No. 09-1554

IN THE

Supreme Court of the United States

REX SHELBY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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AMICUS BRIEF IN SUPPORT OF PETITIONER IN *SHELBY V. UNITED STATES*

INTEREST OF THE *AMICUS CURIAE*[1]

The Texas Criminal Defense Lawyers Association (TCDLA) is a Texas, non-profit corporation with a membership of more than 3000 attorneys practicing in and outside the State of Texas. TCDLA was organized thirty-nine years ago with the following purposes: (1) to protect and ensure by rule of law those individual rights guaranteed by the Texas and United States Constitutions in criminal cases, (2) to resist efforts to curtail such rights, (3) to encourage cooperation among lawyers engaged in the defense of persons accused of crimes through educational programs and other assistance, and (4) through such cooperation, education, and assistance to promote justice and the common good.

In regard to this case, TCDLA has concern about how the decision of the Court of Appeals affects the jurisprudence of the Nation. First, the Court of Appeals' opinion places a limitation on a defendant's right to not be subject to double jeopardy. Second, the Court of Appeals has not fully abided by this Court's holding in *Yeager v. United States*, 129 S. Ct.

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[1] Amicus TCDLA gave notice to counsel of record for all parties ten days prior to the due date for this brief. Counsel for Rex Shelby and for the United States have both consented to the filing of this brief. No party or counsel for a party authored any part of this brief, and no one other than TCLDA, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

2360 (2009), that no effect shall be given to hung counts when engaging in a double jeopardy analysis.

SUMMARY OF THE ARGUMENT

TCLDA agrees with Petitioner Shelby's contention that this Court's decision in *Yeager* affected material change in the double jeopardy standard applicable to claims involving multiple-count verdicts consisting entirely of acquittals and hung counts. TCLDA shares Shelby's view that the Fifth Circuit erred in refusing his attempt to have that standard applied in his case, in denying relief, and finding the appeal to be substantially frivolous. TCLDA agrees with Shelby that the standard applied in his earlier appeal was both wrong and material to the outcome. However, TCLDA is also concerned more broadly with the Fifth Circuit's attempt to impose new procedural barriers to the review of double jeopardy claims.

In rejecting Shelby's appeal of a denial of a double jeopardy motion, the Fifth Circuit ignored settled precedent of this Court regarding jurisdiction over appeals of collateral orders. Since *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), this Court has held that appellate jurisdiction over a defined set of collateral orders, including double jeopardy orders, depends on the class of the order appealed, not the merits of the claim. *Arthur Andersen, LLP v. Carlisle*, 129 S. Ct. 1896, 1900-01 (2009); *Behrens v. Pelletier*, 516 U.S. 299, 311 (1996); *Abney v. United States*, 431 U.S. 651, 662 (1977). Indeed, even in a case of successive appeals of the same claim, this Court has rejected the attempt by lower courts to control "abuse" or frivolous claims through jurisdictional rulings. *Behrens*, 516 U.S. at

310-11; *see also Arthur Andersen,* 129 S. Ct. at 1901. This is so for the obvious reason that review of the issue after trial makes effective relief impossible. *Abney*, 431 U.S. at 659-61. The Fifth Amendment Double Jeopardy Clause protects against successive trials, not just multiple sentences. *Id.*, at 660-61.

The Fifth Circuit, in finding lack of subject-matter jurisdiction to review a final order on the grounds the claim is not "colorable," has "conflated the jurisdictional question with the merits of the appeal," *Arthur Andersen,* 129 S. Ct. at 1900, in precisely the manner this Court has refused to countenance. *See id.*; *Behrens*, 516 U.S. at 310. While the Fifth Circuit's Enron fatigue may or may not be understandable, this Court cannot let this jurisdictional error stand. The lower court's new jurisdictional hurdle upsets decades of this Court's jurisprudence related to the finality of orders under 28 U.S.C. § 1291. Refusal to accept jurisdiction over the claim essentially renders the claim "non-final," and insulates it from review until after trial, in direct contravention of *Abney*.

Moreover, the decision, although not limited to double jeopardy appeals, will have particularly grave consequences for that class of defendants. Double jeopardy appeals are brought by defendants who have already been tried on, and acquitted of, some counts. Rather than have their claim thoroughly and expeditiously reviewed under the standard set forth in *Ashe v. Swenson*, 397 U.S. 436 (1970), these defendants will be forced preliminarily to defend, without benefit of the record or briefing, the "colorable" nature of their claim. This burden is imposed even where, as here, the district court found

that the double jeopardy claim was not frivolous. *See* Pet. App. at 18a. The Court should grant the petition to preserve the right of defendants pleading double jeopardy to have their cases reviewed on the merits before they are required to "run the gauntlet of trial" a second time.

The Fifth Circuit's jurisdictional ruling is wrong on its face. Moreover, the ruling is premised on its erroneous contention that this Court's decision in the case of Scott Yeager, Rex Shelby's co-defendant, did not change the law applicable to Shelby's double jeopardy claim. *United States v. Shelby*, 604 F.3d 881, 887 (5th Cir. 2010), Pet. App. at 14a; *Yeager*, 129 S. Ct. 2360. In so finding, the Court of Appeals has erroneously read *Yeager* in a way that ignores both the explicit holding and rationale of that decision. In distinguishing *Shelby*, the lower court found that *Yeager* "stands for the proposition that if an acquittal establishes that the jury necessarily determined a certain element of the offense, the court may not examine the effect of hung counts to undermine that determination by showing that the jury was necessarily inconsistent or confused." *Shelby*, 604 F.3d at 887, Pet. App. 15a. That is the essence of the *Yeager* holding. However, the Fifth Circuit continues to believe that hung counts can be used to analyze whether the jury necessarily determined a fact in the first place. That is the issue in this case. And, unlike the narrower *Yeager* situation, it is or will be the case of the vast majority of defendants put in the position of double jeopardy. Courts, if allowed to speculatively compare why a jury acquitted on some counts and hung on others, will be able to create some

theory in every case to foreclose double jeopardy protections.

The holding and rationale of *Yeager* do not support the Fifth Circuit's reading. *Yeager*, 129 S. Ct. at 2368 ("we hold that the consideration of hung counts has no place in the issue-preclusion analysis"). Both require the elimination from the double jeopardy calculus of any and all speculation about hung counts from the determination of the facts the jury necessarily decided on the acquitted counts. Under *Yeager*, the failure of the jury to decide is a meaningless "non-event." Unanswered counts cannot be used, even comparatively, as a basis to speculate about what the jury did determine in deciding to acquit. The Fifth Circuit's continued reliance on the hung counts, whether for its own inferences or those it imputes to the jury, deny Shelby and any similarly-situated defendants their right under *Yeager* to the full benefit of what the jury indisputably did decide.

The test that *Yeager* requires is simple: the Court should consider the trial record as if the hung counts had not been brought at all. The question to be answered is whether, had the government not charged the hung counts, could it now charge them in a seriatim prosecution? TCDLA agrees with petitioner that the result of such analysis in this case would be to bar the earlier counts. We urge the Court to grant certiorari and direct the Fifth Circuit to apply this test, requiring the elimination of any and all consideration of hung counts, to this and future cases.

ARGUMENT

I. The Fifth Circuit's Jurisdictional Ruling Upsets Important and Settled Law on the Appeal of Collateral Orders and Should be Reversed.

Regardless of the underlying merits of Shelby's double jeopardy claim, the Fifth Circuit's refusal to accept jurisdiction and decide the case on the merits must be corrected. The decision flies in the face of settled law and analysis regarding jurisdiction over interlocutory appeals, including over successive appeals on the same issue.

Without belaboring the point, this Court's precedents make abundantly clear that even ostensibly frivolous appeals do not divest the appellate court of otherwise proper subject matter jurisdiction. *Arthur Andersen*, 129 S. Ct. 1900-01. Jurisdiction "'must be determined by focusing on the category of the order appealed from, rather than upon the strength of the grounds for reversing the order.'" *Id.* at 1900 (quoting *Behrens*, 516 U.S. at 311). A decision on double jeopardy is unquestionably a "final order," subject to interlocutory review. *Abney*, 431 U.S. at 662.

Even in instances of successive appeals, the Court has found that the only proper inquiry is the finality of the order, not the merits of the appeal. *Behrens*, 516 U.S. at 308-09; *cf. Mitchell v. Forsyth*, 472 U.S. 511, 515-19 (1985) (assigning no significance to successive aspect of second immunity claim). *Behrens* involved successive appeals of the denial of qualified immunity. In *Behrens*, the court of appeals affirmed the district court's denial of defendant's

claim of qualified immunity in a motion to dismiss. In *dicta*, the court of appeals then stated that "'[o]ne such interlocutory appeal is all that a government official is entitled to and all that we will entertain.'" *Id.*, at 304 (quoting *Pelletier v. Federal Home Loan Bank of San Francisco*, 968 F.2d 865, 870-71 (9th Cir. 1992)). After his summary judgment motion was denied on the same issue, Behrens appealed. The district court certified the appeal as frivolous and the court of appeals, in an unpublished order, summarily dismissed the appeal for lack of jurisdiction.

This Court reversed, holding that the proper analysis remains that of the Court's "finality jurisprudence" under *Cohen*, 337 U.S. 541, and not whether the appeal is frivolous, superfluous, or otherwise unnecessary. *Behrens*, 516 U.S. at 308-09. The Court specifically rejected the dissent's argument that the second appeal "does not come within *Cohen*'s class of immediately appealable final orders because it is insufficiently 'separable' from the claim raised on the first appeal." *Id.* at 309, n.3. The Court reasoned that, under *Cohen*, the question to be resolved is whether the appeal is "separable" from the merits of the plaintiff's claims, not, as the dissent would have it, whether the second appeal is "separable" from the first. *Id.*

Under these precedents, the order from which Shelby appeals is clearly a final interlocutory order under 28 U.S.C. § 1291. Indeed, the district court here, unlike in *Behrens*, did not even find the appeal to be frivolous and affirmatively held otherwise. Pet. App. at 18a. But, strikingly, the Fifth Circuit does not cite *Cohen* or *Behrens*. And the Court cites *Abney* only for the proposition that the court may establish

summary procedures to control frivolous appeals. 604 F.3d at 884, 885; Pet. App. at 9a, 10a. *Abney* specifically rejected conditioning jurisdiction on the merits of the claim; *Abney*'s point is that frivolous claims are better controlled through the court's supervisory powers. *Abney*, 431 U.S. at 663. The Fifth Circuit's decision to use jurisdiction to control potential abuse is precisely the same rationale that has been consistently rejected by this Court. *See Abney*, *Behrens*, and *Arthur Andersen*.

The Fifth Circuit's reliance on the *dicta* of *Richardson v. United States*, 468 U.S. 317 (1984) is misplaced. TCDLA adopts the arguments of Petitioner Shelby in this regard and does not repeat them here.

The effects of allowing this case to stand are clear. Apart from vitiating this Court's finality jurisprudence under *Cohen*, all defendants claiming double jeopardy may now be faced with a motion to dismiss, forcing them to defend the "colorable" merits of their claim without benefit of briefing or the record — even where the district court most familiar with the case has found the issue to be worthy of immediate review and a stay of trial proceedings. This is the very opposite of the careful, thorough *Ashe/Yeager* analysis of the record that this Court has mandated, and abrogates *Abney*'s requirement that the defendant obtain final review before undergoing a second trial. This Court should grant the petition for certiorari and reverse.

II. This Court Should Correct the Fifth Circuit's *Yeager* Analysis, or, in the Alternative, Reverse Under This Court's Supervisory Power.

This Court's holding in *Yeager*, according to the Fifth Circuit, "stands for the proposition that if an acquittal establishes that the jury necessarily determined a certain element of the offense, the court may not examine the effect of hung counts to undermine that determination by showing that the jury was necessarily inconsistent or confused in its conclusions." 604 F.3d at 887; Pet. App. at 15a. However, the Fifth Circuit went on to say that "[n]othing in *Yeager []* prohibits the type of comparison drawn in this case, in which the distinction was cited simply to demonstrate one possible rational basis for the jury's acquittal." *Id.* Thus, the Fifth Circuit and the district court did exactly what *Yeager* said not to do, that is, consider the hung counts to determine, in the first place, what the jury necessarily determined. *Id.*; Pet. App. at 23a-24a. The Fifth Circuit rejected petitioner's claim that this use of the hung counts violated *Yeager*. *Shelby*, *supra* at 887; Pet. App. at 14a-15a.

The Fifth Circuit's erroneous reading may be premised on a distinction not cognizable under the holding and rationale of *Yeager*. In *Yeager*, this Court's "grant of certiorari was based on the assumption that the Court of Appeal's interpretation of the record was correct", after noting that the district court and the Court of Appeals disagreed as to what the jury necessarily decided in its acquittals. *Yeager*, 129 S. Ct. at 2364-65, 2370. This Court said that the Court of Appeals could revisit its factual

analysis in light of the government's arguments before this Court. *Id.*, at 2370. The Court further accepted the lower court's finding that these facts were logically inconsistent with the jury's non-decision in the hung counts. *Id.*, at 2365. The Court then rejected the Fifth Circuit's use of the hung counts to escape the collateral estoppel effect of the actual findings relating to the acquittals. *Id.*, at 2368. Because *Yeager* did not address *how* the Fifth Circuit determined the facts necessary to the acquittal, the case did not squarely present the issue raised here — and therefore, according to the Fifth Circuit did not change the intervening law applicable to Shelby.

The holding in *Yeager* is not so limited: "we hold that the consideration of hung counts has no place in the issue-preclusion analysis." *Id.*, at 2368. "No place" is unequivocal, and would appear to encompass even the "comparative" use of the hung counts sanctioned by the Fifth Circuit. Moreover, this Court addressed, in detail, why hung counts are not considered a relevant part of the proceedings for purposes of the *Ashe* inquiry. *Id.*, at 2367-68. As this Court explained, hung counts do not make the "'existence of any fact . . . more probable or less probable'" and drawing any inferences or conclusions from them "is not reasoned analysis; it is guesswork." *Id.*, at 2368 (quoting in part FED. R. EVID. 401). Further, such an inquiry would require impermissible "speculation into what transpired in the jury room." *Id.* This reasoning applies perhaps even more strongly to the inquiry regarding the issue of determining what the jury necessarily decided in the first place.

Under the test TCDLA believes *Yeager* mandates and that we urge this Court to explicitly enforce, courts must consider whether, had the hung counts never been charged, a seriatim prosecution could be brought after the acquittals. Applying that test to the facts of this case demonstrates its merits.

Rex Shelby was tried and acquitted of four counts of insider trading based on trades in Enron stock that occurred on June 26, 27, 28 and July 19, 2000. The counts were based on an alleged scheme, that took place "from at least April 1999 until May 14, 2001," to engage in conduct and make "false and misleading statements and omit[] material information from statements made, all of which were designed to and did deceive the public and others about the technological capabilities, value, revenue and business performance of" Enron Broadband Services, Shelby's employer. *See* Fifth Superceding Indictment at ¶ 11. The specific counts of which he was acquitted re-alleged the scheme and further charged that Shelby, "while in possession of material non-public information regarding the technological capabilities, value, revenue and business performance" of Enron sold the shares of Enron stock. *Id.* at ¶ 50.

Considering only those counts, and the record at trial relevant to them under *Ashe*, a rational court would conclude that the indictment, and the government at trial, charged that there was one simple scheme to defraud, running for over two years, and involving the continual touting of the "technological capabilities, value, revenue and business performance" of Enron Broadband Services. During the period of the alleged scheme, Shelby sold stock

repeatedly, without disclosing the non-public material information that the "technological capabilities, value, revenue and business performance" of the company was a sham. A rational court would conclude, as there was no contention to the contrary, that the non-public information that Shelby allegedly knew remained in essence the same throughout the period of the scheme. No evidence was presented, nor did either party contend, that any disclosures were made during the time of the scheme that changed the non-public nature of the information. There was no evidence or argument that the state of Shelby's knowledge changed.

The essence of insider trading is the rule of "abstain or disclose." It is undisputed that Shelby did not abstain from trading. It is also undisputed that he did not disclose. Ergo, to acquit, the jury must have determined that Shelby did not have non-public material information, either because he was not part of the scheme, or because the scheme itself did not exist. Under this record, barring any new facts regarding a different scheme or intervening disclosures, it is virtually certain that a seriatim prosecution based on Shelby's January 21, February 1, and March 22, 2000, trades (or, for that matter, any of his other trades during the scheme) would be prohibited under *Ashe*.

Comparing the above to the Fifth Circuit's analysis aptly proves that the use of hung counts, at whatever stage of analysis, leads to just the type of speculation that *Yeager* sought to prevent. Rather than exclude all evidence of the hung counts, the Fifth Circuit began its analysis with the comparison between the hung and acquitted counts. *See Yeager*

v. United States, 521 F.3d 367, 373 (5th Cir. 2008) ("In acquitting . . . , the jury could have differentiated between the two different sets of trades"). Then, attempting to reconcile the acquittals with the hung counts, the Fifth Circuit fixates on an obscure element of insider trading not even alleged in the indictment or in controversy at trial: whether the insider information was "used" or "a factor" in Shelby's trades. *Id.* at 373-74; *see* Fifth Superceding Indictment at ¶¶ 11, 50. That focus comes *because of, not in spite of,* the court's consideration of the hung counts.

Similarly, the lower court's conclusion that the government introduced more evidence of Shelby's knowledge of the fraud in January through March than later in the summer months is simply not relevant (and is irrational) unless one is attempting to distinguish the hung counts. *See Shelby*, 604 F.3d at 886. Moreover, the absurdity of this "distinction" is evident if one turns it around; surely the government would not concede that it was required to prove, by introducing contemporaneous evidence, that Shelby still knew in June what he had known in March —indeed the allegation at trial was that he knew *more* as time went on.

Because the "timing" theory has been spun from its attempt to differentiate the counts, and not from the evidence at trial, the Fifth Circuit is forced to conclude that the "timing distinction is . . . one that the jury could have made on its own." *Yeager*, 521 F.3d at 373, n.11. But this is exactly the kind of speculation regarding jury deliberations that this Court's decision in *Yeager* sought to foreclose. In any event, as that opinion points out, the jury, in

hanging, did not make any such distinction; it made no finding at all. *Yeager* 129 S. Ct at 2367-68. Rather, the distinction here has been made by the Fifth Circuit, and then only because it looked first for a reason to distinguish the hung counts from the acquittals.

To paraphrase an old saying, once the skunk of hung counts was thrown into the Circuit conference room, it was tough for this Court to instruct it to ignore the stench. Thus, after this Court's decision in *Yeager*, the lower court refused to reengage in the *Ashe* analysis in a way that would eliminate all consideration of the hung counts from its analysis. But we believe that, *without reference to the hung counts*, it strains credibility, and insider trading law, to argue that the jury found that Shelby knew that the company was a fraud, and the stock would be virtually worthless if that fraud were exposed, but that the information was not "used" or "a factor" in his decision to trade in the summer of 2000. If the defense had made such an argument in trial, the government would have ridiculed it to great effect with the jury. The government would have argued that it defied "common sense" for Shelby to contend that in the summer of 2000 he did not act on the inside information he had acquired when he sold the stock and made millions of dollars, even though he had all of this insider information when he made the early 2000 trades. How could he "use" the insider information in early 2000, but not in the summer of 2000? Because he logically could not (and no such argument was made on this trial record) the government must be precluded from retrying him on his remaining counts.

This Court should grant certiorari to make clear that, in applying *Ashe*, courts must completely exclude consideration of the hung counts at every stage of the analysis, including in determining what the jury necessarily decided in its acquittals. The vast majority of defendants alleging double jeopardy will find themselves in a situation like Shelby, rather than Yeager. This is because, if *Shelby* is left to stand, it will be a rare court that, in comparing hung counts and acquittals, cannot come up with some distinguishing circumstance that would explain the jury's action, especially when allowed to speculate outside the theory of the case and the points in controversy at trial, and base its decision on what the jury could have decided "on its own."

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari, vacate the judgment below, and remand with instructions to reconsider in light of this Court's holding in *Yeager*.

Respectfully submitted,

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