No. _____

In the Supreme Court of the United States

RUEL M. HAMILTON,
Applicant,

v.

UNITED STATES OF AMERICA,
Respondent.

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ABBE DAVID LOWELL
CHRISTOPHER D. MAN
Counsel of Record
Winston & Strawn LLP
1901 L Street NW
Washington, DC 20036
(202) 282-5000
CMan@winston.com

Counsel for Applicant

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

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

Pursuant to Rule 13.5 of the Rules of this Court, applicant Ruel Hamilton requests a 30-day extension of time, up to and including February 24, 2025, to file a petition for a writ of certiorari. *See* S. Ct. R. 30.1.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

Hamilton seeks review of the U.S. Court of Appeals for the Fifth Circuit's judgment affirming the district court's denial of his motion to dismiss the case against him on double jeopardy grounds (*Hamilton v. United States*, No. 23-11132, Exhibit 1) ("Op."). The Fifth Circuit denied rehearing on October 25, 2024 (Exhibit 2).

JURISDICTION

The Court will have jurisdiction over a timely-filed petition for certiorari under 28 U.S.C. § 1254(1). Hamilton's petition is currently due on or before January 23, 2025—90 days after the Fifth Circuit denied rehearing. S. Ct. R. 13.1, 13.3. This application is being filed at least 10 days before that deadline. *See* S. Ct. R. 13.5.

REASONS JUSTIFYING AN EXTENSION OF TIME

"For good cause, a Justice may extend the time to file a petition for a writ of certiorari for a period not exceeding 60 days." S. Ct. R. 13.5. There is good cause to extend the deadline to February 24.

Factual background. Hamilton currently faces trial on a theory of criminal liability that he has already been acquitted of. Hamilton phoned city councilman Dwaine Caraway to request assistance with a ballot initiative, and they met the next

day to discuss it in person. Unrelatedly, Caraway complained to Hamilton of his and his mother's ill health and financial troubles. When he asked Hamilton, a philanthropist known for his generosity, for help paying his mother's medical bills, Hamilton wrote him a check as an act of charity.

Unbeknownst to Hamilton, the government was prosecuting Caraway on bribery allegations and was listening in. The government prosecuted Hamilton's conduct in two ways. First, it alleged the check was a bribe in violation of the Travel Act. Specifically, it argued that Hamilton violated the Travel Act by using an instrumentality of commerce (the phone) to offer a bribe, and then paying the bribe the next day. Second, the government alleged the check was either a bribe or a gratuity under 18 U.S.C. § 666. The jury acquitted Hamilton of Travel Act bribery, but it convicted him under Section 666. Because the jury acquitted when it was told proof of bribery was required, but convicted when told a gratuity would suffice, the most obvious explanation for the split verdict was that the jury must have concluded that the check was a gratuity and not a bribe.

On appeal, the Fifth Circuit vacated the Section 666 conviction on the ground that the statute prohibits only bribery, not gratuities. *United States v. Hamilton*, 46 F.4th 389 (5th Cir. 2022); *accord Snyder v. United States*, 144 S. Ct. 1947 (2024). So when the government decided to retry Hamilton on a bribery-only theory, Hamilton objected on double jeopardy preclusion grounds—the jury had already rejected this bribery theory when it acquitted him of bribery under the Travel Act.

Legal background. In *Ashe v. Swenson*, this Court recognized that the Double Jeopardy Clause bars the relitigation of facts a jury has already found. 397 U.S. 436 (1970). The question then becomes, "What facts did the jury find?" This Court has placed that burden on the defendant (*Dowling v. United States*, 493 U.S. 342, 350 (1991)), but it has not yet specified what, exactly, the burden of proof is.

At times, this Court has suggested that the burden to prove what the jury decided 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)). But the Court has also acknowledged that the burden cannot be a "hypertechnical" standard so high that none of the many defendants acquitted by general verdict—which by nature does not specify the ground for acquittal—could possibly meet it. *See, e.g.*, 397 U.S. at 444.

The decisions below. Despite this caveat, on this occasion the district court and the Fifth Circuit took the latter approach. Ignoring the obvious explanation for the split verdict—that the jury found that the check Hamilton gave Caraway was not a bribe—the government concocted (for the first time on remand, and contrary to its presentation at trial) a complicated theory in which Hamilton did not develop the requisite intent under the Travel Act until *after* he called Caraway about the ballot initiative. Because this theory of intent did not apply to Section 666, it could, the government argued, theoretically explain the split verdict as well.

The district court and Fifth Circuit agreed. Chief Judge Elrod wrote separately to lament her court's "unduly heavy" interpretation of the burden and the lack of guidance on the standard for double jeopardy preclusion under *Ashe*. Op. 13. "Must the invoking party demonstrate this by a preponderance of the evidence? Beyond a reasonable doubt? Or by some other standard? The courts"—presumably referring to this Court—"would do well to clarify this point." *Id.*

The need for review. Hamilton's forthcoming petition for certiorari will present the questions posed by Chief Judge Elrod. It will give this Court the opportunity to revisit the mixed messages it sent in *Ashe*, and to eliminate the "unduly heavy" burden imposed by the Fifth Circuit and some—but not all—other courts of appeals.

The inconsistencies in the law of double jeopardy preclusion begin with this Court's own decisions—sometimes within individual cases. In *Ashe* itself, for example, the Court at one point appeared to require that, to have preclusive value, the issue must have been "necessarily decided" by the jury. 397 U.S. at 444. But on the very same page, the Court recognized that the test could not be so "technically restrictive" that a defendant acquitted by general verdict could not meet it; this "would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings" and therefore could not be the standard. *Id.*

More recently, in *Yeager v. United States*, this Court again purported to require the issue to have been "necessarily decided." 557 U.S. 110, 119–20 (2009) (quoting *Ashe*, 397 U.S. at 444). But it did not in fact hold the defendant in that case to such

a high standard. In *Yeager*, the government had proposed a plausible alternative explanation for the verdict in arguing harmless error—and yet this Court remanded for a determination of the basis for the jury's acquittal because the mere presence of a plausible alternative by the government would not defeat a double jeopardy claim. *See id.* at 120–21, 125–26; *see also id.* at 133 (Alito, J., dissenting) (arguing that *Ashe* standard had not been applied with sufficient "rigor").

Given the internal inconsistency in this Court's precedent, it is not surprising that the courts of appeals have applied different standards that fall along a spectrum. Some require proof beyond a reasonable doubt. *See, e.g.*, *United States v. Ruhbayan*, 325 F.3d 197, 203 (4th Cir. 2003) ("reasonable doubt as to what was decided by a prior judgment should be resolved against using it as an estoppel" (quoting since-abrogated 1970 Third Circuit decision)). Others require a slightly lesser quantum of "certainty." *United States v. McGowan*, 58 F.3d 8, 12 (2d Cir. 1995) (requiring "precision"); *see also, e.g.*, *Wilkerson v. Superintendent Fayette State Corr. Inst.*, 871 F.3d 221, 233 (3d Cir. 2017) ("where no clear answer emerges, the tie goes to the Government"); *United States v. Kimberlin*, 805 F.2d 210, 232 (7th Cir. 1986) (requiring "assurance"). But in other circuits, "convincing and competent evidence" will suffice. *United States v. Crabtree*, 878 F.3d 1274, 1283 (11th Cir. 2018); *accord Christian v. Wellington*, 739 F.3d 294, 299 (6th Cir. 2014). And the Ninth Circuit, adhering faithfully to *Ashe*, requires only "realism and rationality." *United States v. Romeo*, 114 F.3d 141, 143 (9th Cir. 1997) (quoting 397 U.S. at 444).

Still other circuits are plagued by their own internal inconsistencies and contradictions. The First Circuit demands a showing that is at the same time both "unequivocal" and merely "convincing." *United States v. Marino*, 200 F.3d 6, 10 (1st Cir. 1999) ("If all proffered explanations for why a jury's verdict does not decide an issue are frankly implausible, collateral estoppel ought to bar relitigation of the issue."). And whereas the Fifth Circuit on remand in *Yeager* accepted the defendant's explanation for the verdict over the government's in upholding his double jeopardy claim (334 F. App'x 707, 709 (2009)), it held in this case that the government's merely "possible" alternative explanation was enough to defeat Hamilton's. Op. 11.

Hamilton intends to ask this Court to resolve this confusion. Without this Court's intervention, problems like this will continue to plague *Ashe* preclusion claims. The question of what the jury necessarily found will occur in just about every case with a general verdict—that is, the overwhelming majority of criminal cases. And given "the extraordinary proliferation of overlapping and related statutory offenses," it is now "possible for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction." *Ashe*, 397 U.S. at 445 n.10. The government can simply retry cases under a new statute in the hope that the next jury will give it a more favorable verdict than the one before. The thicket that the modern federal criminal law has become—which the Framers surely could not have imagined—risks eviscerating the Double Jeopardy Clause entirely.

Counsel's conflicts. Hamilton requests this extension of time to give counsel the opportunity to thoroughly research the legal issues and prepare a petition that

fully addresses the important questions raised by the proceedings below. Counsel leading this petition have other professional obligations that make an extension necessary. Hamilton's lead counsel, Abbe David Lowell, has cross-appeal briefing due February 4 in *Mac Isaac v. Politico, LLC* (Del. No. 448,2024), summary judgment reply briefing due February 14 with a hearing likely to follow soon afterward in *Steiner v. eBay Inc.* (D. Mass. No. 21-11181), and is preparing for a jury trial in *Biden v. Byrne* (C.D. Cal. No. 23-9439). Hamilton's co-counsel (and counsel of record here), Christopher Man, has an opening brief due January 10 in *United States v. Mizrahi* (2d Cir. No. 24-2507). Other appellate counsel working on the petition are new to the case and require more time to familiarize themselves with the voluminous record and intricate legal issues.

Low risk of delay or prejudice. Recent developments in this case have made the timeline more clear. Hamilton's application to stay the Fifth Circuit's mandate was denied on December 10 (No. 24A475), and the district court has set a June 2025 trial date. In the event that Hamilton's petition for certiorari is denied, assuming it is disposed of in accordance with this Court's typical internal schedule, the requested extension should not be expected to interfere with the scheduled trial. *See* Office of the Clerk, Memorandum Concerning the Deadlines for Cert Stage Pleadings and the Scheduling of Cases for Conference (Jan. 2023).

CONCLUSION

For these reasons, Hamilton requests an extension up to and including February 24, 2025, to file a petition for a writ of certiorari in this case.

Respectfully submitted,

s/ *Christopher D. Man*

ABBE DAVID LOWELL
CHRISTOPHER D. MAN
Counsel of Record
Winston & Strawn LLP
1901 L Street NW
Washington, DC 20036
(202) 282-5000
CMan@winston.com

Counsel for Applicant

JANUARY 8, 2025

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

---

[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

---

[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

---

[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

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.