



WHITE-COLLAR CRIME

Expert Analysis

When Is Once Enough? Collateral Estoppel in Criminal Cases

The Double Jeopardy Clause of the U.S. Constitution protects individuals from multiple prosecutions for the same conduct. When a defendant charged with multiple counts arising out of essentially a single criminal episode is acquitted on some of those counts and convicted of others, courts should be vigilant to ensure that the constitutional protection is afforded and does not lose out to a prosecutor's initial decision to overcharge the conduct.

An amici curiae brief filed by the National Association of Criminal Defense Lawyers and Criminal Law Professors in a case currently pending before the Supreme Court states that we are in an "age of overlapping federal offenses that provide multiple means of imposing criminal liability for the same underlying conduct."¹

Moreover, in an era when white-collar behaviors can be prosecuted by many jurisdictions, each of whom can devise a number of theories for the same conduct, prosecutors often take the kitchen sink approach to charging defendants—charging many counts on different theories for the same conduct. Thus, more and more, juries find defendants not guilty on some counts, but cannot reach a verdict on others. In such situations, courts need to be aggressive in protecting defendants from multiple trials.

The collateral estoppel doctrine plays a role in this process by ensuring 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." In a criminal context, the collateral estoppel principles are embodied in the Double Jeopardy Clause of the Fifth Amendment which protects a defendant against being reprosecuted on an issue for which he has been acquitted.

The Supreme Court's decision to grant certiorari in *United States v. Yeager*, as well as



By
**Robert G.
Morvillo**

And
**Robert J.
Anello**

a recent U.S. Court of Appeals for the Second Circuit opinion in the well-known Squawk Box case, highlights how the doctrine of collateral estoppel is used in criminal cases, as well as issues that emerge when a jury returns a split verdict of partial acquittals and partial hung counts.

The specific issue pending before the Supreme Court in *Yeager* is whether a court's assumption on the jury's reasoning in connection with hung or mistried counts should play a role in a court's consideration of a defendant's claim of collateral estoppel as a result of the acquitted counts. The circuit courts of appeal are split on the issue, some holding that mistried counts are not to be considered in the application of collateral estoppel, while others consider the jury's inability to reach a decision a relevant factor and indeed give all benefit of doubt to the prosecution by assuming that the jury must have acted irrationally in its acquitted decision.

'United States v. Yeager'²

In *United States v. Yeager*, the Fifth Circuit considered the defendants' motion to dismiss an indictment based on collateral estoppel. The defendants, three former Enron Broadband Services employees, were indicted on various counts of conspiracy to commit securities and wire fraud, substantive counts of securities and wire fraud, as well as insider trading, and money laundering. In July 2005, the jury acquitted the defendants on some of the counts, but were hung on the others. The district court declared a mistrial as to those counts on which the jury could not reach a verdict. In November 2005, the government issued new indictments against the defendants, recharging them with some of

the mistried counts. Defendants argued that their previous acquittals collaterally estopped the government from pursuing the mistried charges. The district court denied their motion and the defendants took an interlocutory appeal to the Fifth Circuit.

Fifth Circuit Opinion

The court of appeals noted that the Supreme Court's decision in *Ashe v. Swenson*, "bars the government from prosecuting defendants on a different charge 'if one of the facts necessarily determined in the former trial is an essential element of the subsequent prosecution.'" It also stated that to determine whether the doctrine of collateral estoppel prevents a subsequent criminal prosecution, a two-step analysis must be performed, as set forth in *Ashe*. First, a court must decide which facts necessarily were decided in the first proceeding. Second, the court must consider whether the facts necessarily decided in the first trial constitute essential elements of the offense in the second trial.⁴

Although all of the defendants in *Yeager* argued that collateral estoppel applied to the charges, each was acquitted of and recharged with different counts. Accordingly, the court analyzed each defendant's collateral estoppel argument separately. In each case, the court concluded that the claims were not barred by collateral estoppel. The court's analysis with respect to one of the defendants, F. Scott Yeager, is instructive:

The government alleged in the first indictment that the defendants intended to deceive the public by making false statements about their company's financial condition and its progress in developing an "intelligent" telecommunications network. Mr. Yeager was acquitted of securities fraud, four counts of wire fraud, and conspiracy to commit securities and wire fraud. The jury hung on 20 counts of insider trading and 99 counts of money laundering. Mr. Yeager argued that in acquitting him, the jury "necessarily found that he did not have insider information, and, therefore, collateral estoppel bars the [g]overnment from retrying him on insider trading and money laundering."

Based on the jury instructions provided at trial, which stated that the government was required to prove beyond a reasonable doubt that:

ROBERT G. MORVILLO and ROBERT J. ANELLO are partners at Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer. GRETCHAN R. OHLIG, an attorney, assisted in the preparation of this article.

1) Mr. Yeager participated in making material misrepresentations or omissions; 2) Mr. Yeager acted “willfully, knowingly and with the intent to defraud”; and 3) Mr. Yeager used “a means or instrumentality of interstate commerce or of the mails,” the court concluded that only two rational bases existed on which the jury could have acquitted Mr. Yeager of securities fraud.

The court reasoned that the jury must have concluded that the government failed to prove either that there were material misrepresentations or omissions made, or that Mr. Yeager did not knowingly make misrepresentations or omissions because he believed the questionable statements were truthful. According to the Fifth Circuit, “[U]nder either rationale, 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.” The court of appeals reasoned that this conclusion seemed to support Mr. Yeager’s contention that the government was now barred from prosecuting him for insider trading and money laundering, for which insider trading was the underlying “unlawful activity.”

The court noted, however, that the same jury also had hung on the insider-trading counts brought against Mr. Yeager at the first trial. “Thus, when we consider the hung counts along with the acquittals, we are faced with a potential inconsistency, making it impossible for us to decide with any certainty what the jury necessarily determined.” Under such circumstances, the court of appeals noted that its precedent required not only that they consider the mistried counts in its collateral estoppel analysis, but also that “the presence of mistried counts diminishes the likelihood that, in acquitting defendants on related counts, the jury made a factual determination that bars a retrial.”⁵

The court reasoned that if Mr. Yeager were correct in concluding that the jury necessarily determined he did not have insider information when it acquitted him on the securities fraud counts, “then the jury, acting rationally, would have acquitted him of insider trading and money laundering. Instead the jury hung.” Although the court considered a number of different scenarios under which the jury could have reached its seemingly contradictory conclusions—including that it was irrational or did not reach the issue of whether Mr. Yeager possessed insider information when it deliberated on the insider trading counts because it could not agree on whether the government had carried its burden on the other elements—the court ultimately found that it was impossible to divine the jury’s reasoning. Accordingly, it held that collateral estoppel did not bar a retrial against Mr. Yeager.⁶

The Fifth Circuit’s reasoning seems flawed with respect to its treatment of the acquitted counts. Indeed, in virtually every other aspect of jury instructions or curative instructions courts consider jurors not only to act rationally but, indeed, to put normal human prejudice and influences aside and faithfully fulfill the court’s instructions. Similarly, if the constitutional

protections of the Double Jeopardy Clause are to be given meaning, a reviewing court always should consider the jury to have acted rationally and thoughtfully in unanimously acquitting a defendant. Doing so ensures that the acquitted counts—the only actual conclusion by the jury—have been given their full meaning, their broadest logical extension. To do otherwise would mean that the Double Jeopardy Clause and its protections would give way to a presumption of jury irrationality.

Petition for Certiorari

On Nov. 14, 2008, the Supreme Court granted certiorari in the *Yeager* case.⁷ The issue they accepted is whether, under the Double Jeopardy Clause, the government may retry defendants acquitted of some charges on factually related counts on which the jury failed to reach a verdict.

In their petition for certiorari, the defendants noted that the circuit courts of appeals are divided as to whether, when conducting the Fifth Amendment collateral estoppel analysis set forth in *Ashe v. Swenson*, a court should consider those counts on which a jury may have been unable to reach a verdict, in addition to the counts on which a defendant has been acquitted, in trying to determine the jury’s rationale. To allow such consideration, defendants argued, effectively requires a court to try and read the jurors’ minds.

The issue in ‘Yeager’ is whether a court’s assumption on the jury’s reasoning regarding hung or mistried counts should play a role in review of a claim of collateral estoppel as a result of the acquitted counts.

The defendants also argued that the practical effect of the Fifth Circuit’s opinion was to render the Fifth Amendment protections of collateral estoppel unavailable when a jury acquits a defendant on some counts, but fails to resolve others that have a common element. “That is because in all but the (exceedingly rare) situation where the substance of a jury’s deliberations is made known, a defendant will never be able to demonstrate why the jury necessarily determined a particular element in his favor when acquitting him on some counts but failing to render a verdict on related counts.”⁸

The defendants stated that the majority of courts of appeals facing the issue have found that hung counts do not prevent the application of collateral estoppel. Specifically, the petitioners cited cases from the Sixth, Seventh, Ninth, and Eleventh circuits which have held that the failure of a jury to reach a decision on some counts should not “deprive an acquittal of collateral estoppel consequences, because the presence of hung counts should not be weighed as part of the *Ashe* analysis.” In engaging in the *Ashe* collateral

estoppel analysis, these courts focused only on the counts on which the jury had actually reached a verdict, finding that a consideration of the hung counts required too much speculation.⁹ Such speculation has no place in the context of ensuring a criminal defendant’s Fifth Amendment rights are protected.

In contrast, defendants noted that the First, Fifth, and District of Columbia circuit courts of appeal have held that collateral estoppel does not have any application to hung counts. These courts have found that hung counts are not only relevant to, but can preclude the application of collateral estoppel.¹⁰

The government opposed the petition for certiorari, acknowledging tension between the circuit courts, but arguing that the Supreme Court’s review was not warranted because no conflict exists. It argued that none of the decisions coming from the Sixth, Seventh, Ninth, or Eleventh circuits held that a jury’s failure to reach a verdict on one count is always irrelevant in determining what facts the jury necessarily found in acquitting the defendant on another count. Rather, the government argued, those decisions merely found that the defendants had successfully proven their collateral estoppel claims based on the particular facts of their respective cases.

In addition, the government argued that the doctrine of collateral estoppel should never bar the government from retrying a defendant on a count on which the jury was unable to reach a verdict. Noting that the Supreme Court has held that a retrial following a hung jury does not, in and of itself, violate the Double Jeopardy Clause, the government asserted that the rationale behind collateral estoppel does not apply when a jury renders a mixed verdict of acquittals and hangs. According to the government, such a mixed verdict has only two explanations, neither of which supports the application of collateral estoppel. First, a mixed verdict may mean that the jury found that the government failed to prove a fact that, although essential for conviction on the count on which the defendant was acquitted, was not essential for conviction on the count on which the jury could not agree. The government asserted that collateral estoppel would not be applicable in this context because an acquittal on one charge collaterally estops the government only if the jury necessarily decided some fact that the government must prove beyond a reasonable doubt to convict on the second charge.

Second, a mixed verdict may mean that the jury found that the government failed to prove a fact that was essential for conviction on both counts. According to the government, collateral estoppel still would not apply because the jury’s failure to acquit on the hung count would be inconsistent with its acquittal on the other count. And, according to the government, the Supreme Court “has recognized that ‘principles of collateral estoppel—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict—are no longer useful’ when a jury’s verdicts are inconsistent.”¹¹

In addition to the parties' submissions, the National Association of Criminal Defense Lawyers and Criminal Law Professors also submitted an amicus brief in support of petitioners/defendants. Noting that the doctrine of collateral estoppel is "embodied in the Fifth Amendment guarantee against double jeopardy," Amici argued that the Fifth Circuit's decision "aggravates an already deep and entrenched circuit split" on the issue of whether a jury's failure to return a verdict on one count of a multicount indictment can be "weighed" against the jury's judgment of acquittal on a factually overlapping charge in a way that "fatally undermines the collateral estoppel consequences of that acquittal."¹²

Amici gave an opinion that by weighing mistried counts in the collateral estoppel analysis, the Fifth Circuit's decision allowed the mistried counts to trump an acquittal in a partial-verdict scenario. Indeed, Amici believes that the decision "incentivizes prosecutors to overcharge criminal defendants as a means of paving the way for a retrial in the event that the jury acquits on some counts but hangs on others."¹³ To do so, undermines the fundamental constitutional principles underlying the Double Jeopardy Clause that final judgments should be safeguarded and that an acquitted defendant is not subject to a "do-over in which the prosecution hopes to refine his case or strike a more favorable jury."

Second Circuit Law

Although the Second Circuit has not directly chimed in on the issue currently pending before the Supreme Court—whether hung charges can be considered in resolving a collateral estoppel issue—the Court of Appeals recently has addressed the issue of the application of the doctrine of collateral estoppel in criminal retrials.

In *United States v. Mahaffy*, a case out of the U.S. District Court for the Eastern District of New York that has come to be referred to as the Squawk Box case, seven defendants were charged in a 41-count indictment with various securities violations. The government argued that the defendants, who were either stockbrokers or day traders, engaged in a "front running" securities operation by sharing confidential proprietary information over the brokerage house's internal loud speakers known as squawk boxes. After a lengthy trial, most of the defendants were acquitted of all counts with the exception of conspiracy to commit securities fraud. The government announced its intention to retry the defendants on the conspiracy counts and the defendants moved to prevent retrial.¹⁴

First, the defendants sought a judgment of acquittal under Federal Rule of Criminal Procedure 29 arguing that no rational trier could find the essential elements of the conspiracy count charged beyond a reasonable doubt. Specifically, the defendants argued that the government could not prove the specific intent element of the conspiracy charge given that the jury had found them innocent of all substantive securities fraud counts. District Court Judge Jack B. Weinstein noted that

although the government had not offered any direct proof of the defendants' specific intent to commit securities fraud in connection with the conspiracy count at the first trial, sufficient circumstantial evidence had been introduced to allow a jury to infer that each defendant knew the information on the squawk boxes was confidential, proprietary, and being disseminated to outsiders in contravention of company policy. Accordingly, the defendants' motions for acquittals under Rule 29 were denied.

The defendants also sought to prevent the government from introducing evidence of conduct underlying the charges of which they were acquitted at any retrial of the conspiracy count. The district court noted that collateral estoppel precluded the government from relitigating any issue decided in the defendants' favor by a valid final judgment. According to the court, the difficulty of applying collateral estoppel in criminal cases, however, is determining precisely what the first judgment decided. "It usually cannot be determined with any certainty upon what basis the previous jury reached its general verdict." Examining the record, pleadings, evidence and jury instructions from the initial trial, the court determined that it was impossible to discern with any accuracy the precise findings of the jury as to each element of the charges of which the defendants were acquitted. Accordingly, the defendants' collateral estoppel motions also were denied.¹⁵

The Second Circuit affirmed the district court's decision in a summary order. Specifically, the court of appeals found that the defendants' collateral estoppel arguments fell short because the acquittals could plausibly be explained for reasons unrelated to the elements of the conspiracy charges. Furthermore, the court agreed with the district court's determination that it was impossible to divine the precise findings made by the jury. Accordingly, the Second Circuit affirmed the convictions.¹⁶

The government brought a new trial against the defendants based on the hung conspiracy count. The defendants sought to dismiss the indictment. The district court denied their motion and trial is set to begin soon.¹⁷

Conclusion

Double-jeopardy protections are a constitutional right. Accordingly, where a court is unable to determine why or how a jury reached a verdict, it should resolve such issues in a manner that gives full effect to the jury's unanimous determination resulting in an acquittal. To do otherwise, would risk the deprivation of the constitutional guarantees set forth in the Double Jeopardy Clause of the Fifth Amendment and encourage unnecessarily charging multiple counts to preserve a second bite at the apple.



1. *Hirko v. United States*, Brief of the National Association of Criminal Defense Lawyers and Criminal Law Professors as Amici Curiae in Support of Petitioners,

Nos. 08-40, 0-58 and 08-67 at p. 7 (Aug. 8, 2008).
 2. 521 F.3d 367 (5th Cir. 2008).
 3. 397 U.S. 436, 443-44 (1970).
 4. 521 F.3d at 371 (citing *Bolden v. Warden, W. Tenn. High Sec. Facility*, 194 F.3d 579, 584 (5th Cir. 1999)).
 5. Id. at 378-379.
 6. Id. at 379.
 7. ___S.Ct. ___, 2008 WL 2773476 (U.S.), 77 USLW 3052 (2008).
 8. *Yeager v. United States*, Petition for a Writ of Certiorari, Nos. 08-40, 08-58 and 08-67 at p. 3 (July 14, 2008).
 9. Id. at pp. 12-16.
 10. Id. at pp. 16-22.
 11. *Hirko v. United States*, Brief for the United States in Opposition, Nos. 08-40, 08-58 and 08-67 at p. 13 (October 2008).
 12. Amici Brief at p. 4.
 13. Id. at p. 19.
 14. 499 F. Supp.2d 291 (E.D.N.Y. 2007).
 15. Id. at 296.
 16. 283 Fed.Appx. 852 (2d Cir. 2008).
 17. "Judge Denies Latest Bid to Dismiss 'Squawk Box' Case," Market Outlook (Sept. 12, 2008).