No. 15-537

IN THE

Supreme Court of the United States

JUAN BRAVO-FERNANDEZ AND
HECTOR MARTÍNEZ-MALDONADO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

ABBE DAVID LOWELL
CHRISTOPHER D. MAN
CHADBOURNE & PARKE LLP
1200 New Hampshire Ave., NW
Washington, DC 20036
(202) 974-5600

Counsel for Hector Martínez-Maldonado

LISA S. BLATT
Counsel of Record
ANTHONY J. FRANZE
R. STANTON JONES
ELISABETH S. THEODORE
ARNOLD & PORTER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
lisa.blatt@aporter.com

Counsel for Juan Bravo-Fernandez

February 23, 2016

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPLY

This case presents a perfect vehicle to resolve an acknowledged split on an important and recurring question of constitutional law. The Government concedes that the lower courts are split on the principal question presented, whether a vacated conviction deprives an acquittal of its preclusive effect under the Double Jeopardy Clause. Opp. 18. That question is squarely presented and outcome determinative, and the Government identifies no barrier to this Court's review. Pet. 1, 24.

The Government does not dispute that this question is of immense significance to criminal defendants. The First Circuit emphasized the issue's "importan[ce]" in the very first sentence of its opinion, App. 2a, then stayed its mandate pending resolution of this petition, App. 136a. This Court termed "vitally important" the question whether a hung count deprives an acquittal of its preclusive effect. *Yeager v. United States*, 557 U.S. 110, 117 (2009). The parallel question for vacated convictions is no less so. There are few issues of greater significance than whether a criminal defendant who has been tried once must be "forced to endure a [second] trial that the Double Jeopardy Clause was designed to prohibit." *Abney v. United States*, 431 U.S. 651, 662 (1977).

The opposition's makeweight objections are no reason to deny review. The Government quibbles about whether the split is 5-1 or 5-3 and bizarrely accuses petitioners of failing to make a "significant statistical" showing that the First Circuit's rule encourages prosecutorial overreach. Opp. 19, 23. But a 5-1 split is still a split. And if the decision below and others like it contribute to even one instance of excessive charging, that is one too many.

The petition presents a recurring question of constitutional criminal procedure of the sort this Court routinely takes up when the lower courts are split. There is no need for further percolation, and no reason to leave the lower courts divided. If the Government had lost below, it would have sought certiorari. The rules should not change when the United States is on the other side of the "v."

I. This Court Should Decide Whether a Vacated Conviction Deprives an Acquittal of its Collateral Estoppel Effect

The Government admits that the First Circuit's decision widens a direct conflict among lower courts on a question of constitutional law. That admission alone demonstrates the need for this Court's review. But there is more. The decision below is irreconcilable with this Court's decision in Yeager. And the question presented has immense significance, for not only individual defendants facing retrial, but also the criminal justice system writ large.

1. The Government argues (at 18-22) that the split in the lower courts is 5-1 rather than 5-3. This is both incorrect and irrelevant. This Court's review would be equally warranted if the split were 5-1. Just ask the Government, which has sought and obtained certiorari at least *23 times* in the last two decades in criminal cases in which only one federal appellate court or state high court adopted a particular view of the law.[1] Such

[1] *See* petitions in *United States v. Bryant*, No. 14-420, 2015 WL 5817972; *United States v. Apel*, No. 12-1038, 2013 WL 682820; *United States v. Jones*, No. 10-1259, 2011 WL 1462758; *United States v. Tinklenberg*, No. 09-1498, 2010 WL 2300574; *United States v. Williams*, No 09-466, 2009 WL 3389926; *United States v. Marcus*, No. 08-1341, 2009 WL 1179321; *United States v.*

splits were not too "shallow," Opp. 19, for example, when the Government successfully sought certiorari in *United States v. Ressam*, 553 U.S. 272 (2008), urging: "This 2-1 conflict among published court of appeals decisions merits this Court's review."[2] Ditto in *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), where the Eighth Circuit joined other circuits in ruling that denial of counsel of choice is structural error, but the Government successfully sought certiorari because one circuit disagreed.[3] And the same is true in *United States v. Wells*, 519 U.S. 482 (1997), where the decision joined nine other circuits in imposing a materiality requirement on a federal criminal statute, but a single circuit disagreed and took the Government's side.[4]

Comstock, No. 08-1224, 2009 WL 1541676; *United States v. Hayes*, No. 07-608, 2007 WL 3322292; *United States v. Ressam*, No. 07-455, 2007 WL 2898699; *United States v. Santos*, No. 06-1005, 2007 WL 173651; *United States v. Rodriguez*, No. 06-1646, 2007 WL 1684900; *United States v. Gonzalez-Lopez*, No. 05-352, 2005 WL 2275408; *United States v. Grubbs*, No. 04-1414, 2005 WL 936477; *United States v. Smith*, No. 04-1390, 2005 WL 883803; *United States v. Maxwell*, No. 04-1382, 2005 WL 883796; *United States v. Patane*, No. 02-1183, 2003 WL 21251626; *United States v. Bean*, No. 01-704, 2001 WL 34092098; *United States v. Drayton*, No. 01-631, 2001 WL 34092095; *United States v. Knights*, No. 00-1260, 2000 WL 33979551; *United States v. Rodriguez-Moreno*, No. 97-1139, 1998 WL 34081104; *United States v. Hyde*, No. 96-667, 1996 WL 33414097; *United States v. Watts*, No. 95-1906, 1996 WL 33413781; *United States v. Wells*, No. 95-1228, 1996 WL 33413829.

[2] Petition for Certiorari, *Ressam*, No. 07-455, 2007 WL 2898699, at *13.

[3] Petition for Certiorari, *Gonzalez-Lopez*, No. 05-352, 2005 WL 2275408, at *16-18 & n.6.

[4] Petition for Certiorari, *Wells*, No. 95-1228, 1996 WL 33413829, at *12-13.

The Government suggests that state supreme court decisions are unworthy of this Court's attention. Opp. 19. This Court's Rule 10 is to the contrary: conflicts between "a United States court of appeals" and "a decision by a state court of last resort" present a "compelling" reason to grant certiorari. Sup. Ct. R. 10(a). So is *United States v. Knights*, where the Government successfully sought certiorari from a Ninth Circuit decision requiring consent for searches of probationers; the government argued that one state supreme court disagreed.[5]

Regardless, whether the conflict is 5-3 or 5-1, numerous appellate courts have addressed the issue. There is no reason to think any lower court will change its mind. The Government does not identify any reason why additional percolation would assist this Court. There is no reason to let the conflict fester.

And the split is 5-3. Like the Michigan Supreme Court, the high courts of Iowa and New Mexico would have sided with petitioners. The Government hypothesizes a rationale for *State v. Montoya*, 306 P.3d 426 (N.M. 2013), that is entirely absent from the decision itself. Because the court instructed the jury that absence of provocation was an element of the offense of acquittal but not the offense of conviction, the Government argues that the case "did not involve an inconsistent verdict." Opp. 21. But the New Mexico Supreme Court performed no such analysis in holding that *Ashe v. Swenson*, 397 U.S. 436, 446 (1970), prohibited the defendant's retrial for felony murder. The court did not attempt to reconcile the two verdicts. Rather the court reasoned only that a fact necessarily

---

[5] Petition for Certiorari, *United States v. Knights*, No. 00-1260, 2000 WL 33979551, at *20.

determined by the acquittal—absence of provocation—was an essential element of the vacated conviction. 306 P.3d at 432. The same is true here—in acquitting petitioners of conspiring and traveling to violate § 666, the jury necessarily determined that petitioners did not commit bribery. The New Mexico Supreme Court thought the improper instruction on the vacated conviction relevant to its decision to vacate that conviction, of course, but did not focus on the improper instruction as part of the *Ashe* analysis.

The Iowa Supreme Court's decision in *State v. Halstead*, 791 N.W.2d 805 (Iowa 2010), likewise conflicts with the decision below. Pet. 11-12. The Government does not dispute that *Halstead* held that the Double Jeopardy Clause collateral estoppel principle precluded retrial on a vacated conviction because that charge depended on a fact necessarily determined by a simultaneously-rendered acquittal. 791 N.W.2d at 816. Instead the Government asserts that *Halstead*'s collateral estoppel analysis "cannot be divorced from its holding that, under state law," a conviction must be vacated if it is inconsistent with an acquittal. Opp. 21.

There is a reason the Government offers no explanation for that assertion. It is plainly untrue. *Halstead* analyzed the state and federal questions separately: "Having determined that the compound conviction in this case cannot stand, we next confront whether the defendant may be retried on remand." 791 N.W.2d at 816. The court's analysis of that second, federal question relied exclusively on two decisions of this Court, *Ashe* and *Smalis v. Pennsylvania*, 476 U.S. 140 (1986). Nowhere did *Halstead* suggest that that result was compelled by its initial decision to vacate the conviction under state

law. Also, as petitioners noted (at 12 n.1), the Alaska Supreme Court vacates inconsistent convictions under state law but holds that federal law *permits* retrial, decisively undermining the notion that *Halstead*'s federal collateral estoppel holding "cannot be divorced" from its state law holding. Indeed, *Halstead* discussed the Alaska case at length, adopting its state law holding but rejecting its federal holding. 791 N.W.2d at 811, 815-16. The Government ignores this point.

Finally, there is nothing "[t]elling[]," Opp. 22 n.9, about the First Circuit's failure to address *Montoya* and *Halstead*. It is unsurprising that the court did not address two cases neither party raised below.

In Michigan, New Mexico, and Iowa, petitioners would be secure from retrial. The protections of the Double Jeopardy Clause cannot depend on the identity of the prosecutor or the location of the prosecution. This Court should resolve the conflict.

2. On the merits, the Government regurgitates arguments that *Yeager* rejected. Opp. 13-18. The vacated convictions here "demonstrate[] that the jury was not acting rationally," Opp. 16, to the exact same extent as the hung counts in *Yeager*, which nonetheless do not factor into the collateral estoppel analysis. And while the First Circuit's 2013 decision vacating petitioners' convictions for instructional error did "'not constitute a decision to the effect that the government has failed to prove its case,'" Opp. 16, that is entirely beside the point. What *did* constitute a decision to the effect that the government has failed to prove its case was the jury's decision to *acquit* petitioners of conspiring and traveling to commit bribery. The Government does not dispute that those acquittals standing alone necessarily rested on a finding that

petitioners did not commit federal program bribery. Pet. 7, 22.

To be clear, the jury made no "determination that [petitioners] were guilty beyond a reasonable doubt of a Section 666 offense," Opp. 16, and no "decision to convict [petitioners] of a Section 666 offense," Opp. 18. The Government's suggestion that it did is inexplicable. Section 666 proscribes only bribery, and the jury unquestionably has never found that petitioners bribed anyone. All the vacated convictions show is that the jury found beyond a reasonable doubt that petitioners engaged in certain conduct that *was not a crime*. To be sure, the court of appeals declined to direct an acquittal on sufficiency grounds, and held that it could not be sure the jury had convicted based on the improper gratuity theory—because the jury *might* have thought petitioners committed a crime. App. 20a-36a. Contrary to the Government's suggestion (at 17 n.5), however, neither of those holdings is equivalent to a jury finding that petitioners were guilty beyond a reasonable doubt of conduct that is a crime.

The Government likewise fails to confront the significant tension between the decision below and a host of decisions from this Court and others declining to give any legal effect to vacated convictions. Pet. 17-19. The Government agrees that vacated convictions "may not be used to impose legal disabilities," Opp. 16; *see* Pet. 19-20, but does not explain how its position obeys that principle. And while the government does not argue that the vacated convictions themselves "collaterally estop petitioners from proving a fact" at trial, Opp. 16 n.4, the government does argue that the

facts supposedly determined by the vacated convictions preclude petitioners from exercising a constitutional right that would otherwise prevent retrial.

3. The Government does not deny that whether a vacated conviction deprives an acquittal of its otherwise preclusive effect is an important federal question. Pet. 1-2, 20-24. The First Circuit declared that "[t]his appeal raises important … issues," App. 2a, and stayed its mandate pending this petition, App. 136a. Few questions of constitutional law are more significant than whether a criminal defendant must stand trial in the first place.

The Government claims that the issue arises "extremely infrequently," stating that only three courts of appeals and three state high courts have decided the question. Opp. 22. First, that is actually a lot of decisions, and this Court regularly takes up issues that have produced many fewer reported decisions. Second, the Government undercounts. Whether or not the Iowa and New Mexico Supreme Court decisions are distinguishable, they clearly faced the factual scenario present here, and the rule petitioners advance would have precluded retrial in those cases. And the Government ignores numerous other state and federal cases in which the issue has arisen. Pet. 12 n.2, 13 n.3, 23 n.5. Third, the question presented is arising with even greater frequency since *Yeager*. In the last 6 years, the First and Second Circuits and the courts of last resort in D.C., New Jersey, Iowa, New Mexico, and Michigan have decided the question. Pet. 10-13. There can be no serious dispute that many more cases will follow.

The Government is "aware of only two occasions other than this one in the last three decades in which this Court has been asked to resolve the question

presented here." Opp. 22. The Government said the same in *Yeager*. Brief for the United States in Opposition at 21, *Yeager*, No. 08-67, 2008 WL 5692872, at *21 ("We are aware of only two occasions other than this one in the last 20 years in which this Court has been asked to resolve the tension among the courts of appeals on the issue."). This is a curious, backwards argument. When this Court frequently denies petitions presenting a question, the Government argues that fact counts *against* certiorari.

Whether an unlawful conviction deprives a lawful acquittal of its preclusive effect is significant not only for individual criminal defendants facing retrial. The question presented has substantial downstream effects on prosecutorial charging decisions, reinforcing the need for review. Pet. 20-23. The First Circuit's rule encourages overcharging and expansive interpretations of criminal statutes by eliminating consequences for prosecutors. Pet. 22. The Government responds by accusing petitioners of failing to offer a "significant statistical showing" about the problem of excessive charging. Opp. 23. What number does the government think would be enough? Even one abusive indictment is "significant."

The Government suggests that four Supreme Court cases rejecting expansive interpretations of criminal statutes (Pet. 21) are statistically "[in]significant" in light of the 60,000 federal indictments each year. But one Supreme Court case obviously does not mean there was only one indictment under each statute. Those decisions involve Sarbanes-Oxley, the honest services fraud statute, and the federal mail fraud statute. Pet. 21. These are some of the most used (and over-used) statutes on the books.

The Government finally argues that "petitioners cite no evidence that prosecutors in the Second and Fifth Circuits routinely bring unwarranted charges or urge unwarranted interpretations of criminal statutes." Opp. 22. Petitioners are unaware of any comparative statistics on overcharging by circuit or how one could perform such an analysis. But there is plenty of evidence of overcharging within both circuits. *E.g.*, *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014) (rejecting government's theory of securities fraud); *Skilling v. United States*, 561 U.S. 358 (2010) (overturning Fifth Circuit and rejecting government's theory of honest services fraud). And this Court and lower courts have repeatedly recognized that declining to afford collateral estoppel effect to acquittals creates a "potential for unfair and abusive reprosecutions." *Ashe*, 397 U.S. at 445 n.10; *see also* Pet. 20-23.

II. This Court Should Decide Whether a District Court Can Retract a Judgment of Acquittal

The First Circuit permitted the district court to retract its judgment acquitting petitioners on a ground that is squarely contrary to *Evans v. Michigan*, 133 S. Ct. 1069 (2013). The court held: "The *determinative question* is thus 'whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.'" App. 37a-38a (emphasis added) (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977)). The Government does not dispute that Evans rejected precisely that test. Pet. 25. Instead the Government contends that "the facts of this case have nothing to do with that aspect of *Evans*," and that the "court of appeals did not focus on whether the district court had failed to resolve a

factual element of the offense." Opp. 26 n.12. These arguments are hard to square with the First Circuit's holding that precisely that inquiry was "determinative."

The Government does not dispute that the First Circuit's 2013 decision constituted a "substantive" resolution of petitioners' ultimate guilt or innocence. Pet. 25-26. Nor does the Government explain how a district court order interpreting an appellate court's substantive decision qualifies as "procedural" rather than "substantive" under any precedent of this Court —the dichotomy that is, in fact, determinative. Pet. 25. The government argues that the district court's *ex post* characterization of its ruling as an "oversight" should control, Opp. 25 n.11, but such an exception would swallow the rule. Defendants who have been acquitted should not lose the protection of that acquittal because the court later decides it made a mistake.

Nor is the second question presented "factbound." Opp. 26. Whether an acquittal based on a substantive determination by the court of appeals can be withdrawn is a question of law. The government notably fails to identify a single decision from this Court supporting its argument that such orders fall on the procedural end of the spectrum. Opp. 23-26. This Court should grant review of both questions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ABBE DAVID LOWELL
CHRISTOPHER D. MAN
CHADBOURNE & PARKE LLP
1200 New Hampshire Ave., NW
Washington, DC 20036
(202) 974-5600

Counsel for Hector Martínez-Maldonado

LISA S. BLATT
Counsel of Record
ANTHONY J. FRANZE
R. STANTON JONES
ELISABETH S. THEODORE
ARNOLD & PORTER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
lisa.blatt@aporter.com

Counsel for Juan Bravo-Fernandez

February 23, 2016