

double-jeopardy guarantee enshrined in the Constitution.

In a future case, the Court might be confronted with a decision below that embraces petitioner's view that—completely untethered from the Double Jeopardy Clause—collateral estoppel provides an independent bar to relitigating evidentiary facts in criminal cases. If that case arises, the Court might grant review to preserve the proper role of the double-jeopardy protection.

### CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted.

GREG ABBOTT  
Attorney General of Texas

DANIEL T. HODGE  
First Assistant Attorney  
General

DON CLEMMER  
Deputy Attorney General  
for Criminal Justice

JONATHAN F. MITCHELL  
Solicitor General

ADAM W. ASTON  
Assistant Solicitor General  
*Counsel of Record*

Office of the Attorney General  
P.O. Box 12548  
Austin, Texas 78711-2548  
(512) 936-0596

COUNSEL FOR RESPONDENT

December 2011

expanding a sound basic principle beyond the bounds—or needs—of its rational and legitimate objectives[.]

*Id.* at 460–61 (Burger, C.J., dissenting).

And since the Chief Justice’s prediction in *Ashe*, criminal defendants have, unsurprisingly, urged courts to apply collateral-estoppel principles in situations further and further removed from multiple prosecutions “for the same offense.” These efforts have met with varying degrees of success; the split in authority on whether collateral estoppel applies to evidentiary facts is an example.

Petitioner seeks to drive the wedge between collateral estoppel and its double-jeopardy foundation even further. He would have the Court hold that a fact decided in the defendant’s favor in a prosecution for one crime may not be relitigated in a prosecution for a wholly unrelated crime, even if the fact is merely evidentiary in nature as to the second prosecution. The core double-jeopardy protection certainly would not bar such relitigation. Under *Blockburger v. United States*, 284 U.S. 299, 304 (1932), and *Brown v. Ohio*, 432 U.S. 161, 164–66 (1977), two statutes are not the same offense so long as each requires proof of an element that the other does not. For unrelated crimes like those at issue in this case (failure to identify oneself to a peace officer and the possession of a controlled substance), double jeopardy does not bar a subsequent prosecution.

Unable to find relief within the Double Jeopardy Clause itself, petitioner urges that the clause “incorporates” collateral estoppel, Pet. 20 (quoting

*Schiro v. Farley*, 510 U.S. 222, 232 (1994)). To support his view that collateral estoppel should bar the relitigation of evidentiary facts, petitioner relies on the twin purposes of the Double Jeopardy Clause recently discussed in *Yeager v. United States*, 129 S. Ct. 2360 (2009). Pet. 20–21. But neither of these principles support petitioner’s proposed rule. First, the Double Jeopardy Clause safeguards “the deeply ingrained principle that the State . . . should not be allowed to make repeated attempts to convict an individual for an alleged offense.” *Yeager*, 129 S.Ct. at 2365 (internal quotations omitted). This bedrock principle is not disturbed by allowing prosecutions for wholly unrelated crimes, such as those committed by petitioner, to include litigation over evidentiary facts. And second, double jeopardy preserves the finality of criminal judgments. *Id.* at 2366. But Texas does not seek to disturb the judgment in petitioner’s failure-to-identify trial. Permitting the litigation of an evidentiary fact in a subsequent prosecution for an unrelated crime does no damage to the finality of the initial acquittal. Petitioner’s rule thus finds no support in these twin purposes.

The better rule, of course, is the one that remains faithful to the Double Jeopardy Clause: the State is not barred from relitigating a fact that is not an ultimate fact in the second prosecution. Whether defined as one that “must be proven beyond a reasonable doubt,” *United States v. Bailin*, 977 F.2d 270, 280 (7th Cir. 1992), or as an “essential” element of the prosecution, *Flittie v. Solem*, 775 F.2d 933, 942 (8th Cir. 1985) (en banc), these are the kinds of facts contemplated by the

vehicle for determining whether such a re litigation would be permitted.<sup>1</sup>

## II. THE CORRECT RESOLUTION OF THE QUESTION PRESENTED WOULD NOT PROVIDE PETITIONER ANY RELIEF.

The decision below noted that “[t]here is a split among the federal circuits and various other jurisdictions on whether collateral estoppel can ever apply to facts that are merely evidentiary in the second prosecution.” Pet. 39a; *id.* at 39a–40a n.125 (collecting cases); see *also* Pet. i (asserting that the question presented here is “[w]hether the doctrine of collateral estoppel, embodied in the Double Jeopardy Clause . . . bars re litigation of a fact . . . when that fact is deemed evidentiary in nature in a subsequent prosecution”); Pet. 10–16 (urging the Court to resolve an “entrenched” split). Petitioner’s question—which seeks to further distance the collateral-estoppel doctrine from its foundation in the Double Jeopardy Clause—must be answered “no.”

When the Court determined that the collateral-estoppel doctrine had a place in criminal cases, it

---

1. The conflict on this question is also far from new. The certiorari petition asserts that five circuit-court opinions and ten state-court cases form the present conflict. Pet. 9–15. The most recent circuit court opinion, *United States v. Castillo-Basa*, 483 F.3d 890 (9th Cir. 2007), was decided in 2007, and the remaining four cases are more than fifteen years old, with one decision dating back to 1965, see *Laughlin v. United States*, 344 F.2d 187 (D.C. Cir. 1965). The Court has remained content to allow this split to linger, and it need not expend its scarce resources resolving this stale split at this time.

explained that this was because collateral estoppel is “embodied” in the “guarantee against double jeopardy.” *Ashe v. Swenson*, 397 U.S. 436, 442 (1970). And the Court noted that, in this context, collateral estoppel “mean[t] simply that 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.” *Id.* at 443. Under this framework, the Court held that a man acquitted of the robbery of one man could not be tried for the robbery of another man (who was robbed during the same transaction) because the only issue that could have been before the initial jury is whether the defendant was one of the masked robbers. *Id.* at 445–46.

Even at the time the Court decided *Ashe*—using that (relatively) narrow application of the collateral-estoppel doctrine—Chief Justice Burger provided a robust dissent to the Court’s “new and novel collateral-estoppel gloss” on the double-jeopardy guarantee. *Id.* at 464 (Burger, C.J., dissenting). The Chief Justice explained:

The Fifth Amendment . . . provides in part: ‘nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb\* \* \*’. Nothing in the language or gloss previously placed on this provision of the Fifth Amendment remotely justifies the treatment that the Court today accords the collateral-estoppel doctrine. Nothing in the purpose of the authors of the Constitution commands or even justifies what the Court decides today; this is truly a case of

As Judge Cochran explained in a concurring opinion below, the judge in the initial prosecution misapplied the law to these facts. Pet. 74–78a (Cochran, J., concurring). Article 14.03(d) of the Texas Code of Criminal Procedure authorizes a police officer outside his jurisdiction to temporarily detain or arrest a person for any felony or breach of the peace offense. Pet. 74a–75a (Cochran, J., concurring). That provision states:

A peace officer who is outside his jurisdiction may arrest, without warrant, a person who commits an offense within the officer's presence or view, if the offense is a felony, a violation of Chapter 42 or 49, Penal Code, or a breach of the peace.

TEX. CODE CRIM. PROC. art. 14.03(d). And under Article 14.03(g)(2), Officer Johnson had statewide authority to detain or arrest for any non-traffic offense and county-wide authority for any traffic offense committed in his presence. Pet. 75a–76a (Cochran, J., concurring). That provision states:

A peace officer . . . outside of the officer's jurisdiction may arrest without a warrant a person who commits any offense within the officer's presence or view, except that an officer described in this subdivision who is outside of that officer's jurisdiction may arrest a person for a violation of Subtitle C, Title 7, Transportation Code, only if the offense is committed in the county or counties in which the municipality employing the peace officer is located.

TEX. CODE CRIM. PROC. art. 14.03(g)(2). Thus, Texas law permitted Officer Johnson to detain petitioner by asking him to step out of his car so long as he had a reasonable suspicion to think petitioner had committed, was committing, or was about to commit *any* offense. Pet. 76a–78a (Cochran, J., concurring) (citing *Derichsweiler v. State*, No. PD-0176-10, 2011 WL 255299, at \*4–\*6 (Tex. Crim. App. Jan. 26, 2011)) (“A police officer has reasonable suspicion to detain if he has specific, articulable facts that, combined with rational inferences from those facts, would lead him reasonably to conclude that the person detained is, has been, or soon will be engaged in criminal activity,” but the particular offense need not be specified because “it is not a *sine qua non* of reasonable suspicion that a detaining officer be able to pinpoint a particular penal infraction” in order to temporarily detain a person.)).

In the subsequent felony prosecution for possession of a controlled substance, the State did not attempt to relitigate the historical facts regarding petitioner's detention and arrest. Rather, petitioner attempted to foreclose the judge in that prosecution from making the correct legal determination based on those historical facts. As Judge Cochran explained, the issue of collateral estoppel is not presented in this case. Pet. 70a (Cochran, J., concurring). Because the State did not seek to relitigate evidentiary facts decided in petitioner's initial prosecution, this case presents a poor

Petitioner pleaded guilty on the possession charge and pleaded true to two prior enhancement allegations, and the jury sentenced him to sixty years in prison. *Id.*

4. Petitioner appealed the suppression issues, raising his collateral-estoppel arguments. *Id.* The Tyler Court of Appeals determined that collateral estoppel applies only to a previously litigated fact that constitutes an essential element of the offense in the second prosecution. *Id.* at 9a–10a. The collateral-estoppel doctrine thus did not preclude the State from proving the legality of petitioner’s detention and arrest because that issue did not constitute an element of the offense of possession of a controlled substance. *Id.* at 10a.

Petitioner sought review in the Texas Court of Criminal Appeals (CCA), and the CCA affirmed. *Id.* at 49a. The CCA determined that collateral estoppel did not bar the relitigation of petitioner’s detention, explaining that the validity of the detention was not an essential element of the drug-possession offense that was the subject of the second prosecution. *Id.* at 19a–22a, 34a–39a. The CCA recognized that this Court “has never abandoned *Ashe* [*v. Swenson*]’s ‘ultimate fact’ formulation of the test for what is barred. *Id.* at 47a. And the CCA concluded that:

to accord collateral-estoppel protection, under the rubric of double jeopardy, to such an issue would stray far from the theoretical groundings of the Double Jeopardy Clause and the Supreme

Court’s earlier pronouncements on the issue of collateral estoppel.

*Id.* at 48a.

#### REASONS TO DENY THE PETITION

##### I. THIS CASE IS A POOR VEHICLE TO ADDRESS THE QUESTION ARTICULATED IN THE PETITION.

Petitioner asserts that his case “squarely presents,” Pet. 16, 16–20, an issue on which there is a three-way split of authority, Pet. 9–16. According to petitioner, the issue is whether collateral estoppel bars relitigation of an evidentiary fact decided in the defendant’s favor in an earlier prosecution. Pet. i. But even if the Court believes that is a certworthy question, this case provides a poor vehicle for answering it.

It is undisputed that when Leland Johnson, an officer for the City of Bullard in Smith County, Texas, observed petitioner’s car parked on a sidewalk, the car was parked within Smith County (but outside Bullard’s city limits). Pet. 2a. And during petitioner’s trial for his failure to identify himself, Officer Johnson testified that he had not seen petitioner commit any specific offense prior to waking petitioner and asking him to step out of the car. Pet. 4a–6a. The judge in the failure-to-identify prosecution recognized these facts, and the State has not tried to relitigate them. Critically, the judge’s directed verdict followed not just from the determination of these historical facts, but also from the judge’s legal conclusions derived from these facts.

shining into the building. *Id.* The car did not appear to be occupied, and Johnson parked his vehicle and approached. *Id.* He noticed the engine was running and discovered that petitioner was asleep in the car with the seat reclined. *Id.* Johnson watched for a few minutes. He did not see any items in the car that might have been stolen from the store, and, after looking for weapons, Johnson woke petitioner. *Id.* at 2a–3a.

Johnson asked petitioner for his identification, but petitioner stated that he left it at home. *Id.* at 3a. Johnson asked petitioner to step out of the car, and after petitioner did so, he gave Johnson consent to search his person. *Id.* Johnson discovered marijuana and methamphetamine and arrested petitioner. *Id.* Following his arrest, petitioner gave Johnson a false name. *Id.*

2. The district attorney's office prosecuted petitioner in a county court at law for the misdemeanor offense of failure to identify himself to a peace officer under section 38.02(b) of the Texas Penal Code. *Id.* at 3a–4a. The case was tried to a jury, and Officer Johnson's testimony was the only evidence. *Id.* at 4a. On cross-examination, Johnson testified that prior to requesting consent to search petitioner, he did not see petitioner commit any felony offense or breach of the peace within his view. *Id.* at 4a–5a.

Petitioner filed two defense motions (a motion to suppress evidence and a motion for a directed verdict of acquittal). *Id.* at 5a. Both motions were based on petitioner's belief that the State failed to prove the arrest or detention was lawful because it occurred outside Johnson's jurisdiction. *Id.* at 5a. After the

judge and the parties discussed both motions, the judge granted the motion to suppress and then, before bringing the jury back in, stated that he would enter a directed verdict of acquittal. *Id.* at 5a–6a. The judge explained to the jury that because Officer Johnson was "outside his jurisdiction and him not testifying to any articulable facts as to how he thinks an offense might have been committed, I think the law requires me to grant the motion to suppress." *Id.* at 6a. The State did not appeal that ruling.

3. The district attorney's office next prosecuted petitioner in district court for possession of a controlled substance (the methamphetamine). *Id.* In a hearing, petitioner and the State litigated the legality of Officer Johnson's conduct in detaining and arresting petitioner. *Id.* at 6a–7a. Johnson testified that when he approached petitioner's car, he believed that there was a possible burglary in progress at the Exxon. *Id.* at 7a. Johnson also explained that his testimony in the failure-to-identify prosecution reflected that he did not yet know particular offenses had been committed as he conducted his investigation. *Id.*

Petitioner's counsel argued that suppression should be granted under the doctrine of collateral estoppel. *Id.* Counsel argued that the lawfulness of the arrest is an element of the offense of failure to identify, and that collateral estoppel barred the relitigation of such evidentiary facts in a subsequent prosecution. *Id.* at 8a. The district judge rejected petitioner's collateral-estoppel argument, found that Officer Johnson had an adequate basis to conduct an investigative detention, and denied the motion to suppress. *Id.* at 9a.

<i>Yeager v. United States</i> , 129 S.Ct. 2360 (2009) .....	11
<i>York v. State</i> , 342 S.W.3d 528 (Tex. Crim. App. 2011) .....	1

## Constitutional Provisions and Statutes

U.S. CONST. amend. V .....	1
TEX. CODE CRIM. PROC. art. 14.03(d) .....	6
TEX. CODE CRIM. PROC. art. 14.03(g)(2) .....	6, 7

## INTRODUCTION

The concept of a prohibition against double jeopardy is a common one—although it is not universal, *see Palcko v. Connecticut*, 302 U.S. 319, 326 n.3 (1937)—that pre-dates our Nation’s founding. The Double Jeopardy Clause of the Constitution provides: “[n]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb[.]” U.S. CONST. amend. V. But courts have not limited the re litigation protection offered by the double-jeopardy guarantee via a strict adherence to the text of the Double Jeopardy Clause—collateral-estoppel principles have sometimes been used to broaden the re litigation bar. Petitioner’s rule goes too far. It would sever the collateral-estoppel doctrine from its foundation in the Double Jeopardy Clause. And petitioner advances this rule in a case presenting a poor vehicle for addressing the issue. The petition should be denied.

## STATEMENT

The Texas Court of Criminal Appeals’s opinion thoroughly reviews the factual and procedural background of this case. *York v. State*, 342 S.W.3d 528 (Tex. Crim. App. 2011) (available at pages 1a–78a of the certiorari petition). But the following overview should aid in the Court’s consideration of the petition.

1. Leland Johnson was a patrol officer of Bullard, Texas, a town located in Smith County. Pet. 2a. While Officer Johnson was driving to Tyler at about 3:00 a.m., he passed a closed Exxon station (located outside Bullard, but still within Smith County) that he had been advised had been burglarized multiple times in recent years. *Id.* Johnson saw a car parked partially on the sidewalk just outside the store, with its headlights

# TABLE OF CONTENTS

Question Presented .....	i
Table of Authorities .....	iii
Introduction .....	1
Statement .....	1
Reasons to Deny the Petition .....	5
I. This Case Is a Poor Vehicle To Address the Question Articulated in the Petition .....	5
II. The Correct Resolution of the Question Presented Would Not Provide Petitioner Any Relief .....	8
Conclusion .....	12

# TABLE OF AUTHORITIES

## Cases

<i>Ashe v. Swenson</i> , 397 U.S. 436 (1970) .....	9, 10
<i>Blockburger v. United States</i> , 284 U.S. 299 (1932) .....	10
<i>Brown v. Ohio</i> , 432 U.S. 161 (1977) .....	10
<i>Derichsweiler v. State</i> , No. PD-0176-10, 2011 WL 255299 (Tex. Crim. App. Jan. 26, 2011) .....	7
<i>Flittie v. Solem</i> , 775 F.2d 933 (8th Cir. 1985) .....	11
<i>Laughlin v. United States</i> , 344 F.2d 187 (D.C. Cir. 1965) .....	8
<i>Palko v. Connecticut</i> , 302 U.S. 319, 326 n.3 (1937) .....	1
<i>Schiro v. Farley</i> , 510 U.S. 222 (1994) .....	11
<i>United States v. Bailin</i> , 977 F.2d 270 (7th Cir. 1992) .....	11
<i>United States v. Castillo-Basa</i> , 483 F.3d 890 (9th Cir. 2007) .....	8

**Question Presented**

Whether the doctrine of collateral estoppel, embodied in the Double Jeopardy Clause of the Fifth Amendment and made applicable to the States through the Fourteenth Amendment, bars relitigation of a fact necessarily decided in the defendant's favor in an initial prosecution, when that fact is deemed evidentiary in nature in a subsequent prosecution.

No. 11-397

In the  
Supreme Court of the State of Texas

RICKIE DAWSON YORK,  
*Petitioner,*

v.

STATE OF TEXAS  
*Respondent.*

On Petition for a Writ of Certiorari to the  
Texas Court of Criminal Appeals

BRIEF FOR RESPONDENT IN OPPOSITION

GREG ABBOTT  
Attorney General of Texas

DANIEL T. HODGE

First Assistant Attorney  
General

DON CLEMMER  
Deputy Attorney General  
for Criminal Justice

JONATHAN F. MITCHELL  
Solicitor General

ADAM W. ASTON  
Assistant Solicitor General  
*Counsel of Record*

OFFICE OF THE ATTORNEY  
GENERAL

P.O. Box 12548  
Austin, Texas 78711-2548  
(512) 936-1700  
adam.aston@oag.state.tx.us

COUNSEL FOR RESPONDENT