No. 24A____

In the Supreme Court of the United States

RUEL M. HAMILTON,
Applicant,

v.

UNITED STATES OF AMERICA,
Respondent.

On Application To Stay the Mandate of the
United States Court of Appeals for the Fifth Circuit

EMERGENCY APPLICATION FOR A STAY PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI

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To the HONORABLE SAMUEL A. ALITO, JR., Associate Justice of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit:

Ruel Hamilton—facing trial on a theory of criminal liability a jury already acquitted him of—moves to stay the Fifth Circuit's mandate pending the disposition of his forthcoming petition for a writ of certiorari. Sup. Ct. R. 22, 23.

In *Ashe v. Swenson*, this Court recognized that the Double Jeopardy Clause prevents relitigating facts found by a jury. 397 U.S. 436 (1970). The Court has placed the burden of proving what facts the jury found on the defendant, but it has not yet clearly stated what the defendant's burden of persuasion is in making such a claim.

At times, the Court has used language suggesting that the burden is heavy. *See, e.g.*, *Yeager v. United States*, 557 U.S. 110, 119–20 (2009) ("To decipher what a jury has *necessarily decided*," courts should scrutinize the full trial record and consider "'whether a rational jury *could have* grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'" (emphasis added) (quoting *Ashe*, 397 U.S. at 444)). On other occasions, however—including in *Ashe* itself—this Court has acknowledged that the burden cannot be so high that no defendant acquitted by the typical general verdict could possibly meet it. *See, e.g.*, 397 U.S. at 444 ("Any test more technically restrictive would, of course, 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."). After all, a general verdict always leaves room to speculate that an acquittal could just as easily result from "compromise, compassion, lenity, or

misunderstanding of the governing law" as from a finding of fact on a particular issue. *McElrath v. Georgia*, 601 U.S. 87, 94 (2024) (quoting *Bravo-Fernandez v. United States*, 580 U.S. 5, 10 (2016)).

These mixed messages have resulted in inconsistent opinions across the lower courts. The Fifth Circuit's decision in this case is just the latest of them. Concurring with her colleagues out of respect for her court's precedent, now-Chief Judge Elrod lamented the lack of clear guidance on this issue. "[T]hese articulations of the burden of proof" she explained, "do not clarify the weight of the invoking party's burden to demonstrate that the issue was already determined in the first trial." Exhibit 1 ("Op.") at 12–13 (Elrod, J., concurring). "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." *Id.*

Hamilton intends to ask this Court to grant certiorari to provide that clarity. To prevent the very right at issue – to be free from double jeopardy – from being lost in the meantime, he asks this Court to stay the mandate while he does. Absent a stay, the mandate will issue on ***November 12***. Given the press of time, if the mandate should issue before this Court can dispose of this application, Hamilton asks that the Court exercise its authority under 28 U.S.C. § 2101(f) to stay the proceedings in the district court until his forthcoming petition for certiorari can be decided.

OPINIONS BELOW

The ruling of the district court most relevant to this application is its denial of Hamilton's motion to dismiss on double jeopardy grounds, which was not reported

and is attached as Exhibit 2. The Fifth Circuit's opinion is reported at 118 F.4th 655, but this application cites the slip opinion attached as Exhibit 1.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 2101(f) to stay the mandate of the Fifth Circuit or, alternatively, to stay the proceedings in the district court. *See* Sup. Ct. R. 23.2.

STATEMENT OF THE CASE

A. Hamilton's charity is mistaken by the prosecution for bribery.

To get a paid-sick-leave referendum on Dallas's November 2018 election ballot, its proponents needed the mayor to just put the referendum on the City Council's agenda so that the measure could be added to the ballot for a popular vote. Dist. Ct. ECF 410 at 110 (trial transcript). The proponents hoped then-City Councilman Dwaine Caraway could help them persuade the mayor to do so—but first they needed to ask Caraway who they expected supported the measure. They enlisted Hamilton, a local businessman and activist whose generous improvements in Caraway's district were well known, to make the ask. *Id.* at 113 (trial transcript).

When Caraway returned Hamilton's initial voicemail about the referendum, Hamilton touted its merits and requested that Caraway ask the mayor to put it on the City Council agenda. Dist. Ct. ECF 416-1 (meeting transcript) at 3–5. During the call, Caraway mentioned health problems he was having and asked to meet in person the next day. *Id.* at 2, 5–6, 9. At the time, unknown to Hamilton or the public, Caraway who had been caught engaging in a huge kickback scheme concerning a city

contract was cooperating with federal authorities at the time who recorded his conversation.

When Hamilton arrived at Caraway's office, in an interaction that also was recorded, he overheard Caraway talking on speakerphone with his mother about her own health issues and related financial worries. *Id.* at 13–14. After briefly commiserating, Caraway and Hamilton discussed the referendum's merits, and Caraway expressed support. *Id.* at 15. The conversation later returned to Caraway's personal problems. He lamented that he was "trying to survive in this . . . it's difficult man." *Id.* at 22–23. When Hamilton asked how he could help, Caraway proposed that Hamilton might defray Caraway's mother's medical expenses. *Id.* at 31. As a cancer survivor himself, Hamilton sympathized with the plight of those struggling with illness and was grateful to receive the excellent health care that had saved his life. Dist. Ct. ECF 411 at 12–13, 32–33 (trial transcript). Hamilton wrote a check for slightly more than Caraway asked. Dist. Ct. ECF 400 at 68 (trial transcript). On the memo line, he wrote his birth date—a reference to his post-cancer habit of thanking God on his birthdays for the additional year of life and reminding himself of the need to show God that he was using that gift of extra time to help others. Dist. Ct. ECF 411 at 32–33.

Although neither Hamilton nor Caraway had linked the check to the referendum in either the recorded call or recorded in-person meeting, the prosecution interpreted Hamilton's act of charity as bribery. It indicted Hamilton for (among other things) violating 18 U.S.C. § 666, as either a gratuity or a bribe, and the Travel

Act, predicated on a violation of a Texas bribery law, by giving Caraway the same check. Exhibit 3 (superseding indictment) at 18–19.

B. The prosecution attempts to try Hamilton a second time on a bribery theory the jury rejected in the first trial.

The Travel Act charge was predicated on a violation of a Texas bribery statute, and the jury was specifically instructed that this statute prohibited only bribery, so a quid pro quo would be required to convict. Dist. Ct. ECF 413 at 26 (trial transcript). On the Section 666 charge, however, the jury was told to convict if it found the check was *either* a bribe *or* a gratuity. *Id.* The jury acquitted Hamilton on the Travel Act charge but convicted him on the Section 666 charge. Op. at 4.

The most obvious explanation for the divergent verdicts is the jury rejected the prosecution's bribery theory—it found the check to be a gratuity and not a bribe. After all, the jury was told that it had to find bribery to convict under the Travel Act and it acquitted, whereas it was told that it could find the check to be *either* a bribe or a gratuity for purposes of Section 666 and it convicted.

Hamilton appealed the conviction on the ground that Section 666 should have only applied to bribery. *United States v. Hamilton*, 46 F.4th 389 (5th Cir. 2022). The Fifth Circuit agreed that Section 666 prohibits only bribery, not gratuities, and reversed Hamilton's Section 666 conviction. *Id.* at 398–99. This Court ultimately adopted this position as well: Section 666 prohibits only bribery. *Snyder v. United States*, 144 S. Ct. 1947 (2024).

The prosecution sought to retry Hamilton on the Section 666 charge on a bribery-only theory. Hamilton sought dismissal on double jeopardy grounds. He

argued that the Section 666 and Travel Act counts, as charged and argued to the trial jury, addressed the same conduct: the one check Hamilton gave Caraway. The jury had acquitted on the Travel Act count, where it was instructed that bribery must be proven, thus implicitly rejecting the prosecution's bribery theory. Because the jury must have found that the check was not a bribe, the Double Jeopardy Clause of the Fifth Amendment prevented the government from relitigating its bribery theory under Section 666.

In opposing Hamilton's motion to dismiss, the government speculated for the first time that the jury's acquittal might have rested on a ground that neither side argued at trial. This labyrinthine theory was premised on the Travel Act's requirement that a defendant must act with criminal intent at two points in time: (1) when an instrumentality of commerce (e.g., a telephone) is used, and (2) when a predicate act (e.g., bribery) is committed. At trial, the government argued only one scheme and one intent: that Hamilton called Caraway with the intent to set his alleged bribery scheme in motion and, the next day, gave Caraway the check as a bribe. Hamilton argued in response—as any innocent person would have—that he always had innocent intent, both when he made the call and when he gave the check to Caraway the next day. But now, with its back against a legal wall, the government posited a new theory that artificially divided its previous single-intent theory into two subparts: perhaps the jury might have concluded that Hamilton initially *called* Caraway with innocent intent, only to choose to commit bribery when they met in person the next day.

The district court indulged this speculation, denying Hamilton's double jeopardy motion on the ground that the jury might have acquitted on the Travel Act charge by finding that Hamilton had innocent intent when he called Caraway, but convicted on the Section 666 charge by finding the check was a bribe. Ex. 2 at 3–4 (district court opinion). The district court's reasoning that the two charges might have "concern[ed] different conduct on different days, and involve[d] different elements" (*id.* at 3) was belied by the trial record, as the prosecution had argued that the call itself was part of one scheme and was intended to initiate the alleged bribery, while Hamilton insisted that he had acted with innocent intent throughout. The court also ignored the more intuitive explanation for the divergent verdicts: that the jury had also been told that it could convict if it found the check to be a gratuity.

The Fifth Circuit affirmed. That court, too, accepted the "possib[ility] that the jury acquitted [Hamilton] on the Travel Act violation because it found he lacked the requisite intent"—even as the court acknowledged that "the verdict did not necessarily rest" on this ground. Op. 10–11.

Chief Judge Elrod concurred, feeling bound by her "inferior" court's "strict rule of orderliness." Op. 14. At the same time, she noted her discomfort with the Fifth Circuit's double-jeopardy issue-preclusion precedent, which "imposes a burden of proof that is both unclear in its weight and higher than is appropriate." *Id.* at 12. Her concurrence identified three problems with that court's formulation of the burden: (1) its weight is unclear, (2) it appears to be "unduly heavy," and (3) it fails to account for the (very real) possibility that a jury's verdict could rest on findings on

multiple issues, not just one. *Id.* at 12–13. She explained that the burden for establishing most constitutional rights is proof by a preponderance of the evidence and, if that standard had been applied here, the outcome of Hamilton's "appeal may have been different." *Id.* at 14

Hamilton filed petitions for rehearing by the panel and en banc, but the Fifth Circuit denied them. Exhibit 4 (Fifth Circuit order denying rehearing). Hamilton then moved to stay the mandate to give him an opportunity to seek review by this Court of the important questions Chief Judge Elrod raised before his constitutional right to be free from double jeopardy is irretrievably lost. The Fifth Circuit denied that request on November 5, 2024. Exhibit 5 (Fifth Circuit order denying motion to stay mandate); *see also* S. Ct. R. 23.3. Absent relief from this Court, the mandate is set to issue on ***November 12***. *See* Fed. R. App. P. 41(b).

REASONS FOR GRANTING A STAY

This Court has sent mixed messages as to a defendant's burden in establishing double jeopardy under *Ashe v. Swenson*. This Court placed the burden on defendants to prove what the jury necessarily found, but it has not clearly stated the weight of that burden. *Dowling v. United States*, 493 U.S. 342, 350 (1991).[1] As Chief Judge Elrod pointed out, "these articulations of the burden of proof . . . do not clarify the weight of the invoking party's burden to demonstrate that the issue was already

[1] In *Dowling*, three Justices would have placed the burden on the *government* to "prov[e] that the issue it seeks to relitigate was *not* decided in the defendant's favor by the prior acquittal" because the purpose of the doctrine is "to protect defendants against governmental overreaching." 493 U.S. at 357 (Brennan, J., dissenting).

determined in the first trial." Op.12–13 (concurring). We are left to guess: "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." *Id.* Because the lack of clarity has led to inconsistent opinions across the lower courts—and, arguably, in this Court, too—there is at least a "reasonable probability" that four members of this Court will vote to grant certiorari. *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). And as explained below, there is more than "a fair prospect" that the Fifth Circuit applied too high a standard. *See id.* The proceedings against Hamilton should be stayed to give him the chance to present this issue and the Court time to consider this important question—or at least weigh whether to hear it—before he is forced to undergo an unconstitutional trial. *See id.*

I. There is at least a reasonable probability that four Justices will take this opportunity to clarify the *Ashe* standard for issue preclusion in the double jeopardy context.

A. This Court has sent mixed messages about the burden of persuasion needed to prove an *Ashe* claim.

Typically, when this Court identifies what a party must prove to establish a constitutional claim, it also establishes the burden of persuasion necessary to prove that claim (e.g., beyond a reasonable doubt, a preponderance of the evidence, or clear and convincing evidence). But it has not clearly addressed the burden or persuasion in the context of an *Ashe* double jeopardy claim. Instead, the Court has suggested that the burden of proving which facts were found by the jury (and therefore have

preclusive effect) is onerous, only to later backtrack and warn that the burden cannot be made *too* onerous.

In the former camp, this Court suggested in *Yeager v. United* States that the burden is heavy. *See* 557 U.S. 110, 119–20 (2009). "To decipher what a jury has *necessarily decided*," the Court said there, courts should scrutinize the full trial record and consider "whether a rational jury *could have* grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Id.* (emphasis added) (quoting *Ashe*, 397 U.S. at 444).

But the Court also has suggested—starting in *Ashe* itself—that the burden cannot be made overly onerous. That Court explained 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." *Ashe*, 397 U.S. at 444. It emphasized that "[a]ny test more technically restrictive would, of course, 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.* As this Court recognized just last Term, a general verdict always leaves room to speculate that, even beyond a finding of fact on a particular issue, an acquittal "might also be 'the result of compromise, compassion, lenity, or misunderstanding of the governing law.'" *McElrath*, 601 U.S. at 94 (quoting *Bravo-Fernandez*, 580 U.S. at 10). This observation explains why *Ashe* cannot be read to require a defendant to eliminate *all* alternative possible explanations for general verdict reached in secret. A standard so high could simply never be met because a

clever prosecutor can always posit another *possibility*. Surely the *Ashe* Court did not mean to require defendants to do the impossible to vindicate a right the constitution guarantees.

As if to confirm this reading of *Ashe*, this Court has found the test met several times. *See, e.g.*, *Yeager v. United States*, 557 U.S. 110 (2009); *Turner v. Arkansas*, 407 U.S. 366 (1972); *Sealfon v. United States*, 332 U.S. 575 (1948). In *Ashe* and *Turner*, for example, the Court concluded the jury must have accepted an alibi defense and imposed a double jeopardy bar. But both of those were general verdicts, which left open the possibility that the verdicts could also have been "the result of compromise, compassion, lenity, or misunderstanding of the governing law." *McElrath*, 601 U.S. at 94 (quotation omitted). Had the Court in either case applied a test that required the defendant prove what the jury found to a virtual certainty, the outcomes of those cases would have been different.

The same is true of *Sealfon* and *Yeager*, where the government argued an alternative explanation for the verdicts that was at least plausible based on the evidence—and yet the defendants still prevailed because their explanation was *more* credible. *Sealfon* involved a defendant who had been acquitted of conspiracy, only to face a subsequent prosecution for a substantive aiding and abetting charge. 332 U.S. at 576. The Court concluded that the second charge was barred by double jeopardy. *Id.* at 580. It reasoned that the first jury must have found that the defendant did not aid one conspirator, even though there was another possibility: that the jury found that he had not joined the broader conspiracy. *Id.* at 579. Viewing the record in a

"practical frame," the Court did not find this alternative explanation persuasive. *Id.* at 579; *see also Ashe*, 397 U.S. at 444 (quoting *Sealfon* for the proposition that "[t]he [preclusion] inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings'" (332 U.S. at 579)).

More recently—and notably—*Yeager*'s preclusion analysis required only a probabilistic determination that the defendant's proffered explanation for a jury's verdict is more likely than other possibilities. There, this Court held that the Fifth Circuit committed legal error by considering hung counts in the *Ashe* analysis, even as the government argued that the error was harmless because there was another explanation for the verdict. *Id.* at 125–26; *see* Gov't Br., *Yeager v. United States*, 2009 WL 390031, at *41–45 (U.S. Feb. 17, 2009). The district court had found that the jury's acquittal rested on a basis that did not support the defendant's double jeopardy claim. 557 U.S. at 120-21. Although this Court acknowledged that the district court's explanation was at least possible, it suggested that the defendant's explanation was more likely in remanding for a determination of the basis for the jury's acquittal. *Id.* And on remand, the Fifth Circuit rejected the district court's explanation in favor of the defendant's as it upheld his double jeopardy claim. *United States v. Yeager*, 334 F. App'x 707, 709 (2009). This would not have been necessary if a mere possibility were sufficient to defeat the defendant's claim. It follows that the existence of another plausible explanation for a jury's verdict does not defeat a defendant's *Ashe* claim.

The dissenters, by contrast, read *Ashe* to require "the doctrine of issue preclusion [to] be applied with . . . rigor." *Id.* at 133 (Alito, J., dissenting). Under this

"demanding standard," the dissent explained, "[t]he second trial is not precluded simply because it is unlikely—or even very unlikely—that the original jury acquitted without finding the fact in question. Only if it would have been *irrational* for the jury to acquit without finding that fact is the subsequent trial barred." *Id.* at 133–34. A six-Justice majority, however, rejected this view of *Ashe*. Instead, it rejected the government's harmless error argument and remanded—despite the government's (at least plausible) alternative explanation for the jury's verdict.

B. The lack of clarity as to the post-*Ashe* standard has led to inconsistent outcomes.

As *Yeager* illustrates, depending on which language in *Ashe* a court chooses to cite, it can justify nearly any outcome. In this case, for example, the Fifth Circuit applied a strict reading of *Ashe* in line with the *Yeager* dissent discussed above. The Fifth Circuit understood this Court's precedent to mean that a defendant's double jeopardy claim must fail if it is "*possible*" the jury's verdict rested on some other basis. Op. 11. In effect, the panel imposed a virtual-certainty requirement—a standard even higher than proof beyond a reasonable doubt.

Chief Judge Elrod concurred to explain that the Fifth Circuit's interpretation of *Ashe* "imposes a burden of proof that is both unclear in its weight and higher than is appropriate in this context." Op. 12 (concurring). Although she felt bound as a member of "an inferior court with a strict rule of orderliness" to apply this reading of *Ashe*, she noted her discomfort with that precedent. Op. 14. She identified three problems with this formulation of the burden: (1) its weight is unclear, (2) it appears to be "unduly heavy," and (3) it fails to account for the (very real) possibility that the

jury's verdict could rest its findings on multiple issues, not just one. Op. 12–13. "The courts," Chief Judge Elrod urged, "would do well to clarify this point." Op. 13.

Indeed, the decision below evinces serious confusion in the Fifth Circuit's application of this Court's precedent. Its virtual-certainty standard cannot be squared with either this Court's decision in *Yeager* or its own. Nor can it be reconciled with other decisions in that circuit upholding *Ashe* claims in the face of plausible alternative explanations for jury verdicts. *See, e.g.*, *United States v. Griggs*, 651 F.2d 396 (5th Cir. 1981); *McDonald v. Wainwright*, 493 F.2d 204 (5th Cir. 1974); *see also United States v. Leach*, 632 F.2d 1337, 1340 n.7 (5th Cir. 1980) ("[M]erely look[ing] to whether there is any technically possible means by which the jury could have acquitted [the defendant] without resolving the . . . issues in his favor . . . is clearly misinterpreting *Ashe*.").

Whereas the Fifth Circuit in this case interpreted *Ashe* to require the party invoking preclusion to "prove conclusively that the issue under consideration was the sole disputed issue in the first trial" (Op. 13 (Elrod, J., concurring)), other circuits have applied a probabilistic assessment of which explanation for a verdict is more reasonable (as opposed to whether another explanation is merely plausible). The Ninth Circuit, for example, has read *Ashe* to require it to "give jury verdicts the *most rational interpretation possible*." *United States v. Carbullido*, 307 F.3d 957, 962 (9th Cir. 2002) (emphasis added); *see also, e.g.*, *United States v. Castillo-Basa*, 494 F.3d 1217, 1221 (9th Cir. 2007) (Callahan, J., dissenting from denial of *en banc* review)

(arguing that panel erred on finding *Ashe* bar because the verdict could rest on a combination of other factors).

Some circuits state this the other way around: that an *Ashe* claim fails where "the jury *most likely* grounded its verdict on an issue other than the one which defendants seek to foreclose." *United States v. Dray*, 901 F.2d 1132, 1136 (1st Cir. 1990) (emphasis added) (quoting *United States v. Ranney*, 719 F.2d 1183, 1187 (1st Cir. 1983)). Still others have at times emphasized that they "must not make the defendant's task even more formidable by straining to postulate 'hypertechnical and unrealistic' grounds on which the jury could conceivably have rested its conclusions." *United States v. Mespoulade*, 597 F.2d 329, 333 (2d Cir. 1979). And where a defendant's explanation for a verdict is more reasonable, they will "not bend over backwards to formulate some route by which the jury could have conceivably found" something else. *United States v. Fernandez*, 722 F.3d 1, 34 (1st Cir. 2013). Where the government's alternative explanation is plausible, but less likely, courts sometimes treat such arguments as requests "to adopt 'the hypertechnical and archaic approach'" this Court in *Ashe* "instructed [them] to reject." *United States v. Whittaker*, 702 F.2d 901, 904 (11th Cir. 1983).

The burden of persuasion imposed by *Ashe* cases is important because it will often dictate the outcome. When a preponderance of the evidence burden is imposed, *Ashe* claims often succeed. But where the defendant has the burden to exclude *any* other possibility for the verdict—a burden that is even higher than beyond a reasonable doubt—an *Ashe* claim becomes nearly impossible to prove. It is therefore

not enough to state, as the Court has, that a defendant must prove what the jury necessarily decided. The Court must also clarify *how* a defendant proves what the jury necessarily decided.

Because a constitutional right hangs in the balance—and should not depend on where in the country the defendant happens to be prosecuted—this issue is worth this Court's attention. *See* Sup. Ct. R. 10(a), (c).

II. There is more than a fair prospect that a majority of this Court will agree that the Fifth Circuit erred in applying an impossible-to-meet "virtual certainty" standard.

If this court were to grant certiorari, it would be unlikely to follow the Fifth Circuit down the virtual-certainty path. *See Rostker*, 448 U.S. at 1308. Under the majority approach—a preponderance of the evidence standard—"the outcome of this appeal may have been different." Op. 14 (Elrod, J., concurring).

A. A preponderance of evidence standard should apply.

No other constitutional right requires proof to a virtual certainty, and there is no reason why double jeopardy—a right expressly guaranteed in the Constitution's text—should be subject to so high a burden. As Chief Judge Elrod recognized in her concurrence, "in other contexts" a party challenging a constitutional violation "need only satisfy the preponderance of the evidence standard." Op. 13 (citing, *inter alia*, *Medina v. California*, 505 U.S. 437, 439 (1992) (incompetence to stand trial), and *Moore v. Michigan*, 355 U.S. 155, 161–62 (1957) (right to counsel not waived)).

In fact, this Court has on many occasions imposed an even lesser burden. *See, e.g.*, *United States v. Watts*, 519 U.S. 148, 157 (1997) (government must prove sentencing enhancements by a preponderance); *Purkett v. Elem*, 514 U.S. 765, 767

(1995) (government must rebut defendant's *prima facia Batson* challenge). And where the Constitution confers an immunity—as the Double Jeopardy Clause does—this Court has held the burden of proof on the defendant is also significantly lower. *See, e.g.*, *Trump v. United States*, 144 S. Ct. 2312, 2337 (2024) (government's burden to rebut presumptive presidential immunity); *United States v. Menendez*, 831 F.3d 155, 165 (3d Cir. 2016) (defendant must prove Speech or Debate Clause immunity by a preponderance); *United States v. Cantu*, 185 F.3d 298, 303 (5th Cir. 1999) (government must prove by preponderance that it did not use immunized testimony); *United States v. Levy*, 803 F.2d 1390, 1393–94 (5th Cir. 1986) (government must rebut defendant's prima facie *Blockburger* double jeopardy claim that the new charge is the same by a preponderance of the evidence).

There is no reason a claim of double jeopardy under *Ashe* should be so much more onerous than these other constitutional claims—especially when the burden rests on the defendant. Worse still, the virtual certainty standard as applied to double jeopardy cannot coexist with other constitutional rights. Because virtual certainty requires a defendant to defend on only a single issue to secure their right to double jeopardy protection, the defendant is in effect forced choose between their Fifth Amendment right and their Sixth Amendment right "to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 331 (2006) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)).

Chief Judge Elrod explained in her concurrence why the virtual certainty standard is so unfair. By requiring the party invoking *Ashe* double jeopardy to "prove

conclusively that the issue under consideration was the sole disputed issue in the first trial," the virtual certainty standard dictates that "any evidence to the contrary" means "the invoking party loses his challenge." Op. 13. This is all but impossible. As the government argued below, the fact that "a previous trial included multiple bases for acquittal" necessarily means that "a defendant cannot demonstrate that the jury necessarily rested its acquittal on any one of them." 5th Cir. Gov't Br. 14. A defendant who wishes to preserve their double jeopardy right is therefore left with only one surefire option: argue only a single defense at trial. And even that leaves open the possibility that a verdict might still rest on other bases, such as compassion, lenity, or misunderstanding the law. *See McElrath*, 601 U.S. at 94.

Here, Hamilton argued one theory—innocent intent—but because the Travel Act requires proof of intent at two separate times, the prosecution was allowed to defeat his double jeopardy claim by speculating that the jury may have only found innocent intent on the day of the call but not the very next day. To obtain double jeopardy protection for any acquittal that he achieved, what was he supposed to do? Falsely concede he called with the intent to bribe, but then argue the check he wrote the next day was not actually a bribe? Double jeopardy protection should not come to only a defendant who pulls all his punches but one. And it is surely a perverse result when a defendant who pokes just one hole in the prosecution's case gets double jeopardy protection, but a defendant can be retried if he obtains an acquittal by poking too many holes in the prosecution's case.

This Court would not adopt a standard for double jeopardy claims that forces a defendant to make a strategic choice to waive one constitutional right to secure another. Nor should the standard require a defendant to concede an element of the case against him (for example, in this case, criminal intent on one day versus another especially when the prosecutor was arguing one intent in both communications) to preserve that right. This Court would therefore likely reject the Fifth Circuit's virtual certainty standard in favor of the preponderance standard, which reflects the "realism and rationality" of *Ashe*. *See* 397 U.S. at 444.

B. Under a preponderance standard, this case would come out differently.

Applying the preponderance standard to this case, this Court would conclude that the Fifth Circuit erred when it affirmed the district court's denial of Hamilton's double jeopardy motion.

As Chief Judge Elrod explained, "the outcome of this appeal may have been different" under a preponderance standard "because [Hamilton] has shown that at least some evidence in the record weighs in his favor." Op.14 (concurring). Indeed, the record confirms that Hamilton proved by a preponderance of the evidence that the prosecution's bribery theory was rejected. The jury's verdict speaks for itself, as the jury acquitted every time it was told the check must be a bribe and convicted only where it was told (erroneously) to convict if it found the check a gratuity.

Conversely, the record contains no support for the government's *post hoc* attempt to carve Hamilton's phone pitch to Caraway and their meeting the next day into separate events with separate intents. At trial, neither side sought to distinguish

Hamilton's intent when he made the call from his intent the next day at the meeting. Hamilton maintained that he had innocent intent at all times (*see, e.g.*, Dist. Ct. ECF 399 at 89), while the government repeatedly argued that Hamilton's call to Caraway and the check he gave him in person the next day were part of a single bribery scheme. There is no reason the jury would have come up with the government's counterintuitive new theory that Hamilton called with innocent intent, only to decide to offer a bribe the next day.

If this Court were to take this case, there is at least "a fair prospect that a majority of the Court will conclude that the decision below was erroneous." *See Rostker*, 448 U.S. at 1308.

III. Without a stay, Hamilton's Fifth Amendment right to avoid double jeopardy will be lost.

In a double jeopardy context, the "irreparable harm" this Court requires for a stay is obvious. *See id.* The Double Jeopardy Clause confers more than a right not to be convicted; it is "a right not to be tried." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 802 (1989). Double jeopardy therefore operates more like an immunity than an ordinary trial right, in that its "protections would be lost" if a defendant were forced to defend against an unconstitutional second prosecution in the first place. *Abney v. United States*, 431 U.S. 651, 662 (1977).

This is why the denial of a motion to dismiss on double jeopardy grounds is immediately appealable—the right would be moot if a defendant is tried before an appellate court resolves his double jeopardy claim. *Id.* The whole point of the right is to spare the defendant from the burdens of trial by preventing the government from

"mak[ing] repeated attempts to convict [him] for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Id.* at 661 (quotation omitted). "[T]hese aspects of the guarantee's protections would be lost if the accused were forced to 'run the gauntlet' a second time"—even if "his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit." *Id.* at 661–62.

These are the stakes here: if Hamilton is tried before this Court can review his appeal and vindicate his double jeopardy right, it will be lost for good. A stay is therefore necessary to preserve that right. This is not "a close case." *Rostker*, 448 U.S. at 1308. But even if it were, the balance of the equities—the loss of a constitutional right on the one hand, versus a temporary scheduling delay for the government on the other—favors Hamilton.

CONCLUSION

For these reasons, Hamilton requests that this Court stay the mandate of the Fifth Circuit pending disposition of his forthcoming petition for certiorari. Alternatively, Hamilton requests that the Court exercise its authority to stay the proceedings against him in the U.S. District Court for the Northern District of Texas.

Respectfully submitted,

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EXHIBIT 1

United States Court of Appeals for the Fifth Circuit

No. 23-11132

United States Court of Appeals
Fifth Circuit
FILED
September 30, 2024
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

RUEL M. HAMILTON,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:19-CR-83-1

Before WIENER, ELROD, and WILSON, *Circuit Judges*.

CORY T. WILSON, *Circuit Judge*:

A jury convicted Ruel M. Hamilton of bribery under 18 U.S.C. § 666(a)(2) based on his interactions with Dallas City Council member Dwaine Caraway but acquitted Hamilton on a related Travel Act count under 18 U.S.C. § 1952(a)(3). This court vacated Hamilton's § 666 conviction due to an improper jury instruction. When the Government decided to retry the § 666 count on remand, Hamilton moved to dismiss based on collateral estoppel. The district court denied his motion. Because Hamilton has not shown that "the factual issue allegedly barred by collateral estoppel was

actually decided in the first proceeding," *Garcia v. Dretke*, 388 F.3d 496, 501 (5th Cir. 2004) (internal quotation marks and citation omitted), we affirm.

I.

A.

Hamilton is a wealthy real estate developer in Dallas, Texas. In 2018, Hamilton and others were engaged in an effort to place on the ballot a proposed ordinance that would require certain private employers to provide paid sick leave to their employees. They failed to obtain the needed signatures. Nevertheless, the City Council could still vote to place the issue on the ballot that November if the Mayor agreed to put a discussion of the ordinance on the City Council's agenda. To promote this possible avenue, Councilman Philip Kingston asked Hamilton to speak with Councilman Dwaine Caraway, who "had a much warmer relationship" with the Mayor, to see if Caraway would ask the Mayor to put the proposed ordinance on the agenda for the City Council's next meeting. Hamilton agreed. Unbeknownst to Hamilton, Caraway was cooperating with the FBI in a corruption investigation.

Unable to reach Caraway initially, Hamilton left him a voicemail about the ordinance. At the FBI's behest, Caraway returned Hamilton's call on August 2, 2018. The FBI recorded that call. During the conversation, Hamilton explained how Caraway could help to get the proposed ordinance on the ballot and asked Caraway if he would talk to the Mayor. Though Caraway did not commit to talking to the Mayor about the ordinance, he scheduled an in-person meeting with Hamilton the next day. The FBI also recorded that meeting.

When Hamilton arrived for the meeting on August 3, Caraway was talking to his mother on the phone about her poor health and medical bills. After Caraway hung up, the conversation quickly turned to the proposed

ordinance. Among other things, Caraway and Hamilton discussed the council members who would likely vote favorably and the importance of getting the ordinance on the agenda for the August 8 council meeting.

Hamilton then stated, "I've been told, there's only one person that might get the Mayor to [put the ordinance on the next meeting agenda] and that's Councilmember Dwaine Caraway." As the conversation proceeded, Hamilton referenced Caraway's potential run for reelection. He told Caraway that he thought Caraway was "doing an extraordinary job in [Caraway's] district," and that he and Caraway could "get a lot of stuff done." Hamilton then clarified the point he was trying to make: "What I'm saying is, I'm there, you know, and so if there is anything that I can help you with, I mean, I hope you feel like you can reach out." Caraway responded, "Well, I'm going to tell you something, I'm reaching out today. I . . . got to go find me $6,200 today."[1]

The conversation then turned to a real estate development project in Caraway's district. As they wrapped up, Hamilton assured Caraway that he wanted to help with that project. Hamilton then asked, "So what can I do for you right now today?" Caraway responded, "You can answer that bill that I just threw out there . . . for about 62 today and that will help me . . . do what I need to do." After Caraway agreed to "follow through with the Mayor," Hamilton wrote Caraway a check for $7,000.

B.

A grand jury indicted Hamilton on four counts. Two of those counts concerned Hamilton's interactions with Caraway: bribery of a local government agent receiving federal benefits, *see* 18 U.S.C. § 666(a)(2), and

[1] Hamilton asserts that the money was to pay for Caraway's mom's medical bills.

use of an interstate facility to violate the Travel Act, *see* 18 U.S.C. § 1952(a)(3).[2] After a two-week trial, the district court submitted the case to the jury. As to the Travel Act count, the district court instructed the jury that the "statute requires a direct and intended exchange of the benefit for the recipient's action, not merely a gratuity," i.e., a *quid pro quo* bribe. Conversely, the district court did not expressly instruct the jury that the § 666 count required proof of a *quid pro quo* bribe.

The jury convicted Hamilton on the § 666 count but acquitted him on the Travel Act count. Hamilton appealed his conviction, arguing that the district court should have expressly instructed the jury that the § 666 count required proof of a *quid pro quo* bribe, as opposed to a mere gratuity. This court agreed. *United States v. Hamilton*, 46 F.4th 389, 398–99 (5th Cir. 2022), *petition for reh'g en banc denied*, 62 F.4th 167 (5th Cir. 2023). Accordingly, we vacated Hamilton's conviction and remanded for further proceedings. *Id.* at 399.

The Government elected to retry the case. Hamilton moved to dismiss the § 666 count stemming from his interactions with Caraway. He argued, as he does on appeal, that double jeopardy precludes the Government from relitigating that count. According to Hamilton, because the jury acquitted him on the Travel Act count, it necessarily found that the check he wrote for Caraway on August 3 was not a *quid pro quo* bribe. And because this

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[2] The other two counts involved bribes Hamilton allegedly made to Councilwoman Carolyn Davis, in violation of 18 U.S.C. § 666. The jury convicted Hamilton of those charges. However, as explained *infra*, this court reversed those convictions because the district court failed to instruct the jury that a conviction under § 666 requires proof of a *quid pro quo* bribe, as opposed to a mere gratuity. *United States v. Hamilton*, 46 F.4th 389, 398–99 (5th Cir. 2022), *petition for reh'g en banc denied*, 62 F.4th 167 (5th Cir. 2023). The Government also intends to retry Hamilton on those charges. But Hamilton's double jeopardy argument only applies to the § 666 charge related to his interactions with Caraway. Thus, the counts related to Davis are not at issue in this appeal.

court held that the § 666 count required proof of a *quid pro quo* bribe, the first jury's acquittal on the Travel Act count is dispositive as to his § 666 claim.

The district court rejected Hamilton's argument and denied his motion. The court reasoned that the § 666 count and the Travel Act count "concern[ed] different conduct on different days, and involve[d] different elements[.]" Specifically, the Travel Act count "required the jury to find that when he spoke with Caraway by phone on August 2, Hamilton had the specific intent to promote, manage, establish or carry on unlawful activity, namely bribery in violation of Texas Penal Code Section 36.02." In contrast, the § 666 count "related to Hamilton's actual conduct in writing and transmitting to Caraway a $7,000 check the next day." Based on those differences the district court concluded:

> It is not the case that the issue of whether the check . . . was a gratuity or a bribe is implicated by the jury's decision to acquit Hamilton on [the Travel Act count] based on what he was intending the day before he acted. Put differently, a lack of the requisite specific intent for the alleged Travel Act violation on August 2 is not dispositive of whether Hamilton paid a bribe on August 3.

To support its reasoning, the district court pointed to notes sent by the jury during deliberation "indicating that they were grappling with" the specific intent element of the Travel Act count, as opposed to whether the check was

a *quid pro quo* bribe or a gratuity.[3] Hamilton timely appealed the district court's order.[4]

II.

"Whether a prosecution violates the Double Jeopardy Clause or is precluded by collateral estoppel are issues of law that we review *de novo*." *United States v. Brown*, 571 F.3d 492, 497 (5th Cir. 2009) (citation omitted). The party invoking collateral estoppel "bears the burden of demonstrating

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[3] Though the district court referenced the jury notes to support its conclusion, it also plainly stated that the notes were "not dispositive," but rather simply "support[ed] the obvious conclusion the Court would [have] reach[ed] without them." Hamilton asserts that the district court improperly considered the jury notes in denying his motion. Some courts have considered jury notes in weighing whether collateral estoppel applies in the double jeopardy context. *See, e.g.*, *Owens v. Trammell*, 792 F.3d 1234, 1247–48 (10th Cir. 2015); *United States v. Venable*, 585 F.2d 71, 79 (3d Cir. 1978); *see also United States v. Barragan-Cepeda*, 29 F.3d 1378, 1380 (9th Cir. 1994) (holding that juror affidavits could properly be considered in a collateral estoppel inquiry). Though this court has yet to address the issue directly, we have refused to consider jury notes in other contexts due to their speculative nature. *E.g.*, *Sanchez v. Davis*, 936 F.3d 300, 307 (5th Cir. 2019); *United States v. Agofsky*, 458 F.3d 369, 374 (5th Cir. 2006). Further, in holding that courts should not consider hung counts in conducting double jeopardy analysis, the Supreme Court cautioned against "speculati[ng] into what transpired in the jury room" and "explorations into the jury's sovereign space." *Yeager v. United States*, 557 U.S. 110, 120–22 (2009). Thus, we are hesitant to pass on the issue of whether the district court properly considered the jury notes in conducting its analysis. Setting the jury notes aside, we conclude that the Double Jeopardy Clause is not implicated regardless.

[4] Neither party challenges our jurisdiction on appeal. But the Government raised the issue of jurisdiction in the district court by arguing that Hamilton's motion to dismiss was frivolous. And "[w]e have an independent duty to determine our jurisdiction over any case presented to us for decision." *Persyn v. United States*, 935 F.2d 69, 71 (5th Cir. 1991) (citation omitted). Though Hamilton's appeal is ultimately unsuccessful, we agree with the district court that his arguments are at least "colorable," giving us jurisdiction under 28 U.S.C. § 1291. *See United States v. Shelby*, 604 F.3d 881, 885 (5th Cir. 2010) (per curiam) (citation omitted) ("Under the collateral order doctrine, we have jurisdiction under 28 U.S.C. § 1291 to review a pretrial order rejecting a claim of double jeopardy, providing the jeopardy claim is 'colorable.'").

that the factual issue allegedly barred by collateral estoppel 'was actually decided in the first proceeding.'" *Garcia*, 388 F.3d at 501 (quoting *Dowling v. United States*, 493 U.S. 342, 350 (1990)). "This burden requires a defendant to prove that a second jury [would] necessarily ma[k]e a finding of fact that contradicted a finding of the first jury." *Id.* (citation omitted).

III.

The sole issue on appeal is whether Hamilton's acquittal on the Travel Act count in his first trial precludes the Government from retrying his § 666 count stemming from his interactions with Caraway. It does not.

"The Double Jeopardy Clause provides that no person subject to the same offense shall 'be twice put in jeopardy of life or limb.'" *Lewis v. Bickham*, 91 F.4th 1216, 1222 (5th Cir. 2024) (per curiam) (quoting U.S. CONST. amend. V). In *Ashe v. Swenson*, the Supreme Court made clear that the collateral estoppel doctrine is incorporated into the Double Jeopardy Clause. 397 U.S. 436, 445 (1970). Thus, "'when an issue of ultimate fact has once been determined by a valid and final judgment,' the Clause forbids the prosecution from relitigating that issue 'in any future lawsuit.'" *United States v. Auzenne*, 30 F.4th 458, 462 (5th Cir. 2022) (quoting *Ashe*, 397 U.S. at 443).

Ashe set forth a two-part test to resolve whether collateral estoppel applies in the double jeopardy context. *United States v. Cessa*, 861 F.3d 121, 140 (5th Cir. 2017). The threshold determination is "to determine which facts were 'necessarily decided' in the first trial." *United States v. Brackett*, 113 F.3d 1396, 1398 (5th Cir. 1997) (quoting *United States v. Levy*, 803 F.2d 1390, 1398–99 (5th Cir. 1986)). If the court concludes that a fact was necessarily decided in the first trial, it must then "determine whether the fact[] necessarily decided in the first trial constitute[s] [an] essential element[] of the offense in the second trial." *Cessa*, 861 F.3d at 140 (internal

quotation marks and citations omitted). We need reach only the first part of *Ashe*'s test to decide this case.

The application of the *Ashe* test in criminal cases is often "awkward, . . . as a general verdict of acquittal does not specify the facts 'necessarily decided' by the jury." *Brackett*, 113 F.3d at 1398–99. In view of that, this court takes a "functional approach to collateral estoppel in criminal cases[.]" *Id.* at 1399. "To determine 'what the jury has necessarily decided,' the court must '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.'" *United States v. Sarabia*, 661 F.3d 225, 230 (5th Cir. 2011) (alteration accepted) (quoting *Yeager v. United States*, 557 U.S. 110, 129 (2009)). "This 'inquiry must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.'" *Id.* (internal quotation marks omitted) (quoting *Ashe*, 397 U.S. at 444).

"But the fact that it is *possible* that the jury could have based its verdict on any number of facts is insufficient to apply the collateral estoppel doctrine." *United States v. El-Mezain*, 664 F.3d 467, 555–56 (5th Cir. 2011) (emphasis in original) (citing *Sarabia*, 661 F.3d at 231; *Brackett*, 113 F.3d at 1398–99; *United States v. Lee*, 622 F.2d 787, 790 (5th Cir. 1980)). "When a fact is not necessarily determined in a former trial, the possibility that it may have been does not prevent re-examination of that issue." *Brackett*, 113 F.3d at 1398 (quoting *Lee*, 622 F.2d at 790) (internal quotation marks omitted). "[O]ur inquiry does not focus on what the jury *may* have decided, but rather on what it *must* have decided." *Sarabia*, 661 F.3d at 232 (citing *Brackett*, 113 F.3d at 1398) (emphasis in original).

These precepts in mind, we turn to this case. To determine what the jury necessarily decided in Hamilton's first trial, we must examine the elements of the Travel Act violation. *See Sarabia*, 661 F.3d at 231. The district court instructed the jury that it must consider three elements to convict Hamilton of a Travel Act violation:

> First, that [Hamilton] traveled in interstate commerce or that he used any facility in interstate commerce. Second, that he did so with a specific intent to promote, manage, establish or carry on unlawful activity; that is, bribery; in violation of Texas Penal Code, Section 36.02; and [t]hird, that subsequent to the act of travel or use of any facility in interstate commerce, [Hamilton] did knowingly and willfully promote, manage, establish or carry on such unlawful activity; that is, bribery; in violation of Texas Penal [C]ode, Section 36.02.

See 18 U.S.C. § 1952(a). The district court further instructed the jury that violation of Texas Penal Code § 36.02 "requires a direct and intended exchange of the benefit for the recipient's action, not merely a gratuity," i.e., there must be a *quid pro quo* bribe. Thus, to convict Hamilton on the Travel Act count, the jury would necessarily have had to find three things: (1) Hamilton used a facility in interstate commerce when he talked to Caraway on August 2; (2) during that call, he had the specific intent to make a *quid pro quo* bribe; and (3) he actually made such a bribe by giving Carraway the $7,000 check on August 3.

It follows that in acquitting Hamilton on the Travel Act count the jury *could* have found (at least) three different things: (1) Hamilton did not use a facility in interstate commerce when he talked to Caraway on August 2; (2) during that call, Hamilton lacked the specific intent to make a *quid pro quo* bribe; or (3) Hamilton did not actually make a *quid pro quo* bribe when he handed Caraway the check on August 3. Because the jury could have acquitted Hamilton based on the second possibility, that he lacked the

required intent when he spoke with Caraway on August 2, the district court correctly concluded that the verdict did not *necessarily* rest on the third possibility, that Hamilton did not make a *quid pro quo* bribe on August 3 when he gave Caraway the check. *See Sarabia*, 661 F.3d at 232 (emphasis in original) ("[O]ur inquiry does not focus on what the jury *may* have decided, but rather on what it *must* have decided.").[5] Restated, though it is possible that the jury determined that Hamilton's check was not a *quid pro quo* bribe, that possibility "does not prevent re-examination of th[e] issue." *Brackett*, 113 F.3d at 1398 (quoting *Lee*, 622 F.2d at 790).

Hamilton all but concedes it is possible that the jury acquitted him on the Travel Act violation because it found he lacked the requisite intent. Instead, the thrust of his argument is that no "rational jury could have grounded its verdict upon an issue other than" the question of whether Hamilton's check was a *quid pro quo* bribe. *See Sarabia*, 661 F.3d at 230 (quoting *Yeager*, 557 U.S. at 129). But a practical view of the record belies that contention. *See id.*

A straightforward comparison of the August 2 phone call transcript and the August 3 meeting transcript shows that a rational jury could have acquitted Hamilton by finding that he lacked the specific intent to make a *quid pro quo* bribe on August 2, regardless of whether he actually made such a bribe on August 3 when he wrote the check. Though Hamilton and

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[5] The Government also notes that the district court's charge specifically instructed the jury that it could acquit Hamilton on the Travel Act count if it concluded that the phone call was "inconsequential" to the scheme, thus providing another basis for Hamilton's acquittal. Though it is possible that the jury found the August 2 phone call to be "inconsequential" to the scheme, the district court did not address that hypothetical in its order denying Hamilton's motion to dismiss, and there is no evidence in the record to support such a finding. Thus, declining to apply collateral estoppel based on this possibility risks the "hypertechnical and archaic approach" warned of by the Supreme Court in *Ashe*, *see* 397 U.S. at 444, and we do not explore it further.

Caraway discussed the proposed ordinance during the August 2 call, and Hamilton asked Caraway to talk to the Mayor about putting the ordinance on the agenda, Caraway never asked for a favor in return. Nor did Hamilton offer Caraway anything of value on the call. By contrast, during the August 3 meeting, Hamilton repeatedly asked Caraway what he could do for him. After Caraway responded that Hamilton "can answer that bill that I just threw out there" and agreed to "follow through with the Mayor," Hamilton gave him a check for $7,000. From that evidence, the jury could have concluded that Hamilton lacked the specific intent to make a *quid pro quo* bribe on August 2, but nonetheless decided to bribe Carraway during the meeting the next day. As the district court succinctly stated, "a lack of the requisite specific intent for the alleged Travel Act violation on August 2 is not dispositive of whether Hamilton paid a bribe on August 3."

Hamilton counters that the record shows that he had no reason to bribe Caraway and the check was a charitable act to help Caraway pay for his mother's medical expenses. Of course it is possible that the jury could have accepted Hamilton's version of the record and acquitted him by finding that the check was a charitable gratuity and not a bribe. "But the fact that it is *possible* that the jury could have based its verdict on any number of facts is insufficient to apply the collateral estoppel doctrine." *El-Mezain*, 664 F.3d at 555–56 (emphasis in original). In short, Hamilton fails to meet his burden to show that the jury in his first trial necessarily determined that the August 3 check to Carraway was not a *quid pro quo* bribe. Therefore, the district court did not err in denying Hamilton's double jeopardy motion.

AFFIRMED.

JENNIFER WALKER ELROD, *Circuit Judge*, concurring:

I join Judge Wilson's opinion because his formulation and application of the burden of proof in this case is consistent with our case law and Supreme Court precedent. Nonetheless, I write separately to express my view that this precedent imposes a burden of proof that is both unclear in its weight and higher than is appropriate in this context.

Under the principle of collateral estoppel, "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). In *Ashe v. Swenson*, the Supreme Court held that an issue is barred from relitigation only when the party invoking collateral estoppel can prove that the issue was "[t]he single rationally conceivable issue in dispute before the jury" in the first proceeding. *Id.* at 445.

"This court has interpreted *Ashe* to require a twofold inquiry for analyzing double jeopardy claims." *United States v. Cessa*, 861 F.3d 121, 140 (5th Cir. 2017) (quoting *United States v. Tran*, 433 F. App'x 227, 230 (5th Cir. 2011)); *see Bolden v. Warden, W. Tenn. High Sec. Facility*, 194 F.3d 579, 583-84 (5th Cir. 1999). "First, the court must determine what, if anything, the jury necessarily decided in the first trial." *Cessa*, 861 F.3d at 140 (quoting *Tran*, 433 F. App'x at 230). "Second, a court must determine whether the facts necessarily decided in the first trial constitute essential elements of the offense in the second trial." *Id.* (internal quotation marks omitted) (quoting *Tran*, 433 F. App'x at 230).

The first problem with these articulations of the burden of proof is that they do not clarify the weight of the invoking party's burden to demonstrate that the issue was already determined in the first trial. 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.

The second problem is that these precedents, their poor articulation of the invoking party's burden notwithstanding, make that burden unduly heavy. Under these precedents, the invoking party essentially must prove conclusively that the issue under consideration was the sole disputed issue in the first trial for collateral estoppel to apply. If there is any evidence to the contrary, the invoking party loses his challenge. But in other contexts in which a constitutional right is at stake, the Supreme Court and this court have recognized that a party challenging a violation of his constitutional right need only satisfy the preponderance of the evidence standard. *See, e.g.*, *Medina v. California*, 505 U.S. 437, 439 (1992) (criminal defendant claiming incompetence to stand trial must prove incompetence by a preponderance of the evidence); *Moore v. Michigan*, 355 U.S. 155, 161-62 (1957) (to collaterally attack his conviction on ineffective-assistance-of-counsel grounds, criminal defendant must show, by a preponderance of the evidence, that he did not intelligently and understandingly waive his right to counsel); *United States v. Guerrero-Barajas*, 240 F.3d 428, 432 (5th Cir. 2001) (on a motion to suppress, defendant generally must prove, by a preponderance of the evidence, that the evidence in question was obtained in violation of her constitutional rights).

The third problem is that these precedents disregard the possibility that a jury could have reached its verdict based on multiple issues, as opposed to merely a single issue. Although a court can never fully know the reasoning behind or the bases for a jury's verdict, it is conceivable that this may sometimes be the case. And in such a scenario, 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," *Cessa*, 861 F.3d at 140 (quoting *Tran*, 433 F. App'x at 230), he will be categorically unable to succeed on a collateral estoppel challenge, in a manner that could violate his constitutional rights.

Had Hamilton been required to prove only by a preponderance of the evidence that the question whether his check was a *quid pro quo* bribe was the sole disputed issue in his first trial, the outcome of this appeal may have been different, because he has shown that at least some evidence in the record weighs in his favor. Furthermore, it is conceivable that the jury could have decided Hamilton's Travel Act count based on multiple issues, meaning that any determination regarding whether the jury "necessarily decided" a single issue could violate his right to be free from double jeopardy.

But we are an inferior court with a strict rule of orderliness. And concur I must.

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	
	§	No. 3:19-CR-0083-M
RUEL M. HAMILTON	§	
	§	
	§	

ORDER

Before the Court is the Motion to Dismiss Count Three based on Double Jeopardy, filed by Defendant Ruel Hamilton. ECF No. 471. For the reasons stated below, the Motion is **DENIED**.

On June 29, 2021, a jury convicted Hamilton of Counts One, Two, and Three of the Superseding Indictment. ECF No. 339. Count One charged Hamilton with conspiracy to commit bribery concerning programs receiving federal funds, in violation of 18 U.S.C. § 371. Counts Two and Three charged Hamilton with bribery concerning a local government receiving federal benefits, in violation of 18 U.S.C. § 666(a)(2). The jury acquitted Hamilton of Count Four, a Travel Act violation of Texas bribery law under 18 U.S.C. § 1952(a)(3). On appeal, the United States Court of Appeals for the Fifth Circuit vacated the convictions for failure to instruct the jury that § 666 requires a *quid pro quo*, and remanded the case for further proceedings. *United States v. Hamilton*, 46 F.4th 389 (5th Cir. 2022). Hamilton now moves to dismiss Count Three on double jeopardy grounds based upon his acquittal on Count Four.

"[T]he Double Jeopardy Clause precludes the Government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial." *Yeager v. United States*, 557 U.S. 110, 119 (2009). To decipher what the jury "necessarily decided," courts should "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." *Id.* at 119–20. The inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Id.*

Counts Three and Four arise out of Hamilton's interactions in August 2018 with Dwaine Caraway, who was then serving as a member of the Dallas City Council. Count Four charged a Travel Act violation in connection with an August 2, 2018, telephone call Hamilton made to Caraway (identified in the Superseding Indictment as Council Member A), regarding the addition of a referendum item to the agenda for an upcoming Dallas City Council meeting. Count Three charged bribery, in violation of 18 U.S.C. § 666, when Hamilton met Caraway in person on August 3, 2018, and wrote a $7,000 check to Caraway to facilitate addition of the agenda item.

The jury was instructed that the Travel Act charge in Count Four requires a *quid pro quo*, but was not given a similar instruction for Count Three. Hamilton argues that the difference in outcome on those two charges—*i.e.*, conviction on Count Three, and acquittal on Count Four—indicates that the jury found that the check Hamilton gave to Caraway was a gratuity and not a bribe. ECF No. 471 at 3. For support, Hamilton points to the Fifth Circuit's observation that "[i]nstructing the jury on one count that a *quid pro quo* was required but not others may have further communicated that no *quid pro quo* was required for the § 666 counts," including Count Three. *Hamilton*, 46 F.4th at 399 n.4. Hamilton also relies on *Ashe v. Swenson*, 397 U.S. 436, 443 (1970), in which the Supreme Court recognized "that the relitigation of an issue can sometimes amount to the impermissible relitigation of an offense." *Currier v. Virginia*, 138 S.

Ct. 2144, 2149 (2018) (discussing *Ashe*). Thus, Hamilton contends that the jury rejected the Government's theory that the check was a bribe, acquitting him of Count Four, thereby preventing litigating that issue again in Count Three. *See, e.g.*, ECF No. 488 at 4 ("[T]he first jury rejected the government's claim that the check to Dwaine Caraway was a bribe, so the government cannot ask a new jury to conclude that the check was a bribe.").

The Court disagrees that what Hamilton describes is what the jury necessarily decided. Counts Three and Four concern different conduct on different days, and involve different elements: Hamilton's use of a telephone on August 2 to facilitate a bribe by setting up a meeting with Caraway (Count Four), and the alleged bribe itself by giving the check to Caraway on August 3 (Count Three).

"*Ashe* forbids a second trial only if to secure a conviction the prosecution must prevail on an issue the jury necessarily resolved in the defendant's favor in the first trial." *Currier*, 138 S. Ct. at 2150. Hamilton contends that the jury acquitted Hamilton on Count Four because it "concluded that [the check] was not a bribe." ECF No. 488 at 5. But whether the check was given as a bribe or a gratuity is not implicated in the jury's decision in Count Four, which concerned Hamilton's intent when he spoke to Caraway by phone on August 2, a full day before any check was written. Count Four required the jury to find that when he spoke with Caraway by phone on August 2, Hamilton had the specific intent to promote, manage, establish or carry on unlawful activity, namely bribery in violation of Texas Penal Code Section 36.02. ECF No. 343 at 17. Count Three related to Hamilton's actual conduct in writing and transmitting to Caraway a $7,000 check the next day. It is not the case that the issue of whether the check—which did not even exist during the August 2 call—was a gratuity or a bribe is implicated by the jury's decision to acquit Hamilton on Count Four based on what he was intending the day before

he acted. Put differently, a lack of the requisite specific intent for the alleged Travel Act violation on August 2 is not dispositive of whether Hamilton paid a bribe on August 3.

Consistent with the above analysis, the jury sent multiple notes indicating that they were grappling with that specific element of Count Four, *i.e.*, whether Hamilton possessed the requisite intent to bribe Caraway at the time of the August 2 call. *See* ECF No. 338.[1] The jury notes are not dispositive,[2] but they support the obvious conclusion the Court would reach without them: the crimes charged in Counts Three and Four are different offenses arising under different statutes with different elements, and concern different conduct occurring on different days.

Thus, the record indicates that the jury could have grounded its verdict upon an issue other than that which Hamilton seeks to foreclose from consideration. As a result, retrying Hamilton on Count Three would not be relitigating a factual issue necessarily determined in his favor by the earlier jury, and acquittal on Count Four is not preclusive as to the crime charged in Count Three.

However, the Court declines to find, as the Government urges, that Hamilton's Motion is frivolous. Under the collateral order doctrine, the Fifth Circuit has jurisdiction under 28 U.S.C. § 1291 to review a pretrial order rejecting a claim of double jeopardy, provided the claim is "colorable." *United States v. Shelby*, 604 F.3d 881, 885 (5th Cir. 2010). A "colorable" claim presupposes there is some possible validity to it, while a claim is not colorable if "no set of facts

[1] In Note 3, the jury asked, "In regards to count 4 must the jury establish that the defendant had ill intent at the time of the call or does the call only need to meet the criteria of facilitating a bribe. . . ." ECF No. 338. In Note 4, the jury asked, "If we find the defendant 'guilty' of count 3, does that make him guilty of count 4, regardless of his intent at the time of the call the use [sic] of interstate travel facilitated the act." *Id.*

[2] Hamilton argues that it would be improper to rely on the jury notes to conclude that the jury decided Count 3 and Count 4 differently on a basis *other* than the *quid pro quo* requirement. However, the relevant Fifth Circuit precedent instructs the Court to review the entire record of the case—which includes the jury notes—to determine whether the jury had a factual basis for deciding Count 3 and Count 4 differently besides the *quid pro quo* requirement. *See Yeager*, 557 U.S. at 119–20.

will support the assertion" of the double jeopardy claim. *Id.* ("We join these circuits in concluding that a colorable, non-frivolous claim is a prerequisite to our jurisdiction under 28 U.S.C. § 1291 to hear a pretrial double jeopardy appeal."). Here, although the Court firmly rejects Hamilton's claim of double jeopardy, the claim itself is colorable and not frivolous.

For the foregoing reasons, the Motion is **DENIED.**

SO ORDERED.

November 15, 2023.

BARBARA M. G. LYNN
SENIOR UNITED STATES DISTRICT JUDGE

EXHIBIT 3

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA

v.

RUEL M. HAMILTON

NO. 3:19-CR-083-M
(Supersedes indictment filed on February 21, 2019)

SUPERSEDING INDICTMENT

The Grand Jury Charges:

Introduction

At all times material to this indictment:

1. Defendant **Ruel M. Hamilton ("Hamilton")** was a principal of AmeriSouth Realty Group ("AmeriSouth") and a real estate developer engaged in developing low income and other for-profit housing projects within the City of Dallas and elsewhere.

2. From in or around November 2013 to in or around August 2018, **Hamilton** engaged in a scheme to corruptly influence public officials related to **Hamilton's** business interests within the City of Dallas and to further **Hamilton's** political objectives.

3. Carolyn Rena Davis was elected to the Dallas City Council District 7 in 2007, and re-elected to the same position in 2009, 2011, and 2013. During her tenure on the City Council, Davis also served as Chair of the Dallas Housing Committee. Davis was, as such, an agent of the City of Dallas during her tenure on the City Council.

4. Jeremy Scroggins was the owner of a nonprofit known as Hip Hop Government.

5. Council Member A, an individual known to the grand jury, was at all relevant times a member of the Dallas City Council, and as such, during all relevant times, was an agent of the City of Dallas.

6. The City of Dallas was an incorporated unit of local government and a political subdivision of the State of Texas that received benefits in excess of $10,000 in each of the consecutive fiscal one-year periods beginning October 1, 2013, October 1, 2014, October 1, 2015, October 1, 2016, and October 1, 2017, under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

Count One
Conspiracy to Commit Bribery Concerning Programs Receiving Federal Funds
[Violation of 18 U.S.C. § 371]

7. From in or around November 2013 to in or around June 2015, in the Dallas Division of the Northern District of Texas, the defendant, **Ruel M. Hamilton**, Carolyn Rena Davis, and others known and unknown to the grand jury, unlawfully, willfully, and knowingly did combine, conspire, confederate and agree with each other for Davis to receive bribes and other things of value from **Hamilton**, a real estate developer, intending to be influenced and rewarded in connection with a business, transaction, or series of transactions of the City of Dallas involving anything of value of $5,000 or more, specifically, **Hamilton's** affordable housing projects, with the intent to influence and reward Davis, an agent of the City of Dallas, a local government that received benefits in excess of $10,000 in the one-year periods beginning October 1, 2013 and October 1, 2014, under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, and other form of Federal assistance, in violation of Title 18, United States Code, Section 666(a)(1)(B) & (a)(2).

8. It was an object of the conspiracy for **Hamilton** to enrich himself by corruptly offering, giving, and agreeing to give things of value to Davis for her performance of official acts that would advance the business interests of **Hamilton** concerning his affordable housing projects in the City of Dallas.

9. It was a part and object of the conspiracy that Davis corruptly solicited and demanded, and agreed to accept and did accept things of value with the intent to be

influenced and rewarded in the performance of Davis's official acts as a Dallas City Council Member and as Chair of the Dallas City Housing Committee that would advance the business interests of **Hamilton** in acquiring and developing affordable housing projects in the City of Dallas.

Purposes of the Conspiracy

10. It was a purpose of the conspiracy for Davis to enrich herself through bribe payments and other things of value while on the City Council and to establish herself as a consultant and lobbyist once she left the Council.

11. It was a purpose of the conspiracy for **Hamilton** to enrich himself through obtaining beneficial official action.

12. It was a purpose of the conspiracy for Davis and **Hamilton** to conceal the payment of bribes to Davis from the Dallas City Council, the voters of the City of Dallas, and the Texas Department of Housing and Community Affairs.

Manner and Means of the Conspiracy

13. In return for benefits totaling approximately $40,000 in checks and cash, the benefit of bundling and dispersing money from **Hamilton** to other political candidates, and the promise by **Hamilton** of future employment for Davis as a consultant and lobbyist, Davis, in her official capacity, advocated and voted for **Hamilton's** Royal Crest project including the authorization of City of Dallas funds and obligations in excess of $2.5 million for said project.

14. As a member of the City Council and as Chair of the Housing Committee,

Davis would and did use her official position to seek things of value for herself by providing official assistance to **Hamilton**, who sought Texas Department of Housing and Community Affairs ("TDHCA") approval of **Hamilton's** Low Income Housing Tax Credit applications for projects located in the City of Dallas.

15. More specifically, in return for things of value, Davis would and did agree to perform and did perform a pattern of official acts to promote and advance **Hamilton's** business interests, which included:

a. supporting and voting for **Hamilton's** projects as the Chair of the Dallas Housing Committee, including recommending tax credit applications;

b. moving the City Council to vote for, and voting for, **Hamilton's** Royal Crest project as a City Council Member, including authorizing the Dallas Housing Finance Corporation ("DHFC") to provide a $2,520,000 development loan to the project, and for the City of Dallas to recommend the project for the 9% tax credits to the TDHCA;

c. seeking the support of other elected officials for **Hamilton's** project; and

d. agreeing to lobby for **Hamilton's** project before the TDHCA.

16. At the direction of Davis, and in order to disguise the bribe payments, **Hamilton** wrote checks payable to a nonprofit company owned by Jeremy Scroggins and to Scroggins individually.

17. At Davis' direction, Scroggins deposited and or cashed the checks received from **Hamilton** and then gave some or all of the proceeds to Davis in cash.

18. **Hamilton** also provided checks and large sums of cash to Davis knowing

that Davis would further distribute these amounts as campaign contributions to candidates for the Dallas City Council. In order to skirt campaign finance laws, **Hamilton** would write multiple checks to the same candidate for an aggregate amount that exceeded the limit for a single donor, but, often without their knowledge, reference the names of his employees and family members, including his minor grandchildren, on the checks to disguise the fact that these donations all came from **Hamilton** and were in excess of campaign finance limits. **Hamilton** engaged in this conduct to further his scheme to influence Davis while she was on the City Council, and to promote her future consulting and lobbying venture on behalf of herself and **Hamilton's** projects once she was off the council in June 2015 due to term limits.

19. Davis concealed her expected and actual receipt of things of value by not disclosing conflicts of interest, omitting sources of income on a financial disclosure report filed with the City, and failing to recuse herself from votes wherein she was conflicted.

Overt Acts

20. In furtherance of the conspiracy and to effect the objects thereof, **Ruel M. Hamilton,** Davis, Scroggins, and others, committed, and caused to be committed, the following overt acts, among others, in the Dallas Division of the Northern District of Texas:

21. Sometime on or before November 18, 2013, the exact date being unknown to the grand jury, Davis and **Hamilton** agreed that Davis would promote **Hamilton's**

affordable housing projects before the Dallas Housing Committee and the City Council in exchange for things of value.

22. On or about November 18, 2013, **Hamilton** gave Davis a check in the amount of $2,500, payable to Scroggins, written on **Hamilton's** Amegy Bank account ending in 8967.

23. On or about September 10, 2014, **Hamilton** gave Davis a check in the amount of $2,500, payable to Scroggins's nonprofit company, written on **Hamilton's** Independent Bank of Texas account ending in 1273.

24. On or about October 20, 2014, **Hamilton** gave Davis a check in the amount of $2,500, payable to Scroggins's nonprofit company, written on **Hamilton's** Amegy Bank account ending in 8967.

25. On or about November 7, 2014, **Hamilton** gave Davis a check in the amount of $9,000, payable to Scroggins's nonprofit company, written on **Hamilton's** Sovereign Bank account ending in 0497.

26. On or about November 18, 2014, **Hamilton** gave Davis a check in the amount of $6,000, payable to Scroggins's nonprofit company, written on **Hamilton's** Sovereign Bank account ending in 0497.

27. On or about January 8, 2015, **Hamilton** gave Davis a check in the amount of $3,500, payable to Scroggins's nonprofit company, written on **Hamilton's** Amegy Bank account ending in 8967.

28. On or about January 22, 2015, **Hamilton** gave Davis a check in the amount

of $1,500, payable to Scroggins's nonprofit company, written on **Hamilton's** Amegy Bank account ending in 8967.

29. On or about January 22, 2015, **Hamilton** wrote eight checks payable to Dallas City Council Member Candidate B's campaign, an individual known to the grand jury, totaling $10,000, written on **Hamilton's** Independent Bank of Texas account ending in 1273. These checks indicated that the donors were members of **Hamilton's** family, including minor grandchildren, and **Hamilton's** employees. **Hamilton** wrote an additional $2,000 check payable to Candidate B's campaign on his Amegy Bank account ending in 8967. This check indicated that **Hamilton** and his wife were the donors.

30. On or about February 16, 2015, at approximately 2:37 p.m., Davis tells an associate that she told candidates, including Dallas City Council Member Candidate C, an individual known to the grand jury, that they should not take "money from folk that's over a thousand. Get some nonprofits that you could support and tell them to channel the money through those nonprofits. I – and – and you know, can nobody touch you. The money ain't in your name. You can't put that money in your name and then expect not to get caught. I have turned people on to nonprofits all day long."

31. On or about February 16, 2015, at 3:49 p.m., Davis and **Hamilton** discussed campaign contributions for Candidate B. Davis reminds **Hamilton** that she will be off the council soon whereupon **Hamilton** responds: "Yeah, I know. I know we got to get as much done as possible."

32. On or about February 20, 2015, at approximately 12:27 p.m., Davis

reminds **Hamilton** that the campaign contributions for Candidate B can only be "a thousand dollars per person." **Hamilton** responds: "Yeah. Well, I got a couple people up here I'm going to get some from and then I'm going to start rounding out stuff for family members."

33. On or about February 22, 2015, at approximately 9:04 a.m., Davis tells Scroggins that if a public official's spouse had "started her own nonprofit -- them checks could have went to her nonprofit all day long and there's nothing the FBI could do about it." Davis further says: "It's just not to be caught red-handed doing stuff."

34. On or about February 26, 2015, at approximately 9:57 a.m., Davis tells **Hamilton** that the checks he had previously written for Candidate B have to be rewritten. **Hamilton** then tells Davis to "bring them all and I'll rewrite every one of them."

35. On or about February 27, 2015, **Hamilton** wrote seven checks payable to Candidate C's campaign, totaling $10,000, written on **Hamilton's** Sovereign Bank account ending in 0497. These checks indicated that the donors were members of **Hamilton's** family, including minor grandchildren, and **Hamilton's** employees.

36. On or about February 27, 2015, **Hamilton** wrote seven checks payable to Council Member A's campaign totaling $10,000, written on **Hamilton's** Sovereign Bank account ending in 0497. These checks indicated that the donors were members of **Hamilton's** family, including minor grandchildren, and **Hamilton's** employees.

37. On or about March 6, 2015, **Hamilton** gave Davis a check in the amount of $2,000, payable to Scroggins's nonprofit company, written on **Hamilton's** Independent

Bank of Texas account ending in 1273.

38. On each occasion wherein **Hamilton** gave Davis a check for Scroggins or his nonprofit, Davis would give the check to Scroggins who would then either deposit it into an account held by Scroggins or cash it. Generally, Scroggins, at Davis's direction, would then give some or all of the proceeds to Davis in cash.

39. On or about March 6, 2015, at approximately 4:23 p.m., Davis asked **Hamilton** if we can meet tomorrow "so I can give you your checks back and you can rewrite some new ones?"

40. On or about March 18, 2015, **Hamilton** wrote four checks payable to Council Member A's campaign totaling $4,000, written on **Hamilton's** Sovereign Bank account ending in 0497. The checks indicated that the donors were **Hamilton's** employees.

41. On or about March 19, 2015, Davis filed her 2014 Personal Financial Statement with the City of Dallas and did not disclose the payments she received from **Hamilton** in 2014.

42. On or about April 13, 2015, at approximately 4:16 p.m., **Hamilton** told Davis: "So, I know you wanted the rest of the cash. I have a -- probably half of it. I know I have over another thousand bucks or we could do it tomorrow, so - ." Davis responded: "Well, it's up to you .... We can wait until tomorrow if you want to."

43. On or about April 14, 2015, at approximately 4:52 p.m., **Hamilton** and Davis discuss meeting at **Hamilton's** office momentarily for Davis to pick up cash.

Hamilton asks Davis if she "want[s] to come up for a little bit or are you just planning to -- doing a hit and run?"

44. On or about May 11, 2015, at approximately 10:26 a.m., while discussing campaign donations, Davis told **Hamilton** to "try to have the money in different – in different names already laid out, but not your office address, if that makes sense. Because I don't want them to come back, hit me like they did last time."

45. On or about May 18, 2015, at approximately 12:49 p.m., Davis tells **Hamilton** "I'm on my -- my way to come -- you need me to meet you downstairs and we just go over there? I – I – I got the totals figured out what I think we need to do."

46. On or about May 18, 2015, **Hamilton** went to Amegy Bank, accompanied by Davis, withdrew $5,000 cash from his Independent Bank of Texas account ending in 1620, and gave it to Davis for herself and for political donations.

47. On or about June 2, 2015, at approximately 10:36 a.m., Davis told **Hamilton** she will have to "work the polls" for Candidate B. **Hamilton** asks: "Is there anything I can do to help?" Davis replies: "we might have to get some -- income -- I need." **Hamilton** responds: "Yeah, well, -- just come see me."

48. On or about June 4, 2015, at approximately 10:49 a.m., while Davis and **Hamilton** were discussing Davis's future lobbying practice once she departed the City Council later that month, **Hamilton** told Davis "…technically you can't lobby directly for a year or whatever, but you could talk to people… You can -- you can effectively do the same thing through other people."

49. On or about June 4, 2015, at approximately 3:53 p.m., **Hamilton** and Davis discuss going to the bank the next day.

50. On or about June 5, 2015, at approximately 11:08 a.m., Davis tells **Hamilton** that she is on her way to meet him at his office.

51. On or about June 5, 2015, at approximately 12:16 p.m., **Hamilton** withdrew $4,000 cash from his Sovereign Bank account ending in 0497 and gave Davis cash.

52. On or about June 11, 2015, **Hamilton** withdrew $5,000 cash from his Sovereign Bank account ending in 0497.

53. On or about June 13, 2015, **Hamilton** met with Davis and gave her cash.

54. On or about June 13, 2015, at approximately 8:18 a.m., Davis tells an associate that she is "going to continue to work with Ruel" and that she told **Hamilton** that his "name is not going to be attached to none of this next year."

55. On or about June 13, 2015, at approximately 9:56 p.m., Davis told **Hamilton** "everyone won who I was supporting. I used every bit that you had to give me. I'll come over Monday and you can put something into my eager nest. I had to do what I had to pay. I tried to hold on to a little, but couldn't because I just had to pay people." **Hamilton** agreed and said: "I'll see you Monday."

Additional Overt Acts: Official Acts by Davis to Benefit **Hamilton**

56. On or about February 2, 2015, during a meeting of the Housing Committee, Davis, as the Chair of the Housing Committee, voted to support moving **Hamilton's**

Royal Crest project forward to the City Council, so that the Council could then decide whether to provide City of Dallas backed funding and support tax-exempt bonds and tax credits for **Hamilton's** project. At that time, the tax credit application for **Hamilton's** project was in direct competition with that of a competing project. Davis's vote included support for City of Dallas funding of $168,000 and a DHFC development loan funding of $2,520,000 for **Hamilton's** project. **Hamilton** was present at the meeting.

57. On or about February 25, 2015, Davis moved the City Council to authorize the DHFC to make a development loan to **Hamilton's** company in an amount not to exceed $2,520,000 for **Hamilton's** project, as an integral part of **Hamilton's** TDHCA's 9% tax credit application. Davis, along with those City Council members present, voted to adopt the resolution supporting the tax credit application **Hamilton** sought.

58. On or about April 23, 2015, at approximately 9:24 a.m., Davis told **Hamilton** that she questioned a City of Dallas housing official (Official X) about the status of **Hamilton's** Royal Crest project that was tied in points with another competing project. Davis told **Hamilton** that she told Official X to connect **Hamilton** with a nonprofit so that his project would get another point in the scoring system, thereby surpassing the score of the other competing project. **Hamilton** told Davis that he would be "disappointed" if his project did not get on TDHCA's list of projects "they are seriously considering." **Hamilton** told Davis that he wanted her, and another City Council Member (Council Member A), to lobby for his project before the TDHCA, specifically, to speak before the TDHCA during a hearing on tax credits. Davis agreed

to lobby the project in her official capacity before the TDHCA in Austin, Texas.

Payments by **Hamilton** to Davis after June 2015 in Furtherance of the Conspiracy

59. From on or about October 2015 to on or about October 2018, Hamilton, as agreed, paid Davis at least $20,000 as a "consultant" to benefit **Hamilton's** financial interests.

All in violation of 18 U.S.C. § 371 (18 U.S.C. § 666(a)(1)(B) and (a)(2)).

Count Two
Bribery Concerning a Local Government Receiving Federal Benefits
[Violation of 18 U.S.C. § 666(a)(2)]

60. The Grand Jury hereby adopts, re-alleges and incorporates herein all allegations set forth in the preceding paragraphs of this indictment as if fully set forth herein.

61. From in or about November 2014 to in or about June 2015, in the Dallas Division of the Northern District of Texas, the defendant, **Ruel M. Hamilton**, corruptly offered to give and did give something of value to Carolyn Rena Davis in connection with a business, transaction, and series of transactions of the City of Dallas involving anything of value of $5,000 or more, to wit: votes and other official acts by Davis regarding **Hamilton's** projects, with intent to influence and reward Davis, an agent of the City of Dallas, a local government that received benefits in excess of $10,000 in the one-year period beginning October 1, 2014 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, and other form of Federal assistance.

In violation of 18 U.S.C. § 666(a)(2).

Background to Counts Three and Four

62. In furtherance of **Hamilton's** scheme to corruptly influence public officials, on or about August 2, 2018, **Hamilton** initiated contact with Council Member A. **Hamilton** urgently sought Council Member A's official assistance in facilitating the late-addition of a referendum item, which would serve **Hamilton's** political agenda, to be placed on the agenda of the next Dallas City Council meeting scheduled for August 8, 2018. **Hamilton** told Council Member A: "So I was told that if there is anybody that could get the Mayor to put it on the agenda for the 8th, that it was Councilmember [Council Member A]." The item, if added on the agenda and passed by the City Council, would have resulted in the placement of a referendum item on the November 2018 general election ballot for City of Dallas voters.

63. The next day, on August 3, 2018, **Hamilton** and Council Member A met and further discussed **Hamilton's** request for the addition of the agenda item and Council Member A's vote on it. **Hamilton** also sought future official action by Council Member A in relation to a housing project that **Hamilton** desired to develop in the City of Dallas. Specifically, **Hamilton** stated: "Before you leave office or whenever your last term is, we're going to have stuff built down there on Eleventh Street. You just watch. I need you for that. I'm saying is, I'm there, you know, and so if there is anything that I can help you with, I mean, I hope you feel like you can reach out."

64. Council Member A agreed to facilitate the addition of the agenda item to the agenda, and to provide official assistance on the proposed housing project, in return

for money. When Council Member A asked **Hamilton** for $6,200, **Hamilton** agreed but confirmed that Council Member A would "follow through with the Mayor." **Hamilton** then offered to pay $6,500, which Council Member A accepted. **Hamilton,** instead, wrote a $7,000 check to Council Member A. **Hamilton** further discussed with Council Member A how **Hamilton** should characterize the purpose of the check, including: "What should I put down just for posterity sake, down in here [the memo line] for, what should I say? All right. I just wrote something down there just so … some -- somebody ever asks, I can come up with some kind of reference."

Count Three
Bribery Concerning a Local Government Receiving Federal Benefits
[Violation of 18 U.S.C. § 666(a)(2)]

65. The Grand Jury hereby adopts, re-alleges and incorporates herein all allegations set forth in the preceding paragraphs of this indictment as if fully set forth herein.

66. On or about August 3, 2018, in the Dallas Division of the Northern District of Texas, defendant, **Ruel M. Hamilton**, corruptly offered to give and did give something of value to Council Member A, an individual known to the grand jury, in connection with a business, transaction, and series of transactions of the City of Dallas involving anything of value of $5,000 or more, to-wit, the facilitation of the addition of an agenda item for the upcoming City Council meeting and Council Member A's vote for it, and in relation to official acts for a housing project that **Hamilton** desired to develop in the City of Dallas, with intent to influence and reward Council Member A, an agent of the City of Dallas, a local government that received benefits in excess of $10,000 in the one-year period beginning October 1, 2017 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, and other form of Federal assistance.

In violation of 18 U.S.C. § 666(a)(2).

Count Four
Use of Interstate Facility to Commit Travel Act Violation
[Violation of 18 U.S.C. § 1952(a)(3)]

67. The Grand Jury hereby adopts, re-alleges and incorporates herein all allegations set forth in the preceding paragraphs of this indictment as if fully set forth herein.

68. On or about August 2, 2018, within the Dallas Division of the Northern District of Texas, the defendant, **Ruel M. Hamilton**, used and caused to be used facilities in interstate commerce with the intent to promote, manage, establish, carry on, distribute the proceeds of, and facilitate the promotion, management, establishment, carrying on, and distribution of the proceeds of an unlawful activity, that is, Bribery in violation of Texas Penal Code § 36.02, and thereafter, to perform and attempt to perform acts to promote, manage, establish, carry on, distribute the proceeds of, and facilitate the promotion, management, establishment, carrying on, and distribution of the proceeds of such unlawful activity as follows: the facilitation of the addition of an agenda item for the upcoming City Council meeting by Council Member A, an individual known to the grand jury, and Council Member A's vote for it, and in relation to official acts by Council Member A for a housing project that **Hamilton** desired to develop in the City of Dallas.

In violation of 18 U.S.C. § 1952(a)(3).

A TRUE BILL

FOREPERSON

ERIN NEALY COX
UNITED STATES ATTORNEY

MARCUS BUSCH
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE UNITED STATES OF AMERICA

v.

RUEL M. HAMILTON

SUPERSEDING INDICTMENT

18 U.S.C. § 371
Conspiracy to Commit Bribery Concerning Programs Receiving Federal Funds
(Count 1)

18 U.S.C. § 666(a)(2)
Bribery Concerning a Local Government Receiving Federal Benefits
(Counts 2 and 3)

18 U.S.C. § 1952(a)(3)
Use of Interstate Facility to Commit Travel Act Violation
(Count 4)

4 Counts

A true bill rendered

DALLAS FOREPERSON

Filed in open court this 3rd day of December, 2019.

No Warrant Needed **Defendant on Federal Bond since 03/01/2019**

UNITED STATES MAGISTRATE JUDGE
Criminal Case Pending: 3:19-CR-00083-M

EXHIBIT 4

United States Court of Appeals for the Fifth Circuit

No. 23-11132

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

RUEL M. HAMILTON,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:19-CR-83-1

ON PETITION FOR REHEARING
AND REHEARING EN BANC

Before ELROD, *Chief Judge*, WIENER, and WILSON, *Circuit Judges*.

PER CURIAM:

The petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.[*]

[*] JUDGE IRMA CARRILLO RAMIREZ, did not participate in the consideration of the rehearing en banc.

EXHIBIT 5

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
November 5, 2024
Lyle W. Cayce
Clerk

No. 23-11132

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

RUEL M. HAMILTON,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:19-CR-83-1

ORDER:

IT IS ORDERED that the Appellant's motion for stay of the mandate pending petition for writ of certiorari is DENIED.

CORY T. WILSON
United States Circuit Judge