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# DOUBLE JEOPARDY—SUPREME COURT DENIES RELEVANCE OF HUNG COUNTS TO COLLATERAL ESTOPPEL, EXPANDS DOUBLE JEOPARDY CLAUSE TO APPLY WITHIN A SINGLE PROCEEDING

Jessica Greenwood\*

**I**N *Yeager v. United States*, the U.S. Supreme Court expounded upon the collateral estoppel component of the Double Jeopardy Clause recognized as inherent to the Fifth Amendment in *Ashe v. Swenson*.<sup>1</sup> In particular, the Court resolved a circuit split by holding that hung counts should not be considered when determining the preclusive effect of acquittals returned under the same indictment.<sup>2</sup> The Court in *Yeager* also arrived at the related conclusion that the Double Jeopardy Clause as interpreted by *Ashe* has the potential to bar retrial of hung counts.<sup>3</sup> Although the Court in *Yeager* thus reinvented the Double Jeopardy Clause, its analysis did not rise to such a momentous occasion, as it relied not only on circular logic but also serious misreadings of precedent.<sup>4</sup>

Beginning in October 1998, F. Scott Yeager served as Senior Vice President of Strategic Development for Enron Broadband Services, a telecommunications division of Enron Corporation.<sup>5</sup> In this capacity, Yeager personally contributed to Enron's efforts to develop a telecommunications system dubbed the Enron Intelligent Network (EIN).<sup>6</sup> From mid-1999 until early 2000, Enron repeatedly praised the EIN in press releases, describing the network as operational and technologically advanced.<sup>7</sup> In addition to these public statements, Enron employees—including Yeager—allegedly made a number of laudatory comments about the EIN at

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1. *Yeager v. United States*, 129 S. Ct. 2360, 2362-63 (2009), *rev'g* 521 F.3d 367 (5th Cir. 2008); *Ashe v. Swenson*, 397 U.S. 436, 445-46 (1970).

2. *Yeager*, 129 S. Ct. at 2365, 2368.

3. *Id.* at 2370.

4. *See id.* at 2368, 2370.

5. *Id.* at 2363.

6. *Id.*

7. *Id.*

a conference held for equity analysts in January 2000.<sup>8</sup> Two days later, Yeager sold 100,000 shares of Enron stock at \$18 a share above their pre-conference price; this sale and later transactions earned Yeager a personal profit in excess of \$19 million.<sup>9</sup> Contrary to Enron's claims, the EIN proved unworkable and was "never fully developed."<sup>10</sup>

In November 2004, the United States indicted Yeager on 126 total counts of conspiracy to commit wire fraud and securities fraud, securities fraud, wire fraud, insider trading, and money laundering.<sup>11</sup> After a lengthy trial, the jury acquitted Yeager of each fraud and conspiracy count but deadlocked on the remaining counts of insider trading and money laundering.<sup>12</sup> On November 9, 2005, Yeager was re-indicted on thirteen of these hung counts, and he moved to dismiss under the collateral estoppel doctrine of the Double Jeopardy Clause.<sup>13</sup> Yeager argued that the jury in acquitting him must have decided that he did not possess material, non-public information about Enron's technology system.<sup>14</sup> Because the government would have to disprove this very issue in his retrial for insider trading and money laundering, Yeager argued that the government was barred from proceeding against him on these counts.<sup>15</sup>

After examining the evidence and arguments presented at trial, the district court rejected Yeager's position and found that "the most realistic, rational, and practical" basis for his acquittals was the finding that he did not "participate in a scheme to defraud" the public.<sup>16</sup> In the course of this analysis, the court noted that if the jury had decided that Yeager lacked material, non-public information, it should have acquitted him on the insider trading counts too.<sup>17</sup> Because the jury acquitted Yeager by deciding an issue that need not be raised in his retrial, the government could freely proceed against him.<sup>18</sup> On review, the Fifth Circuit Court of Appeals ultimately affirmed the trial court's denial of Yeager's motion to dismiss but found that his argument would have prevailed were it not for the logical inconsistency identified by the district court and made apparent by the hung insider trading counts.<sup>19</sup> Because this inconsistency left the court of appeals unable to ascertain what issues the jury necessarily decided at trial, it held that Yeager's acquittals—and, for that matter, any acquittal accompanied by a hung count with common factual elements—

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8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 2364.

13. *Id.*

14. *Id.*

15. *United States v. Yeager*, 446 F. Supp. 2d 719, 726 (S.D. Tex. 2006), *aff'd*, 521 F.3d 367 (5th Cir. 2008), *rev'd*, 129 S. Ct. 2360 (2009).

16. *Id.* at 735.

17. *Id.*

18. *Id.* The government was, however, barred from contesting Yeager's non-participation in the original scheme. *Id.* at 737.

19. *United States v. Yeager*, 521 F.3d 367, 380-81 (5th Cir. 2008), *aff'g* 446 F. Supp. 2d 719 (S.D. Tex. 2006), *rev'd*, 129 S. Ct. 2360 (2009).

could not preclude rehearing of the hung count under *Ashe v. Swenson*.<sup>20</sup> The Supreme Court granted certiorari to resolve the legal issues raised by Yeager's case.<sup>21</sup>

The Double Jeopardy Clause mandates that “[n]o person shall . . . be twice put in jeopardy of life or limb” for the “same offence.”<sup>22</sup> Interpreting this Clause, the Supreme Court has held that it protects a defendant from a second trial if he was previously convicted or acquitted of the same offense, but it does not bar further proceedings if the first trial resulted in a hung jury or involved a different offense.<sup>23</sup> In *Ashe v. Swenson*, the Court expanded this traditional understanding of the Clause by identifying a collateral estoppel “ingredient” therein; under *Ashe*, the government is now prohibited from trying a defendant when an essential element of the offense charged was necessarily decided in the defendant's favor in an earlier prosecution for another offense.<sup>24</sup>

After *Ashe*, a circuit split developed as to whether the presence of hung counts should be considered when determining what issues the jury necessarily decided in its acquittals; if not considered, an acquittal could potentially bar rehearing of a hung count with common factual elements.<sup>25</sup> Without guidance from *Ashe*,<sup>26</sup> some circuits found that hung counts should not be treated as a factor in the collateral estoppel analysis because they represent nothing more than a jury's indecision.<sup>27</sup> By contrast, other circuits treated hung counts as relevant and thus properly considered under *Ashe* because their existence tends to disprove the claim that certain issues were decided in the defendant's favor in acquitted counts; were it otherwise, the hung counts would have been acquittals.<sup>28</sup>

In *Yeager v. United States*, the Supreme Court settled this circuit split by reaching the questionable decision that hung counts should not be considered as part of the collateral estoppel analysis.<sup>29</sup> According to the

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20. *Id.* at 379-81. In this context, the defendant bears the burden of proving which issues were necessarily decided in his favor. *Id.* at 380.

21. *Yeager v. United States*, 129 S. Ct. 2360, 2365 (2009), *rev'g* 521 F.3d 367 (5th Cir. 2008). The U.S. Supreme Court recently granted certiorari to Jeffrey Skilling, another Enron executive-turned-defendant. *Skilling v. United States*, 130 S. Ct. 393, 393 (2009) (granting certiorari).

22. U.S. CONST. amend. V.

23. *United States v. Randenbush*, 33 U.S. (1 Pet.) 288, 290 (1834); *United States v. Perez*, 22 U.S. (1 Wheat.) 579, 580 (1824). The Clause does not prevent retrial of a hung count, as a mistrial is a non-event which does not cease the jeopardy faced by a defendant. *United States v. Richardson*, 468 U.S. 317, 325-26 (1984).

24. *Ashe v. Swenson*, 397 U.S. 436, 442-43 (1970).

25. *Yeager*, 129 S. Ct. at 2365.

26. *Ashe*, 397 U.S. at 445 (finding that the defendant's acquittal for armed robbery precluded the government from charging him with armed robbery of another victim of the same incident because the only conceivable issue in dispute before the jury was the defendant's participation in the crime). The *Ashe* Court had no opportunity to address how collateral estoppel applies in the case of partial acquittals because it dealt only with an acquittal under a single-count indictment. *See id.* at 445 n.10.

27. *See, e.g., United States v. Ohayon*, 483 F.3d 1281, 1289 (11th Cir. 2007).

28. *See, e.g., United States v. Howe*, 538 F.3d 820, 828-29 (8th Cir. 2008); *United States v. Romeo*, 114 F.3d 141, 145 (9th Cir. 1997) (O'Scannlain, J., dissenting).

29. *See Yeager*, 129 S. Ct. at 2368.

Court, examining hung counts in this context undermines the finality of acquittals by requiring a court to look past the acquittals themselves when determining what issues they necessarily decided.<sup>30</sup> In deciding to reverse and remand Yeager's case for further proceedings, the Court also made explicitly clear that, under *Ashe*, acquittals have the potential to bar retrial of hung counts when they share factual elements.<sup>31</sup>

Before addressing how the Double Jeopardy Clause should apply in *Yeager*, the Court first demonstrated that a retrial of the defendant would violate the Clause by causing him to be "twice put in jeopardy" for the "same offence."<sup>32</sup> At this point, however, the Court hit a logical snag; jeopardy traditionally has been terminated only by an acquittal or a conviction in a prior proceeding.<sup>33</sup> Acknowledging this problem early in its analysis, the Court asserted that the public interest in preserving the finality of acquittals mandates that we "look beyond" the fact that a defendant facing retrial on a hung count must be placed "in jeopardy 'twice'" for the Double Jeopardy Clause to be implicated.<sup>34</sup> In the very next clause, however, the Court belied this claim by implying—without support—that Yeager would in fact face jeopardy twice if he was retried for insider trading because the "jury's acquittals unquestionably terminated petitioner's jeopardy with respect to the issues finally decided in those counts."<sup>35</sup> Having thus argued that the first requirement of Double Jeopardy was both inconsequential and satisfied in *Yeager*, the Court proceeded by asserting that *Ashe* allows it to treat insider trading and fraud as the "same offence" for Double Jeopardy purposes.<sup>36</sup> As the Court explained, *Ashe* clearly established that the Double Jeopardy Clause precluded prosecution of a given offense when a material element thereof was an issue necessarily decided in the defendant's favor in a "prior trial."<sup>37</sup> Presumably, therefore, *Ashe* stood for the proposition that when an acquittal on one offense decides a particular issue in the defendant's favor, any offense with that issue as an element may be treated as the "same offence" under the Double Jeopardy Clause.<sup>38</sup> Under the factual assumptions adopted by the Court, insider trading and fraud thus could be treated as the "same offence."<sup>39</sup>

After concluding that the facts in *Yeager* triggered the Double Jeopardy Clause, the Court turned to the legal issues at the heart of the case and quickly disposed of the notion that hung counts can negate or alter the preclusive effect of an acquittal under *Ashe*.<sup>40</sup> The Court stated that

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30. *Id.*

31. *Id.* at 2368-70.

32. *Id.* at 2366 (quoting U.S. CONST. amend. V).

33. *See* *United States v. Perez*, 22 U.S. (1 Wheat.) 579, 580 (1824).

34. *Yeager*, 129 S. Ct. at 2366.

35. *Id.* at 2365.

36. *Id.* at 2366-67.

37. *Id.* at 2366-67, 2368 n.6 (emphasis added).

38. *See id.* at 2366-67.

39. *See id.* at 2366.

40. *See id.* at 2367-69.

because mistried counts are mere non-events, an acquittal accompanied by a hung count should be treated precisely as an acquittal returned alone.<sup>41</sup> The *Yeager* Court further held that hung counts are irrelevant to the collateral estoppel analysis under *Ashe*.<sup>42</sup> While *Ashe* instructed the courts to consider the “record of the prior proceeding” and “other relevant matter” when deciding which issues were necessarily decided in an acquittal, the Court found that hung counts are neither relevant nor part of the record, as are “the pleadings, the jury charge, or the evidence.”<sup>43</sup> As such, the Court concluded that the presence of hung counts does not impact the collateral estoppel analysis set forth under *Ashe*.<sup>44</sup>

In dissent, Justices Scalia and Alito demonstrated the many shortfalls in the majority’s logic. To begin, Justice Scalia criticized the Court’s application of the Double Jeopardy Clause in the case of a partial verdict. Because *Richardson v. United States* has long established that the retrial of a hung count merely prolongs the original proceedings against a defendant, while *Ashe* held only that issues decided during “a prior proceeding” may preclude subsequent trials, Justice Scalia found no justification for using the Double Jeopardy Clause to prevent the proceedings in *Yeager* from continuing to completion.<sup>45</sup> Justice Scalia likewise rejected the Court’s unsupported conclusion that acquittals terminate the jeopardy faced by a defendant “with respect to the issues” they necessarily decided; jeopardy has classically started and ended “charge by charge, not issue by issue.”<sup>46</sup> Finally, Justice Scalia noted that the public interest in preserving the finality of judgments is hardly served by the Court’s decision because when the jury returns acquittals inconsistent with hung counts, it fails to carry through its factual determinations to finality.<sup>47</sup> Justice Alito joined Justice Scalia in his dissent but penned his own to emphasize the extremely high burden faced by the defendant who asserts that an acquittal—whether returned in a prior proceeding or alongside a hung count—has preclusive effect; the defendant will succeed in foreclosing further litigation of an issue under *Ashe* only if he can establish that a jury returned a verdict in his favor and would have been “irrational” in so doing without also deciding that issue in his favor.<sup>48</sup>

The Court’s holding in *Yeager* that hung counts are irrelevant to the collateral estoppel analysis under the Double Jeopardy Clause fails for lack of support, circular logic, and misuse of precedent.<sup>49</sup> For instance, the Court opened its analysis by making the unprecedented statement

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41. *Id.* at 2367.

42. *Id.* at 2367-68.

43. *Id.* (using principles of *eiusdem generis* and the definition of “record” in Black’s Law Dictionary to reach this conclusion).

44. *See id.* at 2367.

45. *Id.* at 2372-73 (Scalia, J., dissenting) (citing *Richardson v. United States*, 468 U.S. 317, 325 (1984)).

46. *See id.* at 2373.

47. *Id.* at 2374.

48. *Id.* at 2374-75 (Alito, J., dissenting).

49. *See id.* at 2368, 2370.

that an acquittal terminates a defendant's jeopardy as to the issues decided therein.<sup>50</sup> As Justice Scalia noted in his dissent, this conclusion flies in the face of long-established precedent.<sup>51</sup> More importantly, however, the Court attempted to support its conclusion by engaging in revisionist history. Paraphrasing the *Ashe* holding, the majority substituted the original term "prior proceeding" with "*prior trial*," so that rehearing of a hung count would fall "squarely" within binding precedent.<sup>52</sup> The Court also relied on the holding in *Ashe* as the only support for its own conclusion that hung counts should not affect the analysis established in that case.<sup>53</sup> Given that any discussion of the partial verdict situation in *Ashe* would have been mere dicta, this tactic is unconvincing. Finally, the Court departed from the very case it so heavily relied upon by ignoring *Ashe's* mandate that the collateral estoppel analysis should be "set in a practical frame and viewed with an eye to all the circumstances of the proceedings."<sup>54</sup> Although hung counts may not seem "relevant" or part of the "record" when technically analyzed using principles of *ejusdem generis* or Black's Law Dictionary, it is axiomatic that a hung count constitutes a relevant brick in the wall which ultimately forms the foundation of a jury's verdict.<sup>55</sup>

The Court's decision in *Yeager* has a number of troubling implications, two of which Justice Scalia addressed in dissent. First, extending *Ashe* to apply in the case of partial verdicts forces courts to engage in prolonged and difficult examinations of the record far more often than in the past.<sup>56</sup> Second, this increased flow at the trial level will burden the higher courts with interlocutory appeals and petitions for certiorari.<sup>57</sup> Furthermore, *Yeager* promotes judicial inefficiency by discouraging prosecutors from simultaneously pursuing all possible charges against a defendant; the prosecutor who delays prosecution on a factually related charge may avoid *Yeager's* holding in the case of an acquittal by manipulating the facts so that the same issues are not raised in second prosecution as were decided in the acquittal.

In *Yeager v. United States*, the U.S. Supreme Court drastically expanded the scope of the Double Jeopardy Clause by finding that the application of issue preclusion under *Ashe v. Swenson* is left unchanged by the presence of mistried counts; as such, the Clause may now apply within a single prosecution. Despite the importance of this holding, the Court's analysis is weak at best, as it repeatedly draws conclusions without concrete support and, at times, improperly manipulates and departs from the precedent it cites. All in all, the Court hangs its hat on the public policy

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50. *Id.* at 2366 (majority opinion); *Ashe v. Swenson*, 397 U.S. 436, 444 (1970).

51. *See Yeager*, 129 S. Ct. at 2372 (Scalia, J., dissenting).

52. *See id.* at 2366-67 (majority opinion) (emphasis added).

53. *Id.* at 2367.

54. *See Ashe*, 397 U.S. at 444.

55. *See Yeager*, 129 S. Ct. at 2367-68.

56. *Id.* at 2374 (Scalia, J., dissenting).

57. *See id.*

interest of preserving the finality of acquittals. Although the policies underlying the Double Jeopardy Clause are only arguably implicated in the case of partial verdicts, the overwhelming weight of authority dictates that the Clause itself has no application in the case of a retrial because the defendant in this situation has faced jeopardy not twice, but once.



