No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MIKHAIL ZEMLYANSKY, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Government prosecutors strategically decided to subdivide their prosecution of petitioner's ongoing New York city enterprise into two parts. The first jury acquitted petitioner on 8 of 9 counts, three non-RICO conspiracy counts and six substantive offense counts involving health insurance fraud. It hung on the RICO conspiracy charge. After losing, prosecutors reindicted petitioner for the same RICO conspiracy, targeting the same enterprise's securities fraud and illegal gambling activities.

At the second trial, the district court let the government reintroduce its entire health care fraud case to help secure a conviction on the previously hung RICO conspiracy count. Did the district court violate the collateral estoppel component of the double-jeopardy clause by letting the government reintroduce at the second trial its entire health care fraud case - rejected by the jury at the first trial - and thus gain an unfair advantage that rendered the second trial fundamentally unfair.[1]

[1] The attached appendix is cited as "App.", followed by the page number. The petitioner's opening brief is cited as "AOB," followed by the page number; the appendix accompanying the opening brief is cited as "AA III:" followed by relevant page numbers.

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JUDGMENT AND OPINIONS BELOW

The district court issued an opinion and order on November 20, 2014 (1: 12-cr-00171, Doc. No. 1346). App. 14. The published opinion of the United States Court of Appeals for the Second Circuit was filed on November 5, 2018, and is reported at 908 F.3d 1 (Nov. 5, 2nd Cir. 2018). *See* App. 27.

JURISDICTION

The Second Circuit filed its denial of the petition for rehearing and suggestion for rehearing en banc on December 17, 2018. *See* App. 60. The jurisdiction of this Court to review the judgment of the Second Circuit is invoked under Supreme Court Rule, No. 10(c), and involves an important question of federal law that has not been, but should be, settled by this Court, or the Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

- Sixth Amendment right to a fair trial. See *Skilling v. U.S.* 561 U.S. 358, 438-441, 130 S.Ct, 2896, 2948-2950 (2010).
- Fifth Amendment Double Jeopardy Clause: No person shall be subject for the same offense to be twice put in jeopardy of life or limb." This amendment embodies the rule of collateral estoppel in criminal cases. See *Ashe v. Swenson*, 397 U.S. 436, 443-444, 90 S. Ct. 1189, 1194 (1970).

STATEMENT OF THE CASE

Jurisdiction in the Courts Below

The district court had jurisdiction pursuant to 18 U.S.C. §3231. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. §1291 and 18 U.S.C. §3742.

Facts Material to Consideration of the Question Presented

The government's investigation revealed that Petitioner Mikhail Zemlyansky and his partner Michael Danilovich managed a single, ongoing enterprise engaged in health care fraud, securities fraud, and illegal gambling in and around New York City during the period from 2007-2012. They used the money acquired through their securities fraud to fund the development of their fraudulent health care clinics. Notwithstanding this seamless pattern of activities, federal prosecutors made a strategic decision to subdivide their prosecution into two parts, thereby securing an opportunity to get two bites of the apple.[2]

At the first trial, the government focused exclusively on the organization's health care fraud scheme, labeling it the "No Fault Organization." The jury acquitted Zemlyansky on 8 of 9 counts, including health care fraud, mail fraud,

[2] The government's pleadings and arguments openly acknowledge that there was but one enterprise (the Zemlyansky/ Danilovich organization) that operated seamlessly in New York from 2007-2012. During that time, it committed all of the charged activities employing the same methods, including wire and/or mail fraud, and money laundering to achieve one consistent goal, financial enrichment. AOB 20-24.

and money laundering conspiracies and their respective substantive offenses (Counts 2-9), and hung on the RICO conspiracy charged in Count 1.

Failing to achieve any convictions at the first trial, prosecutors reindicted petitioner, relabeled the organization the "Zemlyansky/Danilovich organization," charged the same RICO conspiracy in Count 1, and targeted its securities fraud and illegal gambling activities, including securities, mail, and wire fraud conspiracies and their respective substance offenses (Counts 2-6).

Prior to the second trial, Petitioner moved to dismiss the RICO conspiracy count or to preclude, or at least minimize, the reintroduction of the government's health care fraud case introduced at the first trial. Over defense objection, the district court not only let the government reintroduce its entire, previously failed no-fault insurance fraud case, it allowed the government to call an entirely new witness, who admitted to laundering money for the Zemlyansky/Danilovich organization over a period of two years. Petitioner also asked the district court to preclude the government from arguing at the second trial that he had engaged in health care fraud or agreed to do so; the district court agreed and so ordered. AA III: RT 2-9-2015: 3-4. However, the government ignored the district court's preclusion order and argued during its summation at the second trial that Zemlyansky was guilty of no fault health insurance fraud. AA III: 502-503. The second jury convicted petitioner on all counts.

On appeal, Zemlyansky argued that the district court ran afoul of the collateral estoppel component of the double jeopardy clause by letting the

government reintroduce its entire health care fraud case and more at the second trial to help prove his participation in the same RICO conspiracy litigated at the first trial, which undermined the fairness of that trial.

In affirming petitioner's convictions, the 2nd Circuit ignored his primary contention: that the government's strategic decision to subdivide its prosecution of a single RICO enterprise in order to get a second bite of the apple violated fundamental fairness principles addressed by the collateral-estoppel component of the double jeopardy clause. Instead, the court ruled that the "government was not precluded, under Double Jeopardy Clause, from using acquitted conspiracy offenses as racketeering predicates"; and "the government was permitted to introduce evidence from defendant's prior trial to prove his guilt in subsequent RICO conspiracy trial." 908 F.3d at 1.

REASONS FOR GRANTING CERTIORARI

The double jeopardy clause guarantee recognizes the vast power of the sovereign, the ordeal of a criminal trial, and the injustice our criminal justice system would invite if prosecutors could treat trials as dress rehearsals until they secure the convictions they seek. *Currier v. Virginia*, 138 S.Ct. 2144, 2149 (2018).

"The constitutional provision against double jeopardy is a matter of substance and may not be [] nullified by the mere forms of criminal pleading." *United States v. Mallah*, 503 F.2d 971, 985 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975); double-jeopardy/collateral-estoppel may, in the event of a subsequent trial, operate to bar the introduction or argumentation of certain facts necessarily

established in the prior proceeding. *United States v. Jackson*, 778 F.2d 933, 943, fn.1 (2d. Cir. 1985) citing *United States* v. *Lee*, 622 F.2d 787, 790 (5th Cir. 1980)(citations omitted), *cert. denied,* 451 U.S. 913 (1981).

> "The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'[8] The inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.' *Sealfon v. United States*, 332 U.S. 575, 578-579, 68 S.Ct. 237, 240 (1948)."

In addition to barring retrial of a charge upon which a defendant was acquitted, "the Double Jeopardy Clause precludes the Government from relitigating any issue that was necessarily decided by a jury's acquittal(s) in a prior trial." *Yeager v. United States*, 557 U.S. 110, 122–23, 129 S. Ct. 2360, 2365-66, 174 L. Ed. 2d 78 (2009).

The issue in dispute at the first trial was whether petitioner participated in a RICO conspiracy to commit health care fraud, based the non-RICO conspiracies of health care fraud, mail fraud, and money laundering and their respective substantive offenses. The first jury hung on the RICO conspiracy count, but acquitted him of conspiring to commit health care fraud, mail fraud, and money laundering, and their respective substantive offenses. These verdicts were consistent with the inference that he was neither a manager, leader, nor participant

in the charged health care fraud offenses. If so, the government's introduction of its entire health care fraud case at the second trial would have had a significant impact on the jury's evaluation of the new offenses committed by the same enterprise. "A jury's verdict of acquittal represents the community's collective judgment regarding all the evidence and arguments presented to it. Even if the verdict is "based upon an egregiously erroneous foundation"[;] its finality is unassailable. *Yeager v. United States*, 557 U.S. at 122–23, 129 S. Ct. at 2368 (internal citations omitted).

The first jury's acquittals show that petitioner had neither the knowledge of, nor the intent to commit any of the non-RICO conspiracies and accompany substantive offenses. His lack of knowledge or participation in any of the enterprise's health care fraud schemes involved critical issues of ultimate fact bearing on his knowledge of and intent to participate in the same enterprise's closely related offenses at the second trial, namely his knowledge, intent, and agreement to facilitate the same enterprise's securities fraud and illegal gambling schemes. This Court has concluded that a mistried count, although an event of significance, cannot be used "...to ignore the preclusive effect of a jury's acquittal[s]." *Yeager v. United States*, 557 U.S. at 124-125.

No doubt the government prosecutors here felt they had a provable case on the first RICO conspiracy charge, but when they lost, they did what every good attorney would do—they shifted focus, renamed the enterprise the Zemlyansky/ Danilovich organization, and targeted the enterprise's parallel activities. But this is

precisely what the constitutional guarantee forbids." *Ashe v. Swenson*, 397 U.S. at 447, 90 S. Ct. at 1196.

In order to secure a conviction the second time around, the prosecutors renamed the same enterprise the Zemlyansky/Danilovich organization and targeted its securities fraud and illegal gambling activities. At the second trial, the court forced petitioner to relitigate the government's entire health care fraud case. Petitioner argued that, given the first jury's rejection of all non-RICO conspiracy and substantive charges (and specifically those involving mail fraud and money laundering), a second jury could not rationally convict him of participating in the same RICO conspiracy based on the enterprise's related activities of securities fraud and illegal gambling without calling into question the earlier acquittals. *Ashe v. Swenson*, 397 U.S. at 445-446, 90 S.Ct. 1189.

As such, the double jeopardy clause should have barred a retrial of the RICO conspiracy count. Or, in the alternative, the collateral estoppel component of the double jeopardy clause should have precluded the government from using, or at the very least, limited the government's use at the second trial of its entire health care fraud, mail fraud, and money laundering case – rejected by the first jury - to prove petitioner's participation in the RICO conspiracy charged at the retrial. See *Yeager v. United States*, 557 U.S. at 123-124.

CONCLUSION

This Court should grant certiorari in this case in order to settle the important questions of federal law addressed in this petition.

Dated: January 25, 2019

Respectfully submitted,

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Attorney for Petitioner