No. 08-40

In the Supreme Court of the United States

JOSEPH HIRKO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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RULE

REPLY BRIEF FOR PETITIONER

The Solicitor General has filed a "Brief in Opposition," but it more accurately resembles a grudging acquiescence. The government concedes that the primary question presented – whether a court may refuse to give collateral estoppel effect to an acquittal under *Ashe* v. *Swenson*, 397 U.S. 436 (1970), solely because the jury also hung on one or more factually related counts – has divided the circuits. And the government does not dispute that the Fifth Circuit's rule renders the constitutional protections of *Ashe* categorically inapplicable to partial-verdict cases, or that Hirko's case squarely presents this issue.

Nonetheless, the government suggests that review is unnecessary "at this time." Br. in Opp. 21. First, the government attempts to downplay the extent of the conflict by claiming that the Eleventh Circuit may "reconsider" its conflicting decision and that decisions by other circuits are in mere "tension" with the rule adopted below. But neither assertion has the slightest foundation; indeed, both the decision below and the Eleventh Circuit have expressly acknowledged this stark and widespread conflict. Second, the government claims that the issue does not arise with sufficient "frequency" to merit further review. But that was not the government's view when it urged the Eleventh Circuit to consider this question of "exceptional importance" *en banc* just last year. The government also asserts that Hirko cannot demonstrate that the jury necessarily decided a fact in his favor that would preclude retrial. But the government merely recycles factbound arguments that failed to persuade even the court below and are no obstacle to this Court's review.

When all is said and done, the government's brief is devoted largely to defending the result reached below (but, notably, not the Fifth Circuit's reasoning). As we briefly explain, the government's theory fares no better than that adopted by the court below. In any

event, the government's opposition should be viewed for what it is: a prelude to the full consideration on the merits that this question plainly warrants.[1]

I. The government does not seriously dispute that the decision below deepens a conflict among the federal courts of appeals. The government's attempts to downplay the scope of that divide are insubstantial.

A. The government acknowledges that the Fifth Circuit's decision and those by three other courts of appeals squarely conflict with *United States* v. *Ohayon*, 483 F.3d 1281 (11th Cir. 2007). See Br. in Opp. 17, 20. The government suggests, however, that the Eleventh Circuit might "reconsider" *Ohayon* because the decision below adopted a competing interpretation of a 1979 Fifth Circuit case upon which both *Ohayon* and the opinion below rely. That suggestion is mere wishful thinking.

As noted in our petition (at 17 n.7), the Fifth Circuit read *United States* v. *Larkin*, 605 F.2d 1360

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[1] On October 14, 2008, Hirko entered a plea of guilty pursuant to a plea agreement with the United States. *United States* v. *Hirko*, Crim. No. H-03-93 (S.D. Tex), Dkt. 1536. The plea was entered pursuant to Fed. R. Crim. P. 11(c)(1)(C), which allows the parties to agree upon a specific sentence that "binds the court once the court accepts the plea agreement." If – and only if – the district court accepts the binding plea agreement, Hirko is required to withdraw his Double Jeopardy challenge. The district court, however, will not rule on the plea agreement until well *after* this Court decides whether to grant certiorari in these cases. See Dkt. 1537 (setting sentencing for March 3, 2009). If this Court grants certiorari, the district court's decision on Hirko's plea may be further postponed until this Court has resolved these cases on the merits. Accordingly, counsel for Hirko and counsel for the government have agreed that Hirko's plea does not moot his certiorari petition.

(5th Cir. 1979), to require the consideration of hung counts when evaluating the collateral estoppel effects of an acquittal. Pet App. 23a. *Ohayon*, by contrast, read *Larkin* to compel exactly the opposite conclusion. See 483 F.3d at 1289. The government's suggestion that the Eleventh Circuit "may be willing to re-examine" *Ohayon* now that the Fifth Circuit has offered a competing interpretation of *Larkin* (Br. in Opp. 21) is groundless. The Eleventh Circuit is bound by Fifth Circuit cases decided before October 1, 1981, see *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), but not by Fifth Circuit decisions that *interpret* pre-1981 cases. Indeed, the Eleventh Circuit has specifically held that subsequent Fifth Circuit cases "cannot displace" the Eleventh Circuit's interpretation of pre-1981 cases. *United States* v. *Thomas*, 916 F.2d 647, 651 n.4 (11th Cir. 1990).

B. The government also mistakenly claims that decisions by the Sixth, Seventh, and Ninth Circuits are in mere "tension" – but not actual conflict – with the Fifth Circuit's rule. Contrary to the government's assertions, those decisions do not rest on their "particular facts" (Br. in Opp. 19). Rather, each case squarely holds that the presence of a hung count is legally irrelevant to the collateral estoppel effect of an acquittal. *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, we will not speculate on why the jury could not agree."); *United States* v. *Bailin*, 977 F.2d 270, 276 (7th Cir. 1992) ("In a retrial of a mistried count in a multicount indictment, does direct estoppel bar the government from relitigating issues that were necessarily and finally decided in the defendant's favor by reason of the jury's partial acquittal on other counts? We hold that it does."); *United States* v.

Frazier, 880 F.2d 878, 883 (6th Cir. 1989) (if a defendant can show that "a verdict of guilty [at the second trial would] be based on evidence that necessarily formed the basis of not guilty findings on other counts at the first trial, * * * then principles of collateral estoppel will preclude a subsequent trial of those counts"). Tellingly, the government does not identify a single case from those jurisdictions that considers a hung count in the collateral estoppel analysis, or that otherwise suggests that those decisions are somehow limited to their "particular facts."

Moreover, the Fifth Circuit admitted that its holding forced it to "part ways with [its] sister circuits." Pet. App. 27a. The Eleventh Circuit's decision in *Ohayon* likewise acknowledged the widespread conflict on this question. See 483 F.3d at 1290. Notably, the government simply ignores *Ferrell* v. *State*, 567 A.2d 937, 944 (Md. 1990), which held that the federal Constitution precludes the government from relying on mistried counts to evade the collateral estoppel consequences of an acquittal. See Pet. 19 (citing and quoting same).

The government briefly suggests that review would be "premature" here because the Fifth Circuit "left open the possibility that collateral estoppel may apply in mixed verdict cases." Br. in Opp. 14 n.4. But in the very same footnote, the government effectively *concedes* that "the analysis adopted by the court of appeals will in practice produce the same result as a categorical rule that collateral estoppel never applies in mixed verdict cases." *Ibid.* The fact that the Fifth Circuit mistakenly believes that consideration of hung counts will not categorically preclude application of

Ashe to partial-verdict cases does not diminish the significance or effect of its ruling.[2]

II. The government asserts that review is not warranted because the issue "arises relatively infrequently" and is not outcome-determinative in Hirko's case. Br. in Opp. 21, 22-23. Neither contention has merit.

A. Just last year, the government urged the Eleventh Circuit to grant rehearing *en banc* in *Ohayon*, averring that the issue was one of "exceptional importance." *Ohayon* Reh'g Pet. at i. The government cannot now disavow that assertion simply to defeat review in this case. Moreover, it is hardly fair to say that the issue arises "infrequently" when eight circuits and one state high court have directly addressed the question and two more courts have rejected the argument that collateral estoppel is categorically inapplicable to partial-verdict cases. See *United States* v. *Mespoulede*, 597 F.2d 329, 336-337 (2d Cir. 1979);[3] *United States* v.

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[2] The government does not dispute that this issue is squarely presented in Hirko's case. Indeed, the government expressly agrees "that the [Fifth Circuit's] decision is most reasonably read" to rely on the presence of hung counts to conclude that Hirko is not entitled to the collateral estoppel effects of the jury's acquittals. Br. in Opp. 14-15 n.5. That is hardly surprising, because the alternative reading of the Fifth Circuit's opinion – *i.e.*, that the jury acquitted Hirko of money laundering simply because it "could not decide" whether he committed the predicate offenses (Pet. App. 18a) – is patently erroneous. See Pet. 28-31. Notably, the government does not even address, much less defend, such a holding; in the event this Court were to conclude that the Fifth Circuit intended this alternative reading, summary reversal is warranted.

[3] Contrary to the government's assertion (Br. in Opp. 19 n.7), the essential holding of *Mespoulede* remains valid. See *Bailin*,

Felder, 548 A.2d 57, 66 (D.C. 1988); Pet. 23 (discussing same). And the government appears simply to have overlooked numerous instances in which this issue has arisen in recent years.[4]

In any event, the government ignores the long shadow this rule casts over countless criminal prosecutions. In jurisdictions where the government's failure to prove hung counts is rewarded by eliminating the collateral estoppel effects of an acquittal, prosecutors will have good reason to overcharge their cases in order to maximize that advantage. See Pet. 26-27. The government does not deny that the rule adopted below would give prosecutors just such an incentive. Rather, the

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977 F.2d at 276-277 ("A number of circuits * * * have held that issue preclusion 'bar[s] the Government from relitigating a question of fact that was determined in defendant's favor by a partial verdict.'" (quoting *Mespoulede*, 597 F.2d at 336)). *Dowling* v. *United States*, 493 U.S. 342 (1990), "partially overruled" *Mespoulede* only to the extent the latter "held that issue preclusion applies to *evidentiary* * * * facts." *Bailin*, 977 F.2d at 277 n.9 (emphasis added). Tellingly, the government does not point to a single case within the Second Circuit that questions *Mespoulede*'s repudiation of the argument the government advances here.

[4] See, *e.g.*, *Commonwealth* v. *States*, 938 A.2d 1016 (Pa. 2007); *People* v. *Hodge*, 802 N.Y.S.2d 613 (N.Y. Sup. Ct. 2005); *People* v. *Morales*, 112 Cal. App. 4th 1176 (Cal. Ct. App. 2003); *People* v. *Wharton*, 779 N.E.2d 346 (Ill. App. Ct. 2002); *State* v. *Howell*, No. CR-00-0236-PR (Ariz. Sept. 26, 2000) (unpublished), aff'g No. 1 CA-CR 98-0886 (Ariz. Ct. App. Mar. 2, 2000) (unpublished); *Griffin* v. *State*, 717 N.E.2d 73 (Ind. 1999); *Craigmire* v. *State*, No. 03C01-9710-CR-00440, 1999 WL 508445 (Tenn. Crim. App. July 20, 1999) (unpublished); *Aparo* v. *Super. Ct. for Jud. Dist. of Hartford/New Britain at Hartford*, 129 F.3d 113 (2d Cir. 1997) (unpublished).

government insists that "[t]he Double Jeopardy Clause is * * * not designed to limit the number of charges that prosecutors bring." Br. in Opp. 16. The Double Jeopardy Clause is, however, very much concerned with overcharging when used as a tool to give prosecutors multiple attempts to obtain a conviction. *Ashe*, 397 U.S. at 445-446; Br. *Amici Curiae* NACDL and Criminal Law Professors 19-22.

B. The government also claims that Hirko cannot "show that the jury necessarily found a fact in his favor that is an essential element of the counts on which the jury deadlocked." Br. in Opp. 22. But that argument has no more merit here than it did before the court of appeals, where it was *unsuccessful*. The Fifth Circuit expressly acknowledged that Hirko's sole defense to the 2000 Money Laundering Counts was that he did not commit the predicate offenses. Pet. App. 16a. As the court of appeals observed, Hirko had "stipulated to the other elements" of money laundering, other than the commission of the predicate acts. Pet. App. 17a. Accordingly, the only possible basis for the jury's acquittal on the money laundering counts was that Hirko did not commit any of the predicate offenses upon which the government seeks to retry him.

The government argues that "the indictment and jury instructions could rationally have led the jury to believe that it had to convict Hirko on *all* of the predicate securities, wire fraud, and insider trading counts in order to convict him on the money laundering counts." Br. in Opp. 22. That is precisely the same argument the government advanced – again, *without success* – to the Fifth Circuit.

Indeed, the government subtly (but significantly) mischaracterizes the court of appeals' opinion to suggest that this argument had some traction below. According to the government, the Fifth Circuit

> observed that the jury was instructed that it could find Hirko guilty of money laundering only if the government proved that he engaged in transactions with funds "derived from a specified unlawful activity," and the instructions defined "specified unlawful activity" as "wire fraud" ***and*** "fraud in the sale of securities" (including insider trading).

Br. in Opp. 9 (emphasis added). The government's careful phrasing implies that the Fifth Circuit agreed with the government that the jury was instructed that it could acquit on money laundering only if the government had failed to prove ***all*** of the predicate offenses.

Not so. Here is what the Fifth Circuit actually said: "Under the jury instructions for money laundering, the Government must prove that the funds transacted were 'derived from a specified unlawful activity,' which the district court defined as 'wire fraud' ***or*** 'fraud in the sale of securities.'" Pet. App. 17a (emphasis added). Thus, the Fifth Circuit was unpersuaded by the government's reading of the jury instructions. Indeed, the government simply ignores those instructions that explained to the jury – in no uncertain terms – that the money laundering counts required the government to prove only that Hirko had committed "*some* criminal offense" and that defined "criminally derived property" as "any property constituting or derived from the proceeds of *a* criminal offense." Tr. 13670 (emphasis added); Pet. 6 (quoting same).

III. While the government seeks to preserve the result below, it does not defend the Fifth Circuit's reasoning. Instead, the government renews its argument that *Richardson* v. *United States*, 468 U.S. 317 (1984), and *United States* v. *Powell*, 469 U.S. 57 (1984), require that "the doctrine of collateral estoppel should never bar the government from retrying a defendant on a

count on which a jury was unable to reach a verdict when the same jury acquitted him on another count." Br. in Opp. 12. The government's theory is wrong and only underscores the need for this Court's review.

As we have explained (Pet. 26-27), *Richardson* and *Powell* cannot bear the weight the government's theory requires. *Richardson* held that a jury's failure to reach a verdict on a particular count does not, standing alone, preclude retrial on that count. 468 U.S. at 324-326. The government claims that it "follows" from *Richardson* that there is *never* a double jeopardy bar against retrying mistried counts (Br. in Opp. 12), but *Richardson* did not remotely say that. To the contrary, *Richardson* confirmed that a hung jury is "not an event" for double jeopardy purposes, *id.* at 326; the government's theory would nevertheless allow such a "non-event" to *eliminate* the double jeopardy consequences afforded to a verdict of acquittal. See Pet. 27.

What is more, if the government's contrary reading of *Richardson* were correct, then *Ashe* itself was wrongly decided. 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; this Court nevertheless held that Ashe's prosecution on the new charge violated the Double Jeopardy Clause. *Id.* at 446-447.

The courts of appeals have made exactly this point, noting that the government's 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 *Bailin*, 977 F.2d at 275)). Indeed, the government has acknowledged elsewhere "that the logical conclusion of its argument renders collateral estoppel superfluous." *Bailin*, 977 F.2d at 275 n.6 (citing government's reply

brief). *Richardson* cannot fairly be read to mandate that remarkable result, which is perhaps why the government's theory has been repudiated by the Sixth, Seventh, Ninth, and Eleventh Circuits, 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).

Likewise, *Powell* held only that inconsistent *verdicts* of acquittal and conviction do not entitle a defendant to relief. 469 U.S. at 65. *Powell* did not address the question whether the double jeopardy protections that arise from a *verdict* of acquittal are trumped by a *non-verdict* on another count. Indeed, *Powell* rests on the fundamental respect courts owe to unanimous decisions reached by a jury; it would be odd to think that the collateral estoppel consequences afforded to such a decision could be set aside based solely on the jury's *failure* to decide another, factually overlapping count.

To say the very least, the government's position would require a significant extension of *Richardson* and *Powell*. This Court – not the government or a minority of courts of appeals – ought to decide whether to extend those cases to the circumstances presented here. And to the extent the government's reading of *Richardson* would implicitly overrule *Ashe*, such a sweeping decision ought to come, if at all, only after this Court's plenary consideration.

CONCLUSION

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

Respectfully submitted.

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