No. 08-058

IN THE

Supreme Court of the United States

REX SHELBY,

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

REPLY BRIEF FOR THE PETITIONER

SUSAN HAYS*
LAW OFFICE OF SUSAN HAYS, P.C.
5646 MILTON AVENUE
SUITE 218
DALLAS, TEXAS 75206
(214) 557-4819

EDWIN J. TOMKO
JASON M. ROSS
CURRAN TOMKO TARSKI, LLP
2001 BRYAN ST., SUITE 2050
DALLAS, TEXAS 75201
(214) 270-1400

**Counsel of Record*

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(Continued)

Page(s)

REPLY BRIEF FOR THE PETITIONER

I. This Court Should Grant the Petition to Decide the Proper Standard for Criminal Collateral Estoppel.

While admitting only to "tension" among the courts of appeals, the government urges this Court to adopt yet another position that no court of appeals has adopted: that hung counts in a partial verdict of acquittal may always be retried. In doing so, the government only broadens the divergence among the circuits, disagreeing with the admittedly differing standards applied by the lower courts. Further, the government fails to offer a coherent standard for collateral estoppel review. Here, the Fifth Circuit applied the same standard to all three petitioners before this Court, albeit one that differs from even its own prior decisions. Because the lower court's analysis combines conjecture with failures to answer and a "presumption of rationality," the result is foreordained. Under the standard as applied, every time the jury refuses to answer a count, the court must presume a rationale beyond any factual overlap, and forces itself to conclude the jury did not answer any common fact issue in the defendant's favor because, otherwise, it would have acquitted. Thus, this process of conjecture ends up being less and less "practically framed" until, as here, the court is forced to look beyond the actual arguments and evidence made at trial to ever increasingly absurd suppositions to support its "rational" conclusion. This approach deprives any preclusive effect to any defendant who has run the gauntlet and been

acquitted on the basis of increasingly improbable speculation.

The question before this Court now is whether that standard was correct, and if not, what is the correct standard?

Shelby contends that the Fifth Circuit's standard was incorrect and that the correct standard is a review of answers and questions actually made at trial. The correct standard is, as set forth in *Ashe*, to "examine the record of a prior proceeding" to determine whether a rational jury could have decided to acquit on the basis of some fact other than the one the defendant seeks to foreclose. *Ashe v. Swenson*, 397 U.S. 436, 444 (1970). The inquiry into what the jury decided, to function "practically" and "rationally" as *Ashe* directs, cannot venture into conjecture about what a jury "could have" meant based on factual issues that were not contested — or even mentioned — at trial, much less reach beyond the actual verdict to a jury's failure to decide. Conjecture into the rationale for a jury's failure to decide is inherently unproductive. Such a test elevates form over substance, robs the Double Jeopardy Clause of its intended purpose, and promotes overcharging on multiple counts. A jury speaks with its verdict, just as a court speaks with its opinion. What is left unsaid is not properly considered.

The government urges that a failure to reach a verdict is "among the 'relevant matter' that a court may consider" — and hence a defendant must explain — "in determining what facts the jury necessarily found in the defendant's favor." Br. in Opp. at 15-16. But, a hung count is not a decision at all; instead it is

a failure to decide. *United States v. Ohayon*, 483 F.3d 1281, 1289 (11th Cir. 2007). In addition, presuming why a jury did not reach an answer is rife with improper conjecture. *See id.* Barring something extraordinary in the record, such as a telling jury note or a bench trial with fact findings,[1] courts should never read anything into an unanswered count. Instead, to determine what a jury necessarily decided, courts should take a "detailed, trial-specific look at the factual issues asked and answered at each prosecution." *United States v. Benkahla*, 530 F.3d 300, 307 (4th Cir. 2008).

On the trial record here, the three petitioners put on a unified defense to the allegations of securities fraud: there was no scheme because the defendants subjectively believed the public representations about EBS's technological capabilities, and thus the defendants lacked the necessary *mens rea*. No one denied that the statements were made or that the transactions underlying the insider trading and money laundering counts occurred. The government chose to try the case based on a theory of a monolithic, unwavering, all-encompassing scheme to defraud. Making no temporal differentiations as to the alleged scheme, the government put on no evidence and made no arguments at trial that the defendants changed their state of mind between any of the sales of stock. *Cf. De La Rosa v. Lynaugh*, 817 F.2d 259, 265 (5th Cir. 1987) (rejecting the

---

[1] *E.g.*, *United States v. Benkahla*, 530 F.3d 300 (4th Cir. 2008); *United States v. Rogers*, 960 F.2d 1501 (10th Cir. 1992).

government's argument that the jury could have based its verdict on a change in the defendant's state of mind when the state made no such argument at trial). Consequently, since the government tried the case on a simple theory flatly disputed by the defendants, the collateral estoppel analysis may be applied in the three defendants' favor where it typically cannot in a factually complex case submitted to the jury on broad form.

This Court should grant the petition to settle this growing disagreement on the correct standard and to firmly establish the standard for analysis in criminal collateral estoppel cases.

II. The Proper Standard Places No Weight on a Failure to Return an Answer on Some Counts.

In its logic, the government argues, and the Fifth Circuit pragmatically held, that collateral estoppel should not apply because jeopardy has not terminated and then presumes that hung counts, if they have overlapping elements with acquitted counts, are "inconsistent" with acquittals. Br. in Opp. at 13 (citing *United States v. Powell*, 469 U.S. 57, 68 (1984) and *Standefer v. United States*, 447 U.S. 10, 23 n.17 (1980)). Both points incorrectly assume that hung and acquitted counts should be given equal weight and reconciled together. The first point was rebutted by Justice Holmes in *United States v. Oppenheimer*, 242 U.S. 85 (1916), while the second point is addressed by *Powell* itself and by the majority of the courts of appeals.

A. While the Double Jeopardy Clause Encompasses Collateral Estoppel, those Protections are Broader and Must Be at Least Equal to those in Civil Cases.

The government in essence argues, and the Fifth Circuit pragmatically held, that estoppel should not be permitted in a direct estoppel context, but this position is in direct conflict with the Seventh Circuit. *See United States v. Bailin*, 977 F.2d 270 (7th Cir. 1992). In *Bailin*, the court rejected the government's urging to extend *Powell*, holding instead that direct estoppel applies in a criminal case and may bar retrial of hung counts that overlap acquitted ones. *Id.* 276-77. The court rejected the same arguments the government makes here, including that double jeopardy does not apply because retrial is a continuation of original jeopardy. *Id.* at 275 ("Sometimes simple syllogisms are simply sophistic."). The court reasoned that collateral estoppel may have application in criminal cases precisely because it does not overlap the protections of the Double Jeopardy Clause. *Id.*

Further, the government's reliance on *Ohio v. Johnson* is misplaced. There this Court held that greater offenses may be prosecuted after a defense guilty plea to lesser-included offenses because the situation did not invoke the kind of multiple prosecution prohibited by the Double Jeopardy Clause. *Ohio v. Johnson*, 467 U.S. 493 (1984). In *dicta*, the Court reasoned that because the state had not attempted to prosecute the charges seriatim, Double Jeopardy concerns implicit in collateral estoppel were not implicated. *Id.* at 500 n.9. Here, the situation is exactly the opposite: the government

is attempting to re-prosecute a case it has already tried — extensively — and failed on the same facts it hopes to retry.

If a jury rendered a partial verdict in a civil case concerning two men arguing over possession of a hog, any actual jury answers to disputed issues would be given preclusive effect despite the prospect of additional litigation.[2] Why should less effect be given to the partial verdicts of acquittal won by the litigants here who survived the government's all-out onslaught to convict? A fundamental principle of justice prohibits the government from prosecuting defendants once they have been acquitted on the merits, resolving any disputed issues in their favor. *Oppenheimer*, 242 U.S. at 88. "Even in civil litigation, each party bears the consequences of its own inadequate litigation efforts and its presentation of insufficient evidence." *United States v. Castillo-Basa*, 483 F.3d 890, 903 (9th Cir. 2007).

Of course, the broad form submission favored in criminal cases may make determining what fact issues were decided more difficult than it would be in most civil cases. But that is precisely why the standard of analysis should be faithful to the record at hand, considering only what was actually disputed, actually argued, and thus likely to actually have been on the jury's mind as the jurors deliberated.

---

[2] *See United States v. Stauffer Chem. Co.*, 464 U.S. 165, 170-71 (1984).

B. The Government Confuses Inconsistent, Mixed Verdicts with Partial Verdicts Containing Unanswered Counts.

The government attempts to bootstrap partial verdicts — those containing hung counts and verdicts on the remaining counts — into the jurisprudence of inconsistent, mixed verdicts — those containing acquittals and guilty verdicts that cannot be logically reconciled. *Powell* and *Standefer* both concerned "truly inconsistent verdicts" that were mixed, not just partial. *See Powell*, 464 U.S. at 64; *Standefer*, 447 U.S. at 23, n.17. Here, the jury returned a partial, not a mixed, verdict, and consistently acquitted on all the counts it reached. Such hung counts are not "inconsistent" with verdicts of acquittal.

The rationale of *Powell* is consistent with the rationale Shelby urges here: Courts should never speculate about a jury's decision when it is irreconcilable or unknown. *See Powell*, 469 U.S. at 477 ("it's unclear whose ox has been gored"). When a verdict is "truly inconsistent" determining what the jury "really meant" requires either pure speculation or delving into the jury's deliberations. *Id.* Either is untenable. But partial verdicts present a different logical scenario. The acquittals demonstrate that the jury determined some fact issues in the defendant's favor. The hung counts indicate nothing clearly. There should be no speculation from the hung counts. Instead, the court should start with the actual verdicts, then decide whether the record in the case — that is, what issues were actually disputed — allows a determination of what fact questions the jury necessarily answered to reach its verdict.

C. The Conflict Among the Circuits Grows.

The Eighth Circuit has now broadened the split in the circuits on the issue of consideration of hung counts. *United States v. Howe*, 538 F.3d 820 (8th Cir. 2008). *Howe* follows the First and D.C. Circuits, without acknowledging the positions of the Seventh, Ninth, Eleventh, and other Circuits, to find the "inherent flaw" in the defendant's collateral estoppel argument: had the jury found certain facts in the defendant's favor it would have acquitted him of the hung count. *Id*. at 828-29 (citing *United States v. Aguilar-Aranceta*, 957 F.2d 18, 23-25 (1st Cir. 1992) and *United State v. White*, 936 F.2d 1326, 1329 (D.C. Cir. 1991)). The logic of this argument is at once circular and premised on presumptions irrelevant to a refusal to answer and on hopeless speculation about the cause for the hung counts.

As multiple circuits have found, a hung count is not a decision at all, and thus should have no weight, and certainly not enough weight to balance the scales against an actual verdict of acquittal. *Ohayon*, 483 F.3d at 1289; *United States v. Romeo*, 114 F.3d 141, 144 (9th Cir. 1997); *Bailin*, 977 F.2d at 279-80 ("The powerful double jeopardy protections that attach to acquitted counts should not be outweighed by the inconclusiveness inherent in hung counts."). Proving why a jury did not arrive at a verdict on particular counts is inherently speculative and will always present criminal defendants with an insurmountable obstacle, thus foreclosing defendants from the collateral estoppel protections that civil litigants enjoy. This Court should grant the petition to resolve the conflict among the Circuits.

III. The *Ashe* Test and the Standard Shelby Urges are Not "Fact-Bound" in the Sense the Government Alleges.

The government argues that Shelby's collateral estoppel claim is "fact-bound" and thus does not warrant consideration by this Court, ignoring that no analysis of the facts can be divorced from the standard used to weigh them. Br. in Opp. at 14-15 n.5. The fact that the legal question presented by collateral estoppel review rests on a review of the record does not make it "fact-bound." To be sure, collateral estoppel analysis always requires a review of what facts were *actually litigated* at trial — not what fact issues the reviewing court can imagine the jury might have considered. The Fifth Circuit, as it sought to reconcile the acquitted insider trading counts with the earlier-in-time, unanswered insider trading counts, reasoned that the jury must have found that Shelby did not "use" inside information in his later trades but did use it during his earlier trades. App. 9a-10a. While the error of this conclusion is "fact bound" in the sense that it relies on facts not disputed at trial or not in the record at all, the standard to review this decision does not require the weighing of disputed facts in the manner the government insinuates.

The government argues that *Schiro* has no application to the question of whether hung counts should be considered. Br. in Op. at 16 n.6 (citing *Schiro v. Farley*, 510 U.S. 222 (1994)). The lesson of *Schiro* is to follow the record of the specific case as far as it leads and no farther. There, this Court put particular emphasis on the jury instructions and the closing arguments to determine what the jury

necessarily decided. *Schiro*, 510 U.S. at 233-34. Such emphasis is rightly placed as those components of the record have great influence on the jury's deliberations. In contrast, a hung count tells us nothing conclusive as it only indicates a failure of the decision-making process. Thus, a court should put no weight or even consideration on hung counts while putting great weight on the jury instructions and closing arguments of the trial that produced the verdict under review.

Here, the jury charge instructed that a defendant "used" inside information if it was "a factor" in the decision to sell. A rational jury would certainly believe that if an insider trading scheme existed at all in 2000, then knowledge of that scheme would be "a factor" in the Summer 2000 sales, yet it acquitted Shelby of all four counts. Consequently, the acquittals demonstrate that the jury determined there was no such scheme, or if there was, Shelby did not know about it.

In addition, this record presents the odd circumstances of the 70-minute expiring *Allen* charge. Even if a court were to consider the reason for the scattered hung counts, there is the most obvious one: the jurors wanted to go home after a three-and-a-half-month trial and took the first opportunity to do so.

The closing arguments, as well as the opening, are devoid of any argument that Shelby's state of mind changed such that he "used" the inside information in his earlier sales, but may not have during his later sales. Instead, the arguments concern the narrow disputed issue: whether the

defendants subjectively believed, as the public was informed, that EBS's technology worked.

Finally, the government claims that collateral estoppel arises too infrequently to concern this Court. Just the opposite is true. In the criminal justice trenches, *Ashe* is routinely applied, and to the defendant asked to defend himself against the same factual assertion the burden is all too real. Meanwhile, the standard used is increasingly confused as illustrated by the deepening circuit split the government acknowledges.

Surely, few defendants have the resources or the tenacity to take the issue this far. After all, entering a plea agreement can feel less burdensome than another lengthy trial. Thus, instead of reaching this Court, many defendants simply wear down exactly as this Court forewarned. *See United States v. Scott*, 437 U.S. 82, 91 (1978) (citing *Green v. United States*, 355 U.S. 184, 188 (1957)). And, regardless of how many more cases are coming, the framers surely intended that a judgment of acquittal would have some effect, and individual defendants have a keen interest in terminating their continuing jeopardy.

CONCLUSION

The petition for writ of certiorari should be granted as to both questions presented.

Respectfully submitted,

SUSAN HAYS
LAW OFFICE OF
SUSAN HAYS, P.C.
5646 MILTON AVENUE
SUITE 218
DALLAS, TEXAS 75206
(214) 557-4819

EDWIN J. TOMKO
JASON M. ROSS
CURRAN TOMKO TARSKI, LLP
2001 BRYAN ST., SUITE 2050
DALLAS, TEXAS 75201
(214) 270-1400

COUNSEL FOR PETITIONER

October 2008