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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether, when a jury acquits a defendant on multiple counts but fails to reach a verdict on other counts that share a common element, and, after a complete review of the record, the court of appeals determines that the only rational basis for the acquittals is that an essential element of the hung counts was determined in the defendant's favor, collateral estoppel bars a retrial on the hung counts.

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the United States Court of Appeals for the Fifth Circuit were Joseph Hirko, Rex Shelby, Petitioner F. Scott Yeager, and Respondent the United States of America.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL AMENDMENTS AND STATUTES

OTHER AUTHORITIES

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Petition Appendix ("Pet. App.") 1a-28a) is reported at 521 F.3d 367. The opinion of the United States District Court for the Southern District of Texas (Pet. App. 29a-66a) is reported at 446 F. Supp. 2d 719.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 2008. A petition for rehearing en banc was denied on April 14, 2008. Pet. App. 68a-70a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment, set out in the appendix to the petition (Pet. App. 71a), provides in pertinent part: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT OF THE CASE

This case arises out of the reprosecution of Petitioner F. Scott Yeager on multiple counts of insider trading and money laundering following a lengthy jury trial at which he was acquitted of closely related charges of conspiracy, securities fraud and wire fraud. The jury that acquitted Yeager deadlocked on the insider trading and money laundering counts. Yeager moved to bar his retrial on the hung counts, arguing that the jury, by acquitting him, resolved in his favor an issue of ultimate fact common to the acquitted and hung counts.

Yeager argued that his retrial was barred by this Court's holding in *Ashe v. Swenson*, 397 U.S. 436 (1970), that the Double Jeopardy Clause embodies principles of collateral estoppel. After a thorough *de novo* review of the record, the court of appeals concluded that the only rational interpretation of the jury's acquittals was that Yeager did not possess insider information, a critical element of the hung insider trading counts. Pet. App. 21a. Nonetheless, solely because of the presence of the hung counts, the court of appeals refused to apply collateral estoppel. Pet. App. 22a. According to that court, the jury's failure to reach a verdict on the hung counts was inconsistent with its acquittals on counts sharing an essential element with them. In its view, the jury would have acquitted on the hung counts if it had determined that Yeager did not possess insider information. This presumed inconsistency "precluded" Yeager from establishing that the jury necessarily decided a common factual element in his favor. Pet. App. 27a.

Yeager now faces trial on an Eighth Superseding

Indictment charging five counts of insider trading and eight counts of money laundering that he already faced at his first trial. A retrial will allow the government to avoid the jury's rejection of its theory of prosecution and sidestep the evidentiary weaknesses in its case exposed during the first trial, in the hope that a different jury will reach factual determinations contrary to those made by the first jury. Yeager seeks to bar the government from retrying the fact of his possession of insider information, which is an essential element of the currently pending charges.

The Fifth Superseding Indictment.

1. As Vice President for Strategic Development at Enron Broadband Services ("EBS"), Yeager helped develop its telecommunications network and a series of products designed to promote its use. Yeager, along with four other EBS executives, was charged with conspiracy to engage in securities fraud and wire fraud (18 U.S.C. § 371); wire fraud (18 U.S.C. § 1343); securities fraud (17 C.F.R. § 240.10b-5, 15 U.S.C. §§ 78j(b) and 78ff); insider trading (17 C.F.R. § 240.10b-5, 15 U.S.C. §§ 78j(b) and 78ff); and money laundering (18 U.S.C. § 1957).

The Fifth Superseding Indictment named Yeager as a defendant in 127 of its 176 counts, charging that he and others engaged in a scheme to make false and misleading statements and material omissions designed to deceive investors about the technological capabilities, value, revenue, and business performance of EBS. Joint Appendix ("J.A.") 9.

Each of the counts on which Yeager was tried relied on the same basic factual allegations, because they incorporated Paragraphs 1 to 33 of the Fifth

Superseding Indictment, which described the defendants' participation in a scheme to profit from the sale of inflated Enron stock by misrepresenting EBS's capabilities and concealing its shortcomings from the public. *See* J.A. 20 (incorporating ¶¶ 1-33 into Count One); J.A. 25 (Count Two); J.A. 26 (Counts Three through Six); J.A. 29 (Counts Twenty-seven through Forty-six); J.A. 37 (Counts Sixty-seven through One Hundred Sixty-Five). Yeager's insider trading was described in the incorporated Paragraphs 11 and 33. Paragraph 33 alleged that "[a]t a time when they and others at Enron were making materially false and misleading public statements about EBS, the defendants sold large quantities of Enron stock, generating huge profits." J.A. 20. Paragraph 11 described the overall scheme. J.A. 9.

The misrepresentations and omissions allegedly began around April 1999, with EBS's release of several materially false and misleading press releases about its development of an advanced, intelligent telecommunications network. J.A. 10-11. These releases continued throughout the remainder of 1999. J.A. 10-11. In November 1999, Enron fully committed to Yeager's strategic plan to develop a telecommunications network and elevated EBS from a third-level subsidiary to a business division of Enron, with the announcement to come at a January 2000 Enron conference for securities analysts (the "2000 Analysts Conference"). J.A. 11.

Yeager attended the 2000 Analysts Conference, and while he "barely said a word," he is alleged to have been part of the effort to systematically misrepresent and fail to disclose truthful information about EBS and its network. Record on Appeal ("R-") 5716. The next day, the price of Enron

stock rose significantly, allegedly as the result of the presentation at the conference. J.A. 12-13. The indictment went on to allege that, following the conference, Yeager continued to cause "the issuance of materially false and misleading press releases" about EBS. J.A. 13. At the same time, according to the indictment, Yeager traded in Enron stock while in possession of insider information about problems at EBS that he failed to disclose. This was the same information he was also charged with failing to disclose in the conspiracy, securities fraud, and wire fraud counts. J.A. 20. The indictment also charged that Yeager engaged in a series of monetary transactions with the proceeds of the wire fraud and securities fraud, in violation of the money laundering statute.

2. Yeager moved to dismiss the insider trading charges for failure to specify the insider information that he allegedly possessed. *See* R-3488. The government responded that the incorporation of Paragraphs 1 to 33—especially Paragraph 17, which described the 2000 Analysts Conference—provided an adequate description of the insider information. R-4165.

The district court denied Yeager's motion. It concluded that Paragraph 17 identified Yeager's knowledge of false statements and omissions made at the 2000 Analysts Conference as the insider information that Yeager allegedly failed to disclose at the times he traded Enron stock. R-5052.

Over Yeager's objections, the indictment was neither read to the jury nor provided to it during its deliberations. R-20409, 20412-15, 20423-24, 20430-35. Instead, the jury was read only parts of the indictment, including the charging language, portions of several counts, the conspiracy's overt

acts, and Paragraph 11, which set out a single factual basis for the conspiracy, securities fraud, wire fraud, and insider trading charges:

> [The defendants] made false and misleading statements and omitted material information from statements made, all of which were designed to and did deceive the investing public and others about the technological capabilities, value, revenue and business performance of EBS. The defendants executed this scheme by, among other means: (i) causing Enron to issue materially false and misleading press releases; (ii) making and causing others to make materially false and misleading statements to equity analysts and others; (iii) using fraudulent means to generate revenue so that EBS and Enron could appear to reach publicly declared financial targets; and (iv) failing to disclose material adverse information about EBS's poor business performance. During this same time period, defendants [including Yeager] sold large quantities of Enron stock, generating millions of dollars for themselves.

J.A. 9. The government's bill of particulars response clarified that the information that Yeager allegedly failed to disclose in the securities fraud, wire fraud, and conspiracy counts was the same information he allegedly failed to disclose when he sold Enron stock. R-21724-25. Accordingly, each of the counts against Yeager asked the jury to determine whether he possessed and failed to disclose the same insider information.

Trial Evidence, Argument And Pleadings.

1. At trial, the government portrayed EBS's effort to develop its network as a failure plagued by technical shortcomings, incomplete network software, and a host of administrative and personnel problems. Throughout its presentation of evidence, and in argument to the jury during the thirteen-week jury trial, the government insisted that Yeager and others misrepresented and failed to disclose the "truth" about EBS's dysfunction to the investing public in order to drive up the price of Enron stock and then sell their stock at inflated prices. These stock sales were characterized as insider trading.

The first words in the prosecutor's opening statement were: "This case is about lying, lying for profit. The evidence will show that these five men seated over here lied to the public in order to make millions of dollars in profit. Not just for their company, but for themselves." R-5701. The prosecutor squarely linked the charged insider trading with the failures to disclose charged in the securities and wire fraud counts, arguing "[t]he evidence will show that they made this money from their [sale] of stock while they knew the real story and while they hid it from the public." R-5718. Later in her opening statement, the prosecutor left no doubt that the insider trading charges were based on the identical failures to disclose: "The public didn't get the benefit of what they knew. These men got that benefit and millions more. You will learn that's called insider trading, and it's a crime." R-5725.

In presenting the testimony of former codefendant Kenneth Rice, the government continued this theme, eliciting his statement that

the purpose of lies at the 2000 Analysts Conference was to "[g]et the stock price up." R-6718. The government tied this inflation of the stock price to Rice's admitted insider trading and asked what insider information he personally traded on. Rice answered, "[t]he information I had was the fact that the market believed our network was capable of doing more than it really was, and I helped lead them to believe that, and that was information that I had that the market did not have." R-6719-20.

The government focused at trial on proving that Yeager's failure to disclose information was as culpable as an affirmative misrepresentation about EBS. During Yeager's cross examination, the government challenged him for not speaking out at the 2000 Analysts Conference, R-16892-96, and, claiming that he had a duty to disclose, repeatedly asked why he failed to correct misstatements and omissions and to tell the "entire story about EBS." R-16986-88, 17040.

2. At the close of the government's case, Yeager moved for a judgment of acquittal. In response, the government argued that it had proven the insider trading case because:

> Each of the defendants possessed and used material, non-public information to profit from their criminal plan. Each of the defendants[] knew that the true state of the business did not reflect what had been told to the investing public when they [sold stock]. By selling their stock [they] completed their crime that began with the conspiracy in April 1999.

R-12809. The government thus admitted that the misrepresentations and omissions about EBS were essential to the insider trading charges and argued that the insider information on which Yeager traded was his knowledge that public statements about EBS were false.

In rebuttal closing argument, the government concluded by linking Yeager's stock sales with the fraud counts, saying that the investing public "didn't have the advantage of the inside story . . . because each of these men played their role and chose to lie and put on a charade." R-21324-25.

This left no doubt in the jury's mind that the government's claim was that the insider information that Yeager allegedly traded on was his knowledge that the statements made at the 2000 Analysts Conference and in press releases about EBS were false and that the same undisclosed "truth" about EBS was the basis for the conspiracy, wire fraud, and securities fraud charges.

Jury Instructions.

In its instructions on the elements of insider trading, the district court directed the jury to the description of the scheme, misstatements, and omissions "as detailed in the indictment." J.A. 124-25. The jury, unable to review the indictment in its entirety, would naturally have looked to Paragraph 11, the only factual description of the scheme made available to it.

The district court instructed that insider trading occurs when a person who comes into possession of material, nonpublic information uses that information to buy or sell stock, without disclosing that information to the public. J.A. 125. The

instructions on the insider trading charges included a single-sentence description of Yeager's possession of insider information: "Specifically, while in possession of material, nonpublic information regarding the technological capabilities, value, revenue, and business performance of . . . Enron Broadband Services, Yeager sold shares of Enron stock. . . ." J.A. 119. Accordingly, the insider trading charges were submitted to the jury on the government's theory that they, like the conspiracy, securities fraud, and wire fraud charges, were based on the same nondisclosures of information at the 2000 Analysts Conference and in the press releases.

The Jury's Deliberations And Verdict.

After four days of deliberation, the jury announced that it had reached agreement on some counts and was deadlocked on others. R-21523. The district court then gave an *Allen* charge to the jury and ordered it to continue its deliberations "until the end of the day," which was approximately an hour away. R-21536. When 70 minutes later the jury indicated that it had not made additional progress, the district court decided to "take their verdict" rather than allow a fifth day of deliberations. R-21537-40.

The jury acquitted Yeager on all of the conspiracy, securities fraud, and wire fraud counts. J.A. 161-62. The jury deadlocked on charges that Yeager, as the culmination of the scheme, engaged in insider trading and money laundering. J.A. 162-66. The jury also entered several other acquittals on counts against Yeager's codefendants, entered no convictions, and failed to reach a verdict on a total of 140 counts.

Yeager's Collateral Estoppel Challenge.

1. Yeager moved to dismiss the insider trading and money laundering counts of the Fifth Superseding Indictment as barred by collateral estoppel. *See* R-21586. In response to Yeager's motion, the government obtained an Eighth Superseding Indictment, separating Yeager from his codefendants and charging him with some of the same insider trading and money laundering offenses he had already faced at trial. But the government did not simply delete the acquitted counts of the Fifth Superseding Indictment and rely on the hung counts. It instead reworked and refined its theory of the case against Yeager.

The new indictment realleged five of the insider trading charges contained in the Fifth Superseding Indictment, which had charged that Yeager participated in a scheme to pump up the price of Enron stock and then sell his shares. The insider trading charges that remained in the Eighth Superseding Indictment, however, did not include the allegations that Yeager participated in the scheme, but rather alleged that he came into possession of adverse information about EBS and failed to disclose it when he sold his stock.

This was an obvious response to the acquittals of Yeager on the fraud counts, as is clear from the government's decision to leave the fraud allegations in the Seventh Superseding Indictment, which it brought against Yeager's codefendants, who were not acquitted of all the fraud counts. Yeager moved to dismiss the charges in the Eighth Superseding Indictment, arguing that they were also barred by collateral estoppel because, like the charges in the

Fifth Superseding Indictment, they relied on proof that Yeager possessed insider information when he traded in Enron stock.[1]

2. Yeager argued that the jury's acquittals necessarily determined an essential element of the insider trading charges, and that those charges were therefore barred by collateral estoppel. The district court refused to apply collateral estoppel because the jury had failed to acquit Yeager on the insider trading counts. Because it deadlocked on those charges, the court concluded, the jury did not accept Yeager's defense that he possessed a good-faith belief in the business prospects of EBS. Pet. App. 59a.

Proceedings In The Court Of Appeals.

1. Yeager appealed, and on March 17, 2008 a panel of the Fifth Circuit affirmed. The court of appeals first determined that it need not look further than Yeager's acquittal of securities fraud to conclude that, were it not for the hung counts, his reprosecution for insider trading was barred by collateral estoppel. It reasoned that the jury must have acquitted Yeager of securities fraud either (1) because there were no material misrepresentations or omissions made at the 2000 Analysts Conference or (2) because "Yeager did not knowingly make

[1] The government initially reserved its right to try Yeager on either one of the pending indictments. R-21902. Later, the government represented that it only sought to retry Yeager on the counts in the Eighth Superseding Indictment and claimed that those counts charged the "same offenses as the Fifth Superseding Indictment" on which Yeager was tried. Appellee's Br. (5th Cir. filed Dec. 22, 2006) ("Appellee's Br.") at 24, n.6.

misrepresentations and omissions because he believed the presentations were truthful." Pet. App. 20a. In either case, "the jury must have found when it acquitted Yeager that Yeager himself did not have any insider information that contradicted what was presented to the public." Pet. App. 21a.

The court specifically acknowledged that "when we consider the acquittals by themselves, it appears that Yeager is correct that collateral estoppel bars a retrial." Pet. App. 21a-22a. It therefore concluded that "[w]hether we can weigh hung counts in applying collateral estoppel then is critical to our analysis." Pet. App. 22a.

2. Deciding that it must weigh the hung counts under Fifth Circuit precedent, the court speculated that if the jury had acted "rationally [it] would also have acquitted Yeager of the insider trading counts." Pet. App. 22a. Based on this hypothesis regarding the sole way that a "rational" jury would have reached a verdict, the court held that, when the hung counts were considered, it was "faced with a potential inconsistency, making it impossible for us to decide with any certainty what the jury necessarily determined." Pet. App. 22a.

The court of appeals attempted to explain the "discrepancy" between the acquitted and hung counts and offered several guesses why the jury deadlocked, including that "the jury was irrational." Pet. App. 24a. It then concluded that, because Yeager was unable to demonstrate which of its posited explanations was correct, he "failed to carry his burden and establish what the jury necessarily decided." Pet. App. 25a. Thus, despite finding that the rest of the trial record compelled the conclusion that the jury decided Yeager did not possess undisclosed insider information, the court held that

the mere presence of the hung counts meant that "we cannot apply collateral estoppel in this case." Pet. App. 22a. By introducing the possibility that the jury acted irrationally, the court placed an impossible burden on Yeager to explain why the jury hung.

3. On April 14, 2008, Yeager's request for rehearing en banc was denied. Pet. App. 69a. Yeager filed a timely petition for a writ of certiorari on July 14, 2008, and his petition was granted on November 14, 2008.

SUMMARY OF THE ARGUMENT

As the court of appeals expressly acknowledged, the jury, by its acquittals, necessarily determined that Yeager was not in possession of insider information about EBS when he traded in Enron stock. The jury thus rejected an essential element necessary to convict Yeager on each of the pending insider trading counts. Yeager's retrial on these counts is therefore barred by criminal collateral estoppel, and the charges should be dismissed under *Ashe,* 397 U.S. 436. The jury's failure to reach a verdict on these counts does not change the *Ashe* analysis.

The fundamental protections of the Double Jeopardy Clause prevent the government from forcing a defendant to face ultimate facts already decided in his favor. The government cannot subject a defendant to repeated trials, as it refines its case in successive attempts to convict. Yeager should not be forced to defend himself in a second trial against the allegation, already rejected by the jury in his first trial, that he possessed the very same insider information.

Moreover, reversal of the decision below is necessary to vindicate this Court's insistence on the importance of giving proper deference to jury acquittals. Over the last century—which has seen a dramatic proliferation of overlapping criminal offenses—the Court has applied the doctrine of criminal collateral estoppel to ensure that whenever a jury determines an essential factual issue in the defendant's favor, the government may not attempt to relitigate that issue in successive trials.

In contrast to verdicts of acquittal, courts have always viewed hung counts with disfavor. A hung count has never been recognized as a decision by the jury entitled to deference, and the Court should not adopt a rule that would allow a hung count to nullify an acquittal in a collateral estoppel analysis. While a court can find meaning in a jury's *acquittals* based upon a careful examination of the record, a hung count does not permit a similar analysis. To determine why a jury hung would require either an inquiry into the jury's deliberative process or speculation about why it failed to reach a verdict. Under *Ashe* and *United States v. Powell*, 469 U.S. 57 (1984), both are prohibited.

The entire case against Yeager was based on misrepresentations about problems at EBS, and the district court instructed the jury that a failure to disclose the true state of EBS was grounds for conviction on the conspiracy, securities fraud, and wire fraud counts. If the jury had found that Yeager knew that the statements at the 2000 Analysts Conference and in the press releases were false, and that he said nothing to correct them, it would have convicted him of securities fraud and wire fraud. Since it acquitted him on those counts, the jury necessarily determined that Yeager did not possess

and fail to disclose information about EBS. Now Yeager faces trial for illegally trading stock during the same time period while failing to disclose the very same information.

ARGUMENT

I. Yeager's Reprosecution On The Hung Counts Is Barred By Collateral Estoppel.

A. Applying Collateral Estoppel Here Would Further Important Double Jeopardy Protections.

1. Both history and the Double Jeopardy Clause decisions of this Court demonstrate that the protections of collateral estoppel are far too important to be limited as the court of appeals did here. First, the application of collateral estoppel to bar hung counts would ensure the fundamental protections of the Double Jeopardy Clause by precluding the government from forcing Yeager to answer factual allegations that have already been determined in his favor; such relitigation would unfairly allow the government to hone its case after an adverse verdict. Second, it would further the traditional deference accorded to jury acquittals. Third, it would protect against prosecutorial abuses that can arise from the overlapping nature of complex modern criminal statutes.

Ashe found that collateral estoppel "is embodied in the Fifth Amendment guarantee against double jeopardy" because "whatever else that constitutional guarantee may embrace, it surely protects a man who has been acquitted from having to 'run the gantlet' a second time." 397 U.S. at 445-46.

Collateral estoppel "stands for an extremely important principle in our adversary system of justice." *Id.* at 443. The doctrine ensures that "when an issue of ultimate fact has once been determined by a valid and final judgment, the issue cannot again be litigated between the same parties in any future lawsuit." *Id.* First developed in civil litigation, collateral estoppel was a fixed principle of federal criminal law for many years before *Ashe*. *See, e.g., United States v. Oppenheimer*, 242 U.S. 85, 88 (1916).

The test established in *Ashe* 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." 397 U.S. at 444. This review should be conducted with "realism and rationality" rather than hypertechnical formalism, *id.*, and "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings. Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal." *Id.* (quoting *Sealfon v. United States*, 332 U.S. 575, 579 (1948)) (internal citation omitted).

Although this inquiry may be time-consuming, it provides the best practicable method for determining what the jury decided by its acquittals. As this Court has recognized, any more technically restrictive test would mean that collateral estoppel never applied in criminal proceedings. *Ashe*, 397 U.S. at 444.

Applying collateral estoppel to mixed verdicts of acquittals and hung counts by the same jury is no more demanding of the reviewing court. Implicit in the decision below is the conclusion that, had the remaining insider trading counts been brought for the first time in a subsequent indictment, they would be barred by collateral estoppel. There is nothing about their inclusion in the same indictment as the acquitted counts that should change the *Ashe* analysis. A court's duty to preserve double jeopardy rights is equally important in all cases where a jury speaks its will through acquittals and the government seeks to force the defendant to defend twice against the same facts that the jury has already decided in his favor.

2. "The constitutional prohibition against 'double jeopardy' 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 v. United States*, 355 U.S. 184, 187 (1957). This concept has "ancient roots" in the "common-law pleas of *autrefois acquit*, *autrefois convict*, and pardon, and found expression in the legal tradition of colonial America." *United States v. DiFrancesco*, 449 U.S. 117, 128 (1980) (citing William Blackstone, 4 Commentaries 329-30 (1st ed. 1769); *Green*, 355 U.S. at 187; *id.* at 200 (dissenting opinion); *United States v. Wilson*, 420 U.S. at 339-42; *United States v. Scott*, 437 U.S. 82, 87 (1978)).

The Double Jeopardy Clause was in part a response to the high potential for abuse inherent in allowing prosecutors a second chance to convict a defendant. English judges in the seventeenth century routinely engaged in the "'tyrannical practice' of discharging juries and permitting reindictment when acquittal appeared likely,"

thereby giving the Crown prosecutors an opportunity to strengthen their case and try the defendant again. *Crist v. Bretz*, 437 U.S. 28, 42 (1978) (Powell, J., dissenting) (citing *The Queen v. Charlesworth*, 121 Eng. Rep. 786, 801-02 (Q.B. 1861)). In response to this oppressive practice, English courts began to prohibit the dismissal of a jury once it was sworn. *Id.* at 42-43 (citing *The King v. Perkins*, Holt. 403, 90 Eng. Rep. 1122 (K.B.1698)). American courts later invoked this prohibition to protect against governmental oppression. Throughout the nineteenth century, "many state courts began to blend the rule against needless discharges of juries into the guarantee against double jeopardy contained in the Federal and State Constitutions." *Id.* at 45 (citing cases). "[T]he prohibition against double jeopardy as it evolved in this country was plainly intended to condemn this 'abhorrent' practice [of discharging a jury for the purpose of benefiting the Crown]." *Arizona v. Washington*, 434 U.S. 497, 507-08 (1978) (citing *State v. Garrigues*, 2 N.C. 241 (N.C. Super. Ct. L. & Eq. 1795)).

As the Court noted in *United States v. Dinitz*, the Double Jeopardy Clause operates to protect defendants from oppressive governmental practices similar to those engaged in by Crown prosecutors and judges. *See* 424 U.S. 600, 611 (1976); *see also Arizona*, 434 U.S. at 508 ("[T]he strictest scrutiny is appropriate . . . when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused."); *Downum v. United States*, 372 U.S. 734, 736 (1963) ("Harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy

attaches.") (citation omitted).

In *Green*, the Court affirmed the important purposes of the double jeopardy bar:

> [T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

355 U.S. at 187-88.

The Double Jeopardy Clause also protects against the risk that an innocent defendant may be convicted because the government can refine its case in serial prosecutions and reduce the defendant's ability to present an adequate defense. *See* Comment, *Twice in Jeopardy*, 75 Yale L.J. 262, 278 (1965) ("Without a rule of finality no procession of juries could effectively acquit a defendant, but a single jury could convict. The prosecutor could keep trying until he found an accommodating panel."). A prosecutor who is given a second chance can present a more effective case by learning from the mistakes of the first trial, reassembling his evidence, and remedying any deficiencies. The government might therefore use the first trial as a dry run, affording it a more favorable opportunity to convict the defendant. *See Ashe*, 397 U.S. at 447 (treating "the first trial as no more than a dry run for the second prosecution . . . is precisely what the constitutional guarantee forbids"); *see also* Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy After Rodney*

King, 95 Colum. L. Rev. 1, 31 n.158 (1995) ("If you play with something long enough, you are likely to break it; and if the government is allowed to prosecute an innocent defendant enough times and disregard all acquittals, eventually it is likely to convict an innocent (by hypothesis) person.").

The need to limit governmental action in order to safeguard individual interests is also reflected by "society's awareness of the heavy personal strain which a criminal trial represents for the individual defendant . . . manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws." *United States v. Jorn*, 400 U.S. 470, 479 (1971). A retrial, no matter the cause, exposes the defendant to the psychological and financial hardships of a second trial, and to an increased risk of conviction, even if he is innocent, due in large part to the prosecutor's use of the first trial as a learning experience.

The failure of a jury to reach a verdict does not in itself bar further prosecution; neither should it nullify the collateral estoppel effect of a jury's acquittal on a different count. The fundamental purpose underlying the Double Jeopardy Clause would be undermined if the Court affirms that hung counts cannot be barred by collateral estoppel because they introduce uncertainty into the *Ashe* analysis.

3. Yeager defended himself at a thirteen-week trial against 127 counts of conspiracy, securities fraud, wire fraud, insider trading, and money laundering. The jury acquitted him on all the lead counts and convicted him on none of the counts. The government reacted to the jury's verdicts and Yeager's motion to bar his reprosecution on the hung

counts by severing the defendants into three indictments so it could refine its case as to each group. In its Eighth Superseding Indictment, which named only Yeager as a defendant despite the prosecution's earlier insistence that all the defendants were participants in an overarching conspiracy and could not be severed, R-1780, the government brought some of the same insider trading charges it had already presented but refined them to avoid the failures of proof evidenced by the first jury's acquittals of Yeager. The charges in the new indictment, however, still rely on the same issue already decided in Yeager's favor—his possession of insider information at the time of the charged insider trading.

If the government is permitted to retry Yeager on the insider trading counts on which the first jury hung, it will have "the opportunity to marshal its evidence and resources more than once" and will have had the chance "to hone its presentation of its case through a trial." *Ohio v. Johnson*, 467 U.S. 493, 501 (1984). While there is no question that the government has a legitimate interest in prosecuting a hung count under appropriate circumstances, its attempt to ignore the effect of acquittals for collateral estoppel purposes, while tailoring a new indictment to avoid making the same mistakes with a second jury, is precisely the kind of abuse that collateral estoppel should prevent.

At the same time, the cost to Yeager of a retrial will be enormous. After already experiencing the emotional and financial hardship that necessarily accompanies an extended trial, Yeager will be forced to go through the process again, and without the benefit of the factual determination that the first jury made. Yeager will be forced to "run the gantlet"

a second time against a case the prosecution has already tested and refined through the course of the first trial. The concerns set out in *Green* support applying collateral estoppel to bar further prosecution on the hung counts.[2]

B. The Deferential Treatment Accorded To Jury Verdicts Is Furthered By Honoring Acquittals Through Their Application To Hung Counts.

1. Application of collateral estoppel to bar the hung counts is also compelled by the deferential treatment accorded to jury verdicts—a treatment rooted in respect for the jury's sovereignty. When a jury speaks through an acquittal, it is exercising its sovereign function to decide guilt or innocence. "[D]eference [to] the jury brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality." *Powell*, 469 U.S. at 67. Applying the jury's determination of an ultimate issue of fact to the counts it failed to decide furthers this important protective role, honoring what the jury decided and appropriately refusing to give equivalent value to its failure to make a decision. The statement of the jury's will through its verdicts is a powerful expression of the

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[2] If Yeager cannot be retried on the insider trading charges due to the collateral estoppel effects of the acquittals, the money laundering charges must also be dismissed, because with Yeager's acquittals on the conspiracy, securities fraud, and wire fraud charges, the remaining money laundering charges against him are now solely based on transactions using his alleged insider trading proceeds.

voice of the community that is entitled to great deference. Hung counts can make no such claim. Application of criminal collateral estoppel to hung counts is both consistent with and a necessary component of jury sovereignty.

The right to trial by jury existed in England for hundreds of years before the United States Constitution was written. *Duncan v. Louisiana*, 391 U.S. 145, 152 (1968). The First Continental Congress declared in 1774 that it was "the great and inestimable privilege" of defendants to be "tried by their peers of the vicinage." *Id.* (citation omitted). The Declaration of Independence objected to the King's "depriving us in many cases, of the benefits of Trial by Jury." *Id.* And the right to trial by jury is the only guarantee to appear in both the Constitution and the Bill of Rights. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 870 (1994).

The modern jury continues to provide a vital safeguard to the rights of individual citizens against oppressive governmental practices. *Duncan*, 391 U.S. at 156; *see also Taylor v. Louisiana*, 419 U.S. 522, 530 (1975); *Williams v. Florida*, 399 U.S. 78, 100 (1970); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 18-19 (1955).

The important role of juries is evidenced by the near absolute deference accorded to jury acquittals. Nowhere is this clearer than in the traditional power of a jury to refuse to convict even if the facts and law establish guilt. As this Court recognized in *Jones v. United States*, 526 U.S. 227, 245 (1999), the jury's "power to thwart Parliament and Crown took the form . . . of flat-out acquittals in the face of guilt . . . what Blackstone described as 'pious perjury' on the

jurors' part." (citing Blackstone, 4 Commentaries 238-39).

2. The Double Jeopardy Clause protects juror sovereignty by upholding the force of a verdict. *Arizona*, 434 U.S. at 503. A verdict of acquittal is final and not subject to appeal. *Ball v. United States*, 163 U.S. 662, 671 (1896). "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.'" *Arizona*, 434 U.S. at 503 (quoting *Fong Foo v. United States*, 369 U.S. 141, 143 (1962)). "If the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair." *Id.* The prohibition of retrial following an acquittal is "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977).

3. *Powell* reaffirmed the deference accorded to acquittals by affirming the jury's right to render inconsistent verdicts. In *Powell*, a jury acquitted the defendant of conspiracy to possess and possession of cocaine, but convicted her of using the telephone in "committing and in causing" the same conspiracy and possession. 469 U.S. at 60. The jury's verdicts were clearly inconsistent, because Powell could not have used the telephone to further offenses she did not commit. This Court upheld the jury's verdicts, despite their facial inconsistency, because any analysis of the reasons for the verdicts "would be based either on pure speculation, or would require inquiries into the jury's deliberations that courts generally will not undertake." *Id.* at 66.

Moreover, Powell was asking an appellate court

to reverse the jury's conviction, which had as much validity as the acquittals on which she based her claim. Thus, the *Powell* Court found that it was "unclear whose ox has been gored" by the recognition of jury sovereignty: both the government and the defendant could point to verdicts supporting their position. *Id.* at 65. Each side was entitled to the finality that accompanies the jury's expression of its will through a verdict, whether that verdict was an acquittal or a conviction. The Court recognized that any attempt to determine why the jury acted as it did in rendering its verdicts would necessarily intrude on jury sovereignty.

4. *Powell* is consistent with the application of collateral estoppel in this case because a mixed verdict of acquittals and hung counts does not create the same inconsistency as a mixed verdict of acquittals and convictions. As numerous courts have held, "the jury's failure to reach a verdict is too inconclusive to qualify as inconsistent for the purposes of issue preclusion. The powerful double jeopardy protections that attach to acquitted counts should not be outweighed by the inconclusiveness inherent in hung counts." *United States v. Bailin*, 977 F.2d 270, 279-80 (7th Cir. 1992); *accord United States v. Seley*, 957 F.2d 717, 723 (9th Cir. 1992); *United States v. Frazier*, 880 F.2d 878, 882-883 (6th Cir. 1989). *But see United States v. White*, 936 F.2d 1326 (D.C. Cir. 1991).

Powell teaches that unlike the *Ashe* inquiry—which is designed to determine the meaning of a jury's expression of its will by its verdicts—speculation about a jury's deliberations is both impractical and a suspect infringement of jury sovereignty, since such an analysis intrudes on the jury's deliberative process. *Powell*, 469 U.S. at 66.

As *Powell* put it, "[c]ourts have always resisted inquiring into a jury's thought processes." *Id.* at 67 (citing *McDonald v. Pless*, 238 U.S. 64 (1915); Fed. R. Evid. 606(b)).

The *Powell* Court's unwillingness to inquire into a jury's deliberative process to determine the basis for its verdict applies with equal force to any attempt to determine why a jury deadlocked on some counts. Here, the court of appeals burdened Yeager with the impossible task of demonstrating why the jury failed to acquit him on the hung counts. The court engaged in precisely the type of speculation forbidden by *Powell* when it postulated that, if the jury had in fact determined that Yeager did not possess insider information, it would have acquitted on all counts.

C. The Court's Criminal Collateral Estoppel Jurisprudence Has Developed As Modern Criminal Codes Have Become Increasingly Complex.

1. As the Court recognized in *Ashe*, criminal collateral estoppel is necessary because of the increasing complexity of the criminal code, which now contains "overlapping and related statutory offenses," allowing prosecutors to "spin out a startlingly numerous series of offenses from a single . . . criminal transaction." 397 U.S. at 445, n.10. The era of distinct offenses with little overlap between them has passed. *See, e.g.,* John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, 26 Heritage Foundation Legal Memorandum 1 (June 16, 2008) (cataloguing approximately 4,450 federal crimes and noting that Congress creates approximately 57 new crimes per

year). Today, what appears to be a single criminal act may be charged under several statutes. *See, e.g., Texas v. Cobb*, 532 U.S. 162, 182 (2001) (Breyer, J., dissenting).

With overlapping crimes, the risk of prosecutorial overcharging increases. Collateral estoppel ensures that, when a jury determines an ultimate fact in the defendant's favor, the government cannot relitigate it under the guise of a violation of a different statute.

Jurors can be overwhelmed by complicated indictments charging multiple overlapping crimes. The inability or unwillingness of jurors to differentiate between hundreds of related counts charged under statutes with common elements may result in mixed verdicts of acquittals and unresolved counts. Here, the jury was asked to resolve 176 separate counts brought against five defendants. Yeager alone was charged in 127 counts.

In such cases, collateral estoppel provides the only reasonable way to resolve hung counts that share a common element with acquitted counts. If a jury's ability to reach unanimity is exhausted before it considers all of the counts in a lengthy indictment, its decisions to acquit on some counts must be applied to common factual issues on unresolved counts. Any other result rewards prosecutorial overcharging, which can overwhelm a jury and create an opportunity to retry a defendant even if the jury acquits on counts involving common factual issues.

2. As complicated criminal codes have developed, so has the Court's jurisprudence on criminal collateral estoppel. In a series of important rulings, the Court has shaped the doctrine of criminal collateral estoppel into a critical component of a defendant's rights under the Double Jeopardy

Clause.

This Court first recognized the importance of criminal collateral estoppel in *Oppenheimer*, 242 U.S. 85. In that case, Herman Oppenheimer was charged with a conspiracy to conceal assets from a trustee in bankruptcy. But he had previously been indicted for the same offense, and a court had ruled that the charge was barred by the statute of limitations. *Id.* at 86. The government claimed that "the doctrine of res judicata does not exist for criminal cases except in the modified form of the 5th Amendment, that a person shall not be subject for the same offence to be twice put in jeopardy of life or limb." *Id.* at 87. Attempting to limit the scope of the Fifth Amendment to exclude collateral estoppel, it argued that "a decision upon a plea in bar cannot prevent a second trial when the defendant never has been in jeopardy in the sense of being before a jury upon the facts of the offence charged." *Id.*

The Court rejected this argument: "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 rightly mentioned with solemn reverence, are less than those that protect from a liability in debt." *Id.* The Court went on to note that, while the Fifth Amendment did not specifically address the application of collateral estoppel in criminal cases, it "was not intended to do away with what in the civil law is a fundamental principle of justice in order, when a man has once been acquitted on the merits, to enable the Government to prosecute him a second time." *Id.* at 88 (internal citations omitted).

3. In *United States v. Adams*, 281 U.S. 202 (1930), the Court reaffirmed the application of collateral estoppel to criminal cases, finding that

where the defendant had been acquitted of making a false statement, the jury's acquittal, which "was conclusive upon all that it decided," must be examined to see whether issues were necessarily determined that might preclude the defendant's prosecution on a different false statement charge. Since the acquitted false statement was not identical to the newly indicted count, the traditional principle of double jeopardy, in itself, did not bar the defendant's prosecution. *Id.* at 205. Instead, the question was whether the jury's determination collaterally estopped the new count. *See id.* (citing *Oppenheimer*, 242 U.S. 85). After analyzing the acquittal, the Court found that the new false-report count was not barred by collateral estoppel, because the earlier acquittal did not determine an issue essential to the pending count. *See id.*

4. In *Sealfon*, the defendant was charged in two indictments. 332 U.S. at 576-79. The first charged him with conspiring to defraud the United States by submitting false documents relating to sugar rationing, while the second charged him with substantive acts of submitting the false documents under an aiding-and-abetting theory. *Id.*

Central to both indictments was Sealfon's letter to a codefendant, Greenberg, falsely stating that Sealfon was selling vanilla syrup exempt from rationing. The conspiracy theory was that Sealfon agreed to send Greenberg the letter so that Greenberg could sell Sealfon more sugar than would otherwise be allowed, which Sealfon in turn would sell to non-exempt buyers. *Id.* at 576-77. At Sealfon's first trial, on the conspiracy charge, the central issue was whether he agreed to send the letter as part of the conspiracy. The jury acquitted, thereby necessarily determining that Sealfon, "who

concededly wrote and sent the letter, did not do so pursuant to an agreement with Greenberg to defraud." *Id.* at 580. Sealfon was then tried on the substantive counts, on the theory that he aided and abetted Greenberg by writing the letter, and he was convicted.

The Court reversed the conviction on collateral estoppel grounds. Although the commission of a substantive offense and the conspiracy to commit it "are separate and distinct offenses," the Court, citing *Oppenheimer* and *Adams*, held that collateral estoppel "may be a defense in a second prosecution" and "operates to conclude those matters in issue which the verdict determined though the offenses be different." *Id.* at 578 (citations omitted).

The government urged that "the basis of the jury's verdict cannot be known with certainty" and posited that the jury might have decided nothing more than that Sealfon was not guilty of conspiracy. *Id.* at 579. But the Court laid the foundation for *Ashe* by rejecting this technical approach, responding that "[t]he instructions under which the verdict was rendered . . . must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings. We look to them only for such light as they shed on the issues determined by the verdict." *Id.* The second indictment "was a second attempt to prove the agreement which at each trial was crucial to the prosecution's case and which was necessarily adjudicated in the former trial to be non-existent. That the prosecution may not do." *Id.* at 580.

5. Several years later, *Ashe* presented the Court with facts displaying the risks of prosecutorial overreaching by forcing a criminal defendant to defend against identical factual allegations in

successive prosecutions, where the government could refine its case and wear down the defendant. Six men were playing poker when "three or four masked men" broke in and robbed the players. *Ashe*, 397 U.S. at 437. The police arrested four men for the crime, including Ashe. *Id.* The government charged all the men with six counts of robbery (one for each poker player) and tried Ashe first for the robbery of one of the players. *Id.* at 438. At trial, the evidence was clear that a robbery occurred, but the evidence that Ashe was one of the robbers was weak. *Id.* The jury acquitted Ashe in a general verdict. *Id.* at 439.

The government then proceeded to a second trial in which Ashe was charged with the robbery of a second poker player. *Id.* At the second trial, "[t]he witnesses were for the most part the same, though this time their testimony was substantially stronger on the issue of the petitioner's identity." *Id.* at 439-40. The government also "refined" its case by declining to call a witness "whose identification testimony at the first trial had been conspicuously negative." *Id.* at 440. This time, the jury found Ashe guilty. *Id.*

After setting out the "realism and rationality" test and the reasons why a non-technical analysis of what the jury decided was necessary to preserve criminal collateral estoppel, the court evaluated the record and concluded that Ashe's second trial was barred by collateral estoppel because "[t]he single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers. And the [first] jury by its verdict found that he had not." *Id.* at 445.

Finally, the Court stated its concern over the government's efforts to hone its case through successive efforts to prove the same facts: "In this

case, the State in its brief has frankly conceded that, following the petitioner's acquittal, it treated the first trial as no more than a dry run for the second prosecution. . . . But this is precisely what the constitutional guarantee forbids." *Id.* at 447.

6. *Dowling v. United States*, 493 U.S. 342 (1990), dealt with evidentiary issues about the admissibility of acquitted conduct in later proceedings. *Dowling* distinguished the use of evidentiary facts arising out of a prior acquittal from a complete bar of reprosecution, but did not alter the *Ashe* approach to determining the collateral estoppel effects of acquitted counts on counts sharing ultimate issues of fact. In fact, *Dowling* reaffirmed the *Ashe* test, finding that, even if *Ashe* applied to preclude the use of evidentiary facts, Dowling had failed to meet his burden of establishing that the evidence the government sought to introduce at his subsequent trial had even been contested, much less necessarily decided, by the jury that acquitted him of an unrelated crime. *Id.* at 348. The mere fact that the admitted testimony related to evidence at a prior trial in which Dowling was acquitted was insufficient to raise double jeopardy concerns: "unlike the situation in *Ashe v. Swenson*, the prior acquittal did not determine an ultimate issue in the present case." *Id.* at 348.

7. The *Ashe* test established a practical method to determine what a jury necessarily decided and to fully implement a jury's acquittal. As the court of appeals found here, the jury necessarily decided that Yeager did not possess the insider information he allegedly used in the pending insider trading counts. Under this Court's collateral estoppel jurisprudence and the traditional deference given to jury acquittals, that finding must be applied to bar the

pending charges.

II. Hung Counts Should Not Be Given Any Weight In The *Ashe* Test.

A. Consideration Of Hung Counts Is Inconsistent With Historical Practice.

1. In contrast to the deference given to acquittals as an expression of a jury's sovereignty, there is no equivalent deference given to a jury's inability to speak its will. Hung counts simply have not been viewed as decisions by the jury, and are not entitled to the deference usually accorded to those decisions. The Court therefore should not adopt a rule that allows consideration of hung counts as part of the *Ashe* analysis. In a mixed verdict of acquittals and hung counts, consideration of the hung counts as if they were decisions inconsistent with the acquittals would violate the protection against double jeopardy by allowing the government to relitigate issues that have already been resolved in the defendant's favor.

Unlike the task of discerning the basis for a jury's acquittals, examining hung counts to understand their basis is necessarily a fruitless endeavor because of the limitations traditionally placed on inquiring into a jury's deliberations. When the burden of identifying the reason for the jury's hung verdict is placed on the defendant—as it was on Yeager by the court of appeals—the defendant will never be able to establish what the jury necessarily decided. The result would be that criminal collateral estoppel could never apply to hung counts. Attributing decisional significance to a jury's inability or unwillingness to reach a verdict, as the court of appeals did here, would elevate the jury's

failure to render a decision to the equivalent of its *complete verdicts* of acquittal and would be inconsistent with both the favored status of verdicts and the hostility toward hung counts.

2. Mistrials caused by hung juries were a rare and disfavored occurrence when the Constitution and Bill of Rights were adopted. As a result, Constitutional questions about hung counts must be viewed in the light of the Framers' views on the role of jury verdicts and the protection against being held twice in jeopardy. *Cf. Apprendi v. New Jersey*, 530 U.S. 466, 518 (2000) (Thomas, J., concurring) ("Today's decision, far from being a sharp break with the past, marks nothing more than a return to the *status quo ante*—the status quo that reflected the original meaning of the Fifth and Sixth Amendments."). At common law, an empanelled jury could not be dismissed before it rendered a verdict. "A jury sworn and charged in case of life or member, cannot be discharged by the court or any other, but they ought to give a verdict." 1 E. Coke, Institutes 227(b) (6th ed. 1681). The rule against discharge before verdict appears to have originated in the medieval English practice of drawing the jury from the vicinage in which the crime was alleged to have been committed. Marion S. Kirk, *Jeopardy During the Period of the Year Books*, 82 U. Pa. L. Rev. 602, 609-12 (1934). Since jurors were chosen for their personal knowledge of the facts, each jury was uniquely qualified to decide the case before it, and therefore finality was required. *Id.* at 612.

The English courts used coercive techniques to ensure that each jury reached a unanimous verdict. During deliberations, jurors were deprived of "meat, drink, fire, or candle, . . . till they are all unanimously agreed." Blackstone, 3 Commentaries

375 (1978). And "if the jurors do not agree in their verdict before the judges are about to leave the town, . . . the judges are not bound to wait for them, but may carry them round the circuit from town to town in a cart." *Id.* at 376. Unsurprisingly, English juries decided cases quickly, sometimes hearing twelve or more trials in succession before retiring to decide all the cases at once. J.M. Beattie, Crime and the Courts in England, 1660-1800 395 (1986).

By the 1730s, juries left the courtroom to deliberate where the issues were especially complex but typically deliberated for no more than a few minutes. *Id.* at 396-99. The English practice of forcibly detaining a criminal jury unable to reach a unanimous verdict without food or drink, and without heat in the winter, persisted until 1870. *See* William Forsyth, History of Trial by Jury 201 (Lawbook Exchange, Ltd. 2d ed. 1994) (1974).

Early American juries were subjected to similar coercive tactics. "Judges used to urge deadlocked juries to resolve their disagreements through such coercive measures as the denial of food and drink, excessive deliberation hours, and the threat of confinement." Saul M. Kassin, *The American Jury: Handicapped in the Pursuit of Justice*, 51 Ohio St. L.J. 687, 709 (1990). These juries returned verdicts in nearly all cases, and ordinarily did so with little or no deliberation. Daniel D. Blinka, *Trial by Jury on the Eve of Revolution: The Virginia Experience*, 71 UMKC L. Rev. 529, 577-78 (2003). Consequently, mistrials caused by hung juries were virtually nonexistent in colonial America. No mistrials occurred, for example, in New Jersey criminal cases from 1749 to 1757. *See* George C. Thomas III, *Colonial Criminal Law and Procedure: The Royal Colony of New Jersey*, 1749-57, 1 N.Y.U. J. L. &

Liberty 671, 703-04, tbl.1 (2005). And in Virginia in the mid-eighteenth century, less than one jury per year was unable to reach a verdict. Blinka, 71 UMKC L. Rev. at 580.

3. This Court has consistently acknowledged the importance of considering criminal practices as they existed in the thirteen colonies and England when the Bill of Rights was adopted when evaluating the proper function of the jury, as guaranteed by constitutional provisions such as the Sixth Amendment. *See Crawford v. Washington*, 541 U.S. 36, 43-50 (2004).

The Court's decisions recognize the need to conform the jury's historical function to the realities of the contemporary disputes presented to them. When a court is "faced with the issue of preserving an ancient guarantee under a new set of circumstances," it should ensure "that the jury [will] still stand between the individual and the power of the government." *See United States v. Booker*, 543 U.S. 220, 237 (2005). Because hung juries were a rarity when the Bill of Rights was adopted, the Framers did not focus on them when they considered limiting the power of the government to twice hold a defendant in jeopardy.

4. The development of complex criminal codes, however, increased the likelihood that a jury would be unable to reach a verdict. As hung counts became more prevalent, courts struggled with whether retrial was barred by the Double Jeopardy Clause following dismissal of a hung jury. Many of the courts that initially considered the question held that a defendant could not be subjected to a second trial following the discharge of a hung jury. *See, e.g.*, *Garrigues*, 2 N.C. at 242 (hung jury found to be "strong evidence of the party's innocence" precluding

retrial).

The first known mistrial in an American federal court based on a jury's inability to agree on a verdict occurred in 1807. *See United States v. Workman*, 28 F. Cas. 771 (D. La. 1807). That court, while describing the notion as obsolete, acknowledged the existence of a "general doctrine prohibiting the discharge of a jury in all cases." *Id.* at 773. Shortly thereafter, this Court settled the issue, holding that a jury could be discharged before verdict only in situations of "manifest necessity." *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824). The Court cautioned that the power to declare a mistrial when the jury could not reach a verdict "ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner." *Id.* The issue of whether courts had authority to discharge a jury prior to verdict persisted even after *Perez*. Janet E. Findlater, *Retrial After a Hung Jury: The Double Jeopardy Problem*, 129 U. Pa. L. Rev. 701, n.20 (1981) (citing cases). While hung counts were then tolerated, they were certainly not encouraged, and courts attributed no meaning to them.

5. By the mid-nineteenth century, American courts abandoned the physically coercive tactics employed at common law to force complete verdicts, and instead began instructing deadlocked jurors to reach a verdict even if it required a reexamination of their beliefs. While the strategy may have changed, the objective of obtaining a unanimous verdict remained the same.

In *Allen v. United States*, the Court approved

instructing a jury "that it was their duty to decide the case if they could conscientiously do so" and that any dissenting juror "should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself." 164 U.S. 492, 501 (1896).

In approving an instruction that explicitly directed dissenting jurors to reassess their conclusions in the hopes of reaching a unanimous verdict, the Court emphasized that "[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves." *Id.* The Court has repeatedly affirmed the holding in *Allen*. *See Jones v. United States*, 527 U.S. 373, 382 (1999) (the "very object of the jury system is to secure unanimity" and a hung verdict is "a breakdown in the deliberative process"); *Lowenfield v. Phelps*, 484 U.S. 231 (1988).

The *Allen* line of cases demonstrates the judiciary's continuing belief that a jury should be encouraged to reach a unanimous verdict. *See* Kassin, 51 Ohio St. L.J. at 709 ("The [*Allen*] charge and the relaxation of a unanimous verdict requirement are driven by a contempt for the hung jury and the costs incurred by a mistrial.").

A hung count is not an exercise by the jury of its exercise of sovereign power; it merely demonstrates a failure to exercise that power. Judicial efforts to encourage a jury to utilize its power to convict or acquit demonstrate that it is only the definitive expression of a jury's will that can be credited. The corollary, that a jury's failure to reach a verdict can be given no weight in determining what it decided, is equally important.

B. Courts Do Not Attribute Decisional Significance To Hung Counts.

1. This Court has never attributed any meaning to hung counts. In *Perez*, the defendant was tried for a capital offense, and "the jury, being unable to agree, were discharged by the Court from giving any verdict upon the indictment." 22 U.S. (9 Wheat.) at 579. After noting that a court should discharge a jury only in a case of manifest necessity, the Court held that the jury's failure to reach a verdict was not a decision about the charges against the defendant, "since the prisoner has not been convicted or acquitted, and may again be put upon his defence." *Id.* at 580.

The majority of courts of appeals to consider the issue has held that hung counts should be given no weight in a collateral estoppel analysis.[3] The Sixth, Seventh, Ninth, and Eleventh Circuits agree that the failure of a jury to reach agreement on some counts cannot deprive an acquittal of collateral estoppel consequences. *See United States v. Ohayon*, 483 F.3d 1281 (11th Cir. 2007); *United States v. Romeo*, 114 F.3d 141, 144 (9th Cir. 1997); *Bailin*, 977 F.2d at 276; *Frazier*, 880 F.2d at 885-86. The Second Circuit has similarly recognized that hung counts do not create an inconsistency that prevents the application of collateral estoppel. *See United States v. Citron*, 853 F.2d 1055, 1059 (2d Cir.

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[3] The First and District of Columbia Circuits, applying *Powell*, have concluded that when acquittals and hung counts share a common element, there is an inconsistency between them that prevents application of collateral estoppel to the hung counts. *See United States v. Aguilar-Aranceta*, 957 F.2d 18, 24-25 (1st Cir. 1992); *White*, 936 F.2d 1326.

1988) ("[A]n acquittal accompanied by a failure to reach a verdict may appropriately give rise to collateral estoppel if the acquittal necessarily determined facts in the defendant's favor . . . .").[4]

These courts agree that the *Ashe* collateral estoppel analysis must focus on the counts on which the jury actually reached a verdict, because consideration of why the jury failed to reach a verdict on other counts requires speculation inconsistent with *Ashe* and *Powell*. The inconclusiveness inherent in a hung count makes it impossible to find an inconsistency between an acquittal and a hung count, and therefore, "when a jury acquits on some counts in a multicount indictment, principles of collateral estoppel may preclude retrial of charges upon which the jury was unable to agree at the earlier trial." *Frazier*, 880 F.2d at 883.

"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. The inquiry under *Ashe* is what the jury actually decided when it reached its verdict, not on why the jury could not agree on the deadlocked count." *Romeo*, 114 F.3d at 144. The Seventh Circuit held in *Bailin* that:

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[4] The Court of Appeals of Maryland follows the majority rule as well. *See Ferrell v. State*, 567 A.2d 937, 944 (Md. 1990). The Fourth and Eighth Circuits have not specifically addressed whether the presence of hung counts bars collateral estoppel, but have conducted an *Ashe* analysis even when the jury hung on some counts, implying that the mere presence of hung counts does not prevent the application of collateral estoppel. *See United States v. Goodine*, 400 F.3d 202, 209-10 (4th Cir. 2005); *United States v. Bearden*, 265 F.3d 732, 735-36 (8th Cir. 2001).

> [T]he jury's failure to reach a verdict is too inconclusive to qualify as inconsistent for the purposes of issue preclusion. The powerful double jeopardy protections that attach to acquitted counts should not be outweighed by the inconclusiveness inherent in hung counts.

977 F.2d at 279-80. Most recently, in *Ohayon*, the Eleventh Circuit rejected the notion that the jury's verdicts could have resulted from juror error, "[b]ecause we ask what a rational jury would have done." 483 F. 3d at 1288. Similarly, the court refused to consider whether the jury had simply nullified by refusing to convict on a hung count because, "[w]hile the possibility of jury nullification may influence the strategy of trial lawyers, it cannot enter into the analysis of courts making collateral estoppel inquiries." *Id.*

Ohayon also rejected the government's argument "that we should search for the basis of a mistried count," holding "that the search for the basis of a mistried count *will necessarily be in vain*." *Id.* at 1289 (emphasis added). The court added, "[i]n truth, the failure of a jury to reach a verdict is not a decision; it is a failure to reach a decision. A partial verdict does not comprise two decisions that we must try to reconcile, because the mistried count is not a decision for which we can discern, or to which we can impute, a single, rational basis." *Id.* at 1289-90.

2. In *Richardson v. United States*, 468 U.S. 317 (1984), this Court refused to attribute any decisional significance to hung counts. The jury acquitted Richardson on one of three counts of narcotics violations but hung on the remaining counts. *Id.* at 318-19. Richardson then moved to dismiss the hung

counts, claiming that the government's failure to submit sufficient evidence to convict on these counts barred his retrial. *Id.* at 321. Like the government in this case, Richardson attempted to attribute decisional significance to the jury's failure to reach a verdict.

The Court refused to attribute any decisional significance to the hung counts, holding that double jeopardy "applies only if there has been some event, such as an acquittal, which terminates the original jeopardy." *Id.* at 325. Therefore, "a trial court's declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy," even where there has been an acquittal on another count. *Id.* at 326. The Court rejected the notion "that a hung jury is the equivalent of an acquittal." *Id.* at 325. Therefore, Richardson could not use the jury's failure to reach a verdict as an indication that it must have been presented with insufficient evidence. *Id.* at 325-26. Notably, Richardson never argued that his acquittal by the jury collaterally estopped his reprosecution on the hung counts.

3. In its argument to the court of appeals, the government started with the *Richardson* holding—that the mistrial of a count does not bar a retrial on that count—and made the leap that if "the Double Jeopardy Clause does not protect a defendant against a retrial on a hung count when the evidence as to that very count is insufficient, it makes little sense to conclude a defendant should be able to bar his retrial because of the jury's verdict on other counts." Appellee's Br. at 24.

This argument conflates traditional double jeopardy and the related doctrine of collateral estoppel. Traditional double jeopardy principles prevent the government from trying a defendant for

the same crime of which he has previously been convicted or acquitted. This doctrine is rooted in the common law pleas of *autrefois acquit* and *autrefois convict*. Collateral estoppel, on the other hand, applies when an acquittal on one count resolves a factual issue on a wholly different count. In *Ashe*, the second prosecution was not prohibited by traditional double jeopardy, because the robbery of the first poker player was not the same crime as the robbery of the second poker player; instead, it was prohibited by collateral estoppel. Thus, to accept the government's argument that the doctrines are coterminous would be to overrule *Ashe*.[5] Whatever *Richardson* has to say about traditional double jeopardy principles, it was not a collateral estoppel case.

As in *Richardson*, the Court here should find that the hung counts decided nothing about the charges against Yeager. Under *Ashe*, it should look to the acquittals to determine the effect of the jury's verdict. The court of appeals would place an impossible burden on defendants by requiring them to explain the reason why a jury hung. This task is necessarily fruitless, because hung counts have no decisional significance. As a practical matter, it is also impossible, because well-established policies prevent inquiries into jury deliberations or speculation about why a jury hung. This Court should reverse, because double jeopardy is simply too important a right to be left to speculation or constrained by impossible burdens.

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[5] In *Bailin*, 977 F.2d at 275, the court of appeals rejected this very argument, holding that it required reversal of *Ashe* and would mean that collateral estoppel never applied. *Id.*

III. Yeager Established That An Essential Element Of The Pending Charges Was Decided In His Favor By The Jury's Acquittals.

1. The court of appeals concluded that, when the hung counts were not considered, the *Ashe* test established that Yeager did not possess insider information. But the court of appeals went on to give decisional significance to the jury's failure to act on those counts. In elevating the jury's failure to decide to the same significance as the clear expression of its will in its acquittals, the court of appeals placed itself at odds with the long history of according great deference to acquittals. At the same time, the court created a nearly impossible standard for criminal defendants invoking the protections of collateral estoppel. In all but the rarest of circumstances, they will not be able to demonstrate why a jury *failed* to reach a verdict. Here, Yeager was precluded from interviewing the jurors and thus lacked any ability to meet the burden imposed on him. *See* Pet. App. 67a.

2. The court of appeals was correct that when the acquittals are considered without giving any weight to the hung counts, "collateral estoppel bars a retrial," because the record shows that the jury determined that Yeager did not possess insider information. Pet. App. 21a-22a. As in *Ashe*, where the jury was asked to determine whether Ashe was in fact one of the robbers, the jury in this case faced a stark choice. The government presented the charges against Yeager as seamless and unified, and it encouraged the jury to accept or reject them wholesale. The district court also recognized that Yeager's defense theory was an all-or-nothing good-

faith defense "that he believed in the business plan, believed the network operated properly, applied for a patent, and that he worked hard to make things work." Pet. App. 55a-56a.

Faced with two alternatives, the jury rejected the government's theory and decided that since Yeager believed in EBS and its products and services, he could not have possessed the insider information. Yeager simply could not have simultaneously held the belief that all was well at EBS, while also holding the radically different view of its failure attributed to him in the government's case. The insider information he allegedly traded on was nothing more than the knowledge that statements at the 2000 Analysts Conference and in press releases were false. Consequently, by acquitting Yeager of the securities fraud charge, the wire fraud charges, and the conspiracy related to both, the jury rejected the government's failure-to-disclose theory and accepted his good-faith defense.

3. The government crafted the Fifth Superseding Indictment to include a failure-to-disclose theory in each of the counts on which the jury acquitted Yeager. The government urged the jury to convict Yeager if the truth about EBS was left out of the charged press releases or the presentation at the 2000 Analysts Conference, even if he did not make or cause any false statements. R-20320, R-13593-94.

The district court instructed the jury to consider in its decision on the securities fraud count whether Yeager failed to disclose material information in his possession. J.A. 104-05. With its acquittal on that count, the jury found that Yeager did not make either false statements *or material omissions* at the 2000 Analysts Conference. J.A. 25. Yeager's acquittals on the wire fraud charges relating to the

press releases were also rejections of both the misrepresentations and the failure-to-disclose theory. When charging the jury on wire fraud, the district court included failure to disclose as a basis for liability, just as it did for the securities fraud and conspiracy counts: "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.

This same failure to disclose the "truth" about EBS was the core of the insider trading charges. Insider trading qualifies as a "deceptive device" under § 10(b) of the Securities Exchange Act of 1934 because a relationship of trust between insiders of a corporation and the shareholders creates "a *duty to disclose or to abstain from trading* because of the necessity of preventing a corporate insider from taking unfair advantage of uninformed stockholders." *United States v. O'Hagan,* 521 U.S. 642, 652 (1997) (emphasis added). The failure to disclose the insider information is the key element of insider trading—if the information were disclosed to the public, the trading would not be "insider" trading. *See Dirks v. SEC*, 463 U.S. 646, 654 (1983) ("[A]n insider will be liable under Rule 10b-5 for inside trading only where he fails to disclose material nonpublic information before trading on it and thus makes 'secret profits.'"); *see also Chiarella v. United States*, 445 U.S. 222, 231 (1980).

The government's failure-to-disclose theory of insider trading was evident in its opening statement, in which the prosecutor described Yeager's role at the 2000 Analysts Conference:

> Now, Scott Yeager barely said a word during that presentation. . . . He knew they were

> going to present a false picture to the analysts. He chose to let that go forward and for the public to be none the wiser. And you will see that he profited directly and handsomely from that choice.

R-5716.

When Yeager sought particularity on the insider trading charges, *see* R-1649, the government provided an informal bill of particulars, R-21724, stating that "the material omissions made by the defendants and their co-conspirators *encompass the same issues* as the affirmative factual statements that have already been identified" in an earlier letter describing the affirmative misrepresentations in the press releases and at the 2000 Analysts Conference. R-21724-25. The government thus clarified that the failure to cure misrepresentations at the 2000 Analysts Conference and in press releases constituted the alleged criminal omissions.

The letter also listed failures to disclose at the 2000 Analysts Conference, including the striking claim that the defendants omitted the fact that "EBS executives were . . . planning to sell stock despite being in possession of material, non-public information." R-21726. In other words, Yeager allegedly failed to disclose that he was planning to engage in insider trading.

4. In accordance with the court's instructions, the jury had to convict Yeager on the securities fraud, wire fraud and conspiracy counts if it found that Yeager knew the "truth" about EBS and failed to disclose it at the time of the 2000 Analysts Conference, the issuance of the press releases, or when he traded Enron stock. If the jury determined that Yeager sat at the 2000 Analysts Conference,

with full knowledge that significant false statements were made and said nothing as "the technological capabilities, the value, the revenue, and the business performance of EBS" were misrepresented, R-21325, it would have convicted him of securities fraud. Similarly, the jury would have convicted Yeager of wire fraud if it found that he knew that the press releases were false, and that he failed to disclose the truthful information that would correct these misstatements. The only realistic interpretation of the jury's verdict is that it determined that Yeager did not believe that these statements were false and therefore did not possess the inside information that the government claimed.

The jury's rejection of the government's failure-to-disclose theory reaches all of the insider trading charges in the Eighth Superseding Indictment because all of the charged trades occurred after the 2000 Analysts Conference but before the last allegedly false press release. Accordingly, Yeager was acquitted of failing to disclose insider information throughout that entire period.

Even though the jury determined that Yeager did not possess and fail to disclose insider information during this period, the government charged in the Eighth Superseding Indictment that Yeager failed to disclose that very same insider information in connection with charged trades that are all within the same four-month period. The following chart illustrates this temporal overlap. **Bold** text shows when Yeager allegedly failed to disclose inside information in trades, and *italicized* text shows when Yeager was acquitted of failing to disclose that very same information:

Date of Charged Conduct (all in the year 2000)	Count	Current Status
January 20	*Count Two of Fifth Superseding Indictment*	*Acquitted of failing to disclose inside information*
January 21	**Count One of Eighth Superseding Indictment**	**Charged with trading on inside information**
January 31	*Count Three of Fifth Superseding Indictment*	*Acquitted of failing to disclose inside information*
March 22	**Count Two of Eighth Superseding Indictment**	**Charged with trading on inside information**
March 30	*Count Four of Fifth Superseding Indictment*	*Acquitted of failing to disclose inside information*
April 11	*Count Five of Fifth Superseding Indictment*	*Acquitted of failing to disclose inside information*
April 12	**Count Three of Eighth Superseding Indictment**	**Charged with trading on inside information**

May 10	**Count Four of Eighth Superseding Indictment**	**Charged with trading on inside information**
May 11	**Count Five of Eighth Superseding Indictment**	**Charged with trading on inside information**
May 15	*Count Six of Fifth Superseding Indictment*	*Acquitted of failing to disclose inside information*

The government's position that the jury's verdict allows it to reprosecute Yeager for insider trading during this period flies in the face of the jury's rejection of the government's failure-to-disclose theory. For example, the government now seeks to convict Yeager of trading on inside information on May 10 and 11, 2000, even though a jury has already determined that he did not possess and fail to disclose *that very same information* when a press release was issued four days later on May 15.

The government offered the jury several different ways to convict Yeager of conspiracy, securities fraud, and wire fraud based on a failure to disclose, but the jury rejected them all. Because the jury found that Yeager did not fail to disclose the specified inside information through the entire relevant period in early 2000, that verdict collaterally estops the government from trying to prove that he used that same information to trade in Enron stock during the same time period.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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