

No. 11-397

In the Supreme Court of the United States

RICKIE DAWSON YORK, PETITIONER

v.

STATE OF TEXAS

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS*

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Although Texas styles its submission as a “Brief in Opposition,” it is noteworthy for the many factors the State admits counsel review. Texas concedes, for example, that there is a “split in authority on whether collateral estoppel applies to evidentiary facts.” Br. in Opp. 10; see also *id.* at 8 & n.1. And it admits that the patchwork of different rules governing collateral estoppel challenges to reprosecution has real-world consequences, conceding that defendants in petitioner’s shoes have met with “varying degrees of success” in different jurisdictions. *Id.* at 10.

Nor does Texas dispute that decisions on the same side of the split as the Texas Court of Criminal Appeals are prone to abuse, giving prosecutors—like “every good attorney,” *Ashe v. Swenson*, 397 U.S. 436, 447 (1970)—an incentive to split proceedings so they can have several chances to obtain a conviction, “refin[ing]” their presentation based on the lessons of previous prosecutions. *Id.* at 440. The State did *precisely that* to obtain the sixty-year sentence Mr. York is now serving for possessing one to four grams of methamphetamine, Pet. App. 89a: Texas charged him with a trivial misdemeanor and, after the judge found his arrest unlawful, tried him for a felony arising from the same arrest, which this time was found lawful based on the arresting officer’s revised and expanded testimony.

While conceding that this is an important issue on which “the Court might grant review” “[i]n a future case,” Br. in Opp. 12, Texas argues half-heartedly that “this case provides a poor vehicle,” *id.* at 5, because, the State claims, this case actually involves

only a legal determination and “the issue of collateral estoppel is not presented,” *id.* at 7. But the majority of the Court of Criminal Appeals specifically disclaimed that conclusion. The balance of the State’s brief is devoted to a perfunctory defense of the result reached below (but, notably, not the court’s *reasoning*). The State’s analysis, which clings to the long-discredited distinction between “ultimate” and “evidentiary” facts, fails to acknowledge that this Court already has held that the Double Jeopardy Clause incorporates collateral estoppel principles.

Despite its strained efforts, Texas is unable to identify any reason this Court should not decide a question that it concedes is important and recurring and which has divided the courts. Review is plainly warranted.

A. The Recognized Three-Way Split Will Persist Absent This Court’s Review

The federal and state courts are deeply divided over whether the doctrine of collateral estoppel embodied in the Double Jeopardy Clause extends to “evidentiary” facts in subsequent criminal prosecutions. Texas concedes as much. See Br. in Opp. 8 & n.1, 10. And the Texas Court of Criminal Appeals, after surveying the confusion among courts nationwide, recognized that “[t]here is a split among the federal circuits and various other jurisdictions” on this issue. Pet. App. 39a.

As explained in the petition, courts confronted with this question have divided generally into three camps, two of which generally or categorically bar relitigation of evidentiary facts. Pet. 10-16. In practical terms, if the methamphetamine charges had been

brought against Mr. York in Connecticut, Idaho, Iowa, New York, Pennsylvania, or Wisconsin (or as a federal prosecution within the Ninth, Eleventh, or D.C. Circuits)—a majority of the jurisdictions that have weighed in on the issue—the prosecution would have been precluded from relitigating the facts surrounding the arrest. See *id.* at 10-15.

No consensus position has yet emerged. Indeed, the last four courts to decide the issue have divided evenly: two have held that the Constitution does not bar such relitigation and two have concluded that it does.¹ This Court’s review is necessary to resolve this entrenched and growing conflict.

B. The Decision Below Is Wrong

1. As explained in our petition (Pet. 20-21), barring relitigation of evidentiary facts serves the twin purposes of the Double Jeopardy Clause, by advancing the “‘deeply ingrained’ principle that ‘the State with all its resources and power should not be allowed to make repeated attempts to convict an indi-

¹ Compare Pet. App. 1a-78a and *State v. Glenn*, 9 A.3d 161, 171 (N.H. 2010), with *United States v. Castillo-Basa*, 483 F.3d 890, 897 n.4 (9th Cir. 2007), and *Commonwealth v. Holder*, 805 A.2d 499, 502 & n.4 (Pa. 2002).

The State’s argument that this split is “stale” (Br. in Opp. 8) rests on its carefully worded statement that “[t]he most recent *[federal] circuit court* opinion * * * was decided in 2007,” *ibid.* (emphasis added). The State’s curious focus on *federal* prosecutions in opposing review of a *state* court judgment upholding a *state* conviction reflects the lengths to which one must go to obscure this case’s certworthiness. As reflected by the citations above (and in the petition), *three* federal circuits or state courts of last resort have weighed in on this issue just since 2007. This split is in no sense “stale.”

vidual for an alleged offense,” and interests in “the preserv[ation] of the finality of judgments.” *Yeager v. United States*, 129 S. Ct. 2360, 2365-2366 (2009) (quoting *Green v. United States*, 355 U.S. 184, 187-188 (1957), and *Crist v. Bretz*, 437 U.S. 28, 33 (1978)). Texas contends that these principles are not implicated by “allowing prosecutions for wholly unrelated crimes, such as those committed by petitioner, to include litigation over evidentiary facts,” and, in any event, “Texas does not seek to disturb the judgment in petitioner’s failure-to-identify trial.” Br. in Opp. 11.

But it is difficult to conceive of how petitioner’s failure-to-identify and methamphetamine charges are “wholly unrelated,” given that they arose from the same arrest by the same officer. If the crimes were “wholly unrelated,” the state would have had no need to relitigate *any* historical facts, whether “ultimate” or “evidentiary.” See *ibid.* (“[T]he State is not barred from relitigating a fact that is not an ultimate fact in the second prosecution.”). And it is utterly irrelevant that “Texas does not seek to disturb the judgment in petitioner’s failure-to-identify trial.” *Ibid.* Double jeopardy and collateral estoppel have never been about disturbing existing judgments; rather, they involve concerns—plainly implicated here—about denying judgments preclusive effect in subsequent litigation. See *Baker v. General Motors Corp.*, 522 U.S. 222, 233 n.5 (1998) (“[C]ollateral estoppel [means] an issue of fact or law, actually litigated and resolved by a valid final judgment, binds the parties in a *subsequent* action.”) (emphasis added).

Citing a *dissent* in *Ashe* for the proposition that the Double Jeopardy Clause does not incorporate col-

lateral estoppel principles, Br. in Opp. 9-10, Texas suggests that it is a novel proposition to “urge[] that the [C]lause ‘incorporates’ collateral estoppel,” *id.* at 10. See generally *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 362 (1997) (“‘Whatever appeal the dissenting opinion’s view may have * * *, it is not the law.’”) (quoting *Mobile v. Bolden*, 446 U.S. 55, 75 (1980) (plurality opinion)). But as noted in our petition, Pet. 20, this Court has already squarely held that “the Double Jeopardy Clause incorporates the doctrine of collateral estoppel in criminal proceedings.” *Schiro v. Farley*, 510 U.S. 222, 232 (1994).

2. The State parrots the Court of Criminal Appeals’ distinction between “ultimate” and “evidentiary” facts, without acknowledging, much less rebutting, the compelling arguments counseling rejection of that distinction. As discussed at length in the petition (Pet. 21-29), that distinction is a vestige of *civil* collateral estoppel law that is based on the now-rejected understanding that “ultimate” facts likely are more foreseeable than “evidentiary” ones. This distinction effectively has been abandoned in the civil context, see *Synanon Church v. United States*, 820 F.2d 421, 426 n.15 (D.C. Cir. 1987) (collecting cases); 18A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 4424 (2d ed. 2002) (noting the “distinction may frequently deny preclusion without sufficient justification”); Restatement (Second) of Judgments § 27 cmt. j (1982), and the State offers no reason why it should continue to apply in the criminal context. Indeed, the State does not dispute that *Ashe* itself applied collateral estoppel to “evidentiary” facts about whether a defendant had been present at the robbery of a card game, rather than to the “ulti-

mate” fact of whether the defendant had robbed the victim at the first trial.

The decision under review reflects widespread misunderstanding among the courts over application of collateral estoppel principles in the criminal context. This Court’s guidance is urgently needed.

C. No Vehicle Problem Would Prevent Resolution Of This Issue

Texas labors to demonstrate that this case is a “poor vehicle” to decide the undeniably important question presented, Br. in Opp. 5, because, it claims, “the issue of collateral estoppel is not presented in this case,” *id.* at 7. According to Texas, “the State did not attempt to relitigate the historical facts regarding petitioner’s detention and arrest.” *Ibid.* Rather, citing Judge Cochran’s concurring opinion, it argues that the second prosecution involved only a “legal determination based on * * * historical facts.” *Ibid.* (citing Pet. App. 70a (citing opinion of Cochran, J., concurring, joined by Johnson, J.)).

But what Texas fails to note is that the majority opinion *specifically disclaimed* Judge Cochran’s understanding, observing that it was not the basis on which the case had been litigated:

In her concurring opinion, Judge Cochran concludes that the issues resolved in appellant’s favor in the first prosecution were legal issues and that legal issues are not subject to collateral estoppel. But the court of appeals did not resolve appellant’s claim on this basis * * *.

Pet. App. 21a n.47; see also *id.* at 89a (court of appeals concludes that “whether [officer] observed an

offense or action that would allow him to detain [York] are not barred by collateral estoppel because such facts do not constitute essential elements of the offense of possession of methamphetamine”). The majority plainly believed the issue to be squarely presented, saying it “*must* resolve” whether “the doctrine of collateral estoppel require[s] the suppression of evidence in a subsequent prosecution when that evidence was suppressed in an earlier prosecution arising from the same facts.” *Id.* at 1a (emphasis added). After discussing the issue at great length, *id.* at 19a-49a, the court squarely held that “the State is not barred by the Double Jeopardy Clause from relitigating a suppression issue that was not an ultimate fact in the first prosecution and was not an ultimate fact in the second prosecution.” *Id.* at 49a. If “the issue of collateral estoppel is not presented in this case,” Br. in Opp. 7, that certainly would be news to the majority.

In any event, Texas is demonstrably wrong that “the State did not attempt to relitigate the historical facts regarding petitioner’s detention and arrest.” *Ibid.* During the first trial, the State elicited *no testimony* indicating that the arresting officer observed any criminal activity or that he suspected criminal activity; but during the second trial, the State for the first time elicited testimony that the officer suspected Mr. York of burglary, public intoxication, and trespass. Compare Pet. App. 4a-5a (describing testimony at the first suppression hearing, including testimony that the officer had seen “[n]othing that would give [him] reason to believe that [York] had burglarized the store”) with *id.* at 7a (describing testimony at the second suppression hearing, including testimony that

the officer “believed that there was a [p]ossible burglary in progress”). The Court of Criminal Appeals itself noted the testimony Officer Johnson gave during the second prosecution “[i]n addition to the facts outlined” during the first. *Ibid.*² The doctrine of collateral estoppel is intended to “prevent such abuses.” *Ashe*, 397 U.S. at 445 n.10.

* * * * *

Although admitting that jurisdictions are split and that the issue warrants review, Texas ends by suggesting that the Court wait until it is “confronted with a decision below that embraces petitioner’s view.” Br. in Opp. 12. There is no reason to wait. As the State concedes, this case presents a question on which over a dozen federal circuits and state courts of last resort are deeply and intractably divided, reflecting fundamental disagreement about the meaning of the Double Jeopardy Clause. And, as the opinion below makes clear, this case squarely presents that issue for review. The courts are in critical need of this Court’s guidance on this exceptionally important issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

² See also Reporter’s R. Vol. V 98-127 (testimony of Officer Johnson in the first prosecution); Vol. II 8-22 (testimony of Officer Johnson in the second prosecution); Vol. II. at 23-30 (outlining differences in testimony).

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