No. 08-____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) As the Fifth Circuit held in conflict with decisions of the Sixth, Seventh, Ninth and Eleventh Circuits, whether a defendant must explain why a jury failed to return a verdict on factually related counts in order to invoke collateral estoppel to bar a successive trial that would raise the same alleged criminal transaction or occurrence as the acquitted counts?

2) Assuming a defendant, following acquittal in such a partial verdict, has the burden of reconciling acquittals with unanswered counts as part of the "practical framing" Double Jeopardy inquiry dictated, does defendant's burden reach to all arguments and inferences that *could be* made or drawn regardless of the government's theory and the facts in contention at trial, as the Fifth Circuit held in conflict with the practices of the Second, Ninth, and Eleventh Circuits?

PARTIES TO THE PROCEEDING

The parties to the proceedings in the United States Court of Appeals for the Fifth Circuit were Rex Shelby, Defendant-Appellant, and the United States of America, Plaintiff-Appellee. Joseph Hirko and F. Scott Yeager were also Defendants-Appellants in the proceedings below.

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PETITION FOR A WRIT OF CERTIORARI

Rex Shelby respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 521 F.3d 367 and reprinted at App. 1a. The opinion of the United States District Court for the Southern District of Texas is reported at 447 F. Supp. 2d 750 and reprinted at App. 29a.

JURISDICTION

The judgment of the Fifth Circuit was entered on March 17, 2008. A petition for rehearing en banc was denied on April 17, 2008. App. 61a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISION

The Fifth Amendment provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT OF THE CASE

Rex Shelby is a software engineer. Shelby was charged with participation in a scheme to mislead the public markets about the functionality of software being developed by Enron Broadband Services ("EBS"), a business unit of the collapsed, publicly-traded energy company, Enron. The stock

scheme alleged in this case is unrelated to the well-publicized activities of the parent company that ultimately led to its demise.

Shelby and codefendants, Joseph Hirko and F. Scott Yeager, went to trial over fifty-four days with all three men facing numerous counts having a common core allegation: the men knew EBS software to be hopelessly flawed but nonetheless hid that information from the public and touted its prospects in order to raise the stock price so they could personally profit from trades. All three men were acquitted on multiple counts, but the jury failed to reach a verdict on many remaining counts.[1]

A. Shelby's arrival at and interest in Enron

In December 1998, Enron Communications, Inc. ("ECI") acquired Modulus, a software company that Shelby and his partner, David Berberian, had joined during its start-up. The final Modulus acquisition agreement specified cash payments to be paid out in installments and was conditioned on Shelby's continuing employment at ECI. As part of his employment compensation, he received private, non-tradable ECI stock options. In June 1999, ECI was made a "core business" of Enron Corporation and

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[1] Two other defendants, Kevin Howard and Michael Krautz, were tried with the three, but on an unrelated alleged accounting scheme regarding a transaction with Blockbuster. The first trial resulted in hung counts for these defendants. They were tried together a second time resulting in some guilty verdicts against Howard and all acquittals against Krautz. After reversal, 517 F.3d 731, Howard is set for a third trial in March 2009.

Shelby, along with other ECI shareholders, were forced to accept Enron stock interests ("ENE"),[2] in exchange for those in ECI. With this change in status, ECI also became a stand-alone division to allow Enron executives to directly manage it.

Shelby's options were set to vest in four annual installments from 1999 to 2002. Shelby's 1999 options vested on June 25, 1999 ("1999 Options"), but he did not exercise them immediately. In June 2000 and June 2001, Shelby received the second and third installments, exercised the options, and sold the resulting stock.

B. Events underlying the charges against Shelby

On January 20, 2000, Enron held its annual Analyst Conference ("2000 Analyst Conference"). The EBS presentation at this event forms the basis of the securities fraud counts against Shelby, Hirko, and Yeager. As to Shelby, the government made much issue of a short video, identified as "Shelby 2," where he described the evolving capabilities of the Broadband Operating System, a series of software programs that included InterAgent, a product Modulus developed. There was another video, "Shelby 1," in which Shelby described the Enron Intelligent Network, a collection of hardware and software spread around the country.

Thereafter, in early 2000, EBS sent out several press releases touting its technology services and

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[2] Enron Corporation stock will be referred to by its trading symbol, ENE.

business prospects. Four, dated January 31, March 30, April 11, and May 15, were the basis for the wire fraud counts against Hirko, Yeager, and Shelby. The jury saw both videos and received all of the press releases.

After the 2000 Analyst Conference and during the time of the charged press releases, Shelby exercised his vested 1999 Options as the price rose well above the strike price, selling shares on January 21, February 1, and March 22. While ENE's price had hovered around the option strike price of $38.50[3] for several months, it increased its value by about 51% from the end of December 1999 to the day *before* the Analyst Conference, it increased again during the day of the conference, and it continued a general rise after the conference and throughout most of 2000 peaking above $80 per share in August and September. Shelby sold his 2000 Options in June and July when the price was around $70 per share. Tr. 9209-18. These early 2000 and summer 2000 sales were the basis of Shelby's insider trading counts.

All proceeds from Shelby's stock sales were rolled into money market accounts. Shelby moved some funds derived from his 2000 Options sales into different money market accounts in 2002, after he was no longer at Enron. These transfers were the basis of the money laundering counts against him.

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[3] The strike price was $77 before the August 16, 1999, two-for-one stock split. Shelby also received a small amount of restricted shares which were granted on the same schedule as the options.

C. Acquittal, Post-verdict Motions, and Appeal

The linchpin in the indictment against Shelby and his colleagues alleged that they had made false and misleading statements in order to mislead the investing public about the technological capabilities, value, revenue and business performance of EBS. The indictment further alleged that the Defendants executed their scheme by causing Enron to issue false press releases and making false statements to analysts, selling stock to enrich themselves. App. 40a-41a.

At trial, most of the testimony about Shelby, Hirko, and Yeager centered on the functionality of EBS's technology. The government alleged that Shelby made false statements in videos shown to the analysts, especially Shelby 2. However, the government suffered several significant set-backs at trial. The government's chief witness, Ken Rice, a former co-defendant who had made a plea deal with the government to testify against the Defendants, testified at length about the projection of the Shelby 2 video to the analysts. He was forced to admit during cross-examination that the video was never played and that he had been mistaken in so testifying.

Shelby waived his Fifth Amendment rights and testified at trial admitting his stock sales but vigorously contesting the government's core factual allegation that he had believed EBS's software to be hopeless at the time the public was being told of its potential. He also defended his statements about the state of the EBS technology, including those in

Shelby 2, maintaining that they were all true and accurate, and that any problems with the software were normal software development issues any company faces and all in the technology sector expect.

Shelby also testified that he sold his stock because he was uncomfortable being in the stock market at all, and that since he was inexperienced in the stock market he sold when Berberian (who held the same sequence of options) advised him to do so. The government argued and purported to provide evidence that the flaws with software became even more clear as time went on, cross-examining Shelby extensively on this theory.

Late in the afternoon of the fourth day of jury deliberations, the jury indicated to the judge that it was deadlocked. At 3:50 p.m. the judge gave the jurors an Allen charge, but directed them to work only until the end of the day — a mere 70 minutes later — then deliberations could end. Tr. 13,710-14. Not surprisingly, the jury returned at 5 p.m. with a partial verdict. Tr. 13,717-25.

The court accepted the jury's partial verdict in which it had acquitted all three defendants as to every charge on which a verdict had been reached. In particular, the jury acquitted Shelby in connection with the later-in-time insider trading counts, though it did not reach a verdict with respect to earlier trades. Tr. 13,727-28. In response to a Rule 29 motion to acquit, the district court dismissed the money laundering and wire fraud counts, as the money laundering counts arose from the acquitted insider trading counts and there was no evidence

presented that Shelby participated in the challenged press releases.

Shelby moved to dismiss the remaining securities fraud and insider trading counts and to prohibit the introduction of evidence underlying the acquitted counts on collateral estoppel grounds, reasoning that the acquittal of the later stock trades, combined with the evidence and argument that the software's failings only became more obvious as time went on, precluded any retrial of the remaining issues, as all of them depended on a finding that Shelby knew the software to be flawed and participated in a scheme to cover up the failings.

The district court denied Shelby's motion, finding the insider trading and wire fraud acquittals to be based on the "use" elements applicable to both charges, adopting arguments related to Shelby's "use" of inside information that were not made by the government at any point during the trial and that were contrary to the court's instructions to the jury that "use" of inside information need only be "a factor" in the decision to sell.

The Fifth Circuit affirmed, employing the same theory as the district court that the jury could have decided that Shelby did not "use" inside information in the sale of the 2000 Options but could have done so in the earlier-in-time sale of the 1999 Options, particularly since those options were not exercised until some months after they vested. The Court discounted Shelby's argument that there was no evidence or argument at trial concerning any such timing distinction by finding the distinction "obvious" and noting that the jury could have made it "on its

own." App. 11a, n.11. The Court also reasoned that Shelby could have sold his 1999 Options in late 1999 rather than waiting for the stock price to rise. App. 10a-11a & n.10. The Fifth Circuit's decision leaves Shelby and the other Defendants to another trial to face the same theory that they harbored unspoken doubts about the software's viability, affording no repose from the earlier acquittals.

REASONS FOR GRANTING THE PETITION

This Court has held that the doctrine of collateral estoppel is embraced within the Double Jeopardy Clause. *Ashe v. Swenson*, 397 U.S. 436, 444 (1970). *Ashe* set out the basic notion that the defendant bears the burden of proving what the first jury necessarily decided, directing that this review be conducted with "realism and rationality":

> Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to 'examine *the record of a prior proceeding*, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' The inquiry 'must be set in *a practical frame* and viewed with an eye to *all the circumstances of the proceedings*.'

Ashe, 397 U.S. at 444 (emphasis added and internal citation omitted). This Court has only twice reviewed

the issue of the proper methodology for a criminal collateral estoppel analysis.[4] Now, there is a growing disagreement in the circuit courts regarding unanswered counts in partial verdicts.

Here, the Fifth Circuit required all of the Defendants to explain the jury's failure to reach decisions on the hung counts, in addition to reasoning what the jury must have decided given the facts at issue at trial on the acquitted counts. Contrary to the Fifth Circuit's decision in this case, several circuits have read *Ashe* to require the defendant in a partial verdict case to account only for the decisions the jury actually made. *United States v. Ohayon*, 483 F.3d 1281, 1286-89 (11th Cir. 2007) (a reviewing court should "ask what the record tells us about the basis for an acquittal" not "search for the basis of a mistried count"); *accord United States v. Romeo*, 114 F.3d 141, 144 (9th Cir. 1997); *United States v. Bailin*, 977 F.2d 270, 279 (7th Cir. 1992); *see also United States v. Frazier*, 880 F.2d 878 (6th Cir. 1989).

Likewise, several circuits have construed *Ashe*'s directive for a "practical framing" of the inquiry into what a jury actually decided to focus on the arguments, instructions, and evidence presented to the jury. *Ohayon*, 483 F.3d at 1286-89; *Bailin*, 977 F.2d at 280-81; *United States v. Seley*, 957 F.2d 717 (9th Cir. 1992); *United States v. Citron*, 853 F.2d 1055, 1060 (2d Cir. 1988). These circuits reject the notion that the reviewing court can or should

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[4] *Schiro v. Farley*, 510 U.S. 222 (1994); *Dowling v. United States*, 493 U.S. 342 (1990).

speculate about what the jury might have done or why it might not have returned other verdicts.

By elevating the burden on the acquitted defendant to explain why a jury did not arrive at a verdict as part of the inquiry into what it actually decided *and* forcing the defendant also to account for arguments and inferences that were not actually attempted at trial, the Fifth Circuit has created a conflict among the circuits and elevated the burden beyond the simple, "practical" approach dictated in *Ashe*. Indeed, the Fifth Circuit's decision in this case makes collateral estoppel virtually unavailable in any criminal case that does not result in a complete acquittal on all charged counts. The Fifth Circuit's decision also gives the government an incentive to over-indict, as the mere presence of multiple counts increases the prospects for a successive prosecution and the opportunity for the government to take a mulligan.

I. The Fifth Circuit Erred and Exacerbated the Conflict Among the Circuits When it Required a Defendant to Assume the Burden of Explaining the Jury's Failure to Arrive at a Complete Verdict.

As part of the Fifth Amendment guarantee against double jeopardy, collateral estoppel is "a matter of constitutional fact" that must be decided "through an examination of the entire record." *Ashe*, 397 U.S. at 442-43. *Ashe* sought to avoid a hyper-technical test and instead impose a common-sense, case-specific analysis. In that case this Court reasoned that any more restrictive a test would amount to a rejection of the collateral estoppel rule in

criminal cases. *Ashe*, 397 U.S. at 444, 444 n.9. For example, if a reviewing court were able to assume that a jury disbelieved substantial and uncontradicted evidence, "the possible multiplicity of prosecutions is staggering." *Id*. at 444 n.9 (quoting Mayers & Yarbrough, *Bix Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 38 (1960)).

A. This Court's Decision in *Ashe v. Swenson* Recognized the Preclusive Doctrine of Collateral Estoppel as Part of the Double Jeopardy Bar and Put the Burden on the Defendant to Establish What the Jury Necessarily Decided.

Under *Ashe*, the Defendant bears the burden to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding. *Schiro v. Farley*, 510 U.S. 222, 233 (1994). The court, however, must review the *entire* record to determine whether the jury could have grounded its verdict in an issue other than the one the Defendant seeks to foreclose. *Id*. at 236. Which issues were significant at trial compared to those not seriously in dispute may reveal what a rational jury actually decided. *Id*. at 235. The notion of what the jury "could have" decided is, of course, tempered by the practical framing of the review of the entire record of the prior proceeding. *Ashe*, 397 U.S. at 444. Thus, the court considers what questions the jury was asked in the charge and what facts and arguments were before this particular jury that returned the verdicts.

B. The Sixth, Seventh, Ninth, and Eleventh Circuits Have Correctly Held that the Burden Recognized in *Ashe* Does Not Reach to Indecision.

With the opinion below, the Fifth Circuit joins the minority of circuits that require defendants to explain hung counts along with acquitted counts before an acquittal will be given preclusive effect. Most circuits that have considered the issue of partial verdicts of acquittal directly reject the idea that a defendant's burden reaches beyond the actual decision and also requires a justification for hung counts. *See Ohayon*, 483 F.3d 1281; *Bailin*, 977 F.2d 270; *Romeo*, 114 F.3d 141; *see also Frazier*, 880 F.2d 878, 882-83. While the D.C. Circuit has required logical reconciliation of hung counts, and had that reasoning followed by the First Circuit, these courts did so with minimal analysis and remain in the minority. *See United States v. White*, 936 F.2d 1326 (D.C. Cir. 1991), *cited by United States v. Aguilar-Aranceta*, 957 F.2d 18, 24 (1st Cir. 1992).

The government has taken yet a third approach, arguing without success in multiple cases that this Court's decision in *United States v. Powell* forecloses application of collateral estoppel or double jeopardy where any count remains unanswered. In *Powell*, the jury returned a mixed, complete verdict of guilty and not guilty on multiple counts that was truly, internally, and logically "inconsistent." 469 U.S. 57, 65 (1984). The defendant sought to benefit from the inconsistency, arguing that collateral estoppel barred the application of the conviction against her even though it was returned by the same jury that acquitted her on some counts. This Court rejected

that assertion because with the inconsistent verdict it was not clear "whose ox had been gored." That is, when the jury, whether because of "mistake, compromise, or lenity" issued a logically inconsistent verdict, no reviewing court could ever ascertain with any certainty what the jury "really meant." 469 U.S. at 67-68.

Powell's refusal to speculate on the unknowable is exactly why a reviewing court should not speculate on why a jury could not agree. *See Romeo*, 114 F.3d at 144 (rejecting the government's argument based on *Powell*). The government has urged its theory that *Powell* precludes the application of collateral estoppel to partial verdicts to multiple circuit courts but few have accepted. A mere failure to decide other counts does not result in "inconsistency."

The Seventh Circuit's reading of *Ashe* is better reasoned and garners the support of the majority of circuits to address the issue. *United States v. Bailin*, 977 F.2d 270 (7th Cir. 1992). The first trial in *Bailin* consisted of 195 counts of various white-collar crimes against multiple defendants arising "from only one criminal scheme." 977 F.2d at 278 n.10. The jury returned a verdict of acquittals and hung counts, but no convictions. The unanimous court reasoned that the government cannot prevail with an argument "that an acquittal on one count, coupled with a hung jury on a related count, makes it impossible to determine that the jury necessarily established any common element of those two offenses against the government." *Id*. at 279. A jury's failure to reach a verdict is too inconclusive to qualify as "inconsistent' for the purposes of issue preclusion. *Id*. at 280. Thus, any facts necessarily decided by the jury must

be taken without regard to the jury's failure to reach a decision on other counts. The Seventh Circuit's view has been followed by the Eleventh, Ninth, and Sixth Circuits.[5]

The Fifth Circuit's opinion here conflicts with *Bailin* and those circuits following it both in reasoning and result. The court required all three Defendants, as part of their burden to establish the application of collateral estoppel, to explain why the jury hung on some counts, rather than begin with the acquitted counts and refer to the issues in dispute at trial. As in *Bailin*, the government chose a trial strategy of alleging one, singular scheme without differentiation over time or among the three defendants.[6] As in *Bailin*, when the jury acquitted on multiple counts it necessarily rejected the government's factual allegations of a unified scheme.

Jurors should be taken at their word — without conjecture as to what they did ***not*** decide. The *Ashe* inquiry is a functional one looking only to what the jury actually decided when it reached a verdict, not what it could not decide. Courts may not presume a jury misbehaved or failed to follow its instructions. If a reviewing court approached every acquittal suspecting the acquittal was the result of nullification,

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[5] *Ohayon*, 483 F.3d at 1288-89; *Romeo*, 114 F.3d at 144; *Seley*, 957 F.2d at 723, *Frazier*, 880 F.2dd at 882-83.

[6] *See Bailin*, 977 F.2d at 278 & n.10; *see also United States v. Leach*, 632 F.2d 1337, 1341 (5th Cir. 1980), *cf. United States v. Brown*, 983 F.2d 201 (11th Cir. 1993) (acquittal of one financial scheme did not bar prosecution of a second scheme).

then acquittals would never be said to have settled questions of ultimate fact and *Ashe* would mean nothing at all. *See Romeo*, 114 F.3d at 144; *Seley*, 957 F.2d at 723. *Ashe* warned that too restrictive a test would eliminate any collateral estoppel protections.

Finally, this Court has refused to make inferences from a jury's failure to answer a count when reviewing the collateral estoppel effect of a conviction in a partial verdict. In *Schiro*, the defendant argued that the jury's failure to answer a count for "knowingly" killing a woman while finding him guilty of killing her while committing the crime of rape meant that the jury must have found he did not intentionally murder. 510 U.S. at 227, 114 S. Ct. at 788. This Court rejected that argument, refusing to "draw any particular conclusion from [the jury's] failure to return a verdict on Count I." 510 U.S. at 234, 114 S. Ct. at 791.

The D.C. Circuit is alone in explicitly holding that a hung count is "inconsistent" with an acquittal, and in holding that had the jury found an ultimate issue underlying both counts in the defendant's favor, the jury would have acquitted on both. *White*, 936 F.2d at 1329. Citing *White*, the First Circuit follows its reasoning that a rational jury would have acquitted on the hung count had it really found the underlying fact in the defendant's favor. *Aguilar-Aranceta*, 957 F.2d at 24. Neither court recognizes in their respective opinions the issues pointed out by the majority circuits: that a hung count is no decision at all, and may result from a variety of factors many of which are unrelated to the merits or unknowable. If the defendant is required to reconcile

a hung count with an acquittal it can always be said that had the jury really found the common underlying fact in the defendant's favor it would have acquitted on both counts. Under such a formulation, the doctrine of collateral estoppel will have no application at all, just as *Ashe* warned would happen with too restrictive, or perhaps illogical, a test.

C. The Fifth Circuit's Analysis in Failing To Find That Collateral Estoppel Bars Re-Litigation of the Factually-Similar Claims Against Shelby Presumes That There Was a Reason Behind the Hung Counts.

The jury returned a verdict of acquittal on multiple counts against Shelby, along with Hirko and Yeager. Despite the government's and the Fifth Circuit's preference in focusing on hung counts in their analysis, a verdict of acquittal is a constitutionally significant development that simply cannot be on equal footing with a hung count. *See Ashe*, 397 U.S. at 442-43. "[T]he law attaches particular significance to an acquittal."[7] By giving as much weight to the hung counts as to the acquittals, the Fifth Circuit erred in its analysis and put itself on the minority side of a circuit split.

The Fifth Circuit's opinion openly wrestles with the issue of whether and how to consider the hung counts in its analysis of Yeager's appeal. App. 22a-25a. But in Shelby's and Hirko's cases, the Court simply requires that the Defendants explain why

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[7] *United States v. Scott*, 437 U.S. 82, 91 (1978).

some counts were hung and others acquitted, then concludes that since the jury did not acquit on all counts, it must have found facts contrary to the defendants' position. App. 10a, 17a-18a.

In Shelby's case, the Fifth Circuit followed the district court's reasoning that the jury must have found that Shelby did not "use" inside information when he made his Summer 2000 trades, but could have used inside information when he made his Early 2000 trades. App. 10a. The Fifth Circuit declares the timing distinction "obvious" and "one that the jury could have made on its own" to accept Shelby's defense for one set of counts "and not the other." App. 11a, n.11. By comparing the acquitted counts with the hung counts the Fifth Circuit in fact sought to rationalize hung counts with the acquittals.

Here, at trial, the government's theory of the case hinged on a singular, factual "pump and dump" scheme. The government alleged a single insider-trading scheme, arguing in closing argument that that scheme was "the backdrop that underlies this entire case." Tr. 13,190. Much like the government's single, unified accusation of a monolithic, ongoing scheme to commit securities fraud, Shelby defended himself with a single, unified theme against all counts. Shelby argued that the software and network in fact "worked," that the representations made at the 2000 Analyst Conference were accurate, and that there was no scheme or intent to defraud. In fact, all three Defendants disputed the existence of any falsehoods about the technology. The vast majority of the trial testimony was about functionality of the technology (not the motivation of the stock sales). Since the functionality of the technology and the

existence of any scheme were the main disputed issues, and since there were twenty-five acquittals, it is hard to imagine that a rational jury would have accepted the government's theory of the case and acquitted on so many counts.

Another problem with the Court's speculation in reconciling hung counts is, as this Court noted in *Powell* when discussing inconsistent verdicts, it is not clear whose ox has been gored. If the jury in fact reasoned as the Court conjectures it did, determining that Shelby did not use the illicit information in the later sales but did use it in the earlier sales, then the jury would have convicted Shelby of the earlier counts.

The Fifth Circuit — admittedly in the case of Yeager and in practice in the cases of Shelby and Hirko — considers the hung counts in its analysis. While the Fifth Circuit claims to not accept the government's interpretation of *Powell*, again in practice it does so by requiring the defendants to explain the hung verdicts, precluding the application of collateral estoppel.

D. The Fifth Circuit's Rule Would Encourage Over-indicting and Make Collateral Estoppel Practically Unavailable in Any Case Involving Partial Verdicts.

Nearly one hundred years ago, the government urged the Court to consider double jeopardy as some lesser form of *res judicata* so that criminal cases would not provide the same protections as the civil collateral estoppel doctrine. Writing for the court, Justice Holmes quite directly rejected the proposal:

> It seems that the mere statement of the position should be its own answer. It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt.

United States v. Oppenheimer, 242 U.S. 85, 87 (1916). When it comes to the effect of an adjudication in a criminal matter, the adjudicated matter is final; in this, the civil and criminal law are in agreement. *Id.* at 88. Justice Holmes explicitly noted that the doctrines protecting the finality of adjudicated matters apply with or without Double Jeopardy Clause protections:

> The safeguard provided by the Constitution against the gravest abuses has tended to give the impression that when it did not apply in terms, there was no other principle that could. But the 5th Amendment was not intended to do away with what in the civil law is a fundamental principle of justice in order, when a man once has been acquitted on the merits, to enable the government to prosecute him a second time.

Id. at 88 (citation omitted). Thus, in criminal cases, collateral estoppel reaches beyond the Double Jeopardy Clause, while encompassing its protections, to included fundamental principles of justice to place the defendants at least on par with their civil counterparts.

The policy underlying the Double Jeopardy Clause and its collateral estoppel corollary requires the government to live with its strategy choices at

trial, put on its strongest case the first time, and not get a second chance should a chosen strategy not succeed as the government should not have the "opportunity to hone its presentation on those issues which have already been decided against it."[8]

Indeed, if collateral estoppel is not practically available in a case involving partial verdicts the government has a perverse incentive to indict broadly in hopes of securing, if not a victory, then at least a "mulligan" on the basis of the unanswered count.[9] Given the enormous increase in federal statutory offenses over the last several decades, the possibility for overlapping counts is great. *See Ashe*, 397 U.S. at 445, n.10.

Trials as notorious and complicated as the Enron trials greatly exacerbate that burden on defendants. *See Bailin*, 977 F. 2d at 278 n.10 (lamenting the years the defendants remain in jeopardy in a 195-count securities fraud case based on one criminal scheme when the government was unable to secure convictions in the first trial). The longer the government is given to try, try, and try again, the longer the acquitted defendants are punished without any conviction.

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[8] *Bailin*, 977 F.2d at 277-78. *See United States v. Castillo-Basa*, 483 F.3d 890, 893 (9th Cir. 2007); *United States v. Cavanaugh*, 948 F.2d 405, 417 (8th Cir. 1991) (applying double jeopardy to bar retrial when the government's deliberate trial strategy did not succeed as defendants should not have to "run the gauntlet" a second time).

[9] *Castillo-Basa*, 483 F.3d at 893.

II. *Ashe* Announced a Pragmatic and Practical Standard Addressed to the Evidence and Arguments the Jury Actually Heard — Not Conjecture and Speculation as to What the Jurors Might Have Been Thinking.

The collateral estoppel doctrine requires a fact-specific and context-specific analysis to determine what a jury necessarily decided, if such a determination can be fairly made. A court should not indulge in speculation outside the record of a particular case, whether doing so benefits the defendant or the government.

A. Both *Ashe* and *Schiro* require a record-specific test.

Collateral estoppel analysis is best approached on a case-by-case basis, with an analysis based on "realism and rationality." *Ashe*, 397 U.S. at 444. In *Schiro*, for example, the defendant had been convicted of a lesser murder charge but the jury was hung on intentional murder. This Court held that the hung count did not imply a fact finding of no intent on the part of the defendant because the jury in that trial had been instructed to only return one verdict. 510 U.S. at 233. In addition, during Schiro's trial, his intent to kill was not a significant, contested issue, nor was there any point in the transcript where the defense even discussed intent. 510 U.S. at 235. Thus, for the purposes of collateral estoppel, this Court looked at the particular question asked of the jury and the context of the issues actually litigated during the trial to determine whether a fact issue was necessarily decided.

A collateral estoppel jurisprudence that does not consider hung counts when it inures to the benefit of the government but does insist on considering hung counts when it would increase the burden on the defendant runs counter to the purposes behind the Double Jeopardy Clause and the fundamental principles of justice behind collateral estoppel. The very nature of hung counts as a failure to make a decision also undermines the government's position. If a defendant cannot benefit from a mixed, inconsistent verdict under *Powell*, the government should not prevail with the analogous argument that an acquittal coupled with a hung count makes it impossible to determine what the jury decided. *See Bailin*, 977 F.2d at 279.

B. The Second, and Eleventh Circuits Have Read *Ashe* and *Schiro* to Require an Examination of the Arguments Actually Made and the Facts Actually Contested to Determine What the Jury Decided.

In *Ohayon*, the Eleventh Circuit rejected the government's argument about what the jury may have thought because to do so would be "speculating" which the reviewing court is "forbidden from doing." 483 F.3d at 1287. There, the court held the government to the way it presented its case to the jury. *Id.* Moreover, the court looked closely to the particular record, giving credence to a question the jury posed about the exact issue the defendant argued was decided. *Id.* The Eleventh Circuit warned that speculation, possible jury error, and possible jury nullification play no part in collateral estoppel review because the reviewing court must

presume a rational jury that follows the rules. *Id*. at 1288.

The Second Circuit has also held the parties to the theories and fact issues that were actually tried. *See Citron*, 853 F.2d at 1060 (rejecting the argument that a convicted count was factually based on a minor issue rather than the main factual contention at trial). The Ninth Circuit also follows *Ashe's* directive to focus on the record of a particular case. *Seley*, 957 F.2d at 721 (barring retrial and rejecting the government's arguments that were not made at trial nor supported by evidence submitted at trial).

C. The Fifth Circuit's Test Reaches Well Beyond *Ashe* and Makes Collateral Estoppel Effectively Unavailable in Multi-Count Trials.

Here, the Fifth Circuit found that the jury could have acquitted Shelby of his later-in-time insider trading counts and not his earlier counts, because those earlier sales took place well after his options vested. The court supports its conclusion by noting that the stock price had risen above the strike price by November 1999, a few months after the 1999 Options vested but a few months before Shelby exercised them and sold the resulting stock. In so reasoning the court ventures into facts and argument not before the jury.

The Fifth Circuit found the timing distinction "obvious" and reasoned that the jury could have made the distinction "on its own." App. 11a, n.11. However, a court cannot follow *Ashe*'s framework for a practical analysis and conjecture what a jury might have come up with "on its own."

The court also declared that the evidence indicated that the stock "had value" in late 1999. App. 10a-11a, n.10. But the price hovered a few dollars above the strike price in 1999, even dipping below it in November. It was not until a week before the 2000 Analyst Conference that the price broke $50 a share (a price where the net would have still been substantially below the 25% of gross sale net the government's expert testified resulted from the allegedly illicit sales here).[10]

The government offered no evidence or argument at trial to differentiate Shelby's state of mind at the time he sold stock under the hung counts versus under the acquitted counts. Instead, the prosecution argued that false information was repeated (and if anything compounded) as time progressed.

The jury charge asked simply whether any inside information was "a factor" in the decision to sell stock. That is, while the government must prove that the defendant sold "because" of the inside information, the government need not prove that the defendant sold "solely because of the material, non-public information." Tr. at 13,663-64. The Fifth Circuit presumes that Shelby was engaged in the

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[10] Tr. 6747-48. The Fifth Circuit's presumption about how a rational jury would view the earlier stock sales directly contradicts uncontroverted testimony about the economics of stock options sales. Multiple witnesses testified to the jury what a "strike price" is and how options work. Witnesses explained that traders must pay the strike price, but must also pay taxes and trading fees. Thus, exercising an option when the price is at or just above the strike price yields no or little profit.

most significant financial and legal development of modern times yet forgot about the scheme to defraud millions of people, or, as the insider-trading scheme grew and threatened to explode the business, Shelby kept his knowledge so far back in his mind that it was not even "a factor" in his decision to sell. Either contention is ill-suited for the "practical framing" *Ashe* directs. When there is no evidence or argument at trial to explain a change in state of mind over time, courts cannot presume one, after the fact.[11]

By fashioning a standard that operates like a backward-looking version of civil summary judgment — requiring the defendant to disprove any inference a jury might have drawn from the evidence, regardless of the probability the jury likely actually did so in view of the theory and evidence presented below — the Fifth Circuit makes collateral estoppel practically impossible in any case where a defendant would not have been entitled to an acquittal at the close of the evidence.

CONCLUSION

The petition for writ of certiorari should be granted.

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[11] *De La Rosa v. Lynaugh*, 817 F.2d 259, 265-66, 266 n.13 (5th Cir. 1987) (applying collateral estoppel to bar retrial when there was no legally sufficient evidence indicating a change in state of mind); *cf. Frazier*, 880 F.2d at 884-85 (acquittals of earlier counts does not collaterally estop retrial of later, hung counts as the jury could have found that the defendant formed his intent to defraud at the later date).

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