No. _____

In The
Supreme Court of the United States

BRIAN P. KALEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Where an Acquitted Defendant Contested Multiple Elements of the Offense, Was Acquitted by a General Verdict, and Can Demonstrate That the Evidence of a Particular Element Was Constitutionally Insufficient, Does the Double Jeopardy Clause Collaterally Estop the Government from Prosecuting the Defendant for Another Offense That Also Requires Proof of That Particular Element?

II.

Where an Acquitted Defendant Contested Multiple Elements of the Offense, What Burden of Proof Must He Shoulder to Establish That a Particular Element Was "Necessarily Decided" in His Favor for Purposes of Collateral Estoppel?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Brian P. Kaley, Petitioner.

Kerri Kaley, co-defendant at a joint trial with Petitioner, at which a jury convicted her of one count of obstruction of justice but hung on the remaining counts against her. She is scheduled to be re-tried on the hung counts in August 2016.

Jennifer Gruenstrass, co-defendant, who at an earlier trial was acquitted of all counts.

United States of America, Respondent.

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PETITION FOR WRIT OF CERTIORARI

Brian Kaley respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION OF THE COURT BELOW

The opinion of the Eleventh Circuit, *United States v. Kaley*, No. 15-12695, ___ Fed. Appx. ___, 2016 WL 758697 (CA11 2016), is attached as App.1-7.

JURISDICTION

The Eleventh Circuit affirmed the denial of Brian Kaley's Motion to Dismiss Based on Double Jeopardy on February 25, 2016 and denied rehearing on April 21, 2016. App.8-9.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or

> limb; . . . nor be deprived of life, liberty, or property, without due process of law. . . .

U.S. CONST. amend. V.

PROVISIONS OF LAW INVOLVED

Title 18, United States Code, Section 1956, provides in pertinent part:

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity –
>
> * * *
>
> (B) knowing that the transaction is designed in whole or in part –
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
>
> * * *
>
> (c) As used in this section–
>
> (1) the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the transaction represented proceeds from some form,

> though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law. . . .

Title 18, United States Code, Section 2314, provides in pertinent part:

> Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; . . . .
>
> Shall be fined under this title or imprisoned not more than ten years, or both. . . .

Rule 29(a) of the Federal Rules of Criminal Procedure provides in pertinent part:

> Before Submission to the Jury. After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. . . .

STATEMENT OF THE CASE

A. Introduction

Brian Kaley was tried and acquitted of money laundering conspiracy. In the same trial, the jury hung on the underlying charge of transportation of stolen property, the crime that generated the proceeds that Kaley allegedly laundered. The Government proposes to retry Kaley on the hung counts. Invoking the principles of collateral estoppel enunciated by the Court in *Ashe v. Swenson*, 397 U.S. 436 (1970), Kaley submits that the upcoming retrial is barred by the Double Jeopardy Clause, because both offenses undisputedly require proof of an overlapping, essential element – i.e., whether Kaley knew that the property was stolen.

In *Ashe*, the Court "squarely held that the Double Jeopardy Clause 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 (2009) (emphasis added). Where, as here, the jury rendered a general verdict, which does not explicitly identify the facts the jury actually decided, a reviewing court is tasked with deciphering what fact(s) a "rational jury" would have "necessarily decided" in the defendant's favor. The inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Id*. at 120.

In the courts below, Kaley argued that the evidence on the overlapping element of knowledge was constitutionally insufficient, so that *no* "rational trier of fact could have found the essential element[ ]" in the

Government's favor as a matter of due process. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Given "that issue preclusion is 'predicated on the assumption that the jury acted rationally,'" *Yeager*, 557 U.S. at 124 (quoting *United States v. Powell*, 469 U.S. 57, 68 (1984)), Kaley contended that his "rational jury" "*necessarily* decided" that element in his favor. *See id.* at 119 (emphasis added).

The Eleventh Circuit, however, eschewed any analysis of what a "rational jury" was compelled by due process to "necessarily decide." Because Kaley contested more than one element at trial, the court concluded that he could not prove by "convincing and competent" evidence which element *his jury* decided in his favor. App.6 ("Because the jury was not asked any specific questions or instructed to make any specific findings regarding the elements of each charge, we have no direct evidence regarding the basis of the jury's decision to acquit Kaley of the money laundering charge."). Consistent with the opinions of most, but not all, of the Circuits, the Eleventh Circuit denied the acquittal any preclusive effect, precisely because at trial Kaley contested more than just the one overlapping element he now seeks to foreclose. App.5 ("The jury could have acquitted Kaley of the money laundering count on a number of grounds that would not require a determination of whether Kaley knew the devices were stolen."). *But see Hoult v. Hoult*, 157 F.3d 29, 32 (CA1 2000) (collaterally estopping relitigation of the "central and pivotal issue" of fact, even though a rational jury

could "[t]heoretically" have grounded its verdict on a different finding of fact).

By extending the majority rule even to situations where the evidence on the overlapping element was wholly unproven at the first trial, the Eleventh Circuit both ignored *Ashe*'s directive to apply collateral estoppel with "realism and rationality," *Ashe*, 397 U.S. at 444, and *Jackson*'s mandate for an acquittal when the Government fails to present constitutionally sufficient evidence of the overlapping element. *Jackson*, 443 U.S. at 319, 324. Thus, Kaley petitions the Court for a writ of certiorari to clarify the burden of proof an acquitted defendant must shoulder to establish that a jury "necessarily decided" a particular element in his favor, and to confirm that, whatever the burden, it is satisfied when an acquitted defendant demonstrates that no "rational" jury could have decided that element in favor of the Government.

B. Procedural History and Relevant Facts

So far, this criminal prosecution against Brian Kaley, his wife Kerri, and a third co-defendant Jennifer Gruenstrass, has traversed two jury trials, three interlocutory appeals and one decision by the Court. At his trial, Kaley was acquitted of money laundering conspiracy (18 U.S.C. § 1956(f)) and obstruction of justice. He now argues that a retrial on the six counts on which the jury hung, charging transportation of stolen goods (18 U.S.C. § 2314), would violate his rights under the Double Jeopardy Clause of the Fifth Amendment.

In the earlier two appeals and certiorari review by the Court, the Kaleys unsuccessfully challenged a pretrial restraining order freezing assets that they needed to retain counsel of choice. *Kaley v. United States*, ___ U.S. ___, 134 S. Ct. 1090 (2014). Chief Justice Roberts summarized the facts of the case up to that point:

> Kerri Kaley worked as a sales representative for a Johnson & Johnson subsidiary, selling prescription medical devices. [Kerri] Kaley and other sales representatives occasionally obtained outmoded or surplus devices from staff members at the medical facilities they served, when, for example, those devices were no longer needed because they had been superseded by newer models. [Kerri] Kaley sold the unwanted devices to a Florida company, dividing the proceeds among the sales representatives.
>
> [Kerri] Kaley learned in January 2005 that a federal grand jury was investigating those activities as a conspiracy to sell stolen prescription medical devices. [Kerri] Kaley and her husband [Brian Kaley] (who allegedly helped ship the products to Florida) . . . contended that the prosecution was baseless because the Government could not identify anyone who claimed ownership of the medical devices alleged to have been "stolen."
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> * * *
>
> [T]he Government proceeded to trial separately against their codefendant Gruenstrass. . . . Her counsel argued that the Government was

> pitching a fraud without a victim, because no Government witness took the stand to claim ownership of the allegedly stolen devices. The jury acquitted Gruenstrass on all charges in less than three hours – a good omen for the Kaleys and their counsel as they prepared for their own trial.

Id. at 1105-07 (Roberts, C.J., dissenting).

After remand from the Supreme Court, the Kaleys proceeded to trial without counsel of choice. The Government's case-in-chief included testimony from former Johnson & Johnson ("J&J") sales representatives who claimed that they sometimes had acquired medical devices without consent of the hospitals and had given them to Kerri for resale. Those same witnesses and others confirmed, however, that at other times medical devices had been freely given to sales representatives by hospital staff. As to Brian, who was not employed by J&J or any hospital, not one witness testified that Brian stole medical devices, knew that devices were stolen or even should have known that devices were stolen (the "specified unlawful activity" for the money laundering charge).[1]

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[1] More than once in the tortured history of this case, the Government has shifted its theory as to the identity of the victim of this alleged theft. Originally, at the sentencing of one sales representative who was cooperating, the Government claimed that the hospitals were the victims – not because they had ever complained about thievery but because the Government had not found any hospital employee who would admit to having "authoriz[ed]" the giveaways. *Id*. The court was "very much concerned" about going forward with no one "complaining except the

In order to convict Brian of the money laundering conspiracy charge in Count 7, the Government had to prove, as the district court instructed, that he attempted to conceal various financial "transactions involving the proceeds of specified unlawful activity," which in this case was the interstate transportation of stolen property charged in Counts 1-6. DE434:27, 86. Brian did not contest that he engaged in financial transactions involving the proceeds from the sales of the devices. There also was no question that both Kaleys were the recipients of the "proceeds" (i.e., revenue) from the sale of the devices, and Brian did not contest that he was personally involved in packing and shipping the devices interstate from New York to Florida. Instead, Brian pursued a defense focusing on the absence of any evidence that he knew or should have known that the funds involved in the transactions were from the sale of stolen property. Thus, in his closing argument to the jury, Brian's counsel emphasized that Brian reasonably believed that the devices were not stolen and that, to his knowledge, the financial

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Government" but nevertheless accepted the plea and imposed the agreed-upon sentence. DE105-1:31-33, 36. At the sentencing of another former sales representative, the Government did not even seek a restitution order, admitting that "[t]here is no readily identifiable [victim]." DE70-1:12. At the severed trial of the Kaleys' codefendant, Gruenstrass, the Government claimed instead that the victim of the alleged theft was J&J, which employed Gruenstrass and had sold the devices to the hospitals. After a jury rejected that theory and acquitted Gruenstrass, the Government reverted back to the hospitals-as-victims theory at the trial of the Kaleys, over their objection.

transactions in which he partook did not involve the proceeds of unlawful activity. DE434:58-59.

To be sure, Brian Kaley also contested the concealment element of money laundering conspiracy. However, the evidence on that element was mixed and certainly constitutionally sufficient to permit the jury's resolution. The Government presented witnesses and documentary evidence to prove that Brian created and owned the two construction-related companies that received the bulk of the proceeds from the sale of the devices to Keith Danks (the alleged "fence") in Florida. The Government also presented evidence that those companies did almost no construction business; that virtually all of the income of those companies came from selling medical devices; and that Brian failed to file any IRS Forms 1099 in the names of other sales representatives, thereby concealing, as the Government argued in closing, the nature of the proceeds paid to those sales representatives. DE434:9, 18-19, 24. Brian tried to counter by arguing that (1) Danks issued accurate invoices and wrote checks to Kerri in her name from Danks's own company's account; (2) the Kaleys deposited the checks in the accounts of the two companies owned by and easily traced to Brian; and (3) the proceeds from the sales of the devices were reported on the tax returns of those companies.

The district court denied Brian's motion for judgment of acquittal, DE402:1, and submitted the case to the jury. The jury returned a general verdict, acquitting Brian Kaley of money laundering conspiracy and obstruction of justice; the jury hung on six counts

charging transportation of stolen goods.[2] The district court declared a mistrial on the hung counts and denied renewed motions for judgments of acquittal. DE402:1. Thus, the trial judge believed that there was constitutionally sufficient evidence on all elements of the offense. *See* Fed. R. Crim. P. 29.

After the Government announced that it would retry Brian on the hung counts, he moved to dismiss on collateral estoppel grounds.[3] Brian argued that a retrial on the hung counts would require another jury to find that he knew that the medical devices were stolen, an overlapping essential element common to both the money laundering conspiracy charge and the stolen property offenses. Brian argued that the acquittal on the money laundering charge *necessarily* reflected a finding in his favor on that element, barring further prosecution under the Double Jeopardy Clause – notwithstanding that the jury was hung on the stolen property counts at his earlier trial.[4]

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[2] As to Kerri Kaley, the jury hung on all of the counts alleging the transportation of stolen goods and money laundering conspiracy, though it found her guilty of obstruction of justice.

[3] After his acquittal on the money laundering charge that formed the basis for the pretrial restraint of assets, the protective order was modified, DE458, to allow Brian Kaley to use funds to retain counsel of choice, who filed all subsequent motions and is currently representing him.

[4] In *Yeager*, the Court held that in determining why a rational jury acquitted on one count, any other count for which the jury deadlocked is deemed "a nonevent" and "conjecture about possible reasons for a jury's failure to reach a decision should play no part in assessing the legal consequences of a unanimous verdict that the jurors did return." 557 U.S. at 121-22. Therefore,

The district court denied the motion, but explicitly found that the motion was not frivolous, so the retrial was stayed pending an interlocutory appeal. DE524:7; DE532. In his brief to the Eleventh Circuit, Brian argued that his acquittal on the money laundering charge was based on the Government's failure to present constitutionally sufficient evidence that the financial transactions involved proceeds that he knew were derived from the transportation of stolen goods. Brian argued, in the alternative, that even if the evidence of knowledge was constitutionally sufficient to go to the jury, the acquittal still reflected that the jury necessarily decided that element of the offense in his favor, because his challenge to the other contested element – concealment – "was just the corollary to Brian's theory of defense that he did not know that any of the medical devices were stolen, so he had no motive to conceal." Appellant's Corrected Initial Brief, CA11 No. 15-12695-AA, at 49. Indeed, the Government itself described the evidence of concealment as the "direct evidence of" and "inextricably intertwined" with Brian's knowledge that the devices were stolen. DE522:92. Thus, Kaley argued that "a rational jury could not untwine these two elements and acquit solely on the basis that Brian lacked the intent to conceal." Appellant's Brief at 55.

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where an issue necessarily decided in the defendant's favor on the acquitted counts is an "essential element" of a hung count, the court must bar retrial on that count notwithstanding the jury's failure to reach a verdict on the hung count. *Id*. at 123.

The Government countered that because Brian Kaley "did not defend against the money laundering charge *solely* on the ground that he did not know about the underlying unlawful activity," but also contested the "concealment" element, collateral estoppel did not apply. *See* Brief for the United States, CA11, at 56; *accord id.* at 58 (noting that the court's jury instructions "did not take any element of the money laundering count off the table for the jury"). The Government expressly argued that collateral estoppel applied only in "single issue" cases. *Id.* at 62-63, 65.[5] Although the Government did not concede that there was constitutionally insufficient evidence of the "knowledge" element, it argued that even if there was it was irrelevant to a collateral estoppel analysis. *Id.* at 59.[6]

Without oral argument, the Eleventh Circuit affirmed. In construing *Ashe*, the Eleventh Circuit held that "'[t]he burden is on the defendant to prove *by convincing and competent evidence* that in the earlier trial, it was necessary to determine the fact sought to be foreclosed.'" App.4 (emphasis added; citation omitted). Although acknowledging that "Kaley's knowledge of the stolen nature of the goods [was] an overlapping

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[5] The Government observed that "[i]n virtually every instance where this Court has found collateral estoppel, the parties argued only a single issue at the trial, or the defendant expressly conceded all of the elements of the offense on which he was acquitted except for a single factual matter overlapping the counts on which the jury hung." *Id.* at 53.

[6] The Government devoted barely one page of its 57-page appellate brief to marshaling the (constitutionally insufficient) evidence of the overlapping knowledge element. *Id.* at 51-52.

essential element of the transportation of stolen goods charge," the Eleventh Circuit held that Brian had failed to meet his (alleged) "convincing and competent" burden of proof, because "[t]he jury could have acquitted Kaley of the money laundering count on a number of grounds that would not require a determination of whether Kaley knew the devices were stolen." App.5.

The Eleventh Circuit never opined on whether the Government presented *constitutionally sufficient* evidence of the overlapping element because it focused exclusively on the fact that Brian contested more than just a single element of the acquitted offense. *See* App.6-7 n.1 (appellate court concluding that it could not determine "on which element the jury rested and therefore cannot assume that it rested on, let alone decided, that Kaley knew [sic] the stolen nature of the devices"). Notably, however, the Eleventh Circuit provided a summary of the evidence presented. App.2 (describing the evidence as proving only that Brian "Kaley assisted in the packing and shipping [the devices], and managed the large amount of incoming profits through accounts belonging to his construction businesses"). That evidence would plainly have been *constitutionally insufficient* to support a finding beyond a reasonable doubt that Brian knew the devices were stolen. *See* Appellant's Brief, CA11, at 37, 42-46, citing *United States v. McDougald*, 990 F.2d 259, 262 (CA6 1993) (judgment of acquittal required as a matter of law in money laundering case because Government

presented "insufficient evidence" of knowledge of the unlawful activity).

The Eleventh Circuit rejected out of hand Brian Kaley's principal argument on appeal: that the Double Jeopardy Clause bars a second trial as to any charge requiring proof of an overlapping essential element of an acquitted charge for which there was constitutionally insufficient evidence at the first trial. App.6-7 n.1. Brian Kaley's petition for rehearing and rehearing en banc was denied. Brian Kaley's retrial is currently scheduled for August 2016.[7]

[7] Brian filed a motion to sever his retrial from his wife's so that she can be available to testify in his defense at the retrial. The district court granted the severance but has ordered that the defendants be tried simultaneously, albeit in front of two different juries. DE469.

REASONS FOR ISSUING THE WRIT

I. The Court of Appeals Has Decided an Important Question of Constitutional Law That Should Be Settled by the Court: Where an Acquitted Defendant Contested Multiple Elements of the Offense, Was Acquitted by a General Verdict, and Can Demonstrate That the Evidence of a Particular Element Was Constitutionally Insufficient, Does the Double Jeopardy Clause Collaterally Estop the Government from Prosecuting the Defendant for Another Offense That Also Requires Proof of That Particular Element?

This case lies at the intersection of *Ashe v. Swenson*, 397 U.S. 436 (1970), and *Jackson v. Virginia*, 443 U.S. 307 (1979), which, when read together, compel the conclusion that an acquittal bars a subsequent prosecution requiring proof of any element for which the Government's evidence at trial was constitutionally insufficient.

A. *Ashe v. Swenson* Precludes Relitigation of Any Element "Necessarily Decided" by a Verdict of Acquittal

In *Ashe v. Swenson*, this Court did "not hesitate to hold" that the doctrine of collateral estoppel is "embodied in the Fifth Amendment guarantee against double jeopardy." 397 U.S. 436, 445 (1970). "Although better known as a civil law concept, collateral estoppel also applies in criminal cases," where it "serves to: (1) reduce chances of wrongful conviction after an acquittal,

(2) strengthen notions of finality, (3) preserve judicial resources, and (4) restrain overzealous prosecutors." *Smith v. Dinwiddie*, 510 F.3d 1180, 1186 (CA10 2007).

The doctrine "precludes the Government from relitigating any issue that was *necessarily* decided by a jury's acquittal in a prior trial." *Yeager*, 557 U.S. at 119. "A jury verdict that necessarily decided that issue in his favor protects him from prosecution for any charge for which that is an essential element." *Id.* at 123.

The Court applies the double jeopardy bar to *all* types of acquittals, not distinguishing between acquittals ordered by trial or appellate judges based on constitutionally insufficient evidence[8] and acquittals by juries even when based "upon an egregiously erroneous foundation." *Fong Foo v. United States*, 369 U.S. 141, 143 (1962) (*per curiam*); *accord Tibbs v. Florida*, 457 U.S. 31, 41 (1982) ("A verdict of not guilty, whether rendered by the jury or directed by the judge, absolutely shields the defendant from retrial.").[9] The only

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[8] *See, e.g.*, *Smalis v. Pennsylvania*, 476 U.S. 140, 142 (1986); *Burks v. United States*, 437 U.S. 1 (1978); *Greene v. Massey*, 437 U.S. 19 (1978); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977).

[9] *See also Evans v. Michigan*, ___ U.S. ___, 133 S. Ct. 1069, 1075 (2013) (acquittal based on trial court's "clear misunderstanding of what facts the State needed to prove under State law"); *Smith v. Massachusetts*, 543 U.S. 462, 467-68 (2005) (acquittal based upon a mistaken understanding of what evidence would suffice to sustain conviction); *Arizona v. Rumsey*, 467 U.S. 203, 211 (1984) (acquittal based upon a "misconstruction of the statute" defining the requirements to convict); *Sanabria v. United States*, 437 U.S. 54, 68-69 (1978) (acquittal after trial court erroneously excluded evidence); *see generally United States v. Scott*, 437 U.S. 82,

triggering qualification is that the jury actually "decided" the case by either acquitting or convicting, as opposed to failing to reach any verdict at all resulting in a hung jury mistrial.[10] "Decided," for double jeopardy purposes, can mean an acquittal based on legally insufficient evidence or based on a jury's reasonable doubt about contested issues of fact.

The Court has construed the collateral estoppel prong of the double jeopardy protection as applying only when a reviewing court can adequately decipher the element or elements of the offense on which the jury likely had a reasonable doubt, even assuming that all of the Government's evidence survived Due Process review for evidentiary sufficiency. *See Ashe*, 397 U.S. at 443. That does not mean, however, that courts should "presume an ability to identify which factor was at play in the jury room," because that "would require speculation into what transpired in the jury room" and

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98 (1978) ("[T]he fact that the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles affects the accuracy of that determination, but it does not alter its essential character" for double jeopardy purposes) (internal quotation marks and citation omitted).

[10] The application of collateral estoppel first requires a "jeopardy-terminating event." *See generally Richardson v. United States*, 468 U.S. 317, 322-23 (1984) (no double jeopardy bar to retrying a hung count – even if the evidence presented on that count at the first trial was constitutionally insufficient – because there was no acquittal collaterally estopping the retrial); *United States v. Sanford*, 429 U.S. 14 (1976); *cf. Tibbs*, 457 U.S. at 42 (retrial permitted where trial judge set aside guilty verdict as against the weight of the evidence because a reversal on that ground "does not mean an acquittal was the only proper verdict").

courts must "avoid such explorations into the jury's sovereign space. . . ." *Yeager*, 557 U.S. at 122. Therefore, the Court in *Ashe* provided courts with an objective standard: Courts inquire "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 (emphasis added); *accord Yeager*, 557 U.S. at 120.

The Court realized that where a jury has reached only a general verdict, a too "restrictive" view of what the acquitting jury "could have" decided "would . . . simply amount to a rejection of the rule of collateral estoppel in criminal proceedings." *Ashe*, 397 U.S. at 444. To prevent lower courts from doing so, the Court emphasized that the doctrine should not be applied "with the hypertechnical and archaic approach of a 19th century pleading book" but, instead, with "realism and rationality." *Id*.

The facts in *Ashe* made it relatively simple to apply that standard, because the Court could glean from the record only one contested factual issue in the armed robbery trial – whether Ashe was one of the robbers. *Id.* at 445 ("For the record is utterly devoid of any indication that the first jury could rationally have found that an armed robbery had not occurred, or that Knight had not been a victim of that robbery. The *single rationally conceivable issue in dispute* before the jury was whether the petitioner had been one of the robbers.") (emphasis added); *see also Yeager*, 557 U.S. at 119 (applying collateral estoppel where there was only one "contested issue"). Though the *Ashe* Court

ruled it was *sufficient* to satisfy the objective standard if only a single issue was actually contested at trial,[11] it expressed no view as to whether contesting only a single issue was a *prerequisite* for applying collateral estoppel. Nor has the Court in any case since explored whether or how the *Ashe* standard applies when multiple elements of an offense were at least marginally "contested" at trial.

B. *Jackson v. Virginia* Mandates an Acquittal Where Any Element is Not Supported by Constitutionally Sufficient Evidence

In *Jackson v. Virginia*, 443 U.S. 307 (1979), the Court extended its earlier decision in *In re Winship*, 397 U.S. 358, 362 (1970), which required the Government to prove each element of a crime beyond a reasonable doubt. In *Jackson*, the Court held that *Winship* "presupposes as an essential of the due process guarantee . . . that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof." 443 U.S. at 315. To be constitutionally sufficient, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements beyond a reasonable doubt." *Id.* at 319.

[11] In assessing a verdict "rationally," the *Ashe* Court made it clear that courts should not presume "that the jury may have disbelieved substantial and uncontradicted evidence of the prosecution on a point the defendant did not contest." *Ashe*, 397 U.S. at 444 n.9.

Because that principle was "so fundamental a substantive constitutional standard," the Court reasoned that while a jury's power to *acquit* a defendant was "unassailable," its "discretion" to *convict* required a constitutional limit, because even a properly instructed jury may "occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt." *Id.* at 317 & n.10. "The Due Process Clause, in other words, sets a lower limit on an appellate court's definition of evidentiary sufficiency." *Tibbs*, 457 U.S. at 45 (footnote omitted). The Government's failure to present constitutionally sufficient evidence

> means that the government's case was so lacking that it should not have even been *submitted* to the jury. Since we necessarily afford absolute finality to a jury's *verdict* of acquittal – no matter how erroneous its decision – it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.

Burks, 437 U.S. at 16.

C. Harmonizing *Ashe v. Swenson* and *Jackson v. Virginia*

Given that, as *Jackson* holds, courts have "a duty to assess the historic facts when it is called upon to apply [this] constitutional standard" to a conviction, 443 U.S. at 318, courts likewise have that duty when applying collateral estoppel to a jury's general verdict

of acquittal. So "when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty," *Burks*, 437 U.S. at 16, precisely because no "rational trier of fact could have found [the overlapping] essential element[] of the crime beyond a reasonable doubt," *Jackson*, 443 U.S. at 318-19, the reviewing court must conclude, as a threshold matter, that the acquittal "necessarily decided" that element in the defendant's favor – no different than if the trial judge had entered a judgment of acquittal on that basis. *See* Fed. R. Crim. P. 29.[12]

In this case, the Eleventh Circuit held that an acquitted defendant bears the burden to prove, by "convincing and competent" evidence, the fact or element necessarily decided by the jury's acquittal, but the only way to satisfy that burden is to demonstrate that, at trial, the acquitted defendant contested only the single element that he now seeks to foreclose. According to the Eleventh Circuit, it is not enough for a defendant to demonstrate that the Government's evidence on the

[12] It bears repeating, *see ante* at 18 n.10, that this sufficiency analysis is triggered by the acquittal of a charge that happens to share an "overlapping essential element" with the hung counts. Absent the acquittal (a "jeopardy-terminating event"), the reviewing court would have no occasion to assess the sufficiency of evidence as to the factual element common to the acquitted and hung counts. *See generally Richardson*, 468 U.S. at 322-23. The sufficiency analysis is triggered by the acquittal and thus focuses on the elements of the *acquitted* charge. A finding of insufficiency on any element of the *acquitted* count necessarily decides that element in the defendant's favor, which then estops the Government from prosecuting any other charge that would require proof of that same element.

factual issue he seeks to foreclose was constitutionally insufficient under *Jackson* – which would mandate that the jury, if not the judge, acquit on that basis, no matter how many elements the defendant contested at trial. Taking the Eleventh Circuit's holding to its logical end, if the defendant contested more than one element at trial, he cannot meet his burden, even if he demonstrates that the Government presented *no evidence at all* on the element he later seeks to foreclose.

It may well be, as the Eleventh Circuit hypothesized, that the jury made a finding of fact in the defendant's favor on another element of the offense, App.5-6, and this finding would have also justified an acquittal. But if the evidence of the essential element that the defendant seeks to foreclose was insufficient as a matter of due process, a reviewing court must still conclude that the jury "necessarily decided" that element in the acquitted defendant's favor. Collateral estoppel does not depend on "ascertain[ing] the thought process in which the jury *actually* engaged." *United States v. Hogue*, 812 F.2d 1568, 1581 (CA11 1987) (emphasis added). It is enough that the defendant establishes what facts those twelve jurors "*necessarily* decided," *Yeager*, 557 U.S. at 119, in light of the (constitutionally insufficient) evidence presented at trial – an objective, legal determination of the factual findings "necessarily inherent in the verdict." *United States v. Gonzalez*, 548 F.2d 1185, 1192 (CA5 1977).

Any other rule cannot be reconciled with *Griffin v. United States*, 502 U.S. 46 (1991), where the Court held that, in a case charging a multi-object conspiracy for

which one object was supported by constitutionally sufficient evidence while the other was not, the jury is presumed to have convicted on the theory for which there was constitutionally sufficient evidence. *Id*. at 59. The Court viewed the chance as "'remote'" that "'the jury convicted on a ground that was not supported by adequate evidence when there existed alternative grounds for which the evidence was sufficient.'" *Id.* (citation omitted). Per *Griffin*, the Court presumes that "jurors are well equipped to analyze the evidence" in deciding to convict. *Id.* The same assumption about a rational jury's reasoning skills should apply when analyzing an acquittal, even one that might theoretically be based on more than one element. If a rational, convicting jury is presumed to have convicted using the constitutionally *sufficient* theory, a rational, acquitting jury should be presumed to have acquitted based on the constitutionally *insufficient* theory. Indeed, if the Government introduces no evidence whatsoever on one of the contested essential elements of an offense, there would be no reason for a rational jury to even *consider* any other elements, much less to acquit based on one of those other elements, instead of the element for which there was no evidence at all.

The Eleventh Circuit's opinion thus creates tension between *Ashe* and *Jackson*, when those cases can easily be harmonized: If, as a matter of constitutional law (due process), *Jackson*'s "rational" jury could not find a particular element in favor of the Government, then *Ashe*'s equally "rational" jury could not either, and

the general verdict has "necessarily decided" that element in favor of the defendant.

By adopting the Government's iron-clad, "single issue" test, the Eleventh Circuit has diluted the Fifth Amendment's double jeopardy protections when, arguably, its potency should be strongest – i.e., when the Government's case is at its weakest. To illustrate: Imagine a trial in which the Government presents constitutionally insufficient evidence as to multiple elements – or, for that matter, presents no evidence at all. The jury, if not the judge, acquits, as it would be *required* to do as a matter of law. *Jackson*, 443 U.S. at 318-19; *Burks*, 437 U.S. at 16. Yet, in the absence of "specific findings regarding the elements of each charge," App.6, the Eleventh Circuit would deny the acquittal *any* preclusive effect because the judge or "[t]he jury could have acquitted . . . on a number of grounds." App.5. The Government would be free to prosecute the defendant for other offenses requiring proof of some of the very same elements that were wholly unproven at the first trial. A total failure of proof resulting in a general verdict of acquittal thus invites a second prosecution, "precisely what the constitutional guarantee forbids." *Ashe*, 397 U.S. at 447. After all, "[t]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials." *Burks*, 437 U.S. at 11 (footnote omitted).

II. The Lower Courts Are In Disarray Over (1) Whether Collateral Estoppel Applies to a General Verdict Where the Defendant Contested More than One Element of the Acquitted Offense And, If So, (2) What Burden of Proof an Acquitted Defendant Must Satisfy to Establish the Factual Issues Necessarily Decided in His Favor.

Section I of this Petition addresses the scenario where an acquitted defendant can demonstrate that the evidence as to the particular element he seeks to foreclose was constitutionally insufficient. In the courts below, the Government argued that it presented constitutionally sufficient evidence of all of the elements of the offense for which Brian Kaley was acquitted; and because he contested multiple elements, the Government argued that he cannot meet his burden of establishing the basis for the acquittal. In cases in which a defendant contested more than just the element he seeks to foreclose, the circuit courts of appeals and state courts of last resort are in disagreement over how – or even whether – a defendant can satisfy his burden of persuasion. Thus, even if the Government presented constitutionally sufficient evidence of the knowledge element that Brian Kaley seeks to foreclose, this case presents the question of what exactly is a defendant's burden of persuasion and whether the so-called "single issue" test is a condition for invoking collateral estoppel.

In *Dowling v. United States*, 493 U.S. 342, 350 (1990), the Court adopted, without discussion, the

unanimous view of the circuit courts that a criminal defendant has the burden of *persuasion* in demonstrating the basis for a general verdict acquittal in order for that verdict to have any preclusive effect in a subsequent proceeding. However, the *Dowling* Court stated only that the defendant had to "persuasively" establish that basis but did not define "persuasively" by any traditional measure (preponderance, clear and convincing, beyond a reasonable doubt). 493 U.S. at 352. For example, the Court did not specify whether a defendant could satisfy his burden by establishing that it was "more likely than not" that a rational jury would have acquitted on a particular basis – as would be the case where, at trial, the defendant focused *mostly* but not *exclusively* on a single element.

Since *Dowling* was decided, the circuit courts have struggled to quantify the defendant's burden, especially when more than a single element was contested, even marginally, at trial. The circuit courts employ both vastly different terminology and methodologies to describe the defendant's burden, but most end up resolving the multiple-contested-issue dilemma with the same rigid conclusion reached by the Eleventh Circuit.

In this case, as in a string of prior ones, the Eleventh Circuit held that an acquitted defendant must establish the basis for his acquittal "by convincing and competent" evidence, which the court construed to deny relief in every case where the defendant contested more than the one element of the acquitted offense he seeks to foreclose. App.4 (citing *Hogue*, 812 F.2d at 1578); *accord United States v. Magluta*, 418

F.3d 1166, 1174 (CA11 2005) ("[A] court must determine whether the jury's verdict of acquittal was based upon reasonable doubt about *a single element* of the crime which the court can identify.") (emphasis added); *see also United States v. Hewitt*, 663 F.2d 1381, 1387 (CA11 1981).[13] The Eleventh Circuit refused to evaluate *the likelihood* that a rational jury would have acquitted the defendant on the element he seeks to foreclose – a strong likelihood here, given that the Government failed to introduce legally sufficient evidence of the knowledge element at trial. In contrast to the evenly fought battle over the other contested element (concealment), lack of knowledge was central and pivotal to the defense, and the two contested elements were so intertwined that a jury could not practically find in favor of Kaley on the concealment element without also finding in his favor on the knowledge element. *See*, *e.g.*, *Roesser v. State*, 294 Ga. 295, 299 (Ga. 2013) (although the State identified other issues that may have been the basis for the acquittal, the Supreme Court of Georgia applied collateral estoppel, "disagree[ing] with the Court of Appeals to the extent it concluded that the jury could have determined whether the element of malice was established without having

[13] The cases in which the Eleventh Circuit has sided with the defendant and given a general verdict preclusive effect are those where the defendant contested only one element. *See, e.g.*, *United States v. Valdiviez-Garcia*, 669 F.3d 1199, 1202 (CA11 2012) (applying collateral estoppel where "the evidence of the remaining three . . . elements was undisputed") (citation omitted); *United States v. Ohayon*, 483 F.3d 1281, 1287 (CA11 2007) (applying collateral estoppel where "[t]he lone dispute at trial was whether Ohayon was aware of the contents of the bags").

to decide whether his conduct was justified as self-defense").

The Sixth Circuit comes closest to mimicking the Eleventh Circuit's terminology. In *United States v. Uselton*, 927 F.2d 905, 907 (CA6 1991), the Sixth Circuit, citing a string of earlier decisions, held that a defendant must prove "by clear and convincing evidence" that the jury in an earlier proceeding acquitted on the claimed basis. And, like the Eleventh Circuit, in explaining the meaning of that phrase, the Sixth Circuit adopted earlier circuit opinions limiting estoppel to cases where there was only a "'single rationally conceivable issue in dispute.'" *Id.* at 907-08 (citation omitted); *see also United States v. Benton*, 852 F.2d 1456, 1466 (CA6 1988) (employing "convincing and competent evidence" standard).[14]

The Second, Third, Seventh and Ninth Circuits appear to agree with that extreme construction but do so without expressly framing the issue in terms of any particular evidentiary burden. *See Tucker v. Arthur Andersen & Co.*, 646 F.2d 721, 728-29 (CA2 1981) (once a defendant "put[s] in issue" elements without

[14] The Sixth Circuit in *Benton* cited a Seventh Circuit case, *United States v. Gentile*, 816 F.2d 1157, 1162 (CA7 1987), for this standard, but there is no such language in *Gentile*. The *Benton* court also stated that an acquittal "need not be based on *any* jury factual finding" but could simply be (irrationally) "based on jury lenity." 852 F.2d at 1466 (emphasis added). That suggestion, of course, runs contrary to *Ashe*'s requirement that courts assume an acquittal was by a "rational" jury.

"conced[ing]" them, a general verdict will have no preclusive effect so long as the jury is instructed on them, even if the defendant did not actively contest them); *United States v. Rigas*, 605 F.3d 194, 218-19 (CA3 2010) (holding that defendants have a "heavy burden. . . . To succeed on their collateral estoppel claim, the Rigases would have to convince us that the *only question* at issue in the New York trial was whether the Rigases received the wire transfers as income. In other words, the Rigases would have to show that their *only defense* was that they believed that the wire transfers were legitimate loans. . . . But the record does suggest that there were *other contested issues*.") (emphasis added); *United States v. Patterson*, 827 F.2d 184, 187 (CA7 1987) (the defendant "must show more than that the [first] jury might have, or even probably, found he did not scheme to defraud [the victim]. If a rational jury could have acquitted [the defendant] on any basis other than a finding that he did not scheme to defraud [the victim], then collateral estoppel does not bar" a second trial); *United States v. Romeo*, 114 F.3d 141, 143 (CA9 1997) (applying estoppel where "the only element that was contested" was defendant's knowledge); *United States v. Alroy*, 133 F.3d 929, 1997 WL 812249 (CA9 Dec. 24, 1997) (unpublished) ("It is Appellant's burden to show the jury could not have based its verdict on any other issue. . . . Appellant's burden is met if the issues in both the new and mistried counts are the only issues litigated and necessarily decided in Appellant's acquittal.").

The Fifth Circuit too seems to have arrived at the same destination but does so by construing the phrase "necessarily decided" as used in *Yeager* and an earlier Fifth Circuit opinion to effectively mean indispensable, thereby denying relief when elements in addition to the one the defendants sought to foreclose were contested. *See United States v. Sarabia*, 661 F.3d 225, 231 (CA5 2011) (denying relief where it was "possible" that the verdict was attributable to a different element) (citing *United States v. Brackett*, 113 F.3d 1396, 1398 (CA5 1997)); *see also United States v. El-Mezaan*, 664 F.3d 467, 557 (CA5 2011) (no estoppel where defendant failed to "show that the jury's verdict on the acquitted count in the first trial could have been based *solely* on an issue that was not an element of the re-tried count") (emphasis added).

The positions of the D.C. Circuit and Eighth Circuit are not crystal clear, as they do not frame the issue in terms of any particular burden of proof. But neither circuit appears to confine its inquiry to whether the defendant contested only a single element, instead focusing on whether other elements could rationally have been the basis for the acquittal. For example, in *United States v. Coughlin*, 610 F.3d 89 (CADC 2010), the D.C. Circuit barred a defendant's retrial on three wire fraud counts, concluding that the jury's earlier acquittals on mail fraud affirmatively established that "he lacked fraudulent intent." *Id*. at 98. The court rejected the Government's hypothesis that the jury may have acquitted on the other element, not because the defendant conceded that other element, but because the

court did not believe that a "rational" jury would have acquitted on that other element in light of the jury instructions.[15] In *United States v. Howe*, 590 F.3d 552 (CA8 2009), the Eighth Circuit rejected the defendant's theory of what an earlier jury decided as only "one potential reason" for the acquittal, but, at the same time, rejected several of the Government's alternative theories for an acquittal as too abstract. *Id*. at 556-57 & n.5.

The First Circuit stands in sharp contrast to the approach adopted by the Eleventh Circuit and others. It has applied collateral estoppel even when the verdict may have been based on an issue other than the one the litigant seeks to foreclose. In *Hoult v. Hoult*, the First Circuit squarely framed the issue in traditional burden of proof terms, recognizing that *Ashe* left open "[t]he more difficult threshold issue [of] *how clear* it must be that the jury found the fact in question." 157 F.3d 29, 32 (CA1 2000) (emphasis in original).[16] In

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[15] Insofar as the defendant in *Coughlin* did not concede the other element(s) of the offense, *Coughlin*'s approach, which gave the general verdict preclusive effect, would appear to directly conflict with the holding in *Tucker*, *ante* at 29, where the Second Circuit rejected collateral estoppel precisely because the defendant had not conceded the other issues upon which the jury was instructed. *See Tucker*, 646 F.2d at 728-29 ("We see no evidence that those issues were not submitted to the jury. Judge Werker's charge with regard to State Mutual's claims against Meckler did not suggest that the reliance and causation elements had been conceded.").

[16] Although *Hoult* is a civil, not a criminal, case, the principles of collateral estoppel enunciated by the Court in *Ashe* apply

Hoult, a father sued his daughter for defamation based on letters the daughter sent to third-parties telling them that her father had raped her. The daughter moved to dismiss the defamation lawsuit on collateral estoppel grounds based on an earlier civil jury verdict that she had obtained against her father for having subjected her to various forms of sexual abuse, including rape. Opposing collateral estoppel, the father countered that the general verdict did not necessarily reflect a jury finding in the daughter's favor on the specific rape allegations; the verdict may have been based solely on the other alleged abuse not amounting to rape. The district court granted the daughter's motion to dismiss the defamation action on collateral estoppel grounds, and the First Circuit affirmed, agreeing with the daughter that the verdict in her favor "necessarily decided that rapes had occurred." *Id*. at 33.

The First Circuit began by summarizing the holding in *Ashe* and its emphasis on the need to review the entire record to determine the basis of a jury's verdict. The court believed that the burden of proof should be "more demanding than the 'more likely than not' standard commonly applied in civil matters, but sensibly so." *Id.* at 32. While noting that many circuits had framed the burden in terms of a jury's finding being "necessary" to the judgment, the court defined that

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equally in both contexts: "Although first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law at least since this Court's decision more than 50 years ago in *United States v. Oppenheimer*, 242 U.S. 85 (1916)." *Ashe*, 397 U.S. at 443.

term to mean only "central to the route that led the factfinder to the judgment reached." *Id.* In its view, an issue could be central "even if the result 'could have been achieved by a different, shorter and more efficient route.' " *Id.* (citation omitted). Upon examination of the record, including opening statements, testimony and closing arguments, the court concluded that the rape allegations were "the centerpiece" of the case. *Id.* That was enough in the court's estimation to give the rape allegations preclusive effect, concluding that while "[t]heoretically" the jury could have based the verdict on evidence of other abusive conduct, such speculation was "wholly unrealistic" given that the rape allegation was "the central and pivotal" issue in the case. *Id.*[17]

The Fourth and Tenth Circuits do not appear to have staked out positions in any precedential cases.[18]

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[17] Prior to *Hoult*, the First Circuit struggled to define the defendant's burden. In *United States v. Marino*, 200 F.3d 6 (CA1 1999), for example, the First Circuit agreed that a defendant did not have to prove the basis for an acquittal to " 'a standard of absolute certainty,' " *id*. at 10 (citing *United States v. Morris*, 99 F.3d 476, 481 (CA1 1996)), but still had to prove it " 'unequivocally.' " *Id*. (citing *United States v. Aguilar-Aranceta*, 957 F.2d 18, 25 (CA1 1992)). Because the jury instructions were ambiguous, the First Circuit in *Marino* then held that the defendant failed to satisfy a "reasonable degree of reliability" standard. *Id.* Subsequently in *Yeager*, the Court overruled *Aguilar-Aranceta*, insofar as it held that a reviewing court had to reconcile an acquittal on one count with a hung jury on another.

[18] The initial panel decision in *Phillips v. United States*, 502 F.2d 227, 231-32 (CA4 1974), applied collateral estoppel even when multiple bases for an acquittal could have been possible. However, the panel opinion was vacated, and the subsequent

At least two state courts of last resort likewise appear to have eschewed a strict single-issue test, in favor of permitting a more holistic consideration of which issues were "necessarily decided" in a general verdict of acquittal. *See Roesser*, 294 Ga. at 301 (holding that "the jury in acquitting" the defendant "*necessarily determined* that [he] acted in self-defense" notwithstanding the fact that the "Court of Appeals and the State identified two other issues that they believe were possibly decided by the jury," including the intent element); *Commonwealth v. Davis*, 290 Va. 362, 371-72 (Va. 2015) (holding that the trial court's acquittal "actually and necessarily decided" that the defendant was not the shooter, notwithstanding the contest on the issue of recklessness).[19]

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opinions in *Phillips* make it difficult to discern the Fourth Circuit's views. *See United States v. Phillips*, 518 F.2d 108 (CA4 1975) (vacating panel opinion), *vacated and remanded*, 424 U.S. 961 (1976), *on remand*, 538 F.2d 586 (judgment of conviction aff'd), *cert. denied*, 429 U.S. 1024 (1976).

[19] In *Davis*, the Virginia Supreme Court alluded to the fact that the defendant did not concede the issue of recklessness. *Davis*, 290 Va. at 367 ("Davis argued that if the facts were insufficient for the general district court to convict him of recklessly handling 'any firearm so as to endanger the life, limb, or property of any person,' then '[c]learly the evidence was insufficient to establish' that he was the shooter"); *accord Davis v. Commonwealth*, 63 Va. App. 45, 64, 66 n.18 (Va. Ct. App. 2014) (Beales, J., dissenting) ("I would hold . . . that the record supports a possible basis for acquittal other than a conclusion that Davis was not the triggerman" because "a rational factfinder could conclude that Davis shot and killed the murder victim in a manner that . . . was not necessarily reckless.").

Admittedly, the positions taken by many of the circuits – as well as the state courts of last resort that have considered the question – are murky. But there is no denying that the Eleventh Circuit's decision below cannot be reconciled with the First Circuit's decision in *Hoult*, insofar as the Eleventh Circuit categorically "denies the protection of collateral estoppel to those defendants who affirmatively contest more than one issue or who put the Government to its burden of proof with respect to all elements of the offense." *Dowling*, 493 U.S. at 358 (Brennan, J., dissenting).

III. This Case Presents the Appropriate Vehicle for Resolving the Questions Presented.

In the courts below, Brian Kaley argued that his "defense at trial was that he did not know that the money [he allegedly laundered] was derived from unlawful activity because he did not believe the devices were stolen. . . . 'The evidence was simply insufficient to establish that . . . Brian Kaley knew that anyone stole anything and that's why the jury found him not guilty of [money laundering conspiracy].'" Appellant's Brief, CA11, at 48-49 (quoting from the district court proceedings). Kaley went further, dissecting the evidence to attempt to demonstrate to the courts below that the element of knowledge was wholly unproven and thus constitutionally insufficient. *Id*. at 42-46 (citing, *inter alia*, *McDougald*, 990 F.2d at 262 (reversing money laundering conviction because of "insufficient evidence" of knowledge)).

But the Eleventh Circuit deemed this showing irrelevant, precisely because Kaley contested more than just that single element at trial. The Eleventh Circuit expressly declined to assess the constitutional sufficiency (or insufficiency) of the evidence presented as to the one element that Kaley now seeks to estop the Government from relitigating. And given the Eleventh Circuit's "single issue" test, it would make no difference even if the Eleventh Circuit agreed that the element Kaley seeks to foreclose was, in the words of the First Circuit, "the centerpiece" of his defense, "the central and pivotal" issue, "central to the route that led the factfinder to the judgment reached." *Hoult*, 157 F.3d at 32.

Thus, this case provides an opportunity for the Court to end the circuit confusion over a defendant's burden of proof; to clarify that collateral estoppel is not categorically unavailable to a defendant who contested more than a single element at trial; and, to reconcile the holdings of *Ashe* and *Jackson*. If no "rational" jury – the type of jury that both *Ashe* and *Jackson* presume – could have found in favor of the Government on the element that Kaley seeks to foreclose (knowledge), then neither could Kaley's jury. Accordingly, the acquittal should be understood as having "necessarily decided" that element in his favor, even if Kaley contested another element – indeed, even if the jury *explicitly* found in his favor on that other element – as well. To hold otherwise is to say that *Jackson*'s "rational" jury would *necessarily* have to find in Kaley's favor on a particular element (because there is constitutionally

insufficient evidence) while *Ashe*'s "rational" jury would not. This case presents a suitable vehicle to resolve this constitutional contradiction.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Brian P. KALEY, Defendant-Appellant.

No. 15-12695
|
Non-Argument Calendar.
|
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Appeal from the United States District Court for the Southern District of Florida. D.C. Docket No. 9:07-cr-80021-DPG-2.

Before WILSON, MARTIN, and ANDERSON, Circuit Judges.

Opinion

PER CURIAM:

Brian Kaley was tried before a jury on charges of interstate transportation of stolen property and conspiracy to transport stolen property interstate (Counts 1-6), money laundering conspiracy (Count 7), and obstruction of justice (Count 8). The charges were based on Brian Kaley's alleged involvement in a conspiracy to sell stolen prescription medical devices. The government alleged that Kaley's wife, Kerri – a former sales representative and sales representative supervisor of Ethicon Endo Surgery – and other salespeople working at her request took valuable prescription medical devices – that they had oversupplied to New York hospitals. They then took the devices to the Kaley home in New York, where Kaley and Kerri prepared shipments to a contact in Florida to resell. Kaley assisted in the packing and shipping, and managed the large amount of incoming profits through accounts belonging to his construction businesses – alleged straw companies. Kaley argued that the goods were not stolen, but were in fact given away by hospitals to Kerri and her colleagues. Alternatively, he argued, even if the devices were deemed stolen, he had no knowledge of the stolen nature of the goods.

Kaley was acquitted of Counts 7 and 8, and the jury could not reach a verdict on Counts 1 through 6. Kaley then moved to dismiss Counts 1 through 6 on collateral estoppel grounds. Specifically, Kaley argued that retrial was not permitted under the doctrine of

collateral estoppel because (1) his acquittal on the money laundering conspiracy charge was necessarily based on the jury having found that he did not know the devices in question were stolen from the hospitals; and (2) knowledge that the devices were stolen is an essential element of the first six counts of his indictment. The district court denied the motion, and Kaley filed this interlocutory appeal.

I

We review de novo a district court's ruling on a collateral estoppel claim. *See United States v. Quintero*, 165 F.3d 831, 834 (11th Cir.1999).

The doctrine of collateral estoppel applies to criminal proceedings and "is embodied in the Fifth Amendment guarantee against double jeopardy." *Ashe v. Swenson*, 397 U.S. 436, 443-45, 90 S.Ct. 1189, 1194-95 (1970). Under the doctrine, "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443, 90 S.Ct. at 1194. The relevant collateral estoppel analysis has two steps: "First, courts must examine the verdict and the record to see what facts, if any, were necessarily determined in the acquittal at the first trial. Second, the court must determine whether the previously determined facts constituted an essential element of the second offense." *United States v. Ohayon*, 483 F.3d 1281, 1286 (11th Cir.2007) (citation and internal quotation marks omitted).

In undertaking such a review in the criminal context, we 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, 90 S.Ct. at 1194 (internal quotation marks omitted). "The burden is on the defendant to prove by convincing and competent evidence that in the earlier trial, it was necessary to determine the fact sought to be foreclosed." *United States v. Hogue*, 812 F.2d 1568, 1578 (11th Cir.1987).

II

The district court correctly denied Kaley's motion to dismiss Counts 1 through 6 because Kaley did not meet his burden of showing by convincing and competent evidence that the jury necessarily determined that Kaley did not know the devices were stolen. *See id.*

Kaley argues that the jury necessarily decided that Kaley did not know the devices were stolen when it acquitted him of money laundering. Because Kaley's knowledge of the stolen nature of the goods is an overlapping essential element of the transportation of stolen goods charge, collateral estoppel should apply and foreclose a second trial on that charge.

A money laundering conspiracy charge requires the Government to show, in relevant part, that a

defendant conspired to conduct "a financial transaction which in fact involves the proceeds of specified unlawful activity," "knowing that the transaction is designed in whole or in part[] to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." 18 U.S.C. § 1956(a); *see id.* § 1956(h). The jury could have acquitted Kaley of the money laundering count on a number of grounds that would not require a determination of whether Kaley knew the devices were stolen.

At trial, the parties hotly contested the scienter element of the money laundering charge requiring that Kaley knowingly concealed the proceeds of the unlawful device sales. *See id.* § 1956(a). If the jury decided that the funds were not meant to be concealed, it would have to acquit Kaley without needing to make any finding regarding knowledge of the stolen nature of the devices. Although some details in the testimony supported a finding that Kaley engaged in financial transactions to knowingly conceal the nature, source, or ownership of the sales proceeds, other details supported an opposite finding of no such knowledge. As the defense pointed out at trial, some of the Kaleys' behavior indicated that they made no attempt to conceal the flow of proceeds: the Florida reseller who purchased the devices from the Kaleys provided them invoices bearing Kerri's name with each payment; the Kaleys spoke with their accountant about the fact that the only funds going into their "construction" businesses were from the sale of medical devices; the Kaleys used

their home address for their construction businesses and named themselves as officers of those businesses; and the Kaleys paid the sales representatives involved and some personal bills by check from the funds of those businesses.

Because the jury was not asked any specific questions or instructed to make any specific findings regarding the elements of each charge, we have no direct evidence regarding the basis of the jury's decision to acquit Kaley of the money laundering charge. Thus, the jury could have decided the money laundering charge on facts that do not implicate any overlapping elements of the transportation of stolen goods charges. *See* 18 U.S.C. § 2314 (no knowledge of concealment required for charge brought against Kaley). Although the jury possibly found that Kaley did not know the devices were stolen, *see United States v. Boldin*, 818 F.2d 771, 775 (11th Cir.1987), "it is far from clear what facts the jury decided when it acquitted [Kaley]," and "[w]e will not speculate" as to the verdict's meaning, *see United States v. Gil*, 142 F.3d 1398, 1401 (11th Cir.1998). We decline to employ collateral estoppel in the face of such uncertainty. *See United States v. Bennett*, 836 F.2d 1314, 1316 (11th Cir.1988) ("If . . . the jury could have based its verdict on something other than the issue to be barred, then collateral estoppel would not apply.").[1]

[1] Kaley also argues that as a matter of law, the jury necessarily had to acquit Kaley of money laundering conspiracy because the Government's evidence regarding Kaley's knowledge of the stolen nature of the devices was constitutionally insufficient.

III

Because Kaley is unable to carry his burden of showing that the jury necessarily concluded he did not know the devices were stolen, his claim fails. *See Hogue*, 812 F.2d at 1578. As the district court noted, we "cannot determine with any precision the basis for the jury's [acquittal]," and we cannot engage in guesswork to determine on which grounds the jury ultimately decided the issues in Kaley's trial. *Cf. Yeager v. United States*, 557 U.S. 110, 122, 129 S.Ct. 2360, 2368 (2009) ("Courts properly avoid . . . explorations into the jury's sovereign space."). Therefore, we affirm.

AFFIRMED.

But it is well settled that the insufficiency of just one essential element of a crime is enough to require an acquittal. *Cf. United States v. Medina*, 485 F.3d 1291, 1300 (11th Cir.2007) ("[I]t is the government's burden to prove every element of the charged offense beyond a reasonable doubt") As noted, *supra*, we do not know on which element the jury rested and therefore cannot assume that it rested on, let alone decided, that Kaley knew the stolen nature of the devices.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-12695-AA

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BRIAN P. KALEY,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Filed Apr. 21, 2016)

BEFORE: WILSON, MARTIN, and ANDERSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc

(Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Charles R. Wilson
UNITED STATES
CIRCUIT JUDGE