No. 08-67

In the
# Supreme Court of the United States

F. SCOTT YEAGER,
*Petitioner*,
v.
THE UNITED STATES OF AMERICA,
*Respondent.*

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

## REPLY BRIEF FOR PETITIONER

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## INTRODUCTION

For nearly a century, this Court has held that a jury's verdict of acquittal is "conclusive upon all that it decided." *United States v. Adams*, 281 U.S. 202, 205 (1930) (citing *United States v. Oppenheimer*, 242 U.S. 85 (1916)). Where a defendant can demonstrate that, in acquitting him, the jury necessarily decided an issue in his favor, the Double Jeopardy Clause bars his prosecution for any crime requiring resolution of that issue in the government's favor. *Ashe v. Swenson*, 397 U.S. 436 (1970).

Petitioner Scott Yeager, following a lengthy jury trial, was acquitted of multiple charges of conspiracy, securities fraud, and wire fraud. He has demonstrated that in acquitting him, the jury necessarily decided that he did not possess insider information about his company that contradicted what was told to the public. The government, however, asks this Court to ignore the collateral estoppel effect of Yeager's acquittals because the jury that acquitted him also deadlocked on counts that share the common element of possession of insider information.

This Court's precedent on collateral estoppel fully supports Yeager's position that he cannot be forced to stand trial on issues already decided in his favor. The government, in response, asks this Court to extend the holdings of *United States v. Powell*, 469 U.S. 57 (1984), and *Richardson v. United States*, 468 U.S. 317 (1984), in a way that would deprive criminal defendants of important constitutional protections against successive prosecutions. Neither case should be interpreted to prevent the application of collateral estoppel here.

The Court held in *Powell* that when a jury reaches inconsistent verdicts, all the verdicts must be allowed to stand. Here, however, all of the jury's verdicts were acquittals. The government reads *Powell* to mean that a hung count can be inconsistent with an acquittal, but the Court should not treat hung counts with the same deference reserved for a jury's *verdict*. The powerful protections that attach to an acquittal should not be outweighed by the inconclusiveness of a hung count. Unlike the expression of the community's will inherent in an acquittal, a hung count represents nothing more than an inability to reach a verdict. Given the secrecy of the jury's deliberative process, no meaning can be derived from a jury's failure to reach a verdict.

*Richardson* was not a collateral estoppel case, and the government's efforts to extend its narrow holding would blur the fundamental distinction between a claim and an issue because Yeager's case involves collateral estoppel, also known as issue preclusion, and not double jeopardy, which is akin to claim preclusion. Collateral estoppel prevents a reprosecution when double jeopardy does not otherwise apply, and it should apply here since forcing Yeager to "run the gantlet" twice offends the important policies that this Court has repeatedly relied upon in defining the protections of the Double Jeopardy Clause.

Finally, the Court should recognize, as the Fifth Circuit did, that the only realistic explanation for the jury's acquittals is its determination that Yeager did not possess insider information. The government's broad omissions theory provided the jury with multiple avenues of conviction, and when the jury acquitted Yeager it necessarily rejected the theory

that he possessed insider information but failed to disclose it to correct misstatements made by others. The jury's verdicts necessarily decided this critical issue in Yeager's favor, and the government should not be allowed to relitigate the same issue before a new jury at Yeager's peril.

## ARGUMENT

### I. Since There Is No Inconsistency Between The Acquittals And The Hung Counts, *United States v. Powell* Does Not Prevent The Application Of Collateral Estoppel Here.

#### A. The Hung Counts Should Not Be Considered In The Collateral Estoppel Analysis.

1. Despite this Court's consistent treatment of hung counts as lacking decisional significance, the government would nullify the collateral estoppel effect of the jury's acquittals by assuming they are inconsistent with the hung counts. To establish this claimed inconsistency, the government first speculates on why the jury was unable to reach a verdict—a task that is both futile and inappropriate—and then asks the Court to treat its speculation about why the jury hung with the deference that should apply only to verdicts.

This Court held in *Powell* that inconsistent *verdicts* of acquittal and conviction by the same jury must be allowed to stand. 469 U.S. at 64-67. In this case, unlike in *Powell*, the jury did not convict Yeager of anything—*its only verdicts were acquittals*. There is no inconsistency between those acquittals and the hung counts because hung counts

are not unanimous decisions of the jury entitled to the deference accorded to verdicts. Extending *Powell* to cases where the jury acquits on some counts and hangs on others would effectively treat the hung counts as if they were unanimous jury decisions inconsistent with the acquittals. The Court should reject this argument because of the obvious differences between unanimous verdicts and hung counts.

2. A hung jury is defined as a jury "so irreconcilably divided in opinion that they cannot agree upon any verdict by the required unanimity," Black's Law Dictionary 741 (6th ed. 1990), or as "one that did not carry out the task assigned it." Anne B. Poulin, Collateral Estoppel in Criminal Cases, 58 Cinn. L. Rev. 1, 44 n.12 (1989). Therefore, the "jury's failure to reach a verdict [is] too inconclusive to qualify as inconsistent" for the purposes of collateral estoppel. *Id.* Historically, a hung count, unlike an acquittal, was treated as a non-event. *See United States v. Perez*, 22 U.S. (9 Wheat.) 579, 579 (1824) ("[T]he jury, being unable to agree, were discharged by the Court from giving any verdict upon the indictment . . . ."); *Richardson*, 468 U.S. at 325 (rejecting the argument "that a hung jury is the equivalent of an acquittal"). The government summarily rejects the thorough historical analysis of hung counts by Yeager and his amici, dismissively asserting that "petitioner and his amici rely on cases like *Richardson*." Gov't Br. at 34. In fact, the historical analysis relies on precedent stretching back to pre-colonial times and addresses the treatment of hung counts at and before the time of the framing of the Constitution. *See* Pet. Br. at 35-39; Law Prof. Br. at 20, 26-27.

Since a hung count is not a unanimous decision

by the jury, it cannot affect or resolve any factual issues, either in favor of the government or in favor of the defendant. When it hangs, "the jury makes no decision at all." *Sattazahn v. Pennsylvania*, 537 U.S. 101, 117 (2003) (O'Connor, J., concurring). An acquittal, on the other hand, "represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). And when a defendant demonstrates that an issue was necessarily decided by the jury, an acquittal forecloses that issue from future consideration. *Ashe*, 397 U.S. at 443; *see also Dowling v. United States*, 493 U.S. 342, 347-48 (1990). Treating hung counts as jury decisions inconsistent with unanimous acquittals or convictions would ignore this history and policy. *Powell* did not work a change in the historical treatment of hung counts as lacking significance, and the government's treatment of a hung count as the equivalent of a verdict would trivialize the acquittals.

3. Given the clear differences between an acquittal and a hung count, the government's interpretation of *Powell* must be rejected. In *Powell*, the Court was faced with clearly "inconsistent *verdicts*" that were erroneous, "in the sense that the jury [had] not followed the court's instructions." 469 U.S. at 65 (emphasis added). The Court applied the rule established in *Dunn v. United States*, 284 U.S. 390 (1932), that "a criminal defendant convicted by a jury on one count could not attack that conviction because it was inconsistent with the jury's verdict of acquittal on another count." *Powell*, 469 U.S. at 58. The Court recognized that the "rule that [a] defendant may not upset such a verdict" was prudent for a number of reasons, including that

"once the jury has heard the evidence and the case has been submitted, *the litigants must accept the jury's collective judgment*. Courts have always resisted inquiring into a jury's thought processes." *Id.* at 65, 67 (citing *McDonald v. Pless*, 238 U.S. 64 (1915); Fed. R. Evid. 606(b)) (emphasis added).

Here, it is the government, not Yeager, that is attempting to "upset" the jury's verdicts and inquire into why it deadlocked. Unable to point to a contradiction on the face of the jury's verdicts, but still unwilling to "accept the jury's collective judgment," *Powell*, 469 U.S. at 67, the government encourages this Court to speculate about the jury's thought processes, ignoring *Powell's* specific admonition against such speculation. *Id.* at 66.

### B. The Hung Counts Are Not Inconsistent With The Acquittals.

1. The government asks the Court to assume that the jury acted irrationally. Gov't Br. at 31. It claims that, if the jury rejected an issue essential to the hung counts, it should have acquitted on the hung counts, and that not doing so was "irrational" or "inconsistent." This argument fails for three reasons.

*First*, under the government's technically restrictive test, which assumes that the jury may have acted irrationally in hanging on some counts, acquittals can never be said to settle questions of ultimate fact, and collateral estoppel would mean nothing at all. The Court recognized this in *Ashe*, when it said that "a restrictive definition of 'determined' amounts simply to a rejection of collateral estoppel . . . ." 397 U.S. at 444 n.9 (quoting Daniel K. Mayers & Fletcher L. Yarbrough, Bis

Vexari: New Trials and Successive Prosecutions, 74 Harv. L. Rev. 1, 38 (Nov. 1960)); *see also United States v. Romeo*, 114 F.3d 141, 144 (9th Cir. 1997) ("Because there are so many variable factors which can cause a jury not to reach a verdict," a court should not "speculate on why the jury could not agree."). Speculation about why the jury hung that allows for the possibility that the jury acted irrationally ends the *Ashe* collateral estoppel analysis before it begins, because *Ashe* asks "whether *a rational jury* could have grounded its *verdict* upon an issue other than that which the defendant seeks to foreclose from consideration." 397 U.S. at 444 (emphasis added).

The government's interpretation of *Powell* is based on the flawed premise that the jury took an irrational approach to its deliberations. The government assumes that the jury applied collateral estoppel itself, first resolving factual issues in one count, and then analyzing whether that resolution necessitated additional acquittals. Gov't Br. at 30. Because Yeager was not acquitted on the insider trading counts, the argument goes, the jury must not have determined any issue critical to those counts in his favor—because otherwise he would have been acquitted. *Id.* The government's theory should be rejected not only because it speculates about the jury's deliberations, but also because it is almost certainly wrong.

The jury was specifically instructed by the district court not to engage in the analysis that the government proposes. In its instructions, the court told the jury:

> Each count, and the evidence pertaining to it, should be considered separately. The case of

> each defendant should be considered separately and individually. The fact that you may find one or more of the accused not guilty or guilty of any of the crimes charged should not control your verdict as to any other crime or any other defendant.

J.A. 82-83. Since the jury is presumed to have followed its instructions, *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (citing *Richardson v. Marsh*, 481 U.S. 200, 211 (1987)), it would have gone from count to count, considering Yeager's guilt or innocence separately on each count. When the jury acquitted on the securities fraud count, it was instructed not to leap forward to analyze whether that acquittal resolved issues on the insider trading counts. And if the deliberations ended before the jury reached a verdict on each count, it is highly possible that the jury simply never considered the hung counts. While we can never know why the jury hung, it is incorrect that the jury must have determined an issue common to the acquittals and hung counts inconsistently or irrationally.

*Second*, the government demands the impossible when it insists that Yeager must explain the "rational" basis for the jury's failure to reach a verdict. *See, e.g.*, *United States v. Ohayon*, 483 F.3d 1281, 1289 (11th Cir. 2007) ("[T]he search for the basis of a mistried count will necessarily be in vain . . . because the mistried count is not a decision for which we can discern, or to which we can impute, a single, rational basis."). Due to the well-settled prohibition on inquiring into the jury's deliberations, no defendant could establish the reasons for a hung count. In fact, Yeager requested permission to interview the jurors following their verdict, and his

motion was denied by the district judge. *See* Pet. App. 67a. And even if Yeager had interviewed the jurors, he could not have used the information he learned to establish why they failed to reach verdicts. *See* Fed. R. Evid. 606(b).

*Third*, even assuming it is appropriate to consider the basis for the hung counts, the government ignores other possible explanations that do not compel the conclusion that the jury was irrational or that the hung counts were inconsistent with the acquittals. The jury may have been overwhelmed by the 176 counts against the five defendants and never reached the insider trading and money laundering counts against Yeager. Alternatively, after sitting through a thirteen-week trial, the jurors may have cut their deliberations short because they were exhausted by the hardships of their service. Another possibility is that the district court's unusual *Allen* charge, which essentially told the jurors they could go home at the end of the day if they did not reach verdicts on the hung counts, caused the jurors to stop their deliberations. *See* R-21536. It is also possible that, by the time it reached the insider trading counts, the jury deadlocked on an element that was not shared with the acquitted counts and abandoned deliberations without considering the common element of possession of insider information.

Consider the theory that the jury was exhausted and simply gave up in the middle of deliberations. Despite the government's contention that this theory "lacks foundation," Gov't Br. at 40, the record is clear that the jurors suffered considerable hardship throughout the trial. The district judge expressed her concerns on the record:

> The jury is going insane back there [due to the length of the witness examinations]. . . . They're back there having a fit. . . . A whole bunch of people are not being paid [by their employers], so another month out of work is like going to drive them—they're having fits back there. They said everybody but one person says they're not going to get paid. . . . I am just trying to tell y'all, you got a jury that's getting ready to go insane. They're not getting paid. . . . [E]verybody has got problems except for one person.

R-11034-035. Economic hardship led the court to consider dismissing two jurors, R-11237-238, and began to affect the jurors' ability to focus, according to the district judge, who said the jurors "aren't even paying attention anymore, they're in such dire financial straits." R-11401. One juror was eventually forced to borrow money to remain on the jury. R-11908. And when the jurors asked not to take off the Memorial Day holiday, their reason was clear to the court: "These jurors want this case over." R-11908. These repeated and extreme statements on the record reveal the very real possibility that the jurors cut their deliberations short out of exhaustion.

2. All of the scenarios offered by Yeager explain how the jury may have deadlocked without acting inconsistently or irrationally. But it is impossible to know which, if any, is the correct explanation, and for this very reason *Powell* prohibits an assessment of the jury's actions that is based on "pure speculation." 469 U.S. at 66.

For the same reason, the government is wrong that *Ashe's* holding that the collateral estoppel

inquiry should "be set in a practical frame and viewed with an eye to all the circumstances of the proceedings" means that the Court must divine a basis for the hung counts and consider them as part of its *Ashe* analysis. Gov't Br. at 35. The basis for hung counts can never be ascertained except in the rare case where the jurors are allowed to testify about their deliberations, and therefore the reasons why a jury hung cannot be considered part of the "record of [the] prior proceeding" that must be examined in the *Ashe* inquiry. *See* 397 U.S. at 444.

3. The Court should reject the government's reading of *Powell* because hung counts are not verdicts entitled to the same deference as acquittals. Here, weighing hung counts as findings contrary to the acquittals would not accord those acquittals the deference to which they are entitled. Instead, it would equate them in significance with the hung counts. *See Powell*, 469 U.S. at 67 ("[D]eference [to] the jury brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality."); *see also Arizona v. Washington*, 434 U.S. 497, 503 (1978) ("The public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.'") (quoting *Fong Foo v. United States*, 369 U.S. 141, 143 (1962)). The powerful double jeopardy protection that attaches to acquitted counts should not be nullified by the inconclusiveness inherent in hung counts.

## II. The Government's Interpretation Of *Richardson* Is Inconsistent With This Court's Collateral Estoppel Precedent.

### A. Collateral Estoppel Can Apply Even If Double Jeopardy Does Not.

1. The claim preclusive effects of double jeopardy are rooted in the common law pleas of *autrefois acquit*, *autrefois convict*, and pardon. *E.g., United States v. Scott*, 437 U.S. 82, 87 (1978). For either *autrefois acquit* or *autrefois convict* to apply, the defendant must already have been acquitted or convicted of the same offense now brought against him. There must have been "some event, such as an acquittal, which terminates the original jeopardy" before the claim preclusive effect of double jeopardy may bar a subsequent prosecution for that same offense. *Richardson*, 468 U.S. at 325 (citing *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 308-10 (1984); *Price v. Georgia*, 398 U.S. 323, 329, (1970)). This reference to a termination of jeopardy must be viewed in the context of the issues before the Court when *Richardson* was decided—the defendant only invoked the claim preclusive protections of double jeopardy and never argued that collateral estoppel barred his retrial.

The government places great weight on the language from *Richardson* quoted above, claiming that jeopardy must have "terminated" on the hung counts before collateral estoppel can bar them. Gov't Br. at 24. But the government is attempting to invoke a doctrine properly applied to cases of *claim preclusion* double jeopardy—where the same offense has already been adjudicated—whereas in this case the issue is collateral estoppel—the branch of the

double jeopardy doctrine that deals with issue preclusion. Yeager argues that the acquittals necessarily resolved an ultimate issue in his favor, thereby barring his retrial on the hung counts. He does not claim that the offenses he is now charged with have already been adjudicated.

2. In *Richardson*, the defendant "assume[d] that the judicial declaration of a mistrial [following a hung count] was an event which terminated jeopardy in his case and which allowed him to assert a valid claim of double jeopardy." 468 U.S. at 325. This assumption was incorrect because this Court's precedent stretching back to *Perez*, 22 U.S. (9 Wheat.) 579, rejected the argument that "a hung jury is the equivalent of an acquittal." *Richardson*, 468 U.S. at 325. Without a "termination" of the claim against Richardson, it was plainly impossible for him to assert the double jeopardy equivalent of *autrefois acquit*, because there was no prior acquittal to bar reprosecution on the same offense. Thus, *Richardson* affirmed that a hung count, in itself, does not prevent reprosecution on the same offense.

But determining whether collateral estoppel bars the hung counts in this case requires a different kind of analysis. Collateral estoppel involves the preclusion of issues, not claims. As this Court held in *Sealfon v. United States*, 332 U.S. 575, 578-79 (1948), when a defendant is charged with "separate and distinct offenses," collateral estoppel "operates to conclude those matters in issue which the verdict determined though the offenses be different." *See also Ashe*, 397 U.S. at 443 (collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated"); *Adams*, 281 U.S. at 205 ("[A]lthough not technically

a former acquittal, the judgment was conclusive upon all that it decided.").

As this Court first held in *Oppenheimer*, it is sometimes necessary to apply collateral estoppel when the claim preclusive effect of double jeopardy does not apply:

> 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 Fifth 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.

242 U.S. at 88 (internal citations omitted).[1]

3. The government reads *Richardson* broadly to establish that, if "original jeopardy" has not terminated on the hung counts, they cannot be barred by collateral estoppel. Gov't Br. at 24. This assertion effectively requires Yeager to prove that he is entitled to a double jeopardy plea of *autrefois acquit* before collateral estoppel can apply here. Moreover, this reading of *Richardson* is inconsistent

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[1] Though *Oppenheimer* used the phrase "res judicata," it addressed collateral estoppel or issue preclusion. *See Ashe*, 397 U.S. at 464 (Burger, J., dissenting) ("The majority rests its holding in part on a series of cases beginning with *United States v. Oppenheimer* . . . which did not involve constitutional double jeopardy but applied collateral estoppel . . . ."); *see also Taylor v. Sturgell*, 128 S. Ct. 2161, 2171 (2008) ("The preclusive effect of a judgment is defined by claim preclusion and issue preclusion, which are collectively referred to as 'res judicata.'").

with the Court's precedent holding that collateral estoppel applies even when a prior acquittal has not occurred. In fact, there are numerous collateral estoppel decisions in this Court evaluating whether counts on which the defendant was not acquitted or convicted—and on which jeopardy had not terminated—should be barred. *See Ashe*, 397 U.S. at 444; *Sealfon*, 332 U.S. 575; *Adams*, 281 U.S. at 205; *Oppenheimer*, 242 U.S. 85; *see also* Gov't Br. at 25 (collecting cases).

The government's reading of *Richardson* would make it inconsistent with these cases. In *Ashe*, the defendant was acquitted of robbing one card player and then prosecuted for robbing another player at the same card game. 397 U.S. at 439-440. Jeopardy had not even *attached*, much less *terminated*, with respect to the new charge, but this Court nevertheless held that Ashe's prosecution on the new charge was barred by collateral estoppel. *Id.* at 446-447.

The courts of appeals have recognized the flaws in the government's argument, finding that its interpretation of *Richardson* "would eliminate collateral estoppel from criminal cases and overrule *Ashe*." *United States v. Shenberg*, 89 F.3d 1461, 1479 (11th Cir. 1996) (quoting *United States v. Bailin*, 977 F.2d 270, 275 (7th Cir. 1992)). Indeed, the government has acknowledged elsewhere "that the logical conclusion of its argument renders collateral estoppel superfluous." *Bailin*, 977 F.2d at 276 n.6 (citing government's reply brief). *Richardson* cannot fairly be read to eliminate criminal collateral estoppel, particularly when the doctrine was not even raised by the defendant in that case. Perhaps this is why the government's expansive reading of *Richardson* has been rejected in the appellate courts

and adopted nowhere. *See Wilson v. Czerniak*, 355 F.3d 1151, 1156 (9th Cir. 2004); *Shenberg*, 89 F.3d at 1479; *Bailin*, 977 F.2d at 275; *United States v. Benton*, 852 F.2d 1456, 1462 (6th Cir. 1988).

4. Jeopardy has terminated on the counts on which Yeager was acquitted, even if it has not on the hung counts. *See, e.g.*, *Smith v. Massachusetts*, 543 U.S. 462, 469 n.3 (2005) ("[O]ur cases establish that jeopardy may terminate on some counts even as it continues on others."). Those acquittals are therefore entitled to deference, including the recognition that they were "conclusive upon all that [they] decided." *Adams*, 281 U.S. at 205. Whether jeopardy has terminated on the hung counts would only be relevant if Yeager were asserting, like Richardson, that the adjudication of those counts barred his further reprosecution. But Yeager asserts that the *acquittals* bar his reprosecution on the hung counts, and this distinguishes his case from Richardson's. Those acquittals are final. No court has the power to set them aside.

### B. The Government Had A Full And Fair Opportunity To Prove That Yeager Possessed Insider Information.

Whenever collateral estoppel bars retrial of hung counts, the government will lose an opportunity to relitigate factual issues decided against it by the prior acquittal and to obtain a jury verdict on the hung counts. There is nothing unfair about this result, because the government was given one opportunity to convict on each count. Giving the government a fair opportunity to prosecute Yeager cannot require this Court to allow the government to retry an issue that has already been decided in

Yeager's favor, because *Ashe* held that the government cannot "constitutionally hale him before a new jury to litigate that issue again." 397 U.S. at 446. In *Ashe*, the government never received any opportunity to prosecute Ashe for the robbery of the second poker player because the prosecution was barred by collateral estoppel. *Id.* at 447.[2]

As this Court has held in multiple contexts, a defendant's Fifth Amendment rights may trump the government's interest in obtaining a verdict. For instance, when a district judge, in the middle of trial, directs the jury to return verdicts of acquittal that are "egregiously erroneous," that action is not appealable, and the government never gets an opportunity to present the acquitted charges to the jury. *See Fong Foo*, 369 U.S. at 143. Similarly, when a court grants a Rule 29(c) motion for judgment of acquittal following a hung jury, the government is not entitled to appeal that decision, and it has no opportunity to obtain a jury verdict. *Martin Linen Supply*, 430 U.S. at 575. And, as the Court held in *Smith*, when a district judge orders an acquittal midtrial, that acquittal cannot be overturned, even if the district judge later reverses her own order during the same trial. 543 U.S. at 468. The issue is not an abstract notion of fairness

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[2] The Restatement of Judgments does not support the government's position, because it deals only with "the effects of prior adjudications in civil litigation [and] does not deal with res judicata in criminal proceedings, that is, the effects of a prior criminal or civil judgment in a subsequent criminal prosecution." Restatement (Second) of Judgments 1 Scope (1982). That subject "includes not only concepts of claim and issue preclusion as applied to criminal litigation but also the closely related matter of double jeopardy, and is worthy of separate exposition." *Id.*

but rather the constitutionally mandated protection of the defendant's Fifth Amendment rights.

Thus, "subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause." *Id.* at 467 (quoting *Smalis v. Pennsylvania*, 476 U.S. 140, 145 (1986)). And this rule applies even where there is no prejudice to the defendant other than the retrial itself, because "[r]equiring someone to defend against a charge of which he has already been acquitted is prejudice *per se* for purposes of the Double Jeopardy Clause." *Id.* at 473 n.7. This unwillingness to overturn acquittals illustrates their "particular significance." *Scott*, 437 U.S. at 98. Indeed, this Court has called its refusal to review acquittals for error "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence." *Martin Linen Supply*, 430 U.S. at 571 (citing *United States v. Ball*, 163 U.S. 662, 671 (1896)).

Letting the government retry Yeager would unfairly ignore the first jury's acquittals and its resolution of the factual issues. The Court should not permit the government to relitigate that finding before a second jury, because "[t]he primary goal of barring reprosecution after acquittal is to prevent the State from mounting successive prosecutions and thereby wearing down the defendant." *Justices of Boston Municipal Court*, 466 U.S. at 307.

### C. Application Of Criminal Collateral Estoppel Is Not Limited To Seriatim Prosecutions.

1. If the hung counts are not barred by collateral estoppel, Yeager will be subjected to all the hardships that the Double Jeopardy Clause protects

against, including "having to 'run the gantlet' a second time." *Ashe*, 397 U.S. at 445-46 (citing *Green v. United States*, 355 U.S. 184, 190 (1957)). The government's decision to charge Yeager with 127 felony counts in a single indictment, rather than splitting the charges into separate indictments, does not prevent the application of collateral estoppel here. Relying on dicta in *Ohio v. Johnson*, 467 U.S. 493, 500 n.9 (1984), the government claims that the Fifth Amendment does not protect Yeager against retrial on an issue already decided in his favor because the retrial would not be "seriatim." Gov't Br. at 16.

In *Johnson*, the defendant was charged with four crimes. He offered to plead guilty to the two lesser offenses and to plead not guilty to the two greater ones. This plea was accepted over the government's objection. After the trial court held that, under the Double Jeopardy Clause, the defendant's guilty pleas on the lesser offenses barred further prosecution on the more serious ones, this Court reversed, holding that the defendant "should not be entitled to use the Double Jeopardy Clause as a sword to prevent the State from completing its prosecution on the remaining charges." *Johnson*, 467 U.S. at 502. Of special importance here, the Court also found that Johnson's guilty plea did not decide any factual issues because "the taking of a guilty plea is not the same as an adjudication on the merits after full trial, such as took place in *Ashe v. Swenson*." *Id.* at 500 n.9. *Johnson* does not support the government's position here because the facts of Yeager's case are almost precisely opposite to the facts in *Johnson*. As the Court described Johnson's situation:

> No interest of respondent protected by the Double Jeopardy Clause is implicated by continuing prosecution on the remaining charges brought in the indictment. . . . Respondent has not been exposed to conviction on the charges to which he pleaded not guilty, nor has the State had the opportunity to marshal its evidence and resources more than once or to hone its presentation of its case through a trial. . . . There simply has been none of the governmental overreaching that double jeopardy is supposed to prevent.

*Id.* at 501-02.

In contrast, Yeager is not using collateral estoppel as a sword to prevent the government from having its one full opportunity to prosecute, but as a shield to prevent the government from having the opportunity to relitigate an issue that was already decided at his first trial. Yeager, unlike Johnson, has been exposed to conviction and has already been through a trial.

2. Moreover, the government has not only had an opportunity to hone its presentation of the evidence through a lengthy trial—it has done far more, using what it learned at the first trial to reformulate the charges against Yeager. After Yeager filed his initial collateral estoppel challenge to the hung counts, the government obtained an Eighth Superseding Indictment that separated Yeager from his codefendants and significantly altered the factual allegations against him. Pet. Br. at 11, 21-22. Rather than merely "omitting" allegations, as the government claims, Gov't Br. at 37, the Eighth Superseding Indictment added new language and a

new theory of prosecution. Pet. Br. at 11, 21-22. The government could have merely redacted the Fifth Superseding Indictment on which Yeager was previously tried by removing those counts on which he was acquitted. Instead, it presented a new indictment to a grand jury to find probable cause for new allegations against him.

The government's effort to refashion its case against Yeager based on what it learned at his first trial provides another good reason to apply collateral estoppel here. The Fifth Amendment "was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Green*, 355 U.S. at 187. Even if the government believed when Yeager was first indicted that it could prove all 127 counts against him in a single trial, "the constitutional guarantee forbids" its attempt to "refine [its] presentation in light of the turn of events at the first trial." *Ashe*, 397 U.S. at 447.

3. Under the government's "seriatim" prosecution rule, so long as a prosecutor includes all charges in an initial indictment, he may prosecute those charges repeatedly until he receives a verdict on all of them, while ignoring any collateral estoppel that might arise from acquittals along the way. Gov't Br. at 26. At the same time, the government admits that collateral estoppel would bar a new charge that relies on an element already decided in Yeager's favor. *Id.* at 38.

This distinction between charges brought in one indictment and those brought in separate indictments would treat defendants differently depending on a prosecutor's decision to charge multiple counts, as in this case, or to proceed with multiple indictments, as was done in *Ashe*. But this

differential treatment cannot be squared with the rule that "[e]ach count in an indictment is regarded as if it was a separate indictment." *Dunn,* 284 U.S. at 393 (citing *Latham v. The Queen*, 5 B. & S. 635, 642, 643 (1864); *Selvester v. United States*, 170 U.S. 262 (1998)); *see also Selvester,* 170 U.S. at 267 ("Each count is, in fact and theory, a separate indictment . . . ."); *Powell*, 469 U.S. at 62 (citing *Dunn*, 284 U.S. at 393). Under the *Dunn* rule, collateral estoppel should apply in the same fashion to each count, whether the counts are brought in the same or sequential indictments. The *Green* concerns about a defendant being repeatedly subjected to trial are applicable whenever the government relitigates the same *issue* seriatim after it has been decided in the defendant's favor, whether the government uses one indictment or many.

4. In addition, the government's proposed rule would encourage prosecutors to overcharge defendants in sprawling indictments like the one that Yeager went to trial on, so that even if the jury acquits on some counts, the government can still relitigate any issues decided in the defendant's favor if the jury fails to reach a verdict on other related counts. The government responds that overcharging presents "substantial risks" to the government. Gov't Br. at 39. But in reality, overcharging is all too common, as illustrated by the 127 counts brought against Yeager. And despite the government's assertion that the U.S. Attorney's Manual provides "clear guidance" discouraging overcharging, Gov't Br. at 39, courts have consistently held that Department of Justice policies do not establish a standard to which defendants can hold the government. *See United States v. Lopez-Matias,* 522 F.3d 150, 155-156 (1st Cir. 2008) (collecting cases);

*United States v. Wilson,* 413 F.3d 382, 389 (3d Cir. 2005).

5. Finally, even when charges are grouped in one indictment, the facts of this case illustrate how the government, "with its vastly superior resources, might wear down the defendant, so that 'even though innocent he may be found guilty.'" *Scott*, 437 U.S. at 91 (quoting *Green*, 355 U.S. at 188). Yeager was charged with more counts than any top Enron official, including Chairman Kenneth Lay, CEO Jeffrey Skilling, and CFO Andrew Fastow. *See* Press Release, U.S. Dep't of Justice, Federal Jury Convicts Former Enron Chief Executives Ken Lay, Jeff Skilling on Fraud, Conspiracy and Related Charges (May 25, 2006), http://www.usdoj.gov/enron/pdf/layskillingverdictfinalpr.pdf; Press Release, U.S. Dep't of Justice, Former Enron Chief Financial Officer Andrew Fastow Pleads Guilty to Conspiracy to Commit Securities and Wire Fraud, Agrees to Cooperate With Enron Investigation (Jan. 14, 2004), http://www.fbi.gov/dojpressrel/pressrel04/enron011404.htm. He was charged with overlapping crimes, including wire fraud, securities fraud, insider trading, and 99 counts of money laundering. Like other defendants who have raised similar collateral estoppel issues in the appellate courts, Yeager "could be subject to numerous retrials simply because of the multiplicity of technically distinct (though factually overlapping) counts." *Bailin*, 977 F.2d at 277 (defendants charged with 195 counts of mail fraud, wire fraud, and Commodity Exchange Act violations); *United States v. Frazier*, 880 F.2d 878, 881 (6th Cir. 1989) (defendants charged with 52 counts); *see also Ashe*, 397 U.S. at 445 n.10 ("As the number of statutory offenses multiplied, the

potential for unfair and abusive reprosecutions became far more pronounced.").

Although the government did not secure a single conviction at Yeager's first trial, he remains in jeopardy nearly six years after the initial indictment was brought against him. While there is no question that his efforts to prevent the government from relitigating issues that have already been decided have consumed some of this time, the strain on Yeager from such extended proceedings is undeniable. The government cannot force him "to live in a continuing state of anxiety and insecurity." *Green*, 355 U.S. at 187.

## III. The Jury Necessarily Decided That Yeager Did Not Possess Insider Information.

1. Yeager's acquittal on securities fraud necessarily decided that he did not possess and fail to disclose the "truth" about Enron when alleged misstatements were made at the January 20, 2000 conference for stock analysts ("the 2000 Analysts Conference"). The Fifth Circuit recognized that Yeager's acquittal on the securities fraud allegations of Count Two alone is enough to demonstrate that the jury necessarily decided that he did not possess insider information, because by acquitting Yeager the jury must have determined either that (1) there were no material misrepresentations or omissions made at the 2000 Analysts Conference or (2) that Yeager did not knowingly make misrepresentations or omissions at the 2000 Analysts Conference because he believed the presentations were truthful. Pet. App. 21a. While the government now tries to focus on events leading up to the 2000 Analysts Conference, Count Two only alleged conduct on the

day of the conference, charging that Yeager made "untrue statements of material facts *and omit[ted] to state facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading*." J.A. 25 (emphasis added).

Since the government's position at trial regarding Yeager's role at the 2000 Analysts Conference was that he "barely said a word," R-5716, the omissions allegation was critical to the case against him. The government crafted the Fifth Superseding Indictment to include a theory of criminal omissions in each of the counts on which the jury acquitted Yeager and in the insider trading counts on which the jury hung. In Count One, the government charged Yeager with conspiring "to make untrue statements of material facts *and omit to state facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading*." J.A. 20-21 (emphasis added).

On Count Two, in addition to the language from the indictment quoted above, the district court instructed the jury to consider whether Yeager committed criminal omissions. J.A. 104-09. Yeager could be convicted if he "*omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading as charged in the Indictment.*" J.A. 105 (emphasis added).

When charging the jury on Counts Three to Six, which alleged wire fraud, the district court also included omissions as a basis for liability: "A representation would also be 'false' when it constitutes a half-truth, or effectively omits or conceals a material fact, provided it is made with intent to defraud." J.A. 117.

The jury was thus instructed that it could convict Yeager if he either personally failed to correct false or misleading information on the day of the 2000 Analysts Conference or caused omissions in the presentations made that day. The government pressed this omissions theory during its lengthy cross-examination of Yeager. That line of questioning made clear that the government's theory was that Yeager committed criminal omissions during the 2000 Analysts Conference by failing to disclose insider information that was necessary to correct misstatements made at the conference:

> Q: At any time during the Analyst Conference, did you ever get up and say, "Well, some of this is inaccurate?"
>
> A: No.
>
> Q: Did you ever say, "Some of this isn't clear"?
>
> A: No.
>
> Q: Did you ever get up and say, "This isn't the entire story"?
>
> A: No. I thought at the level it was being given it was clear, and it was a high level.
>
> Q: My question was simply about your actions.
>
> A: I did not do that.

R-16987-88. Given this omissions theory, it does not matter whether Yeager disputed that he participated

in meetings before the 2000 Analysts Conference or not. Gov't Br. at 43. Even if Yeager made no false statements, caused no one to make false statements, and did not participate in the crafting of false statements or omissions in the presentations that were made at the Analysts Conference, the jury, under the district court's instructions, had to convict him on Count Two if it believed that he knew insider information—the "truth" about Enron Broadband Services ("EBS") that contradicted what was presented at the 2000 Analysts Conference—but failed to disclose it at the conference. As the government succinctly put it, Yeager could have been guilty of not "getting up" and saying something at the conference. R-16987-88.

Since Yeager was acquitted on Count Two, charging in part a failure to correct the allegedly false statements made at the 2000 Analysts Conference by others, the jury must have determined that when he said nothing at the conference, he did not possess and withhold insider information.

2. Like the Fifth Circuit, the district court erred by weighing the hung counts in the collateral estoppel analysis, instead of focusing only on the acquittals. The district court's consideration of the hung counts is clear from the record:

> If the jury necessarily acquitted Yeager based on the "good faith" defense, they would have had to acquit Yeager of insider trading as well. Because the jury did not acquit Defendant Yeager of both securities fraud and insider trading, but instead chose only to acquit Yeager of conspiracy, securities fraud, and wire fraud, the Court finds that the most

> realistic, rational and practical analysis of the verdicts is that the jury did not acquit Defendant Yeager based on the defense of "good faith."

Pet. App. 59a. Thus, although the government would have this Court follow the district court's reasoning, that analysis is similarly tainted by the court's consideration of the hung counts. Gov't Br. at 42.

3. The government proposes an alternative basis for the jury's multiple acquittals of Yeager, positing that the jury found that Yeager lacked the necessary intent to defraud or to knowingly conspire. *Id.* at 44-45. But what it fails to recognize is that Yeager's defense was that he held a good-faith belief that all was well at EBS. Pet. App. 20a. As the court of appeals recognized, that good-faith defense was the equivalent of a failure to possess insider information that the "truth" about EBS differed from public statements. *Id.* If the jury accepted Yeager's defense that he held a good-faith belief in EBS and its products and services, it must have found that he did not possess insider information that contradicted the statements made about EBS at the 2000 Analysts Conference. Yeager simply could not have knowingly possessed insider information that he did not believe was true.

## CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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