No. 15-1539

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

REPLY BRIEF FOR PETITIONER

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REPLY

The Petition describes this case as lying at the "intersection of *Ashe v. Swenson*, 397 U.S. 436 (1970), and *Jackson v. Virginia*, 443 U.S. 307 (1979)." Pet. at 16. *Ashe* "precludes the Government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial." *Id*. And *Jackson* mandates an acquittal where the Government fails to present sufficient evidence for "*any* rational trier of fact [to find an] essential element[] of the crime beyond a reasonable doubt." *Id*. at 20. The sum of those Constitutional commands should logically bar the Government, after an acquittal, from "relitigating any issue" that would require proof of the same issue that no "rational trier of fact" could have found "beyond a reasonable doubt."

In a single sentence, the Government dismisses that simple calculation:

> In determining whether a jury's acquittal necessarily decided an issue in the defendant's favor, this Court does not consider whether it would have been irrational for the jury to decide that issue against the defendant; instead a court must examine "whether a rational jury could have grounded its verdict upon an issue *other than* that which the defendant seeks to foreclose from consideration."

BIO at 13. In the Government's view, a general verdict of acquittal has no issue-preclusive effect if the defendant challenged more than one element, even if the Government failed to present constitutionally

sufficient evidence as to the element the defendant seeks to foreclose.

A corollary of the Government's position is that, after producing *no evidence* on an essential element of the tried offense (zip, zero, zilch), it could thereafter try an acquitted defendant for a different offense requiring proof of that same element for which there was not even a smidgen of evidence – solely because the defendant contested more than just that one element of the offense. Given the array of separate criminal offenses that can be spun out of a single wrongful act, *Ashe*, 397 U.S. at 445 n.10, the Constitution cannot tolerate, and the Court has never endorsed, such a cramped view of the Double Jeopardy Clause, which "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." *Burks*, 437 U.S. 1, 11 (1978).

Review is warranted because the narrow view of issue preclusion urged by the Government does not square with the Court's due process jurisprudence; the single-issue test cannot be reconciled with *Yeager*, 557 U.S. 110, 119 (2009), and perpetuates a division in the lower courts; and this case is an excellent vehicle to resolve the questions presented.

A. The Court has Never Endorsed a "Single-Issue Test" As the *Sine Qua Non* for Applying Issue Preclusion to All General Verdicts of Acquittal (And Certainly Not For Acquittals Mandated by Due Process For Lack of Constitutionally Sufficient Evidence)

The Government contends that the Petition should be denied because the Court has already articulated a "single-issue test" that serves as the only way to determine whether the issue preclusion component of the Double Jeopardy Clause applies to a general verdict of acquittal. BIO at 16. The single-issue test, however, is not a one-size-fits-all standard.

The Court's issue-preclusion jurisprudence was forged in cases like *Ashe*, *Yeager*, and *Bravo-Fernandez*, where there was "scarcely a [question that] the prosecution 'failed to muster' sufficient evidence in the first proceeding." *Bravo-Fernandez*, 137 S. Ct. 352, 364 (2016). Those cases presupposed the existence of constitutionally sufficient evidence as to all essential elements of the acquitted offense, so that a rational jury could perform its traditional deliberative, fact-finding role and permissibly acquit *or convict* based on the conflicting evidence presented at trial.

Because juries in such cases might render irrational, unappealable acquittals, the Court cautiously embraced issue preclusion, emphasizing that its application should be limited to those issues or elements necessarily decided by the acquittal. *Id*. The single-issue test applied by the majority of circuits was thus

born to reflect a "guarded application of preclusion doctrine," *id.*, in cases where juries voted to acquit in the face of evidence sufficient to convict. It employs an objective means of identifying a particular element that was necessarily decided by a *rational* jury's verdict of acquittal: If a defendant contested only a single element, it is fair to infer that the acquittal reflects a finding in favor of the defendant on that element.

Thus, the single-issue test has only been employed in cases where juries were constitutionally permitted to acquit *or convict* – making their verdicts of acquittal one of two possible, rational outcomes. But due process places a limit on the jury's discretion, mandating an acquittal as the *only* rational outcome where the Government fails to present "sufficient proof – defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of [that] element. . . ." *Jackson*, 443 U.S. at 316.

And while the Government might be unfairly prejudiced if precluded from relitigating issues that a rational jury may well have decided in its favor notwithstanding the acquittal, "[t]he same cannot be said when [there has been a constitutional] failure of proof at trial." *Burks*, 437 U.S. at 16. Where, as here, the Government has been afforded "one fair opportunity to offer whatever proof it could assemble," *id.*, and its failure of proof to prove an element is so complete that, "as a matter of law[,] the jury could not properly have returned a verdict of guilty," *id.*, it neither bestows a windfall upon the defendant nor imposes a shortfall on the Government to foreclose relitigation of that same

element. Thus, applying issue-preclusive effects to elements unsupported by constitutionally sufficient evidence, by definition, ensures a "guarded application of preclusion doctrine," *Bravo-Fernandez*, 137 S. Ct. at 358, because it only touches the elements as to which the "government's case was so lacking that it should not have even been *submitted* to the jury" in the first place. *Burks*, 437 U.S. at 16.

The test that Petitioner proposes could hardly be more demanding or objective: The evidence regarding the element that the defendant seeks to foreclose must have been so lacking that there was nothing for jurors to deliberate about, nothing about which they could rationally disagree, and only one verdict (an acquittal) that they could permissibly deliver. There is no risk that the verdict "can evince irrationality," *Bravo-Fernandez*, 137 S. Ct. at 366, because the case was "so weak that it would have demanded a jury verdict of acquittal." *Yeager*, 557 U.S. at 131 (Scalia, J., dissenting). The test "requires no speculation into what transpired in the jury room," and thus "properly avoid[s] such explorations into the jury's sovereign space." *Yeager*, 557 U.S. at 122.

And because "a jury is presumed to follow its instructions," *Evans v. Michigan*, 133 S. Ct. 1069, 1080 (2013), the acquittal does not "shroud in mystery what the jury *necessarily* decided." *Bravo-Fernandez*, 137 S. Ct. at 366 (emphasis added). Here, as in all federal cases, the jury was instructed that "[a] Defendant can be found guilty . . . only if all the [elements] are proved beyond a reasonable doubt." DE 380-1 at 22. A rational

jury following the court's instructions was required to acquit, no matter how many elements were contested.

Only by ignoring (not even citing) *Burks* and *Jackson* can the Government state that Petitioner loses "[u]nder a straightforward application of this Court's decisions." BIO at 10. And, in doing so, the Government declines to address the anomaly of a hypothetical trial resulting in an acquittal "in which the government . . . presents no evidence at all." Pet. at 25. By its silence, the Government implicitly welcomes the opportunity, after an acquittal, to initiate a successive prosecution for a different offense requiring proof of the same essential elements that it failed to support with *any* evidence in a first trial.

Accordingly, the Court should decide how reviewing courts, faced with general verdict acquittals, should reconcile double jeopardy-based issue preclusion principles with the commands of due process. Petitioner urges that, to identify the element necessarily decided, *Burks* and *Jackson* compel courts to begin by determining whether the Government produced constitutionally sufficient evidence of the element that the defendant seeks to foreclose. The Government and the Eleventh Circuit would skip that step and instead resort to a methodology that assumes the existence of sufficient evidence to support a conviction. This "flaw . . . in the order of analysis" leads to anamolous and

unconstitutional results. *Amici Curiae* Brief of Associations of Criminal Defense Attorneys (ACDA Brief) at 17.[1]

To illustrate, a defendant *rightly acquitted* by the jury after a trial in which he contested multiple elements may be afforded less protection under the Double Jeopardy Clause than if he had been *wrongly convicted*. If convicted, he could obtain appellate review of the denial of a judgment of acquittal, and an appellate finding of insufficiency would mandate reversal, bar a retrial on the count of conviction, *Burks*, 437 U.S. at 17, and, presumably, estop the Government from prosecuting him for a different offense requiring proof of the wholly-unproven essential element. Having instead been acquitted, the defendant could face successive prosecutions for other offenses requiring proof of that same element. This portends a harrowing prospect for the acquitted defendant. As *Amicus* observes, "prosecutors have the ability to pick and choose among a smorgasbord of statutes that might apply to given criminal conduct." Brief for *Amicus Curiae* California Attorneys for Criminal Justice (CACJ Brief) at 18. It is therefore all the more important that issue preclusion "operate[] as a 'safeguard'" against "the potential for unfair and abusive reprosecutions," given

[1] *Amici* also observe that this "flaw . . . in the order of analysis" has generated a circuit conflict in yet another double jeopardy context, with some – but not all – circuits holding that they can evade review of a defendant's sufficiency claim, which "would bar retrial altogether under *Burks*," if there is an alternative basis for remand that would give the government a second bite at the proverbial apple. ACDA Brief at 10.

"the extraordinary proliferation of overlapping and related statutory offenses" that allows "prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction." *Ashe*, 397 U.S. at 445 n.10.

B. The Decision Below Cannot be Reconciled with *Yeager* and Perpetuates a Division Among the Lower Courts

First, as *Amicus* emphasizes, CACJ Brief at 3, 6-7, the Eleventh Circuit's categorical single-issue test conflicts with the Court's mandate in *Yeager*, 557 U.S. 110 (2009). In *Yeager*, the defendant challenged multiple elements at trial and, indeed, the trial court and the appellate court offered two distinct rationales that could explain the jury's acquittal. *Id*. at 116; *id*. at 227 (Kennedy, J., concurring); *id*. at 135-36 (Alito, J., dissenting). Yet despite the contest as to multiple issues at trial, "[n]o Member of the Court suggested the presence of multiple contested issues *per se* precluded" the availability of relief under the Double Jeopardy Clause, CACJ Brief at 7, which would have been the required result if the single-issue test were in fact the law of the land. The single-issue test that was born in the years following *Ashe* should not have survived the Court's remand in *Yeager*, and yet it lives on in the Eleventh Circuit and elsewhere. *See, e.g.*, App. at 6-7 & n.1; *United States v. Rigas*, 605 F.3d 194, 218 (CA3 2010); *McWhorter v. State*, 993 N.E.2d 1141, 1147 (Ind. 2013).

Second, as *Amicus* underscores, the Eleventh Circuit (along with the Second and Third Circuits, and the Supreme Court of Indiana) is in conflict with other courts that "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." CACJ Brief at 2-3 (citing cases from the First, Fifth, and Ninth Circuits, as well as state courts of appeal); *accord* Pet. at 35 & n.19.

This division among the courts is not illusory. Because the Eleventh Circuit did little more than count the contested elements, it is impossible to posit that no other court "would find a retrial precluded on the facts of this case." BIO at 14. For instance, although the jury's general verdict of acquittal in this case did not "*explicitly* decide[]," *Hoult v. Hoult*, 157 F.3d 29, 32 (CA1 1998), any particular element of the offense, and more than one element was contested, other courts could dig deeper to determine what was *necessarily* decided. Even if another element was "hotly contested" (concealment), App. 5, the First Circuit could still find that the element Petitioner seeks to foreclose (knowledge) "constituted, logically or practically, a necessary component of the decision reached," *Hoult*, 157 F.3d at 32, if the record reflected that the evidence on that element, by comparison, was marginal (even if not constitutionally insufficient). Other courts could find that "the two contested elements were so intertwined that a jury could not practically find in favor of [Petitioner] on the concealment element without also finding in his favor on the knowledge element." Pet. at 28. *See, e.g.*,

Roesser v. State, 294 Ga. 295, 299 (Ga. 2013); *Commonwealth v. Davis*, 290 Va. 362, 371-72 (Va. 2015).

C. This Case is an Ideal Vehicle to Resolve the Questions Presented

1. The Petition Raises a Legal, Not a Factbound, Challenge

Lower courts conducting issue-preclusion analyses are obligated to "examine the record of a prior proceeding," *Bravo-Fernandez*, 137 S. Ct. at 359, to identify the issues necessarily resolved by the acquittal. But that obligation does not transform this – and every other – issue-preclusion case into a "factbound challenge." The Government opposed certiorari on those grounds in *Yeager*, Brief for the United States in Opposition, 2008 WL 4600057 at 24 ("[P]etitioners' claims involve only fact-bound applications of the doctrine of collateral estoppel. Further review of those claims by this Court is not warranted."), and attempts to do so again here. BIO at 12. But just as in *Yeager*, this Petition does not request, much less require, the Court to conduct a factbound review of the proceedings below, because the Eleventh Circuit's issue-preclusion analysis was itself purely legal, not factbound. Petitioner admittedly contested more than a single element at trial, so the Eleventh Circuit "decline[d] to employ collateral estoppel," App. 6, and refused to consider whether, "as a matter of law, the jury necessarily had to acquit [Petitioner] of money laundering conspiracy

because the Government's evidence regarding [Petitioner]'s knowledge of the stolen nature of the devices was constitutionally insufficient." App. 6-7 n.1.[2]

Just as in *Yeager*, the Petition simply asks the Court to correct the Eleventh Circuit's pure legal error and remand for further proceedings. No factbound review is requested or required.[3]

2. The District Court's Denial of the Motion for Judgment of Acquittal is a Prerequisite, Not an Obstacle, to this Court's Review

Petitioner does not "fail[] to acknowledge that the district court twice denied his motion for a judgment of acquittal based on insufficient evidence." BIO at 12. Rather, he asserts that the district court's sufficiency rulings were erroneous and should have been reviewed de novo by the court of appeals in identifying the element(s) necessarily decided by the acquittal.

Indeed, the fact that the district court *denied* the motion for judgment of acquittal makes this case the

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[2] Although the Government continues to cite the same limited evidence that it relied upon to prove the knowledge element, the Eleventh Circuit never addressed Petitioner's argument that, in light of *United States v. McDougald*, 990 F.2d 259, 262 (CA6 1993), the evidence of his knowledge was constitutionally insufficient – and thus necessarily determined by the acquittal.

[3] Had the Eleventh Circuit already found that the evidence of the knowledge element was constitutionally sufficient, then a Petition asking the Court to review that sufficiency finding would be more aptly described as "factbound."

ideal, if not the only, vehicle for the Court to address the questions presented. Had the district court *granted* the requested judgment of acquittal based on insufficient evidence of the element Petitioner seeks to foreclose, the Government would be hard-pressed to avoid the preclusive effect of that explicit finding. *See Burks*, 437 U.S. at 10-11, 16. Thus, the trial court's denial of a judgment of acquittal cannot possibly be a *roadblock* to this Court's review; indeed, it is a *prerequisite* to this Court's consideration of the question presented. We cannot envision any other procedural posture that would present a better vehicle for a defendant to petition the Court to harmonize *Ashe* and *Jackson* and provide guidance to the lower courts regarding the burden of proof imposed upon an acquitted defendant when invoking the issue-preclusion component of the Double Jeopardy Clause.

3. The Footnote in Petitioner's Reply Brief in the Court of Appeals is No Obstacle to Review by the Court

The Government attempts to characterize as a concession, BIO at 17, a footnote in Petitioner's Reply Brief in the Eleventh Circuit which acknowledged that the single-issue test, urged by the Government, provides one way to decipher what the jury necessarily found in cases "that turn[] on weighing evidence, making credibility determinations and reaching unanimity on one or more of those [contested] issues in play." Pet. C.A. Reply Br. 9 n.4 (expressly citing "Gov. Br. at 55-56"). The Eleventh Circuit, however, did not construe that

footnote as conceding anything. It reached, but ultimately rejected, the merits of Petitioner's argument, advanced on that very same page and throughout Petitioner's briefs, that the single-issue test is not the *only* way to decipher the findings implicit in an acquittal, particularly where the evidence was so deficient that it mandated the acquittal as a matter of law. Pet. C.A. Reply Br. 9; *accord* Pet. Corr. Initial Br. at 32. The footnote, therefore, presents no obstacle to this Court's review.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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