No. 15-1539

In The

Supreme Court of the United States

BRIAN P. KALEY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF FOR *AMICUS CURIAE* CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

California Attorneys for Criminal Justice ("CACJ") is a nonprofit organization of criminal defense lawyers founded in 1972, with members across California. CACJ works on behalf of criminal defense attorneys to ensure justice for their clients. CACJ has appeared in this Court as *amicus curiae* on several occasions, and its *amicus* brief was cited in *Kaley v. United States*, 134 S. Ct. 1090, 1104, 1111-12 (2014) (Roberts, C.J., dissenting), the last time this Court addressed this case on the merits.

CACJ has an interest in ensuring the fair administration of justice in criminal cases. CACJ believes this case presents an important issue relating to the scope of protection the Double Jeopardy Clause provides a defendant who already has been acquitted and is facing successive prosecutions.

SUMMARY OF ARGUMENT

This case is an ideal vehicle to clarify a recurring question of national importance that has divided the lower courts concerning the Fifth Amendment's Double Jeopardy Clause. In *Ashe v. Swenson*, 397 U.S. 436 (1970), this Court held that the Double

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[1] CACJ provided at least ten days' notice of its intent to file this brief to counsel of record for all parties. The parties consented to the filing of this brief, and their written consents are on file with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person other than *amicus* and its counsel has made any monetary contribution to the preparation or submission of this brief.

Jeopardy Clause incorporates the doctrine of collateral estoppel, meaning 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.* at 443-44. The issue that has divided the lower courts is how to determine what issue was decided by a general verdict of acquittal when the defendant challenged more than one element of the charged offense.

Following this Court's guidance in *Ashe*, and more recently in *Yeager v. United States*, 557 U.S. 110 (2009), several courts have recognized that determining what facts were decided by an acquittal requires an extensive and careful analysis of the trial record. Through such analysis, the First, Fifth and Ninth Circuits, and a handful of state courts, believe it is possible to discern what facts were found by a jury, even when more than one element of a charged offense was contested. *See, e.g., United States v. Yeager*, 334 F. App'x. 707, 709 (5th Cir. 2009); *Hoult v. Hoult*, 157 F.3d 29, 33 (1st Cir. 1998); *United States v. Romeo*, 114 F.3d 141, 143 (9th Cir. 1997); *Roesser v. State*, 294 Ga. 295, 300-01 (Ga. 2013); *State v. Hermalyn*, No. 06-11-2085, 2012 WL 3000334, at *7 (N.J. Super. Ct. App. Div. July 24, 2012); *State v. Lewis*, 599 S.W.2d 94, 99-100 (Mo. Ct. App. 1980).

By contrast, other courts, have cut short such careful analysis by adopting a *per se* rule that a defendant cannot establish that a general verdict of acquittal established any particular fact whenever the defendant challenged more than one issue. Rather than assess how a rational jury would have resolved the issue, the Eleventh Circuit below, along

with the Second and Third Circuits, and the Supreme Court of Indiana, categorically conclude that it is impossible to discern the factual basis for an acquittal when more than one element has been challenged. *See, e.g.*, *United States v. Kaley*, No. 15-12695, 2016 WL 758697, at *2-3 (11th Cir. Feb. 26, 2016); *United States v. Rigas*, 605 F.3d 194, 218 (3d Cir. 2010); *Tucker v. Arthur Andersen & Co.*, 646 F.2d 721, 728-29 (2d Cir. 1981); *McWhorter v. State*, 993 N.E.2d 1141, 1147 (Ind. 2013).

This Court's decision in *Yeager* is a clear rejection of any rule that a defendant challenging more than one element of a charged offense categorically cannot meet his burden under *Ashe*. Multiple elements were challenged at trial in *Yeager*, but this Court remanded for the lower courts to determine whether the defendant could establish an *Ashe* claim. *Yeager*, 557 U.S. at 126; *id.* at 136 (Alito, J., dissenting). There would have been no reason for this Court to have remanded for "a fact-intensive analysis of the voluminous record" if the presence of a second challenged issue at trial would have doomed any analysis under *Ashe*. *Yeager*, 557 U.S. at 126.

This Court's review is warranted to resolve the conflict as to how to decide what facts were decided by a jury when more than one element was challenged, and to bring the lower courts into alignment with this Court's decisions in *Ashe* and *Yeager*. This issue is important.

The categorical rule foreclosing *Ashe* protection whenever a defendant contests more than one element of an offense encourages defendants to pull their punches at trial and invites prosecutorial

abuse. Providing a vigorous defense against multiple elements may be the best strategy for securing an acquittal, but without the protection of the Double Jeopardy Clause that acquittal may be worth little. Experience under this categorical rule has demonstrated that it is all too easy for the government to exploit. The categorical rule allows the government to try the same case a second time, alleging the same facts with the same evidence, while charging only a slightly different offense. Consequently, the Double Jeopardy Clause's protection against successive prosecutions is severely compromised.

ARGUMENT

I. GUIDANCE IS NEEDED ON APPLYING *ASHE* WHEN A DEFENDANT CHALLENGES MORE THAN ONE ISSUE

The lower courts subject defendants to different burdens of proof in advancing *Ashe* claims, with some making the burden so high as to categorically bar such claims whenever a defendant has challenged more than one element of an offense. Clarity from this Court is needed.

A. This Court Has Not Foreclosed *Ashe* Claims When More Than One Issue Is Challenged

In *Ashe*, this Court held that the Double Jeopardy Clause prevents the government from relitigating any fact that was found by a jury through a prior acquittal. 397 U.S. at 443. Such a rule is necessary to preserve the constitutional guarantee of the Double Jeopardy Clause, which "surely protects a man who has been acquitted from having to 'run the

gantlet' a second time" and to prevent the government from treating a "first trial as no more than a dry run for the second prosecution." *Id.* at 446-447 (internal citations omitted). As the Court later noted: "The Clause operates as a 'bar against repeated attempts to convict, with consequent subjection of the defendant to embarrassment, expense, anxiety, and insecurity, and the possibility that he may be found guilty even though innocent.'" *Schiro v. Farley*, 510 U.S. 222, 229-30 (1994) (quoting *United States v. DiFrancesco*, 449 U.S. 117, 136 (1980)). The Court explained that "our cases establish that the primary evil to be guarded against is successive prosecutions." *Id.*

Ashe provided extensive guidance to the lower courts as to how to discern what facts were found by a prior acquittal rendered through a general verdict:

> The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' The inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.' Any

> test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal.

397 U.S. at 444. Applying this guidance in *Ashe* was relatively simple because the defendant had challenged only a single issue at trial.

The Court quoted this language from *Ashe* in explaining how courts should "decipher what a jury has necessarily decided" in *Yeager*, a case where the defendant had challenged multiple elements of an offense. 557 U.S. at 119-120. In *Yeager*, the District Court and Court of Appeals had disagreed as to which fact the jury had found through its acquittal. *Id.* at 125-26. Although the Court of Appeals concluded that the defendant had met his burden under *Ashe*, it stripped the defendant of double jeopardy protection under Circuit precedent that allowed retrial of any count where the jury hung. *Id.* at 116. This Court reversed, concluding that hung counts should be ignored in double jeopardy analysis. *Id.* at 122.

In doing so, the Court noted that it declined "to engage in a fact-intensive analysis of the voluminous record" necessary to determine whether the defendant had met his burden under *Ashe* and authorized the Court of Appeals to revisit its factual analysis. *Id.* at 126. Justice Kennedy concurred to urge the Court of Appeals to "reexamine this question" because there are reasons to question whether the District Court had properly found a different factual basis for acquittal than the Court of

Appeals. *Id.* at 127 (Kennedy, J., concurring). Justice Alito's dissent, joined by Justices Scalia and Thomas, urged the Court of Appeals to reexamine the issue as well because the District Court appeared to have the better argument, although Justice Alito could not "say with certainty that the *Ashe* standard was not met in this case." *Id.* at 136 (Alito, J., dissenting).

No Member of the Court suggested the presence of multiple contested issues *per se* precluded the defendant from establishing an *Ashe* claim. On remand, free to ignore the hung count in its analysis, the Court of Appeals adhered to its prior interpretation of the fact found under its *Ashe* analysis and barred retrial. *Yeager*, 334 F. App'x. at 708-09.

The pertinent lesson of *Yeager* to this case is that, even where the Court recognized that there was a debatable issue as to which of two factual bases an acquittal rested upon, the Court appeared unanimous that the mere existence of a debate did not categorically foreclose the defendant from prevailing under *Ashe*. All Members of the Court appeared to agree that this was a fact-intensive inquiry that should be left to the lower courts, rather than a simple issue the Court could decide for itself.

B. This Court Should Provide Guidance On The Burden Of Proof Under *Ashe*

Part of the confusion among the lower courts in applying *Ashe* is that the Court has not clearly defined the applicable burden of proof. In *Dowling v. United States*, 493 U.S. 342, 350-51 (1990), the Court noted that "the Courts of Appeals have unanimously

placed the burden on the defendant to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding" and the Court saw "no reason to depart from the majority rule in this case."[2] Justice Brennan's dissent, joined by Justices Marshall and Stevens, argued "the Government should bear the burden of proving that the issue it seeks to relitigate was *not* decided in the defendant's favor by the prior acquittal." *Id.* at 357 (Brennan, J., dissenting).

While the Court appears to have left the burden of proving an *Ashe* double jeopardy bar on defendants since *Dowling*, it is not clear how onerous that burden should be. The majority in *Yeager* did not address the burden directly, but noted in language reminiscent of Justice Brennan's dissent in *Dowling* that "the fact that petitioner has already survived one trial should be a factor cutting in favor of, rather than against, applying a double jeopardy bar." *Yeager*, 557 U.S. at 122. That language seems to suggest that a presumption in favor of a defendant should prevail under *Ashe*, so long as the defendant has shown an equal likelihood of being right when compared to the government's alternative explanations for the factual basis of the acquittal.

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[2] *Dowling* did not decide how onerous that burden should be. The petitioner in *Dowling* had not sought to bar reprosecution, but merely to bar the introduction of certain evidence in a subsequent prosecution. The Court declined to apply the Double Jeopardy Clause to bar evidence. 493 U.S. at 348. The Court also noted that the identification evidence the petitioner sought to exclude was not inconsistent with his prior acquittal because even the petitioner had conceded that he had not disputed identity at trial. *Id.* at 351-52.

That reading of *Yeager* is consistent with *Ashe*. The Court in *Ashe* called for a review of the whole record with "realism and rationality," as opposed to following a "hypertechnical and archaic approach." *Ashe*, 397 U.S. at 444. The Court rightly noted: "Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal." *Id.* Given that the Court found the right being protected "an extremely important principle in our adversary system of justice," the Court was careful not to set the bar so high that an acquitted defendant would face an insurmountable burden to secure that right. *Id.* at 443; *see also Dowling*, 493 U.S. at 357-59 (Brennan, J, dissenting) (arguing that placing the burden on the defendant at all too greatly impaired double jeopardy rights).

Although *Ashe* and *Yeager* seem to suggest that defendants would merely need to show the fact they contend was actually decided by an acquittal is as likely an explanation for the verdict as any other, some Members of the Court have suggested the defendant's burden is greater. In *Yeager*, four members of the Court explained their view that a defendant has a "demanding standard" under *Ashe* of proving "it would have been *irrational* for the jury to acquit without finding that fact." *Yeager*, 557 U.S. at 127 (Kennedy, J., concurring) (emphasis in original); *id.* at 133-34 (Alito, J., concurring) (emphasis in original).

Some lower court decisions appear to go even further and suggest the defendant's burden under *Ashe* is nearly impossible. *See, e.g.*, *United States v.*

McGowan, 58 F.3d 8, 12 (2d Cir. 1995) ("[S]ince it is usually impossible to determine with any precision upon what basis the jury reached a verdict in a criminal case, it is a rare situation in which the collateral estoppel defense will be available to a defendant."); *United States v. Consloe,* 13 F.3d 641, 665 n.28 (3d Cir. 1993) ("When a case involves a general verdict, establishing that the verdict necessarily determined any particular issue is extremely difficult.") (quoting *United States v. Bailin,* 977 F.2d 270, 282 (7th Cir. 1992)); *see also United States v. Howe,* 590 F.3d 552, 560 (8th Cir. 2009) (defendant's "*plausible* reading of the record" is not enough when another alternative is "equally plausible"); *United States v. Patterson,* 827 F.2d 184, 187 (7th Cir. 1987) (defendant must show more than that the "jury might have, or even probably found" a particular fact). The Eleventh Circuit in the case below held: "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." *Kaley,* 2016 WL 758697, at *1 (quoting *United States v. Hogue,* 812 F.2d 1568, 1578 (11th Cir. 1987)).

But as explained above, there is nothing in this Court's opinions imposing a "convincing and competent" standard or otherwise setting the bar so high that it is nearly impossible to meet. The courts creating this obstacle have adopted the sort of "technically restrictive" tests *Ashe* said should not be followed because they "simply amount to a rejection of the rule of collateral estoppel in criminal proceedings." *Ashe,* 397 U.S. at 444.

C. Lower Courts Are Divided On Whether Defendants Sacrifice *Ashe* Claims By Challenging More Than One Issue

As an outgrowth of the confusion over the burden of proof in establishing an *Ashe* claim, courts have come to wildly different conclusions about how to apply *Ashe* or even whether *Ashe* applies at all when a defendant has challenged more than one element of an offense. This Court should resolve that conflict.

The core issue under *Ashe* is determining what was "actually decided in the first proceeding." *Dowling*, 493 U.S. at 350. Stated differently, the Court has framed the issue as what a "rational jury" would have "necessarily decided" on the record before it. *Yeager*, 557 U.S. at 120.

Those courts that treat the burden as closer to an all-things-being-equal test or even a preponderance of the evidence test reach no categorical conclusion about what follows when a defendant challenges more than one element. To be sure, a court must assess the strength of different arguments when more than one element is in play, and that makes it more difficult to discern what was "actually decided" than when only a single element is at issue. But courts weigh the strength of arguments and the evidence supporting them all the time.

Applying the realism and rationality this Court has called for in making an *Ashe* assessment, some courts have weighed the evidence supporting competing assessments of a general verdict and ruled in the defendant's favor, even when other explanations are theoretically possible. *See, e.g.*, *Yeager*, 334 F. App'x. at 709; *Hoult*, 157 F.3d at 33;

Romeo, 114 F.3d at 143; *Roesser*, 294 Ga. at 300-01; *Hermalyn*, 2012 WL 3000334, at *7; *Lewis*, 599 S.W.2d at 99-100. That approach makes sense. It may often be the case that one theory is remotely plausible, but another is far more likely.

For example, in *Romeo*, a defendant was acquitted of marijuana possession with intent to distribute for driving a car into the United States with 188 pounds of marijuana in the trunk. His defense was that he drove the car for a friend and did not know the marijuana was present. 114 F.3d at 142. The Ninth Circuit concluded his acquittal reflected a finding that the defendant did not know about the marijuana, so he could not be retried for knowingly importing marijuana. Although the jury theoretically could have concluded he knew of the marijuana but had no intent to distribute, the majority found that no rational jury would conclude that 188 pounds of marijuana would just be for personal use. *Id.* at 143; *but see id.* at 145 (O'Scannlain, J., dissenting) (applying a heavier burden and finding it impossible to know whether the jury found the marijuana was for personal use).

It is not uncommon for a defendant to challenge multiple elements of a charge, and find greater success with one challenge than another. Take *Ashe*, for example, where a defendant was acquitted of robbing a gambler at a poker game after solely raising an alibi defense. This Court held that the verdict meant the jury found the defendant was not present at the crime, so he could not be reprosecuted for robbing a different poker player at the same game. 397 U.S. at 438. Imagine whether the outcome would have been any different if the defendant had questioned in opening argument

whether the first alleged victim was even present at the game, but the evidence at trial was overwhelming that the victim was present and robbed. The defendant would have placed a second issue in play before the jury, but a rational assessment of the record should lead to the same conclusion that the acquittal rested on the alibi.[3]

It should even be possible to conclude that an acquittal reflects findings of fact on multiple elements. Imagine that the government fails to offer any evidence on three of five elements of an offense, or the evidence is overwhelmingly against it on all three elements. Under those circumstances, it would be fair to conclude the defendant prevailed on all three elements. To do otherwise, and speculate that the jury grounded its verdict on only one defect and that it is impossible to determine which one, would expose the defendant to a possible retrial where no particular fact is precluded from relitigation. That would create the perverse result that the weaker the government's case – one that fails for multiple reasons – the more susceptible it is to retrial than a stronger case where only one element is challenged.

Nevertheless, that is the path several other courts have followed. *See, e.g.*, *Kaley*, 2016 WL 758697, at *2-3; *Rigas*, 605 F.3d at 218; *Tucker*, 646

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[3] It is easy to imagine a sliding scale where there is more, but still unconvincing evidence. For example, the victim's wife could testify that the victim had promised her that he had stopped gambling and would work late that night, but the evidence clearly showed she had been duped by her husband. That too should not alter the fact that, viewed rationally, the acquittal rested on an alibi defense.

F.2d at 728-29; *McWhorter*, 993 N.E.2d at 1147. These courts will not weigh the evidence when multiple elements are challenged. They deem the inherent speculation associated with determining what a jury concluded in secret to be too problematic whenever more than one issue has been contested, so an *Ashe* claim will always fail. *See, e.g., Rigas,* 605 F.3d at 218 (holding the defendant "would have to convince us that the only question at issue" and "that their only defense" was the issue they claim was decided).

The Eleventh Circuit has been particularly rigid. It requires that "a court must determine that the jury's verdict of acquittal was based upon a reasonable doubt about a single element of the crime which the court can identify." *United States v. Magluta*, 418 F.3d 1166, 1174 (11th Cir. 2005) (quoting *United States v. Brown*, 983 F.2d 201, 202 (11th Cir. 1993)). It also requires the defendant to meet that standard by "convincing and competent evidence." *Kaley*, 2016 WL 758697, at *2.

In the present case, the Eleventh Circuit used that high standard to bar any meaningful assessment of Kaley's *Ashe* defense. Kaley was charged with transporting stolen property and money laundering related to the proceeds of that stolen property. The thrust of Kaley's defense was that he did not know the property was stolen. The jury acquitted him of money laundering, but hung on the stolen property charges, and Kaley argued that the jury's finding that he did not know the property was stolen required acquittal on the stolen property charges as well. *Id.* at *1-2.

The Eleventh Circuit acknowledged that "the jury possibly found that Kaley did not know the devices were stolen," but stated it would not "speculate" or engage in "guesswork to determine on which grounds the jury ultimately decided the issues in Kaley's trial." *Id.* at *2-3. The Eleventh Circuit believed the jury could have acquitted Kaley of money laundering for not having knowingly concealed the proceeds of the sale, regardless of whether the property was stolen. *Id.* at *2. The Court noted there was some evidence in the record on both sides of the knowing concealment issue, and it did not attempt to weigh that evidence given the burden of proof it placed on Kaley. *Id.* Because of the Eleventh Circuit's cramped view that a verdict may only reflect a finding that the jury actually decided a single issue and that issue could have been knowing concealment, the court held that it could not determine whether the jury concluded that Kaley did not know the goods were stolen. *Id.* at *2 n.1.

Significantly, the Eleventh Circuit only analyzed the contested evidence as to whether Kaley knowingly concealed the proceeds. It failed to analyze at all Kaley's competing claim that he did not know the property was stolen. As Kaley argues in his petition, the evidence of his knowledge that the goods were stolen was so thin that it was constitutionally insufficient under *Jackson v. Virginia*, 443 U.S. 307 (1979). Although a defendant does not need to prove evidence is constitutionally insufficient under *Jackson* to prevail under *Ashe*, it certainly is rational to infer that an acquittal by a jury confronted with evidence so weak as to be constitutionally insufficient would be the basis for an

acquittal. That is true even if the jury also could have acquitted on another basis as well.

II. CONFUSION IN APPLYING *ASHE* IMPERILS DOUBLE JEOPARDY PROTECTION

Justice Brennan's dissent in *Dowling* raised the fear that even placing the burden of proof on defendants to prove *Ashe* claims "essentially 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." 493 U.S. at 358 (Brennan, J., dissenting). He emphasized that "forcing defendants to choose between foregoing the protections of the Double Jeopardy Clause and abandoning the defense of a general denial raises grave due process concerns." *Id.*[4]

While Justice Brennan is undoubtedly correct that placing the burden on defendants to prove *Ashe* claims may encourage them to pull their punches at trial so that no more than one element is contested, that risk is mitigated if the burden is manageable. By contrast, the Eleventh Circuit's absolute, categorical bar against *Ashe* claims whenever defendants place more than one issue in contention forces the very unfair choice on a defendant that Justice Brennan envisioned.

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[4] The majority in *Dowling* did not engage Justice Brennan on this point because the defendant sought preclusion on a theory that was not argued at trial. *See, supra*, n.2.

Challenging more than one element may maximize the chance of gaining an acquittal at trial, but the Eleventh Circuit's categorical rule means that choice comes at the cost that any acquittal obtained will be stripped of double jeopardy protection and the client may have to run the gauntlet again in a second trial. Moreover, experience under this categorical rule has shown that it is all too easy for the government to retry the same case, alleging the same facts with the same evidence, just using a slightly different charge. The Eleventh Circuit's categorical rule also encourages the government not to bring all its charges at once, so that it can more easily bring successive prosecutions.

Ashe recognized that in America's early history there "were relatively few and distinct" criminal offenses, so "[a] single course of criminal conduct was likely to yield but a single offense." 397 U.S. at 445 n.10. But with the "extraordinary proliferation of overlapping and related statutory offenses," prosecutors gained the ability to "spin out a startlingly numerous serious of offenses from a single alleged criminal transaction." *Id.* "As the number of statutory offenses multiplied, the potential for unfair and abusive prosecutions became far more pronounced." *Id.* Collateral estoppel operates as a "safeguard" to "prevent such abuses." *Id.*

The problem has grown worse since *Ashe*. Three of every five federal crimes "enacted since the Civil War have been enacted since 1970," when the Court decided *Ashe*. Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. Crim. L. & Criminology 643, 653 (2006). In 2008, the United States Code contained at

least 4,450 federal crimes, with Congress creating 500 new crimes per decade. John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, Legal Memorandum (Heritage Foundation), June 16, 2008, at 1. Criminal law presents "a singular case in the legislative process: criminal law expands unusually easily, and its contraction is unusually difficult." Darryl K. Brown, *Democracy and Decriminalization*, 86 Tex. L. Rev. 223, 233 (2007).

The consequence is a cornucopia of criminal statutes that cover similar, if not identical, conduct. For example, the federal criminal code in 1998 contained "232 statutes pertaining to theft and fraud, 99 pertaining to forgery and counterfeiting, 215 pertaining to false statements, and 96 pertaining to property destruction." O'Sullivan, *supra*, at 654. Consequently, prosecutors "have the ability to pick and choose among a smorgasbord of statutes that might apply to given criminal conduct." *Id.*

Abusive successive prosecutions do occur under the Eleventh Circuit's categorical rule, as *Magluta* highlights. In a first trial, the defendant was acquitted on twenty-four drug-related counts, and the Eleventh Circuit assumed the defendant was right that those acquittals reflected a jury finding that he had ceased all drug trafficking activities long ago. 418 F.3d at 1174. Following that acquittal, the government initiated a successive prosecution and convicted Magluta of money laundering. But the "unlawful activity" that the government charged led to the laundered funds was the very drug trafficking the defendant previously had been acquitted of committing.

Nevertheless, the Eleventh Circuit resorted to a hypothetical "factual theory that had no support in the record." Pet. for *Cert.*, *Magluta v. United States*, No. 08-731, 2008 WL 5129021, at *9. The Eleventh Circuit correctly noted that Magluta hypothetically could have been convicted of "laundering someone else's illegal proceeds," but the evidence at trial was that he laundered the proceeds of his *own* drug sales – the very drug transactions he had been acquitted of committing. 418 F.3d at 1174. In petitioning this Court for *certiorari*, Magluta explained:

> The government not only used the same evidence to prove 'unlawful activity' as it unsuccessfully offered in 1996, but its direct examination of the drug-related witnesses followed, nearly verbatim, the direction and proof it used in the earlier trial. Thereafter, in its closing argument, the government repeatedly argued that the funds at issue in the money laundering came from Petitioner's *own* prior drug dealing – the same offenses for which he had previously been acquitted.

2008 WL 5129021, at *5. The government acknowledged that it "introduced evidence of criminal activity for which the petitioner had been acquitted," but sought to justify its conduct for different reasons. Gov't Br., *Magluta v. United States*, No. 08-731, 2009 WL 759412, at *12.[5]

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[5] The government opposed *certiorari* because it claimed Magluta had bribed the original jury, which would have extinguished his *Ashe* claim. 2009 WL 759412, at *12. The Eleventh Circuit did not reach that issue and instead decided

Magluta demonstrates just how easy it is for the government to circumvent *Ashe* in the Eleventh Circuit.[6]

By contrast, the Missouri Court of Appeals rejected a similar successive prosecution in *Lewis*. The defendant there had been acquitted of unlawful possession of burglar's tools, a charge that required the government to prove intent to use the tools to commit burglary, and the government had sought to prove that intent through proof the defendant had completed a particular burglary. 599 S.W.2d at 98-99. Following that acquittal, the defendant was charged with burglary for the very same burglary at issue in the prior case. As in *Magluta*, the Missouri court explained the "evidence in each prosecution, to be sure, was congruent if not an exact likeness." *Id.* at 97.

Unlike *Magluta*, the Missouri court put a stop to such abuses by holding that the second conviction

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the *Ashe* claim based on a lack of overlapping elements between the first and second trials. The issue of jury corruption may have made that case a poor vehicle for reviewing the Eleventh Circuit's decision in *Magluta*, but the Eleventh Circuit's actual holding concerning *Ashe* is alarming. Kaley's petition provides the Court an ideal vehicle to correct the Eleventh Circuit's mistake.

[6] *Ashe* also was circumvented in *Santamaria v. Horsley*, 133 F.3d 1242 (9th Cir. 1998) (en banc), where a defendant was convicted of murder, but the jury found "not true" a sentencing enhancement for using a knife. The conviction was reversed, and the Ninth Circuit allowed the prosecution to relitigate that the defendant committed the murder with a knife even though it could result "in a verdict contrary to that rendered by the first jury." *Id.* at 1247; *see id.* at 1251-52 (Pregerson, J., dissenting).

was barred by double jeopardy. *Id.* at 100. As a technical legal matter, the court agreed with the government that the two charges were theoretically distinct. Hypothetically, the government could have tried to prove the defendant intended to use the burglar's tools to commit a different burglary, but this particular burglary was the one that the government attempted to prove. Consequently, a rational jury confronted with that evidence must have rejected that the defendant committed that burglary. Quite appropriately, this court would not do as the *Magluta* court had done and hypothesize that the jury could have reached a different conclusion.

Cases like *Magluta* and *Lewis* demonstrate that the potential for abusive successive prosecutions is all too real when the constitutional protection secured by *Ashe* is not meaningfully enforced. The Court should clarify the burden required in making *Ashe* claims to eliminate the divergent approaches of the lower courts, and do so in a way that ensures a defendant who has secured an acquittal from a jury does not have to fear that his win at trial will only be round one in a series of successive prosecutions.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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