No.

In the Supreme Court of the United States

JOSEPH HIRKO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals, in conflict with the Sixth, Seventh, Ninth, and Eleventh Circuits, but consistent with the First and D.C. Circuits, correctly refused to give collateral estoppel effect to an acquittal under *Ashe* v. *Swenson*, 397 U.S. 436 (1970), solely because the jury also hung on one or more factually related counts.

2. Alternatively, whether the court of appeals' holding that an acquittal may have rested on the jury's *failure* to agree unanimously on the sole disputed element of the offense should be summarily reversed or certiorari granted to resolve the conflict between that decision and those by the Second and Ninth Circuits.

PARTIES TO THE PROCEEDING

The petitioner, defendant-appellant below, is Joseph Hirko. Scott Yeager and Rex Shelby were also defendants-appellants below.

The respondent, plaintiff-appellee below, is the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-28a) is reported at 521 F.3d 367. The opinion of the district court (App. 29a-59a) is reported at 447 F. Supp. 2d 734.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 2008. The order denying rehearing (App. 60a-61a) was entered on April 14, 2008. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides, in pertinent part: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT

Petitioner Joseph Hirko was charged with (among other offenses) twelve counts of money laundering, in violation of 18 U.S.C. § 1957. As the court of appeals correctly acknowledged, the only element of those offenses disputed at trial was whether the funds involved were derived from "unlawful activity" – *i.e.*, whether Hirko committed any of the predicate offenses of securities fraud or wire fraud specified in the indictment. The jury acquitted Hirko of all twelve money-laundering counts.

As this Court explained in *Ashe* v. *Swenson*, 397 U.S. 436, 443 (1970), the Double Jeopardy Clause bars the government from attempting to re-litigate "an issue of ultimate fact" that a jury has conclusively resolved in the defendant's favor. Here, because the jury resolved the sole factual dispute in Hirko's favor,

Ashe forecloses the government from attempting to try Hirko on the predicate offenses in a subsequent proceeding.

The court of appeals, however, held that *Ashe* does not bar re-prosecution of the predicates, because those offenses had been separately charged in the first trial and the jury had failed to reach a verdict on those counts. More particularly, the court of appeals held that it must "weigh" the presence of those mistried counts when evaluating whether the jury, in acquitting Hirko on the money-laundering offenses, necessarily decided that Hirko did not commit the predicate offenses. The Fifth Circuit acknowledged that its holding forced it to "part ways" with the majority of circuits, which have squarely held that the presence of hung counts does not affect the collateral estoppel analysis applied to counts on which the jury acquitted.

Alternatively, the court of appeals' opinion could be read to hold that – regardless of whether another count was mistried – a verdict of acquittal may simply mean that the jury was *undecided* about the only element of the offense in dispute. It is elementary, however, that a federal jury may acquit a defendant only if each and every juror agrees that the government has failed to meet its burden. Here, where the only question before the jury was whether Hirko committed any of the predicate offenses, the jury's unanimous verdict of acquittal can mean *only* that every juror concluded that Hirko was not guilty of *any* of the predicate offenses. If the court of appeals in fact concluded that the acquittals might reflect indecision rather than unanimous agreement, that reasoning (which has been rejected by two other courts of appeals) is so patently erroneous as to justify summary reversal.

A. Background

This case arises out of certain statements made by Hirko and others to analysts and to the public in early 2000 concerning a telecommunications network owned by a subsidiary of Enron Corporation ("Enron"). In 1997, Enron acquired Portland General Electric, where Hirko had worked for 17 years. Tr. 10475, 10480. Following the acquisition, Hirko became an executive with the Enron-owned company, later renamed Enron Broadband Services ("EBS"), serving as its President and CEO from approximately July 1999 through July 2000. Tr. 10470. EBS was developing a telecommunications network known as the Enron Intelligent Network ("EIN").

The trial principally concerned allegations that Hirko and his co-defendants, Scott Yeager and Rex Shelby, had misrepresented capabilities of the EIN and certain network-control software, thereby inflating Enron's stock price. According to the government, the defendants thereafter sold shares of Enron stock, profiting from the fraudulently inflated price. The government further alleged that Hirko "laundered" the proceeds of those offenses by transferring the proceeds of his stock sales to other accounts.[1] See App. 39a-41a.

More particularly, the government charged Hirko with seven counts of securities fraud and wire fraud for activities occurring in the first half of 2000. Count 2 charged securities fraud based on alleged misrepresentations at Enron's annual equity analyst conference on January 20, 2000. Counts 3 through 6 charged wire fraud based on alleged mis-

[1] The indictment also charged Hirko with a variety of other offenses, none of which is at issue in this petition.

representations in EBS press releases issued in January, March, April, and May 2000. Counts 25 and 26 charged two acts of insider trading (a type of securities fraud) based on Hirko's sale of Enron stock in May 2000, at prices the government claimed were inflated by the prior frauds. App. 32a-34a.

The indictment also alleged 12 counts of money laundering based on those fraud counts. The government charged that Hirko transferred the proceeds of his stock sales (which, in turn, were the product of his securities- and wire-fraud offenses) to other accounts. App. 32a-34a. The government claimed that those transfers constituted acts of money laundering, in violation of 18 U.S.C. § 1957.[2] Significantly, the indictment did not tie these offenses – which the parties refer to as the "2000 Money Laundering Counts" – to a particular securities- or wire-fraud count. App. 41a. Accordingly, the jury was free to use *any* of the underlying securities and wire fraud counts as predicates for each of the 2000 Money Laundering Counts.

B. The Trial

1. Hirko's Sole Defense To The 2000 Money Laundering Counts.

Hirko presented a single, well-focused defense to the 2000 Money Laundering Counts: He did not

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[2] Section 1957 makes it unlawful to "knowingly engage[] or attempt[] to engage in a monetary transaction in criminally derived property of a value greater than $10,000 [that] is derived from specified unlawful activity." Unlike money laundering charged under 18 U.S.C. § 1956, Section 1957 does not require the government to prove that the transaction "promoted" a criminal offense; rather, Section 1957 criminalizes the mere movement of the criminally derived funds.

commit the predicate frauds. Hirko's counsel argued that his client "did not lie, misrepresent, hype, or falsely t[ou]t the capabilities of his business." Tr. 511. And Hirko himself took the stand and testified that he "absolutely" believed in the accuracy of EBS's public statements and that his stock trades were not based on any material, nonpublic information. Tr. 10472, 10908, 10942. But Hirko never contested the remaining elements of the money laundering charges – *i.e.*, that he had engaged in monetary transactions, derived from his stock sales, that exceeded $10,000. App. 16a. Indeed, Hirko agreed with the government's characterization that his "total net proceeds for the trades in 2000 that are at issue in this case" were approximately $9.8 million. Tr. 11373. He simply insisted that those proceeds were not "criminally derived" because he was not guilty of any of the predicate offenses charged in the indictment. Tr. 13307.

2. The Jury Was Authorized To Convict Hirko Of Money Laundering If It Found That He Had Committed Any *Of The Predicate Offenses.*

With respect to the 2000 Money Laundering Counts, the jury instructions explained that Hirko was charged with laundering "funds generated through wire fraud and fraud in the sale of securities" (Tr. 13664), and that he should be convicted of money laundering if the jury found five elements:

> First: That the defendant engaged or attempted to engage in a monetary transaction;
>
> Second: That the monetary transaction involved criminally derived property of a value greater than $10,000;
>
> Third: That the property was in fact derived from a specified unlawful activity, that is, wire fraud in

> violation of Title 18, United States Code, Section 1343, and fraud in the sale of securities in violation of Title 15, United States Code, Sections 78j(b) and 78ff and Title 17, Code of Federal Regulations, Section 240.10b-5;
>
> Fourth: That the defendant acted knowingly, that is, with knowledge that the transaction involved proceeds of a criminal offense; and
>
> Fifth: That the transaction took place in the United States.

App. 16a-17a n.17.

The jury instructions also made clear that the jury need not find that Hirko had committed both wire fraud *and* securities fraud to sustain a conviction for money laundering. On the contrary, all that was necessary was that the jury find that the defendant knowingly possessed proceeds of "some" offense, which could be either wire fraud or securities fraud or both:

> The Government must prove that the Defendant knew that the property involved in the monetary transaction constituted or was derived from proceeds obtained by *some* criminal offense. The Government does not have to prove that the Defendant knew the precise nature of that criminal offense or knew the property involved in the transaction represented the proceeds of *wire fraud or fraud in the sale of securities*.

Tr. 13670 (emphases added).

The jury instructions also expressly defined "criminally derived property" as "any property constituting or derived from the proceeds of *a* criminal offense." Tr. 13670 (emphasis added). They also made clear that, "[a]lthough the Government must prove that, of the property at issue, more than $10,000 was

criminally derived, the Government does not have to prove that all of the property at issue was criminally derived." Tr. 13670-71. In addition, the jury was instructed: "When the aggregate amount withdrawn from an account containing commingled funds exceeds the clean funds, individual withdrawals may be said to be of tainted money, even if a particular withdrawal was less than the amount of clean money in the account." Tr. 13671. Thus, the jury was instructed to convict Hirko of the 2000 Money Laundering Counts if it found that Hirko had committed *any* of the predicate frauds.

3. The Jury's Deliberations And Partial Verdict.

During the fourth day of deliberations, the jury indicated it had reached agreement on certain counts but was deadlocked on others. Tr. 13711. At 3:50 p.m., the district court sent the jury back, but directed it to take only "until the end of the day" – *i.e.*, "until 5:00 [p.m.]" – to decide whether additional deliberations could be helpful. Tr. 13724. After the prescribed 70 minutes had elapsed, the jury indicated that it had not yet made additional progress. The court decided to "take their verdict" instead of asking the jury to return for a fifth day of deliberations. Tr. 13725. The jury then returned verdicts of acquittal on 14 of the counts against Hirko, including all of the 2000 Money Laundering Counts (Counts 55 through 66) and the insider trading counts for stock sales on February 18, 2000, and April 20, 2000 (Counts 23 and 24). App. 31a. The jury did not reach a verdict on the remaining counts, which were mistried. Tr. 13727-28.[3]

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[3] Hirko's co-defendants fared similarly: The jury acquitted Yeager of conspiracy, wire fraud, and securities fraud; it acquitted Shelby of some insider trading counts. The

C. The Superseding Indictment And Motion To Dismiss

The government then filed a superseding indictment, which proposed to retry several of the predicate offenses that underlay the 2000 Money Laundering Counts on which the jury had acquitted. In addition to several offenses not relevant here, the superseding indictment charged Hirko with several of the same acts of securities fraud and wire fraud that formed the predicate offenses for the 2000 Money Laundering Counts.

Hirko moved to dismiss those counts (numbered 2-6 in the superseding indictment). Hirko's motion argued that, because the only element of the 2000 Money Laundering Counts in dispute at the first trial was whether Hirko had committed the predicate offenses, and because the jury had unanimously acquitted him of all 12 of the 2000 Money Laundering Counts, the jury necessarily had concluded that Hirko did not commit the predicate offenses. Accordingly, Hirko explained, *Ashe* prohibited the government from attempting to re-litigate the predicate offenses by separately charging them in a superseding indictment.

The district court denied the motion.[4] It acknowledged that *Ashe* precludes the government from attempting to relitigate in a subsequent proceeding "'the facts necessarily determined in the

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remaining counts against those defendants were likewise mistried. Notably, the jury did not convict Hirko, Yeager, or Shelby of *any* of the 176 total counts brought to trial (in various combinations) against these defendants.

[4] The district court rejected similar motions filed by Yeager and Shelby. See App. 3a. Hirko's retrial is currently scheduled to commence on November 3, 2008.

former trial.'" App. 36a (quoting *United States* v. *Brackett*, 113 F.3d 1396, 1398 (5th Cir. 1997)). And it did not dispute that Hirko's only defense to the 2000 Money Laundering Counts was that he did not commit the predicate offenses. The district court nevertheless denied the motion on grounds on which the court of appeals refused to rely, which the government refused to defend on appeal, and which therefore do not merit further discussion.

D. The Fifth Circuit's Decision

Hirko appealed,[5] arguing that *Ashe* foreclosed the government's second attempt to prove that Hirko had committed the predicate offenses upon which the 2000 Money Laundering Counts were based. Hirko again noted that his sole defense to those charges was that he did not commit the predicate offenses and argued that, in acquitting him of the 2000 Money Laundering Counts, the jury necessarily resolved that fact in his favor. C.A. Br. 15-18, 30-39. Hirko further explained that the jury's failure to reach a verdict on other counts in the indictment – including the separately charged predicate offenses – should not affect the collateral estoppel analysis. *Id.* at 48-54. Hirko specifically directed the court of appeals to several decisions from other circuits holding that the presence of mistried counts does not alter the collateral estoppel effect of a verdict of acquittal. *Id.* at 48-49.

The government did not dispute that Hirko's sole defense to the 2000 Money Laundering Counts was that he had not committed the predicate fraud

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[5] Because the motion to dismiss was based on double jeopardy grounds, its denial was immediately appealable under 28 U.S.C. § 1291 and the collateral order doctrine. See *Abney* v. *United States*, 431 U.S. 651, 662 (1977).

offenses. Instead, the government's principal argument was that *Ashe never* applies when a jury has failed to reach a verdict on counts that are factually related to the acquitted counts. The government reasoned that, because *Richardson* v. *United States*, 468 U.S. 317, 324 (1984), held that declaration of a mistrial does not automatically bar the government from retrying its case, declaration of a mistrial precludes any examination into the collateral estoppel consequences of an acquittal that is coupled with one or more hung counts. The government also pointed to *United States* v. *Powell*, 469 U.S. 57 (1984), which held that courts should not attempt to reconcile inconsistencies between unanimous verdicts of conviction and acquittal. In the government's view, it followed from *Powell* that a court must ignore the collateral estoppel consequences of an acquittal where the jury *fails* to reach a verdict on another count.

The Fifth Circuit affirmed the denial of Hirko's motion to dismiss.[6] The court of appeals recognized that, "[a]fter an acquittal, *Ashe* bars the government from prosecuting defendants on a different charge 'if one of the facts *necessarily determined* in the former trial is an essential element of the subsequent prosecution.'" App. 6a (quoting *Brackett*, 113 F.3d at 1398). And with respect to Hirko, the panel expressly acknowledged that Hirko's sole defense to the 2000 Money Laundering Counts was that he did not commit the predicate offenses. App. 16a. Indeed, the court of appeals observed that Hirko had "stipulated to the other elements" of money laundering, other than the commission of the predicate acts. App. 17a.

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[6] The court of appeals likewise affirmed the denials of Yeager's and Shelby's motions. App. 3a.

Nevertheless, the court of appeals rejected Hirko's collateral estoppel argument. In so doing, the panel relied on the fact that the jury had failed to reach a verdict on the separately charged predicate offenses and speculated that the acquittals on the 2000 Money Laundering Counts might therefore have been based on mere indecision about whether Hirko had committed the predicate offenses. As the panel explained:

> In addition to money laundering, Hirko was also charged with securities fraud, wire fraud, and insider trading, and the jury hung on these counts. Since it could not determine whether Hirko committed these acts, the jury then could not convict Hirko on the Money Laundering Counts and had to acquit.

App. 18a. Put another way, the court of appeals concluded that, because the jury had hung on the separately charged counts, it did not "necessarily" find that Hirko had not committed the predicate offenses when acquitting him of money laundering. Rather, the panel surmised, the jury's unanimous decision to acquit Hirko of the 2000 Money Laundering Counts might have reflected mere *indecision* about the sole disputed element, not a unanimous finding that the government had failed to prove it. App. 17a-18a.

When discussing a similar challenge brought by one of Hirko's co-defendants, the court of appeals explained at length why it thought it was legally appropriate to rely on the presence of hung counts in applying the collateral estoppel principles set forth in *Ashe*. The court held that its decision in *United States* v. *Larkin*, 605 F.2d 1360, 1370 (5th Cir. 1979), withdrawn in part on other grounds, 611 F.2d 585 (5th Cir. 1980), "requires that we consider mistried counts in our

collateral estoppel analysis." App. 23a. "[T]he presence of mistried counts," the court of appeals continued, "diminishes the likelihood that, in acquitting defendants on related counts, the jury made a factual determination that bars a retrial." *Ibid*.

The court of appeals declined (at least formally) to embrace the government's sweeping assertion that *Ashe* never applies to any count on which a jury has failed to reach a verdict. In particular, the court of appeals rejected the notion that *Powell* – which bars attempting to reconcile inconsistent *verdicts* (*i.e.*, acquittal and guilty) within the *same proceeding* – categorically "preclude[s] applying collateral estoppel where a jury acquitted defendants on some counts but hung on related counts." App. 26a. The court of appeals agreed with numerous other circuits that have rejected that precise argument. App. 26a (citing *United States* v. *Ohayon*, 483 F.3d 1281, 1289 (11th Cir. 2007); *United States* v. *Romeo*, 114 F.3d 141, 144 (9th Cir. 1997); *United States* v. *Bailin*, 977 F.2d 270, 276 (7th Cir. 1992); *United States* v. *Frazier*, 880 F.2d 878, 883 (6th Cir. 1989)). "[W]e concur with our sister circuits," the court of appeals explained, "that it is impossible to discern definitively why a jury hung." App. 27a.

The court of appeals expressly acknowledged, however, that its willingness even to *consider* the presence of hung counts when examining the collateral estoppel consequences of an acquittal directly conflicted with other courts of appeals: "Where we part ways with our sister circuits is that they ignored the mistried counts after they determined that *Powell* does not apply. Because our precedent dictates that we weigh mistried counts, however, we cannot do the same." App. 27a; see also *id.* n.22 ("We can only

speculate as to why our sister circuits did not also consider the mistried counts in [their] analysis under *Ashe*. While our precedent requires us to weigh mistried counts in determining whether collateral estoppel applies under the *Ashe* framework, the other circuits may not be similarly bound by their precedent.").

Hirko timely filed a petition for rehearing *en banc*, which was denied without comment. App. 60a-61a.

REASONS FOR GRANTING THE PETITION

In *Ashe* v. *Swenson*, 397 U.S. 436, 445 (1970), this Court made clear that principles of collateral estoppel are "embodied in the Fifth Amendment guarantee against double jeopardy." Consequently, when a jury has resolved "an issue of ultimate fact" in favor of a defendant, the government cannot then re-litigate that issue in a subsequent criminal proceeding. *Id.* at 443. In application, that "requires a court to examine the record of a prior proceeding" in order to determine "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Id.* at 444 (citation and internal quotation marks omitted).

The facts at issue in *Ashe* perfectly illustrate the wisdom of that rule. The defendant there was charged with armed robbery of one of six participants in a poker game. *Id.* at 438. At trial, "[t]he single rationally conceivable issue in dispute before the jury" was whether the defendant had been properly identified as present at the scene. *Id.* at 445. The jury returned a verdict of acquittal, after which prosecutors tried the defendant for the armed robbery of a different participant at the same poker game. *Id.* at 439. This Court held that the "[s]traightforward application" of

collateral estoppel principles prohibited the second prosecution because the first jury had determined that the defendant was not present when the robbery took place. *Id.* at 445.

Here, as in *Ashe*, Hirko presented a single defense to the 2000 Money Laundering Counts: He did not commit the predicate offenses upon which they were premised. The court of appeals expressly acknowledged as much, yet it refused to recognize the logical import of the jury's verdicts of acquittal. Instead, it held that the government was free to re-try Hirko for the very same predicate offenses. The evident basis for its holding was that the same jury had failed to reach a verdict on the separately charged predicate offenses.

The Fifth Circuit's willingness to "weigh" the presence of hung counts when determining whether a verdict of acquittal precludes re-litigation of the sole disputed element furthers an already deep conflict among the lower courts. The majority of circuits to have considered the question have specifically held that hung counts are irrelevant as a matter of law to the collateral estoppel analysis. The Fifth Circuit recognized that fact, explaining that its analysis forced it to "part ways with [its] sister circuits." App. 27a. This Court's review is necessary to resolve that persistent conflict on a question the government has acknowledged to be of "exceptional importance." See p. 24, *infra*.

Review is also warranted to remedy the serious defects inherent in the Fifth Circuit's rule. As a practical matter, permitting courts to consider hung counts renders the protections of collateral estoppel unavailable in partial verdict cases. If a hung count is "relevant" at all, it necessarily introduces uncertainty

as to the meaning of an acquittal and thereby suspends application of *Ashe*. Relying on hung counts also violates the long-settled understanding – confirmed in *Richardson* v. *United States*, 468 U.S. 317 (1984), and *United States* v. *Powell*, 469 U.S. 57 (1984) – that a jury's failure to reach a verdict is, for purposes of the Double Jeopardy Clause, a "non-event."

There is another way to interpret the Fifth Circuit's opinion, but that reading renders the decision so patently erroneous as to warrant summary reversal. Arguably, the Fifth Circuit denied Hirko's appeal without regard to the presence of hung counts because, in its view, the jury's acquittal on the 2000 Money Laundering Counts might have been based on mere *indecision* as to whether Hirko committed the predicate offenses. App. 18a. Such a rule – specifically, that a jury may acquit a defendant because it *cannot agree* whether the defendant is guilty of the sole disputed element – violates even the most basic understanding of a jury's function (not to mention the actual instructions the jury here received). If a jury cannot agree on a disputed element, it must *hang*; conversely, a verdict of *acquittal* can mean only that the jury has unanimously resolved that element in the defendant's favor. To our knowledge, no federal court – other than the panel in this case – has ever held otherwise, and at least two Circuits have expressly repudiated the rationale invoked by the panel. If the court below in fact acted on that legally untenable premise, its decision should be summarily reversed.

I. The Decision Below Deepens A Conflict Among The Lower Courts And Erroneously Permits The Government To Relitigate Questions A Jury Has Unanimously Determined In A Defendant's Favor.

A. The Fifth Circuit's Decision Squarely Conflicts With Those From Several Other Circuits And One State High Court.

This Court should grant review to resolve the deep split among the lower courts over the application of *Ashe* to partial verdicts of acquittal – *i.e.*, verdicts where a jury acquits on some counts and hangs on others. Four federal courts of appeals and one state high court have specifically held that the presence of mistried counts does not affect the collateral estoppel consequences of a jury's verdict of acquittal. The Fifth Circuit, however, concluded that courts must "weigh" the mistried counts to determine whether they limit the collateral estoppel consequences of an acquittal. App. 27a-28a. In so holding, the Fifth Circuit expressly "part[ed] ways with" the majority rule and adopted the minority position followed by only two other circuits.

1. The Sixth, Seventh, Ninth, and Eleventh Circuits – plus the Court of Appeals of Maryland – have specifically held that the presence of mistried counts is irrelevant to the collateral estoppel effect afforded to a verdict of acquittal. In *United States* v. *Ohayon*, 483 F.3d 1281, 1282 (11th Cir. 2007), the defendant was charged with "conspiracy to possess with intent to distribute and attempt to possess with intent to distribute * * * ecstasy." Ohayon's sole defense "was that he was unaware of the contents of the bags" that were in his possession when he was arrested. *Ibid.* The jury "acquitted Ohayon of the

attempt count but was unable to reach a unanimous verdict on the conspiracy count." *Ibid.* The government then sought to retry Ohayon on the conspiracy charge, and he moved to dismiss that count under *Ashe*. The district court granted the motion, concluding that the jury's acquittal reflected its unanimous conclusion that Ohayon was not aware of the bags' contents and that such knowledge was an essential component of the government's conspiracy allegation.

The Eleventh Circuit affirmed. Recognizing that "the application of collateral estoppel to a partial verdict * * * is an issue that has divided not only our sister circuits but panels of our circuit as well," *ibid.*, the court flatly rejected the government's claim that the mistried count cast doubt on the basis of the jury's verdict of acquittal. The court explained that

> the failure of a jury to reach a verdict is not a decision; *it is a failure to reach a decision.* A partial verdict does not comprise two decisions that we must try to reconcile, because *the mistried count is not a decision for which we can discern, or to which we can impute, a single, rational basis.* The very essence of a mistried count is that the jury failed to reach agreement.

Id. at 1289 (emphasis added).[7]

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[7] Notably, the Eleventh Circuit held that this conclusion was compelled by *United States* v. *Larkin*, 605 F.2d 1360 (5th Cir. 1979), upon which the Fifth Circuit here relied to reach precisely the opposite result. Compare 483 F.3d at 1289 ("*Larkin* settles the issue") with App. 23a ("*Larkin* requires that we consider mistried counts in our collateral estoppel analysis").

Likewise, in *United States* v. *Romeo*, 114 F.3d 141, 142 (9th Cir. 1997), the defendant presented a single defense to a two-count indictment charging importation of marijuana and possession with intent to distribute. "The only contested element, and the only contested issue argued to the jury, was * * * whether or not [Romeo] knew that there was marijuana in the car" that he was driving when arrested. *Ibid.* The jury acquitted Romeo of the possession charge but hung (11-1 in favor of acquittal) on the importation count. *Ibid.* Romeo moved for a verdict of acquittal on the importation count, arguing that *Ashe* barred retrial. *Ibid.* The district court denied the motion, but the Ninth Circuit reversed. The court of appeals refused to rely on the presence of the hung count to diminish the collateral estoppel consequences that followed from the jury's unanimous verdict of acquittal on the possession count: "Because there are so many variable factors which can cause a jury not to reach a verdict, we will not speculate on why the jury could not agree. The inquiry under *Ashe* is what the jury actually decided when it reached its verdict, *not on why the jury could not agree on the deadlocked count*." *Id.* at 144 (emphasis added).

The Sixth Circuit also follows this rule. In *United States* v. *Frazier*, 880 F.2d 878, 883 (6th Cir. 1989), the court explained that "[n]o * * * inconsistency is necessarily present * * * when a jury acquits on some charges and fails to agree on others. Both the acquittal and the failure to agree could result from a number of factors, none of which makes the verdict inconsistent or the jury's actions irrational." Accordingly, it held that *Ashe* precluded retrial of a count of making false entries in bank records (on which the jury had hung), where the jury had acquitted the defendant of

misapplication of funds and the sole defense to both charges was that the defendant lacked intent to defraud. *Id.* at 885-886.

The Seventh Circuit likewise has adopted the majority rule, although it cast its rule as a question of "direct" rather than "collateral" estoppel: "In a retrial of a mistried count in a multicount indictment, does direct estoppel bar the government from relitigating issues that were necessarily and finally decided in the defendant's favor by reason of the jury's partial acquittal on other counts? We hold that it does." *United States* v. *Bailin*, 977 F.2d 270, 276 (7th Cir. 1992); see also *id.* at 280 ("[T]he 'jury's failure to reach a verdict [is] too inconclusive to qualify as inconsistent' for the purposes of issue preclusion.") (quoting Anne B. Poulin, *Collateral Estoppel in Criminal Cases*, 58 CINN. L. REV. 1, 44 n.12 (1989)). And at least one state high court also has held that the federal Constitution precludes the government from relying on mistried counts to evade the collateral estoppel consequences of an acquittal. See *Ferrell* v. *State*, 567 A.2d 937, 944 (Md. 1990) ("There is no question that those verdicts [of acquittal] do constitute a valid determination of issues of ultimate fact. Because the jury's failure to agree [on other counts] did not decide any facts, it did not make the validity of that determination questionable.").

2. In stark contrast, three circuits hold that a court must consider the presence of hung counts when evaluating the collateral estoppel consequences afforded to an acquittal under *Ashe*. In the decision below, the Fifth Circuit held that it must "weigh" the mistried counts, expressly acknowledging that its holding forced it to "part ways with [its] sister circuits." App. 23a, 27a. The court of appeals conceded that the

only disputed fact with respect to the 2000 Money Laundering Counts was whether Hirko had committed the predicate offenses. App. 16a ("At trial, Hirko stipulated to having engaged knowingly in monetary transactions involving more than $10,000. Both parties also acknowledged that the bulk of the funds involved in the transactions underlying the [2000] Money Laundering Counts came from Hirko's sale of Enron stock in 2000."). Nor did the court of appeals dispute that the jury was authorized to convict Hirko of the 2000 Money Laundering Counts if it determined that he had committed *any* of the predicate offenses. Relying on the hung counts, however, the court of appeals held that the jury's unanimous acquittal on all 12 of the 2000 Money Laundering Counts did not preclude the government from retrying Hirko on the predicate offenses.

The effect of the hung counts on the Fifth Circuit's analysis cannot be overstated. The court relied on the hung counts to conclude that the acquittals on the 2000 Money Laundering Counts might simply have reflected the jury's failure to agree as to the lone disputed element of those charges. As we explain below (pp. 28-31, *infra*), the proposition that a jury can acquit (rather than hang) if it is simply undecided about an element is manifestly erroneous. Thus, the Fifth Circuit's effort to account for the presence of the hung counts did not just shade its analysis of the acquittals, it led it to elide the crucial distinction between an acquittal and a hung jury.

The D.C. Circuit also follows the minority rule embraced by the court below. In *United States* v. *White*, 936 F.2d 1326, 1327 (D.C. Cir. 1991), the defendant was charged with possession of "an unlawfully issued birth certificate with the intent to

defraud the United States" and making false statements in support of a passport application. "At trial, * * * the defendant did not deny committing the acts charged," disputing only whether he had knowledge of the applicant's true identity and therefore formed the fraudulent intent necessary to commit both offenses. *Id.* at 1328. The jury acquitted the defendant of the possession count but hung on the false-statement count. The government then obtained a superseding indictment re-charging the false-statement count and charging additional (factually overlapping) offenses. The defendant unsuccessfully moved to dismiss those counts under *Ashe*.

The D.C. Circuit affirmed. The court refused to "read the implications of the appellant's acquittal" on the possession charge to preclude retrial, expressly relying on the fact that the jury had hung on the false-statement count:

> The finding that the defendant believed Linden to be Baldwin would have extended to and controlled the verdict on the second count and the jury would have found that the defendant did not wilfully make a false statement in the passport application. Since the jury reached no verdict on the passport count, it must have based the Count I acquittal on a finding other than that which the appellant urges.

Id. at 1329.

The First Circuit also appears to have adopted the minority rule. In *United States* v. *Aguilar-Aranceta*, 957 F.2d 18, 21 (1st Cir. 1992), the defendant was charged with one count of importation of cocaine and one count of possession with intent to distribute. At trial, the government's sole theory of guilt on both charges was that the defendant knew the packages in

question contained drugs when she retrieved them from the Post Office. *Id.* at 24. The jury acquitted the defendant on the importation count but hung on the possession count. The defendant moved to dismiss the possession count under *Ashe*, arguing that the jury necessarily concluded that she did not know the packages contained drugs. The district court denied the motion.

The First Circuit affirmed, concluding that the "[f]irst and foremost" "flaw[] in defendant's arguments" was that the presence of the hung count belied the notion that the jury had necessarily concluded the defendant was unaware of the package's contents. *Ibid.* "[I]f the jury acquitted the defendant on count two [importation] based on a determination that she had no knowledge as to the contents of the packages," the court explained, "it seems to us that an acquittal as to count one [possession] would have necessarily followed since knowledge as to the contents of the packages is an element of the offense of possession with intent to distribute." *Ibid.*

3. As explained above, the majority of circuits to have specifically addressed the question (plus at least one state high court) have held that hung counts are not relevant to the collateral estoppel analysis prescribed by *Ashe*. But the weight of opinion is even more strongly against the minority position adopted below. That is because there is no meaningful difference between holding that hung counts must be "weighed" in the collateral estoppel analysis and a *de facto* rule that collateral estoppel is categorically inapplicable to partial verdicts. If the hung count is relevant *at all*, it will *necessarily* create uncertainty regarding the basis for the verdict of acquittal. Any time a jury returns a partial verdict, the government

will be able to claim (as it did here) that, because the jury failed to reach a verdict on the factually overlapping hung count, the jury must have based its acquittal on something other than the rationale that would preclude further prosecution.

Properly understood, then, the Fifth Circuit's rule is tantamount to holding that *Ashe* is a dead letter in partial verdict cases. In addition to those courts that have specifically held that hung counts are irrelevant to the collateral estoppel analysis, at least two more courts have rejected a categorical ban on applying *Ashe* to partial verdicts. See *United States* v. *Mespoulede*, 597 F.2d 329, 336-337 (2d Cir. 1979); *United States* v. *Felder*, 548 A.2d 57, 66 (D.C. 1988) ("[T]he fact that the original determination was in a multi-count indictment, part of which remains unresolved by the jury, is no *per se* bar to application of collateral estoppel."). Thus, among the increasingly large number of courts that have considered the application of *Ashe* to partial verdict cases, the Fifth Circuit is among the small minority that permit the government to evade the collateral estoppel consequences of an acquittal.

4. Finally, there can be no doubt regarding the existence and importance of this conflict, because the United States has recently acknowledged as much. Just last year, the United States urged the Eleventh Circuit to grant *en banc* review of the panel's opinion in *Ohayon*, arguing that the D.C. Circuit's decision in *White* and the First Circuit's decision in *Aguilar-Aranceta* correctly considered hung counts when applying *Ashe* to a partial verdict. See U.S. Pet. for Reh'g and Reh'g En Banc at 12, *United States* v. *Ohayon*, 483 F.3d 1281 (11th Cir. 2007) (No. 05-17045). It is not surprising, then, that the government never

challenged the panel's statement that this question has divided the circuits, 483 F.3d at 1290.

What is more, the government recognized that this issue is one of "exceptional importance." *Ohayon* Reh'g Pet. at i. On that point we are in complete agreement: Whether the presence of hung counts should affect – or, as the government would have it, eviscerate – the application of *Ashe* is a question of tremendous significance. Juries reach partial verdicts on a virtually daily basis, and, as the cases described above illustrate, the issue has arisen with some frequency in recent years.

Moreover, as this Court and many commentators have recognized, the collateral estoppel principles set forth in *Ashe* (and recognized at least since Justice Holmes' opinion in *United States* v. *Oppenheimer*, 242 U.S. 85 (1916)), provide an essential complement to the traditional double jeopardy framework under *Blockburger* v. *United States*, 284 U.S. 299 (1932). See, *e.g.*, *United States* v. *Dixon*, 509 U.S. 688, 705 (1993) (rejecting argument that government must bring prosecutions for the "same conduct" simultaneously, in part because *Ashe* protects against relitigation "where the Government has *lost* an earlier prosecution involving the same facts"); Anne Bowen Poulin, *Double Jeopardy Protection From Successive Prosecution: A Proposed Approach*, 92 GEO. L.J. 1183, 1214 (2004) ("[*Blockburger*] is too easily circumvented in the modern era of numerous duplicative offenses.").

B. The Decision Below Is Wrong.

This Court's review is also necessary to remedy the serious defects inherent in the Fifth Circuit's rule. The decision below thoroughly dilutes the protections of the Double Jeopardy Clause and (perversely) *rewards* the

government for *failing* in its first attempt to prove its case.

1. As explained above (pp. 22-23, *supra*), "weighing" the presence of hung counts is no different from categorically foreclosing the application of *Ashe* to partial verdicts. This case illustrates that fact all too well. As the Fifth Circuit expressly acknowledged, Hirko presented a *single* defense to a *single* element of the 2000 Money Laundering Counts: He did not commit *any* of the underlying predicate offenses. The jury unanimously agreed, acquitting him of all 12 of those counts.

Under the Fifth Circuit's rule, however, that determination does nothing to bar the government from relitigating the predicate offenses. The decision below establishes, in effect, an irrebutable presumption that a hung count cannot be reconciled with the otherwise uncontested import of a jury's acquittal. Indeed, the enormous "weight" of the hung counts at issue here led the Fifth Circuit to speculate that the jury acquitted Hirko of the 2000 Money Laundering Counts because it *could not decide* whether Hirko committed the predicate offenses – *i.e.*, that the jury violated its instructions by rendering a verdict that was not unanimous. Tr. 13673, 13676. It is well settled, however, that "a jury is presumed * * * to follow its instructions." *Weeks* v. *Angelone*, 528 U.S. 225, 226 (2000) (citing *Richardson* v. *Marsh*, 481 U.S. 200, 211 (1987)). Worse still, the decision below violates that maxim selectively: It presumes that the jury followed its instructions to the letter when deliberating on the hung counts, but that it must have acted irrationally or mistakenly *only* with respect to the counts on which it unanimously acquitted.

2. The Fifth Circuit's rule also has the perverse effect of rewarding the government for bringing additional counts but failing to prove them. Here, had the original indictment charged Hirko only with the 2000 Money Laundering Counts – *i.e.*, had it not separately charged the predicate offenses – there would be no question that the jury's acquittal on those counts would preclude the government from attempting to prove a second time that he committed those offenses. See *United States* v. *Powell*, 469 U.S. 57, 64 (1984). But because the government larded the indictment with multiple offenses based on the same conduct and then *failed* to convince the jury to convict on some of them, it is relieved of the consequences of a jury's *acquittal* on related offenses.

That makes no sense. If prosecutors are rewarded for securing a mistrial on perhaps just one factually overlapping count, they will have strong incentives to heap multiple factually overlapping counts into an indictment. That is because, if the jury acquits the defendant on all charges, the government is no worse off than if it had exercised sound prosecutorial discretion and brought only those charges truly necessary to vindicate the government's interests. But if the jury hangs on even a single factually overlapping count, the government is entitled to retry that charge even if the jury has acquitted the defendant of the very same conduct on other counts. The Fifth Circuit's rule thus encourages prosecutors to overcharge a case, turning the protective function of the Double Jeopardy Clause on its head.

Relying on a hung count to limit the reach of the Double Jeopardy Clause based on a mistried count is particularly odd because a hung jury is generally a "non-event" for double jeopardy purposes. Just as a

defendant cannot rely on the jury's failure to reach a verdict to preclude retrial, see *Richardson* v. *United States*, 468 U.S. 317 (1984), the government cannot rely on the same to preclude the double jeopardy consequences of an acquittal. See *Ohayon*, 483 F.3d at 1289 ("the failure of a jury to reach a verdict is not a decision; it is a failure to reach a decision").

It is puzzling, then, that the government has claimed that *Richardson* supports its bid to retry Hirko for these crimes. See Gov't C.A. Br. at 23-24. If that decision sheds any light on the question presented here, it confirms that hung counts do not have double jeopardy consequences the way *actual verdicts* do. For the same reason, the government's reliance on *Powell* is entirely misplaced. *Powell* held that mixed *verdicts* of convictions and acquittals that appear inconsistent do not entitle the defendant to a retrial on the counts of conviction because "it is unclear whose ox has been gored." *Id.* at 65. The Fifth Circuit's rule, however, would eliminate the double jeopardy consequences of a *verdict* of acquittal based merely on the jury's *failure to decide* another count. And if the government successfully circumnavigates the (flexible) *Blockburger* test, it can also bring *new* charges based on the same factual allegations that a jury already has resolved in favor the defendant – effectively upending the verdict of acquittal on the basis of a mistried count.

Indeed, this is an especially inappropriate case in which to attempt to discern meaning from the jury's failure to reach a verdict on certain counts. When the jury indicated it was deadlocked on only the fourth day of deliberations, the district court gave an *Allen* charge, but with a peculiar twist: Shortly before the jury's usual 4:00 p.m. quitting time, the district court asked the jury to deliberate only "until 5:00 [p.m.]" on

that day – an unusual step, given that it takes time for a proper *Allen* charge to work. See *Lowenfield* v. *Phelps*, 484 U.S. 231, 240 (1988) (verdict that closely follows an *Allen* charge "suggests the possibility of coercion"). By telling the jury, in effect, that it could avoid additional days of service simply by waiting out the clock for another 70 minutes, the charge likely entrenched, not dissipated, the deadlock. That the jury did not push through to additional acquittals during those final minutes of the fourth day of deliberations provides no basis to reject the preclusive effect of the acquitted counts.

II. Alternatively, If One Reads The Court Of Appeals' Opinion Not To Rely Directly On The Presence Of Mistried Counts, The Decision Is So Patently Erroneous As To Warrant Summary Reversal.

The most reasonable reading of the Fifth Circuit's opinion is that it treated the presence of mistried counts as a basis for disregarding the evident meaning of the verdicts of acquittal. But the court of appeals also made the following cryptic statement in attempting to explain its rationale: "if the jury could not decide whether Hirko committed 'a specified unlawful activity,' then it would have to acquit him on the [2000] Money Laundering Counts." App. 18a. This remark – to which the panel adhered even after our rehearing petition called attention to its palpable error – suggests that the court may have disposed of Hirko's case *without regard* to the presence of mistried counts. If the court of appeals indeed concluded that a jury may acquit a defendant where it is simply *undecided* about a particular element of the offense, then that

reasoning is so patently erroneous as to warrant summary reversal.

It is well settled that when a jury fails to resolve an element of an offense – but is otherwise convinced by the sufficiency of the government's proof – the jury must hang, not acquit, on the offense. See Fed. R. Crim. P. 31(b)(3) ("If the jury cannot agree on a verdict on one or more counts, the court may declare a *mistrial* on those counts.") (emphasis added). Tellingly, the Fifth Circuit offered no authority – because none exists – to support its novel contrary assertion. Nor did the court even attempt to confront (much less explain away) the fact that the jury here was properly instructed that its verdict must be *unanimous* on every element of each offense. Tr. 13673, 13676.

At least two circuit courts have expressly repudiated the proposition on which the panel relied. In *United States* v. *Gotti*, 451 F.3d 133 (2d Cir. 2006), the defendant was charged with participation in a RICO enterprise, which required the government to prove that he had committed "'at least two acts of racketeering activity.'" *Id.* at 135 (quoting 18 U.S.C. § 1961(5)). The jury found that the government had "not proved" one predicate offense and that it was undecided as to the remainder. After the district court declared a mistrial, the defendant moved for a verdict of acquittal. He argued that "because the government failed to prove two predicate racketeering acts, he was entitled to acquittal on the RICO charges and the government was therefore barred from retrying him on those charges." 451 F.3d at 135-136. The district court denied the motion, and the Second Circuit likewise "reject[ed] Gotti's extraordinary argument." *Id.* at 136. "Assuming the other elements of the RICO charge were proved to the jury's satisfaction," the court held, "lack

of unanimity as to two predicate acts results in a *hung jury* and a mistrial, not a judgment of *acquittal*." *Id.* at 137 (emphasis added).

Similarly, in *Hoyle* v. *Ada County*, 501 F.3d 1053, 1055 (9th Cir. 2007), the defendant was charged with a compound racketeering offense requiring proof of predicate offenses. The jury found that the government had not proved a number of the predicate offenses, but it specifically indicated that it had failed to reach agreement as to seven of them. *Id.* at 1057. The trial court denied the defendant's motion for judgment of acquittal, concluding that the jury's failure to agree on those predicate offenses meant that it "had not returned a verdict on the entirety of [the count]." *Ibid.* The Ninth Circuit affirmed the denial of federal habeas relief. "Because the jury excepted from its verdict the seven predicate acts on which it could not agree," the court explained, "the trial court correctly refused to acquit * * * because the verdict was not 'a resolution . . . [of] all of the factual elements of the offense charged.'" *Id.* at 1065 (quoting *Smith* v. *Massachusetts*, 543 U.S. 462, 468 (2005) (alterations in original)).

The suggestion that Hirko's jury acquitted on the 2000 Money Laundering Counts because it may have been undecided about the predicate offenses is flatly contrary to those decisions. Moreover, as the government itself argued in *Gotti*, the notion that a jury's failure to agree is the same thing as failure to prove the predicate offense is "nonsensical"; "a defendant cannot be acquitted unless all the jurors agree on the Government's failure to prove his guilt." U.S. Br. at 6, *United States* v. *Gotti*, 451 F.3d 133 (2d Cir. 2006) (No. 05-6872). It follows that a verdict of

acquittal can rest only on jurors' unanimous resolution of the disputed element in the defendant's favor.

Logical defects aside, the Fifth Circuit's contrary ruling would work considerable mischief if left standing. When, in future cases, juries deadlock on one or more elements of an offense, defendants will be entitled to demand a directed verdict of acquittal. They will argue (citing the published decision at issue here) that a jury's failure to decide constitutes an acquittal. To our knowledge, no other court has ever adopted so surprising a proposition. Yet that is the unavoidable implication of the apparent assertion that a jury that "could not decide" an element of money laundering "would have to acquit" the defendant of that charge. App. 18a.

In our view, the more sensible reading of the Fifth Circuit's opinion is that it relies on the presence of hung counts to evaluate the collateral estoppel consequences of a verdict of acquittal. If, however, the Court were to read the decision below to have rejected Hirko's claim *without regard* to the presence of hung counts – *i.e.*, to have concluded that the jury's acquittals on the 2000 Money Laundering Counts might have rested on mere indecision with respect to the sole disputed element – summary reversal is warranted to correct such an unprecedented and egregious error. Alternatively, this Court should grant certiorari to resolve the stark conflict between such reasoning and the decisions in *Gotti* and *Hoyle*.

CONCLUSION

The petition for a writ of certiorari should be granted on the first question presented. Alternatively, the court should summarily reverse the Fifth Circuit's judgment or grant certiorari on the second question presented.

Respectfully submitted.

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