refused to consider whether the jury had simply nullified by refusing to convict on the conspiracy count because, “[w]hile the possibility of jury nullification may influence the strategy of trial lawyers, it cannot enter into the analysis of courts making collateral estoppel inquiries.” *Id.*⁹

The Eleventh Circuit also rejected the government’s argument “that we should search for the basis of a mistried count,” holding “that the search for the basis of a mistried count *will necessarily be in vain.*” *Id.* at 1289 (emphasis added). The court added, “[i]n truth, the failure of a jury to reach a verdict is not a decision; it is a failure to reach a decision. A partial verdict does not comprise two decisions that we must try to reconcile, because the mistried count is not a decision for which we can discern, or to which we can impute, a

⁹ Here, the Fifth Circuit took exactly the opposite approach, finding that one of the possible grounds for the jury’s failure to reach a verdict on the hung counts was that the jury acted irrationally.

single, rational basis.” *Id.* at 1289-90.¹⁰

The decisions in the Sixth, Seventh, Ninth, and Eleventh Circuits held that a jury’s failure to reach a verdict on related counts did not prevent an analysis of the collateral estoppel effect of the acquitted counts on the hung counts. Under this rule, Yeager could not be retried on the insider trading and money laundering counts on which the jury hung, because (as the Fifth Circuit here acknowledged), in acquitting Yeager on the conspiracy, wire fraud, and securities fraud counts of the indictment, the jury necessarily found that the government failed to prove an essential element common to the acquitted and hung counts.¹¹ Since possession and use of that inside information is an essential element of the remaining insider trading charges, his retrial on those charges would be barred under the majority rule.

2. *The First, Fifth, and District of Columbia Circuits Have Held That Collateral Estoppel Does Not Apply to Hung Counts.*

Along with the Fifth Circuit in this case, the District of Columbia Circuit and the First Circuit have held that hung counts are relevant to—and alone can preclude—collateral estoppel. In *United States v. White*, 936 F.2d 1326 (D.C. Cir. 1991), the defendant was charged with possessing an

¹⁰ But here, the Fifth Circuit attempted precisely this type of search for a rational basis for the hung counts and, unable to find one, merely passed this impossible task on to Yeager.

¹¹ That is, it found that the jury necessarily decided that fact in Yeager’s favor, *but for* the presence of the hung counts.

unlawfully issued birth certificate with the intent to defraud the United States, in violation of 18 U.S.C. § 1028(a)(4), as well as making false statements in an application for a United States passport, in violation of 18 U.S.C. § 1542. 936 F.2d at 1327. The government's theory was that White committed his crimes in the course of assisting another man, Harold Linden, in obtaining a U.S. passport under the name "William Baldwin." *Id.* Since White admitted that he had committed the alleged acts, the sole issue at trial was White's mens rea. *Id.* at 1328-29. The jury acquitted White on the birth certificate count, but hung on the false statements charge. *Id.* at 1327.

When the government attempted to retry White on the false statements charge, White argued that his re prosecution on the hung count was barred by collateral estoppel, because the jury had conclusively determined that he believed that the papers at issue were not false. *Id.* at 1329.

The D.C. Circuit rejected White's argument, holding that if "the jury [had] found, as the appellant contends, that he actually believed Linden to be William Baldwin, it would have acquitted him on the second count as well as the first." *Id.* The court found that accepting White's collateral estoppel argument "would require us to assume that the jury acted inconsistently, reaching opposite findings on the same issue in the different counts," citing this Court's holding in *Powell*, 469 U.S. at 68. *White*, 936 F.2d at 1329. Shortly after the decision in *White*, the First Circuit reached the same conclusion, in a decision citing both *White* and *Powell*. *See United States v. Aguilar-Aranceta*, 957 F.2d 18, 24-25 (1st Cir. 1992).

In *Powell*, a jury acquitted the defendant of conspiracy to possess and possession of cocaine, but convicted her of using the telephone in “committing and in causing” the conspiracy and possession. 469 U.S. at 60. These verdicts were inconsistent because Powell could not have used the telephone to commit offenses she did not commit. But the Court held that the inconsistent verdicts were not grounds to overturn the convictions on the telephone charges, because an inconsistent verdict may be the result of lenity or compromise rather than error. *Id.* at 65-67. To assess the reason for the inconsistency, the Court opined, “would be based either on pure speculation, or would require inquiries into the jury’s deliberations that courts generally will not undertake.” *Id.* at 66.

In extending *Powell* to find that an inconsistency between an acquittal and a hung count prevents the application of collateral estoppel, *White* and *Aguilar-Aranceta* reached a holding directly contrary to those of other courts of appeals on the same issue. *See, e.g., Ohayon*, 483 F.3d at 1289-90 (“In truth, the failure of a jury to reach a verdict is not a decision; it is a failure to reach a decision. A partial verdict does not comprise two decisions that we must try to reconcile, because the mistried count is not a decision for which we can discern, or to which we can impute, a single, rational basis.”); *Bailin*, 977 F.2d at 279-80 (“[T]he jury’s failure to reach a verdict is too inconclusive to qualify as inconsistent for the purposes of issue preclusion.”); *Frazier*, 880 F.2d at 883 (“We do not believe that *Powell* supports the government’s argument that collateral estoppel may never be applied to prevent retrial of charges on which the first jury fails to agree.”).

While the Fifth Circuit also held that collateral estoppel does not bar retrial on hung counts, it disagreed with the government's argument for an extension of *Powell*.¹² App. 26a-27a. But given its admitted inability to determine why the jury hung, the court's requirement that a defendant eliminate any uncertainty caused by the hung counts effectively adopted the very *Powell* argument that it claimed to reject.

The correct rule in these circumstances, and the only one that can preserve *Ashe's* protections, is that courts must search for the rationality of a jury's verdict based on what the jury actually found—i.e., verdicts—and not default to a presumption that it may have acted irrationally in *failing* to reach a verdict on related counts. The Eleventh Circuit articulated this rule in *Ohayon* when it rejected the Government's argument “that we should search for the basis of a mistried count,” holding “that the search for the basis of a mistried count will necessarily be in vain,” and refused to consider whether the jury had simply nullified because “[w]hile the possibility of jury nullification may influence the strategy of trial lawyers, it cannot

¹² The Fifth Circuit stated that, “[i]n the cases before our sister circuits, the government has argued, as it does here, for an extension of *Powell*. The government maintains that *Powell* precludes applying collateral estoppel in cases where the jury acquitted defendants on some counts but hung on related counts because this result is also inconsistent. The Sixth, Seventh, Ninth, and Eleventh Circuits rejected this argument because they found that acquittals are not inconsistent with mistried counts. As the Sixth Circuit noted, ‘[n]o such inconsistency is necessarily present’ because ‘[b]oth the acquittal and the failure to agree could result from a number of factors.’” App. 26a (internal citations omitted).

enter into the analysis of courts making collateral estoppel inquiries.” 483 F.3d at 1289.

By entertaining the possibility that the jury was acting irrationally or “for some unknown reason,” thereby ignoring *Ashe’s* mandate that the jury must be presumed to be rational, *see* 397 U.S. at 444, the Fifth Circuit effectively threw up its hands at the hung counts and concluded that the jury’s acquittals decided nothing, even though this meant ignoring its own determination that the only way a rational jury could have acquitted Yeager of securities fraud was by determining that he did not possess any insider information.

Except in the extremely rare instance when a jury’s reasons for deadlocking are known and made part of the record, a defendant is prevented from establishing the basis for the jury’s failure to reach a verdict.¹³ Here, the Fifth Circuit postulated several possible bases for the jury’s inability to reach complete verdicts, but its list was by no means complete. App. 24a-25a. Once the door to speculation is opened to possible reasons the jury failed to reach a verdict, other even more likely possibilities emerge, including the jury’s inability to reach unanimity in the face of an *Allen* charge, prosecutorial overcharging in the indictment (which included 119 insider trading and money laundering counts against Yeager), and an abrupt termination of deliberations by the district court.¹⁴ Equally

¹³ For example, Yeager sought leave to interview the jurors after trial, but that request was opposed by the government and denied by the district court. App. 67a.

¹⁴ On the fourth day of deliberations, the jurors informed the district court that they had reached a verdict on some counts but were deadlocked on others. Trial Tr. 13711, July 19, 2005.

important, these explanations of the hung counts do not cast doubt on the court of appeals' initial determination that the jury necessarily concluded that Yeager did not possess material, nonpublic information when acquitting him of numerous fraud counts.

For purposes of collateral estoppel analysis, the Fifth Circuit treated the hung counts as if they were determinations of fact contrary to the acquittals. Although the court of appeals purported to claim that “the presence of mistried counts *diminishes* the likelihood that, in acquitting defendants on related counts, the jury made a factual determination that bars a retrial,” App. 23a (emphasis added), its later reasoning demonstrated that, far from diminishing the likelihood, it *precluded* it.

If it is “impossible to discern definitively why a jury hung,” no defendant could ever “show that the jury necessarily determined that he did not have insider information.” App. 28a. The Fifth Circuit, however, would have it both ways. It contends that it is impossible to discern why the jury hung, but it would require that defendants do precisely that to apply collateral estoppel. The impossible burden the Fifth Circuit placed on defendants is inconsistent with the Fifth Amendment’s protection against double jeopardy and this Court’s opinion in *Ashe*.

At 3:50 p.m., the district judge gave an unusual *Allen* charge, instructing the jury to take until 5 p.m. to determine whether additional deliberations could help it reach a verdict on the deadlock counts. *Id.* at 13724. At 5 p.m., when the jury again indicated that it was deadlocked on some counts, the district judge accepted its partial verdict rather than insisting on further deliberations. *Id.* at 13725.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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