NO:

IN THE
SUPREME COURT OF THE UNITED STATES

ISAAC FELDMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where a jury returns a final verdict on a charge of conspiracy, finding a defendant guilty of only one of multiple charged offense objects, is the government barred from reinitiating the prosecution as to charged conspiratorial objects on which the jury did not convict?

2. Does the government's repeated use of an antisemitic cultural reference to prejudice the Jewish petitioner at trial warrant any form of relief in the federal courts if the government asserts on appeal the lack of bad intentions by the two prosecutors who employed the antisemitic character theme to obtain petitioner's conviction?

INTERESTED PARTIES

There are no parties interested in the proceeding other than those named in the caption of the case.

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Isaac Feldman respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 17-13443 in a decision by that court on July 30, 2019, *United States v. Feldman*, published at 931 F.3d 1245, affirming the judgment and commitment of the United States District Court for the Southern District of Florida and remanding for resentencing.

OPINION BELOW

A copy of the published decision of the United States Court of Appeals for the Eleventh Circuit is contained in the Appendix (App. 1) along with a copy of the Eleventh Circuit's order denying the petition for rehearing (App. 58).

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on July 30, 2019. The petition for rehearing was denied on October 1, 2019. The petitioner's application to extend the time for filing the petition to February 28, 2020 was granted by Justice Thomas. This petition is timely filed pursuant to SUP. CT. R. 13.1.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provision:

U.S. Const., amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject

> for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioner and seventeen co-defendants were indicted by a Miami federal grand jury on charges of fraud and related offenses pertaining to overcharging customers for drinks at two bars in which petitioner was a minority investor. In the first jury trial, petitioner was convicted of one count of wire fraud conspiracy (18 U.S.C. § 1349) and one count of conspiracy (18 U.S.C. § 1956(h)) to commit concealment money laundering (18 U.S.C. § 1956(a)(1)(B)(i)), but was acquitted of all six substantive wire fraud charges (18 U.S.C. § 1343) and was also not convicted of the charge of conspiracy (18 U.S.C. § 1956(h)) to transfer money internationally to promote a fraud offense (18 U.S.C. § 1956(a)(2)(A)). The indictment actually charged an overarching § 1956(h) money laundering conspiracy with two objects: concealment laundering (§ 1956(a)(1)(B)(i)) and international promotion transfers (§ 1956(a)(2)(A)). The jury at the first trial was instructed that it need find only one of the two charged conspiratorial objects, but was not given any instruction as to how to acquit petitioner of any object of which it did not find him guilty. Instead, the jury was instructed that its work was done if it reached a guilty verdict on one conspiratorial object, and petitioner's jury did so only as to concealment laundering in his first trial. Thus, no mistrial was declared as to the absence of a verdict on the international-transfer promotion offense object, and at the first sentencing hearing, petitioner was sentenced

as if convicted of solely a conspiracy to commit concealment laundering and wire fraud conspiracy.[1]

On appeal to the Eleventh Circuit, because the indictment, prosecution arguments, and jury instructions erroneously relied on a non-fraud theory—that customers were deceived because women (referred to by the government as "bar girls" or "B-girls") who encouraged customers to buy drinks secretly worked for the lounges—the Eleventh Circuit overturned petitioner's convictions and those of the two co-defendants who proceeded to trial with him. *See United States v. Takhalov*, 827 F.3d 1307, *revised on reh'g*, 838 F.3d 1168 (11th Cir. 2016).

On remand to the district court, petitioner proceeded to a second jury trial. Petitioner moved unsuccessfully to bar the government from seeking to retry him on the charge of conspiracy to commit international-promotion money laundering. The jury returned guilty verdicts on the wire fraud conspiracy and (unlike the first jury) on *both* objects of money laundering conspiracy objects. The district court sentenced petitioner to 100 months imprisonment, and petitioner appealed to the Eleventh Circuit again.

The Eleventh Circuit affirmed, concluding that even though no mistrial was sought or declared as to the conspiracy to commit international promotional money laundering, and the jury simply performed as instructed without resolving that charge,

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[1] Unlike petitioner, a co-defendant, Albert Takhalov, was convicted at the first (joint) trial of charge of conspiracy to commit international money laundering to promote fraud offenses.

there was no bar to reprosecution of petitioner for that offense. App. 16–17. The Eleventh Circuit also concluded that the prosecution's repeated characterization of petitioner as *Fagin*—a literary allusion that was particularly pernicious because of the centrality to the defense of petitioner's identity as a foreign-accented Jew whose defense case rested on showing that he was active in an ethnically-Russian Jewish business community—did not require reversal because the references to *Fagin* were "anodyne" in that the court of appeals did not believe that two prosecutors who used the slur were aware that Dickens had painted *Fagin* as the archetypal Jewish criminal villain. The Eleventh Circuit addressed the issue as follows:

> *Prosecutorial Allusions to Oliver Twist Did Not Deprive Feldman of Due Process*. Feldman, who is Jewish, contends that he was deprived of due process by several comments in which prosecutors drew an analogy between his conduct and that of Fagin, the street criminal in Charles Dickens's Oliver Twist, who is also Jewish. * * *
>
> The government never referred to Fagin's or Feldman's ethnicity, and it is clear from the record that it neither intended to trade nor inadvertently traded on an ethnic stereotype in order to prejudice Feldman. The government first used Fagin as an example when it asked prospective jurors whether they understood that someone who masterminds a crime is guilty even if he employs someone else to commit the crime on his behalf. A few moments later, the government made another fleeting reference to Fagin to inquire whether a prospective juror would be unwilling to credit a witness's testimony just because the witness was himself a criminal. The government referred to Fagin only once more, when, in its rebuttal closing argument, it compared both Feldman and its own witness Simchuk—who, at least as far as the record reflects, is not Jewish—to the Dickensian villain. Feldman did not object to the government's remarks at trial, so we review their propriety only for plain error, ... and under that deferential standard, Feldman cannot establish that the prosecutors' brief, anodyne references to a literary character deprived him of a fair trial and caused him substantial prejudice.

App. 27–28.

Because it found the use of the *Fagin* slur to be anodyne, the court of appeals did not make any alternative finding as to the effect of the prosecutor's conduct on the outcome of trial. The trial evidence was ambiguous as to petitioner's knowledge of any fraud. Although the government used an undercover police officer video recordings in the bars, the officer lacked a basis to opine as to what fraudulent conduct petitioner may have witnessed. The court of appeals, in finding the evidence sufficient to convict, relied on the opinion testimony of a convicted felon who entered into a plea deal with the government, but whose testimony remained generalized and predictive rather than definitive as to any specific fact showing petitioner's knowledge.

REASONS FOR GRANTING THE WRIT

1. The Eleventh Circuit's rejection of petitioner's double jeopardy claim conflicts with this Court's precedent by improperly limiting the protections of the Double Jeopardy Clause to implied acquittals.

The Double Jeopardy Clause provides that no person shall be "twice put in jeopardy of life or limb" for "the same offence." U.S. Const, amend. V. Accordingly, "once a defendant is placed in jeopardy for an offense, and jeopardy terminates with respect to that offense, the defendant may [not] be tried . . . a second time for the same offense." *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106 (2003).

The purpose of the Double Jeopardy Clause is not merely to deny the government a second chance after a jury affirmatively rejects its charges the first time. More fundamentally, its purpose is to protect all Americans against the risks and

burdens of successive prosecutions. "Even if the first trial is not completed," the Court has explained, "a second prosecution . . . increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted." *Arizona v. Washington*, 434 U.S. 497, 503–04 (1978). "[S]ociety'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 second prosecution can also be "grossly unfair," *Arizona v. Washington*, 434 U.S. at 503, because "if the Government may reprosecute, it gains an advantage from what it learns at the first trial about the strengths of the defense case and the weaknesses of its own." *United States v. DiFrancesco*, 449 U.S. 117, 128 (1980); *see also Downum v. United States*, 372 U.S. 734, 736 (1963) ("[T]he prohibition of the Double Jeopardy Clause is 'not against being twice punished, but against being twice put in jeopardy.'") (quoting *United States v. Ball*, 163 U.S. 662, 669 (1896)).

This Court has consistently held that a criminal defendant's jeopardy on a particular count begins when a jury is empaneled and ends when that jury is discharged. The rule applies whether the jury acquits, convicts, reaches no verdict at all, and even when the jury never considers a particular charge. *United States v. Scott*, 437 U.S. 82, 92 (1978); *Green v. United States*, 355 U.S. 184, 188 (1957) ("it is not even essential that a verdict of guilt or innocence be returned for a defendant to have once

been placed in jeopardy so as to bar a second trial on the same charge"); *Wade v. Hunter*, 336 U.S. 684, 688 (1949) (Double Jeopardy Clause bars retrial even when a trial "is discontinued without a verdict" at all.)

While many of this Court's decisions recognize the importance of acquittal in Double Jeopardy Clause analyses, the ultimate touchstone is the formal termination of jeopardy, not acquittal. Here, the Eleventh Circuit focused narrowly on whether the first jury impliedly acquitted petitioner on the concealment theory of conspiracy to commit money laundering. By focusing so narrowly on this issue, the Eleventh Circuit limited the protections of Double Jeopardy Clause and misinterpreted this Court's decisions.

A jury's silence on a verdict form does not terminate jeopardy solely because it may imply an acquittal. Instead, the dismissal of the jury when they have been silent as to some parts of the verdict constitutes the termination of jeopardy in and of itself. As this Court wrote in *Selvester v. United States*, 170 U.S. 262, 269 (1898),

> [W]here [jurors], although convicting as to some, are silent as to other, counts in an indictment, and are discharged . . . the effect of such discharge is 'equivalent to acquittal,' because, as the record affords no adequate legal cause for the discharge of the jury, any further attempt to prosecute would amount to a second jeopardy, as to the charge with reference to which the jury has been silent.

Fifty-nine years later, in *Green v. United States*, this Court again held that a jury's silence could "be treated no differently, for purposes of former jeopardy, than if the jury had returned a verdict" of acquittal. *Green*, 355 U.S. at 191. Though *Green* may have

established the doctrine of implied acquittal, this Court made clear that its result did not depend on the assumption that the defendant had been acquitted:

> But the result in this case need not rest alone on the assumption, which we believe legitimate, that the jury for one reason or another acquitted Green of murder in the first degree. For here, the jury was dismissed without returning any express verdict on that charge and without Green's consent. Yet it was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so. Therefore it seems clear, under established principles of former jeopardy, that Green's jeopardy for first degree murder came to an end when the jury was discharged so that he could not be retried for that offense.

Id. at 190–91 (citing *Wade*); *see also United States v. Ewell*, 383 U.S. 116, 125 n.9 (1966) (recognizing *Green*'s two alternate holdings). Indeed, the only exception to the dismissal of the jury constituting the termination of jeopardy is where there is a "manifest necessity" for a mistrial. *Arizona v. Washington*, 434 U.S. at 505; *see also Wade*, 336 U.S. at 690 (a trial can be discontinued only "when particular circumstances manifest a necessity for doing so").

The Eleventh Circuit's insistence that there is no double jeopardy because the jury did not impliedly acquit petitioner is thus inapt and a misinterpretation of this Court's precedent. Here, there was no barrier to the jury considering and rendering a verdict as to all of the government's theories of guilt except for the trial court's express instructions that the jury could find petitioner guilty of either the money-laundering theory or the international promotion theory, or both, so long as they unanimously agreed. With such instructions, and given a full opportunity to return a verdict on both, the jury only returned a verdict as to the international-promotion theory of conspiracy to commit money laundering. Upon the jury's discharge, jeopardy thus terminated as

to the concealment-based theory. This Court should grant review of the Eleventh Circuit's overly narrow interpretation of *Green*.[2]

Additionally, the government's abandonment of one its theories of guilt terminated jeopardy as to that theory. The government has the right to seek all the verdicts it wants, because the government is the party seeking affirmative relief in a criminal case. But when the government announces that it will be satisfied with a guilty verdict on any one object of a multi-object conspiracy charge, and that it will not and does not demand resolution of the other components of the conspiracy charge, the government waives its right to continue to pursue the abandoned aspect of the case.

This Court should thus also grant review because it has never considered whether the government's abandonment of a theory of guilt constitutes the termination of jeopardy for the purpose of the Double Jeopardy Clause. Here, by permitting the use of a verdict sheet that did not demand a finding on each of its theories, and by accepting an incomplete verdict that only found the defendant guilty on one theory, the government at least constructively abandoned the other theory of guilt.

Allowing the government to pick and choose which theory of guilt it pursues after trial has commenced, only to have another chance to refine its strategy at a

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[2] *State v. Kent,* 678 S.E.2d 26, 31-33 (W. Va. 2009); *State v. Wright,* 203 P.3d 1027, 1031-1040 (Wash. 2009); *Commonwealth v. Carlino,* 865 N.E.2d 767 (Mass. 2007); *State v. Wade,* 161 P.3d 704, 715 (Kan. 2007); *State v. Pexa,* 574 N.W.2d 344, 347 (Iowa 1998); *United States v. Ham,* 58 F.3d 78, 84-86 (4th Cir. 1995); *United States v. Wood,* 958 F.2d 963, 971-972 (10th Cir. 1992); *United States ex rel. Jackson v. Follette,* 462 F.2d 1041, 1049-1050 (2d Cir. 1972); *People v. Jackson,* 231 N.E.2d 722, 730-731 (N.Y. 1967).

second trial, is exactly the type of prosecutorial abuse that the Double Jeopardy Clause should prevent. If abandonment is held not to terminate jeopardy on the abandoned theories and allegations, in the same manner as other acquittal-equivalent jeopardy-terminating events, the Government would be free to manipulate prosecutions by selectively abandoning theories and allegations in one trial, only to resurrect those theories and allegations, or aspects thereof, during a subsequent trial.

Collateral estoppel is encompassed in the guarantee against Double Jeopardy, *Ashe v. Swenson*, 397 U.S. 436, 445 (1970), and a defendant is protected from a second trial on any issue or fact for which there is former jeopardy. Because, in the instant case, the government abandoned its accusations relating to the concealment-based theory of conspiracy to commit money laundering after jeopardy attached, permitting the government to pursue this theory again at the second trial was improper. *See United States v. Cavanaugh*, 948 F.2d 405, 416 (8th Cir. 1991) (where a "trial terminates without a determination of guilt or innocence on a charge as a result of a deliberate, tactical decision by the prosecution" retrial on another theory is barred by double jeopardy); *see also State v. Quitog*, 938 P.2d 559, 580 (Haw. 1997) (barring prosecution on a theory of guilt that was abandoned during defendant's first trial). Simply put, "[t]he Double Jeopardy Clause does not permit 'constructive abandonment' of a portion of the charging instrument." *State v. Wright*, 127 P.3d 742, 748 (Wash. Ct. App. 2006), *aff'd*, 203 P.3d 1027 (Wash. 2009); *see also United States v. Hoeffner*, 626 F.3d 857, 867 (5th Cir. 2010) ("We therefore assume, without deciding, that the abandonment functioned as an acquittal of the defendant").

"A free society does not allow its government to try the same individual for the same crime until it's happy with the result." *Gamble v. United States*, 139 S.Ct. 1960, 1996 (2019) (Gorsuch, J., dissenting). Yet, here, the Eleventh Circuit permitted petitioner to be retried on a theory of guilt that the government effectively abandoned by not demanding that the jury in the first trial resolve all the components of the conspiracy charge.

2. The Eleventh Circuit's decision finding no error in the prosecutorial use of highly-prejudicial literary allusions in the absence of a specific showing of racist or bigoted intent by the prosecutors should be reviewed by this Court.

The Court should grant the petition to review the court of appeals' decision finding no error in debasement of petitioner through the use of a racist and religiously-bigoted literary allusion. The key to the Eleventh Circuit's decision is the untenable assertion that *Fagin*, in the context of a trial of petitioner—a foreign-accented Jewish man, whose status as a businessman in an ethnic Jewish community was a key theme of his defense—is an anodyne or harmless reference. It is not. *See, e.g.*, https://www.nytimes.com/2010/05/09/books /review/Bloom-t.html (late Yale University professor Harold Bloom explaining that Charles Dickens' *Oliver Twist* is one of the three primary "monuments" in "the cavalcade of anti-Semitism in English literature" and that "nothing mitigates the destructiveness of the portraits of Shylock and Fagin"); https://en.wikipedia.org/ wiki/Racism_in_the_work_of_Charles_Dickens ("The first 38 chapters of [*Oliver Twist*] refer to Fagin by his racial and religious origin 257 times, calling him 'the Jew', against 42 uses of 'Fagin' or 'the old man.'"; "Paul Vallely wrote

in The Independent that Dickens' Fagin in Oliver Twist—the Jew who runs a school in London for child pickpockets—is widely seen as one of the most grotesque Jews in English literature."; "Nadia Valdman, who writes about the portrayal of Jews in literature, argues that Fagin's representation was drawn from the image of the Jew as inherently evil, that the imagery associated him with the Devil, and with beasts."; "Fagin is also seen as one who seduces young children into a life of crime.").

The government vilified petitioner—whose Jewish émigré identity was central to his defense—by repeatedly comparing him to *Fagin*. Petitioner was identified at trial and on recordings admitted in evidence as Jewish; his principal character witness, Rabbi Kaller, confirmed that petitioner's Jewishness and involvement in the Jewish community were central to his identity. By repeatedly telling the jury to convict him for being like *Fagin*, a character Dickens notoriously created to match his view of the Jewish criminal nature (for which Dickens later sought to make amends to the world), the government went far over the line of permissible argument and tainted the trial with racial prejudice.

Fagin depictions in movies and in the novel *Oliver Twist* carry a strong visual image to match the written character attack. Even apart from its racist and bigoted identification, the use of such loathsome-villain terms is not acceptable in a criminal trial when hurled by a prosecutor in derogation of a defendant's constitutional rights. For that reason, and even apart from the *Fagin* character's racist origins and message, the harmfulness of such prosecutorial arguments warrants addressing the analysis employed in the published decision by the Eleventh Circuit. Thus, use of other famous

villain or monster figures—Frankenstein, Dracula, the Creature from the Black Lagoon—is unacceptable even without concerns for racism; the images carry too much fearful and emotive prejudice, imply a personal prosecutorial judgment about monstrous character of the defendant, and serve to dehumanize. *See Darden v. Wainwright*, 477 U.S. 168, 180 (1986) (prosecutor's reference to defendant as "an animal" was "undoubtedly improper"; on appeal, the inquiry is whether such "offensive comments reflecting an emotional reaction to the case" are harmless in the context of the entire trial; whether such harm existed is *separate* from whether the comments should be "universally condemned"); *Bennett v. Stirling*, 842 F.3d 319, 325 (4th Cir. 2016) (affirming grant of habeas relief where prosecutor's closing used literary character allusion that "drew on longtime staples of racial denigration," particularly where the physical characteristics of the defendant helped make the allusion effective); *Hall v. United States*, 419 F.2d 582, 587 (5th Cir. 1969) (noting improper use of "Dr. Jekyl and Mr. Hyde" reference to defendant as plain error; "This type of shorthand characterization of an accused, not based on evidence, is especially likely to stick in the minds of the jury and influence its deliberations. Out of the usual welter of grey facts it starkly rises-succinct, pithy, colorful, and expressed in a sharp break with the decorum which the citizen expects from the representative of his government.").

Fagin, however, "is no ordinary villain: he mirrors the medieval Christian view of Jew as devil. He became a stereotype for Jews as criminal characters and moral seducers." *Dictionary of Antisemitism from the Earliest Times to the Present* (https://books.google.com/books?id=d5927rY-UgoC&pg=PA127&lpg=PA127&dq=fagi

n+is+no+ordinary+villain+milton+kerker&source=bl&ots=fKMQOQFWuq&sig=tScNMbptjxNtqqU4F6PDHZLgIyA&hl=en&sa=X&ved=2ahUKEwjp1uPF_djdAhUFeawKHZXSC9QQ6AEwCXoECAgQAQ#v=onepage&q=fagin%20is%20no%20ordinary%20villain%20milton%20kerker&f=false). Even Shylock, whose depiction in *The Merchant of Venice* has been condemned as antisemitic, is portrayed as vengeful, not criminal, nor as preying on children, and thus fails to reach the abyss of depravity ascribed to *Fagin*. *See, e.g.*, https://en.wikipedia.org/wiki/Shylock ("[S]hakespeare meant to contrast the mercy of the main Christian characters with the vengeful Shylock, who lacks the religious grace to comprehend mercy.").

The question of whether *Fagin* is anodyne simply cannot be answered as an ordinary opinion by a jurist alone, but must be viewed through the eyes of those who would *reasonably* see their humanity diminished by a prosecutor's asking a jury to convict a Jew by comparing him to *Fagin*. The Court should grant the petition and remand for a more searching review of the potential harm of the tactic employed, requiring the appellate court to go beyond the individual experience or impression of a judge or judges.

CONCLUSION

The Eleventh Circuit's decision in petitioner's case warrants review.

Respectfully submitted,

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February 2020