No. 24-902

In the Supreme Court of the United States

RUEL M. HAMILTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
U.S. Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

ABBE DAVID LOWELL
Counsel of Record
Lowell & Associates, P.L.L.C.
1701 Rhode Island Avenue, Third Floor
Washington, D.C. 20036
(202) 841-4772
ADLowell@lowellandassociates.com

CHRISTOPHER D. MAN
Winston & Strawn LLP
1901 L Street NW
Washington, D.C. 20036
(202) 282-5000
CMan@winston.com

Counsel for Petitioner

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The government's opposition illustrates the need for this Court to grant certiorari to resolve confusion among the lower courts concerning the weight of a defendant's burden of proof to establish a double jeopardy claim under *Ashe v. Swenson*, 397 U.S. 436 (1970). The government acknowledges that the circuits "use different formulations" in describing that burden—formulations that vary widely—and rather than endorse any of those formulations, the government suggests a new one that *none* of the circuits apply. BIO 17. Even then, the government's contradictory statements about how that standard would operate in practice add to the confusion. Only this Court can resolve that uncertainty, which is exactly what Chief Judge Elrod's concurrence below urged this Court to do. App.15a ("Must the invoking party demonstrate this by a preponderance of the evidence? Beyond a reasonable doubt? Or by some other standard? The courts would do well to clarify this point.").

I. THE GOVERNMENT'S BRIEF HIGHLIGHTS CONFUSION IN THE LOWER COURTS

The government recognizes there is a circuit split concerning the weight of a defendant's burden to prove an *Ashe* claim. In cases raising a textual constitutional right, that alone provides the Court with a compelling reason to grant certiorari—to resolve a circuit split.

The thrust of the government's opposition is its false claim that, even with the circuit split, Hamilton "has not demonstrated that his case would come out differently in any other circuit." BIO 8. But that is not true. As Chief Judge Elrod's concurrence points out, "the outcome of this appeal may have been different" if "a

preponderance of the evidence" standard had been applied. App.16a. Indeed, Hamilton raised only one defense—that he always had innocent intent—and it is only because the Travel Act requires intent at two different points in time that the government treats Hamilton's intent as two issues. And there was no evidence of bribery. Hamilton urged Dwaine Caraway to support an official act on the merits alone, never in exchange for a bribe. Likewise, the check Hamilton gave Caraway was explicitly a response to Caraway's plea for charity, with no request for or promise of an official act in return. There was no quid pro quo.

More importantly, whether a petitioner's claim ultimately succeeds under the proper standard is of little relevance to the Court in deciding whether to grant certiorari. Rather than grant certiorari to correct case-specific errors, the Court grants certiorari to resolve conflicts among the lower courts on questions of law. Sup. Ct. R. 10(a). That is precisely the situation here.

In cataloguing the divergent views of the circuits, the government explains that the Second Circuit strictly requires a defendant to establish what facts the jury found "with certainty," the Seventh Circuit asks whether a fact was proven "with assurance," and the Fourth Circuit declares that "[r]easonable doubt" about what the jury decided is resolved in favor of the government. BIO 17 (quoting *United States v. Seijo*, 537 F.2d 694, 698 (2d Cir. 1976); *United States v. Kimberlin*, 805 F.2d 210, 232 (7th Cir. 1986); *United States v. Ruhbayan*, 325 F.3d 197, 203 (4th Cir. 2003)). At the other end of the spectrum, the government recognizes that the Ninth Circuit seeks the "most rational interpretation possible" for the verdict and the First Circuit will not "bend over backwards" to help the government ferret out a plausible alternative explanation.

BIO 18–19 (quoting *United States v. Carbullido*, 307 F.3d 957, 962 (9th Cir. 2002); *United States v. Fernandez*, 722 F.3d 1, 34 (1st Cir. 2013)). Somewhere in the middle, the government notes that the Sixth and Eleventh Circuits require a defendant to produce "convincing and competent evidence" as to what the jury decided. BIO 17–18 (quoting *Christian v. Wellington*, 739 F.3d 294, 299 (6th Cir. 2014); *United States v. Hogue*, 812 F.2d 1568, 1578 (11th Cir. 1987)).

Rather than endorse any of the tests in use by the circuits that it discusses, the government advocates yet another path. The government explains that when a defendant challenges a conviction as against the weight of the evidence, a defendant must show that no rational jury would find the evidence sufficient to convict. BIO 12. Although that analysis merely asks whether a rational jury could have found facts sufficient to convict—without necessarily deciding what those facts were—the government seeks to import that standard into the double jeopardy context where courts must determine what facts the jury did decide. It believes a defendant's double jeopardy claim should fail if a rational jury could have rested its verdict on some other ground than the one claimed by the defendant, no matter how unlikely. *Id.*

Transplanting sufficiency-of-the-evidence review into double jeopardy analysis is inappropriate. Sufficiency-of-the-evidence review is stringent to protect a jury's verdict from attack, but a defendant invoking double jeopardy is not attacking a verdict; the defendant seeks to give the jury's decision meaning and protect it.

Here, the jury acquitted Hamilton under the Travel Act when told it must find bribery and convicted under

18 U.S.C. §666 when it was wrongly instructed that conduct short of bribery—a gratuity—would be sufficient to convict. The most realistic and rational explanation for that verdict is the jury concluded the check was a gratuity and not a bribe.

The whole point of guarding against double jeopardy is to prevent the government from relitigating facts that were decided by a prior jury. To do that, courts should apply a preponderance-of-the-evidence standard to arrive at what the Ninth Circuit calls the "most rational interpretation possible." *Carbullido*, 307 F.3d at 962. That approach attempts to accurately determine what facts a jury necessarily decided, so the jury's verdict is respected in the future. And the government does not contest that the preponderance-of-the-evidence standard is the norm in constitutional law. Pet. 22–23; App.15a (Elrod, C.J., concurring). The government's suggested approach of diluting that protection whenever an alternative explanation for a verdict is plausible—no matter how unlikely—would hollow the verdict out of any meaning.

Ashe rejected the sort of "hypertechnical and archaic" approach that the government now endorses and instead directed courts to apply "realism and rationality." 397 U.S. at 444. A rational and realistic view of the facts looks to decipher what *probably* happened, consistent with a preponderance-of-the-evidence standard. *Ashe* recognized that "[a]ny test more technically restrictive would . . . 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.*

The government relies heavily on dicta in *Currier v. Virginia*, 585 U.S. 493 (2018), to suggest than any plausible alternative explanation for a verdict would defeat a defendant's double jeopardy claim,[1] but that is not what this Court's decisions have actually held. In *Yeager v. United States*, 557 U.S. 110, 121–22, 126 (2009), for example, this Court corrected a legal error and remanded for the lower court to determine what facts the jury actually found. Over a dissent that echoes the government's argument here, the Court in *Yeager* rejected the government's harmless error argument that the jury's verdict could plausibly have rested on a factual basis that was different from what the defendant claimed. *Id.* at 125–26. If the mere fact that a plausible alternative explanation existed was sufficient to defeat the defendant's claim, *Yeager* would have come out the other way. Pet. 13–15. On remand, the defendant prevailed on the merits despite a plausible alternative explanation for the verdict. *United States v. Yeager*, 334 F. App'x 707, 709 (5th Cir. 2009).

The government seeks to minimize the outcome of this Court's decision in *Yeager* because the case focused more on the legal error than the remedy, but that does not change the fact that the Court would have found harmless error if it had applied the legal standard the government now claims is applicable. Indeed, that is precisely the outcome that three Justices in dissent favored. *Yeager*, 557 U.S. at 133–34 (Alito, J., dissenting).

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[1] *Currier* did not need to decide the weight of the defendant's burden because it found his double jeopardy claim waived.

While the government's effort to distinguish *Yeager* is unconvincing, it makes no effort at all to distinguish *Sealfon v. United States*, 332 U.S. 575 (1948). *See* Pet. 21–22. In *Sealfon*, the Court upheld a double jeopardy challenge even though another factual explanation for the verdict was plausible because it found that explanation less probable. *Id.* at 579–80. The Court viewed the facts through a "practical frame"—one that looked to what likely happened—and *Ashe* repeated *Sealfon*'s language in defining the applicable standard. *Ashe*, 397 U.S. at 444 (quoting *Sealfon*, 332 U.S. at 579).

Thus, the applicable standard rests on rationality and a probabilistic assessment of what a jury most likely decided. The fact that a less likely alternative possibility is merely plausible does not reflect realism, and it cannot be used to erase the work of the first jury and diminish a defendant's right not to be placed in double jeopardy.

II. THE GOVERNMENT'S CONTRADICTORY POSITIONS ADD TO THE CONFUSION

Further demonstrating confusion in the law, the government takes contradictory positions on how the burden of proof should be applied. Before the Fifth Circuit, the government argued that where "a previous trial included multiple bases for acquittal, a defendant cannot demonstrate that the jury necessarily rested its acquittal on any one of them." CA5 Gov't Br. 14. In response, Hamilton argued that a rule requiring him to raise only a single defense to preserve his Fifth Amendment right would force him to give up his Sixth Amendment right to present a complete defense. Pet. 26.

Now, however, the government reverses course and argues there is no conflict for a defendant who wants

to exercise both his Fifth and Sixth Amendment rights: "Contesting multiple elements of the crime . . . does not categorically preclude a determination that, based on the whole record, a jury's acquittal can only be explained by a view of the facts that is inconsistent with conviction on other counts." BIO 14 n.1. Of course, the only way that could be true is if one explanation for the verdict is more probable than another.

The government's new concession comes too late for the Fifth Circuit, which accepted the government's prior position. While the government chides Hamilton for describing the Fifth Circuit's test as one of "virtual certainty," that is what the Fifth Circuit did in explaining it would reject a double jeopardy claim if it was "possible," or any "possibility" existed, that the jury could have found a different fact. App.12a–13a, 16a (using these words twelve times). Chief Judge Elrod concurred, explaining that she understood her court's precedents to mean that "if the invoking party is unable to prove that the relevant issue is the *sole issue* that the jury 'necessarily decided in the first trial,' he will be categorically unable to succeed on a collateral estoppel challenge." App.16a (emphasis added; citation omitted). She explained that the case could have come out differently if "the question whether his check was a *quid pro quo* bribe was the sole disputed issue in his first trial," but she felt constrained to reject Hamilton's claim because "multiple issues" were raised. *Id.* In doing so, however, she lamented that this standard made Hamilton's "burden unduly heavy" and "higher than is appropriate in this context." App.14a–15a.

III. THE GOVERNMENT DOES NOT CONTEST THAT THE FRAMERS' INTENT SUPPORTS HAMILTON

Protecting a jury's verdict and a defendant's right not to be subjected to double jeopardy requires courts to prevent the relitigation of facts that a jury most likely found. An academic exercise that asks whether a merely plausible alternative explanation for a verdict could exist—no matter how unlikely—does not lead to a realistic or rational understanding of what a jury most likely decided. Diminishing a verdict's significance based on a speculative assessment of unlikely possibilities insults the efforts of the jury and places a defendant's constitutional rights at risk.

That is not what the Framers intended. It is clear—and the government does not contest—that at common law there were just over a dozen crimes and each was distinct. Pet. 27. Thus, the Framers understood a bar against double jeopardy would ensure that any criminal dispute would be conclusively resolved through a single trial.

In *Ashe*, this Court recognized that "the extraordinary proliferation of overlapping and related statutory offenses" since the Founding had made it "possible for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction." *Ashe*, 397 U.S. at 445 n.10. As Justice Gorsuch recently explained, "[m]any federal criminal statutes overlap entirely, are duplicative in part, or when juxtaposed raise perplexing questions about what they mean." Neil Gorsuch & Janie Nitze, *Over Ruled: The Human Toll of Too Much Law* 22 (2024). And that is particularly true of the numerous public corruption offenses. *Id.* Consequently, a prosecutor thwarted by an acquittal

at a first trial can simply pick a new charge and try again, and again, and again.

Left unchecked, prosecutors can turn the legal system into a form of Russian roulette where a defendant is the only one forced to play. Any conviction may cost a defendant his freedom or even his life, but the government can take shot after shot through new trials until it gets the result it wants.

Hamilton's case illustrates the problem. Hamiton was acquitted of bribery under the Travel Act for writing a single check, and now the government wants to charge him with bribery under §666 for writing the same check. If that theory fails too, perhaps it will try again by charging bribery as mail fraud, wire fraud, honest services fraud, or under the Hobbs Act. Pet. 29. The government does not deny any of these possibilities either.

The Framers did not provide prosecutors with such unchecked power; they checked it through the Double Jeopardy Clause. Congress remains free to enact any number of criminal statutes to fill the prosecution's arsenal, but the Double Jeopardy Clause ensures that the prosecution can take only one shot. Trials should mean something but, absent meaningful *Ashe* protection, they mean only that the prosecution's win is a conclusive victory, and a loss entitles them to a do-over. That is neither what the Framers intended nor what occurred at Founding and, in keeping with *Ashe*, that is not what this Court should permit now.

CONCLUSION

Lower courts are deeply divided on the weight of a defendant's burden in proving a double jeopardy claim under *Ashe*, with many making the burden so heavy

that the freedom from double jeopardy is all but entirely lost. This Court should grant the petition for certiorari to resolve that conflict and vindicate the principles that animate the Double Jeopardy Clause.

Respectfully submitted.

/s/ Abbe David Lowell
ABBE DAVID LOWELL
Counsel of Record
Lowell & Associates, P.L.L.C.
1701 Rhode Island Avenue, Third Floor
Washington, D.C. 20036
(202) 841-4772
adlowell@lowellandassociates.com

CHRISTOPHER D. MAN
Winston & Strawn LLP
1901 L Street NW
Washington, D.C. 20036
(202) 282-5000
CMan@winston.com

Counsel for Petitioner

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